
CONSTITUTIONAL LAW — FULL FAITH AND CREDIT CLAUSE — TENTH CIRCUIT INVALIDATES OKLAHOMA STATUTE BARRING RECOGNITION OF OUT-OF-STATE ADOPTIONS BY SAME-SEX COUPLES. — *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

The Union that binds the fifty states both contemplates and transcends interstate differences and tensions. Indeed, the fact that the Framers included in the Constitution a clause explaining that respect should “be paid to acts, records, &c., of one state in other states”¹ reveals that nonuniformity in state laws led to interstate tension even before the Founding.² Both the Full Faith and Credit Clause³ and the Effects Clause⁴ moderate this interstate tension: the first lays a groundwork for interstate relations, and the second empowers Congress to ease growing tensions when the normal framework fails.⁵ These provisions, ratified over two hundred years ago, remain relevant today as tension reverberates between states that adhere to starkly opposing views on adoption by same-sex couples. Recently, in *Finstuen v. Crutcher*,⁶ the Tenth Circuit held unconstitutional an Oklahoma statute barring recognition of out-of-state adoptions by same-sex couples,⁷ declaring that the statute violated the Full Faith and Credit Clause. In ruling that adoption judgments fall outside of a judicially created public policy exception to that clause, the court exposed an area where the Full Faith and Credit framework falls short in moderating interstate tension. Pursuant to its authority under the Effects Clause, Congress should enact legislation that restores the right of Oklahoma’s citizens to govern themselves.

Greg Hampel and Ed Swaya, both residents of Washington, adopted Oklahoma-born “V” in 2002.⁸ At the couple’s request, the

¹ 2 JAMES MADISON, THE JOURNAL OF THE DEBATES IN THE CONVENTION WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES, MAY–SEPTEMBER, 1787, at 293 (Gaillard Hunt ed., 1908).

² See CHARLES WARREN, THE MAKING OF THE CONSTITUTION 5, 13–14 (Fred B. Rothman & Co. 1993) (1928) (suggesting that fear of disunion, stemming in part from interstate tensions, motivated the creation of the Constitution).

³ U.S. CONST. art. IV, § 1, cl. 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”).

⁴ *Id.* art. IV, § 1, cl. 2 (“And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”).

⁵ See Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1511 (2007) (“The constitutional model of interstate relations . . . is one of judicially enforceable constitutional default rules prohibiting state discrimination that are subject to an ultimate congressional override.” (footnote omitted)).

⁶ 496 F.3d 1139 (10th Cir. 2007).

⁷ The statute stated in part that “this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.” OKLA. STAT. tit. 10, § 7502-1.4(A) (Supp. 2007).

⁸ *Finstuen*, 496 F.3d at 1142.

Oklahoma State Department of Health (OSDH) issued a new birth certificate for V listing both men as V's parents.⁹ The Oklahoma legislature responded by amending the adoption statute to ban official recognition of out-of-state adoptions by same-sex couples.¹⁰ Anne Magro and Heather Finstuen had two children in New Jersey, where they obtained birth certificates for each child naming both Magro and Finstuen as parents; they subsequently moved to Oklahoma.¹¹ Lucy and Jennifer Doel adopted child "E" in California, and later became residents of Oklahoma.¹² After the amended adoption statute took effect, the Doels requested an Oklahoma birth certificate listing both Jennifer and Lucy as parents, which OSDH refused to issue.¹³ All three couples sued to enjoin enforcement of the Oklahoma adoption amendment.

The plaintiffs brought suit in the Western District of Oklahoma.¹⁴ In response to cross-motions for summary judgment,¹⁵ the trial court ruled that Hampel and Swaya had only speculative fears that their legal status as parents would be challenged; therefore, they had suffered no injury and lacked standing.¹⁶ The remaining plaintiffs, however, had suffered injuries,¹⁷ and the court considered their full faith and credit, equal protection, due process, and right to travel claims in turn.¹⁸ The court explained that the adoption decree required the sanction of a judicial officer and was therefore a judgment.¹⁹ As a judgment, it was entitled to national recognition under the Full Faith and Credit Clause.²⁰ Further, the court dismissed the defendant's argument that *Baker v. General Motors Corp.*²¹ permitted Oklahoma to ignore out-of-state judgments when those judgments "purported to accomplish an official act" that, like adoption, lay within Oklahoma's "exclusive province."²² According to the trial court, that language in *Baker* referred only to judgments that command another state's action or inaction; because it was Oklahoma law, not the out-of-state adoption decree, that required the issuance of the birth certificate, the ex-

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* They never had an actual dispute with Oklahoma authorities. *See id.* at 1144-45.

¹² *Id.* at 1142.

¹³ *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1301 (W.D. Okla. 2006).

¹⁴ *Id.* at 1300.

¹⁵ *Id.*

¹⁶ *Id.* at 1304. Hampel and Swaya worried that their parental rights would be revoked during visits to Oklahoma required by their adoption agreement. *Id.*

¹⁷ *Id.* at 1303-04.

¹⁸ *Id.* at 1304-15.

¹⁹ *Id.* at 1304.

²⁰ *Id.* at 1305.

²¹ 522 U.S. 222 (1998).

²² *Finstuen*, 497 F. Supp. 2d at 1306-07 (quoting *Baker*, 522 U.S. at 235).

ception was irrelevant.²³ The court concluded that the Oklahoma adoption statute violated the Full Faith and Credit, Equal Protection, and Due Process Clauses, but rejected the right to travel claim.²⁴

The Tenth Circuit reversed in part and affirmed in part. Writing for the panel, Judge Ebel²⁵ first addressed the standing issue, concluding that in addition to Hampel and Swaya, Finstuen and Magro also lacked standing for failing to state an injury-in-fact.²⁶ The Doels, however, had alleged two specific injuries-in-fact: they were denied a birth certificate listing both Lucy and Jennifer Doel as parents, and when their child E suffered a medical emergency, they were initially told by an ambulance crew and an emergency room crew that only “the mother” could accompany E.²⁷ The majority also considered OSDH’s argument that the adoption statute did not apply to the Doels because their adoption had occurred in more than one proceeding.²⁸ It held that there was no basis for OSDH’s construction of the statute,²⁹ and further concluded that OSDH’s concession did not render the case moot because the agency lacked authority to issue a binding interpretation of the statute.³⁰

Moving to the merits of the case, Judge Ebel explained that statutes and judgments are treated differently under the Full Faith and Credit Clause.³¹ Under the public policy exception to the clause, a state need not defer to a sister state’s statutes when those statutes run counter to local public policy.³² Judgments, however, once rendered by a court of competent jurisdiction in any state, must be recognized “throughout the land.”³³ Oklahoma, then, was required to recognize the ruling of a California court that Jennifer Doel could adopt E and to extend to her the same rights given to other adoptive parents in Oklahoma.³⁴ Without reaching the due process or equal protection issues, the court concluded that the Oklahoma adoption statute was unconstitutional because of its categorical refusal to honor out-of-state adoption judgments for same-sex couples.³⁵

²³ *Id.* at 1307.

²⁴ *Id.* at 1306–15.

²⁵ Judge Ebel was joined by Judge O’Brien.

²⁶ *Finstuen*, 496 F.3d at 1144–45.

²⁷ *Id.* at 1145.

²⁸ *Id.* at 1147–48.

²⁹ *Id.* at 1148–49.

³⁰ *Id.* at 1149–51.

³¹ *Id.* at 1152–53.

³² *Id.*

³³ *Id.* at 1153 (citing *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232–33 (1998)).

³⁴ *Id.* at 1154–55. Oklahoma law gives adoptive parents all the rights of natural parents. *See* OKLA. STAT. tit. 10, § 7505-6.5(A) to (B) (2001).

³⁵ *Finstuen*, 496 F.3d at 1156. The court also dismissed several of OSDH’s arguments because they were raised for the first time on appeal. *See id.* at 1155 n.13.

Judge Hartz concurred in part and dissented in part. Hampel and Swaya, he agreed, lacked standing to bring their suit.³⁶ Finstuen and Magro sought relief only from the Governor and Attorney General, neither of whom had appealed the district court's decision; therefore, discussion of their situation and standing was irrelevant.³⁷ As for Jennifer and Lucy Doel, Judge Hartz explained, the OSDH brief conceded that "the statute challenged by the Doel plaintiffs does not preclude issuance of the birth certificates that they seek."³⁸ Rather than addressing the merits of the case, the majority should have accepted OSDH's concession and affirmed the district court without further discussion.³⁹

The Tenth Circuit's weakly supported characterization of adoption proceedings as judgments allowed the court to implement its own ideals at the expense of a public policy clearly stated by Oklahoma's elected legislature. The court's ruling also revealed an important shortcoming of the Full Faith and Credit Clause: its practical effect is a one-way expansion of state-recognized individual rights that occurs at the expense of strongly held local public policies. In order to properly balance individual rights with the collective right to establish public policy, and to restore Oklahoma's right to determine its own public policy, Congress should enact Effects Clause legislation permitting all states to decide what effect out-of-state adoption proceedings should be given within their respective boundaries.

At the conclusion of its decision, the majority asserted that "final adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause."⁴⁰ Astonishingly, the majority offered only a brief footnote as support for the assertion that adoption orders and decrees are judgments,⁴¹ and devoted most of its opinion to how judgments should be treated under the Full Faith and Credit Clause. This interpretation was not as clearly required as the opinion's façade of confident, authoritative language suggested — indeed, scholars disagree over whether adoption decrees should be treated as judgments for purposes of the Full Faith and Credit Clause, or whether they should be subject to the public policy exception.⁴² Although a full discussion of this issue falls outside

³⁶ *Id.* at 1156 (Hartz, J., concurring and dissenting).

³⁷ *Id.* at 1156–57.

³⁸ *Id.* at 1157.

³⁹ *Id.*

⁴⁰ *Id.* at 1156 (majority opinion).

⁴¹ *See id.* at 1152 n.12.

⁴² *See generally* Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbian and Gay Adoptions*, 3 AVE MARIA L. REV. 561 (2005) (presenting conventional arguments for mandating interstate recognition of adoptions and suggesting reasons why out-of-state adoptions by same-sex couples should be treated differently).

the scope of this comment, the majority's failure to provide any justification for treating adoption orders as judgments weakens its conclusion that the adoption-related policy decisions of California should be imposed on the people of Oklahoma against their wishes.

Regardless of whether the *Finstuen* court applied precedent correctly in treating adoption as a judgment beyond the reach of the public policy exception, judicial willingness to exalt individual judgments over an entire state's public policy reveals a practical shortcoming of the Full Faith and Credit Clause: in suits between individuals and a state, the clause serves only to expand state-recognized individual rights.⁴³ As quasi-sovereign entities, states are concerned with enacting laws and passing judgments that further their respective public policies within their respective boundaries.⁴⁴ Once elected officials achieve a desirable result for the citizens of their state, they generally have no motivation (in their capacity as elected officials) to ensure the same result in other states.⁴⁵ Individuals, on the other hand, are interested in the scope of their own respective rights and privileges. Understandably, most individuals want a broad range of rights that remains consistent as they travel from one state to another. Thus, an individual who feels her rights are curtailed in one state will seek to expand them in that state, while an individual who already enjoys broad rights in one state will seek consistent recognition of those rights throughout the remaining states. The Full Faith and Credit Clause empowers individuals to gain consistent recognition of a state-recognized right throughout the fifty states.

Under this expanding rights hypothesis, once individuals obtain recognition of a right — like the right for same-sex couples to adopt — in one state, they can use the clause to establish that right in one or more additional states. Thus, each of the plaintiffs in *Finstuen* received a favorable adoption judgment in another state and then sought recognition of that judgment in Oklahoma; although in the end only the Doels' claims were recognized, the expanded right applies to all of the plaintiffs. Meanwhile, people who receive a negative judgment,

⁴³ Importantly, this argument does not apply to full faith and credit suits about money judgments, which are retrospective in nature; rather, it is limited to suits which would prospectively change individual rights in a state. *Cf. id.* at 588–90 (arguing that adoption decrees are different from money judgments because they “create an ongoing relationship”).

⁴⁴ See Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 940 (2006) (stating that “subfederal polities are apt to pursue only their state interests”).

⁴⁵ Officials motivated by a strong belief in a certain policy may desire to spread their state's policy to other states individually or to the nation as a whole; however, practicalities such as the time and resource requirements of such an undertaking, combined with the superior ability of federal officials to represent state interests on the national level, probably temper this desire.

denying state recognition of a right, may still seek to establish that right in any other state. If the Doels had attempted to adopt in Oklahoma first, they would have been unsuccessful; however, that would not have prevented them from going to California or any of the remaining forty-eight states to seek recognition of the right in question.⁴⁶ As a result, the practical effect of the Full Faith and Credit Clause is to expand individual rights.

The problem with one-way expansion of individual rights is that requiring a state to recognize a new individual right simultaneously diminishes another collective right: the right of citizens to act through their elected officials to establish their state's public policy. When life-tenured judges apply the Full Faith and Credit Clause to impose one state's conception of rights (as embodied in a judgment) on another state, they frustrate the democratic process, denying citizens of the second state the right of self-government as it applies to that issue. Thus, by giving Jennifer and Lucy Doel the right to have their parental status recognized by the state of Oklahoma, the *Finstuen* court effectively told the people of Oklahoma that they had no right to set Oklahoma's public policy towards adoption by same-sex couples. The judicially created public policy exception allows states to ignore out-of-state statutes that run counter to strong local policy;⁴⁷ but, as reiterated in *Finstuen*, it generally does not apply to judgments.⁴⁸ Thus, had the Doels' adoption been given effect in California by statute, rather than by judicial proceeding, the people of Oklahoma would have retained their right to choose whether or not to recognize adoptions by same-sex couples. However, because the adoption required the sanction of a judicial officer,⁴⁹ the court deemed the public policy exception inapplicable — seemingly in accordance with precedent,⁵⁰ although perhaps not⁵¹ — and refused to recognize the public policy of Oklahoma as codified by its elected government.

The inability of Oklahoma to protect its strongly held public policy on adoption by same-sex couples from extraterritorial judgments can

⁴⁶ Likewise, one who seeks and obtains the right to divorce — or perhaps more accurately, the right to remarry — in one state could use the Full Faith and Credit Clause to establish the same right in a second state. See *Williams v. North Carolina*, 317 U.S. 287, 301–02 (1942) (holding that a divorce decree properly issued in one state is entitled to full faith and credit in all other states). But one who is denied the right to remarry in one state may still seek that right in every other state.

⁴⁷ See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1972 (1997).

⁴⁸ See *Finstuen*, 496 F.3d at 1153–54.

⁴⁹ See *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1305 (W.D. Okla. 2006).

⁵⁰ See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232–34 (1998).

⁵¹ See *Wardle*, *supra* note 42, at 599–609.

best be rectified by congressional action.⁵² Professor Gillian Metzger advocates the admittedly controversial view that the Effects Clause of the Constitution authorizes Congress to act as a “national umpire over interstate relations”⁵³ with power to determine whether “[interstate] discrimination is justified by substantial interstate strife over an activity.”⁵⁴ She argues that the Full Faith and Credit Clause was designed to be “self-executing,” but that Congress was simultaneously given “power to legislate regarding the effects of laws and judgments if it so chose.”⁵⁵ Thus, although the *Baker* Court refused to subject the interstate enforceability of judgments to a “roving ‘public policy exception’”⁵⁶ — one not tethered to any particular judicial category or congressional enactment — Congress can still legislate a fixed exception for adoption judgments. Professor Metzger also suggests that Congress might choose to exercise this power because of significant differences in policy among the states, or to preserve local traditions.⁵⁷ Both of these reasons apply to same-sex adoption policy. Although some commentators argue against such legislation on the ground that it would permit the states to enact discriminatory public policies,⁵⁸ the sharp divergence of views regarding homosexual family relationships suggests that “permitting interstate discrimination may better advance interstate harmony and attachment than would unbending adherence to antidiscrimination principles.”⁵⁹ The enactment of the Defense of Marriage Act⁶⁰ — an example of Effects Clause legislation — dealt with the similarly divisive issue of same-sex marriage, and the resulting interstate discrimination has arguably relieved significant interstate

⁵² Oklahoma has decided not to appeal the Tenth Circuit’s decision. See Barbara Hoberock, *State Won’t Fight Same-Sex Adoption Ruling*, TULSA WORLD, Aug. 17, 2007, at A9. Therefore, congressional action is needed to restore Oklahoma’s right to determine its own public policy regarding adoption by same-sex couples.

⁵³ Metzger, *supra* note 5, at 1478.

⁵⁴ *Id.* at 1501. For a thorough discussion of Congress’s power under the Effects Clause, see Rosen, *supra* note 44. But see Letter from Laurence H. Tribe to Sen. Edward M. Kennedy (May 24, 1996), in 142 CONG. REC. 13,359, 13,360 (1996) (stating that the text of the Effects Clause does not support allowing statutes and judgments from one state to be given no effect in other states); Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 44 (2005) (arguing that Congress can only increase the required interstate effect of state laws and judgments, because to decrease the required effect would be to “repeal part of the Constitution”).

⁵⁵ Metzger, *supra* note 5, at 1498.

⁵⁶ *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (emphasis added).

⁵⁷ Metzger, *supra* note 5, at 1501.

⁵⁸ See Kramer, *supra* note 47, at 1983, 1987, 1999.

⁵⁹ Metzger, *supra* note 5, at 1503.

⁶⁰ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000)).

tension by allowing each state to adhere to a marriage policy that reflects its values.⁶¹

Furthermore, congressional action on same-sex adoption would preserve the states as sovereign “laboratories of democracy”⁶² in which different principles and standards can be tested. Rather than impose national uniformity, such legislation would provide United States citizens with options, giving them freedom to establish residency in a state whose bundle of rights most closely reflects their own convictions about which rights should and should not be recognized. Most importantly, congressional action would leave the citizens of Oklahoma and every other state free to define their own public policy.⁶³

The Full Faith and Credit Clause serves an important function in the United States: it “make[s the states] integral parts of a single nation.”⁶⁴ In most cases, the granting of full faith and credit to judgments of sister states is beneficial to the citizens of each state whose judgments and laws are represented in the conflict. But when the issue being decided implicates the strong opposing convictions of the citizens of different states, such that the policies of one state might be imposed on another, Congress has both the power and the duty to allow the people to determine and enforce their own public policy. As Abraham Lincoln once observed in a different context, “When . . . man governs himself that is self-government; but when he governs himself and also governs *another* man, that is *more* than self-government — that is despotism.”⁶⁵

⁶¹ See Metzger, *supra* note 5, at 1533.

⁶² See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁶³ See Mark D. Rosen, “*Hard*” or “*Soft*” Pluralism?: *Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers*, 51 ST. LOUIS U. L.J. 713, 749 (2007) (listing three reasons why states should be allowed to set their own public policies: to “allow the fullest possible political expression”; to permit experimentation with different policies; and to afford citizens an opportunity to “participate in sub-federal democratic politics”); Rosen, *supra* note 44, at 935 (arguing that the Full Faith and Credit Clause “aims not only at unifying the states, but also at ensuring that the states remain meaningfully empowered, distinct polities”).

Of course, any implementation of a public policy against recognition of out-of-state adoptions by same-sex couples must comply with constitutional standards and address the practical effects of the nonrecognition of established familial relationships. As evidenced by the lower court’s decision, the hastily-drafted Oklahoma statute probably would not have met this standard. Any further attempt to regulate adoptions by same-sex couples should take into account, for example, the inevitability that same-sex parents will travel through Oklahoma, and should ensure that while doing so these parents will feel confident that they can obtain medical care and other necessities for their children without any delay or intolerance on the part of public or emergency officials.

⁶⁴ *Williams v. North Carolina*, 317 U.S. 287, 295 (1942) (quoting *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935)) (internal quotation mark omitted).

⁶⁵ ABRAHAM LINCOLN, Speech at Peoria, Illinois (Oct. 16, 1854), *excerpted in THE WIT AND WISDOM OF ABRAHAM LINCOLN* 18 (Bob Blaisdell ed., 2005).