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## ADAM AND STEVE AND EVE: WHY SEXUALITY SEGREGATION IN ASSISTED REPRODUCTION IN VIRGINIA IS NO LONGER ACCEPTABLE

High infertility rates among Americans<sup>1</sup> and the increasing number of people who desire to have children without participating in heterosexual intercourse have created a surge in demand for, and use of, artificial reproductive technologies (ART) and assisted conception strategies.<sup>2</sup> Protection of individuals' uses of these technologies flows from the substantive due process component of the Fourteenth Amendment.<sup>3</sup> A Virginia statute, however, limits the enforceability of surrogacy contracts based on the marital status of prospective parents.<sup>4</sup> This statute impinges upon the liberty of homosexuals to pursue reproductive autonomy through ART.<sup>5</sup> The Supreme Court's recent decision in *Lawrence v. Texas*<sup>6</sup> invalidates the Virginia law restricting access to surrogacy based on sexual orientation as violative of constitutional principles.

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1. See Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARVARD J. ON LEGIS. 1, 7 (2003) (describing a report by the American Society of Reproductive Medicine that an estimated ten percent of Americans, roughly six million people, of "reproductive age (ages fifteen to forty-five)" suffer from infertility). See also Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 B.Y.U. L. REV. 107 n.1 (citing the same report).

2. See Baum, *supra* note 1, at 107 n.2 (citing generally to REPRODUCTIVE ENDOCRINOLOGY, SURGERY, AND TECHNOLOGY (Eli Y. Adashi et al. eds., 1996), which explains that reproductive technologies are "treatments or procedures that involve physical or pharmacological augmentation of the procreative process. They involve controlled ovarian hyperstimulation, artificial insemination (AI), *in vitro* fertilization (IVF), gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), and other emerging techniques, including the reimplantation of ovaries to postmenopausal women").

3. See discussion *infra* pp. 307-12.

4. See VA. CODE ANN. § 20-156 (Michie 2003).

5. See Justyn Lezin, Note, *(Mis)Conceptions: Unjust Limitations on Legally Unmarried Women's Access to Reproductive Technology and Their Use of Known Donors*, 14 HASTINGS WOMEN'S L.J. 185, 189 (2003) (discussing the effects of sexuality discrimination in ART legislation on lesbians and single women). "Where married women are free to consent to using methods most likely to result in conception, legally unmarried women, through a combination of excessive physician discretion and lack of legal protections, are frequently barred from choosing their preferred options for conception." *Id.*

6. *Lawrence v. Texas*, 539 U.S. 558 (2003).

## HYPOTHETICAL — IT'S A FAMILY AFFAIR

Emmett and Bryan<sup>7</sup> have been living together in a committed homosexual relationship for ten years. They are both residents of Virginia and work in large law firms in Washington, D.C. Three years after their commitment ceremony, Emmett and Bryan started thinking about having children. A friend of Emmett's sister, Emily, volunteered to receive Bryan's sperm through artificial insemination and deliver the resulting child to the couple, relinquishing her parental rights. Emily was married with two children of her own and said she wanted to help Emmett and Bryan create a family that would bring them as much joy as her own family brought to her.

Thrilled about finding a surrogate mother, Emmett and Bryan asked their attorney to draw up a surrogacy contract that complied as nearly as possible with Virginia law. The attorney arranged the appropriate home studies as well as the necessary physical and psychological screenings of Emmett, Bryan, Emily, and her husband in accordance with a Virginia statutory requirement.<sup>8</sup> All four parties signed the surrogacy contract; however, the circuit court refused to approve the contract because Emmett and Bryan did not fit the definition of "intended parents" set forth in the statute.<sup>9</sup>

Emily agreed to go forward with the surrogacy arrangement regardless of the court's refusal, and she became pregnant in February. When she gave birth to a boy in November, however,

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7. Emmett and Bryan are a fictional couple. Any resemblance they bear to individuals or other fictional characters is purely coincidental. The author chose to create this particular couple because they allow for the simplest exposition of the issues addressed in this paper. By no means is this note intended to suggest that only male homosexual couples face this problem. In fact, it is quite easily conceivable that two infertile women in a committed lesbian relationship could present the same circumstances, face the same issues, and make the same arguments that this paper will make on behalf of Emmett and Bryan.

8. See VA. CODE ANN. § 20-160 (Michie 2003) (requiring that "a local department of social services or welfare or a licensed child-placing agency has conducted a home study of the intended parents, the surrogate, and her husband" and that "[p]rior to signing the surrogacy contract, the intended parents, the surrogate, and her husband have submitted to physical examinations and psychological evaluations by practitioners licensed to perform such services").

9. *Id.* § 20-156. The statute defines "intended parents" as  
a man and a woman, married to each other, who enter into an agreement with a surrogate under the terms of which they will be the parents of any child born to the surrogate through assisted conception regardless of the genetic relationships between the intended parents, the surrogate, and the child.

*Id.*

Emily changed her mind, deciding that she could not give the child to Emmett and Bryan.<sup>10</sup> Devastated but realizing that Emily's decision was a legal one,<sup>11</sup> Bryan brought suit in federal court against the Commonwealth of Virginia.<sup>12</sup> Bryan claims that Virginia's surrogacy statutes precluded him from the category of "intended parent"<sup>13</sup> based on his sexuality and violated his constitutional right to reproductive autonomy under the doctrine of substantive due process and the Equal Protection Clause.

### DECIDING THE CASE

#### *The Statutes at Issue*

In response to the problem of infertility, state legislatures have implemented laws and policies to facilitate or regulate development and use of medical procedures that help infertile individuals achieve parenthood by replacing or enhancing coital reproduction.<sup>14</sup> Virginia's statutory policy on ART appears, on first blush, moderately liberal, especially in comparison with some of its sister states, such as Louisiana, which explicitly prohibits remuneration of female gamete donors<sup>15</sup> and legally nullifies all contracts for surrogate motherhood.<sup>16</sup> Under its laws governing anatomical gifts, Virginia exempts ova and "self-replicating body fluids" such as sperm from its prohibition on the sale or purchase of "any natural body part for any reason . . . ."<sup>17</sup> Additionally, the Code authorizes circuit courts to approve surrogacy contracts that comply with statutory criteria and specifically instructs the courts how to construe non-approved

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10. See *id.* § 20-162(A)(3) (allowing a surrogate engaged in a non-court approved contract to decide whether or not to "relinquish her parental rights").

11. *Id.* § 20-158(E) (providing for the parentage of a child born pursuant to a non-court approved surrogacy contract:

The gestational mother is the child's mother . . . if (i) the surrogate is married, (ii) her husband is a party to the surrogacy contract, and (iii) the surrogate exercises her right to retain custody and parental rights to the resulting child pursuant to §20-162, then the surrogate and her husband are the parents).

12. From this point forward, the argument in this note assumes, without analysis of the issue, that Bryan has standing to bring such a suit.

13. VA. CODE ANN. § 20-156 (Michie 2003).

14. See, e.g., CAL. HEALTH & SAFETY CODE § 1374.55 (West 2004) (mandating health insurance coverage for the treatment of infertility other than *in vitro* fertilization).

15. See Baum, *supra* note 1, at 126 (citing LA. REV. STAT. ANN. § 9:122 (West 2003), which specifically states, "The sale of a human ovum . . . is expressly prohibited").

16. LA. REV. STAT. ANN. § 9:2713 (West 2003).

17. VA. CODE ANN. § 32.1-289.1 (Michie 2003).

surrogacy contracts.<sup>18</sup> Closer consideration of Virginia's surrogacy statutes, however, reveals a policy of limiting protected use of this form of ART to heterosexual couples.<sup>19</sup>

Chapter nine of the Virginia Code addresses the "status of children of assisted conception."<sup>20</sup> This chapter opens with a list of definitions, most of which contain explanations of medical terminology and procedures; however, the article defines "intended parents" as

a man and a woman, married to each other, who enter into an agreement with a surrogate under the terms of which they will be the parents of any child born to the surrogate through assisted conception regardless of the genetic relationships between the intended parents, the surrogate, and the child.<sup>21</sup>

The chapter later provides for circuit court approval of surrogacy contracts that comply with a list of constraints,<sup>22</sup> including that intended parents and the surrogate satisfy the "standards of fitness applicable to adoptive parents"<sup>23</sup> and that the surrogate is married and has given birth to at least one living child.<sup>24</sup> The law also requires that all parties have undergone physical and psychological evaluations prior to signing the contract,<sup>25</sup> that "[a]t least one of the intended parents is expected to be the genetic parent of any child resulting from the agreement,"<sup>26</sup> and that the surrogate's husband is a party to the contract.<sup>27</sup> The Code further recognizes that some parties may enter into contracts for surrogacy that do not comply with the strictures set forth in section 20-160.<sup>28</sup> The Code instructs courts regarding the construction of such non-approved contracts, including a provision that the surrogate may lawfully elect to either complete the

18. *See id.* § 20-162.

19. *See* discussion of the Virginia statutes that limit the availability of ART to individuals based on their marital status, *infra* pp. 296-97.

20. VA. CODE ANN. §§ 20-156 to -165 (Michie 2003).

21. *Id.* § 20-156.

22. *Id.* § 20-160.

23. *Id.* § 20-160(B)(3).

24. *Id.* § 20-160(B)(6).

25. *Id.* § 20-160(B)(7).

26. *Id.* § 20-160(B)(9).

27. *Id.* § 20-160(B)(10).

28. *See id.* § 20-162 (setting forth instructions for a circuit court's construction of "contracts not approved by the court").

agreement by delivering the resulting child to the intended parents and signing a surrogate consent form or not complete the agreement,<sup>29</sup> unequivocally retaining her parental rights so long as she is the genetic parent of the resulting child.<sup>30</sup>

As in the proposed hypothetical, the Code precludes the genetic father of a child resulting from a non-approved surrogacy contract from parenthood in all cases when the surrogate mother is married.<sup>31</sup> This results from the statutory construction of a non-approved contract, demanding that "[t]he surrogate, her husband, if any, and the intended parents shall be parties to any such surrogacy contract"<sup>32</sup> and the blanket provision that "if (i) the surrogate is married, (ii) her husband is party to the surrogacy contract, and (iii) the surrogate exercises her right to retain custody and parental rights to the resulting child pursuant to § 20-162, then the surrogate and her husband are the parents."<sup>33</sup>

### *Bryan's Claims Against Virginia*

In effect, the Code allows circuit courts to deny homosexual men the right to beget and raise children. Bryan's federal case against the Commonwealth of Virginia would contain the following claims:

(1) Virginia's statutory scheme for allocation of court approval to surrogacy contracts inappropriately classifies prospective parents based on their marital status, precluding legally unmarried individuals from receiving the benefit of enforcement.<sup>34</sup> This creates a presumption that homosexual individuals in committed relationships are *per se* unfit parents and violates the Equal Protection Clause of the Fourteenth Amendment.<sup>35</sup>

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29. *Id.* § 20-162(A)(3).

30. *Id.* § 20-158(D).

31. *See id.* § 20-162(A)(1); *id.* § 20-158.

32. VA. CODE ANN. § 20-162(A)(1) (Michie 2003).

33. *Id.* § 20-158(E)(2).

34. *Id.* § 20-156 (limiting the protected class of parents to "a man and a woman, married to each other").

35. *See Eisenstadt v. Baird*, 405 U.S. 438, 446-47 (1972) (citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

In applying that [Equal Protection] clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and

(2) Virginia's statutory definition of "intended parents" precludes Bryan from procuring an enforceable surrogacy contract based on his status as a homosexual and is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because it exhibits a "desire to harm a politically unpopular group."<sup>36</sup>

(3) Virginia's statutory definition of "intended parents" precludes Bryan from pursuing reproductive freedom and is unconstitutional under the substantive due process doctrine of the Fourteenth Amendment because it places a substantial obstacle in Bryan's path of seeking to beget a child.<sup>37</sup>

(4) Virginia's scheme for interpreting non-approved contracts violates the substantive due process doctrine of the Fourteenth Amendment by strictly preventing Bryan from legally claiming parenthood of a child he sired in performance of a non-approved surrogacy contract based upon the surrogate's arbitrary decision not to follow through with the contract.<sup>38</sup>

### *Equal Protection Analysis*

Equal protection jurisprudence does not prohibit states from making classifications or treating different classes of people differently.<sup>39</sup> Instead, it requires that the legal classifications made by states "be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly

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must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

*Id.* (quoting *Royster*, 253 U.S. at 415) (citations omitted).

36. See *Lawrence*, 539 U.S. 580 (O'Connor, J., concurring) (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) for the proposition that some state objectives, such as "a bare . . . desire to harm a politically unpopular group," are *per se* illegitimate in terms of the rational basis test).

37. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992); see *infra* pp. 309-12 for a discussion of privacy rights attached to decisions whether to bear or beget a child.

38. For a discussion of parents' protected liberty interest in the care, custody, and control of their children, see *Troxel v. Granville*, 530 U.S. 57 (2000); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Parham v. J.R.*, 442 U.S. 584 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

39. Daniel A. Per-Lee, Annotation, *Validity, Under Equal Protection Clause of Fourteenth Amendment, of Gender-Based Classifications Arising by Operation of State Law — Federal Cases*, 60 L. Ed. 2d 1188, § 2 (2004).

circumstanced shall be treated alike."<sup>40</sup> This 'traditional' approach to equal protection cases calls for application of the rational basis test — all classifications rationally related to some legitimate state interest pass muster — and delivers significant deference to legislative decisions.<sup>41</sup> Supreme Court precedent, however, delineates two additional approaches to determining a statute's constitutionality under the Equal Protection Clause:<sup>42</sup> strict scrutiny applies to 'suspect classifications' and those classifications that affect fundamental rights, and intermediate scrutiny applies to 'semi-suspect classifications.'<sup>43</sup> A suspect classification is one from "which there is reason to infer antipathy,"<sup>44</sup> and to satisfy strict scrutiny the state must advance a compelling interest that can be achieved through only the means in question.<sup>45</sup> Statutes that create classifications less suspected of concealing animus receive intermediate scrutiny under equal protection analysis: laws that draw distinctions by gender, for example, must serve an "important" interest and the classification must be "substantially related" to that interest.<sup>46</sup>

Bryan first claims that Virginia violates the Equal Protection Clause because its definition of "intended parents" creates an unconstitutional classification based on sexual orientation, preventing him from procuring court approval of a surrogacy contract.<sup>47</sup> Sexual orientation, while not identified as a suspect classification, bears many characteristics in common with the paradigm class.<sup>48</sup> Society has historically ostracized gay men

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40. *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) and explaining that the Equal Protection Clause denies "to States [sic] the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute").

41. *Per-Lee*, *supra* note 39, § 2.

42. *See Romer v. Evans*, 517 U.S. 620, 629 (1996) (listing heightened scrutiny classifications to conclude that the Colorado constitutional amendment in question did not alter any state or local rules that protected non-suspect groups from discrimination other than homosexuals, who it singled out to be ineligible for antidiscrimination protection under the guise of equalizing the legal treatment of all people regardless of sexual orientation).

43. *Per-Lee*, *supra* note 39, § 2.

44. *Id.* at 1191. Race serves as the paradigm suspect class. *Id.*

45. *Id.*

46. *Id.*; *Craig v. Boren*, 429 U.S. 190, 197 (1976) (interpreting the standard of scrutiny set forth in *Reed*, 404 U.S. at 75, in considering an Oklahoma law that provided a lower age of majority for purposes of buying "non-alcoholic" beer for females than for males).

47. *See* enumeration of claims, *supra* pp. 297-98.

48. *See Frontiero v. Richardson*, 411 U.S. 677, 683-88 (1973) (analyzing the political, legal, and social treatment of women throughout American history and comparing that with the treatment of racial minorities, impliedly African Americans, to determine that



and lesbians, treating them as diseased,<sup>49</sup> as sexual predators,<sup>50</sup> and as criminals.<sup>51</sup> Conservative politicians and groups continue to stymie the gay rights movement and prevent homosexuals from enjoying the protection of laws and a presence in public arenas.<sup>52</sup> Homosexuals have been the victims of hate crimes perpetrated by individuals as well as by government organizations.<sup>53</sup>

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the lower court appropriately considered a gender classification, which the state rationally justified, under heightened scrutiny).

49. See *Homosexuality*, GALE ENCYCLOPEDIA OF PSYCHOLOGY (2d ed. 2001), available at [http://www.findarticles.com/p/articles/mi\\_g2699/is\\_0004/ai\\_2699000499](http://www.findarticles.com/p/articles/mi_g2699/is_0004/ai_2699000499) (last visited February 24, 2004). "Homosexuality was classified as a mental disorder until 1973, when the American Psychiatric Association removed 'homosexuality' from the *Diagnostic and Statistical Manual of Mental Disorders*." *Id.*

50. See Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who Are Queer: Looking at Sexual Minority Rights from a Different Perspective*, 64 ALB. L. REV. 915, 915 (2001) (citing DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 78-79 (1997), for the proposition that fundamentalist forces in the United States portray homosexuals as sexual predators "who target children, hoping to 'seduce them into a life of depravity and disease'"). Both authors note the "similarity of this disease and seduction discourse to the anti-Semitic discourses associating Jews with disease, filth, urban degeneration, and child-stealing." *Id.* at n.2. Professor Robson also quotes MICHAEL BRONSKI, *THE PLEASURE PRINCIPLE: SEX, BACKLASH, AND THE STRUGGLE FOR GAY FREEDOM* 112 (1998) ("While all studies show that physical and sexual abuse of children is far more likely to occur within the heterosexual biological family, the fear of the homosexual molester is persistent and powerful.").

51. See *Lawrence*, 539 U.S. at 575-76 (discussing the prevalence and effects of anti-sodomy laws, both state-propagated and Court-approved, after *Bowers v. Hardwick*, 478 U.S. 186 (1986), that apply only against homosexual conduct). "The stigma this criminal statute imposes, moreover, is not trivial." *Id.* The Court found unconstitutional a Texas law that made sodomy between people of the same sex a crime based on its interference with the individuals' substantive due process right to privacy in the conduct of intimate consensual behavior. *Id.*

52. For an example of state action intended to withhold legal protection from gays and lesbians, see generally *Romer*, 517 U.S. 620, (discussing a Colorado constitutional amendment that would prohibit any law providing protection based on homosexual, bisexual, or transsexual status). See also Mike Allen & Alan Cooperman, *Bush Backs Amendment Banning Gay Marriage; President Says States Could Rule on Civil Unions*, WASH. POST, Feb. 25, 2004, at A01 ("President Bush called yesterday for a constitutional amendment restricting marriage to the union of men and women, asserting that gay marriage would weaken society.").

53. See Douglas Martin, *Strictly Business; Christopher St. Rebounds As a Thriving "Gay Mecca"*, N.Y. TIMES, Jun. 21, 1993, at B3 (discussing the rejuvenation of Christopher Street in Greenwich Village:

Christopher Street resembles other small retail streets in Greenwich Village, but it became a magnet and a symbol for homosexuals after the police raided the Stonewall Inn, at 53 Christopher Street, on June 27, 1969. That led to the city's first gay-rights protests, and the emergence of a unified, forceful gay-rights movement);

*A Stiff and Proper Sentence*, N. Y. TIMES, Apr. 6, 1999, at A26 (noting that "[a]nti-gay violence accounted for more than 1,100 reported hate crimes in this country in 1997, according to the latest F.B.I. figures," and addressing the plea agreement made between prosecutors and one of the defendants charged with the kidnapping and

This history of mistreatment should guide the courts, in considering Bryan's case, to apply heightened scrutiny when analyzing Virginia's surrogacy statutes for equal protection violations.<sup>54</sup>

The Supreme Court stated in *Frontiero v. Richardson*: "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."<sup>55</sup> Classification based on sexual orientation parallels this characterization of sex, and the same justification for considering sexuality a suspect classification applies. The only limitations on homosexuals' "ability to perform or contribute to society"<sup>56</sup> come from society itself: laws,<sup>57</sup> moral traditions,<sup>58</sup> and general ignorance<sup>59</sup> have prevented homosexuals from living openly, raising families, and otherwise contributing to society. Even if the classification of homosexuals does not rise

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beating death of Matthew Shepard in 1998); Stephen Holden, *A Rape and Beating, Later 3 Murders and Then the Twist*, N.Y. TIMES, Sep. 23, 1998, at E5 (reviewing *The Brandon Teena Story*, a documentary film about a twenty-one year old female-to-male transsexual who was raped, beaten, and shot by two men in Nebraska after they discovered her gender).

54. See *supra* note 48 and accompanying text.

55. *Frontiero*, 411 U.S. at 686 (citing *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1173-74 (1969)).

56. *Id.*

57. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 188 n.1 (1986) (upholding a Georgia statute that criminalized sodomy, defined as performance of or submission to "any sexual act involving the sex organs of one person and the mouth or anus of another").

58. See *Lawrence*, 539 U.S. at 567-70 (making the point that, while laws addressing sodomy did not address homosexual sodomy specifically, by outlawing any act that had the purpose of creating sexual pleasure without the possibility of conception, these laws have been powerful tools in condemning homosexuals and homosexuality); see also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992) (stating that the Supreme Court's "obligation is to define the liberty of all, not to mandate our own moral code").

59. See *Lawrence*, 539 U.S. at 566-67 (restating that the Court's decision in *Bowers* focused on the question "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy," and correcting the precedent: "That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake").

to the level of suspect, these statutes burden the recognized and protected fundamental right to make reproductive choices, which commands strict scrutiny analysis.<sup>60</sup>

Applying strict scrutiny to the classification of "intended parents," the Court must first identify a compelling state interest on which the Virginia legislature premised its surrogacy statutes.<sup>61</sup> Then, Virginia must prove that the interest "cannot be achieved in other ways."<sup>62</sup> The states have an established compelling interest in protecting child welfare<sup>63</sup> under which Virginia will seek defense from Bryan's equal protection challenge. Virginia, however, must fulfill the second prong of the strict scrutiny test by proving that its surrogacy statutes are "narrowly tailored measures" that further the state's compelling governmental interest.<sup>64</sup> By requiring that a law's means be narrowly tailored

60. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (emphasis in original)).

61. *Per-Lee*, *supra* note 39, § 2 (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964)).

62. *Id.* (citing *McLaughlin*, 379 U.S. 184).

63. *See Troxel v. Granville*, 530 U.S. 57, 70 (2000) (noting that states have "long-recognized interests as *parens patriae*" against which courts must balance parents' rights and children's own interests to determine how best to preserve the child's welfare (citations omitted)); *Reno v. Flores*, 507 U.S. 292, 303-04 (1993) (citing *Santosky v. Kramer*, 455 U.S. 745, 766 (1982), for the establishment of a governmental interest in "preserving and promoting the welfare of the child"); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years."); *Parham v. J.R.*, 442 U.S. 584, 605 (1979) ("The *parens patriae* interest in helping parents care for the mental health of their children . . ."); *Prince v. Massachusetts*, 321 U.S. 158, 168-69 (1944) (finding:

The state's authority over children's activities is broader than over like actions of adults . . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection.).

64. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)); *see also Grutter v. Bollinger*, 539 U.S. 306, 335 (2003) (defining the second prong of the strict scrutiny test in determining the constitutionality of a race-based affirmative action plan at the University of Michigan: "Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still 'constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.'" (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996))).

to its end, the Court ensures that a state's actions arise only to further its compelling interest and not out of animus toward the affected group.<sup>65</sup> Virginia's surrogacy statutes, however, cannot pass this test.

Although its interest in protecting the welfare of children is sufficiently compelling, Virginia's exclusion of legally unmarried individuals<sup>66</sup> from the freedom to make an enforceable surrogacy contract is far from narrowly tailored to satisfy that objective. The State's legislated reservation of surrogacy contract enforcement to those "intended parents"<sup>67</sup> who are "a man and a woman, married to each other"<sup>68</sup> is too broad to accomplish the objective of protecting child welfare.<sup>69</sup> Much like the law that the Supreme Court overturned in *Romer v. Evans*, the Virginia statute singles out legally unmarried individuals who desire to reproduce using ART and denies them the protection of a court approved contract.<sup>70</sup> This definition embodies a sweeping assumption that heterosexual, legally married couples are fit parents while homosexual, legally unmarried couples are *per se* unfit,<sup>71</sup> an assumption that both Virginia common law and Supreme Court precedent condemn.<sup>72</sup>

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65. See *Grutter*, 539 U.S. at 335 (quoting the plurality opinion in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989), for the proposition that "the purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype").

66. See Lezin, *supra* note 5, at 189 n.13 (using the term 'legally unmarried women' . . . interchangeably with 'lesbians and/or single women,' recognizing that many lesbian couples see themselves as married, even when the state has yet to reflect this reality. While the term 'single' technically describes the legal standing of women who are not in state-sanctioned marriages with men, it does not sufficiently match many partnered women's identities).

67. VA. CODE ANN. § 20-156 (Michie 2003).

68. *Id.*

69. See *Romer v. Evans*, 517 U.S. 620, 633 (1996) (considering, under the rational basis test, an amendment to Colorado's state constitution that would deny homosexuals any specific protection from discrimination within the state:

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence).

70. See *id.*

71. See VA. CODE ANN. § 20-156 (Michie 2003) (allowing only heterosexual married couples the opportunity to be "intended parents").

72. See discussion *infra* pp. 304-05.

The Virginia Supreme Court has long held that an individual's sexuality cannot define that person's fitness as a parent.<sup>73</sup> Additionally, United States Supreme Court precedent counsels against consideration of homosexuality in determining parental fitness.<sup>74</sup> In 1985, the Virginia Supreme Court decided the custody of a young girl in favor of her mother because her father's homosexuality created living conditions that were "not only unlawful but also impose[d] an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large."<sup>75</sup> The court failed, however, to heed the United States Supreme Court's admonition in *Palmore v. Sidoti*<sup>76</sup> that custody decisions based on conjecture about public reaction to one parent's unconventional relationship violate equal protection.<sup>77</sup> In deciding a 1995 custody case in favor of the child's grandmother, the Virginia Supreme Court considered the illegality of homosexual acts in more depth: "Conduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth . . . thus, that conduct is another important consideration in determining custody."<sup>78</sup> In 2003, however, the United States Supreme Court ruled that laws criminalizing homosexual sodomy are unconstitutionally violative of substantive due process.<sup>79</sup> The Court interpreted such statutes to "seek to

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73. See generally *Doe v. Doe*, 222 Va. 736, 748 (1981) (declining "to hold that every lesbian mother or homosexual father is *per se* an unfit parent").

74. See generally *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Lawrence v. Texas*, 539 U.S. 558 (2003).

75. *Roe v. Doe*, 228 Va. 722, 728 (1985).

76. 466 U.S. 429 (1984).

77. *Id.* at 433 (citing *Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971) (White, J., dissenting)).

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held."

*Id.* (quoting *Palmer*, 403 U.S. at 260-61).

78. *Bottoms v. Bottoms*, 249 Va. 410, 419 (1995); see also VA. CODE ANN. § 18.2-361 (Michie 2003) (delineating crimes against nature: "If any person carnally knows in any manner any brute animal, or carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony").

79. See generally *Lawrence*, 539 U.S. 558.

control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."<sup>80</sup>

In addition to attacking Virginia's definition of "intended parents" for being overly broad and creating an unlawful classification that cannot pass strict scrutiny, Bryan claims that the definition evinces a "desire to harm a politically unpopular group" and automatically fails the equal protection rational basis test for being derived from a *per se* illegitimate state objective.<sup>81</sup> The Virginia statutes mandate that court determinations of child custody primarily focus on the best interests of the child in question.<sup>82</sup> Three factors go to such a determination in cases of homosexual parentage: "the legality of homosexual conduct,"<sup>83</sup> the ability of the homosexual parent to be an appropriate role model for the child,<sup>84</sup> and the "social stigma attached to homosexuality."<sup>85</sup> The Supreme Court determined that the first and third inquiries violate the Constitution,<sup>86</sup> leaving only the second question for discussion — whether homosexuals can be effective role models to children.<sup>87</sup>

This consideration of homosexual parents as role models breaks down into two distinct questions: "[C]an a homosexual parent serve the 'modeling' needs of a child who will grow up to be a heterosexual adult?"<sup>88</sup> and "[I]s the sexuality of a child influenced by the sexuality of his or her parent?"<sup>89</sup> Professor Charlotte Patterson,<sup>90</sup> an expert witness in the Virginia Supreme Court case *Bottoms v. Bottoms*, scrutinized the available social

80. *Id.* at 567 (stating further, "It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons").

81. *See id.* at 580 (O'Connor, J., concurring) (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), for the proposition that some state objectives are *per se* illegitimate in terms of the rational basis test).

82. VA. CODE ANN. § 20-124.2(B) (Michie 2003) ("In determining custody, the court shall give primary consideration to the best interests of the child.").

83. *See* Kif Skidmore, Note, *A Family Affair: Constitutional and Prudential Interests Implicated When Homosexuals Seek to Preserve or Create Parent-Child Relationships*, 89 KY. L.J. 1227, 1256-57 (2000).

84. *Id.* at 1257-59.

85. *Id.* at 1259-60.

86. *See* discussion of *Palmore v. Sidoti*, 466 U.S. 429 (1984), and *Lawrence v. Texas*, 539 U.S. 558 (2003), *supra* pp. 304-05.

87. *See* Skidmore, *supra* note 83, at 1257-59.

88. *Id.* at 1258.

89. *Id.*

90. Patterson is a Professor of Psychology at the University of Virginia. She was an Associate Professor when she testified in *Bottoms*.

science studies of American children born to lesbian or gay parents.<sup>91</sup> She found no evidence to support the fear that children of lesbian or gay parents have developmental difficulties compared to children of heterosexual parents; in fact, "they have produced no evidence at all in support of this proposition."<sup>92</sup> The research reveals that the widespread concern that children of homosexual parents are likely targets of sexual abuse is completely erroneous; in fact, the truth is quite the opposite — children are much more likely to be sexually abused by a heterosexual man than by any homosexual.<sup>93</sup>

The second major concern about role modeling questions whether children of homosexual parents develop a propensity for homosexuality based on their parents' model.<sup>94</sup> This inquiry develops out of scientific uncertainty surrounding the source of sexuality.<sup>95</sup> Further research, however, exposes this anxiety as baseless: children's predilection toward heterosexuality or homosexuality rarely evinces influence from their parents' sexuality.<sup>96</sup> Because a preponderance of research refutes the

91. Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191 (1995).

92. *Id.* at 198. Patterson cites studies reported in, *inter alia*, Robert L. Barret & Bryan E. Robinson, *Gay Dads*, in REDEFINING FAMILIES: IMPLICATIONS FOR CHILDREN'S DEVELOPMENT 157, 168 (Adele E. Gottfried & Allen W. Gottfried eds., 1994) for the proposition that "there is generally no difference in development between children of gay parents and children of heterosexual parents" and Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1036 (1992) which concludes "that there is no research evidence supporting the claim that children of lesbian or gay parents develop differently than children of heterosexual parents." *Id.* at 197-98 n.33.

93. See Patterson, *supra* note 91, at 199 ("[T]he existing research suggests that the great majority of child sexual abuse is committed by heterosexual men, not by lesbians or gay men."); see also Ruthann Robson, *supra* note 50, at 915 n.2 (quoting MICHAEL BRONSKI, THE PLEASURE PRINCIPLE: SEX, BACKLASH, AND THE STRUGGLE FOR GAY FREEDOM 112 (1998), "While all studies show that physical and sexual abuse of children is far more likely to occur within the heterosexual biological family, the fear of the homosexual molester is persistent and powerful").

94. See Skidmore, *supra* note 83, at 1259.

95. *Id.* (recognizing "the unsettled question whether sexual orientation is a product of biology or environmental factors").

96. See Robson, *supra* note 50, at 917 n.9 (citing S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985), "finding no evidence that an infant boy's exposure to his lesbian mother would increase the likelihood of his becoming homosexual"); *id.* (citing Conkel v. Conkel, 509 N.E.2d 983, 986 (Ohio Ct. App. 1987), "rejecting the appellant's argument that exposing her two boys to their homosexual father may cause them to become homosexual, and taking judicial notice that, while the causes of homosexuality are elusive, most experts agree that it is not caused by contact with a homosexual parent"); *id.* (citing Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 852-56, "conceding [in her contradictory paper] that the 'sympathetic orientation and methodological bias' of social scientific studies tending to demonstrate that children of homosexual parents are more likely to become

applicability of concerns about the ability of homosexual parents to function as appropriate role models, and the Supreme Court has deemed the other two 'best interest' calculations focusing on homosexuality unconstitutional,<sup>97</sup> Virginia has no legitimate interest in preventing homosexuals from pursuing parenthood through enforceable surrogacy contracts. The prohibition must, therefore, evolve from some desire to prevent homosexuals from this protection based on their status as homosexuals. The Supreme Court clearly stated that statutes propagated out of such a "desire to harm a politically unpopular group" are *per se* illegitimate and patently fail under the Equal Protection Clause.<sup>98</sup>

### *Due Process Analysis*

#### *The Constitutional Right to Reproductive Autonomy for Individuals*

The Supreme Court has not specifically defined a right to participate in assisted conception;<sup>99</sup> nevertheless, the Court's extensive discussion and successive affirmation of procreative liberty suggests that the Constitution protects an individual's right to use reproductive technologies to effectuate conception as a function of that liberty.<sup>100</sup> Bryan's final two claims arise out of this freedom of reproductive self-determination guaranteed

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homosexual renders such studies unreliable"); *id.* (citing David P. Russman, Note, *Alternative Families: In Whose Best Interests?*, 27 SUFFOLK U. L. REV. 31, 58 (1993), "Although some courts fear that children of gay parents will become gay themselves, little evidence suggests that a parent's sexual orientation influences that of the child"); *id.* at 924 n.36 (citing Charlotte J. Patterson & Richard E. Redding, *Lesbian and Gay Families with Children: Implications of Social Science Research for Policy*, 52 J. SOC. ISSUES 29, 30 (1996), "concluding, from an overview of social science literature, that gay and lesbian parents are as likely as heterosexual parents to provide a positive home environment").

97. See *supra* note 86 and accompanying text (referring to discussion of *Palmore v. Sidoti*, 466 U.S. 429 (1984), and *Lawrence v. Texas*, 539 U.S. 558 (2003), *supra* pp. 304-05).

98. *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); see also *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

99. *Lezin*, *supra* note 5, at 197.

100. See Alexander N. Hecht, Note, *The Wild, Wild West: Inadequate Regulation of Assisted Reproductive Technology*, 1 HOUS. J. HEALTH L. & POL'Y 227, 247 (2001) (noting that "a woman's right to use ART is deeply rooted in the United States Constitution"); see also ROBERT BLANK & JANNA C. MERRICK, *HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS* 8 (1995).



by the Fourteenth Amendment doctrine of substantive due process. First, he claims that Virginia's statutory definition of "intended parents" violates his fundamental right to reproductive autonomy by placing a "substantial obstacle" in his path to begetting a child.<sup>101</sup> Second, Bryan posits that Virginia's statutory scheme for interpreting non-approved surrogacy contracts strictly prevents him from parenting his biological offspring in violation of substantive due process.<sup>102</sup>

The Supreme Court has protected individuals' autonomy in reproductive decision-making in a series of cases since 1942. In *Skinner v. Oklahoma*,<sup>103</sup> the Court determined that an Oklahoma law requiring the sterilization of habitual criminals "runs afoul of the equal protection clause."<sup>104</sup> The state could not articulate a compelling interest that justified its classification of "habitual criminals" for purposes of sterilization.<sup>105</sup> Determining that the Oklahoma statute "involves one of the basic civil rights of man"<sup>106</sup> because "marriage and procreation are fundamental to the very existence and survival of the race,"<sup>107</sup> the Court overturned it for failure to pass strict scrutiny.<sup>108</sup>

In 1965, in *Griswold v. Connecticut*, the Court broadened the interpretation it set forth in *Skinner*, deeming reproductive freedom a fundamental human right.<sup>109</sup> The Connecticut law in question prohibited dispensation of devices used for contraception, information regarding contraception, and use of any such information or devices.<sup>110</sup> The state prosecuted a medical doctor and the Executive Director of Planned Parenthood under this law, and the trial court found them guilty, as accessories, for counseling married couples

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101. See discussion of "substantial obstacle" test from *Stenberg v. Carhart*, 530 U.S. 914 (2000), *infra* p. 312; discussion of *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), *infra* pp. 309-10 (defining the fundamental liberty of reproductive freedom as "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child") (emphasis in original).

102. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing the "fundamental liberty interest of natural parents in the care, custody, and management of their child").

103. 316 U.S. 535 (1942).

104. *Id.* at 541.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* (explaining that "strict scrutiny of the classification which a State makes in a sterilization law is essential").

109. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

110. *Id.* at 480.

about how to prevent conception.<sup>111</sup> The Supreme Court's plurality opinion drew upon precedent concerning substantive due process,<sup>112</sup> parents' right to make determinations about their children's upbringing and education,<sup>113</sup> and freedom of association<sup>114</sup> to formulate the famous 'penumbras and emanations' theory of privacy rights.<sup>115</sup> Justice Douglas explained that the guarantees contained in the Bill of Rights create "zones of privacy," or penumbras, that command the same constitutional protection as those rights explicitly set forth by the amendments themselves.<sup>116</sup> The plurality in *Griswold* determined that the privacy of the marital relationship protects reproductive choices made within that relationship, including the right to use contraception.<sup>117</sup>

In 1972, the Court further expanded its protection of procreative privacy to unmarried individuals in *Eisenstadt v. Baird*.<sup>118</sup> Under the microscope of the Equal Protection Clause,<sup>119</sup> the Court examined a Massachusetts statute that criminalized provision of "any drug, medicine, instrument or article whatever for the prevention of conception" except by registered physicians and pharmacists to married persons.<sup>120</sup> Searching for "some ground of difference that rationally explains the different treatment accorded married and unmarried persons,"<sup>121</sup> a non suspect classification, the Court applied the rational basis test.<sup>122</sup> Significantly, Justice Brennan pointed out that if the Court were to consider the statute under the doctrine of substantive due process, as it had considered the Connecticut statute in *Griswold*,

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111. *Id.*

112. *Id.* at 481-82 (discussing the *Lochner v. New York*, 198 U.S. 45 (1905), line of cases, which defined the concept of substantive due process in terms of economic rights before the Court abandoned such analysis, leaving the doctrine to be used almost exclusively to justify protections under the right to privacy).

113. *Id.* at 482 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) and *Meyer v. State of Nebraska*, 262 U.S. 390 (1923)).

114. *Id.* at 483 (discussing *NAACP v. Alabama*, 357 U.S. 449 (1958), and subsequent cases construing this right).

115. *Id.* at 484.

116. *See generally id.*

117. *Id.* at 485-86.

118. 405 U.S. 438 (1972).

119. *Id.* at 447.

120. *Id.* at 440-41 n.2.

121. *Id.*

122. *Id.* at 477 n.7.

it would necessarily apply strict scrutiny because of the fundamental right at issue.<sup>123</sup> Because the Massachusetts statute in question failed to satisfy even the rational basis test, the Court had no need to reach the question of whether the classification was “*necessary* to the achievement of a *compelling* state interest” under substantive due process.<sup>124</sup> The Court found no rational basis for the Massachusetts law, concluding,

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>125</sup>

*Affirming Reproductive Freedom & Defining Tests to Ensure Noninterference by States*

Further affirming individuals’ protected fundamental right to freedom from state interference in reproductive choices, the Supreme Court passed down a series of decisions concerning the constitutionality of state regulations of abortion procedures: *Roe v. Wade* in 1973,<sup>126</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey* in 1992,<sup>127</sup> and *Stenberg v. Carhart* in 2000.<sup>128</sup> At their core, these cases ensured that women in the United States can engage the reproductive freedom enumerated in the *Skinner* line of cases by obtaining abortion services before the point of fetal viability, which serves as the point at which

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123. *Id.*

Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold*, the statutory classification would have to be not merely *rationaly related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest. But just as in *Reed v. Reed* . . . we do not have to address the statute’s validity under that test because the law fails to satisfy even the more lenient equal protection standard.

*Id.* (emphasis in original) (citations omitted).

124. *Id.* (emphasis in original).

125. *Id.* at 453 (emphasis in original).

126. 410 U.S. 113 (1973).

127. 505 U.S. 833 (1992).

128. 530 U.S. 914 (2000).

a state's interest in the life of the unborn fetus inheres.<sup>129</sup> On a more complex level, the *Roe* line of cases defines the boundary between individual and state interests in reproduction.<sup>130</sup> While much debate over the Court's abortion decisions focuses on the state's interest in the fetus, the most poignant result of these decisions affirms the vested right of individuals to determine whether and when to reproduce.

In *Roe*, the Court concluded that the privacy right protecting reproductive choice extends to the decision by a woman whether to terminate her pregnancy by procuring an abortion procedure.<sup>131</sup> A state's interest in protecting life overcomes the woman's right to choose to terminate her pregnancy only when the fetus reaches the point of medical viability.<sup>132</sup> The Court further limited a state's interest, mandating that preservation of the woman's life or health take precedence at all points during pregnancy.<sup>133</sup>

The Court's decision in *Casey* affirmed *Roe* as an expression of the substantive due process right to freedom of reproductive choice:

It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* afford constitutional protection. We have no doubt as to the correctness of those decisions. They support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it.<sup>134</sup>

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129. See *infra* notes 131-40 and accompanying text.

130. See *Roe*, 410 U.S. at 154 ("[T]he right of personal privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation.").

131. *Id.* at 164 (clarifying that a "state criminal abortion statute of the current Texas type, that excepts from criminality only a *lifesaving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment") (emphasis in original).

132. *Id.* at 163-64.

With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.

*Id.* at 163.

133. *Id.* at 163-64 ("If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.").

134. *Casey*, 505 U.S. at 852-53.

*Casey* denominated the right to procure an abortion not as a fundamental right in itself but as a necessary function of the fundamental right to reproductive autonomy, which states may not unduly burden without presenting a compelling interest to which the regulation is substantially related.<sup>135</sup>

Finally, in *Stenberg*, the Court determined that a Nebraska law proscribing "partial birth abortion" violated women's protected liberty interest in two ways.<sup>136</sup> First, it did not contain an exception for circumstances of medical necessity to save the life of the pregnant woman,<sup>137</sup> and second, it had the "effect of placing a *substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus."<sup>138</sup> Logically, if the right to choose an abortion is a function of the right to reproductive autonomy, then other functions of that right will enjoy the same protections that abortion receives. Therefore, because the pursuit of conception through non-coital means is a function of reproductive autonomy,<sup>139</sup> the Virginia laws that place a "substantial obstacle in the path"<sup>140</sup> of an individual seeking assisted reproduction are unconstitutional.

### *Natural Parents' Constitutional Right to Care, Custody, and Control Over Their Children*

Bryan's fourth claim presents the most difficult case under Supreme Court precedent because, while the fundamental right vested in parents to care, custody, and control over their natural children has a long history of recognition,<sup>141</sup> the Court decided

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135. See *id.* at 877 (establishing that a statute that places an undue burden on the fundamental right to reproductive freedom — in this case a woman's right to procure the abortion of a non-viable fetus — places a "substantial obstacle in the path" to expression of that right and is categorically violative of the Constitution and, therefore, invalid. "[T]he means chosen by the State . . . must be calculated to inform the woman's free choice, not hinder it").

136. See generally *Sternberg*, 530 U.S. 914.

137. *Id.* at 938.

138. *Id.* (quoting *Casey*, 505 U.S. at 877) (emphasis added).

139. For Supreme Court discussion of reproduction as a major life activity worthy of significant protection, see *Bragdon v. Abbot*, 524 U.S. 624, 638 (1998) (considering whether reproduction and childbearing are major life activities from which an HIV-positive woman was limited based on her inability to expect to reproduce healthy offspring and determining, with "little difficulty," that reproduction fulfills the Americans with Disabilities Act requirement that a major life activity of an individual be limited in order for the individual to be considered 'disabled').

140. *Stenberg*, 530 U.S. at 938 (quoting *Casey*, 505 U.S. at 877).

141. For a list of cases recognizing this fundamental right, see *supra* note 38.

a case with facts similar to Bryan's against the biological father in 1989.<sup>142</sup> In *Michael H. v. Gerald D.*, Michael sired a child, Victoria, in an adulterous relationship with Gerald's wife.<sup>143</sup> A California law created a presumption that the child of a married woman was born of the marriage so long as the woman was cohabiting with her husband and her husband was not sterile or impotent during the requisite time period.<sup>144</sup> Similarly, Virginia's law presents a presumption under non-approved surrogacy contracts that the surrogate's husband is the father of any resulting child if the surrogate chooses not to fulfill her promise to relinquish custody to the intended parents.<sup>145</sup> The Supreme Court explained that irrebuttable presumptions call for equal protection rather than procedural due process analysis, and the Justices considered Michael's substantive claim to protection under the law, finding that the statute's classification rationally furthered the state's legitimate interest in protecting the marital family.<sup>146</sup> The Court explained that liberty interests protected by the Fourteenth Amendment must be both "fundamental" and "traditionally protected by our society,"<sup>147</sup> reducing the legal issue in question to "whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection."<sup>148</sup>

Applying the Court's analysis in *Michael H.* to Bryan's case, the legal issue reduces to whether society has historically accorded protection to the kind of relationship Bryan shares with his biological son.<sup>149</sup> Virginia has, in fact, protected this type of relationship for more than a decade by allowing court approval

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142. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

143. *Id.* at 113.

144. See *id.* at 115 (quoting CAL. EVID. CODE ANN. § 621(a) (West Supp. 1989), establishing that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage").

145. See VA. CODE ANN. § 20-158(E)(2) (Michie 2001).

146. See *Michael H.*, 491 U.S. at 121.

147. *Id.* at 122.

148. *Id.* at 124.

149. See *id.*

of surrogacy contracts.<sup>150</sup> If not for Virginia's unconstitutional classification of "intended parents" as "a man and a woman, married to each other,"<sup>151</sup> Bryan would receive this protection like all heterosexual, legally married biological fathers who can pursue a court-approved surrogacy contract.<sup>152</sup> As applied by the Virginia circuit court that refused to approve Bryan's contract with Emily, the statutes unconstitutionally preclude Bryan from achieving an enforceable contract based on his sexuality.<sup>153</sup> The statutes also deny Bryan recognition as the parent of his biological son in violation of his fundamental right to the care, custody, and control of his biological child.<sup>154</sup>

### CONCLUSION AND RECOMMENDATIONS

Because it inappropriately classifies intended parents based on sexuality and marital status, Virginia's scheme for approving and enforcing surrogacy agreements violates the constitutional mandate that states shall accord equal protection of the laws to all people in their jurisdiction and that no state shall "deprive any person of life, liberty or property, without due process of the law."<sup>155</sup> Virginia need only amend one portion of Title 20 in order to overcome these constitutional violations. The legislature should amend the definition of "intended parents" in section 20-156 to read: "Intended parent means an individual who enters into an agreement with a surrogate under the terms of which that individual will be the parent of any child born to the surrogate through assisted conception regardless of the genetic relationships between the intended parent, the surrogate, and the child."<sup>156</sup>

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150. See VA. CODE ANN. § 20-159 (Michie 2001), stating:

A surrogate, her husband, if any, and prospective intended parents may enter into a written agreement whereby the surrogate may relinquish all her rights and duties as parent of a child conceived through assisted conception, and the intended parents may become the parents of the child . . . .

Surrogacy contracts shall be approved by the court as provided in § 20-160.

The legislature initially enacted this statute in 1991.

151. *Id.* § 20-156.

152. See *id.* § 20-158(D) (concerning "[b]irth pursuant to [a] court approved surrogacy contract . . . . After approval of a surrogacy contract by the court and entry of an order . . . the intended parents are the parents of any resulting child").

153. See *id.* § 20-45.2 ("A marriage between persons of the same sex is prohibited.").

154. See *id.* § 20-158(E)(2).

155. U.S. CONST. amend. XIV, § 1.

156. But see VA. CODE ANN. § 20-156 (Michie 2001).

Intended parents means a man and a woman, married to each other, who enter into an agreement with a surrogate under the terms of which they will be the parents of any child born to the surrogate through assisted conception

This would overcome the equal protection problems presented by Bryan's case, allowing him to procure an enforceable court-approved surrogacy contract through the circuit court regardless of his status as a legally unmarried homosexual.<sup>157</sup> This change would also solve the substantive due process problems presented by Bryan's claims against Title 20 by allowing people in Bryan's position to procure approved surrogacy contracts. The availability of enforceable contracts would eradicate the problem of unapproved contracts being the only avenue for homosexuals to pursue surrogacy arrangements. Thus, a court could construe the irrebuttable presumption embodied in the statute determining the parentage of children born pursuant to such unapproved contracts to rationally advance the state's legitimate interest in protecting the marital family,<sup>158</sup> and no longer to further the objective of denying parenthood from homosexuals, a patently illegitimate objective.

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regardless of the genetic relationships between the intended parents, the surrogate, and the child.

*Id.*

157. See discussion of the statute's equal protection violations, *supra* pp. 298-307.

158. See discussion of *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), *supra* pp. 312-14.

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