CONCURRING AND DISSENTING OPINION BY CORRIGAN, J.

In my view, Californians should allow our gay and lesbian neighbors to call their unions marriages. But I, and this court, must acknowledge that a majority of Californians hold a different view, and have explicitly said so by their vote. This court can overrule a vote of the people only if the Constitution compels us to do so. Here, the Constitution does not. Therefore, I must dissent.

It is important to be clear. Under California law, domestic partners have "virtually all of the same substantive legal benefits and privileges" available to traditional spouses. (Maj. opn., *ante*, at p. 45.) I believe the Constitution requires this as a matter of equal protection. However, the single question in this case is whether domestic partners have a constitutional right to the name of "marriage."[1]

Proposition 22 was enacted only eight years ago. By a substantial majority the people voted to recognize, as "marriage," only those unions between a man and a woman. (Fam. Code, § 308.5.) The majority concludes that the voters' decision to retain the traditional definition of marriage is unconstitutional. I disagree.

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[1] Like Justice Baxter, I agree with the majority on the following subsidiary issues: (1) Family Code section 308.5 applies to both in-state and out-of-state marriages; (2) the marriage statutes do not discriminate on the basis of gender; and (3) the Court of Appeal properly dismissed as moot 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). I confine my discussion to the central disputed issue before the court.

The majority correctly notes that it is not for this court to set social policy based on our individual views. Rather, this is a question of constitutional law. (Maj. opn., *ante*, at pp. 4-5, 109.) I also agree with the majority that we must consider both the statutes defining marriage and the domestic partnership statutes. (*Id*. at pp. 3, 46-47.) The California Domestic Partner Rights and Responsibilities Act of 2003 (DPA), and other recent legislative changes, represent a dramatic and fundamental transformation of the rights of gay and lesbian Californians. It is a remarkable achievement of the legislative process that the law now expressly recognizes that domestic partners have the same substantive rights and obligations as spouses.

The majority, however, fails to give full and fair consideration to the DPA. Indeed, the majority says its conclusion that "California's current recognition that gay individuals are entitled to equal and nondiscriminatory legal treatment" is not grounded on the DPA. (Maj. opn., *ante*, at p. 68.) Surely greater consideration is due to legislation broadly proclaiming that "[r]egistered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." (Fam. Code, § 297.5, subd. (a).) As the majority acknowledges, the Legislature intended that the DPA be liberally applied, to secure for domestic partners the full range of legal rights and responsibilities enjoyed by spouses. (Maj. opn., *ante*, at pp. 38-39.)

This court has previously held that the "chief goal of the DPA is to equalize the status of registered domestic partners and married couples." (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 839.) In this case, however, the majority fails to honor that goal. Instead of recognizing the equality conferred by the Legislature, the majority denigrates domestic partnership as "only a novel alternative designation . . . constituting significantly unequal treatment,"

and “a mark of second-class citizenship.” (Maj. opn., *ante*, at pp. 103, 104.) Without foundation, the majority claims that to hold the domestic partnership laws constitutional would be a statement “that it is permissible, under the law, for society to treat gay individuals and same-sex couples differently from, and less favorably than, heterosexual individuals and opposite-sex couples.” (Maj. opn., *ante*, at p. 118.) This is simply not so. The majority’s narrow and inaccurate assertions are just the opposite of what the Legislature intended. To make its case for a constitutional violation, the majority distorts and diminishes the historic achievements of the DPA, and the efforts of those who worked so diligently to pass it into law.

Domestic partnerships and marriages have the same legal standing, granting to both heterosexual and homosexual couples a societal recognition of their lifelong commitment. This parity does not violate the Constitution, it is in keeping with it. Requiring the same substantive legal rights is, in my view, a matter of equal protection. But this does not mean the traditional definition of marriage is unconstitutional.

The majority refers to the race cases, from which our equal protection jurisprudence has evolved. The analogy does not hold. The civil rights cases banning racial discrimination were based on duly enacted amendments to the United States Constitution, proposed by Congress and ratified by the people through the states. To our nation’s great shame, many individuals and governmental entities obdurately refused to follow these constitutional imperatives for nearly a century. By overturning Jim Crow and other segregation laws, the courts properly and courageously held the people accountable to their own constitutional mandates. Here the situation is quite different. In less than a decade, through the democratic process, same-sex couples have been given the equal legal rights to which they are entitled.

In *Perez v. Sharp* (1948) 32 Cal.2d 711, we struck down a law prohibiting interracial marriages. The majority places great reliance on the *Perez* court’s

statement that "the right to marry is the right to join in marriage with the person of one's choice." (*Id*. at p. 715.) However, *Perez* and the many other cases establishing the fundamental right to marry were all based on the common understanding of marriage as the union of a man and a woman. (See maj. opn., *ante*, at pp. 54-63.) The majority recognizes this, as it must. (*Id*. at p. 66.) Because those cases involved the traditional definition of marriage, they do not support the majority's analysis. The question here is whether the meaning of the term as it was used in those cases must be changed.

What is unique about this case is that plaintiffs seek both to join the institution of marriage and at the same time to alter its definition. The majority maintains that plaintiffs are not attempting to change the existing institution of marriage. (Maj. opn., *ante*, at p. 53.) This claim is irreconcilable with the majority's declaration 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." (*Id*. at p. 23, fn. omitted.) The people are entitled to preserve this traditional understanding in the terminology of the law, recognizing that same-sex and opposite-sex unions are different. What they are not entitled to do is *treat* them differently under the law.

The distinction between substance and nomenclature makes this case different from other civil rights cases. The definition of the rights to education, to vote, to pursue an office or occupation, and the other celebrated civil rights vindicated by the courts, were not altered by extending them to all races and both genders. The institution of marriage was not fundamentally changed by removing the racial restrictions that formerly encumbered it. Plaintiffs, however, seek to change the definition of the marital relationship, as it has consistently been understood, into something quite new. They could certainly accomplish such a redefinition through the initiative process. As a voter, I might agree. But that change is for the people to adopt, not for judges to dictate.

My view on this question of terminology rests on both an equal protection analysis and a recognition of the appropriate scope of judicial authority. As a matter of equal protection, while plaintiffs are in the same position as married couples when it comes to the substantive legal rights and responsibilities of family members, they are not in the same position with regard to the title of "marriage." " ' "The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." ' [Citation.] 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' [Citation.]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253; see also *Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 439.)

The legitimate purpose of the statutes defining marriage is to preserve the traditional understanding of the institution.[2] For that purpose, plaintiffs are not similarly situated with spouses. While their unions are of equal legal dignity, they are different because they join partners of the same gender. Plaintiffs are in the process of founding a new tradition, unfettered by the boundaries of the old one.

The majority relegates the threshold question of "similar situation" to a footnote, observing that "[b]oth groups at issue consist of pairs of individuals who wish to enter into a formal, legally binding and officially recognized, long-term

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[2] The majority recognizes that these statutes were not enacted with an invidious purpose. (Maj. opn., *ante*, at p. 118, fn. 73.) Thus, this is not a case like *Mulkey v. Reitman* (1966) 64 Cal.2d 529, where this court declared an initiative measure unconstitutional because it was enacted "with the clear intent to overturn state laws" prohibiting racial discrimination. (*Id*. at p. 534.)

family relationship that affords the same rights and privileges and imposes the same obligations and responsibilities." (Maj. opn., *ante*, at p. 83, fn. 54.) The majority ignores the fact that plaintiffs already have those rights and privileges under the DPA. The majority aptly articulates how domestic partnerships and marriages are the same. But it fails to recognize that this case involves only the *names* of those unions. The fact that plaintiffs enjoy equal substantive rights does not situate them similarly with married couples in terms of the traditional designation of marriage. Society may, if it chooses, recognize that some legally authorized familial relationships unite partners of the same gender while others join partners of opposite sexes. There is nothing pernicious or constitutionally defective in this approach.[3]

The voters who passed Proposition 22 not long ago decided to keep the meaning of marriage as it has always been understood in California. The majority improperly infringes on the prerogative of the voters by overriding their decision. It does that which it acknowledges it should not do: it redefines marriage because it believes marriage should be redefined. (See maj. opn., *ante*, at pp. 4-5, 109.) It justifies its decision by finding a constitutional infirmity where none exists. Plaintiffs are free to take their case to the people, to let them vote on whether they are now ready to accept such a redefinition. Californians have legalized domestic partnership, but decided not to call it "marriage." Four votes on this court should

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3 The majority correctly observes that if plaintiffs are not similarly situated to married couples for the purpose of the laws they challenge, those laws are insulated from equal protection review. (Maj. opn., *ante*, at p. 83, fn. 54.) That is the purpose of the well-settled requirement that plaintiffs making an equal protection claim first show that they are similarly situated. (*Cooley v. Superior Court*, *supra*, 29 Cal.4th at p. 253.) It is particularly appropriate for us to refrain from employing equal protection doctrine to thwart the will of the voters in this case. Whether the institution of marriage should be expanded to include same-sex couples is a question properly reserved for the political process.

not disturb the balance reached by the democratic process, a balance that is still being tested in the political arena.[4]

Certainly initiative measures are not immune from constitutional review. However, we should hesitate to use our authority to take one side in an ongoing political debate. The accommodation of disparate views is democracy's essential challenge. Democracy is never more tested than when its citizens honestly disagree, based on deeply held beliefs. In such circumstances, the legislative process should be given leeway to work out the differences. It is inappropriate for the judiciary to interrupt that process and impose the views of its individual members, while the opinions of the people are still evolving.

Restraint is the hallmark of constitutional review. "[I]f the judiciary is to fulfill its role in our tripartite system of government as the final arbiter of constitutional issues, it cannot hope to escape the tension between legislative policy determinations and the challenges raised by those who would seek exceptions thereto. We can, however, while entertaining such challenges, seek to hold the tension in check by always *presuming the constitutional validity* of legislative acts and resolving doubts in favor of the statute." (*Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 939, italics added.)

The majority abandons this judicious approach. Instead of presuming the validity of the statutes defining marriage and establishing domestic partnership, in effect the majority *presumes them to be constitutionally invalid* by characterizing domestic partnership as a "mark of second-class citizenship." (Maj. opn., *ante*, at p. 118.) This judicial presumption contravenes the express intent of the Legislature to equalize the rights of spouses and domestic partners.

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4 The majority details the latest legislative and gubernatorial moves, which occurred in 2005 and 2007. (Maj. opn., *ante*, at pp. 29-30, fn. 17.)

The principle of judicial restraint is a covenant between judges and the people from whom their power derives. It protects the people against judicial overreaching. It is no answer to say that judges can break the covenant so long as they are enlightened or well-meaning.

The process of reform and familiarization should go forward in the legislative sphere and in society at large. We are in the midst of a major social change. Societies seldom make such changes smoothly. For some the process is frustratingly slow. For others it is jarringly fast. In a democracy, the people should be given a fair chance to set the pace of change without judicial interference. That is the way democracies work. Ideas are proposed, debated, tested. Often new ideas are initially resisted, only to be ultimately embraced. But when ideas are imposed, opposition hardens and progress may be hampered.

We should allow the significant achievements embodied in the domestic partnership statutes to continue to take root. If there is to be a new understanding of the meaning of marriage in California, it should develop among the people of our state and find its expression at the ballot box.

CORRIGAN, J.