PHI243/POL312 - Philosophy of Law/Jurisprudence

Marcello Di Bello - Lehman College, CUNY

Notes about DeBoer v. Snyder (2014) [page numbers refer to opinion on website]

Facts (pp. 9–12) Homosexual couples demand that their union be legally recognized through marriage in Ohio, Michigan, Tennessee and Kentucky. In some cases, said homosexual couples demand that they enjoy the right to adopt children as couples (and not merely as individuals), and such a right comes only with marriage.

Laws Applicable laws here are the 14th Amendment to the US Constitution on equal protection by the law, and also, previous Supreme Course opinions, such as Baker v. Nelson (1972), holding that the fact that a Minnesota gay couple was denied a marriage license did not raise any substantial federal question; US v. Windsor (2013), holding that the 1996 federal law Defense of Marriage Act (DOMA) that defined marriage as the union between a man and a woman was unconstitutional; and Loving v. Virginia (1967), holding that individuals of difference races have a fundamental right to marry.

Question (p. 8) Does the 14th Amendment prohibit a state from defining marriage as a union between a man and a woman? Are state laws that define marriage as the union between a man and a women unconstitutional?

Majority's answer No

Supporting arguments *Binding legal precedent* (p. 14). *Baker* asserts that if a homosexual couple is not allowed to marry, this does not raise any substantial federal question. So, Supreme Court precedent indicates that homosexual marriage isn't a right. By contrast, *Windsor* invalidated a piece of federal law, DOMA, not because DOMA defined marriage as the union between a man and a woman, but because DOMA was an intrusion of the federal government into state power. *Baker* represents a stance against federal intrusion.

Original Meaning (p. 17). In deciding whether a law is unconstitutional, we should determine the original meaning of the constitution, that is, what the framers of the Constitution meant. Since marriage at the time—the 14th Amendment was ratified in 1868—meant the union between a man and a woman, the framers could not think that prohibiting same sex marriage would be a violation of the 14th Amendment. Given its original meaning, then, the 14th Amendment allows the states to define marriage as the union between a man and a woman.

Rational basis (p. 19). A law is unconstitutional if it is clearly irrational or unreasonable, and conversely, so long as the law exhibits some rational basis or justification, the law can withstand scrutiny. There is a justification for the law that defines marriage as the union between a man and a woman. This justification is that marriage is an institution set up to regulate the effects of intercourse, namely children. Since same sex couples do not generate children through intercourse, marriage cannot apply to them.

Fundamental right (p. 28). A law is unconstitutional if it violates a fundamental right. (In this context, a fundamental right is a right that is recognized by the US constitution or a right that is deeply rooted in US history, tradition and the concept of "ordered liberty"; see first paragraph on page 28 after letter E.) There is no mention of same sex marriage as a right in the US constitution, nor is there any mention of same sex marriage as a fundamental right in US history. The case that comes the closest is Loving v. Virginia (1967). It establishes that individuals of difference races have a fundamental right to marry. But the right to marry in *Loving* is a qualified right to marry (where 'marriage' can still be understood as a heterosexual union). The unconditional right to marry does not become a fundamental right with *Loving*. Furthermore, if the unconditional right to marry were to become a fundamental right, it would be hard to distinguish the right to same sex marriage and the right to plural marriages (p. 30). In other words, all types of marriages would become fundamental rights, and this outcome seems excessive.

Evolving meaning (p. 35). While the meaning of the constitution is evolving, this evolution should not be decided by unelected judges, but by the people. It is not even clear that the meaning of marriage has evolved because many people still want to retain the traditional definition. At any rate, it is not up to unelected judges to decide.

Dissent (pp. 43–64) The majority opinion treats the couples who filed the petitions as mere abstractions. The relevant issues here is not "who should decide?", but whether the well-being of the petitioners—and their children—is being harmed. According to Judge Posner in Baskin v. Bogan (7th Circuit, 2014), there are 200,000 American children who are raised by same sex parents in the US (p. 45).[1] Further, there are also 14,000 children in foster care in Michigan (p. 48). Same sex couples could adopt them (as couples), but denying them the right to marry puts a halt on the adoptions. All in all, denying the right to marry to same sex couple harms the well-being of their children. In response to the rational basis argument, the dissent argues that also same sex couples raise children (p. 60). They want to be allowed to marry because they want to be able to benefit their children. If marriage is for the children, same sex couple should be allowed to marry.

[1] On this point, see the discussion by Federal Judge Posner in "Listen to a Conservative Judge Brutally Destroy Arguments Against Gay Marriage" in *Slate* August 27, 2014. Google this. Posner observes that marriage comes with state and federal benefits which married couples enjoy. Denying these benefits to homosexual couples harms their children.