THE MASSACHUSETTS LAW ON MARRIAGE IN EVASION OF THE LAW OF THE DOMICILE AS A BARRIER TO THE EXPORT OF SAME-SEX MARRIAGE
by Dwight G. Duncan

In May of this year, Massachusetts became the first state in the United States to recognize marriage between people 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: on the part of opponents of homosexual marriage, to prevent the replication or export of this social experiment, by attempting to amend the United States Constitution with a Federal Marriage Amendment, endorsed by President Bush; and by attempting to get various states to amend their state constitutions to prevent a local version of what happened in Massachusetts. Recently, both Missouri and Louisiana passed state constitutional amendments by overwhelming majorities.

On Election Day just this week, referenda to that effect passed in an additional eleven of the eleven states where the state constitutional amendment enshrining the traditional definition of marriage was on the ballot. “One step forward, eleven steps back”? The reelection 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, can largely be attributed to this issue, it seems. The day after the Goodridge decision came down almost a year ago, a Democratic strategist was quoted in the Wall Street Journal as commenting, “We knew the Supreme Court would do anything to help re-elect Bush—we just didn’t know it would be the supreme court of Massachusetts.” Those words were prophetic, it turns out.

Meanwhile, the proponents of homosexual marriage were also busy around the

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country, and not just defensively in attempting 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. Similar civil disobedience by local government officials took place in Oregon and in New Mexico.

Notwithstanding the occasional loss in the courts, and the consistent loss at the polls, the strategy of advancing same-sex marriage around the country depends in large part on homosexual advocates continuing to use 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, California, etc., etc.

The wild card, at this juncture, and the endgame, is the looming use of the federal courts and the federal constitution to settle the question once and for all. Even if Lawrence v. Texas is not read to imply a federal right to same-sex marriage, there is still the Full Faith and Credit Clause of Article IV, section 1 of the United States Constitution. There are those, such as Harvard Law’s Professor Laurence Tribe, who argue that the 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 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

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4 1 Laurence H. Tribe, American Constitutional Law, 1247 n. 49 (3d ed. 2000).
determination.

In the meantime, there is a significant obstacle on the law books in Massachusetts preventing the immediate export of same-sex marriage to other jurisdictions, the 1913 uniform law on marriage outside the state in evasion of the law of the domicile. That law is currently subject to state court challenge in Massachusetts, in the companion cases of Cote-Whitacre v. Dep’t of Public Health and Johnstone v. Reilly. While the trial judge upheld the constitutionality of the marriage evasion law under both the state and federal constitutions, the decision is currently being appealed: Plaintiffs’ lawyers, who also represented the Goodridge plaintiffs, have petitioned for direct review by the Massachusetts Supreme Judicial Court, the Goodridge court. Here we will see if supreme court judges read election returns.

For our purposes, the most interesting legal challenge to the marriage evasion law is the challenge based on the Privileges and Immunities Clause of Article IV, section 2 of the United States Constitution: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” The reason it is interesting is because it represents another attempt to marshal the United States Constitution to force the export 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. As such, how the matter of its constitutionality is resolved in the courts could be a harbinger of the Full Faith and Credit cases to come.

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The Massachusetts uniform law on marriage outside the state in evasion of the law of the domicile was eventually adopted by four other states: Illinois, Louisiana, Vermont, and Wisconsin (though Louisiana subsequently repealed it). The law, codified as Massachusetts General Law chapter 207, section 11, 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.

The idea of the law is simple: visitors to Massachusetts can only be married there if they could be married where they’re from. Thus, minimum age requirements and forbidden degrees of kinship are determined by the place of the couples’ marital domicile rather than by the place of the wedding. 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 status that will actually be lived out elsewhere, at least when that status is not recognized by the host state?

Nor is Massachusetts somehow disabling out-of-state residents in a way that exempts its own citizens and residents. For another provision of the uniform marriage evasion law, M.G. L. chapter 207, section 10, 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. 

Massachusetts residents can similarly not evade the law of their state by going elsewhere to get married under more accommodating rules and then returning home and expecting their “marriage” to be recognized there.

The pending lawsuits question the 1913 Massachusetts marriage evasion law on both state and federal constitutional grounds. I do not intend to deal with the state constitutional arguments in this talk. My reason is that after the Goodridge decision, I think the Massachusetts Supreme Judicial Court is capable of just about anything under the pretext of interpreting its state Constitution. Let me illustrate that point with an example I have developed elsewhere:6 There is a specific provision of the Massachusetts Constitution that deals with marriage, and that is Part 2, Chapter 3, Article V, which states:

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 verdict was delivered just days before May 17, when the SJC stated that Goodridge was “not a cause of marriage.”7 No authority was given

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for that proposition, no reasoning, no explanation. Just the court’s say-so. One could not ask for a clearer admission 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 words have ceased to have any meaning and are simply subject to the manipulation of those in power.

No, it is anybody’s guess how the Massachusetts Supreme Judicial Court will deal with the state constitutional claims concerning the 1913 marriage evasion law. Since it is the final word on such claims, and there is no real check on the court’s supersized sense of its own jurisdiction, I would prefer to analyze the federal constitutional claims, since 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 down the pike. Fortunately, we have the benefit of the full briefing of the issue that was done by the parties at the trial court level.

At the outset, we should note that 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. Originally, as reported by the Boston Globe, 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.

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Here’s what I wrote about that at the time in a blog posted on [www.boston.com](http://www.boston.com), the Globe’s website:

It’s a good thing he said “at least” 38 states. Thirty-eight states have their own Defense of Marriage Acts, which specify that only marriage between a man and a woman is valid and recognized there. Clearly, as to those 38 states, a Massachusetts same-sex marriage would not be valid. Since marriage between two persons of the same sex is legally valid in no other state, and is only valid in the Netherlands, Belgium and Canada, then any same-sex marriage involving a domiciliary of another state or foreign country other than those three would be “void if contracted there,” and thus null and void here.

Even residents of states without DOMAs, like Maryland and New York, whose attorney generals have recently stated that while in-state same-sex marriages would not be valid, those imported from out-of-state would be, would not be able to contract a Massachusetts marriage because it would be “void if contracted in” that state.

Prof. Laurence Tribe of Harvard Law thinks that under the federal Constitution, according to today’s Globe, “Massachusetts officials may be compelled to ignore DOMA laws in other states.” Does he really mean to endorse the actions of local government officials around the country in disregarding their laws because of reservations about their constitutionality?

If he’s right about that, of course, then the main reason Democrats like John Kerry have been giving for refusing to support the Federal Marriage Amendment, that the issue is best left for the states to resolve, just doesn’t hold water. The state with the lowest common denominator definition of marriage decides the matter for the nation.

Actually, it turns out that AG Reilly is a late-convert to his states-rights, gay-marriage-stops-at-the-border position. In 1999, commenting on a proposed state DOMA, he wrote to the Joint Committee on the Judiciary, “As to prospectively invalidating such unions when and if they are recognized in other states, the bill is, in my opinion, an unconstitutional attempt to avoid giving full faith and credit to legal obligations recognized by other states.” So his view,
apparently, is that Massachusetts would be required to recognize out-of-state same-sex marriages, but other states would not be required to recognize Massachusetts same-sex marriages. Go figure.10

When Goodridge went into effect last May 17, several cities and towns in Massachusetts proceeded to issue marriage licenses to same-sex couples from out of state, in contravention of the 1913 law on marriage evasion: Worcester, Provincetown, Somerville and Northampton. Eventually, they were stopped by the Governor asking the Attorney General to enforce the law. 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.”11 The lawsuits challenging the law ensued, with Gay Lesbian Advocates and Defenders representing eight same-sex couples living outside Massachusetts in Cote-Whitacre v. Dep’t of Public Health, and Gretchen Van Ness and the ACLU of Massachusetts representing the clerks of thirteen cities and towns: the four previously mentioned, plus Acton, Burlington, Cambridge, Marblehead, Nantucket, Plymouth, Rowe, Sherborn, and Westford.12

The claims are 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

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9 In Newsweekly, June 9, 1999.
Privileges and Immunities Clause of Art. IV, section 2. Trial judge Carol S. Ball, Justice of the Massachusetts Superior Court, decided against plaintiffs on both counts. The case brought by the municipal clerks was denied for lack of standing: the “long-standing and far-reaching prohibition on constitutional challenges by governmental entities to acts of their creator State.”

The lower court ruled that the plaintiffs “have failed to prove their selective enforcement claim,” 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…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.”

Since there was no intent to discriminate against a suspect group, and the Goodridge court had not declared same-sex marriage to be a fundamental right, the law would be given rational basis review. “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

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15 Cote-Whitacre, supra n. 12, slip op. at 15.
16 Id.
17 Id.
18 Id. at 17.
children.”

The principal challenge, though, is under the Privileges and Immunities Clause. Prof. Laurence Tribe of Harvard Law School was quoted by the Globe on April 26, 2004, as saying “Romney’s decision to ban out-of-state gay couples from marrying here defies the US constitutional principle that a state cannot discriminate against out-of-state residents on fundamental rights—in this case, the right to marry.” The court, however, quotes U.S. Supreme Court precedent that “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.” “[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 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.”

Interestingly, as the Attorney General’s Opposition to Clerks’ and Couples’ Motions for Preliminary Injunction notes, “[T]he Registrar has not found any case

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19 Id., citing Goodridge, 440 Mass. At 321-325.
22 Id. at 21.
holding that marriage is fundamental within the meaning of the Privileges and Immunities Clause.”

Because marriage in the United States has been largely governed by state law rather than federal law, and indeed, the U.S. Supreme Court has called it “an area that has long been regarded as a virtually exclusive province of the States,” it has never been the case that the Privileges and Immunities Clause of Article IV, section 2, or the Fourteenth Amendment, for that matter, has been interpreted to make states extend their domestic relations law to non-residents on an equal basis with residents.

In *Sosna v. Iowa*, 419 U.S. 393 (1975), 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.” *Id.* at 406. 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.’” *Id.* at 407 (quoting *Williams v. North Carolina*, 325 U.S. 226, 229 (1945))…[States] certainly have the ability to 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

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23 Defendants’ Opposition to Clerks’ and Couples’ Motions for Preliminary Injunctions, Johnstone v. Reilly, Cote-Whitacre v. Dep’t of Public Health at 86, referencing Couples’ Memo at 28 “(conceding that Supreme Court has never so held).”.


25 See the discussion in Alliance Defense Fund’s Brief of *Amici* Raymond Flynn and Thomas Shields in Support of Defendants’ Opposition to Clerks’ and Couples’ Motions for Preliminary Injunctions, pp. 2-3, Johnstone v. Reilly, Civil Action No. 04-2655-G.

26 *Id.* at 3.
anyone, resident or nonresident, who may request it so to do.”

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.

[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.” Id. 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 “null and void” any resident’s out-of-state marriage if that marriage would be void if contracted within the Commonwealth.

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 Supreme Judicial Court did not declare it a fundamental right, applying only rational basis scrutiny to the marriage law at issue in Goodridge. Finally, comity between the states provides a substantial reason for not

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28 Id.
29 Id. at 80-81, citing Mass. G. L. c. 207 § 10 (also enacted by St. 1913, c. 360).
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applying Massachusetts marriage law to couples from other states that do not recognize or sanction same-sex marriage. This is akin to states refusing to accord Full Faith and Credit to other states’ marriages which are in violation of their own public policy, an exception to the general rule of “married anywhere, married everywhere” that is widely recognized.

In conclusion, the Massachusetts marriage evasion law should be held to be constitutional. If ultimately upheld by the Supreme Judicial Court and by federal courts, this law will prove a substantial barrier to the export of same-sex marriage from Massachusetts to the rest of the country. At best, though, it gives other states some time, since it will not impede attempts to export same-sex marriage by couples legitimately domiciled in Massachusetts who subsequently move to other jurisdictions. At that time, the various Defense of Marriage Acts, state constitutional amendments, and the Full Faith and Credit Clause will be in play.