Cowardly Supreme Court ducks gay marriage issue

ROBERT ROBB  **Robert Robb, columnist | azcentral.com** *3:52 p.m. MST October 21, 2014*

(Photo: Nick Oza, Nick Oza/The Republic)

I've been intrigued by the self-congratulatory reactions to a federal judge's decision requiring Arizona to issue marriage licenses to same-sex couples.

Politicians and activists refer to it as something "we" accomplished. Others say that it reflects well on Arizona as a state.

If this was truly a judicial decision, something dryly determined by the mechanical operation of law, the self-congratulations are misplaced. If you weren't one of the plaintiffs, their lawyers or the judges rendering the decisions, you made no contribution. All Arizona did was to be subject to the jurisdiction of the Ninth Circuit Court of Appeals and bound by its precedents.

Purely as a legal matter, however, same-sex marriage has taken a strange route and now rests in a highly peculiar place.

There are two main interpretative approaches to the U.S. Constitution, originalism and the living Constitution school. Originalism says the Constitution should be interpreted based upon the intent of those who wrote it. The living Constitution school says that the Constitution enunciates certain enduring principles that judges need to apply to current circumstances informed by current mores and values.

I'm an originalist myself. But from the living Constitution perspective, a strong case can be made that prohibiting same-sex marriage violates today's notions of equality and thus the Constitution's guarantee of equal protection under the law.

A U.S. Supreme Court decision so finding would hardly be surprising. But the high court has pointedly refused to so find.

In 2013, the U.S. Supreme Court did strike down a provision of the federal Defense of Marriage Act defining marriage, for federal law purposes, as limited to opposite-sex couples.

The court's reasoning was as follows. States have primacy in family law. The State of New York has the right to define marriage as including same-sex couples. It violates the federal Constitution's equal protection guarantee for the federal government to treat same-sex married couples in New York differently than opposite-sex ones.

The court's decision was consciously narrow. It did not find that a decision by a state limiting marriage to opposite-sex couples violated the federal Constitution. Nor did it find that another section of DOMA, providing that states don't have to recognize the same-sex marriages of other states, unconstitutional.

The court's decision seemed to say that defining marriage was up to the states, but the federal government has to accept whatever the states decide.

Nevertheless, federal district court judges and Courts of Appeals now covering most of the country have cited the U.S. Supreme Court's DOMA decision in striking down state bans on same-sex marriage. At a minimum, this goes well beyond the high court's DOMA ruling. A very good argument can be made that it in fact violates one of the ruling's central tenets, the primacy of the states in family law.

Yet the U.S. Supreme Court has refused to accept any appeals of these lower court decisions. The high court appears to want to stay out of the issue unless a conflict at the appellate court level requires it to act. That's cowardly and cynical.

The laws of the majority of states on so fundamental an issue shouldn't be invalidated piecemeal by lower court judges not acting on clear precedent. Yet that's what has happened.

It's hard to resist the conclusion that a majority of Supreme Court justices want to see same-sex marriage judicially mandated, but prefer not to be the instrument of it. It is inconceivable that, should a jurisdictional conflict arise, the high court would decide to restore same-sex marriage bans. That would be indescribably cruel, given the hope and joy its inaction has engendered.

It's also hard not to conclude that there's a political calculation in this. That a Supreme Court majority feels that the country is ready to accept same-sex marriage. The courts are just speeding it along.

That's probably a savvy calculation. But the courts are supposed to be independent of political calculations, savvy or otherwise.

So, perhaps the self-congratulations aren't so misplaced, after all. Changing the political climate does appear to have influenced judicial decisions.

That's good news for the cause of marriage equality. Not so good news for the cause of preserving an independent judiciary.

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