Statutory Regulation of Legal Parentage in Cases of Artificial Insemination by Donor: A New Frontier of Gender Discrimination

Christina M. Eastman*

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* J.D. Candidate, University of the Pacific, McGeorge School of Law, 2010; B.A., Law, Societies, and
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At first glance, the advertisements in college newspapers offering anywhere from $5,000 to $150,000 for human eggs\(^1\) seem like pretty good deals, considering eggs are something that the female body discards every month anyway.\(^2\) Fertility clinics and prospective parents want smart, athletic, tall, and young donors, and they are willing to pay large sums of money as compensation\(^3\) to donors for their efforts.\(^4\) However, the danger lurks in what is not advertised.\(^5\) Egg extraction procedures involve great risk to the women who choose to donate.\(^6\) The body is subjected to intense levels of hormones, the ovaries are hyper-stimulated, which creates the potential for ovarian trauma and later infertility, and there are risks of infection and anesthesia-related complications, including death.\(^7\)

However, despite the above mentioned risks, the egg donation industry is largely unregulated.\(^8\) Due to the high rates of infertility\(^9\) and the increasing

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1. The terms “egg” and “oocyte” both refer to the female reproductive cell and will therefore be used interchangeably in this Comment. See CHARLES P. KINDREGAN, JR. & MAUREEN McBRIE, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE 324 (2006) (defining assisted reproductive terminology used in decisional law, statutes, and legal literature); see also infra Part II.C.2 (discussing egg donation in further detail).


3. Some commentators fear that large payments to egg donors go beyond compensation for the time, effort, and risks involved in the egg donation process and that they become payment for a human commodity—the actual eggs. Kenneth Baum, Golden Eggs: Towards the Rational Regulation of Oocyte Donation, 2001 BYU L. REV. 107, 134-52 (2001); see Ethics Comm. of the Am. Soc’y for Reproductive Med., Financial Compensation of Oocyte Donors, 88 FERTILITY & STERILITY 305, 305-07 (2007) [hereinafter Financial Compensation of Oocyte Donors] (describing the ethical concerns with high rates of compensation for egg donors and specifically recommending that payment for egg donation should not exceed $5,000 unless there is some justification for a higher amount and should never exceed $10,000).


5. See Frase-Blunt, supra note 4 (describing egg donation advertisements and the risks that donors find about only later in the process).

6. Frase-Blunt, supra note 4; Hopkins, supra note 2.

7. Frase-Blunt, supra note 4; Hopkins, supra note 2.

8. DAAR, supra note 2, at 221; see id. at 687-95 (outlining the minimal levels of state and federal regulation of assisted reproductive technology (ART)).

9. See U.S. DEPT. OF HEALTH AND HUMAN SERVS., CTRS. FOR DISEASE CONTROL AND PREVENTION, NAT’L CTR. FOR HEALTH STATISTICS, FERTILITY, FAMILY PLANNING, AND WOMEN’S HEALTH: NEW DATA FROM THE 1995 NATIONAL SURVEY OF FAMILY GROWTH 7 (May 1997) (finding that ten percent of women of
popularity of assisted reproductive technology (ART), the egg donation industry is rapidly expanding, and the law is not keeping pace. Egg donors help thousands of women conceive children each year, but in many states, they are given considerably less legal protection from the rights and responsibilities of parentage compared to sperm donors, even though both genders are donating their respective reproductive cells. As a result, egg donors in these states are left exposed to potential claims for child support or inheritance from the children that result from donation, while sperm donors are protected from identical claims.

This Comment addresses the need for equal statutory protections for both men and women who choose to donate gametes. It argues that states violate the Equal Protection Clause of the Fourteenth Amendment when they provide statutory protections from the rights and responsibilities of legal parentage for gamete donors of one gender but not for the other. Part II provides a brief description of popular ART procedures that can involve donated gametes, as well as a summary of both sperm and egg donation procedures. Part III outlines the state statutory and common law approaches to parentage issues in gamete donation. Part IV discusses general principles of equal protection, outlining the reproductive age, approximately 6.1 million, have difficulty or find it impossible to get pregnant or carry a baby to term; see also Am. Soc’y for Reprod. Med., Frequently Asked Questions About Infertility, http://www.asrm.org/Patients/faqs.html#Q1: (last visited Jan. 11, 2009) (on file with the McGeorge Law Review).

Infertility is a disease of the reproductive system that impairs one of the body’s most basic functions: the conception of children. Conception is a complicated process that depends upon many factors: on the production of healthy sperm by the man and healthy eggs by the woman; unblocked fallopian tubes that allow the sperm to reach the egg; the sperm’s ability to fertilize the egg when they meet; the ability of the fertilized egg (embryo) to become implanted in the woman’s uterus; and sufficient embryo quality.

Finally, for the pregnancy to continue to full term, the embryo must be healthy and the woman’s hormonal environment adequate for its development. When just one of these factors is impaired, infertility can result.

Id.


11. See infra Part III.A (outlining the state statutory approaches, and the lack thereof, regarding gamete donation and the lesser level of legal protection for egg donors compared to sperm donors).

12. Hopkins, supra note 2 (stating that thirty-eight million dollars a year is spent on donor eggs and around 10,000 children are born each year from donor eggs).

13. The terms “sperm” and “semen” both refer generally to male reproductive cells and will therefore be used interchangeably for purposes of this Comment. KINDREGAN, JR. & McBRIEN, supra note 1, at 327.

14. See infra Part III.A (outlining the statutory protections provided to sperm and egg donors).

15. See John A. Robertson & Susan L. Crockin, Legal Issues in Egg Donation, in FAMILY BUILDING THROUGH EGG AND SPERM DONATION: MEDICAL, LEGAL, AND ETHICAL ISSUES 147 (Machelle M. Seibel & Susan L. Crockin eds., 1996) (“A . . . dispute would arise if attempts were made to hold the egg donor liable after birth for child support or other rearing obligations toward her genetic child.”).

16. See infra Part II.C (defining the term “gamete” as including both female and male reproductive cells).
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heightened level of scrutiny courts apply in cases of gender-based classifications. Part V applies heightened scrutiny to the gamete donation statutes in states that only provide protections to one gender and fail to do the same for the other. Finally, Part VI concludes that gender-based gamete donation statutes violate the Equal Protection Clause, because they lack a substantial relationship with important state objectives.

II. ASSISTED REPRODUCTIVE TECHNOLOGY: THE BASICS

A. Artificial Insemination

Artificial insemination (AI) is a time-tested and cost-effective reproduction technology.17 “It is estimated that about twenty thousand American women each year are artificially inseminated, with a success rate of one in every seven attempts.”18

AI involves inserting sperm into a woman’s uterus, fallopian tubes, or vagina with a needle to cause pregnancy.19 The sperm used in AI can originate from the woman’s husband or from a donor.20 The sperm can be fresh or cryopreserved,21 so it can be used immediately or stored for future use.22 A woman undergoing this procedure usually takes hormone medication that stimulates the ovaries to increase egg production in order to improve success rates.23

B. In Vitro Fertilization

In vitro fertilization (IVF) is a time-consuming, emotionally taxing, painful, and expensive method of reproductive assistance; however, its success rates are superior to other ART methods.24 Success rates have been estimated at between

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18. Id.
19. Id.
20. DAAR, supra note 2, at 33. When the sperm comes from the woman’s husband, the procedure is known as homologous insemination, or artificial insemination by husband (AIH). When the sperm comes from a donor, the procedure is known as heterologous insemination, or artificial insemination by donor (AID). Id.
22. DAAR, supra note 2, at 28.
ten and forty percent, but individual chances of pregnancy can range from zero to one hundred percent, depending on the candidate.\textsuperscript{25}

Literally meaning “in glass” fertilization,\textsuperscript{26} IVF involves removing eggs from a woman’s body and fertilizing them with sperm “ex utero” (outside of the uterus) in a petri dish.\textsuperscript{27} The whole process takes about two weeks.\textsuperscript{28} Throughout this period, a woman undergoes hormone therapy to increase egg production and doctors monitor ultrasounds and blood tests to determine the optimal time to remove the eggs.\textsuperscript{29} Once the eggs are fully developed, doctors provide hormone medications that trigger ovulation.\textsuperscript{30} A woman then undergoes a laparoscopy or ultrasound-guided transvaginal aspiration to remove the eggs from her ovaries.\textsuperscript{31}

Once the eggs are removed, they are examined to determine suitability.\textsuperscript{32} Suitable eggs are fertilized with sperm in a petri dish and become embryos.\textsuperscript{33} Doctors monitor the embryos over the next few days to ensure proper cell division.\textsuperscript{34} When the requisite cell division has occurred, the embryos can either be immediately implanted in a woman’s uterus or frozen using cryopreservation.\textsuperscript{35} Because doctors often remove more eggs than needed, IVF patients usually use some embryos immediately and freeze the remaining embryos.\textsuperscript{36} If pregnancy does not result from the first implantation, the frozen embryos can be thawed and implanted, or a woman can undergo the whole process anew.\textsuperscript{37}

\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id.; Lyon, supra note 21, at 697.
\textsuperscript{28} Lyon, supra note 21, at 697.
\textsuperscript{29} Id. at 697-98.
\textsuperscript{30} Id. at 698.
\textsuperscript{31} In Vitro Fertilization and Embryo Transfer, supra note 24. “Laparoscopy is a surgical procedure in which a fiber-optic instrument (laparoscope) and a hollow needle are inserted through a small incision in a woman’s abdomen to retrieve some of her eggs. A less invasive alternative is ultrasound-guided transvaginal aspiration, in which a suctioning needle is inserted through the abdomen and bladder or through the vagina while the physician monitors the process using ultrasound.” Robyn L. Ikehara, Comment, Is Adoption the “New” Solution for Couples in Dispute Over Their Frozen Embryos?, 15 S. CAL. REV. L. & WOMEN’S STUD. 301, 303-04 n.17 (2006).
\textsuperscript{32} Lyon, supra note 21, at 698.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} In Vitro Fertilization and Embryo Transfer, supra note 24.
\textsuperscript{37} Lyon, supra note 21, at 698.
C. Gamete Donation

The term “gamete” includes both the egg and the sperm.\(^{38}\) It refers to “a mature reproductive cell which, upon union with another gametic cell, results in the development of a new individual.”\(^{39}\)

1. Sperm Donation

Although the history of artificial insemination dates back to the 1700s,\(^ {40}\) sperm donation has existed since the 1950s.\(^ {41}\) The banking of sperm began in the 1970s with the advent of cryopreservation, which allowed the sperm to be stored for a lengthy time period.\(^ {42}\) Approximately “30,000 children are born each year to women using sperm donors . . . ,”\(^ {43}\) and a variety of sperm banks exist in almost every state.\(^ {44}\) Prospective parents use donated sperm to overcome male infertility issues, avoid genetic defects, or conceive a child as a single mother.\(^ {45}\)

Sperm banks solicit donors largely through the Internet and on college campuses.\(^ {46}\) The California Cryobank reports that approximately five percent of men who apply to be sperm donors are actually chosen to be donors.\(^ {47}\) “The screening process includes laboratory analysis of the applicant’s sperm and blood, an extensive review of family and medical history, genetic screening, [and] physical examination . . . .”\(^ {48}\) Those selected as donors “are paid around $75 per specimen, up to a maximum of $900 per month . . . [and] are asked to provide an average of 2 to 3 specimens per week for a period of 12 to 18

\(^{38}\) DAAR, supra note 2, at 8. Sperm is the male sexual cell, which fertilizes the female sexual cell referred to as the egg. Id.

\(^{39}\) Id.


\(^{42}\) See DAAR, supra note 2, at 201-02 (describing how artificial insemination by donor gained popularity with the development of cryopreservation techniques and how this subsequently spawned a new industry of commercial sperm banks in the 1970s).

\(^{43}\) Id. at 201.


\(^{45}\) Anderson, supra note 41, at 598.


\(^{47}\) DAAR, supra note 2, at 202.

\(^{48}\) Id.
months. Donors also provide pictures of themselves and fill out donor profiles containing information about race, religion, educational background, hobbies, and family relationships.

2. Egg Donation

Compared to sperm donation, egg donation is a recent phenomenon, growing in popularity over the last twenty-five years. "In the United States, approximately twelve thousand to fifteen thousand IVF cycles are performed annually with donated eggs." The recruiting and screening process for egg donors is similar to that of sperm donors, however, the procedures involved are much more complex. As a result, an egg donor can receive anywhere from $5,000 to $150,000 per donation cycle.

An egg donor begins the process by taking hormones to suppress ovarian function and synchronize the donor’s menstrual cycle with that of the recipient. The donor later takes additional hormones to stimulate the ovaries to produce an increased amount of mature eggs. While the donor is anesthetized, the eggs are extracted using a large needle and are fertilized immediately with either the sperm of the recipient’s husband or donor sperm. Three to five days after fertilization, the resulting embryo is inserted into the uterus of the recipient.

The procedures involved in egg donation carry significantly greater risks compared to the relative ease of sperm donation. Recently, a twenty-two-year-old Stanford graduate student experienced a massive stroke caused by the hormone injections required to stimulate egg production in donors. This
example of the danger of egg donation illustrates the need for statutory regulation of this industry similar to that of sperm donation. Ultimately, legislation is needed to ameliorate the health risks involved in egg donation, but discussion of this issue is outside the scope of this Comment. Instead, this Comment will focus solely on the statutory protections from the rights and responsibilities of parenthood that are needed for the women who choose to accept the risks of the procedure.

III. DETERMINING LEGAL PARENTAGE IN CASES OF ARTIFICIAL INSEMINATION BY DONOR: STATE LAW APPROACHES

A. Gamete Donation Statutes

The Uniform Parentage Act (UPA), originally promulgated in 1973, singlehandedly “led a revolution in the law of determination of parentage, paternity actions and child support.”\(^1\) The 2000 and 2002 amendments to the UPA took into account new genetic identification technology and incorporated similar uniform laws.\(^2\) Although the UPA has been very influential on state statutes, not all states have adopted it,\(^3\) and some states have only adopted its older, original version, which does not take into account new scientific advances such as ART.\(^4\) An analysis of the various state statutes governing the parentage of children born of artificial insemination by donor (AID) is necessary to highlight the inadequacy of statutory authority in this field and to illuminate equal protection concerns.

1. State Statutes That Mimic the Original UPA

The original 1973 version of the UPA states that “[t]he donor of semen provided to a licensed physician for use in artificial insemination of a married

\(^{2}\) Id. The 2000 amendments incorporated the Uniform Status of Children of Assisted Conception Act and the Uniform Putative and Unknown Fathers Act, which were both introduced in 1988. Id.
\(^{3}\) See infra Part III.A.3 (describing the state statutes that only indirectly mention gamete donation); infra Part III.A.4 (outlining the states that lack gamete donation statutes).
\(^{4}\) See infra Part III.A.1 (describing the state statutes that mimic or directly copy the original version of the UPA).
woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.”65 Minnesota, Missouri, Montana, and Nevada all adopted the exact language from the original UPA.66 California, Illinois, Kansas, New Jersey, and Wisconsin adopted substantially the same language, making changes that, although small, could nevertheless have a considerable impact on circumstances outside the scope of this Comment.67 Finally, New Hampshire, Ohio, and Oregon adopted gamete donation statutes that do not follow the language of the original UPA, but still have the same effect.68 In total, twelve states have statutes that mimic the original UPA.69

66. MINN. STAT. ANN. § 257.56(2) (West 2007); MO. ANN. STAT. § 210.824(2) (West 2004); MONT. CODE ANN. § 40-6-106(2) (2007); NEV. REV. STAT. ANN. § 126.061(2) (LexisNexis Supp. 2007).
67. These states all removed the word “married,” providing for increased rights for unmarried women seeking to conceive from donated sperm and more protection for donors whose sperm is used by unmarried women. CAL. FAM. CODE § 7613(b) (West Supp. 2009); 750 ILL. COMP. STAT. ANN. 40/3(b) (West 2009); KAN. STAT. ANN. § 38-1114(f) (2000); N.J. STAT. ANN. § 9:17-44(b) (West 2002); WIS. STAT. ANN. § 891.40(2) (West Supp. 2008). This change in language has a substantial impact on lesbian women seeking to use donated sperm to conceive a child because, in most states, lesbian women cannot legally marry. See Jesse McKinley & Laurie Goodstein, Bans in 3 States on Gay Marriage, N.Y. TIMES, Nov. 6, 2008, at A1 (stating that thirty states ban gay marriage, which is only legal in Connecticut and Massachusetts).

The changes from the original language of the UPA are italicized in the following: CAL. FAM. CODE § 7613(b) (“The donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in artificial insemination or in vitro fertilization of a woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.”) (emphasis added)); 750 ILL. COMP. STAT. ANN. 40/3(b) (only removed the word “married”); KAN. STAT. ANN. § 38-1114(f) (“The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor’s wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.”) (emphasis added)); N.J. STAT. ANN. § 9:17-44(b) (“Unless the donor of semen and the woman have entered into a written contract to the contrary, the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor’s wife is treated in law as if he were not the father of a child thereby conceived and shall have no rights or duties stemming from the conception of a child.”) (emphasis added)); WIS. STAT. ANN. § 891.40(2) (“The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor’s wife is the natural father of a child conceived, bears no liability for the support of the child and has no parental rights with regard to the child.”) (emphasis added)).

Additionally, both Kansas and New Jersey added a provision allowing the sperm donor and the woman undergoing AI to contract around the statute. KAN. STAT. ANN. § 38-1114(1); N.J. STAT. ANN. § 9:17-44(b). This provision allows the sperm donor to voluntarily accept the rights and obligations of parenthood, which may be important in cases where the woman and sperm donor are not married, but wish to raise a child together as co-parents.

68. N.H. REV. STAT. ANN. § 168-B:11 (LexisNexis 2001) (“A sperm donor may be liable for support only if he signs an agreement with the other parties to that effect.”); OHIO REV. CODE ANN. § 3111.95(B) (LexisNexis 2008) (“If a woman is the subject of a non-spousal artificial insemination, the donor shall not be treated in law or regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall not be treated in law or regarded as the natural child of the donor.”); OR. REV. STAT. § 109.239 (2007) (“If the donor of semen used in artificial insemination is not the mother’s husband: (1) Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination; and (2) A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to such donor.”).

69. See supra notes 66-68 (outlining the language of the state statutes that exactly copy or mimic the language of the original UPA).
These statutes, based on the original version of the UPA, fail to address egg donation, likely because the UPA was written before ART procedures involving donated eggs were widely available. Therefore, states that adopted the original UPA gamete donation provision, or language similar thereto, provide statutory protections from parental rights and responsibilities to men who donate their gametes but fail to provide the same protections to women who do the same.

2. State Statutes That Mimic the Amended 2002 UPA

The 2002 UPA gamete donation provision provides that “[a] donor is not a parent of a child conceived by means of assisted reproduction.” The comments to this provision state that “[i]f a child is conceived as the result of assisted reproduction, this section clarifies that a donor (whether of sperm or egg) is not a parent of the resulting child. The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation.”

Seven states adopted the exact language of the 2002 UPA gamete donation provision. Six additional states did not adopt the 2002 UPA language, but their gender-neutral gamete donation statutes have the same effect for the purposes of this Comment. These thirteen states provide the same protections from parental rights and responsibilities for both sperm and egg donors.

70. See DAAR, supra note 2, at 36 (stating that the first baby conceived through IVF was born in 1978). The original version of the UPA was issued in 1973, five years after the first IVF birth. Nat’l Conference of Comm’rs on Unif. State Laws, supra note 61.

71. See UNIF. PARENTAGE ACT (1973) § 5(b), 9B U.L.A. 377 (2001) (exempting donors of semen from legal parentage of the resulting child in certain circumstances, but not addressing the parental obligations of donors of eggs). The sperm donors must still donate to a licensed physician and the sperm must be used by a married woman who is not the donor’s wife in order to gain the protection of the statute. Id.


75. These states include Alabama, Connecticut, Florida, Idaho, New Mexico, and Virginia. ALA. CODE § 26-17-702 (LexisNexis Supp. 2008) (“A donor who donates to a licensed physician for use by a married woman is not a parent of a child conceived by means of assisted reproduction. A married couple who, under the supervision of a licensed physician, engage in assisted reproduction through use of donated eggs, sperm, or both, will be treated at law as if they are the sole natural and legal parents of a child conceived thereby.”); CONN. GEN. STAT. ANN. § 45a-775 (West Supp. 2009) (“An identified or anonymous donor of sperm or eggs used in A.I.D., or any person claiming by or through such donor, shall not have any right or interest in any child born as a result of A.I.D.”); FLA. STAT. ANN. § 742.14 (West 2005) (“The donor of any egg, sperm, or preembryo, other than the commissioning couple or a father who has executed a preplanned adoption agreement . . . shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children . . . .”); IDAHO CODE ANN. § 39-5405(1)-(2) (2002) (“The donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination. A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to such donor.”); N.M. STAT. ANN.

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3. State Statutes That Indirectly Mention Gamete Donation

Seven states implicate gamete donation by stating that a child conceived through AI and born to a married couple is the natural and legitimate child of both spouses. This statutory language implies that a sperm or egg donor would not be the natural and legitimate parent of a child conceived through AI, so long as the woman giving birth is married and the donor is not one of the spouses. If the woman using the donated sperm or eggs is not married, these statutes provide absolutely no protection to gamete donors, because the statute would not be implicated. The states that have these statutes offer questionable protection to gamete donors, because there are no statutes specifically outlining donor rights and responsibilities. However, although these statutes offer minimal protection,

§ 40-11A-702 (effective Jan. 1, 2010) ("Donors of eggs, sperm or embryos are not the parents of a child conceived by means of assisted reproduction."); VA. CODE ANN. § 20-158(A)(3) (2008) ("A donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother.").

76. See supra notes 74-75 (outlining the state gamete donation statutes that use gender-neutral language similar to the 2002 UPA).

77. These states include Alaska, Arizona, Massachusetts, New York, North Carolina, Tennessee, and Louisiana. ALASKA STAT. § 25.20.045 (2008) ("A child, born to a married woman by means of artificial insemination performed by a licensed physician and consented to in writing by both spouses, is considered for all purposes the natural and legitimate child of both spouses."); ARIZ. REV. STAT. ANN. § 25-501(B) (Supp. 2008) ("A child who is born as the result of artificial insemination is entitled to support from the mother as prescribed by this section and the mother’s spouse if the spouse either is the biological father of the child or agreed in writing to the insemination before or after the insemination occurred."); MASS. gen. LAWS ANN. ch. 46, § 4B (West 1994) ("Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband."); N.Y. DOM. REL. LAW § 73(1) (McKinney Supp. 2009) ("Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes."); N.C. Gen. Stat. § 49A-1 (2003) ("Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique."); TENN. CODE ANN. § 68-3-306 (2001) ("A child born to a married woman as a result of artificial insemination, with consent of such married woman’s husband, is deemed to be the legitimate child of the husband and wife.").

In addition, Louisiana indirectly implicates gamete donation by mandating that “[t]he husband of the mother may not disavow a child born to his wife as a result of an assisted conception to which he consented.” LA. CIV. CODE ANN. art. 188 (2009).

78. See ALASKA STAT. § 25.20.045 (declaring a child conceived through artificial insemination the legal child of the birth mother and her husband in certain circumstances, so the child cannot be the legal child of an egg or sperm donor); ARIZ. REV. STAT. ANN. § 25-501(B) (same); MASS. gen. LAWS ANN. ch. 46, § 4B (same); N.C. Gen. Stat. § 49A-1 (same); TENN. CODE ANN. § 68-3-306 (same).

79. See ALASKA STAT. § 25.20.045 (requiring that a woman be married in order to gain the protection of the statute); ARIZ. REV. STAT. ANN. § 25-501(B) (same); MASS. gen. LAWS ANN. ch. 46, § 4B (same); N.C. Gen. Stat. § 49A-1 (same); TENN. CODE ANN. § 68-3-306 (same); LA. CIV. CODE ANN. art. 188 (same).

80. See ALASKA STAT. § 25.20.045 (lacking any mention of gamete donors or their parental rights and responsibilities); ARIZ. REV. STAT. ANN. § 25-501(B) (same); MASS. gen. LAWS ANN. ch. 46, § 4B (same); N.C. Gen. Stat. § 49A-1 (same); TENN. CODE ANN. § 68-3-306 (same); LA. CIV. CODE ANN. art. 188 (same).
the level of protection they do provide (or lack thereof) is the same for sperm and egg donors. 81

Arkansas has a highly unusual statute that also indirectly implicates gamete donation, but it appears to offer more protection to egg donors than to sperm donors. 82 It states that “[a]ny child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman’s husband if the husband consents in writing to the artificial insemination.” 83 However, it goes further to state that “[a] child born by means of artificial insemination to a woman who is unmarried at the time of the birth of the child shall be, for all legal purposes, the child of the woman giving birth . . . .” 84

These two Arkansas statutes read together indicate that a child conceived through AI is the legal child of the birth mother, regardless of whether she is married or unmarried. 85 Read in converse, this means that an egg donor would not be the legal mother of a child conceived through AI, regardless of whether the donated eggs are used by married or unmarried women. 86 In contrast, a child conceived through AI is the legal child of the intended father only if the intended father is married to the birth mother and consents to the AI. 87 Read in converse, this means that a sperm donor would only be protected from the rights and responsibilities of legal parenthood if the woman who uses the sperm is married and her husband consents to the procedure. 88 Therefore, the Arkansas statute offers two different levels of indirect protection for gamete donors based on the gender of the donor.

Oklahoma’s unique gamete donation statutes both indirectly and directly implicate the rights and responsibilities of gamete donors, and they provide more protection to egg donors than to sperm donors. 89 One provision uses the same language as the other state statutes that indirectly implicate the parental rights of

81. See ALASKA STAT. § 25.20.045 (lacking any mention of both male and female gamete donors); ARIZ. REV. STAT. ANN. § 25-501(B) (same); MASS. GEN. LAWS ANN. ch. 46, § 4B (same); N.C. GEN. STAT. § 49A-1 (same); TENN. CODE ANN. § 68-3-306 (same); LA. CIV. CODE ANN. art. 188 (same).
82. This statute indicates that some states may offer more protection to female rather than male gamete donors, potentially in violation of the Equal Protection Clause. However, this occurrence appears isolated to Arkansas and Oklahoma at this point in time. Since the more widespread problem involves offering greater levels of statutory protection to men, this Comment will focus solely on that issue.
84. Id. § 9-10-201(c)(1).
85. Id. § 9-10-201(a), (c)(1).
86. See id. (declaring that the birth mother of a child conceived by means of artificial insemination is the legal parent of the child regardless of marital status, so any egg donor could not be the legal mother).
87. Id. § 9-10-201(a).
88. See id. (indicating that only a man who is married to the birth mother and consents to the artificial insemination gains the declaration of legal parenthood contained in the statute, so in all other circumstances a sperm donor is left open to parenthood challenges).
89. Okla. Stat. Ann. tit. 10, §§ 552, 555 (West 2007). The Oklahoma statutes, like the statute in Arkansas, appear to offer more protection to female donors than to male donors. While this may also violate the Equal Protection Clause, it is an isolated situation in these two states. It will, therefore, not be discussed in this Comment, because the more widespread problem is the denial of equal protection to women.
responsibilities of gamete donors. However, another provision goes further and provides direct protection to egg donors by declaring that “[a]n oocyte donor shall have no right, obligation or interest with respect to a child born as a result of a heterologous oocyte donation from such donor. A child born as a result of a heterologous oocyte donation shall have no right, obligation or interest with respect to the person who donated the oocyte which resulted in the birth of the child.” There is no correlating statute for sperm donors. As a result of this language, Oklahoma provides egg donors with protection from the rights and responsibilities of legal parentage, but it fails to do so for sperm donors.

4. States That Lack Gamete Donation Statutes

Sixteen states (or approximately one-third of all states) lack statutes that protect gamete donors. These states do not violate equal protection principles, because statutory protection from the rights and responsibilities of legal parentage is offered to neither male nor female gamete donors. However, an equal protection claim could still arise if the state courts, in applying common law approaches to determining legal parentage, treat sperm donors more favorably than egg donors.

B. In the Absence of Statutory Authority on Egg Donation: Common Law Approaches

The case law that has developed around the issue of gamete donation is important, because it illustrates how courts may impose the rights and responsibilities of legal parentage on egg donors when there are no statutory provisions indicating otherwise.

90. Id. § 552 (“Any child or children born as the result [of artificial insemination] shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife so requesting and consenting to the use of such technique.”).

91. Id. § 555.

92. See id. (declaring that oocyte donors are not legal parents of the resulting children, but failing to address the parental status of sperm donors).


94. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 670 (3d ed. 2006) (stating that the threshold inquiry in every equal protection analysis is whether the government is distinguishing among groups of people).

95. The Equal Protection Clause applies to all state action. Both state statutes and rulings by state courts are considered state action. See Shelley v. Kraemer, 334 U.S. 1, 14 (1948) (“[T]he action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment . . . .”).

96. See Sarah Terman, Comment, Marketing Motherhood: Rights and Responsibilities of Egg Donors in
1. Intent-Based Analysis to Determine Legal Parentage

Most of the limited case law regarding gamete donation involves parentage disputes with sperm donors in states that do not have governing sperm donation statutes. These cases are highly relevant to egg donation, because courts presented with an egg donation parentage dispute are likely to analogize to similar sperm donation cases. The courts in these cases apply an intent-based analysis to determine legal parentage, because there are no governing statutes on point.

For example, in Kesler v. Weniger, a Pennsylvania court considered a mother’s claim for child support against the biological father of her son. Although the mother and father had been in a sexual relationship for fifteen years, the father claimed that he and the mother had agreed prior to conception that he would be absolved of financial responsibility for the child. The father essentially claimed that he acted merely as a sperm donor. The court found that no such agreement existed between the parties, noting that the parents were engaged in a long-term sexual relationship and the child was conceived, not from an anonymous sperm donation or sperm bank, but from sexual intercourse. These facts reflected the intent of the parties not to enter into a sperm donation agreement that absolved the father of the responsibilities of legal parentage.

In contrast, the court refused to enforce a child support order against a biological father in another Pennsylvania case, Ferguson v. McKiernan. As in Kesler, the father in this case argued that he and the child’s mother agreed to absolve him of all financial responsibility for the child before conception. However, unlike in Kesler, the father presented significant evidence that he merely acted as a sperm donor and did not intend to assume any responsibility for

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Assisted Reproductive Technology Agreements, 3 N.W. J. L. & Soc. Pol’y 167, 176 (2008) (“The evolution of judicial decisionmaking in this area demonstrates the uncertainty that parties may face when they seek judicial resolution of their parental disputes.”).

97. See Susan L. Crockin, Statutory and Case Law Governing Oocyte and Embryo Donation, in PRINCIPLES OF OOCYTE AND EMBRYO DONATION 245 (Mark V. Sauer ed., 1998) (“Numerous lawsuits involving children born through sperm donation have occurred over the years . . . .”).

98. Robertson & Crockin, supra note 15, at 145-46 (“A court faced with a dispute over rearing rights and duties in children born of egg donation . . . is likely to follow the donor sperm model and give legal effect to the intention of the parties to have the recipient of the donation recognized as the rearing mother.”).

99. Id. at 145 (“In sperm donation, the intention of the parties to have the consenting husband assume all paternal rearing rights and duties and to exclude the sperm donor from any rearing role is recognized by statute or court decisions in over 30 states.”).


101. Id. at 795.

102. Id. at 796.

103. Id.

104. See id.


106. Id. at 1242.
the child.\textsuperscript{107} The child was conceived through IVF at a fertility clinic, instead of through sexual intercourse, and the mother listed her then-husband and not the biological father on the child’s birth certificate.\textsuperscript{108} Additionally, the parties did not disclose the biological father’s paternity to friends and family.\textsuperscript{109} The court stated that these factors indicated “the parties’ mutual intention to preserve all of the trappings of a conventional sperm donation . . . .”\textsuperscript{110}

\textit{Ferguson} and \textit{Kesler} together indicate that, in the absence of governing statutes, courts will likely determine legal parentage based on the intent of the parties, as evidenced by such factors as: the method of conception, the existence of a sexual relationship between the parties, the anonymity of sperm donation (and by analogy, egg donation), the name of the parent listed on the birth certificate, and the parties’ representations to others as to the child’s legal parentage.\textsuperscript{111}

Several cases involving egg donation appear to apply the intent-based analysis established in sperm donation cases. In a New York case, \textit{McDonald v. McDonald}, the biological father of twin girls conceived through IVF with donated eggs sought to gain full custody of his children in a divorce proceeding by claiming that his wife was not the mother of the children.\textsuperscript{112} He claimed that, because the children were conceived with donated eggs, his wife was not the natural and genetic parent of the children.\textsuperscript{113} The court rejected this argument and ruled that the parties’ mutual intention to raise the children as their own made the wife the natural mother of the children.\textsuperscript{114}

The leading case outlining the intent-based analysis for determining legal parentage is \textit{Johnson v. Calvert}.\textsuperscript{115} In this California case, a gestational surrogate,\textsuperscript{116} who was implanted with the fertilized egg of a married couple, decided that she had bonded with the child and sought to be declared its legal mother.\textsuperscript{117} The court stated that, because either genetic consanguinity or giving birth establishes maternity, further inquiry into the intentions of the parties was necessary to determine legal parentage.\textsuperscript{118} The court ruled that, “when [genetic consanguinity and giving birth] do not coincide in one woman, she who intended

\begin{footnotes}
\item[107] Id. at 1246.
\item[108] Id.
\item[109] Id.
\item[110] Id.
\item[111] Id. at 1236; Kesler v. Weniger, 744 A.2d 794 (Pa. Super. Ct. 2000).
\item[113] Id. at 479.
\item[114] Id. at 480.
\item[115] 851 P.2d 776 (Cal. 1993).
\item[116] A gestational surrogate is “a woman who agrees to carry a child for intended parents (who may or may not also be the genetic parent or parents), conceived by the gametes of others, with a result that she gives birth to a child with whom she has no genetic connection.” \textsc{Kendregan, Jr.} \& Mc\textsc{brien}, \textit{supra} note 1, at 132.
\item[117] \textit{Johnson}, 851 P.2d at 778.
\item[118] Id. at 781-82.
\end{footnotes}
to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.”

In a similar Ohio gestational surrogacy case, Belsito v. Clark, the court undermined the Johnson intention analysis by refusing to follow it. In this case, a hospital refused to list the names of a child’s genetic parents on a birth certificate, because a gestational surrogate carried the child. The court discussed and then expressly rejected the Johnson analysis, stating that “the individuals who provide the genes of that child are the natural parents.” However, the court retained a portion of the intent-based analysis. It stated that “a second query must be made to determine the legal parents, the individual or individuals who will raise the child . . . . If the genetic providers have not waived their rights and have decided to raise the child, then they must be recognized as the natural and legal parents.” The court was careful to articulate, however, that this intention inquiry is “subordinate and secondary to genetics.”

Belsito illustrates that, although most state courts utilize an intent-based analysis to determine legal parentage, other states are not obligated to apply this analysis. With no statutory guidance, this ambiguity in the law leaves egg donors with no airtight protection from potential child support or inheritance claims of resulting children.

2. The Effect of Parentage Agreements

An underlying issue in many gamete donation disputes involves the effect of parentage agreements on the determination of legal parentage. These agreements are often the most effective method of demonstrating intent, but many courts hold them unenforceable on public policy grounds. This adds
another layer of uncertainty to the case law regarding egg donation and further demonstrates why statutory protection is necessary to protect egg donors from the rights and responsibilities of legal parentage.\textsuperscript{131}

A leading case outlining public policy concerns of parentage agreements is \textit{In re Baby M.}\textsuperscript{132} In this case, a traditional surrogate, who was the genetic mother of the child she carried, refused to surrender the child to the genetic father and his wife, who had contracted with the surrogate.\textsuperscript{133} The court held the contract unenforceable because it violated public policy.\textsuperscript{134} Public policy considerations cited by the court include concerns that “children should remain with and be brought up by both of their natural parents” and that “the rights of natural parents are equal concerning their child, the father’s right no greater than the mother’s.”\textsuperscript{135} These public policy concerns implicate egg donation because the egg donor is the natural and genetic parent of any resulting children. Therefore, courts could theoretically invalidate any parentage agreements and maintain that an egg donor should be given custody of the children or should be responsible for child support and other parental obligations.

To further exemplify this point in the context of sperm donation, the \textit{Kesler} court held that a father involved in a child support dispute would be financially responsible for the child regardless of the existence of a parentage agreement.\textsuperscript{136} The court held that no agreement existed between the parents, but stated that if there had been an agreement, the father would still retain financial responsibility for the child.\textsuperscript{137} It reasoned that any agreement reached between parents that bargains away support of a child is unenforceable because of public policy concerns.\textsuperscript{138}

The California Supreme Court even went as far as invalidating an express parental rights waiver in \textit{K.M. v. E.G.}\textsuperscript{139} The parties in this case were two women engaged in a lesbian relationship.\textsuperscript{140} E.G. wanted to have a child as a single mother but could not produce sufficient eggs, so K.M. agreed to donate hers.\textsuperscript{141} K.M. signed a known-donor consent form, which stated that she “waive[d] any right and relinquish[ed] any claim to the donated eggs or any pregnancy or

\textsuperscript{131}. See Robertson & Crockin, supra note 15, at 147 (“Until state law makes clear that egg donors have no rearing rights and duties, there is always some risk that such a duty could be imposed . . . .”).

\textsuperscript{132}. \textit{In re Baby M.}, 537 A.2d 1227 (N.J. 1988).

\textsuperscript{133}. \textit{Id.} at 1235-37.

\textsuperscript{134}. \textit{Id.} at 1240.

\textsuperscript{135}. \textit{Id.} at 1247.


\textsuperscript{137}. \textit{Id.} at 796.

\textsuperscript{138}. \textit{Id.}

\textsuperscript{139}. 117 P.3d 673 (Cal. 2005).

\textsuperscript{140}. \textit{Id.} at 675.

\textsuperscript{141}. \textit{Id.} at 675-76.
offspring that might result from them." 142 E.G. gave birth to twins, but the relationship between the women ended five years later. 143 K.M subsequently attempted to be declared the legal parent of the children and gain custody. 144 The court ruled that K.M. did not intend to donate her eggs 145 and invalidated the consent agreement, stating that parents cannot contract away child support obligations. 146 These cases indicate that, while parentage agreements entered into by egg donors may be an effective method of demonstrating intent to relinquish parental rights and responsibilities, they are tenuous and open to interpretation by the courts based on public policy considerations. 147 The only way to protect egg donors from the rights and responsibilities of legal parentage is to enact statutes similar to those applicable to sperm donors.

IV. PRINCIPLES OF EQUAL PROTECTION

A. The Equal Protection Clause of the Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution states in relevant part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." 148 The Supreme Court has interpreted this provision, known as the Equal Protection Clause (EPC), as prohibiting many forms of state-sponsored discrimination, including those involving gender classifications. 149 In order to be entitled to equal treatment under the EPC, equality claimants must meet the threshold requirement of being "similarly situated" to those unaffected by the inequality. 150 After the claimant meets this requirement, the basic inquiry conducted by the court is whether the classification, on the face of a law or as applied, constitutes a means that is sufficiently related to the purpose of the law to justify the discrimination. 151 The

142. Id. at 676.
143. Id. at 676-77.
144. Id. at 675.
146. Id. at 682.
147. See KINDREGAN, JR. & MCBRINE, supra note 1, at 312 ("[C]ontracts are important from the perspective of intent of the parties, and at the very least can serve as a guideline in the event of a dispute over issues such as parentage, consent, custody, and visitation."); see also supra text accompanying note 131.
149. See CHEMERINSKY, supra note 94, at 668 ("[T]he Supreme Court has relied on the equal protection clause as a key provision for combating invidious discrimination and for safeguarding fundamental rights."); id. at 752-55 (outlining various cases in which the Supreme Court has invalidated gender-based classifications using intermediate scrutiny).
151. LOUIS MICHAEL SEIDMAN, CONSTITUTIONAL LAW: EQUAL PROTECTION OF THE LAWS 66 (2003) ("The last stage of the analysis is to evaluate the nexus between the means (i.e. the classification) and [the] purpose."). In order to be upheld under equal protection analysis, a state-sponsored classification must not be
The Supreme Court has developed varying levels of scrutiny to resolve this inquiry based on the type of classification and the rights involved. If a statute or other state action involves a “suspect” classification or a fundamental right, it receives the highest level of scrutiny called “strict scrutiny.” Under this level of scrutiny, the state must demonstrate a compelling interest in making the classification, and the state action must be necessary and narrowly tailored to the accomplishment of that interest. Race, national origin, and alienage are the only suspect classifications recognized by the Court. Fundamental rights defined by the Court in the equal protection context include, but are not limited to, the rights to procreate, marry heterosexually, and travel between states.

If a challenged state action involves neither a suspect classification nor a fundamental right, the most deferential level of scrutiny, called “rational basis,” is generally used to determine whether the action violates the EPC. Under this
level of scrutiny, the state must show that the action is rationally related to a legitimate interest. However, rational basis scrutiny is not always applied in the absence of a suspect classification or fundamental right. The Court developed an intermediate level of scrutiny, roughly in between strict and rational basis scrutiny, to analyze state actions that involve “quasi-suspect” classifications, the most prominent of which is gender.

C. Intermediate Level of Scrutiny for Gender-Based Classifications

Although the Court now defines gender as a quasi-suspect classification, it did not always garner that level of scrutiny. In fact, the Court initially refused to read gender into the language of the Fourteenth Amendment. The Court’s ruling in Reed was the first time a state-law gender classification was held to violate the EPC. In Reed, the Court applied rational basis review to invalidate a state law that preferred similarly situated males over females as administrators of intestate estates.

163. Id. at 46.
164. See Chemerinsky, supra note 94, at 752-55 (describing the emergence of the intermediate level of scrutiny for gender-based classifications).
165. A quasi-suspect classification is defined as “[a] statutory classification based on gender or legitimacy, and therefore subject to intermediate scrutiny under equal-protection analysis.” Black’s Law Dictionary 1487 (8th ed. 2005).
166. Mackinnon, supra note 150, at 221 (“The standard . . . of what has come to be called ‘intermediate’ or ‘second tier’ scrutiny—above the merely rational, below the strict—has not been widely applied beyond the gender area.”).
168. See generally Reed v. Reed, 404 U.S. 71 (1971) (applying a rational basis level of scrutiny to invalidate a gender-based classification).
169. See Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 132 (1872) (denying a qualified woman a license to practice law because the state legislature that enacted the law made a policy judgment “[t]hat God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws . . . ”). See generally Mackinnon, supra note 150, at 215 (“Only a handful of cases were brought in the nineteenth-century United States to establish women’s rights through litigation. Even those that won did not establish, or in most cases try to establish, sex equality as a constitutional principle.”); Seidman, supra note 151, at 188 (“Early interpretations of the fourteenth amendment reflected the view that gender discrimination was outside its scope.”).
170. 404 U.S. 71.
171. Mackinnon, supra note 150, at 216 (“The 1971 decision by the U.S. Supreme Court in [Reed], ruling for the first time that a state law that gave women fewer rights than men on its face was found to violate the Equal Protection Clause of the Fourteenth Amendment, gave birth to the modern constitutional movement for sex equality under law.”).
172. Although purporting to use classic rational basis review, the Court appears to have opened the door to a higher level of scrutiny by its wording of its so-called rational basis review, namely that [a] classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . .” Reed, 404 U.S. at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (emphasis added)).
Five years later, the Court in *Craig v. Boren* employed an intermediate level of scrutiny, holding that a gender-based classification “must serve important governmental objectives and must be substantially related to achievement of those objectives.”\(^\text{173}\) Subsequent equal protection cases attempted to define gender as a suspect classification, but a majority of the Court has never adopted this level of scrutiny.\(^\text{174}\)

Although gender-based classifications do not garner a strict level of scrutiny, the Court arguably enhanced intermediate scrutiny in 1994 when it asserted that “gender-based classifications require ‘an exceedingly persuasive justification’ in order to survive constitutional scrutiny.”\(^\text{175}\) Despite this strong language, intermediate scrutiny does not apply to all gender-based classifications.\(^\text{176}\) If the Court finds that the genders are “not similarly situated” or that the classification reflects real differences between the genders, the state action will survive.\(^\text{177}\)

V. GAMETE DONATION STATUTES AS GENDER-BASED CLASSIFICATIONS

A. Pregnancy and the Maternal Relationship: Similarly Situated or Real Differences?

Men and women are similarly situated for the purposes of defining legal parentage in gamete donation cases and are therefore entitled to equal protection under the law. Although there are clear, biological, and “real differences” between men and women,\(^\text{178}\) these variations become null in the context of gamete donation, because both genders are doing the same thing: donating their respective gametes.\(^\text{179}\) Distinctions between the reproductive systems of the

\(^{173}\) 429 U.S. 190, 197 (1976).

\(^{174}\) See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (where a plurality of the Court called gender a suspect classification and adopted strict scrutiny for review of gender classifications); Michael M. v. Sup. Ct. of Sonoma County, 450 U.S. 464, 468 (1981) (“Unlike the California Supreme Court, we have not held that gender-based classifications are ‘inherently suspect’ and thus we do not apply so-called ‘strict scrutiny’ to those classifications.”); see also MCKINNON, supra note 150, at 229 (“At least since Reed, activist litigators have attempted to secure ‘suspect classification’ status, hence ‘strict scrutiny,’ for sex classifications by law. . . . No Supreme Court majority has since adopted this position . . . .”).


\(^{176}\) SEIDMAN, supra note 151, at 194 (“[The Court] has justified [intermediate] scrutiny as necessary to uncover statutes that involve ‘arbitrary and overbroad generalizations’ about gender or that are based upon ‘old notions.’ In contrast, statutes that reflect supposedly real differences between the genders survive enhanced review.”).

\(^{177}\) MCKINNON, supra note 150, at 247.

\(^{178}\) See Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) (defining pregnancy and childbirth as real differences between the genders); MCKINNON, supra note 150, at 247 (“Social institutions through which women have historically been disadvantaged on a broad scale, such as the military and maternity, have provided settings in which courts have limited constitutional sex discrimination doctrine through finding women ‘different’ from men.”).

\(^{179}\) See KINDREGAN, JR. & McBRIEN, supra note 1, at 325 (using one definition for gamete donation, which includes both male donation of sperm and female donation of eggs). See generally DAAB, supra note 2,
genders, namely the ability to get pregnant, are not implicated here because neither gender is attempting to bear children.\textsuperscript{180} On the contrary, the very purpose of egg and sperm donation is to enable others to have children.\textsuperscript{181}

Various family law cases involving gender-based classifications illustrate that a court would likely hold that men and women are “similarly situated” for the purposes of gamete donation. For instance, in \textit{Caban v. Mohammed}, the Supreme Court ruled that a state statute that permitted “an unwed mother, but not an unwed father, to block the adoption of a child by withholding consent” violated the EPC.\textsuperscript{182} The Court expressly rejected an argument that there are fundamental differences in the importance of the roles of mothers and fathers, stating that “an unwed father may have a relationship with his children fully comparable to that of the mother.”\textsuperscript{183} Implied in this case is the premise that the roles of men and women in the lives of their children are equal, and thus, both genders are similarly situated in the context of parenthood.\textsuperscript{184} Therefore, both genders should be given equal protection from the rights and responsibilities of legal parenthood when they choose \textit{not} to be a part of the lives of the children that result from gamete donation.

\textit{Lord v. Lord}, a family law case in New York, addressed gender differences in the imposition of child support orders.\textsuperscript{185} While holding that child support obligations should be based on the circumstances of the respective parties and not based on gender, the court stated that “[t]he traditional and statutory notion . . . that a father has the primary obligation to support his children neither reflects the realities of modern life nor complies with our constitutional requirements of equal protection.”\textsuperscript{186} This ruling is highly relevant to gamete donation. If states fail to provide equal statutory protection from the responsibilities of legal parenthood to egg donors, these women will be susceptible to child support claims from the children that result from the donation, whereas men who donate their sperm under similar circumstances will be protected.\textsuperscript{187} This statutory situation

at 201 (stating that infertile couples turn to \textit{both} egg and sperm donors for assistance in conceiving a child).

180. \textit{See Kindred, Jr. & McBrian, supra note 1, at 325} (defining “gamete donor” as “[a] person who provides sperm or eggs \textit{for use by others} in an attempt to conceive a child by assisted reproductive technology, whether for compensation or not” (emphasis added)).

181. \textit{See id.} (explaining that donors who give their gametes do so for use by others). \textit{See generally} Frase-Blunt, \textit{supra} note 4 (describing how egg donors usually receive little information about the people who use their eggs and how most donors go through the process of donation because they have a strong desire to help infertile people).


183. \textit{Id.} at 388-89.

184. \textit{Id.}


186. \textit{Id.} at 47.

187. \textit{See supra} Part III.A (analyzing the varying levels of protection contained in state gamete donation statutes).
directly contradicts the holding in *Lord* that the genders are similarly situated in the context of child support and must be treated equally.  

Cases that have held that men and women are not similarly situated are easily distinguished from the circumstances in a hypothetical case involving egg and sperm donors and parental rights and responsibilities. The Supreme Court addressed differences between men and women in the reproductive field in *Nguyen v. I.N.S.* In *Nguyen*, the Court upheld a federal statute imposing different standards for establishing U.S. citizenship for children born abroad and out of wedlock to parents that included one citizen parent and one foreign parent. The statute required more stringent standards for establishing U.S. citizenship of the child when the father was the U.S. citizen instead of the mother. In denying a gender-based equal protection challenge, the Court found that mothers and fathers were not similarly situated in this context. The Court stated that the identification of a child’s mother is readily verifiable through hospital records of the birth, whereas a father’s presence at a child’s birth is not proof of parentage. Therefore, “[t]he imposition of a different set of rules for making that legal determination [of biological parentage] with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective.”

In a similar lower court case, *In re RFF*, the Michigan Court of Appeals held that statutory distinctions between unwed biological fathers and unwed biological mothers with respect to termination of parental rights did not violate the EPC. The court based its ruling on the fact that, unlike a father, a mother carries her child in her womb and, therefore, her identity as the mother of the child is “rarely in question.”

*Nguyen* and *In re RFF* are distinguishable from the gamete donation situation, because female egg donors do not give birth to the children that result from the donation. Therefore, the parental identities of both egg and sperm donors are equally in question, resulting in both genders being similarly situated.
The above cases illustrate that biological differences between genders (e.g., that only women can give birth) are irrelevant in the context of gamete donation. The purpose of gamete donation is for those other than the donors to achieve pregnancy. Therefore, because female egg donors do not give birth to the children resulting from the donation, they are similarly situated to male donors in terms of the determination of legal and biological parentage and are entitled to equal protection under law.

B. Regulation of the Procedure, Not the Gender?

In some instances, the Supreme Court has found that a classification that seems to treat the genders differentially is actually based, not on gender, but on a neutral third category. In the case of gamete donation, an argument exists that sperm donation statutes do not regulate the genders, but simply the procedure of sperm donation. In such a case, the statute receives rational basis review, because it does not make a classification based on gender, which receives intermediate scrutiny. As a result, the courts are much more likely to defer to legislative judgments and uphold the statute.

The leading case addressing a neutral third category statute is Geduldig v. Aiello. In that case, the Supreme Court held that California’s disability insurance program, which excluded pregnancy-related disabilities from coverage but included disabilities only affecting men, was not a denial of equal protection. The Court stated that “[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.” The Court ruled that the statute did not classify on the basis of gender, but rather, it was a classification of pregnant and non-pregnant persons. “While the first group is exclusively female, the second

198. See supra note 181 (describing the purpose of gamete donation).
199. See supra note 197 (describing the process of egg donation, whereby eggs are extracted from the donor and inserted into a recipient mother who gives birth to the child).
200. See Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) (finding no gender-based classification where the two groups affected were women and non-pregnant persons); Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 270 (1993) (finding that protestors who were blocking access to abortion clinics were not violating equal protection principles, because there was no gender-based classification—women were included in both the group protesting and the group seeking abortions).
201. CHEMERINSKY, supra note 94, at 671-72.
202. Id. at 678 (“The Supreme Court generally has been extremely deferential to the government when applying the rational basis test. . . . [T]he Court often has said that a law should be upheld if it is possible to conceive any legitimate purpose for the law, even if it was not the government’s actual purpose. The result is that it is very rare for the Supreme Court to find that a law fails the rational basis test.”).
203. 417 U.S. 484.
204. Id.
205. Id. at 496-97.
206. Id. at 496 n.20.
includes members of both sexes." \cite{207} The Court analyzed, and subsequently 
upheld, the statute under rational basis review, because it was not a gender-based 
classification entitled to intermediate scrutiny. \cite{208}

By analogy, sperm donation statutes do not classify on the basis of gender, 
but distinguish between sperm donors and those not donating sperm. \cite{209} The 
persons protected are sperm donors (exclusively male), but the persons left 
unprotected are all those not donating sperm, which include both males and 
females. \cite{210} Employing the language of the Court in \textit{Geduldig}, "[t]here [are] no 
risk[s] from which men are protected and women are not." \cite{211} Specifically, 
women are not at risk from accusations of legal parentage as a result of sperm 
donation. Similarly, all men who have not donated sperm, like all women, are not 
in need of protection from claims of legal parentage. If this argument is 
successful, courts will analyze sperm donation statutes under rational basis 
review, because they do not make gender-based classifications. \cite{212} While it 
may not be wise to protect sperm donors at the expense of egg donors, this deferential 
level of scrutiny allows courts to leave that decision up to the state legislatures so 
long as it is rational. \cite{213}

It is unlikely that courts will find that sperm donation statutes are neutral 
third category classifications, rather than gender-based classifications. First, state 
and Supreme Court cases following \textit{Geduldig} have questioned the continuing 
validity of the precedent that \textit{Geduldig} set. \cite{214} Supreme Court Justice Blackmun 
has stated that the Court’s reasoning in cases after \textit{Geduldig} “makes the 
recognition of [\textit{Geduldig}] as continuing precedent somewhat questionable.” \cite{215}

Furthermore, the precedent set in \textit{Geduldig} has been sharply criticized, \cite{216} because it implies that pregnancy is not a gender-based characteristic. \cite{217} In

\begin{itemize}
  \item \textbf{207.} \textit{Id.}
  \item \textbf{208.} \textit{Id.} at 495-97. After the \textit{Geduldig} opinion, Congress amended Title VII of the Civil Rights Act to 
define pregnancy discrimination as gender discrimination. However, Congress cannot overrule a constitutional 
interpretation, so \textit{Geduldig} continues to control equal protection analysis in the reproductive area. \textit{MacKinnon,} \textit{supra} note 150, at 252 n.5.
  \item \textbf{209.} \textit{Cf.} cases cited \textit{supra} note 200 (involving similar fact situations in which the Court found no 
gender-based classification).
  \item \textbf{210.} \textit{Cf.} cases cited \textit{supra} note 200 (involving similar fact situations in which the Court found no 
gender-based classification).
  \item \textbf{211.} 417 U.S. at 496-97.
  \item \textbf{212.} \textit{Chemerinsky,} \textit{supra} note 94, at 671-72 (outlining the appropriate levels of scrutiny for various 
types of classifications).
  \item \textbf{213.} \textit{See} supra note 202 (noting that the Supreme Court is deferential in applying the rational basis test).
  \item \textbf{214.} Shannon E. Liss, \textit{The Constitutionality of Pregnancy Discrimination: The Lingering Effects of 
Geduldig and Suggestions for Forcing Its Reversal,} 23 \textit{N.Y.U. Rev. L. 
  \item \textbf{215.} City of Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702, 725 (1978) (Blackmun, J., 
concurring).
  \item \textbf{216.} \textit{Chemerinsky,} \textit{supra} note 94, at 759; Liss, \textit{supra} note 214; Diane L. Zimmerman, Comment, 
Geduldig v. Aiello: \textit{Pregnancy Classifications and the Definition of Sex Discrimination,} 75 \textit{Colum. L. Rev.} 
441 (1975).
  \item \textbf{217.} The Court in \textit{Geduldig} held that the classification at issue involved pregnant individuals versus
\end{itemize}
reality, only women are susceptible to pregnancy, so excluding insurance coverage for pregnancy-related disabilities is a discriminatory practice.\textsuperscript{218} Likewise, the ability to donate sperm or eggs is a gender-based characteristic. Only women are able to donate eggs, so excluding egg donors from the statutory protections from legal parentage given to sperm donors constitutes gender discrimination. However, although only men can donate sperm and only women can donate eggs, the genders are still similarly situated for equal protection purposes because they are both doing the same thing—donating their respective gametes so that a recipient can achieve pregnancy.\textsuperscript{219} The differences between the gametes become irrelevant, because both can result in a pregnancy, subjecting the donors to identical claims of legal parentage.\textsuperscript{220}

In sum, equal protection case law regarding families and reproduction support the conclusion that gamete donation statutes are gender-based classifications.\textsuperscript{221} The genders are similarly situated because they both donate their respective gametes and neither gender is attempting to get pregnant or establish a legal or biological parental relationship.\textsuperscript{222} Additionally, the argument that sperm donation statutes are simply distinguishing between sperm donors and those not donating sperm will likely not be accepted by the courts.\textsuperscript{223} Therefore, the courts will likely analyze gamete donation statutes under an intermediate level of scrutiny, which applies to gender-based classifications.\textsuperscript{224}

\textbf{VI. GAMETE DONATION STATUTES UNDER INTERMEDIATE SCRUTINY}

The intermediate level of scrutiny, developed by the courts to analyze the constitutionality of gender-based classifications under the EPC, requires a showing by the state that the classification serves important state objectives and is substantially related to the achievement of those objectives.\textsuperscript{225} In addition, any non-pregnant individuals, and because some non-pregnant individuals are men, there is no gender-based classification. M\textsc{ackinnon}, supra note 150, at 247. This ruling has been criticized because the “entire burden from the exclusion of pregnancy is borne by women” and the law at issue in Geduldig “distinguished between persons capable of becoming pregnant and those not capable of becoming pregnant,” making the discriminatory nature of the classification clear. C\textsc{hemerinsky}, supra note 94, at 759.

\begin{itemize}
  \item \textsuperscript{218} Id.
  \item \textsuperscript{219} See supra Part V.A (outlining the arguments that support defining the genders as similarly situated for purposes of gamete donation).
  \item \textsuperscript{220} See id.
  \item \textsuperscript{221} See supra Part V (outlining the case law that supports the conclusion that the courts would likely identify gamete donation statutes as gender-based classifications).
  \item \textsuperscript{222} See supra Part V.A (outlining the arguments that support defining the genders as similarly situated for purposes of gamete donation).
  \item \textsuperscript{223} See supra Part V.B (arguing that gamete donation statutes are not neutral, third-category classifications, but are gender-based classifications instead).
  \item \textsuperscript{224} See C\textsc{hemerinsky}, supra note 94, at 671-72 (outlining the appropriate levels of scrutiny for various types of classifications).
  \item \textsuperscript{225} Craig v. Boren, 429 U.S. 190, 197 (1976); C\textsc{hemerinsky}, supra note 94, at 671 (describing the intermediate standard of review).
\end{itemize}
gender-based classification requires “an exceedingly persuasive justification” to pass constitutional muster, arguably increasing the level of scrutiny to the high end of the intermediate range.\(^{226}\)

\section*{A. Important State Objectives}

The existence of egg donation is a relatively recent phenomenon, especially compared to sperm donation.\(^{227}\) Sperm donation became widely available in the 1950s,\(^{228}\) while egg donation has only been practiced since 1984.\(^{229}\) The law governing gamete donation reflects this pattern of scientific development.\(^{230}\) State laws regulating legal parentage in cases of sperm donation have existed for many years, while egg donation statutes have only recently been adopted by a few states, due in large part to the promulgation of the 2002 amendments to the UPA.\(^{231}\) If sperm donation statutes are challenged as violative of the EPC, states may have to justify the lack of similar protections for egg donation by showing important state objectives that are achieved by providing protections only to sperm donors from legal parentage claims.\(^{232}\)

One such reason may be that men historically needed more protection from parentage claims.\(^{233}\) In traditional reproduction, a woman gives birth to her biological child, so the parental relationship of the mother to the child is clear.\(^{234}\) In contrast, the biological relationship of the father to the child can only be conclusively established by genetic testing.\(^{235}\) In most instances, men voluntarily

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acknowledge paternity when the child is born or the law presumes that a married man is the father of any child born to his wife.\textsuperscript{236} However, in the absence of a genetic paternity test, the paternity of a child is uncertain, leaving men open to fraudulent claims of parentage to which women are not susceptible.\textsuperscript{237}

The law of equal protection occasionally allows for gender-based classifications where one gender bears a larger burden.\textsuperscript{238} “In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.”\textsuperscript{239} In cases of traditional reproduction, men bear a disproportionate burden of proving or refuting paternity, because they cannot easily establish a biological relationship to a child as women can by giving birth.\textsuperscript{240} This burden, however, disappears in the context of gamete donation; the burdens are equally borne between the genders, because neither gender gives birth to a child.\textsuperscript{241} Therefore, the difficulties in establishing or refuting a biological parental relationship are the same, requiring equal protections for both genders.\textsuperscript{242} This circumstance undermines a claim by a state that providing sperm donors, but not egg donors, with protection from the responsibilities of legal parentage is justified by a potentially important objective of providing men with greater protection from claims of paternity, which they have historically needed.\textsuperscript{243}

\begin{itemize}
  \item \textsuperscript{236} See Hill, supra note 234, at 372-73.
  \item \textsuperscript{237} See Gunderson, supra note 233, at 355-58 (describing how paternity presumptions are used to commit parentage fraud).
  \item \textsuperscript{238} Compare Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (finding that a women’s-only nursing school violated equal protection by not admitting men because it made no showing that women were disproportionately burdened in the field of nursing), with Califano v. Webster, 430 U.S. 313 (1977) (upholding a Social Security retirement program that allowed women to obtain higher monthly benefits because women have historically been unable to earn as much as men).
  \item \textsuperscript{239} Miss. Univ. for Women, 458 U.S. at 728.
  \item \textsuperscript{240} Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting).
  \item The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father’s parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother . . . . In some circumstances the actual relationship between father and child may suffice to create in the . . . father parental interests . . . .
  \item \textsuperscript{241} See supra text accompanying note 180.
  \item \textsuperscript{242} See supra Part V.A (arguing that the genders are similarly situated in the context of gamete donation, so gamete donation statutes must be analyzed under intermediate scrutiny as gender-based classifications).
  \item \textsuperscript{243} See CHEMERINSKY, supra note 94, at 671 (stating that under intermediate scrutiny, gender-based classifications must serve important governmental objectives).
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A state could also claim a related important objective: “assuring that a
biological parent-child relationship exists” between fathers and their biological
children. In *Nguyen v. I.N.S.*, the Supreme Court recognized this as an
important objective when upholding a gender-based classification that requires
fathers, but not mothers, of children born overseas to provide proof of paternity
in order for their children to gain U.S. citizenship. The Court stated:

The mother’s status is documented in most instances by the birth
certificate or hospital records and the witnesses who attest to her having
given birth. In the case of the father, the uncontestable fact is that he
need not be present at the birth. If he is present, furthermore, that
circumstance is not incontrovertible proof of fatherhood.

However, as stated above, in cases of gamete donation, the difficulties of
establishing a biological link between gamete donors and the children that result
from their donations are equal for men and women because neither gender gives
birth. Furthermore, the objective of gamete donation is not to establish a
relationship between the donors and their biological children; instead, the
purpose is to help others have children that they can consider their own.
Therefore, the important objective of assuring that a link is established between
biological fathers and children cannot be used to justify greater protections from
parentage claims for sperm donors.

A state may also claim that greater protections from the responsibilities of
legal parentage for sperm donors are necessary to discourage women from
donating eggs and incurring the attendant health risks. Egg donation is a
newer, less-developed procedure than sperm donation and is much more
invasive. Procedural risks include severe abdominal pain caused by hyper-
stimulation of the ovaries, ovarian trauma, lacerations, infections, and even
infertility. The long-term effects of these risks are unclear, providing a state

245. *Id.*
246. *Id.*
247. See supra text accompanying note 180.
248. See id.
ophthalmologists over opticians on the basis that public safety was an important state objective). See also
DAAR, supra note 2, at 220 (discussing the various health risks from egg donation procedures).
250. See supra Part I.LC (describing sperm and egg donation procedures).
251. See Frase-Blunt, supra note 4. Psychological effects are also a concern. A recent study found that
one in five women had lasting psychological effects from egg donation. Serena Gordon, *Risks and Benefits of
healthday/2008/12/26/risks-and-benefits-of-egg-donation-reported.html (on file with the *McGeorge Law
Review*). However, approximately two-thirds of those women reported positive feelings about their experience.
*Id.*
with a potentially important objective of protecting the health and safety of women.  

The Supreme Court recognized this important state objective in *Williamson v. Lee Optical*253 and *Roe v. Wade*.254 In *Williamson*, the Court upheld a statute under rational basis review that precluded opticians from fitting new lenses into glasses, thus favoring optometrists and ophthalmologists capable of performing eye exams and writing prescriptions.255 The Court’s decision rested on the premise that the state has a legitimate interest in ensuring public safety.256 Although this case was not analyzed under intermediate scrutiny, it indicates that courts may be willing to accept a more severe concern about the health of egg donors as an important state objective. *Roe*, a case analyzed under strict scrutiny, lends support to this proposition.257 Here, the Court recognized that a state has an important interest in safeguarding the health of women and maintaining medical standards.258 Given the Court’s emphasis on protecting the public health and safety in these two cases, it is likely that the Court would accept a state’s concern about the health risks of egg donation as an important state objective.  

The importance of discouraging egg donation to protect the health of women is weakened, however, in light of a state’s interest in the creation and strength of families.259 By discouraging women from donating their eggs, many infertile women may be unable to conceive children and start families260—a result in direct contravention of a state’s interest in stable families. This indicates that a better way to promote the important objectives of a state is to reconcile the state’s interest in stable families and the health of women, rather than discouraging...

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252. See generally Catherine Elton, *As Egg Donations Mount, So Do Health Concerns*, Time, Mar. 31, 2009, http://www.time.com/time/health/article/0,8599,1888459-1,00.html (on file with the McGeorge Law Review) (discussing concerns about the health risks of egg donation and the lack of comprehensive studies addressing the issue); Gordon, supra note 251 (indicating that a study conducted recently was the first to consider the long-term effects of egg donation and that there are no studies on the effects of egg donation on fertility).


256. *Id.* (“[T]he legislature may have concluded that eye examinations were so critical, not only for correctness of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert.”).

257. 410 U.S. 113. Although this case was decided on the basis of a right to privacy under the Fourteenth Amendment and not on the basis of the Equal Protection Clause, the Court’s reasoning regarding what constitutes an important interest of the state is instructive for purposes of equal protection analysis. *Id.*

258. *Id.* at 153-54.

259. See Caban v. Mohammed, 441 U.S. 380, 391 (1979) (“The State’s interest in providing for the well-being of illegitimate children is an important one. We do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a normal, two-parent home.”).

260. See Hopkins, supra note 2 (stating that $38 million a year is spent on donor eggs and around 10,000 children are born each year from donor eggs).
women from donating eggs.\textsuperscript{261}

In fact, a state’s concern about the health risks incurred by women during egg donation procedures can also be used to justify giving egg donors more protection from parentage claims, rather than less.\textsuperscript{262} Mississippi University for Women established that, when one gender bears a disproportionate burden, gender-based classifications favoring the burdened gender are justified in limited circumstances.\textsuperscript{263} In the context of gamete donation, women are arguably disproportionately burdened because they incur significantly greater risks in donating their eggs than men do in donating their sperm.\textsuperscript{264} Therefore, a state’s concern about women’s health risks in egg donation could justify offering more protections to egg donors—women who risk their health in order to help infertile couples have children should not be subjected to contentious claims of legal parentage, at least no more so than men.\textsuperscript{265}

Perhaps the strongest argument on behalf of a state defending the disparity between statutory protections for sperm and egg donors is that the state has an obligation to prevent the exploitation of women, and by providing less protection from parentage claims to egg donors, the state will dissuade many women from participating in the perceived exploitative industry of egg donation.\textsuperscript{266} Concern over large payments offered to egg donors, which can range from $5,000 to $150,000,\textsuperscript{267} has prompted some medical and legal professionals to question whether the financial incentives of egg donation have a coercive effect on women.\textsuperscript{268} These concerns may justify increasing regulation of the market for egg donation, but likely do not suffice to justify using the fear of parentage claims to

\begin{footnotesize}
\begin{enumerate}
\item See infra Part VI.B (arguing that gender-neutral statutes accompanied by industry-wide regulations are a better way to address the important objectives of the state while still eliminating gender-based discrimination).
\item See supra text accompanying note 238.
\item 458 U.S. 718, 728 (1982).
\item See DAAR, supra note 2, at 220 (describing the differences in the invasiveness of egg and sperm donation); Elton, supra note 252 (discussing concerns about the health risks of egg donation).
\item See supra Part III.B (outlining the difficulties that arise in cases of gamete donation when legal parentage must be determined by the courts without the aid of governing statutes).
\item See Financial Compensation of Oocyte Donors, supra note 3, at 306.
\item Both monetary compensation and oocyte sharing create the possibility of undue inducement and exploitation in the oocyte donation process. Women may agree to provide oocytes in response to financial need. . . . With both types of compensation, there is a possibility that women will discount the physical and emotional risks of oocyte donation out of eagerness to address their financial situations or their infertility problems. Financial compensation also could be challenged on grounds that it conflicts with the prevailing belief that gametes should not become products bought and sold in the marketplace.
\item Id.
\item See DAAR, supra note 2, at 228-29 (describing payments made to egg donors); see also Hopkins, supra note 2 (describing egg donation advertisements on college campuses and the monies paid to donors).
\item See Financial Compensation of Oocyte Donors, supra note 3, at 305-09 (explaining how potential donors ignore the risks of egg donation because of financial gain); Bonnie Steinbock, Payment for Egg Donation and Surrogacy, 71 Mt. Sinai J. of Med. 255, 261-63 (2004) (stating that women may fall victim to coercion or exploitation).
\end{enumerate}
\end{footnotesize}
discourage women from donating eggs. Using existing gamete donation statutes in such a way limits the reproductive choices of women, while men are not subject to the same limitations.\textsuperscript{269}

Even if a state can prove that its interests—such as ensuring that a biological relationship exists between fathers and their children, protecting the health of women, or preventing exploitation of women—are important objectives that justify a gamete donation statute that discriminates based on gender, it still must satisfy the second part of intermediate scrutiny review—a substantial relationship between discriminatory gamete donation statutes and the important state objectives.\textsuperscript{270}

\textbf{B. Substantial Relationship}

In order to determine whether a gender-based classification is substantially related to important state interests, courts examine the degree to which the classification is underinclusive or overinclusive.\textsuperscript{271} “A law is underinclusive if it does not apply to individuals who are similar to those to whom the law applies. . . . A law is overinclusive if it applies to those who need not be included in order for the government to achieve its purpose.”\textsuperscript{272} In the case of gamete donation, the existing sperm donation statutes are underinclusive, because they provide protections from claims of legal parentage to men who donate sperm, but they do not provide the same protections to women who donate their respective reproductive cells.\textsuperscript{273}

Almost all statutes are underinclusive or overinclusive at some point in time.\textsuperscript{274} A finding of underinclusiveness does not automatically render the classification unconstitutional.\textsuperscript{275} Rather, courts analyze the closeness of the relationship between the classification and the important state objectives.\textsuperscript{276}

\begin{itemize}
  \item \textsuperscript{269} \textit{See} Lynn M. Squillace, \textit{Too Much of a Good Thing: Toward a Regulated Market in Human Eggs}, 1 \textit{J. HEALTH & BIOMED. L.} 135, 143 (2005) (“The problems involved in a human egg market should be for the women participating in such a market to weigh through their own moral deliberation and choice. Women should be left to make the same autonomous decisions as men. The societal concern with commodification through egg donation and lack of such concern over sperm donation devalues women as autonomous equals with men.”).
  \item \textsuperscript{270} \textit{See} Craig v. Boren, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”); \textit{CHEMERINSKY, supra} note 94, at 671 (describing the intermediate standard of review).
  \item \textsuperscript{271} \textit{CHEMERINSKY, supra} note 94, at 673-74.
  \item \textsuperscript{272} \textit{Id.} at 674.
  \item \textsuperscript{273} \textit{See} supra Part III.A.1 (outlining state statutes that provide protections from parentage claims to sperm donors, but not egg donors); \textit{supra} Part V.A (arguing that men and women are similarly situated for purposes of gamete donation).
  \item \textsuperscript{274} \textit{CHEMERINSKY, supra} note 94, at 674.
  \item \textsuperscript{275} \textit{Id.}
  \item \textsuperscript{276} \textit{Id.}
\end{itemize}
Under intermediate scrutiny, a closer fit will be required than under rational basis review, but it need not be as close as under strict scrutiny.\(^{277}\) Therefore, the level of closeness for ordinary intermediate scrutiny cases lies somewhere between a rational relationship and the classification being necessary to achieve the important state objectives.\(^{278}\) However, when dealing with gender-based classifications, the proponent of the statute must also provide an “exceedingly persuasive justification” for the classification.\(^{279}\) This increases the closeness to which the classification must be related to the important state objectives in order to remain valid under the EPC.

The Court expressed its tolerance for underinclusiveness in *Williamson*, where it stated that the government can choose to move “one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.”\(^{280}\) “The legislature may select one phase of one field and apply a remedy there, neglecting the others.”\(^{281}\) This case is instructive in the context of gamete donation statutes, because it indicates that a state could theoretically address sperm donation—“one phase of the field”—while neglecting to address egg donation.\(^{282}\)

However, the circumstances in *Williamson* are distinguishable from a case involving egg donation in that *Williamson* only required rational basis scrutiny.\(^{283}\) Therefore, the relationship between the classification at issue in that case and the objectives of the state needed only to be rational.\(^{284}\) On the other hand, gamete donation statutes arguably involve gender-based classifications, which require an intermediate level of scrutiny with an exceedingly persuasive justification.\(^{285}\) Thus, the courts will be much less likely to defer to the judgments of legislatures regarding whether it is appropriate to regulate only sperm donation and not egg donation, especially when egg donation presents the most acute risks.\(^{286}\)

Furthermore, the Court’s decision in *Orr v. Orr*, an intermediate scrutiny

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\(^{277}\) Id.

\(^{278}\) Id.


\(^{281}\) Id.

\(^{282}\) *See* id. (reasoning that a state legislature can regulate only portions of an industry if it decides that portion has a more acute need for regulation).

\(^{283}\) Id. at 488-89.

\(^{284}\) *See* CHEMERINSKY, supra note 94, at 672 (outlining rational basis review).

\(^{285}\) *See* supra Part V (arguing that gamete donation statutes are gender-based classifications); *see also* U.S. v. Virginia, 518 U.S. 515, 531 (1996) (holding that gender-based classifications must have an exceedingly persuasive justification to be valid under the EPC); Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that intermediate scrutiny is the proper level of review for gender-based classifications).

\(^{286}\) *See* Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (“Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.” (emphasis added)); CHEMERINSKY, supra note 94, at 678 (“The Supreme Court generally has been extremely deferential to the government when applying the rational basis test.”).
case, mandates that, “[w]here . . . the State’s compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies . . . , the State cannot be permitted to classify on the basis of sex.” The state interests that support the regulation of legal parentage in cases of sperm donation can be served just as well, if not better, by gender-neutral statutes, so states should not be allowed to maintain gender-based gamete donation statutes. For instance, a state’s interest in ensuring that parent-child relationships exist and men are protected from fraudulent parentage claims could be more thoroughly addressed by a gender-neutral statute. This type of statute could comprehensively define the parental responsibilities of all those involved in gamete donation, providing certainty and stability to those who rely on methods of reproduction involving donated gametes to bear children, and thus promoting a state’s interest in healthy families. Additionally, a state’s interest in the health risks of egg donation and the potential for financial exploitation of women in the egg donation industry should be addressed directly and neutrally, rather than indirectly through gender-based parentage statutes. Both men and women deserve statutory protection from the health risks and lack of informed consent that occurs regularly in the gamete donation industry. Similarly, concerns about payment for gametes exist in both the sperm and egg donation industries, so the important state objectives regarding financial exploitation can be better served by gender-neutral, industry-wide statutes.

No substantial relationship, and certainly no exceedingly persuasive justification, exists between sperm donation statutes and the objectives of those statutes, because the important state objectives that could potentially support sperm donation statutes are more successfully accomplished through gender-

288. See id. (holding that a state cannot be allowed to classify on the basis of gender when a gender-neutral statute could accomplish the state’s objectives).
289. See supra Part VI.A (outlining potentially important objectives that could be espoused by a state in defending gender-based sperm donation statutes).
291. See supra text accompanying notes 249-52 (describing the health risks involved in egg donation and the state’s important interest in protecting public safety); supra text accompanying notes 266-69 (describing concerns about the financial exploitation of women in the egg donation industry).
293. See Letisia Marquez, UCLA Study Finds That Sperm Donors Are Less Valued Than Egg Donors, UCLA NEWS, May 23, 2007, http://newsroom.ucla.edu/portal/ucla/PRN-Getting-Paid-to-Do-What-You-Already-7854.aspx (on file with the McGeorge Law Review) (“A pronounced double-standard exists in the way that men and women donors are valued by the fertility industry, and it can’t be explained medically or by market forces.] Based on the availability of donors alone, you would expect the abundance of potential egg donors to drive down compensation fees and the scarcity of potential sperm donors to drive up their fees. But I found just the opposite.” (quoting UCLA Ph.D. candidate Rene Almeling)); Financial Compensation of Oocyte Donors, supra note 3, at 306 (describing the ethical concerns with high rates of compensation for egg donors).
neutral statutes.\textsuperscript{294} Therefore, state statutes that provide protections from claims of legal parentage to men who donate sperm, but not to women who donate eggs, violate the EPC and are thus invalid under intermediate scrutiny.\textsuperscript{295}

\section*{VII. Conclusion}

Egg donors help thousands of infertile women conceive children each year.\textsuperscript{296} The industry is rapidly expanding, but the law is not keeping pace.\textsuperscript{297} Women who donate their eggs are subjected to numerous health risks, but they are not given even the minimal protections from claims of legal parentage that their male counterparts receive.\textsuperscript{298} Without the same statutory protections provided to sperm donors, egg donors may be deemed the legal parents of children born from their donations under common law principles.\textsuperscript{299} States that provide sperm donors with statutory protection from claims of legal parentage, but fail to provide the same level of protection to egg donors, violate the EPC.\textsuperscript{300} These statutes involve gender-based classifications\textsuperscript{301} that lack a substantial relationship to important state objectives and are thus invalid.\textsuperscript{302}

The courts, acting under their power to enforce the Constitution, should encourage the states to enact gender-neutral statutory protections for gamete donors by invalidating sperm donation statutes.\textsuperscript{303} The gamete donation industry, and the fertility industry in general, needs comprehensive regulation to address concerns, not only regarding legal parentage, but also regarding health risks, informed consent, and the potential for the financial exploitation of donors.\textsuperscript{304} However, the enactment of gender-neutral statutes regulating legal parentage in cases of gamete donation would be a large step in the right direction. It would provide the comfort of a stable, healthy family to the thousands of women who

\begin{itemize}
  \item \textsuperscript{294} See Orr v. Orr, 440 U.S. 268, 283 (1979) (holding that a state cannot be allowed to classify on the basis of gender when a gender-neutral statute could accomplish the state’s objectives).
  \item \textsuperscript{295} See Craig v. Boren, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).
  \item \textsuperscript{296} Hopkins, supra note 2 (stating that $38 million a year is spent on donor eggs and around 10,000 children are born each year from donor eggs).
  \item \textsuperscript{297} 2005 \textit{Assisted Reproductive Technology Success Rates}, supra note 10, at 61.
  \item \textsuperscript{298} See supra Part II.C.2 (describing the health risks associated with egg donation); supra Part III.A (outlining the statutory approaches to gamete donation, which most often offer more protections from claims of legal parentage to men).
  \item \textsuperscript{299} See supra Part III.B (summarizing the common law approaches to determining legal parentage).
  \item \textsuperscript{300} See supra Part IV (describing the requirements of the EPC).
  \item \textsuperscript{301} See supra Part V (arguing that gamete donation statutes employ gender-based classifications).
  \item \textsuperscript{302} See supra Part VI (arguing that gamete donation statutes lack a substantial relationship to potentially important state objectives).
  \item \textsuperscript{303} See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing the authority of the courts to review the constitutionality of legislative acts).
  \item \textsuperscript{304} See \textit{Interests, Obligations, and Rights}, supra note 292 (describing various concerns in gamete donation and suggestions on how to resolve them).
\end{itemize}
struggle with infertility and to the women who provide them with the opportunity to conceive children.