

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

GITANJALI DEANE & LISA POLYAK; *
ALVIN WILLIAMS & NIGEL SIMON;
TAKIA FOSKEY & JOANNE RABB; *
JODI KELBER-KAYE & STACEY KARGMAN-KAYE;
DONNA MYERS & MARIA BARQUERO; *
JOHN LESTITIAN;
CHARLES BLACKBURN & GLEN DEHN; *
STEVEN PALMER & RYAN KILLOUGH;
PATRICK WOJAHN & DAVID KOLESAR; and *
MIKKOLE MOZELLE & PHELICIA KEBREAU, *

Plaintiffs,

v.

Case No. 24-C-04-005390

FRANK CONAWAY, in his official capacity as *
Baltimore City Circuit Court Clerk; *
ROSALYN PUGH, in her official capacity as *
Prince George's County Circuit Court Clerk; *
EVELYN ARNOLD, in her official capacity as *
St. Mary's County Circuit Court Clerk; *
DENNIS WEAVER, in his official capacity as *
Washington County Circuit Court Clerk; and *
MICHAEL BAKER, in his official capacity as *
Dorchester County Circuit Court Clerk, *

Defendants.

* * * * *

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	1
I. THE JUDICIAL BRANCH HAS AN ESSENTIAL ROLE IN ENSURING EQUALITY AND LIBERTY FOR DISFAVORED CLASSES.....	1
II. THERE ARE NO EXCEPTIONS TO THE GUARANTEES OF EQUALITY AFFORDED BY THE DECLARATION OF RIGHTS	2
A. There Are No Exceptions to the Guarantee of Equality Afforded by Article 46 of the Declaration of Rights.....	2
B. There Are No Exceptions to the Guarantee of Equality Afforded by Article 24 of the Declaration of Rights.....	4
III. <u>BAKER V. NELSON</u> AND ITS PROGENY ARE NOT PERSUASIVE AUTHORITY	7
IV. THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE IS SUBJECT TO STRICT SCRUTINY.....	9
A. The Exclusion of Same-Sex Couples from Marriage Burdens the Exercise of the Fundamental Right to Marry	9
B. The Exclusion of Same-Sex Couples from Marriage Discriminates Based on Sex.....	10
C. The Exclusion of Same-Sex Couples from Marriage Discriminates Based on Sexual Orientation	12
V. THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE FAILS EVEN RATIONAL BASIS REVIEW.....	14
VI. BECAUSE PLAINTIFFS MAY NOT MARRY, THEY AND THEIR CHILDREN SUFFER SIGNIFICANT INJURY	18
CONCLUSION.....	21

INTRODUCTION

Defendants fail to appreciate that the fundamental right to marry extends to people in lesbian and gay relationships, that the exclusion of same-sex couples from marriage discriminates based on sex, and that sexual orientation is a suspect classification – and, therefore, that the exclusion of same-sex couples from marriage is subject to strict scrutiny. Defendants also fail to appreciate that the exclusion of same-sex couples from marriage fails even rational basis review. Md. Code Ann., Fam. Law § 2-201 lacks a constitutionally sufficient justification and is therefore unconstitutional.

ARGUMENT

I. THE JUDICIAL BRANCH HAS AN ESSENTIAL ROLE IN ENSURING EQUALITY AND LIBERTY FOR DISFAVORED CLASSES

Under the Maryland Constitution, the essential role of the judicial branch is to serve as a check on the legislative and executive branches by ensuring that they do not transgress constitutional limitations on governmental action. See Md. Const. Decl. Rts. art. 8 (“That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.”). Thus, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” Marbury v. Madison, 5 U.S. 137, 177 (1803).

Defendants’ plea that the exclusion of same-sex couples from marriage “not be the subject of judicial action” but rather “be determined by the legislature,” Defs.’ Mem. of Law at 9, asks the Court to be unfaithful to its constitutional duties. The judicial branch has an essential role in ensuring equality and liberty for disfavored classes where social policy is concerned. See Pls.’ Mem. of Law at 70-72.

II. THERE ARE NO EXCEPTIONS TO THE GUARANTEES OF EQUALITY AFFORDED BY THE DECLARATION OF RIGHTS

A. There Are No Exceptions to the Guarantee of Equality Afforded by Article 46 of the Declaration of Rights

The canons of constitutional construction confirm that there are no exceptions to the guarantee of equality afforded by Article 46 of the Declaration of Rights.

The Court of Appeals recently reiterated that, in construing a constitutional provision, the meaning of the text is the primary inquiry: “[T]o ascertain the meaning of a constitutional provision or rule of procedure we first look to the normal, plain meaning of the language.” Davis v. Slater, 383 Md. 599, 604, 861 A.2d 78 (2004) (citations omitted); see also Brown v. Brown, 287 Md. 273, 278, 412 A.2d 396 (1980) (“[The] intent [of the framers] is first sought from the terminology used in the provision, with each word being given its ordinary and popularly understood meaning.”) (citations omitted); Cohen v. Governor, 255 Md. 5, 16, 255 A.2d 320 (1969) (“[The] intention [of the framers] is primarily discovered by considering the words used by the draftsmen, and these words are deemed to have been used in their ordinarily and generally accepted meaning.”). The text is assigned its plain meaning. See Andrews v. Governor, 294 Md. 285, 290, 449 A.2d 1144 (1982) (“[A constitutional provision], unlike the Acts of our legislature, owes its whole force and authority to its ratification by the people, and they judged of it by the meaning apparent on its face.”) (quotation omitted); Norris v. Mayor and City Council, 172 Md. 667, 192 A. 531, 535 (1937) (“Since Constitutions are the basic and organic law, and are meant to be known and understood by all the people, the words used should be given the meaning which would be given to them in common and ordinary usage by the average man in interpreting them in relation to every day affairs.”).

If the meaning of the text is clear, the inquiry ends. See Davis, 383 Md. at 604-05 (“If [the] language is clear and unambiguous, we need not look beyond the provision’s terms to inform our analysis.”); Brown, 287 Md. at 278 (“[I]f the words are not ambiguous, the inquiry is terminated, for the Court is not at liberty to search beyond the Constitution itself where the intention of the framers is clearly demonstrated by the phraseology utilized.”) (citation omitted); Norris, 192 A. at 535 (“[I]t is axiomatic that where the language of a Constitution is clear and unambiguous, there can be no resort to construction to attribute to the founders a purpose or intent not manifest in its letter.”) (citation omitted).

Here, “[t]he words of the E.R.A. are clear and unambiguous; they say without equivocation that ‘Equality of rights under the law shall not be abridged or denied because of sex.’ This language mandating equality of rights can only mean that sex is not a factor.” Rand v. Rand, 280 Md. 508, 511-12, 374 A.2d 900 (1977) (citation omitted). Significantly, the text of Article 46 does not allow for any exception. Thus, the Court of Appeals has held that “the Maryland E.R.A. *absolutely* forbids the determination of . . . ‘rights,’ as may be accorded by law, solely on the basis of one’s sex, i.e., sex is an impermissible factor in making *any* such determination.” Giffin v. Crane, 351 Md. 133, 149, 716 A.2d 1029 (1998) (citation omitted) (emphases added).

Notwithstanding the clarity of the text of Article 46, Defendants seek to rely on legislative history. As their own exhibits make clear, however, “there is no legislative history expressing the intention of the drafters of the Maryland Amendment.” Defs.’ Ex. 5 at 5; see also id. (“[I]t is not possible at this time to surmise how the Maryland Amendment will be interpreted”). Thus, Defendants rely solely on legislative history

concerning the proposed federal Equal Rights Amendment. Such reliance is misplaced. As their own exhibits make clear, “Maryland courts are not, of course, bound by the interpretation of the federal Amendment.” Id.; see also id. at 3 (“It is not possible now to predict how the [federal] Amendment will be interpreted or precisely what impact it will have.”). Moreover, it is a fundamental tenet of our federalist system that the scope of protection afforded by state constitutional provisions is distinct from that afforded by their federal analogs. See Attorney General v. Waldron, 289 Md. 683, 714-15, 426 A.2d 929 (1981); Maryland Green Party v. Maryland Bd. of Elections, 377 Md. 127, 157, 832 A.2d 213 (2003); Dua v. Comcast Cable of Md., Inc., 370 Md. 604, 621-22, 805 A.2d 1061 (2002); Frankel v. Board of Regents of Univ. of Md. Sys., 361 Md. 298, 313, 761 A.2d 324 (2000); Verzi v. Baltimore County, 333 Md. 411, 417, 635 A.2d 967 (1994); Kirsch v. Prince George’s County, 331 Md. 89, 97, 626 A.2d 372 (1993). Thus, legislative history concerning the proposed federal Equal Rights Amendment is unpersuasive.

In sum, Defendants’ radical proposition that there are exceptions to the equality guarantee afforded by Article 46 is indefensible.

B. There Are No Exceptions to the Guarantee of Equality Afforded by Article 24 of the Declaration of Rights

Since the framing of the Maryland Constitution in 1776, Marylanders have enjoyed the expansive protections guaranteed by Article 24 (then Article 21) of the Declaration of Rights. Defendants advocate a significant diminution of such protections by advancing the radical proposition that the application of Article 24 cannot yield any result at odds with the state of affairs in 1776.

Defendants' theory is analytically flawed because the proper inquiry is not what the framers of the Maryland Constitution understood marriage in particular (or any other matter subject to Article 24) to mean. Rather, it is what they understood equality in principle to mean. The historical record does not support the proposition that the framers of the Maryland Constitution intended Article 24 to be a limited and static mandate of equality. Indeed, the enduring check on the tyranny of the majority over any disfavored class in any context is the *sine qua non* of any constitutional guarantee of equal protection. Article 24 would be meaningless if it guaranteed Marylanders nothing more than the "equality" that existed at the time of the framing of the Maryland Constitution – an "equality" that tolerated pervasive bias based on race, sex, alienage, illegitimacy, and numerous other considerations that have since been repudiated. Cf. Lawrence v. Texas, 539 U.S. 558, 579 (2003) ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

More fundamentally, Defendants' theory is inconsistent with the text, context, and binding judicial interpretation of Article 24. The text of Article 24 reads in its entirety as follows: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." By its own terms, Article 24 does not limit its own application to the "equality" that existed in 1776. Nor does it exempt marriage (or any other matter subject to Article 24) from its purview. This expansive reading is only reinforced when Article 24 is placed in context with the other articles of the Declaration of Rights. See, e.g., Md. Const. Decl. Rts. art. 1 ("[A]ll Government of right . . . [is] instituted solely for the good of the

whole.”). And it is reflected in the interpretation of Article 24 by Maryland courts throughout the past 250 years. See, e.g., Murphy v. Edmonds, 325 Md. 342, 356-57, 601 A.2d 102 (1992) (all forms of discrimination, including discrimination based on race, sex, alienage, and illegitimacy, are subject to some level of review under Article 24). Indeed, it is inconceivable that, if, for example, the State were to re-enact an anti-miscegenation law, there would be no recourse under Article 24 because the framers of the Maryland Constitution tolerated, even sanctioned, such discrimination.

In the end, Defendants’ theory proves far too much. It would implicate much more than the exclusion of same-sex couples from marriage by turning back the clock to 1776 for all disfavored classes in all contexts.¹ It would also implicate much more than Article 24 by turning back the clock to 1776 for all of the original provisions of the Maryland Constitution. Throughout the past 250 years, Maryland courts have necessarily rejected the extremely cramped view of the Maryland Constitution that Defendants urge this Court to adopt.²

¹ For this reason, the fact that Md. Const. art. III, § 43 protects the property of a wife from the debts of her husband is not limiting. If the constitutional guarantee of equal protection were limited by the social conventions indirectly referenced by the framers of the Maryland Constitution, then not only would the exclusion of same-sex couples from marriage be outside of the scope of protection, but also the unequal treatment of married women, aside from matters of property, prior to enactment of Article 46. Cf. Deems v. Western Md. Ry. Co., 247 Md. 95, A.2d (1967) (pre-Article 46 case recognizing that disparity between married men and married women with respect to right to sue for loss of consortium implicated constitutional guarantee of equal protection).

² Defendants’ alternative theory – that the framers of the Maryland Constitution intended to grant the legislative branch sole authority over marriage-related matters – simply cannot be reconciled with the long history of judicial review of such matters in Maryland. See, e.g., Giffin v. Crane, 351 Md. 133, 716 A.2d 1029 (1998) (parity in child custody); Condore v. Prince George’s County, 289 Md. 516, 425 A.2d 1011 (1981) (parity in necessities); Kline v. Ansell, 287 Md. 585, 414 A.2d 929 (1980) (parity in criminal conversation); Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977) (parity in child support); Hofmann v. Hofmann, 50 Md. App. 240, 437 A.2d 247 (1981) (parity in alimony); Coleman v. State, 37 Md. App. 322, 377 A.2d 553 (1977) (parity in criminal desertion).

III. BAKER V. NELSON AND ITS PROGENY ARE NOT PERSUASIVE AUTHORITY

Defendants rely heavily on Baker v. Nelson, 191 N.W.2d 185 (Minn.), appeal dismissed, 409 U.S. 810 (1971), and its progeny throughout their arguments. Baker and its progeny, however, are not persuasive authority.

At the time of Baker, the United States Supreme Court had no discretion to decline to accept jurisdiction over certain types of appeals. See Hicks v. Miranda, 422 U.S. 332, 344 (1975). It therefore routinely and summarily dismissed such appeals “for want of a substantial federal question,” as it did in Baker. “[T]he precedential effect of a summary affirmance can extend no farther than the precise issues presented and necessarily decided by those actions.” Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 182 (1979) (quotation omitted); see also In re Kandu, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004) (“[S]ummary dispositions are to be narrowly interpreted and are of limited precedential value.”) (quotation omitted). Of particular significance to this case, “[s]ummary actions . . . should not be understood as breaking new ground but as *applying principles established by prior decisions* to the particular facts involved.” Mandel v. Bradley, 432 U.S. 173, 176 (1977) (emphasis added). This is wholly consistent with the principle that continued reliance on a summary dismissal for want of a substantial federal question is unwarranted where there have been “extensive intervening doctrinal developments.” Jones v. Bates, 127 F.3d 839, 851 n.13 (9th Cir. 1997); see also Hicks, 422 U.S. at 344 (reliance on a summary dismissal is unwarranted “when doctrinal developments indicate otherwise”) (quotation omitted).

Intervening case law of the United States Supreme Court has altered the legal landscape so drastically that Baker now has little, if any, precedential value. Perhaps

most significantly, since the summary dismissal in Baker, the Court has expressly held that sex discrimination is subject to heightened scrutiny. Compare Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (“[C]lassifications based upon sex . . . [are] subject to close judicial scrutiny.”), with Reed v. Reed, 404 U.S. 71, 76 (1971) (“The question presented by this case . . . is whether a difference in . . . sex . . . bears a rational relationship to a state objective that is sought to be advanced.”). This is significant because Baker expressly acknowledged that the exclusion of marriage is a form of sex discrimination, Baker, 191 N.W.2d at 187 (characterizing the exclusion as “a marital restriction . . . based upon the fundamental difference in sex”), yet subjected the exclusion to rational basis review, id. (“There is no irrational or invidious discrimination.”). The sea change in the treatment of sex classifications under the Fourteenth Amendment to the United States Constitution means that Baker and its progeny have no remaining precedential value.

Moreover, since 1972, the equality jurisprudence of the United States Supreme Court with respect to sexual orientation has been revolutionized. The Court has held that the exclusion of lesbian and gay people from legal protections that are available to heterosexual people can violate the right to equal protection. Romer v. Evans, 517 U.S. 620, 634-35 (1996). The Court has further held that that lesbian and gay people are protected by the right to privacy to the same extent as heterosexual people. Lawrence, 539 U.S. at 574; see also Kandu, 315 B.R. at 138 (“The Supreme Court’s approach to the constitutional analysis of same-sex conduct . . . at least arguably appears to have shifted. This is particularly apparent in light of the Supreme Court’s decision in Lawrence.”)

(citation omitted). In light of such case law, continued reliance on Baker and its progeny is no longer warranted.

Finally, since 1972, the Court has continued to extend the right to marry to disfavored classes. Turner v. Safley, 482 U.S. 78 (1987) (extending the right to marry to prisoners); Zablocki v. Redhail, 434 U.S. 374 (1978) (extending the right to marry to “deadbeat” parents). Thus, it is no longer credible to assert that the exclusion of same-sex couples from marriage poses no substantial federal question.

For all of these reasons, Baker and its progeny are not persuasive authority.

IV. THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE IS SUBJECT TO STRICT SCRUTINY

A. The Exclusion of Same-Sex Couples from Marriage Burdens the Exercise of the Fundamental Right to Marry

The exclusion of same-sex couples from marriage is subject to strict scrutiny under Article 24 of the Declaration of Rights because it significantly and disparately burdens the exercise of the fundamental right to marry. Defendants concede that governmental action that significantly or disparately burdens the exercise of the fundamental right to marry is subject to strict scrutiny. They contest only whether the fundamental right to marry extends to people in lesbian and gay relationships.

The exclusion of same-sex couples from marriage burdens the fundamental right to marry, an existing fundamental right that courts have long recognized. See Massage Parlors, Inc. v. Mayor and City Council, 284 Md. 490, 496, 398 A.2d 52 (1979); Turner, 482 U.S. at 95-96; Zablocki, 434 U.S. at 383; Boddie v. Connecticut, 401 U.S. 371, 376 (1971); Loving v. Virginia, 388 U.S. 1, 12 (1967); see also In re Coordination Proceeding, No. 4365, 2005 WL 583129, at *10-*11 (Cal. Super. Ct. Mar. 14, 2005)

(appeal pending) (holding that the fundamental right to marry extends to people in lesbian and gay relationships); Hernandez v. Robles, 794 N.Y.S.2d 579, 595-96, 601-03 (N.Y. Sup. Ct. 2005) (appeal pending) (same); Castle v. Washington, No. 04-2-00614-4, 2004 WL 1985215, at *12-*13 (Wash. Super. Ct. Sept. 7, 2004) (appeal pending) (same); Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *5-*7 (Wash. Super. Ct. Aug. 4, 2004) (appeal pending) (same). Defendants misconstrue Plaintiffs' argument as seeking the recognition of a new fundamental right, as opposed to the extension of an existing fundamental right. In determining whether a liberty interest rises to the level of a fundamental right, the United States Supreme Court has repeatedly demonstrated that proper inquiry is *what* has historically been enjoyed, not *who* has historically enjoyed it. Otherwise, the fundamental right would extend only to those people who historically enjoyed it.³ Thus, the fundamental right at issue in this case is the fundamental right to marry, not the fundamental right of same-sex couples to marry. See Pls.' Mem. of Law at 39-42.

In sum, the exclusion of same-sex couples from marriage is subject to strict scrutiny because the fundamental right to marry extends to people in lesbian and gay relationships.

B. The Exclusion of Same-Sex Couples from Marriage Discriminates Based on Sex

The exclusion of same-sex couples from marriage is also subject to strict scrutiny under Article 46 of the Declaration of Rights because it discriminates based on sex, a

³ Whether there is a constitutionally sufficient justification for continuing to deny the fundamental right to marry to categories of people whose unions have not been historically recognized is a separate inquiry.

suspect classification. Defendants contest only whether the exclusion of same-sex couples from marriage discriminates based on sex.

Under Article 46, “sex is not, and cannot be, a factor in the enjoyment or the determination of legal rights.” Giffin, 351 Md. at 148 (citation omitted). By its very terms, Md. Code Ann., Fam. Law § 2-201, which provides that “[o]nly a marriage between a man and a woman is valid in this State,” makes sex – i.e., whether people are men or women – a factor in the enjoyment and the determination of the right to marry. See Pls.’ Mem. of Law at 45.

Loving supports the conclusion that the exclusion of same-sex couples from marriage discriminates based on sex. See Pls.’ Mem. of Law at 45-50. Indeed, the case law cited by Defendants in support of their assertion to the contrary only serves to reinforce this conclusion. Baker expressly acknowledges that the exclusion of same-sex couples from marriage discriminates based on sex. Baker, 191 N.W.2d at 187. Moreover, neither Zablocki nor Lawrence addresses whether the exclusion of same-sex couples from marriage discriminates based on sex. Defendants may avail themselves only of the flawed reasoning set forth in the holding of Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974), and the dicta of Baker v. Vermont, 744 A.2d 864 (Vt. 1999). Compare Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) (holding that the exclusion of same-sex couples does not discriminate based on sex), with Bachr v. Lewin, 852 P.2d 44, 60, 68 (Haw. 1993) (holding that the exclusion of same-sex couples discriminates based on sex); Coordination Proceeding, 2005 WL 583129, at *9 (same); Li v. Oregon, No. 0403-03057, 2004 WL 1258167, at * 6 (Or. Cir. Ct. Apr. 20, 2004), rev’d on other grounds, 110 P.3d 91 (Or. 2005) (same); Brause v. Bureau of Vital Statistics,

