Testimony of

Mr. Gregory Coleman

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Testimony before the Senate Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Property Rights
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Mr. Chairman and the members of the Senate Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Property Rights, I am honored and appreciate the invitation to testify before the Subcommittee today for its hearing entitled "What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?"

My name is Greg Coleman. I am a partner with the law firm of Weil, Gotshal & Manges LLP and am head of the firm's Supreme Court and Appellate Litigation Practice Group. My testimony today represents my own views and does not represent the views of the firm. Between 1999 and 2001, I served as Solicitor General for the State of Texas. I also served as a law clerk to Justice Clarence Thomas and, earlier, to Judge Edith Hollan Jones on the United States Court of Appeals for the Fifth Circuit. I am a graduate of the University of Texas School of Law.

I was invited to testify this afternoon on the litigation risks that the Defense of Marriage Act (DOMA) may face in the foreseeable future and particularly in light of the Supreme Court's recent decisions in Lawrence v. Texas, 123 S.Ct. 2472 (2003), and Romer v. Evans, 517 U.S. 620 (1996).

The question of same-sex marriage is not a particularly new phenomenon. Starting in the 1970s, numerous same-sex couples brought challenges in a variety of jurisdictions seeking to marry. These challenges ordinarily sought an order compelling a county clerk to issue a marriage license to the couple. Prior to 1993, unsuccessful challenges had been brought in several jurisdictions, including Colorado, District of Columbia, Kentucky, Minnesota, Pennsylvania, and Washington. See, e.g., Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), appeal dism'd, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972); De Santo v. Barnsley, 328 Pa. Super. 181, 476 A.2d 952 (1984); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187, review denied, 84 Wash.2d 1008 (1974).

The first successful constitutional challenge to traditional heterosexual marriage occurred in Hawaii. In 1993, the Hawaii Supreme Court held that the state's marriage law defining marriage as between a man and a woman "regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex" and "establishes a sex-based classification." Baehr v. Lewin, 852 P.2d 44, 64 (Haw. 1993). Consequently, the court held, the statute was subject to strict scrutiny under the state's equal protection clause and would be presumed to be unconstitutional. Id. at 67. The court remanded the case to permit the lower court to determine whether the state could demonstrate that the statute's sex-based classification was justified by compelling state interests and was narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights. Id. at 68. On remand, the circuit court declared the state's marriage statute unconstitutional. Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. 1996). The

decision was stayed pending appeal and, in 1998, the voters approved a state constitutional amendment preserving traditional marriage.

Litigation has continued in several states. Voters in Alaska similarly adopted a state constitutional amendment in 1998 in response to a lower court determination that Alaska's marriage law would be subjected to strict scrutiny. See Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Alaska Super. Ct. 1998). The Vermont Supreme Court ordered the state legislature to provide the benefits of marriage to same-sex couples, and the legislature enacted a civil-union statute. Courts in Connecticut and Georgia have rejected claims by couples who obtained civil unions in Vermont to claim the legal incidents of marriage in the home states. A New York court has permitted a man with a civil union to sue a hospital for the death of his partner. Lawsuits seeking recognition of same-sex marriage are also currently pending in Massachusetts, New Jersey, and Indiana.

The federal Defense of Marriage Act was enacted in 1996, largely in response to the Baehr decision in Hawaii. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C and 1 U.S.C. §7). DOMA contains two substantive provisions, one of which defines "marriage" and "spouse" for federal purposes as excluding same-sex marriages, and the other providing that states need not recognize a same-sex marriage performed and valid in another state. The first provision substantively defines marriage for purposes of federal law and the second was enacted pursuant to Congress's power under the Full Faith and Credit Clause to prescribe "by general Laws" the effect that one state's "public Acts, Records, and judicial Proceedings" will have in every other state. DOMA was the first time that authority was used to contract the reach of the Full Faith and Credit Clause.

Direct challenges to the constitutionality of DOMA will focus on two tracks, each of which has been significantly strengthened by the Supreme Court's recent decisions in Romer and Lawrence. First, and primarily, proponents of same-sex marriage will continue to push, as they have for more than 30 years, for formal recognition of the right to marry. Second, couples with civil unions or similar forms of recognition will continue to seek to require states to give formal recognition to the status achieved in other jurisdictions. My review of the key cases and litigation trends leads me to conclude that both of these efforts are likely to be successful in the next five to fifteen years.

Although Lawrence v. Texas does not address the issue of same-sex marriage--and, indeed, specifically disclaims the issue--much of the language in the Court's opinion suggests that recognition of same-sex marriage may be a foregone conclusion in near future. The right the petitioners sought to have recognized in Lawrence can be viewed from two perspectives: first, as a privacy interest that protects sexual conduct between consenting adults in the home; or, second, as a liberty interest that requires a broader societal recognition of the relationship itself (and perhaps legal recognition, too).

The Court could have decided the case on the narrower privacy grounds, but it expressly declined to do so. Indeed, the first paragraph in Justice Kennedy's opinion for the Court is explicit in its intentions:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

Slip op. at 1.

The first two sentences are clearly directed at the privacy interest, but the remainder of the paragraph is directed toward a broader "liberty" and "freedom" that, while not defined, are clearly not directed at the specific conduct directly at issue in the case. Indeed, the crux of the Court's criticism of Bowers, which it overruled, is that it focused solely on conduct and failed to "appreciate the extent of the liberty at stake." Again, although the Court does not expressly define that "liberty," the opinion appears to equate it with the same-sex relationship with which the Texas sodomy statute interfered:

The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition of the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Slip op. at 6.

The first sentence in the quotation addresses the question of same-sex marriage in two related ways. First, by defining the offending nature of the Texas sodomy statute, not in its prohibition of sexual conduct, but in its "control" of a "personal relationship," the Court has for the first time clearly recognized constitutional protection for homosexual relationships. Second, that conclusion is bolstered rather than weakened by the Court's disclaimer, "whether or not entitled to formal recognition of the law." The federal courts have never recognized a formal marriage-like same-sex relationship, so the Court's mere invoking of the "whether or not" is itself a suggestion that perhaps same-sex relationships are entitled to formal legal recognition.

The second paragraph in the quotation similarly focuses on the "relationship" and the "personal bond" but is somewhat more oblique. In stating that "the Constitution allows homosexual persons the right to make this choice," the opinion is unclear about whether the "choice" relates to the conduct directly at issue in the case or more generally to the relationship. Given the nature of the paragraph, though, it is more probably the latter.

These statements regarding the Constitution's protection of same-sex relationships do not, of course, inevitably lead to the conclusion that DOMA and similar state statutes and state constitutional amendments are unconstitutional invasions of liberty and privacy as those terms have come to be defined by the Supreme Court. But the Court's reminder that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," slip op. at 13, do not suggest that those enactments are beyond Lawrence's reach. Ultimately, there is a tension between the Court's demurrer that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," slip op. at 18, and its insistence on "respect for their private lives" and preventing the state from "demean[ing] their existence or control[ing] their destiny." The Court is not speaking of the private respect to which every person is morally entitled from every other, but rather of a formal, governmental respect for individuals' choices in their personal relationships. If so, then there is only a short and relatively insignificant step between Lawrence's holding that the control and demeaning consequences of a sodomy statute is unconstitutional and a future holding that the control and stigma from not being able to obtain formal governmental recognition of a same-sex relationship

are similarly unconstitutional.

DOMA is also at risk from the Court's decision in Romer v. Evans, 517 U.S. 620 (1996). Courts have long recognized that the Full Faith and Credit Clause does not require states to recognize as valid a marriage from another state that violates its strong public policy. See Brinson v. Brinson, 96 So.2d 653 (La. 1957); Henderson v. Henderson, 87 A.2d 403 (Md. 1952); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS §283(2). Moreover, while DOMA represents the first time that Congress has contracted the application of full faith and credit, most believe that Congress has authority to do so. Although many would dispute those general propositions, the greatest litigation danger to DOMA is not from the direct application of the Full Faith and Credit Clause, but from the logical application of Romer.

In Romer, as in these circumstances, sexual orientation was not required to be recognized as a protected class in state and municipal discrimination codes, just as full faith and credit does not necessarily require a state to recognize a marriage (or civil union) from another state. The problem in Romer was not that the result sought by the Colorado referendum was itself necessarily unconstitutional, but that the Court held that the referendum was grounded in animus to a specific group. Thus, the court found that the classification was "at once too narrow and too broad." It would be a relatively straightforward application of Romer for a Court to similarly find that DOMA and its state-law parallels violate equal protection. These legislative and state-constitutional enactments are clearly directed toward the preservation of traditional marriage and, consequently, like Amendment 2 in Romer, are express in their purpose of preventing same-sex marriage and, therefore, suffer the same infirmities the Court identified in Romer.

As things currently stand, given the outcomes and rationales in Romer and Lawrence, it is likely, though not inevitable, that DOMA itself and prohibitions on same-sex marriage more generally will be held to be unconstitutional in the relatively near future. Those decision provide the necessary background principles for such a holding, and the courts need not establish any additional concepts before reaching that conclusion. And while that future result is not ineluctable, current trends point strongly in that direction, and it is my professional opinion that, in the absence of some intervening event, the Supreme Court's evolving standards of liberty and privacy will result in constitutional protection for same-sex marriages within the next five to fifteen years.

A final note on the issue of states' rights. Some have objected to a proposed constitutional amendment on federalism grounds. These concerns are misplaced. The relationship between the states and the federal government is defined by the Constitution and, a fortiori, a constitutional amendment cannot violate principles of federalism and states' rights. A federal constitutional amendment is perhaps the most democratic of all processes--because it requires ratification by three-fourths of the states--and simply does not raise federalism concerns. The real danger to states' rights comes from the recognition of unenumerated constitutional rights in which the states have had no participation. If DOMA or similar state enactments are invalidated on federal constitutional grounds, the only possible recourse would be a constitutional amendment.