

**Joint Informational Hearing of the  
Senate and Assembly Judiciary Committees**

October 2, 2008  
10:00 AM – 12:30 PM  
Auditorium  
Ronald Reagan Building  
300 South Spring Street  
Los Angeles, California

**“Proposition 8: Amending the Constitution to Eliminate  
the Right of Same-Sex Couples to Marry”**

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*I. Introduction*

On November 4, 2008, California voters will be asked to decide whether to eliminate the right of same-sex couples to marry. This right was articulated in May 2008 when the California Supreme Court ruled that the substantive right to marry, as embodied in the California Constitution, Art. I, §§ 1 and 7, guarantees same-sex couples the same rights as opposite-sex couples to choose one’s life partner and enter into an officially recognized, and protected family relationship. Accordingly, the Court held that state’s existing statutory ban on same-sex marriage, embodied in Family Code §§ 300 and 308.5, was unconstitutional. (*In re Marriage Cases* (2008) 43 Cal.4<sup>th</sup> 757.)

*II. The Proposition*

Proposition 8 is an attempt to overrule the Supreme Court’s decision by amending the state’s constitution. It would insert only one sentence into the California Constitution: “Only a marriage between a man and a woman is valid or recognized in California.” This is the exact same sentence that was added to the Family Code by Proposition 22 in 2000, which the Court ruled was unconstitutional.

Despite its apparent simplicity, Proposition 8 would have a significant social and economic impact on the state. The Legislative Analyst, who is required to analyze all state propositions, has determined that Proposition 8 would abrogate the Supreme Court’s recent decision and limit marriage to only couples of the opposite sex. In addition, the Legislative Analyst found that the proposition would result in revenue loss to both state and local governments in the next few years as the result of elimination of spending on weddings by same-sex couples, and the resulting loss of sales tax revenue.

In light of the civil liberties (and potential revenues) at stake, it is imperative that the public is well informed on Proposition 8 and its ramifications prior to heading to the polls on Election Day.

### *III. History of Legal Recognition of Same-Sex Couples in California*

California's Recognition of Same-Sex Couples as Family Units: The issue of legal recognition of same-sex couples in California dates back two decades. Before the 1980s, same-sex couples had no legal recognition in California – or virtually anywhere else. In 1984, however, the City of Berkeley extended employee benefits to the same-sex partners of municipal employees. A year later, West Hollywood became the first governmental entity to offer legal recognition to same-sex couples by establishing a legal status called a “domestic partnership.” Through the status of domestic partnership, same-sex couples could obtain not only limited protections for themselves and their children, but also, for the first time, government recognition as family units. By 2000, eighteen local governments in California had established domestic partnership registries.

Registered Domestic Partnership Legislation in California: In 1999, the Legislature enacted AB 26 (Migden), Chap. 588, Stats. 1999, to create the state's first domestic partnership statute. This statute, which forms the backbone of California's domestic partnership law, provided for domestic partnerships to be registered with the Secretary of State, for public employers to offer health benefits to domestic partners, and for domestic partners to have hospital visitation rights. Since 1999, over 15 statutes have been enacted to provide legal protections to domestic partners in California.

The most comprehensive set of rights and responsibilities for registered domestic partners was enacted in 2003 by AB 205 (Goldberg), Chap. 421, Stats. 2003. That bill became fully operative on January 1, 2005, and it has been upheld by the courts against challengers' arguments that granting legal protections to same-sex couples is inconsistent with Proposition 22 (see below). The California Court of Appeal explained that, because of differences that remain between marriage and domestic partnership, “marriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership.” (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 30.)

Under the existing domestic partnership statutory scheme, domestic partners are denied access to certain long-term care benefits that are available to married heterosexual couples. In addition, the prerequisites for entering a domestic partnership differ from the prerequisites for marriage. Marriage and domestic partnership also have different formation and termination procedures. In particular, there is no solemnization requirement for domestic partnership, unlike for marriage; this difference suggests a distinction in stature.

On the federal level, domestic partners are denied the protections available under more than 1,100 federal statutes relating to marriage. The federal benefits afforded to opposite-sex, married couples include such basic benefits as social security, Medicare, federal housing assistance, food stamps, veterans' benefits, military benefits, tax benefits and federal employment benefits. Also, domestic partners risk losing essential legal protections – such as hospital visitation rights and authority to make medical decisions for their partners in an emergency – when they travel outside California because California's domestic partnership registry is not recognized in most jurisdictions outside California.

California's Proposition 22: A group of citizens led by the late State Senator William J. (“Pete”) Knight placed an initiative on the March 2000 California ballot to prohibit California from recognizing any marriages between same-sex couples contracted in other states or countries. Proposition 22 proposed adding the following language to the Family Code: “Only marriage

between a man and a woman is valid or recognized in California." The measure was presented to the voters shortly after the Vermont Supreme Court announced its decision requiring equal benefits, but before the Vermont legislature had decided between marriage and civil unions, for same-sex couples. The Proposition 22 ballot materials emphasized the prospect that California might soon be required to recognize out-of-state marriages of same-sex couples. The measure passed with 61% of the vote and became codified as Section 308.5 of the Family Code.

California Legislation to Permit Same-Sex Marriage: Assembly Member Leno's first legislative attempt to permit same-sex couples to marry – AB 19 – failed in the Assembly in June of 2005. That same year, Mr. Leno revived the bill as AB 849, which became the first such bill in the nation to be passed by both houses of a state legislature. However, Governor Schwarzenegger vetoed the bill. In his veto message, the Governor reiterated his belief that gay and lesbian couples should be afforded the same rights as married heterosexual couples and that he would “continue to vigorously defend” the rights afforded under the state’s domestic partnership laws. However, the Governor cited Proposition 22 and the state constitutional provision (Article 1, Section 10) that prohibits a state legislature from reversing any initiative approved by the voters of California. The Governor suggested that the only way the law could be changed is if the courts voided the ban as unconstitutional, or if the people reversed Proposition 22 through another initiative or a referendum. The Governor’s veto message noted that the question of Proposition 22’s constitutionality was pending before the state’s courts and that: "If the ban of same-sex marriage is unconstitutional, this bill is not necessary. If the ban is constitutional, this bill is ineffective."

Assembly Member Leno reintroduced the bill the following year, in 2007, as AB 43. It passed the Legislature, but was once again vetoed with a similar message from the Governor.

#### *IV. Legal Recognition in Other States*

In 1993, the Hawaii Supreme Court became the first in the nation to hold, on equal protection grounds, that the state could not exclude same-sex couples from marriage without a compelling interest. *Baehr v. Lewin* (Haw. 1993) 852 P.2d 44. Subsequent to this decision, the state legislature passed a law creating a new status of “Reciprocal Beneficiaries,” under which certain limited benefits were made available to same-sex couples (as well as others). With that law in place, the voters passed a constitutional amendment giving the legislature authority to define “marriage” in whatever way it saw fit. The legislature then proceeded to re-codify its existing definition of marriage as between a man and a woman, while continuing to grant “reciprocal beneficiaries” a limited set of benefits.

In 1999, the Vermont Supreme Court ruled that Vermont’s Equal Benefits Clause prohibited the Vermont Legislature from denying to same-sex couples the rights, benefits, and privileges granted to married heterosexual couples. *Baker v. State* (Vt. 1999) 744 A.2d 864. The Vermont Legislature responded by passing a comprehensive "civil unions" law, rather than by permitting same-sex couples to marry. In 2004, New Jersey and Maine established domestic partnership registries offering limited protections for same-sex couples. In 2006, the New Jersey Supreme Court held that the New Jersey state constitution required that same-sex couples be offered all of the comprehensive state-law legal protections that are made available through marriage to heterosexual couples. *Lewis v. Harris* (N.J. 2006) 908 A.2d 196. The New Jersey Legislature responded with a comprehensive civil unions bill. Connecticut followed, enacting a civil unions law as well in 2005.

Massachusetts Marriage Rulings: The Massachusetts Supreme Judicial Court ruled in November 2003 that laws prohibiting marriage between persons of the same sex violate the Massachusetts Constitution. Wrote the majority:

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. “The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.” Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.

(*Goodridge v. Dep't of Pub. Health* (Mass. 2003) 798 N.E.2<sup>nd</sup> 941, 968 (citation omitted).)

Three months later, in February 2004, acting on a request from the Massachusetts Legislature, the Supreme Judicial Court issued an advisory opinion to the state legislature stating: “The history of our nation has demonstrated that separate is seldom, if ever, equal.” Even where a state grants substantially similar rights to same-sex “civil unions,” the court found that refusing to recognize these unions as “marriage” is a “considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.” To permit such a distinction would amount to “maintaining and fostering a stigma of exclusion that the Constitution prohibits.”

Other Recent State Actions: Challenges to laws banning marriage between persons of the same sex have been reviewed by a number of other state courts, almost all of which have upheld – relying on the rational basis test – their own states’ bans on same-sex couples marrying. (See *Conaway v. Deane* (2007) 401 Md. 219 (Maryland); *Hernandez v. Robles* (2006) 7 N.Y.3<sup>rd</sup> 338 (New York); and *Anderson v. King County* (2006) 158 Wn.2d 1 (Washington).

While not permitting same-sex marriage within the state, two states – New York and Rhode Island – now recognize same-sex marriages performed in other jurisdictions.

State Initiatives Ban Same-Sex Marriage in Fall 2006: A number of state ballot measures have attempted to amend state constitutions, similar to Proposition 8, to state that marriage is only between a man and a woman. Some states have gone so far as to enact into their constitutions provisions that purport to prohibit recognition of relationships between same-sex couples other than marriage, such as domestic partnerships or civil unions. Of eight states that had initiatives on the 2006 ballot, only one – Arizona – saw the initiative defeated. However, the election results suggested that traditional public opinion on this issue has been changing nationwide, in that the votes were not as lopsided as were the votes on 13 similar initiatives during the 2004 elections. According to the website Stateline.org, which tracks state legislation and initiatives, the percentage of voters opposed to constitutional bans increased on average from 33% in 2004 to 39% in 2006.

Three State Initiatives to Ban Same-Sex Marriage Go Before Voters in 2008: This November, in addition to California, voters in Arizona and Florida will be deciding whether to amend their constitutions to limit the definition of marriage as a union between a man and a woman.

#### *V. Federal and International Action*

The Federal Defense of Marriage Act: In 1996 Congress passed, and President Clinton signed, the federal Defense of Marriage Act (DOMA), which among other things says that no state is required under federal law to give effect to marriages of same-sex couples contracted in other states. In light of the federal DOMA, some states, including California (Proposition 22), enacted measures prohibiting recognition of marriages entered into by same-sex couples in other jurisdictions.

In 2003, Congresswoman Marilyn Musgrave of Colorado introduced a resolution in the U.S. House of Representatives seeking to amend the U.S. Constitution to define marriage as between a man and a woman. Senator Wayne Allard of Colorado introduced a companion measure in the Senate. Although President Bush has repeatedly expressed support for such efforts to amend the U.S. Constitution, those measures have thus far always failed to garner the necessary level of support in Congress.

Recent International Developments: While courts and voters in the United States continue to grapple with the issue of marriage rights for same-sex couples, Norway becomes the latest nation to legalize marriages of same-sex couples, effective January 1, 2009. Norway joins Belgium, Canada, the Netherlands, Spain and South Africa that have already legalized same-sex marriages. Additional countries, including France and Israel, do not permit same-sex marriages, but will recognize such unions performed in other jurisdictions.

#### *VI. The Marriage Cases*

In February 2004, the City and County of San Francisco began issuing marriage licenses to same-sex couples. From February 12 through March 11, 2004, 4,037 same-sex couples from 46 states and eight countries married in San Francisco. However, on March 11, 2004, the California Supreme Court ordered San Francisco to stop issuing marriage licenses to same-sex couples while the court considered the legality of the County's actions. On August 12, 2004, the California Supreme Court unanimously ruled that San Francisco officials exceeded their authority in issuing the licenses because it is the role of the courts, not local officials, to determine the constitutionality of the state's marriage laws. (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055.) By a 5-2 vote, the court also invalidated the 4,037 marriages that had taken place in San Francisco. The court did not rule on the constitutionality of the state's statutory prohibition of marriage by same-sex couples. Rather, an order filed by the Court in March 2004 expressly invited the filing of a lawsuit to address this very issue.

Trial Court Action: The coordinated Marriage Cases began in 2004 when the state's Judicial Council ordered that six cases challenging California's statutory exclusion of same-sex couples from marriage were to be coordinated and heard together in San Francisco Superior Court. On March 14, 2005, the San Francisco Superior Court issued a landmark ruling in the coordinated marriage cases, concluding that same-sex couples are indeed denied equal protection by marriage laws that prohibit them from marrying. The trial court held that California's exclusion of same-

sex couples from marriage constitutes discrimination on the basis of gender and interferes with the fundamental right to marry the person of one's choosing. Under the trial court's reasoning, California's statutory exclusion of same-sex couples from marriage should thus be subject to the strictest level of constitutional scrutiny, known as "strict scrutiny." But according to the trial court, the marriage exclusion could not survive even the lowest level of constitutional scrutiny – that is, review to determine whether the law has even a "rational basis." The trial court explained that California could not demonstrate any rational basis for denying same-sex couples the right to marry. The trial court emphasized that so-called "separate but equal" systems have long been rejected by the courts as unconstitutional.

Appellate Court Decision: The California Court of Appeal for the First Appellate District thereafter reversed the San Francisco Superior Court on October 5, 2006, upholding the state's statutory ban on marriages between persons of the same sex. (*In re Marriage Cases* (2006) 143 Cal.App.4<sup>th</sup> 873.) In a 2-1 opinion, Justice McGuiness, writing for the majority, concluded that "California's historical definition of marriage does not deprive individuals of a vested fundamental right or discriminate against a suspect class," and that therefore the law only needed to pass a "rational basis" test. (*Id.* at 890.)

Under this deferential standard, Justice McGuiness held that the California Legislature could constitutionally define marriage as only between a man and a woman. Justice McGuiness did not address the scope of Proposition 22, and whether the Legislature could reverse the initiative, (*Id.* at 899). Instead, Justice McGuiness only considered whether there was a rational basis for the Legislature to restrict marriage to opposite-sex couples. Justice McGuiness concluded that the state had a legitimate interest in maintaining a "traditional definition" of marriage. More pointedly, however, Justice McGuiness concluded that if a change is to be made, it must come from the Legislature or voters, not the courts: "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. 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." (*Id.* at 937-38, citations omitted.)

Justice Parrilli's concurring opinion agreed that the Legislature must ultimately define marriage, but expressed the view that the Legislature should remove the ban on marriage between persons of the same sex. She noted that "the forms marriage can take have changed over the centuries, and will continue to change if history is a reliable guide. It seems rational that allowing more people to participate in the institution of marriage would only strengthen that institution, not diminish it . . . Seemingly, it would be wise to encourage such commitment, especially where children and families are involved." (*Id.* at 940.) Noting the changing sensibilities and the struggles that gay and lesbian couples have endured, Justice Parrilli concluded that "if being gay or lesbian is an immutable trait or biologically determined," then "the inequities of the current parallel institutions [i.e. marriage and domestic partnership] should not continue . . . if we are to remain faithful to our Constitution." (*Id.* at 938-43.) Nonetheless, despite these beliefs, Parrilli agreed with Justice McGuiness's opinion that rather than the courts, the Legislature or the voters should decide whether same-sex couples may marry.

In his dissenting opinion, Justice Kline criticized the majority for defining the issue in a way that he said pre-ordained its conclusion. That is, the majority claimed it was obliged to use the deferential "rational basis" test because, while there is a fundamental right *to marry*, there is no

fundamental right *to marry someone of the same sex*. But according to Justice Kline, the plaintiffs were no more asserting a “right to same-sex marriage” than the plaintiffs in earlier challenges to anti-miscegenation laws were asserting “a right to interracial marriage.” In both the current marriage cases and the miscegenation cases, he noted, plaintiffs were asserting a right to marry the person *of their choice*, and existing statutes arbitrarily and unconstitutionally prevented them from doing so. (*Id.* at 943-44.) Unlike his colleagues, Justice Kline believed that the ban on marriage of same-sex couples involved several fundamental rights (to marry and to privacy) and a suspect classification (sexual orientation) and therefore the law should have been analyzed under the heightened “strict scrutiny” test. (*Id.* at 945-65, 970-71.) Nonetheless, Justice Kline concluded that even under a rational basis test, the ban on same sex marriage was not rationally related to any legitimate state purpose. (*Id.* at 976-77.)

Finally, Justice Kline stated that in attempting to defend two separate systems – marriage and domestic partnership – the majority had adopted the repudiated doctrine of “separate but equal.” (*Id.* at 978-80 (referring to the infamous U.S. Supreme Court decision, *Plessy v. Ferguson* (1896) 163 U.S. 573).) As Justice Kline concluded: “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.” (*Id.* at 983-84.)

Supreme Court Decision: On May 15, 2008, the California Supreme Court, in a 4-3 decision, struck down as unconstitutional the California statutes limiting marriage to a man and a woman. The majority opinion, which sets forth the decision of the court, was authored by Chief Justice Ronald George, and was signed by Justices Joyce Kennard, Kathryn Werdegar, and Carlos Moreno.

Majority Opinion: The legal issue identified by the majority opinion for resolution was whether California’s Constitution “prohibits the state from establishing a statutory scheme in which both opposite-sex and same-sex couples are granted the right to enter into an officially recognized family relationship that affords all of the significant legal rights and obligations traditionally associated under state law with the institution of marriage, but under which the union of an opposite-sex couple is officially designated a ‘marriage’ whereas the union of a same-sex couple is officially designated a ‘domestic partnership.’” (43 Cal.4<sup>th</sup> at 779-80.) In other words, did the failure of the state to designate the official relationship of same-sex couples as “marriage” violate the State Constitution? After determining the nature and scope of the constitutional “right to marry,” the Court concluded that “the California Constitution properly must be interpreted to guarantee this basic civil right to all Californians, whether gay or heterosexual, and to same-sex couples as well as to opposite-sex couples.” (*Id.* at 782 (footnote omitted).)

However, in reaching its conclusion, the majority opinion discussed and analyzed a number of complex legal arguments with respect to the statutory and constitutional provisions at issue.

Family Code § 308.5 – Scope of Statutory Ban: First, the Court considered the scope of Family Code § 308.5, the statutory ban on same-sex marriage implemented by Proposition 22 in 2000. The plaintiffs asserted that section 308.5 should only be interpreted to apply to marriages entered into in another jurisdiction. The Court noted that the principal motivating factor underlying Proposition 22 appeared to have been to ensure that California would not recognize marriages of same-sex couples that might be validly entered into in another jurisdiction. Nonetheless, the

Court concluded that the statute's text in full (“[o]nly marriage between a man and a woman is valid or recognized in California”) could not be properly interpreted to apply to only marriages performed outside of California. The statute contained no language limiting its application to out-of-state marriages, and the court noted that the average voter likely understood the proposed statute to apply to in-state marriages as well. The court further noted that serious constitutional problems would be presented if section 308.5 were to be interpreted as creating a distinct rule for out-of-state marriages as contrasted with in-state marriages.

*Constitutional Right to Marry:* Second, the opinion analyzes the nature and scope of the constitutional right to marry under the California Constitution. The opinion notes that “[a]lthough our state Constitution does not contain any explicit reference to a ‘right to marry,’ past California cases establish beyond question that the right to marry is a fundamental right whose protection is guaranteed to all persons by the California Constitution.” (*Id.* at 809.) The opinion went on to discuss the California Supreme Court’s landmark 1948 decision in *Perez v. Sharp*, 32 Cal.2d 711, which found that the California statutory provisions prohibiting interracial marriage were inconsistent with the fundamental constitutional right to marry. As the opinion noted, the *Perez* decision focused on the substance of the constitutional right to “join in marriage with the person of one’s choice” in determining whether the statute impinged upon the plaintiff’s fundamental constitutional rights. (*Id.* at 811 (citation omitted).) Relying on *Perez*, the Court rejected the Court of Appeal’s characterization of the constitutional right at issue as the right to same-sex marriage, but proceeded to analyze the meaning and substance of the constitutional right to marry.

After an extensive review of California case law, the opinion explains that the core substantive rights embodied in the right to marry “include, most fundamentally, the opportunity of an individual to establish — with the person with whom the individual has chosen to share his or her life — an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.” (*Id.* at 781.) The opinion notes that “in contrast to earlier times, our state now recognizes that an individual’s capacity to establish a loving and long-term committed relationship with another person and responsibly to care for and raise children does not depend upon the individual’s sexual orientation, and, more generally, that an individual’s sexual orientation — like a person’s race or gender — does not constitute a legitimate basis upon which to deny or withhold legal rights.” (*Id.* at 782.) Accordingly, the Court concludes that “in light of the fundamental nature of the substantive rights embodied in the right to marry — and their central importance to an individual’s opportunity to live a happy, meaningful, and satisfying life as a full member of society — the California Constitution properly must be interpreted to guarantee this basic civil right to all individuals and couples, without regard to their sexual orientation.” (*Id.* at 820.)

Although the opinion acknowledges that the recent comprehensive domestic partnership legislation enacted in California affords same-sex couples most of the substantive elements embodied in the constitutional right to marry, the opinion further concludes that by assigning a different name for the family relationship of same-sex couples, while preserving the historic and honored designation of “marriage” only for opposite-sex couples, the California statutes threaten to deny the family relationship of same-sex couples dignity and respect equal to that accorded the family relationship of opposite-sex couples.



*Equal Protection:* Third, the majority opinion addresses whether the statutory assignment of different labels for the official family relationship of opposite-sex couples and same-sex couples raises constitutional concerns under the state constitution's equal protection clause. This portion of the opinion begins with a discussion of whether the different treatment between opposite-sex and same-sex couples should be evaluated under the deferential "rational basis" test that is applied to ordinary statutory classifications, or under the more exacting "strict scrutiny" standard that is applicable when a statute's differential treatment rests upon a "suspect classification" or impinges upon a fundamental right.

In addressing this point, the opinion first rejects the contention of those challenging the marriage statutes that in treating same-sex couples differently from opposite-sex couples, the marriage statutes discriminate on the basis of sex or gender, thereby triggering strict scrutiny. Nonetheless, the opinion concludes that the strict scrutiny standard is applicable in this case (1) because the statutes discriminate on the basis of sexual orientation, a characteristic the majority determines represents — like gender, race, and religion — a constitutionally suspect basis upon which to impose differential treatment, and (2) because the different statutory treatment impinges upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple.

Utilizing strict scrutiny, the majority opinion determined that the state interest underlying the marriage statutes' differential treatment of opposite-sex and same-sex couples — the interest in retaining the traditional and well-established definition of marriage — cannot properly be viewed as a *compelling* state interest for purposes of the equal protection clause, or as *necessary* to serve such an interest. The opinion explains that the exclusion of same-sex couples from the designation of marriage clearly is not *necessary* to protect all of the rights and benefits currently enjoyed by married opposite-sex couples: permitting same-sex couples access to the designation of marriage will not deprive opposite-sex couples of any rights and will not alter the legal framework of the institution of marriage inasmuch as same-sex couples who choose to marry will be subject to the same obligations and duties that are currently imposed on married opposite-sex couples. The opinion further observes that retaining the traditional definition of marriage and affording same-sex couples only a separate and differently named family relationship will, as a realistic matter, impose appreciable harm on same-sex couples and their children. Denying same-sex couples access to the familiar and highly favored designation of marriage is likely to cast doubt on whether the official family relationship of same-sex couples enjoys dignity equal to that of opposite-sex couples, and may perpetuate a more general premise that gay individuals and same-sex couples are in some respects "second-class citizens." Under these circumstances, the opinion finds that retaining the traditional definition of marriage cannot be considered a compelling state interest.

Consequently, the majority opinion holds that the statutory ban on same-sex marriage is unconstitutional. The Court rejected the defendants' argument that the Court had to defer the statutory definition of marriage contained in section 308.5 because the statute, having been adopted through the initiative process, represents the expression of the "people's will." As the Court notes, the argument failed "to take into account the very basic point that the provisions of the California Constitution itself constitute the ultimate expression of the people's will, and that the fundamental rights embodied within that Constitution for the protection of all persons represent restraints that the people themselves have imposed upon the statutory enactments that may be adopted either by their elected representatives or by the voters through the initiative process." (*Id.* at 852.)

Concurring Opinion by Justice Kennard: In her separate concurring opinion, Justice Kennard explains how the majority's decision in this case is consistent with its decision in the earlier *Lockyer* matter. The concurring opinion also reiterates the position that Justice Kennard set forth in her separate opinion in *Lockyer*, in which she concluded that the court in that case should not have declared void all of the marriages of same-sex couples that had been performed in San Francisco prior to the Court's issuance of a stay, but rather should have reserved the question of the validity of those marriages until after the constitutionality of the California marriage statutes was authoritatively resolved through judicial proceedings. However, the concurring opinion recognizes that the decision in *Lockyer* finally and conclusively invalidated those earlier marriages of same-sex couples and that the decision in the current case does not alter the voiding of those marriages.

Finally, the concurring opinion emphasizes that “[t]he architects of our federal and state Constitutions understood that widespread and deeply rooted prejudices may lead majoritarian institutions to deny fundamental freedoms to unpopular minority groups, and that the most effective remedy for this form of oppression is an independent judiciary charged with the solemn responsibility to interpret and enforce the constitutional provisions guaranteeing fundamental freedoms and equal protection.” (*Id.* at 860.)

Dissenting Opinion by Justice Baxter: In his dissenting opinion, joined by Justice Chin, Justice Baxter explains that although he agrees with several of the majority's conclusions, he disagrees with the majority's holding that the California Constitution invalidates the statutes that define marriage as an opposite sex union. In reaching this decision, Justice Baxter contends, the majority “violates the separation of powers, and thereby commits profound error.” Citing the legislative progress that gays and lesbians have already achieved in California, Justice Baxter urges that the future definition of marriage should also be decided by the democratic process, not by the courts.

Justice Baxter further criticizes the majority's mode of analysis in reaching its conclusion, stating that the majority “relies heavily on the *Legislature's* adoption of progressive civil rights protections for gays and lesbians to find a *constitutional* right to same-sex marriage. In effect, the majority gives the Legislature *indirectly* power that body does not *directly* possess to amend the Constitution and repeal an initiative statute.” Justice Baxter emphasizes that “there is no deeply rooted tradition of same-sex marriage, in the nation or in this state,” and concludes that there is no constitutional right to same-sex marriage. Rather, Justice Baxter states that “marriage is, as it always has been, the right of a woman and an unrelated man to marry each other.” (*Id.* at 872.)

The dissenting opinion also disagrees with the majority's equal protection analysis in a number of respects, stating that (1) “same-sex couples and opposite-sex couples are not similarly situated with respect to the valid purposes of” the current marriage statutes, (2) that the state, by assigning different labels to same-sex and opposite-sex legal unions, does not discriminate directly on the basis of sexual orientation, and (3) that sexual orientation is not properly considered a suspect classification because “gays and lesbians in this state currently lack the insularity, unpopularity, and consequent political vulnerability upon which the notion of suspect classifications is founded.” (*Id.* at 877.)

After determining that the normal rational basis test, rather than strict scrutiny, is applicable to evaluating the validity, under the equal protection clause, of the distinction drawn between opposite-sex and same-sex couples by the current marriage and domestic partnership statutes, Justice Baxter concludes that there are ample grounds for upholding the assignment of a name other than marriage to unions of same-sex couples. (*Id.* at 878.)

*Dissenting Opinion by Justice Corrigan:* In her dissenting opinion, Justice Corrigan states at the outset that although in her view Californians should allow same-sex couples to call their unions marriages, she must acknowledge that “a majority of Californians hold a different view, and have explicitly said so by their vote.” (*Id.* at 878.) Justice Corrigan further states that the Court’s ruling exceeds the bounds of judicial authority.

In explaining her position, Justice Corrigan notes that, under California law, domestic partners have virtually all of the substantive legal benefits and privileges available to traditional spouses, which she states is required by the Constitution as a matter of equal protection. However, her separate opinion goes on to explain that the single question in this case is whether domestic partners have a constitutional right to the name of marriage. Indicating that her view “on the question of terminology rests on both an equal protection analysis and a recognition of the appropriate scope of judicial authority,” Justice Corrigan concludes first that, as a matter of equal protection, “while plaintiffs are in the same position as married couples when it comes to the substantive legal rights and responsibilities of family members, they are not in the same position with regard to the title of ‘marriage.’” (*Id.* at 881.) With respect to the question of the proper scope of judicial authority, Justice Corrigan finds that the majority fails to exercise appropriate judicial restraint, maintaining that “[i]nstead of presuming the validity of the statutes defining marriage and establishing domestic partnership, in effect the majority *presumes them to be constitutionally invalid* by characterizing domestic partnership as a ‘mark of second-class citizenship.’” (*Id.* at 883.) Her dissenting opinion concludes: “We should allow the significant achievements embodied in the domestic partnership statutes to continue to take root. If there is to be a new understanding of the meaning of marriage in California, it should develop among the people of our state and find its expression at the ballot box.” (*Id.* at 884.)