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Richard F. Duncan

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# From *Loving* to *Romer*: Homosexual Marriage and Moral Discernment

Richard F. Duncan\*

## I. INTRODUCTION

I am delighted to take part in this symposium on *Loving v. Virginia*<sup>1</sup> and the politics of marriage. *Loving*, the landmark decision in which the Supreme Court invalidated state laws mandating racial apartheid in marriage, is 30 years old this year.<sup>2</sup> It clearly has withstood the test of time.

I celebrate two things. First, I celebrate the eminent rightness of the Court's decision in *Loving* and its steadfast opposition to a racist definition of civil marriage. Second, I celebrate moral discernment, an attribute that continues to inform the common sense of the community, but which is in danger of becoming "the duty that dare not speak its name"<sup>3</sup> in the legal academy and elsewhere among the "herd of independent minds."<sup>4</sup>

*Loving* is a case in which public morality triumphed over social pathology. The Court held that "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations."<sup>5</sup> *Loving* not only renounced the poisonous doctrine of White Supremacy, it also freed the institution of marriage from the debasement of anti-miscegenation laws.

The legacy of *Loving* is threatened today by those who seek to use the courts to accomplish a radical and dangerous agenda — the reordering of marriage to reflect the alleged equal goodness of homosexuality and heterosexuality. As Richard Neuhaus has observed, those who have failed to persuade the public "that homosexuality is a good or even a morally neu-

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\* Copyright © 1998 by Richard F. Duncan. Sherman S. Welpton, Jr. Professor of Law, University of Nebraska College of Law. This Essay is based upon my presentation at a conference on *Law and the Politics of Marriage: Loving v. Virginia After Thirty Years*. I wish to thank Dave Coolidge, all the conference participants, and the co-sponsors of the conference, the law schools of Catholic University, Howard University, and Brigham Young University. This Essay is dedicated to my wife, Kelly, and to my children, Casey, Joshua, Rebecca Joy, Hannah Grace, and Kathleen Noel: I pray that you will not live in a world that calls evil good and good evil.

1. 388 U.S. 1 (1967).

2. The case was decided on June 12, 1967. *Id.*

3. Richard John Neuhaus, *Love No Matter What*, FIRST THINGS, Oct. 1997, at 84.

4. *Id.*

5. *Loving*, 388 U.S. at 12.

tral thing,"<sup>6</sup> now seek to employ constitutional litigation as a tool "to remake the world in the image of their dissent."<sup>7</sup>

The purpose of this Essay is to share some preliminary thoughts about *Loving*, gender, equal protection, and homosexual "marriage." It is not my task here to provide a full and complete analysis of the constitutionality of the heterosexual paradigm for marriage.<sup>8</sup> Rather, I will first devote my efforts to explaining why I believe the institution of marriage does not discriminate on the basis of gender. Then I will briefly summarize the work I have published elsewhere<sup>9</sup> analyzing the impact of *Romer v. Evans*<sup>10</sup> on the question of homosexual marriage. Finally, I will share some concluding thoughts on *Loving*, moral discernment, and same-sex marriage.

## II. RICKY, LUCY AND FRED: EQUAL PROTECTION, GENDER, AND HOMOSEXUAL MARRIAGE

A number of academic advocates of homosexual marriage have argued that traditional marriage laws violate equal protection because they discriminate on the basis of gender.<sup>11</sup> Although this clever attack on traditional marriage laws is superficially plausible, it is contrived and ultimately unpersuasive.

Professor Koppelman uses an *I Love Lucy* hypothetical to demonstrate his view that marriage laws discriminate on the basis of gender when they define marriage as a relationship between one man and one woman.<sup>12</sup> Under traditional marriage laws, reasons Koppelman, Ricky may marry Lucy but he may not marry Fred. The reason Ricky is denied a license to marry Fred is because of gender — if Ricky were a woman, he would be allowed to marry Fred. Thus, "Ricky is being discriminated against because of his

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6. Neuhaus, *supra* note 3, at 84.

7. *Id.* at 83.

8. For a brilliant defense of the constitutionality of traditional marriage laws, see Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1.

9. See Richard F. Duncan, *The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response To Professor Koppelman*, 6 Wm. & Mary Bill of Rights J. 147 (1997).

10. 116 S. Ct. 1620 (1996).

11. See, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians And Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994). A plurality of the Hawaii Supreme Court recently decided that the State's dual-gender marriage law discriminates on the basis of sex under the state constitution. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). The case was remanded to the trial court, and on December 3, 1996, the trial judge ruled that the Hawaii marriage law violated the state constitution. The case is currently awaiting review in the Hawaii Supreme Court. For an excellent description of the Hawaii litigation, see David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 7-18 (1997).

12. Koppelman, *supra* note 11, at 208.

sex”<sup>13</sup> and this triggers heightened scrutiny under equal protection doctrine.<sup>14</sup>

It is certainly true that Ricky and Fred cannot marry anywhere in the world. There is a unanimous, international consensus<sup>15</sup> on the meaning of marriage as a unique interpersonal “community defined by sexual complementarity.”<sup>16</sup> However, marriage laws do not treat men and women unequally. To the contrary, far from being based upon a desire to discriminate on the basis of gender, conventional marriage laws recognize the full and equal contribution of both men and women to the institution of marriage, the most essential building block of civilized society.<sup>17</sup>

Marriage is a dual-gender relationship in the sense that a lawful marriage requires participation by both a man and a woman. Marriage laws apply the same equal standard to each gender — neither men nor women may marry a person of the same gender. Neither the benefits nor the burdens of these laws are distributed unequally to men or women as a class. Therefore, these laws do not discriminate on the basis of gender.<sup>18</sup>

The problem with the “equal application” counter-argument is that it was made — and rejected — in defense of Virginia’s anti-miscegenation laws in *Loving*. The so-called “*Loving Analogy*” is a problem for those defending marriage laws, but not an insurmountable problem. Prohibiting interracial marriages is one thing; recognizing that marriage is an equal partnership between one man and one woman is something quite different.

In *Loving*, the State of Virginia argued that its anti-miscegenation laws did not “constitute an invidious discrimination based upon race” because they punished “equally both the white and the Negro participants in an interracial marriage.”<sup>19</sup> The Court rejected the equal application defense because Virginia’s anti-miscegenation laws were based upon a clearly in-

13. *Id.*

14. See *United States v. Virginia*, 116 S. Ct. 2264, 2274 (1996) (stating that parties who seek to defend laws that discriminate on the basis of gender must establish an “exceedingly persuasive justification” for the gender classification). This burden of justification “is demanding and it rests entirely on the State.” *Id.* at 2275.

15. At present, no country or state in the world recognizes homosexual relationships as marriages. Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 *FAM. L.Q.* 497, 500 (1995). Although Sweden, Denmark, and Norway have legalized “domestic partnerships” for homosexual couples, lawmakers in these nations carefully distinguish domestic partnerships from marriage. *Id.*

16. Coolidge, *supra* note 11, at 29.

17. See Wardle, *supra* note 8, at 87. See generally *id.*, at 38-39, 75-88.

18. See *id.* at 84:

The heterosexual marriage requirement does not facially discriminate on the basis of gender, or reinforce stereotyped gender roles discriminantly, because it does not distinguish between what men and women are permitted to do nor between the governmental benefits they may obtain. Formally, men and women are treated the same by the heterosexual marriage requirement because both genders are equally required to marry only persons of the other gender.

19. *Loving v. Virginia*, 388 U.S. 1, 8 (1967).

vidious purpose — an endorsement of the doctrine of “White Supremacy.”<sup>20</sup> Indeed, in *Naim v. Naim*,<sup>21</sup> an unreconstructed Virginia Supreme Court of Appeals unabashedly defended the State’s anti-miscegenation scheme as properly designed “to preserve the racial integrity of its citizens,” to “regulate the marriage relation so that [the State] shall not have a mongrel breed of citizens,” and to prevent “the corruption of blood.”<sup>22</sup>

Of course, as Chief Justice Warren pointed out in *Loving*, the statute was not neutral in its concern about racial integrity — it was based upon the invidious idea that the white race was superior and must be protected against the “corruption of blood” that would result from marriages between whites and non-whites.<sup>23</sup> In his seminal Article on the Court’s landmark segregation decisions,<sup>24</sup> Professor Charles Black eloquently captured the injustice of laws mandating racial segregation:

Then does segregation offend against equality? Equality, like all general concepts, has marginal areas where philosophic difficulties are encountered. But if a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated “equally,” I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.<sup>25</sup>

Like laws mandating racially segregated schools for children, a system of racial apartheid in marriage is “inherently unequal.”<sup>26</sup> Chief Justice Warren applied this legal, political, and moral truth in *Loving* just as he had more than a decade earlier in *Brown v. Board of Education*.<sup>27</sup>

*Loving*, then, is a case about racial segregation and equal protection. What does the reasoning of *Loving* tell us about the argument that the dual-gender marriage requirement constitutes unlawful discrimination on the basis of gender? The answer is not very much.

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20. *Id.* The Court twice cited (and capitalized) this poisonous doctrine that strikes at the core of the concept of racial equality under the law. *Id.* at 7, 11.

21. 87 S.E.2d 749 (Va. 1955).

22. *Id.* at 756.

23. *Loving*, 388 U.S. at 7. The law prohibited only interracial marriages between whites and non-whites. Thus, the law’s expressed concern with racial integrity extended “only to the integrity of the white race.” *Id.* at 11 n.11.

24. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

25. *Id.* at 424.

26. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

27. *Id.*

The heterosexual paradigm reflected in the dual-gender requirement is not based upon the notion that one gender is superior and one inferior.<sup>28</sup> Therefore, the anti-miscegenation law struck down in *Loving* is not analogous to laws defining marriage as a dual-gender union of husband and wife. As Professor Wardle put it, “[t]he heterosexual marriage requirement . . . merely recognizes the unique social importance of the institution of marriage for relationships, complementarity, and generativity that lie at the heart of the social interest in marriage.”<sup>29</sup> Anti-miscegenation laws separated the races; but conventional marriage laws integrate the genders. Anti-miscegenation laws endorsed the invidious doctrine of White Supremacy; but conventional marriage laws provide for the full and equal participation of one man and one woman in the institution of marriage. Anti-miscegenation laws—like laws requiring racial segregation in schools and other public facilities—were properly held to violate the central meaning of the Equal Protection Clause. However, by requiring participation by one person of each gender, conventional marriage laws affirm the concept of gender equality and convey a critically important message about the equal indispensability of both men and women to the institution of marriage.<sup>30</sup>

The *Loving* Analogy is simply inapposite. Dual-gender marriage laws do not classify on the basis of gender. They merely define marriage as a relationship between one man and one woman and apply the same neutral rules to both men and women. The *Loving* court rejected equal applicability as a justification for anti-miscegenation laws for reasons that clearly do not apply to the dual-gender definition of marriage.<sup>31</sup> Properly understood, the same-sex marriage issue is about an eminently reasonable distinction drawn on the basis of sexual orientation; it is not about an attempt to stigmatize one gender as inferior and untouchable.<sup>32</sup>

Some commentators counter with the radical feminist argument that the “compulsory heterosexuality” of conventional marriage laws is designed to keep “women in relationships in which men exert power over their lives.”<sup>33</sup> According to one commentator, the “homosexuality taboo” is similar to the “miscegenation taboo” and endorses the message that “[s]ex equality is dangerous; it will reduce men to the level of women.”<sup>34</sup> Profes-

28. See Wardle, *supra* note 8, at 87-88.

29. *Id.* at 85-86.

30. *Id.* at 87.

31. “The *Loving* Court did not repudiate equal applicability as a justification for classification by gender, but only as a justification for invidious racial discrimination.” *Id.* at 84.

32. See Wardle, *supra* note 8, at 86; Sunstein, *supra* note 11, at 19.

33. Koppelman, *supra* note 11, at 249.

34. *Id.* Professor Eskridge also cites “feminist psychology” to support this theory. Under his “hypothesis,” “[f]eminized men and masculinized women” are treated as “objects of intense hatred by men hoping to reaffirm a manhood about which they are deeply uncertain.” WILLIAM N.

sor Sunstein “speculates”<sup>35</sup> that the ban on same-sex relationships is the product of “impermissible sex-role stereotyping.”<sup>36</sup> He argues that the heterosexual paradigm is based upon the “definition of men as essentially active in social and sexual arenas, and of women as essentially passive in both places.”<sup>37</sup> Sunstein cites no less an authority than Iron Mike Tyson in support of this remarkable assertion:

Thus, it is a familiar part of violent male encounters that the victim will be feminized, as in boxer Mike Tyson’s remark to challenger Donovan “Razor” Ruddock: “I’m going to make you my girlfriend.” I suggest that far from being an oddity, this comment says something deeply revealing about the relationship between same-sex relations and the system of caste based on gender.<sup>38</sup>

Sunstein’s reliance on this kind of evidence in support of his “speculations” about the meaning of the institution of marriage says something deeply revealing about the weakness of his argument.<sup>39</sup> Dual-gender marriage laws do not impose any sex-role stereotypes on married couples. Men and women are free to define their roles as husband and wife any way they please. The law recognizes the critical importance of both men and women to the institution of marriage and leaves to each couple the task of deciding how to conduct their life together. This is perfectly consistent with equal regard for men and women under the Fourteenth Amendment. Moreover, it is perfectly consistent with both the holding and the reasoning of the Court in *Loving*.

Interestingly, one of the leading advocates of same-sex marriage, Professor William Eskridge, bases his argument for radical change at least in part on an egregious sex-role stereotype. Eskridge argues that one of the major benefits of state recognition of same-sex marriage is the “civilizing effects” it is likely to produce for gay men.<sup>40</sup> Eskridge says “[g]ay men are

ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 169 (1996). Straining to pass a gnat, Eskridge asserts this “evidence” supports the argument that conventional marriage laws discriminate “by reason of a sex-based classification.” *Id.* at 170.

35. Sunstein, *supra* note 11, at 22.

36. *Id.* at 23.

37. *Id.* at 22.

38. *Id.*

39. Sunstein, “[a]gain speaking speculatively,” asserts that the “ban on lesbian relations” is designed (at least in part) “to ensure that women are sexually available to men.” *Id.* Actually, according to the best estimates of the homosexual population, homosexual males significantly outnumber lesbians. See RICHARD A. POSNER, *SEX AND REASON* 128 (1992) (3 to 4 percent of adult males and only 1 percent of adult females “have a strongly homosexual preference”). Thus, if straight males really wanted to maximize their opportunities to compete for sexually available women, they would strongly support homosexual relations.

40. ESKRIDGE, *supra* note 34, at 82-84.

like Ulysses, who directed that he be bound to the ship's mast as it passed the Sirens, sea creatures whose seductive voices enticed men to their deaths."<sup>41</sup> "Likewise," continues Eskridge, homosexual males "tend to lose their balance and succumb to private sirens if they are not socially and even legally constrained."<sup>42</sup> Eskridge seems to think that same-sex marriage will tie gay males "to the ship's mast" and help them to live more disciplined, perhaps even monogamous, lives. Indeed, he thinks that same-sex marriage is a good thing because it "civilizes gay men by making them more like lesbians."<sup>43</sup> Eskridge's use of a sex-role stereotype does not necessarily undermine his argument in favor of same-sex marriage, but it does call to mind the classic aphorism about glass houses and the throwing of stones.

At the end of the day, the argument that the traditional definition of marriage violates the principle of gender equality misses the mark. Traditional marriage laws treat men and women with equal regard and endorse an extremely important social message about the equal indispensability of each gender to the institution of marriage. Moreover, these laws do not impose or endorse any sex-role stereotypes on married couples; husbands and wives are free to define their roles within marriage any way they please. The institution of marriage, as it exists today everywhere in America, is perfectly consistent with our Nation's enduring commitment to gender equality. The attempt to use *Loving* to radically transform the nature of marriage is misguided and should be rejected.

### III. ROMER, MARRIAGE, AND RATIONALITY

In *Romer v. Evans*,<sup>44</sup> the Supreme Court considered an equal protection challenge to Colorado Amendment 2, a citizen initiative that amended the Colorado state constitution to forbid all levels of state and local government from adopting any statute, ordinance or policy designed to protect

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41. *Id.* at 83.

42. *Id.*

43. *Id.* at 84. Eskridge is correct in recognizing that sexual promiscuity is a serious problem for many homosexual males. See THOMAS E. SCHMIDT, *STRAIGHT & NARROW: COMPASSION & CLARITY IN THE HOMOSEXUALITY DEBATE* 106-07 (1995). However, as Richard Posner has observed, homosexual marriage is not the solution for this problem. RICHARD A. POSNER, *SEX AND REASON* 305 (1992). Men are civilized by their wives and children, not by being tied to the ship's mast. *Id.* at 305-306. Indeed, one prominent advocate of same-sex marriage suggests that homosexual marriages might serve as models for a new kind of family life, one in which monogamy and sexual fidelity are not seen as "essential component[s] of love and marriage." Richard D. Mohr, *The Case For Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215, 233 (1995). See also ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 202 (1995) (noting that in gay male unions "there is more likely to be greater understanding of the need for extramarital outlets"). It is certainly reasonable to resist this dangerous social experiment upon the institution of marriage.

44. 116 S. Ct. 1620 (1996).

homosexuals or bisexuals against any kind of discrimination.<sup>45</sup> *Romer* is a unique equal protection case in which the Court invalidated what it called an “unprecedented”<sup>46</sup> law that denied a particular group protection “against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”<sup>47</sup> It was the almost infinite legal disability created by Amendment 2—not the identity of the class of persons disadvantaged by the Amendment—that concerned Justice Kennedy and his colleagues in the *Romer* majority.<sup>48</sup>

Indeed, *Romer* is far more notable for what it did not do than for what it did do. The Court did not hold that homosexuals are a suspect or a quasi-suspect class under the Equal Protection Clause. It did not hold that moral disapproval of homosexual conduct is invidious or irrational. It did not hold that laws that make distinctions on the basis of sexual orientation or relationships are tainted by animus or dislike for a politically unpopular group.<sup>49</sup> Nor did the Court find any new fundamental rights lurking in the shadows of our written Constitution. Amendment 2 failed the rational basis test only because no legitimate state interest came close to fitting the Amendment’s nearly infinite path of disadvantage.

*Romer* is not a “gay rights” case; it is a case about a limitless legal disability. The Court drew an inference of animus from the unlimited breadth of the disability created by Amendment 2 and from the fact that no legitimate state interest reasonably fit the infinitely broad sweep of the law’s coverage, not from the identity of the group subjected to the disability.<sup>50</sup> The Colorado Amendment would have failed the rational basis test with-

45. If allowed to go into effect, Amendment 2 would have been COLO. CONST. art. II, § 30b (overturned by *Romer v. Evans*, 116 S. Ct. 1620 (1996)). It stated:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

*Romer*, 116 S. Ct. at 1623.

46. *Romer*, 116 S. Ct. at 1628. The Court’s literal reading of the text of Amendment 2 enabled it to interpret the Amendment as being of almost unlimited breadth.

47. *Id.* at 1627.

48. *Id.* at 1627-28.

49. See *Duncan*, *supra* note 9, at 155. The Court drew an inference of animus from the unlimited breadth of the disability created by Amendment 2, not from the identity of the group covered by the disability. *Id.* According to the Court, the extreme breadth of Amendment 2 outran and belied “any legitimate justifications that may be claimed for it.” *Romer*, 116 S. Ct. at 1628-29.

50. *Romer*, 116 S. Ct. at 1629. The Court noted that under the rational basis test “a law must bear a rational relationship to a legitimate governmental purpose . . . and Amendment 2 does not.” *Id.*

out regard to whether it covered homosexuals, smokers, insurance salesmen, or any other particular group.

Under *Romer* and the rational basis test, laws that make distinctions on the basis of sexual orientation are presumptively constitutional. Such laws will be upheld so long as they are “narrow enough in scope and grounded in a sufficient factual context for [the Court] to ascertain that there exist[s] some relation between the classification and the purpose it serve[s].”<sup>51</sup> If *Romer* governs the constitutionality of laws defining marriage as a relationship between one man and one woman, these laws will certainly be upheld because they are sufficiently narrow and focused to enable the Court to ascertain their eminent reasonableness.<sup>52</sup> I have developed this argument in greater detail elsewhere,<sup>53</sup> and I have nothing further to add at present.

This essay will now focus on the impact of *Romer* on the proposed amendment to the Hawaii state constitution that is designed to remove the issue of same-sex marriage from the state courts and return it to the political process. The proposed amendment, which will be submitted to the people of Hawaii in November 1998, reads as follows: “The legislature shall have the power to reserve marriage to opposite-sex couples.”<sup>54</sup>

Does this proposed amendment violate the Equal Protection Clause under *Romer*? Some might argue that non-recognition of same-sex marriages singles out homosexual couples and denies them access to an extensive list of tax, welfare, and other benefits made available to married couples by the state. But this argument misses the mark entirely. This is an easy case under *Romer*; the proposed Hawaii amendment should easily pass muster under the reasoning of Justice Kennedy’s majority opinion.<sup>55</sup>

Unlike Colorado Amendment 2, the Hawaii Amendment focuses on a narrow and specific issue—the power of the legislature to define marriage as a dual-gender relationship—and does not impose an across-the-board disability on a particular group.<sup>56</sup> *Romer* explicitly states that laws such as this one will be upheld so long as they are narrow in scope and “grounded in a sufficient factual context” to enable the Court to ascertain the existence of some reasonable relationship between the law and any legitimate

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51. *Id.* at 1627.

52. *See* Duncan, *supra* note 9, at 156.

53. *See id.* at 156-165.

54. Coolidge, *supra* note 11, at 17. As part of the compromise that led to passage of the proposed amendment in the Hawaii Legislature, the legislature enacted a “reciprocal benefits” law providing certain benefits to “reciprocal beneficiaries” a term defined as “those legally ineligible to marry.” *Id.* This is not a same-sex domestic partnership law. Reciprocal beneficiaries need not be of the same sex, nor does the law require a common household or an intimate relationship. For example, a widow and her son could qualify as reciprocal beneficiaries. *Id.*

55. *See supra* notes 51-52 and accompanying text.

56. *See* Coolidge, *supra* note 11, at 17.

governmental purpose.<sup>57</sup> The proposed amendment does not target a class of persons and deny that class the opportunity to protect itself politically against a limitless number of discriminatory harms and exclusions. The amendment merely permits the Hawaii legislature to define marriage as a dual-gender relationship; it does not forbid any individual or group from seeking political protection against any kind of public or private discrimination.<sup>58</sup> Same-sex couples are free to seek to amend any tax, welfare, or other laws privileging marriage to acquire the same or similar benefits. Indeed, gays and others ineligible to marry remain free to use the political process to change the marriage laws.

The proposed Hawaii amendment is reasonably and substantially related to the clearly legitimate purpose of returning an important and controversial political issue to the political branch of state government. If adopted by a vote of the people of Hawaii, the amendment will not decide the issue of same-sex marriage; rather, it will merely restore the power to decide that important issue of social policy to the Hawaii Legislature. The amendment is clearly related to the eminently legitimate goal of protecting the collective right of democratic self-government.

Moreover, *Crawford v. Los Angeles Board of Education*,<sup>59</sup> is controlling. In that case, the citizens of California amended the state constitution to provide that state courts shall not order mandatory pupil assignment or busing unless the Equal Protection Clause of the United States Constitution requires such an order.<sup>60</sup> In effect, the citizens of California amended the state constitution to restore the issue of busing to the political process (except when busing was mandated by the U. S. Constitution). The Supreme Court upheld the citizen initiative and expressly rejected "the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede."<sup>61</sup> The Court explained that to hold otherwise would be "destructive of a State's democratic processes and of its ability to experiment."<sup>62</sup> This ruling decisively applies to the proposed Hawaii amendment and makes clear that when the state courts go "beyond the requirements of the Federal Constitution, the State [is] free to return . . . to the standard prevailing generally throughout the United States."<sup>63</sup> Thus, under *Romer* and *Crawford*, the people of Hawaii are free to amend their state constitution to remove the same-sex marriage issue from the state courts.

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57. *Romer*, 116 S. Ct. at 1627.

58. See Coolidge, *supra* note 11, at 17.

59. 458 U. S. 527 (1982).

60. *Id.* at 529.

61. *Id.* at 535.

62. *Id.*

63. *Id.* at 542.

#### IV. CONCLUDING THOUGHTS ON *LOVING*, MORAL DISCERNMENT AND SAME-SEX MARRIAGE

In *THE CASE FOR SAME-SEX MARRIAGE*, Professor Eskridge dismisses supporters of traditional marriage as either ignorant<sup>64</sup> or emotionally unstable.<sup>65</sup> Moreover, he dismisses Western civilization — at least since the thirteenth century — as “intolerant.”<sup>66</sup> He then provides what he calls a “mini-history of same-sex unions” to demonstrate that “same-sex marriages . . . have served civilizing functions”<sup>67</sup> in the course of human history for both homosexuals and mainstream society. His point seems to be that sick societies like ours (i.e. those that do not celebrate same-sex “marriages”) have a great deal to learn from those societies that have recognized and accepted homosexual unions.<sup>68</sup>

I find this chapter of Eskridge’s tome amazing. Consider two of his historical examples of how same-sex marriages have served “civilizing functions” in society.

Eskridge cites the same-sex “marriage” of the Roman Emperor Nero as one example of a “publicly celebrated same-sex marriage.”<sup>69</sup> Since Nero ruled Rome absolutely, his sexual activities were, I suppose, sanctioned by Rome. But is Nero a suitable role model for Eskridge to claim in support of his campaign to celebrate the goodness of homosexual marriage? Don’t we need to know a little more about Nero and his same-sex “marriage”?

Few would disagree that Nero was one of the most evil men in history. He was responsible for the murder of his mother Agrippina, and he waged a vicious religious holocaust against Christians.<sup>70</sup> The circumstances of at least one of Nero’s same-sex “marriages” are no less depraved. When

64. ESKRIDGE, *supra* note 34 at 183.

65. *Id.* at 183-85. He asserts that “most people” who disagree with him are suffering from what he calls a “fear of flaunting.” *Id.* at 183. In other words, most Americans are tolerant about private, consensual homosexual conduct, but are unwilling to support laws that celebrate and subsidize homosexual unions as legally recognized “marriages.” Eskridge labels this large group of his fellow citizens “unhealthy.” He puts it this way: “It is beyond my competence to psychoanalyze Americans’ complex emotional reaction to open homosexual expression, but medical professionals generally consider anti-homosexual feelings mentally unhealthy.” *Id.* at 185. This remarkable assertion by Eskridge is risible. It needs no further response.

66. *Id.* at 16.

67. *Id.*

68. *Id.*

69. *Id.* at 23.

70. WILL DURANT, *CAESAR AND CHRIST* 277-281 (1944). According to Tacitus, Nero’s pogrom against the Christians was exceedingly cruel:

They were put to death with exquisite cruelty, and to their sufferings Nero added mockery and derision. Some were covered with skins of wild beasts, and left to be devoured by dogs; others were nailed to crosses; numbers of them were burned alive; many, covered with inflammable matter, were set on fire to serve as torches during the night.

*Id.* at 281 (quoting TACITUS, *ANNALS* XV 44 (1830)).

Nero's wife, Poppaea, died in the year 65, Nero grieved bitterly her passing.<sup>71</sup> He found a boy, Sporus, "who closely resembled Poppaea, . . . had him castrated, married him by a formal ceremony, and 'used him in every way like a woman.'" <sup>72</sup> Eskridge does not explain how Nero's "celebrated" same-sex union produced civilizing effects on Roman society.<sup>73</sup> The reader is left to figure this out for herself.

Another historical example cited by Eskridge—he calls it the "most interesting example of same-sex initiation relationship"<sup>74</sup>—involves a form of "ritualized homosexuality"<sup>75</sup> practiced by certain aboriginal populations of Australia and Melanesia. This interesting "man-boy" ritual<sup>76</sup> involves boys being prepared to enter manhood and heterosexual marriage by first being sodomized by adult males. As Eskridge explains it, "by inseminating a boy the older male is believed not only to facilitate the boy's passage into manhood but also to prepare him for his marriage to a woman."<sup>77</sup>

Eskridge lacks moral discernment, the ability to distinguish between right and wrong. In his world, "most people" (i.e. those who support traditional notions of sexual morality) are either evil or mentally ill.<sup>78</sup> However, he seems to think we have much to learn from the Emperor Nero's sexual perversions and from the "man-boy" homosexual rituals he finds so "interesting."<sup>79</sup>

At the end of the day, the "case for same-sex marriage" fails because it lacks the quality that animated the Supreme Court's opinion in *Loving* — a

71. Poppaea was killed "in advanced pregnancy, allegedly from a kick in the stomach; rumor said this had been Nero's answer to her reproaches for having come home late from the races." *Id.* at 281-82. See also JOHN BISHOP, *NERO: THE MAN AND THE LEGEND* 148 (1964).

72. DURANT, *supra* note 70, at 282. Suetonius confirms the circumstances of Nero's abuse of this unfortunate boy. "Having tried to turn the boy Sporus into a girl by castration, he went through a wedding ceremony with him—dowry, bridal veil and all—took him to his Palace with a great crowd in attendance, and treated him as a wife." GAIUS SUETONIUS TRANQUILLUS, *THE TWELVE CAESARS* 195 (Robert Graves trans., Allen Lane 1979). It is clear that Eskridge has Sporus in mind when he refers to Nero's "publicly celebrated" same-sex marriages. See William N. Eskridge Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1446-47 (1993).

73. Nero's second same-sex "marriage"—to Doryphoros—was almost as (if not more) depraved as his "marriage" to Sporus. Suetonius describes it as follows:

Nero practiced every kind of obscenity, and after defiling almost every part of his body finally invented a novel game: he was released from a cage dressed in the skins of wild animals, and attacked the private parts of men and women who stood bound to stakes. After working up sufficient excitement by this means, he was dispatched—shall we say?—by his freedman Doryphorus. Doryphorus now married him—just as he himself had married Sporus—and on the wedding night he imitated the screams and moans of a girl being deflowered.

SUETONIUS, *supra* note 72, at 195.

74. ESKRIDGE, *supra* note 34, at 33.

75. *Id.*

76. *Id.*

77. *Id.*

78. See *supra* notes 65-66 and accompanying text.

79. See *supra* notes 69-77 and accompanying text.

well-developed sense of moral discernment. The Court in *Loving* understood that the institution of marriage is "fundamental to our very existence and survival."<sup>80</sup> It was precisely because Mildred and Richard Loving had formed "a unique community defined by sexual complementarity"<sup>81</sup> that it was wrong for Virginia to prohibit their marriage. Because race is irrelevant to what makes a relationship a marriage, it was immoral and unconstitutional for Virginia to forbid interracial marriages. However, unlike Virginia's racist restriction on marriage, the dual-gender requirement is based upon the inherent sexual complementarity of husband and wife.<sup>82</sup> As Justice Ginsburg observed in *United States v. Virginia*:<sup>83</sup> "Physical differences between men and women . . . are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'"<sup>84</sup>

## V. CONCLUSION

The dual-gender marriage requirement does not treat men and women unequally. Instead, it recognizes and celebrates the physical differences between men and women and their obvious sexual complementarity. Traditional marriage laws do not discriminate on the basis of gender; rather, they recognize the equal indispensability of both genders to the institution of marriage. The dual-gender requirement, like the decision in *Loving*, is animated by a moral sense that discerns the true nature of marriage. As Justice Ginsburg put it so well, most people understand that the two sexes are not fungible and that dual-gender marriages and same-sex unions are very different things indeed. These fundamental differences provide a reasonable (indeed, I would say a compelling) justification for traditional marriage laws. The legacy of *Loving* is dishonored by those who seek to use the decision as a tool to radically remake the institution of marriage "in the image of their dissent."<sup>85</sup>

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80. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

81. Coolidge, *supra* note 11, at 29. By the time the Lovings came before the Supreme Court, their marriage had been blessed with three children. See ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 449 (1997).

82. "In this view, marriage is a unique community defined by sexual complementarity—the reality that men and women are 'different from, yet designed for' one another." Coolidge, *supra* note 11, at 29. The *Loving* Court demonstrated its awareness of this biological reality when it referred to marriage as "fundamental to our very existence and survival." *Loving*, 388 U. S. at 12.

83. 116 S. Ct. 2264 (1996).

84. *Id.* at 2276 (quoting *Ballard v. United States*, 329 U. S. 187, 193 (1946)).

85. See *supra* note 7 and accompanying text.