



## Cato legal analyst: DOMA is dead

By: Lou Chibbaro Jr. - March 28, 2013

---

A senior fellow with the Cato Institute, a libertarian think tank that supports LGBT equality, said comments by U.S. Supreme Court justices on Wednesday lead him to believe the high court will strike down the anti-gay Defense of Marriage Act known as DOMA.

Cato Institute senior fellow Ilya Shapiro, who attended Wednesday's oral arguments at the high court, said the court's four liberal justices would likely invoke the Constitution's "equal protection" clause as grounds for overturning DOMA's Section 3, which prohibits the federal government from recognizing same-sex marriages. Shapiro said comments made by Justice Anthony Kennedy, who is considered the court's swing vote on DOMA, indicate Kennedy would vote to strike down DOMA based on grounds that it violates "federalism" or states' rights protections under the constitution.

Assuming Kennedy joins liberal leaning Justices Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan in voting to declare Section 3 of DOMA as unconstitutional, the five would become a majority on the nine-member court needed to strike down that provision of DOMA, according to Shapiro.

"Assuming they get past the jurisdictional arguments it seems like DOMA Section 3 is not long for this world," he said.

Shapiro gave his assessment on the justices' views on DOMA at a Cato Institute forum Wednesday afternoon called Law, Politics, and Same-Sex Marriage.

Others panelists speaking at the forum included Walter Olson, a Cato Institute fellow, who served as moderator; Evan Wolfson, executive director of the same-sex marriage advocacy group Freedom to Marry; and Ken Mehlman, a York City businessman and former chair of the Republican National Committee.

Wolfson attended Wednesday's Supreme Court oral arguments on DOMA as well as the arguments before the court one day earlier on California's Proposition 8 case, which legal experts say could potentially lead to the legalization of same-sex marriage in all fifty states.

He told the forum that making predictions about how the court will rule on a case based on the justices' statements and questions during oral arguments is highly speculative.

"I think you really need to take every prediction you hear and read and see tweeted and re-tweeted very, very skeptically," Wolfson said. "The justices are going to go back and delve through a mountain of briefs in both cases, a huge amount of evidence and argument."

While the outcome of both the Prop 8 and DOMA cases is uncertain, there are things marriage equality advocates know “very, very clearly,” Wolfson said.

“One thing we know is that while the justices are doing their homework in going through the process, the best single way we can maximize winning the freedom to marry and even getting the justices encouraged to do the right thing as they deliberate now in the court is to do what we’ve been doing, which is to continue winning in more states and to continue winning over more hearts and minds,” he said.

“There are as many as four states that are going to be considering or have begun considering freedom to marry legislation and could pass those bills into law before the court hands down its decision likely at the end of June,” Wolfson said. “So the single biggest thing we can do to maximize the chances of winning are to pass those marriage bills and to continue growing the extraordinary ‘who’s who’ of Americans that have stepped up the last many weeks and months in supporting the freedom to marry.”

Mehlman, who’s gay and who has emerged as an outspoken same-sex marriage advocate in recent years, said that aside from using sound legal arguments, marriage equality advocates have made important advances by putting a human face on the same-sex couples who want the right to marry.

“In my judgment, what has so galvanized the public is our stories,” he said. “These are real stories about real people and they make a gigantic difference.”

He said the numerous “friend-of-the-court” or amicus briefs filed in support of the marriage equality side by a wide range of organizations also shows how the breadth of support for same-sex marriage has greatly expanded.

The Cato Institute is among the groups that have filed an amicus brief in support of striking down DOMA.

“It’s not just that it is a large number,” he said of the groups and individuals filing amicus briefs. “It’s the cross section of society. It’s military leaders. It’s religious leaders. It’s business leaders. It’s Republicans and conservatives. It’s leaders of excellent think tanks — all making the case from their perspective and why it makes sense,” Mehlman said.