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

Dwight G. Duncan†

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 Health1 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.

† Professor, Southern New England School of Law, North Dartmouth, Massachusetts. The author filed amicus briefs on behalf of Massachusetts Family Institute et al. in both Goodridge v. Department of Public Health and the advisory opinion case regarding proposed civil-union legislation.

In May of 2004, Massachusetts became the first state, and thus far the only state, to recognize marriage between persons of the same sex. 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, endorsed by President George W. Bush, and by seeking the amendment of various state constitutions in order to prevent local versions of what happened in Massachusetts. 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.

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. 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, 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

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.
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. LXXIII; 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.
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

---

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).
13. See 11 US States, supra note 5.
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 authorization for states to disregard the same-sex marriages of other states “is of dubious validity.” 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. 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. 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. While the trial judge in Cote-Whitacre upheld the constitutionality of the marriage evasion law under both the state and federal constitutions, the decision is currently being appealed. The plaintiffs’ lawyers, who also represented the Goodridge plaintiffs, announced that they would petition for direct

review by the Massachusetts Supreme Judicial Court (“SJC”), the same court that decided Goodridge.24

The Uniform Marriage Evasion Act25 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?

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.”).
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., C A L. FAM. CODE § 301 (West 2004) (Eighteen-year-olds may marry if otherwise qualified to marry); 23 P A. 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.

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. 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. 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.”

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.” No authority was given for that proposition, no reasoning, no explanation. 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;


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


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 states43 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


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


Canada,\textsuperscript{46} and New Zealand,\textsuperscript{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.\textsuperscript{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;\textsuperscript{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.\textsuperscript{50}

When \textit{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.\textsuperscript{51} Eventually, they were stopped by the Attorney General at the Governor’s request.\textsuperscript{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.”\textsuperscript{53} Lawsuits challenging the law ensued, with Gay Lesbian Advocates and Defenders (“GLAD”) representing eight same-sex couples living outside Massachusetts in \textit{Cote-Whitacre v. Department of Public Health},\textsuperscript{54} and Gretchen Van Ness and the ACLU of Massachusetts representing the clerks of

\textsuperscript{47} \textit{PRESS (NEW ZEALAND)}, \textit{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.”).
\textsuperscript{51} See Abraham, supra note 41.
\textsuperscript{52} Id.
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

---

57. *Id.* at *10-11, *12-14,
60. *Id.*
fundamental right, the law was to be subjected to rational basis review. 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.

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.

The principal challenge, though, arises under the Privileges and Immunities Clause. 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.” 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.” 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

63. Id. at *11 (citing *Goodridge*, 798 N.E.2d at 953-56).
do not have a fundamental right to travel from other states to Massachusetts in order to marry.

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 Amendment70 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.

67. Id. at *14.
68. Johnstone Defendants’ Opposition, supra note 40, at 86.
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.”

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.” 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.

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.
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 conflicts

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