

From the SJC Cote-Whitacre Decision and A.G.'s Brief on the 1913 Law

When §§ 11 and 12 were enacted in 1913, same-sex marriage was not visible on the horizon of our jurisprudence, suggesting that the Legislature did not, in fact, promulgate these statutes for the express purpose of discriminating against same-sex couples. . . . Rather, the focus of §§ 11 and 12 was on the status of all nonresidents who were prohibited from entering into marriage contracts in this Commonwealth where precluded from doing so in their home States. This focus originated from the enactment of the Uniform Marriage Evasion Act in 1912, which was intended to promote general uniformity in the prohibitory laws of every State. . . . The Commonwealth . . . has a significant interest in not meddling in matters in which another State, the one where a couple actually resides, has a paramount interest. Massachusetts can reasonably believe that nonresident same-sex couples primarily are coming to this Commonwealth to marry because they want to evade the marriage laws of their home States, and that Massachusetts should not be encouraging such evasion. . . . §§ 11 and 12 promote interstate harmony by mandating respect for the laws of other jurisdictions.

Justices Spina, Cowin & Sosman, *Cote-Whitacre v. Department of Public Health*, 446 Mass. 350, 844 N.E.2d 623, 644, 645 (2006).

[I]t is rational for the Legislature to direct the Commonwealth's resources to celebrating those marriages of nonresident couples that will not be legally irrelevant in the couple's home State. It is rational for Massachusetts to take precautions that marriages performed here be considered legally binding and not merely aspirational. Put another way, it is rational for the Legislature to take steps to ensure that marriages performed here will hold up elsewhere, and that they will not be ignored by other States. The Commonwealth's concern is not a matter of comity so much as a matter of federalism, that is, of a State's concern for the integrity of its own laws.

Chief Justice Marshall and Justices Cordy & Greaney, *Cote-Whitacre*, 844 N.E.2d at 657.

The Couples [Plaintiffs] had also argued [in the trial court] that §§ 11 and 12 were enacted in 1913 in order to deter interracial couples from coming to Massachusetts to marry if barred by doing so by their home states, and that this asserted history undercut the statutes' rationality. The court did not accept this historical argument, . . . and the Couples do not press it on appeal. . . . Sections 11 and 12 have ample rational bases and thus satisfy equal protection and due process requirements. Goodridge does not resolve that issue; the classification found irrational in Goodridge is quite separate from the one at issue here. Sections 11 and 12 further the many interests served by marriage itself, by assuring that no marriage is performed here unless there is an "approving State" as envisioned in Goodridge, one that confers benefits on the marriage and stands ready to enforce the spouses' duties to each other and their children. It is rational to believe that, of the 49 states where same-sex marriage is void or prohibited, the vast majority will not recognize a Massachusetts marriage of a same-sex couple from that state. Thus it is rational for §§ 11 and 12 to prevent such marriages from occurring here. Moreover, if an out-of-state same-sex couple's Massachusetts marriage broke down, Massachusetts courts would likely be the only courts available to grant a divorce. Yet the resulting divorce judgments, particularly insofar as they awarded child custody and support, alimony, and a division of marital property, could easily be refused enforcement or collaterally attacked in other states, a result the

Commonwealth has a legitimate interest in avoiding. *Sosna v. Iowa*, 419 U.S. 393 (1975). The Commonwealth also has a legitimate interest “in avoiding officious intermeddling in matters in which another State has a paramount interest,” i.e., the existence of marriages between that other State’s citizens. *Sosna*, 419 U.S. at 407. And the Commonwealth has a legitimate interest in avoiding the interstate friction and possible retaliation that could occur if the Commonwealth allows marriages of out-of-state same-sex couples despite their home states’ express policies barring such marriages. Such retaliation (e.g., in the form of a federal constitutional amendment barring same-sex marriage in any state) could harm the Commonwealth and its resident same-sex married couples. Sections 11 and 12 rationally serve to prevent all of these harms.

Attorney General Thomas F. Reilly, Brief of the Appellees, *Cote-Whitacre v. Department of Public Health*, No. SJC-09436, at pages 18 & 25-26 (filed June 24, 2005), available online at http://www.glad.org/marriage/Cote-Whitacre/AG_Opp_Brief_1913.pdf.