

**THE FREEDOM OF INTERNAL MOBILITY
AND SAME-SEX MARRIAGE LAWS IN THE UNITED STATES**

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ABSTRACT

Within the United States of America, the LGBT community has suffered not only gross levels of discrimination and victimization, this community continues to this day to suffer a level of inequality that puts into question the nation's commitment to liberal democratic principles, such as human, political, and civil rights. From the Stonewall Riots of the 1960s to the legalization of same-sex marriage in 13 states throughout the Republic, the LGBT community has had to struggle immensely to be recognized as a group of citizens who are equally deserving of the freedoms and rights allotted to all Americans. Nevertheless, same-sex couples in the majority of states within the United States of America are banned from entering the public institution of marriage. The disparity on the recognition of same-sex marriage is a violation of the Freedom of Internal Movement guaranteed by the Privileges and Immunities Clause of Article IV, Section 2 of the US Constitution, as well as, the Privileges **or** Immunities Clause in the Fourteenth Amendment of the same. This paper examines the concept of liberal democracy and liberal democratic values. It establishes that freedom of internal mobility is inherent to a liberal democracy. Then, I conduct an analysis of the importance of internal mobility within the United States through the review of a Supreme Court case; this later provides the basis necessary to analyze the four states with four levels of recognition of same-sex marriage. These four states are: South Carolina (constitutional ban), New Mexico (no prohibition, nor recognition), New Jersey (civil unions) and New York (marriage equality). The reality established by the different levels of recognition of same-sex marriage is one that is unique to the LGBT community because it creates two costs of mobility from which heterosexual couples are exempt. These two costs are a lack of access to benefits available through marriage and a condition of restricted autonomy. This paper shows that the costs same-sex couples must face are due to invidious discrimination and do not constitute a compelling government interest for the states that have a ban on same-sex marriage; therefore, it represents a sort of institutionalization of inequality for a group of Americans who met all other requirements to obtain a marriage license. As a result, the disparity among states on the recognition of same-sex marriage impedes on American same-sex couples' right to migrate freely throughout the Republic, rendering this disparity as unconstitutional.

Keywords: internal mobility, same-sex marriage, liberal democracy, equality, LGBT rights, autonomy

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INTRODUCTION

The small city of Moscow in northern Idaho would seem like any quaint city in the Northwestern part of the United States. With a meager population of 23,800 people (Census.gov, 2010), there would not seem to be anything out of the ordinary about this town; however, one look at the map and it becomes apparent that this town is anything but ordinary. Moscow, Idaho is on the border with the state of Washington. In fact, the city of Pullman, Washington is only a few minutes' drive from the Idahoan city. Its proximity allows residents from Moscow the opportunity to commute to their jobs in Pullman, and vice-versa (Johnson, 2013).

While commuting across state borders is not very unique in North America, what is special about this border is that for a certain group of American citizens, it represents the border between equality and inequality. On December 6, 2012, Washington State made marriage legal for same-sex couples, with hundreds of gay and lesbian weddings taking place immediately following its legalization (Pilkington, 2012). Having taken the referendum route instead of a court decision or legislative vote, Washington was one of three states that proposed to legalize same-sex marriage through popular vote (Pilkington, 2012). The other two were Maine and Maryland, which legalized same-sex marriage on December 29, 2012 and January 1, 2013, respectively (Pilkington, 2012). Washington now joins the growing number of states across the country that are opening the door to marriage for same-sex couples. These states include Massachusetts, California, Connecticut, Iowa, Vermont, New Hampshire, New York, Maine, Maryland, Washington, Delaware, Rhode Island (as of August 1, 2013), Minnesota (also, as of August 1, 2013), and the District of Columbia, along with several tribal jurisdictions. There are, also various states that have domestic partnerships such as Oregon and Nevada, while Colorado,

Hawaii, Illinois, New Jersey and Wisconsin have either limited civil unions or civil unions with full rights of marriage. New Jersey is the only state that permits civil unions without having a ban on same-sex marriage, as well.

Idaho, on the other hand, took a very different path. In 2006, a referendum was held that amended the state constitution prohibiting same-sex marriage and even denying any recognition of civil unions performed elsewhere (Johnson, 2013). In choosing to prohibit same-sex marriage within its jurisdiction, Idaho joins a majority of states that have instituted a legal ban on same-sex marriage. These states are: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. As mentioned previously, Colorado, Hawaii, Illinois, Nevada, Oregon, and Wisconsin have bans on same-sex marriage but allow certain civil union or domestic partnership rights. As a result, a same-sex couple crossing the border faces a very different reality.

Indeed, while Moscow and Pullman are separated by only a few minutes drive, the reality of their different conditions becomes problematic for a same-sex couple. In Pullman, a same-sex couple enjoys all the rights and privileges provided by the state to married couples. The moment this same-sex couple crosses into Idaho, its marital status is unrecognized, thereby, depriving it of the rights and privileges guaranteed by the state of Idaho to married couples. This paper discusses the topic of the status of same-sex marriage across the United States and the manner in which same-sex couples' mobility is affected by it. The disparity among American states on the recognition of same-sex marriage creates a condition within the American social and legal

landscape that is constitutionally problematic. It establishes a sub-group of American citizens who cannot partake in the public institution of marriage, in effect, relegating this group to an inferior, second-class citizen standing. This paper seeks to contribute to the discussion of same-sex marriage by shedding light on a particular issue that has not been thoroughly studied: internal mobility and the role it plays in the marginalization of this group of American citizens. It addresses the problem presented by the disparity among states on the legality of same-sex marriage to the right of internal mobility guaranteed by the US Constitution.

Freedom of internal mobility is the right to travel and reside freely within the jurisdiction of a state and enjoy the same rights and benefits of other citizens of the state (Oloka-Onyango, 2010). It is a liberal democratic value that ensures a vibrant democracy because it strengthens its democratic institutions and ensures equality across the state (Aradau and Huysmans, 2009). As will be discussed in more detail in Chapter 2, impeding this right would constitute a violation of the principles to which a liberal democracy, like the United States, adheres.

As such, the research question this paper attempts to answer is: “Is the right for same-sex couples to freedom of internal mobility, guaranteed by the US Constitution, violated by the disparities in state laws on the legality of same-sex marriage?” I argue that the right of freedom of internal mobility for same-sex couples is, indeed, violated by the current state of same-sex marriage recognition among the American states. I illustrate my argument empirically through the analysis of four states that have each responded to the issue of same-sex marriage differently. That is to say that I analyze one state that has a constitutional ban on same-sex marriage; another that has no specific prohibition nor recognition of same-sex marriage; a state that permits a type of union (in the form of a civil union) that grants similar rights to marriage and, lastly, a state that

has legalized same-sex marriage. The four states studied are: South Carolina (constitutional ban); New Mexico (neither prohibition nor recognition); New Jersey (civil unions) and New York (same-sex marriage). The result of my research shows that the existence of these four disparate conditions concerning same-sex marriage recognition creates migration costs for same-sex couples that heterosexual couples need not face. The two costs same-sex couples must face are: a lack of access to benefits offered by states to legally married couples and restricted autonomy. These costs represent an impediment on the constitutionally guaranteed right of internal mobility.

Chapter 1 provides a historical overview on the struggles the LGBT community has suffered in the United States, such as sodomy laws and homophobia, and examines the plight for increased legal rights for the community, specifically the recognition of same-sex couples. I continue with an examination of the status of same-sex marriage on the federal level, where until recently, federal benefits given to married couples were refused to same-sex couples who had been legally married in a state recognizing same-sex marriages. Next, this chapter analyzes the opposition to LGBT rights and same-sex marriage led by the conservative and religious right. The chapter, then, turns to a comparative analysis between the plight of same-sex marriage advocates and those who supported interracial marriage in the 1960s. This comparison reveals the many similarities between the two struggles and how the ruling on the latter is applicable to the issue of same-sex marriage recognition. The chapter concludes with an examination of the two mechanisms that have been utilized to legalize, as well as, ban same-sex marriage in various states.

Chapter 2 begins by conducting a brief literature review on the components of a liberal democracy and liberal democratic values. This will be used to establish the United States as a

liberal democracy with certain values and principles to which it must adhere. As a liberal democracy, the United States has a commitment to civil and political rights and freedoms, one of them being the freedom of internal mobility. As guaranteed by various parts of the Constitution, the freedom of internal mobility is a right that all American citizens enjoy and which cannot be infringed by individual states within the Union. In order to demonstrate the importance of internal mobility, I examine a Supreme Court Case on welfare payments. In this case, the Supreme Court ruled that freedom of internal mobility is a constitutional right that cannot be violated through the creation of barriers which seek to impede or prevent American citizens from migrating to a state.

In Chapter 3 each state is presented along with their current policies regarding same-sex marriage. Then, I continue with each individual case, starting with a brief historical overview of LGBT rights in the state, followed by an analysis of the status of same-sex marriage in the state. Next, this paper provides a detailed analysis of the costs that this disparity creates and that they represent an impediment on same-sex couples' constitutional right to internal mobility.

I conclude by remarking the important role the courts have played within the struggle for same-sex marriage; especially, the recent Supreme Court ruling that has not only granted all federal benefits to legally married same-sex couples, but has opened the door for future challenges in states that currently have constitutional bans. Moreover, I propose that further research in this topic should be conducted due to the lack of information therein.

CHAPTER 1 - THE LONG ROAD TO EQUALITY FOR THE LGBT COMMUNITY

It is common knowledge that it has not been until recently that the LGBT community has experienced a growing tolerance and acceptance towards them by greater society. This chapter examines the struggles experienced by the LGBT community within the United States for most of the 20th century. It continues with analyzing the plight for recognition of same-sex unions in the late 80's and 90's, as well as, in the first decades of the 21st century. Next the ruling in *Loving v. Virginia*, which removed anti-miscegenation laws across the country, reveals an important connection to same-sex marriage. Lastly, it will examine the practice of popular referenda and the usage of the judicial system which have led to different results. The purpose of this chapter is to shed light on the fact that this group of American citizens has been marginalized legally, socially, and politically due to an inherently discriminatory sense of morality by greater society and its institutions.

The Age of Homophobia: Sodomy Laws and Other Forms of Institutionalized Discrimination

Krystal E. Noga-Styron et al. (2012) explain that while in many parts of the pre-Renaissance world, homoeroticism and other homosexual acts were not only tolerated but celebrated. Specifically in Western Europe, it would appear that it was not until the 13th century that the Catholic Church actively targeted those who practiced homosexual acts; it not only demonized them but encouraged their violent persecution (Noga-Styron et al., 2012). Henry F. Fradella (2002) furthers this claim by adding that Western Civilization, especially, was disgusted by homosexuality due to its Christian beliefs. This hatred for homosexuals was fueled by a prevailing sense of homophobia (Noga-Styron et al., 2012). The term homophobia did not come

into existence until 1972 by psychologist George Weinberg, who first described it as a ‘dread of being in close quarters with homosexuals’ (Herek and McLemore 2013; Weinberg, 1972); however, presently the term has evolved to signify a “hostility toward homosexuality and [those] who are not heterosexual” (Herek and McLemore, 2013). Interestingly, Gregory M. Herek and Kevin A. McLemore (2013) choose to differentiate homophobia from another term they propose which is sexual prejudice; an idea that relates to all negative attitudes towards sexual orientation regardless if its bisexuality, heterosexuality or homosexuality. Nevertheless, it was the deep hatred for homosexuality that drove the persecution of homosexuals not just in Europe but eventually throughout the Americas by way of the explorers and colonists, which continued well into the 20th century in the United States (Noga-Styron et al., 2012).

During most of the 20th century, acts of homosexuality were still widely criminalized within the United States. Some of the most notorious homophobic laws were the sodomy laws that were widespread throughout most of the US. Fradella (2002) states that sodomy laws find their roots in Abrahamic religions during biblical times, given that the word sodomy originates from the Leviticus story concerning the city of Sodom. With the arrival of Puritans to colonial America, the enforcement of these laws continued throughout the 20th century (Fradella, 2002). In his article discussing the various potential theories on the criminality of sodomy, Fradella (2002) arrives at the conclusion that sodomy laws have no criminological reason for their existence, rather they seek to act as a tool for the ‘social control’ of homosexuality. As such, these sodomy laws stigmatized and discriminated male homosexuals, with the goal of identifying heterosexuality as superior to homosexuality (Fradella, 2002). In fact, the state of Colorado went further and declared that homosexuals were a class of citizens who are no longer protected by

anti-discrimination laws in the state (Fradella, 2002); the Colorado Anti-Discrimination Act was later amended to include sexual orientation (Colorado.gov, 2007). Such realities would undoubtedly affect homosexuals, indeed the entire LGBT community, in very profound ways.

Jac Brown and Robert Trevethan (2010) explain that many LGBT individuals suffer from internalized homophobia due to the shame that a mainly heterosexual society has placed on homosexuality. Internalized homophobia refers to the idea that LGBT members hold the same negative views that are held in society towards homosexuality (Brown and Trevethan, 2010). The effects of internalized homophobia are alarming; Brown and Trevethan (2010) report that during youth, LGBT individuals suffering from internalized homophobia experience great difficulty in coming out, effecting mental health and long-term self-esteem. Moreover, when these individuals become adults they experience high levels of feelings of insecurity and anxiety; also, they find difficulty developing relationships with others (Brown and Trevethan, 2010). It would appear, therefore, that discriminatory laws, such as sodomy laws, which seek to demonize LGBT individuals, have a dangerous effect on this community, leading one to conclude that such laws would need to be eliminated.

Indeed, sodomy laws began to be repealed by individual states in the mid 1900s leading to the Supreme Court Decision in 2003, *Lawrence v. Texas*, which overturned the remaining state sodomy laws across the country (Pierceson, 2005). Nevertheless, these laws along with other forms of institutionalized homophobic discrimination represented seemingly insurmountable obstacles on the road to equality for the LGBT community.

The Fight for Equality: The Stonewall Riots, Pride, AIDS, and Recognition of Same-sex Couples

The LGBT movement which sought to attain equal rights did not start in earnest until a bloody confrontation involving police officers and LGBT individuals at a New York City bar. In the late 1960s, there were few places that were open to the LGBT community, much less those catering to it (The Leadership Conference, 2009). To further aggravate the situation, New York had implemented laws that banned public displays of homosexuality, which often times led to police raids of private businesses and gay establishments (The Leadership Conference, 2009; Gillespie, 2008). In his study on current police behaviour towards the LGBT community, Wayne Gillespie (2008) details the events at the Stonewall Inn, claiming that the police entered the establishment ‘under the false pretenses of liquor law enforcement’ and proceeded to detain and arrest many of the male patrons at the bar. This led to a boiling point whereby several patrons decided to resist the police raid (Gillespie, 2008; The Leadership Conference, 2009). Several gay men were arrested and beaten by police officers, causing other patrons to spread the word, which encouraged the participation of gay men and women from around New York City (The Leadership Conference, 2009). As more LGBT individuals and police reinforcements joined the crowd, the altercation had turned into what is now known as the Stonewall Riots (The Leadership Conference, 2009). Gillespie (2008) reveals that this event mobilized the LGBT community to oppose the category of criminal due to their sexual orientation, which led to public demonstrations in New York City and elsewhere, giving birth to the LGBT movement. Indeed, the Stonewall Riots were a physical manifestation of the lack of willingness of the LGBT community to be labeled as criminals (Gillespie, 2008).

The impact of the Stonewall Riots was significant. Julie Mertus (2007) explains that as the LGBT community gained momentum, the 1970s witnessed the splintering of two groups within the LGBT Movement. While the struggle between assimilationists, those who desired to be part of mainstream society, and radicals produced ideological differences, the 1970s LGBT movement was mainly characterized by “central liberal tenets of the day...equality, integration, individual self-worth, and self-determination” (Mertus, 2007). Indeed, Mertus explains that LGBT activists aimed to remove the stigma that LGBT individuals were abnormal. Part of this campaign was to be manifested in parades, marches, and festivals (Mertus, 2007). Times Magazine (2013) explains that in 1970, the first Gay Pride Parades were held in New York City, Chicago, and Los Angeles on the first anniversary of the Stonewall Riots.

Mertus (2007) argues that the very act of public demonstrations, such as pride parades, allowed society to bear witness to the reality of the existence of the LGBT community; moreover, they instilled a sense of self-confidence that had long been absent in much of the LGBT community. Furthermore, Ronald Bayer (1981), in *Homosexuality and American Psychiatry: The Politics of Diagnosis*, makes the claim that for the LGBT community, “mere tolerance [could not be] the [main] goal; the demand was for social legitimation”. Bayer (1981) continues by equating the American Psychiatric Association’s classification of homosexuality as a disorder to white supremacy, thereby constituting a ‘final solution to the problem of homosexuality’. Fortunately, for LGBT activists, the American Psychiatric Association removed homosexuality as a disorder from the *Diagnostic and Statistical Manual of Mental Disorders* (Mertus, 2007). This would be an important step because it removed a significant ‘scientific’

argument against homosexuality, thereby, partially establishing Bayer's social legitimation for the LGBT community.

The 1970s continued to be a decade of many advancements with Elaine Noble becoming the first openly gay American to be elected in a public office in the Massachusetts House of Representatives in 1975, while Harvey Milk was successful in being elected to the San Francisco board of supervisors in 1976 (Time.com, 2013). Milk was also the first to organize the LGBT community into a veritable voting bloc (Time.com, 2013).

The 1980s bore witness to the onset of the AIDS epidemic that led not only to the deaths of thousands of LGBT individuals but, as well as, to the demonization of the community by those who believed AIDS was an exclusively homosexual disease (Mertus, 2007; Time.com, 2013). Mertus (2007) develops on this reality by explaining that the rise of the AIDS epidemic provided 'fodder' for conservatives who placed blame on gay men for their own demise. This demonization seemed to create a situation where healthcare professionals and practitioners were slow to assist in fighting the problem in the LGBT community (Mertus, 2007). As a result, Barry D. Adam (1995) reveals that the LGBT community relied on itself to establish services that would assist affected LGBT individuals, as well as, provide education on ways to protect oneself against the disease. While these actions helped to mobilize the LGBT community in the fight against AIDS, thousands of gay men contracted the disease, many of whom died (Adam, 1995).

There were also quite a few advances made in the LGBT rights movement. In 1980, the Democratic Party became the first of the major political parties to declare its support for LGBT rights (Time.com, 2013). Furthermore, Noga-Styron et al. (2012) reveal that in 1982, the state of Wisconsin implemented an anti-discrimination law that prohibited employers from

discriminating against an individual's sexual orientation. The rest of the 1980s saw certain benefits being granted to domestic partnerships (Time.com, 2013).

As the LGBT movement entered into the 1990s, the conversation had turned to towards the status of same-sex unions. The first state to consider same-sex marriage was Hawaii in the case of *Baehr v. Miike*, whereby, the Hawaii State Supreme Court declared that banning same-sex couples from marriage constitutes an act of discrimination and a violation of their right to the equal protection of laws (Noga-Styron et al., 2012). Unfortunately, by the time the State Supreme Court reached its decision in 1999, voters chose to amend the constitution to limit marriage to opposite-sex couples (Noga-Styron et al., 2012). Back on the continental US, Vermont's Supreme Court ruled in the *Baker v. Vermont* case that same-sex couples should be allowed the same rights as heterosexual marriage, therefore, the legislature was ordered to either legalize same-sex marriage or develop an alternative that granted similar rights to same-sex couples (Noga-Styron et al., 2012). The state opted for civil unions for same-sex couples (Noga-Styron et al., 2012).

The twenty-first century has witnessed many advances in the realm of same-sex marriage. The most notable at the beginning of the century was Massachusetts, which legalized same-sex marriage in 2003, becoming effective in 2004 (Stacey and Meadow, 2009). Noga-Styron et al. (2012) present the Massachusetts Supreme Judicial Court's reasoning for opening marriage to same-sex couples, "the right to marry is not a privilege conferred by the State, but a fundamental right that is protected against unwarranted State interference". This is significant because it not only established a precedent that marriage is a fundamental right, but it also created the impetus

for marriage equality across the country. Indeed, since 2004, 13 states as well as, the District of Columbia legalized same-sex marriage.

Same-Sex Marriage on the Federal Level

On the federal level, the Defense of Marriage Act (DOMA), which legally defined marriage as between a man and a woman, has just been struck down by the Supreme Court of the United States on June 26, 2013 (Williams and McClam, 2013). In the final weeks of March of this year, legal teams both supporting and opposing same-sex marriage presented their case to the Supreme Court on whether a section of DOMA is constitutional (Williams and McClam, 2013). The section that was of concern was the part of DOMA that relates to the federal benefits that were denied to same-sex couples, and whether this violated the Equal Protection Clause of the US Constitution (Williams and McClam, 2013); that is to say, since the Supreme Court decided to strike down DOMA, only those couples in states that already perform and recognize same-sex marriage would receive the over 1,000 federal benefits, rendering the other states untouched (the Justices could have also ruled that it is unconstitutional across the board, legalizing it in all states; however, this seemed to be unlikely) (Liptak, 2013). It appears, though, that the ruling is quite broad (Williams and McClam, 2013); the importance of this is that the Supreme Court struck down the federal benefits section of DOMA because it was “unconstitutional as a matter of equal protection”; in other words, the federal government cannot distinguish between same-sex and opposite-sex married couples, which means that advocates for same-sex marriage in states that do not recognize it have legal precedent to file lawsuits (Williams and McClam, 2013).

The Human Rights Campaign (HRC) is an advocacy organization that focuses on achieving marriage equality not only at the state-level but nationwide as well. The HRC (2013) reveals that, until June 26, 2013, the 1,138 benefits, rights and protections that are provided by the federal government to married couples were denied to married same-sex couples in the states that perform same-sex marriages. In other words, even in states that grant same-sex couples the right to marry, and with it the benefits, rights, and protections at the state-level, these couples were still considered as two separate individuals who had not entered into legal contract in the eyes of the federal government.

The case that had been brought forth to the Supreme Court is that of Edith Windsor and Thea Clara Spyer. In 2007, these two women married in Canada; however, when Ms Spyer passed away in 2009, her wife was not recognized as her legal spouse, therefore, Ms Windsor was taxed by the Internal Revenue Services \$360,000 in her inheritance from Ms Spyer (Liptak, 2013). If their marriage had been recognized by the federal government, Ms Windsor would have been exempt from this, as are married heterosexual couples. Indeed, the thousands of couples who have been given the right to enter the public institution of marriage in their state were still marginalized by the federal government due to a law that defined marriage as between a man and a woman.

The Conservative and Religious Right Opposition

Such laws that limited marriage to one man and one woman represented the legal manifestation of a counterrevolution that had arisen since the commencement of the LGBT movement. Indeed, the achievement of LGBT rights created a conservative backlash led by

conservative and religious leaders. To understand the reasons for the ire felt by these segments of American society towards the realization of LGBT rights, I look to Gillian Frank. In an article examining the anti-discrimination ordinance in Miami-Dade County during the 1970s, Frank (2013) provides an account on the origins of the reactionary movement. Frank (2013) explains antigay activism accelerated after the civil rights successes by the African American community. Pro-segregationists were disappointed by the court decisions that integrated schools and busing; moreover, they considered the Equal Rights Amendment, which aimed for guaranteed equal rights for women, as another affront to their ideology (Frank, 2013). Truly, it would appear that the convergence of racial, gender and now sexual civil rights movements aggravated an already agitated conservative segment of society (Frank, 2013).

Judith Stacey and Tey Meadow provide another possible explanation for the animosity the conservative and religious right holds towards these happenings. In reference specifically to same-sex marriage, Stacey and Meadow (2009) postulate that such rights to minorities constitute a ‘challenge’ to a believed central component of the national republican identity. This sentiment is applicable to the conservative reaction to racial, gender, and sexual rights movements. If the conservative and religious right felt that the very fabric of American society was being undermined, the mobilization of counterrevolutionaries with the goal of defending traditional values would seem to be an expected response. Indeed, the 1970s witnessed this organized response.

In order to mobilize a veritable challenge to civil rights activists, the conservative and religious right had to transform the nature of the national conversation of civil rights. To do so, the conservative and religious right appropriated the ‘rights discourse’ by claiming that

conservatives are the true sufferers of minority activists because the government has abused its power by establishing special rights to racial, gender, and sexual activists (Johnston, 1994). This is quite interesting because it would imply a manipulation of discourse where the oppressor claims that the oppressee is in fact the oppressor because he or she seeks an equality that impedes on the rights of the newly oppressed oppressor. For example, in the discussion of Miami-Dade County's anti-discrimination ordinance, Frank (2013) reveals that the formation of a conservative campaign, Save Our Children, which united various churches and conservative organizations under one umbrella led by then-celebrity Anita Bryant, was successful in eliminating the anti-discrimination ordinance, thereby, allowing employers to discriminate against LGBT individuals, as well as, denying same-sex couples the right to adopt children. The impact of this was astounding as this represented the effectiveness of the conservative and religious right in achieving its goals.

More recently, the conservative and religious right has achieved further successes. In 1996, even though the Democratic Party had officially supported LGBT rights since the 1980s, Democratic President Bill Clinton signed into law DOMA which amended the definition of marriage as between one man and one woman (Time.com, 2013). Previously, the US military had implemented the "Don't Ask, Don't Tell, Don't Pursue" policy, whereby homosexuals could serve in the military as long as their sexual orientation was not disclosed (Mertus, 2007). After Massachusetts legalized same-sex marriage in 2004 (Stacey and Meadow, 2009), the conservative and religious right was also successful in countering a potential wave of states legalizing same-sex marriage by successfully lobbying state leaders to amend state constitutions to include a ban on same-sex marriage (Time.com, 2013).

To be sure, while LGBT activists have been effective in obtaining many rights and eliminating discriminatory laws, the conservative and religious right has managed to create many obstacles on the road towards equality for the LGBT community. Interestingly, the opponents of LGBT rights, specifically same-sex marriage, seem to share the same antagonistic feelings regarding the institution of marriage as another marriage debate almost 50 years old.

Interracial Marriage and Same-sex Marriage

The discourse concerning the type of consenting parties who can legally enter into the institution of marriage is a story that has been told before. R. A. Lenhardt (2008) provides an interesting analysis on the current plight of same-sex marriage advocates and the fight for interracial marriage 46 years ago. Lenhardt (2008) reveals that *Loving v. Virginia*, the Supreme Court Case that struck down anti-miscegenation laws across the country, carried with it language that is very applicable to the case for same-sex marriage. Indeed, she argues that “Chief Justice Warren’s assertion that ‘[m]arriage is one of the basic civil rights of man, fundamental to our very existence and survival’ arguably provides strong support for the extension of marriage to same-sex couples” (Lenhardt, 2008). This is quite significant because such language in a ruling can provide a precedent for same-sex marriage advocates to utilize. Nevertheless, in order to truly understand the ways in which *Loving v. Virginia* can be beneficial to marriage equality, it would be prudent to examine this case in detail.

In the 1958, a couple consisting of Mildred Loving, an African American, and Richard Loving, a white American, travelled to Washington, D.C. with the purpose of marriage (Patria, 2007). While the couple was able to rejoice in having their relationship legalized in Washington,

D.C., upon crossing the border into their home state of Virginia, not only was their marriage unrecognized, it was illegal (Patria, 2007; Bell, 2013). The couple was arrested by Virginian Authorities and the case eventually reached the Supreme Court (Patria, 2007) (Bell, 2013). It appears that throughout most of the southern states, there was still wide opposition to interracial marriages. Debra Bell (2013) describes that many at the time believed that if interracial marriage is permitted, then everyone will want to enter into an interracial marriage; this is interesting because it appears to reinforce an archaic belief that races, while they may be viewed as similar by the law, they are different and should not be mixed. Indeed, this falls in line with the idea of separate, but equal which was prevalent in most southern states.

Regardless of this, the Supreme Court struck down these anti-miscegenation laws in Virginia and the other 15 states that still had them (Patria, 2007). This was a great step towards removing state-sanctioned segregation from the US social and legal landscape (Patria, 2007). Chief Justice Earl Warren describes effectively the importance of this court decision,

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival....To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

[Loving v. Virginia, 388 U.S. 1 (1967)]

Basing the Supreme Court's decision on the clauses of Due Process and Equal Protection found within the Fourteenth Amendment, this opinion expressed by Chief Justice Earl Warren is quite telling. Here, the Chief Justice is defining the institution of marriage as a 'basic civil right' that is

essential for every individual and that one's own survival and existence is dependent on having access to this right (Lenhardt, 2008). This is very important because it appears the Chief Justice is categorizing the institution of marriage as something that is vital not only for the individual but for the very fabric of the society within which this individual finds him or herself. From this, one can infer that, truly, within a liberal democracy, such as the United States, an individual's access to certain liberties and freedoms must be upheld and defended from discrimination, regardless if it has been state-sanctioned. Indeed, the Chief Justice seems to allude to a very interesting idea. While there are certain aspects of life where a state can retain a particular ideology, such as deciding which types of employment are to be valued and which days are to be considered holidays, the Chief Justice appears to draw a line between state partisanship and the supremacy of the individual. The state cannot infringe on the fundamental liberties and rights of an individual, regardless of the intensity of the volition of a state to protecting a particular lifestyle.

Moreover, the Chief Justice evokes the principle of equality by claiming that denying this fundamental right on the basis of classification is a direct violation of the spirit of the Fourteenth Amendment. Such a claim carries with it a significant notion. It declares that the idea of equality is central to the Constitution and, as an extension, to the very fabric of American society. As a result, a government, whether federal or sub-national, cannot under any circumstance undermine the principle of equality regarding basic civil rights. Lastly, the Chief Justice clarifies that the Fourteenth Amendment demands that the 'freedom of choice to marry may not be restricted by invidious racial discrimination' [*Loving v. Virginia*, 388 U.S. 1 (1967)]. In other words, a person has the freedom to choose whoever they wish to marry regardless of racial discrimination.

Not only does this, once again, restrict a state's ability to impose a particular lifestyle upon its citizens, but it enters into the realm of the constitution of a marriage. Surely, this creates a precedent in the case for same-sex marriage. Indeed, this is the idea that Lenhardt seeks to explain in her dissertation. The issue of contention within the debate of same-sex marriage revolves entirely around the idea of who a person can choose to marry, just as in the case of interracial marriage (Lenhardt, 2008). By claiming that the Fourteenth Amendment protects against racial discrimination on a person's choice to marry, the Chief Justice has opened the door on the idea that hateful discrimination has no legal weight when deciding the components of a legal contract, such as that of the institution of marriage.

It would appear that the Supreme Court, indeed the judicial system, is acting as a guarantor of equality and individual freedoms. As we see in the next section, the judicial system plays an important role in fight for marriage equality.

Same-sex Marriage, the Courts, and the People

In the past decade, there have been two mechanisms that have been utilized in various states, and recently on the federal level, in order to either legalize same-sex marriage or insert an amendment to the state constitution banning same-sex marriage. Furthermore, one of these, the Courts, has been supportive of the same-sex marriage cause, while the other, popular vote through referendum, has tended to limit marriage to one man and one woman (Mertus, 2007; Stacey and Meadow, 2009; Time.com, 2013). As examined previously, following the legalization of same-sex marriage in 2004 in Massachusetts by the State Supreme Judicial Court, many states held referenda that barred same-sex couples from marriage (Stacey and Meadow, 2009;

Time.com, 2013). Interestingly, there is one state in particular that has experienced both these mechanisms: California. California is unique in the United States for first having legalized same-sex marriage through the judicial system, then constitutionally banning it through referendum (Lewis and Gossett, 2011), only to have it later (re)legalized by the Supreme Court of the United States.

In 2008, the State Supreme Court of California ruled that same-sex couples were allowed to be legally married within the state (Newman, 2010). The importance of this decision lies on the fact that this ruling was not based on extending the right of marriage to same-sex couples, but rather that sexual orientation was not a legitimate basis for discrimination (Newman, 2010). Peter A. Newman (2010) reveals that the Court concluded that a person's sexual orientation has no effect on the commitment shown within a relationship; therefore, sexual orientation, like race, cannot be grounds to discriminate these couples. With this decision, on May 15, 2008, California legalized same-sex marriage.

Such an event leads one to consider the reasons advocates would choose the judicial system, instead of the legislative, to achieve marriage equality. In his paper on same-sex marriage and judicial interpretation, Paul Johnson analyzes the judicial system as a means to legalize same-sex marriage. Johnson (2008) explains that the relevance of the judicial system as a means for marriage equality depends on the standpoint of the court with regards to its views on society and heteronormativity. If the court believes that society is truly heterocentric and, as such problematic to minorities, it could interpret current laws as marginalizing same-sex couples because they do not fit within heteronormative values; therefore, the court is more likely to rule that same-sex couples must not be denied entry into marriage due to their sexual orientation

(Johnson, 2008). Likewise, if the judges' standpoint is more traditional, whereby an opposite-sex marriage is held by society to be essential, the judges may rule that barring same-sex couples from marriage does not constitute a form of discrimination due to the inherently heterosexual nature of marriage (Johnson, 2008). The importance of these claims made by Johnson cannot be overstated. It appears that one can deduce from Johnson the idea that a society's evolutionary history, in terms of its interpretation of societal values and the institutions that embody these, directly impacts how a judge will rule on same-sex marriage. A society that has progressively come to tolerate and accept diversity will likely breed a judicial system that may come to interpret discrimination as unacceptable. If one examines California's recent history with regards to same-sex relationships, it would appear that the state had been developing greater acceptance towards same-sex couples.

Gregory B. Lewis and Charles W. Gossett (2011) reveal that both the Courts and legislators in California have demonstrated efforts to bring same-sex couples into the foray of mainstream society. Lewis and Gossett (2011) detail that, since the early 2000s, California's legislature had been expanding legal benefits to same-sex domestic partnerships. The legislature passed in two occasions, 2005 and 2007, same-sex marriage laws that were later vetoed by then Governor Arnold Schwarzenegger (Lewis and Gossett, 2011). In 2004, the State Supreme Court made it possible to challenge the law defining marriage as between a man and a woman that was created in 1977 (Lewis and Gossett, 2011). As mentioned previously, it later ruled unconstitutional this ban and opened marriage to same-sex couples (Lewis and Gossett, 2011).

As Lewis and Gossett (2011) have shown, the legislature and, more importantly, the Courts, seem to have gradually developed a standpoint that is critical to heteronormative

perspectives on marriage. As such, if one adheres to Johnson, the judicial system represented the most effective means to legalize same-sex marriage due to its progressive behaviour in preceding years towards the issue. Nevertheless, in the fall of 2008, only months after the Supreme Court of California legalized same-sex marriage, voters through a referendum amended the state constitution to define marriage as between one man and one woman.

While the option of the judicial system is characterized by one or several individuals choosing the fate of same-sex relationships within a state, the alternative includes the involvement of the electorate of a state. On the ballot in California during the 2008 Presidential Election was a proposition that sought to limit marriage as only between a man and a woman (Abrajano, 2010; Lewis and Gossett, 2011). If a voter was opposed to same-sex marriage, he or she selected Yes on the proposition, while those voters who wished to maintain the current legal state of same-sex marriage voted No (Abrajano, 2010; Lewis and Gossett, 2011). Unfortunately for same-sex couples, while most polls conducted prior to the vote showed a majority in opposition to the proposition, 52% of voters chose to support the proposition, amending the constitution to ban same-sex marriage (Lewis and Gossett, 2011).

The final vote led to several seeking to investigate the reasons why such a proposition managed to pass in a historically liberal state like California. Lewis and Gossett (2011) focused on the disparities between poll results prior to the vote and the final result. They proposed four possible reasons to explain this:

- 1) poll respondents did not respond honestly to pollsters;
- 2) some respondents who opposed same-sex marriage were initially reluctant to amend the constitution for this purpose;
- 3) the campaign over the amendment changed people's opinions about same-sex marriage; and

4) poll respondents did not initially understand how to accurately connect their position on same-sex marriage with the 'right' position on Proposition 8, but that they gained such knowledge over time.
(Lewis and Gossett, 2011).

The findings of their investigations reveal that there was little support for any of these explanations; therefore, the apparent reason for a majority support for Proposition 8 is simply that more Californian voters opposed same-sex marriage than those who supported it (Lewis and Gossett, 2011). If, indeed, Proposition 8 passed due to a majority in California simply being against same-sex marriage, this would suggest that popular votes are the least effective in securing marriage equality.

Marisa Abrajano (2010) examined the role race may have played in voting for Proposition 8. She reveals that during the campaign both sides focused on black and Latino voters appealing to their race (Abrajano, 2010). Proponents of Proposition 8 utilized language that focused on religion and morality due to the more traditional character of the black and Latino communities; opponents of Proposition 8 emphasized civil rights and discrimination discourse to appeal to the struggles both communities have suffered (Abrajano, 2010). Her research found that while there was a higher turnout of black and Latino voters in the 2008 Presidential Election, if participation levels had remained equivalent to those of the 2004 Presidential Election, Proposition 8 would still have passed (Abrajano, 2010). Nevertheless, there was evidence that showed that blacks and Latinos were significant in passing Proposition 8; the black community, in particular, had a stronger preference in support of Proposition 8 (Abrajano, 2010). Regardless of the racial aspect, it becomes apparent that there was a strong opposition to same-sex marriage within the state.

However, on June 26, 2013, the Supreme Court of the United States decided that it could not rule on the case, returning the issue to state courts that had already struck down on Proposition 8, thereby, legalizing again same-sex marriage in the state (Williams and McClam, 2013). Interesting about this is manner in which proponents of the proposition reacted. A spokesperson at the National Organization for Marriage, an organization opposing same-sex marriage, claimed the Supreme Court has made an ‘illegitimate’ decision because it chose to support lower court decisions that invalidated the vote of the people (Brown, 2013). Truly, this decision by the Supreme Court pits the judicial system against popular vote. No doubt, this leads one to consider which institution is more legitimate. This is, indeed, a topic of great interest, yet, for the purpose of this paper, the idea that is important is that the judicial system in California, and in several other states, appears to be the most effective and efficient tool for proponents of same-sex marriage to achieve marriage equality. Likewise, a referendum seems to be the mechanism that tends to amend constitutions in order to define marriage as between a man and a woman.

Regardless of the mechanism that is used to secure same-sex marriage, it becomes apparent that the road towards equality for the LGBT community has been long and oftentimes difficult. Many obstacles have been placed in front of LGBT rights advocates, be it the onslaught of the AIDS epidemic or the mobilization of a coherent conservative and religious movement with the goal of countering the advances made towards equality. In the next chapter, I turn the conversation towards the concept of freedom of mobility, its importance within the United States, and the relationship it has with the recognition of same-sex marriage across the country.

CHAPTER 2 - INTERNAL MOBILITY

When a regime is considered to be a liberal democracy, it is expected that the tenets and principles of said political construct would be reflected in the laws, institutions, and policies of the state. This chapter discusses those very tenets that are pertinent to a liberal democracy and the ways in which the United States can be classified as such. Establishing the United States as a liberal democracy is necessary to understand the importance of internal mobility and the role same-sex marriage plays within it. This will be analyzed through the Supreme Court of the United State's ruling on *Shapiro v. Thompson* which established a connection between the principle of equality and the freedom of internal mobility.

Liberal Democratic Values

In order to understand the importance of internal mobility within the United States it would be prudent to examine the reasons supporting the right of internal mobility as necessary for a liberal democracy; however, first we should establish the components of a liberal democracy. While analyzing liberal democratic values in Turkey and the European Union, Jeffrey C. Dixon (2008) explains that liberal democracy can be conceptualized two-dimensionally because it consists of democratic rule and political liberties. A liberal democracy ensures and protects political freedoms, transparency, and the rule of law (among others) that derive from the electoral process and diffuses them throughout the various organs of the government (Dixon, 2008). This connection between the people and the government is further shared by Fareed Zakaria who defines liberal democracy as a form of government that is

managed by those educated in public affairs but still accountable to the electorate (Hobson, 2012).

Indeed, it appears leaders of liberal democratic regimes are in charge of the daily affairs of the state, but the manner in which they conduct these affairs must be in the interest of the people, but most importantly, transparent, so as to ensure their accountability. Furthermore, in their discussion of the role of lawyers within a liberal democracy, Russell G. Pearce and Sinna Nasseri (2012) specify that a liberal democracy is based on the majority rule of equal citizens, in turn the government upholds individual freedoms. Likewise, Devin K Joshi (2013) proposes that a liberal democracy has the intent of allowing and protecting freedom of expression, association, religion, and private property, as well as, the supremacy of the rule of law, the autonomy of individuals and the protection of the rights of individuals and minorities.

Noteworthy in these definitions of liberal democracy is the play of a binary conceptualization of the term, which is formulated by the ideas of liberalism and democracy. Dixon (2008) argues that the democratic quality ensures at a minimum the competition for popular votes. Joshi (2013) developed a more expansive definition by claiming there are at least five core procedural dimensions of democracy: participation, representation, equality, information transparency, and accountability. It would appear, therefore, that the democratic concerns itself primarily on the relationship between the citizenry as a wholly single entity and a state's governing bodies. On the other hand, liberalism seeks to protect the freedoms and rights of the individual as an entity separate from the greater whole (Joshi, 2013). Indeed, the liberal aspect would place civil and political rights as the most important qualities of a liberal regime (Hobson, 2012). Pearce and Nasseri (2012) provide a concrete example of this reality; they

contrast the democratic value of equal opportunity among the citizenry to becoming a lawyer with the liberal value of the right of individual citizens to having access to legal knowledge and assistance in order to protect their individual rights, specifically when the majority has sought to impose on the rights of the individual.

Interestingly, this dualism within the idea of liberal democracy is the central focus of Christopher Hobson's argumentation. Hobson (2012) argues that this 'composite' definition that Zakaria has proposed allows for liberal values, such as constitutionalism and the rule of law, to mitigate the potentially oppressive democratic values, such as majority rule. Truly, since democracy appears to be dedicated to the people as a whole rather than the individual, the individual and the minority may find themselves in a situation where the majority continuously oppresses the minority. While democratic values establish that a government must be accountable for its deeds, one must determine the entity, or entities, to which is it accountable; for if a regime cares only for the wills of the majority, its institutions would need not concern themselves with the plight of those who may suffer at the hand of the majority. In order to ensure that a state's leaders will not favour one segment of society over the other, liberal values will need to be included in the governing regime. As a result, for the purpose of this paper, I believe the most functional interpretation of the term liberal democracy is a regime that not only ensures the participation of the people through voting, but also protects human, political, and civil rights of the individual and the minority. With this working definition of liberal democracy, one can see that the United States is truly a liberal democratic state with certain values and principles it must uphold.

The United States as a Liberal Democracy

Undoubtedly, the United States of America falls under the category of a liberal democracy. In terms of democratic values, as discussed previously, the United States satisfies the core requisites that Joshi describes. There exists popular participation in virtually all levels of government, from municipal to federal, with the elected officials fulfilling the role of representation. Institutions such as the Senate, access to mass media, and the plurality of associations found within the United State demonstrate a fundamental commitment to equality of opportunity within the United States. In relation to information transparency and accountability, Joshi (2013) explains that when there is greater access to political information and a plurality of sources of information, and, if there are effective insurance mechanisms on transparency, a state is truly democratic. Covey Oliver (1976) mentions that since the United States has a system of separation of powers with checks and balances, the three branches of government - executive, legislative, and judicial - are independent from each other. This independence among the three branches appears to serve the purpose of keeping watch on the other branches in order to guarantee information is transmitted to the public and that the media is allowed to question government decisions (Olsson, 2009).

Just as the United States is democratic, it is surely liberal. Individual freedoms in the political, civil, social and economic realms seemed to be prized cornerstones of the Republic. This commitment to individual liberties united the disparate and seemingly different societies of the 13 colonies to rise against their common oppressor (Woodard, 2011). Moreover, so much is the importance of individual freedom in the foundation of the US that it appears in the Declaration of Independence: “We hold these truths to be self-evident, that all men are created

equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness” (USCIS, n.d.). It appears the role of the government is to ensure the protection of individual rights and to allow individuals to pursue their happiness. Indeed, the Legal Information Institute (LII) at Cornell University Law School reveals that within the US Constitution there are various clauses that protect individual rights and freedoms. For example, the 5th Amendment of the US Constitution guarantees the right of due process (Legal Information Institute, n.d.). In its analysis of the due process clause within the 5th Amendment, the LII (n.d.) explains that the government must respect all rights, guarantees, and protections that are found within the US Constitution and its statutes before “the government can deprive a person of life, liberty, or property”. That is to say, that all citizens will be treated fairly and have their rights respected by the executive, legislative, and judicial branches (Legal Information Institute, n.d.). As a result, one is led to conclude that by adhering to both democratic and liberal values the United States is effectively a liberal democracy.

It must be said, nevertheless, that while the Constitution guarantees the protection of individual liberties so as to allow for the pursuit of happiness, this paper does not believe that all actions that bring happiness to an individual can go unregulated; some may need to be outlawed. Individuals who cause harm to others physically or otherwise because it brings them happiness are violating the rights of other individuals, demanding intervention from the state; however, as is discussed later, potential harm to other individuals has to be based on evidence and not hypothetical threats.

The Freedom of Internal Mobility

As established previously, liberal democracies are characterized by popular vote, individual freedoms, the rule of law, open society and the equal protection of political and civil rights. As a result, it would be difficult to imagine a truly liberal democracy that restricts the internal mobility of its citizens. The ability for a state's citizens to travel freely throughout its jurisdiction, entering and exiting the sub-national constituents, would seem to be an essential component for a healthy liberal democracy. Truly, citizens must be allowed an autonomous life where they are able to pursue their lives in the location they wish. Citizens are not citizens of a sub-national jurisdiction, they are merely residents. International migrants who enter a country do not take an official oath of allegiance to a sub-national jurisdiction; just as native born individuals are given national, not sub-national, citizenship.

The Privileges and Immunities Clause of Article IV, Section 2 of the US Constitution declares that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states" (Legal Information Institute, 2010). That is to say, the fundamental rights of individuals will be protected; furthermore, states will not be allowed to discriminate against citizens who do not originate from the state (Legal Information Institute, 2010). This clause is joined by Section 1, Clause 2 (also known as the Privileges **or** Immunities Clause) within the Fourteenth Amendment of the US Constitution that states that "no State shall make or enforce any law which shall abridge the privileges of citizens of the United States;...nor deny to any person within its jurisdiction the equal protection of the laws" (Archives.gov, n.d.). A state cannot treat US citizens arriving from another state differently than those citizens born therein. Truly, these two clauses seek to include the concept of internal mobility as a liberal democratic

value that to which individual states and the US as a whole must adhere. Indeed, this would be consistent with the liberal democratic concepts of individual autonomy and freedom of association that Joshi and Hobson describe as inherent in a liberal democracy. In a liberal democracy, citizens are granted and guaranteed a right to freely associate with other individuals and groups regardless of their affiliations (Joshi, 2013; Hobson, 2012). It would be difficult to protect this right if citizens' mobility were severely restricted. Citizens would not be able to freely join communities or associations that are not found in their local regions if mobility were not guaranteed.

This suggests that there is a liberal democratic right of freedom of internal mobility, which individual sub-national constituents cannot infringe. In the case of the United States, this is to say that individual states cannot impede or prevent citizens from other states to enter and reside within its borders. The importance of this freedom of internal mobility lies within the geopolitical integrity of a state. If citizen mobility is restricted, it may come to pass that different regions, especially in large and densely populated countries like the United States, develop separate societies that may no longer consider allegiance to the national state to be necessary. This would constitute a threat to the survival of the state that freedom of internal mobility may help pacify. Indeed, the freedom to move internally without obstacles protects the integrity of the country. It would help perpetuate a single unified culture and society because the spread of ideas would reach all corners of the nation, instead of concentrating itself in particular areas. The following case reveals how the ability of citizens to travel freely across the country is considered to be a constitutional right.

Supreme Court Case on Welfare Payments and Internal Mobility
[Shapiro v. Thompson, 394 U.S. 618 (1969)]

The *Shapiro v. Thompson* case discusses the issue of whether a new resident in a state is eligible for welfare payments within the first year or should be denied these, despite having met all other requirements [Holland, 1970; Shapiro v. Thompson, 394 U.S. 618 (1969)]. The ruling on this case is important for the issue of same-sex marriage because even though same-sex couples satisfy all other requirements for a marriage license, they are denied this solely because they are of the same sex. In Connecticut, Pennsylvania, and the District of Columbia, district judges ruled it unconstitutional for a state to deny welfare benefits and payments to new residents [Holland, 1970; Shapiro v. Thompson, 394 U.S. 618 (1969)]. Those who were against these rulings appealed to the Supreme Court, arguing that by not imposing the one-year waiting period, the state's finances would be greatly affected since many of those who will require immediate welfare payments will continue to do so after the first year [Holland, 1970; Columbia Law Review Association, 1970; Shapiro v. Thompson, 394 U.S. 618 (1969)]. Furthermore, the appellants argued that this sort of classification was necessary in order to discourage individuals who enter the state with the goal of taking advantage of any potentially larger benefits; also, they claimed that since these new residents have not contributed taxes, they should not be entitled to benefits [Holland, 1970; Columbia Law Review 1970; Shapiro v. Thompson, 394 U.S. 618 (1969)].

Interestingly, the Supreme Court ruled in favour of the district court judges from Connecticut, Pennsylvania and the District of Columbia (Holland, 1970; Columbia Law Review Association, 1970). The ruling came with 8 different components. The first component touches upon the limit a state can have on imposing rules on equality,

The classification may not be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes because the Equal Protection Clause prohibits the states from apportioning benefits or services on the basis of the past tax contributions of its citizens.

[Shapiro v. Thompson, 394 U.S. 618 (1969)].

In his review of the court decision, Tommy L. Holland (1970) explains that with this ruling, states cannot prevent citizens, regardless of their status in the state, from access to welfare payments because it violates the Equal Protection Clause. It would appear that equality played a decisive role in this case. The principle of equality protects citizens from states deciding who can benefit from public programs.

In another component, the Supreme Court ruled that there is a guarantee within the Constitution for the right of interstate movement; creating barriers in the hopes of deterring migrants is not only “impermissible” but it cannot be used as a justification for creating a one-year waiting period [Shapiro v. Thompson, 394 U.S. 618 (1969)]. A Columbia Law Review Association (1970) article further adds that while the justifications provided by the states seem to have some ‘rational connection’ to welfare discrimination, the fact that it is impeding on the constitutional right to migrate negates any chances it may have to constituting a compelling government interest. A compelling government interest is the idea that a government may regulate a particular area in society; for example, governments have a compelling interest in regulating drugs that have yet to be approved by government health agencies (Currie, 2007).

Also, a third component within the decision explains that “a state may no more try to fence out those indigents who seek higher welfare payments than it may try to fence out indigents generally” [Holland, 1970; Shapiro v. Thompson, 394 U.S. 618 (1969)]. In these two

components, it becomes explicit that internal mobility within the US is a guaranteed right and that no state has the authority to create obstacles that may impede this. This is very important because it demonstrates that a sub-national constituent, such as a state, has no legal right or authority to prevent migration into its borders. States cannot pursue policies in the name of defending any sort of ideology, whether fiscal or social, which would seek to prohibit the entry into the state by particular types of migrants.

Interestingly, Holland draws an impactful conclusion from the Supreme Court decision. Holland (1970) argues that due to the application of the Equal Protection Clause of the Fourteenth Amendment on dismissing that which a state may consider a compelling government interest, the Court has opened the door for challenges against state classifications that plaintiffs may consider as causal to the denial of a ‘fundamental’ constitutional right (such as the freedom of internal mobility). Indeed, Holland (1970) continues by claiming that *Shapiro v. Thompson* would from then on act as a constitutionality litmus test for states wishing to categorize a certain group of citizens. The Columbia Law Review Association (1970) article agrees with this assessment adding that, in effect, *Shapiro v. Thompson* fully established travel as a fundamental constitutional right and that the reach of the Equal Protections Clause has been greatly increased.

By increasing the legal extent of the Equal Protections Clause, and as a result, the right of internal mobility, the Supreme Court has now opened a channel through which laws prohibiting same-sex marriage can be challenged. Indeed, *Shapiro v. Thompson* is applicable to the case of same-sex couples’ mobility rights. One could draw from this idea that those states that choose to classify same-sex couples as incapable of entering the public institution of marriage are failing the precedent established by *Shapiro v. Thompson*. They are failing to show a

compelling government interest because they are violating a same-sex couples' rights to migrate without experiencing barriers or impediments. These barriers appear to have the intention of not only preventing same-sex couples indigenous to the state from wedding, they seek to impede the ingress of married same-sex couples into the state. By doing so, they are infringing on a fundamental constitutional right disqualifying any potential compelling government interest or rational connection to a state's objective.

Moreover, as revealed with *Loving v. Virginia*, the Supreme Court had decided that hateful discrimination is not a compelling government interest, as well. A government cannot limit who can enter into the marriage contract due to discriminatory reasons, just like it cannot prevent migrants from entering a state due to discriminatory government interests. As such, the Supreme Court seems to be ensuring that equality and autonomy are rights that supersede particular social values that a state may have.

Moreover, married same-sex couples residing in Washington would find the lack of recognition of their marriage in neighbouring Idaho as a financial, legal and social barrier imposed by Idaho to their freedom of internal mobility. Furthermore, if it can be accepted that animosity against homosexuality is the main driver for a ban on same-sex marriage, it would come to be that these bans constitute hateful discrimination. If interpreted as hateful discrimination, the ban ceases to be a compelling government interest; rather, it reveals itself to be a barrier established by a state, which indicates an impediment on the freedom of mobility of same-sex couples.

CHAPTER 3 - CASE STUDIES

In order to provide real-world examples of the present disparity on the recognition of same-sex marriage among American states and its impact on the freedom of internal mobility, this chapter examines the policies regarding same-sex marriage of South Carolina, New Mexico, New Jersey, and New York . The current policies of each state are presented first, before proceeding to discuss them individually. Following this is an analysis on the implications of these four policies on same-sex couples' freedom of internal mobility. It reveals that the disparity in these four policies creates a cost where same-sex couples must surrender access to benefits otherwise given to married couples. Also, the very existence of this disparity constitutes restricted autonomy in the sense that same-sex couples lack veritable and realistic options for migration. The result of these costs is that same-sex couples do not truly enjoy freedom of internal mobility.

The Current Status of Same-sex Marriage in the Four Cases

During the growing public attention towards same-sex unions, be it marriage or civil unions, the staunchly conservative southern state of South Carolina was quick to join many other states in amending the state constitution to include a ban on same-sex marriage (Adcox, 2007). The question was included on the ballot during the 2006 state elections where 78% of the voting electorate was in favour of including the amendment to ban same-sex marriage in the state constitution, while only 22% was against (Cnn.com, 2006). The approved amendment states that “a marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this state” (Adcox, 2007). The impact of this wording not only prohibits

same-sex couples from entering into the institution of marriage, but it also bars other forms of domestic partnerships. Furthermore, this amendment prevents same-sex marriages conducted in other states from being recognized within in the state, therefore nullifying the marriage while the couple is within the state.

Like South Carolina, New Mexico does not recognize same-sex marriage; however, New Mexico is a very interesting case because it is the only state in the Union that neither recognizes nor bans same-sex marriage (Santos, 2013). This places the state in a vulnerable position to be contested by same-sex couples wishing to marry. The ambiguity on the status of same-sex marriage within the state arises from two realities. In New Mexico the legal definition of marriage is “a civil contract, for which the consent of contracting parties, capable in law of contracting, is essential” (Santos, 2013). That is to say that, the parties wishing to marry must be able under the law to enter into this contract; however, there is no mention of gender within the statement. Nevertheless, gender does appear in the marriage license applications that county clerks around the state use. These marriage license applications have spaces for bride and groom (Santos, 2013).

Out of the four cases that are to be studied in this paper, New Jersey offers an answer to the same-sex marriage question that attempts to satisfy both proponents and opponents of same-sex marriage. New Jersey is one of the few states that do recognize a form of legal union that grants some of the rights of marriage: civil unions. Signed into law in 2006, becoming effective in early 2007, the Civil Union Act of New Jersey seeks to establish civil unions as equal in rights, protections and responsibilities under the law as marriages (Civil Union Act, 2012). Furthermore on forms or official documents, the Act declares that “whenever in any

law....reference is made to [any words] which in a specific context denotes a marital or spousal relationship, the same shall include a civil union pursuant to the provisions of this act” (Civil Union Act, 2012). It would appear that New Jersey may have successfully given all rights of marriage without the word marriage to same-sex couples; however, upon closer examination, this may not be so.

On June 14, 2011, Assemblyman Daniel O’Donnell introduced the “Marriage Equality Act” into the New York State Assembly. Passing through both the Assembly and the Senate, on June 24, 2011, Governor Andrew Cuomo signed the bill into law, thereby, making same-sex marriage legal in the state of New York. I later describe in further detail the various aspects of the “Marriage Equality Act”; however, the main idea that should be extrapolated from this at this moment is that according to this bill a marriage is valid regardless if the consenting parties are of the same or different sex, and the state government and all its branches will not treat differently same-sex marriages from heterosexual marriages (Marriage Equality Act, 2011). Moreover, an amendment was added that protects religious institutions or religiously affiliated institutions, including their employees and clergy, from civil claims or penalization from the state government and all its branches (Marriage Equality Act, 2011). The remarkable passage of this bill through the two houses and its signing into law by the Governor made New York the most populous state at the time to legalize same-sex marriage.

The LGBT Community and South Carolina

With the striking down of South Carolina’s sodomy laws in 2003 by the Supreme Court in *Lawrence v. Texas*, South Carolina removed one of the last discriminatory laws against the

LGBT community (Hagood, 2010). Nevertheless, the Human Rights Campaign (2007) reveals that there is no law that includes sexual orientation as a classification under South Carolina's non-discrimination laws. The organization continues by clarifying that while any South Carolina resident can petition to adopt a child, including LGBT individuals, there is a grey zone in relation to same-sex couples jointly petitioning to adopt, as well as, in cases where one partner petitions to adopt his or her partner's child (HRC.org, South Carolina Adoption Law, 2009). This is interesting since there is no explicit ban on same-sex couple adoption. Just like New Mexico's lack of prohibition on same-sex marriage, this leaves adoption in South Carolina vulnerable to challenges by same-sex couples. The HRC (2009), however, states that while there is no explicit prohibition, the issue has not been brought forth to state courts. While adoption may continue to exist in a state of confusion and inexactitude, as mentioned previously, the state has been quite clear on the status of marriage and the type of couple that may enter into this institution.

South Carolina Amendment 1

When Massachusetts legalized same-sex marriage in 2004, as a response to the fear that it would become legal in the state, South Carolina, along with several other states, established within its constitution a state-ban on same-sex marriage (Associated Press, 2013). By declaring marriage to be between a man and a woman, South Carolina effectively shut the door on same-sex couples from entering the institution. Article XV, Section 15 of the South Carolina Constitution clarifies that:

A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State. This State and its political subdivisions shall not create a legal status, right, or claim respecting any other domestic union, however denominated. This State and its political subdivisions shall

not recognize or give effect to a legal status, right, or claim created by another jurisdiction respecting any other domestic union, however denominated. Nothing in this section shall impair any right or benefit extended by the State or its political subdivisions other than a right or benefit arising from a domestic union that is not valid or recognized in this State. This section shall not prohibit or limit parties, other than the State or its political subdivisions, from entering into contracts or other legal instruments (SC Constitution, 2012).

The importance of this lies in the fact that not only is same-sex marriage banned within the state but no other domestic union will be recognized; moreover, it will not recognize same-sex unions, be it marriage or another sort of partnership performed in another jurisdiction. A noteworthy clause is found at the end where it does allow parties, regardless of sex, to enter into contracts that have already been established as legal. This means that an individual can designate whomever they choose as inheritor of estate, executor of will, emergency contact, and power of attorney, among other things. Nevertheless, these are rights that are offered to all citizens regardless of marital status, maintaining the institutional marginalization of same-sex couples.

LGBT Rights in New Mexico

In contrast to South Carolina, New Mexico eliminated its sodomy laws in 1975 (HRC.org, New Mexico Sodomy Law, n.d.). Furthermore, New Mexico includes in its non-discrimination laws protections for not only sexual orientation, but gender identity as well (HRC.org, New Mexico Non-Discrimination Law, 2007.). With regards to adoption, New Mexico law allows all individuals and married couples to adopt children (N.M. STAT. ANN. § 32A-5-11). Like South Carolina, there is no explicit prohibition on adoption for same-sex couples; however, it appears that the New Mexico Children, Youth and Families Department has allowed same-sex couples to jointly petition for adoption, since the application does not specify

the gender of the applicants (HRC.org, New Mexico Adoption Law, 2009). Interestingly, the usage of gender-neutral language is the issue that has allowed same-sex couples activist to challenge the current laws on same-sex marriage.

The Fight for Marriage Equality in New Mexico

The question of legalizing same-sex marriage in New Mexico began in earnest in April of this year, when the City Council of Santa Fe passed a resolution urging clerks across the state to recognize and issue marriage licenses to same-sex couples (Santos, 2013). Even though this was more of a symbolic gesture (Santos, 2013), this move seems to have given the issue more weight in the state. This action was preceded by a lawsuit filed in March 2013 against the Albuquerque County clerk by the American Civil Liberties Union of New Mexico. The A.C.L.U. claims that since there is no legal mention of gender in terms of who can marry within New Mexico, and given that state courts have ruled on challenges regarding the equal-protection statute in other issues, there is not only a lack of legal barrier against same-sex marriage, but there is also legal precedent in protecting equality (Crawford and Gullo, 2013; Santos, 2013). On June 6, 2013, same-sex couple Alexander Hanna and Yon Hudson filed a lawsuit against the Sante Fe County clerk because they were refused a marriage license (Santos, 2013). Following the example of the A.C.L.U., the attorney representing Hanna and Hudson argued that the law makes no mention of gender, which leaves the door open for same-sex couples to enter into the public institution of marriage (Santos, 2013). Nevertheless, the ambiguity of the law has led to conflicting interpretations, which has created tension in and outside the courtroom (Santos, 2013). The Republican Governor, Susana Martinez, has declared that she believes marriage is

solely between a man and a woman; her actions speaking to her beliefs, the Governor has repeatedly impeded attempts to extend rights to domestic partners, as well as, any sort of legalization of same-sex marriage in New Mexico (Santos, 2013).

Public opinion on the issue seems to be divided as a slight majority of voters seem to favour the banning of same-sex marriage, with 47% in favour of its legalization, even though most young voters support same-sex marriage (Santos, 2013; Crawford and Gullo, 2013). Moreover, it is reported that 94 of New Mexico's religious leaders have made an official declaration in support of same-sex marriage, which was rejected by the state's Catholic bishops in a separate statement (Santos, 2013). According to a policy think tank at the University of California at Los Angeles, "New Mexico had the country's seventh-highest concentration of same-sex couples in 2010" (Crawford and Gullo, 2013). Currently, no action has been taken in either direction, with many same-sex couples waiting for the day when they are able to marry their partners.

LGBT Rights and the State of New Jersey

In his book on sodomy laws of America, William N. Eskridge (2008) mentions that in New Jersey, sodomy laws were struck down in 1978. In 2001, The Final Report of the Task Force on Gay and Lesbian Issues formed by the New Jersey Supreme Court had the intent of investigating any state discrimination against LGBT individuals, especially concerning adoption, in the court system and found that since 1997, when adoption was opened to unmarried couples, discrimination has been minimized (NJJ, 2001). Furthermore, the Final Report explained that it did not find that the sexual orientation of potential parents affected the best interest of the child

(NJJ, 2001). As a result, New Jersey continues to permit same-sex couples to petition for adoption. Also, New Jersey not only has a comprehensive anti-discrimination law that includes sexual orientation and gender identity, but it also has implemented enhanced penalties for hate crimes, as well as, sensitivity courses for judges (NJJ, 2001; Wiener, 2009). It appears that New Jersey has made many efforts to providing the rights and protections that are required in order for the LGBT community to be at equal status with greater society.

Road to Civil Union Act

The case that led to the passing of the Civil Union Act in 2006 was that of *Lewis v Harris* (Supreme Court of New Jersey, 2006). In 2002, Lambda Legal, the oldest civil rights and legal organization in the US that focuses on LGBT legal cases, launched a case demanding marriage equality on behalf of seven New Jersey couples (Lambda Legal, *Lewis v. Harris*, n.d.; Lambda Legal, *About Us*, n.d.). After 3 years, the case was finally heard by the Supreme Court of New Jersey (Lambda Legal, *Lewis v. Harris*, n.d.; Supreme Court of New Jersey, 2006). Upon reaching their decision, Judge Albin described the grounds on which the argument was made:

The statutory and decisional laws of this State protect individuals from discrimination based on sexual orientation. When those individuals are gays and lesbians who follow the inclination of their sexual orientation and enter into a committed relationship with someone of the same sex, our laws treat them, as *couples*, differently than heterosexual couples. As committed same-sex partners, they are not permitted to marry or to enjoy the multitude of social and financial benefits and privileges conferred on opposite-sex married couples (Supreme Court of New Jersey, 2006).

Analyzing the case before them through the lens of the New Jersey Constitution that outlines an equality protection guarantee (Supreme Court of New Jersey, 2006; Lambda Legal, *Lewis v. Harris*, n.d.), the Supreme Court of New Jersey reached its decision:

On this day, the majority parses plaintiff's rights to hold that plaintiffs must have access to the tangible benefits of state-sanctioned heterosexual marriage. I would extend the Court's mandate to require that same-sex couples have access to the "status" of marriage and all that the status of marriage entails.
(Supreme Court of New Jersey, 2006).

As a result of this, the Court gave the state legislature 180 days to decide on how to provide equality, either through marriage or an alternative form of union (Lambda Legal, *Lewis v. Harris*, n.d.). The state legislature opted for the implementation of civil unions instead of marriage; however, the Act requires that all rights granted to marriages be given to civil unions (Lambda Legal, *Lewis v. Harris*, n.d.). As such, many believed that equality had been reached.

Nevertheless, the New Jersey Legislature appointed the Civil Union Review Commission to conduct an investigation on whether the Civil Union Act achieved equality in rights and responsibilities between heterosexual marriages and same-sex civil unions (Lambda Legal, *Lewis v. Harris*, n.d.) (Hurdle, 2008). The report provided by the Commission states that "same-sex couples cannot achieve equality with heterosexual couples if their legal status is restricted to civil unions" (Hurdle, 2008). The report goes further by adding that because the word marriage is not included, the general public will not view it as equal to marriage; also, the Civil Union Act itself leads to and encourages the "unequal treatment of same-sex couples and their children" (Hurdle, 2008). The final conclusion is that marriage equality must be achieved in New Jersey in order for true equality to exist in the state (Hurdle, 2008).

LGBT Rights in New York State

In 1980, the New York Court of Appeals struck down on its sodomy laws (Katz, 1982). Interestingly, Katheryn D. Katz (1982), in her review of the decision, argues that the decision made by the courts in New York was quite special because it transformed New York into one of the very few states that provided constitutional protection to homosexual acts. Indeed, this separates New York from the other three states that are studied in this paper. New York seems to be the most advanced, in terms of LGBT rights, in this grouping. The Sexual Orientation Non-Discrimination Act (SONDA) in 2003 seeks to “prohibit discrimination on the basis of actual or perceived sexual orientation in employment, housing, public accommodations, education, credit and the exercise of civil rights” (SONDA, 2012). Moreover, since before same-sex marriage was legalized in the state, New York allowed jointly petitioned applications for adoptions from same-sex couples, as well as, partners who wished to adopt his or her partner’s child (HRC.org, New York Adoption Law, 2009).

Towards the Marriage Equality Act

The first attempt for same-sex marriage recognition occurred in 2007, when the New York State Assembly passed a measure in 2007 but was defeated by the Senate which was then controlled by the Republicans (Groll, 2009). Another attempt was made by the Assembly which passed another bill, however once again it was defeated in the Senate, with 8 Democrats opposing the bill (Groll, 2009; Peters, 2009). It was at this point that it began to appear that the tide had shifted against same-sex marriage. Indeed, Jeremy W. Peters (2009) of *The New York Times* describes that with 8 Democrats joining the Republicans for a 38-to-24 defeat of the bill in

the Senate, the political momentum had turned against same-sex marriage, with the heavily Democratic and traditionally liberal state of New York failing to secure its passage.

The result seemed to be a surprise for many who supported it, including Governor David A. Peters who led proponents through this bill. Peters (2009) explains that many in the proponent side believed that they would have at least 26 supporting Senators but they expected 35. Unfortunately for the proponent side, political pressure for first-term Democrats led to at least four joining the Republicans in the rejection of this bill (Peters, 2009). Surprisingly, there was another interesting factor at play. It appears some of the reasons that Republicans and several Democrats voted against this bill were due to the economic woes facing the state (Peters, 2009). While the underlying unease about changing the state definition of marriage was, of course, a large component for the opposition side, deputy Republican Leader Senator Tom Libous explains that “I just don’t think the majority care too much about it at this time because they’re out of work, they want to see the state reduce spending, and they are having a hard time making ends meet. And I don’t mean to sound callous but that’s true” (Peters, 2009).

Nevertheless, same-sex marriage advocates in and out of the Senate regarded the Republican-Democrat defeat of the bill as all but callous, with one Senator claiming it to be the “worst example of political cowardice I’ve ever seen” (Peters, 2009), while the New York City Council speaker declared that those who rejected the bill have made a “massive miscalculation” (Peters, 2009). It would appear that the Council speaker would have fate on her side.

Following in the footsteps of his predecessor, Governor Cuomo supported the 2011 attempt to legalize same-sex marriage under the Marriage Equality Act (Confessore and Barbaro, “4 Senators”, 2011). It seemed that several who had voted against the 2009 proposed bill had a

change of heart, with Republican Senator James Alesi apologizing for “voting politically rather than in a way that in my heart and soul I felt I should have voted” (Confessore and Barbaro, “4 Senators”, 2011). This was a sentiment shared by others who had voted against marriage equality. Democratic Senator Kruger declared that redefining the American family is a good thing because the world is evolving, while Democratic Senator Addabbo reveals that the vast majority of calls from his district support marriage equality and that is how he will vote (Confessore and Barbaro, “4 Senators”, 2011).

Nevertheless, there remained one Democratic Senator, Ruben Diaz Sr. who was vocally opposed to same-sex marriage (Confessore and Barbaro, “4 Senators”, 2011). So intensified was his opposition to marriage equality that Senator Diaz removed himself from the Black, Puerto Rican, Hispanic and Asian Legislative Caucus (Seiler, 2011). In his letter announcing his departure, the Senator clarifies that it is because of their “different philosophies” that he can no longer remain partisan to this caucus (Seiler, 2011). Likewise, most Republicans declared their opposition to the bill and vowed to defeat it (Confessore and Barbaro, “4 Senators”, 2011).

As was expected, the State Assembly passed the bill, moving it to the Senate floor for a vote (Lovett, 2011). Noteworthy was the fact that out of the four times a bill legalizing same-sex marriage was passed in the Assembly, this was the lowest margin with 80 in favour and 63 against (Lovett, 2011). In an effort to accelerate the process, Governor Cuomo exercised what is called messages of necessity; this mechanism removes the constitutional requirement of allowing a 3 day waiting period on bills so the public, media and legislators have time to analyze deals that take place behind close door (Gormley, 2012). Although controversial, it was accepted by

the Legislature allowing for the Senate leadership, the Governor and the Republican caucus to make deals in order to pass the bill (Gormley, 2012).

On June 24, 2011 the Senate passed the “Marriage Equality Act” with 33 voting in favour and 29 against (Confessore and Barbaro, “New York”, 2011). At 11:55 pm that same day, Governor Cuomo signed the measure making same-sex marriage legal in New York State. The importance of this cannot be understated for several reasons. First, New York at the time was the largest state, in terms of population, to have marriage equality which increased drastically the number of same-sex couples who can legally wed across the country. This has implications on a national scale because more same-sex couples are allowed to formalize their relationship through the legal system, these couples will become more legitimate in the eyes of greater society, which could lead to further acceptance of same-sex marriage across the country. The second reason is tied to this idea but on the state level. Being a large state, this could create a momentum that could encourage other states to do the same, even if the federal government had not struck down DOMA. Indeed, when one takes into account recent developments in Delaware, Rhode Island and Maine, where same-sex marriage has been recently legalized, it would appear that New York may have had an effect, especially in its vicinity. To be sure, Nicholas Confessore and Michael Barbaro from *The New York Times* share this idea by claiming that marriage equality in New York will “[give] the national gay rights movement new momentum from the state where it was born” (Confessore and Barbaro, 2011).

Regardless if this actuality has furthered and/or will continue to further the same-sex marriage movement it is now a reality that same-sex couples have been granted the same

benefits, entitlements, and rights as heterosexual couples within the public institution of marriage. In the following section, I will analyze the components of the “Marriage Equality Act”.

The Marriage Equality Act

Proposed by Assemblyman O’Donnell, the bill has the legislative intent of granting access to the same “protections, responsibilities, rights, obligations, and benefits of civil marriage” to same-sex couples (Marriage Equality Act, 2011). The argument is that stable families are necessary for a strong society and that for the sake of fairness and the welfare of the New York community, recognition of marriage does not depend on if the parties are of the same sex or different sex; furthermore, in the spirit of equality all legal provisions which “utilize gender-specific terms in reference to the parties to a marriage, which in any other way may be inconsistent with this act, [must] be construed in a gender-neutral manner or in any way necessary to effectuate the intent of this act” (Marriage Equality Act, 2011).

The result of this was that:

1. A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.
2. No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common-law or any other source of law, shall differ based on the parties to the marriage being or having been of the same-sex rather than a different sex. (Marriage Equality Act, 2011).

The implications of this act are of great importance. The first clause explicitly outlines that there can be no differentiation between a marriage that is comprised of same-sex or opposite-sex couples. In other words, the state must become blind to the issue of gender when the marriage is consistent with laws otherwise. Furthermore, on the bureaucratic and

administrative level, same-sex marriages shall be granted the same benefits and protections that are pertinent to a marriage.

The Costs of Disparity: Access to Benefits and Restricted Autonomy

The preceding discussion concerning the state of same-sex unions within South Carolina, New Mexico, New Jersey and New York present a condition that is uniquely experienced by same-sex couples. South Carolina, from the onset of the wave of rising tolerance towards homosexuality across the country, decided to take action and implemented an outright constitutional ban on same-sex marriage, while New Mexico has decided to remain in a sort of grey zone, where there is neither recognition of nor a ban on same-sex marriage. New Jersey has opted for a recognition that comes short of marriage but provides many of the same rights and privileges pertaining to the public institution of marriage. Further still, New York has completely opened the doors of marriage to same-sex couples, allowing them to be on equal footing as their heterosexual counterpart. To be sure, the disparities between these four states, and those akin to them, have created a social and legal landscape that places particular costs on the mobility of same-sex couples, which are not faced by heterosexual couples.

When a couple decides to collect its belongings and resettle in another part of the country, there are several considerations that a couple may take into account. The couple must be aware of the job opportunities available, in the case that the purpose of for migrating is not due to company position transfers. Additionally, the couple may investigate educational opportunities that are at each other's disposal in the new location, if it be necessary to acquire new skills. The couple may also research the various social programs and services that are present at the new

location to which each may have access. A couple would be wise into being knowledgeable of the tax system of the state, so as to know if this location is beneficial to its economic status. Then, there is the question of the future such as: child services, schools, housing, retirement opportunities, etc. All of these issues require consideration when a couple has chosen to relocate.

However, same-sex couples have other considerations to take into account when moving to another state, such as the benefits, rights, and privileges that are given to couples who form part of the public institution of marriage. Access to benefits can play a large role in persuading or dissuading a couple from relocating to a new state. As mentioned above, there are several benefits and privileges that couples are entitled to when they enter into the contract of marriage. In South Carolina and New Mexico, married couples are granted access to the right to file their taxes jointly, whereby the household will receive a tax credit (differing from state to state) (Tax.newmexico.gov, n.d.; Tax Credits, 2009). For example, South Carolina provides a tax credit of .007 of the lesser of either “(1) the SC qualified earned income of the spouse with the lower qualified earned income for the year or (2) \$30,000” (Tax Credits, 2009). This is to say that a portion of the amount the married couple owes to the state will be deducted, therefore allowing the couple to retain this amount for personal use. To be sure, states may compete with each other in devising more generous tax credits in order to entice married couple to move to the state. New Mexico provides various tax credits, exemptions, and special treatment to married couples’ ‘community income’. For example, New Mexico offers the right to not have to report half of the combined income of a married couple if:

- [the spouses] lived apart all year;
- [the spouses] did not file a joint return;
- [the spouses] had wages, salaries, and professional fees that are community income;

[the spouses] did not transfer, directly or indirectly, any of the wages, salaries or professional fees between [each other] during any part of the year.
(Tax.newmexico.gov, n.d.)

Such benefits and exemptions would do well for a couple who may be struggling financially or who spend great amounts of time apart from each other for whatever reason. Moreover, these benefits and exemptions represent particular rights that are offered on an equal basis to those married couples who wish to enjoy them. Truly, this 'equal' aspect ensures the open participation in these benefits and exemptions by married couples. This character of equality is essential for a democratic regime, as Joshi has explained (Joshi, 2013).

Unfortunately, since New Mexico does not recognize same-sex marriage, same-sex couples find themselves at a financial and legal disadvantage. Truly, a homosexual couple wishing to move to New Mexico who may benefit from such special treatment would be facing a large cost that a heterosexual couple would not. By denying access to this tax exemption, New Mexico, and South Carolina through its own policies, would be dissuading same-sex couples from relocating to these states because they are imposing a cost on the right of internal mobility. They are violating the democratic value of equality because they are marginalizing a segment of the citizenry. Furthermore, just as Pearce and Nasser (2012) describe that it is a liberal value for individual citizens to have access to legal knowledge, so too, in a liberal regime, could one consider a liberal value a married couple's right to access to these benefits. However, same-sex couples in these states are prohibited these democratic and liberal values.

Tax credits and exemptions are not the only benefits to which same-sex couples are denied access. Due to the privatized nature of healthcare in the United States, an individual relies heavily on the healthcare coverage plan provided by his or her employer. As such, it is up to the

employer and/or the insurance company to decide the spousal benefits and privileges available to the employee. If an employee's partner is not considered to be his or her legal spouse, his or her employer and/or insurance company are under no legal obligation to provide health coverage to the employee's partner. In South Carolina and New Mexico, same-sex couples are not recognized as legal unions, thereby denying access to a partner's insurance coverage benefits (*Insurance Benefits Guide*, 2012; COBRA, 2012). This not only places same-sex couples at a less than equal standing to their heterosexual peers, but, just as in the case of tax benefits, such policies dissuade potential migrants from relocating to these states.

There are several other areas where marriage financially and legally protects spouses. For example, only legally married spouses are able to have a say in relation to emergency medical situations for each other and are entitled to hospital visitation rights; furthermore, spouses have a right to medical and bereavement leave (NYCLU, 2011). Also, there are inheritance, property ownership and transfer rights that allow spouses to transfer or jointly own property more easily (NYCLU, 2011). Other privileges include parental rights, workers compensation and wrongful death claims, cemetery plot rights, spousal privilege in legal proceedings, and access to family law courts (NYCLU, 2011). It must be noted, however, that all of the federal equivalents of these benefits and privileges were denied under DOMA until recently (NYCLU, 2011).

Interestingly, New Jersey presents a particular situation when it comes to access to benefits. Since it is not marriage, rather, civil unions that are recognized, a sort of legal loophole has evolved. The Civil Union Act declares that "committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples...legal benefits, protections and responsibilities of spouses shall apply in like manner to civil union

couples” (Civil Union Act, 2012). It would appear from this that same-sex unions should enjoy the same rights and benefits as their married heterosexual counterparts, but this is not so.

According to the civil rights organization, Garden State Equality, since the word marriage is not utilized for same-sex unions, several employers across the state refuse to consider civil unions as on the same level as marriage (GSE, 2013). The problem then becomes that if employers, as well as, insurance companies and hospitals refuse to recognize civil unions as the same as marriage, same-sex couples may be denied the benefits and privileges that spouses have within a marriage. Indeed, a civil union partner may be barred from making decisions during a medical emergency. He or she may not be allowed to make hospital visits exclusive to family because technically he or she is not the patient’s wedded spouse. It would seem that regardless if the state has declared civil unions to be on par with marriages legally and financially, private entities are ignoring this because there seems to be an innate difference between civil unions and marriage. Truly, the word marriage carries with it a long tradition of not only being a social event where two loving partners become one unit, it is also a legal event where two consenting parties sign a contract to behave, in many areas, as one legal entity, despite what the state may deem as equal to it. Consequently, this reality places New Jersey in a rather bizarre legal condition, where there has been a legal effort to place same-sex unions at the same level as marriage but in reality they are far from it. It would appear that once again the idea of ‘equal, but separate’ has been shown to be anything but equal.

As a result of the lack of recognition of same-sex marriage in these three states, same-sex couples are forced to face a migration cost that their peers are exempt from due to the illegality of their marriage in various state jurisdictions. Truly, a same-sex couple’s guaranteed freedom of

movement is restricted when they are dissuaded from moving to a state because they are denied access to benefits that are otherwise given to heterosexual married couples. If the Privileges or Immunities Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of Article IV, Section 2 of US Constitution guarantee not only freedom of internal mobility but also equal treatment of migrants entering a state, South Carolina and New Mexico (and to some extent New Jersey), are violating this. Furthermore, as Holland (1970) argues, an impediment to the freedom of movement is unconstitutional under the Equal Protection Clause. As discussed before, Holland (1970) claims *Shapiro v. Thompson* to be a precedent that can be used to judge if a state's categorization of segments of citizens is constitutional. If one were to submit New Mexico and South Carolina to the constitutional litmus test established by *Shapiro v. Thompson*, they would surely fail. In the case of South Carolina, the state has explicitly marginalized same-sex couples with its constitutional ban, effectively institutionalizing inequality. This unequal state of affairs would violate the expanded reach of Equal Protections Clause established through *Shapiro v. Thompson*. Likewise, New Mexico's inaction demonstrates a failure to uphold equality.

In his work, *A Theory of Justice*, John Rawls stresses the importance of equality (Carens, 1987). He argues that there are two central principles that must always be defended: protection of rights and equality of opportunity (Carens, 1987). Indeed, these are principles that the Fourteenth Amendment embodies and seeks to protect. All citizens are guaranteed the same basic human rights; states that prohibit same-sex marriage violate these principles because they are not only failing to protect the rights of citizens of the same country, but they are actively seeking to prohibit these rights from a specific group of citizens, as is the case with South Carolina. As

such, this ban on the rights of a specific group does away with the principle of equality of opportunity.

As mentioned previously, Lenhardt (2008) postulates that the precedent established by *Loving v. Virginia* claiming that marriage is a fundamental right of all citizen arguably suggests that same-sex couples are entitled to this fundamental right to marry. Truly, the institution of marriage represents the backbone of a society and the first level of social organization within a community. Denying legal entry into this public institution explicitly prevents loving and committed couples not only from enjoying this fundamental right to marry (Lenhardt, 2008) but it prevents them from the opportunities, both financial and legal, that are guaranteed in this public institution. To be sure, the benefits, rights and protections that are granted in a legal marriage represent entitlements that are denied to same-sex couples, thereby, creating an inferior category of citizens due to hateful discrimination. This, in effect, creates an environment of inequality of opportunity, where segments of society have been legally marginalized.

Indeed, they are marginalized not solely because they are barred from entering the public institution of marriage, but same-sex couples married in states recognizing same-sex marriage are faced with a cost of moving that other citizens need not worry about. To be sure, a heterosexual couple from New York has no need to concern itself with the legality of its marriage, and the benefits therein, if it were to move to South Carolina or New Mexico; however, a homosexual couple must take this into account. Homosexual couples must sacrifice financial benefits if they wish to move to South Carolina or New Mexico. They must render themselves more vulnerable financially and legally if they were to practice their constitutionally guaranteed right of internal mobility.

Tied to this idea, on a more theoretical level, there exists another cost that same-sex couples must suffer that impedes on their freedom of internal movement: lack of autonomy. In order to conceptualize properly the idea of autonomy, I look to the ongoing debate of international migration and the ideas of open or closed borders. With regards to the importance of autonomy and the role it plays in the personal lives of migrants, Arash Abizadeh analyzes effectively the concept of autonomy and how it can only be understood if three conditions are realized. Following in the footsteps of Joseph Raz, Abizadeh (2008) describes autonomy to “involve ‘the vision of people controlling, to some degree, their own destiny’, such as that they are able to set and pursue their own projects and see themselves as ‘part creators of their own moral world,’ and not simply ‘subjected to the will of another’.” He further details that autonomy is violated if the following three conditions are not met:

- “1) [Appropriate] *mental capacities* to formulate personal projects and pursue them;
- 2) [ability to enjoy] an adequate range of valuable *options*;
- 3) [*independence*], that is free from subjection to the will of another through coercion or manipulation”
(Abizadehh, 2008).

While the third condition may be quite contestable, as David Miller has demonstrated in his elaborate response to Abizadeh called “Why Immigration Controls Are Not Coercive: a Reply to Arash Abizadeh”, truly, the first two conditions would appear to be reasonable components of a person who enjoys effective autonomy. A person not sound of mind may find it difficult to exercise their autonomy, especially in many countries where there are social programs and services that in many cases decide what is best for him or her. More importantly for this paper, a person is not truly autonomous if his or her options for migration are severely limited due to the

lack of realistic or valuable options that are before them. This is even more significant when one moves away from international migration and considers internal mobility.

Article 13.1 of the United Nations Universal Declaration of Human Rights explicitly protects the right of freedom of movement within one's own country (Un.org, n.d.). Furthermore, the US Constitution also guarantees the freedom of internal mobility within the Republic. An individual sub-national constituent cannot create blocks or barriers on citizens migrating from other sub-national constituents in order to prevent their resettlement within its borders, as *Shapiro v. Thompson* has demonstrated [Holland, 1970; Shapiro v. Thompson, 394 U.S. 618 (1969)] In other words, a state like South Carolina cannot impede on the freedom of a citizen to choose in which state to reside. Herein lies the conceptualization of autonomy that I will use within this paper. I define autonomy to be the freedom for married couples, regardless of the sex of the consenting parties, to have veritable and realistic choices when considering migration to another state without fear of the loss of legality of their union. That is to say that in order for a married couple to be truly autonomous, they must have the option to move across the Republic without worrying that their marriage will become non-existent in another state. The autonomy of same-sex couples legally wed in New York becomes violated by the fact that their mobility is restricted to only a handful of states that recognize their marriage. Thirteen states out of fifty, representing a mere quarter of the states within the Union, is a condition lacking an adequate range of veritable and realistic options.

Of course, a same-sex couple may move to South Carolina, for the state will not physically prevent them from migrating there; however, with the promise of losing the legality of their marriage, it would be a far-fetched claim that any couple would want to sacrifice the

recognition of their marriage so they can move to the state. Not only would the couple be sacrificing their benefits and privileges as discussed previously, but it would lose the social recognition that comes attached with it, which also is problematic as the case of New Jersey has shown. Indeed, the lack of recognition would constitute the sort of lack of social legitimation, that Bayer (1981) claims to be the main goal of the entire LGBT movement. Moreover, by refusing to legitimize a same-sex couple's relationship, South Carolina and New Mexico are attributing to and institutionalizing shame towards the LGBT community. As Brown and Trevethan (2010) explain, such shaming has serious negative consequences on the self-esteem of LGBT individuals. As such, South Carolina or Tennessee or Texas are not veritable and realistic options for same-sex couples because the moment they enter these states, they immediately become inferior to their heterosexual counterparts. As a result, the autonomy of same-sex couples is restricted because they are coerced from migrating to the majority of states.

Likewise, same-sex couples originating in South Carolina, New Mexico, and New Jersey, as well as others like them, find that they must consider the idea of leaving their home state. To be sure, same-sex couples could relocate to New York, Washington, Maine or Rhode Island, where their marriage would be recognized; however that would require leaving their home state and their families behind. As such, same-sex couples find themselves in a situation where they can remain in South Carolina, their home, and remain second class citizens, or they can migrate to New York. This inherently impedes on the autonomy of same-sex couples in a very explicit way. Through its ban on same-sex marriage, South Carolina has expressed that it does not want married same-sex couples to be part of its community. To achieve this end, it has taken action in order to prevent their existence in South Carolina, as well as, deter those who

may wish to reside in the state. In doing so, South Carolina has effectively discouraged same-sex couples from migrating to the state, while at the same time, encouraging couples to leave it.

Indeed, this represents a sort of implicit will on the part of South Carolina, and other states like it, to expel same-sex couples from the state, creating a situation of forced migration. By not recognizing and banning same-sex marriage, South Carolina is denying entry into the public institution of marriage to same-sex couples, relegating them to a level that is inferior to other couples. This would appear to violate the Equal Protections Clause of the Fourteenth Amendment because it is refusing rights to a specific group, that meet all other eligibility requirements, due to a will to classify a segment of citizens in an invidiously discriminatory way. Consequently, this impedes on the autonomy of same sex couples with regards to internal mobility. As discussed previously in the *Shapiro v. Thompson* case, a state cannot impede a US citizen from migrating to it through policies because it contradicts the internal mobility right that is guaranteed to all US citizens. States must have open borders and cannot seek to discourage a particular sub-sect of society from moving, whether they may be of lower economic status, as in the *Shapiro v. Thompson case*, or due to sexual orientation, for this would constitute a form of hateful discrimination, not a compelling government interest, as established by *Loving v. Virginia*.

As a result, same-sex couples within states like South Carolina find themselves in a peculiar situation, whereby they must decide to abandon their roots, families, friends and homes in order to enjoy full rights as other American citizens because their native state does not wish to treat them as equal citizens. This forces many same-sex couples to migrate because they wish to be recognized as equal in an institution that is guaranteed for all, while married same-sex couples

in New York are restricted to the 13 states and the District of Columbia. Forced migration and restricted internal mobility go against the principles of liberal democracies. If liberal democracies are to be characterized as being constituted by individual rights and freedoms guaranteed by the law against governing powers that may wish to encroach on them (Dixon, 2008; Hobson, 2012), the current situation in the US is not befitting that of a liberal democracy.

One must therefore question if the governing bodies of South Carolina, New Mexico, and New Jersey are truly representing all citizens or only the majority to the detriment of the minority. Regardless if same-sex marriage represents an affront to the ‘moralities’ or ‘values’ of many in the opposition, a state must protect the rights of all citizens. States cannot allow themselves to be enveloped in particular values that may lead to the marginalization of a group because of hate. The result of not doing so is a patchwork of a landscape characterized by discriminatory states and non-discriminatory states, creating a much divided Union.

However, opponents of this paper’s argument claim that by redefining the definition of marriage, an institution that has been around for millennia, it will lose its sanctity. Indeed, they argue, marriage is for the purpose of procreation; therefore, two members of the same-sex do not meet this qualification (NOM, 2013). Other more conservative voices would argue that redefining marriage constitutes the downfall of society. Rawls clarifies that if public order and stability are in jeopardy, migration should be restricted (Carens, 1987). Indeed, if any policy places public order and stability in jeopardy, it should be analyzed if the benefits truly outweigh the costs. There would be a very compelling government interest to impede on the freedom of internal mobility if the spread of same-sex marriage constituted a veritable threat to order and American society; however, as Rawls cautions, public order must not be used in expansive

fashion; it has to be a real threat, not a hypothetical one (Carens, 1987). It must be based on evidence and cannot take into consideration the antagonistic reactions of private citizens (Carens, 1987).

Some opposing perspectives may also claim that states have a right to implement social policies that have been supported by public referenda, as is the case with various states that have banned same-sex marriage (Brown, 2013) (NOM, 2013). In essence, this relates to the idea put forth by Michael Walzer (1983), who claims that membership is something that a community distributes to its members. Furthermore, he claims that when communities organize, they create an identity, and therefore have a right to exclude (Walzer, 1983). A referendum is one of the greatest tools to determine what a population wills as policy/law.

Indeed, if a popular vote decides that same-sex marriage should not be part of the fabric of their state, according to Walzer, they are entitled to do so, as this is part of their identity; however, this argument becomes problematic when one enters into the discussion of that which constitutes a society. Defining what a society is would have philosophical and legal ramifications. I proposed earlier that one of the main objectives of the right to freedom of internal mobility may be to ensure a particular national identity that shares its allegiance to the nation, and to discourage regionalisms that may develop into distinct national identities and allegiances. A state cannot develop barriers to freedom of internal mobility based on invidious discrimination because it would impede allegiance to the nation. Furthermore, the US Constitution demands that freedom of internal mobility be respected for it is a right that has been granted to all Americans regardless of the segment of society with which an individual wishes to associate.

CONCLUSION

There is still much to be investigated in this field. This underdeveloped topic that could have some important implications on the legality of same-sex marriage across the United States. Furthermore, I believe the issue of internal mobility matters beyond that of the United States, especially other liberal democracies. The European Union could represent an interesting area of study due to the practiced principle of freedom of movement of persons that is enshrined in law through the Schengen Convention. Indeed, in many internal aspects, the European Union behaves like a state with many sub-national constituents like the United States. There are some states within the European Union, such as the Netherlands and Belgium, that have legalized same-sex marriage and provided full adoption rights, while Portugal has made same-sex marriage legal since 2010, but does not grant full adoption rights to same-sex married couples. This becomes problematic for same-sex couples with children in Antwerp who may wish to migrate to Oporto. They would lose essential parenting rights, therefore creating a barrier and a migration cost that may impede on the law established by the Schengen Convention.

In any case, the difficult reality that a marriage may not be recognized in one part of the country solely due to enshrined hateful discrimination is one that all American same-sex couples must face. Regardless of whether same-sex couples share a volition to relocate to a part of the Republic that denies this basic right of entry into the public institution of marriage, the very existence of this disparity is an impediment to their right to travel and reside anywhere in the country. Whether it is the financial costs they must incur, that their heterosexual peers do not, or the idea that they are restricted to certain pockets of the country if they wish to maintain their union legal, same-sex couples are deprived of the freedom of internal mobility.

Of course, one cannot deny the great steps forward made in recent history. It would have been unimaginable 20 years ago that such committed relationships would ever have the opportunity to be placed on the same pedestal as heterosexual marriage. After a long history of discrimination and victimization, the LGBT community within the US has remained persistent in its fight for equal rights. As Massachusetts rang the bell of equality for the first time, thousands of same-sex couples were given, if only an islet in an ocean of discrimination, the opportunity to legally express what had been in existence long before: their love and commitment to each other. One by one in the past decade, states have come to the conclusion that they cannot justifiably claim to adhere to principles of equality if a segment of their people is suffering from institutionalized discrimination and inequality. For, truly, in a liberal democratic society where the ideals of human, political, and civil rights are deemed to be of utmost importance to the survival of the Republic, the marginalization of an entire group betrays these very principles.

For LGBT youth, the rise in public opinion in favour of equality represents a new hope that many before them could not have dreamed to experience. Political leaders ranging from former Secretary of State Hillary Clinton to the President of the United States have thrown their support behind marriage equality. The latter, President Barack Obama, is not only the first sitting President to support same-sex marriage but he also symbolically instructed the Department of Justice to not support DOMA, even though it must enforce it (Williams and McClam, 2013). Even more interesting is that the President who signed DOMA into law, President Bill Clinton, has renounced his support of it and threw his support behind marriage equality.

Truly, the wave of change has been given more strength with the recent Supreme Court ruling. By striking down the federal benefits clause of DOMA and deciding not to rule on the

appeal from proponents of California's Proposition 8, effectively (re)legalizing same-sex marriage in the state, the Supreme Court has on the federal level supported the cause of marriage equality. Moreover, as mentioned previously, the declaration that the federal government has no right to discriminate against same-sex couples in the institution of marriage has impact not only on those states that perform same-sex marriage, but also on those that do not. The broad ruling establishes legal precedent that can be used to challenge state laws on marriage. This could encourage marriage equality advocates to pursue their goals even in states that have instituted a constitutional ban on same-sex marriage. Truly, this ruling could provide the impetus for change in states that were previously deemed lost causes. Furthermore, since federal benefits to married couples are solely managed by the federal government, in theory, a same-sex couple could register as spouses on those federal forms that allow for spousal entitlements on the federal level, regardless if the couple resides in a state with a ban on same-sex marriage.

While these advances brings American society closer to complete marriage equality across the country, the road is still long with a majority of states not recognizing same-sex marriage. Advocates must continue to challenge their local governments by demonstrating that they are entitled to the same recognition and treatment as their fellow citizens. Whether these arguments are based on an American citizen's right to internal mobility on equal terms with their heterosexual peers with veritable and realistic options, or on the legal precedent established by the Supreme Court, efforts must continue if equality is to be obtained. For one thing is certain, the current state of affairs, characterized by a patchwork landscape of recognition and non-recognition, represents an affront to the values that America sought to establish and protect since

its inception as a collection of rebellious colonies united by the virtuous belief that all men are created equal.

WORK CITED

- 2010 Census. (2010). *Census Bureau Homepage*. Retrieved June 20, 2013, from <http://www.census.gov/2010census/>
- Abizadeh, A. (2008). Democratic Theory And Border Coercion: No Right To Unilaterally Control Your Own Borders. *Political Theory*, 36(1), 37-65.
- About Us | Lambda Legal. (n.d.). *Lambda Legal*. Retrieved June 23, 2013, from <http://www.lambdalegal.org/pages/about-us>
- Abrajano, M. (2010). Are Blacks and Latinos Responsible for the Passage of Proposition 8? Analyzing Voter Attitudes on California's Proposal to Ban Same-Sex Marriage in 2008. *Political Research Quarterly*, 63(4), 922-932.
- Adam, B. D. (1995). *The Rise of a Gay and Lesbian Movement*. Boston: Twayne Publishers.
- Aradau, C., & Huysmans, J. (2009). Mobilising (Global) Democracy: A Political Reading Of Mobility Between Universal Rights And The Mob. *Millennium - Journal of International Studies*, 37(3), 583-604.
- Archives.gov. (n.d.). The Constitution of the United States: Amendments 11-27. *National Archives and Records Administration*. Retrieved June 15, 2013, from http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html
- Associated Press. (2013, June 26). Supporters hail same-sex marriage court victory - World - CBC News. *CBC.ca - Canadian News Sports Entertainment Kids Docs Radio TV*. Retrieved June 26, 2013, from <http://www.cbc.ca/news/world/story/2013/06/26/supreme-court-us-gay-marriage.html>
- Adcox, S. (2007, March 22). South Carolina officially bans gay marriage; New Hampshire takes step toward civil unions. *Breaking News and Opinion on The Huffington Post*. Retrieved June 20, 2013, from <http://www.huffingtonpost.com/huff-wires/20070322/gay-marriage/>
- Bayer, R. (1981). *Homosexuality and American psychiatry. The politics of diagnosis*. New York: Basic Books.
- Bell, Debra. (2013). "As the Supreme Court Weighs Gay Marriage, a Look at Its Last Major Marriage Ruling". *USNews.com* Retrieved from <http://www.usnews.com/news/blogs/press-past/2013/03/28/as-the-supreme-court-weighs-gay-marriage-a-look-at-its-last-major-marriage-ruling>
- Brown, B. S. (2013, June 26). Supreme Court issues two illegitimate decisions on same-sex marriage | Fox News. *Fox News - Breaking News Updates | Latest News Headlines | Photos &*

News Videos. Retrieved July 11, 2013, from <http://www.foxnews.com/opinion/2013/06/26/supreme-court-issues-two-illegitimate-decisions-on-same-sex-marriage/>

Brown, J., & Trevethan, R. (2010). Shame, Internalized Homophobia, Identity Formation, Attachment Style, And The Connection To Relationship Status In Gay Men. *American Journal of Men's Health*, 4(3), 267-276.

Carens, Joseph. (1987). "Aliens and Citizens: The Case for Open Borders", *Review of Politics*, 49, 2, 251-273.

CNN. (2006). CNN.com - Elections 2006. *CNN.com - Breaking News, U.S., World, Weather, Entertainment & Video News*. Retrieved June 16, 2013, from <http://www.cnn.com/ELECTION/2006//pages/results/states/SC/index.html>

COBRA | Benefits | New Mexico State University. (n.d.). *Benefits | New Mexico State University*. Retrieved June 21, 2013, from <http://benefits.nmsu.edu/insurance/cobra/>

Colorado Anti-Discrimination Act. (n.d.). *Colorado.gov*. Retrieved July 13, 2013, from www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadname1=Content-Disposition&blobheadname2=Content-Type&blobheadvalue1=inline%3B+filename%3D%22Non-discrimination+Policy.pdf%22&blobheadvalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251741381222&ssbinary=true

Columbia Law Review Association. (1970). Residence Requirements after Shapiro v. Thompson. *Columbia Law Review*, 70(1), 134-155.

Community Property, Divorce, Separation and Your New Mexico Income Tax. (n.d.). *New Mexico Taxation and Revenue Department*. Retrieved June 5, 2013, from http://www.tax.newmexico.gov/sitecollectiondocuments/publications/fyi-publications/fyi-310__divorce%20and%20your%20new%20mexico%20income%20tax.pdf

Confessore, N., & Barbaro, M. (2011). 4 N.Y. Senators Switch to Favor Gay Marriage Bill - NYTimes.com. *The New York Times - Breaking News, World News & Multimedia*. Retrieved June 21, 2013, from <http://www.nytimes.com/2011/06/14/nyregion/4-ny-senators-switch-to-favor-gay-marriage-bill.html>

Confessore, N., & Barbaro, M. (2011). New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law - NYTimes.com. *The New York Times - Breaking News, World News & Multimedia*. Retrieved June 22, 2013, from <http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html>

Currie, P. M. (2007). Restricting Access to Unapproved Drugs: A Compelling Government Interest. *Journal of Law and Health*, 20(2), 309-323.

Crawford, A. J., & Gullo, K. (2013, April 25). Gay Marriage in New Mexico? Could Happen - Businessweek. *Businessweek - Business News, Stock market & Financial Advice*. Retrieved June 21, 2013, from <http://www.businessweek.com/articles/2013-04-25/gay-marriage-in-new-mexico-could-happen>

Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws. (2013, June 26). *NCSL Home*. Retrieved July 11, 2013, from <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>

Dixon, J. C. (2008). A clash of civilizations? Examining liberal-democratic values in Turkey and the European Union. *The British Journal of Sociology*, 59(4), 681-708.

Dolan, M. (2012, February 7). Prop. 8: Gay-marriage ban unconstitutional, court rules. *Latimesblog.latimes.com*. Retrieved June 20, 2013, from latimesblogs.latimes.com/lanow/2012/02/gay-marriage-prop-8s-ban-ruled-unconstitutional.html <http://>

Eskridge, W. N. (2008). *Dishonorable passions: sodomy laws in America, 1861-2003*. New York: Viking.

Fradella, H. F. (2002). Legal, Moral, And Social Reasons For Decriminalizing Sodomy. *Journal of Contemporary Criminal Justice*, 18(3), 279-301.

Frank, G. (2013). "The Civil Rights of Parents": Race and Conservative Politics in Anita Bryant's Campaign against Gay Rights in 1970s Florida. *Journal of the History of Sexuality*, 22(1), 126-160. Retrieved July 14, 2013, from http://resolver.scholarsportal.info.proxy.bib.uottawa.ca/resolve/15353605/v22i0001/126_cropraagri1f

Garden State Equality » Civil Unions. (2013). *Garden State Equality*. Retrieved June 16, 2013, from <http://www.gardenstateequality.org/issues/civilunions/>

Gillespie, W. (2008). Thirty-Five Years After Stonewall: An Exploratory Study Of Satisfaction With Police Among Gay, Lesbian, And Bisexual Persons At The 34th Annual Atlanta Pride Festival. *Journal of Homosexuality*, 55(4), 619-647.

Gormley, M. (2012, March 13). Analysis: Gov. Cuomo gets things done behind closed doors, but at what cost?. *The Saratogian*. Retrieved June 19, 2013, from <http://www.saratogian.com/articles/2012/03/18/news/doc4f6542d6432bf963705661.txt>

Groll, M. (2009, May 13). N.Y. Assembly passes same-sex marriage legislation - USATODAY.com. *USA TODAY: Latest World and US News - USATODAY.com*. Retrieved June 21, 2013, from http://usatoday30.usatoday.com/news/nation/2009-05-12-ny-gaymarriage_N.htm

Hagood, M. A. (2010). CONSTITUTIONAL LAW: South Carolina's Sexual Conduct Laws After Lawrence v. Texas. *South Carolina Law Review*, 61.

Herek, G. M., & McLemore, K. A. (2013). Sexual Prejudice. *Annual Review of Psychology*, 64, 309-333.

Hobson, C. (2012). Liberal democracy and beyond: extending the sequencing debate. *International Political Science Review*, 33(4), 441-454.

Holland, T. L. (1970). Residence Waiting Period Denies Equal Protection. *Tulsa Law Review*, 6(3), 268-276.

HRC.org. (n.d.). New Mexico Non-Discrimination Law | Human Rights Campaign. *Human Rights Campaign*. Retrieved July 5, 2013, from <http://www.hrc.org/laws-and-legislation/entry/new-mexico-non-discrimination-law1>

HRC.org. (n.d.). New Mexico Sodomy Law | Human Rights Campaign. *Human Rights Campaign*. Retrieved July 10, 2013, from <http://www.hrc.org/laws-and-legislation/entry/new-mexico-sodomy-law>

HRC.org. (2009). New Mexico Adoption Law | Human Rights Campaign. *Human Rights Campaign*. Retrieved July 10, 2013, from <http://www.hrc.org/laws-and-legislation/entry/new-mexico-adoption-law>

HRC.org. (2009). New York Adoption Law | Human Rights Campaign. *Human Rights Campaign*. Retrieved July 10, 2013, from <http://www.hrc.org/laws-and-legislation/entry/new-york-adoption-law>

HRC.org. (2007). South Carolina Non-Discrimination Law | Human Rights Campaign. *Human Rights Campaign*. Retrieved July 05, 2013, from <http://www.hrc.org/laws-and-legislation/entry/south-carolina-non-discrimination-law1>

HRC.org. (2009, December 4). South Carolina Adoption Law | Human Rights Campaign. *Human Rights Campaign*. Retrieved July 11, 2013, from <http://www.hrc.org/laws-and-legislation/entry/south-carolina-adoption-law>

HRC.org (2013). "An Overview of Federal Rights and Protections Granted to Married Couples". Retrieved from <http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples>

Hurdle, J. (2008, December 10). Panel says New Jersey should allow gay marriage| Reuters. *Reuters*. Retrieved June 21, 2013, from <http://www.reuters.com/article/2008/12/11/us-gaymarriage-newjersey-idUSTRE4B96KJ20081211>

Johnson, Kirk. (2013). "State Laws on Gay Marriage Lead to Disparities", *The New York Times*.

Johnson, P. (2011). Challenging The Heteronormativity Of Marriage: The Role Of Judicial Interpretation And Authority. *Social & Legal Studies*, 20(3), 349-367.

Johnston, S. (1994). On The Fire Brigade: Why Liberalism Won't Stop The Anti-Gay Campaigning Of The Right. *Critical Sociology*, 20(3), 3-19.

Joshi, D. K. (2013). The protective and developmental varieties of liberal democracy: a difference in kind or degree?. *Democratization*, 20(2), 187-214.

Katz, K. D. (1982). Sexual Morality and the Constitution: People v. Onofre. *Albany Law Review*, 46(2), 311-362.

Know Your Rights: Frequently Asked Questions about New York's Marriage Equality Act (2011) | New York Civil Liberties Union (NYCLU) - American Civil Liberties Union of New York State. (n.d.). *New York Civil Liberties Union (NYCLU) - American Civil Liberties Union of New York State*. Retrieved June 15, 2013, from <http://www.nyclu.org/marriage-faq#9>

Leadership Conference. (2009, June 22). Stonewall Riots: The Beginning of the LGBT Movement. *The Leadership Conference on Civil and Human Rights*. Retrieved June 15, 2013, from <http://www.civilrights.org/archives/2009/06/449-stonewall.html>

Legal Information Institute. (2010) Privileges and Immunities Clause | LII / Legal Information Institute. *LII | LII / Legal Information Institute*. Retrieved June 25, 2013, from http://www.law.cornell.edu/wex/privileges_and_immunities_clause

Legal Information Institute. (n.d.). Fifth Amendment | LII / Legal Information Institute. *LII | LII / Legal Information Institute*. Retrieved July 5, 2013, from http://www.law.cornell.edu/wex/fifth_amendment

Lenhardt, R. (2008). Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage. *California Law Review*, 96(4), 839-900.

Lewis, G. B., & Gossett, C. W. (2011). Why Did Californians Pass Proposition 8? Stability and Change in Public Support for Same-Sex Marriage. *The California Journal of Politics and Policy*, 3(1), 1-20.

Lewis v. Harris | Lambda Legal. (n.d.). *Lambda Legal*. Retrieved June 22, 2013, from <http://www.lambdalegal.org/in-court/cases/lewis-v-harris>

“Liberal Democracy”. (2013). AustralianPolitics.com. Retrieved from <http://australianpolitics.com/democracy-and-politics/key-terms/liberal-democracy>

Liptak, Adam. (2013). “Background on Same-Sex Marriage Case at Supreme Court”, The New York Times. Nytimes.com 25 Mar. 2013. Accessed: 3 Apr 2013

Lovett, K. (2011, June 15). New York Assembly passes bill to legalize gay marriage 80-63; Legislation now heads to Senate - NY Daily News. *Daily News America - Breaking national news, video, and photos - Homepage - NY Daily News*. Retrieved June 13, 2013, from <http://www.nydailynews.com/new-york/new-york-assembly-passes-bill-legalize-gay-marriage-80-63-legislation-heads-senate-article-1.129026>

Loving v. Virginia, 388 U.S. 1 (1967)

Marriage Equality Act. (n.d.). *Governor.ny.gov*. Retrieved June 13, 2013, from www.governor.ny.gov/assets/marriageequalitybill.pdf

Mertus, J. (2007). The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US. *Human Rights Quarterly*, 29(4), 1036-1064.

N.M. STAT. ANN. § 32A-5-11

NJ Division of Taxation - Civil Union Act. (2013). *The Official Web Site for The State of New Jersey*. Retrieved June 17, 2013, from <http://www.state.nj.us/treasury/taxation/civilunionact.shtml>

NJJ. (2001). Final Report of the Task Force on Sexual Orientation Issues. *Judiciary.state.nj.us*. Retrieved July 10, 2013, from www.judiciary.state.nj.us/pressrel/2001/summary.pdf

NOM. (2013). NOM 2013. *NOM 2013*. Retrieved July 15, 2013, from <http://www.nationformarriage.org>

Newman, P. (2010). “It's Not Just About Marriage; It's About Antidiscrimination”: The California Supreme Court Decision And The Future Of Same-Sex Marriage In The United States. *Journal of Gay & Lesbian Social Services*, 22(1), 183-190.

Noga-Styron, K. E., Reasons, C. E., & Peacock, D. (2012). The last acceptable prejudice: an overview of LGBT social and criminal injustice issues within the USA. *Contemporary Justice Review*, 15(4), 369-398.

Oliver, C. (1976). The United States and the World. *The Annals of the American Academy of Political and Social Science*, 426(1), 166-197.

Oloka-Onyango, J. (2010). Movement-Related Rights in the Context of Internal Displacement. *Incorporating the Guiding Principles on Internal Displacement into Domestic Law : Issues and Challenges* (pp. 9-46). Washington, DC: American Society of International Law.

Olsson, S. (2009). Defending The Rule Of Law In Emergencies Through Checks And Balances. *Democracy and Security*, 5(2), 103-126.

Patria, Melia. (2007). "Groundbreaking Interracial Marriage". *Abcnews.com*. Retrieved from <http://abcnews.go.com/US/story?id=3277875&page=1#.UXSIFpUn3IK>

Pearce, R. G., & Nasser, S. (2012). The virtue of low barriers to becoming a lawyer: promoting liberal and democratic values. *International Journal of the Legal Profession*, 19(2-3), 357-378.

Peters, J. W. (2009, December 3). New York Senate Rejects Gay Marriage Bill - NYTimes.com. *The New York Times - Breaking News, World News & Multimedia*. Retrieved June 04, 2013, from http://www.nytimes.com/2009/12/03/nyregion/03marriage.html?_r=0

Pierceson, J. (2005). *Courts, liberalism, and rights: gay law and politics in the United States and Canada*. Philadelphia, PA: Temple University Press.

Pilkington, E. (2012, December 9). Washington state kicks off day of gay marriages with midnight ceremonies | World news | guardian.co.uk . *Latest US news, world news, sport and comment from the Guardian | guardiannews.com | The Guardian* . Retrieved June 21, 2013, from <http://www.guardian.co.uk/world/2012/dec/09/washington-gay-marriages-midnight-ceremonies>

Same-sex marriage in the United States. (2013, June 28). *CNN.com - Breaking News, U.S., World, Weather, Entertainment & Video News*. Retrieved July 10, 2013, from <http://www.cnn.com/interactive/us/map-same-sex-marriage/index.html>

Santos, F. (2013, June 6). With New Legal Challenge, Gay Marriage Debate in New Mexico Heats Up - NYTimes.com. *The New York Times - Breaking News, World News & Multimedia*. Retrieved June 11, 2013, from <http://www.nytimes.com/2013/06/07/us/with-new-legal-challenge-gay-marriage-debate-in-new-mexico-heats-up.html>

Seiler, C. (2011, June 13). Capitol Confidential » Diaz pulling out of minority caucus. *Blogs - Times Union*. Retrieved June 17, 2013, from <http://blog.timesunion.com/capitol/archives/70464/diaz-pulling-out-of-minority-caucus/>

Shapiro v. Thompson, 394 U.S. 618 (1969)

Stacey, J., & Meadow, T. (2009). New Slants On The Slippery Slope: The Politics Of Polygamy And Gay Family Rights In South Africa And The United States. *Politics & Society*, 37(2), 167-202.

State of South Carolina. (n.d.). Insurance Benefits Guide. *Insurance Employee Program*. Retrieved June 10, 2013, from http://www.eip.sc.gov/ibg/publications/2012_IBG_Final.pdf

SONDA. (2012). The Sexual Orientation Non-Discrimination Act ("SONDA") | Eric T. Schneiderman . *Eric T. Schneiderman | New York State Attorney General*. Retrieved July 10, 2013, from <http://www.ag.ny.gov/civil-rights/sonda-brochure>

South Carolina Constitution. (2012). *scstatehouse.gov*. Retrieved June 21, 2013, from <http://www.scstatehouse.gov/scconstitution/SCConstitution.pdf>

Supreme Court of New Jersey - Lewis v. Harris. (2006). *Princeton.edu*. Retrieved May 29, 2013, from <http://www.princeton.edu/aci/cases-pdf/aci-update-lewisvharris.pdf>

Tax Credits 2009. (2009). *Sc.gov*. Retrieved June 14, 2013, from <http://sc.gov/pages/external.aspx?http://www.sctax.org/Tax+Information/default.htm>

The Fight for Gay Rights: An Interactive Timeline | TIME.com. (2013, March 26). *U.S. | News, Headlines, Stories, Video from Around the Nation | TIME.com*. Retrieved June 22, 2013, from <http://nation.time.com/2013/03/26/pride-and-prejudice-an-interactive-timeline-of-the-fight-for-gay-rights/>

The Declaration of Independence and Constitution of the United States of America (n.d.) Retrieved from <http://www.uscis.gov/USCIS/Office%20of%20Citizenship/Citizenship%20Resource%20Center%20Site/Publications/PDFs/M-654.pdf>

The Universal Declaration of Human Rights. (n.d.). *Welcome to the United Nations: It's Your World*. Retrieved June 1, 2013, from <http://www.un.org/en/documents/udhr/>

Walzer, Michael. (1983). *Spheres of Justice*, Basic Books, chapter 3

Weinberg, G. H. (1972). *Society and the healthy homosexual*. New York: St. Martin's Press.

Wiener, R. (2008, January 10). Lawmakers pass hate-crimes bill | New Jersey Jewish News. *New Jersey Jewish News | NJJN*. Retrieved July 9, 2013, from <http://www.njjewishnews.com/njjn.com/011008/njLawmakersPassHateCrimes.html>

Williams, P., & McClam, E. (2013, June 26). Supreme Court strikes down Defense of Marriage Act, paves way for gay marriage to resume in California. *Nbcpolitics.nbcnews.com*. Retrieved June 26, 2013, from http://nbcpolitics.nbcnews.com/_news/2013/06/26/19151971-supreme-

[court-strikes-down-defense-of-marriage-act-paves-way-for-gay-marriage-to-resume-in-california?lite](#)

Woodward, C. (2012). *American Nations: A History of the Eleven Rival Regional Cultures of North America*. Penguin Books.