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Fourth Circuit Affirms Virginia's Ban on Gay Marriage Unconstitutional: An Analysis of the Dissent

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BY [ARI EZRA WALDMAN](#)

Today, the Richmond, Virginia-based Fourth Circuit affirmed [a lower court judge's decision striking down Virginia's ban on same-sex marriage](#). When last we discussed this case, [a three-judge panel was hearing oral argument](#) and [one judge, Paul V. Niemeyer \(right\), was using his time questioning the pro-equality advocacy to spout particular offensive rhetoric](#).

Not surprisingly, Judge Niemeyer is in the minority today, writing a lone dissenting opinion to the majority's affirmation that banning gays from marrying denies them a fundamental right under the U.S. Constitution. That fundamental right — the right to marry — is denied to gay persons when a state says that they cannot marry the person they love, that they could be forced to deny the equality of their love and union (by being relegated to a civil union or worse) or could easily marry a stranger as long as that stranger is of a different gender.



The majority opinion sounds pretty familiar: the appellants have standing, *Baker v.*

Nelson does not foreclose a federal decision on the merits, and Virginia's ban violates the Fifth and Fourteenth Amendments by denying gays the fundamental right to marry, a right that the Supreme Court has affirmed and reaffirmed more than 15 times.

We have covered all those matters before. [AFTER THE JUMP](#), I want to spend a few column inches on the dissent, a diatribe that is dismissive, at best, and hateful, at worst.

Judge Niemeyer's central point is that the majority makes a logical jump. Sure, he admits, the right to marry is a fundamental right and the Supreme Court has said as much many times. But the majority, Judge Niemeyer protests, extends that fundamental right to gays without acknowledging or explaining that the actual marriages underlying all those Supreme Court statements that the right to marry is fundamental were opposite-sex, man-woman marriages. To Judge Niemeyer, gays marrying is something "new"; it invokes a "new right." This "new" thing is different from the old, traditional thing. It can't be the same right. If indeed the parties were seeking the recognition of

a *new* fundamental right, the court had to go through a difficult process and the individuals seeking to marry would have had a tough sell on their hands.

[At oral argument, Judge Niemeyer kept referring to gay relationships as "new" and "different."](#) He other-ized the gay community in ways we normally reserve to homophobic rants. The problem is that Judge Niemeyer is a federal appellate court judge who just wrote his rapid homophobia into a snide dissent. Luckily, it was only a dissent.

But Judge Niemeyer's other-ing of the gay community and his insistence that gay marriage presents courts with a proposed "new right," is not just spiteful; it also bad law, having been rejected, most strikingly, when the Supreme Court decided *Lawrence v. Texas* in 2003.

Lawrence was about sodomy, not marriage. But the case overturned the odious *Bowers v. Hardwick*, a Supreme Court decision that permitted states to criminalize gay sodomy, by rejecting the very "new right" jurisprudence Judge Niemeyer seeks to resurrect today. In *Bowers*, which challenged the constitutionality of an anti-sodomy law that was used to criminalize gay sex and used to justify discrimination against gays, Justice White framed the question this way: Does the Constitution guarantee a right to gay sex?

Of course that is not what we were asking for in *Bowers*. Rather, we asked the court to recognize a fundamental association right and the inherent equality of all persons, gay or heterosexual. He wanted the pro-equality side to sound as terrible as possible. Using Justice White's language, it sounds as if we went to the Supreme Court asking the justices to read into the text of the Constitution a right to have anal sex with someone of the same sex. That sounds hard to justify and it stacks the deck against.



Lawrence explicitly rejected Justice White's narrow formulation of the right at stake in the constitutional challenge to anti-sodomy laws.

In *Lawrence*, Justice Kennedy stated that the right is broader than just sex, which was a pretty crass way of looking at basic human rights. Anti-sodomy laws aimed at gay persons prevented gays from associating with whom they choose, to love the way they choose, and to express themselves intimately. Nothing could be more fundamental and nothing could be more outside the regulatory (actually, criminal) power of the state.

Judge Niemeyer is trying to frame the question in a similar way to *Bowers* and thereby deny us victory in court and in the court of public opinion. He is trying to frame the marriage question as whether there is a constitutional right to get "gay married" just like Justice White framed the sodomy question as whether there is a constitutional right to have "gay anal sex."

They are both wrong. There is a constitutional right to marry that is being denied to gays for no good reason. That right extends to all Americans regardless of sexual orientation.

But even though *Lawrence* explicitly rejected the way Justice White formed the question in *Bowers*, Judge Niemeyer, and the countless backward looking conservatives in the federal judiciary, have no qualms about bringing it back. Thankfully, at least five justices on the Supreme Court are going to laugh Judge Niemeyer out of the courtroom.