WHITEWOOD V. WOLF

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ABSTRACT: *The decision in the 2014 case Whitewood v. Wolf was monumental for the future of marriage in the Commonwealth of Pennsylvania. Continuing in the precedent of the 2013 Supreme Court decision of United States v. Windsor, the U.S. District Court of Pennsylvania declared Pennsylvania's marriage laws to be unconstitutional according to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, removing the ban on same-sex marriage in the Commonwealth. The Whitewood decision not only represents a huge change in the cultural attitude toward marriage, but is also a continuation of the expansion of the federal courts' use of the U.S. Constitution to strike down state laws. For those who support the decision, it is seen as a necessary step for making the Constitution work for all citizens, including same-sex couples. For those who oppose the decision, it is seen as a dangerous step towards the complete undermining of federalism and the eroding of our cultural traditions.*

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I. Introduction

In *Whitewood v. Wolf*, the U.S. District Court for the Middle District of Pennsylvania ruled that the 1996 law banning same-sex marriage in the Commonwealth was unconstitutional. The court found that Pennsylvania's marriage laws violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. This decision, while not surprising given the contemporary cultural climate, may be a continuation of Federal Courts undermining federalism to promote political ends; whether this is good or bad may depend on one's own political ideology. Regardless, the decision is here to stay and will likely be used to expand the legalization of same-sex marriage in other states.

II. Procedural History

The Plaintiffs included eleven same-sex couples, five of whom were seeking marriage within the Commonwealth and six of whom desired to have their out-of-state marriages officially recognized by the Commonwealth. The Plaintiffs filed the suit on July 9, 2013 against the Defendants, who included Governor Thomas Corbett and Michael Wolf, Secretary of the Pennsylvania Department of Health. On September 30, Defendants filed motions to dismiss, and during these proceedings the Plaintiffs voluntarily dismissed Corbett and two other Defendants from the case. On November 7, Plaintiffs filed an amended complaint against Defendants Wolf and Petrille, and the Defendants' motion to dismiss was rejected on November 15. After the conclusion of

discovery, the parties filed cross-motions for summary judgment; the parties agreed that there were no genuine disputes of material fact. Therefore, the constitutional issues presented to the Court were "fully at issue and ripe for [their] disposition."[1]

III. Legal Background

In 1996, the Pennsylvania state legislature amended its marriage laws to include anti-ceremony and anti-recognition provisions applicable to same-sex couples. The amendment explicitly defined marriage as "[a] civil contract by which one man and one woman take each other for husband and wife."[2] The amendment also made "void in this Commonwealth" any "marriage between persons of the same sex . . . entered into in another state or foreign jurisdiction, even if valid where entered into."[3] The Pennsylvania legislature cited "moral opposition" as the primary reason for banning same-sex marriages in the Commonwealth.[4] These statutes are often referred to as Pennsylvania's Defense of Marriage Act (DOMA), in reference to the Federal law of the same name.

IV. The Case

A. Facts

There were no genuine disputes of material fact from either party. The Plaintiffs filed the suit in order to receive legal recognition from their home state of the relationships that were

1 Whitewood v. Wolf, 992 F.Supp.2d 410, 10 (M.D. Pa. 2014).
2 Marriage Law, 23 Pa. C.S. § 1102 (1996).
3 Marriage Law, 23 Pa. C.S. § 1704 (1996).
4 *Id.*

already in place; according to the majority opinion, "the plaintiff couples are spouses in every sense, except that the laws of the Commonwealth prevent them from being recognized as such."[5] The Court's opinion cited four ways in which each of the couples were already living as spouses, and thus should be treated as such in the eyes of the law:[6]

For better, for worse: These couples had blended their property and finances, buying homes and making decisions together. Some of them had started families by giving birth to or adopting children. Pennsylvania's marriage laws cause hardship for these couples, from extra property taxes to adoption complications.

For richer, for poorer: While the Plaintiff couples have shared their financial resources together, without the recognition of marriage, it is more difficult for them to be financially secure.

In sickness and in health: Since the Commonwealth of Pennsylvania considers the couples legal strangers, they may be left vulnerable in times of medical emergencies, even with the preparation of powers of attorney.

Until death do us part: Like many traditionally married couples, the Plaintiff couples have demonstrated intentions of living their lives together. The lack of recognition of their relationships by the Commonwealth makes this more difficult.

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5 Whitewood v. Wolf, 992 F.Supp.2d at 4.

6 *Id.* at 5-8.

B. Judicial Reasoning

In the end, the Court found that Pennsylvania's Marriage Laws violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and therefore struck down the restrictions on same-sex marriage. However, before the Defendants had to defend the same-sex marriage ban against the Due Process and Equal Protection Clauses, they raised two preliminary challenges to the Plaintiffs. First, the Defendants contended that the Supreme Court's 1974 decision in *Baker v. Nelson* established precedent for there to be "no substantial federal question implicated by any of Plaintiffs' claims."[7] The Court rejected this defense, considering that there were "significant doctrinal developments in the four decades that have elapsed since it was announced by the Supreme Court."[8] The Court found no reason to depart from their sister district courts' in rejecting Baker's precedential value.

Second, the Defendants contended that the Plaintiffs lacked a burden of proof necessary under the statute 42 U.S.C. § 1983. This defense rests on the Defendants' assertion that they did not enforce Marriage Laws in such a way as to cause the Plaintiffs cognizable injury.[9] The Court used the precedent set in the 2013 Supreme Court decision in *United States v. Windsor* to reject this argument. In *Windsor*, the Supreme Court decided that the non-recognition of same-sex couples' marriages causes stigmatizing, cognizable harms against same-sex couples, which would reason-

7 *Id.* at 10.

8 *Id.* at 11.

9 *Id.* at 14.

ably include those who live in Pennsylvania and are subject to the Marriage Laws of the Commonwealth. Thus, the Court determined that the Plaintiffs had cause for their complaint.

After dismissing these two preliminary challenges from the Defendants, the Court turned to the substantive constitutional questions raised by the Plaintiffs challenge to the Marriage Laws. The first question was whether the Marriage Laws violate the Plaintiffs' due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution. The second question was whether the Marriage Laws violate the Plaintiffs' rights to equal protection, also guaranteed by the Fourteenth Amendment.

The Due Process Clause preserves the individual's right to liberty, defined by the Supreme Court as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[10] The fundamental right to marry is included within this right to liberty. Both parties agreed on this, but the conflict occurred over whether the fundamental right to marry includes marriage to a person of the same-sex.[11] The Court cited the Supreme Court's 1967 decision in *Loving v. Virginia*, which overturned a longstanding ban on interracial marriage, as precedent for clarifying "the boundaries of the fundamental right to marry when tested by new societal norms."[12] More recently and relevantly, in *Lawrence v. Texas* the Supreme Court found that gay and lesbian individuals do not forfeit their constitutional rights

10 Whitney v. California, 274 U.S. 357, 851 (1927).

11 Whitewood v. Wolf, 992 F.Supp.2d at 4.

12 *Id.* at 18.

simply because of their sexual orientation, therefore same-sex couples do not forfeit their fundamental right to marry. Thus, the Court majority found that 23 Pa. C.S. § 1102 violates this fundamental right to marry and is unconstitutional. The Court also decided that 23 Pa. C.S. § 1704, which refuses to acknowledge same-sex marriages legally performed in other jurisdictions, also violates the Plaintiffs' fundamental liberty and is unconstitutional.[13]

The Equal Protection Clause prohibits states from denying the equal protection of its laws to any person within its jurisdiction. Laws reviewed under the Equal Protection Clause are subject to three different kinds of scrutiny depending upon the demographics of who the law is imposed upon. Strict scrutiny is reserved for laws engendering suspect classifications, such as race or national origin. Intermediate scrutiny is applied to statutes engendering "quasi-suspect" classifications, such as sex or illegitimacy. Rational-basis review is used when the statute does not target a suspect or quasi-suspect group. The Defendants argued for rational-basis review, while the Plaintiffs argued for intermediate scrutiny. In order for intermediate scrutiny to be applied here, the Court must determine whether classifications based on sexual orientation can be qualified as quasi-suspect. The Supreme Court has established four criteria for determining whether a class qualifies as a quasi-suspect: (1) the group has been historically been subjected to "purposeful unequal treatment"[14]; (2) the characteristic

13 *Id.* at 21.

14 *Id.* at 27.

of the class "bears no relation to ability to perform or contribute to society"[15]; (3) the class exhibits characteristics that define them as a discrete group; and (4) the class is "a minority or politically powerless."[16] The Court determined that gay and lesbian individuals fulfill the first criteria, citing the law in question as an example, and that the second and third criteria were fulfilled axiomatically. The Court also found that the fourth criteria is weakly, but sufficiently fulfilled. Thus, through the fulfillment of these four criteria, intermediate scrutiny is applied to the statutes.[17]

In order for the statutes "to survive intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective."[18] The Defendants argued that the governmental objectives served by the Marriage Laws included "the promotion of procreation, child-rearing and the well-being of children, tradition, and economic protection of Pennsylvania businesses."[19] According to the Court, the Defendants only argue that these objectives are "legitimate," not the required "important"; further, the Defendants fail to "explain the relationship between the classification and the governmental objectives served."[20] Thus, the Court found that the Marriage Laws do not overcome intermediate scrutiny and violate the Equal Protection Clause, and therefore are unconstitutional.

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15 *Id.*
16 *Id.* at 28.
17 *Id.* at 36.
18 *Id.* at 23.
19 *Id.* at 37.
20 *Id.*

V. Implications of the Case

The decision in *Whitewood* seems to be a sensible continuation of the Supreme Court's decision in *United States v. Windsor*. The landmark decision in *Windsor* overturned decades of marriage law that prohibited same-sex marriage. What differentiates *Whitewood* and other similar cases is the use of the Federal Court system to overturn a *state* law. In his dissenting opinion in *Windsor*, Justice Scalia warned the Court that, despite the intentions of Justice Kennedy in his majority opinion, this case would be used to justify future overturns of state bans of same-sex marriage.[21] Scalia argues, "By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition."[22] Supporters of same-sex marriage, such as the American Civil Liberties Union (ACLU), happily agreed with Scalia's analysis.[23] The decision in *Windsor* may have even given groups like the ACLU encouragement to fight against same-sex marriage bans on the state level, including Pennsylvania's laws in this case. The *Whitewood* decision has proven Scalia's concerns, and the ACLU's optimism, to be justified.

Another implication of both the *Windsor* and *Whitewood* decisions is the continued expansion of the Federal Courts' use of the Equal Protection Clause to strike down state laws. While the original intended purpose of the Fourteenth Amendment was

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21 United States v. Windsor. 570 U.S. ___ (2013). Docket No. 12-307.

22 *Id.* at 24 (Scalia, J., dissenting).

23 Josh Gerstein, *The DOMA decision ripple effect*. Politico. June 26, 2013. http://www.politico.com/story/2013/06/doma-decision-gay-marriage-ripple-effect-93479.html?hp=t1_3.

to prevent the states from passing laws which violated the constitutional rights of their citizens, the most contextual reading of the Amendment would interpret the Equal Protection Clause to be primarily concerned with race or ethnicity;[24] in these cases, the discriminated class is sexual orientation. The Supreme Court recognizes this distinction, using the term "quasi-suspect" to differentiate the historically protected classes of race or national origin from the more recently protected classes of gender or sexual orientation.

The use of the quasi-suspect classification for intermediate scrutiny in association with the Equal Protection Clause is fairly new. The first use of intermediate scrutiny was by the Supreme Court in the 1988 decision in *Clark v. Jeter*.[25] Gender was introduced as a quasi-suspect classification in the 1996 decision in *United States v. Virginia*.[26] The decision in *Windsor* in 2013, however, was the very first time that the quasi-suspect classification was applied to gay and lesbian individuals. The *Whitewood* decision continues in the precedent set by the *Windsor* decision, further expanding the power of the quasi-suspect classification in constitutional cases. The major difference is that the *Whitewood* decision uses intermediate scrutiny to undermine federalism; Justices Roberts and Scalia claimed that federalism was used to defend the *Windsor* decision.[27]

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24 *Equal Protection: An Overview*, CORNELL UNIVERSITY LAW SCHOOL, http://www.law.cornell.edu/wex/equal_protection.

25 Clark v. Jeter, 486 U.S. 456 (1988).

26 United States v. Virginia, 518 U.S. 515 (1996).

27 United States v. Windsor, 570 U.S. ___ (2013), Docket No. 12-307 at 2 (Roberts, J., dissenting) and 15 (Scalia, J., dissenting).

The *Whitewood* decision's impact has already been seen, as the precedent for quasi-suspect classification of gay and lesbian individuals has been used in several sister district court decisions to overturn or amend same-sex marriage laws.[28]

VI. Conclusion

While the broader judicial implications of the decision may yet to be seen, the decision in *Whitewood v. Wolf* is certainly a major change for marriage in Pennsylvania as the Commonwealth becomes the nineteenth state to declare same-sex marriage legal. For those who favor same-sex marriage, it is a step forward to a more just system that does not discriminate against individuals based on their sexual orientation. For those who disagree with same-sex marriage, it is a step backward, away from a traditional foundation of civil society. Despite the opinions of each side, it looks as though the decision is here to stay. Governor Thomas Corbett has decided that he will not appeal the decision, as he does not expect the appeal to be successful.[29] Legislators who voted for the 1996 Marriage Laws claim to have changed their minds, saying they would vote differently today;[30] whether this is a genuine

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28 See Love v. Beshear, 989 F.Supp.2d 536 (W.D. Ky. 2014), Smithkline v. Abbott 740 F.3d 471 (9th Cir. 214), Bassett v. Snyder, 951 F. Supp. 2d 939 (E.D. Mich. 2013), and Robicheaux v. Caldwell 2 F. Supp.3d 910 (E.D. La. 2014).

29 McNees Wallace & Nurick LLC, *Whitewood v. Wolf Legalizes Same-Sex Marriage in Pennsylvania*, LexisNexis Legal Newsroom Constitutional Law and Civil Rights, June 28, 2014, http://www.lexisnexis.com/legalnewsroom/constitution/b/constitutional-civil-rights/archive/2014/06/18/whitewood-v-wolf-legalizes-same-sex-marriage-in-pennsylvania.aspx.

30 Associated Press, *Since Pennsylvania's gay marriage ban in 1996, minds have changed*, PennLive, July 13, 2013, http://www.pennlive.com/midstate/index.ssf/2013/07/since_pennsylvanias_gay_marria.html.

change or a reflection of a change in the opinions of the voters is irrelevant. As a whole, the culture surely seems to be shifting towards toleration and acceptance of same-sex marriage as a legitimate institution.