responsibilities of registered domestic partners furthers California's interest in promoting and protecting stable family relationships]; see also *Koebke v. Bernardo Heights Country Club*, *supra*, 36 Cal.4th at p. 847 [public policy favoring domestic partnerships, like policy favoring marriage, "seeks to promote and protect families as well as reduce discrimination based on gender and sexual orientation"].) Thus, the Legislature has enacted sweeping domestic partnership laws to provide substantially the same rights as marriage to committed same-sex couples. By maintaining the traditional definition of marriage while simultaneously granting legal recognition and expanded rights to same-sex relationships, the Legislature has struck a careful balance to satisfy the diverse needs and desires of Californians.

Of course, the mere fact that a majority wishes it so cannot save an otherwise unconstitutional law. Majoritarian whims or prejudices will never be sufficient to sustain a law that deprives individuals of a fundamental right or discriminates against a suspect class. (See *Bixby v. Pierno* (1971) 4 Cal.3d 130, 141 [it is a solemn duty of the courts "to preserve constitutional rights, whether of individual or minority, from obliteration by the majority"].) But, in reviewing a challenged law under the rational basis test, we must give due deference to the Legislature's considered judgment. (See *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180; *Schettler v. County of Santa Clara* (1977) 74 Cal.App.3d 990, 999 ["where, as here, the findings of the Legislature have a reasonable basis, the question of what constitutes a legitimate public purpose or public policy is largely one for the Legislature which may not be second-guessed, much less disturbed by the reviewing court"].) It is the proper role of the Legislature, not the court, to fashion laws that serve competing public policies. "The legislative process involves setting priorities, making difficult decisions, making imperfect decisions and approaching problems incrementally, and rational basis analysis does not require that a legislature take

the ideal or best approach [citations]." (*Hernandez v. Robles*, *supra*, 26 A.D.3d at p. 106 [805 N.Y.S.2d 354].)[34]

Like Justice Sosman in Massachusetts, we "fully appreciate the strength of the temptation to find [the marriage laws] unconstitutional." (*Goodridge v. Department of Public Health*, *supra*, 798 N.E.2d at p. 982 (dis. opn. of Sosman, J.).) Gay and lesbian couples can—and do—form committed, lasting relationships that compare favorably with any traditional marriage. Many same-sex couples have also devoted themselves to raising children, and these families are equally worthy of protection. (See *Sharon S. v. Superior Court*, *supra*, 31 Cal.4th at pp. 437-440.) But, absent infringement of a constitutional right, it is not for us to say the state must allow these couples to marry.

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. We may not strike down a law simply because we think it unwise or because we believe there is a fairer way of dealing with the problem. (*Fein v. Permanente Medical* Group (1985) 38 Cal.3d 137, 163; see also *California Federation of Teachers v. Oxnard Elementary Sch.* (1969) 272 Cal.App.2d 514, 535 ["It is not the duty of the courts to evaluate the wisdom of specific legislation"].) Respect for the considered judgment of the Legislature and the voters 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. "It is not the judiciary's function to reorder competing societal interests which have already been ordered by the Legislature. [Citation.]" (*University of Southern California v. Superior Court* (1996) 45 Cal.App.4th 1283, 1289; cf. *Goodridge v. Department of*

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[34] "[W]hen the Court seeks to situate itself at the vanguard of cultural change, it can interrupt the process by which society arrives at a consensus on its own: ordinary democratic politics and the cultural redefinition that invariably occurs over time. Constitutionalizing a matter, and thereby removing it from democratic politics, also can serve to radicalize opponents." (Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires* (2006) 90 Minn. L.Rev. 915, 928.)

Public Health, *supra,* 798 N.E.2d at p. 982 (dis. opn. of Sosman, J.) [great controversy and publicity surrounding same-sex marriage issue "make it all the more imperative that we adhere precisely and scrupulously to the established guideposts of our constitutional jurisprudence," including the extreme deference accorded to legislative justifications under the rational basis test].)[35]

The trial court's decision, although purporting to apply rational basis review, essentially redefined marriage to encompass unions that have never before been considered as such in this state. Laudable as the trial court's intentions may have been, it is beyond the judiciary's realm of authority to redefine a statute or to confer a new right where none previously existed. "While courts have the authority to recognize rights supported by the Constitution, the creation of new and unique rights is more properly reserved for the people through the legislative process." (*In re Kandu*, *supra*, 315 B.R. at p. 145.) In the final analysis, the court is not in the business of defining marriage. The Legislature has control of the subject of marriage, subject only to initiatives passed by the voters and constitutional restrictions. (*Lockyer*, *supra*, 33 Cal.4th at p. 1074; *Estate of DePasse*, *supra,* 97 Cal.App.4th at p. 99.) If marriage is to be extended to same-sex couples, this change must come from the people—either directly, through a voter initiative, or through their elected representatives in the Legislature.[36]

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[35] Lest there be any speculation that the Legislature is powerless to address this issue, because Governor Schwarzenegger vetoed its one attempt to do so in Assembly Bill No. 849, one should not oversimplify what the Governor's veto message actually said. In exercising his veto power, the Governor expressed doubts about the Legislature's ability to amend Fam. Code, section 308.5 without submitting the matter to voters, because section 308.5 was enacted by initiative, and appropriately urged restraint while constitutional issues concerning same-sex marriage were determined by the courts. As his press release explained, the proposed legislation risked adding confusion to the issues on appeal and, depending on the appeal's outcome, could have proven unnecessary. (Governor's veto message to Assem. on Assem. Bill No. 849 (Sept. 29, 2005) Recess J. No. 4 (2005-206 Reg. Sess.) pp. 3737-3738.)

[36] As the City notes, when the Legislature most recently spoke to this issue, it expressed a desire to extend marriage to same-sex couples. (Assem. Bill No. 849 (2005-2006 Reg. Sess.) as amended June 28, 2005.) Assembly Bill No. 849 was not ultimately enacted

Having concluded the interests articulated by the state are legitimate and are advanced by the statutory limitation of marriage to opposite-sex couples, we need not consider the legitimacy of additional interests posited by other appellants and amici curiae.

DISPOSITION

For the reasons discussed herein, the judgments in *CCSF*, *Woo*, *Tyler* and *Clinton* are reversed. The judgments against CCF and the Fund in *Thomasson* (denoted *Campaign for California Families v. Newsom* on appeal) and *Proposition 22* are affirmed on the ground that the cases do not present justiciable controversies. All parties shall bear their own costs on appeal.

McGuiness, P. J.

I concur:

Parrilli, J.

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into law, however. Although the Governor did not openly disagree with the bill's intentions, neither did his veto message endorse the idea of extending civil marriage rights to gay and lesbian couples. (See 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; cf. *Johnson v. Calvert* (1993) 5 Cal.4th 84, 95 [reservations expressed in Governor's veto prevented court from concluding bill was consistent with public policy].) No party has suggested our constitutional analysis must begin and end with the legislative statements in Assembly Bill No. 849, and it is just as well, since rational basis review obliges us to consider all reasonably conceivable state interests justifying the challenged law. (*Warden v. State Bar*, *supra*, 21 Cal.4th at p. 644.) Given that the marriage laws in this state originate with both the Legislature and the voters, we cannot say Assembly Bill No. 849 reflects the final or complete word on the state's public policy with respect to marriage.

PARRILLI, J. concurring.

With complete respect to my colleagues, I join in the opinion of Justice McGuiness and write separately only to address what are more philosophical questions presented by the challenging legal issues before us.

In my view, this case is about two things: *Who* gets to define what marriage is, and an uncomfortable intersection of law, culture, and religion. The court must confine itself to the former question; it is not in a position to resolve the latter issue, though it must be conscious of the dynamic.

I also write separately to identify a major difficulty with all attempts at reasoned dialogue about this subject. There is a legitimate and meaningful disagreement in this country, and in many places around the world today, about what marriage is and should be.[1] Over the last 30 years we have seen a gradual reconfiguration of family; emerging models of family exist alongside traditional models. We have also witnessed an expansion of personal freedom to express who one really is that is desirable if each person is to become who he or she *was created* to be. The roots of the disagreement over what marriage should be necessarily intertwine cultural, societal, and religious ideas. There is a great tendency, out of zeal to eliminate genuine inequities, to be swayed emotionally and to overreach in applying legal principles. My colleague has done so in his dissent. Justice Kline writes passionately of the "profound nature of the liberty interest" at stake (dis. opn., *post* at p. 47) and of "autonomy privacy," (dis. opn., *post* at pp. 9, 22) but does not cite a single case where the asserted liberty or privacy interest has been identified as he would have us recognize. Most of the cases he relies upon are cases

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[1] The Netherlands, Belgium, Canada and Spain have enacted legislation allowing same-sex couples to marry. Denmark, Norway, Sweden, Iceland, France, Germany, Finland, Luxembourg, and Britain allow same-sex registered partnerships or civil unions. (Eskridge & Spedale, Gay Marriage: For Better or for Worse? What We've Learned from the Evidence, pp. 43-87. (Oxford U. Press, USA 2006), pp. 43-87.) The rights available vary from country to country.

where the rights at issue have been discussed in the context of marriage as it has been understood historically, or in situations that criminalize acts of sexual intimacy. In the end the dissent advocates, from cases that do not lead inexorably to such a result, the existence of a fundamental right to participate in an institution that as *historically defined* excludes such individuals. And to suggest the majority's description and discussion of the California Domestic Partner Rights and Responsibilities Act of 2003 (DPA) (Family Code § 297 et seq.) is like the " 'separate but equal' institution analysis" used in earlier United State Supreme Court cases (dis. opn., *post*, at p. 45) reflects but one example of the way passion can obscure understanding.

The DPA represents a legitimate effort by the Legislature to afford same-sex couples *many* of the rights and responsibilities currently attached to marriage, but is distinct from marriage. (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14.) The DPA seems to recognize that at this stage, we do not know whether the state must name and privilege same-sex unions in exactly the same way traditional marriages are supported. The nuance at this moment in history is that the institution (marriage) and emerging institution (same-sex partnerships)[2] are distinct and, we *hope*, equal. We hope they are equal because of the great consequences attached to each. Childrearing and passing on culture and traditions are potential consequences of each. To the degree that any committed relationship provides love and security, encourages fidelity, and creates a supportive environment for children it is entitled to respect. Whether it must be called the same, or supported by the state as equal to the traditional model, only time and patient attention to the models at issue will tell. And whether it applies in every marriage or not, marriage has historically stood for the principle that men and women who *may,* without

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[2] One of the reasons the later institution seems so inadequate is the nomenclature, in my view. "Domestic partnership" connotes neither the achievement nor dignity of "marriage." Even "civil union" sounds more permanent and dignified. Though both terms describe commitment to a partner, "civil union" would denote a state-recognized unity of persons and purpose. Under specified circumstances, however, the DPA affords rights to opposite-sex couples that do not seek a "union" of this sort.

planning or intending to do so, give life to a child should raise that child in a bonded, cooperative, and enduring relationship. Obviously, that ideal is far from universally achieved. But to define marriage, as the Family Code does, in a way which recognizes that function of the institution is hardly irrational. Nor is it irrational to admit that *wherever* children are being raised, their adult providers are performing a public service the community would otherwise have to undertake. The DPA seeks to recognize and protect these partnerships, in no small part, for the sake of the children involved. (See Historical and Statutory Notes, 29C West's Ann. Fam. Code (2004 ed.) foll. § 297, p. 142 [legislative intent].)

The forms marriages can take have changed over the centuries, and will continue to change if history is a reliable teacher. It seems rational that allowing more people to participate in the institution of marriage would only strengthen that institution, not diminish it. Loving covenant relationships encourage stability and mirror the Divine-human relationship of some religious traditions. Seemingly, it would be wise to encourage such formal commitment, especially where children and families are involved.

It is the legitimate business of the Legislature to attempt to close the distance between the parallel institutions (marriage and same-sex committed domestic partnerships) as they develop, and to address such concerns. The "public square" and the Legislature are the appropriate places within a democracy for the debate to fully develop and the evidence to be collected. When and if the Legislature, or the People through the initiative process, provide civil marriage to same-sex couples, we will be called upon to decide legal questions that emerge. Even though equity may favor recognizing such unions equally, it does not follow that courts are free to redefine how marriage has been historically understood under the guise of discovering a fundamental right to marry a person of the same sex. We would essentially have to conclude, as the dissent implies, that an undetected right to marry a member of the same sex has *always* existed under our

state constitution. There is nothing in law or logic that compels such a conclusion.[3] Of course, the arguments for and against the ascertainment of a "fundamental right" become circular when we start from a definition of marriage that presupposes and requires members of the opposite sex and moves inexorably to excluding same-sex couples from participating by definition. Yet, a common understanding and meaning of the word "marriage," or the term "to marry," *is* required before the word, and the institution, can be discussed intelligently. Or we must admit *we* are redefining the historical understanding to accommodate this discussion and the cultural developments that precipitated it. Words do matter and there is much in favor of using terms that differentiate to describe biologically different models.

A danger revealed through this debate is that the state has necessarily involved itself in a venture that combines civic process with religious symbolism. (Dis. opn., *post* at pp. 24-27.) When referring to a civil marriage, we speak of the "sacred" institution, the "spiritual meaning" and the "reverence" accorded to married status, yet avow that the state must remain separated from furthering any particular religious ideation and tradition, and that the institution we deal with is civil in nature. The often unspoken, but

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[3] The individuals in *Perez v. Sharp* (1948) 32 Cal.2d 711 and *Loving v. Virginia* (1967) 388 U.S. 1, were not excluded from the institution of marriage; the legal issue in these cases did not concern the *definition of marriage*. Rather they focused on what restrictions the state could legitimately impose based on the racial characteristics of the man and woman applying for a license. Had the cases involved same-sex couples of different races, one can imagine the opinions would have read very differently. This illustrates the problem with using *Perez* and *Loving* as authority for the proposition that there is a fundamental right to marry a person of the same sex. The ability of same-sex couples to benefit from the "incidents of marriage" (dis. opn., *post*, at p. 16) or to enjoy the full capacity for human love and lasting commitment is not at issue. They are as capable as opposite-sex couples of doing so. Because Justice Kline recognizes they are similarly capable, he concludes same-sex couples must be given the right to marry. However, even if they are identically qualified to enjoy the benefits and attributes of marriage, it does not follow that the current statutory distinctions between the parallel institutions violate the Constitution. My dissenting colleague reads the existing case law imaginatively, but no amount of imagination entitles us to rely upon cases as authority for issues not addressed.

underlying, assumption about the current definition of marriage is that it comes from religious tradition. (Dis. opn., *post*, at p. 25.) Similarly, the opposition to same-sex partnerships comes from biblical language and religious doctrine.[4] This reality is nothing to avoid, and we must acknowledge it if we are to proceed honestly. Humanity did not simply arrive at a definition of marriage devoid of religious concepts informing and shaping that definition, or indeed, us as a people. If we conclude ultimately that marriage is an institution which cannot be separated from its religious history, we must examine whether in an increasingly pluralistic and secular society it can endure as a *civic* institution.[5] (Miller, *Letting Go of a National Religion: Why the State Should Relinquish All Control Over Marriage* (2005) 38 Loy. L.A. L. Rev. 2185.) But it seems to me we cannot have it both ways. We say the state must not promote a particular religious viewpoint or establish religion, and then we watch it simultaneously enmesh itself with religious tradition, terminology, and teaching. As the dissent observes, the amici curiae briefs in this case report that some religious denominations that wish to solemnize marriages for same-sex couples are prevented from doing so by the current law; however, other amici curiae argue on behalf of religious denominations against same-sex

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[4] Such arguments were presented to this court, for example, in the amicus curiae brief filed by the Church of Jesus Christ of Latter-Day Saints, California Catholic Conference, National Association of Evangelicals, and Union of Orthodox Jewish Congregations. Historically, passages from sacred scripture were also used to justify support of slavery and to assert the superiority of men over women. (Rogers, Jesus, The Bible and Homosexuality: Explode the Myths, Heal the Church. (Westminster John Knox Press, 2006) pp. 17-51.)

[5] In what is undoubtedly an oversimplification, one religious leader has written: "Let people be wed in the private realm with no official legal sanction. Then, religious communities that oppose gay marriage will not sanction them, and those like mine that sanction the practice will conduct it. Rather than issuing marriage certificates or divorces, the state would simply enforce civil unions as contracts between consenting adults and enforce laws imposing obligations on people who bring children into the world." (Lerner, *The Only Winning Way to Fight the Ban on Gay Marriage*, Baltimore Chronicle & Sentinel, June 6, 2006 <http://baltimorechronicle.com/2006/060606Lerner.shtml> [as of Oct. 5, 2006].)

marriages.[6] The parties to this litigation have not presented those issues directly, but to the degree the issue has been articulated it presents legitimate concern and reflects yet another matter better suited to legislative consideration and public debate.

We are now in the midst of a definitional process that will affect how the citizens of California go forward in the 21st century. The struggles gay men and lesbians have faced to become who they *are* individually is not to be understated. And though this record does not contain findings of fact nor evidence sufficient to support a conclusion one way or the other, if 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. Having endured the often long and difficult process of claiming their true identities, gay men and lesbians are now asking to be recognized as the equally loving and committed partners and capable family units they are, and to be afforded the same responsibilities and protections available to other families. 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. Although we are being called upon to work together toward a mutual goal of liberty and justice, we must be careful about where the achievement comes from. If respect for the rule of law is to be maintained, courts must accept and abide by their limited powers. The Constitution is not some kind of "origami project"[7] to be twisted and reconfigured to accomplish ends better left to the democratic process. To those who are waiting for the rewards and responsibilities of marriage, this process will seem too slow; to those who feel the challenge to their "sacred" civic

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[6] The first argument was raised in the amicus curiae brief filed by the General Synod of the United Church of Christ and dozens of other religious associations. The second was raised in the amicus curiae brief filed by the Church of Jesus Christ of Latter-Day Saints, et al.

[7] Lilek, *The Fizzle in Filibuster Fission,* Newhouse News Service (May 25, 2005) <http://www.newhousenews.com/archive/lileks052505.html> (as of Oct. 5, 2006).

institutions and the likelihood of change, it will seem too fast. The courts must move only at the pace, and within the limits, the law permits.

Parrilli, J.

Concurring and Dissenting opinion of Kline, J.

I dissent from all portions of the majority opinion except the portion concluding that the Campaign for California Families (CCF) and the Proposition 22 Legal Defense and Education Fund (Fund) lack standing to pursue their purely declaratory relief claims, with which I concur.

As the majority rightly states, "whether California's marriage laws infringe upon a fundamental right depends almost entirely on how that right is defined." (Maj. opn., *ante*, at p. 23.) However, like the determination in *Bowers v. Hardwick* (1986) 478 U.S. 186 (*Bowers*) repudiated by the United States Supreme Court in *Lawrence v. Texas* (2003) 539 U.S. 558 (*Lawrence*), the conclusion my colleagues reach is preordained by a false premise. Respondents are no more asserting a "right to same-sex marriage" than the plaintiffs in *Perez v. Sharp* (1948) 32 Cal.2d 711 (*Perez*) and *Loving v. Virginia* (1967) 388 U.S. 1 (*Loving*), were asserting a right to interracial marriage; or the plaintiff in *Bowers* was asserting a constitutional right of homosexuals to engage in sodomy. Respondents do not seek the establishment of a "new" constitutional right to serve their special interests, but rather the application of an established right to marry a person of one's choice; a right available to all that government cannot significantly restrict in the absence of compelling need. As in *Bowers*, the majority's mischaracterization of the right asserted in this case "discloses the Court's own failure to appreciate the extent of the liberty at stake." (*Lawrence*, *supra*, 539 U.S. at pp. 566-567.)

The question at the center of this case is whether the *reasons* the United States Supreme Court and the California Supreme Court have deemed marriage a fundamental constitutional right are as applicable to same-sex couples as to couples consisting of members of the opposite sex. The majority's indifference to those reasons effectively divests the marital relationship of its most constitutionally significant qualities and permits marriage to be defined instead by who it excludes. Though not its purpose, the inescapable effect of the analysis the majority adopts is to diminish the humanity of the lesbians and gay men whose rights are defeated. The right to marry is "of fundamental importance *for all individuals*." (*Zablocki v. Redhail* (1978) 434 U.S. 374, 384, italics

added (*Zablocki*).) The exclusion of lesbians and gay men from this all-encompassing group denies them the individual autonomy and dignity that is embodied in the freedom to marry the person of one's choice and the reason the right is so highly protected.

The majority's validation of the state's restriction of the freedom of lesbians and gay men to choose whom to marry rests on three determinations: that the right respondents assert is not the fundamental right to marry; that classifications based on sexual orientation do not constitute a "suspect classification" for purposes of equal protection analysis; and that the ban on same-sex marriage survives rational basis review because, while maintaining the traditional definition of opposite-sex marriage, the state provides same-sex couples "equal rights and benefits . . . through a comprehensive domestic partnership system," and "[t]he state may legitimately support these parallel institutions while also acknowledging their differences." (Maj. opn., *ante,* at p. 55.)

The determinations that the fundamental right to marry is not at issue in this case and that the California Domestic Partner Rights and Responsibilities Act of 2003 (Fam. Code, § 297 et seq.) provides a rational basis upon which to uphold the traditional ban on same-sex marriage are, as I shall explain, unsupportable. As for the question whether sexual orientation is a suspect class for equal protection purposes, I acknowledge most courts have said it is not. However, sexual orientation satisfies the criteria our Supreme Court has used to determine whether a class is suspect.

Respondents' claim that the challenged statutes impose a discriminatory classification restricting their exercise of a substantial liberty rests on both article I, section 7 of the California Constitution, which guarantees equal protection of the law, and article I, section 1, which protects the right of privacy. Claiming privacy jurisprudence does not "fit" same-sex marriage, my colleagues say this case "is most appropriately analyzed—like other unequal access claims—under equal protection principles." (Maj. opn., *ante*, at pp. 48-49.) I see the matter a bit differently. The fact of unequal treatment is conceded by the state and is obvious, and I address the remaining equal protection issues (whether respondents are members of a suspect class and whether the restriction survives the appropriate level of judicial scrutiny). But I believe it most

appropriate to focus judicial inquiry most sharply on respondents' privacy claim,[1] because privacy principles shed brightest light on what I consider the critical issue in this case, namely, whether the right respondents assert is a "novel" right designed specifically for gay men and lesbians, as appellants and my colleagues claim, or is instead a fundamental right available to all, as respondents maintain. If respondents are right about this, as I believe they are, it is irrelevant whether classifications based on sexual orientation are "suspect" for equal protection purposes, as the challenged restriction would be subject to strict scrutiny even if they are not, and the restriction clearly cannot survive such scrutiny.

Moreover, whether this case is viewed from the perspective of equal protection or that of the substantive due process that informs the right of privacy, the central question is the same: how much may be demanded of the state to justify its restriction of the right? Far from having separate missions and entailing different inquiries, substantive due process and equal protection are profoundly interlocked. (See, e.g., *Zablocki, supra,* 434 U.S. at pp. 391, 395 (dis. opn. of Stewart, J.) [stating that the majority's reliance on equal protection in striking a restriction on marriage is really "no more than substantive due process by another name"]; *Lawrence, supra*, 539 U.S. at p. 575 ["Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests"].)

Part I of this opinion describes the state constitutional right of privacy and its application to this case, part II explains why it is time to abandon the increasingly

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[1] As the majority recognizes, this privacy claim was asserted in respondents' complaint for declaratory relief and petition for writ of mandate. All parties addressed the privacy issue theory in their briefs on this appeal, albeit not at great length, and at oral argument. The trial court declined to address the issue only because it felt that its decision for respondents on their equal protection claim rendered it unnecessary to do so. Although the majority says otherwise (maj. opn., *ante*, at p. 50), my discussion explores concepts falling directly within the parameters of the constitutional right to privacy invoked by respondents and also by several amici curiae.

transparent pretext that sexual orientation is not a "suspect classification" for purposes of equal protection analysis, and part III explains why the challenged restriction has no rational basis, let alone a compelling justification.

I.

The State Constitutional Right of Privacy

A.

The Protection of Individual Autonomy and Personhood

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 life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*." (Italics added.) The only changes in this provision since its original adoption in 1849 were made in 1972. The word "people" was substituted for the original "men" and, much more significantly for our purposes, "privacy" was added to the list of protected rights.

The state constitutional right to privacy encompasses not just informational privacy but also "a variety of rights involving private choice in personal affairs." (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 212.) This is clear not just from the case law (e.g., *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252 [right of procreative choice]; *Atkisson v. Kern County Housing Authority* (1976) 59 Cal.App.3d 89 [right of unmarried person to cohabit]; *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130, 134 [the right to choose the people with whom one lives]), but also from the 1972 ballot pamphlet argument in favor of the proposal (Prop. 11 or the Privacy Initiative) to add privacy to the inalienable rights enumerated in article I, section 1. Voters were told: " 'The right to privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, *our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose.* . . . [¶] . . . The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth, and Ninth Amendments to the U.S. Constitution. This

right should be abridged only when there is compelling public need.' " (*Robbins v. Superior Court, supra,* 38 Cal.3d at p. 212, quoting Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) p. 27, italics added.)

The distinctive nature of the interests protected by the Privacy Initiative was discussed by the Supreme Court in detail in *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 (*Hill*). *Hill* made clear that the contours of the state constitutional right are influenced by elucidations of the counterpart federal right. Citing the same portion of the ballot argument relied upon in *Robbins,* the *Hill* court concluded that the language describing the Privacy Initiative "as 'an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, and Ninth Amendments to the U.S. Constitution' " invoked "the federal constitutional right to privacy as recognized in decisions of the United States Supreme Court." (*Id.* at p. 28.) *Hill* noted that testimony on the Privacy Initiative given before the Assembly Constitution Committee and analyses submitted to the Senate Constitution Committee, also made "explicit reference to the federal constitutional right to privacy, particularly as it developed beginning with *Griswold* [*v. Connecticut* (1965)] 381 U.S. 479 (*Griswold*)" (*Hill, supra,* 7 Cal.4th at p. 28), and that the provisions of the Bill of Rights cited in the ballot argument were precisely those in which *Griswold* found implicit the " 'zones of privacy' emanating from what it called the 'penumbras' of the specific constitutional guarantees." (*Ibid.*) As *Hill* says, the United States Supreme Court "has included within the post-*Griswold* implicit right to privacy 'certain rights of freedom of choice in marital, sexual, and reproductive matters' " as an aspect of the liberty interest protected by the due process clause. (*Id.* at p. 29, quoting 3 Rotunda & Nowak, Treatise on Constitutional Law (2d ed. 1992) § 18.26, p. 298.)[2] *Griswold* and its progeny establish that the constitutional right of privacy includes freedom from government regulation within "a

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[2] The *Hill* court went on to state that the United States Supreme Court "has not recognized a general right to engage in sexual activities done in private," citing *Bowers, supra,* 478 U.S. 186. (*Hill, supra,* 7 Cal.4th at p. 29.) As *Bowers* has since been overruled (*Lawrence, supra,* 539 U.S. 558), this statement is no longer accurate.

zone of prima facie autonomy, of presumptive immunity from regulation," which is separate from and in addition to the doctrinally related protection provided by the First Amendment. (Henkin, *Privacy and Autonomy* (1974) 74 Colum. L.Rev. 1410, 1425.)[3] *Griswold* teaches that the right of privacy bars the state not just from arbitrarily restricting an individual's *personal* liberty (as in *Skinner v. Oklahoma* (1942) 316 U.S. 535 [striking a sterilization scheme applicable to certain habitual criminals]), but also from so restricting an individual's *interpersonal* or relational liberty.

While drawing on federal privacy jurisprudence, our case law has repeatedly stressed that the state constitutional right to privacy is significantly more protective than the counterpart federal right. "[N]ot only is the state 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 right is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts. (Compare *Hill*[, *supra,*] 7 Cal.4th 1, 15-20 [state constitutional right of privacy applies to private, as well as to state, action] with *Skinner v. Railway Labor Executives' Assn.* (1989) 489 U.S. 602, 614 [federal privacy right applies only to governmental action]; *City of Santa Barbara* [, *supra,*] 27 Cal.3d 123 [for purposes of determining validity of zoning ordinance, state privacy right protects right to reside with unrelated persons] with *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1 [contra].)" (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307,

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[3] The right of privacy protected under article I, section 1 of California's Constitution is distinct from that protected under the federal search and seizure clauses of the Fourth Amendment and the counterpart provision of our state Constitution (Cal. Const., art. 1, § 13), which are also referred to as "privacy" provisions. "Collectively, the federal cases 'sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.' (*Whalen v. Roe* (1977) 429 U.S. 589, 598-600 . . . . The former interest is informational or data-based; the latter involves issues of personal freedom of action and autonomy in individual encounters with government." (*Hill, supra,* 7 Cal.4th at p. 30, fns. omitted.)

326-327, italics added; see also *Committee to Defend Reproductive Rights v. Myers, supra,* 29 Cal.3d 252, 262-263, 280-281 ["the federal right of privacy . . . is more limited than the corresponding right in the California Constitution"].)[4]

The autonomy interest protected by the state constitutional privacy clause, which our high court has described as a "fundamental" right (*American Academy of Pediatrics v. Lungren, supra,* 16 Cal.4th at p. 338), may be seen as a vital aspect of the "personhood" the California Supreme Court has identified as "the foundation for individual rights protected by our state and national Constitutions." (*In re William G.* (1985) 40 Cal.3d 550, 563); see also *Rynecki v. Connecticut Dept. of Social Servs.* (2d Cir. 1984) 742 F.2d 65, 66 [referring to "rights of privacy and personhood"]; Tribe, American Constitutional Law (2d ed. 1988) pp. 1302-1435 [ch. 15 entitled Rights of Privacy and Personhood]; Craven, *Personhood: The Right to Be Let Alone* (1976) Duke L.J. 699, 702-703; Fried, An Anatomy of Values: Problems of Personal and Social Choice (1970); Reiman, *Privacy, Intimacy, and Personhood* (1976) 6 Phil. & Pub. Affairs 26; Gerety, *Redefining Privacy*, 12 Harv. C.R-C.L. L.Rev. (1977) 233, 261-281.)

"The very idea of a fundamental right of personhood rests on the conviction that, even though one's identity is constantly and profoundly shaped by the rewards and penalties, the exhortations and scarcities and constraints of one's social environment, the 'personhood' resulting from this process is sufficiently 'one's own' to be deemed

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[4] The fact that our state Constitution offers broader protection of the right to privacy than does the federal Constitution distinguishes California from many other states. For example, in *Hernandez v. Robles* (July 6, 2006, No. 86 (2006 N.Y. Slip Op. 05239) ___ N.E.2d ___ [WL 1835429], in which the New York Court of Appeals upheld a ban on same-sex marriage, the plurality opinion (2006 WL 1835429, at p. *11) and the concurring opinion both pointed out that "[a]lthough our Court has interpreted the New York Due Process Clause more broadly than its federal counterpart on a few occasions, all of those cases involved the rights of criminal defendants, prisoners, or pretrial detainees, or other confined individuals . . . [and] [e]ven then, our analysis did not turn on recognition of broader family privacy rights than those articulated by the Supreme Court." (*Id.* at p. *12 (conc. opn. of Graffeo, J.).) A California court could not make such a statement.

fundamental in confrontation with the one entity that retains a monopoly over legitimate violence—the government. Thus active coercion by government to alter a person's being, or deliberate neglect by government which permits a being to suffer, are conceived as qualitatively different from the passive, incremental coercion that shapes all of life and for which no one bears precise responsibility." (Tribe, American Constitutional Law, *supra*, § 15-2, pp. 1305-1306.) This rationale is reflected in the statement in *Roberts v. United States Jaycees* (1984) 468 U.S. 609, that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." (*Id.* at pp. 617-618.) Protecting such relationships from undue government intrusion therefore "safeguards the ability to independently define one's identity that is central to any concept of liberty." (*Id.* at p. 619; see Karst, *The Freedom of Intimate Association* (1980) 89 Yale. L.J. 624.)

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. "When two people marry . . . they express themselves more eloquently, tell us more about who they are and who they hope to be, than they ever could do by wearing armbands or carrying red flags." (Karst, *The Freedom of Intimate Association*, *supra*, 89 Yale L.J. at p. 654.) There is no reason to think this less true for gay men and lesbians who wish to marry same-sex partners. The assertion that denial to gay men and lesbians of the right to marry does not deprive them of a constitutionally significant expressive interest (maj. opn., *ante*, at p. 51), cannot be squared with the view of the Supreme Court. In *Turner v. Safley* (1987) 482 U.S. 78 (*Turner*), the high court struck a restriction on the right of prison inmates to marry because, among other things, it deprived prisoners the "expressions of emotional support and public commitment" the court considered "an important and significant aspect of the marital relationship." (*Turner*, *supra*, 482 U.S. at pp. 95-96; see also Cruz, *"Just Don't Call It Marriage": The*

First Amendment and Marriage as an Expressive Resource (2001) 74 So.Cal. L.Rev. 925.) The understanding that privacy protects a constitutionally significant expressive interest was communicated to the voters who enacted the Privacy Initiative, who were told that the right protected " 'our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose.' " (*Robbins v. Superior Court, supra,* 38 Cal.3d at p. 213.) Marriage cannot give a prison inmate lacking conjugal rights greater expressive rights than it provides members of a law-abiding same-sex couple who are able to live together and raise children in the community.

The protection of personhood provided by autonomy privacy does not divest the state of the ability to impose majoritarian views of morality; it simply tells the state that it cannot do so without justification. However, unlike privacy cases involving informational interests, in which "the federal courts have generally applied balancing tests that avoid rigid 'compelling interest' or 'strict scrutiny' formulations" (*Hill, supra,* 7 Cal.4th at p. 30), the United States Supreme Court has generally applied a higher standard of judicial scrutiny in privacy cases involving autonomy interests. (*Id.* at pp. 30-31; see also *Plante v. Gonzalez* (5th Cir. 1978) 575 F.2d 1119, 1134.)

B.

The Federal and State Marriage Cases

The United States Supreme Court has in many cases significantly touched upon why the right to marry is among "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men" (*Meyer v. Nebraska* (1923) 262 U.S. 390, 399), and why government restrictions on the freedom to decide who to marry are subject to the highest level of judicial scrutiny; but it has decided only three cases directly involving government restrictions of that liberty. These cases do not address same-sex marriage, but, because they identify the attributes of marriage that account for the fundamentality of the right to marry, it is possible to learn from them whether those attributes are applicable to same-sex couples. This is the basis upon which it must be determined whether such couples enjoy the fundamental right to marry.

In holding Virginia's antimiscegenation laws unconstitutional, *Loving, supra*, 388 U.S. 1, took its cue from the unprecedented decision of our Supreme Court almost two decades earlier in *Perez, supra,* 32 Cal.2d 711. *Loving* cannot be seen as simply the product of the Supreme Court's special concern about the use of racial classifications, as the majority says, because it was not decided just on the basis of equal protection. After explaining why the statutes violated the Lovings' rights under the equal protection clause, Chief Justice Warren declared that the statutes also deprived them of liberty without due process of law, reiterating the statement in *Meyer v. Nebraska, supra*, 262 U.S. 390, 399, and *Skinner v. Oklahoma, supra*, 316 U.S. 535, 541, that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. [¶] Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (*Loving,* at p. 12.) Like *Perez*, *Loving* made clear that "the right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety and welfare." (*Goodridge v. Department of Public Health* (2003) 440 Mass. 309 [798 N.E.2d 941, 958] (*Goodridge*).)

In *Zablocki, supra,* 434 U.S. 374, the second Supreme Court case evaluating a restriction on the right to marry, the high court drew upon its due process holding in *Loving* and further illuminated the reasons the right to marry is fundamental and therefore subject to "rigorous scrutiny." (*Id.* at p. 386.) *Zablocki* struck down a Wisconsin statute providing that any resident having minor issue not in his custody that he is under obligation to support by any court order or judgment—i.e., a facially irresponsible parent—may not marry without court approval. In his opinion for the majority, Justice Marshall reiterated the oft-cited statement in *Griswold, supra*, 381 U.S. 479, 486, that " '[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.' " (*Zablocki, supra,* 434 U.S. at p. 384.) Justice Marshall emphasized that

"[c]ases subsequent to *Griswold* and *Loving* have routinely categorized the decision to marry as among the personal decisions protected by the right of privacy. [Citations.] For example, last Term in *Carey v. Population Services International* [(1973)] 431 U.S. 678, we declared: [¶] 'While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions "relating to marriage . . . ." ' " (*Zablocki, supra,* 434 U.S. at pp. 384-385.) Thus, *Zablocki* concludes, "[i]t is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." (*Id.* at p. 386.)

Zablocki establishes that the right to marry is constitutionally protected even where restriction on the right is not based on race or membership in some other suspect class. As the court stated, "[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this court confirm that the right to marry is of fundamental importance *for all individuals*." (*Zablocki, supra*, 434 U.S. at p. 384, italics added.) State laws that "interfere directly and substantially with the right to marry" therefore can never be sustained unless the restriction is "supported by sufficiently important state interests and is closely tailored to effectuate only those interests." (*Id.* at pp. 387, 388.)

Turner, supra, 482 U.S. 78, was a challenge to a Missouri prison regulation providing that an inmate could marry "only with the permission of the superintendent of the prison," with approval to be given only " 'when there are compelling reasons to do so.' " (*Id.* at p. 82.) "[G]enerally only pregnancy or birth of a child [was] considered a 'compelling reason' to approve a marriage." (*Id.* at pp. 96-97.) Applying the deferential standard of review afforded prison regulations—essentially, whether there is a " 'valid rational connection' " between the regulation and a legitimate purpose (*id.* at pp. 89-

91)—the court found the regulation was "not reasonably related to legitimate penological objectives" and therefore "facially invalid." (*Id.* at p. 99.)

Speaking for the court, Justice O'Connor conceded that prisoner marriages could be subjected to "substantial restrictions" (presumably referring to restrictions on conjugal visits), but explained that, "[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated.[5] Finally, marital status often is a precondition to the receipt of government benefits . . . property rights . . . , and other, less tangible benefits . . . ." (*Turner, supra*, 482 U.S. at pp. 95-96.) Justice O'Connor concluded that "[t]hese incidents of marriage, like the religious and personal

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[5] In his dissent in *Goodridge, supra,* 798 N.E.2d 941, Justice Cordy suggested that the words "will be fully consummated" show that the possibility of procreation is "essential to the Supreme Court's denomination of the right to marry as fundamental." (*Id.* at p. 985 (dis. opn. of Cordy, J.).) However, as has been noted, "[c]onsummation of a marriage ordinarily refers to sexual relations or cohabitation, . . . not procreation. See, e.g., *Conner ex rel. Curry v. Schweiker*, No. C81-281A, 1981 U.S. Dist LEXIS 18399, at p. *5-6 (N.D. Ga. Nov. 30, 1981) ('A marriage is consummated according to law when the parties co-habitate and hold themselves out as husband and wife. . . .') [This is consistent with the dictionary definition of the word. (See, e.g., Oxford English Dict. (2d ed. 1989) (defining 'consummate' as 'To complete marriage by sexual intercourse')]; see also Webster's New Collegiate Dictionary 242 (9th ed. 1981) (defining 'consummate' as 'to make (marital union) complete by sexual intercourse'); [see also] Laurence Drew Borten, Note, *Sex, Procreation, and the State Interest in Marriage*, 102 Colum. L.R. 1089, 1109 (2002) (noting that impotence as a ground for divorce does not typically encompass 'those who have the capacity to copulate but are infertile')." (Comment, *Divorcing Marriage From Procreation* (2005) 114 Yale L.J. 1989, 1995, fn. 40.)

aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals." (*Id.* at p. 96.)

The majority's determinations that the restrictions challenged here "do not interfere with the ability of individuals in this state to enter intimate relations with persons of their choosing" and do not prevent such couples from "expressing their mutual commitment" (maj. opn, *ante*, at pp. 50, 51), and, therefore, that respondents have not asserted a legally protected privacy interest, are indifferent to the analysis and reasoning of *Perez, Loving, Zablocki*, and *Turner* and the pre- and post-*Griswold* cases they rely upon. Just as the ruling in *Turner* required the Supreme Court to determine whether the "incidents of marriage" described in that opinion were "unaffected by the fact of confinement," (*Turner, supra*, 482 U.S. at p. 96), so too is it necessary for us to inquire and decide whether those attributes are unaffected by the fact that those claiming the right to marry are members of the same sex.

The California Supreme Court attaches the same importance to the right to marry as the United States Supreme Court. It has repeatedly acknowledged a " 'right of privacy' or 'liberty' in matters related to marriage, family, and sex" (*People v. Belous* (1969) 71 Cal.2d 954, 963; accord, *Committee to Defend Reproductive Rights v. Myers, supra,* 29 Cal.3d 252, 275), and has described marriage as " ' "at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." ' " (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 275, quoting *Nieto v. City of Los Angeles* (1982) 138 Cal.App.3d 464, 471, quoting *Marvin v. Marvin* (1976) 18 Cal.3d 660, 684; see also *De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 863-864 ["marriage is a great deal more than a contract. . . . The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life"].) As one court has stated, "under the state Constitution, the right to marry and the right of intimate association are virtually synonymous" (*Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal.App.4th 1288, 1303), so that an assertion of the right to marry is an assertion of the right to privacy. That fundamental right, which belongs to gay men and lesbians as much as it does to all other citizens of this state, is precisely the right asserted in this case.

The fact that the right to marry is a fundamental right does not, of course, mean that the legislative branch may not define marriage in such a way as to as to limit the right to defined groups, or that the courts need pay no mind to a statutory definition or historical understandings. In striking a state statute that restricted the right of marriage, the *Zablocki* court rejected the view "that every state regulation which relates in any way to the incidents of or perquisites for marriage must be subjected to rigorous scrutiny," and made clear that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." (*Zablocki, supra,* 434 U.S. at p. 386, citing *Califano v. Jobst* (1977) 434 U.S. 47 as providing an example of such a permissible regulation.) As Justice Stewart stated in his concurring opinion in *Zablocki*, "[a] State may not only 'significantly interfere with decisions to enter into the marital relationship,' but may in many circumstances absolutely prohibit it. Surely, for example, a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife. *But, just as surely, in regulating the intimate human relationship of marriage, there is a limit beyond which a State may not constitutionally go.*" (*Zablocki, supra,* 434 U.S. at p. 392 (conc. opn. of Stewart, J.), italics added, fn. omitted.)

If, after the interest balancing required by due process analysis, prohibitions of marriage involving an interracial couple, an irresponsible parent or a prison inmate exceed the constitutional limit, 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. My colleagues accuse me of positing a fundamental right of same-sex marriage on the basis not of "controlling precedent," (maj. opn., *ante*, at p. 3), but rather a social policy that cannot be judicially invented. This is not so. The right I posit is that which has been declared fundamental and available to all by the highest court of this nation in *Loving, Zablocki, Turner*, and other cases, and by our own Supreme Court in *Perez*. As will be seen, the state does not

deny that the attributes of marriage which explain the fundamentality of the right to marry are as applicable to same-sex couples as to all others.

My colleagues' conclusion that respondents have no constitutionally protected privacy interest in marrying same-sex partners rests on "the reality that respondents have never enjoyed such a right before." (Maj. opn., *ante*, at pp. 47-48.) This differentiates the case from *Zablocki* and *Turner*, they say, because in those cases the state had "taken away" a right to marry that previously existed. This attempt to avoid the reasoning of *Zablocki* and *Turner* fails. 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. As earlier indicated, if that were true, *Perez* and *Loving* would not have been decided as they were, because interracial couples in California and Virginia *never* previously possessed the right to marry. The majority's reasoning is circular: same-sex couples have no fundamental right to marriage because same-sex couples "have never had a legal right to marry each other" (maj. opn., *ante*, at p. 48), as the rights and benefits marriage affords "have historically been reserved for others." (Maj. opn., *ante*, at p. 49.)

In her concurring opinion, Justice Parrilli says we could not grant respondents the right to marry without concluding "that an undetected right to marry a member of the same sex has *always* existed under our state constitution," a conclusion she finds incompatible with "law or logic." (Conc. opn., *ante*, at pp. 3-4.) Aware the *Perez* and *Loving* courts could have employed that reasoning to defeat the right to marry a member of a different race, but did not, Justice Parrilli distinguishes *Perez* and *Loving* (and presumably also *Zablocki* and *Turner*) on the ground that the individuals in those cases "were not excluded from the institution of marriage" because those cases "did not concern the *definition of marriage.*" (Conc. opn., *ante*, at p. 4, fn. 3.) This reasoning is faulty. It is true that the legislative definition of marriage presented to the *Perez* and *Loving* courts was that which excluded interracial, not same-sex, couples. But the "definition" the marriage cases focus upon is that which relates to the nature and significance of the marital relationship; that is, to what *Turner* variously describes as the

"attributes," "elements," or "incidents of marriage" (*Turner, supra*, 482 U.S. at pp. 95-96) that make the right of all individuals to choose whom to marry a highly protected liberty interest. From the point of view of autonomy privacy, a ban on same-sex marriage is no less intrusive than a ban on interracial marriage. Thus, *unless it can be shown that same-sex couples are less able than interracial couples to partake of the constitutionally significant attributes of marriage*, it is no more difficult for us to say that a previously undetected right to marry a member of the same sex exists under our constitution than it was for the *Perez* and *Loving* courts to say the same thing with respect to the previously undetected right to marry a person of a different race. The attempt to distinguish *Perez* and *Loving* fails. The 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.

The majority's statement that I have not and cannot "explain precisely how the marriage laws *intrude upon* respondents' right to privacy and intimate association" (maj. opn., *ante*, at p. 48) is bewildering. As earlier noted, the constitutional right to marry and that of intimate association are "synonymous." (*Ortiz v. Los Angeles Police Relief Assn., supra*, 98 Cal.App.4th at p. 1303.) Parties cannot marry, however, merely on the basis of mutual consent, but only upon the issuance of a license by the state. (Fam. Code, § 300.) Because the state has made its license a condition to the exercise of a fundamental constitutional right, it cannot deny the necessary license to an entire class without a showing of compelling need. As stated by the Supreme Court, a state cannot "interfere directly and substantially with the right to marry" without showing that the restriction is "supported by sufficiently important state interests and is closely tailored to effectuate only those interests." (*Zablocki, supra*, 434 U.S. at pp. 387, 388.)

C.

The Significance of Lawrence v. Texas

Use of the concept of privacy autonomy to sustain the right of homosexuals to marry persons of the same sex was, for a time, cast in doubt by the majority opinion in *Bowers, supra,* 478 U.S. 186. The opinion of the United States Supreme Court in *Lawrence, supra,* 539 U.S. 558, which overruled *Bowers*, decisively eliminates that uncertainty.

Because the *Lawrence* majority went out of its way to endorse the view of the dissenters in *Bowers,* it is useful to examine their views before turning to *Lawrence* itself. In his dissent, which was joined by Justices Brennan, Marshall and Stevens, Justice Blackmun declared that Hardwick stated a cognizable claim that the Georgia anti-sodomy statute "interferes with constitutionally protected interests in privacy and freedom of intimate association." (*Bowers, supra,* 478 U.S. at p. 202 (dis. opn. of Blackmun, J.).) "[W]e protect the decision whether to marry," Justice Blackmun explained, "precisely because marriage 'is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects[,]' (*Griswold v. Connecticut, supra,* 381 U.S. at p. 486)," and "we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. . . . [¶] . . . The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds." (*Bowers, supra,* 478 U.S. at pp. 204-205 (dis. opn. of Blackmun, J.).)

The *Bowers* dissenters also refused to agree that "either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny." (*Bowers, supra,* 478 U.S. at p. 210 (dis. opn. of Blackmun, J.).) Quoting *Board of Education v. Barnette* (1943) 319 U.S. 624, 641-642, Justice Blackmun emphasized that " '[f]reedom to differ is not limited to things that do

not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.' [Citation.] It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority." (*Bowers, supra*, 478 U.S. at pp. 210-211 (dis. opn. of Blackmun, J.).)

In his separate dissent in *Bowers*, Justice Stevens reinforced this point, stating that prior Supreme Court cases made two propositions abundantly clear. "First, the fact that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. *Griswold v. Connecticut*[, *supra*,] 381 U.S. 479." (*Bowers, supra*, 478 U.S. at p. 216 (dis. opn. of Stevens, J.), fn. omitted.) Stating that Justice Stevens's view "should have been controlling in *Bowers*," the *Lawrence* majority concluded that "*Bowers* was not correct when it was decided and it is not correct today." (*Lawrence, supra*, 539 U.S. at p. 578.)

The principle defect of *Bowers* was its erroneous definition of the right at stake as " 'whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . .' " (*Lawrence, supra,* 539 U.S. at p. 566.) As *Lawrence* explained, "[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the

law, is within the personal liberty of persons to choose without being punished as criminals." (*Id.* at p. 567; see also *Carey v. Population Services, Int'l., supra,* 431 U.S. at p. 687 [pointing out that the "individual autonomy" vindicated in *Griswold* and *Eisenstadt v. Baird* (1972) 405 U.S. 438 protected the individual's "right of *decision*" regarding procreation, not the right to procreate].)

Speaking for the *Lawrence* majority, Justice Kennedy acknowledged that *Bowers* "was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives." (*Lawrence, supra*, 539 U.S. at p. 571.) These considerations nevertheless present no answer, *Lawrence* says, because "[t]he issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.' *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992)." (*Ibid.*)

Lawrence goes on to explain how the rationale of *Bowers* was undermined by *Planned Parenthood of Southeastern Pa. v. Casey,* which reconfirmed that constitutional protection is accorded to personal decisions relating to "marriage, procreation, contraception, family relationships, child rearing, and education" because " '[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.' " (*Lawrence, supra*, 539 U.S. at pp. 573-574, quoting *Planned Parenthood of Southeastern Pa. v. Casey, supra,* 505 U.S. at p.

851.) "*Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.*" (*Lawrence, supra,* 539 U.S. at p. 574, italics added.)

My colleagues purport to downplay and distinguish *Lawrence* on the grounds that the majority in that case did not apply strict scrutiny to Texas's antisodomy law, and that having intimate relations is private conduct while civil marriage is a public institution to which the reasoning of *Lawrence* is inapplicable. (Maj. opn., *ante*, at pp. 41-43.) Neither attempt to differentiate *Lawrence* succeeds.

First of all, as our Supreme Court has observed, federal courts generally apply strict scrutiny "to serious intrusions of specific autonomy rights such as marriage, family and procreation" (*Hill, supra*, 7 Cal.4th at p. 30, citing *Plante v. Gonzalez, supra,* 575 F.2d at p. 1134), and nothing in *Lawrence* suggests any retreat from this consistent practice. On the contrary, a fair reading of *Lawrence* renders it impossible to think that the court's failure to explicitly state that it was applying strict scrutiny means it did not do so, as my colleagues say. "[T]he strictness of the Court's standard in *Lawrence*, however articulated, could hardly have been more obvious. That much follows not only from what the Court *did* but from what it *said* in declaring *Griswold*[, *supra,* 381 U.S. 479] 'the most pertinent beginning point' for its analysis and then proceeding to invoke precedents such as *Roe* [*v. Wade* (1973) 410 U.S. 113, 155] in which the strictness of the scrutiny employed was explicit]. To search for the magic words proclaiming the right protected in *Lawrence* to be 'fundamental,' and to assume that in the absence of those words mere rationality review applied, is to universalize what is in fact only an occasional practice [i.e., explicit announcement of the standard of review]. Moreover, it requires overlooking passage after passage in which the Court's opinion indeed invoked the talismanic verbal formula of substantive due process but did so by putting the key words in one unusual sequence or another—as in the Court's declaration that it was dealing with a 'protection of *liberty* under the Due Process Clause [that] has a *substantive* dimension of *fundamental* significance in defining the rights of the person.' " (Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name* (2004) 117 Harv. L.Rev. 1893, 1917, fns. omitted.)

The theory that *Lawrence* has no application to the public institution of marriage because that case related to private conduct is also refuted by the language and clear meaning of the opinion. "The *Lawrence* opinion not only denies that the Court's decision was just about sex, it also goes out of its way to equate the insult of reducing a same-sex intimate relationship to the sex acts committed within that relationship with the insult of reducing a marriage to heterosexual intercourse. Besides, . . . the evil targeted by the Court in *Lawrence* wasn't criminal prosecution and punishment of same-sex sodomy, but the disrespect for those the Court identified as 'homosexuals' that labeling such conduct as criminal helped to excuse. . . . Similarly, by denying a same-sex couple a civil marriage license that it would have given them if only they were of opposite sexes, a state tells the couple that they should keep their love behind closed doors rather than 'flaunt' that love by proclaiming marital intentions or pronouncing marriage vows. By imposing this lopsided regime—telling a same-sex couple that its members are guilty of unseemly display when they say and do in public no more than what, for a mixed-sex couple, would be described as displaying reassuring signs of affection and symbols of enduring commitment—the state engages in what amounts to discriminatory, viewpoint-based suppression of expression." (Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, *supra,* 117 Harv. L.Rev. at pp. 1948-1949, fns. omitted.) As Justice Scalia has observed, the majority opinion in *Lawrence* leaves no room to "deny[] the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution." (*Lawrence*, *supra,* 539 U.S. at p. 605 (dis. opn. of Scalia, J.).)

In short, a fair reading of *Lawrence* undermines my colleagues' belief that the opinion provides no authority for subjecting the restriction on same-sex marriage to strict judicial scrutiny.

D.

The Right to Marry Asserted in this Case is

That Which Has Been Declared a Fundamental Right

My colleagues accept, as they must, that a fundamental right to marriage exists, but consider *Perez*, *Loving*, *Zablocki, Turner* and the many other cases bearing upon the

right to marry largely irrelevant because they view this case as presenting the different question whether there is a fundamental right to same-sex marriage, and no court, save the Supreme Judicial Court of Massachusetts, in *Goodridge, supra,* 798 N.E.2d 941, has said such a "novel" right exists. The majority insists that same-sex unions do not fit within the definition of marriage that has been declared a fundamental right and that the state and federal autonomy privacy interest does not encompass same-sex marriage, *but provide no explanation at all as to why this is so.*

Washington v. Glucksberg (1997) 521 U.S. 702 does not support the majority's view that the right respondents assert is not fundamental because it is not " 'deeply rooted in this Nation's history and tradition.' " (*Id.* at p. 721, quoting *Moore v. East Cleveland* (1977) 431 U.S. 494, 503; accord, *Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 940.) Whether the right at issue fits this description depends, like almost everything else in this case, on how one defines that right. *Glucksberg* states that, in addition to the specific freedoms protected by the Bill of Rights, "the 'liberty' specially protected by the Due Process Clause includes the rights to marry . . . [and] to marital privacy . . . ." (*Glucksberg, supra,* 521 U.S. at p. 720, citing, inter alia, *Loving, supra,* 388 U.S. 1, and *Griswold, supra,* 381 U.S. 479.) *Glucksberg* may be seen as impeding the application of strict scrutiny in this case only by refusing to see that the right to marry it referred to is a liberty interest "of fundamental importance for *all individuals*" (*Zablocki, supra*, 434 U.S. at p. 384, italics added), including gay men and lesbians who wish to marry same-sex partners.

It also bears emphasizing that, except for the aberrant and now overruled decision in *Bowers, supra,* 478 U.S. 186, the limiting principle reflected in the language of *Glucksberg* my colleagues rely upon has never been employed by the United States Supreme Court or the California Supreme Court to sustain a government restriction of privacy autonomy remotely comparable to that presented in this case. After *Lawrence, supra,* 539 U.S. 558, it is impossible to sustain such a restriction on the basis of *Glucksberg.* The focus of *Lawrence* is *not* on whether the asserted liberty interest is among those traditionally considered beyond government control or fits comfortably

within historical understandings (and the *Lawrence* majority virtually acknowledged it would have had to reach a different result if, as in *Bowers*, that were the test), but on whether the government restriction substantially interferes with the type of " 'intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [that] are central to the liberty protected by the Fourteenth Amendment.' " (*Lawrence*, at p. 574, quoting *Planned Parenthood of Southeastern Pa. v. Casey, supra*, 505 U.S. at p. 851.) The decision to marry is unquestionably such an "intimate and personal choice," and it is therefore protected by the substantive due process accorded by the right of privacy enshrined in article I, section 1 of the California Constitution.

My colleagues' view of the right at issue here rests largely on opinions of some courts in other states concluding that the institution of marriage is by its very nature necessarily restricted to opposite-sex couples. The rationale of these opinions, which embodies no serious inquiry into the attributes of marriage the Supreme Court considers constitutionally significant, and is therefore entirely blind to the nature and importance of the liberty interest at stake, is the only justification the majority can muster for its most crucial determination—that the right to marry of a same-sex couple is different from and not included within the right to marry that has judicially been declared fundamental.

According to the cases my colleagues rely upon, the word "marriage"—in and of itself, even if not specifically described as between a man and a woman—pertains to a relationship that can *only* be between a man and a woman. (Maj. opn., *ante*, at p. 25.) For example, in *Adams v. Howerton* (C.D.Cal. 1980) 486 F.Supp. 1119, which the majority cites, the court declares that "[t]he term 'marriage,' (and therefore the term 'spouse' which is derivative from the term 'marriage,') *necessarily and exclusively* involves a contract, a status, and a relationship between persons of different sexes." (*Id.* at p. 1122, italics added, fn. omitted.) Similarly, in *Jones v. Hallahan* (Ky. 1973) 501 S.W.2d 588, which the majority also relies upon, the court declared that "[the] appellants [were] prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined," so that "the relationship

proposed by the appellants . . . is not a marriage." (*Id.* at pp. 589-590.) For courts that hold this view, marriage is not defined by love and commitment, by the benefits it confers and the burdens it entails, or even by children, but rather by its exclusion of homosexuals—that is, by its discriminatory aspect. Therefore, as they see it, the concept of same-sex marriage is an oxymoron: Because the statutory definition of marriage as a relationship between members of the opposite sex represents what they consider the unalterable nature of things,[6] these courts treat the right of same-sex couples to marry as constitutionally unsupportable as a claim of the right to be 10 feet tall.

Courts adopting this circular reasoning invariably rely upon dictionary definitions showing the common usage of the word "marriage" (e.g., *Jones v. Hallahan, supra,* 501 S.W.2d at p. 589; *Dean v. District of Columbia* (D.C. 1995) 653 A.2d 307, 315), historical understandings (e.g., *Anonymous v. Anonymous* (1971) 67 Misc.2d 982 [325 N.Y.S.2d 499, 500] [marriage "always has been a contract between a man and a woman"]), the importance of procreation (e.g., *Andersen v. King County* (2006) __Wn.2d__ [138 P.3d 963, 969] ["limiting marriage to opposite-sex couples furthers procreation, essential to survival of the human race, and furthers the well-being of children"]) and religious doctrine (e.g., *Lewis v. Harris* (2005) 378 N.J. Super. 168 [875 A.2d 259, 269] ["Our leading religions view marriage as a union of men and women recognized by God"]). Neither the religious aspect of marriage nor the issues of procreation and child rearing are placed at issue in this case by the state, as it does not assert those factors as justification for prohibiting same-sex couples from marrying, and the majority disclaims reliance upon such grounds. However, some form of the procreation argument is vigorously advanced by several amici curiae, and reasons related

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[6] If it were permissible to use so imprecise a notion as the "natural order of things" to distinguish between those acts protected by the right of privacy and those that are not, contraception and abortion would be unprotected, which is, of course, not the case. The many problems created by the use of this factor in constitutional analysis are discussed in Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory* (1977) 45 Ford. L.Rev. 1281.

to religion and procreation are relied upon in most of the opinions rejecting constitutional challenges to restrictions on same-sex marriage, including those relied upon by my colleagues. It is therefore necessary to address these issues.

The scriptural basis of marriage as between a man and a woman, which appears to be the subtext of some opinions that do not dwell on the subject (e.g., *Baker v. Nelson* (1971) 291 Minn. 310 [191 N.W.2d 185, 186], app. dism. 409 U.S. 810 ["institution of marriage as a union of man and woman . . . is as old as the book of Genesis"]), was articulated with unabashed clarity in *Adams v. Howerton, supra,* 486 F.Supp. 1119. The opinion in that case explains, in soritical fashion, that the definition of marriage is governed by our civil law, which has its roots in English civil law, which in turn "took its attitudes and basic principles from canon law, which, in early times, was administered in the ecclesiastical courts. Canon law in both Judaism and Christianity could not *possibly* sanction any marriage between persons of the same sex because of the vehement condemnation in the scriptures of both religions of *all* homosexual relationships. Thus there has been for centuries a combination of scriptural and canonical teaching under which a 'marriage' between persons of the same sex was *unthinkable and, by definition, impossible.*" (*Id.* at p. 1123, italics added, fns. omitted.) This reasoning rests upon a religious doctrine that cannot influence the civil law and, in any case, is not universally shared.[7] Furthermore, it begs the crucial question whether the constitutionally significant attributes of marriage identified by the Supreme Court apply to same-sex couples.

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[7] The religious aspect of marriage is emphasized by amici curiae who represent certain Christian, Jewish, and other religious denominations that recognize and sanctify same-sex unions, and also the California Council of Churches. They maintain that the state ban on such marriages places the state in one religious camp over another and therefore violates the principle of separation of church and state and the religious clauses of the state and federal Constitutions. (Cal. Const., art. I, § 4; U.S. Const., 1st Amend.) As they emphasize, "[o]urs is a religiously diverse nation. Within the vast array of Christian denominations and sects, there is a wide variety of belief and practice. Moreover, substantial segments of our population adhere to non-Christian religions or to no religion. Respect for the religious choices of the people of this country requires that government neither place its stamp of approval on any particular religious practice, nor appear to take

The relationship between marriage and procreation emphasized by some religions is not a factor the United States Supreme Court has ever relied upon. The first statement of that court indicating the reasons marriage is a fundamental right, from which all of that court's later analyses of the right have evolved, is the frequently quoted description of marriage in *Griswold, supra*, 381 U.S. at page 486. *Griswold* makes no reference to procreation; and the precise holding of *Griswold*, that the state could not criminalize a married couple's use of contraceptives, is itself incompatible with the proposition that the constitutionally protected status of marriage turns on its relationship to procreation. The language and the facts of *Turner, supra,* 482 U.S. 78, also exclude procreation from the constitutionally significant attributes of marriage. As previously discussed, *Turner* invalidated prison regulations restricting inmates' rights to marry even though the regulations contained exceptions for cases involving pregnancy or birth of a child and therefore did *not* preclude marriage where procreation was directly involved. Prison regulations ordinarily prohibit inmates from physically conceiving a child. In holding that prisoners, including life prisoners who typically lack conjugal rights (see, e.g., Cal. Code Regs., tit. 15, § 3177, subd. (b)(2)) and cannot conceive, have a fundamental right

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a stand on any religious question." (*Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 883-884, fn. omitted.) These amici curiae maintain that the ban on same-sex marriage has no secular legislative purpose, and the state's reliance on the "common understanding of marriage" is "a pretext for naked religious preference" which impermissibly prefers certain religious beliefs over others. (*Everson v. Board of Education* (1947) 330 U.S. 1, 15; *Sands v. Morongo Unified School Dist., supra*, 53 Cal.3d at p. 871; *Fox v. City of Los Angeles* (1978) 22 Cal.3d 792, 796; see also *Mandel v. Hodges* (1976) 54 Cal.App.3d 596, 617.)

These amici curiae also claim the ban on same-sex marriage violates the free exercise clause of the California Constitution, which is stronger than the counterpart federal right (*Sands v. Morongo Unified School Dist., supra*, 53 Cal.3d at pp. 882-883), and which guarantees not just freedom to believe, but "freedom to act." (*McNair v. Worldwide Church of God* (1987) 197 Cal.App.3d 363, 374.) Their religious beliefs and practices are abridged by the ban, they argue, because it prevents their clergy from administering the sacrament of marriage to couples they deem fit. They claim this abridgement can be sustained "only upon a demonstration that some compelling state interest outweighs the . . . interests in religious freedom." (*People v. Woody* (1964) 61 Cal.2d 716, 718.)

to marry, *Turner* necessarily recognized that the fundamentality of the right to marry is not tied to procreation.

Furthermore, as is often pointed out, "[n]o State marriage statute mentions procreation or even the desire to procreate among its conditions for legal marriage. No State requires that heterosexual couples who wish to marry be capable or even desirous of procreation. Moreover, many heterosexual couples who discover they cannot procreate in the usual way have chosen to procreate using the technologies of artificial insemination, sometimes involving strangers to their marital relationship; or they have availed themselves of adoption provided by state law. Artificial insemination and adoption, which all States today permit, are equally available as a practical matter to same-sex couples who wish to have and raise children." (Doherty, *Constitutional Methodology and Same-Sex Marriage* (2000) 11 J. Contemp. Legal Issues 110, 113.)

The nuanced argument that the state's primary interest in recognizing and regulating marriage is "responsible procreation," i.e., steering procreation into marriage, focuses on the protection of children resulting from potentially unplanned natural procreation. (See, e.g., *Hernandez v. Robles, supra,* 2006 WL 1835429 at pp. *5-6; *Morrison v. Sadler* (Ind. Ct.App. 2005) 821 N.E.2d 15, 24-25; *Lewis v. Harris, supra,* 875 A.2d at pp. 266-267; see *id.* at p. 276 (conc. opn. of Parrillo, J.A.D.) ["Marriage's vital purpose is not to mandate procreation but to control or ameliorate its consequences"].) The argument is based on the idea that children are best raised in a stable environment, that children conceived accidentally are more apt to be raised in unstable environments, and that because only opposite-sex couples can conceive accidentally, these couples are in need of incentives to marry. This argument not only ignores the children of lesbians and gay men, but fails to explain how excluding same-sex couples from marriage encourages opposite-sex couples to marry or otherwise enhances the interests of their children. Under no reasonably conceivable facts would the care received by accidentally conceived children be improved in any way by denying the right to marry to same-sex couples. All the restriction accomplishes is to deprive the children of same-sex unions the greater stability enjoyed by the children of married couples.

The Attorney General's failure to claim that the state has an interest in "steering procreation into marriage" is understandable. California has decided to provide same-sex couples who register as domestic partners the same legal rights and obligations with respect to a child of either of them as are enjoyed by spouses. (Fam. Code, § 297.5, subd. (d).) Our law also authorizes same-sex second parent adoptions (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417), and our Supreme Court has held that a same-sex partner not biologically related to a child may nevertheless be considered a parent for purposes of the Uniform Parentage Act (*Elisa B. v. Superior Court* (2005) 37 Cal.4th 108). California's "public policy favoring that a child has two parents rather than one" (*Kristine H. v. Lisa R.* (2005) 37 Cal.4th 156, 166), both of whom may be members of the same sex, is difficult to reconcile with the view that the relationship between procreation and marriage justifies the prohibition of same-sex marriage.

Because the ability of spouses to procreate—naturally and/or responsibly—is not among or necessarily related to the reasons the United States Supreme Court deems the right to marry a fundamental constitutional right, and because the reasons the high court has relied upon to reach that conclusion are as applicable to same-sex couples as to others, the right of such couples to marry is as highly protected by our Constitution as the right of opposite-sex couples.

E.

Recognizing Same-Sex Marriage
Would Not Usurp a Legislative Function

Central to the majority's resolution of this case is its position that respondents and this court cannot make "marriage" a legally protected privacy interest without impermissibly invading the legislative right to define the term. The majority says that "[o]ur role is limited to determining whether the Legislature's definition comports with constitutional standards" (maj. opn., *ante*, at p. 32), but in the next breath declares that "[w]ere we to expand the definition of marriage to include same-sex unions, we would overstep our bounds as a coequal branch of government." (Maj. opn., *ante*, at p. 32.) 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. As our Supreme Court has declared, " 'The regulation of marriage and divorce is solely within the province of the Legislature, *except as the same may be restricted by the Constitution.*' " (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1074, italics added, quoting *Beeler v. Beeler* (1954) 124 Cal.App.2d 679, 682.)

The majority feels free, indeed obliged, to defer to the legislative definition of marriage, and leave the matter to the political process, because of its conclusion that the right to marry asserted in this case is different from, and not as highly protected as, the right to marry that the Supreme Court has declared a fundamental constitutional right. That conclusion is unjustified because, in the end, it rests on no more than the facts that same-sex marriage has not traditionally been recognized and there is no public consensus favoring recognition of such marriage. Thus, the majority finds it significant that some states have reacted to the "controversial" decision of the Massachusetts Supreme Judicial Court in *Goodrich, supra*, 798 N.E.2d 941, by amending their constitutions to prohibit same-sex marriage. (Maj. opn., *ante*, at p. 26, fn. 16.) I do not think political developments in some other states deserve the emphasis the majority places upon them; we are deciding this case only for California, and we must be faithful to the mandates of *our* Constitution.

Moreover, the fact that same-sex couples have traditionally been prohibited from marrying is the reason this lawsuit was commenced; it cannot be converted into the dispositive reason it cannot succeed. The inquiry whether the right claimed in this case is fundamental should include its historical applications, to be sure, but it must consist of a careful weighing of the values at stake against the justifications asserted by the state for their restriction, not a mechanical application of a historical definition of marriage and popular opinion. The jurisprudential purpose of declaring a right fundamental is, of course, to *remove* it from the vagaries of popular opinion and the political process. What Justice Jackson said in *Board of Education v. Barnette, supra,* 319 U.S. 624, about the Bill of Rights, can also be said about the inalienable rights protected under article I,

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." (*Board of Education v. Barnette, supra,* 319 U.S. at p. 638.)

The doctrine of separation of powers is thus modified by the principle of checks and balances, which appropriately comes into play in this case. "It is precisely because we cannot expect the Legislature, representing majoritarian interests, to act to protect the rights of the homosexual minority, that our courts must take the necessary steps to acknowledge and act in protection of those rights. [¶] Moreover, the assumption that 'a majority of citizens has the right to insure by legal fiat that marriage continue to have its historical associations . . . contradicts a very basic principle of human dignity, which is that no person or group has the right deliberately to impose personal ethical values—the values that fix what counts as a successful and fulfilled life—on anyone else.' [Citation.]" (*Hernandez v. Robles* (N.Y. App.Div. 2005) 805 N.Y.S.2d 354, 383 (dis. opn. of Saxe, J.).)[8]

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[8] The majority supports its deference to the statutory definition of marriage by noting "the exclusionary intent of California voters who passed Proposition 22," which prevented California from recognizing same-sex marriages entered into in jurisdictions that authorize such marriages. (Maj. opn., *ante*, at p. 39.) However, the sentiments of the people reflected in a referendum or initiative are entitled to no greater deference than the legislative sentiments embodied in a statute. As Chief Justice Burger stated in *Citizens Against Rent Control v. Berkeley* (1981) 454 U.S. 290, "[i]t is *irrelevant* that the voters rather than a legislative body enacted [this law], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." (*Id.* at p. 295, italics added; accord, *Lucas v. Colorado Gen. Assembly* (1964) 377 U.S. 713, 715; *Felix v. Milliken* (E.D.Mich. 1978) 463 F.Supp. 1360, 1375.) The California Supreme Court shares this view. (See, e.g., *Wallace v. Zinman* (1927) 200 Cal. 585, 593 ["We do not recognize an initiative measure as having any greater strength or dignity than attaches to any other legislation"].) For an

Perez and Loving demonstrate that the fundamentality of the right to marry does not depend in any way upon whether its application would be consistent with the norms of the dominant culture. Interracial marriage was certainly not "deeply rooted in this Nation's history and tradition" when those cases were decided.[9] Indeed, the dissent in *Perez* emphasized the depth of the then-existing antipathy toward interracial marriage, arguing that in light of scientific, judicial and religious support for the traditional prohibition of such marriages, it was not within the court's province to upset the legislative determination. (*Perez, supra,* 32 Cal.2d at pp. 744-760 (dis. opn. of Shenk, J.) Same-sex marriage is now indeed "controversial," as my colleagues say. But even if one believes this is a factor we should heavily weight, as *Loving* and *Perez* certainly did not, the opposition to such unions in this state is not nearly as broad, as deep-seated, and as fierce as the hostility to interracial marriage when our Supreme Court invalidated the prohibition of such marriages.[10]

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explanation of the view that "judicial review of direct democracy frequently calls for *less* rather than more [judicial] restraint," and an inquiry as to whether elected state judges are "up to this task," see Eule, *Judicial Review of Direct Democracy* (1990) 99 Yale L.J. 1503, 1507, especially at pages 1579-1584.

[9] "The first antimiscegenation law in the colonies was enacted in Virginia in 1691 and thus antedated the Constitution by almost a century. Thirty-one states still had such laws at the end of World War II; sixteen states still had them in 1966, shortly before *Loving* was decided. [Citation.] In the *Dred Scott* decision, Chief Justice Taney cited the antimiscegenation laws of several states, including Massachusetts, Connecticut, New Hampshire, and Rhode Island, as evidence that blacks could not be citizens of the United States; such laws represented the fact that 'intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage.' *Scott v. Sandford*, 60 U.S. (19 How.) 393, 409, 413-16 (1857)." (Hohengarten, *Same-Sex Marriage and the Right of Privacy* (1994) 103 Yale L.J. 1495, 1506, fn. 42.)

[10] The *Perez* dissent explained that marriage between Whites and Negroes was prohibited by our Legislature at its original session, and the ban was thereafter extended to marriages between White persons and Mongolians. When the district court of appeal decided in 1933 that those laws did not prohibit a marriage between a White person and a Filipino (*Roldan v. Los Angeles County* (1933) 129 Cal.App. 267), the Legislature promptly extended the prohibition to apply to marriages between White persons and

Nor could the *Loving* and *Perez* courts have reached the result they did if the Supreme Courts of this nation and state accepted my colleagues' constricted view of the scope of judicial review. It is telling that the majority's theory that judicial invalidation of the challenged restrictions would usurp the Legislature's function was the basis not only of the dissent in *Perez,* but also of the unanimous decision of the Supreme Court of Appeals of Virginia in *Loving.* (*Loving v. Commonwealth* (1966) 206 Va. 924 [147 S.E.2d 78], revd. by *Loving, supra*, 388 U.S. 1).[11] The Virginia court refused to examine

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"members of the Malay race." (*Perez, supra,* 32 Cal.2d at pp. 746-747 (dis. opn. of Shenk, J.).) When *Perez* was decided, 29 other states prohibited interracial marriage, six "regarded the matter to be of such importance that they have by constitutional enactments prohibited their legislatures from passing any law legalizing marriage between white persons and Negroes or mulattoes," and '[s]everal states refuse[d] to recognize such marriages even if performed where valid." (*Id.* at p. 747.) The *Perez* dissent also noted that there was an "unbroken line of judicial support, both state and federal, for the validity of our own legislation, and there is none to the contrary" (*id.* at p. 752), and emphasized that in *Pace v. Alabama* (1882) 106 U.S. 583, rejected by *McLaughlin v. Florida* (1964) 379 U.S. 184, 188, the United States Supreme Court had upheld an Alabama statute mandating a state prison sentence for " 'any white person and any negro . . . [who] intermarry or live in adultery or fornication with each other.' " (*Perez, supra,* 32 Cal.2d at pp. 748-749.) The dissent argued that, given the overwhelming scientific and judicial support for the traditional prohibition of interracial marriage, and because "the Church bids her ministers to respect these laws, and to do all that is in their power to dissuade persons from entering into such unions" (*id.* at p. 744), "[i]t is not within the province of the courts to go behind the findings of the Legislature and determine that conditions did not exist which gave rise to and justified the enactment" (*id.* at p. 754). According to the dissent, "[w]hat the people's legislative representatives believe to be for the public good must be accepted as tending to promote the general welfare" (*id.* at p. 756), because "under our tripartite system of government this court may not substitute its judgment for that of the Legislature as to the necessity of the enactment where it was, as here, based upon existing conditions and scientific data and belief . . . ." (*Id.* at p. 760.)

[11] The Virginia Supreme Court of Appeals noted in *Loving v. Commonwealth* that the defendants' claims that the prohibition of interracial marriage denied them due process of law and equal protection of law had been earlier addressed and rejected in *Naim v. Naim* (1955) 197 Va. 80, remanded 350 U.S. 891, affirmed 197 Va. 734, appeal dismissed 350 U.S. 985. "There, it was pointed out that more than one-half of the states then had miscegenation statutes and that, in spite of numerous attacks in both state and federal courts, no court, save one, had held such statutes unconstitutional. The lone exception, it

"texts dealing with the sociological, biological and anthropological aspects of the question of interracial marriages," because it thought that consideration of such materials "would be judicial legislation in the rawest sense of that term.[12] *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.*" (*Loving v. Commonwealth, supra,* 147 S.E.2d at p. 82,

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was noted, was the California Supreme Court which declared the California miscegenation statutes unconstitutional in *Perez v. Sharp*, 32 Cal.2d 711 . . . ." (*Loving v. Commonwealth, supra*, 147 S.E.2d at p. 80.) Rejecting *Perez*, which it described as "contrary to the otherwise uninterrupted course of judicial decision, both State and Federal" (*Naim, supra*, 197 Vt. at p. 85), the *Naim* opinion relied instead upon the statement in *Plessy v. Ferguson* (1896) 163 U.S. 537 (*Plessy*)—which had been overruled by *Brown v. Board of Education* (1954) 347 U.S. 483 (*Brown*) the year before *Naim* was decided—that " '[l]aws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the state.' " (*Naim, supra,* 197 Va. at p. 87.) The Virginia Supreme Court of Appeals felt *Plessy* survived *Brown* on this point because "[n]othing was said in the *Brown v. Board of Education* case which detracted in any way from the effect of the language quoted from the *Plessy* opinion" relating to the power of the state to prohibit interracial marriage. (*Loving v. Commonwealth supra,* 147 S.E.2d at p. 80, quoting *Plessy, supra,* 163 U.S. at p. 545.)

The Virginia court was equally unimpressed with the defendants' reliance on "numerous federal decisions in the civil rights field in support of their claims that the *Naim* case should be reversed and that the statutes under consideration deny them due process of law and equal protection of the law," because "none of them deals with miscegenation statutes or curtails a legal truth which has always been recognized—that there is an overriding state interest in the institution of marriage." (*Loving v. Commonwealth, supra*, 147 S.E.2d at p. 82.)

[12] The court's condemnation of judicial reliance on "texts dealing with the sociological, biological and anthropological aspects of the question of interracial marriages" was a not-so-veiled criticism of the opinion in *Perez, supra*, 32 Cal.2d 711, in which Justice Traynor relied on such texts in repudiating the proposition that " '[t]he amalgamation of the races is not only unnatural, but is always productive of deplorable results.' " (*Id.* at p. 720; see also *id*, p. 720,fn. 3.) The many scholarly studies of the effects of racial segregation Justice Traynor relied on (*id.* at p. 722, fns. 4 & 5, p. 723, fn. 6, p. 727, fn. 8, and p. 729, fn. 8a), included the 1944 study, An American Dilemma: The Negro Problem and Modern Democracy, by Swedish economist and Nobel laureate Gunnar Myrdal, which was subsequently and more famously relied upon by the United States Supreme Court in *Brown, supra*, 347 U.S. at pp. 494-495, fn. 11.)

italics added.) The Virginia court considered it significant that "[t]oday, more than ten years since [the opinion in which we last sustained the ban on interracial marriage], a number of states still have miscegenation statutes and yet there has been no new decision reflecting adversely upon the validity of such statutes." (*Ibid.*)

The analysis of the Supreme Court of Appeals of Virginia is strikingly similar to that of my colleagues here. Ignoring the *reasons Brown* repudiated the doctrine of separate but equal, which rested heavily on its stigmatizing effect (*Brown, supra*, 347 U.S. at p. 493), the Virginia court dismissed *Brown* as inapposite. (*Loving v. Commonwealth, supra*, 147 S.E.2d at pp. 80-81.) Because the reference in *Plessy* to the validity of prohibitions of interracial marriage was not explicitly contradicted by *Brown*, the court felt free to rely on *Plessy* in validating restrictions on interracial marriage and declaring that they could be changed only by the Legislature. Similarly, it is only by ignoring the reasoning of the United States Supreme Court opinions relating to marriage and our Supreme Court's opinion in *Perez*—because none speak *directly* to the issue of same-sex marriage—that my colleagues can conclude that it would offend the separation of powers for this court to declare the restriction on same-sex marriage unconstitutional. As I have said, the federal marriage cases 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. (*Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 176-177.)

II.

A Classification Based on Sexual Orientation Should Be Subjected to Heightened Scrutiny

The legislative exclusion of same-sex couples from civil marriage should be subjected to strict scrutiny not only because it affects the fundamental constitutional right to marry, but also because it burdens a suspect class. Whether a classification is "suspect" depends on three factors: (1) The classification is based on "an immutable trait, a status into which the class members are locked by the accident of birth"; (2) the

defining characteristic "frequently bears no relation to ability to perform or contribute to society"; and (3) the characteristic defining the class is associated with a "stigma of inferiority and second class citizenship" and history of "severe legal and social disabilities." (*Sail'er Inn v. Kirby* (1971) 5 Cal.3d 1, 18-19 (*Sail'er Inn*).) All of these factors apply to lesbians and gay men.

Homosexuality was once widely considered a biological disease or psychological disorder that could be medically "cured" by a horrifying array of surgical procedures, as well as by electroshock treatment, psychoanalysis and other more bizarre conversion therapies. (Katz, Gay American History (rev. ed. 1992) pp. 129-207.)[13] This has long ceased to be the case. The American Psychiatric Association stopped considering homosexuality a disease in 1973 (Bayer, Homosexuality and American Psychiatry (1981) p. 138), and in 1994 mention of homosexuality completely disappeared from the Association's authoritative manual of mental disorders. (See Am. Psychiatric Assn., Task Force on DSM-IV, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) pp. 493-538.)

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[13] The treatments included "surgical measures: castration, hysterectomy, and vasectomy. In the 1800's, surgical removal of the ovaries and of the clitoris [were considered] a 'cure' for various forms of female 'erotomania,' including . . . Lesbianism. Lobotomy was performed as late as 1951. A variety of drug therapies have been employed, including the administration of hormones, LSD, sexual stimulants, and sexual depressants. Hypnosis, used on Gay people in America as early as 1899, was still being used to treat such 'deviant behavior' in 1967. Other documented 'cures' are shock treatment, both electric and chemical; aversion therapy, employing nausea-inducing drugs, electric shock, and/or negative verbal suggestion; and a type of behavior therapy called 'sensitization,' intended to increase heterosexual arousal, making ingenious use of pornographic photos. Often homosexuals have been the subjects of Freudian psychoanalysis and other varieties of individual and group psychotherapy. Some practitioners . . . have treated homosexuals by urging an effort of the will directed toward the goal of sexual abstinence. Primal therapists, vegetotherapists, and the leaders of each new psychological fad have had their say about treating homosexuals. Even musical analysis has reportedly assisted a doctor in such a 'cure.' Astrologers, Scientologists, Aesthetic Realists, and other quack philosophers have followed the medical profession's lead with their own suggestions for treatment." (Katz, Gay American History, *supra*, at p. 129, fn. omitted.)

Concluding 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," the Ninth Circuit has found that the imposition of conversion therapies by foreign nations may constitute "persecution" within the meaning of the Immigration and Nationality Act. (*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 *Gonzales v. Thomas* (2006) __ U.S. __ [126 S.Ct. 1613, 1615]; *Pitcherskaia v. I.N.S.* (9th Cir. 1997) 118 F.3d 641); see *Amanfi v. Ashcroft* (3d Cir. 2003) 328 F.3d 719, 727-730.) It may be true that the scientific community has not dispositively established that homosexuality is biologically immutable. Nevertheless, "[a]lthough the causes of homosexuality are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change. [Citations.] . . . It may be that some heterosexuals and homosexuals can change their sexual orientation through extensive therapy, neurosurgery or shock treatment. [Citations.] But the possibility of such a difficult and traumatic change does not make sexual orientation 'mutable' for equal protection purposes. . . . [A]llowing the government to penalize the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the constitutional ideal of equal protection of the laws." (*Watkins v. United States* (9th Cir. 1989) 875 F.2d 699, 725-726 (conc. opn. of Norris, J.); see also Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality* (1984) 57 S.Cal. L.Rev. 797, 817-821 [collecting scientific studies on the immutability of homosexuality].)[14]

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[14] The majority in *Watkins* did *not* find homosexuality to be a suspect classification, and *High Tech Gays v. Defense Industrial Security Clearance Office* (9th Cir. 1990) 895 F.2d 563, 572-573, expressly disagreed with Judge Norris's equal protection analysis in *Watkins*. *High Tech Gays* and the other federal cases that have held sexual orientation does not constitute a suspect classification (see, e.g., *Lofton v. Secretary of the Dept. of Children and Family Services* (11th Cir. 2004) 358 F.3d 804, 818 & fn. 16; *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* (6th Cir. 1997) 128 F.3d 289,

Our Supreme Court has also recognized the centrality of sexual orientation to individual identity, viewing it, for purposes of the Unruh Civil Rights Act (Civ. Code, § 51), as akin to sex, race, color, religion, ancestry, national origin, disability and medical condition, in that all these categories "represent traits, conditions, decisions, or choices fundamental to a person's identity, beliefs and self-definition." (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 842-843 (*Koebke*).) "The kinds of intimate relationships a person forms and the decision whether to formalize such relationships implicate deeply held personal beliefs and core values." (*Id.* at p. 843.)

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.)

Turning to the second *Sail'er Inn* factor, our state law clearly recognizes that sexual orientation is unrelated to an individual's ability to contribute to society. *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, expressly described workplace discrimination against gay men and lesbians as "arbitrary discrimination on grounds unrelated to a worker's qualifications." (*Id.* at pp. 474-475.) Discrimination on the basis of sexual orientation is prohibited in areas ranging from employment (e.g., Gov. Code, § 12940; Exec. Order No. B-54-79 (Apr. 4, 1979)), to judicial bias (Cal. Code of

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292-293; *Thomasson v. Perry* (4th Cir. 1996) 80 F.3d 915, 928; *Richenberg v. Perry* (8th Cir. 1996) 97 F.3d 256, 260, fn. 5; *Steffan v. Perry* (D.C.Cir. 1994) 41 F.3d 677, 685, fn. 3; *Ben-Shalom v. Marsh* (7th Cir. 1989) 881 F.2d 454, 464; *Woodward v. United States* (Fed. Cir. 1989) 871 F.2d 1068, 1076; *Padula v. Webster* (D.C.Cir. 1987) 822 F.2d 97, 102-103) can no longer be regarded as persuasive authority. The opinions in these cases all relied upon the since-overruled *Bowers, supra,* 478 U.S. 186, reasoning that since homosexual conduct could be criminalized, and it would be incongruous to view homosexuals as a protected class. The premise of this conclusion was destroyed by *Lawrence, supra,* 539 U.S. 558.

Judicial Ethics, canon 3) and custody and visitation determinations (*Nadler v. Superior Court* (1967) 255 Cal.App.2d 523, 525; *In re Marriage of Birdsall* (1988) 197 Cal.App.3d 1024, 1031.) Same-sex parents have been held to have the same rights and responsibilities as opposite-sex parents toward children they have had and raised together. (See *Elisa B. v. Superior Court, supra,* 37 Cal.4th 108; *Kristine H. v. Lisa R., supra,* 37 Cal.4th 156; *Sharon S. v. Superior Court, supra,* 31 Cal.4th 417.)

Finally, the record of discrimination against lesbians and gay men is long and well known. In western culture since the time of Christ the prevailing attitude has been "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment." (Posner, Sex and Reason, *supra*, at p. 291.) Courts have recognized that "[t]he aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities." (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co., supra,* 24 Cal.3d at p. 488.) "Lesbians and gay men . . . share a history of persecution comparable to that of Blacks and women." (*People v. Garcia* (2000) 77 Cal.App.4th 1269, 1276.) "Outside of racial and religious minorities, we can think of no group which has suffered such 'pernicious and sustained hostility' (*Rowland v. Mad River Local Sch. Dist.* (1985) 470 U.S. 1009, 1014 (dis. opn. of Brennan, J.) [dissenting from denial of certiorari]), and such 'immediate and severe opprobrium' (*ibid.*) as homosexuals." (*Garcia, supra,*, 77 Cal.App.4th at p. 1279, fn. omitted [lesbians and gay men are "cognizable group" requiring protection against discrimination in jury selection].)[15] Even *High Tech Gays* agreed that "homosexuals have suffered a history of discrimination." (*High Tech Gays v. Defense Industrial Security Clearance Office, supra,* 895 F.2d at p. 573.) The California Legislature officially acknowledged this history in its findings regarding the California Domestic Partner Rights and

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[15] The Legislature codified the decision in *People v. Garcia, supra*, 77 Cal.App.4th 1269, by enacting Code of Civil Procedure section 231.5, which prohibits the use of "a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her . . . sexual orientation . . . ."

Responsibilities Act of 2003 (Fam. Code, § 297 et seq.). (*Koebke, supra,* 36 Cal.4th at p. 849.)[16] Three years earlier, when it enacted the statute that prohibits peremptory challenges of prospective jurors on the basis of sexual orientation, the Legislature similarly found and declared that "[l]esbians and gay men share the common perspective of having spent their lives in a sexual minority, either exposed to, or fearful of, persecution and discrimination." (Stats. 2000, ch. 43, § 1, subd. (4), pp. 104-105.)

Examples of discrimination against lesbians and gay men abound. Because of their sexual orientation, lesbians and gay men have been denied custody of children (e.g., *Thigpen v. Carpenter* (Ark.Ct.App. 1987) 730 S.W.2d 510, 512-514; *S.E.G. v. R.A.G.* (Mo.Ct.App. 1987) 735 S.W.2d 164, 167; *Roe v. Roe* (Va. 1985) 324 S.E.2d 691, 694), denied employment opportunities (e.g., *Gay Law Students Assn. V. Pacific Tel. & Tel. Co., supra,* 24 Cal.3d at pp. 463, 464, 475; *Murray v. Oceanside Unified School Dist.* (2000) 79 Cal.App.4th 1338; *Kovatch v. California Casualty Management Co.* (1998) 65 Cal.App.4th 1256, 1275, overruled on other grounds in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 18; *Collins v. Shell Oil Co.* (1991) 56 Fair Empl.Prac.Cas. (BNA) 440 [1991 Cal.App.LEXIS 783]; *Gaylord v. Tacoma School Dist. No. 10* (1977) 88 Wn.2d 286 [559 P.2d 1340]; and subjected to harassment on the job (e.g., *Carreno v. Local Union No. 226, International Brotherhood of Electrical Workers* (D.Kan. 1990) 54 Fair Empl.Prac.Cas. (BNA) 81 [1990 U.S.Dist. LEXIS 13817].) As

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[16] *Koebke* stated: "[T]he Legislature has found that expanding the rights and obligations of domestic partners '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).)" (*Koebke, supra*, 36 Cal.4th at p. 846.)

"[D]iscrimination based on marital status implicates discrimination against homosexuals who, as the Legislature recognized in the Domestic Partner Act, have been subject to widespread discrimination. For example, in its findings with respect to [Code of Civil Procedure] section 297.5, the Legislature notes that gay, lesbian, and bisexual Californians have established 'lasting, committed, and caring relationships' despite 'longstanding social and economic discrimination' (Stats. 2003, ch. 421, § 1, subd. (b).) Additionally, the Legislature declared that one purpose served by expanding the rights of domestic partners is to combat such discrimination. (*Ibid.*)" (*Koebke, supra*, 36 Cal.4th at p. 849.)

earlier discussed, lesbians and gay men have been treated as deviants, in need of treatment, and have frequently been victims of pervasive harassment and violence. (See, e.g., *In re M.S.* (1995) 10 Cal.4th 698, 707-708; *In re Joshua H.* (1993) 13 Cal.App.4th 1734, 1748, fn. 9.)[17] Moreover, the sheer brutality of attacks against gay people demonstrates the animosity such individuals engender in some members of society.[18]

Simply put, as an Oregon court stated in finding sexual orientation a suspect class under that state's constitution, "it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice." (*Tanner v. Oregon Health Sciences Univ.* (1998) 157 Or.App. 502 [971 P.2d 435, 447].) The discrimination homosexuals suffer is at least comparable to that visited on women, illegitimate children, and often aliens, all of whom are members of classes

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[17] According to a national survey conducted in 2000, 74 percent of lesbians, gay men and bisexuals reported having been subjected to verbal abuse because of their sexual orientation and 32 percent reported being the target of physical violence. (Henry J. Kaiser Family Foundation, Inside-Out: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's View on Issues and Policies Related to Sexual Orientation (2001) pp. 3-4 [www.kff.org/kaiserpolls].)

The Federal Bureau of Investigation reported that 15.6 percent of hate crimes in the United States in 2004 resulted from sexual orientation prejudice (FBI, Hate Crime Statistics 2004 (2005) p. 5; in California in 2004, 18.7 percent of hate crimes were based on sexual orientation. (Cal. Dept. of Justice, Criminal Justice Statistics Center, Hate Crime in California 2004 (2005) p. 7 [www.ag.ca.gov.cjsc/publications/hatecrimes/hc04/preface.pdf].) These statistics are vastly disproportionate to the percentage of lesbians and gays in the general population: One study found approximately 2.1 percent of the United States population self-identified as gay or lesbian. (Rubenstein, et al., Some Demographic Characteristics of the Gay Community in the United States (2003) pp. 3-4) [www.law.ucla.edu/williamsinstitute/publications/GayDemographics.pdf].

[18] (See, e.g., Clines, *For Gay Soldier, A Daily Barrage of Threats and Slurs,* N.Y. Times (Dec. 12, 1999) p. 33, col. 1 [gay soldier harassed for months, then bludgeoned to death while sleeping in barracks]; Firestone, *Trial in Gay Killing Opens, To New Details of Savagery,* N.Y. Times (Aug. 4, 1999) p. A8, col. 1 [gay man brutally murdered then set on fire]; Brooke, *Witnesses Trace Brutal Killing of Gay Student,* N.Y. Times (Nov. 21, 1998) p. A9, col. 1 [Wyoming college student beaten, chained to fence and left to die by attackers, one taunting him with "It's Gay Awareness Week"].)

entitled to heightened protection. (*Frontiero v. Richardson* (1973) 411 U.S. 677 [women]; *Jimenez v. Weinberger* (1974) 417 U.S. 628 [illegitimate children]; *Graham v. Richardson* (1971) 403 U.S. 365 [aliens].)

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.

III.

There is Not Even a Rational Basis for the Challenged Restriction

As indicated, I believe the challenged statutes must be subjected to strict scrutiny both because they burden a fundamental right and, independently, because they target a suspect class. However, the statutes do not bear any reasonably conceivable rational relationship to a legitimate state purpose even assuming that is the proper test.

The state encapsulates its rational basis argument as follows: "The word 'marriage has a particular meaning for millions of Californians, and that common understanding of marriage is important to them. [¶] At the same time, Californians do not want to deny same-sex couples the rights, benefits and protections afforded to spouses. Accordingly, the California Legislature approved, and the Governor signed, sweeping laws dictating that registered domestic partners shall have the same rights, benefits and protections as spouses. [¶] . . . The resulting statutes create an appropriate and constitutional balance of legitimate interests, and the statutes are rationally related to those interests." Accepting this argument, the majority concludes that "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."[19] (Maj. opn., *ante*, at p. 55.)

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[19] As noted above, and unlike the recent decisions of the New York Court of Appeals and the Supreme Court of Washington (*Hernandez v. Robles, supra,* 2006 WL 1835429;

The theories that California provides same-sex partners rights and benefits equal to those provided spouses and that the state has a legitimate interest in perpetuating a traditional form of discrimination are both unsustainable.

A.

Domestic Partnership and Marriage are Not Equal

The California Domestic Partner Rights and Responsibilities Act of 2003 does not provide same-sex couples the same benefits as spouses, even if consideration is limited to those rights, protections and benefits the state has the power to grant, and ignoring also the disparity between the tangible benefits of domestic partnership and those of marriage, which is not great. The real problem lies in the disparity between the intangible disparities which, though difficult to measure precisely, is enormous. (See *Brown, supra*, 347 U.S. at p. 492 [decision "cannot turn on merely a comparison of [the] tangible factors . . . . We must look instead to the effect of segregation on public education"].)

To begin with, because domestic partnership is significantly easier to enter and leave than marriage (see Fam. Code, §§ 298-299), denying same-sex couples the right to

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Andersen v. King County, supra, 138 P.2d 963), and other courts, the majority does not purport to find a rational basis for banning same-sex marriage in the child-bearing and child-rearing purposes of marriage. The majority explicitly acknowledges that the "responsible procreation" argument advanced by some amici curiae (but expressly disavowed by the Attorney General, who alone speaks for the state) cannot be considered, "because [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.* [Citations.]" (Maj. opn., *ante*, at pp. 59-60, fn. 33, italics added.) Nevertheless, the majority insists, "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." (*Ibid.*) The majority thus reveals that, while it is aware that the historical understanding of marriage as excluding same-sex couples is inconsistent with our state policy of treating opposite-sex and same-sex couples equally (see, e.g., Fam. Code, § 297.5, subd. (a)), and does not take contemporary reproductive technology into account, it is in fact relying in some measure on the very procreative theory it purports to reject.

marry denies their children the greater stability of home environment offered by the marital relationship. Permitting their parents to marry would much more effectively protect the interests of these children and permit them to see their family as more normal than is now the case. More stable same-sex relationships would also benefit the individuals involved and the larger community.

More fundamentally, my colleagues' disclaimer notwithstanding, their claim that domestic partnership and marriage are "parallel institutions" is not very different from that made in *Plessy, supra*, 163 U.S. 573, and with the rejected reasoning of the Virginia Supreme Court of Appeals in *Loving v. Commonwealth, supra*, 147 S.E.2d 78, which explicitly relied on *Plessy*. (See discussion, *ante*, pp. 32-33, fn. 11.) Just as "[e]very one kn[ew]" that the statute at issue in *Plessy* "had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons" (*Plessy, supra*, 163 U.S. at p. 557 (dis. opn. of Harlan, J.)), so too does everyone know that the domestic partnership act was created not so much for the purpose of excluding heterosexual couples (though it does exclude most)[20] as to ameliorate the effect of and thereby help justify the state's refusal to permit homosexual couples to marry.

The point is not that relegating same-sex couples to domestic partnerships rather than marriage is as "bad" as racial segregation, for it clearly is not; but it *is* similar to the doctrine of "separate but equal" in that it also serves to legitimate and perpetuate differential group treatment. Offering homosexual couples the opportunity to become domestic partners does not eradicate the stain of their exclusion from the institution of civil marriage our society venerates so highly and makes readily available to everybody else. The difference between the terms "civil marriage" and "domestic partnership" "is not innocuous; it is a considered choice of language that reflects a demonstrable

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[20] The domestic partnership act provides that "persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62." (Fam. Code, § 297, subd. (b)(6)(B).)

assigning of same-sex, largely homosexual, couples to second-class status." (*Opinions of the Justices to the Senate* (2004) 440 Mass. 1201, 1207; 802 N.E.2d 565, 570.) A domestic partnership therefore does not provide a same-sex couple the same self-identifying expression of personhood made available by marriage. On the contrary, entrance of a gay or lesbian couple into a legal relationship known to have been made available to them to compensate for their exclusion from the superior marital relationship compels such a couple to acknowledge their inferior status.[21] The most powerful message their partnership communicates, to which everything else they may wish to communicate is subordinated, is that their sexual orientation disqualifies them from receiving the same respect and benefits the state accords heterosexual unions.[22] Laudable

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[21] This point was made in *Brown, supra*, 347 U.S. at page 494: " 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.' "

[22] Declarations submitted to the trial court eloquently illustrate the distinction between marriage and domestic partnerships. Helen Zia, a Chinese-American woman, explained: "In Chinese culture . . . marriage is a very important institution because it is regarded as the social expression of family, and affirms the strong values and obligations that family members owe one another. . . . [¶] . . . [¶] Neither we nor our families have been blessed with the sense of legitimacy and social support that comes with marriage. Marriage is something that Asian cultures, including Asian American culture, view in an almost spiritual way. It is a bonding of two families, the family of each person in the couple. It signifies lifelong commitment not only of the individuals in the couple to each other, but of each person in the couple to the family of the other and vice versa. . . ."

Zia married Lia Shigemura in San Francisco on February 16, 2004. "My 15-year-old niece has only ever known us as being together. Yet, when we told her we had married, she said to Lia: 'Now you're *really* my auntie. . . . How can you explain domestic partnership or civil union to a child or even to an older person? These concepts mean nothing to most people and certainly not to children. Marriage, on the other hand, has an acquired meaning that everyone understands. Now everyone in our families and our lives—including the children—'gets it.' [¶] . . . [¶] In the eyes of the law and of much of society, our commitment and our union, to each other and to our families, is not

as the domestic partnership act may be as providing at least half a loaf, it is in the end a simulacrum, a form of pseudomarriage that stigmatizes homosexual unions in much the same way "separate but equal" public schools stigmatized black students. Like separate educational facilities, domestic partnership and marriage are "inherently unequal."

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legitimate and not real, including because the stigma associated with being lesbian or gay in the Asian American community is deeply rooted. . . . Our relationship with our families has changed inalterably, and indescribably, as a result of our very brief civil marriage. . . ."

Zia's mother confirmed the point. "When you tell somebody that your daughter or son is 'married,' they know what you mean. They know your son or daughter has someone they love and someone they are committed to. [¶] When your son or daughter is married, you know how to introduce their spouse to your friends: you call them your son or son-in-law or your daughter or daughter-in-law. Everyone knows what it means. It means they are related to you and are part of your family. [¶] . . . [¶] For many years, Helen and Lia lived together and loved each other but could not get married. I almost never talked with my friends about Helen and Lia's relationship because I did not know how to describe it. . . . I didn't call Lia my 'daughter' even though I thought of her as a daughter, because it was not official and I didn't have the right words to explain what she means to Helen or why she is part of my family. [¶] Now I tell people that all of my children are married. I introduce Lia to my friends as 'my daughter' or 'my daughter-in-law.' I feel that Lia and her family are now truly our relatives."

Cecilia Manning described marrying Cheryl (Sher) Strugnell, with whom she had lived for 28 years: "I finally got to say out loud the vows that I had lived by with Sher my entire life. We felt like we were full-fledged citizens for the first time. [¶] . . . When we became domestic partners we did not receive gifts or gift certificates or bottles of wine, and we did not receive one single card. But when we got married, we received an abundance of cards and other gifts which signified the recognition of our legal union. That is something domestic partnership could not give us because in other people's eyes domestic partnership is not marriage and it never will be. There is something about the institution of marriage that is not only about the benefits that you get and the tax breaks that you get because you're married, but there's a homage, almost, that is paid by the rest of society because you are spouses."

Michael Allen Quenneville pestered his two mothers to get married in February 2004 because he felt "marriage is the way to show the highest form of love to someone" and wanted his mothers to be "equal with everyone else." "Even though they've been together for a very long time, they seem less equal in other people's eyes because they are not married. . . . It's an acknowledgement of a relationship and it isn't the real thing until you get married. . . . [¶] . . . [¶] I'll never forget my parents' wedding day. I cannot say the same for when they became domestic partners."

(*Brown, supra,* 347 U.S. at p. 495.) The trial court was right in stating that offering same-sex couples "marriage-like rights" instead of marriage itself " 'generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.' " (See *id.* at p. 494.) The majority's characterization of the issue here as a "largely symbolic" quarrel about the word that will be used to describe same-sex relationships (maj. opn., *ante,* at p. 57) downplays the extraordinary significance of the symbol in question and the profound consequence of barring its use. (See *Opinions of the Justices to the Senate, supra,* 440 Mass. at p. 1208 & fn. 4 [802 N.E.2d 565, 570 & fn. 4].)

I do not say the domestic partnership act cannot bear legal or constitutional scrutiny, or that it is bad policy, which I do not believe; but there seems to me something perverse about relying upon a law which tells the public homosexual unions may be treated less well than heterosexual unions as a basis upon which to constitutionally justify a law that bars homosexuals from marrying.

B.

The State Has No Legitimate Interest in Perpetuating Traditional Disapproval of Same-Sex Marriage

The state says the traditional understanding of marriage as excluding same-sex couples is "important" to "millions of Californians," but does not explain why. It is fair to assume that it is because permitting same-sex marriage would acknowledge that homosexual relationships can be as loving, committed, and socially useful as heterosexual relationships, and thereby offend those who for religious or moral reasons reject that possibility. Preserving the traditional understanding of marriage may thus be seen, as Justice Scalia says, as simply a "way of describing the State's *moral disapproval* of same-sex couples." (*Lawrence, supra*, 539 U.S. at p. 601 (dis. opn. of Scalia, J.).) If that moral attitude still prevails in this state, it cannot be legitimated by its historical roots. As stated in *Perez*, "the fact alone" that California and most other states always prohibited interracial marriage cannot justify the practice. (*Perez, supra*, 32 Cal.2d 711

at p. 727.) While tradition will often be a relevant factor, because the enduring nature of a practice does suggest it has social utility, reliance upon historical understandings to validate an intentionally discriminatory restriction *not otherwise justified* would devitalize and embalm the Constitution as we know it. Constitutional principles are "not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights." (*People v. Belous, supra,* 71 Cal.2d at p. 967; see also *Lawrence, supra*, 539 U.S. at pp. 578-579.)

I do not take the position that the state can have no interest in promoting a moral view, but the state constitutional right of privacy would be meaningless if government repression of expressive and intimate associational conduct can be justified by the risk that a competing moral view will gain acceptance. *Lawrence, supra,* 539 U.S. 558, rejects such a morality-based rationale. In response to Texas's argument that its anti-sodomy law promoted morality, the *Lawrence* court adopted the view expressed by Justice Stevens in his dissent in *Bowers, supra,* 478 U.S. 186: " 'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.' " (*Lawrence, supra*, 537 U.S. at p. 577.) Judicial 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. If the Constitution permits the state to prohibit same-sex marriage because homosexuality offends many people, the right to marry of other unpopular groups can also be abridged.

The interest the state claims in maintaining the ban on same-sex marriage ignores not only the profound nature of the liberty interest it denies to an entire class of citizens, but also the dramatic extent to which traditional concepts of marriage are constantly evolving, so that many of the features that once most significantly defined marriage have been discarded. Such changes were almost always strongly resisted. When the New York Legislature was considering whether to allow married women to own property

independently of their husbands, a legislator claimed that the measure would lead "to infidelity in the marriage bed, a high rate of divorce, and increased female criminality," while turning marriage from "its high and holy purposes" into something that merely facilitated "convenience and sensuality." (Graff, What is Marriage For? (1999) pp. 30-31.) The fundamental changes that have been made in the institution of marriage include not just divorce and property reform "but also the abolition of polygamy, the fading of dowries, the abolition of childhood betrothals, the elimination of parents' rights to choose mates for their children or to veto their children's choices, the legalization of interracial marriage, the legalization of contraception, the criminalization of marital rape (an offense that wasn't even recognized until recently), and of course the very concept of civil marriage. Surely it is unfair to say that marriage may be reformed for the sake of anyone and everyone except homosexuals, who must respect the dictates of tradition." (Rauch, Gay Marriage (2004) p. 168.)

Because marriage is central to one's sense of self, resistance to change in the traditional concept of the institution is to be expected, particularly when the change is related to sexual identity. Nevertheless, the state *has not even claimed*, let alone shown, that same-sex marriage conflicts with any legitimate interest it has in preserving and strengthening the institution of marriage. Respondents "seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit." (*Goodridge, supra*, 798 N.E.2d at p. 965.)

The majority acknowledges that Family Code section 300 was enacted for the *express purpose* of prohibiting persons of the same sex from marrying. (Maj. opn., *ante*, at pp. 12-13.) But rational basis inquiry is meant to "ensure that classifications are *not* drawn for the purpose of disadvantaging the group burdened by the law . . . ." (*Romer v. Evans* (1996) 517 U.S. 620, 633, italics added.) The *Romer* court faulted the Colorado constitutional amendment at issue in that case for imposing a "broad and undifferentiated disability on a single named group" (*id.* at p. 632), noting that "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it effects." (*Ibid.*) The amendment was "a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests." (*Id.* at p. 635.) Thus the court felt compelled to draw "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." (*Id.* at p. 634.) Because " 'desire to harm a politically unpopular group cannot constitute a legitimate governmental interest' " (*ibid.*, quoting *U.S. Dept. of Agriculture v. Moreno* (1973) 413 U.S. 528, 534), the court concluded that the amendment violated the "conventional and venerable" principle that "a law must bear a rational relationship to a legitimate governmental purpose." (*Romer, supra,* 517 U.S. at p. 635.)

Much the same reasoning applies here. Though the ban on same-sex marriage does not have as many different applications as the constitutional amendment at issue in *Romer*, it is just as completely unconnected to any legitimate governmental purpose. The state and the majority agree that the restriction of marriage to opposite-sex couples cannot be justified by reliance upon the procreation rationale that focuses on the only trait genuinely distinguishing same-sex from opposite-sex couples. The same-sex marriage ban thus 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. There is here no connection whatsoever between the exclusion of same-sex marriage and the quality of opposite-sex marriage. Neither the rights or interests of opposite-sex couples nor those of their children are in any conceivable way

advanced by banning same-sex marriage, though the ban substantially impairs the rights of same-sex couples and their children. The ban on same-sex marriage is thus as discontinuous with the reasons offered for it as the disability imposed by the amendment stricken in *Romer*.

IV.

CONCLUSION

To say that that the inalienable right to marry the person of one's choice is not a fundamental constitutional right, and therefore may be restricted by the state without a showing of compelling need, is as terrible a backward step as was the unfortunate and now overruled opinion in *Bowers, supra*, 478 U.S. 186. Ignoring the qualities attached to marriage by the Supreme Court, and defining it instead by who it excludes, demeans the institution of marriage and diminishes the humanity of the gay men and lesbians who wish to marry a loved one of their choice.

We are told by the Supreme Court of the United States that the right to marry—which is among "the vital personal rights essential to the orderly pursuit of happiness by free men" (*Loving, supra*, 388 U.S. at p. 12)—cannot be taken from deadbeat dads, spousal abusers, and other condemned criminals because their characteristics do not render them unable to partake of the attributes of marriage that render the right to marry a fundamental constitutional right. Gay men and lesbians are no less capable of enjoying and benefiting from the constitutionally significant aspects of marriage. Homosexual couples are as able as heterosexual couples to love and commit themselves to one another, to responsibly raise children, and to define for themselves and to express to the world the authenticity of their relationship. So too are they as able as other couples to benefit from the spiritual, religious, and emotional experience marriage best provides, and as deserving of the official respect and numerous other benefits the state confers upon the marital relationship. My colleagues do not say otherwise (nor does the state), but the restriction they uphold does, because it sends the unmistakable message that, unlike all other citizens, to whom marriage is made easily available, "gay people are not genuinely capable of the unitive good of interpersonal joy and commitment." (Eskridge,

Equality Practice: Civil Unions and the Future of Gay Rights (2002) pp. 237-238.) Judicial opinions upholding blanket denial of the right of gay men and lesbians to enter society's most fundamental and sacred institution are as incompatible with liberty and equality, and as inhumane, as the many opinions that upheld denial of that right to interracial couples. Like them, such opinions will not stand the test of time.

For the foregoing reasons, I dissent from all portions of the majority opinion except that concluding that CCF and the Fund lack standing to pursue their declaratory relief claims.

Kline, J.*

* Presiding Justice of the Court of Appeal, First Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Trial Court:	San Francisco County Superior Court
Judge:	Richard A. Kramer

Alliance Defense Fund, Benjamin W. Bull, Glen Lavy, Christopher R. Stovall, Dale Schowengerdt; Advocates for Faith and Freedom, Robert H. Tyler; Law Offices of Terry L. Thompson, Terry L. Thompson; Law Offices of Andrew P. Pugno and Andrew P. Pugno for Plaintiff and Appellant Proposition 22 Legal Defense and Education Fund.

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Marriage Law Foundation and Monte N. Stewart for United Families International and Family Leader Foundation as Amici Curiae on behalf of Defendant and Appellant State of California.

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Black Attorneys Association and Zuna Institute as Amici Curiae on behalf of Plaintiffs and Respondents.

Raoul D. Kennedy, Elizabeth Harlan, Jo Ann Hoenninger, Joren S. Bass, Philip A. Lieder, Michael D. Meuti, Stephen Lee; Eric Alan Isaacson; and Reverend Silvio Nardoni for Affirmation: Gay and Lesbian Mormons, Al-Fatiha Foundation, Dignity USA, Executive Committee of the American Friends Service Committee, General Synod of the United Church of Christ, Soka-Gakkai International-USA, Union for Reform Judaism, Unitarian Universalist Association of Congregations, Universal Fellowship of Metropolitan Community Churches, California Church IMPACT, California Council of Churches, California Faith for Equality, Council of Churches of Santa Clara County, Friends Committee on Legislation of California, Jews for Marriage Equality (Southern California), Pacific Central District Chapter of the Unitarian Universalist Ministers Association, Pacific Southwest Council of the Union for Reform Judaism, Pacific Southwest District Chapter of the Unitarian Universalist Ministers Association, Progressive Christians Uniting, Reconciling Ministries Clergy of the California-Nevada Conference of the United Methodists, Unitarian Universalist Legislative Ministry-CA, All Saints Episcopal Church, All Saints Metropolitan Community Church, Bay Area American Indian Two-Spirits, Berkeley Fellowship of Unitarian Universalists, Emerson Unitarian Universalist Church Board of Trustees, First Unitarian Universalist Church of San Diego Board of Trustees, Neighborhood Unitarian Universalist Church Board of Trustees, Unitarian Universalist Church of Ventura Board of Trustees, UCC Community Church of Atascadero, Congregation Beth Chayim Chadashim, Congregation Kol Ami, Congregation Sha'ar Zahav, Congregation Shir Hadash, Conejo Valley Unitarian Universalist Fellowship Faith in Action Committee, First Unitarian Universalist Church of Stockton, First Unitarian Universalist Society of San Francisco, Humboldt Unitarian Universalist Fellowship, Kol Hadash, Community for Humanistic Judaism, Metropolitan Community Church in the Valley, Metropolitan Community Church of San Jose, Metropolitan Community Church Los Angeles, Mt. Diablo Unitarian Universalist Church, Mt. Hollywood Congregational Church United Church of Christ, Pacific School of Religion, Parkside Community Church, United Church of Christ, Pilgrim United Church of Christ, San Leandro Community Church, Berkeley Unitarian Universalist Fellowship Social Justice Committee, Social Justice Ministry at First Church, St. John Evangelist Episcopal Church, Starr King Unitarian Universalist Church, The Ecumenical Catholic Church, Unitarian Universalist Church of Palo Alto, Unitarian Universalist Church of the Monterey Peninsula, Unitarian Universalist Community Church of Sacramento, Unitarian Universalist Community Church of Santa Monica, Unitarian Universalist Community Church of South County, Unitarian Universalist Congregation of Marin, Unitarian Universalist Fellowship of Laguna Beach, Unitarian Universalist Fellowship of Redwood City, Unitarian Universalist Fellowship of Stanislaus County, Unitarian Universalists of San Mateo, Unitarian Universalists of Santa Clarita, United Church of Christ in Simi Valley, Universalist Unitarian Church of Santa Paula, University Lutheran Chapel, Reverend Doctor Pam Allen-Thompson, Reverend Rachel

Anderson, Rabbi Camille Angel, Rabbi Melanie Aron, Reverend Joy Atkinson, Reverend JD Benson, Rabbi Linda Bertenthal, Pastor LeAnn Blackert, Reverend Susan Brecht, Pastor Paul Brenner, Reverend Doctor Ken Brown, Reverend Kevin Bucy, Reverend Helen Carroll, Rabbi Ari Cartun, Reverend Craig B. Chapman, Reverend Barbara M. Cheatham, Reverend Jan Christian, The Reverend Beate Chun, Reverend June M. Clark, The Reverend Anne G. Cohen, Rabbi Helen T. Cohn, Rabbi Susan S. Comforti, Rabbi Laurie Coskey, Reverend Lyn Cox, Reverend Sofia Craethnenn, Reverend Robbie Cranch, Reverend Matthew Crary, Reverend Cinnamon Daniel, Reverend Diann Davisson, Pastor Jerry De Jong, Reverend Frances A. Dew, Rabbi Lisa A. Edwards Ph.D., Rabbi Denise Eger, Reverend Michael Ellard, Reverend Stefanie Etzbach–Dale, Pastor Brenda Evans, Interim Minister Mark Evens, Reverend Lydia Ferrante-Roseberry, Reverend Michelle Favreult, Reverend Renae Extrum-Fernandez, Rabbi Joel Fleekop, Reverend Diana Gibson, Reverend Doctor Robert Goss, Reverend Doctor June Goudey, Reverend Robert C. Grabowski, Reverend James Grant, Rabbi Bruce DePriester Greenbaum, Reverend Doctor Susan Hamilton, Reverend Bill Hamilton-Holway, Reverend Barbara Hamilton-Holway, Reverend Doctor Kathy Hearn , Reverend Jane Heckles, Rabbi Alan Henkin, Rabbi Jay Heyman, Reverend Anne Felton Hines, Reverend Jackie Holland, Reverend Marcia Hootman, Reverend Ricky Hoyt, Reverend Kathy Huff, Reverend Keith Inouye, Reverend Bryan Jessup, Reverend Jeff Johnson, Reverend Beth Johnson, Reverend Roger Jones, Reverend Julie Kain, Reverend Kathryn Kandarian, Reverend John Kirkley, Reverend Benjamin A. Kocs-Meyers, Reverend Kurt Kuhwald, Reverend Richard Kuykendall, Reverend Peter Laarman, Rabbi Howard Laibson, Reverend Darcey Laine, , Pastor Scott Landis, Rabbi Moshe Levin, Reverend Tom Lewis, Reverend Ken MacLean, Rabbi Tamar Malino, Reverend Elder Debbie Martin, Pastor Michael-Ray Matthews, Reverend Gregory W. McGonigle, Reverend Joseph McGowan, Rev. William McKinney, Reverend Susan Meeter, Reverend Eric H. Meter, Reverend Judith Meyer, Reverend Barbara F. Meyers, Reverend Beth Miller, Reverend John Millspaugh, Reverend Sarah Moldenhauer-Salazar, Reverend Amy Zucker Morgenstern, Reverend David Moss, Reverend Silvio Nardoni, Reverend James A. Nelson, Reverend Drew Nettinga, Reverend Julia Older, Reverend Nancy Palmer Jones, Rev. Doctor Rebecca Parker, Reverend Ernest Pipes, Reverend Georgia Prescott, Reverend Carolyn Price, Reverend Sherry Prud'homme, Reverend Jane Quandt, Reverend Lindi Ramsden, Rabbi Lawrence Raphael, Reverend John Robinson, Reverend Carol Rudisill, Reverend Susan Russell, Reverend David Sammons, Reverend Thomas Schmidt, Reverend Craig Scott, Reverend Wayne Scovell, Reverend Michael Schuenemeyer, Doctor John M. Sherwood, Most Reverend Mark Shirilau, The Reverend Madison Shockley II, Reverend Grace Simons, Most Reverend Bruce J. Simpson, Reverend Dan Smith, Reverend Jeffrey Spencer, Reverend June Stanford-Clark, Reverend Doctor Betty Stapleford, Reverend Stanley Stefancic, Reverend Arvid Straube, Reverend Doctor Archer Summers, Reverend Steven Swope, Reverend Paul Tellstrom, Reverend Margo Tenold, Reverend Neil Thomas, Reverend Lynn Ungar, Reverend Nada Velimirovic, Rabbi Arthur Waskow, Reverend Theodore A. Webb, Reverend Doctor Petra Weldes, Reverend Vail Weller, Reverend Bets Wienecke, Reverend Elder Nancy

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Thomas J. Kuna-Jacob as Amicus Curiae.

EXHIBIT B

COPY

Filed 11/6/2006

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

FILED
Court of Appeal First Appellate District
NOV 06 2006
Diana Herbert, Clerk
By _____ Deputy Clerk

In re MARRIAGE CASES

[Six consolidated appeals.*]

A110449, A110450, A110451, A110463, A110651, A110652

(JCCP No. 4365)

ORDER MODIFYING OPINIONS AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

BY THE COURT:

The majority opinion filed herein on October 5, 2006, is modified as follows:

1. In the last sentence in the text on page 44, replace the clause after the word "and" with the following: "no clear factual record was developed addressing the three suspect classification factors."

2. In the first sentence on page 45, replace the word "evidence" with the words "lower court findings."

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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-04428794]).

The concurring and dissenting opinion of Kline, J.,* filed herein on October 5, 2006, is modified as follows:

1. At the end of the last sentence of the paragraph commencing at the bottom of page 34 and ending at the top of page 35 (first full paragraph of part II), add as footnote 13 the following footnote, which will require renumbering of all subsequent footnotes in the concurring and dissenting opinion:

> [13] The majority's statement that "no clear factual record was developed [in the trial court] addressing the three suspect classification factors" (maj. opn., *ante*, at p. ___ [*see modification No. 1, above, to page 44 of majority opinion*]) 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.

These modifications do not affect the judgment.

Rehearing petitions filed by respondents City and County of San Francisco, Gregory Clinton and Lancy Woo, and by respondent-interveners Equality California and Del Martin, are denied.

Dated: _____ P.J.

---

* Presiding Justice of the Court of Appeal, First Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Trial Court: San Francisco County Superior Court

Judge: Richard A. Kramer

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EXHIBIT C

FILED
San Francisco County Superior Court
APR 13 2005
GORDON PARK-LI, Clerk
BY: Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

COORDINATION PROCEEDING, SPECIAL TITLE [RULE 1550(c)], MARRIAGE CASES	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4365
	FINAL DECISION ON APPLICATIONS FOR WRIT OF MANDATE, MOTIONS FOR SUMMARY JUDGMENT, AND MOTIONS FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

This Judicial Council Coordination Proceeding consists of six coordinated cases.[1] While the cases differ from each other in several respects, all share a common issue: whether Family Code section 300, which provides that a marriage in this state is a union between a man and a woman, and Family Code section 308.5, which provides that only a marriage between a man and a woman is valid or recognized in California, violate California's Constitution.

[1] All of the cases except *Clinton v. State of California* were coordinated under the Order Assigning Coordination Trial Judge, filed June 14, 2004. On September 8, 2004, *Clinton* was coordinated as an add-on case under Rule 1544, California Rules of Court.

For the reasons set forth below, this court concludes that both sections are unconstitutional under the California Constitution.

PROCEDURAL MATTERS

Through various pretrial proceedings, the coordinated cases were organized so that their common issue could be resolved simultaneously. The idea was that such resolution be embodied in an appealable judgment in each case, and thus all cases could proceed together for appellate review. In order to accomplish this, on December 22 and 23, 2004, the following proceedings were held:

1. *Woo* v. *State of California* (San Francisco Superior Court No. 504038) - Hearing on Application for Writ of Mandate under Code of Civil Procedure section 1094.
2. *City and County of San Francisco* v. *State of California* (San Francisco Superior Court No. 429539) - Hearing on Application for Writ of Mandate under Code of Civil Procedure section 1094.
3. *Clinton* v. *State of California* (San Francisco Superior Court No. 429548) - Hearing on Application for Writ of Mandate under Code of Civil Procedure section 1094.
4. *Proposition 22 Legal Defense and Education Fund* v. *City and County of San Francisco* (San Francisco Superior Court No. 503943) - Hearing on Motion for Summary Judgment under Code of Civil Procedure section 437c and on Motion for Judgment on the Pleadings.
5. *Randy Thomasson* v. *Gavin Newsom* (San Francisco Superior Court No. 428794) - Hearing on Motion for Summary Judgment under Code of Civil Procedure section 437c and on Motion for Judgment on the Pleadings.

6. *Robin Tyler v. County of Los Angeles* (Los Angeles Superior Court No. 088506) - Hearing on Application for Writ of Mandate under Code of Civil Procedure section 1094.

This decision resolves the constitutional question for each case in its respective procedural context.

ANALYSIS

1. General Constitutional Concepts

The parties advocating same-sex marriage argue that Family Code sections 300 and 308.5 violate the due process, equal protection and privacy provisions of the California Constitution (Cal. Const., art. I § 7, subd. (a), and art. I, § 1). The cases can be resolved upon the equal protection argument.

In analyzing an equal protection challenge to a statute under our state Constitution, the courts have recognized that most legislation creates classifications for one purpose or another, and then differentiates upon the classifications. (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913.) This inexorably leads to legislatively conferred advantages or disadvantages based on such classifications. (*Flynt v. California Gambling Control Commission* (2004) 104 Cal.App.4th 1125, 1140.) The power to classify in this manner emanates from the police power under the United States Constitution, which reserves to the states the power to promote the general welfare of their citizens, and from the inherent power of government to provide for the protection, security and benefit of the people. This general police power, however, must be reconciled with the equal protection clause, which provides that no person shall be denied equal

protection under the law. (*Romer v. Evans* (1996) 517 U.S. 620, 633-35; *Board of Supervisors v. Local Agency Formation Com.*, *supra*, 3 Cal.4th at 913.)

The reconciliation of the police power to promote the general welfare with the right of citizens to equal protection under the law is manifested in two tests that depend on the nature of the classification created by the legislation. The first is the basic standard for reviewing economic and social welfare legislation, in which there is a differentiation between classes of individuals but such classifications are not "suspect" or do not implicate fundamental human rights. In such instances, the legislative classifications are presumptively valid and must be upheld so long as there exists a rational relationship between the disparity of treatment and some legitimate governmental purpose. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 17; *Flynt v. California Gambling Control Commission*, *supra*, 104 Cal.App.4th at 1140.) Under this test, the burden is on the party challenging the legislation to demonstrate the absence of any rational connection to a legitimate state interest. (*D'Amico v. Board of Medical Examiners*, *supra*, 11 Cal.3d at 17.) This first test is known as the "rational basis test."

The second test is more stringent and is applied in cases where "suspect" classifications or fundamental human rights are implicated in the legislation. Here, the courts adopt "an attitude of active and critical analysis, subjecting the classification to strict scrutiny [citations]. Under this standard, *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 17, original italics.) This second test is known as the "strict scrutiny" test.

The parties dispute both which test applies here and what the result of such application would be. For the reasons set forth below, the strict scrutiny test applies to this case. Further, this court concludes that under either the rational basis test or the strict scrutiny test, Family Code sections 300 and 308.5 fail to meet constitutional muster. Accordingly, in the interest of a full analysis of the issues, each test will be applied.

2. The Rational Basis Test

As is set forth above, the rational basis test places the burden of demonstrating the lack of a rational connection between the challenged legislation and a legitimate state purpose on those who challenge the law. While the courts defer to the legislature, the fact that legislation exists is not sufficient to conclude that the requisite rational basis likewise exists. Instead, under this test, the courts must conduct "a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals" as follows:

> The decisions clearly hold that a legislative classification, such as that involved here, violates the constitutional requirement of equal protection of the law unless it rationally relates to a legitimate state purpose. Neither our cases nor those of the United States Supreme Court have settled on a particular verbal formula to express this proposition. Some decisions require that the classification 'bear some rational relationship to a conceivable legitimate state purpose'[citation]; others, that the classification must rest upon 'some ground of difference having a fair and substantial relation to the object of the legislation.'[citations].

(*Newland v. Board of Governors* (1977) 19 Cal.3d 705, 711.)

Upon these standards, the challengers to Family Code sections 300 and 308.5 have met their burden of demonstrating that those sections do not

rationally relate to a legitimate state purpose. To be sure, the burden here is to demonstrate a negative. Nonetheless, it appears that no rational purpose exists for limiting marriage in this State to opposite-sex partners.

Looking for a rational legitimate state purpose, this court begins with the purposes advanced by the State in its oppositions filed herein. The State offers two purported purposes. The first is that the male/female marriage requirement embodies California's traditional understanding that a marriage is a union between a male and a female. This argument is that opposite-sex marriage is deeply rooted in our state's history, culture and tradition and that the courts should not redefine marriage to be what it has never been before.

In the appropriate contexts, the legislative embodiment of history, culture and tradition is constitutionally permissible. Indeed, examples abound. From such areas as the legislative recognition of traditional holidays (Government Code section 19853) to the requirement that everyone drive on the right side of the road (Vehicle Code section 21650) and the statutory adoption of common law maxims of jurisprudence (Civil Code sections 3509 through 3548), the legislature has often codified history, culture and tradition. In each such instance, however, an underlying rational basis beyond general acceptance by society justifies the law. Hence, legislative determinations of appropriate working conditions recognize generally accepted holidays, the Vehicle Code rules of the road which adopt how people had already been driving prevent highway chaos, and the enactment of well-established common law maxims of jurisprudence provides useful guideposts to fill gaps in codified law.

This is not to say that all legislative adoptions of how things have been are constitutional. The state's protracted denial of equal protection cannot be justified simply because such constitutional violation has become traditional. In *Perez v. Sharp* (1948) 32 Cal.2d 711, California's statutory ban on interracial marriages was challenged as violating the equal protection clause of the United States Constitution. Advocates of the racial ban asserted that because historically and culturally, blacks had not been permitted to marry whites, the statute was justified. This argument was rejected by the Court: "[c]ertainly, the fact alone that the discrimination has been sanctioned by the state for many years does not supply such [constitutional] justification." *Id.* at 727.

To be sure, the Court in *Perez* applied a "compelling state interest" analysis rather than the lesser rational basis test. This difference, however, is of no consequence. Even under the rational basis standard, a statute lacking a reasonable connection to a legitimate state interest cannot acquire such a connection simply by surviving unchallenged over time. As was stated in other contexts "no length of uncritical history or mindless tradition may sanction a procedure when the 'unconstitutionality of the course pursued...has been made clear.' *Erie R.R. Co. v. Tompkins* (1938) 304 U.S. 64, 77-78 [citations]." (*In Re Anderson* (1968) 69 Cal.2d 613, 641.)

Similarly, in *Lawrence v. Texas* (2003) 539 U.S. 558, 577-78, the Court said:

> [T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.

From these authorities, this court concludes that California's traditional limit of marriage to a union between a man and a woman is not a sufficient rational basis to justify Family Code sections 300 and 308.5. Simply put, same-sex marriage cannot be prohibited solely because California has always done so before.

The second argument advanced by the State is a combination of the tradition argument with the assertion that California has granted to same-sex couples virtually all of the rights that marriage entails. Thus, the State asserts, "it is not irrational for California to afford substantially all rights and benefits to same-sex couples while maintaining the common and traditional understanding of marriage."

If the maintenance of opposite-sex only marriage cannot be constitutionally justified due to tradition alone, the creation of a superstructure of marriage-like benefits for same-sex couples is no remedy. The issue is not whether such a system is "irrational." The rational basis test is not an abstract logic exercise whereby the court determines whether the challenged law makes sense. 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. If this State has decided not to allow same-sex couples to marry, it might be quite reasonable to ameliorate some of their practical concerns in such areas as taxation, health care, inheritance and the like. Such reasonableness does not substitute for the need to find a rational basis for denying same-sex marriage in the first place.

It is true that the marriage-like benefits legislation is relevant to the constitutional question here. In determining whether a rational basis for

a classification exists, the court must consider the nature of the class being singled out and must view the operation of the questioned legislation in the context of other legislation defining the rights of persons similarly situated. (*Brown* v. *Merlo* (1973) 8 Cal.3d 855, 861-62.)

In this context, the existence of marriage-like rights without marriage actually cuts against the existence of a rational government interest for denying marriage to same-sex couples. California's enactment of rights for same-sex couples belies any argument that the State would have a legitimate interest in denying marriage in order to preclude same-sex couples from acquiring some marital right that might somehow be inappropriate for them to have. No party has argued the existence of such an inappropriate right, and this court cannot think of one. Thus, the State's position that California has granted marriage-like rights to same-sex couples points to the conclusion that there is no rational state interest in denying them the rites of marriage as well.

The idea that marriage-like rights without marriage is adequate smacks of a concept long rejected by the courts: separate but equal. In *Brown* v. *Board of Education of Topeka, et al.* (1952) 347 U.S. 483, 494, the Court recognized that the provision of separate but equal educational opportunities to racial minorities "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Such logic is equally applicable to the State's structure granting substantial marriage rights but no marriage and is thus a further indication that there is no rational basis for denying marriage to same-sex couples.

As is set forth above, this court is not limited to the justifications offered by the State in determining whether there is a sufficient connection between Family Code sections 300 and 308.5 and some legitimate state interest. The task here is to determine whether such a connection exists. Therefore, this court will look beyond the governmental interests advanced by the State in these cases.

A second potential source for finding a rational basis is legislative history. Family Code Section 300 was enacted in 1992. It replaced former Civil Code section 4100, which prior to 1977 defined marriage as "a personal relation arising out of a civil contract, to which the consent of the parties capable of making it is necessary." A 1977 amendment to section 4100 changed this definition to add that marriage is the union between a man and a woman. Family Code section 308.5 resulted from a referendum called Proposition 22, the Limit on Marriages Initiative, passed by the electorate on March 7, 2000.

At the December 22, 2005 hearing in this matter, this court took judicial notice of legislative history of Family Code section 300 and of voter materials for Proposition 22. The substance of these materials is that the legislature and voters intended to clarify that under existing law, marriage in California was limited to opposite-sex couples. The parties advocating same-sex marriage argue that these materials demonstrate an impermissible discriminatory purpose to Family Code sections 300 and 308.5. The opponents of same-sex marriage assert that these materials demonstrate that the legislature and the voters intended that marriage only be between a man and a woman.

For the purposes of the rational basis test, this legislative history sheds no light on the existence of a legitimate governmental interest for

precluding same-sex marriage. As for Family Code section 300, the legislative materials indicate that a purpose of the 1977 amendment to then Civil Code section 4100 seems to have been to eliminate a perceived ambiguity in the law. Former Civil Code section 56, amended in 1969 as Civil Code section 4101 and more recently replaced as Family Code section 301, in substance provided that an unmarried male over the age of 18 and an unmarried female over the age of 18 could consent to marriage. The legislative history to what is now Family Code section 300 indicates an intention to clarify that each such party capable of consent had to consent to marry a member of the opposite sex rather than of the same sex. Notwithstanding any such perceived ambiguity, marriage in California before Family Code section 300 and the 1977 amendment to former Civil Code section 4100 was limited to opposite-sex couples, and no legislative history provided to this court indicates the existence of a legitimate governmental purpose for that previous limitation. Thus, the legislative history to section 300 is irrelevant to the search for a legitimate governmental purpose for limiting marriage to opposite-sex couples.

Similarly, the background materials to Proposition 22 indicate that its purpose as articulated to the voters was to preclude the recognition in California of same-sex marriages consummated outside of this state. Any such discriminatory purpose, however, does not determine whether there is nonetheless a legitimate governmental interest in limiting marriage in this state to opposite-sex couples.

Thus, the legislative history of Family Code sections 300 and 308.5 does not offer any authority for determining whether there is a legitimate

governmental interest under the rational basis test for precluding same-sex marriage.

Plaintiffs in the Proposition 22 and the Thomasson cases add another possible state purpose for the limitation of marriage to opposite-sex partners. These plaintiffs argue that California courts have long recognized that the purpose of marriage is procreation and that limiting the institution to members of the opposite sex rationally would further that purpose. The cases cited for this proposition, however, do not establish the judicial recognition advocated by plaintiffs.

In *Baker v. Baker* (1859) 13 Cal. 87, the Court held that a man who had married a woman who he did not know was then pregnant by another man could annul the marriage. This case is cited for the proposition that "the first purpose of matrimony, by the laws of nature and society, is procreation. A woman, to be marriageable, must, at the time, be able to bear children to her husband..." (*Id.* at 103.)

The facts and language of the case, however, do not stand for the proposition that one must be capable of producing children in order to marry. The woman in *Baker* had defrauded her husband into the marriage by concealing her condition. The entire paragraph in which plaintiffs' quote appears is:

> It cannot be pretended that the condition of the defendant was not a most material circumstance to the consent required for the validity of the [marriage] contract. Its concealment operated as a fraud on the plaintiff of the gravest character. His contract was with and for her; it referred to no other person, much less included a child of bastard blood. A child imposes burdens and possesses rights. It would necessarily become a charge upon the defendant, and through her upon the plaintiff. It would become a presumptive heir of his estate, and entitled under our law, as against his testamentary disposition, to an interest in his property acquired after marriage, to the deprivation of any legitimate offspring. The assumption of such burdens, and the yielding of such rights, cannot be inferred in the absence of proof of actual knowledge of her condition on his part. Again, the

> first purpose of marriage, by the laws of nature and society, is procreation. A woman, to be marriageable, must, at the time, be able to bear children to her husband, and a representation to this effect is implied in the very nature of the contract. A woman who has been pregnant over four months by a stranger, is not at the time in a condition to bear children to her husband, and the representation in this instance was false and fraudulent. The second purpose of matrimony is the promotion of the happiness of the parties by the society of each other, and to its existence, with a man of honor, the purity of the wife is essential. Its absence under such circumstances as necessarily to attract attention must not only tend directly to the destruction of his happiness, but to entail humiliation and degradation upon himself and family. We can conceive no torture more terrible to a right-minded and upright man than a union with a woman whose person has been defiled by a stranger, and the living witness of whose defilement he is legally compelled to recognize as his own offspring, as the bearer of his name and the heir of his estate, and that, too, with the silent, if not expressed, contempt of the community. By no principle of law or justice can any man be held to this humiliating and degrading position, except upon clear proof that he has voluntarily and deliberately subjected himself to it.

(*Baker v. Baker*, *supra*, 13 Cal. at 103-04.)

From this quote, it is clear that *Baker* stands for the proposition that the concealment of pregnancy by another man is grounds for annulment because, due to the potential legal and emotional consequences of having another man's child born into one's marriage, such concealment precludes the requisite consent to the marriage by the husband. The point of the case is that the parties to the marriage have a right not to be defrauded as to material matters that might affect their decision to marry. Indeed, the last line from the quote that "[b]y no principle of law or justice can any man be held to this humiliating and degrading position, except upon clear proof that he has voluntarily and deliberately subjected himself to it" supports the position that a party can enter into a marriage with someone who cannot produce children so long as that party voluntarily and deliberately does so.

Accordingly, the line in *Baker* regarding the "first purpose of matrimony" no more supports a rational governmental purpose to preclude same-

sex marriage than would the line in the same paragraph that "with a man of honor, the purity of the wife is essential" support a notion that in California, only virgins can marry.

The other California cases cited on this point are to the same effect as *Baker*. In *Vileta v. Vileta* (1942) 53 Cal.App.2d 794, a woman represented to a man that she was capable of bearing children. He married her, then discovered she had lied about being fertile. The court annulled their marriage because "[h]er concealment of her sterility is a fraud that vitiates the marriage contract [citations] and justifies annulment, when the man acts promptly upon his discovery of the fraud." (*Id.* at 796.) Thus it was her fraud, not her sterility, that obviated the marriage. In fact, the court's statement that annulment is justified "when the man acts promptly" shows that an annulment might not be available if the husband's behavior upon discovery indicates that he had accepted the fact of his wife's sterility.

In *Schaub and Security First National Bank of Los Angeles v. Schaub* (1945) 71 Cal.App.2d 467, the court affirmed the annulment of a marriage that had been fraudulently induced. The trial court had found that the defendant had married Schaub solely to gain an interest in his property, and was never intimate with him. Instead, she continued a sexual relationship with her boyfriend in an "open, flagrant and continuous" manner. The case did not deal with the essence of marriage being procreation. Given that the husband was 60 years old at the time of the marriage and he had died during the pendancy of the appeal, the production of children may not have been an issue with him. The issue in the case was the fraudulent nature of the woman's representations before the marriage, which resulted in the annulment of both the marriage and a deed conveying real property to her in joint tenancy.

Sharon v. *Sharon* (1888) 75 Cal. 1 concerned whether a couple's union under a contract that provided that their relationship would be kept secret for a period of time was a marriage under California law. The union had not been solemnized in a ceremony, but the parties' agreement and their behavior indicated consent to many of the rights and obligations of marriage. The case had nothing to do with the concept of procreation as a purpose of marriage, although the Court did quote from a treatise called *Stewart on Marriage and Divorce* stating that "the procreation of children under the shield and sanction of the law" is a purpose of marriage.[2] (*Id.* at 33.) This quote, being both unrelated to the issues in the case and the words of an obscure treatise rather than those of the Court, is insufficient to establish procreation as a legitimate government purpose for marriage in California.

Hultin v. Taylor (1970) 6 Cal.App.3d 802 was an action to recover money spent by the plaintiff on his former wife's house. The marriage had been annulled in a separate earlier case on the basis that the husband had defrauded his wife before the marriage by falsely telling her he wanted to have children. *Hultin* does not deal with the legal issues of the couple's marriage and only mentions the annulment in passing as one of the facts of the case. *Hultin* cannot support the argument for which plaintiffs cite it.

Finally, the plaintiffs opposing same-sex marriage cite *In Re Marriage of Liu* (1987) 197 Cal.App.3d 143. In this case, the court found that the wife's sole purpose for marrying was to get a "green card" in order to remain

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[2] The correct full title of the Stewart work is *The Law of Marriage and Divorce as Established in England and the United States*. It was published in 1884 and does not appear to have been updated since. The author is David Stewart, who was a lawyer in Baltimore, Maryland. This court found no indication that this treatise has ever been sufficiently accepted as an authority on California law to be relied upon here.

in the United States and that she had no intention of having sexual relations with her husband. The marriage was annulled because the husband's consent had been obtained through fraud. *Id.* at 156. There was no discussion of procreation in the case.

Thus, the cases cited do not establish that California courts have recognized that the purpose of marriage in this state is procreation. Instead, these cases establish that annulment is a remedy for the fraudulent inducement to marry. The facts in these cases also confirm the obvious natural and social reality that one does not have to be married in order to procreate, nor does one have to procreate in order to be married. Thus, no legitimate state interest to justify the preclusion of same-sex marriage can be found in these authorities.

This court is not aware of any other source of a legitimate state interest in precluding same-sex marriage. Since neither the parties' arguments nor any other matter properly available to this court demonstrate such a legitimate state interest, this court concludes that under the rational basis test, Family Code sections 300 and 308.5 violate the equal protection clause of the California Constitution.

3. Strict Scrutiny Test

The second analysis of constitutionality of legislation under the equal protection clause is the strict scrutiny test. It applies where a legislative classification creates a "suspect" class or impinges on a fundamental human right. Both circumstances exist here.

The parties in favor of same-sex marriage assert that the statutory classification created by Family Code sections 300 and 308.5 are based on gender. They argue that the sole reason that a person in California cannot

marry another of the same sex or have an out-of-state same-sex marriage recognized is that each member of the couple is of the same gender. The parties against same-sex marriage assert that the Family Code sections do not discriminate upon gender because the prohibition against same-sex marriage applies equally to both genders, and thus neither gender is segregated for discriminatory treatment.

The idea that California's marriage law does not discriminate upon gender is incorrect. 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. To say that all men and all women are treated the same in that each may not marry someone of the same gender misses the point. The marriage laws establish classifications (same gender vs. opposite gender) and discriminate based on those gender-based classifications. As such, for the purpose of an equal protection analysis, the legislative scheme creates a gender-based classification.

The argument that the marriage limitations are not discriminatory because they are gender neutral is similar to arguments in cases dealing with anti-miscegenation laws. In *Perez v. Sharp*, *supra*, 32 Cal.2d 711, the Court 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 stated "[t]he right to marry is the right of individuals, not of racial groups." (*Id.* at 716.) An identical argument was rejected in *Loving v. Virginia* (1967) 388 U.S. 1, 8: "we reject 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 individual racial discriminations..."

The State seeks to distinguish *Perez* and *Loving* on this point by arguing that racial neutrality under the anti-miscegenation statutes was superficial at best and that the real purpose of such laws was to maintain white supremacy over black people. In contrast, the State argues, no such patent discrimination exists relative to the marriage laws because California has granted to same-sex couples substantially the same rights as are given in marriage to opposite-sex couples. Thus, the State concludes that the holdings in *Perez* and *Loving* relative to rights being those of the individual and not a group are inapplicable here. The State's argument is to no avail.

Neither *Perez* nor *Loving* uses language to indicate that the protection of equal protection under the law depends on the number of the areas in which it has been denied. Neither case states that the right to marriage is to be determined by considering how many other rights have also been granted or denied. To the contrary, *Perez* makes it crystal clear that equal protection of the law applies to individuals and not to the groups into which such individuals might be classified and that the question to be answered is whether such individual is being denied equal protection because of his/her characteristics. Also, *Loving* expressly states that its holdings apply to any race-based statutory scheme, not just one purportedly seeking to achieve racial supremacy. (*Loving v. Virginia, supra,* 388 U.S. at 11, fn. 11.)

In *McLaughlin v. Florida* (1964) 379 U.S. 184, the Court similarly rejected the argument that a ban on interracial cohabitation which treated all interracial couples the same was not racially discriminatory. The Court held that even though the statute applied equally to whites and blacks, a

court must inquire "whether the classifications drawn in a statute are reasonable in light of its purpose...[or] whether there is an arbitrary or invidious discrimination between those classes covered by...[the statute] and those excluded." (*Id.* at 191.)

Accordingly, this court concludes that Family Code sections 300 and 308.5 create classifications based upon gender.

It is well established that a gender-based classification is a "suspect" classification and thus subject to the strict scrutiny of analysis under the equal protection clause of the California Constitution. (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 564; *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17-20.) Since Family Code sections 300 and 308.5 create a gender-based classification, the strict scrutiny test applies here.

In addition to the gender-based classification, the Family Code sections implicate a fundamental human right: the right to marry. The United States Supreme Court and California courts have repeatedly recognized the existence of the right to marry. "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." (*Loving v. Virginia, supra*, 388 U.S. at 12.) "Marriage is...something more than a civil contract subject to regulation by the state; it is a fundamental right of free men." *Perez v. Sharp, supra*, 32 Cal.2d at 714. "The right to marry is a fundamental constitutional right." (*In Re Carrafa* (1978) 77 Cal.App.3d 788, 791.)

The opponents of same-sex marriage argue that the fundamental right to marry as recognized in California should be viewed as a right to marry a person of the opposite sex. They assert that a fundamental right to same-sex

marriage has never been recognized in California, hence cannot form a basis for an equal protection analysis. In other words, these opponents advocate that the right to marry must be defined in terms of who one can marry. They suggest that to do otherwise will open a door to such improprieties as brothers marrying their sisters or the marriage of an adult to a child.

This argument misses the manner in which the identification of a fundamental human right relates to a strict scrutiny equal protection analysis. The point is not to define a right so as to make it inexorably inviolate from governmental intrusion. Instead, the exercise is to determine whether a fundamental human right exists and then to determine to what extent, if at all, the government can limit that right. This process is clearly explained in *Perez*. *Perez* identifies the fundamental human right to marriage, then states "[t]here can be no prohibition of marriage except for an important social objective and by reasonable means." (*Perez v. Sharp, supra*, 32 Cal.2d at 714.) Thus, when *Perez* recognizes that "...the essence of the right to marry is freedom to join in marriage with the person of one's choice..." (*id.* at 717), it is not saying that therefore anyone can marry anyone else (e.g. siblings to each other or adults to children), but rather that the starting point is that one can choose who to marry, and that choice cannot be limited by the state unless there is a legitimate governmental reason for doing so:

> In determining whether the public interest requires the prohibition of a marriage between two persons, the state may take into consideration matters of legitimate concern to the state. Thus, disease that might become a peril to the perspective spouse or to the offspring of the marriage could be made a disqualification for marriage...[statutory citation]. Such legislation, however, must be based on tests of the individual, not on arbitrary classifications of groups or races...

Id. at 718.

Likewise, the state can preclude incestuous marriages (Family Code section 2200) as well as establish a minimum age for effective consent to marriage (Family Code section 301) because such limitations on the fundamental right to marry would further an important social objective by reasonable means and do not discriminate based on arbitrary classifications. Thus, the parade of horrible social ills envisioned by the opponents of same-sex marriage is not a necessary result from recognizing that there is a fundamental right to choose who one wants to marry.

Accordingly, this court finds that the strict scrutiny test applies to this case because Family Code sections 300 and 308.5 implicate the basic human right to marry a person of one's choice.

As is set forth above, the strict scrutiny test places on the State the burden of establishing a compelling interest which justifies the limitation of marriage in California to opposite-sex couples and that the distinctions drawn by the law are necessary to further such purpose.

In its rational basis analysis, this court has determined that the State's two rationales (tradition and tradition plus marriage rights without marriage) do not constitute a legitimate governmental interest for the limitation of marriage to opposite-sex couples. It is axiomatic that such rationales could not therefore constitute a compelling state interest. The same must be said for the various other potential interests analyzed by this court under the rational basis test, although it is noted that under the strict scrutiny test, the burden is on the State to demonstrate the compelling governmental interest. Be that as it may, for the reasons set forth above, the other arguments do not constitute legitimate governmental interests, let alone compelling governmental interests.

This court is aware that several states have interpreted the constitutionality of their opposite-sex only marriage laws under due process standards. Some courts have concluded that their state's marriage laws can be

seen as rationally related to a legitimate governmental interest in procreation. In addition, the plaintiffs in the Proposition 22 and Thomasson cases here have argued that California's preclusion of same-sex marriage is related to a state interest in procreation.

While this court has concluded that there is no sufficient basis for finding that any governmental purpose of fostering procreation underlies Family Code sections 300 and 308.5, the possibility that others in this State might conclude otherwise renders it appropriate to analyze such a potential interest under the strict scrutiny test.

One component of the strict scrutiny test inexorably leads to the conclusion that even if the encouragement of procreation were to be seen to be a rational basis for our marriage laws and even if it appeared that such interest is compelling, this rationale still fails to satisfy constitutional equal protection standards. Even where a compelling state interest exists, the State must also demonstrate that the distinctions drawn by the law are not arbitrary but instead are *necessary* to further its purpose. Under this element, California's opposite-sex only marriage law fails to satisfy the strict scrutiny test.

Under our present opposite-sex only law, marriage is available to heterosexual couples regardless of whether they can or want to procreate. As long as they choose an opposite-sex mate, persons beyond child-bearing age, infertile persons, and those who choose not to have children may marry in California. Persons in each category are allowed to marry even though they do not satisfy any perceived legitimate compelling governmental interest in procreation. Another classification of persons, same-sex couples, also do not satisfy any such perceived interest, yet unlike the other similarly situated classifications of non-child bearers, same-sex couples are singled out to be

denied marriage.[3]

Given this situation, one cannot conclude that singling out the same-sex couple classification of non-child bearers from other classifications of non-child bearers is necessary to any perceived governmental interest in allowing marriage in order to further procreation. On this point, the advocates of opposite-sex only marriage have failed to offer any explanation whatsoever for such disparate treatment of similarly situated classifications, let alone satisfy their burden of proof thereon under the strict scrutiny test. Thus, the denial of marriage to same-sex couples appears impermissibly arbitrary.

Accordingly, this court concludes that under the strict scrutiny test, Family Code sections 300 and 308.5 violate the equal protection clause of the California Constitution.

Upon this conclusion and upon the result reached applying the rational basis test, this court need not resolve any of the other constitutional questions raised by the parties.

CONCLUSION

Upon the foregoing, the following dispositions will be made in the various cases:

1. Woo v. State of California - Judgment declaring Family Code sections 300 and 308.5 unconstitutional under the California Constitution shall be entered and an appropriate Writ of Mandate shall be issued. Counsel for the Petitioners shall meet and confer with opposing counsel and prepare and submit appropriate papers.

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[3] To be precise, same-sex couples can cause procreation. A female capable of producing children can be married to another female and become pregnant through various methods, then produce and raise the child in her same-sex union. Similarly, a same-sex male couple could cause a female to become pregnant, directly or otherwise, and later adopt and raise the child.

2. *City and County of San Francisco v. State of California* - Judgment declaring Family Code sections 300 and 308.5 unconstitutional under the California Constitution shall be entered and an appropriate Writ of Mandate shall be issued. Counsel for the Petitioners shall meet and confer with opposing counsel and prepare and submit appropriate papers.

3. *Clinton v. State of California* - Judgment declaring Family Code sections 300 and 308.5 unconstitutional under the California Constitution shall be entered and an appropriate Writ of Mandate shall be issued. Counsel for the Petitioners shall meet and confer with opposing counsel and prepare and submit appropriate papers.

Further, Petitioner Clinton has requested that this court make five findings of fact, which this court believes are neither findings of fact nor appropriate in light of this decision. Accordingly, the request for such findings is denied.

4. *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* - The plaintiff's Motion for Summary Judgment requested that this court determine whether as a matter of law the subject Family Code sections violate the California Constitution. The position taken by the moving party was that such statutes do not violate California's Constitution. This Final Decision makes the constitutional determination requested by the motion but does not reach the conclusion advocated by the moving party. No counter-motion for summary judgment was filed. Therefore, procedurally this court has granted the plaintiff's request that the legal determination regarding the Family Code sections be made but reached the opposite result from that argued by the plaintiffs, thus making it inexorable that judgment in favor of the defendants be entered. Accordingly, judgment shall enter in

favor of the defendants and against the plaintiffs and declaring that Family Code sections 300 and 308.5 violate the California Constitution.

In the alternative, the City and County of San Francisco moved for Judgment on the Pleadings upon the argument that in the event that this court finds that Family Code sections 300 and 308.5 violate the California Constitution, then as a matter of law judgment should be entered against the plaintiff in this case declaring that Family Code sections 300 and 308.5 are unconstitutional. Said motion is granted.

Further, this court can on its own motion grant a judgment on the pleadings. Code of Civil Procedure section 438(b)(2). The determinations of this Final Decision justify this court ordering that Judgment on the Pleadings against the plaintiff and in favor of defendants declaring that Family Code sections 300 and 308.5 violate the California Constitution be entered. It is so ordered.

5. *Randy Thomasson v. Gavin Newsom* - The plaintiffs' Motion for Summary Judgment requested that this court determine whether as a matter of law the subject Family Code sections violate the California Constitution. The position taken by the moving parties was that such statutes do not violate the California Constitution. This Final Decision makes the constitutional determination requested by the motion but does not reach the conclusion advocated by the moving parties. No counter-motion for summary judgment was filed. Therefore, procedurally this court has granted the plaintiffs' request that the legal determination regarding the Family Code sections be made but reached the opposite result from that argued by the plaintiffs, thus making it inexorable that judgment in favor of the defendants be entered. Accordingly, judgment shall enter in favor of the defendants and against the

plaintiffs and declaring that Family Code sections 300 and 308.5 violate the California Constitution.

In the alternative, the defendants moved for Judgment on the Pleadings upon the argument that in the event that this court finds that Family Code sections 300 and 308.5 violate the California Constitution, then as a matter of law judgment should be entered against the plaintiffs in this case declaring that Family Code sections 300 and 308.5 are unconstitutional. Said motion is granted.

Further, this court can on its own motion grant a judgment on the pleadings. Code of Civil Procedure section 438(b)(2). The determinations of this Final Decision justify this court ordering that Judgment on the Pleadings against the plaintiffs and in favor of defendants declaring that Family Code sections 300 and 308.5 violate the California Constitution be entered. It is so ordered.

6. *Robin Tyler v. County of Los Angeles* - Judgment declaring Family Code sections 300 and 308.5 unconstitutional under the California Constitution shall be entered and an appropriate Writ of Mandate shall be issued. Counsel for the Petitioners shall meet and confer with opposing counsel and prepare and submit appropriate papers.

Dated: April 13, 2005

Richard A. Kramer
Judge of the Superior Court

Superior Court of California
County of San Francisco

Coordination Proceeding
Special Title (Rule 1550(b))

MARRIAGE CASES

Judicial Council Coordination
Proceeding No. 4365

CERTIFICATE OF MAILING
(CCP 1013a (4))

I, Andrea Carney, a Deputy Clerk of the Superior Court of the City and County of San Francisco, certify that I am not a party to the within action.

On April 13, 2005 I served the attached FINAL DECISION ON APPLICATIONS FOR WRIT OF MANDATE, MOTIONS FOR SUMMARY JUDGMENT, AND MOTIONS FOR JUDGMENT ON THE PLEADINGS by placing a copy thereof in a sealed envelope, addressed as follows:

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I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: April 13, 2005

GORDON PARK LI, Clerk

By: Andrea Carney
Andrea Carney, Deputy Clerk

EXHIBIT D

To the Members of the California State Assembly:

I am returning Assembly Bill 849 without my signature because I do not believe the Legislature can reverse an initiative approved by the people of California.

I am proud California is a leader in recognizing and respecting domestic partnerships and the equal rights of domestic partners. I believe that lesbian and gay couples are entitled to full protection under the law and should not be discriminated against based upon their relationships. I support current domestic partnership rights and will continue to vigorously defend and enforce these rights and as such will not support any rollback.

California Family Code Section 308.5 was enacted by an initiative statute passed by the voters as Proposition 22 in 2000. Article II, section 10 of the California Constitution prohibits the Legislature from amending this initiative statute without a vote of the people. This bill does not provide for such a vote.

The ultimate issue regarding the constitutionality of section 308.5 and its prohibition against same-sex marriage is currently before the Court of Appeal in San Francisco and will likely be decided by the Supreme Court.

This bill simply adds confusion to a constitutional issue. If the ban of same-sex marriage is unconstitutional, this bill is not necessary. If the ban is constitutional, this bill is ineffective.

Sincerely,

Arnold Schwarzenegger

PROOF OF SERVICE

I, MONICA QUATTRIN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, California, 94102.

On November 13, 2006, I served the attached:

PETITION FOR REVIEW

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

and served the named document in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY EXPRESS SERVICES OVERNITE**: I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered to EXPRESS SERVICES OVERNITE for overnight courier service to the office(s) of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed November 13, 2006, at San Francisco, California.

MONICA QUATTRIN

SERVICE LIST

City and County of San Francisco v. State of California, et al.
San Francisco Superior Court Case No. CGC-04-429539
consolidated with
Woo v. Lockyer
San Francisco Superior Court Case No. CPF-04-504038

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Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco
San Francisco Superior Court Case No. CPF-04-503943
consolidated with
Thomasson, et al. v. Newsom, et al.
San Francisco Superior Court Case No. CGC-04-428794

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