Process Failure on the Road to Obergefell

Author : Kevin C. Walsh

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Josh Blackman and Howard M. Wasserman, *The Process of Marriage Equality*, 43 **Hastings Const. L.Q.** 243 (2016), available at SSRN.

In *The Process of Marriage Equality*, Josh Blackman and Howard Wasserman provide a chronicle and critical assessment of the judicial decisions about procedure, jurisdiction, and remedies through which the federal courts moved from *United States v. Windsor* to *Obergefell v. Hodges*. It is an essential article for understanding how the process unfolded.

The picture painted by the authors is not a pretty one. Some of the procedural decisions come out looking somewhat shabby, and the judges who made them possibly partial. Blackman and Wasserman do not always say so squarely, but the best explanation for some of the procedural misadventures they chronicle is likely found in partial judicial strategery: Procedural monkeying made the underlying substantive right more likely to stick, which is what the judges wanted because they were partial to the plaintiffs (and similarly situated couples) seeking it.

This is a strong claim, and one that the authors stop short of making when assessing most of the procedural decisions. But at times they come close. Consider, for example, their bottom-line assessment of why Judge Crabb of the Western District of Wisconsin granted summary judgment for the plaintiffs but delayed issuing an injunction or a stay for a week: “The most plausible explanation for this bizarre turn of events is that it was a deliberate effort to allow marriages to proceed before the court of appeals put them on hold.” Or consider their characterization of the Fourth Circuit’s denial of a stay as “inexplicable” (p. 305), and the judges’ order as revealing “what can charitably be described as deliberate indifference” to the contrary orders of the Supreme Court and other circuits.” (P. 306)

The authors do not declare themselves on the substantive correctness of *Windsor* or *Obergefell*, and it might be that the two are not of the same mind on that point. But it would be difficult to dismiss their critical assessments of “the process of marriage equality” as the product of disgruntlement with the Supreme Court’s adoption of a constitutional right to same-sex marriage. After all, their descriptions of the core issue as one of “marriage equality” and of the state laws at issue as “bans” come straight from the plaintiffs’ playbook.

The authors’ criticisms appear to arise, instead, from a sense that much of the confusion and disorder surrounding a domain that should be marked by clarity and order was unnecessary. This can be seen in the way that they praise the decisions of some of the lower courts that they examine. They describe as “particularly measured,” for example, the path chosen by lower courts that held invalid “bans on same-sex marriage, but put their judgments on hold pending the review process.” (P. 291.) They quote Judge Heyburn of the Western District of Kentucky, who expressed empathy with plaintiffs’ desire for quick action but stayed his judgment nonetheless, because “[i]t is the entire process … which gives our judicial system and our judges such high credibility and acceptance.” (P. 292.) “It is best that these momentous changes occur upon full review, rather than risk premature implementation or confusing changes. That does not serve anyone well.” (P. 292.) These are the words of the quoted judge, but they also express the thoughts of Blackman and Wasserman.

A primary difficulty with the process, they observe, is that the Supreme Court sent conflicting signals from its perch at the top of the federal judicial hierarchy. The Court initially ordered stays, presumably to maintain the status quo pending its resolution of the merits. But the Court then denied certiorari in the stayed cases, and subsequently declined to issue stays. The consequence was predictable. "[L]ower courts appeared conflicted about what to do with the penumbras emanating from the shadow docket—whether to decide cases by exercising their best judgment in light of existing precedent or to be guided by the Court's non-precedential and unexplained signals." (P. 285.)

Despite their evident disdain for result-oriented proceduralism, Blackman and Wasserman ultimately counsel lower courts against any "formalistic approach [that] disregards the Supreme Court's role as traffic cop in major constitutional cases." (P. 323.) Once the Supreme Court has taken an interest in high-stakes constitutional litigation, they argue, lower courts should put a hold on their injunctions and let the Supreme Court dictate the pace of constitutional change. (P. 324.)

There is a pragmatic streak that runs through the authors' proceduralism. They carefully discuss, for instance, the formal legal differences between the binding authority of precedents and of injunctions. But they also acknowledge circumstances, such as when there has been a final appellate ruling, in which officials who are not formally bound by a ruling should nonetheless act as if they are. That is sometimes "the cheapest, simplest, and likely least controversial move." (P. 272.)

Although the authors are critical of courts throughout, Blackman and Wasserman do not limit their criticisms to the courts. They devote one of the article's three principal sections to an unsparing assessment of the unavailing attempts of state officials to use unpersuasive abstention theories to slow down federal court adjudication of states' marriage laws.

Overall, however, the focus of *The Process of Marriage Equality* is on the courts, and the balance of the assessment is critical.

All of us now are still too close to the process of this particular constitutional change to have the perspective that comes with the distance of many years. But the chronicle that Blackman and Wasserman provide will remain valuable for future observers who possess such a perspective. Whether those observers view *Obergefell* more like *Brown* or more like *Roe*, the record of the process that led to *Obergefell* will remain. As one who largely agrees with Blackman and Wasserman's critical assessments—if anything, I would be more critical—I suspect that this record is not likely to look any better with age.

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