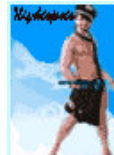



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## Windy City Times

### ANALYSIS: Md. Court Upholds Same-Sex Marriage Ban

by Lisa Keen  
2007-09-26

The supreme court of Maryland, on Sept. 18, reversed a lower court decision which had found a constitutional right for gay couples to marry. The decision made Maryland the fifth state high court in less than two years to uphold as legal the withholding of marriage licenses from same-sex couples.

Gay legal activist Evan Wolfson, head of the national Freedom to Marry group, called the decision "deeply flawed" and said the 4 to 3 majority never even tried to answer the key question of how excluding gay couples affects the ability of heterosexual couples to procreate.

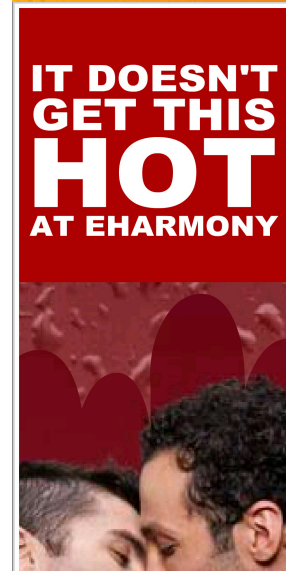
The Maryland lawsuit *Conaway v. Deane* challenged the state's marriage law that, in 1973, defined marriage as being only between a man and a woman. The ACLU, which led the challenge, argued that the restriction amounted to sex discrimination against gay people.

But the majority of the court upheld the law as written and concluded that, because gay people have never been legally designated as a "suspect class"—a legal designation for an oppressed minority—the government did not need to show any compelling reason for denying them equal treatment under the law. Instead, said the majority, all the government need show was a simple rational reason—the lowest level of review for the statute.

And the government's simple rational reason—that licenses to heterosexual couples foster procreation and encourage the traditional family structure—is plausible, said the majority.

Gay civil rights supporters were dismayed.

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Human Rights Campaign President Joe Solmonese called the decision a “setback.” National Gay and Lesbian Task Force Executive Director Matt Foreman called it “demeaning.”

“Today is a sad day for all Maryland families,” said Jennifer Chrisler, executive director of Family Pride, a national organization that advocates on behalf of LGBT families. But she and others vowed not to give up.

“The struggle for marriage equality is far from over,” said Chrisler.

Equality Maryland’s Dan Furmanky vowed to continue the fight and called on the state legislature to rewrite the law. That same day, Democratic State Senator Gwen Britt announced she would introduce legislation next year to allow same-sex couples to marry, assuring the fight would now move to the state legislature, which has approved a state law barring discrimination based on sexual orientation.

Ken Choe, the ACLU attorney who argued on behalf of the gay couples, expressed hope that, unlike the majority of the bench, the legislature would be able to see “that lesbian and gay couples form committed relationships and loving families just like heterosexual couples.”

The Maryland Court of Appeals majority decision essentially parroted the harsher of two models for state supreme court decisions that have rejected equal rights for gay couples since 1999. That harsher model—carved out by the supreme court of New York in July of last year—finds nothing in the state constitution to require equal treatment of same-sex couples when it comes to marriage licensing. And it uses the lowest level of legal review to determine whether the state has a legitimate reason to treat gay couples differently. That level of review requires only that the government’s reason be “rational.”

In New York’s case, the court accepted as rational the state’s claim that the marriage law was intended to provide a special “inducement” for heterosexuals to marry. That model was essentially adopted by the Washington Supreme Court later in 2006 when it said “the legislature was entitled to believe that limiting marriage to opposite-sex couples furthers procreation ... and furthers the well-being of children by encouraging families where children are reared in homes headed by the children’s biological parents.” Maryland argued that the purpose of the state’s marriage law was “fostering procreation and encouraging the traditional family structure.”

The second model—initiated by the Vermont Supreme Court in 1999—finds that the state’s constitution requires gay couples be treated equally but passes the buck to the legislature to determine how that will happen. New Jersey adopted that approach in October of last year with its ruling in *Lewis v. Harris*. Both Vermont and New Jersey legislatures chose “civil unions” as the means of providing “equal” benefits.

Last year, other state supreme courts—in Tennessee and Georgia—allowed ballot measures seeking to ban gay marriage to proceed.

Only one state supreme court—the Massachusetts Supreme Judicial Court, in November 2003—has declared that a state’s constitutional promise of equal protection of the law requires the state to issue marriage licenses to same-sex couples the same as it does to heterosexual couples. The Hawaii Supreme Court ruled that denying same-sex couples marriage licenses was sex discrimination but the legislature passed a constitutional amendment to redefine marriage, thus taking the matter away from the court.

The first ever state supreme court ruling concerning same-sex marriage came in 1971 when the Minnesota Supreme Court ruled that the state could deny a marriage license to a same-sex couple. That lawsuit, *Baker v. Nelson*, was dismissed by the U.S. Supreme Court with no explanation beyond “want of a substantial federal question.” In what might also be considered a piece of the silver lining in the ruling, the majority rejected the notion that the Baker dismissal required it to reject plaintiffs’ case out of hand.

A decision on a similar case is now pending in the Connecticut Supreme Court and will be argued soon in the California Supreme Court.

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