IS THE MASSACHUSETTS LAW ON MARRIAGE OF NON-RESIDENTS A BARRIER TO THE SPREAD OF SAME-SEX MARRIAGE?

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INTRODUCTION

This article explores a Massachusetts law on marriage which may slow down the movement towards recognizing same-sex marriages in the United States. The Massachusetts marriage evasion law, which prohibits couples who would not be allowed to marry in the state of their domicile from being married in Massachusetts, does not violate the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution. Moreover, whether or not the courts hold the Massachusetts law constitutional will be a good indicator of how other attempts to compel interstate recognition of same-sex marriages will fare.

First, this article will explain the Massachusetts law on marriage evasion. Second, it will examine past and potential constitutional challenges to the law. Third, it will detail the reactions of Massachusetts government officials to the *Goodridge v. Department of Public Health*[1] case, which implicated the Massachusetts marriage evasion law. Fourth, this article will show why the law does not violate the Privileges and Immunities Clause of the United States Constitution, and will look at a trial judge's ruling to that effect, based upon the fact that same-sex marriage is not a fundamental right. Finally, it will briefly touch upon other related issues, such as comity between states and the Full Faith and Credit Clause of the United States Constitution.

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1. 798 N.E.2d 941 (Mass. 2003).

In May of 2004, Massachusetts became the first state, and thus far the only state, to recognize marriage between persons of the same sex.[2] The bold decision of the state's highest court, purportedly based on the Massachusetts Constitution, set off a chain reaction around the country. Opponents of homosexual marriage began working to prevent the replication or expansion of this social experiment; proponents began to celebrate and perform copycat "marriages" around the country.

Opponents reacted to the decision by attempting to amend the United States Constitution with a federal marriage amendment,[3] endorsed by President George W. Bush,[4] and by seeking the amendment of various state constitutions in order to prevent local versions of what happened in Massachusetts.[5] In late summer of 2004, both Missouri and Louisiana passed constitutional amendments limiting marriage to a union between one man and one woman by overwhelming majorities.[6]

Additionally, on Election Day in November of 2004, referenda to that effect passed in all eleven states where a proposed constitutional amendment enshrining the traditional definition of marriage was on the ballot.[7] The re-election of President Bush, particularly his victory in Ohio, where a defense of marriage amendment was on the ballot and won by a 3-2 margin,[8] seems largely attributable to this issue. The day after the *Goodridge* decision was issued in November of 2003, a Democratic strategist was quoted in the *Wall Street Journal* as commenting, "We knew the Supreme Court would do anything to

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2. *See id.* at 948. The decision was stayed for 180 days until May 17, 2004, to "permit the Legislature to take such action as it may deem appropriate in light of this opinion." *Id.* at 970.

3. Alan Cooperman, *Same-Sex Marriage Ban Being Retooled; Civil Unions Would Be Up to States*, WASH. POST, Mar. 23, 2004, at A4.

4. Lee Romney, *Bush Urges Same-Sex Marriage Ban; Newsom Fires at President's Proposal; San Francisco's Mayor Calls It a 'Shameful' Attempt to Politicize the U.S. Constitution*, L.A. TIMES, Feb. 25, 2004, at A19.

5. *See 11 US States Outlaw Gay Marriage in Legislative Sweep*, AGENCE FRANCE-PRESSE, Nov. 3, 2004, 2004 WL 98565539 [hereinafter *11 US States*].

6. *Id.* (noting that the amendments were passed in Missouri in August of 2004 and in Louisiana in September of 2004); *see* LA. CONST. art. XII, § 15; MO. CONST. art. I, § 33.

7. *11 US States*, *supra* note 5; *see* ARK. CONST. art. LXXXIII; GA. CONST. art. I, § IV; KY. CONST. § 233a; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263-A; MONT. CONST. art. XIII, § 7; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OK. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; UTAH CONST. art. I, § 29.

8. *See* David Crary, *Same-Sex Marriages Rejected*, VENTURA COUNTY STAR (CAL.), Nov. 3, 2004.

help re-elect Bush—we just didn't know it would be the Supreme Court of Massachusetts."[9] These words have proven prophetic.

Meanwhile, proponents of homosexual marriage were busy around the country. In addition to defensive attempts to ward off these constitutional amendments regarding marriage, in San Francisco, California, and New Paltz, New York, mayors issued marriage licenses to same-sex couples in contravention of the local laws.[10] Similar civil disobedience by local government officials took place in Oregon and in New Mexico.[11]

Notwithstanding the occasional loss in the courts,[12] and the consistent loss at the polls,[13] the advancement of same-sex marriage around the country depends in large part on homosexual advocates' continued use of the courts to force the recognition of same-sex marriage on state constitutional grounds. Suits to that effect are pending in New Jersey, Oregon, Washington, and California, among others.[14]

The final stage in this conflict, and the eventual solution apparently advocated by proponents of same-sex marriage, will ultimately entail recourse to the federal courts for a constitutional resolution. Even if *Lawrence v. Texas* is not read to imply a federal right to same-sex marriage,[15] there is still the Full Faith and Credit Clause issue.[16] There are those, such as Harvard Law School's famed Constitutional Law Professor Laurence Tribe, who argue that the

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9. Jacob M. Schlesinger, *Gay-Marriage Issue Is Lifted to New Plane: Massachusetts Ruling Will Force Politicians, Nation to Confront Incendiary Subject*, WALL ST. J., Nov. 19, 2003, at A4.

10. *See Early Today: Same-Sex Marriage at Issue All Over the Country*, CNBC News Transcripts, Mar. 3, 2004.

11. *See* Dean E. Murphy, *Some Democrats Blame One of Their Own*, N.Y. TIMES, Nov. 5, 2004, at A18, LEXIS, News Library (noting that mass same-sex weddings, similar to those that took place in San Francisco, were performed in Oregon, New Mexico, and New York).

12. *See, e.g.*, Press Release, ACLU, New York Trial Court Decision Denying Marriage for Same-Sex Couples Advances ACLU Lawsuit to Appeals Court (Dec. 7, 2004), *at* http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=17157&c=101 (on file with the Ave Maria Law Review).

13. *See 11 US States*, *supra* note 5.

14. *See Briefs and Filings*, THE MARRIAGE LAW PROJECT (providing links to cases related to same-sex marriage), *at* http://marriagelaw.cua.edu/Law/courts.cfm.

15. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("[The present case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."); Dwight G. Duncan, *The Federal Marriage Amendment and Rule by Judges*, 27 HARV. J.L. & PUB. POL'Y 543, 557-60 (2004).

16. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

federal Defense of Marriage Act's[17] authorization for states to disregard the same-sex marriages of other states "is of dubious validity."[18] Now that Massachusetts has same-sex marriage of certifiably "legal" pedigree, it is just a matter of time before challenges to state and federal defense of marriage acts ("DOMAs") arise under the Full Faith and Credit Clause.[19] Presumably, when same-sex couples, legitimately domiciled and married in Massachusetts, eventually move to other states, these challenges would be ripe for judicial determination.

I. THE MASSACHUSETTS LAW ON MARRIAGE EVASION

In the meantime, there is a significant obstacle on the law books in Massachusetts preventing the immediate spread of same-sex marriage to other jurisdictions: the 1913 marriage evasion law.[20] That law is currently subject to state court challenge in Massachusetts in the companion cases of *Cote-Whitacre v. Department of Public Health* and *Johnstone v. Reilly*.[21] While the trial judge in *Cote-Whitacre* upheld the constitutionality of the marriage evasion law under both the state and federal constitutions,[22] the decision is currently being appealed.[23] The plaintiffs' lawyers, who also represented the *Goodridge* plaintiffs, announced that they would petition for direct

17. 28 U.S.C. § 1738C (2000).

18. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-35, at 1247 n.49 (3d ed. 2000).

19. *See, e.g.*, Evan Wolfson, *The Hawaii Marriage Case Launches the US Freedom-to-Marry Movement for Equality*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 169, 171 (Robert Wintemute & Mads Andenaes eds., 2001); EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 155 (2004).

20. MASS. GEN. LAWS ANN. ch. 207, § 11 (West 1998).

21. Cote-Whitacre v. Dep't of Pub. Health, 18 Mass. L. Rptr. 190, No. 04-2656-G, 2004 WL 2075557, at *1 (Super. Ct. Aug. 18, 2004); Johnstone v. Reilly, No. 04-2655-G (Mass. Super. Ct. Aug. 18, 2004) (Memorandum of Decision and Order on Plaintiffs' Motion for Preliminary Injunction), *available at* http://www.glad.org/marriage/johnball.pdf (on file with the Ave Maria Law Review).

22. *Cote-Whitacre*, 2004 WL 2075557, at *10-11, *12-14 (holding that this law violates neither the Massachusetts Constitution nor the Privileges and Immunities Clause).

23. *See* John Ellement, *Gay-Marriage Backers to Seek Action by SJC: Want State to Stop Using 1913 Law*, BOSTON GLOBE, Sept. 17, 2004, at B5; *see also* Press Release, GLAD, Massachusetts Superior Court Denies Immediate Relief to Non-Resident Gay and Lesbian Couples and Sets Case for Further Proceedings (Aug. 18, 2004), http://www.glad.org/News_Room/press79-8-18-04.html (on file with the Ave Maria Law Review).

review by the Massachusetts Supreme Judicial Court ("SJC"), the same court that decided *Goodridge*.[24]

The Uniform Marriage Evasion Act[25] prohibits citizens of foreign states from marrying in another state simply to avoid the laws of their home state.[26] The Act was eventually adopted by Massachusetts as well as by four other states: Illinois,[27] Vermont,[28] Wisconsin,[29] and Louisiana (though Louisiana subsequently repealed it).[30] Massachusetts's law states: "No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void."[31]

The idea of the law is simple: visitors to Massachusetts can only be married there if they could be married in their home state. Thus, minimum age requirements and forbidden degrees of kinship are determined by the laws of the couples' states of domicile rather than by those of the state where they wed.[32] As such, it is a sensible choice-of-law principle. After all, why should mere transitory presence in a jurisdiction be enough to create a legal status in other states, especially when that status is not recognized in such states?

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24. Ellement, *supra* note 23.

25. For information on the Uniform Marriage Evasion Act, see *Social Security Administration Policy Site: The Uniform Marriage Evasion Act*, http://policy.ssa.gov/poms.nsf/lnx/0200305155 (on file with the Ave Maria Law Review).

26. *Id.* (According to the first provision, "If a resident prohibited from marrying under the law of the State goes to another State for the purpose of avoiding this prohibition and contracts a marriage which would be void within his/her home State, that marriage will be held to be void by the home State, just as if the marriage had been entered into there.").

27. 750 ILL. COMP. STAT. ANN. 5/216 (West 1999).

28. VT. STAT. ANN. tit. 15, § 5 (2002).

29. WIS. STAT. ANN. § 765.04(3) (West 2001).

30. *See* Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 27, Johnstone v. Reilly, No. 04-2655-G (Mass. Super. Ct. Aug. 18, 2004), *available at* http://www.glad.org/marriage/ClerksMPI.pdf (on file with the Ave Maria Law Review) [hereinafter Johnstone Plaintiffs' Memo] (noting that Louisiana repealed the Uniform Marriage Evasion Act).

31. MASS. GEN. LAWS ANN. ch. 207, § 11 (West 1998).

32. A fairly standard feature of state marriage laws is to set minimum age requirements for marriage, as well as establish close kinship as an impediment to marriage. These specific requirements vary from state to state. *See, e.g.*, CAL. FAM. CODE § 301 (West 2004) (Eighteen-year-olds may marry if otherwise qualified to marry.); 23 PA. CONS. STAT. ANN. § 1304(b) (West 2001) (If the court decides it is in the best interest of the applicant, the applicant may marry although under the age of sixteen. If either of the applicants is under eighteen, he or she must receive consent from a custodial parent or guardian.).

Massachusetts is not somehow disabling out-of-state residents in a way that exempts its own citizens and residents. Another provision of Massachusetts's marriage statute applies the same rule to Massachusetts domiciliaries who enter into out-of-state marriages in contravention of the law of the commonwealth:

> If any person residing and intending to continue to reside in this commonwealth is disabled or prohibited from contracting marriage under the laws of this commonwealth and goes into another jurisdiction and there contracts a marriage prohibited and declared void by the laws of this commonwealth, such marriage shall be null and void for all purposes in this commonwealth with the same effect as though such prohibited marriage had been entered into in this commonwealth.[33]

Massachusetts residents, therefore, similarly cannot evade the law of their home state by going elsewhere to marry under more accommodating rules and then return home expecting their "marriage" to be recognized.

II. THE CONSTITUTIONAL CHALLENGES TO THE MARRIAGE EVASION LAW

The most interesting legal challenge to the marriage evasion law is the challenge based on the Privileges and Immunities Clause of the United States Constitution: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[34] Such a challenge represents an attempt to marshal the United States Constitution to compel the spread of same-sex marriage from Massachusetts to the rest of the country. It also presents a federal question that could be reviewed by the United States Supreme Court, even before the inevitable full faith and credit challenges to state and federal DOMAs. Thus, how the matter of the marriage evasion law's constitutionality is resolved in the courts could be a harbinger of the full faith and credit cases to come.

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33. MASS. GEN. LAWS ANN. ch. 207, § 10 (West 1998).
34. U.S. CONST. art. IV, § 2, cl. 1.

The pending lawsuits question the 1913 Massachusetts marriage evasion law on both state and federal constitutional grounds.[35] This article will not treat those state constitutional challenges. After the *Goodridge* decision, it appears that the Massachusetts SJC is capable of holding almost anything under the pretext of interpreting its state constitution.[36] There is a specific jurisdictional provision of the Massachusetts Constitution that deals with marriage: "All causes of marriage, divorce, and alimony, and all appeals from the judges of probate shall be heard and determined by the governor and council, until the legislature shall, by law, make other provision."[37]

On its face, this provision would seem to withhold subject matter jurisdiction over marriage from the courts of Massachusetts unless and until the legislature granted it to the courts. Before *Goodridge* went into effect on May 17, 2004, there was extensive litigation regarding the meaning of this provision and its implications for the court's decision in *Goodridge*. The final decision on this issue was delivered just days before May 17, when the SJC stated that *Goodridge* was not a "cause[] of marriage."[38] No authority was given for that proposition, no reasoning, no explanation.[39] One could not ask for a clearer token that the court was actually working in contravention of the state's constitution, all the while purporting to follow it. If *Goodridge* is not a case about marriage, when it expressly ordered that nothing short of "marriage" would satisfy the requirements of the state constitution, then what is it about?

It is anyone's guess as to how the Massachusetts SJC will deal with the state constitutional claims concerning the 1913 marriage evasion law. Since the SJC is the final word on such claims, and there is no real check on that court's exaggerated sense of its own jurisdiction, the federal constitutional claims seem more predictable;

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35. Cote-Whitacre v. Dep't of Pub. Health, 18 Mass. L. Rptr. 190, No. 04-2656-G, 2004 WL 2075557, at *10-11, *12-14 (Super. Ct. Aug. 18, 2004); Johnstone v. Reilly, No. 04-2655-G (Mass. Super. Ct. Aug. 18, 2004) (Memorandum of Decision and Order on Plaintiffs' Motion for Preliminary Injunction), *available at* http://www.glad.org/marriage/johnball.pdf (on file with the Ave Maria Law Review).

36. Dwight G. Duncan, *How* Brown *is* Goodridge*? The Appropriation of a Legal Icon*, 14 B.U. PUB. INT. L.J. 27, 32 (2004).

37. MASS. CONST. pt. II, ch. III, art. V.

38. Goodridge v. Dep't of Pub. Health, No. SJC-08860, slip op. at 2 (Mass. May 7, 2004) (order denying State representatives' motion to intervene) (quoting MASS. CONST. pt. II, ch. III, art. V) (internal quotation marks omitted) (on file with the Ave Maria Law Review).

39. *See id.*

these can be reviewed by the United States Supreme Court, and the precedent would be applicable elsewhere. The privileges and immunities claim may also be a dress rehearsal for the full faith and credit claims that are to come. Fortunately, we have the benefit of the full briefing of the federal constitutional issue that was done by the parties at the state trial court level.[40]

III. REACTIONS OF MASSACHUSETTS GOVERNMENT OFFICIALS TO *GOODRIDGE*

Governor Mitt Romney of Massachusetts initially, and Attorney General Thomas Reilly eventually, interpreted section 11 of the 1913 Massachusetts marriage evasion law as a total bar to same-sex marriage in Massachusetts by out-of-state couples.[41] Originally, the Attorney General had said that the 1913 law "will forbid same-sex couples from at least 38 other states to get married here after May 17, [2004]," the date *Goodridge* was scheduled to go into effect.[42]

It is fortuitous that he said "at least" thirty-eight states. Thirty-eight states[43] at the time had their own Defense of Marriage Acts, which specify that only marriage between a man and a woman is valid and recognized. Clearly, as to those thirty-eight states, a Massachusetts same-sex marriage would not have been valid. Since marriage between two persons of the same sex is legally valid in no other state, and is valid only in the Netherlands,[44] Belgium,[45]

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40. *See, e.g.*, Johnstone Plaintiffs' Memo, *supra* note 30; Defendants' Opposition to Clerks' and Couple's Motions for Preliminary Injunctions, Johnstone v. Reilly, No. 04-2655-G (Mass. Super. Ct. Aug. 18, 2004), *available at* http://www.glad.org/marriage/PI_opposition.pdf (on file with the Ave Maria Law Review) [hereinafter Johnstone Defendants' Opposition]; Brief of Amici Raymond Flynn and Thomas Shields in Support of Defendants' Opposition to Clerks' and Couple's Motions for Preliminary Injunctions, Johnstone v. Reilly, No. 04-2655-G (Mass. Super. Ct. Aug. 18, 2004) (on file with the Ave Maria Law Review) [hereinafter Johnstone Amici Brief].

41. *See* Yvonne Abraham, *AG Asks End of Out-of-State Marriage Licenses*, BOSTON GLOBE, May 22, 2004, at A1.

42. Raphael Lewis, *AG Sees Gay Marriage Limit: Says Law Bars Most Out-of-Staters*, BOSTON GLOBE, Mar. 31, 2004, at A1.

43. *Id.* ("Currently, 38 states have Defense of Marriage Act laws, or DOMAs . . . .").

44. For an English translation of the Dutch law allowing same-sex marriages, see Kees Waaldijk, Text of Dutch Law on the Opening up of Marriage for Same-Sex Partners (May 2, 2001), http://athena.leidenuniv.nl/rechten/meijers/index.php3?c=86 (on file with the Ave Maria Law Review).

45. *Belgium Is 2nd Country to Approve Gay Marriages*, ORLANDO SENTINEL TRIB., Jan. 31, 2003, at A14.

Canada,[46] and New Zealand,[47] any same-sex marriage involving a domiciliary of another state or foreign country other than those four would be void if contracted there and, thus, null and void in Massachusetts.[48]

Even residents of states without DOMAs, like Maryland and New York, would face this bar. For example, the New York Attorney General recently stated that, while in-state same-sex marriages would not be valid, those imported from out-of-state would be valid;[49] nevertheless, New York and Maryland residents would not be able to contract a Massachusetts marriage because it would be "void if contracted in" that state.[50]

When *Goodridge* went into effect, several cities and towns in Massachusetts—Worcester, Provincetown, Somerville, and Springfield—immediately proceeded to issue marriage licenses to same-sex couples from out-of-state, in contravention of the 1913 law on marriage evasion.[51] Eventually, they were stopped by the Attorney General at the Governor's request.[52] Governor Romney said that "Massachusetts should not become the Las Vegas for same-sex marriage," and "[t]he citizens of other states should be able to make their own definitions of marriage and not have Massachusetts export our unique definition to them."[53] Lawsuits challenging the law ensued, with Gay Lesbian Advocates and Defenders ("GLAD") representing eight same-sex couples living outside Massachusetts in *Cote-Whitacre v. Department of Public Health*,[54] and Gretchen Van Ness and the ACLU of Massachusetts representing the clerks of

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46. *See* Halpern v. Canada, 65 O.R.3d. 161 (Ct. App. Ontario 2003).

47. PRESS (NEW ZEALAND), *Civil Unions Same Legal Basis as Marriage*, Mar. 16, 2005, 2005 WLNR 4067920 ("The final act in legalising same-sex unions has passed its final hurdle. Companion legislation to the contentious Civil Union Act was passed yesterday by Parliament, tidying up a raft of laws by putting civil unions on the same legal footing as marriage.").

48. *See* MASS. GEN. LAWS ANN. ch. 207, § 10 (West 1998).

49. 2004 N.Y. Op. Att'y Gen. 1, 2004 WL 551537, at *11-12.

50. MASS. GEN. LAWS ANN. ch. 207, § 11; *see also* Dwight Duncan, *The Same-Sex Marriage Debate* (Mar. 31, 2004), *at* http://www.boston.com/news/special/gay_marriage/blogs/chrisfunnell4.html (on file with the Ave Maria Law Review).

51. *See* Abraham, *supra* note 41.

52. *Id.*

53. Shaun Sutner & John J. Monahan, *Out-of-Staters Will Test Gay Marriage Law; Romney Decries 'Las Vegas' Potential*, WORCESTER TELEGRAM & GAZETTE, May 7, 2004, 2004 WL 5865120 (quoting Governor Mitt Romney on May 6, 2004).

54. Cote-Whitacre v. Dep't of Pub. Health, 18 Mass. L. Rptr. 190, 2004 WL 2075557, at *1 (Super. Ct. Aug. 18, 2004).

thirteen cities and towns: the four previously mentioned, as well as Acton, Burlington, Cambridge, Marblehead, Nantucket, Plymouth, Rowe, Sherborn, and Westford.[55]

IV. THE PRIVILEGES AND IMMUNITIES CLAUSE

Challengers contend that the 1913 law is being selectively enforced out of discriminatory animus, in violation of the constitutional requirement of equal protection of the laws, and that the denial of same-sex marriage to out-of-state couples violates the Privileges and Immunities Clause.[56] Trial judge Carol S. Ball of the Massachusetts Superior Court ruled against the plaintiffs in *Cote-Whitacre* on both counts.[57] The case brought by the municipal clerks, *Johnstone v. Reilly*, was denied for lack of standing based upon the "long-standing and far-reaching prohibition on constitutional challenges by governmental entities to acts of their creator State."[58]

The lower court in *Cote-Whitacre* also ruled that the plaintiffs "have failed to prove their selective enforcement claim"[59] because the law's provisions

> apply equally to same-sex and opposite-sex couples. The clerks were instructed not to issue marriage licenses to all out-of-state couples . . . . [The clerks were also instructed to deny licenses] for all impediments, including whether the impediment is based on age, consanguinity or affinity, marital status, or same gender status of couples who reside and intend to continue to reside in other states.[60]

Since there was no intent to discriminate against a suspect group, and the *Goodridge* court had not declared same-sex marriage to be a

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55. *See* Plaintiffs' Motion for Preliminary Injunction, Johnstone v. Reilly, No. 04-2655-G, (Mass. Super. Ct. Aug. 18, 2004), *available at* http://www.glad.org/marriage/ClerksMPI.pdf (on file with the Ave Maria Law Review).

56. *Cote-Whitacre*, 2004 WL 2075557, at *6; U.S. CONST. art. IV, § 2.

57. *Id.* at *10-11, *12-14.

58. Johnstone v. Reilly, No. 04-2655-G, slip op. at 2 (Mass. Super. Ct. Aug. 18, 2004) (Memorandum of Decision and Order on Plaintiffs' Motion for Preliminary Injunction), *available at* http://www.glad.org/marriage/johnball.pdf (on file with the Ave Maria Law Review) (quoting Mass. Bay Transp. Auth. v. Auditor of the Commonwealth, 724 N.E.2d 288, 294 (Mass. 2000) (quoting Spence v. Boston Edison Co., 459 N.E.2d 80, 85 (1983))).

59. *Cote-Whitacre*, 2004 WL 2075557, at *10.

60. *Id.*

fundamental right,[61] the law was to be subjected to rational basis review.[62] The lower court in *Cote-Whitacre* held:

> The plaintiffs in the instant case have failed to establish that G.L.c. 207, § 11, a facially neutral and even-handedly-applied law, is not rationally serving a legitimate governmental interest.
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> Massachusetts has a legitimate interest in protecting the interests served by the Commonwealth's creation and regulation of the marriage relationship with the requirement that there be an approving state ready to enforce marital rights and duties for the protection of the public, the spouses, and their children.[63]

The principal challenge, though, arises under the Privileges and Immunities Clause.[64] Professor Laurence Tribe said, "Romney's decision to ban out-of-state gay couples from marrying here defies the U.S. constitutional principle that a state cannot discriminate against out-of-state residents on fundamental rights—in this case, the right to marry."[65] The *Cote-Whitacre* court, however, quoted United States Supreme Court precedent: "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally."[66] The court went on to discuss the implications of *Goodridge*:

> [T]he *Goodridge* Court declined to take a position as to whether sexual orientation is a suspect class and did not unequivocally state that a fundamental right was at stake. If marriage is not a fundamental right for purposes of an equal protection analysis, it follows that under the Privileges and Immunities Clause, individuals

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61. *Id.* at *13-14; *see* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 959-61 (Mass. 2003).

62. *Cote-Whitacre*, 2004 WL 2075557, at *13.

63. *Id.* at *11 (citing *Goodridge*, 798 N.E.2d at 953-56).

64. *Cote-Whitacre*, 2004 WL 2075557, at *12.

65. John McElhenny & Michael Levenson, *Marriage Restriction Debated: Under Romney Plan, Couples Face Checks*, BOSTON GLOBE, Apr. 26, 2004, at A1 (reporting comment of Laurence Tribe).

66. *Cote-Whitacre*, 2004 WL 2075557, at *12 (quoting *In re* Jadd, 461 N.E.2d 760, 761 (Mass. 1984) (quoting Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 383 (1978))) (internal quotations omitted).

> do not have a fundamental right to travel from other states to Massachusetts in order to marry.
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> Moreover, even if a fundamental right is at stake here, the plaintiffs' Privileges and Immunities argument fails . . . since there is a valid justification for the distinction other than the mere fact of non-residency. . . . [T]he Commonwealth has a substantial interest in ensuring that the marriage relationship is regulated for the protection of the interests of the public, the spouses, and their children.[67]

Interestingly, as the Attorney General noted, "the Registrar has not found any case holding that marriage is fundamental within the meaning of the Privileges and Immunities Clause."[68]

Because marriage in the United States has been largely governed by state law rather than federal law and, indeed, the United States Supreme Court has called it "an area that has long been regarded as a virtually exclusive province of the States,"[69] it has never been the case that the Privileges and Immunities Clause, or the Fourteenth Amendment[70] for that matter, has been interpreted to make states extend their domestic relations law to non-residents on an equal basis with residents.[71] When it comes to applying domestic relations laws to non-residents, then, the United States Supreme Court has allowed states to discriminate based on their relationship with the parties. It is

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67. *Id.* at *14.

68. Johnstone Defendants' Opposition, *supra* note 40, at 86.

69. Sosna v. Iowa, 419 U.S. 393, 404 (1975).

70. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

71. An amicus brief in the *Johnstone* case argued:

> In *Sosna v. Iowa*, the Court rejected a challenge to the durational residency requirement that Iowa statutes imposed on persons seeking a divorce. The Court noted that it had rejected durational residency requirements for welfare payments, voting rights, and medical care, but that "none of those cases intimated that the States might never impose durational residency requirements, and such a proposition was in fact expressly disclaimed." The Court then held that "[u]ntil such time as Iowa is convinced that appellant intends to remain in the State, it lacks the 'nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance.'"

Johnstone Amici Brief, *supra* note 40, at 2-3 (quoting Sosna v. Iowa, 419 U.S. 393, 406-07 (1975)).

no wonder, then, that states could certainly "limit 'the creation of legal relations and responsibilities of the utmost significance' to persons who reside within the jurisdiction, particularly where those relations and responsibilities are not recognized in other jurisdictions."[72]

As the Attorney General's briefing of the issue demonstrates, the Privileges and Immunities Clause does not require a state to "always apply all its laws . . . equally to anyone, resident or nonresident, who may request it so to do."[73] As explained by the defendants in *Johnstone*, the law does not violate the Privileges and Immunities Clause:

> First, the statutory classification is not in fact drawn along the resident-nonresident line that the Couples assert, and the Privileges and Immunities Clause is not even implicated in this matter. Second, even if the requisite resident-nonresident classification were to exist, § 11 does not burden a right that is "fundamental" as the Supreme Court has defined that term for purposes of Art. IV, § 2. Third, even if there were a resident-nonresident classification burdening a fundamental right, a substantial reason for any difference in treatment would exist.[74]

The first point is the most cogent. The discrimination is between those whose home state recognizes the relationship at issue and those whose home state does not:

> [Section] 11 does not in fact discriminate between residents and nonresidents. . . . The statute instead differentiates between two types of nonresidents—those whose marriages would be void if contracted in their home states, and those whose marriages would not be void. Section 11 allows the latter to marry validly in Massachusetts, while the former's attempted marriages here are "null and void." The Legislature addresses Massachusetts *residents* in the immediately preceding section of Chapter 207, and it treats them in the same manner that § 11 treats nonresidents, declaring

72. Johnstone Amici Brief, *supra* note 40, at 3.

73. Baldwin v. Mo. Fish & Game Comm'n, 436 U.S. 371, 383 (1978).

74. Johnstone Defendants' Opposition, *supra* note 40, at 80 (citations omitted).

> "null and void" any resident's out-of-state marriage if that marriage would be void if contracted within the Commonwealth.[75]

Even if the 1913 law were held to discriminate against nonresidents, however, the right to marry a person of the same sex has never been held to be a fundamental right under any provision of the United States Constitution, so the Privileges and Immunities Clause would not apply to it. Even the Massachusetts SJC did not declare it a fundamental right, applying only rational basis scrutiny to the marriage law at issue in *Goodridge*.[76] Finally, comity between the states provides a substantial reason for not applying the Massachusetts marriage law to couples from other states that do not recognize or sanction same-sex marriage.[77] This is akin to states refusing to accord full faith and credit to other states' marriages that are in violation of their own public policy, an exception to the general rule of "married anywhere, married everywhere" that is widely recognized.[78]

CONCLUSION

In conclusion, the Massachusetts marriage evasion law should be found constitutional. If ultimately upheld by the SJC and by federal courts, this law will prove to be a substantial barrier to the spread of same-sex marriage from Massachusetts to the rest of the country. Though the law will delay other states' recognition of same-sex marriages contracted in Massachusetts, it may not ultimately prevent their recognition in other states, since the law does not impede attempts to export same-sex marriage by couples legitimately domiciled in Massachusetts who subsequently move to other jurisdictions. When same-sex couples, married in Massachusetts in full compliance with Massachusetts law, do move to other jurisdictions, the resulting conflicts will be resolved by the various

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75. *Id.* at 80-81 (citations omitted).

76. Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 959-61 (Mass. 2003).

77. *But see id.* at 967 ("But neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution.").

78. *See, e.g.*, Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1064-65 (stating that there is a "general rule preferring validation of marriages, which exists with an 'overwhelming tendency' in the United States") (footnote omitted).

DOMAs, state constitutional amendments, and the Full Faith and Credit Clause of the United States Constitution.