

CONCURRING AND DISSENTING OPINION BY BAXTER, J.

The majority opinion reflects considerable research, thought, and effort on a significant and sensitive case, and I actually agree with several of the majority's conclusions. However, I cannot join the majority's holding that the California Constitution gives same-sex couples a right to marry. In reaching this decision, I believe, the majority violates the separation of powers, and thereby commits profound error.

Only one other American state recognizes the right the majority announces today. So far, Congress, and virtually every court to consider the issue, has rejected it. Nothing in our Constitution, express or implicit, compels the majority's startling conclusion that the age-old understanding of marriage — an understanding recently confirmed by an initiative law — is no longer valid. California statutes already recognize same-sex unions and grant them all the substantive legal rights this state can bestow. If there is to be a further sea change in the social and legal understanding of marriage itself, that evolution should occur by similar democratic means. The majority forecloses this ordinary democratic process, and, in doing so, oversteps its authority.

The majority's mode of analysis is particularly troubling. The majority relies heavily on the *Legislature's* adoption of progressive civil rights protections for gays and lesbians to find a *constitutional* right to same-sex marriage. In effect, the majority gives the Legislature *indirectly* power that body does not *directly*

possess to amend the Constitution and repeal an initiative statute. I cannot subscribe to the majority's reasoning, or to its result.

As noted above, I do not dispute everything the majority says. At the outset, I join the majority's observation that "[f]rom the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman." (Maj. opn., *ante*, at p. 23, fn. omitted.)

Moreover, I endorse the majority's interpretation of California's Domestic Partnership Act (DPA; Fam. Code, § 297 et seq.). As the majority makes clear, the DPA now allows same-sex partners to enter legal unions which "afford . . . virtually all of the [substantive] benefits and responsibilities afforded by California law to married opposite-sex couples." (Maj. opn., *ante*, at p. 45; see also Fam. Code, § 297.5.) As the majority further correctly observes, California *has done all it can do* with regard to providing these substantive rights, benefits, and responsibilities to same-sex partners. (Maj. opn., *ante*, at pp. 44-45.)¹

I also agree with the majority's construction of Family Code section 308.5. As the majority explains, this initiative statute, adopted by a popular vote of 61.4

¹ As the majority acknowledges, California cannot force other jurisdictions to recognize California same-sex legal partnerships, by any name. Indeed, the federal Defense of Marriage Act (DOMA; 28 U.S.C. § 1738C, as added by Pub.L. 104-199, § 2(a) (Sept. 21, 1996), 110 Stat. 2419) specifies that an American state, territory, possession, or Indian tribe may refuse to recognize any same-sex legal relationship created under the laws of another state, territory, possession, or tribe, and "treated as a marriage" by that other entity. As the majority concedes, many American jurisdictions have exercised this authority, and have enacted laws refusing to recognize same-sex marriages or equivalent same-sex legal unions created under the laws of other jurisdictions. Moreover, under the DOMA, all *federal* laws and regulations affecting marital or spousal rights, responsibilities, and benefits expressly apply only to opposite-sex unions. (1 U.S.C. § 7, as added by Pub.L. 104-199, § 3(a) (Sept. 21, 1996), 110 Stat. 2419.)

percent and thus immune from unilateral repeal by the Legislature (Cal. Const., art. II, § 10, subdivision (c)), does not merely preclude California’s recognition of same-sex “marriage[s]” consummated elsewhere, but also invalidates same-sex “marriage[s]” contracted under that name in this state.²

In addition, I am fully in accord with the majority’s conclusion that Family Code sections 300 and 308.5, insofar as they recognize only legal relationships between opposite-sex partners as “marriage[s],” do not discriminate on the basis of gender.

Finally, I concur that the actions in *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* (Super. Ct. S.F. City & County No. CPF-04-503943) and *Campaign for California Families v. Newsom* (Super. Ct. S.F. City & County No. CGC-04-428794) should have been dismissed as moot in the wake of this court’s decision in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055.

However, I respectfully disagree with the remainder of the conclusions reached by the majority.

The question presented by this case is simple and stark. It comes down to this: Even though California’s progressive laws, recently adopted through the democratic process, have pioneered the rights of same-sex partners to enter legal unions with all the substantive benefits of opposite-sex legal unions, do those laws

² Insofar as Family Code section 308.5 *does* represent California’s decision not to recognize same-sex marriages contracted in another jurisdiction, that choice is expressly sanctioned, of course, by 28 United States Code section 1738C, part of the DOMA. (See fn. 1, *ante*.) This provision is an exercise of Congress’s power under the full faith and credit clause (U.S. Const., art. IV, § 1). (E.g., *Wilson v. Ake* (M.D.Fla. 2005) 354 F.Supp.2d 1298, 1303-1304 (*Wilson*).)

nonetheless violate the California Constitution because at present, in deference to long and universal tradition, by a convincing popular vote, and in accord with express national policy (see fns. 1, 2, *ante*), they reserve the label “marriage” for opposite-sex legal unions?³ I must conclude that the answer is no.

The People, directly or through their elected representatives, have every right to adopt laws abrogating the historic understanding that civil marriage is between a man and a woman. The rapid growth in California of statutory

³ Before addressing the “label” issue — the only one actually presented by this case — the majority spends much time and effort to find that there is a fundamental *constitutional* right to enter a legally recognized familial union with a partner of the same sex. The focus on this subject is puzzling, for, as the majority concedes, California law *already provides*, to the maximum extent of the state’s power, a right to same-sex legal unions with all the substantive legal benefits of their opposite-sex counterparts. Thus, as the majority further acknowledges, plaintiffs *have no occasion* to establish a constitutional basis for these rights, and the issue is simply “whether, *in light of the enactment of California’s domestic partnership legislation*, the current California statutory scheme is constitutional.” (Maj. opn., *ante*, at p. 48, fn. 27, italics in original.) The majority’s objective appears to be to establish that the so-called fundamental right to same-sex legal unions includes, as a “core element[,]” the right to have those unions “accorded the same dignity, respect, and stature” as opposite-sex legal partnerships enjoy. (*Id.*, at p. 81.) This, in turn, supports the majority’s later conclusion that the labeling distinction in the current scheme directly infringes this fundamental right, and is therefore subject to strict scrutiny for reasons independent of the equal protection theory also advanced by the majority. (*Id.*, at pp. 101-106.)

As I explain below, however, I conclude that there is no fundamental constitutional right to a same-sex legal union that equates in every respect with marriage. I would also reject the majority’s alternative theory, based on the equal protection clause, for subjecting the labeling distinction to strict scrutiny. Hence, in my view, the naming distinction preserved by California’s statutes must be upheld under our Constitution unless it is irrational. By that standard, the People’s decision to retain the traditional definition of marriage as between a man and a woman is amply justified.

protections for the rights of gays and lesbians, as individuals, as parents, and as committed partners, suggests a quickening evolution of community attitudes on these issues. Recent years have seen the development of an intense debate about same-sex marriage. Advocates of this cause have had real success in the marketplace of ideas, gaining attention and considerable public support. Left to its own devices, the ordinary democratic process might well produce, ere long, a consensus among most Californians that the term “marriage” should, in civil parlance, include the legal unions of same-sex partners.

But a bare majority of this court, not satisfied with the pace of democratic change, now abruptly forestalls that process and substitutes, by judicial fiat, its own social policy views for those expressed by the People themselves.

Undeterred by the strong weight of state and federal law and authority,⁴ the

⁴ Among American jurisdictions, only the high court of Massachusetts (*Goodridge v. Department of Public Health* (Mass. 2003) 798 N.E.2d 941 (*Goodridge*); see also *Opinions of the Justices to the Senate* (Mass. 2004) 802 N.E.2d 565, 572) has previously found or confirmed in its state Constitution a right of civil marriage to partners of the same sex. Several years earlier, in *Baehr v. Lewin* (Haw. 1993) 852 P.2d 44, the Hawaii Supreme Court had held that the denial of marriage licenses to same-sex couples was subject, under the state Constitution, to strict scrutiny, and had remanded the cause for further proceedings on the issue whether strict scrutiny was satisfied. However, before the lower court’s “no” answer (see *Baehr v. Miike* (Haw.Cir.Ct. 1996) 1996 WL 694235) could be reviewed on appeal, the voters ratified a state constitutional amendment giving the Hawaii Legislature the right to reserve marriage to opposite-sex unions (Haw. Const., art. I, § 23, as adopted at Gen. Elec. (Nov. 3, 1998) pursuant to Haw. H.R. Bill No. 117 (1997 Reg. Sess.)), a step that body had already taken (Haw.Rev.Stat. § 572-1, as amended by Haw. Sess. Laws 1994, act 217, § 3). Meanwhile, a substantially greater number of courts have rejected claims of state constitutional rights to same-sex marriage. (E.g., *Conaway v. Deane* (Md. 2007) 932 A.2d 571; *Hernandez v. Robles* (N.Y. 2006) 855 N.E.2d 1; *Andersen v. King County* (Wash. 2006) 138 P.3d 963; *Morrison v. Sadler* (Ind.Ct.App. 2005) 821 N.E.2d 15; *Standhardt v. Superior Court* (Ariz.Ct.App. 2003) 77 P.3d 451; *Baker v. Nelson* (Minn. 1971) 191 N.W.2d 185, appeal dismissed (1972) 409 U.S. 810; see *Dean v.*

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majority invents a new constitutional right, immune from the ordinary process of legislative consideration. The majority finds that our Constitution suddenly demands no less than a permanent redefinition of marriage, regardless of the popular will.

In doing so, the majority holds, in effect, that the *Legislature* has done *indirectly* what the Constitution prohibits it from doing directly. Under article II, section 10, subdivision (c), that body cannot unilaterally repeal an initiative statute, such as Family Code section 308.5, unless the initiative measure itself so provides. Section 308.5 contains no such provision. Yet the majority suggests that, by enacting *other statutes* which *do* provide substantial rights to gays and lesbians — including domestic partnership rights which, under section 308.5, the Legislature *could not call* “marriage” — the Legislature has given “explicit official recognition” (maj. opn., *ante*, at pp. 68, 69) to a California right of equal treatment which, because it includes the right to marry, thereby invalidates section 308.5.⁵

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District of Columbia (D.C.App. 1995) 653 A.2d 307, 332-333 (conc. & dis. opn. of Ferren, J); *Dean*, at pp. 361-364 (conc. opns. of Terry, J. & Steadman, J.) [federal Const.]; see also *Lewis v. Harris* (N.J. 2006) 908 A.2d 196 [finding right to same-sex civil union with benefits of marriage, but concluding that label issue is premature]; *Baker v. State* (Vt. 1999) 744 A.2d 864 [same].) In the wake of these developments, “[w]ith the exception of Massachusetts, every state’s law, explicitly or implicitly, defines marriage to mean the union of a man and a woman.” (*Lewis v. Harris*, *supra*, 908 A.2d at p. 208, fn. omitted.) As we have seen, federal statutory law also expressly does so.

⁵ The majority refrains from declaring explicitly that same-sex legal unions must be called marriage, suggesting only that the name chosen must be equivalent in respect and dignity to the name allotted to opposite-sex unions. Thus, the majority suggests, the Legislature might choose a new, common name for civil

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I cannot join this exercise in legal jujitsu, by which the Legislature’s own weight is used against it to create a constitutional right from whole cloth, defeat the People’s will, and invalidate a statute otherwise immune from legislative interference. Though the majority insists otherwise, its pronouncement seriously oversteps the judicial power. The majority purports to apply certain fundamental provisions of the state Constitution, but it runs afoul of another just as fundamental — article III, section 3, the separation of powers clause. This clause declares that “[t]he powers of state government are legislative, executive, and judicial,” and that “[p]ersons charged with the exercise of one power *may not exercise either of the others*” except as the Constitution itself specifically provides. (Italics added.)

History confirms the importance of the judiciary’s constitutional role as a check against majoritarian abuse. Still, courts must use caution when exercising the potentially transformative authority to articulate constitutional rights. Otherwise, judges with limited accountability risk infringing upon our society’s most basic shared premise — the People’s general right, directly or through their chosen legislators, to decide fundamental issues of public policy for themselves. Judicial restraint is particularly appropriate where, as here, the claimed constitutional entitlement is of recent conception and challenges the most fundamental assumption about a basic social institution.

The majority has violated these principles. It simply does not have the right to erase, then recast, the age-old definition of marriage, as virtually all societies have understood it, in order to satisfy its own contemporary notions of equality and justice.

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unions of both kinds. Either way, as the majority clearly holds, Family Code section 308.5 must be struck down. (Maj. opn., *ante*, at pp. 119-120.)

The California Constitution says nothing about the rights of same-sex couples to marry. On the contrary, as the majority concedes, our original Constitution, effective from the moment of statehood, evidenced an assumption that marriage was between partners of the opposite sex. Statutes enacted at the state's first legislative session confirmed this assumption, which has continued to the present day. When the Legislature realized that 1971 amendments to the Civil Code, enacted for other reasons, had created an ambiguity on the point, the oversight was quickly corrected, and the definition of marriage as between a man and a woman was made explicit. (Maj. opn., *ante*, at pp. 23-36.) The People themselves reaffirmed this definition when, in the year 2000, they adopted Proposition 22 by a 61.4 percent majority.

Despite this history, plaintiffs first insist they have a fundamental right, protected by the California Constitution's due process and privacy clauses (Cal. Const., art. I, §§ 1, 7, subd. (a)), to marry the adult consenting partners of their choice, regardless of gender. The majority largely accepts this contention. It holds that "the right to marry, as embodied in article I, sections 1 and 7, of the California Constitution, guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to . . . enter with [one's chosen life partner] into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage." (Maj. opn., *ante*, at p. 79, fn. omitted.) Further, the majority declares, a "core element[] of this fundamental right is the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships." (*Id.*, at p. 81.)

To the extent this means same-sex couples have a fundamental right to enter legally recognized family unions called "marriage" (or, as the majority unrealistically suggests, by another name common to both same-sex and opposite-

sex unions), I cannot agree. I find no persuasive basis in our Constitution or our jurisprudence to justify such a cataclysmic transformation of this venerable institution.

Fundamental rights entitled to the Constitution's protection are those "which are, objectively, 'deeply rooted in this [society's] history and tradition,' [citations], and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice could exist if they were sacrificed, [citation].'" (*Washington v. Glucksberg* (1997) 521 U.S. 702, 720-721 (*Glucksberg*); see, e.g., *Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 940.) Moreover, an assessment whether a fundamental right or interest is at stake requires "a 'careful description' of the asserted fundamental . . . interest. [Citations.]" (*Glucksberg, supra*, at p. 721; *Dawn D., supra*, at p. 941.)

These principles are crucial restraints upon the overreaching exercise of judicial authority in violation of the separation of powers. Courts have " 'always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' [Citation.] By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' [citation], lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences" of judges. (*Glucksberg, supra*, 521 U.S. 702, 720.)

It is beyond dispute, as the Court of Appeal majority in this case persuasively indicated, that there is no deeply rooted tradition of same-sex marriage, in the nation or in this state. Precisely the opposite is true. The concept of same-sex marriage was unknown in our distant past, and is novel in our recent

history, because the universally understood *definition* of marriage has been the legal or religious union of a man and a woman.⁶

One state, Massachusetts, has within the past five years recognized same-sex marriage. (*Goodridge, supra*, 798 A.2d 941; see fn. 4, *ante*.) However, as the Court of Appeal majority in our case observed, “the Massachusetts Supreme Judicial Court’s decision establishing this right has been controversial. (See, e.g., Note, *Civil Partnership in the United Kingdom and a Moderate Proposal for Change in the United States* (2005) 22 *Ariz. J. Internat. & Comparative L.* 613, 630-631 [describing the controversy engendered by *Goodridge*]; see also *Lewis v.*

⁶ This traditional understanding is certainly confirmed by the definitions of “marriage” contained in standard dictionaries. (See, e.g., Webster’s Third New Internat. Dict. (2002) p. 1384, col. 3 [“1 a: the state of being united to a person of the opposite sex as husband or wife. b: the mutual relation of husband and wife: WEDLOCK . . .”]; Random House Webster’s College Dict. (2d rev. ed. 2001) p. 814, col. 1 [“1. the social institution under which a man and woman live as husband and wife by legal or religious commitments . . .”]; IX Oxford English Dict. (2d ed. 1989) p. 396, col. 1 [“1.a. The condition of being a husband or wife; . . . [¶] . . . [¶] 2.a. . . . [t]he ceremony or procedure by which two persons are made husband and wife”]; American Heritage Dict. (2d ed. 1985) p. 768, col. 1 [“1.a. The state of being married: wedlock. b. The legal union of a man and woman as husband and wife. . . .”].) In light of the recent development of the issue, late editions of some such works dutifully allude to the concept of same-sex marriage. (See, e.g., American Heritage Dict. (4th ed. 2000) p. 1073, col. 1 [“ . . . d. A union having the customary but usually not the legal force of marriage: *a same-sex marriage*”]; compare, e.g., Black’s Law Dict. (8th ed. 2004) p. 994, col. 2 [noting that “[t]he United States government and most American states do not recognize same-sex marriages,” but citing recent decisions on the issue], with Black’s Law Dict. (7th ed. 1999) pp. 986, col. 2, 987, cols. 1-2, 988, col. 1; compare also, e.g., Merriam Webster’s Collegiate Dict. (11th ed. 2004) p. 761, col. 2, with Merriam Webster’s Collegiate Dict. (10th ed. 2000) p. 711, cols. 1-2.) But such recent acknowledgements in reference books do not undermine the fact that, until very recently, the institution of marriage has universally been understood as the union of opposite-sex partners.

Harris [(N.J.Super.Ct.App.Div. 2005) 875 A.2d 259, 274] [concluding from ‘the strongly negative public reactions’ to *Goodridge*, and similar decisions from lower courts of other states, that ‘there is not yet any public consensus favoring recognition of same-sex marriage’].) Several other states have reacted negatively by, for example, amending their constitutions to prohibit same-sex marriage. (See Stein, *Symposium on Abolishing Civil Marriage: An Introduction* (2006) 27 *Cardozo L.Rev.* 1155, 1157, fn. 12 [noting, as of January 2006, ‘39 states [had] either passed laws or amended their constitutions (or done both) to prohibit same-sex marriages, to deny recognition of same-sex marriages from other jurisdictions, and/or to deny recognition to other types of same-sex relationships’].)”

California’s history falls squarely along this nationwide spectrum, though at its more progressive end. As the majority itself explains, despite the Legislature’s passage of the DPA and other statutes pioneering gay and lesbian rights, California law has always assumed that marriage itself is between a man and a woman. *In recent years, both the Legislature and the People themselves have enacted measures to make that assumption explicit.* Under these circumstances, there is no basis for a conclusion that same-sex marriage is a deeply rooted California tradition.

Undaunted, the majority nonetheless claims California’s legal history as *evidence* of the constitutional right it espouses. According to the majority, the very fact that the Legislature has, over time, adopted progressive laws such as the DPA, thereby granting many substantial rights to gays and lesbians, constitutes “explicit official recognition” (maj. opn., *ante*, at pp. 68, 69) of “this state’s current policies and conduct regarding homosexuality,” i.e., “that gay individuals are entitled to the same legal rights and the same respect and dignity afforded all other individuals and are protected from discrimination on the basis of their sexual orientation.” (Maj. opn., *ante*, at pp. 67-68, fn. omitted.) “In light of this

recognition,” the majority concludes, “sections 1 and 7 of article I of the California Constitution cannot properly be interpreted to withhold from gay individuals” full equality of rights with heterosexual persons, including the right to same-sex legal unions that are fully equivalent—including in name—to those of opposite-sex partners. (*Id.*, at p. 69; see also *id.*, at pp. 81, 101-119.)

This analysis is seriously flawed. At the outset, it overlooks the most salient facts. The Legislature has indeed granted many rights to gay and lesbian individuals, including the right to enter same-sex legal unions with all the substantive rights and benefits of civil marriage. As the majority elsewhere acknowledges, however, our current statutory scheme, which includes an initiative measure enacted by the People, specifically *reserves* marriage itself for opposite-sex unions. (Fam. Code, §§ 300, 308.5.) Under these circumstances, it is difficult to see how our legislative history reflects a current community value in favor of same-sex marriage that must now be enshrined in the Constitution.⁷

Of even greater concern is the majority’s mode of analysis, which places heavy reliance on *statutory* law to establish a *constitutional* right. When a pattern of legislation makes current community values clear, the majority seems to say, those values can become locked into the Constitution itself.⁸

⁷ In this respect, California’s situation differs materially from that of Massachusetts, the only other state that now recognizes a constitutional right to same-sex marriage. In finding such a right, the Massachusetts Supreme Judicial Court addressed marriage statutes that imposed no facial prohibition on the issuance of marriage licenses to same-sex couples. (See *Goodridge, supra*, 798 A.2d 941, 951-952.) The Massachusetts court did not confront, as we do, a law, recently adopted by the voters, that gave explicit voice to a prevailing community standard in favor of retaining the traditional man-woman definition of marriage.

⁸ The majority protests that, contrary to my assertion, the constitutional right it finds is not “grounded upon” the Legislature’s passage of the DPA or any other

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Of course, only the People can amend the Constitution; the Legislature has no unilateral power to do so. (Cal. Const., art. XVIII.) However, the effect of the majority’s reasoning is to suggest that the Legislature can accomplish such amendment indirectly, whether it intends to do so or not, by reflecting current community attitudes in the laws it enacts.

The notion that legislation can become “constitutionalized” is mischievous for several reasons. As indicated above, it violates the constitutional scheme by which only the People can amend the state’s charter of government. It abrogates the legislative power to reconsider what the law should be as public debate on an issue ebbs and flows. And, for that very reason, it may discourage efforts to pass progressive laws, out of fear that such efforts will ultimately, and inadvertently, place the issue beyond the power of legislation to affect.

As applied in this case, the majority’s analysis has also given the Legislature, indirectly, a power it does not otherwise possess to thwart the People’s express legislative will. As noted above, under article II, section 10, subdivision (c) of the California Constitution, “[t]he Legislature may amend or repeal . . . an initiative statute by another statute that becomes effective *only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.*” (Italics added.) Family Code section 308.5, adopted by

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laws, and such legislation “[was] not required” in order to confer equal rights on gay and lesbian individuals. (Maj. opn., *ante*, at p. 68.) As noted, however, the majority’s analysis depends heavily on the Legislature’s efforts in behalf of gays and lesbians as “explicit official recognition” (*id.*, at pp. 68, 69) of California’s policies on this subject, and as consequent justification for concluding, despite an express contrary statute, that our Constitution grants gays and lesbians a right to marry.

Proposition 22, includes no provision allowing its unilateral repeal or amendment by the Legislature.

According to the majority, however, the Legislature's adoption of progressive laws on the subject of gay and lesbian rights, including the DPA, makes it impossible not to recognize a *constitutional* right to same-sex legal unions with full equivalency to opposite-sex legal unions. This development, the majority ultimately concludes, requires the invalidation of Family Code section 308.5. In other words, in the majority's view, the *Legislature's own actions* have, by indirection, caused this initiative statute to be erased from the books. To say the least, I find such a constitutional approach troubling.⁹

⁹ It is true, as the majority suggests, that initiative statutes are not immune from constitutional scrutiny, for “ ‘the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation.’ ” (Maj. opn., *ante*, at p. 114, quoting *Citizens Against Rent Control v. Berkeley* (1981) 454 U.S. 290, 295.) I do not suggest otherwise. I say only that the majority has made three serious mistakes en route to its conclusion that the initiative statute at issue here, Family Code section 308.5, violates the due process clause of the California Constitution. First, the majority finds such a violation largely on the basis of its assessment of prevailing contemporary values in this state, though section 308.5 itself makes clear that our citizens have not yet embraced the concept of same-sex marriage. Second, as evidence that prevailing community attitudes support full marital rights for same-sex couples, the majority cites the Legislature's efforts to accord various rights and benefits to gays and lesbians, including the right to enter same-sex unions that are substantively equivalent to marriage. But this effectively means the Legislature has, by indirection, undermined section 308.5, though the Constitution expressly denies that body express power to do so. (Cal. Const., art. II, § 10, subd. (c).) Third, and most fundamentally, the majority has eschewed the judicial restraint and caution that should always apply, under separation of powers principles, before clear expressions of popular will on fundamental issues are overturned.

Other grounds advanced by the majority for its claim of a fundamental right are equally unpersuasive. The majority accepts plaintiffs' unconvincing claim that they seek no new "right to same-sex marriage" (maj. opn., *ante*, at p. 51), but simply a recognition that the well-established right to marry one's chosen partner is not limited to those who wish to marry persons of the opposite sex. However, by framing the issue simply as whether the undoubted right to marry is *confined* to opposite-sex couples, the majority mischaracterizes the entitlement plaintiffs actually claim. The majority thus begs the question and violates the requirement of " 'careful description' " that properly applies when a court is asked to break new ground in the area of substantive due process. (*Glucksberg, supra*, 521 U.S. 702, 721-722.)

Though the majority insists otherwise, plaintiffs seek, and the majority grants, a *new* right to *same-sex* marriage that only recently has been urged upon our social and legal system. Because civil marriage is an institution historically defined as the legal union of a man and a woman, plaintiffs could not succeed except by convincing this court to insert in our Constitution an altered and expanded definition of marriage — one that includes same-sex partnerships for the first time. By accepting that invitation, the majority places this controversial issue beyond the realm of legislative debate and substitutes its own judgment in the matter for the considered wisdom of the People and their elected representatives. The majority advances no persuasive reason for taking that step.

In support of its view that marriage is a constitutional entitlement without regard for the genders of the respective partners, the majority cites the many California and federal decisions broadly describing the basic rights of personal autonomy and family intimacy, including the right to marry, procreate, establish a home, and bring up children. (See maj. opn., *ante*, at pp. 49-65.) However, none of the cited decisions holds, or remotely suggests, that any right to marry

recognized by the Constitution extends beyond the traditional definition of marriage to include same-sex partnerships.

Certainly *Perez v. Sharp* (1948) 32 Cal.2d 711 (*Perez*) does not support the majority's expansive view. There we struck down racial restrictions on the right of a man and a woman to marry. But nothing in *Perez* suggests an intent to alter the definition of marriage as a union of opposite-sex partners. In sum, there is no convincing basis in federal or California jurisprudence for the majority's claim that same-sex couples have a fundamental constitutional right to marry.¹⁰

In a footnote, the majority insists that, though same-sex couples are included within the fundamental constitutional right to marry, the state's absolute bans on marriages that are incestuous (Fam. Code, § 2200; see Pen. Code, § 285), or nonmonogamous (Pen. Code, § 281 et seq.; Fam. Code, § 2201) are not in

¹⁰ The majority can draw no comfort from *Lawrence v. Texas* (2003) 539 U.S. 558 (*Lawrence*), which struck down a state law prohibiting same-sex sodomy. (Overruling *Bowers v. Hardwick* (1986) 478 U.S. 186.) The five-member *Lawrence* majority, asserting privacy and personal autonomy interests under the due process clause, emphasized that the law, as applied to consenting adults, constituted an intrusion into the most intimate form of human behavior, sexual conduct, in the most private of places, the home. Even if the personal relationships in which such consensual private conduct occurred were "not entitled to formal recognition in the law," the majority concluded, the government could not prohibit the conduct itself. (*Lawrence*, at p. 567.) In response to concerns expressed in dissent by Justice Scalia, the majority made clear that the case "[did] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." (*Id.*, at p. 578.) Justice O'Connor, concurring in the judgment, found the antisodomy law invalid on equal protection grounds, seeing no rational basis for the statute's limitation to homosexual conduct. This did not mean, she made clear, that all distinctions between gay and heterosexual persons would similarly fail. In the case at hand, she noted, "Texas cannot assert any legitimate state interest [in such a classification], such as . . . preserving the traditional institution of marriage." (*Id.*, at p. 585 (conc. opn. of O'Connor, J.).)

danger. Vaguely the majority declares that “[p]ast judicial decisions explain why our nation’s culture has considered [incestuous and polygamous] relationships inimical to the mutually supportive and healthy family relationships promoted by the constitutional right to marry. [Citations.]” (Maj. opn., *ante*, at p. 79, fn. 52.) Thus, the majority asserts, though a denial of same-sex marriage is no longer justified, “the state continues to have a strong and adequate justification for refusing to officially sanction polygamous or incestuous relationships because of their potentially detrimental effect on a sound family environment. [Citations.]” (*Id.*, at pp. 79-80.)

The bans on incestuous and polygamous marriages are ancient and deep-rooted, and, as the majority suggests, they are supported by strong considerations of social policy. Our society abhors such relationships, and the notion that our laws could not forever prohibit them seems preposterous. Yet here, the majority overturns, in abrupt fashion, an initiative statute confirming the equally deep-rooted assumption that marriage is a union of partners of the opposite sex. The majority does so by relying on its own assessment of contemporary community values, and by inserting in our Constitution an expanded definition of the right to marry that contravenes express statutory law.

That approach creates the opportunity for further judicial extension of this perceived constitutional right into dangerous territory. Who can say that, in ten, fifteen, or twenty years, an activist court might not rely on the majority’s analysis to conclude, on the basis of a perceived evolution in community values, that the laws prohibiting polygamous and incestuous marriages were no longer constitutionally justified?

In no way do I equate same-sex unions with incestuous and polygamous relationships as a matter of social policy or social acceptance. California’s adoption of the DPA makes clear that our citizens find merit in the desires of gay

and lesbian couples for legal recognition of their committed partnerships. Moreover, as I have said, I can foresee a time when the People might agree to assign the label marriage itself to such unions. It is unlikely, to say the least, that our society would ever confer such favor on incest and polygamy.

My point is that the majority's approach has removed the sensitive issues surrounding same-sex marriage from their proper forum — the arena of legislative resolution — and risks opening the door to similar treatment of other, less deserving, claims of a right to marry. By thus moving the policy debate from the legislative process to the court, the majority engages in faulty constitutional analysis and violates the separation of powers.

I would avoid these difficulties by confirming clearly that there is no constitutional right to same-sex marriage. That is because marriage is, as it always has been, the right of a woman and an unrelated man to marry each other.

From this conclusion, it follows, for substantive due process purposes, that the marriage statutes are valid unless unreasonable or arbitrary (see, e.g., *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 771), and are not subject to the strict scrutiny that applies when a statute infringes a fundamental right or interest. As I discuss below, California's preservation of the traditional definition of marriage is entirely reasonable. Accordingly, I would reject plaintiffs' due process claim.

Besides concluding that Family Code sections 300 and 308.5 are subject to strict scrutiny as an infringement on the fundamental state constitutional right to marry, the majority also independently holds that such scrutiny is required under the *equal protection* clause of the California Constitution. This is so, the majority declares, because by withholding from same-sex legal unions the label that is applied to opposite-sex legal unions, the scheme discriminates on the basis of sexual orientation, which the majority now deems to be a suspect classification.

I find this analysis flawed at several levels. For two reasons, I would reject plaintiffs' equal protection claim at the threshold. And even if that were not appropriate, I disagree that sexual orientation is a suspect classification. Hence, as with the majority's due process theory, I would not apply strict scrutiny, and would uphold the statutory scheme as reasonable. I explain my conclusions.

“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. [Citations.] When *social* or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, [citations], and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.” (*Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 440, italics added (*Cleburne*).

“The initial inquiry in any equal protection analysis is whether persons are ‘*similarly situated* for purposes of the law challenged.’ [Citation.]” (*In re Lemanuel C.* (2007) 41 Cal.4th 33, 47.) A statute does not violate equal protection when it recognizes real distinctions that are pertinent to the law's legitimate aims. (E.g., *People v. Smith* (2007) 40 Cal.4th 483, 527; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253; *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1125; *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 578; see *Cleburne, supra*, 473 U.S. 432, 441.) In such cases, judicial deference to legislative choices is consistent with “our respect for the separation of powers.” (*Cleburne, supra*, at p. 441.)

Though the majority insists otherwise (see maj. opn., *ante*, at p. 83, fn. 54), I agree with Justice Corrigan that same-sex couples and opposite-sex couples are not similarly situated with respect to the valid purposes of Family Code sections 300 and 308.5. As Justice Corrigan indicates, the state has a legitimate interest in enforcing the express legislative and popular will that the traditional definition of

marriage be preserved. Same-sex and opposite-sex couples cannot be similarly situated for that limited purpose, precisely because the traditional definition of marriage is a union of partners of the opposite sex.

Of course, statutory classifications do not serve legitimate state interests when adopted for their own sake, out of animus toward a disfavored group. (E.g., *Romer v. Evans* (1996) 517 U.S. 620, 633, 634-635 (*Romer*); *U. S. Dept. of Agriculture v. Moreno* (1973) 413 U.S. 528, 534; see *Lawrence, supra*, 539 U.S. 558, 582-583 (conc. opn. of O'Connor, J.); see also *Cleburne, supra*, 473 U.S. 432, 441.) Here, however, the majority itself expressly disclaims any suggestion “that the current marriage provisions were enacted with an invidious intent or purpose.” (Maj. opn., *ante*, at p. 119, fn. 73.) I therefore concur fully in Justice Corrigan’s conclusion that plaintiffs’ equal protection challenge fails for this reason alone.

I also disagree with the majority’s premise that, by assigning different labels to same-sex and opposite-sex legal unions, the state discriminates directly on the basis of sexual orientation. The marriage statutes are facially neutral on that subject. They allow all persons, whether homosexual or heterosexual, to enter into the relationship called marriage, and they do not, by their terms, prohibit any two persons from marrying each other *on the ground that* one or both of the partners is gay. (Cf. *Perez, supra*, 32 Cal.2d 711, 712-713 [statutes prohibited marriage between certain partners *on the basis of* their respective races].)

The marriage statutes may have a *disparate impact* on gay and lesbian individuals, insofar as these laws prevent such persons from marrying, by that name, the partners they would actually choose. But, as we explained in *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, a facially neutral statute that merely has a disparate effect on a particular class of persons does not violate equal protection absent a showing the law was adopted for a discriminatory purpose. In this regard,

discriminatory purpose “ ‘implies more than intent as volition or intent as awareness of consequences. See *United Jewish Organizations v. Carey* [(1977)] 430 U.S. 144, 179 (concurring opinion). It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.’ (*Personnel Administrator of Mass. v. Feeney* [(1979)] 442 U.S. [256,] 279.)” (*Baluyut, supra*, at p. 837.)

There is no evidence that when the Legislature adopted Family Code section 300, and the People adopted Family Code section 308.5, they did so “ ‘ “because of” ’ ” its consequent adverse effect on gays and lesbians as a group. On the contrary, it appears the legislation was simply intended to maintain an age-old understanding of the meaning of marriage. Indeed, California’s adoption of pioneering legislation that grants gay and lesbian couples all the substantive incidents of marriage further dispels the notion that an invidious intent lurks in our statutory scheme. As indicated above, the majority itself expressly disclaims any suggestion that the laws defining marriage were passed for the purpose of discrimination. For this reason as well, I believe our equal protection analysis need go no further.

Even if the distinction were subject to further examination under the equal protection clause, I disagree that strict scrutiny is the applicable standard of review. This is because I do not agree with the majority’s decision to hold, under current circumstances, that sexual orientation is a suspect classification.

The United States Supreme Court has never declared, for federal constitutional purposes, that a classification based on sexual orientation is entitled to any form of scrutiny beyond rational basis review. (See *Cleburne, supra*, 473 U.S. 432, 440-441 [recognizing race, alienage, and national origin as suspect classifications requiring strict scrutiny review, and gender and illegitimacy as

quasi-suspect classifications requiring “somewhat heightened” review].)¹¹

Moreover, as the majority concedes, its conclusion that sexual orientation is a suspect classification subject to strict scrutiny *contravenes* “the great majority of out-of-state decisions” — indeed, all but one of those cited by the majority. (Maj. opn., *ante*, at p. 95, & fn. 60.)¹²

¹¹ In *Lawrence, supra*, 539 U.S. 558, the majority held that Texas’s law prohibiting homosexual sodomy violated the due-process-derived fundamental right of all consenting adults to engage in intimate activity, including sexual conduct, in private. (*Id.* at pp. 564-579.) Concurring in the judgment, Justice O’Connor found, for equal protection purposes, that insofar as the law drew a distinction based simply on dislike and moral disapproval of homosexuals, it served no legitimate state interest. (*Id.*, at pp. 581-585 (conc. opn. of O’Connor, J.)) As noted above, both the majority and Justice O’Connor were careful to state that they were not calling into question laws denying formal legal recognition to gay and lesbian relationships. In *Romer, supra*, 517 U.S. 620, the majority found that a Colorado constitutional amendment which prohibited all state and local agencies from enacting or enforcing laws whereby homosexuality or bisexuality could be the basis for claims of minority or protected status, or of discrimination, was obviously motivated by antigay animus, an illegitimate state purpose, and thus could not survive rational basis review. The *Romer* majority specifically noted (*id.*, at p. 625), but did not adopt, the Colorado Supreme Court’s theory that the amendment was subject to strict scrutiny because it invaded fundamental political rights.

¹² Numerous other decisions have held that sexual orientation is not a suspect or quasi-suspect classification. (E.g., *Lofton v. Secretary of Dept. of Children & Family* (11th Cir. 2004) 358 F.3d 804, 818; *Equality Foundation v. City of Cincinnati* (6th Cir. 1997) 128 F.3d 289, 292-293; *Holmes v. California Army National Guard* (9th Cir. 1997) 124 F.3d 1126, 1132; *Richenberg v. Perry* (8th Cir. 1996) 97 F.3d 256, 260; *High Tech Gays v. Defense Ind. Sec. Clearance Off.* (9th Cir. 1990) 895 F.2d 563, 573-574 (*High Tech Gays*); *Woodward v. U.S.* (Fed.Cir. 1989) 871 F.2d 1068, 1076; *Rich v. Secretary of the Army* (10th Cir. 1984) 735 F.2d 1220, 1229; *Wilson, supra*, 354 F.Supp.2d 1298, 1307-1308 [DOMA and Florida marriage statutes]; *Selland v. Perry* (D.Md. 1995) 905 F.Supp. 260, 265-266, *aff’d* (4th Cir. 1996) 100 F.3d 950; see *Thomasson v. Perry* (4th Cir. 1996) 80 F.3d 915, 928; *Ben-Shalom v. Marsh* (7th Cir. 1989) 881 F.2d 454, 464.)

As the majority also notes, the issue is one of first impression in California. I find that circumstance highly significant. Considering the current status of gays and lesbians as citizens of 21st-century California, the majority fails to persuade me we should now hold that they qualify, under our state Constitution, for the extraordinary protection accorded to suspect classes.

The concept that certain identifiable groups are entitled to extra protection under the equal protection clause stems, most basically, from the premise that because these groups are unpopular minorities, or otherwise share a history of insularity, persecution, and discrimination, *and are politically powerless*, they are especially susceptible to continuing abuse by the majority. Laws that single out groups in this category for different treatment are presumed to “reflect prejudice and antipathy — a view that those in the burdened class are not as worthy or deserving as others. For these reasons, *and because such discrimination is unlikely to be soon rectified by legislative means*,” the deference normally accorded to legislative choices does not apply. (*Cleburne, supra*, 473 U.S. 432, 440, italics added; see also *San Antonio School District v. Rodriguez* (1973) 411 U.S. 1, 28 [noting relevance, for purposes of identification as suspect class, that group “is relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process”].)

Recognizing that the need for special constitutional protection arises from the political impotence of an insular and disfavored group, several courts holding that sexual orientation is not a suspect class have focused particularly on a determination that, in contemporary times at least, the gay and lesbian community does not lack political power. (*High Tech Gays, supra*, 895 F.2d 563, 574; *Conaway v. Deane, supra*, 932 A.2d 571, 609-614 [same-sex marriage]; *Andersen v. State, supra*, 138 P.3d 963, 974-975 [same].)

In California, the political emergence of the gay and lesbian community is particularly apparent. In this state, the progress achieved through democratic means — progress described in detail by the majority — demonstrates that, despite undeniable past injustice and discrimination, this group now “ ‘is obviously able to wield political power in defense of its interests.’ ” (Maj. opn., *ante*, at p. 98, quoting the Attorney General’s brief.).

Nor are these gains so fragile and fortuitous as to require extraordinary state constitutional protection. On the contrary, the majority itself declares that recent decades have seen “a fundamental and dramatic transformation in this state’s understanding and legal treatment of gay individuals and gay couples” (maj. opn., *ante*, at p. 67), whereby “California has repudiated past practices and policies that denigrated the general character and morals of gay individuals” and now recognizes homosexuality as “simply one of the numerous variables of our common and diverse humanity” (*ibid.*). Under these circumstances, I submit, gays and lesbians in this state currently lack the insularity, unpopularity, and consequent political vulnerability upon which the notion of suspect classifications is founded.

The majority insists that a determination whether a historically disfavored group is a suspect class should not depend on the group’s *current* political power. Otherwise, the majority posits, “it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classes.” (Maj. opn., *ante*, at p. 99. fn. omitted.)

I do not quarrel with those decisions. At the times suspect-class status was first assigned to race, and in California to sex and religion, there were ample grounds for doing so. They may well still exist in some or all of those cases. Moreover, I do not suggest that once a group is properly found in need of

extraordinary protection, it should later be “declassified” when circumstances change.

I only propose that, when, as here, the issue is before us as a matter of first impression, we cannot ignore current reality. In such a case, we should consider whether, despite a history of discrimination, a particular group remains so unpopular, disfavored, and susceptible to majoritarian abuse that suspect-class status is necessary to safeguard its rights. I would not draw that conclusion here.

Accordingly, I would apply the normal rational basis test to determine whether, by granting same-sex couples all the substantive rights and benefits of marriage, but reserving the marriage label for opposite-sex unions, California’s laws violate the equal protection guarantee of the state Constitution. By that standard, I find ample grounds for the balance currently struck on this issue by both the Legislature and the People.

First, it is certainly reasonable for the Legislature, having granted same-sex couples all substantive marital rights within its power, to assign those rights a name other than marriage. After all, an initiative statute adopted by a 61.4 percent popular vote, and constitutionally immune from repeal by the Legislature, *defines marriage as a union of partners of the opposite sex*.

Moreover, in light of the provisions of federal law that, for purposes of federal benefits, limit the definition of marriage to opposite-sex couples (1 U.S.C. § 7), California must distinguish same-sex from opposite-sex couples in administering the numerous federal-state programs that are governed by federal law. A separate nomenclature applicable to the family relationship of same-sex couples undoubtedly facilitates the administration of such programs.

Most fundamentally, the People themselves cannot be considered irrational in deciding, for the time being, that the fundamental definition of marriage, as it has universally existed until very recently, should be preserved. As the New

Jersey Supreme Court observed, “We cannot escape the reality that the shared societal meaning of marriage — passed down through the common law into our statutory law — has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin.” (*Lewis v. Harris, supra*, 908 A.2d 196, 922.)

If such a profound change in this ancient social institution is to occur, the People and their representatives, who represent the public conscience, should have the right, and the responsibility, to control the pace of that change through the democratic process. Family Code sections 300 and 308.5 serve this salutary purpose. The majority’s decision erroneously usurps it.

For all these reasons, I would affirm the judgment of the Court of Appeal.

BAXTER, J.

I CONCUR:

CHIN, J.