

Chicago Bar Association  
Moot Court Competition

Winter 2009

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The Hineses were wed in Massachusetts shortly after the Massachusetts Supreme Court handed down the landmark *Goodridge* decision declaring prohibitions on same-sex marriage unconstitutional. The Bradleys were married in the State of California after the Supreme Court rendered an analogous decision to the Massachusetts Court. However, the Hineses, both in their late 60's, were long time residents of Massachusetts prior to their marriage and subsequent relocation to Chicago whereas the Bradleys were native Chicagoans who travelled to California for the sole purpose of becoming wed.

Both couples now seek to have their respective marriages recognized by the State of Illinois for the purposes of extending employment based health benefits that are subsidized by state programs and coextensive application of the Illinois Probate Act among other benefits that are unequally applied to heterosexual couples in Illinois. There is presently no dispute concerning the validity of the marriage licenses issued by the respective states to the respective couples. The Hineses adequately qualified for a license in Massachusetts based on the residency, relation, and majority requirements of the law in that jurisdiction. Similarly, the Bradleys qualified for a license in California under the applicable provisions of the state code, though it is notable that the State of California lacks a residency requirement for the issuance of marriage licenses.

The Plaintiffs assert that the State of Illinois should be required to recognize their marriage licenses as properly issued and solemnized in other jurisdictions such that the State of Illinois is obligated to recognize their unions under State and Federal law as the state would similarly recognize the unions of similarly situated heterosexual couples. Further, they assert that a failure to recognize their unions as required by the doctrine of Full Faith and Credit would result in a violation of their right to equal protection of the law enshrined in the Fifth and

Fourteenth Amendments and the Due Process Clause of the Illinois State Constitution, namely Article I, Section 2 of the same.

Procedurally, the Plaintiffs filed their action in Illinois state court, and the Defendant removed the matter based on federal question jurisdiction. Similarly, the representatives of the State of Illinois, in their official capacity, do not contest the material facts concerning the solemnization of the unions between the respective Plaintiffs. Rather, the Defendant asserts that the operation of the Defense of Marriage Act (DOMA) exempts the State of Illinois from having to recognize the marriage licenses from the foreign jurisdictions. In addition, they assert that an analysis of the conflicts of law principles recognized by the State of Illinois would likewise permit the State's refusal to recognize the Plaintiffs' unions as a matter of public policy.

As all of the necessary and material facts have been stipulated to by the parties, the matter now turns on the application of the law to the concerns raised by the Plaintiffs in this action.

## **DISCUSSION**

As a general principle, the States are required to honor the laws of the various states by operation of Article IV, Section 1, of the United States Constitution. U.S. Const. Art. IV, § 1. In addition, Section 2 of Article IV extends the privileges and immunities of the several states to all citizens. U.S. Const. Art. IV, § 2. The instant action questions the constitutionality of the Defense of Marriage Act on the basis of preemption and full faith and credit as established by Article IV of the Constitution. In addition, this Court needs to be wary of the potentiality of the states to determine whether they will accept the applicability of laws from another state on Conflicts of Law grounds. As such, the Federal Courts should be hesitant to overstep their abilities to review the laws and public policies of the states where the State Courts are in the best

position to interpret their own state's laws. Moreover, a seemingly core issue arising in the context of these proceedings questions whether Congress retains the Constitutional authority to enact legislation that would otherwise abrogate the jurisdiction of state legislatures in regulating social issues typically left within the ambit of the States' regulation.

DOMA was passed in 1996, and contains two parts, the first of which defines marriages as between a man and a woman for the purpose of applying federal law, and the second provision specifically exempts the states from having to honor the laws of the other states that permit same sex marriage. In relevant part, DOMA states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C (West 2008). As a result of this provision, the State of Illinois would then be perfectly within its ability pursuant to DOMA to deny recognition of the respective marriage laws of California and Massachusetts. However, the Plaintiff's herein have challenged the Constitutional sufficiency of DOMA such that it violates the Full Faith and Credit provisions of Article IV or the United States Constitution. Nonetheless, the application of DOMA in any case raises the a significant Constitutional concerns, namely whether Congress within the powers articulated in Article I may effect a law that exempts state policy from the application of the Full Faith and Credit Clause.

As a general principle, additions to the Full Faith and Credit act typically constitute additions to the Full Faith and Credit Clause when these statutes are worded as such. *Thompson v. Thompson*, 484 U.S. 174, 182 (1988). Clearly, Congress can make statutory mandates within the confines of their legislative power within Article IV. This power comes from directly within

Article IV, Section 1, specifically “...the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” U.S. Const. Art. IV, § 1, cl. 2. Therefore, when Congress determines it is necessary for the benefit of the governance of the body politic, and provided that Act does not violate another proscription of the Constitution, regulations regarding the application of Full Faith and Credit are well within the Constitutional authority of the Legislature.

Seeing as no Constitutional provision designates a right to same sex marriage, and no federal court has made a similar finding, DOMA adequately restricts the ability of the states to refuse to recognize same-sex unions by permitting them to preserve their own public policy. Ultimately, and contrary to Plaintiff’s argument, DOMA passes constitutional scrutiny and the determination of the State of Illinois not to honor their respective marriages stands.

### **CONCLUSION**

For the reasons above, this Court finds that Congress properly enacted DOMA, thereby permitting the State of Illinois to deny recognition of same-sex marriages from other states. In addition, because DOMA acts to permit states like Illinois to exercise their sovereignty and deny co-extensive rights to same-sex couples as opposite-sex couples within the State, this Court need not independently consider the merits of the assertion of public policy by the State of Illinois.

It is so ordered.

**IN THE UNITED STATES COURT OF APPEALS  
SEVENTH CIRCUIT**

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ALEXANDRA EVANS-HINES, BEVERLY HINES,	)	
JASON BRADLEY, SHAWN JONES-BRADLEY,	)	
	)	
Plaintiffs/Appellants,	)	
	)	
v.	)	Case No. 08-33445
	)	
JASMINE BARNES, MD, PHD,	)	On appeal from the decision of
In her capacity as Director of	)	the Honorable Patterson Floyd
The Illinois Department of Public Health,	)	Northern District of Illinois
	)	
Defendant/Appellees.	)	
	)	

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**JUDGMENT AND ORDER OF THE COURT**

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By Justice James Henderson,  
with Justice Samuel Speck concurring, and  
Justice Elizabeth Roth concurring in part and dissenting in part

**INTRODUCTION**

Plaintiff/Appellants ask this Court on appeal from the judgment of Judge Patterson Floyd of the Federal District Court for the Northern District of the State of Illinois to consider a novel, though fundamental, issue of Constitutional law. In fact, this question is of such paramount importance that it strikes at the heart of the unified method of governance required to maintain the ordered Union we understand as the American Constitutional Democracy. As such, Plaintiff/Appellant asks this Court to reverse the determination of the District Court and find, as a matter of law, that the Defense of Marriage Act (DOMA) violates the Full Faith and Credit Clause, Privileges and Immunities Clause, and, to some degree, the corollary concerns of due process and equal protection embodied therein. As a prefatory note, we also must be conscience

of the sovereign nature of the individual states while considering this matter. We take these issues in turn, beginning with the Constitutionality of DOMA.

## **DISCUSSION**

We note at the outset the phenomenal importance of the question before this Court. In Federalist 42, James Madison pointed out the fundamental deficiency of the Articles of Confederation as the failure of the same to so bind the member states to the general law such that, in Madison's words, "leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations." THE FEDERALIST No. 42 (Madison) (concerning the Powers Conferred by the Constitution Further Considered); *see also Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948). Madison concludes Federalist 42 by noting that the Full Faith and Credit Clause, though a minor addition to the Constitution, facilitate the cohesive operation of the government of the states and of the Federal Government and protecting the rights of the individual as a citizen within the Union.

The net effect of the case at bar is to question whether Congress violated what limited authority it has to regulate the cohesive nature of the United States governmental system such that DOMA is constitutionally impermissible legislation. We find that DOMA does violate Article IV of the Constitution. As such, we must then consider whether the State of Illinois has an independent public policy that would otherwise permit Illinois to deny coextensive recognition of marriage licenses issued to same-sex couples under the law of other states.

### **I. The Constitutionality of DOMA.**

Initially, we note that the District Court appropriately indicated that Congress does have the ability to draft legislation that regulates the operation of Full Faith and Credit. *See generally Thompson v. Thompson*, 484 U.S. 174 (1988). However, the Supreme Court has demonstrated

suspicion regarding laws that would otherwise limit the direct extraterritorial effect of legislation. *See generally Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980). *Thomas*, though dealing largely with workers' compensation statutes, indicates that the Supreme Court is leery of states that attempt to limit the application of their laws in other jurisdictions. 448 U.S. at 270. Moreover, the Supreme Court has expressly required the operation of the Full Faith and Credit Clause where an existing act by congress or a state legislature did not establish the requirement of Full Faith and Credit pursuant to 28 U.S.C. 1738. *See Bradford Electric Co. v. Clapper*, 286 U.S. 145 (1932).

These, decisions, though, focus on the actions of the State legislatures, and not on the actions of the Federal Congress. This necessarily complicates the analysis as it is clear that the States may not attempt to assert their legislative power beyond their jurisdictional reach. However, it is important to note that the Supreme Court has, in *Thompson* and *Thomas*, questioned whether laws limiting the application of the Full Faith and Credit Clause violate the Constitution thereby rendering them invalid. It is necessary, then, for this Court to apply the same inquiry and analysis to DOMA.

DOMA, specifically the amendment to the Full Faith and Credit Act codified as 28 U.S.C. 1738C, is the only enactment in the history of the amendments by Congress pursuant to its Constitutional authority established in Article IV to restrict the application of Full Faith and Credit. Moreover, DOMA appears to abrogate the Privileges and Immunities Clause by specifically permitting one State to deny recognition of a freedom or privilege provided by another state. In light of the purpose of Article IV, this legislation is wholly inconsistent with the operation of the Constitution meant to create a cohesive national unity among subordinate sovereign entities. As a result, it is clear that DOMA fails to pass Constitutional muster, and is

therefore invalid. However, the application of DOMA on its own would not necessarily require the State of Illinois, or any other similarly situated state, to honor a law or judicial decree of another state if it violates a specific public policy established by the state.

## **II. Notwithstanding DOMA, Illinois May Deny Recognition of Same-Sex Marriage.**

Under general conflict of laws analyses, there are several exceptions to the application of Full Faith and Credit. The first is the procedural distinction, roundly established between the State judicial and Federal judicial forums in *Erie R.R. Co. v. Tompkins* and its progeny. This same principle applies to the application of state laws as well. *See Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). In addition, the States retain the ability to deny the application of foreign law when it conflicts with the public policy of the forum state confronted with applying the law of foreign jurisdictions. *See Pacific Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939). Specifically, this exception to Full Faith and Credit permits states to apply their own law in conflict of laws situations where the law of another state when that law offends a stated public policy of the jurisdiction hearing the matter. *Id.* at 502-503; *see also Nevada v. Hall*, 440 U.S. 410, 421 (1979).

Illinois has a clear policy specifically prohibiting the marriage of same-sex couples. The applicable provisions of the Illinois Marriage and Dissolution of Marriage Act specifically prohibit the issuance of a marriage license to same-sex couples. 750 ILCS 5/212(a)(5). This prohibition is situated among other provisions aimed at protecting the health and wellbeing of the public, namely preventing marriages between parties who are already married and marriages between blood relatives. 750 ILCS 5/212(a). Moreover, the policy is specifically codified within the Illinois Marriage Act that articulates same-sex marriage is contrary to the public policy of Illinois and the stated invalidity of prohibited marriages when solemnized in other

jurisdictions. 750 ILCS 5/213.1; 750 ILCS 5/216. In light of this existing policy, it is permissible for the State of Illinois to deny recognition of same-sex marriages appropriately solemnized pursuant to the law of another state.

### CONCLUSION

Though the enactment of DOMA clearly lies beyond the scope of the legislative power attributed to Congress via Article IV of the Constitution, and though this court finds as a matter of law that DOMA is thereby Constitutionally invalid, the application of the public policy of the State of Illinois is sufficient for this Court to determine the State of Illinois acted in an appropriate manner. As such, this matter is remanded to the District Court for proceedings not inconsistent with this ruling.

It is so ordered.

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Justice Elizabeth Roth concurring in part and dissenting in part.

While I agree with the majority's analysis concerning the constitutionality of DOMA, I write to point out a glaring issue with the Majority's analysis of the applicable conflict of laws standard concerning the policy of the State of Illinois concerning same-sex unions. It is an established point of law that states may resort to assertions public policy when they disagree on the permissive or more tolerant policies of other states. The exercise of public policy by the State of Illinois is particularly troubling based on Illinois' prior adoption of the Uniform Marriage and Divorce Act which requires recognition of marriages solemnized by other states. Unif. Marriage & Divorce Act § 210. While it is clear that Illinois has an established policy regarding the application of its public policy, it remains anomalous to permit a State to establish a policy embracing the application of Full Faith and Credit for some marriages, but not others.

Defendant/Appellees urge this court repeatedly to find that the public policy of Illinois is of paramount legislative concern because it ensures the health and wellbeing of the body politic, but specifically deflected questions concerning the Uniform Marriage and Divorce Act by indicating that policies concerning same-sex unions are new policies not contemplated when Illinois adopted the uniform act.

Regardless of this change in policy, it still raises the specter of Constitutional concern because it appears to discriminate against same-sex couples. While a state may exert its own public policy to avoid the application of foreign law, a state must still demonstrate a legitimate state interest to do so. The majority seems to imply the compelling nature of Illinois' "right" to regulate domestic relations. Indeed, the State vociferously advocated that the application of its public policy as an exception to Full Faith and Credit meets the compelling interests of the state. However, in light of recent decisions concerning same-sex marriage, courts have determined that the state lacks even a legitimate interest in such regulation. As such, it seems incongruous to permit Illinois to apply a public policy that would otherwise discriminate against same-sex couples without asserting a more powerful state interest.

For these reasons I respectfully dissent from the second part of the Majority's analysis and would otherwise require the State of Illinois to honor same-sex unions notwithstanding their public policy concerns.

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**SUPREME COURT OF THE UNITED STATES**

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No. 09-326  
September 1, 2009

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JASMINE BARNES, MD, PHD,  
Petitioner/Cross Respondent

v.

ALEXANDRA EVANS-HINES, BEVERLY HINES  
JASON BRADLEY, SHAWN JONES-BRADLEY  
Respondents/Cross Petitioners

On petition for writ of certiorari to the  
United States Court of Appeals for the Seventh Circuit

**The petition for writ of certiorari is granted and limited to the following questions:**

1. Whether the Defense of Marriage Act violates the provisions of Article IV of the United States Constitution by its restriction of the application of Full Faith and Credit among the various states.
2. Whether the application of public policy of the State of Illinois violates conflicts of law principles in contradiction to the application of Full Faith and Credit by denying recognition of same-sex unions properly solemnized in a sister state.

Case below 7th Cir. Case No. 08-33445