



DOMA Law May Be Headed For the Exit

By Rebekah Metzler March 27, 2013

A woman against DOMA, or the "Defense Of Marriage Act," stands near the Supreme Court in Washington on March 26, 2013.

Legal analysts are nearly united in their assessment that the federal Defense of Marriage Act, which bars same-sex spouses from receiving federal benefits, is at grave risk of being deemed unconstitutional by the Supreme Court following oral arguments on the case Wednesday.

It's often a dicey game trying to predict how the court will rule just by listening to how they question the lawyers pleading the case before them, but a wide array of experts said it's clear a majority in the court are skeptical of the law, signed by President Bill Clinton in 1996.

"If the Supreme Court can find its way through a dense procedural thicket, and confront the constitutionality of the federal law that defined marriage as limited to a man and a woman, that law may be gone, after a seventeen-year existence," wrote Lyle Denniston, a court reporter at SCOTUSblog, who has covered the Supreme Court for 55 years. "That was the overriding impression after just under two hours of argument Wednesday on the fate of the Defense of Marriage Act."

The DOMA case was the second argument the court has heard in two days concerning gay marriage, with arguments made Tuesday for and against a state referendum – Proposition 8 – passed in California that bans gay marriage after the state's courts deemed it a constitutional right.

"It seems much clearer what the court intends to do in the DOMA case than what yesterday's argument portends for Prop 8," says Steve Vladeck, law professor at American University. "Indeed, the more interesting question coming out of [Wednesday]'s argument is not whether the Justices will invalidate DOMA, but why."

The justices first scrutinized whether or not the DOMA case was properly before them and then the underlying argument about whether or not it violated the Constitution's equal protection clause that promises fair treatment for all citizens under the law, as well as if it trumped states' rights.

"There may not be five votes for either the federalism argument or the equal protection argument, but there certainly seem to be at least five votes, if not seven, for one or the other and for therefore invalidating DOMA," says Vladeck.

Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute, says there's reason to believe the court's swing vote, Justice Anthony Kennedy, will side with a majority in striking down the law, but on the basis of federalism rather than equal protection, something that would muddle the court's decision when it comes to practice.

"To the extent the swing justice is wary of the political implications of striking down all states' marriage laws, then he might not want a ruling that would set the logical precedent for such a move," Shapiro says. "There was a definite sense at the court that the provision of DOMA that limits marriage to opposite-sex couples for purposes of federal law isn't long for the world."

But given the case's complexity, he adds that any predictions made at this stage should be taken with a grain of salt.

"We're in for a real cliffhanger of a ruling," Shapiro says.