tain or rebuild a secure home life. Similarly, the Court’s functionalism should move it to expand its definition of marriage. To the extent that marriage is a vehicle for stability because of the commitment it embodies, gay men and lesbians in stable, committed relationships should be no less entitled to marry than their heterosexual counterparts.

Just as courts and legislatures addressing this issue should acknowledge the principles that inform the right to marry, they should recognize which principles do not animate the right. For one, the Constitution does not protect marriage because of its link to procreation. While not directly addressing this issue, the Court’s holdings in Griswold v. Connecticut, Eisenstadt v. Baird, and Roe v. Wade clearly suggest that marriage can be understood independently of procreation. The state cannot force married persons to have children, nor can it forbid infertile persons to marry.

Even if marriage is protected because it often involves procreation, the argument that gay and lesbian couples should therefore be denied the right to marry is without merit. Given current advances in reproductive technology — in particular artificial insemination and surrogacy — gay men and lesbians can easily produce offspring. Thus, allowing gay men and lesbians to marry would not be inconsistent with policies favoring procreation.

In sum, same-sex marriages are wholly consistent with the theoretical and policy justifications behind the right to marry. If the Court is serious about the interests promoted by protecting the right to marry — self-determination, autonomy from the state, and societal and familial stability — then it should value them for heterosexuals and homosexuals alike and recognize that the fundamental right to marry should extend to gay and lesbian couples.

2. State Justifications for Prohibiting Same-Sex Marriage. — Once courts and legislatures acknowledge a constitutionally protected right to marry for same-sex couples, the next inquiry is whether a state’s interests in prohibiting same-sex marriage justify a substantial burden on that right. Under Zablocki, courts must apply strict scrutiny in testing the validity of state restrictions that “significantly interfere with

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30 Id.
31 361 U.S. 479 (1960) (holding that the right to privacy protects the right of a married person to use contraceptives).
32 405 U.S. 438 (1972) (holding that the right to use contraceptives attaches to the individual, irrespective of marriage).
33 410 U.S. 113 (1973) (holding that the right to privacy protects a woman’s right to decide whether or not to have an abortion).
34 See Marks v. Marks, 191 Misc. 448, 449, 22 N.Y.S.2d 169, 170–71 (Kings County Sup. Ct. 1948) (holding that an inability to procreate cannot be grounds for preventing people from getting married).
35 See infra pp. 135–42.
decisions to enter into the marital relationship.\footnote{434 U.S. at 386.} Two arguments further support applying strict scrutiny to same-sex marriage prohibitions. First, gay men and lesbians should constitute a suspect class,\footnote{See supra pp. 54–60; see also Adolph Coors Co. v. Wallace, 570 F. Supp. 202, 209 n.24 (N.D. Cal. 1983); (protecting membership in organizations promoting gay rights because gays are "discrete and insular minority" deserving special solicitude (quoting United States v. Carolene Products Co., 304 U.S. 144, 154 n.4 (1938))).} and second, same-sex marriage prohibitions arguably burden the associational rights of gay men and lesbians under the first amendment.\footnote{See Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 423, 545 (1987) ("[T]he First Amendment protects those relationships ... that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'" (quoting Roberts v. United States Jaycees, 468 U.S. 609, 619–20 (1984))).} This section argues that the prohibition on same-sex marriage cannot withstand any level of scrutiny, because states cannot articulate legitimate interests that are rationally related to the restrictions they impose.\footnote{Whether applying heightened scrutiny under a substantive due process or a fundamental right equal protection approach, the Court effectively engages in a balancing process. Justice Marshall, dissenting in Dandridge v. Williams, 397 U.S. 471 (1970), articulated the balancing approach: In my view, equal protection analysis . . . is not appreciably advanced by the a priori definition of a 'right,' fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification. Id. at 520–21 (Marshall, J., dissenting). Substantive due process methodology typically requires a balancing of governmental and individual interests, with the degree of justification required of the government increasing with the severity of the burden on the protected right. See Moore v. City of E. Cleveland, 431 U.S. 394, 401 (1977) ("When the government intrudes on choices concerning family living relationships, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."). Traditional equal protection analysis uses strict, intermediate, or rational basis scrutiny. Under strict scrutiny, courts must determine whether the law at issue is narrowly tailored to serve a compelling state interest. See Shapiro v. Thompson, 394 U.S. 618, 634 (1969). Intermediate scrutiny requires a substantial relationship to an important state interest. See Craig v. Boren, 429 U.S. 190, 197 (1976). Rational basis review requires only that the means used to achieve a legitimate state interest be rationally related to that interest. See McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969).} States have argued that prohibiting same-sex marriage encourages procreation\footnote{See, e.g., Adams v. Howerton, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) (stating that "the legal protection . . . afforded to marriage . . . has historically . . . been rationalized as being for the purpose of encouraging the propagation of the race"); cf. Proctor v. Nash, 31 Wash. App. 247, 259, 522 P.2d 1157, 1165 (1974) ("[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.")}. For reasons ex-
plained above, the procreation argument is flawed.\textsuperscript{42} Furthermore, same-sex marriage prohibitions, as instruments through which the procreation interest is served, are overinclusive because gay and lesbian couples can have children. In addition, they are underinclusive because many married heterosexual couples cannot, or elect not to, have children. The prohibition on same-sex marriage may in fact discourage procreation; some same-sex couples may elect not to have children precisely because their relationship is not sanctioned by the state.

The second proffered state interest — the invocation of traditional values — is nothing more than an appeal to eliminate diversity, an interest explicitly rejected by the Supreme Court.\textsuperscript{43} As Justice Blackmun has noted, "[t]he legitimacy of secular legislation depends . . . on whether the State can advance some justification for its law beyond its conformity to religious doctrine."\textsuperscript{44} Neither "the length of time a majority has held its convictions [n]or the passions with which it defends them can withdraw legislation from [the] Court's scrutiny."\textsuperscript{45}

Moreover, anti-homosexual biases are nurtured by ill-founded assumptions about gay and lesbian relationships. Gay men and lesbians can and do have stable and long-lasting relationships.\textsuperscript{46} Furthermore, they can and do create favorable environments in which to raise and

\begin{footnotes}
\item[42] See supra p. 98.
\item[43] See Moore, 431 U.S. at 505-06 (plurality opinion) (striking down a housing ordinance that limited occupancy of a unit to a narrowly defined "family").
\item[45] Hardwick, 478 U.S. at 212 (Blackmun, J., dissenting). The irony of the Court's justification of its holding in terms of societal animus towards homosexuality is readily apparent.
\item[46] When the Court uses the history of violent disapproval of the behavior that forms part of the very definition of homosexuality as the basis for denying homosexuals' claim to protection, it effectively inverts the equal protection axiom of heightened judicial solicitude for despised groups . . . and uses that inverted principle to bootstrap antipathy toward homosexuality into a tautological rationale for continuing to criminalize homosexuality. L. Tribe, supra note 21, § 15-21, at 1428.
\item[47] See P. Blumstein & P. Schwartz, American Couples 45 (1983) ("Couplehood, either as a reality or an aspiration, is as strong among gay people as it is among heterosexuals."). The level of commitment in same-sex relationships may in fact be higher than that in heterosexual relationships, given the psychological, social, and legal obstacles that gay couples must overcome in order to stay together. For example, gay men and lesbians who decide to share a residence may face more obstacles than their non-gay counterparts. Landlords may be reluctant to rent to them, families may express disapproval for their decision, neighbors may act with hostility towards them, and employers may show their disapproval in many subtle, and some not so subtle, ways.
\end{footnotes}
educate children. Because the state interest in promoting majoritarian morality is based on "irrational prejudice and fear of unconventional activities and lifestyles," it is illegitimate.

Same-sex marriage prohibitions significantly interfere with the exercise of fundamental constitutional rights and do not withstand even a relatively low level of scrutiny. Courts should, therefore, strike them down. At the very least, courts should recognize that the legal rights of gay and lesbian partners should not depend on marital status classifications. As the following Section indicates, such classifications work an invidious and unjustifiable discrimination against same-sex couples.

B. Same-Sex Couples and Private Law Benefits

Traditionally, the law has denounced cohabitation as a direct threat to the strength and integrity of marriage. Although modern society has been more accepting of heterosexual cohabitation — and, to a lesser degree, gay and lesbian relationships — courts and legislatures have been slow to recognize these contemporary family structures and lifestyles. As a result, unmarried homosexuals and heterosexuals often are denied legal privileges that married couples enjoy.

Generally, courts that have protected the rights of a gay or lesbian couple have required proof that the relationship is sufficiently stable

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47 See Part VI, note 57, infra p. 126.
49 See Palmate v. Sidoti, 466 U.S. 120 (1984) (holding that a custody denial based on potential stigmatization of the child due to the mother's interracial remarriage amounted to endorsing public prejudices and, therefore, violated the equal protection clause; see also Sunstein, Public Values, Private Interests, and the Equal Protection Clause: 1982 Sup. Ct. Rev. 127, 136-37 (proposing that choices "based on a perception that one person is in some sense 'better' than another or based solely on a person's identity should be considered impermissible justifications under the equal protection clause)."
50 See, e.g., E. Farnsworth, Contracts § 5.4, at 345-46 (1982).
51 See, e.g., Note, Marital Status Classifications: Protecting Homosexual and Heterosexual Cohabiters, 14 HASTINGS CONST. L.Q. 101, 114 & n.26 (1986) [hereinafter Note, Marital Status Classifications] (noting that over fifteen years ago, California legislation dealing with cohabitants started to treat married and unmarried couples more equally).
52 See, e.g., Leonard, Madison, WI Council Passes Two Domestic Partnership Bills, 1988 LESBIAN/GAY L. NOTES 49 (reporting that Madison, Wisconsin recently approved bills allowing nontraditional families to live in areas previously zoned for single families and mandating that city employees be allowed bereavement and sick leave for "family partners"); see also Housing Rights of Gay Survivors Subject of New York Litigation, 1986 LESBIAN/GAY L. NOTES 66 (reporting that for the first time, the ACLU has adopted a formal policy of endorsing gay and lesbian marriage as well as a provision for spousal benefits for gay and lesbian couples); Los Angeles Times, Feb. 22, 1989, § 2, at 3, col. 5 (reporting that West Hollywood, where 35% of residents are homosexual, will insure partners of unmarried city employees, regardless of their sexual orientation). But cf. Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that consensual homosexual sodomy is not a protected privacy right under the Constitution).