Maurice A. Deane School of Law at Hofstra University
Scholarly Commons at Hofstra Law

Hofstra Law Faculty Scholarship

2004

Fear and Loathing In Massachusetts: Same-Sex Marriage and Some Lessons From The History of Marriage and Divorce

Joanna L. Grossman
Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

Joanna L. Grossman, *Fear and Loathing In Massachusetts: Same-Sex Marriage and Some Lessons From The History of Marriage and Divorce*, 14 B.U. Pub. Int. L.J. 87 (2004)
Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/913

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawlas@hofstra.edu.

FEAR AND LOATHING IN MASSACHUSETTS: SAME-SEX MARRIAGE AND SOME LESSONS FROM THE HISTORY OF MARRIAGE AND DIVORCE

JOANNA L. GROSSMAN*

In May 2004, Massachusetts became the first and only state in the union to permit same-sex couples to marry.[1] A month earlier, Massachusetts Governor Mitt Romney had announced his intent to enforce a little-known 1913 state law limiting the ability of out-of-state couples to marry in Massachusetts unless their home state would also permit them to marry.[2] "Massachusetts should not become the Las Vegas of same-sex marriage,"[3] he declared in a statement to the press.

Las Vegas *is* known for its impulsive and often short-lived marriages, like the 55-hour marriage between Britney Spears and a childhood friend that was annulled

---

* Professor, Hofstra Law School. B.A., Amherst College; J.D., Stanford Law School. This essay was prepared for "Same Sex Marriage in Massachusetts: The Meaning and Implications of *Goodridge v. Department of Public Health*," Southern New England School of Law, June 11, 2004. My considered thanks to John DeWitt Gregory and J. Herbie DiFonzo for their comments, and to Elizabeth Cohen and Susann Duffy for their assistance with footnotes.

[1] In November, 2003, the Supreme Judicial Court of Massachusetts struck down the state's ban on same-sex marriage as a violation of the state constitutional guarantee of equal protection. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). It gave the legislature 180 days to conform its laws to the ruling, see *id.* at 970, and marriage licenses were first issued to same-sex couples on May 17, 2004. *See* Pam Belluck, *Hundreds of Same-Sex Couples Wed in Massachusetts*, N. Y. TIMES, May 18, 2004, at A1 ("On the first day here, the issuing of licenses and the marriage ceremonies proceeded without many snags or confrontations."). Other states, including Vermont, California, New Jersey, and Hawaii, provide some level of formal recognition to same-sex couples who choose it but none permits them to "marry." *See* Joanna L. Grossman, *The New Jersey Domestic Partnership Law: Its Formal Recognition of Same-Sex Couples, and How it Differs From Other States' Approaches*, FindLaw's Writ, http://writ.news/findlaw.com/grossman/2004/0113.html (Jan. 13, 2004) (comparing and contrasting state approaches to the legal recognition of same-sex couples).

[2] *See* Pam Belluck, *Romney Won't Let Gay Outsiders Wed in Massachusetts*, N. Y. TIMES, Apr. 25, 2004, at A1; *see also* Mass. Gen. Laws ch. 207, § 11 (2004) (prohibiting non-residents from marrying in Massachusetts "if such marriage would be void if contracted" in their home state).

[3] *See* Belluck, *supra* note 2, at A1.

three days after it was celebrated.[4] But couples don't abscond to Las Vegas to marry because they *can't* marry in their home states. They marry there because the culture caters to impulse, and a spontaneous Las Vegas wedding can be enticing (to some, anyway). As Britney Spears lamented, reflecting on her ill-considered marriage: "I do believe in the sanctity of marriage, I totally do. But I was in Vegas, and it took over me."[5] Massachusetts, on the other hand, is not reputed to have such an effect on people – although opposite-sex couples might well choose to marry there because Cape Cod presents a romantic wedding spot. Same-sex couples want to marry there because no other state in the union will permit them to do so.

So what does it mean to be the "Las Vegas of same-sex marriage?" Governor Romney's warning makes sense only as a reference to Las Vegas' reputation for the "quickie" divorce, rather than the impulsive marriage.[6] Historically, a "quickie" divorce was something most states did not make available, but Nevada did.[7] Spouses thus went to Las Vegas or Reno to procure something they could not obtain in their home states, either at all, or at least not as quickly or painlessly as they desired. It is this history Romney apparently invokes as a cautionary tale for Massachusetts.

In modern society, providing out-of-staters with a "quickie" divorce does not necessarily invite moral opprobrium upon the forum state. Yet Romney's reference was meant to foretell doom for Massachusetts as it, alone, legalizes same-sex marriage.[8] Historical context reveals the more pejorative meaning of the phrase "quickie divorce," and provides an interesting basis for comparing the 150-year-old battle over accessible divorce with the comparatively short contemporary one over

---

[4] *See I Blame It on Vegas*, BIRMINGHAM EVENING MAIL, Jan. 15, 2004, at 6. Spears's timing was ironic, given the ongoing national debate about same-sex marriage and President Bush's declaration, designed to galvanize opponents, that marriage should be a "sacred institution." *See* Press Release, Office of the Press Secretary, Statement of the President, President Defends Sanctity of Marriage (Nov. 18, 2003), (at http://www.whitehouse.gov/news/releases/2003/11/20031118-4.html). Columnist Ellen Goodman noted the irony of Spears's marriage given the oft-made argument that same-sex marriage should be banned because it "disparages heterosexual marriage." "Who," she queried, "needs gay couples when you have Britney and Jason?" *See* Ellen Goodman, *Marriages: Gay and Throwaway*, BOSTON GLOBE, Jan. 11, 2004, at L11.

[5] *See I Blame it on Vegas*, *supra* note 4 (quoting Britney Spears).

[6] *See generally* NELSON MANFRED BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 152-59 (1977).

[7] *See generally id.* (describing the history of divorce in the United States, with particular emphasis on the issue of migratory divorce); *see also* LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW 33-43 (2004) [hereinafter PRIVATE LIVES]; LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 204 (2d ed. 1985); WILLIAM O'NEILL, DIVORCE IN THE PROGRESSIVE ERA 246-47 (1967).

[8] Lower courts in Washington and New York have recently invalidated bans on same-sex marriage under state constitutional principles. *See* Anderson v. Kings County, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super., Aug. 4, 2004); Hernandez v. Robles, No. 103434/2004 (N.Y. Sup. Ct. Feb. 4, 2005).

same-sex marriage. This essay first retraces the history of divorce in the United States, with a particular focus on the persistent non-uniformity of divorce laws and the resulting concerns about migratory divorce. It then considers our historical experience with non-uniformity in the marriage context, focusing on the legal and cultural responses to evasive marriages. Finally, it draws on the parallel histories of migratory divorce and evasive marriage to reconsider the contemporary battle over same-sex marriage, which reinvokes historical tensions between the desire for uniformity of state laws and the right of states to regulate domestic relations at the local level. The essay concludes with a different cautionary tale than Romney's: States can peaceably co-exist with non-uniform marriage laws, and historical attempts to make them quasi-uniform through the enforcement of laws against migratory divorce or evasive marriages have been largely ineffective.

I. NON-UNIFORMITY AND MIGRATORY DIVORCE

States today are in virtual agreement that divorce is, at the end of the day, an individual entitlement that need be preceded only by separation or a plea of incompatibility.[9] States differ in the procedural hurdles they impose, but regardless of what the statutes provide, divorce in practice, in many states, has truly become "divorce on demand," with either spouse having an essentially unilateral right of dissolution.[10] This was, of course, not always the case in the American states.

In colonial America, most states did not have provisions for judicial divorce, but instead followed England's "divorceless" tradition.[11] After the Revolutionary war, states began to permit courts to grant divorces, but most retained tight control over marriages and differed, sometimes dramatically, in their willingness to dissolve them. The South, in general, was hostile to divorce, and South Carolina banned it

---

[9] *See* American Bar Association, *Grounds for Divorce and Residency Requirements*, *available at* http://www.abanet.org/family/familylaw/Chart4_GroundsDivorce.pdf (comparing grounds for divorce in all 50 states).

[10] *See, e.g.*, J. Herbie DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519, 519 (1994) ("The elimination of grounds transformed mutual consent divorce, the operating milieu for most of the twentieth century, into divorce on demand.") Only a few states, most notably New York, have retained a real requirement of mutual consent as the only alternative to a fault-based divorce. *See* N.Y. DOM. REL. LAW § 170(5), (6) (McKinney 2001) (requiring that couples be separated for one year pursuant to either a legal decree of separation or a written separation agreement, resolving all the issues between the parties, before filing for divorce on the basis of "separation"); N.Y. DOM. REL. LAW § 170(1)-(4) (McKinney 2001) (listing fault grounds for divorce). But even New York seems poised to update its law to provide for divorce without proof of fault or mutual consent. *See* Joanna L. Grossman, *Will New York Finally Adopt True No-Fault Divorce? Recent Proposals to Amend the State's Archaic Divorce Law*, FindLaw's Writ, http://writ.news.findlaw.com/grossman/20041020.html (Oct. 20, 2004).

[11] *See* FRIEDMAN, A HISTORY OF AMERICAN LAW, *supra* note 7, at 204 (noting that England did not permit judicial divorce until 1857). Legislative divorce was sometimes available, until states abolished the practice in the latter half of the nineteenth century. *See id.* at 498.

altogether.[12] In contrast, northern states other than New York and western states in general tended to be more forgiving, though still strict by modern standards.[13] All states required that an "innocent" spouse file for divorce on one of the legislatively enumerated grounds. The plaintiff spouse had to "prove" the grounds, and a divorce could be granted only with corroborated evidence of fault. While consensual divorces were forbidden by statute, most early statutes made divorce accessible, though "not routine or automatic."[14]

What sometimes gets lost in the retelling of the history of divorce is how the states collectively progressed from the post-Revolutionary period to the modern day, where divorce is both routine and automatic. The earliest divorce laws varied primarily in the grounds upon which a divorce could be granted. Strict states, like New York, recognized only adultery as a justification for divorce,[15] while California recognized not only adultery, but also abandonment, neglect, intemperance, felony conviction, and extreme cruelty.[16] Most other states fell somewhere in the middle, recognizing adultery plus a few additional grounds.[17] A few states had very broad, general grounds, like Rhode Island, which permitted divorce for "gross misbehaviour and wickedness in either of the parties, repugnant to and in violation of the marriage covenant."[18]

The divorce laws in specific states were in flux through much of the nineteenth century and into the twentieth. Divorce law's progression from generally strict to generally lenient occurred in fits and starts, as the balance between the anti-divorce moralists and the social demand for divorce tipped in one direction or the other in a given state or region. From the beginning of the nineteenth century, concerns about the rising divorce rate were already palpable. Anti-divorce moralists warned of the doom divorce would bring; the "whole community," one ardent opponent insisted, "would be thrown . . . into a general prostitution."[19] Those in favor of divorce were just as vocal and rhetorically forceful, as feminists like Elizabeth Cady Stanton insisted that "[i]t is vain to look for the elevation of woman so long as she is degraded in marriage."[20] Pragmatists also favored looser divorce laws because they were "favourable to the virtue and the happiness of mankind."[21] Joel Prentiss

---

[12] *See* FRIEDMAN, A HISTORY OF AMERICAN LAW, *supra* note 7, at 204-05.

[13] *See* BLAKE, *supra* note 6, at 62 ("states of the Old Northwest tended to pass rather liberal divorce laws"); FRIEDMAN, A HISTORY OF AMERICAN LAW, *supra* note 7, at 205.

[14] *See* FRIEDMAN, A HISTORY OF AMERICAN LAW, *supra* note 7, at 207.

[15] *See* N.Y. REV. STAT. ch. 8, tit. 1, § 42 (1852).

[16] *See* CAL. CIV. CODE § 92 (Hart 1889).

[17] *See* BLAKE, *supra* note 6, at 48-63 (discussing grounds for divorce in a variety of states in the nineteenth century).

[18] *See id.* at 50.

[19] 3 TIMOTHY DWIGHT, THEOLOGY EXPLAINED AND DEFENDED IN A SERIES OF SERMONS 434 (5th ed. 1828), quoted in BLAKE, *supra* note 6, at 59.

[20] CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 175 (1980).

[21] 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 192-93 (1795).

Bishop, author of the first comprehensive treatise on divorce law in the United States, published in 1851,[22] thought divorce law should be "adapted to the general needs of society."[23] Pointing to Connecticut, which had an omnibus ground for divorce, he noted, "there is in our Union no State wherein domestic felicity and purity, unblemished morals, and matrimonial concord and virtue, more abound than in Connecticut."[24]

States responded to these competing pressures, as well as the general social demand for divorce, by alternately tightening and loosening their laws. Connecticut, for example, began with a divorce law that permitted dissolution on the basis of "misconduct," which was defined broadly as any act "that permanently destroys the happiness of the petitioner and defeats the purpose of the marriage relation."[25] The legislature eventually repealed the law in the 1870s, as did many other states with similarly vague grounds. Other states tried to deter divorce by increasing the requisite period of residency, restricting the right to remarry,[26] or imposing a waiting period between an initial and final decree.[27]

This ebb-and-flow meant that not only did the degree of variation among states change, but also that their relative reputations for leniency rose and fell accordingly. This variation in grounds gave rise to the legendary migratory divorce – the practice of traveling from one's home state to a state with more lenient divorce laws to obtain a divorce, and, then, decree in hand, returning home. Migratory divorce dates back to the eighteenth century, when New Yorkers, for example, were known to "seek a refuge from [the state's] inexorable law, and take up a residence in moral Pennsylvania."[28] But migratory divorce as a common and lamented practice did not really emerge until residency requirements began to vary as well.

Indiana, for example, enticed divorce-seekers, perhaps inadvertently, with the combination of an "omnibus" ground, which authorized courts to grant divorce for "any other cause" in addition to the enumerated ones, and a requirement only that

---

[22] *See* JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE (1851).

[23] BLAKE, *supra* note 6, at 82 (quoting JOEL PRENTISS BISHOP, 1 COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE 22 (6th ed. 1881)).

[24] *Id.* at 81.

[25] 3 GEORGE ELLIOTT HOWARD, HISTORY OF MATRIMONIAL INSTITUTIONS 13 (1904), quoted in BLAKE, *supra* note 6, at 60-61.

[26] *Id.* In some states, the right of remarriage was withheld from the at-fault spouse. In New York, for example, a person convicted of adultery could not remarry, while the innocent spouse could "in like manner as if the party convicted was actually dead." *Id.* at 65 (quoting 10 LAWS OF NEW YORK, chap. 69 (March 30, 1787)).

[27] *See generally* ELAINE TYLER MAY, GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA 4 (1980) ("Between 1889 and 1906, as the divorce rate began to accelerate rapidly, state legislatures across the country, most of them in the East, enacted more than one hundred pieces of restrictive marriage and divorce legislation in an effort to stem the tide.").

[28] BLAKE, *supra* note 6, at 117.

the plaintiff be a resident as of the time the petition for divorce was filed.[29] Indiana, however, closed its doors to migratory divorce seekers in 1873, when it adopted a two-year residency requirement and required that residency be proven more reliably than under prior law.[30] Utah, for a time, had the least exacting residency rule, requiring simply that a plaintiff was "a resident of the Territory or wished to become one."[31] Furthermore, its omnibus clause permitted a judge to grant a divorce upon proof "that the parties could not live in peace and union together, and that their welfare demanded a separation."[32] But Utah, too, reversed its course by abolishing the omnibus clause in 1878.[33] Both North and South Dakota enticed out-of-state divorce seekers with a three-month residency requirement, but South Dakota became more common as a divorce destination. Like other jurisdictions, though, its notoriety enraged moralists who successfully demanded reform.[34] Both states lengthened their residency periods considerably by the close of the nineteenth century.[35]

In the end, Nevada became the premier divorce haven and remained so well into the twentieth century. Although Nevada's unusually short residency requirement – at first, six months, but eventually just six weeks – began as a way to provide voting privileges and citizenship to the local mining population,[36] the same standard was carried over to divorce laws, where it served quite a different function. The lenient grounds for divorce and the lack of a remarriage restriction made a state like Nevada *appealing* to an out-of-stater seeking a divorce, but the relatively short residency requirement made it *feasible*. Nelson Blake tells the story, for example, of Eddie Fisher, who sought a divorce from wife Debbie Reynolds in Nevada so that he might marry Elizabeth Taylor.[37] He married Debbie in New York and jointly resided with her in California, but he sought a divorce in Nevada to avoid California's one-year remarriage waiting period.[38] A forty-four night gig at Las Vegas' *Tropicana* as a night-club singer gave Eddie a basis for obtaining a divorce in Nevada, since the state law in 1959 required only a forty-two day residency period as a predicate for filing for divorce.

---

[29] *Id.* at 119.

[30] *See id.* at 121.

[31] *Id.* at 122.

[32] *Id.*

[33] *Id.* at 122-123.

[34] *See id.* at 124.

[35] *Id.* at 127. Blake reports that by 1908 every state but four had imposed a residency requirement of at least one year. *Id.* at 129.

[36] *See id.* at 152.

[37] *See id.* at 1-4.

[38] California added a provision in 1903 specifying that the initial decree would be interlocutory and that a final decree could not issue for an additional year. This was designed to delay remarriage, particularly if there was any question about the validity of the divorce. Other states had added similar waiting periods in the 1860s and 1870s. *See id.* at 61 (noting that waiting periods were "a useful device in discouraging hasty remarriage and uncovering any chicanery that might invalidate the original decree").

The Fisher divorce was emblematic of a problem that had been noted and decried for more than a century already: The difference in state laws meant that Fisher was able to obtain a divorce on terms that his home state said he could not have. This problem fueled two different, yet intersecting debates. The morality of divorce was the subject of many exchanges. There were many who believed strongly that divorce ought to be available, if at all, only in the case of an obvious breach of the marital obligation, like the commission of adultery. Equally powerful were those who demanded the right to marital exit and remarriage. Both sides pushed for changes to the existing laws of divorce based on their normative views about the accessibility of marital dissolution.

At the same time, though, there was a debate about the specific problems engendered by non-uniform divorce laws and the effects of one state's lax laws on other states' stricter ones. Some of the concern was procedural; the idea that one might travel from East to West and possess a different marital status at each border was troubling to the frontier-minded denizens of the late nineteenth century. An 1890 traveling show entitled "A Possible Case," presenting on "the stage [] a picture of complications that might occur in connubial arrangements," captured the practical problems of non-uniformity.[39] The show demonstrated the absurdity of a non-uniform set of laws regulating marriage and divorce that would, the script claimed, leave open the possibility of a "woman being legally the wife of three husbands."[40]

The portability of divorce was a perennial concern, evident even in the nineteenth-century shift from legislative to judicial divorce.[41] But concern about "uniformity" only sometimes reflected concerns about portability. Often, it was a mask for reiterating concerns about morality in another guise: non-uniformity, combined with the growing ease of interstate travel, meant that states with "immoral" divorce laws would effectively trump states with moral ones, as evidenced by Eddie Fisher's story.[42]

---

[39] *See The Passing Show: A Play from the Divorce Laws of the States*, OAKLAND TRIB., Feb. 1, 1890, at 12.

[40] *See id.*

[41] *See* BLAKE, *supra* note 6, at 55. Blake notes the objection raised by New York's Chancellor Kent that a state legislature's dissolution of another state's marriage would truly usurp the marrying state's jurisdiction, and raise serious concerns about whether other states would recognize such a legislative action. *See id.* On the decline of legislative divorce generally in the United States, see RICHARD H. CHUSED, PRIVATE ACTS IN PUBLIC PLACES: A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAW (1994).

[42] Some evidence of morality-as-uniformity is in the series of uniform divorce laws adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL), discussed below. In those laws, NCCUSL adopted a "uniform" set of grounds for divorce, but made clear that it was a ceiling rather than a floor. For example, when considering a 1907 uniform annulment and divorce act, the committee report explained: "This Congress desiring to see the number of causes reduced rather than increased, recommends that no additional causes should be recognized in any state, and in those states where causes are restricted, no change is called for." *Report of the Committee on Marriage and Divorce, in* PROCEEDINGS OF THE SEVENTEENTH ANNUAL CONFERENCE OF COMMISSIONERS ON UNIFORM

As one small California paper editorialized in 1894:

> [O]ur divorce laws are both lax and conflicting. A man may be divorced in one State, yet still be married in another; hence in one State he may marry again, while in another he becomes a bigamist if he does. The unsavory reputation which South Dakota has lately enjoyed is but another reminder of the necessity for uniform divorce laws. . . . We sorely need some legislative or judicial reform which shall prevent the disgrace of [lax divorce legislation], operating to weaken, if not vitiate, the marriage laws of every State in the Union.[43]

The sentiments expressed here were commonplace by the end of the nineteenth century. Concerns about morality dovetailed with concerns about uniformity, and both were used to advocate for uniform, or even federal, standards for divorce.

Concerns about uniformity – driven by both moral and practical concerns – led to several attempts to secure uniform laws of marriage and divorce. High profile cases involving obviously migratory divorces renewed concern about the perils of non-uniformity.[44] The New England Divorce Reform League, created in 1881, and eventually reformulated as the National Divorce Reform League in 1885,[45] was dominated by Christian leaders and was central in bringing about the repeal of broad, omnibus divorce grounds in several states.[46] At the urging of one of its officers, Reverend Samuel W. Dike, it successfully lobbied Congress for a national study of marriage and divorce in 1887, which appropriated $10,000 for the Commissioner of Labor to collect statistics and report them to Congress.[47]

Reformers wanted marriage and divorce statistics for two reasons: to study whether divorce laws affected the divorce rate and to determine what percentage of divorces could be characterized as "migratory."[48] The data showed that divorces were rising almost everywhere, but there was disagreement about whether a particular state's laws made any difference. Economist Walter Willcox analyzed the national data and concluded that there was almost no correlation between changes in divorces laws and the divorce rate.[49] Only states that went from very

---

STATE LAWS 122 (1907) [hereinafter 1907 *Report*]. Thus complete uniformity was not contemplated even by the body whose ostensible task was to create it.

[43] REDWOOD CITY DEMOCRAT, Mar. 29, 1894, at 1.

[44] BLAKE, *supra* note 6, at 133.

[45] *See id.*

[46] *See id.* at 132-33.

[47] *See id.* at 134. *See also* Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 5 ISSUES IN LEGAL SCHOLARSHIP 1 (2004) *at* http://www.bepress.com/ils/iss5/art1; *see also* CARROLL D. WRIGHT, A REPORT ON MARRIAGE AND DIVORCE IN THE UNITED STATES, 1867-86; U.S. CENSUS BUREAU, A SPECIAL REPORT ON MARRIAGE AND DIVORCE, 1867-1906.

[48] BLAKE, *supra* note 6, at 135.

[49] *See* WALTER F. WILLCOX, THE DIVORCE PROBLEM 66-67 (1897); *see also* ALFRED CAHEN, STATISTICAL ANALYSIS OF AMERICAN DIVORCE (1932) (finding "little perceptible

broad to very narrow laws experienced any reduction in the divorce rate, and even then, the improvement was only short-term.

On the issue of migratory divorce, the numbers were even less compelling. Commissioner of Labor Carroll Wright's indirect measure of the practice was the number of couples who divorced in a different state from where they had married. Though twenty percent of divorces fit this profile, the increasing mobility and movement of the population as a whole meant that many of these resulted from honest relocations rather than short-term moves undertaken for the sole purpose of securing a divorce.[50] Others estimated that fewer than ten percent of divorces were truly migratory in character.[51]

Though the data on migratory divorce were not persuasive, efforts to create uniformity persisted. Uniformity was periodically pursued via constitutional amendment. Several legislators introduced constitutional amendments that would have given Congress the power to regulate marriage and divorce at the national level.[52] But the push for uniformity through federal action never succeeded.[53]

A federal law of divorce would have produced true uniformity, and yet it was unappealing to states at both ends of the spectrum. Lenient states did not want to be held to a higher standard than they had set for themselves; strict states worried that Congress would pick a more lenient standard than they had chosen.[54] And uniformity through federal action was a somewhat ironic call given the constant reaffirmation—still powerful today—of state power to control family law.[55] Even moralists found tension between strict divorce laws, on the one hand, and a commitment to state control over domestic relations on the other.[56]

The alternative to a federal mandate was to seek uniformity through state cooperation, and that, in the end, was the path more ambitiously pursued. The threat of federal intervention was in part what animated these efforts.[57] Uniformity

---

correlation between statute enactments and the increase of divorces"); JAMES P. LICHTENBERGER, DIVORCE: A STUDY IN SOCIAL CAUSATION 144 (1909); THEODORE WOOLSEY, DIVORCE AND DIVORCE LEGISLATION IN THE UNITED STATES (1882) (concluding that the divorce rate was not significantly affected by the type or number of grounds available, with the possible exception of general omnibus clauses); Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 ILL. L. REV. 719, 724-27 and 725 n.18 (analyzing the weak correlation between strictness of divorce law and the rate of divorce and listing relevant authorities).

[50] *See* BLAKE, *supra* note 6, at 135-36.

[51] *See id.* at 136.

[52] *See* Stein, *supra* note 47.

[53] *See* BLAKE, *supra* note 6.

[54] *See* O'NEILL, *supra* note 7, at 246-47; *see also* LYNNE CAROL HALEM, DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES 40 (1980).

[55] *See* Jill Elaine Hasday, *The Canons of Family Law*, 57 STAN. L. REV. 825 (2004); Stein, *supra* note 47, at 25-26.

[56] *See* Stein, *supra* note 47, at 25-26.

[57] *See* CHAIRMAN HOLLIS R. BAILEY, *Report of the Committee on Marriage and Divorce, in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE THIRTY-EIGHTH ANNUAL MEETING 318 (1928) [hereinafter 1928

was sought by the propounding of uniform state laws of divorce, none of which was particularly successful. The first such law, adopted in 1900 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), purported to deal only with "divorce procedure."[58] Its primary purpose was to eliminate the "scandal of migratory divorces," which it tried to accomplish by prohibiting divorce unless the cause alleged arose in a jurisdiction that recognized that particular cause as a ground for divorce.[59] So, for example, a New York wife whose husband showed her "extreme cruelty" in New York could not seek a divorce in California even though it was a recognized ground for divorce there.

Other provisions of this uniform act included a one-year residency requirement before filing suit for divorce and stricter requirements for service on process on the defendant. It also specified that either party to a divorce could remarry, since a ban "restrains marriage, encourages adultery, leaves the party in a position to contract void marriages and takes away a natural incentive to reformation."[60] Although one had earlier been proposed, the Commissioners did not offer a uniform substantive law because "of the great divergence of opinion in regard to the nature of the marriage contract and what are just causes of divorce."[61] The 1900 Act was superseded by two uniform acts promulgated in 1901 that together covered roughly the same terrain.[62]

Report] ("The time for some effective action has now arrived. Federal legislation is being asked for. If the states fail to act the effort to obtain action by the United States may prove successful."). The desire to avoid national regulation is behind many uniform law movements. *See* Nim Razook, *Uniform Private Laws, National Conference of Commissioners for Uniform State Laws Signaling and Federal Preemption*, 28 AM. BUS. L.J. 41, 46 (2000). On the history of uniform laws relating to divorce, see GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 108-29 (1991); James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096 (1991) (examining the promulgation and lack of success of early uniform laws of divorce).

[58] *See* STATE BOARDS OF COMMISSIONERS FOR PROMOTING UNIFORMITY OF LEGISLATION IN THE UNITED STATES, *An Act to Establish a Law Uniform with the Laws of Other States Relative to Divorce Procedure and Divorce from the Bonds of Marriage, in* REPORT OF TENTH NATIONAL CONFERENCE 44-45 (1900).

[59] *Id.* at 45.

[60] *See id.* at 44. Part of the concern about migratory divorce was the potential for secret divorces—those in which the defendant never knew a case was even pending. Thus many of the reforms toward the end of the nineteenth century involved stiffening service requirements or adding remarriage waiting periods, to maximize the possibility that defendants would have the opportunity to contest the suit for divorce—or appeal one improperly granted before either party had remarried.

[61] *Id.* at 46.

[62] *See* STATE BOARDS OF COMMISSIONERS FOR PROMOTING UNIFORMITY OF LEGISLATION IN THE UNITED STATES, REPORT OF ELEVENTH NATIONAL CONFERENCE 27 (1901) (recommending adoption of *An Act to Establish a Law Uniform with the Laws of Other States Relative to Migratory Divorce* and *An Act to Establish a Law Uniform with the Laws of Other States Relative to Divorce Procedure and Divorce from the Bonds of Marriage*).

The first substantive uniform divorce law followed six years later. A 1907 uniform law, recognizing adultery, bigamy, extreme cruelty, habitual drunkenness, felony conviction, and desertion as grounds for divorce, was approved by the Commissioners, but adopted by only three states.[63] The Commissioners considered, but did not adopt, a similar, but more streamlined law in 1928.[64]

As the twentieth century progressed, uniform laws focused exclusively on questions of divorce jurisdiction and out-of-state recognition rather than grounds for divorce. It had become obvious that although there had been a certain amount of regression toward the mean in the last quarter of the nineteenth century, states were not willing, by and large, to agree on a uniform set of grounds for divorce. Persistent non-uniformity of grounds made it important to find ways for states to peaceably coexist, without triggering the race-to-the-bottom the more conservative states feared. The 1928 proposed uniform act again took the issue of migratory divorce head on, declaring any such divorce invalid outside of the state in which it was granted. It also prescribed the requirements of jurisdiction necessary for a decree to be recognized in other states.[65]

These issues were revisited two years later in an act that dealt only with the questions of jurisdiction and interstate recognition. The 1930 Uniform Divorce Jurisdiction Act (UDJA) laid out rules of jurisdiction, residency, and full faith and credit, designed to maximize the ability of each state to enforce its own standards against its own domiciliaries. It stated that no court would exercise divorce jurisdiction unless both parties were domiciled in the state in which the court was located or, if only one party was, then the domicile must have continued for one uninterrupted year prior to filing for divorce.[66] Divorces granted according to these rules of jurisdiction were to be honored in every other state.[67]

With the UDJA, the Commissioners consciously sought to expand the interstate recognition of divorces beyond that required by principles of Full Faith and Credit, while still preserving some measure of state autonomy. In its 1906 opinion in *Haddock v. Haddock*, the Supreme Court had held, under the Full Faith and Credit Clause in Article IV of the Constitution, that a state *could* refuse recognition to a decree of separation and alimony if it was granted in a state in which only the complainant was domiciled and the defendant did not receive personal service or

---

[63] *See An Act to Make Uniform the Law Regulating Annulment of Marriage and Divorce*, 1907 *Report*, *supra* note 42, at 124-30; 1928 *Report*, *supra* note 57, at 316 (noting adoptions of 1907 uniform law); *see also* BLAKE, *supra* note 6, at 145. The same fate befell many uniform acts that were hard-fought by the Commissioners but ultimately adopted narrowly, if at all. *See* BLAKE, *supra* note 6, at 140-45 (giving examples of uniform acts that were hard-fought within the Commission, but largely ignored by the states).

[64] *See* 1928 *Report*, *supra* note 57, at 318-21.

[65] *See id.* at 320-21.

[66] *See Uniform Divorce Jurisdiction Act*, *in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTIETH ANNUAL CONFERENCE at 502 (1930).

[67] *Id.*

make an appearance.[68] The UDJA went beyond this minimum, stating that states should also recognize divorces where only the complainant was domiciled in the granting state as long as the one-year residency requirement was met, regardless of whether the defendant was served personally or by publication.[69] The Commissioners combined principles of comity with the requirements of Full Faith and Credit to develop this rule.

As states began to live in a non-uniform system, efforts to refuse recognition to migratory divorces were not uncommon. The UDJA was adopted by only one state, and states like Nevada continued to grant divorces where one party had met the six-week domiciliary requirement and the other party was served by publication. *Haddock* had emboldened courts to refuse recognition of some of those divorces, a practice eventually halted by the Supreme Court's decision in *Williams v. North Carolina*[70] in 1942.

Lillie Hendrix and Otis Williams were convicted of bigamy under North Carolina's criminal code and sentenced to prison. Though both were married to someone else in North Carolina, Hendrix and Williams went together to Las Vegas. After living in Las Vegas for the requisite six weeks under the divorce law, they filed and obtained divorces from their respective spouses. Williams' wife received personal service of the complaint, but Hendrix's husband was served only by publication.[71] With their prior marriages dissolved by a Nevada court, the petitioners stayed there long enough to marry each other before returning home and being arrested for bigamy.[72]

Before the Supreme Court was the issue whether North Carolina was obligated to give effect to Nevada's divorce decrees; if so, Hendrix and Williams were not bigamists and could not be convicted as such. North Carolina contended that the decrees were not valid under *Haddock*, since neither defendant in the divorce proceedings entered a personal appearance in the presiding Nevada court.[73]

The Court in *Williams* overruled *Haddock*, holding instead that North Carolina must indeed respect a Nevada divorce as long as Nevada's standards for residency were met.[74] The majority noted its reluctance to admit any exceptions to giving full faith and credit to judgments rendered by courts of a sister state, given that the "very purpose" of Article IV was "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation."[75] *Haddock* did not fit with that general interpretation of the clause

---

[68] 201 U.S. 562 (1906). In that case, the husband left the couple's New York domicil, obtained a divorce in Connecticut, and then held it up as a defense to the wife's New York suit for separation. *See id.* at 605-06.

[69] *See Uniform Divorce Jurisdiction Act*, *supra* note 66, at 501 (Prefatory Note).

[70] 317 U.S. 287 (1942) (*Williams I*).

[71] *See id.* at 289-90.

[72] *See id.*

[73] *See id.* at 290-91.

[74] 317 U.S. at 299.

[75] *Id.* at 296 (quoting Milwaukee County v. White Co., 296 U.S. 268, 276-77 (1935)).

and was thus overruled. The *Williams* court also declined to look beyond the facial validity of the divorce decrees.

The concerns about uniformity and morality that had pervaded the public debate were both evident in the *Williams* opinion, as was the significance of the controversy over divorce laws as a contemporary social issue. The majority warned of the confusion that would result from a refusal to recognize the Nevada decrees:

> We would then have what the Supreme Court of Illinois declared to be the 'most perplexing and distressing complications in the domestic relations of many citizens in the different states.' Under the circumstances of this case, a man would have two wives, a wife two husbands. The reality of a sentence of prison proves that this is no mere play on words. Each would be a bigamist for living in one state with the only one with whom the other state would permit him lawfully to live. Children of the second marriage would be bastards in one state but legitimate in the other.[76]

While the Court was cognizant of the potential for one state's lax rules to dilute another's strict ones, it nonetheless refused to foster a rule "which could not help but bring 'considerable disaster to innocent persons' and 'bastardize children hitherto supposed to be the offspring of lawful marriage' or else encourage collusive divorces."[77] The potential for dilution, the Court concluded, was simply "part of the price of our federal system."[78]

The *Williams* case came back to the Supreme Court three years later, and, in a second opinion, *Williams II*, the Supreme Court held that North Carolina could make its own determination as to whether Nevada's jurisdictional requirements had actually been met.[79] North Carolina was thus free, ultimately, to ignore the out-of-state divorce decrees. Although this second ruling rendered the protection for out-of-state decrees less than absolute, it left intact the core principle established in *Williams I* that states must, in general, respect the divorce decrees granted by sister states as long as the granting state's jurisdictional and due process requirements were met.[80]

---

[76] *Id.* at 299-300.

[77] *Id.* at 302.

[78] *Id.*

[79] *See* 325 U.S. 226 (1945).

[80] *Williams I* put an end to most questions about interstate recognition. *See generally* Lynn D. Wardle, Williams v. North Carolina, *Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187 (1998) (discussing opinions in *Williams I* and *Williams II*). The Uniform Divorce Jurisdiction Act had been withdrawn as obsolete in 1943. *See* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS 103RD YEAR at 1347 tbl. 4 (1994) [hereinafter 1994 *Proceedings*].

The 1947 Uniform Divorce Recognition Act reflected the approach in the two *Williams* opinions.[81] It provided that if both parties were domiciled in one state, a divorce granted in any other state would have no force or effect.[82] It also provided that proof of residence in one state before and after obtaining a divorce in another state constituted "prima facie evidence" that the person was not domiciled in the granting state. Unlike the 1930 UDJA, this Act purported to grant interstate recognition only where absolutely required by Full Faith and Credit, although the Supreme Court in the interim had in effect raised the constitutional minimum standard. The Act's prefatory note highlights the persistence of concerns about non-uniformity and the continuing problem of migratory divorce:

> This act takes its inception from the public dissatisfaction which has arisen over the practice of "migratory divorce," whereby residents of one state journey to another to take advantage of laxer or more speedy divorce procedures than those afforded by the state of their domicil. Public opinion increasingly recognizes the ills which spring from this situation. . . . Respect for local law is destroyed. The effectiveness of state policy is broken down. The autonomy in local affairs which is the object of federalism is subverted. . . . Unless some way is found for states to make their laws effective, we may be sure that the demand for national action will result in Federal intervention.[83]

The end of the story for migratory divorce was not the federal intervention that had been dangled over the states for nearly a century. It was a social movement that perhaps unexpectedly produced virtually uniform laws of divorce: the no-fault revolution. The revolution did not come about because of the desire for uniformity; uniformity, rather, was an unintended byproduct of a percolating demand for easier, less costly, and more honest divorce.[84] With every state's adoption of at least one no-fault ground for divorce,[85] the out-of-state "quickie" divorce lost its allure. The NCCUSL, accordingly, withdrew support for the Uniform Divorce Recognition Act in 1978.[86]

II. NON-UNIFORMITY AND EVASIVE MARRIAGE

"Evasive marriage," a term resurrected by Governor Romney's commitment to prohibiting it, is the understudied historical counterpart to "migratory divorce." Debates about state marriage laws, and the dissonance among them, followed a similar track to those about divorce laws. However, the concerns about uniformity began much later and, at least in some respects, have yet to be resolved.

---

[81] *See* UNIF. DIVORCE RECOGNITION ACT § 1, 9 U.L.A. (1947).

[82] *See id.*

[83] *See id.* (Prefatory Note).

[84] *See generally* HALEM, *supra* note 54; HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES (1988); RILEY, *supra* note 57.

[85] *See supra* note 9.

[86] *See* 1994 *Proceedings*, *supra* note 80, at 1350 tbl. 4.

While states generally had marriage laws less dissonant from one another than divorce laws,[87] they divided at times in history over particular marriage impediments: interracial marriage, marriages of the mentally disabled, marriages between those related by blood or affinity, and common-law marriage. Compared with these historical debates about the appropriate restrictions on marriage, the contemporary gay marriage debate appears more hard-fought than any that preceded it.[88]

All states maintained statutory marriage impediments relating to physical and mental capacity, or marital circumstance. States agreed that polygamous marriages were not permitted,[89] and all had restrictions based in consanguinity. Virtually all states prohibited the insane from marrying, such marriages being either void or voidable depending on the jurisdiction.[90] "Imbeciles" were likewise forbidden to marry.[91] About a third of the states forbade epileptics from marrying, though some only if the epileptic was of childbearing age, and some barred marriage for individuals with venereal disease or tuberculosis.[92] However, these restrictions had no widespread impact on out-of-state marrying practices.

The marriage impediments that sometimes induced evasive marriages dealt primarily with age, race, degree of relationship, and restrictions on remarriage following divorce. All states prohibited marriage below a certain age and permitted it only with parental consent for a few years beyond the minimum,[93] but there was substantial variation among states in the specified ages.[94] Every state, except twelve and the District of Columbia, had a statutory ban on interracial marriages at some point in its history.[95] As late as 1946, two-thirds of the states retained one.[96] Moreover, while states agreed that marriages among close relatives were improper,

---

[87] On the general history of marriage, see NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000) and HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY (2000).

[88] *See* Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 933 (1998) (noting that same-sex marriage is "unique today in the degree of moral passion it arouses"). The "debate" dates back at least to the 1970s, when the first cases were brought (unsuccessfully) to challenge state bans on same-sex marriage. *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973).

[89] *See* MORRILL ACT, ch. 125, 12 Stat. 501 (1862) (making polygamy a federal crime); *see also* Reynolds v. United States, 98 U.S. 145 (1878) (upholding bigamy conviction).

[90] *See* FRIEDMAN, PRIVATE LIVES, *supra* note 7, at 53.

[91] *See* JOHN W. MORLAND, KEEZER ON THE LAW OF MARRIAGE AND DIVORCE 198 (3d ed. 1946); *see also* FRIEDMAN, PRIVATE LIVES, *supra* note 7, at 51-53 (describing common restrictions on marriage and noting the origin of some in the principles of eugenics).

[92] *See* MORLAND, *supra* note 91, at 200-01.

[93] In almost every state, the age requirements differed for males and females; females could generally marry two to three years earlier younger than their male counterparts. *See, e.g., id.*, at 210-12 (compiling chart of state statutes on marriage rules respecting age).

[94] Kansas, for example, permitted a 12-year-old female to marry with parental consent, while Arizona would not permit her to marry until age 16. *See id.* at 210-11.

[95] *See* Stein, *supra* note 47, at 15 (cataloguing state anti-miscegenation laws).

[96] *See* MORLAND, *supra* note 91, at 214-15.

the definition of an incestuous marriage varied by state, particularly as to the treatment of marriages between first cousins. In addition, almost half the states prohibited some marriages based on affinity, while the remaining states had no such restrictions.[97] As discussed in the previous section, states also differed on imposing remarriage restrictions, either a waiting period or a complete bar, on either or both parties to a divorce.[98] These variations, unlike others, did fuel evasive marriage practices and concomitant legal wrangling over the validity of the resulting unions.[99]

Despite these state law variations, states did not converge around a uniform act specifying marriage impediments. A Committee Report issued in conjunction with the 1907 Act to Regulate the Law of Annulment of Marriage and Divorce noted that it had done some work "prepatory to a consideration of the marriage laws of the various states and territories," but deemed "it wiser to postpone any report looking towards a uniform law on this subject" until a uniform divorce law had been adopted.[100] Four years later, the Commissioners enacted the Uniform Marriage and Marriage License Act in 1911, which primarily regulated marriage procedure. As part of its marriage license requirement, the Act urged abolition of common law marriage. It included a provision for requiring parental consent for parties below a certain age, but, given the significant differences among states in marrying age, it left the appropriate age to be filled in by adopting states.[101] Later uniform laws put forth by the NCCUSL dealt with aspects of marriage, but none broached the core question of whom should be able to marry.[102] During the same time period, there were several attempts to amend the Constitution, either to give Congress authority to regulate marriage and divorce,[103] or to ban polygamy or interracial marriage outright,[104] but none was successful.

---

[97] *See id.* at 219.

[98] *See supra* text accompanying notes 38 & 60.

[99] *See, e.g.,* Pennegar v. State, 10 S.W. 305 (Tenn. 1888) (considering whether to recognize an evasive marriage, contracted elsewhere to avoid Tennessee's restrictions on the right of an adulterer to remarry); E.H. Schopler, *Conflict of Laws as to Validity of Marriage Attacked Because of Nonage*, 71 A.L.R.2d 687 (1960) (cataloguing cases decided over the course of several decades about whether states should recognize marriages that were validly celebrated in one state but would not have been in the forum state because of "nonage"); P.H. Vartanian, *Recognition of Foreign Marriage as Affected by Local Miscegenation Law*, 3 A.L.R. 2d 240, 242 (1949) (analyzing marriage recognition cases involving miscegenation bans).

[100] *See* 1907 *Report*, *supra* note 42, at 122.

[101] *See* UNIF. MARRIAGE AND MARRIAGE LICENSE ACT § 5, 9 U.L.A. 256 (1911). The Commissioners' notes to the age provision report that, at the time, thirty states had adopted a marrying age higher than the common law ones of fourteen for boys and twelve for girls. *See id.* at 257.

[102] *See, e.g.,* AN ACT PROVIDING FOR RETURN OF MARRIAGE STATISTICS (1907); MARRIAGE LICENSE APPLICATION ACT (1950); UNIF. MARITAL PROPERTY ACT (1983); UNIF. PREMARITAL AGREEMENT ACT (1983).

[103] *See supra* text accompanying note 52.

[104] *See* Stein, *supra* note 47, at 15-21.

The non-uniformity among state laws with respect to marriage impediments was, instead, addressed indirectly. As with divorce, where agreement could not be reached on the actual grounds for divorce, uniform marriage acts were designed to mimic some of the benefits of uniformity without fully achieving it. The "uniformity" sought was in fact a uniform rule of *marriage recognition*, rather than a uniform rule of *marriage* per se, and its purpose was to limit the impact of one state's marriage laws on any other state.

In 1912, the Commissioners adopted the Uniform Marriage Evasion Act (UMEA),[105] which took head-on the ability of parties to avoid their home state's marriage restrictions by marrying elsewhere and then returning immediately home. Similar to rules regulating interstate recognition of divorce decrees, the UMEA was calculated to protect strict states from being undermined by laxer ones. It did this with four intersecting provisions designed to limit "evasive" marriages. First, it provided that a marriage contracted outside of a person's home state, which would not have been permissible within his home state, would be given no effect in that state.[106] Second, in a so-called "reverse" marriage evasion provision, the Act stated that out-of-state residents were not permitted to marry in a state unless their home state permitted them to marry as well.[107] Third, the Act required state officers to obtain proof that an out-of-state couple seeking a marriage license would not be prohibited from marrying in their home state.[108] Finally, the Act made it a misdemeanor to issue a license for or celebrate a marriage in violation of the evasion rules.[109]

Like the various acts designed to regulate migratory divorce, the UMEA was calculated to avoid some of the pitfalls of non-uniformity without forcing the states to agree on a standard list of impediments to marriage. It created exceptions to the "place of celebration" rule, which otherwise dictated that states would generally recognize marriages as long as they were valid where celebrated.[110] Although most states followed some form of this general rule, polygamous and incestuous marriages were both considered "universal" exceptions to the rule of recognition and were thus not deserving of out-of-state recognition even without an enacted law barring marriage evasion.[111] If adopted widely and followed, the UMEA would have had the effect of allowing each state to enforce its own marriage laws

---

[105] *See* UNIF. MARRIAGE EVASION ACT, 9 U.L.A. 225 (1923).

[106] *See id.* at § 1.

[107] *See id.* at § 2.

[108] *See id.* at § 3.

[109] *See id.* at § 4.

[110] *See id.* (Case Notes).

[111] *See, e.g.*, Medway v. Needham, 16 Mass. 157, 161 (1819) (drawing a distinction between marriage impediments that would cause universal outrage and those that were a function of "political expediency"); Pennegar v. State, 10 S.W.2d 305 (Tenn. 1888) (noting that polygamous and incestuous marriages were never granted out-of-state recognition, regardless of their validity where celebrated); MORLAND, *supra* note 91, at 20-21 (noting universal exceptions to rule of recognition).

against its own domiciliaries. But, like most of the uniform acts purporting to regulate marriage or divorce, it was adopted in only a handful of states.[112]

Even without widespread adoption of this particular act, though, the principle underlying the UMEA made its way into the common law more broadly. Treatises, for example, included evasive marriage in the list of exceptions to the place of celebration rule.[113] The catalyst for the UMEA in particular and anti-evasion principles more generally was the same: to minimize the effects of the underlying variation in state laws respecting the capacity to marry.

Despite the failure of states to adopt uniform anti-evasion laws, the practice of marriage evasion was never truly epidemic. The collective debate about its evils was never as pervasive or piqued as the parallel debate about migratory divorce. To be sure, the occasional lovestruck teenagers snuck across state lines to marry in violation of their home state's laws,[114] and many interracial couples did the same until the Supreme Court held anti-miscegenation laws unconstitutional in *Loving v. Virginia* in 1967.[115] Before *Loving*, the willingness of states to recognize out-of-state interracial marriages, when their own laws forbade them, was repeatedly tested. Consensus grew around two general principles. States generally denied recognition of a truly evasive interracial marriage,[116] but granted recognition when the couple was originally domiciled in the state in which the marriage was celebrated, even though in both cases recognition would be inconsistent with the state's own laws.[117]

After *Loving*, impediments to marriage varied little from one state to the next. Even though states continued to differ in their treatment of cousin marriages and some affinitous marriages, race restrictions disappeared by mandate, age

---

[112] Five states adopted the UMEA during the first decade after it was put forth. Other states subsequently adopted statutes dealing with evasive marriages, either broadly, like the UMEA, or more narrowly with respect to particular impediments. *See generally* Koppelman, *supra* note 88, at 923 n.2.

[113] *See, e.g.*, MORLAND, *supra* note 91, at 20-21.

[114] *See, e.g.*, Payne v. Payne, 214 P.2d 495 (Colo. 1950) (considering whether a Texas marriage between two Colorado teenagers could be recognized in Colorado even though state law prohibited the marriage).

[115] 388 U.S. 1 (1967).

[116] *See* Vartanian, *supra* note 99, at 242 ("[B]y the great weight of authority an intermarriage between races prohibited by the law of the domicil of the parties at the time of its celebration in another state in which it was valid, in evasion of the law of their domicil, the parties intending to return and having returned to their original domicil, will not be recognized there, but will be treated as void the same as if it were contracted in the state."); *see also* Koppelman, *supra* note 88, at 952-54 (referring to general treatment of evasive marriages).

[117] *See* Vartanian, *supra* note 99, at 240 ("the great weight of authority is that although the law of the forum prohibits a marriage between members of different races, a marriage of such persons in another state where the law permits intermarriage of races, entered into by parties who were not at the time domiciled at the forum, will be recognized as valid there notwithstanding its statute"); *see also* Koppelman, *supra* note 88, at 954-62 (describing the general approach to recognition of non-evasive, but otherwise prohibited, marriages).

restrictions regressed toward a mean,[118] and impediments derived from principles of eugenics were by and large removed from statutes. Virtual uniformity was thus achieved almost unwittingly for marriage law,[119] as it had been for divorce law through the widespread adoption of no-fault statutes in the 1960s and 1970s.

III. NON-UNIFORMITY AND SAME-SEX MARRIAGE: A MODERN CONUNDRUM

Goodridge really did change everything. For the first time in our history, a single state's marriage laws are significantly different than every other's, and the difference is exacerbated by the pent-up demand for same-sex marriage nationwide. The legal change immediately gave rise to thousands of same-sex marriages that, until last May, were not legally possible anywhere.

The non-uniformity, and long-awaited anticipation of it, has spurred almost the full range of responses we saw over the course of a century in the divorce context: attempts to federalize aspects of domestic relations law through Congressional legislation; attempts to create uniformity through proposed constitutional amendments; attempts to limit the effect of one state's laws by curtailing out-of-state recognition; and, of course, widespread litigation. In all these machinations, we again see the complicated interrelationship between concerns about uniformity and morality, as well as the ongoing tension between federalism and moral values.

Federal intervention has been urged in response to *Goodridge*, but in fact it preceded the decision by seven years. The 1996 Defense of Marriage Act (DOMA) was enacted to protect states from forced recognition of same-sex marriages validly celebrated in another state.[120] It was pushed through Congress in the anticipation that Hawaii was imminently to become the first state in the nation to recognize same-sex marriage. The state's Supreme Court ruled in *Baehr v. Lewin* that a ban on same-sex marriage was a form of sex discrimination and should thus be evaluated using strict scrutiny – the level typically, and often fatally, applied under the state's Constitution for classifications based on sex.[121] While *Baehr* proceeded to trial on remand, Congress enacted DOMA, which defined marriage, for federal purposes, as a union between a man and a woman.[122] It also amended the Full Faith and Credit Act to exempt states explicitly from any requirement that they recognize out-of-state same-sex marriages.[123]

DOMA purported to reinforce the tradition of state control over domestic relations by giving states the right to refuse recognition to same-sex marriages

---

[118] *See* Guide to Legal Impediments to Marriage for 57 Registration Jurisdictions (July 30, 2004), http://www.mass.gov/dph/bhsre/rvr/impediments1%20.pdf (indicating that every state but six allows both men and women to marry without parental consent at the age of eighteen).

[119] *See* Stein, *supra* note 47, at 47 (noting that "with respect to many issues related to marriage, there has been a convergence among the states").

[120] *See* Defense of Marriage Act of 1996, Pub. L. No. 104-199, 119 Stat. 2419.

[121] 852 P.2d 44, 66 (Haw. 1993).

[122] *See* Defense of Marriage Act § 3(a) (codified at 1 U.S.C. § 7 (2004)).

[123] *See* Defense of Marriage Act §2(a) (codified at 28 U.S.C. § 1738C (2004)).

celebrated in other states – while, at the same time, leaving open the theoretical possibility that some might permit them within their own borders. Even DOMA's most ardent supporters claimed that if same-sex marriage could be limited to Hawaii, there would be no need for federal intervention. Senator Trent Lott, for example, claimed indifference to any state's permitting same-sex marriages, but objected that all states might be forced to recognize such marriages. His stated fear was that a single state's recognition would make same-sex marriage the rule across the country – taking away different states' prerogative to enforce their own rules about whom they would allow to marry. Lott commented, for example, that if

> such a decision affected only Hawaii, *we could leave it to the residents of Hawaii to either live with the consequences or exercise their political rights to change things*. But a court decision would not be limited to just one State. It would raise threatening possibilities in other States because of [the Full Faith and Credit Clause].[124]

Other opponents in Congress made similar arguments. Some expressly praised DOMA *because* it would reserve the right of each state to reach its own decision about the legal status of same-sex unions.[125] DOMA was thus lauded for reinforcing states' rights,[126] as against both the federal government and one another.[127] During his first run for President, George W. Bush purported to draw the same line. During a presidential debate in February, 2000, Bush said he would certainly campaign against gay marriage if his home state of Texas's legislature considered it, but insisted he would not tell another state what to do: "The state can do what they want to do."[128]

Hawaii never recognized same-sex marriage. Indeed, before the lower court could rule on whether the same-sex marriage ban violated the state's Constitution, it was amended by a referendum giving its legislature the authority to limit marriage to heterosexual couples. The Hawaii legislature exercised that power

---

[124] *See* 142 CONG. REC. S10101 (1996) (Statement of Sen. Lott) (emphasis added).

[125] *See id.*

[126] Professor Lynn Wardle, testifying before the House of Representatives, said he would actually call the bill "the Protection of Federalism in Family Law Act." *See Defense of Marriage Act: Hearing on H.R. 3396*, May 15, 1996.

[127] *See, e.g.*, 142 CONG. REC. S.10104 (1996) (Statement of Sen. Nickles) ("This bill does not ban same-sex marriages. It says one State doesn't have to recognize another State should they legalize same-sex marriages. Big difference; a big difference. If one State wishes to legalize same-sex marriages . . . they can certainly do so, and this legislation would not prohibit it.")

[128] Interview by Larry King with George W. Bush, Texas Governor, Columbia S.C. (Feb. 15, 2000), *transcript available at* http://transcripts.cnn.com/TRANSCRIPTS/0002/15/lkl.00.html.

soon thereafter.[129] Thus, DOMA lay dormant for eight years until Massachusetts' *Goodridge* decision again rendered it relevant.

For all opposed to same-sex marriage, *Goodridge* served as a renewed call to action. Familiar themes about the perils of non-uniformity and the imminent threat to the institution of marriage were invoked as different responses materialized. The responses read like a rewrite of the history of marriage and divorce – only this time the reactions and counter-reactions took place over the course of eight months instead of a century.

Spurred mostly by *Goodridge*, President Bush renewed calls for a federal marriage amendment because, in his view, same-sex marriages threaten "the most fundamental institution of civilization."[130] The Senate abided his call, introducing and debating the Federal Marriage Amendment (FMA), which provided that

> [m]arriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.[131]

In contrast to the Congressional debate about DOMA that took place eight years earlier, the Senate's debate over the FMA evidenced almost a complete retrenchment from the rhetoric about states' rights. The focus, instead, was on the possibility – described as a virtual inevitability – that DOMA would be invalidated.[132] If that were to happen, there would be nothing, Republican Senators cautioned, to protect states against being forced to recognize Massachusetts same-sex marriages under the Constitutional principle of Full Faith and Credit.[133]

---

[129] *See generally* Koppelman, *supra* note 88, at 930-31 (summarizing legal developments in Hawaii on the issue of same-sex marriage).

[130] President George W. Bush, *President's Radio Address* (July 10, 2004), *audio and transcript available at* http://www.whitehouse.gov/news/releases/2004/07/20040710.html; *see also* Mae Kuykendall, *The President, Gay Marriage, and the Constitution: A Tangled Web*, 13 WIDENER L.J. 799 (2004) (discussing inconsistencies in President Bush's rationale for urging adoption of a constitutional amendment to ban same-sex marriage).

[131] Federal Marriage Amendment, S.J. Res. 40, 108th Cong. (2004) (introduced by Sen. Allard).

[132] *See* 150 CONG. REC. S7925 (daily ed. July 12, 2004) (statement of Sen. Brownback) ("Federal judges will likely rule DOMA unconstitutional under the doctrine of full faith and credit, and marriages recognized in one State will be required to be recognized in all"); 150 CONG. REC. S7925 (statement of Sen. Santorum); *see also* Koppelman, *supra* note 88.

[133] Of course, many have argued that Article IV does not dictate this result. *See generally* Koppelman, *supra* note 88, at 971-74 (arguing that Full Faith and Credit does not mandate recognition of out-of-state marriages in all circumstances); *see also* F.H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 603-06 (arguing that the Constitution does not restrain the right of a state to refuse enforcement to a marriage celebrated elsewhere); Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799 (1999) (discussing rights of states to refuse recognition to same-sex marriages).

The fear of DOMA's invalidation was not, however, the only driving force behind the FMA. There was a subtle, but palpable shift in the rhetoric of opponents, who were no longer willing to accept the right of any individual state to recognize same-sex marriage – even if other states might somehow be protected from recognizing it themselves. President Bush himself has clearly retreated from the notion that an individual state should have the right to define marriage any way it wants. He now speaks about the importance of traditional marriage as "the most fundamental institution of civilization,"[134] and limits states' discretion to making "their own choices in defining legal arrangements *other than marriage*."[135] Republican senators defended heterosexual marriage on the merits this time, having abandoned the idea that each state should be left to choose its own path. "Traditional marriage," Senator Rick Santorum argued on the Senate floor, "is good for everyone."[136] Other senators pointed to Scandinavia to illustrate that recognition of same-sex households leads to family dissolution, out-of-wedlock childbirth, and a general decline in the institution of marriage.[137] One Senator pointed to Europe where, he claimed, the recognition in some countries of same-sex unions has led to the systematic decline in the number of heterosexual couples who marry, and a resulting decline in the institution of marriage itself.[138] The FMA, however, failed to muster sufficient votes in the Senate to overcome a procedural hurdle necessary to bring it to the floor for a vote.[139] Republican leaders have avowed to continue efforts to pass such a constitutional amendment,[140] but for now it is dead.

Without an amendment to the Constitution to fall back on, House Republicans introduced the Marriage Protection Act (MPA) just two weeks after the FMA failed. The Act, which would strip all federal courts of jurisdiction to hear any case relating to DOMA or the MPA itself,[141] passed the House by a vote of 233-194.[142] The MPA is important because, without it, federal courts might well invalidate DOMA. The first lawsuit unsuccessfully challenging DOMA was filed in federal

---

[134] Press Release, Office of the Press Secretary, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html.

[135] *Id.* (emphasis added).

[136] 150 CONG. REC. S7906 (daily ed. July 12, 2004) (statement of Sen. Santorum).

[137] *See* 150 CONG. REC. S7921 (daily ed. July 12, 2004) (statement of Sen. Cornyn); 150 CONG. REC. S7927 (statement of Sen. Brownback).

[138] *See* 150 CONG. REC. S7927 (statement of Sen. Brownback).

[139] *See* 150 CONG. REC. S8150 (daily ed. July 15, 2004) (Senate voted 50-48 against bringing the proposed amendment to a vote).

[140] *See* Carl Hulse, *Republicans Still Hope to Score Points on Gay Marriage*, N.Y. TIMES, July 16, 2004, at A1.

[141] The MPA specifically provides: "No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or determine any question pertaining to the interpretation of section 1738c of this title or of this section." *See* Marriage Protection Act of 2004, H.R. 3313, 108th Cong. § 1632 (2004).

[142] H.R. 3313, 108th Cong., 150 CONG. REC. H6580 (2004).

court in July 2004[143] by two women seeking federal and out-of-state recognition of their recently celebrated Massachusetts marriage.[144] Other suits will follow, and DOMA could conceivably fall on several grounds: as a violation of substantive due process, given the Supreme Court's recent ruling in *Lawrence v. Texas* striking down Texas' criminal sodomy statute;[145] as an equal protection violation, given the Court's opinion in *Romer v. Evans*, which struck down an amendment to Colorado's constitution banning governmental bodies within the state from granting any legal protection to homosexuals;[146] or as an unconstitutional abridgment of the constitutional guarantee of Full Faith and Credit.[147] And the MPA may itself be an invalid exercise of Congressional power, in violation of equal protection, due process, and/or separation of powers principles.[148]

This phase of the same-sex marriage debate has just begun. Quests for federally mandated uniformity will continue, and backstop efforts to limit Massachusetts law to its own territory will proceed on both state and federal levels. Where these efforts will lead is impossible to predict. It seems unlikely, given both the historical record and modern reluctance, that the federal constitution will be amended to ban same-sex marriage. So whether states will be willing – or forced – to recognize Massachusetts' marriages remains the crucial question.

As the multi-faceted attempts to craft a federal response to same-sex marriage proceed, opponents are also pursuing state-level responses. Outside of Massachusetts, opponents have shored up state laws against same-sex marriage through the enactment of mini-DOMAs (state laws exercising the authority ostensibly granted them by DOMA to refuse recognition to same-sex marriages),[149] statutory modifications to make bans on same-sex marriages explicit,[150] and constitutional amendments to prohibit state legislatures and courts from

---

[143] Until Massachusetts began to permit same-sex couples to marry, no one had standing to challenge DOMA.

[144] *See* Wilson v. Ake, No. 03-714, 2005 U.S. Dist. LEXIS 755 (Jan. 19. 2005) (rejecting challenge to DOMA and refusing to recognize a Massachusetts same-sex marriage for federal or Florida law purposes).

[145] 539 U.S. 558 (2003).

[146] 517 U.S. 620 (1996).

[147] U.S. CONST. art. IV, § 1.

[148] The validity of DOMA and the MPA, should it become law, do not necessarily dictate the validity of same-sex marriages from Massachusetts. Also unsettled are the antecedent questions whether a marriage is a "public Act" within the meaning of the Full Faith and Credit Clause, and, if it is, whether there might be a public policy exception to Full Faith and Credit that enables states to refuse recognition to same-sex marriages even without Congress' express permission. Principles of comity may also dictate recognition of Massachusetts marriages in other states.

[149] *See, e.g.*, FLA. STAT. ch. 741.212 (2003).

[150] *See, e.g.*, California Defense of Marriage Act, Prop. 22, § 2, codified at CAL. FAM. CODE § 308.5 (Deering 2004).

recognizing same-sex marriage.[151] Meanwhile, some states – and in some cases the same states – have created non-marital legal statuses for same-sex couples.[152]

Within Massachusetts, the response to *Goodridge* has been two-fold. Opponents first attempted to block implementation of the decision entirely. The state senate, for example, rushed to pass a bill allowing same-sex couples access to a marriage-like status, but denying them the right to marriage itself. According to the bill, same-sex couples would be able to enter into civil unions with all the "benefits, protections, rights and responsibilities" of marriage.[153] But the senate requested an advisory opinion from the Supreme Judicial Court (SJC) about the constitutionality of its law, and the SJC denounced the law as inconsistent with its ruling in *Goodridge*.[154]

Meanwhile, legislators in Massachusetts approved a measure to amend the state constitution to prohibit same-sex marriages,[155] but it can not take effect, if at all, until November 2006.[156] Private groups also filed lawsuits to block *Goodridge* from taking effect. A coalition of conservative legal groups and individual state legislators sued in federal court to stop same-sex marriage licenses from issuing, arguing that the SJC violated the U.S. Constitution when it interpreted the Massachusetts Constitution to require equality in marriage. The district court refused to enjoin the issuing of marriage licenses, finding a strong likelihood that the SJC would prevail on the merits.[157] After licenses began to issue, the First Circuit affirmed that ruling.[158]

As a fallback to these first-line attempts to block implementation of *Goodridge*, Governor Romney announced his commitment to enforcing the state's marriage

---

[151] Sixteen states now have constitutional amendments banning same-sex marriage, eleven as a result of the November 2004 elections. *See* Monica Davey, *Sharp Reactions to Missouri's Decisive Vote Against Gay Marriage*, N.Y. TIMES, Aug. 5, 2004, at A17; Elissa Gootman *et al.*, *For the President, Some Easy Victories, and a Crucial Close One in Florida*, N.Y. TIMES, Nov. 3, 2004, at P12 (cataloguing state-by-state election results).

[152] *See, e.g.*, CAL. FAM. CODE § 297 *et seq.* (Deering 2004) (creating domestic partnerships for same-sex couples).

[153] S. 2175, 183d GEN. CT., Reg. Sess. (Mass. 2003).

[154] *See* Opinion of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004)

[155] *Joint Session of the Two Houses to Consider Specific Amendments to the Constitution: Proposal for a Legislative Amendment to the Constitution Relative to the Affirmation of Marriage House 3190*, J. SENATE IN JOINT SESSION (Mass. Mar. 29, 2004).

[156] To take effect, the amendment must be passed by a majority of the legislature in two consecutive sessions and then by the voters. MA. CONST. AMEND. ART. 98.

[157] Largess v. Supreme Judicial Court, 317 F. Supp. 2d 77 (D. Mass. 2004). The argument, rooted in the Supremacy Clause and the federal constitution's guarantee of a republican form of government, was that the SJC violated the federal constitution when it rejected the legislature's more limited definition of marriage in favor of a more expansive one. In the court's view, Massachusetts's Constitution clearly endows the judicial branch with the authority to decide cases involving marriage and divorce and, if necessary in the course of doing so, to reinterpret the term marriage. *See id.* at 82-83.

[158] Largess v. Supreme Judicial Court, 373 F.3d 219 (1st Cir. 2004), *cert. denied*, 125 S.Ct. 618 (2004).

evasion law. Today, Massachusetts maintains its original marriage evasion law, patterned after the 1912 uniform act.[159] The Massachusetts code retains the core evasion and reverse-evasion provisions,[160] as well as the provision requiring clerks to obtain proof that a non-resident applicant is not seeking to marry in violation of one of those core provisions.[161] Although ongoing cases challenge the law,[162] it remains in operation.[163]

The state's newfound interest in combating marriage evasion resurrects a long history of dealing with non-uniformity in the law of domestic relations. History repeats itself here as concerns about practical obstacles and morality are implicated by a lone state recognizing same-sex marriage. In fact, parties to Vermont civil unions have faced difficulties because of other states' refusals to recognize their status.[164] They have encountered difficulties when seeking recognition in other states. These difficulties persist even when the parties seek dissolution.[165] Out-of-state couples who married in Massachusetts and then returned home will undoubtedly face similar difficulties,[166] as will in-state couples who marry but subsequently move to a different jurisdiction.[167]

But Governor Romney's concern about the morality of same-sex marriage, even if all states were to permit it, is certainly evident here as well. Romney's "Las Vegas" reference was to the evasive nature of the act—obtaining a legal status that

---

[159] Thirteen states and the District of Columbia retain a marriage evasion law today. *See* Koppelman, *supra* note 88, at 923. Some statutes are coextensive with the original uniform act, *see, e.g.*, N.H. REV. STAT. 457:44 (2004), while others refuse recognition only to evasive marriages that suffer from particular impediments like incest, *see, e.g.*, MISS. CODE ANN. § 93-1-3 (1993).

[160] MASS. GEN. LAWS ch. 207, §§ 10, 11 (2003).

[161] MASS. GEN. LAWS ch. 207, § 12 (2003). The code omits the fourth provision recommended in the uniform act, which would make issuing a license in violation of the substantive provisions a misdemeanor.

[162] *See* Cote-Whitacre v. Dep't of Public Health, No. 04-2656-G 2004 WL 2075557 (Mass. Super. Ct. Aug. 18, 2004) (denying plaintiffs' motion for preliminary relief).

[163] *See* Katie Zezima, *Town Yields on Marriage Licenses*, N.Y. TIMES, May 27, 2004, at A5 (reporting that the last town finally agreed to stop issuing marriage licenses to same-sex couples from out-of-state in defiance of Romney's instructions).

[164] Vermont was the first state to recognize a truly marriage-like status for same-sex couples. *See* 15 V.S.A. § 1201 *et seq.* (2003).

[165] *See, e.g.*, Rosengarten v. Downes, 802 A.2d 170 (Conn. App. Ct. 2002) (refusing to recognize a Vermont civil union for purposes of dissolving it); *cf.* Burns v. Burns, 253 Ga. App. 600 (Ga. Ct. App. Jan. 23, 2002) (refusing to recognize civil union for purposes of measuring compliance with visitation order).

[166] *See, e.g.*, Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A1. *See also supra* note 144.

[167] Historically, most courts drew a distinction, for recognition purposes, between an evasive prohibited marriage and a non-evasive prohibited marriage, even though in both cases the marriage was disallowed by the state asked to recognize it. Ironically, the modern mini-DOMAs do not permit such a distinction to be made, and thus non-evasive same-sex marriages are just as legally ambiguous as evasive ones.

is not and, in the opinion of many, *should not* be available elsewhere. That his actions do not simply reflect concerns about inflicting his state's standards on other states is evident from his resurrection of an otherwise unused law. For the first time, the state's marriage license application asks for information about residency, requires the applicants to swear under penalty of perjury that the information given is true, *and* requires the clerk to list the documents reviewed and sign to verify that the state's residency requirements have been met.[168] The Massachusetts code has theoretically always required this procedure to be followed, but it has not been in the past.

One theory is that these procedures were truly *pro forma*, and therefore not really necessary prior to *Goodridge,* because Massachusetts permitted marriages on the same terms as other states. There would be, therefore, no reason for a couple to choose Massachusetts as the site of their wedding to evade its own state's laws. But minute variations in marriage law persist, even outside of the hot-button issue of same-sex marriage. Neighboring New Hampshire, for example, does not permit first cousins to marry,[169] though Massachusetts does. So, in the spirit of anti-evasion, clerks in Massachusetts should have been refusing to issue licenses to first-cousin couples from New Hampshire – or from the 24 other states that still prohibit cousin marriages[170] – but there is no evidence that they ever did so.

CONCLUSION

Where do we go from here? The future of same-sex marriage is by no means certain. The immediate future hangs in the balance as we wait to see whether state or federal constitutional amendments will pass, and whether challenges to laws like DOMA and Massachusetts' marriage-evasion statute will succeed. The longer-term future resides outside of legal circles, in society more generally. As we saw with interracial marriage, a deeply held belief against a practice can undergo a complete reversal with the passage of enough time.

In the meantime, *Goodridge*, and, more importantly, the responses it engendered, present an opportunity to think about the lessons of history. Reconsideration of the historical role and use of anti-evasion laws is an important part of the lesson. The practice of refusing recognition to evasive marriages arose during a regrettable period in our history. The primary use of the marriage evasion doctrine, whether codified by statute or not, was to refuse recognition to interracial marriages, and attempts to apply it in other contexts were met with much more limited success.[171] A proposal to amend the federal Constitution to prohibit interracial marriage

---

[168] MASS. GEN. LAWS ch. 207, § 12 (2004).

[169] *See* N.H. REV. STAT. ANN. § 457:2 (2003).

[170] National Conference of State Legislatures, State Laws Regarding Marriages Between First Cousins, *available at* http://www.ncsl.org/programs/cyf/cousins.htm.

[171] *See* Schopler, *supra* note 99, at 687 (noting the conflicting authorities about the proper treatment of evasive marriages in violation of a state's age restrictions).

nationwide was introduced into Congress the year after the Uniform Marriage Evasion Act was adopted.[172]

As the twentieth century progressed, however, the number of attempts to secure uniform marriage laws waned[173] and marriage evasion laws fell into disfavor.[174] The Uniform Marriage Evasion Act, in fact, no longer exists. NCCUSL withdrew the Act from its active list in 1943, and expressly repudiated it when it first adopted the Uniform Marriage and Divorce Act (UMDA) in 1970.[175] The UMDA follows a strict version of the place-of-celebration rule, requiring an adopting state to recognize all marriages as long as they are valid either where celebrated or in the domicile of the parties.[176]

For Massachusetts to follow this "modern" rule would actually be a return to its roots. In an 1819 case, *Medway v. Needham*, the Supreme Judicial Court upheld the validity of an interracial marriage between residents of the province of Massachusetts that was contracted in the neighboring province of Rhode Island.[177] Massachusetts had an anti-miscegenation law, which not only prohibited whites from marrying blacks, but also expressly declared such marriages to be void;[178] Rhode Island did not. It was the prototypical evasive marriage: the couple permanently resided in Massachusetts, crossed state lines, contracted a marriage they could not otherwise obtain, and returned to Massachusetts immediately thereafter.[179]

The validity of the marriage was important because it would determine which of the two states would be responsible for the support of the pauper couple. Authoring the opinion that would be widely criticized in other jurisdictions,[180] the Chief Justice had no trouble upholding the evasive marriage. He wrote:

> Now, it is a principle adopted for general convenience and security, that a marriage, which is good according to the laws of the country where it is entered into, shall be valid in any other country. And this principle is considered so essential, that even when it appears that the parties went into

---

[172] *See* Stein, *supra* note 47, at 17 (describing various proposals to amend the constitution to prohibit interracial marriages).

[173] *See id.* at 15 (noting the stark drop-off in proposed constitutional amendments relating to marriage and divorce after the 1940s—from a high of 29 in the 1910s to 0 in the 1950s); *see supra* text accompanying note 102.

[174] Note, *In Sickness and in Health, In Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages*, 109 HARV. L. REV. 2038 (1996).

[175] *See* UNIF. MARRIAGE AND DIVORCE ACT § 210 (1970).

[176] *Id.*

[177] 16 Mass. 157 (1819).

[178] *See Act of June 22, 1786* ch. 3 § 7 Gen. Laws. Mass. 1789-1822 (Wells & Lily Cummings, 1823) (codified as amended at Rev. Stat. Mass. Ch. 75 §5) (repealed by Act of Feb. 25, 1843, ch. 5, Mass. Gen. Laws. 1836-1853 (Dutton and Wentworth, 1854)).

[179] *See Medway*, 16 Mass. at 157.

[180] *See* Vartanian, *supra* note 99 (describing *Medway* as a significant outlier on the question of recognition given to evasive, interracial marriages).

> another state to evade the laws of their own country, the marriage in the foreign state shall nevertheless be valid in the country where the parties live.[181]

This approach was necessary to "avoid the great inconvenience and cruelty" of refusing to recognize such marriages.[182]

This nearly two-hundred-year-old opinion makes several salient points that we might do well to remember today. First, it notes that refusing to recognize an out-of-state marriage would "produce greater inconveniences than those attempted to be guarded against," particularly if such refusal meant that the marriage could be "dissolved at the will of either of the parties, by stepping over the line of a state, which might prohibit such marriages."[183]

Second, the court distinguished evasive contracts, which it would not recognize, from evasive marriages. Refusal to recognize the latter implicates more profound public policy concerns than the former, such as the "disastrous consequences to the issue of such marriages" and "public mischief" that might ensue.[184]

Finally, the court noted that its rule of recognition might not apply to all evasive marriages, but only those – like interracial ones – that are "prohibited merely on account of political expediency," as opposed to those which "would tend to outrage the principles and feelings of all civilized nations."[185] Political expedience should not be a justification for refusing to honor a sister state's act.

The practical complications of non-uniform marriage laws are real, although other areas of domestic relations law, like enforcement of child custody orders, certainly present greater logistical difficulties.[186] With same-sex marriage, as with historical disagreements about the proper standards for marriage and divorce, the quest for uniformity can be only partially explained by pragmatic need. The primary motivation for most calls for standardization is to impose a moral minimum on the underlying practice: to prevent an interracial marriage, to disallow a divorce based on insufficient grounds, or, today, to avoid a same-sex marriage altogether.

These mixed motivations explain why same-sex marriage opponents' responses only partially correct the non-uniformity. Massachusetts' enforcement of its marriage evasion law does nothing to protect bona fide residents who marry and then subsequently move. Those couples will face the same legal uncertainty and disappointment they would face had they never resided in Massachusetts. Were the real concern about the discontinuities of non-uniformity, a strict place of celebration rule, like that embodied in the UMDA, would serve the same result. Those who marry would only have to satisfy themselves of its validity where

---

[181] *Medway,* 16 Mass. at 159.

[182] *Id.*

[183] *Id.*

[184] *Id.* at 160.

[185] *Id.* at 161.

[186] *See* Hasday, *supra* note 55 (noting many examples of federal intervention into domestic relations).

contracted, and they would attain a meaningful, portable legal status. It's only if the real concern is lax morality that full recognition does not solve the problem of non-uniformity. And that, of course, is what Governor Romney is really disparaging about the *Goodridge* ruling and the same-sex marriages it authorized with his reference to Las Vegas.

One of the lasting lessons of history is that regardless of the motivation for seeking it, uniformity of state laws on issues of marriage and divorce has been elusive, at least when it is intentionally sought. Attempts to federalize marriage and divorce law have been singularly unsuccessful, and attempts to secure uniformity through voluntary cooperation have failed as well. States, instead, have learned to live with each other's different standards, and, more often than not, given effect to each other's rules. And on the issues that have caused the greatest unrest – grounds for divorce and interracial marriage – states have gradually come to agree, though often long after the issue of uniformity was first pressed. Whether these lessons will accurately predict the future of same-sex marriage is unknowable. There is certainly reason to suspect that same-sex marriage, like divorce-on-demand, is inevitable, though it may be many generations before it fully comes to pass. For now, it is important not to lose sight of the importance that marriage be a portable status. The ability to shed one's marital status at the state line will produce far greater corruption than the disfavored marriage itself – no matter what the destination state's view of same-sex marriage entails.

Or one might simply ignore the lessons of history, and criticize Governor Romney's choice of metaphors. The "Las Vegas divorce" was outstripped by the "Dominican Republic divorce" many decades ago when the latter opened its doors to foreign divorces. In contrast to Nevada's six-week residency requirement, Dominican law required none.[187] The 1971 law embraced the "quickie divorce" with a vengeance by adopting a "mutual consent" ground for divorce (something no American state had at the time), depriving the court of discretion to deny a divorce when both parties appear, eliminating any residency requirement, and requiring an appearance by only one party.[188] So maybe being the "Las Vegas of same-sex marriage" is not so bad after all.

---

[187] *See* James A. Fulton, Note, *Caribbean Divorce for Americans: Useful Alternative or Obsolescent Institution?*, 10 CORNELL INT'L L.J. 116, 116 (1977) (noting that the Dominican Republic "liberalized their statutes to capitalize on the thirsting American demand for easy divorces"); *see also* Joseph L. Forscher, *Haitian, Dominican Laws on Divorce Evaluated*, N.Y. L.J. , Oct. 19, 1971, at 1 (noting that Haiti and the Dominican Republican took "measures to fill the breach" once Mexico closed its doors to foreign divorce).

[188] *Id.*