SUPREME COURT OF THE STATE OF CALIFORNIA

In re MARRIAGE CASES **Judicial Council Coordination Proceeding No. 4365**	**Case No. S**_____
CITY AND COUNTY OF SAN FRANCISCO, Plaintiff/Respondent, vs. STATE OF CALIFORNIA, Defendant/Appellant,	First Appellate District No. A110449 Superior Court Case No. 429539 (Consolidated for trial with *Woo v. Lockyer*, Superior Court Case No. 504038)

PETITION FOR REVIEW

The Honorable Richard A. Kramer
Superior Court for the City and County of San Francisco

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STATEMENT OF ISSUES PRESENTED

1. Does the exclusion of gay men and lesbians from marriage discriminate on the basis of sexual orientation in violation of the Equal Protection Clause of the California Constitution?

2. Does the exclusion of gay men and lesbians from marriage discriminate on the basis of gender in violation of the Equal Protection Clause of the California Constitution?

3. Does the exclusion of gay men and lesbians from marriage violate the fundamental right to marry the person of one's choice guaranteed by the California Constitution?

4. Does the exclusion of gay men and lesbians from marriage violate the fundamental right to privacy guaranteed by the California Constitution?

WHY REVIEW SHOULD BE GRANTED

In a published decision, the First District Court of Appeal, over a strong dissent,[1] held that the State of California may exclude gay men and lesbians from marriage. Repeatedly emphasizing the controversial nature of the issue and noting that many citizens have a strong desire to preserve the traditional understanding of marriage, the majority concluded: "The Legislature and the voters of this state have determined that 'marriage' in California is an institution reserved for opposite-sex couples, and it makes

[1] Although Justice Kline concurred and dissented, for convenience, this petition refers to his opinion as the dissent.

no difference whether we agree with their reasoning." (*In re Marriage Cases* (2006) 143 Cal.App.4th 873 (*Marriage Cases*) [p. 62].)[2]

This Court should review this decision "to settle an important question of law." (Cal. Rules of Court, rule 28(b)(1).) Same-sex couples in this state "have waited years, sometimes several decades, for a chance to wed, yearning to obtain the public validation that only marriage can give." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1132 (*Lockyer*) (conc. opn. of Kennard, J.).) While the Court correctly deferred some of the constitutional issues presented in *Lockyer*, those issues have now been decided by two lower courts. Almost three years have passed since thousands of couples descended upon San Francisco, many waiting overnight in the rain for their first chance to participate in an official ceremony that places their relationships on the same legal footing as those of heterosexual couples. And just recently, the Governor vetoed legislation legalizing same-sex marriages in part because this Court will likely settle the matter. (Governor's Veto Message to Assembly on Assem. Bill No. 849 (Sept. 29, 2005) p. 1 (Governor's Veto Message), at <http://www.governor.ca.gov/govsite/pdf/vetoes_2005/AB_849_veto.pdf> [as of Nov. 13, 2006], attached as Exhibit D.) Those couples–along with the rest of California's gay men and lesbians and their families and children–therefore deserve a ruling from this Court on whether they are entitled to the full dignity and respect that the state-sanctioned institution of marriage confers.

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[2] The point page references for the Official Report citations are currently unavailable. All point page references in the brackets therefore refer to the court's filed opinion which is attached as exhibit A.

BACKGROUND

A. San Francisco's Decision To Issue Marriage Licenses To Same-Sex Couples

On February 12, 2004, the City and County of San Francisco (City or San Francisco) began issuing marriage licenses to same-sex couples. In the ensuing days, thousands of gay men and lesbians rushed to City Hall to obtain licenses and exchange marriage vows, eager to seize the first opportunity in their lives to participate in officially-recognized wedding ceremonies in their home state. (San Francisco's Request for Judicial Notice (RFJN), Exh. A [Declaration of Nancy Alfaro filed in *Lockyer v. City and County of San Francisco*, No. S122923 (Alfaro Decl.) ¶¶ 5-8].) These couples came from all over California and waited in line overnight and outside in the rain. (*Ibid.* [Alfaro Decl. ¶ 5.].)

In under three weeks, the City issued over 3,500 marriage licenses to same-sex couples. (RFJN, Exh. A [Alfaro Decl. ¶ 8].) Thousands more sought equal recognition of their relationships during this time but the City could not accommodate them all. Indeed, the Clerk's office was so overwhelmed by the volume of marriage license requests that it instituted an "appointment only" policy, requiring couples to sign up to obtain a license rather than wait in line. (*Ibid.* [Alfaro Decl. ¶ 6].) After announcing this policy, the Clerk's office received so many calls that the voicemail system for the entire City crashed. (*Ibid.* [Alfaro Decl. ¶ 7].) Within five days, every available appointment had been filled for the next two months. (*Ibid.*)

On February 13, 2004, two groups filed lawsuits to stop San Francisco from marrying same-sex couples. (*Thomasson v. Newsom*, No. CGC-04-428794 (*Thomasson*); *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*, No. CPF-04-50943

(*Proposition 22*).) The trial court denied their requests for a stay but issued an order requiring the City to show cause to be heard a few weeks later. (*Lockyer, supra*, 33 Cal.4th at p. 1071.)

On February 27, 2004, the California Attorney General filed a petition for writ of mandate in this Court, challenging the City's authority to issue the licenses. (*Lockyer*, *supra*, 33 Cal.4th at p. 1072.) This Court granted the petition, holding that San Francisco officials "had no authority to refuse to perform their ministerial duty [to dispense marriage licenses] in conformity with the current California marriage statutes on the basis of their view that the statutory limitation of marriage to a couple comprised of a man and a woman is unconstitutional." (*Id.* at pp. 1104-1105.) This Court enjoined the City from issuing new licenses to same-sex couples and nullified the marriages that had already taken place. (*Id.* at p. 1118.)

The Attorney General also asked the Court to hold that the Family Code provisions limiting marriage to opposite-sex couples are constitutional. (*Lockyer*, *supra*, 33 Cal.4th at p. 1073.) The Court, however, declined to decide that question. (*Id.* at p. 1069.) Instead, it limited review to whether City officials exceeded their authority and stayed the lower court cases addressing that issue. The Court made clear that its stay would not " 'preclude the filing of a separate action in superior court raising a substantive constitutional challenge to the current marriage statutes.' " (*Id.* at pp. 1073-74.)

B. The Constitutional Challenge To The Marriage Laws

While the Attorney General's writ petition was pending in this Court, the City filed a lawsuit in San Francisco Superior Court challenging the

validity of Family Code sections 300[3] and 308.5[4]–which limit marriage to unions between a man and a woman. (Respondent's Appendix [A110449] (RA) 1-7 [*City and County of San Francisco v. State of California*, No. CGC-04-429539] (*CCSF*).) The City contended these provisions (i) discriminate on the basis of sexual orientation in violation of California's Equal Protection Clause; (ii) discriminate on the basis of gender in violation of California's Equal Protection Clause; (iii) violate the liberty interests of same sex couples protected by California's Due Process Clause; and (iv) violate the constitutionally-protected privacy interests of same-sex couples. (RA 3-4.)

Subsequently, three groups of same-sex couples filed similar challenges to the marriage exclusion in San Francisco and Los Angeles. (*Woo v. State of California*, No. CGC-04-504038 (*Woo*); *Tyler v. County of Los Angeles*, No. BS-088506 (*Tyler*); *Clinton v. State of California*, No. CGC-04-429548 (*Clinton*).) These three actions, as well as the *Thomasson* and *Proposition 22* actions, were coordinated with the City's lawsuit and assigned to San Francisco Superior Court Judge Richard Kramer. (See Final Decision on Applications for Writ of Mandate, Motions for Summary

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[3] Family Code section 300 provides: "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." This provision was gender-neutral until 1977, when the Legislature inserted the phrase "between a man and a woman" to ensure that no same-sex couple could make even a colorable claim to marriage. (RA 98.)

[4] Family Code section 308.5 provides: "Only marriage between a man and a woman is valid or recognized in California." This provision was adopted by initiative in March 2000 to prevent California from recognizing same-sex marriages performed out of state. (RA 89-92.)

Judgment, and Motions for Judgment on the Pleadings (Trial Court Ruling) at p. 2, attached as Exhibit C.)

C. The Trial Court's Ruling

The trial court ruled in favor of the City and the plaintiffs in *CCSF*, *Woo, Tyler*, and *Clinton*. It first held that California's marriage exclusion is subject to strict scrutiny because the exclusion discriminates based on gender and denies lesbians and gay men the fundamental right to marry the person of one's choice. The court then held that the exclusion does not survive strict scrutiny. Finally, it held that the exclusion bears no rational relation to a legitimate governmental purpose. Having held the marriage exclusion unconstitutional on these grounds, the court did not reach the City's sexual orientation discrimination and privacy claims. (See generally Trial Court Ruling.)

1. Strict scrutiny

The trial court first held that the marriage exclusion is subject to strict scrutiny because it discriminates on the basis of gender: "The marriage laws establish classifications (same gender vs. opposite gender) and discriminate based on those gender-based classifications." (Trial Court Ruling at p. 17.) Citing *Perez v. Sharp* (1948) 32 Cal.2d 711 (*Perez*)—which "rejected the argument that anti-miscegenation laws were not invidiously discriminatory because they applied equally to white people and black people in that neither could marry a member of the opposite race"—the court rejected the argument that the exclusion does not discriminate because it denies both women and men the right to marry someone of the same sex. (Trial Court Ruling at p. 17.)

Strict scrutiny is also required, the trial court held, because the marriage exclusion infringes on the fundamental right to marry the person

of one's choice. The court declined the State's invitation to wordsmith the right to marry into the "right to marry a person of the opposite sex." (Trial Court Ruling at p. 19). Instead, the court, as this Court did in *Perez*, recognized that there is a fundamental right to marry the person of one's choice, and found that no important social objective justified denying that right to same-sex couples. (Trial Court Ruling at pp. 20-23.)

2. Rational basis

The trial court also concluded that the marriage exclusion fails to satisfy rational basis scrutiny. First, it rejected the State's argument that preserving the traditional definition of marriage is itself a legitimate government purpose: "[A] statute lacking a reasonable connection to a legitimate state interest cannot acquire such a connection simply by surviving unchallenged over time." (Trial Court Ruling at p. 7.)

Second, the court rejected the State's argument that excluding same-sex couples from marriage is justified because California, through domestic partnership statutes (Fam. Code, §§ 297-299.6), granted those couples most of the tangible rights marriage entails. The court noted that the argument smacked of "separate but equal," a concept rejected in *Brown v. Bd. of Education of Topeka* (1952) 347 U.S. 483 because it " 'generates a feeling of inferiority as to [the excluded group's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone.' " (Trial Court Ruling at p. 9, quoting *Brown*, at p. 494.) The court recognized that the separate-but-equal argument is indefensible here, given the Legislature's explicit determination that there is no reason to deny same-sex couples the benefits opposite-sex couples enjoy. (Trial Court Ruling at p. 9.)

Finally, the trial court rejected as arbitrary a justification that the State did not advance but the *Thomasson* and *Proposition 22* plaintiffs did,

namely, that "the purpose of marriage is procreation and that limiting the institution to members of the opposite sex rationally would further that purpose." (Trial Court Ruling at p. 12.) According to the court, the marriage exclusion does not serve this alleged procreation purpose because other groups that have no ability to procreate—such as "persons beyond child-bearing age, infertile persons, and those who choose not to have children"—may still marry. (*Id.* at p. 22.)

D. The Court Of Appeal's Ruling[5]

The Court of Appeal unanimously affirmed the judgment in the *Thomasson* and *Proposition 22* cases but reversed in a 2-1 decision in the other four coordinated cases. (See generally *Marriage Cases*, *supra*, 143 Cal.App.4th 873.) The justices unanimously held that the plaintiffs in *Thomasson* and *Proposition 22* lacked standing–a holding the City does not ask this Court to review. (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 [pp. 7-12].) The majority then held that the judiciary lacks authority to rule that the marriage exclusion violates the California Constitution in the other four cases.

1. The fundamental right to marry

The Court of Appeal first concluded that even though this Court in *Perez* recognized a fundamental right to marry the person of one's choice, same-sex couples should not enjoy that right:

> Everyone has a fundamental right to "marriage," but, because of how this institution has been defined, this means only that everyone has a fundamental right to

[5] President Justice McGuiness authored the majority opinion in which Justice Parilli joined. Justice Parilli also authored a separate concurring opinion. Justice Kline authored an opinion concurring in the majority's ruling on standing in the *Thomasson* and *Proposition 22* cases but otherwise dissenting.

> enter a public union with an opposite-sex partner. That such a right is irrelevant to a lesbian or gay person does not mean the definition of the fundamental right can be expanded by the judicial branch beyond its traditional moorings. (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 [p. 28].)

The majority acknowledged that "[o]n the surface, the interracial marriage cases appear to provide compelling support for finding gays and lesbians have a fundamental right to marry their same-sex partners." (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 [p. 31].) But it ultimately distinguished those cases invalidating laws banning interracial marriage—like *Perez* and *Loving v. Virginia* (1967) 388 U.S. 1 (*Loving*)—on the ground that they involved race "and race has long been recognized as a suspect classification." (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 [p. 31].) The majority did not, however, explain how its holding squared with decisions holding that laws preventing persons who are not members of any suspect class from marrying unconstitutionally infringe on the fundamental right to marry. (See, e.g., *Turner v. Safley* (1987) 482 U.S. 78 [prisoners]; *Zablocki v. Redhail* (1978) 434 U.S. 374 [deadbeat dads].)

Instead, the majority observed that a contrary ruling would be new and "controversial." (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 [p. 29].) It thus concluded that:

> While same-sex relationships have undeniably gained greater societal and legal acceptance, the simple fact is that same-sex marriage has never existed before. The novelty of this interest, more than anything else, is what precludes its recognition as a constitutionally protected fundamental right. (*Ibid.* [p. 30].)

The dissent disagreed: "No court has ever suggested, and it would be absurd to think, that a class of persons who have never enjoyed a fundamental right available to others can, *for that reason*, continue to be denied it." (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 (conc. & dis.

opn. of Kline, J.) [p. 15].) The dissent criticized the majority's insistence on defining the right at stake as the right to same-sex marriage, noting that it is inappropriate to define the right with reference to the person who seeks to exercise it. (*Ibid.* [p. 18], citing *Lawrence v. Texas* (2003) 539 U.S. 538, 567 ["To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward."].) According to the dissent, "[t]he crucial similarities between the ban on interracial marriage and that on same-sex marriage are that both involve state interference with the right to marry, a supposed state interest that rests heavily on the symbolic significance of marriage, and a restriction designed to preserve a traditional prejudice against a disfavored group." (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 (conc. & dis. opn. of Kline, J.) [p. 16].)

2. Gender discrimination

The majority next concluded that the marriage exclusion does not discriminate based on gender: "The laws treat men and women exactly the same in that neither group is permitted to marry a person of the same gender." (*Marriage Cases*, *supra*, 143 Cal.App.4th 874 [p. 34].) Again, the majority acknowledged that this Court had rejected similar reasoning when it stated in *Perez* that " '[t]he right to marry is the right of individuals, not of racial groups,' " and therefore the question is " 'not whether different races, each considered as a group, are equally treated.' " (*Marriage Cases*, *supra*, 143 Cal.App.4th 874 [p. 36], quoting *Perez*, *supra*, 32 Cal.2d at p. 716.) But again, the majority distinguished *Perez* on the ground that it involved classifications based on race rather than gender. (*Marriage Cases*, *supra*, 143 Cal.App.4th 874 [p. 36].) In making this distinction, however, the majority did not explain why gender classifications—which, like racial

classifications, are subject to strict scrutiny under the California Constitution (see *ibid.* [p. 33])—should be treated differently in this case.

3. Sexual orientation discrimination

The majority concluded that the marriage exclusion *does* discriminate on the basis of sexual orientation. (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 [p. 40].) It nonetheless declined to decide whether sexual orientation is a suspect classification. The majority first recited the test for determining whether a classification is " 'suspect' ": (1) is the classification based on an immutable trait? (2) does the classification bear no relation to a person's ability to perform or contribute to society? (3) does society stigmatize groups based on the classification? (*Ibid.* [p. 44], quoting *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 18-19.) It then stated that "[w]hile the latter two requirements would seem to be readily satisfied in the case of gays and lesbians, the first is more controversial." (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 [p. 47]) "Lacking guidance from our Supreme Court or decisions from our sister Courts of Appeal, and lacking even a finding from the trial court on the issue,"[6] the majority "decline[d] to forge new ground in this case by declaring sexual orientation to be a

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[6] The majority initially stated that there was no evidence in the record on the factors that determine whether sexual orientation is a suspect class. On rehearing, the majority modified the opinion to state that there was no "clear factual record" on those issues. In fact, as the dissent pointed out, the City proffered evidence on all three factors. (Order Modifying Opinion and Denying Rehearing [No Change in Judgment] in *In re Marriage Cases* (2006) 143 Cal.App.4th 873 (Mod. Order) at p. 2, attached as Exhibit B.) The trial court never held an evidentiary hearing because it decided the case on issues of law and did not reach the sexual orientation discrimination claim.

suspect classification for purposes of equal protection analysis." (*Ibid.* [p. 45].)[7]

The dissent countered that sexual orientation is a suspect classification as a matter of law. With respect to the immutability factor—the only factor that the majority considered in doubt—the dissent cited the Ninth Circuit's holding that " '[s]exual orientation and sexual identity are immutable' " and " 'so fundamental to one's identity that a person should not be required to abandon them.' " (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 (conc. and dis. opn. of Kline, J.) [p. 36], quoting *Hernandez-Montiel v. I.N.S.* (9th Cir. 2000) 225 F.3d 1084, 1093-1094, overruled on other grounds in *Thomas v. Gonzales* (9th Cir. 2005) 409 F.3d 1177, 1187, revd. on other grounds in *Gonzales v. Thomas* (2006) __ U.S. __ [126 S.Ct. 1613, 1615].) The dissent continued:

> The proposition that homosexuality is not a freely elected characteristic also comports with common sense. "Given the personal and social disadvantages to which homosexuality subjects a person in our society, the idea that millions of young men and women have chosen it or will choose it in the same fashion in which they might choose a career or a place to live or a political party or even a religious faith seems preposterous." (Posner, Sex and Reason (1992) pp. 296-297.) (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 (conc. and dis. opn. of Kline, J.) [p. 37].)

The dissent concluded (as the majority tacitly did) that the remaining two factors are satisfied as well.[8] It noted that "state law clearly recognizes

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[7] The concurring opinion added: "[I]f being gay or lesbian is an immutable trait or biologically determined, then we must conclude classification based on that status which deprives such persons of legitimate rights *is* suspect." (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 (conc. opn. of Parilli, J.) [p. 6].)

[8] The dissent also acknowledged that the City created a substantial *factual* record on all three factors. (Mod. Order at p. 2.)

that sexual orientation is unrelated to an individual's ability to contribute to society." (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 (conc. and dis. opn. of Kline, J.) [p. 37] [citing statutes and case law prohibiting discrimination against gay men and lesbians in the workplace and case law holding that same-sex parents have the same rights and responsibilities as opposite-sex parents].) And it described the long history of discrimination against gay men and lesbians in our society, from the denial of custody of their children, to harassment and discrimination on the job, to treatment as "deviants" by the medical community, to the violence and brutality gay men and lesbians suffer at the hands of people unwilling to accept their differences. (*Ibid.* [pp. 39-40].) "The discrimination homosexuals suffer," the dissent stated, "is at least comparable to that visited on women, illegitimate children, and often aliens, all of whom are members of classes entitled to heightened protection." (*Ibid.* [pp. 40-41].) It concluded: "To say that the factors which determine whether a classification is suspect do not all apply to homosexuals requires us to deny as judges what we know as people."[9] (*Ibid.* [p. 41].)

4. The right of privacy

The majority next concluded that the marriage exclusion does not violate the constitutionally-protected interest of gay men and lesbians in

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[9] If this Court grants review, agrees with the Court of Appeal that the suspect classification question cannot be reached without additional factual findings, and decides the remaining constitutional issues in favor of the State, then a remand for a trial on the suspect classification factors will be warranted. However, the possibility of a trial on these factors is *not* a reason for this Court to deny review now, because the Court of Appeal's rulings on the remaining issues may become the law of the case, potentially precluding Supreme Court review of those rulings at a later date. (*See, e.g., Morohoshi v. Pacific Home* (2004) 32 Cal.4th 482, 491-492.)

"autonomy privacy," i.e., "in making intimate personal decisions or conducting personal activities without observation, intrusion or interference." (*Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35.) The majority recognized that "matters related to marriage, family and sex" are central to this right and that the right to marry one's chosen partner is "virtually synonymous" with the right to privacy. (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 [pp. 46-47], internal quotations omitted.) Nonetheless, the majority concluded that because gay men and lesbians "have never enjoyed such a right before," the marriage exclusion does not "intrude upon" their privacy. (*Ibid.* [p. 48], italics omitted.)

The dissent disagreed:

> The marital relationship is within the zone of autonomy protected by the right of privacy not just because of the profound nature of the attachment and commitment that marriage represents, the material benefits it provides, and the social ordering it furthers, but also because the decision to marry represents one of the most self-defining decisions an individual can make. (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 (conc. & dis. opn. of Kline, J.) [p. 8].)

If laws prohibiting marriage by interracial couples, irresponsible parents, and prison inmates run afoul of this constitutional protection, "so too must the absolute ban at issue in this case, because there is nothing about same-sex couples that makes them less able to partake of the attributes of marriage that are constitutionally significant." (*Ibid.* [p. 14].)

5. Rational basis review

Having held that the marriage exclusion is not subject to strict scrutiny, the majority applied the rational basis test. Concluding that the exclusion is rationally related to a legitimate government interest, the majority held that the exclusion meets the test.

First, the majority held that the State has a legitimate interest in "preserving the traditional definition of marriage." (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 [p. 52].) "Marriage," the majority stated, "is a social institution of profound significance to the citizens of this state, many of whom have expressed strong resistance to the idea of changing its historically opposite-sex nature." (*Ibid.* [p. 59]; see also *ibid.* [p. 2].) Responding to the argument that domestic partnership laws can never put gay men and lesbians on equal legal footing with those who enjoy the right to marry, the majority stated: "If the Domestic Partner Act does not go far enough" in remedying the unequal treatment, "the Legislature can amend the law, but it is not for the court to implement this change." [10] (*Ibid.* [p. 55].)

Second, the majority held that the marriage exclusion serves the state's interest in "carrying out the will of its citizens." (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 [p. 60].) It stated: "The Legislature and the voters of this state have determined that 'marriage' in California is an institution reserved for opposite-sex couples, and it makes no difference whether we agree with their reasoning." (*Ibid.* [p. 62].) "Respect for the considered judgment of the Legislature and the voters," the majority continued, "is especially warranted where the issue is so controversial and divisive as is the question whether gays and lesbians should be permitted to marry their same-sex partners." (*Ibid.*)

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[10] Ironically, the Governor vetoed legislation approving same-sex marriages in part because the issue was being determined by the courts. (Governor's Veto Message, *supra*, at p. 1.)

The majority, however, rejected the "procreation rationale" offered by the plaintiffs in *Thomasson* and *Proposition 22*.[11] According to the majority, not only did the Attorney General expressly disavow that rationale, "[m]any same-sex couples in California are raising children, and our state's public policy supports providing equal rights and protections to such families." (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 [p. 60, fn. 33].)

By contrast, the dissent concluded that the marriage exclusion fails rational basis review. Like the Colorado constitutional amendment banning laws protecting gay men and lesbians from discrimination struck down in *Romer v. Evans* (1996) 517 U.S. 620, 633, the marriage exclusion "singles out a defined group to completely exclude from a crucial social institution, without basis in any characteristic of the group that distinguishes it for any relevant purpose." (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 (conc. and dis. opn. of Kline, J.) [p. 49].) The dissent recognized that "[j]udicial deference to the importance the state or many of its citizens attach to a traditional bias against homosexuals is fundamentally at war with judicial responsibility to protect the constitutional rights of traditionally disfavored minorities." (*Ibid.* [p. 47].)

6. The role of the judiciary

In upholding the marriage exclusion, the majority did not simply hold that the marriage exclusion is constitutional; it concluded that the judiciary lacks the power to decide otherwise.

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[11] Although the Court correctly ruled that these groups lack standing, it recognized that in conducting rational basis review it need not limit itself to justifications put forth by the parties.

> We do not presume to hold same-sex marriage will never enjoy the same constitutional protection as is accorded to opposite-sex marriage. . . .. Californians' evolving notions of equality may eventually lead to the recognition of a right to same-sex marriage and its ultimate status as a constitutionally guaranteed right. However, these developments are still in their infancy, and the courts may not compel the change respondents seek. (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 [p. 33]; see also *ibid.* [pp. 2, 55, 59, 62.].)

Similarly, Justice Parilli stated in her concurring opinion: "The inequities of the current parallel institutions should not continue if one group of citizens is being denied state privileges and protections attendant to marriage because they were created with a sexual orientation different from the majority, if we are to remain faithful to our Constitution." (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 (conc. opn. of Parilli, J.) [p. 6].) Nonetheless, "[i]f respect for the rule of law is to be maintained, courts must accept and abide by their limited powers." (*Ibid.*)

The dissent disagreed: "We are not being asked to redefine marriage, but simply to say that the Legislature cannot define it in a way that violates the Constitution." (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 (conc. & dis. opn. of Kline, J.) [pp. 28-29].) Quoting this Court in *Lockyer*, the dissent observed that the regulation of marriage is within the province of the Legislature " '*except as the same may be restricted by the Constitution*.' " (*Ibid.*, quoting *Lockyer*, *supra*, 33 Cal.4th at p. 1074).)

> What Justice Jackson said in [*Board of Education v. Barnette* (1943) 319 U.S. 624, 638], about the Bill of Rights, can also be said about the inalienable rights protected under article 1, section 1 of the California Constitution: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." (*Marriage*

Cases, *supra*, 143 Cal.App.4th 873 (conc. & dis. opn. of Kline, J.) [pp. 29-30], quoting *Barnette*, at p. 638.)

Finally, the dissent pointed out that the majority's reasoning was strikingly similar to the reasoning of the Virginia Supreme Court repudiated in *Loving*. (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 (conc. and dis. opn. of Kline, J.) [pp. 32-33], citing *Loving v. Commonwealth* (Va. 1966) 147 S.E.2d 78, 82 ["Such arguments are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate"].) "[T]he federal marriage cases," the dissent concluded, "fully respect the legislative responsibility to define marriage; they stand only for the settled proposition that a definition repugnant to the Constitution is void, and it is the special duty of the judicial branch to say so when this is the case." (*Marriage Cases*, *supra*, 143 Cal.App.4th 873 (conc. and dis. opn of Kline, J.) [p. 34].)

E. Petitions For Rehearing And Subsequent Modification

The City filed a petition for rehearing, asking the Court of Appeal to correct an erroneous statement in the opinion with respect to the record. According to the petition, the majority mistakenly stated that there was no evidence in the record on the factors pertaining to whether classifications based on sexual orientation are suspect. (San Francisco's Petition for Rehearing at p. 1.) The plaintiffs in *Woo* and *Tyler* and certain interveners in the *Thomasson* and *Proposition* 22 cases also filed petitions for hearing. (See *Woo* Petition for Rehearing; *Tyler* Petition for Rehearing; *Thomasson* Petition for Rehearing; *Proposition 22* Petition for Rehearing.)

The Court of Appeal denied rehearing but modified its opinion. It modified the majority opinion to state that "no clear factual record was developed addressing the three suspect classification factors" and replaced

the word "evidence" with the words "lower court findings" in another sentence.[12] (Mod. Order at p. 1.) It also modified the dissent by adding the following footnote:

> The majority's statement that 'no clear factual record was developed [in the trial court] addressing the three suspect classification factors' [citation] is inaccurate. Although the trial court did not hold an evidentiary hearing and found it unnecessary to determine the issue, the City proffered declarations addressing each of the three factors. With respect to immutability—the only one of the factors the majority questions—these declarations state that homosexuality is not a mental illness, that attempts to change an individual's sexuality have not been demonstrated empirically to be effective or safe, and that such interventions can be harmful psychologically. The state presented no evidence to the contrary, although other parties submitted declarations taking an opposing view. (Mod. Order at p. 2.)

DISCUSSION

The question whether the marriage exclusion violates the constitutional rights of gay men and lesbians is of tremendous importance throughout California. Gay and lesbian couples and their families have waited a long time to partake in the validation that marriage alone can provide. (See *Lockyer, supra,* 33 Cal.4th at p. 1132 (conc. opn. of Kennard, J.).) The state sanctioned institution of marriage is highly esteemed by our society in a way that other relationships are not and may never be. Marriage "fulfills yearnings for security, safe haven and connection that express our common humanity, . . . and the decision whether and whom to marry is among life's momentous acts of self-definition." (*Goodridge v. Dept. of Pub. Health* (2003) 440 Mass. 309,

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[12] As explained in footnote seven, the need to remand this action for a trial on the suspect classification factors if this Court agrees with the Court of Appeal does not support the denial of review. (See *ante*, at p. 13, fn. 7.)

322.) Denying gay men and lesbians the right to choose whether and whom to marry not only deprives them of the "full protection of the laws" but "exclude[s] them from the full range of human experience." (*Id.* at p. 326.)

This became evident in February 2004, when thousands of Californians poured into the City and walked the steps of City Hall. From the Clerk's Office inside City Hall to Van Ness Avenue, they stood in line and waited anxiously–some throughout the night in wind and rain—for something that had long eluded them. Their presence, excitement, anxiety, and anticipation bespoke the yearning described in *Goodridge*. Their longing then was palpable, and it has not subsided. They hunger for equal treatment under our state's law and for the respect and honor their relationships deserve and that only marriage can confer.

The parties have now litigated the issues deferred in *Lockyer* in two lower courts. In the meantime, thousands of same-sex couples who tried to get married in San Francisco continue to wait for a definitive ruling on their claim for the same recognition and dignity that the State bestows on married heterosexual couples. The time has come for this Court to provide this ruling.

Indeed, this issue affects not only the thousands of people who came to City Hall in 2004, but also the hundreds of thousands of gay men and lesbians in California as well as their children and families. It also affects government officials in places like San Francisco, who are presently forced to deny marriage licenses to same-sex couples despite a committed belief that they are violating the rights of those couples by doing so.

Concededly, there is presently no conflict among the Courts of Appeal as to the constitutionality of the marriage exclusion. But if the Judicial Council had thought that the issue should be addressed by multiple

courts, it would have allowed the *Tyler* case, then pending in Los Angeles, to proceed separately. Instead, the Council coordinated that case with the five San Francisco cases. Furthermore, if this Court were to deny review, it is unlikely that subsequent litigation would advance the issues further than they have already been advanced in these cases. Given their pressing importance, the constitutional issues presented here should not "percolate" any further in the lower courts.

Indeed, the federal courts have already abstained from deciding federal constitutional challenges to California's marriage exclusion based on the assumption that the state constitutional challenges raised in these cases "would ultimately reach and be decided by the California Supreme Court." (See *Smelt v. County of Orange* (9th Cir. 2006) 447 F.2d 673, 676, 678, fn. 13, 678-682.) As the Ninth Circuit recognized, this Court's resolution of the state constitutional issues may obviate the need for federal courts to decide whether the exclusion violates the federal Constitution. (*Id.* at 681.)

Likewise, the other branches of California government have deferred their consideration of the propriety of the marriage exclusion pending a decision by this Court. Indeed, the Governor vetoed legislation that would have legalized same-sex marriages in part because the constitutionality of the marriage exclusion "will likely be decided by" this Court. (Governor's Veto Message, *supra*, at p. 1.)

The State itself has stated twice before that these issues are of great statewide importance and should be resolved by this Court. In *Lockyer*, the State urged this Court to decide the underlying constitutional issues right away: "[A] definitive resolution by this Court of the fundamental constitutional questions involved would provide much-needed certainty and

guidance to lower courts and the public." (RFJN, Exh. B [Original Petition for Writ of Mandate, Prohibition, Certiorari and/or Other Appropriate Relief; Request for Immediate Cease and Desist Order and/or Stay of Proceedings, *Lockyer v. City and County of San Francisco*, No. S122923, filed February 27, 2004 at p. 4].) And after the trial court issued its decision in these cases, the State again urged this Court to decide the issues: "These cases present issues of great public importance that require prompt resolution by this Court." (RFJN, Exh. C [Petition to Transfer Appeals, *City and County of San Francisco v. State of California, et al.*, No. S135207, filed July 1, 2005 (Transfer Pet.) at p. 4].) "Same-sex couples should be given a prompt determination as to whether they can marry," the State contended, "and should not have to put their lives and affairs on hold indefinitely while this matter works its way through several levels of court proceedings." (*Ibid.* [Transfer Pet. at p. 6].)

In short, this is the major civil rights issue of our time. And this Court should have the final word.

Finally, the Court may wish to address the debate between the majority and dissent over the role of the judiciary in deciding controversial, constitutional issues. As this Court has long recognized, "[t]he judiciary, from the very nature of its powers and the means given it by the Constitution, must possess the right to construe the Constitution in the last resort . . . . It would be idle to make the Constitution the supreme law, and then require the judges to take the oath to support it, and after all that, require the Courts to take the legislative construction as correct." (*Nogues v. Douglass* (1857) 7 Cal. 65, 70; see also *McGlung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 469.) The City respectfully submits that if the marriage exclusion is to be upheld, it must be based on a

substantive constitutional rationale rather than deference to tradition and political will. If, as the City believes, there is no defensible substantive rationale, the marriage exclusion must be struck down.

CONCLUSION

Based on the foregoing, the City respectfully requests that this Court grant its Petition for Review.

Dated: November 13, 2006

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 6,562 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on November 13, 2006.

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EXHIBIT A

Filed 10/5/06

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re MARRIAGE CASES. [Six consolidated appeals.*]	A110449, A110450, A110451, A110463, A110651, A110652 (JCCP No. 4365)

The legal issue presented in these appeals is straightforward: Did the trial court err when it concluded Family Code statutes defining civil marriage as the union between a man and a woman are unconstitutional? (Fam. Code, §§ 300, 301, 302, 308.5.) Appellants assert legal error; respondents reiterate their arguments that excluding same-sex couples from marriage violates due process and equal protection and is not supported by a compelling state interest. Our dissenting colleague advances theories and arguments not made by the parties or relied on by the trial court and concludes a constitutionally protected privacy interest compels expanding the definition of marriage to include same-sex couples.

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* *City and County of San Francisco v. State of California* (A110449 [S.F. City & County Super. Ct. No. CGC-04-429539]); *Tyler v. State of California* (A110450 [L.A. County Super. Ct. No. BS-088506]); *Woo v. Lockyer* (A110451 [S.F. City & County Super. Ct. No. CGC-04-504038]); *Clinton v. State of California* (A110463 [S.F. City & County Super. Ct. No. CGC-04-429548]); *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* (A110651 [S.F. City & County Super. Ct. No. CPF-04-503943]); *Campaign for California Families v. Newsom* (A110652 [S.F. City & County Super. Ct. No. CGC-04-428794]).

California has long sought to eliminate discrimination against gays and lesbians. Our Legislature has passed landmark legislation providing substantially all the rights, responsibilities, benefits and protections of marriage to same-sex couples who register as domestic partners. (Fam. Code, § 297 et seq.) We must now decide whether the state's definition of marriage, which historically has precluded same-sex partners from marrying, is constitutional. Obviously, the question is one of great significance, and it requires us to venture into the storm of a fierce national debate. Both sides believe passionately in their positions. One side argues the time has come for lesbian and gay relationships to enjoy full social equality, and it is fundamentally unfair for the state to continue to reserve marriage as an institution for heterosexual couples only. The other side stresses the need for judicial restraint and the importance of preserving the traditional understanding of marriage—which is very important to many Californians, who fear such a fundamental change will destroy or seriously weaken the institution at the heart of family life.

While we have considered all arguments raised on both sides of the issue, our task as an appellate court is not to decide who has the most compelling vision of what marriage is, or what it should be. "[T]he judiciary is not in the business of preferring, much less anointing, one value as more valid than another. . . ." (*Lewis v. Harris* (2005) 378 N.J. Super. 168, 200 [875 A.2d 259] (conc. opn. of Parrillo, J.A.D.).) We are called upon to decide only whether the statutory definition of marriage as the union of a man and a woman—which has existed, explicitly or implicitly, since the founding of our state—is unconstitutional because it does not permit gays and lesbians to marry persons of their choice.

All can agree that California has not deprived its gay and lesbian citizens of a right they previously enjoyed; same-sex couples have never before had the right to enter a civil marriage. It is also beyond dispute that our society has historically understood "marriage" to refer to the union of a man and a woman. These facts do not mean the opposite-sex nature of marriage can never change, or should never change, but they do limit our ability as a court to effect such change. The respondents in these appeals are

asking this court to recognize a new right. Courts simply do not have the authority to create new rights, especially when doing so involves changing the definition of so fundamental an institution as marriage. "The role of the judiciary is not to rewrite legislation to satisfy the court's, rather than the Legislature's, sense of balance and order. Judges are not ' "knight[s]-errant, roaming at will in pursuit of [their] own ideal of beauty or of goodness." ' [Citation.]" (*People v. Carter* (1997) 58 Cal.App.4th 128, 134.) In other words, judges are not free to rewrite statutes to say what they would like, or what they believe to be better social policy.

Because we have a fundamentally different view of the appellate judicial function, at least in relation to these cases, we part ways with our dissenting colleague. The dissent delivers what is essentially an impassioned policy lecture on why marriage should be extended to same-sex couples. Lacking controlling precedent, it misconstrues case law and mischaracterizes the parties' claims and our analysis to reach this result. But the court's role is not to define social policy; it is only to decide legal issues based on precedent and the appellate record. The six cases before us ultimately distill to the question of who gets to define marriage in our democratic society. We believe this power rests in the people and their elected representatives, and courts may not appropriate to themselves the power to change the definition of such a basic social institution. Our dissenting colleague's views, while well intentioned, disregard this delicate balance. Moreover, his unfortunate rhetoric suggesting our opinion is an exercise in discrimination rather than a legitimate attempt to follow the law (dis. opn., *post*, at pp. 50-51) does nothing to advance the serious subject matter of these appeals.

We conclude California's historical definition of marriage does not deprive individuals of a vested fundamental right or discriminate against a suspect class, and thus we analyze the marriage statutes to determine whether the opposite-sex requirement is rationally related to a legitimate government interest. According the Legislature the extreme deference that rational basis review requires, we conclude the marriage statutes are constitutional. The time may come when California chooses to expand the definition

of marriage to encompass same-sex unions. That change must come from democratic processes, however, not by judicial fiat.

BACKGROUND

Litigation in California over the right to same-sex marriage was sparked by the controversial decision of Gavin Newsom, Mayor of the City and County of San Francisco (City), to begin issuing marriage licenses without regard to the gender or sexual orientation of either prospective spouse. On February 10, 2004, Newsom sent a letter to County Clerk Nancy Alfaro asking her to alter the forms used in order to provide marriage licenses regardless of gender or sexual orientation. (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1069-1070 (*Lockyer*).)[1] Observing that " '[t]he Supreme Courts in other states have held that equal protection provisions in their state constitutions prohibit discrimination against gay men and lesbians with respect to the rights and obligations flowing from marriage,' " the mayor stated his belief that these decisions were persuasive " 'and that the California Constitution similarly prohibits such discrimination.' " (*Id.* at p. 1070.) Finally, Mayor Newsom asserted his request "was made '[p]ursuant to [his] sworn duty to uphold the California Constitution, including specifically its equal protection clause . . . .' " (*Ibid.*, fn. omitted.)

In accordance with this directive, the City began issuing marriage licenses to same-sex couples on February 12, 2004. (*Lockyer*, *supra,* 33 Cal.4th at p. 1071.) The following day, two actions were filed in the San Francisco County Superior Court seeking an immediate stay and writ relief to halt the issuance of such licenses. (*Thomasson v. Newsom* (Super. Ct. S.F. City & County, 2004, No. CGC-04-428794)

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[1] Although Mayor Newsom addressed Alfaro as the "County Clerk," there is some indication that she is in fact the Director of the County Clerk's Office, while Daryl M. Burton is the actual San Francisco County Clerk. (See *Lockyer*, *supra*, 33 Cal.4th at p. 1070, fn. 3.) The difference is not material to the issues on appeal.

(*Thomasson*);[2] *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* (Super. Ct. S.F. City & County, 2004, No. CPF-04-503943) (*Proposition 22*).) After the trial court refused to grant an immediate stay, the Attorney General filed an original writ petition in the California Supreme Court, asserting the City's actions were unlawful and immediate intervention by the Supreme Court was justified. (*Lockyer, supra,* 33 Cal.4th at p. 1072.) On March 11, 2004, the Supreme Court issued an order to show cause and stayed all proceedings in the *Thomasson* and *Proposition 22* actions, noting, however, that its order would not preclude the filing of a separate action raising a direct challenge to the constitutionality of California's marriage statutes. (*Lockyer, supra,* 33 Cal.4th at pp. 1073-1074.)

Acting on this suggestion, the City filed a complaint for declaratory relief and a petition for writ of mandate challenging the validity of Family Code provisions limiting marriage in California to unions between a man and a woman. (Fam. Code, §§ 300, 308.5.) (*City and County of San Francisco v. State of California* (Super. Ct. S.F. City & County, 2004, No. CGC-04-429539) (*CCSF*).) Two similar actions were filed by groups of same-sex couples, who allege they are involved in committed relationships but are prevented from marrying in California, or whose out-of-state marriages are not recognized under California law. (*Tyler v. County of Los Angeles* (Super. Ct. L.A. County, 2004, No. BS-088506) (*Tyler*); *Woo v. Lockyer* (Super. Ct. S.F. City & County, 2004, No. CGC-04-504038) (*Woo*).)[3]

On August 12, 2004, the Supreme Court issued its opinion in *Lockyer*. Having concluded local officials in San Francisco exceeded their authority in issuing marriage licenses to same-sex couples, the court issued a writ of mandate directing these officials

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[2] An organization called the Campaign for California Families (CCF) is the sole appellant in *Thomasson*; accordingly, the case is denoted *Campaign for California Families v. Newsom* (A110651) on appeal.

[3] In addition, the advocacy groups Our Family Coalition and Equality California participated as plaintiffs in the *Woo* case, and Equality California was granted leave to intervene as a plaintiff in the *Tyler* case.

to enforce the statutes governing marriage "unless and until they are judicially determined to be unconstitutional" and compelling them to take remedial action with respect to marriages that were previously conducted in violation of applicable laws. (*Lockyer*, *supra,* 33 Cal.4th at pp. 1069, 1120.) A majority of the court also concluded that the approximately 4,000 same-sex marriages performed in San Francisco were void and of no legal effect. (*Id.* at pp. 1069, 1071, 1114.)[4] The high court repeatedly stressed that the constitutional validity of California's limitation of marriage to opposite-sex couples was not before it, and the court expressed no opinion on the issue. (*Id.* at p. 1069; see also *id.* at p. 1125 (conc. opn. of Moreno, J.); *id.* at pp. 1132-1133 (conc. & dis. opn. of Kennard, J.).)

Meanwhile, when *Lockyer* was pending, the Judicial Council coordinated the three actions challenging the constitutionality of the marriage laws into a single proceeding, known as the *Marriage Cases* (JCCP No. 4365), and assigned them to San Francisco Superior Court Judge Richard A. Kramer. A fourth suit filed by a group of same-sex couples was later added. (*Clinton v. State of California* (Super. Ct. S.F. City and County, 2004, No. CGC-04-429-548) (*Clinton*).) The *Thomasson* and *Proposition 22* cases, which had been stayed while the Supreme Court considered *Lockyer*, were also assigned to the coordinated proceedings before Judge Kramer. The trial court directed all parties to submit briefs, and, on December 22 and 23, 2004, it held hearings in the coordinated cases to consider the constitutional validity of California's marriage statutes.[5]

On April 13, 2005, the trial court issued its final decision. Although the City and other plaintiffs had also claimed the marriage laws violated their rights to due process and

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[4] In separate opinions, Justices Kennard and Werdegar argued the marriages already performed should have been allowed to stand pending a decision on the constitutionality of the marriage statutes. (*Lockyer*, *supra,* 33 Cal.4th at pp. 1131-1133 (conc. & dis. opn. of Kennard, J.); *id.* at pp. 1133-1136 (conc. & dis. opn. of Werdegar, J.).)

[5] Because of the differing procedural postures of the cases, the proceedings in *CCSF*, *Woo*, *Tyler* and *Clinton* were styled hearings on applications for writ of mandate, while the proceedings in *Thomasson* and *Proposition 22* were styled hearings on motions for summary judgment or judgment on the pleadings.

privacy, the court addressed only those challenges based on the equal protection clause of the California Constitution (Cal. Const., art. I § 7, subd. (a)). The court ruled that Family Code provisions limiting marriage in California to opposite-sex unions are subject to strict judicial scrutiny because they rest on a suspect classification (gender) and because they impinge upon the fundamental right to marry. After considering interests advanced by the state and other parties—i.e., CCF and the Proposition 22 Legal Defense and Education Fund (the Fund)—and searching for additional interests in relevant legislative history and ballot materials, the court concluded the marriage statutes' opposite-sex requirement does not pass strict scrutiny, or even the more deferential review accorded under the rational basis test, because it does not further any legitimate state interest. Accordingly, the court declared Family Code sections 300 and 308.5 unconstitutional under the California Constitution and entered judgment in each of the coordinated cases in favor of the City and/or the individual plaintiffs and interveners. Separate appeals from the state, the Fund and CCF followed, and we consolidated all six appeals for purposes of decision.[6]

DISCUSSION

I. Justiciability Issues

As a preliminary matter, we must address arguments that two of the cases before us should have been dismissed because they are not justiciable controversies.

After the Supreme Court issued a remittitur in *Lockyer* and dissolved the stay that had applied to the *Thomasson* and *Proposition 22* actions, CCF and the Fund sought leave to amend the complaints in these cases. The City and certain intervener-defendants opposed this request and moved to dismiss *Thomasson* and *Proposition 22* as moot, arguing the Supreme Court's decision in *Lockyer* had granted all the relief sought in these cases and plaintiffs lacked standing to pursue bare claims for declaratory relief. The trial

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[6] Requests for judicial notice were filed by the respondents in *Thomasson* and *Proposition 22* and by the respondent-interveners in *Tyler*. We grant these requests, though it appears all of the documents in question may be found elsewhere in the record of these consolidated appeals.

court denied the plaintiffs' request for leave to amend but also denied the defendants' motion to dismiss. The court concluded the *Thomasson* and *Proposition 22* complaints "adequately state[d]" claims for declaratory relief concerning the constitutionality of the marriage laws.

On appeal, the City and interveners renew their arguments that claims brought in the *Thomasson* and *Proposition 22* actions are not justiciable. Such challenges may be raised without a cross-appeal because they do not seek affirmative relief; rather, they are alternative legal theories offered to support affirmance of the judgments in these cases. (Code Civ. Proc., § 906; see *Westinghouse Electric Corp. v. County of Los Angeles* (1982) 129 Cal.App.3d 771, 781 [respondent's challenge to ruling on standing proper without cross-appeal].) Assuming the trial court acted within its discretion when it construed the declaratory relief claims in *Thomasson* and *Proposition 22* broadly to encompass issues about the constitutionality of the marriage statutes (see *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881, 892-893),[7] we conclude the court erred in denying the motion to dismiss because CCF and the Fund lacked standing to pursue these pure declaratory relief claims.

Code of Civil Procedure section 1060 confers standing upon "[a]ny person interested under a written instrument" who brings an action for declaratory relief "in cases of actual controversy relating to the legal rights and duties of the respective parties." The validity or construction of a statute is recognized as a proper subject of declaratory relief. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) However, declaratory relief is only appropriate where there is an actual controversy, and not simply an abstract or academic dispute, between parties who are affected by the legislation. (See

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[7] A broad reading was required because the complaints did not mention the constitutionality of the statutes. Rather, in virtually identical passages, both complaints sought "a judicial determination of the rights and duties of the parties and a declaration that Defendants have failed to comply with state statutes governing the issuance of marriage licenses by unlawfully issuing marriage licenses to same-sex couples; and that all marriage licenses issued and marriages solemnized under circumstances not provided by law are invalid."

Newland v. Kizer (1989) 209 Cal.App.3d 647, 657.) In general, to have standing, a plaintiff must have an actual interest in the subject matter that is subject to injury depending on the outcome of the suit. " 'One who invokes the judicial process does not have "standing" if he, or those whom he properly represents, does not have a real interest in the ultimate adjudication because the actor has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented.' [Citations.] [¶] '[T]he mere surmise that some right or claim may be asserted does not confer jurisdiction. . . . [¶] 'The plaintiff must establish facts which give rise as a matter of law to an existing or imminent invasion of his rights by the defendant which would result in injury to him.' [Citations.]" (*Zetterberg v. State Dept. of Public Health* (1974) 43 Cal.App.3d 657, 662-663.)

For reasons we discussed in a prior opinion conceming the Fund's attempt to intervene in the *CCSF* and *Woo* cases, neither the Fund nor CCF satisfies these requirements for injury-based standing. In determining that the Fund lacked a sufficiently direct and immediate interest to support intervention, we observed there was no indication that a judgment in the action would in any way benefit or harm the Fund's members. (*City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1038.) "Specifically, the Fund [did] not claim a ruling about the constitutionality of denying marriage licenses to same-sex couples [would] impair or invalidate the existing marriages of its members, or affect the rights of its members to marry persons of their choice in the future. Nor ha[d] the Fund identified any diminution in legal rights, property rights or freedoms that an unfavorable judgment might impose on" its members, or on other Califomians who oppose same-sex marriage. (*Id.* at pp. 1038-1039, fn. omitted.)[8] The same is true for CCF. Although these associations, and their members, may have a strong philosophical or political interest in defending the validity of Califomia's marriage laws, they have not alleged or demonstrated any

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[8] At oral argument, counsel confirmed the Fund is not claiming injury-based standing in this appeal.

possibility that they will suffer injury from an adverse judgment in these actions. While the Fund urges us to relax the standing rules due to the great public interest in the issues at stake, "[t]he fact that an issue raised in an action for declaratory relief is of broad general interest is not grounds for the courts to grant such relief in the absence of a true justiciable controversy. [Citations.]" (*Zetterberg v. State Dept. of Public Health*, *supra*, 43 Cal.App.3d at p. 662; see also *id.* at p. 663 ["A difference of opinion as to the interpretation of a statute as between a citizen and a governmental agency does not give rise to a justiciable controversy"].)

However, unlike in federal courts, two related rules permit standing in California in the absence of such potential injury. "Code of Civil Procedure section 526a permits a taxpayer to bring an action to restrain or prevent an illegal expenditure of public money. No showing of special damage to a particular taxpayer is required as a requisite for bringing a taxpayer suit. [Citation.] Rather, taxpayer suits provide a general citizen remedy for controlling illegal governmental activity. [Citation.]" (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 29.) The purpose of the taxpayer standing statute "is to permit a large body of persons to challenge wasteful government action that otherwise would go unchallenged because of the standing requirement. [Citation.]" (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240.) Although members of CCF and the Fund may be taxpayers, these organizations do not have standing under Code of Civil Procedure section 526a to seek declaratory relief because their claims do not identify or challenge any allegedly illegal expenditure of public funds. In accordance with the Supreme Court's directive in *Lockyer*, the City has stopped issuing marriage licenses to same-sex couples, and neither the Fund nor CCF has identified any continuing public expenditure it challenges. Regardless of the liberal construction granted claims under Code of Civil Procedure section 526a, "the essence of a taxpayer action remains an illegal or wasteful expenditure of public funds or damage to public property. [Citation.] The taxpayer action must involve an actual or threatened expenditure of public funds. [Citation.]" (*Waste*

Management of Alameda County v. County of Alameda, supra, 79 Cal.App.4th at p. 1240.)

In addition to taxpayer actions, standing requirements are also relaxed in the area of so-called citizen suits. In such actions, citizens who are not personally affected may nevertheless sue to compel performance of a public duty. (*Connerly v. State Personnel Bd., supra,* 92 Cal.App.4th at p. 29.) This exception to standing requirements applies, typically in the context of a mandamus proceeding, "where the question is one of public right and the object of the action is to enforce a public duty—in which case it is sufficient that the plaintiff be interested as a citizen in having the laws executed and the public duty enforced. [Citations.]" (*Waste Management of Alameda County v. County of Alameda, supra,* 79 Cal.App.4th at pp. 1236-1237; see *Green v. Obledo* (1981) 29 Cal.3d 126, 144.) This exception gave CCF and the Fund standing to pursue their original actions for mandamus, because these claims sought to compel City officials to enforce the marriage laws. However, mandamus having been granted by the Supreme Court, the "citizen suit" exception does not give these organizations standing to pursue pure declaratory relief claims in which neither they nor their members have a personal beneficial interest. Judicial recognition of citizen standing is not a repudiation of the usual requirement of a plaintiff's beneficial interest in litigation. (*Waste Management of Alameda County v. County of Alameda, supra,* 79 Cal.App.4th at p. 1237.) Because the remaining claims in *Thomasson* and *Proposition 22* seek only declaratory relief about the constitutionality of the marriage laws, and do not seek to enforce a public duty (such as the execution of these laws), the citizen suit exception no longer applies.

Although we have determined CCF and the Fund lack standing to pursue their declaratory relief claims, this conclusion has had little to no significance, as a practical matter, in our review of the substantive issues in these appeals. We have reviewed all appellate briefs submitted by the Fund and CCF, and amicus curiae briefs submitted on their behalf, and have considered all the arguments contained therein. For reasons discussed later in this opinion, we have concluded California's marriage laws are subject to review under the rational basis test. Because rational basis review requires a court to

consider all reasonably conceivable state interests that may be furthered by a challenged statute (*Warden v. State Bar* (1999) 21 Cal.4th 628, 644, 650), we would have been obliged to consider the merit of state interests proposed by CCF and the Fund regardless of how they were presented (i.e., in appellate or amicus curiae briefs). As a legal matter, however, our conclusion that CCF and the Fund lack standing means that the judgments against them in *Thomasson* and *Proposition 22* must be affirmed on the ground that the cases were not justiciable controversies.

II. Relevant Statutory Provisions

A. The Marriage Statutes

Civil marriage in this state is entirely a creature of statutory law. (*Lockyer*, *supra*, 33 Cal.4th at p. 1074; *Estate of DePasse* (2002) 97 Cal.App.4th 92, 99.) While many legislative enactments govern the creation and dissolution of marriages, and the legal consequences of marriage, these cases require us to address only the statutes that limit the availability of marriage to unions in California between a man and a woman.[9] Of these, the most significant is probably Family Code, section 300, which defines what a marriage *is*. Family Code, section 300 states, in relevant part: "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." Gender-specific language also appears in sections 301 and 302 of the Family Code, which set the age of consent for marriage between "[a]n unmarried male" and "an unmarried female" at 18 years or older, absent parental consent and court approval.

The gender specifications were added to the Family Code's definition of marriage in 1977. (Stats. 1977, ch. 339, § 1, p. 1295.) Previous versions of the statute stated only

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[9] Although one might, more concisely, describe such relationships as "heterosexual unions," the marriage laws make no such reference to sexual orientation. California law does not prohibit gays and lesbians from marrying, so long as they marry a person of the opposite sex. It is therefore more accurate to refer to "same-sex" or "opposite-sex" unions, rather than a moniker that assumes facts about the sexual orientation of the participants.

that marriage "is a personal relation arising out of a civil contract, to which the consent of the parties capable of making that contract is necessary." (Former Civ. Code, § 4100, added by Stats. 1969, ch. 1608, § 8, p. 3314 and repealed by Stats. 1992, ch. 162, § 10, p. 474 [moving the provision, without substantive change, to Fam. Code, § 300]; see also former Civ. Code, § 55, enacted 1872 [stating "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary"].) In 1977, the County Clerks Association of California sponsored Assembly Bill No. 607, which sought to specify that marriage is a relationship "between a man and a woman." (Assem. Bill No. 607 (1977-1978 Reg. Sess.).) Although county clerks throughout the state had interpreted existing law as permitting only opposite-sex marriages, and consequently had "uniformly denied marriage licenses to same sex couples" (Legis. Counsel, Rep. on Assem. Bill No. 607 (1977-1978 Reg. Sess.) p. 1), they believed former Civil Code, section 4100 was unclear and could be interpreted to encompass same-sex unions. (Sen. Republican Caucus, analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.) p. 1.) Assembly Bill No. 607 was therefore introduced, and passed, for the express purpose of amending the statute "to prohibit persons of the same sex from entering lawful marriage." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.) as amended May 23, 1977, p. 1; see *Lockyer*, *supra,* 33 Cal.4th at p. 1076, fn. 11 [stating the bill's objective of prohibiting same-sex marriage is clear from its legislative history].) Former Civil Code, section 4100 was later recodified, without substantial change, as Family Code, section 300. (Stats. 1992, ch. 162, § 10, p. 474.)

A second statute limiting marriage in California to opposite-sex unions was passed by voter initiative in 2000. Proposition 22 added Family Code section 308.5, which states: "Only marriage between a man and a woman is valid or recognized in California." The scope of section 308.5 remains a matter of some dispute. Last year, Division One of the Second District Court of Appeal held that Family Code section 308.5 addresses only the extent to which out-of-state marriages will be recognized as valid in California. (*Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1422-1424.) After reviewing the Legislative Analyst's ballot summary of Proposition 22 and arguments in favor of the

initiative—which acknowledged that same-sex marriage was currently prohibited in California but suggested the state might be required to recognize same-sex marriages entered in other states[10]—the *Armijo* court concluded Proposition 22 "was designed to prevent same-sex couples who could marry validly in other countries or who in the future could marry validly in other states from coming to California and claiming, in reliance on Family Code section 308, that their marriages must be recognized as valid marriages. With the passage of Proposition 22, then, only opposite-sex marriages validly contracted outside this state will be recognized as valid in California." (*Armijo v. Miles*, *supra*, 127 Cal.App.4th at p. 1424.)

The Third District Court of Appeal has reached a somewhat broader interpretation of the reach of Proposition 22. In rejecting a claim that the state's domestic partnership laws (Fam. Code, § 297 et seq.) constitute an inappropriate amendment to Proposition 22, because they grant marriage-like rights to same-sex unions, the Third District concluded the initiative was intended "to prevent the recognition in California of homosexual marriages that have been, or may in the future be, legitimized by laws of other jurisdictions," *and* "to limit the status of marriage to heterosexual couples." (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 18.) The *Knight* court observed the plain language of Proposition 22, and the resulting statute (Family Code section 308.5), "reaffirms the [existing] definition of marriage in section 300, by stating that only marriage between a man and a woman shall be valid and recognized in California. This limitation ensures that California will not legitimize or recognize same-sex marriages from other jurisdictions, as it otherwise would be required to do pursuant to section 308,

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[10] For example, the argument in favor of Proposition 22 included a letter from a "fellow voter" stating: "When people ask, 'Why is this necessary?' I say that even though California law already says only a man and a woman may marry, it also recognizes marriages from other states. However, judges in some of those states want to define marriage differently than we do. If they succeed, California may have to recognize new kinds of marriages, even though most people believe marriage should be between a man and a woman." (Ballot Pamp., Primary Elec. (Mar. 7, 2000) argument in favor of Prop. 22, p. 52.)

and that California will not permit same-sex partners to validly marry within the state." (*Knight v. Superior Court*, *supra,* 128 Cal.App.4th at pp. 23-24, italics added.) In other words, according to the *Knight* decision, Proposition 22 was designed to reserve marriage in California as an institution exclusively for opposite-sex couples. (See *id.* at p. 26.) Furthermore, in light of this broad interpretation of the initiative, *Knight* observed that, "[w]ithout submitting the matter to the voters, the Legislature cannot change this absolute refusal to recognize *marriages* between persons of the same sex. (Cal. Const., art. II, § 10, subd. (c).)" (*Knight v. Superior Court*, *supra,* 128 Cal.App.4th at p. 24; see also *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1483-1484, 1487 [Legislature may not directly or indirectly amend a law passed by initiative without obtaining voters' consent].)

We need not resolve this controversy because issues about the precise scope of Proposition 22, and whether it inhibits the Legislature from passing laws to permit same-sex marriage between Californians, are not directly presented in these appeals. Taken together, Family Code, sections 300 and 308.5 clearly and consistently limit the institution of marriage in California to opposite-sex unions. We must decide only whether the limitation is constitutional. Before turning to this question, however, we discuss the rights and benefits California law currently provides to same-sex relationships, most notably through the domestic partnership statutes.

B. The Domestic Partner Act

California has passed many laws to reduce discrimination against gays and lesbians. For example, the Unruh Civil Rights Act (Civ. Code, § 51) prohibits business establishments that offer services to the public from discriminating on the basis of sexual orientation. (*Curran v. Mount Diablo Council of the Boy Scouts* (1983) 147 Cal.App.3d 712, 733-734; see also *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 850 [concluding Unruh Civil Rights Act prohibits discrimination against registered domestic partners in favor of married couples].) Similarly, California's Fair Employment and Housing Act expressly identifies sexual orientation discrimination as an unlawful employment practice. (Gov. Code, § 12940, subd. (a).) Gays and lesbians are equally

entitled to become foster parents or adoptive parents (Welf. & Inst. Code, § 16013 ["all persons engaged in providing care and services to foster children, including, but not limited to, foster parents, adoptive parents, relative caregivers, and other caregivers . . . shall not be subjected to discrimination or harassment on the basis of . . . sexual orientation"]), and the Supreme Court has upheld the use of "second parent" adoption as a means for a nonbiological parent to establish legal family ties with the child of his or her same-sex partner. (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417; see Fam. Code, § 9000, subds. (b) & (g) [providing for adoption by registered domestic partner]; see also *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 113, 119-120 [same-sex partner not biologically related to child may be considered a "parent" for purposes of Uniform Parentage Act].)

In 1999, the Legislature passed a bill creating a statewide domestic partnership registry. (Stats. 1999, ch. 588, § 2 [adding Fam. Code, §§ 297-299.6]; see *Armijo v. Miles*, *supra*, 127 Cal.App.4th at p. 1411.) In so doing, "California became one of the first states to allow cohabiting adults of the same sex to establish a 'domestic partnership' in lieu of the right to marry." (*Holguin v. Flores* (2004) 122 Cal.App.4th 428, 433.) Newly enacted Family Code, section 297 defined "domestic partners" as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." (Fam. Code, § 297; *Holguin v. Flores*, *supra,* 122 Cal.App.4th at p. 433.) Among other requirements for registration, domestic partners must share a common residence, be at least 18 years old and unrelated by blood, and be either members of the same sex or over the age of 62. (Fam. Code, § 297, subd. (b).)[11]

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[11] "A domestic partnership shall be established in California when both persons file a Declaration of Domestic Partnership with the Secretary of State pursuant to this division, and, at the time of filing, all of the following requirements are met: [¶] (1) Both persons have a common residence. [¶] (2) Neither person is married to someone else or is a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity. [¶] (3) The two persons are not related by blood in a way that would prevent them from being married to each other in this state. [¶] (4) Both persons are at least 18 years of age. [¶] (5) Either of the following: [¶] (A) Both persons

Soon after their creation, these domestic partnership laws were expanded by amendments that granted registered partners new legal rights. (Stats. 2001, ch. 893; *Holguin v. Flores*, *supra,* 122 Cal.App.4th at p. 434.) Then in 2003, with the passage of Assembly Bill No. 205 (2003-2004 Reg. Sess.), the Legislature significantly broadened domestic partnership rights by enacting comprehensive legislation: the California Domestic Partner Rights and Responsibilities Act of 2003 (Domestic Partner Act). (Stats. 2003, ch. 421.)

Family Code, section 297.5, subdivision (a) was added by the Domestic Partner Act and became operative on January 1, 2005. (Stats. 2003, ch. 421, § 4; *Armijo v. Miles*, *supra,* 127 Cal.App.4th at p. 1413.) This statute declares: "Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses." (Fam. Code, § 297.5, subd. (a).) Specifically, registered domestic partners have the same rights and obligations as married spouses regarding financial support, property ownership, child custody and support. (Fam. Code, § 297.5, subds. (a)-(d).)

There are some exceptions, however. First, the Domestic Partner Act confers only rights and responsibilities available under California law; it does not (because it cannot) extend to domestic partners the numerous benefits married couples enjoy under federal law. (Fam. Code, § 297.5, subd. (k); *Knight v. Superior Court*, *supra*, 128 Cal.App.4th at p. 30.)[12] Registered domestic partners may not file joint income tax returns, nor is their

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are members of the same sex. [¶] (B) One or both of the persons meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals. Notwithstanding any other provision of this section, persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62. [¶] (6) Both persons are capable of consenting to the domestic partnership." (Fam. Code, § 297, subd. (b).)

[12] The Legislature ameliorated this disparity to the extent possible by providing that, where California law adopts or relies upon contrary federal law, domestic partners shall be treated as if federal law recognized domestic partnerships in the same manner as California law. (Fam. Code, § 297.5, subd. (e).)

earned income treated as community property for state or federal tax purposes. (Fam. Code, § 297.5, subd. (g).)[13] Second, the Domestic Partner Act does not (because it cannot) impact rights and responsibilities that are expressly reserved for married couples under the California Constitution or statutes adopted by initiative. (Fam. Code, § 297.5, subd. (j).) So, for example, the property tax reassessment benefit granted to surviving spouses under Proposition 13 is not available to a surviving domestic partner. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 205 (2003-2004 Reg. Sess.) as amended Mar. 25, 2003, p. 4.) Third, given the federal Defense of Marriage Act (28 U.S.C. § 1738c) and similar state enactments, registered domestic partners do not have the assurance that their partnerships will be legally recognized in other states, as marriages are. (*Knight v. Superior Court*, *supra*, 128 Cal.App.4th at p. 31; see also Assem. Com. on Judiciary, Analysis of Assem. Bill No. 205 (2003-2004 Reg. Sess.) as amended Mar. 25, 2003, pp. 4, 7.) As a result, domestic partners who travel or move out of California may lose many or all of the rights conveyed by the Domestic Partner Act. (*Knight v. Superior Court*, *supra*, 128 Cal.App.4th at p. 31.)

Moreover, the prerequisites for forming a domestic partnership, and the mechanisms for terminating such a partnership, differ in significant ways from marriage. (See *Knight v. Superior Court*, *supra*, 128 Cal.App.4th at pp. 30-31.) A same-sex couple may form a domestic partnership simply by filing a "Declaration of Domestic Partnership" form with the Secretary of State (Fam. Code, § 298.5), and under certain circumstances they may terminate the partnership simply by filing a corresponding "Notice of Termination of Domestic Partnership" form. (Fam. Code, § 299.) In contrast, marriages must be licensed and solemnized in some form of ceremony (Fam. Code,

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[13] A new law, signed by the Governor on September 30, 2006, resolves this discrepancy, in part, by enabling registered domestic partners to file joint state income tax returns and allows their joint income to be treated as community property. (Sen. Bill No. 1827 (2005-2006 Reg. Sess.) as amended June 14, 2006.) These changes will go into effect January 1, 2007.

§§ 300, 420), and even the most summary dissolution of a marriage requires judicial proceedings. (Fam. Code, §§ 2400-2403.)

Consideration of these differences led the Third District Court of Appeal to observe that "marriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership." (*Knight v. Superior Court*, *supra*, 128 Cal.App.4th at p. 31.) While this may be true, the Legislature declared that the 2003 Domestic Partner Act was intended to serve a broad remedial goal of "help[ing] California move closer to fulfilling the promises of inalienable rights, liberty, and equality contained in Sections 1 and 7 of Article 1 of the California Constitution by providing all caring and committed couples, regardless of their gender or sexual orientation, the opportunity to obtain essential rights, protections, and benefits and to assume corresponding responsibilities, obligations, and duties and to further the state's interests in promoting stable and lasting family relationships, and protecting Californians from the economic and social consequences of abandonment, separation, the death of loved ones, and other life crises." (Stats. 2003, ch. 421, § 1, subd. (a); see *Koebke v. Bernardo Heights Country Club*, *supra*, 36 Cal.4th at p. 838; *Bouley v. Long Beach Memorial Medical Center* (2005) 127 Cal.App.4th 601, 612.) Having found that "despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex," the Legislature determined that expanding the rights and responsibilities of registered domestic partners "would further California's interests in promoting family relationships and protecting family members during life crises, and would reduce discrimination on the bases of sex and sexual orientation in a manner consistent with the requirements of the California Constitution." (Stats. 2003, ch. 421, § 1, subd. (b).) Contrary to *Knight*'s observation about the greater stature of marriage, these legislative declarations and the statutory language of Family Code, section 297.5 recently led the Supreme Court to conclude that "a chief goal of the Domestic Partner Act is to equalize the status of registered domestic partners and married couples." (*Koebke v. Bernardo Heights Country Club*, *supra*, 36 Cal.4th at p. 839.)

Our review of domestic partnership laws would not be complete without a discussion of the Legislature's recent attempt to extend marriage rights to same-sex couples. In 2005, Assemblyman Mark Leno introduced a bill to enact the Religious Freedom and Civil Marriage Protection Act. (Legis. Counsel's Dig., Assem. Bill No. 849 (2005-2006 Reg. Sess.), p. 1.) Assembly Bill No. 849 recited legislative findings that (1) gender-specific language added by the 1977 amendments to the marriage laws (Fam. Code, § 300 et seq.) discriminates against same-sex couples; (2) the exclusion of same-sex couples from marriage violates the rights of gays and lesbians under the California Constitution; (3) California's same-sex couples are harmed in various ways by their exclusion from marriage; and (4) "[t]he Legislature has an interest in encouraging stable relationships regardless of the gender or sexual orientation of the partners. The benefits that accrue to the general community when couples undertake the mutual obligations of marriage accrue regardless of the gender or sexual orientation of the partners." (Assem. Bill No. 849 (2005-2006 Reg. Sess.) as amended June 28, 2005, § 3, subds. (d), (f), (g) & (j).) With a declared intent to "correct the constitutional infirmities" of the marriage laws (*id.*, § 8), the bill would have amended Family Code, sections 300 through 302 to remove all gender-specific terms. (Assem. Bill No. 849 (2005-2006 Reg. Sess.) as amended June 28, 2005, §§ 4-6.) Recognizing its inability to correct any such problems in Family Code, section 308.5, due to its enactment by initiative, the Legislature declared Assembly Bill No. 849 was not intended to alter or amend the prohibition in section 308.5 against recognizing same-sex marriages entered outside California. (Assem. Bill No. 849 (2005-2006 Reg. Sess.) as amended June 28, 2005, §§ 3, subd. (k), 8.) Finally, the bill provided that no clergy or religious official would be required to solemnize a marriage in violation of his or her constitutional right to free exercise of religion. (*Id.*, § 7.)

Although Assembly Bill No. 849 passed both houses of the Legislature in September 2005, it was vetoed by the Governor. In his veto message, Governor Schwarzenegger explained that while he supported domestic partnerships for gay and lesbian couples, he did not believe the Legislature could amend Family Code, section 308.5 without submitting the provision for voter approval. (Governor's veto

message to Assem. on Assem. Bill No. 849 (Sept. 29, 2005) Recess J. No. 4 (2005-2006 Reg. Sess.) pp. 3737-3738.) Moreover, because the constitutionality of the marriage laws was pending before this appellate court at the time, the Govemor believed Assembly Bill No. 849 would add "confusion" to the constitutional issues under review. (*Ibid.*) He remarked, "If the ban of same-sex marriage is unconstitutional, this bill is not necessary. If the ban is constitutional, this bill is ineffective." (*Ibid.*)

III. Respondents' Constitutional Claims

Respondents claim Family Code provisions limiting marriage to unions between a man and a woman violate their fundamental right to marry, under the due process and equal protection clauses of the California Constitution, and discriminate against them on the basis of gender and sexual orientation, in violation of the equal protection clause. (Cal. Const., art. I, § 7, subd. (a) ["A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . ."].) Respondents also argue the marriage laws violate their constitutional rights to privacy and freedom of expression and association. (Cal. Const., art. I, §§ 1, 2.)

A two-tiered analysis is typically used to determine the constitutionality of laws challenged under the equal protection clause, depending upon the classification involved or the nature of the interest affected. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 16-17; *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 16.) "Although normally any rational connection between distinctions drawn by a statute and the legitimate purpose thereof will suffice to uphold the statute's constitutionality [citation], closer scrutiny is afforded a statute which affects fundamental interests or employs a suspect classification. [Citations.]" (*In re Gary W.* (1971) 5 Cal.3d 296, 306.) If a law abridges a fundamental right, or employs a suspect classification, it is reviewed under the strict scrutiny test, under which "*the state* bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." (*D'Amico v. Board of Medical Examiners, supra,* 11 Cal.3d at p. 17; see also *Serrano v. Priest* (1976) 18 Cal.3d 728, 761.) If the law does not impact a fundamental right or employ a suspect classification, we review it under the less

stringent "rational relationship" test. (*Hardy v. Stumpf* (1978) 21 Cal.3d 1, 8; *D'Amico v. Board of Medical Examiners*, *supra*, 11 Cal.3d at p. 16.) Under this standard, which applies to most economic and social welfare legislation, a law passed by the Legislature or the people is presumed to be constitutional, and distinctions drawn by the law must merely " 'bear some rational relationship to a conceivable legitimate state purpose.' [Citation.]" (*D'Amico v. Board of Medical Examiners*, *supra*, 11 Cal.3d at p. 16.) "Moreover, the burden of demonstrating the invalidity of a classification under this standard rests squarely upon *the party who assails it.*" (*Id.* at p. 17.)

A similar approach is employed in passing upon substantive due process challenges to legislative measures. "In analyzing a substantive due process claim, we first examine the nature of the interest at issue to determine whether it is a 'fundamental right' protected by the Fourteenth Amendment. [Citation.] Where there is a fundamental right, we must next determine whether the state has significantly infringed upon this right. [Citation.] If so, we then consider whether an important state interest justifies the infringement. [Citation.]" (*In re Adoption of Kay C.* (1991) 228 Cal.App.3d 741, 748.) "In the absence of such factors, 'a Legislature does not violate due process so long as an enactment is procedurally fair and reasonably related to a proper legislative goal.' [Citations.]" (*In re Arthur W.* (1985) 171 Cal.App.3d 179, 185, fn. omitted.)

In addressing respondents' constitutional claims, we consider decisions of the United States Supreme Court and other federal courts as persuasive authority because the equal protection provision of the California Constitution is "substantially the equivalent of the equal protection clause of the Fourteenth Amendment . . . ." (*Dept. of Mental Hygiene v. Kirchner* (1965) 62 Cal.2d 586, 588; see *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 571-572; *Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 769.) However, "it is well established that the California Constitution 'is, and always has been, a document of independent force' [citation], and that the rights embodied in and protected by the state Constitution are not invariably identical to the rights contained in the federal Constitution. [Citation.]" (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 325.) In the area of civil liberties, for

example, the California Supreme Court has observed that "our first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.' [Citations.]" (*Serrano v. Priest*, *supra*, 18 Cal.3d at pp. 764-765.)

A. No Fundamental Right to Marriage Between Same-sex Partners Has Been Recognized.

The due process clause of the Fourteenth Amendment includes a substantive component that forbids the government from infringing certain fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest. (*Reno v. Flores* (1993) 507 U.S. 292, 301-302; *Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 939-940.) Impairment of a fundamental right or liberty interest is similarly prohibited under equal protection principles. (See, e.g., *Zablocki v. Redhail* (1978) 434 U.S. 374, 381-382 [law infringing fundamental right to marry violated equal protection]; *Perez v. Sharp* (1948) 32 Cal.2d 711, 714, 731-732 [same].) As is typically the case with substantive due process claims, the question whether California's marriage laws infringe upon a fundamental right depends almost entirely on how that right is defined.

Undoubtedly, all citizens have a fundamental constitutional right to marry. (*Zablocki v. Redhail*, *supra*, 434 U.S. at pp. 383-386; *Loving v. Virginia* (1967) 388 U.S. 1, 12; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541; *Perez v. Sharp*, *supra*, 32 Cal.2d at pp. 714-715.) Even prison inmates, however terrible their crime, have an acknowledged right to marry. (*Turner v. Safley* (1987) 482 U.S. 78, 95-96; see also *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal.App.4th 1288, 1304.) Moreover, our high court has explained that this fundamental right includes the right to marry the person of one's choice. (*Perez v. Sharp*, *supra*, 32 Cal.2d at p. 715.)

Respondents urge us to end the discussion here. Because marriage is a fundamental right that belongs to everyone, respondents reason the Family Code provisions that prevent them from marrying the persons they choose—i.e., their same-sex

partners—deprive them of this fundamental right.[14] Language from many historical decisions stressing the importance of the right to marriage supports their position. (See, e.g., *Perez v. Sharp*, *supra,* 32 Cal.2d at p. 714 ["Marriage is thus something more than a civil contract subject to regulation by the state; it is a fundamental right of free men"]; *Loving v. Virginia*, *supra,* 388 U.S. at p. 12 ["The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"]; *Skinner v. Oklahoma*, *supra,* 316 U.S. at p. 541 ["Marriage and procreation are fundamental to the very existence and survival of the race"].) However, we cannot ignore the reality that none of these cases addressed the type of union respondents are now urging California to recognize within the institution of marriage.[15]

Until very recently, the term "marriage" in court opinions has always referred, either explicitly or implicitly, to the union of a man and a woman. (See, e.g., *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274-275 [noting, in context of discussing state's interest in promoting marriage, that marriage is accorded special status " 'in recognition that "[t]he joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime" ' "]; *Mott v. Mott* (1890) 82 Cal. 413, 416 [describing marriage as a civil contract " 'by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and

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[14] Of course, the state imposes other limits on the right to marry a person of one's choosing. For example, one's intended spouse must be at least 18 years old, or else parental consent or a court order is required for the marriage to occur. (Fam. Code, §§ 301-303.) The intended spouse cannot be a blood relative within a specified degree of relationship, or else the marriage will be prohibited as incestuous. (Fam. Code, § 2200.) Bigamous and polygamous marriages are also illegal and void when entered. (Fam. Code, § 2201.)

[15] Although the dissent assumes this question involves the mere application of Supreme Court precedents holding marriage is a fundamental right, the precise nature of this right is far from clear. "The Supreme Court has said that there is a constitutional 'right to marry'; but what can this possibly mean? People do not have a right to marry their dog, their aunt, June 29, a rose petal or a sunny day." (Sunstein, *The Right to Marry* (2005) 26 Cardozo L.Rev. 2081, 2081.)

wife' "].) When cases challenging the constitutionality of marriage laws were first filed in the 1970's, courts dismissed the idea of same-sex marriage as a definitional impossibility. (E.g., *Adams v. Howerton* (C.D.Cal. 1980) 486 F.Supp. 1119, 1122 ["The term 'marriage[]' . . . necessarily and exclusively involves a contract, a status, and a relationship between persons of different sexes"]; *Jones v. Hallahan* (Ky.Ct.App. 1973) 501 S.W.2d 588, 589 ["appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk . . . to issue them a license, but rather by their own incapability to enter into a marriage as that term is defined"]; *Singer v. Hara* (Wn.Ct.App. 1974) 11 Wn.App. 247 [522 P.2d 1187, 1192] ["appellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex"].) The reaction of these courts is not surprising, because "there is a long history in this country of defining marriage as a relation between one man and one woman . . . ." (*Lockyer, supra,* 33 Cal.4th at p. 1127 (conc. & dis. opn. of Kennard, J.).)

This is not to say that marriage can *never* be defined to include same-sex unions. As noted, civil marriage in California is based entirely on statutory law. (*Lockyer, supra,* 33 Cal.4th at p. 1074.) Thus, if the Legislature someday amends Family Code section 300 to omit gender references, the definition of marriage in this state will encompass same-sex unions. "The Court here does not hold marriage must remain a heterosexual institution." (*Smelt v. County of Orange* (C.D.Cal. 2005) 374 F.Supp.2d 861, 878, fn. 22, vacated on another ground (9th Cir. 2006) 447 F.3d 673.) However, it is important to acknowledge the historical definition of marriage because this definition limits the precedential value of cases discussing the fundamental right to marriage. No authority binding upon us—from California appellate courts to the United States Supreme Court—has ever held or suggested that individuals have a fundamental constitutional right to

enter the public institution of marriage with someone of the same sex.[16] Although appellants are probably correct in asserting that marriage is an evolving institution, and that the idea of same-sex marriage is gaining acceptance around the world, they do not dispute the historical understanding of marriage as opposite-sex in nature, and this understanding must inform our consideration of the relevant case law. (See *Hernandez v. Robles*, *supra,* __ N.E.2d at p. __ [2006 WL 1835429] (conc. opn. of Graffeo, J.) ["[T]o ignore the meaning ascribed to the right to marry in these cases and substitute another meaning in its place is to redefine the right in question and to tear the resulting new right away from the very roots that caused the U.S. Supreme Court . . . to recognize marriage as a fundamental right in the first place"].)

Whereas respondents frame the fundamental right at issue generically, as the right to marriage, appellants argue the interest truly at issue here is the more narrow right to same-sex marriage.

In considering which side has the better definition of the right at stake, we heed the guiding principle that substantive due process analysis "must begin with a careful

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[16] To date, the only appellate decision holding that same-sex couples have a constitutionally protected right to marry is the controversial decision of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health* (2003) 440 Mass. 309 [798 N.E.2d 941]. Several trial courts across the country have agreed with the *Goodridge* majority. (E.g., *Deane v. Conaway* (Md.Cir.Ct., Jan. 20, 2006, No. 24-C-04-005390) 2006 WL 148145; *Hernandez v. Robles* (2005) 7 Misc.3d 459 [794 N.Y.S.2d 579], revd. (2005) 26 A.D.3d 98 [805 N.Y.S.2d 354]; *Castle v. State of Washington* (Wn.Super.Ct., Sept. 7, 2004, No. 04-2-00614-4) 2004 WL 1985215, revd. *sub nom. Andersen v. King County* (2006) __ Wn.2d __ [138 P.3d 963]; see also *Baker v. State of Vermont* (1999) 170 Vt. 194 [744 A.2d 864, 867] [holding state is constitutionally required to extend all benefits and protections of marriage to same-sex couples, but allowing the state's legislature to do so through creation of civil unions].) However, many courts at the trial and appellate levels have reached the opposite conclusion. (E.g., *Smelt v. County of Orange*, *supra,* 374 F.Supp.2d at pp. 878-879; *In re Kandu* (Bankr. W.D.Wn. 2004) 315 B.R. 123; *Standhardt v. Superior Court* (2003) 206 Ariz. 276 [77 P.3d 451]; *Lewis v. Harris*, *supra,* 378 N.J. Super. 168 [875 A.2d 259]; *Hernandez v. Robles* (N.Y. 2006) __ N.E.2d __ [2006 WL 1835429]; *Andersen v. Kings County*, *supra,* 138 P.3d 963.)

description of the asserted right." (*Reno v. Flores*, *supra*, 507 U.S. at p. 302; see also *Washington v. Glucksberg* (1997) 521 U.S. 702, 721.) As our Supreme Court has explained, this "careful description" must be "concrete and particularized, rather than abstract and general." (*Dawn D. v. Superior Court*, *supra*, 17 Cal.4th at p. 940.) Judicial restraint in the area of defining fundamental rights is especially important because " '[b]y 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 the members of this Court, [citation].' [Citation.]" (*Id.* at p. 939, quoting *Washington v. Glucksberg*, *supra,* 521 U.S. at p. 720.) Thus, the judicial branch has generally been reluctant to expand the catalog of rights protected as fundamental. (*Washington v. Glucksberg*, *supra,* 521 U.S. at p. 720; *Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 141.)

Considering the importance of judicial restraint in this area, we must agree with appellants that, carefully described, the right at issue in these cases is the right to same-sex marriage, not simply marriage. Just as the United States Supreme Court determined the right before it in *Glucksberg* was the right to assisted suicide, and not a more generic "right to die" or right to control the manner of one's death (*Washington v. Glucksberg*, *supra,* 521 U.S. at pp. 722-723), we must be as precise as possible about the right being asserted by the parties before us. As discussed, the term "marriage" has traditionally been understood to describe only opposite-sex unions. Respondents, who are as free as anyone to enter such opposite-sex marriages, clearly seek something different here.

Although the *Woo* respondents forcefully argue that a fundamental right should not be defined based on the group that is seeking to exercise it,[17] the due process clause

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[17] The *Woo* respondents argue it is just as improper to speak of a right to "gay marriage" as it would be to speak of a right to "women's vote" or to "Negro citizenship." While they have semantic appeal, these comparisons are flawed because gender and race are both recognized as constitutionally suspect classifications. (See, e.g., *City of Richmond v.*

does not require us to blind ourselves to reality. Where the identity of individuals who claim a fundamental right is relevant in defining the precise liberty interest asserted, courts have not ignored such pertinent facts. For example, in *Dawn D. v. Superior Court*, a man who claimed to be the biological father of a child born during the mother's marriage to another man challenged a statutory presumption that favored the mother's husband as the child's natural father. (*Dawn D. v. Superior Court*, *supra*, 17 Cal.4th at pp. 934-935.) Rather than defining the constitutional liberty interest broadly as the claimant's right to have an opportunity to develop a parental relationship with his child (see *id.* at p. 935), our Supreme Court narrowly defined the right, consistent with *Glucksberg*, as the interest of an alleged biological father "in establishing a relationship with his child born to a woman married to another man at the time of the child's conception and birth." (*Dawn D. v. Superior Court*, *supra*, 17 Cal.4th at p. 941.)

Constitutionally protected fundamental rights need not be defined so broadly that they will inevitably be exercised by everyone. For example, although the ability to make personal decisions regarding child rearing and education has been recognized as a fundamental right (see, e.g., *Pierce v. Society of the Sisters* (1925) 268 U.S. 510, 534-535), this right is irrelevant to people who do not have children. Yet, everyone who has children enjoys this fundamental right to control their upbringing. A similar analogy applies in the case of marriage. Everyone has a fundamental right to "marriage," but, because of how this institution has been defined, this means only that everyone has a fundamental right to enter a public union with an opposite-sex partner. That such a right is irrelevant to a lesbian or gay person does not mean the definition of the fundamental right can be expanded by the judicial branch beyond its traditional moorings.

J. A. Croson Co. (1989) 488 U.S. 469, 493-494 [race]; *Mississippi Univ. for Women v. Hogan* (1982) 458 U.S. 718, 723-724 [gender].) In contrast, classifications based on sexual orientation have not been accorded the same degree of searching constitutional scrutiny. (See, e.g., *Holmes v. California Army Nat. Guard* (9th Cir. 1997) 124 F.3d 1126, 1132-1133.)

Furthermore, for purposes of a due process analysis, only rights that are "objectively, 'deeply rooted in this Nation's history and tradition,' [citations] and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed' " are recognized as fundamental. (*Washington v. Glucksberg*, *supra*, 521 U.S. at pp. 720-721; *Dawn D. v. Superior Court*, *supra*, 17 Cal.4th at p. 940; *Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 708.) It is this prong of the analysis that dooms respondents' fundamental rights claim.[18]

Everyone agrees there is no historical tradition of same-sex marriage in this country. Quite the contrary. Until just three years ago, United States Supreme Court precedent permitted states to *criminalize* intimate homosexual conduct. (See *Lawrence v. Texas* (2003) 539 U.S. 558, overruling *Bowers v. Hardwick* (1986) 478 U.S. 186.) Not surprisingly, given *Bowers*'s sanction of such a severe curtailment of the liberty of gays and lesbians, the issue of whether states should or must permit marriage between same-sex partners has only recently come into public debate. Only one state currently allows same-sex couples to enter the institution of marriage itself, i.e., as opposed to alternative legal relationships such as civil unions or domestic partnerships (*Goodridge v. Department of Public Health*, *supra,* 798 N.E.2d 941), and 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. Harris*, *supra,* 378 N.J.Super. at p. 193 [875 A.2d 259] [concluding from "the strongly negative public reactions" to *Goodridge*, and similar decisions from lower courts of other states, that "there is not yet

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[18] The trial court dismissed respondents' description of the asserted right as one to same-sex marriage by asserting, "The point is not to define a right so as to make it inexorably inviolate from governmental intrusion." However, it is not the narrow—and accurate—label "same-sex marriage" that forecloses constitutional protection for this asserted right; rather, it is the requirement that the right in question find support in history. The label in itself is benign, or should be. It is the newness or novelty of this right, narrowly defined, that precludes its recognition as "fundamental."

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 of other types of same-sex relationships"].)

Nevertheless, recognition of the rights and liberties of gays and lesbians is progressing swiftly, and "our laws and traditions in the past half century are of most relevance" in this area. (*Lawrence v. Texas*, *supra*, 539 U.S. at pp. 571-572.) Even the recent history of the last 50 years, however, does not demonstrate the existence of a "deeply rooted" right to or practice of same-sex marriage. While same-sex relationships have undeniably gained greater societal and legal acceptance, the simple fact is that same-sex marriage has never existed before. The novelty of this interest, more than anything else, is what precludes its recognition as a constitutionally protected fundamental right. (See *Smelt v. County of Orange*, *supra,* 374 F.Supp.2d at p. 878 ["A definition of marriage only recognized in Massachusetts and for less than two years cannot be said to be 'deeply rooted in this Nation's history and tradition' of the last half century"]; see also *Coshow v. City of Escondido*, *supra*, 132 Cal.App.4th at p. 709 [noting the "mere novelty" of an asserted fundamental right "is sufficient to create a doubt" whether it is so deeply rooted in our country's traditions and conscience as to be considered fundamental]; Duncan, *Legislative Deference & the Novelty of Same-Sex Marriage* (2005) 16 Stan. L. & Pol'y. Rev. 83, 86 ["To this point, no court has ever held that same-sex marriage is deeply rooted in a state's history and tradition"].)

Respondents argue it is illogical to require that a right long denied by law be supported by a deeply rooted tradition. Of course no such tradition will be found if the people asserting the right have been legally precluded from exercising it. For example, when our Supreme Court struck down California's antimiscegenation laws in *Perez v. Sharp*, *supra,* 32 Cal.2d 711, it did not ask whether there was a "deeply rooted tradition

of interracial marriage." Nor did the United States Supreme Court when it addressed this issue on a national scale. (See *Loving v. Virginia*, *supra*, 388 U.S. 1.)

On the surface, the interracial marriage cases appear to provide compelling support for finding gays and lesbians have a fundamental right to marry their same-sex partners. However, upon closer inspection, the analogy is flawed. The central holdings of *Perez* and *Loving* are that laws prohibiting interracial marriage constitute invidious racial discrimination in violation of the equal protection clause. (*Loving v. Virginia*, *supra*, 388 U.S. at p. 12 ["There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause"]; *Perez v. Sharp*, *supra*, 32 Cal.2d at p. 718 ["By restricting the individual's right to marry on the basis of race alone, [antimiscegenation statutes] violate the equal protection of the laws clause of the United State Constitution"].) These laws were subjected to strict scrutiny because they drew distinctions based solely on the race of potential spouses, and race has long been recognized as a suspect classification. (See *Loving v. Virginia*, *supra*, 388 U.S. at pp. 11-12; *Perez v. Sharp*, *supra*, 32 Cal.2d at pp. 718-719.) To be sure, the cases also held antimiscegenation laws deprived the participants of their fundamental right to marriage, but this holding cannot be divorced from the laws' racially discriminatory context. The laws were doubly evil for equal protection purposes because they denied people a fundamental right (marriage) based upon the most suspect of classifications (race). (See *Loving v. Virginia*, *supra*, 388 U.S. at p. 12 [the Constitution requires "that the freedom of choice to marry not be restricted by invidious racial discriminations"]; *Perez v. Sharp*, *supra*, 32 Cal.2d at p. 715 [laws infringing fundamental right to marry "must be based upon more than prejudice and must be free from oppressive discrimination" to satisfy the Constitution].)

Moreover, although antimiscegenation laws had been around for many years when they were declared invalid (see *Perez v. Sharp*, *supra*, 32 Cal.2d at pp. 746-748 (dis. opn. of Shenk, J.) [tracing history of these laws]), the *Perez* and *Loving* decisions contain no indication that interracial marriages were regarded at the time as so unprecedented that recognizing them would work a fundamental change in the definition of marriage itself.

(See *Smelt v. County of Orange*, *supra*, 374 F.Supp.2d at p. 879 [observing "there is nothing in *Loving* that suggests an extension of the definition of the fundamental right"].)

Because marriage in this state has always been defined, implicitly or explicitly, as the union of opposite-sex individuals, the fundamental right respondents urge us to recognize requires a redefinition of the term "marriage."[19] Courts in this state simply do not have authority to redefine marriage. In California, " 'the Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated. . . .' [Citation.]" (*Lockyer*, *supra*, 33 Cal.4th at p. 1074.) The Legislature's power to regulate marriage is thus exclusive, and subject only to constitutional restrictions. (*Ibid.* [" 'The regulation of marriage and divorce is solely within the province of the Legislature, except as the same may be restricted by the Constitution' "]; *Estate of DePasse*, *supra*, 97 Cal.App.4th at p. 99.) Our role is limited to determining whether the Legislature's definition comports with constitutional standards. Were we to expand the definition of marriage to include same-sex unions, we would overstep our bounds as a coequal branch of government. (See *Dawn D. v. Superior Court*, *supra*, 17 Cal.4th at p. 939 [courts must exercise caution in entertaining substantive due process challenges lest they assume an improper policymaking role]; see also *Hernandez v. Robles*, *supra*, 26 A.D.3d at p. 102 [805 N.Y.S.2d 354] [in "purportedly creat[ing] a new constitutional right" to same-sex marriage, lower court exceeded its constitutional mandate and usurped legislature's function].) "While such a change of a basic element of the institution may eventually find favor with the Legislature"—and perhaps it will sooner rather than later, if the passage of Assembly Bill No. 849 is any indication—"we are not persuaded that the Due Process Clause requires a

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[19] Indeed, the Massachusetts Supreme Judicial Court acknowledged that its decision to extend marriage rights to same-sex couples "[c]ertainly . . . marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries." (*Goodridge v. Department of Public Health*, *supra*, 798 N.E.2d at p. 965.) The court predicted, however, that this new definition would not alter the "fundamental value of marriage in our society." (*Ibid.*)

judicial redefinition of marriage." (*Samuels v. New York State Dept. of Health* (2006) 29 A.D.3d 9 [811 N.Y.S.2d 136, 142]; see also *Goodridge v. Department of Public Health*, *supra,* 798 N.E.2d at p. 978 (dis. opn. of Spina, J.) ["The purpose of substantive due process is to protect existing rights, not to create new rights"].)

We do not presume to hold same-sex marriage will never enjoy the same constitutional protection as is accorded to opposite-sex marriage. "Constitutional concepts are not static" (*People v. Belous* (1969) 71 Cal.2d 954, 967), and Californians' evolving notions of equality may eventually lead to the recognition of a right to same-sex marriage and its ultimate status as a constitutionally guaranteed right. However, these developments are still in their infancy, and the courts may not compel the change respondents seek. "[W]hile same-sex marriage may be the law at a future time, it will be because the people declare it to be, not because . . . members of this court have dictated it." (*Andersen v. King County*, *supra,* 138 P.3d at p. 969.)

B. The Marriage Laws Do Not Discriminate Based on Gender

Respondents also claim California's marriage laws impermissibly discriminate on the basis of gender. "Public policy in California strongly supports eradication of discrimination based on sex." (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 36.) Indeed, gender discrimination is one area in which the California Constitution has been construed to provide *more* protection than the federal Constitution. (See *Sail'er Inn, Inc. v. Kirby*, *supra*, 5 Cal.3d at pp. 17-19; *Connerly v. State Personnel Bd.*, *supra*, 92 Cal.App.4th at pp. 31-32, 39.) Classifications based on gender are therefore considered "suspect" in equal protection analyses under the California Constitution, and laws that discriminate based on sex are subject to strict scrutiny. (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 564; *Sail'er Inn, Inc. v. Kirby*, *supra*, 5 Cal.3d at p. 17.)

The trial court concluded the marriage laws are discriminatory, reasoning: "If a person, male or female, wishes to marry, then he or she may do so as long as the intended spouse is of a different gender. It is the gender of the intended spouse that is the sole determining factor." Obviously, however, the opposite-sex requirement for marriage

applies regardless of the applicant's gender. The laws treat men and women exactly the same, in that neither group is permitted to marry a person of the same gender. We fail to see how a law that merely mentions gender can be labeled "discriminatory" when it does not disadvantage either group. (See *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 559-560 [" '[D]iscriminate' means 'to make distinctions in treatment; show partiality (*in favor of*) or prejudice (*against*)' "]; *Connerly v. State Personnel Bd.*, *supra*, 92 Cal.App.4th at p. 45 ["where the operation of the law does not differ between one individual and another based upon a suspect classification, strict scrutiny is not required even though the law might mention matters such as race or gender"]; cf. *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 490 [rejecting argument that discrimination against homosexuals was effectively "sex discrimination" prohibited by statute because it was discrimination based on the gender of the homosexual's partner].)

All of the leading sex-discrimination decisions from the United States Supreme Court have involved statutes that singled out men or women as a class for unequal treatment. (*Smelt v. County of Orange*, *supra*, 374 F.Supp.2d at pp. 876-877; *Baker v. State of Vermont*, *supra,* 744 A.2d at p. 880, fn. 13; see, e.g., *United States v. Virginia* (1996) 518 U.S. 515, 519-520 [law excluded women from attending Virginia Military Institute]; *Mississippi Univ. for Women v. Hogan*, *supra,* 458 U.S. at p. 719 [policy prevented men from attending state-sponsored nursing school]; *Craig v. Boren* (1976) 429 U.S. 190, 191-192 [law allowed women to purchase low-alcohol beer at an earlier age than men].) The same is true for the California Supreme Court's gender discrimination cases. (See, e.g., *Arp v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 395, 398-399, 407 [invalidating statute that created conclusive presumption of dependency, for establishing entitlement to death benefits, to widows but not widowers]; *Sail'er Inn, Inc. v. Kirby*, *supra*, 5 Cal.3d at pp. 6, 20-22 [invalidating statute that prevented women from working as bartenders unless they were liquor licensees, wives of a licensee, or shareholders in a corporate licensee].)

Despite acknowledging that the marriage laws treat "all men and all women . . . the same," the trial court asserted this equality is beside the point because the laws establish explicit gender-based classifications. Similarly, respondents argue proof of disparate treatment is not required because the laws facially classify by gender. However, we are aware of no controlling authority imposing strict constitutional scrutiny on a law that merely mentions gender, without treating either group differently.[20] Rather than dealing in semantics, a court's primary concern in analyzing gender classifications under the equal protection clause is to ensure *equal treatment* for men and women. (See *Koire v. Metro Car Wash, supra,* 40 Cal.3d at p. 37 ["public policy in California mandates the *equal* treatment of men and women"]; *Michelle W. v. Ronald W.* (1985) 39 Cal.3d 354, 364 [under the equal protection clause, "a sovereign may not subject men and women to disparate treatment"]; cf. *Boren v. Department of Employment Dev.* (1976) 59 Cal.App.3d 250, 257 [more important than a statute's neutral language is whether it has the ultimate effect of creating unequal treatment].) Indeed, unequal treatment is always the touchstone of an equal protection analysis. (See *People v. Wilkinson* (2004) 33 Cal.4th 821, 836 [noting, in the context of a criminal's defendant's equal protection claim, "[i]t is a fundamental principle that, '[t]o succeed on [a] claim under the equal protection clause, [a defendant] first must show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner' "].)

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[20] "[M]ost appellate courts that have addressed the issue have rejected the claim that defining marriage as the union of one man and one woman discriminates on the basis of sex. [Citations.]" (*Baker v. State of Vermont, supra,* 744 A.2d at p. 880, fn. 13; see, e.g., *Baker v. Nelson* (1971) 291 Minn. 310 [191 N.W.2d 185]; *Singer v. Hara, supra,* 522 P.2d 1187; cf. *Hernandez v. Robles, supra,* 26 A.D.3d at p. 105 [805 N.Y.S.2d 354] [plaintiffs conceded New York's marriage laws do not discriminate based on gender].) Although a plurality of the Hawaii Supreme Court concluded this definition was facially discriminatory and triggered strict scrutiny (*Baehr v. Lewin* (1993) 74 Haw. 530 [852 P.2d 44, 59-60, 63-67]), the Hawaii Legislature and voters essentially nullified the court's decision by amending the state's Constitution. (See *Baehr v. Miike* (Haw.Sup.Ct. Dec. 9, 1999, No. 20371) 1999 Haw. Lexis 391.)

Several respondents rely on cases striking antimiscegenation laws as support for their positions. Just as today's marriage laws prohibit men and women equally from entering into same-sex marriages, respondents argue, antimiscegenation laws from the past century prohibited persons of all races equally from marrying outside their race. In the interracial marriage context, the United State Supreme Court "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations . . . ." (*Loving v. Virginia*, *supra*, 388 U.S. at p. 8.) Several years earlier, the California Supreme Court rejected the same argument, stating: "The decisive question, however, is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups. The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals. [Citations.]" (*Perez v. Sharp*, *supra*, 32 Cal.2d at p. 716; see also *Connerly v. State Personnel Bd.*, *supra*, 92 Cal.App.4th at p. 35 [noting rights guaranteed by the equal protection clause are personal rights belonging to the individual].)[21]

The analogy to statutes prohibiting interracial marriage is not entirely apt, however. Close examination of *Perez* and *Loving* reveals that these courts were especially troubled by the challenged laws' reliance on express *racial* classifications. Noting that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination" (*Loving v. Virginia*, *supra*, 388 U.S. at p. 10), the *Loving* court held that *all* laws employing racial classifications must be subjected to strict scrutiny, and it refused to make an exception for laws that appear to affect all races equally. (*Id.* at p. 9 ["the fact of equal application does

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[21] Respondents seize upon the *Connerly* court's statement—made in regard to racial classifications—that a law need not "confer a preference" for strict scrutiny to apply. (*Connerly v. State Personnel Bd.*, *supra*, 92 Cal.App.4th at p. 44.) However, after explaining why racial classifications are immediately suspect, the court clarified that strict scrutiny is not required "merely because [a law] is 'race conscious.' " (*Id.* at p. 45.)

not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race"]; see also *Perez v. Sharp*, *supra*, 32 Cal.2d at p. 719 [regarding California's antimiscegenation statute "with great suspicion" due to its classification based on racial groups].)

Moreover, the Supreme Court looked beyond the apparently neutral classification scheme and determined that the true purpose of Virginia's antimiscegenation law was "to maintain White Supremacy." (*Loving v. Virginia*, *supra*, 388 U.S. at p. 11.) The law punished only marriages "between 'a white person and a colored person,' " but did not prevent intermarriage between non-White persons of different ethnicities. (*Id.* at pp. 4-5; see also *Perez v. Sharp*, *supra*, 32 Cal.2d at p. 721 [California law restricted marriages between "white persons" and members of certain other races but left non-White races free to intermarry].) Thus, the high court concluded the law's superficially neutral classification was in reality a vehicle to perpetuate invidious racial discrimination. (*Loving v. Virginia*, *supra*, 388 U.S. at pp. 11-12.) The analogy to respondents' claim of gender discrimination clearly falters on this point. No evidence indicates California's opposite-sex definition of marriage was intended to discriminate against males or females, and respondents do not argue that the purpose of the definition is to discriminate against either gender. If anything, relevant legislative history and voter materials suggest the intent was to single out same-sex couples for disparate treatment. (See pp. 12-15, *ante*.)

Respondents correctly point out that, during the last century, California has abolished or altered many marriage-related laws because they were based on improper sex-role stereotypes. For example, a husband was once regarded as the owner of all community property in a marriage, and he enjoyed the sole ability to control such marital property. (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 32.) Our state's community property laws did not become completely gender-neutral until reform legislation was passed 1975. (*Id.* at p. 35.) Also illustrative, the Legislature did not make forcible rape of a spouse a crime until 1979. (See *People v. Hillard* (1989) 212

Cal.App.3d 780, 784.) However, this history does not demonstrate that the definition of marriage as male-female can itself be traced to a discriminatory purpose. "It is one thing to show that long-repealed marriage statutes subordinated women to men within the marital relation. It is quite another to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion. That evidence is not before us." (*Baker v. State of Vermont*, *supra*, 744 A.2d at p. 880, fn. 13.)[22]

C. Disparate Impact on Gays and Lesbians Does Not Trigger Strict Scrutiny

Although the trial court did not address this issue, we must consider respondents' claim that the marriage statutes are unconstitutional because they discriminate on the basis of sexual orientation. As noted (*ante*, fn. 9), the Family Code provisions we are considering make no reference to the sexual orientation of potential marriage partners.

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[22] As proof that the marriage definition is gender-discriminatory, the *Woo* respondents point to the Legislature's findings and pronouncements in Assembly Bill No. 205. In this bill, the Legislature declared expanding domestic partnership rights and responsibilities was "intended to help California *move closer* to fulfilling the promises of inalienable rights, liberty, and equality . . . by providing all caring and committed couples, regardless of their *gender* or sexual orientation, the opportunity to obtain essential rights, protections, and benefits and to assume corresponding responsibilities, obligations, and duties . . . ." (Stats. 2003, ch. 421, § 1, subd. (a), italics added.) Assembly Bill No. 205 also recited the Legislature's finding that "[e]xpanding the rights and creating responsibilities of registered domestic partners . . . would *reduce discrimination on the bases of sex* and sexual orientation . . . ." (Stats. 2003, ch. 421, § 1, subd. (b), italics added.) While identifying gender discrimination is undoubtedly within the Legislature's competence (*Catholic Charities of Sacramento, Inc. v. Superior Court*, *supra*, 32 Cal.4th at p. 564), these bare statements do not reflect a studied finding of sex discrimination based on the Legislature's evaluation of evidence. We have found no other mention of gender discrimination in the bill's legislative history, nor have the parties directed us to any legislative analysis of this issue. Moreover, deciding the purely legal question of whether the marriage laws facially discriminate based on gender, in violation of the equal protection clause, is properly the role of the judicial branch, not the Legislature. (See *Lockyer*, *supra*, 33 Cal.4th at p. 1068 ["the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality"].)

California law does not literally prohibit gays and lesbians from marrying; however, it requires those who do to marry someone of the opposite sex. As a practical matter, of course, this requirement renders marriage unavailable to gay and lesbian individuals, whose choice of a life partner will, by definition, be a person of the same sex. Clearly, the statutory definition of marriage as male-female has a disparate impact on gay and lesbian individuals.[23] (See *Personnel Administrator v. Feeney* (1979) 442 U.S. 256, 272-274 [disparate impact of a facially neutral law supports equal protection claim if the impact can be traced to a discriminatory purpose].) As such, the marriage laws implicitly classify along sexual orientation lines. (Cf. *Lockyer, supra,* 33 Cal.4th at pp. 1126, 1128, fn. 2 (conc. & dis. opn. of Kennard, J.) [noting California law restricts marriage to "heterosexual couples"]; *id.* at p. 1135 (conc. & dis. opn. of Werdegar, J.) [contrasting "heterosexual marriages" with same-sex unions that were voided by the majority opinion].)

Moreover, the Legislature's manifest purpose in enacting the 1977 amendments to Family Code, section 300, was to exclude same-sex couples from the institution of marriage. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.) as amended May 23, 1977, p. 1 [stating the purpose of Assembly Bill No. 607 was "to prohibit persons of the same sex from entering lawful marriage"]; see *Lockyer, supra,* 33 Cal.4th at p. 1076, fn. 11 [legislative history demonstrates the bill's purpose was to prohibit same-sex marriage].) Likewise, the exclusionary intent of California voters who passed Proposition 22 could not be more clear. Ballot arguments in favor of the initiative raised the specter of same-sex couples moving to this state and forcing California to recognize marriages they entered elsewhere, even though California law would not have authorized the marriage. (See Ballot Pamp., Primary Elec. (Mar. 7, 2000) argument in favor of Prop. 22, p. 52 ["If [judges in other states] succeed, California may have to

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[23] Indeed, as intervener Equality California notes, the statutory definition does not merely have a "greater impact" on lesbian and gay couples; it excludes 100 percent of them from entering marriage.

recognize new kinds of marriages, even though most people believe marriage should be between a man and a woman"]; *id.*, rebuttal to argument against Prop. 22, p. 53 ["*UNLESS WE PASS PROPOSITION 22, LEGAL LOOPHOLES COULD FORCE CALIFORNIA TO RECOGNIZE 'SAME-SEX MARRIAGES' PERFORMED IN OTHER STATES*"].) The intent of this measure, as with the Legislature's 1977 Family Code amendments, was clearly to prohibit gays and lesbians from marrying their same-sex partners.

However, though we agree with respondents that the marriage statutes implicitly classify based on sexual orientation, we do not agree that this classification requires that the laws be subjected to strict scrutiny. There is no precedent for doing so.

The equal protection clauses of the United States and California Constitutions prohibit arbitrary discrimination against *any* class of individuals, including homosexuals. (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, *supra,* 24 Cal.3d at p. 467; *Citizens for Responsible Behavior v. Superior Court* (1991) 1 Cal.App.4th 1013, 1025.) But, "[w]hile all citizens are entitled to equal protection, the standard of review to be employed in analyzing legislation which singles out a particular group does depend on whether the group is classified as 'suspect,' as well as whether the legislation impinges upon a fundamental right. If a suspect class or fundamental right is involved, the court examines legislation under the 'strict scrutiny' standard; otherwise, a 'rational basis' test is generally employed. [Citation.]" (*Citizens for Responsible Behavior v. Superior Court*, *supra,* 1 Cal.App.4th at p. 1025.) Having concluded respondents are not seeking to exercise a fundamental right, we are therefore called upon to decide whether sexual orientation is a suspect classification for purposes of equal protection analysis. Unfortunately, prior case law does not provide a ready answer.

Lower federal courts have held that sexual orientation does not constitute a suspect or quasi-suspect classification. (E.g., *Holmes v. California Army Natl. Guard*, *supra,* 124 F.3d at p. 1132; *High Tech Gays v. Defense Industrial Security Clearance Office* (9th Cir. 1990) 895 F.2d 563, 571; *Padula v. Webster* (D.C. Cir. 1987) 822 F.2d 97, 102-103.) However, these decisions generally relied on the United States Supreme Court's now-

disfavored decision in *Bowers v. Hardwick*, *supra,* 478 U.S. 186, overruled in *Lawrence v. Texas*, *supra,* 539 U.S. 558. In *Bowers*, the Supreme Court concluded there was no fundamental right, protected by substantive due process, to engage in homosexual sodomy. (*Bowers v. Hardwick*, *supra,* 478 U.S. at pp. 190-192.) The Ninth Circuit Court of Appeals reasoned that this holding foreclosed heightened protection for homosexuals under the equal protection clause: "[B]y the [*Bowers v.*] *Hardwick* majority holding that the Constitution confers no fundamental right upon homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes. [Citations.]" (*High Tech Gays v. Defense Industrial Security Clearance Office*, *supra,* 895 F.2d at p. 571; see also *Padula v. Webster*, *supra,* 822 F.2d at p. 103 ["If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal"].)

In 2003, however, the United State Supreme Court destroyed the foundation of these arguments when it overturned its 17-year-old decision in *Bowers*. Noting that the *Bowers* court had failed to appreciate the liberty interest at stake and had demeaned this interest by framing it only as a right to engage in certain sexual conduct, the Supreme Court held "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent." (*Lawrence v. Texas*, *supra*, 539 U.S. at pp. 566-567, 578.) The court also explained it was reexamining *Bowers* because of the stigma the decision had perpetuated against homosexuals: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. . . . [*Bowers*'s] continuance as precedent demeans the lives of homosexual persons." (*Lawrence v. Texas*, *supra*, 539 U.S. at p. 575.)

Despite this forceful repudiation of *Bowers*, the *Lawrence* court did not apply strict scrutiny to Texas's antisodomy law. (See *Lawrence v. Texas*, *supra*, 539 U.S. at

p. 578 [stating the statute "furthers no legitimate state interest"].) Similarly, Justice O'Connor's concurrence concluded the law was invalid under the "more searching form of rational basis review" the court applies to laws that are designed to harm a politically unpopular group.[24] (*Lawrence v. Texas*, *supra*, 539 U.S. at p. 580 (conc. opn. of O'Connor, J.); see also *Romer v. Evans* (1996) 517 U.S. 620, 632-633 [invalidating under rational basis review a state constitutional amendment that prohibited any legislative, executive or judicial action designed to protect homosexuals].)[25] Moreover, the *Lawrence* majority specifically disclaimed an intention to comment on the constitutionality of laws prohibiting same-sex marriage. (*Lawrence v. Texas, supra,* 539 U.S. at p. 578 [noting the case before it did not involve "whether the government must give formal recognition to any relationship that homosexual persons seek to enter"]; see also *id.* at p. 585 (conc. opn. of O'Connor, J.) [noting invalidation of the antisodomy law "does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review," and suggesting one legitimate state interest for such laws could be "preserving the traditional institution of marriage"]; but see *id.* at pp. 601, 604-605 (dis. opn. of Scalia, J.) [arguing the majority's insufficiently deferential application of rational basis review portends the ultimate invalidation of state laws limiting marriage to opposite-sex couples].)

Lower courts have not seized on *Lawrence* as authority for imposing heightened scrutiny on laws that classify based on sexual orientation. (See, e.g., *In re Kandu*, *supra,*

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[24] Justice Scalia's dissent challenged this "more searching form" of rational basis review as ill defined and unsupported by precedent, arguing the cases Justice O'Connor cited had merely concluded—under a conventional rational basis analysis—"that no conceivable legitimate state interest support[ed] the classification at issue." (*Lawrence v. Texas*, *supra*, 539 U.S. at p. 601 (dis. opn. of Scalia, J.).)

[25] The dissent's suggestion that *Romer* requires invalidation of the marriage laws (dis. opn., *post*, at pp. 49-50) is unconvincing. Quite unlike Colorado's notorious Amendment 2, which stripped gay men and lesbians of many rights and completely crippled their ability to participate in the political process (see *Romer v. Evans*, *supra,* 517 U.S. at pp. 627-631), the Family Code amendments here did not deprive gays and lesbians of any right they previously enjoyed.

315 B.R. at pp. 143-144 [noting that, while *Lawrence* "may indicate a shift in the Supreme Court's treatment of same-sex couples," it did not disturb Ninth Circuit precedent holding homosexuals are not a suspect or quasi-suspect class]; see also *People v. Limon* (2005) 280 Kan. 275 [122 P.3d 22, 29-30] [rejecting argument that *Lawrence* required heightened scrutiny and applying rational basis test to "Romeo and Juliet" statute that reduced penalties only for heterosexual sex with a minor].) Respondents have alerted us to no decision applying strict scrutiny to a classification based on sexual orientation, and the dissent has identified only one appellate opinion suggesting homosexuals belong to a suspect class. (See *Tanner v. Oregon Health Sciences University* (1998) 157 Or.App. 502 [971 P.2d 435, 447] [holding nonmarried homosexual couples are a suspect class under the Oregon Constitution's privileges and immunities clause].)

California courts have not decided whether sexual orientation is a suspect classification under our state Constitution's equal protection clause. In *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, *supra,* 24 Cal.3d at p. 467, the California Supreme Court held state and federal equal protection principles prohibit arbitrary discrimination "against any class of individuals in employment decisions," including gays and lesbians. However, this holding was based on the fundamental nature of the right to work and the arbitrariness of the employment policy at issue. (See *id.* at pp. 467-470.) Although the court observed the homosexual community's struggle for equal rights bears close resemblance to the civil rights struggles of African-Americans, women and other minorities (*id.* at p. 488), its decision "did not establish homosexuality as a suspect class." (*Hinman v. Department of Personnel Admin.* (1985) 167 Cal.App.3d 516, 526, fn. 8.) The question was also left unanswered in *Citizens for Responsible Behavior v. Superior Court*, *supra*, 1 Cal.App.4th at p. 1013. Although the Court of Appeal invalidated a citizens' initiative that sought to repeal antidiscrimination laws pertaining to sexual orientation and HIV infection, it did so under the rational basis test and expressly

declined to decide whether a form of heightened scrutiny should apply. (*Id.* at pp. 1025-1026 & fn. 8.)[26]

For a statutory classification to be considered "suspect" for equal protection purposes, generally three requirements must be met. The defining characteristic must (1) be based upon "an immutable trait"; (2) "bear[] no relation to [a person's] ability to perform or contribute to society"; and (3) be associated with a "stigma of inferiority and second class citizenship," manifested by the group's history of legal and social disabilities. (*Sail'er Inn, Inc. v. Kirby*, *supra*, 5 Cal.3d at pp. 18-19.) While the latter two requirements would seem to be readily satisfied in the case of gays and lesbians, the first is more controversial. (See, e.g., Ludwig, *Protecting Laws Designed to Remedy Anti-Gay Discrimination from Equal Protection Challenges: The Desirability of Rational Basis Scrutiny* (2006) 8 U. Pa. J. Const. L. 513, 552-553 [citing a CBS News/New York Times poll in which respondents were equally divided on the issue of "whether sexuality is a biology-based trait or a choice"]; see also Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 Stan. L.Rev. 503, 563-567 [concluding advocates' reliance on biological immutability arguments may ultimately impede gay and lesbian rights].)[27] In any event, whether sexual orientation is immutable presents a factual question. The trial court did not conduct an evidentiary hearing, and there is no factual record addressing any of the three suspect classification factors.

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[26] In describing equal protection requirements, our colleagues in Division Two of this District once mentioned "race or sexual orientation" as suspect classifications warranting strict scrutiny. (*Children's Hospital & Medical Center v. Bonta, supra,* 97 Cal.App.4th at p. 769.) However, the court cited no authority for the proposition that sexual orientation is a suspect classification, and its statement to this effect was purely dicta, since the case before it involved the "differential treatment of in-state and out-of-state [enterprises]." (*Ibid.*) "Dicta is not authority upon which we can rely. [Citation.]" (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 850.)

[27] Even the meaning of "immutability," and its appropriate place in equal protection analysis, is the subject of debate. (See Marcosson, *Constructive Immutability* (2001) 3 U. Pa. J. Const. L. 646 [discussing academic criticism of the immutability requirement and proposing that the concept of immutability be expanded beyond inherent biological traits to encompass socially constructed aspects of identity].)

Nevertheless, despite the complete absence of evidence on these issues, the dissent is prepared to declare sexual orientation a suspect classification based on assertions made by the authors of law review articles and unrelated federal opinions. (Dis. opn. *post*, at pp. 34-37.) We are not. (Cf. *Dean v. District of Columbia* (D.C. 1995) 653 A.2d 307, 356-357 (conc. & dis. opn. of Ferren, J.) [despite extensive familiarity with relevant articles, a court should not resolve questions about the immutability of sexual orientation "without benefit of a trial record with the right kind of expert testimony, subject to cross-examination"].)

Lacking guidance from our Supreme Court or decisions from our sister Courts of Appeal, and lacking even a finding from the trial court on the issue, we decline to forge new ground in this case by declaring sexual orientation to be a suspect classification for purposes of equal protection analysis. Instead, we will follow the lead of the federal courts and other state courts and review the constitutionality of the marriage laws under the rational basis test. (See, e.g., *Wilson v. Ake* (M.D.Fla. 2005) 354 F.Supp.2d 1298, 1307-1308]; *In re. Kandu*, *supra,* 315 B.R. at pp. 143-144; *Andersen v. King County*, *supra,* 138 P.3d at pp. 973-977, 980-985; *Hernandez v. Robles*, *supra,* 805 N.Y.S.2d at pp. 360-361.)

D. The Marriage Laws Do Not Infringe Other Asserted Constitutional Rights.

Finally, we turn to two additional, somewhat contradictory, arguments respondents have raised—i.e., that the opposite-sex definition of marriage violates their constitutional rights to privacy and to freedom of expression.

1. Right of Privacy/Intimate Association

Unlike the federal Constitution, the California Constitution contains an explicit guarantee of the right of privacy. (Cal. Const., art. **I**, § 1; *American Academy of Pediatrics v. Lungren*, *supra,* 16 Cal.4th at p. 326.)[28] "[N]ot only is the state

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[28] Article I, section 1 of the California Constitution states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending

constitutional right of privacy embodied in explicit constitutional language not present in the federal Constitution, but past California cases establish that, in many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts. [Citations.]" (*American Academy of Pediatrics v. Lungren, supra,* 16 Cal.4th at p. 326.)

The Supreme Court has articulated three requirements necessary to support a constitutional invasion of privacy claim: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40.) The parties have differing views on each of these elements, but they particularly disagree about whether same-sex couples have a legally protected privacy interest that the state is intruding upon by refusing them permission to marry.

"Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." (*Hill v. National Collegiate Athletic Assn., supra,* 7 Cal.4th at p. 35.) Respondents are concerned here with the autonomy form of privacy or, perhaps more precisely stated, the freedom of intimate association. (See *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 624-625 [describing constitutional protection afforded to close family relationships]; see also *Ortiz v. Los Angeles Police Relief Assn., supra,* 98 Cal.App.4th at p. 1302 [identifying intimate and expressive association as the two types of association protected under the constitutional right of free association].) "Courts have 'repeated[ly] acknowledg[ed] . . . a "right of privacy" or "liberty" in matters related to marriage, family, and sex.' (*People v. Belous*[, *supra,*] 71 Cal.2d [at p.] 963;

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life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*." (Italics added.)

accord, *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 275.)" (*Ortiz v. Los Angeles Police Relief Assn.*, *supra,* 98 Cal.App.4th at p. 1303; see also *Griswold v. Connecticut* (1965) 381 U.S. 479, 486 [describing the marital relationship as "a right of privacy older than the Bill of Rights"].) Similarly, the right to marry one's chosen partner is "virtually synonymous" with the right of intimate association. (*Ortiz v. Los Angeles Police Relief Assn.*, *supra,* 98 Cal.App.4th at pp. 1303, 1306.)

Relying on *Lawrence v. Texas*, *supra,* 539 U.S. 558, respondents argue there is now an acknowledged constitutional right to intimate association with persons of the same sex. This is a fair reading of *Lawrence*. But the existence of a protected right of privacy in having intimate relations with a same-sex partner does not mean the right to marry, as it has traditionally been understood, must be expanded to encompass a constitutionally protected privacy interest in same-sex marriage. *Lawrence* addressed the most private of activities between consenting adults and held that states may not criminalize such highly intimate relations based on outdated notions of morality. (*Lawrence v. Texas*, *supra,* 539 U.S. at pp. 567, 571-572, 577-579.) Marriage, however, is much more than a private relationship. To be valid in California, a civil marriage must be licensed and solemnized in some form of ceremony. (Fam. Code, § 306; *Estate of DePasse*, *supra*, 97 Cal.App.4th at pp. 103, 106.) More importantly, marriage is revered as a public institution. (*De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 863-864.) It is valued not just for the private commitment it fosters between the individuals who marry, but also for its public role in organizing fundamental aspects of our society. (See *Maynard v. Hill* (1888) 125 U.S. 190, 213 [describing marriage as " 'not so much the result of private agreement as of public ordination. . . . It is a great public institution, giving character to our whole civil polity' "]; *Elden v. Sheldon*, *supra*, 46 Cal.3d at p. 275 [stating "[t]he policy favoring marriage is 'rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society' "].)

Our dissenting colleague insists that respondents have a constitutionally protected privacy interest in marrying their same-sex partners yet pointedly ignores the reality that

respondents have never enjoyed such a right before. This is not a case in which the state has taken away a person's right to get married (e.g., *Zablocki v. Redhail*, *supra,* 434 U.S. at pp. 381-382; *Turner v. Safley*, *supra,* 482 U.S. at pp. 95-96) or criminalized certain private sexual conduct (*Lawrence v. Texas*, *supra,* 539 U.S. at pp. 567, 571-572); rather, this is a case in which people who have never had a legal right to marry each other argue that the institution unconstitutionally excludes them. Under these circumstances, the dissent's failure to explain precisely how the marriage laws *intrude upon* respondents' right to privacy and intimate association is a glaring omission.

Moreover, all of the California decisions the dissent cites addressing the right to "autonomy privacy" concern *limits* that the Constitution places on the government's ability to interfere into an individual's highly personal decisions or affairs. (See, e.g., *American Academy of Pediatrics v. Lungren*, *supra,* 16 Cal.4th at pp. 332-334 [holding autonomy privacy right protects decision whether to continue or terminate a pregnancy]; *Hill v. National Collegiate Athletic Assn.*, *supra,* 7 Cal.4th at pp. 40-41 [finding an autonomy privacy interest in freedom from observation of urination, "a function recognized by social norms as private"]; *Ortiz v. Los Angeles Police Relief Assn.*, *supra,* 98 Cal.App.4th at pp. 1306-1307, 1312 [concluding termination of employee due to her choice of spouse was an actionable invasion of privacy, but finding it justified by legitimate employer interests]; *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1702 [rejecting argument that employee's harassment and discharge due to his sexual orientation infringed his right to autonomy privacy]; see also *Tom v. City and County of San Francisco* (2004) 120 Cal.App.4th 674, 680 [finding an autonomy privacy interest "in choosing the persons with whom a person will reside, and in excluding others from one's private residence"].) Here, however, the State of California provides benefits for a relationship—civil marriage—and respondents are seeking access to these benefits. The state is not interfering with how respondents conduct personal aspects of their lives; rather, by limiting marriage to opposite-sex couples, it is arguably affording its citizens unequal access to the tangible and intangible benefits marriage provides. This claim is most appropriately analyzed—like other unequal access claims—under equal protection

principles. Furthermore, by contorting these privacy holdings to fit same-sex marriage, the dissent stands the notion of "autonomy privacy" on its head: The right to be let alone from government interference is the polar opposite of insistence that the government acknowledge and regulate a particular relationship, and afford it rights and benefits that have historically been reserved for others.

The Constitution does not protect every conceivable claim for privacy. " '[N]ot every act which has some impact on personal privacy invokes the protections of [our Constitution] . . . . [A] court should not play the trump card of unconstitutionality to protect absolutely every assertion of individual privacy.' [Citation.]" (*Hill v. National Collegiate Athletic Assn.*, *supra,* 7 Cal.4th at p. 37.) Here, respondents have cited no authority showing the right to marry a same-sex partner has ever been recognized as a legally protected privacy interest. We must interpret and apply the right of privacy consistent with the intent of California voters who added this right to our state Constitution. (*Id.* at p. 16.) The Supreme Court has observed that ballot arguments on this subject referred to "the federal constitutional tradition of safeguarding certain intimate and personal decisions from government interference in the form of penal and regulatory laws" but did not "purport to create any unbridled right of personal freedom of action." (*Id.* at p. 36; *Leibert v. Transworld Systems, Inc.*, *supra,* 32 Cal.App.4th at p. 1702.) Because same-sex marriage has not been regarded as a right of any kind under the federal Constitution or state statutes or common law (see *Hill v. National Collegiate Athletic Assn.*, *supra,* 7 Cal.4th at p. 16 [describing legal sources of privacy rights when voters added privacy to the Constitution]), it would be inconsistent with voters' intent to expand our constitutional privacy right to encompass it. Just as the lack of any prior legal recognition of same-sex marriage prevented us from finding it to be a fundamental right, the lack of any precedent for same-sex marriage precludes us from finding it to concern a legally protected privacy interest.

The dissent suggests we have somehow abdicated our responsibility to address respondents' privacy claim. Not so. Respondents' briefing on privacy was often cursory and sometimes completely absent. Much of the parties,' and our, discussion of issues

raised in the dissent proceeds under the rubric of a fundamental rights analysis. The dissent often conflates the fundamental right issue with privacy, following the style of some federal opinions, but nothing obligates the majority to adopt the same approach—especially where the parties have not done so. To the extent a substantial privacy argument has been raised, it has been raised by the dissent.

2. Right of Free Expression

The marriage laws do not interfere with the ability of individuals in this state to enter intimate relationships with persons of their choosing, regardless of gender. The laws do not proscribe any form of intimate conduct between same-sex partners. Nor do they prevent same-sex couples from associating with each other or from publicly expressing their mutual commitment through some form of ceremony. Indeed, California provides formal recognition to same-sex relationships in the Domestic Partner Act. (Fam. Code, § 297 et seq.) What the marriage statutes prohibit, however, is the state's recognition of same-sex relationships as "marriage." Although there are expressive aspects to it, entering a marriage is obviously something much more than a communicative act. If the state has legitimate reasons for limiting marriage to opposite-sex couples, then the unavailability for same-sex couples of this one form of expressing commitment—when all other expressions remain available—does not rise to the level of a constitutional violation.

The dissent argues the state is constitutionally required to change the traditional definition of marriage in order to afford same-sex couples access to this particular form of expression. (Dis. opn. *post*, at p. 8.) Contrary to the dissent's suggestion, the holding in *Turner v. Safley*, *supra*, 482 U.S. at pages 94-95 was not based upon prisoners' First Amendment rights to free expression. We are aware of no constitutional jurisprudence that would require states to make a particular mode of expressive conduct available to all citizens.

IV. The Marriage Laws Withstand Rational Basis Review

Because we have concluded the marriage statutes do not abridge a fundamental right or involve a suspect classification, we review them under the "rational basis" test.

(*Warden v. State Bar*, *supra*, 21 Cal.4th at p. 644; *Hardy v. Stumpf*, *supra*, 21 Cal.3d at p. 8.) As noted, rational basis review is extremely deferential: "It manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government; in so doing it invests legislation involving such differentiated treatment with a presumption of constitutionality and 'requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.' [Citation.]" (*D'Amico v. Board of Medical Examiners*, *supra*, 11 Cal.3d at p. 16.) Under this standard of review, we must uphold the challenged law " '*if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.* [Citations.] Where there are "plausible reasons" for [the classification] "our inquiry is at an end." ' [Citations.]" (*Warden v. State Bar*, *supra*, 21 Cal.4th at p. 644.) Moreover, the state is under no obligation to produce evidence supporting the rationality of a classification. (*Heller v. Doe* (1993) 509 U.S. 312, 320.) " '[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation *unsupported by evidence or empirical data*.' [Citations.]" (*Warden v. State Bar*, *supra*, 21 Cal.4th at p. 650.) So long as the asserted state interest is a reasonably conceivable justification for the law, "rather than [a] 'fictitious purpose[] that *could not have been* within the contemplation of the Legislature' " (*id.* at p. 649), " '[i]t is . . . "constitutionally irrelevant whether [the] reasoning in fact underlay the legislative decision" ' [citation] or whether the 'conceived reason for the challenged distinction actually motivated the legislature.' [Citation.]" (*Id.* at p. 650; see also *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1202; *City and County of San Francisco v. Flying Dutchman Park, Inc.* (2004) 122 Cal.App.4th 74, 83.) As challengers of the marriage laws, respondents bear the burden of demonstrating their constitutional invalidity under the rational basis test. (*D'Amico v. Board of Medical Examiners*, *supra*, 11 Cal.3d at p. 17.)

Under the rational basis test, then, we must decide whether the opposite-sex definition of marriage furthers a legitimate state interest. (*D'Amico v. Board of Medical Examiners*, *supra*, 11 Cal.3d at p. 16.) The dissent misapprehends the rational basis test—and the judicial function—when it criticizes us for undertaking "no serious inquiry"

into the nature of the interests supporting and served by marriage. (Dis. opn. *post*, at p. 23.) The dissent argues that these interests apply equally to same-sex couples, and so advocates that the state extend marriage to them. But the court's role is not to look at interests served by an institution to see if it makes sense to expand the institution. That is policymaking. In reviewing the constitutionality of a statute, a court asks only whether valid state interests are served by limits the state has placed on the activity. Our task is to decide whether the challenged limit is constitutional, not whether state policies would be better served by removing the restriction.

A. State's Interest in Preserving the Traditional Definition of Marriage Is Legitimate

The Attorney General urges us to take a broad view and consider the availability of domestic partnership laws when we assess the constitutionality of laws restricting marriage to opposite-sex couples. He argues the state has a legitimate interest in "maintaining the understanding of marriage that has always existed in California, while declaring that registered domestic partners shall have the same rights, protections and benefits as spouses." Under rational basis review, it is appropriate for us to consider other relevant laws concerning the rights of same-sex couples, such as the Domestic Partner Act. (See *Brown v. Merlo* (1973) 8 Cal.3d 855, 862 [analysis of constitutional validity need not be confined to the four corners of the challenged statute].)

In recent years, the Legislature has worked consistently to expand the legal rights of same-sex domestic partners. (*Bouley v. Long Beach Memorial Medical Center*, *supra*, 127 Cal.App.4th at p. 609.) Through the Domestic Partner Act, California provides one of the most comprehensive systems of rights and benefits for same-sex couples in the country. The Domestic Partner Act gives couples who register as domestic partners substantially "the same rights, protections and benefits" as married spouses, and imposes upon them "the same responsibilities, obligations and duties under law" as are imposed on married couples. (Fam. Code, § 297.5, subd. (a); *Koebke v. Bernardo Heights Country Club*, *supra*, 36 Cal.4th at pp. 837-838.) Indeed, the California Legislature has granted same-sex domestic partners virtually all of the same rights married couples enjoy

to the extent it may do so without running afoul of federal law.[29] Despite the differences focused on by respondents and the dissent, our Supreme Court has concluded that, in the Domestic Partner Act, "the Legislature has granted legal recognition *comparable to marriage* both procedurally and in terms of the substantive rights and obligations granted to and imposed upon the partners, which are supported by policy considerations similar to those that favor marriage. [Citation.]" (*Koebke v. Bernardo Heights Country Club*, *supra*, 36 Cal.4th at p. 845, italics added.) "Additionally, the Legislature has made it abundantly clear that an important goal of the Domestic Partner Act is to create substantial legal equality between domestic partners and spouses." (*Ibid.*)

Ignoring legislative declarations in the Domestic Partner Act, and our high court's interpretation of its purpose, the dissent accuses the Act of "stigmatiz[ing] homosexual unions" and insists the "most powerful message" conveyed by a domestic partnership is the couple's "inferior status." (Dis. opn. *post*, at pp. 45, 44.) We doubt our colleague truly believes that, absent marriage vows, gay and lesbian couples are incapable of creating any meaning for their partnerships beyond oppression and subjugation.[30] In any

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[29] The federal Defense of Marriage Act limits "marriage," for purposes of federal law, to opposite-sex couples. (1 U.S.C. § 7; see *Knight v. Superior Court*, *supra*, 128 Cal.App.4th at p. 20.) This federal law also provides that no state is required to recognize rights accorded by another state to same-sex relationships. (28 U.S.C. § 1738C.) Same-sex couples are thus precluded from receiving federal entitlements or tax benefits in the same manner enjoyed by married spouses. (*Knight v. Superior Court*, *supra*, 128 Cal.App.4th at p. 30.) It is, of course, beyond the ken of the Califomia Legislature to change these federal laws. The Legislature has instead granted domestic partners equal rights and benefits under state law. The main point of difference—i.e., that domestic partners were required to file state income tax forms in the same manner as they filed federal forms (Fam. Code, § 297.5, subd. (g))—was recently eliminated by the Legislature. (See Sen. Bill No. 1827 (2005-2006 Reg. Sess.) as amended June 14, 2006 [signed by Gov. Schwarzenegger on Sept. 30, 2006].)

[30] Indeed, though the dissent assumes all gay and lesbian couples wish to enter a traditional marriage, some of these couples may value, perhaps even prefer, a separate type of union that is not inextricably tied to conservative, heterosexual norms. (See Johnson, *In Praise of Civil Unions* (2002) 30 Capital U. L.Rev. 315, 339-342 [arguing civil unions offer gay and lesbian couples the chance to develop a vibrant altemative

event, however one regards the symbolic value of domestic partnership, the increase in tangible rights and protections the Domestic Partner Act gives to registered couples cannot be denied.

At the same time, in Family Code sections 300 and 308.5, the Legislature has preserved the traditional definition of marriage. Since our Constitution was enacted, "marriage" has referred to the legal union between a man and a woman. (See, e.g., *Murphy v. Ramsey* (1885) 114 U.S. 15, 45 [describing "the union for life of one man and one woman in the holy estate of matrimony" as "the sure foundation of all that is stable and noble in our civilization"].) This traditional definition of marriage is echoed in federal law (1 U.S.C. § 7) and, currently, in the laws of every other state except Massachusetts. (See *Goodridge v. Department of Public Health*, *supra*, 798 N.E.2d at p. 965 [observing court's decision authorizing same-sex marriage "marks a significant change in the definition of marriage as it has been inherited from the common law and understood by many societies for centuries"].)

Certainly, the state has a strong interest in promoting marriage. (See, e.g., *Elden v. Sheldon*, *supra*, 46 Cal.3d at p. 275 [explaining this policy is based on the institutional function marriage serves in defining social roles and responsibilities].) This same interest in supporting stable family relationships is served by the Legislature's expansion of domestic partnership rights. "[T]he Legislature was entitled to conclude that enactment of a statute encouraging same-sex couples to register as domestic partners is beneficial to society in the same way as is encouraging heterosexual couples to marry. It provides an institutional basis for defining their fundamental rights and responsibilities, which is essential to an organized and civilized society and to promote family stability." (*Knight v. Superior Court*, *supra*, 128 Cal.App.4th at p. 29; see also *Bouley v. Long Beach*

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institution that maintains and celebrates their separate identity, "to obtain all the rights and responsibilities of marriage without being totally swallowed up in the straight community"]; see also Eskridge, Equality Practice: Civil Unions and the Future of Gay Rights (2002) pp. 206-213 [discussing arguments against same-sex marriage advanced by some progressive theorists within the gay and lesbian community].)

Memorial Medical Center, *supra*, 127 Cal.App.4th at p. 611 [identifying a "significant public interest," comparable to the interest supporting marriage, in "promoting stable families and individual rights and responsibilities through the extension of rights to domestic partners"].) The state policy favoring domestic partnerships is thus similar to, and intertwined with, the policy favoring marriage. (See *Koebke v. Bernardo Heights Country Club*, *supra*, 36 Cal.4th at pp. 845-847 [noting the policies both seek to promote and protect families].) If the Domestic Partner Act does not go far enough in serving this policy, the Legislature can amend the law, but it is not for the court to implement this change.

Under the highly deferential standard of review that applies, we believe it is rational for the Legislature to preserve the opposite-sex definition of marriage, which has existed throughout history and which continues to represent the common understanding of marriage in most other countries and states of our union, while at the same time providing equal rights and benefits to same-sex partners through a comprehensive domestic partnership system. The state may legitimately support these parallel institutions while also acknowledging their differences.

Some respondents dismiss the state's interest in preserving the definition of marriage as the mere perpetuation of historical discrimination. "Certainly the fact alone that the discrimination has been sanctioned by the state for many years does not supply [a compelling] justification" for sustaining such discrimination. (*Perez v. Sharp*, *supra*, 32 Cal.2d at p. 727.) But this argument presupposes the existence of discrimination. Viewed in its entirety, California's system of marital and domestic partnership rights is not discriminatory. (See *Brown v. Merlo*, *supra*, 8 Cal.3d at p. 862 [proper to consider other relevant laws].) The state provides equal rights and benefits to same-sex couples to the extent possible given conflicting federal law.[31] Moreover, we have concluded the

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[31] The refusal of the federal government and many other states to extend such rights and benefits to same-sex couples does not defeat the rationality of California's dual system of marriage and domestic partnership. No matter whether California calls a solemnized same-sex union "marriage" or "domestic partnership," at present other jurisdictions will

marriage laws do not trigger strict scrutiny because they do not deprive individuals of a fundamental right and do not discriminate against a suspect class. Because the *Perez* court reached an opposite conclusion with respect to laws banning interracial marriage, it rejected the "history" justification for these laws in the context of applying strict scrutiny. (*Perez v. Sharp*, *supra*, 32 Cal.2d at pp. 719, 727.) Under rational basis review, we must view the Legislature's dual system of domestic partnership and marriage rights with much more deference. (See *Heller v. Doe*, *supra,* 509 U.S. at p. 319 ["rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices' "].)

The trial court minimized the state's interest in providing rights to same-sex couples through a parallel domestic partnership scheme, arguing the provision of "marriage-like rights without marriage . . . smacks of a concept long rejected by the courts: separate but equal." Likewise, the dissent maligns our reliance on the Domestic Partner Act as a return to the discredited reasoning of *Plessy v. Ferguson* (1896) 163 U.S. 537. (Dis. opn. *post*, at pp. 43-46.) In *Brown v. Board of Education* (1954) 347 U.S. 483, 493-495, the Supreme Court rejected *Plessy's* central justification for the Jim Crow laws, holding racially segregated public schools deprived minority children of equal protection even though the facilities provided were tangibly equal in all respects. Moreover, even before *Brown* was decided, our Supreme Court observed that the "separate but equal" jurisprudence justifying provision of racially segregated facilities was "clearly inapplicable to the right of an individual to marry." (*Perez v. Sharp*, *supra*, 32 Cal.2d at p. 717.)

Once again, however, the facile comparison of California's marriage statutes to racial segregation is inappropriate. Analogizing the Domestic Partner Act to a "separate

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treat this union differently than it will an opposite-sex marriage. One Massachusetts Supreme Court Justice—a dissenter in *Goodridge*—has posited that such substantive differences provide, in themselves, a rational basis for calling the license issued to same-sex couples by a different name. (*Opinions of the Justices to the Senate* (2004) 440 Mass. 1201 [802 N.E.2d 565, 574-578] (opn. of Sosman, J.).)

but equal" facility assumes the existence of a constitutionally suspect classification. *Brown* and *Perez* addressed laws and policies designed to perpetuate racial segregation, and the courts reviewed these laws and policies with great suspicion. (Cf. *Loving v. Virginia*, *supra*, 388 U.S. at p. 11 [racial classifications are "subjected to the 'most rigid scrutiny' " in equal protection analysis].) Quite the opposite of the Jim Crow laws, the Domestic Partner Act was enacted not to perpetuate discrimination but to *remedy* it. Unlike the racial segregation regime ratified in *Plessy*, the Domestic Partner Act did not strip rights away from members of the minority group; rather, the Domestic Partner Act granted same-sex couples a panoply of rights and protections they had never previously enjoyed. (See Eskridge, Equality Practice: Civil Unions and the Future of Gay Rights, *supra*, pp. 139-145 [disputing the analogy of civil unions to racial apartheid and arguing civil unions are more like *Brown* than *Plessy* because they advance gay rights and promote liberal principles such as respect and tolerance].) Indeed, because registered domestic partners enjoy nearly all the same rights and responsibilities as married couples, to the extent California has the power to provide them, the quarrel here is largely symbolic, albeit highly significant. Respondents and the dissent stress the importance of this symbol. (Dis. opn. *post*, at pp. 43-46.) Of course, we agree marriage has extraordinary symbolic significance. This is all the more reason why a court should not impose drastic changes on the institution in the absence of a clear constitutional violation. Notwithstanding any "separate but equal" rhetoric, the substantial equality afforded to same-sex relationships by the Domestic Partner Act stands in stark contrast to the gross inequality that was imposed on racial minorities under *Plessy*.

We are not dealing with a suspect classification such as race. Therefore, under the correct legal standard (rational basis review), we must uphold the opposite-sex requirement for marriage if it is supported by *any* plausible reason. (*Warden v. State Bar*, *supra*, 21 Cal.4th at p. 644.) Unlike strict scrutiny, it is permissible under rational basis review for the Legislature to apply a piecemeal approach to providing rights or attacking social ills. (*Warden v. State Bar*, *supra*, 21 Cal.4th at p. 649; cf. *McLaughlin v. Florida* (1964) 379 U.S. 184, 289-290 [holding "legislative discretion to employ [a] piecemeal

approach stops short" of justifying racial classifications].)[32] In the context of rational basis review, " '[c]ountless constitutional precedents establish . . . that the equal protection clause does not prohibit [the state] from implementing a reform measure "one step at a time" [citation] . . . .' [Citation.]" (*Warden v. State Bar*, *supra*, 21 Cal.4th at p. 649.)

The trial court suggested the Legislature's provision of domestic partnership rights for same-sex couples is irrelevant, stating: "The issue is not whether such a system is 'irrational.' . . . The issue under the rational basis test in this case is whether there is a legitimate governmental purpose for denying same-sex couples the last step in the equation: the right to marriage itself." With all due respect, what the trial court described is not a rational basis analysis. Rational basis review starts with a presumption that distinctions drawn in a statute are constitutional. (*Heller v. Doe*, *supra*, 509 U.S. at p. 320; *Warden v. State Bar*, *supra*, 21 Cal.4th at p. 641; see also *Legislature v. Eu* (1991) 54 Cal.3d 492, 501 [measures passed by initiative are presumed valid and "must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears"].) While we must probe the relationship between the statutory distinction and the asserted state interest (*People v. Hofsheier*, *supra*, 37 Cal.4th at pp. 1201, 1203; *Young v. Haines* (1986) 41 Cal.3d 883, 900), rational basis review does not permit us to assume that a group is being "den[ied]" a "right" and demand justification for the group's inferior treatment. If "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not," a statutory classification benefiting the first group is not discriminatory under rational basis review. (*Johnson v. Robison* (1974) 415 U.S. 361, 383 [rational basis supported classification providing educational benefit to veterans but not conscientious objectors]; see also *Romer v. Evans*, *supra*, 517 U.S. at

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[32] Indeed, noted scholar and gay-rights advocate William N. Eskridge, Jr. has argued that the creation of civil unions is a valid and useful incremental step for states to take along the path toward social and political acceptance of same-sex relationships and, ultimately, same-sex marriage. (Eskridge, Equality Practice: Civil Unions and the Future of Gay Rights, *supra*, pp. 153-158.)

p. 632 [under rational basis review, "a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous"].)

Here, the opposite-sex requirement in the marriage statutes is rationally related to the state's interest in preserving the institution of marriage in its historical opposite-sex form, while also providing comparable rights to same-sex couples through domestic partnership laws. The same-sex requirement for couples under age 62 who register as domestic partners (Fam. Code, § 297, subd. (b)(5)) could be likewise justified by the state's interest in providing rights to committed couples through this dual system. Contrary to the trial court's assertion, the question for purposes of rational basis review is indeed whether this system is irrational. We conclude it is not. (See *Lawrence v. Texas*, *supra*, 539 U.S. at p. 585 (conc. opn. of O'Connor, J.) [stating in dicta that "preserving the traditional institution of marriage" is a legitimate state interest].)

Setting aside charges of discrimination, respondents also dispute the legitimacy of the state's interest in preserving tradition. The City labels this a " 'status quo' justification" and asserts, "Nothing could be more arbitrary than to uphold a law simply because it is the law and always has been." Marriage is more than a "law," of course; it is a social institution of profound significance to the citizens of this state, many of whom have expressed strong resistance to the idea of changing its historically opposite-sex nature.[33] We cannot say the state's interest in continuing this institution in the form it has

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[33] There are obvious biological reasons why marriage developed through history as an opposite-sex institution. As CCF and the Fund and several amici curiae have stressed, only heterosexual unions have the potential of producing unintended offspring. Marriage, with all the social and legal benefits it confers, apparently developed as an incentive to encourage heterosexual couples to raise their children together, in a reasonably stable and structured environment. (See, e.g., *Baker v. Nelson*, *supra*, 291 Minn. at pp. 312-313 [191 N.W.2d 185]; Crain, *"Where Have All the Cowboys Gone?" Marriage and Breadwinning in Postindustrial Society* (1999) 60 Ohio State L.J. 1877, 1889-1890.) Although some appellants and amici curiae argue this "responsible procreation" incentive justifies the state's continued definition of marriage as opposite-sex, we do not analyze the legitimacy of this asserted state interest because the Attorney

always taken, and continues to take across the country, is so unreasonable that the marriage laws must be stricken under rational basis review. Given that the state affords same-sex couples "legal recognition comparable to marriage" (*Koebke v. Bernardo Heights Country Club*, *supra*, 36 Cal.4th at p. 845) through the domestic partnership laws, the state's reliance on the history and tradition of opposite-sex marriage, and the common understanding of most citizens, does not appear to be a smokescreen hiding a discriminatory intent.

B. State's Interest in Carrying Out the Will of Its Citizens Is Legitimate

In addition to tradition, the Attorney General argues the marriage laws are justified by a related state interest in carrying out the expressed wishes of a majority of Californians. In 2000, voters in this state passed Proposition 22, enacting a law that provides only a marriage between a man and a woman is valid or recognized in California. (Fam. Code, § 308.5.) Regardless of whether this initiative should be interpreted to pertain to all marriages or only those entered outside California (see *ante*, at pp. 14-16), the citizens who voted for Proposition 22 unquestionably expressed a desire to limit recognition of same-sex partnerships *as marriage* in this state. Meanwhile, the citizens' elected representatives in the Legislature have found that the public policy of this state supports providing equal rights and opportunities for gay and lesbian families. (See Stats. 2003, ch. 421, § 1, subd. (b) [finding that expanding the rights and

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General has expressly disavowed it. Many same-sex couples in California are raising children, and our state's public policy supports providing equal rights and protections to such families. (See *Koebke v. Bernardo Heights Country Club*, *supra*, 36 Cal.4th at pp. 845-847; *Bouley v. Long Beach Memorial Medical Center*, *supra*, 127 Cal.App.4th at p. 611.) Indeed, the Attorney General takes the position that arguments suggesting families headed by opposite-sex parents are somehow better for children, or more deserving of state recognition, are contrary to California policy. (Cf. *Sharon S. v. Superior Court*, *supra,* 31 Cal.4th at pp. 438-439 [decision authorizing second-parent adoptions by same-sex partners "encourages and strengthens family bonds"].) However, this does not mean the historical understanding of marriage as an opposite-sex union is irrational. On the contrary, this understanding is consistent with the biological reality that, before the development of reproductive technologies, only heterosexual couples were capable of procreating.