

The Defense of Marriage Act: The Crossroad of Love and Legislation

by
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I. Introduction

The Defense of Marriage Act (“DOMA”)¹ inherently confronts constitutional principles of congressional authority and fundamental rights. A political recipe for reprieve, DOMA is the ultimate crossroad of love and legislation. It is the quintessential embodiment of political strategy, showing disregard for a constitutional check on congressional power and the constituents’ rights that Congress is entrusted to protect.

Congress passed DOMA in the wake of a milestone decision from the Supreme Court of Hawaii. Hawaii became the first state to subject a marriage statute to strict scrutiny as a sex-based classification.² As a result, the Supreme Court of Hawaii found that a statute restricting marriage to one man and one woman was unconstitutional. Threatened with nationwide implications of such a ruling, Congress was desperate to avoid the ramifications of the Full Faith and Credit Clause (“FFCC”).³

Congress, being under such pressure, attempted to act according to its authority granted to it by the FFCC. The FFCC

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¹ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

² Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

³ U.S. CONST. art. IV, § 1.

expressly grants Congress the ability to prescribe the manner and effect of the FFCC. The FFCC does not, however, allow Congress to substantively exempt certain acts, records, or judicial proceedings from full faith and credit. Historically, Congress has acted consistently with this grant of authority. Congress has only acted three other times under its FFCC power, and each action was a procedural prescription for full faith and credit, not a substantive proscription.⁴ DOMA is the first time that Congress has limited the scope of full faith and credit, exempting an entire area of law from its purview.

When it passed DOMA, Congress effectively restricted existing constitutional rights. DOMA poses a serious threat to fundamental personal privacy rights. By creating a sex-based classification, DOMA impedes on a person's right to choose a spouse. Additionally, a couple married in one state will not enjoy the freedom to travel as a married couple and hold themselves out as such in sister states. Decisions regarding whom to marry and where to live fall within the penumbra of privacy rights. By creating a sex-based discrimination, DOMA impedes on a person's right to choose a spouse.

II. The Enactment of DOMA

DOMA came into existence, not as a congressional exercise of wisdom and scrutiny, but in reaction to ethical, moral, and sociological concerns. In an effort to quell the implications of a Hawaiian Supreme Court decision, Congress acted, pushing its envelope of authority under the FFCC. The result is a constitutionally questionable exercise of congressional power creating a troublesome restriction on fundamental rights.

A. *History of DOMA*

Congress passed DOMA in response to political frenzy. The Hawaiian Supreme Court decision in *Baehr v. Lewin*⁵ resounded across the country, raising questions of law, morality, and sociology.⁶ For the first time, a state supreme court subjected a state

⁴ See *infra* discussion in text at notes 45-63.

⁵ 852 P.2d 44 (Haw. 1993).

⁶ H.R. REP. NO. 104-664, at 12 (1996), reprinted in 1996 U.S.S.C.A.N. 2905, 2905.

statute restricting marriage to a man and woman to strict scrutiny because it made a sex-based classification.⁷ The statute did not pass strict scrutiny, and the court opened the door to legal, same-sex marriages.⁸ Congress immediately began drafting its response to the Hawaiian Supreme Court in an effort to circumvent the implications of the FFCC.⁹

Representative Canady, a Republican from Florida, submitted the House Report in support of the Defense of Marriage Act.¹⁰ Republican proponents of the bill emphasized the need to prevent nationwide policy dictated by Hawaii.¹¹ They feared the Full Faith and Credit Clause would require all states to uphold Hawaiian same-sex marriage licenses. By doing so, the Hawaiian court and legislature would effectively dictate public policy regarding marriage for all other forty-nine states.

The only means of preventing such extreme consequences, according to the bill's proponents, was to create some exception to the FFCC. The FFCC demands that acts, records, and judicial proceedings "have the same full faith and credit in every court in the United States."¹² Facially, this clause would require that each state afford the same credit to same-sex marriage licenses as Hawaii. The FFCC, however, also expressly grants Congress the ability to pass full faith and credit legislation. By using this procedural authority to implement a substantive ban, Congress circumvented constitutional mandates.

B. *Lack of Congressional Authority to Enact DOMA*

The Full Faith and Credit Clause (FFCC) allows Congress to make procedural prescriptions, not substantive proscriptions. The FFCC states:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Con-

⁷ Baehr, 852 P.2d at 68.

⁸ Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. 1996).

⁹ H.R. REP. 104-664; 28 U.S.C. 1738.

¹⁰ H.R. REP. 104-664.

¹¹ *Id.*; Orrin Hatch, *Hatch Voices Strong Support for Federal Marriage Amendment*, July 9, 2004, http://hatch.senate.gov/index.cfm?FuseAction=pressReleases.View&PressRelease_id=1100.

¹² U.S. CONST. art. IV, § 1.

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gress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.¹³

Congress may prescribe the *manner* in which states apply full faith and credit.¹⁴ Congress may prescribe the *effect* of full faith and credit.¹⁵ Congress may not, however, determine which acts, records, or proceedings will be given full faith and credit.¹⁶

The second sentence of the FFCC is commonly referred to as the “Effects Clause.”¹⁷ The fight over congressional authority hinges upon interpreting the Effects Clause. Some constitutional scholars argue that, under the Effects Clause, Congress may prescribe one state’s acts, records, or proceedings to have no effect at all in other states.¹⁸ Other scholars argue that the Effects Clause limits congressional ability to prescribe those effects, but that Congress cannot entirely eliminate the effect.¹⁹

Defenders of DOMA argue that Congress may prescribe that a law implemented in one state has no effect at all because states maintain this right apart from DOMA.²⁰ They argue that states have inherent, traditional power and autonomy over family law issues.²¹ The proponents of DOMA maintain that, while the FFCC applies strictly to “judgments,” the FFCC applies more loosely to “acts.”²² “As to judgments, the full faith and credit obligation is exacting.”²³ A “judgment” is one that is rendered by a court with adjudicatory authority.²⁴ Judgments from sister states’ courts must be given strict full faith and credit to ensure

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See, e.g., Emily J. Sack, *The Retreat from DOMA: The Public Policy of Same-Sex Marriage and a Theory of Congressional Power under the Full Faith and Credit Clause*, 38 CREIGHTON L. REV. 507, 507 (2005).

¹⁸ Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1494 (2007).

¹⁹ *Id.* at 1495.

²⁰ Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPAC L. REV. 191, 193 (1996).

²¹ *Id.*

²² *Id.* at 194.

²³ *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 223 (1998).

²⁴ *Id.*

finality of judgments.²⁵ States are not compelled, however, to adopt sister states' laws if those laws contradict the public policy and legitimate interest of that state.²⁶ "A court may be guided by the forum state's public policy in determining the *law* applicable to a controversy."²⁷ Therefore, DOMA defenders argue, DOMA is superfluous legislation, restating a preexisting state right.²⁸ The right to determine family law matters regarding who may or may not marry is left to the discretion of each state, according to its own public policy. The United States Supreme Court, however, nullified that argument forty years ago in *Loving v. Virginia*, when it restricted state authority to regulate marriage.²⁹

DOMA's opponents argue that Congress cannot unilaterally eliminate an area of law from full faith and credit.³⁰ The FFCC states that "Full Faith and Credit *shall* be given . . . to the public Acts, Records, and judicial Proceedings of every other State."³¹ Therefore, given a strict reading of the FFCC in its entirety, Congress may only prescribe the manner and effect of full faith and credit, but may not substantively dictate which acts, records, and proceedings are afforded full faith and credit.

This interpretation is consistent with the "ratcheting theory" of congressional power.³² Under the ratcheting theory, Congress is limited to a one-way "ratcheting" of constitutional mandates.³³ Congress may only expand constitutional rights and privileges, but may not limit them.³⁴ Justice Brennan first proposed this ratcheting theory in *Katzenback v. Morgan*.³⁵

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Silberman, *supra* note 20, at 193.

²⁹ 388 U.S. 1, 12 (1967) (holding that marriage is a fundamental right that states cannot restrict without due process of law). Because of the Court's decision in *Loving*, states do not have unilateral authority to regulate marriage and this federalist argument fails.

³⁰ Sack, *supra* note 17, at 507.

³¹ U.S. CONST. art. IV, § 1 (emphasis added).

³² Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act*, 76 NEB. L. REV. 604, 620 (1997).

³³ *Id.*

³⁴ *Id.*

³⁵ 384 U.S. 641, 651 (1966).

Katzenbach dealt with Congress's authority under section five of the Fourteenth Amendment.³⁶ The issue before the Court was whether the Voting Rights Act was a Constitutional expression of congressional power under section five.³⁷ The court found that because section five is an express grant of congressional authority, Congress is limited to a one-way ratcheting-up of the Constitutional protections for which it was granted the authority.³⁸ Congress may only act to "carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights."³⁹ The Court reasoned that section five does not grant Congress the power to exercise discretion in the other direction to enact "statutes so as in effect to dilute equal protection and due process."⁴⁰ Accordingly, the Court found the Voting Rights Act to be consistent with Congress's authority under section five of the Fourteenth Amendment.

Similarly, the FFCC is an express grant of congressional authority.⁴¹ The effects clause grants Congress specific authority to prescribe the manner and the effect of full faith and credit.⁴² Because this is another express grant of authority, Congress's action is limited to the same one-way ratcheting.⁴³ "The basic test is the same . . . as in all cases concerning the express power of Congress in relation to the reserved powers of the states."⁴⁴ DOMA is another example of the power of Congress in relation to the reserved powers of the states. The constitutionality of DOMA hinges upon the interpretation of Congress's express grant of authority under the FFCC in relation to the reserved powers of the states to legislate according to their own public policy. As such, Congress cannot act to dilute the power of the FFCC. The FFCC demands that full faith and credit be given to the acts, records, and proceedings of sister states. Allowing Congress to eliminate

³⁶ *Id.* at 646.

³⁷ *Id.*

³⁸ *Id.* at 651.

³⁹ *Id.* at 650.

⁴⁰ *Id.* at 651.

⁴¹ U.S. CONST. art. IV, § 1.

⁴² *Id.*

⁴³ *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966).

⁴⁴ *Id.*

some acts or records from full faith and credit would dilute and diminish the rights given under the FFCC.

C. Previous Actions

Congress has only acted under its FFCC authority on three other occasions. Each of those occasions was a procedural prescription, not a substantive proscription. The first exercise of congressional FFCC authority came with the enactment of 28 U.S.C. § 1738 which codifies the constitutional requirements of full faith and credit. Congress acted a second time under this authority when it passed the Parental Kidnapping Protection Act (“PKPA”).⁴⁵ The third exercise of Congress’s FFCC power came with the enactment of the Child Support Orders Act.⁴⁶

Section 1738 codifies the constitutional requirements of full faith and credit.⁴⁷ The statute, however, goes beyond the bounds of the constitutional provision, broadening its effect.⁴⁸ This statute extends the requirements of full faith and credit beyond the state court systems and into the realm of the federal courts.⁴⁹ Thus, 28 U.S.C. 1738 expanded the power of full faith and credit, ratcheting-up those constitutional protections.

Section 1738 is a procedural guideline. The statute sets forth procedures for authenticating acts of any state, territory, or United States possession.⁵⁰ The statute then sets forth the procedures by which other states, territories, or United States possessions enforce those acts and judgments.⁵¹ Because the statute is a procedural guideline, expanding the breadth of full faith and credit, Congress acted consistently with its grant of authority under the FFCC.

Congress also acted appropriately under its FFCC authority when it enacted the PKPA.⁵² The purpose of the PKPA was to “avoid jurisdictional competition and conflict between the

⁴⁵ 28 U.S.C. § 1738A (2000).

⁴⁶ 28 U.S.C. § 1738B (1997).

⁴⁷ Compare 28 U.S.C. § 1738 (1948), with U.S. CONST. art. IV, § 1.

⁴⁸ *Id.*

⁴⁹ Daina B. Garonzik, *Full Reciprocity for Tribal Courts from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 45 EMORY L.J. 723, 723 (1996).

⁵⁰ 28 U.S.C. § 1738.

⁵¹ *Id.*

⁵² 28 U.S.C. § 1738A.

states.”⁵³ Congress deemed the PKPA necessary because of the ambiguities that often arose between states regarding child custody orders.⁵⁴ Courts often create child custody orders to be in the best interest of the child.⁵⁵ Because the child’s circumstances frequently change, those orders seemed to lack finality and enforceability in sister states.⁵⁶ To resolve that ambiguity, the PKPA set forth guidelines by which states may enforce sister states’ child custody orders.⁵⁷ In so doing, Congress created procedural guidelines and expanded the breadth of the FFCC to apply consistently with child custody orders through the PKPA.⁵⁸ Thus, Congress acted consistently with its FFCC authority because it set forth procedural guidelines to ratchet-up the effect of the FFCC.

Congress acted similarly when it created the Child Support Orders Act.⁵⁹ Like child custody orders, the enforcement of child support orders in sister states needed clarification.⁶⁰ Courts from state to state lacked uniformity in the application and creation of child support orders.⁶¹ Therefore, Congress created a set of procedural guidelines for applying full faith and credit to the child support orders of sister states.⁶² Before passage of the Act, as with child custody orders, courts often did not give full faith and credit to child support orders.⁶³ By passing the Child Support Orders Act, Congress, again, increased the breadth of the FFCC by establishing procedural guidelines by which states should give full faith and credit.

⁵³ H.R. 8406, 96th Cong. (2nd Sess. 1980).

⁵⁴ *Id.*; *Thompson v. Thompson*, 484 U.S. 174, 180 (1988).

⁵⁵ *Thompson*, 484 U.S. at 180.

⁵⁶ *Id.*

⁵⁷ 28 U.S.C. § 1738A. For example, the PKPA determines which courts have jurisdiction to enter the custody orders and under what circumstances they may be modified by another state.

⁵⁸ *Id.*; *Thompson*, 484 U.S. at 180.

⁵⁹ 28 U.S.C. § 1738B.

⁶⁰ *Id.*; S. REP. NO. 103-361, at 2 (1994) *reprinted in* 1994 U.S.S.C.A.N. 3259, 3259.

⁶¹ S. REP. NO. 103-361, at 2.

⁶² 28 U.S.C. § 1738B. These guidelines established what the court should do in the event that two other courts have issued support orders. The statute also determines which court has jurisdiction over the support orders and what procedural steps the parties must take to modify and enforce those orders.

⁶³ S. REP. NO. 103-361, at 3.

DOMA was the fourth congressional exercise of FFCC power.⁶⁴ Unlike the other three full faith and credit statutes, DOMA restricts the breadth of the FFCC.⁶⁵ 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.⁶⁶

DOMA makes the application of full faith and credit to same-sex marriages optional. Congress, however, cannot make permissive what is constitutionally mandatory; the legislature cannot undercut a constitutional mandate. DOMA sets forth no procedural guidelines and does not work to create uniformity among the states.⁶⁷ DOMA does the opposite. DOMA is a substantive alteration of the FFCC. Where the FFCC demands that full faith and credit be given to the acts, records, and proceedings of sister states, DOMA exempts one category of records, marriage licenses, from this requirement. DOMA does not apply unilaterally to marriages. Rather, it specifically targets same-sex marriages. By doing so, it fosters animosity and confusion among the states and their citizens. The effect of DOMA is that marriages valid in one state may not be recognized at all in another state, and people's rights may vary greatly from state to state.

Examining prior exercises of congressional authority under the FFCC reveals the inconsistent and constitutionally questionable nature of Congress's inception of DOMA. Congress created DOMA in reaction to a perceived political threat from Hawaii. Congress attempted to exercise its power under the FFCC. In doing so, however, it limited the scope of full faith and credit by eliminating same-sex marriage from this constitutional requirement. Congress's authority to enact DOMA is questionable, and DOMA creates numerous restrictions on existing rights.

⁶⁴ 28 U.S.C. § 1738C (1996).

⁶⁵ *Id.*

⁶⁶ 28 U.S.C. § 1738C.

⁶⁷ *See id.*

III. DOMA and the Privacy Penumbra

One of those restricted rights is the right to privacy. The broad right of privacy, as described in *Roe v. Wade*, encompasses personal decisions regarding family relationships.⁶⁸ The right to choose one's spouse is the essence of the personal family relationship that the right of privacy was intended to protect.

The right to choose a spouse falls within the penumbra of privacy rights outlined by the Supreme Court in *Griswold v. Connecticut*.⁶⁹ All constitutional rights carry with them a "penumbra" of unexpressed rights.⁷⁰ The right to choose a spouse, like the right to use a contraceptive, to choose a child's education, or to choose a course of study, is constitutionally implied.⁷¹ Such rights are equally as important as any expressed constitutional right, and are equally protected from congressional intrusion.⁷² DOMA, however, impedes the right to choose one's spouse by allowing some states to ignore the marital status of same-sex couples. Those couples are then confined to live in the state(s) in which their marriage is recognized.

Proponents of DOMA argue that homosexual couples may choose the state in which they live. By doing so, they may choose to live in a state that recognizes such a marriage. Alternatively, should that couple choose to relocate to another state that does not condone such a marriage, the couple voluntarily relinquishes their rights by subjecting themselves to the law of another state. Confining same-sex couples to the state in which they are married, however, violates basic notions of the freedom of association, freedom to travel, and the right to *freely* choose a state of residence.

IV. Conclusion

The full implications of DOMA remain unseen. Recent developments, such as the vote against California's Proposition 8, and Connecticut condoning same-sex marriages, continue to stir

⁶⁸ *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

⁶⁹ 381 U.S. 479, 484 (1965).

⁷⁰ *Id.*

⁷¹ *Id.* at 483.

⁷² *Id.* at 484.

this politically-charged, civil rights movement.⁷³ Passionate advocates on both sides of the same-sex marriage debate will ensure a resolution to the issue of DOMA's constitutionality. Resolving that issue will certainly entail a look at the history, text, and context in which DOMA was passed.

A glance at the history of DOMA reveals a politically fueled backlash to a groundbreaking Hawaiian Supreme Court decision. Scrambling to ease the concerns of constituents, many lawmakers proposed and promoted DOMA as a resolution to the full faith and credit implications of the Hawaiian Court's decision. With little other authority to stand on, Congress acted under its FFCC power to limit the breadth of that very same provision. This congressional action stands in stark contrast to the nature of Congress's previous acts under the FFCC. Congress has, for the first time, limited the scope of the FFCC and given states the option to *not* give full faith and credit to a sister state.

Restricting fundamental rights is a dangerous game for Congress. Opponents of DOMA are certain to continue fighting, advocating its constitutional conflicts. With equally passionate supporters, the DOMA issues will not be resolved easily or quickly. DOMA presents one of the few pieces of legislation dealing with such emotionally-charged, personal issues. With emotions high, and deeply personal issues at stake, both sides become deeply and passionately ensconced in their ideas. Such a rarely personal issue puts the heart of DOMA truly at the intersection of love and legislation.

⁷³ Voters in California voted for, and passed, Proposition 8, a statewide ban on same-sex marriages, in California's November 2008 election. Jesse McKinley, *With Same-Sex Marriage, a Court Takes on the People's Voice*, N.Y. TIMES, Nov. 21, 2008, at A18. The passage of Proposition 8 came with much protest and controversy.

