

COMPARING THE RIGHTS OF ADOPTEES AND DONOR-CONCEIVED OFFSPRING IN STATES GRANTING ACCESS TO ORIGINAL BIRTH CERTIFICATES AND ADOPTION RECORDS: AN EQUAL PROTECTION ANALYSIS

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INTRODUCTION

Technological advancements in assisted human reproduction have created an entire infertility industry in the United States and abroad, and greatly increased demand for human eggs and sperm. After the birth of the first “test-tube baby” in 1978,¹ assisted reproduction has been commonly used to help couples overcome infertility struggles. Young and healthy men and women are recruited to sell their gametes for use in assisted reproduction while others make donations altruistically out of a desire to help others. It has been estimated that 100,000 young women have been recruited to sell their eggs to infertility clinics in the United States.² As an increasing number of individuals who are conceived through the use of donor gametes are reaching adulthood and seeking information about their genetic origins, debates concerning whether donation of human gametes should be made anonymously have surfaced. Some studies estimate that as many as 30,000 children are born each year in the United States as a result of anonymous sperm donation, and 5,300 from anonymous egg donation.³ Additionally, the use of assisted reproduction to treat infertility has increased as the supply of

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1. Nicole L. Cucci, Note, *Constitutional Implications of In Vitro Fertilization Procedures*, 72 ST. JOHN’S L. REV. 417, 418 (1998). Louise Joy Brown, the world’s first successful “test-tube baby” was born in Great Britain on July 25, 1978. *Id.*

2. J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 363 (2011).

3. Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, 21 CLEV. ST. J.L. & HEALTH 1, 10 (2008).

adoptable children—especially healthy white infants—has decreased⁴: “By 1988, only 3% of babies born to single white women were relinquished for adoption, compared to 19% before 1973.”⁵ Therefore, assisted reproduction has become “an alluring alternative to adoption.”⁶

Assisted reproduction is largely unregulated in the United States, which is inconsistent with the majority of European countries that heavily regulate and restrict access to assisted reproductive technologies. As an article from the Center for Bioethics and Human Dignity explains: “[A]mong developed nations, the U.S. assisted reproduction or fertility industry is one of the least regulated. . . . *Any technological means, regardless of the medical and ethical consequences, can be utilized in the pursuit of parenthood if the price is right.*”⁷ Most gamete donations are made anonymously, and Washington is the only state that has passed legislation restricting donor anonymity.⁸ In the vast majority of states, fertility clinics are largely self-regulated and can choose whether or not to abide by non-legally binding professional and medical guidelines. While the Ethics Committee of the American Society for Reproductive Medicine “strongly encouraged fertility programs to maintain accurate records of donor health to enable information to be shared with donor offspring,”⁹ the Centers for Disease Control and Prevention does not require fertility agencies to track the health records of individual donors.¹⁰

Many concerns raised by donor anonymity are the same as those that have arisen regarding adoption, particularly whether adult adoptees should have the right to obtain their adoption records and original birth certificates. Adoptees have raised arguments concerning the harmful effects of being deprived of information essential to the development of their personal identities,¹¹ as well as alleging a violation of their constitutional rights.¹² As a result, eight states now grant adopted adults access to their adoption records

4. DiFonzo & Stern, *supra* note 2, at 350.

5. *Id.* at 350–51.

6. *Id.* at 351.

7. Kirsten Riggan, *Regulation (or Lack Thereof) of Assisted Reproductive Technologies in the U.S. and Abroad*, CENTER FOR BIOETHICS & HUMAN DIGNITY (Mar. 5, 2011), <http://cbhd.org/content/regulation-or-lack-of-assisted-reproductive-technologies-us-and-abroad> (emphasis added).

8. See Bonnie Rochman, *Where Do (Some) Babies Come From? In Washington, a New Law Bans Anonymous Sperm and Egg Donors*, TIME, (July 22, 2011), <http://healthland.time.com/2011/07/22/where-do-some-babies-come-from-in-washington-a-new-law-bans-anonymous-sperm-and-egg-donors/>.

9. DiFonzo & Stern, *supra* note 2, at 365.

10. *Id.* at 364.

11. See, e.g., Madelyn Freundlich, *For the Records: Restoring a Legal Right for Adult Adoptees*, 2007 EVAN B. DONALDSON ADOPTIVE INST. 12 [hereinafter Donaldson Report], available at http://www.adoptioninstitute.org/publications/2007_11_For_Records.pdf.

12. *Id.*

and/or original birth certificates.¹³ However, the same states do not grant donor-conceived offspring the right to obtain the same information.¹⁴ Similar disparities in the law exist in the Canadian province of British Columbia, prompting a discrimination claim and assertion of the right of donor offspring to receive the same information as adoptees. In the Canadian case of *Pratten v. British Columbia*, plaintiff Olivia Pratten alleged that donor offspring have been discriminated against because British Columbia's adoption laws allow adopted individuals to obtain information about their genetic origins, while donor-conceived offspring did not have access to the same information.¹⁵

This Note will explore whether donor-conceived offspring in states that grant access to adoption records could successfully argue that their equal protection rights under the Fourteenth Amendment have been violated because the states have not also granted them access to identifying information about their donors. In other words, this Note will explore whether a case similar to *Pratten v. British Columbia* could be successful in the United States. Donor offspring would need to seek to have a court apply a heightened level of scrutiny when analyzing their claim, and would do so by attempting to establish that they are members of a suspect or quasi-suspect class and/or that the right to receive information about one's genetic origin is a fundamental right. Part I will further expand on the concerns raised by donor anonymity and present arguments that are raised in support of anonymous donation. Part II will elaborate on the case of *Pratten v. British Columbia* and the discrimination arguments raised by the plaintiff. Part III will explore adoption law and the regulation of assisted reproduction in the United States. Part IV will present the issue in a constitutional framework and determine whether a potential equal protection claim exists for donor offspring located in states that grant access to adoption records. Lastly, this Note will argue that regardless of the equal protection claim, legislatures should impose regulations that ban donor anonymity for the policy reasons that will be discussed, and will suggest that legislative action may be a more effective way to confer additional rights on donor offspring to have access to information about their donors.

13. *Id.* at 11.

14. See Naomi Cahn & Wendy Kramer, *The Birth of Donor Offspring Rights in the USA?*, BIONews, June 27, 2011, http://www.bionews.org.uk/page_97446.asp (explaining that Washington is the first state to allow donor-conceived children to request identifying information about their donor and donor's medical history upon reaching the age of eighteen).

15. *Pratten v. British Columbia* (Att'y Gen.), 2011 BCSC 656, para. 3 (Can. B.C.), available at <http://www.cbc.ca/bc/news/bc-110519-pratten-sperm-donor-ruling.pdf>.

I. CONCERNS RAISED BY DONOR ANONYMITY

One major implication of modern reproductive technologies is the psychological struggles faced by many of the children who are born through the use of donor gametes. Often these individuals have no way of obtaining information about the person(s) who makes up (at least) one half of their biological identity because egg and sperm donations are made anonymously. The focus of the infertility industry is solely to help a couple have a baby, with little to no consideration for the long-term implications or struggles that the donor-conceived child may face.¹⁶ The interests of donor offspring are overlooked and the children are often given little or no choice about secrecy and anonymity after they have been brought into existence.¹⁷ Arguments asserted against donor anonymity focus on the mental, physical, and psychological well-being of the children born through the use of assisted reproduction. Many argue that donor anonymity “undermines the interests of offspring regarding their genetic medical history and ancestral heritage.”¹⁸ They argue that without knowledge of their genetic history, individuals conceived through the use of donor gametes could lose opportunities to make medical decisions to help prevent the development of certain genetic diseases or suffer emotional distress from never having the opportunity to know anything about at least one biological parent.¹⁹

Studies have found that children who are aware that they were conceived through the use of donor gametes are curious about their donors, and long to know “what they looked like, what they are like as persons, their education and interests, and especially details about their health and family health record.”²⁰ All of these missing pieces of information would help the donor offspring form personal identities. The information would also help donor offspring understand who they are and where they came from because “[g]enetic heritage is an important influence in temperament, appearance, abilities, and other traits. Biologically based experiences of the self are significant components of a person’s identity. Knowledge about ones [sic]

16. Jean Benward et al., *Maximizing Autonomy and the Changing View of Donor Conception: The Creation of a National Donor Registry*, 12 DEPAUL J. HEALTH CARE L. 225, 226–27 (2009).

17. *Id.* at 227.

18. Laura Shanner & Jeffrey Nisker, *Bioethics for Clinicians: 26 Assisted Reproductive Technologies*, 164 CAN. MED. ASS’N J. 1589, 1590 (2001).

19. Dena Moyal & Carolyn Shelley, *Articles from the World Congress: Future Child’s Rights in New Reproductive Technology: Thinking Outside the Tube and Maintaining the Connections*, 48 FAM. CT. REV. 431, 436–37 (2010).

20. *Id.* at 437.

genealogy is knowledge about oneself.”²¹ A study by the Institute of American Values compared the psychosocial well-being of donor offspring, adopted children, and biological children.²² According to the study, approximately half of the donor offspring surveyed reported that it made them sad to see their friends with their biological parents.²³ The study also revealed that donor offspring struggle with understanding their origins and identities and are more likely than biological children to report instances of substance abuse and problems with the law.²⁴

Testimonies given by donor offspring illustrate the struggles they face by not having access to information about their genetic histories. One donor offspring explained that when children are told they have their father’s eyes, mother’s laugh, or grandma’s strength, they build a strong internal impression of who they are. Not having this type of information can be painful: “[W]hen you are raised in a family with different genetic origins nobody tells you that you have your dad’s eyes, and the face in the mirror doesn’t belong to anyone.”²⁵ Another donor-conceived child stated:

We didn’t ask to be born into this situation, with its limitations and confusion. It’s hypocritical . . . to assume that biological roots won’t matter to the ‘products’ of the cyrobanks’ service when the longing for a biological connection is what brings customers to the banks in the first place.²⁶

Psychologists A.J. Turner and A. Coyle conducted a study to explore how donor offspring feel about their conception, difficulty in obtaining information about their biological history, and efforts to make contact with their missing “‘father.’”²⁷ The donor offspring surveyed from the United Kingdom, United States, Canada, and Australia reported “feeling alienated from their families, startled and disoriented by the discovery of their donor

21. Benward et al., *supra* note 16, at 232.

22. Elizabeth Marquard et al., *My Daddy’s Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation*, 2010 INST. ON AM. VALUES 5.

23. *Id.* at 7.

24. *Id.* at 7–9.

25. SUZANNE BENNET, LET THE OFFSPRING SPEAK: DISCUSSIONS ON DONOR CONCEPTION 138 (1997).

26. Moyal & Shelley, *supra* note 19, at 437 (alteration in original) (internal quotation marks omitted).

27. Ellen Waldman, *What Do We Tell the Children?*, 35 CAP. U. L. REV. 517, 535 (2006). Generally, donor offspring seek information about their biological father because sperm donation is much more common than egg donation, and egg donation is more common between women who are related or at least know one another. See Jennifer A. Baines, Note, *Gamete Donors and Mistaken Identities: The Importance of Genetic Awareness and Proposals Favoring Donor Identity Disclosure for Children Born From Gamete Donations in the United States*, 45 FAM. CT. REV. 116, 117 (2007).

status, and haunted by the spectral ‘father’ they would never know.”²⁸ The researchers noted that participants had a “profound desire” to learn about their genetic origins, and had a “perceived loss of agency or self-efficacy because of the obstruction they faced in trying to search for and obtain identifying information about their donor fathers.”²⁹

In addition to the mental and psychological struggles faced by donor-conceived offspring, a lack of information about genetic origins may cause physical health concerns. Genetics have begun to play a more significant role in the diagnosis and treatment of disease, and it is therefore becoming more important for individuals to have information about their genetic histories.³⁰ Those who oppose donor anonymity argue that donor offspring should have access to their donor’s medical information to determine if there is a chance that the offspring will develop a genetically inherited disease.³¹ Denying donor offspring the opportunity to obtain this information denies them the ability to be proactive about their health. Genetics play such an important role that some clinicians actually believe that it is “ethically unacceptable” for people to be denied information about their identity.³² Lastly, “[a]lthough it may sound initially far-fetched, incest between donor siblings actually proves to be a genuine concern for donor-conceived children.”³³ When there is little regulation of the donor industry, clinics regulate themselves and can choose whether or not to set limits on the number of times an individual can donate his/her gametes.³⁴ Therefore, a single donor can be the biological parent of multiple children. A search on the Donor Sibling Registry has revealed that one Cryobank sperm donor is the biological father of at least thirty-six children, and that number just accounts for the children that have registered on the website.³⁵ Such

28. Waldman, *supra* note 27, at 537.

29. *Id.* (internal quotation marks omitted).

30. Dennison, *supra* note 3.

31. *Id.* The information sought by donor offspring can be critically important to their health because “[f]amily health history facilitates the prevention, diagnosis, and treatment of disease and assists in reproductive planning. . . . [G]enetic information has the potential to aid in the prevention, early detection, presymptomatic diagnosis, and treatment of thousands of inherited diseases.” Naomi Cahn, *No Secrets: Openness and Donor-Conceived “Half-Siblings,”* 39 CAP. U. L. REV. 313, 332–33 (2011).

32. Naomi D. Johnson, *Excess Embryos: Is Embryo Adoption a New Solution or a Temporary Fix?*, 68 BROOK. L. REV. 853, 874–75 (2003) (quoting SUSAN LEWIS COOPER & ELLEN SARASOHN GLAZER, CHOOSING ASSISTED REPRODUCTION: SOCIAL, EMOTIONAL AND ETHICAL CONSIDERATIONS 24 (1998)).

33. Dennison, *supra* note 4, at 15.

34. *Id.*

35. *Id.* at 15–16. Cryobank is located in Denmark.

alarming statistics sustain the fear faced by many donor offspring that they will unknowingly commit incest with a half-sibling.

While many arguments supporting a ban on donor anonymity exist, there are also many arguments made in support of anonymous gamete donation. The main arguments raised by those who support donor anonymity are that abolishing it would decrease the supply of donors, that unwanted contact from donor-conceived offspring or the donors themselves could disrupt the privacy of the donor or offspring and his/her family, and that it is actually in the donor offspring's best interest not to have access to this information.³⁶ A shortage of donor gametes is a cause of concern, especially as fewer single women are giving up their children for adoption. Proponents of donor anonymity argue that fewer individuals will be willing to donate if they know that identifying information will be revealed to any offspring conceived from the use of their gametes. Some studies have claimed that half of the egg and sperm donors would not donate if anonymity were banned.³⁷ Studies argue that "[a]lthough a [sperm] donor may donate with the non-pecuniary intentions to help women and couples unable to have children any other way, he may not be comfortable with the idea that a child conceived with his sperm may contact him at any unexpected moment in his life."³⁸ Data on the availability of donor gametes in Sweden, the Australian state of Victoria, and the United Kingdom—all of which have enacted bans on donor anonymity—have revealed that the prohibition on anonymity appears to have at least played some role in the creation or enhancement of a shortage of donor gametes.³⁹ The scarcity of donor gametes has both individual and social ramifications.⁴⁰ It "extends the pain of infertility"⁴¹ and "exacerbates the low birth rate problem," especially in many European countries.⁴²

In addition to exacerbating the shortage of donor gametes, others argue that a prohibition on donor anonymity would not be in donor-conceived children's best interest. For example, some parents fear that telling their donor-conceived child about his/her conception will cause social and

36. Eric Blyth & Abigail Farrand, *Anonymity in Donor-Assisted Conception and the UN Convention on the Rights of the Child*, 12 INT'L J. CHILD. RTS. 89, 92 (2004).

37. Naomi Cahn, *Necessary Subjects: The Need for a Mandatory National Donor Gamete Registry*, 12 DEPAUL J. HEALTH CARE L. 203, 215 (2009).

38. Vanessa L. Pi, Note, *Regulating Sperm Donation: Why Requiring Exposed Donation is Not the Answer*, 16 DUKE J. GENDER L. & POL'Y 379, 395 (2009).

39. Gaia Bernstein, *Regulating Reproductive Technologies: Timing, Uncertainty, and Donor Anonymity*, 90 B.U. L. REV. 1189, 1213 (2010).

40. *Id.* at 1214.

41. *Id.*

42. *Id.* at 1215.

psychological struggles.⁴³ Some parents may keep information about how their child was conceived private from others, including some of their own family members, in order to have a “normal” family. Unlike adoption, it is easier to pretend that a donor-conceived child is actually the biological child of both parents if the mother actually carried and gave birth to the baby.⁴⁴ Therefore, some parents may fear that if the child is told that he/she was conceived through the use of donor gametes, other family members will find out and the extended family—previously unaware of the child’s genetic origins—might disapprove of, or possibly even reject, the child.⁴⁵ Some parents abstain from telling donor-conceived children about their origins because they are unsure of the best time and method of telling them, while others emphasize the greater importance of the social—rather than biological—aspects of parenting and believe that there is no need to explain the child’s genetic origin.⁴⁶ Other general rationales for non-disclosure given by parents include “the right to keep their infertility private, the need to protect a family member or the couple’s relationship, a desire to be ‘normal,’ and a fear that disclosure would somehow hinder the parent-child relationship and/or otherwise negatively affect the child.”⁴⁷ While there are arguments that both support and disapprove of donor anonymity, there are many donor-conceived individuals that desire information about their donors and—as the *Pratten* case demonstrates—have begun to assert a legal right to obtain such information.

II. *PRATTEN V. BRITISH COLUMBIA*

On May 19, 2011, a decision from the Supreme Court of British Columbia held that donor-conceived offspring have the right to obtain identifying information about their donors.⁴⁸ A close examination of the case and the current status of the law in the United States may reveal the possibility of a similar case being brought in the United States. Naomi Cahn, a George Washington University law professor, explains that the Canadian ruling has given energy to the donor-conceived movement in the United

43. Susan Golombok et al., *Parenting Infants Conceived by Gamete Donation*, 18 J. FAM. PSYCHOL. 443, 444 (2004).

44. This is assuming that the child was not conceived and born through the use of a surrogate and that the social mother carried the child.

45. Lucy Frith, *Gamete Donation and Anonymity: The Ethical and Legal Debate*, 16 HUM. REPROD. 818, 822 (2001).

46. Baines, *supra* note 27, at 119.

47. Moyal & Shelley, *supra* note 19, at 435.

48. *Pratten v. British Columbia* (Att’y Gen.) 2011 BCSC 656, para. 335 (Can. B.C.).

States and that she “think[s] it is likely that someone will bring something forward . . . in the next five years.”⁴⁹ The plaintiff, Olivia Pratten, was conceived through the use of sperm from an anonymous donor and never had access to any information about her biological father.⁵⁰ When the physician who performed the insemination through which Pratten was conceived retired, he destroyed all medical records pertaining to the plaintiff’s donor.⁵¹ According to the College of Physicians and Surgeons of British Columbia, the physician was under no obligation to keep records for a patient for more than six years after the last entry was recorded.⁵² The plaintiff brought suit alleging that the government of British Columbia permitted the destruction of the medical records, “thereby depriving her of basic personal information that is necessary for her physical and psychological health.”⁵³ She claimed that donor offspring have been discriminated against because British Columbia’s adoption laws preserve information about the genetic history of adopted children and provide ways for adopted children to access this information, and no such laws exist pertaining to the genetic history of donor offspring.⁵⁴ British Columbia’s adoption laws include the Adoption Act⁵⁵ and the Adoption Regulation,⁵⁶ which give adopted children the right to obtain the type of information that the plaintiff had been deprived of.⁵⁷ The Adoption Act allows any and all information that is available in an adoption record to be disclosed to an adopted child once he/she reaches the age of majority.⁵⁸

The plaintiff brought the discrimination claim under section 15(1) of the Canadian Charter of Rights and Freedoms (Charter),⁵⁹ which forms part of the Canadian Constitution. Section 15(1) provides that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without

49. See Alison Motluk, *Canadian Court Bans Anonymous Sperm and Egg Donation*, NATURE NEWS, May 27, 2011, <http://www.nature.com/news/2011/110527/full/news.2011.329.html>.

50. *Pratten*, 2011 BCSC, para. 1.

51. *Id.* para. 2.

52. *Id.*

53. *Id.*

54. *Id.* para. 3.

55. Adoption Act, R.S.B.C. 1996, c. 5 (Can.).

56. Adoption Regulation, B.C. Reg. 291/96 (Can.).

57. *Pratten*, 2011 BCSC, para. 3.

58. Angela Cameron et al., *De-Anonymising Sperm Donors in Canada: Some Doubts and Directions*, 26 CAN. J. FAM. L. 95, 137 (2010).

59. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 § 15(1) (U.K.); *Pratten*, 2011 BCSC, para. 6.

discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁶⁰ The court agreed with Pratten and held that there was in fact a section 15 violation.⁶¹ Justice Adair explained that excluding donor offspring from the Adoption Act and Adoption Regulation creates a distinction between adoptees and donor offspring and that such distinction is discriminatory because it “creates a disadvantage to donor offspring by perpetuating stereotypes about [them].”⁶² Such stereotypes include the belief that because donor offspring were “wanted” they do not desire information about their biological histories or suffer mentally and emotionally when they are deprived of this information.⁶³

Such stereotypes are simply not true. Olivia Pratten described her life experience as “living with a number of highly personal questions that [were] never answered.”⁶⁴ She said that when she notices people who resemble her, she wonders if they are her siblings.⁶⁵ She fears that without information about her biological history her health will be compromised or she will be unaware of genetic diseases that she could potentially pass on to her children.⁶⁶ Lastly, she worries that an individual she becomes romantically involved with could wind up being genetically related to her.⁶⁷ Ms. Pratten explained that the lack of knowledge about her origins leaves her feeling “incomplete and medically more vulnerable.”⁶⁸ Justice Adair expressly concluded that based on the evidence, “assisted reproduction using an anonymous gamete donor is harmful to the child, and it is not in the best interests of donor offspring.”⁶⁹ According to an article from the Canadian Press, Pratten’s attorney, Joseph Arvay, stated that “[the] case represents a monumental victory for our client, Olivia Pratten, and all the donor offspring she represents who have for too long been disadvantaged by their exclusion from the legislative landscape which has promoted and perpetuated prejudice

60. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 § 15(1) (U.K.); *Pratten*, 2011 BCSC, para. 218.

61. *Pratten*, 2011 BCSC, para. 269.

62. *Id.* para. 268.

63. *Id.* para. 253.

64. *Id.* para. 41.

65. *Id.*

66. *Id.* para. 42.

67. *Id.* para. 43.

68. *Id.*

69. *Id.* para. 215.

and stereotyping and caused them grave harm.”⁷⁰ Although the decision will not be able to help Pratten discover the information she has been deprived of, it could prevent future donor offspring from experiencing her personal struggles. Her case could give donor offspring in British Columbia the same rights as adopted children to access information about their biological history and genetic heritage, and could prompt other donor offspring to pursue similar lawsuits in their own provinces.

While the *Pratten* decision marks a victory for Olivia Pratten and other donor offspring in British Columbia, the decision is not yet final. According to an article from the *Vancouver Sun*, British Columbia has appealed the decision.⁷¹ The government will argue that the trial judge erred in her determination that British Columbia’s adoption laws were discriminatory and therefore unconstitutional.⁷² The Attorney General of British Columbia issued a statement explaining that “[t]he B.C. government is appealing the Pratten decision because it raises important constitutional principles that extend beyond this particular case.”⁷³ However, the British Columbia government has also stated that it plans to establish a program for donor offspring to address the concerns raised by Pratten.⁷⁴

III. ADOPTION AND DONOR ANONYMITY LAWS IN THE UNITED STATES

Just as the individual provinces in Canada regulate adoption, adoption is entirely regulated by state statute in the United States.⁷⁵ Adoption “is a legal process by which a set of parents, usually the birth parents, is replaced by another set of parents, who thereby become the legal parents and assume the rights and responsibilities of the natural parents.”⁷⁶ Adoption creates a legal severance of ties between the birth parents and the child. While the majority of current adoption statutes mandate anonymity,⁷⁷ this was not always the

70. The Canadian Press, *B.C. Judge Says Anonymity for Sperm, Egg Donors is Unconstitutional*, VANCOUVER OBSERVER, May 19, 2011, <http://www.vancouverobserver.com/world/canada/2011/05/19/bc-judge-says-anonymity-sperm-egg-donors-unconstitutional>.

71. Neal Hall, *B.C. Government Appeals Landmark Sperm Donor Ruling*, VANCOUVER SUN, June 17, 2011, <http://www.vancouversun.com/health/government+appeals+landmark+sperm+donor+ruling/4966861/story.html>.

72. *Id.*

73. *Id.*

74. *Id.*

75. Baines, *supra* note 27, at 121.

76. *Id.*

77. See, e.g., Donaldson Report, *supra* note 11, at 10; Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 154 (2000).

case. In fact, the earliest adoption laws in the United States allowed for open inspection of adoption records.⁷⁸ Original records remained open until the 1930s and 1940s, when states altered their original approach to adoption records and began to issue entirely new birth certificates to adoptees.⁷⁹ For a limited period of time the original birth certificate remained accessible to the adoptee, while other individuals could access only the revised birth certificate that listed the adoptive parents rather than the birth parents.⁸⁰ Soon thereafter, original birth information was withheld from all individuals, including the adopted child.⁸¹ This shift in the law has been attributed to “deepening stigmas of illegitimacy and infertility which emerged from the post World War II baby-boom atmosphere, and emerging psychiatric anxieties over the mental health of unmarried mothers.”⁸²

Recently a counter-movement has emerged that seeks to reverse the trend of sealed adoption records and grant adoptees access to their original birth certificates upon reaching adulthood. Since the 1970s, adoptees have sought access to their original birth records, challenged the secrecy of their birth certificates, and pressured states to disclose their original birth certificates with the names of their biological parents.⁸³ As a result, six states, including Alabama,⁸⁴ Delaware,⁸⁵ Maine,⁸⁶ New Hampshire,⁸⁷ Oregon,⁸⁸ and

78. Caroline B. Fleming, Note, *The Open-Records Debate: Balancing the Interests of Birth Parents and Adult Adoptees*, 11 WM. & MARY J. WOMEN & L. 461, 461–62 (2005).

79. See, e.g., Donaldson Report, *supra* note 11, at 9; Cahn & Singer, *supra* note 77, at 155.

80. See Donaldson Report, *supra* note 11, at 9–10; Cahn & Singer, *supra* note 77, at 155.

81. Brent J. Clayton, Note, *How Much Do You Need To Know About Yourself? Why Utah Should Start Letting More Adult Adoptees Decide*, 10 J. L. & FAM. STUD. 421, 422–23 (2008).

82. *Id.*

83. Cahn & Singer, *supra* note 77, at 157.

84. Original birth certificates are made available to adoptees age eighteen or older upon request, and birthparents may file a non-binding Contact Preference Form, requesting direct contact, contact through an intermediary, or no contact at all. Donaldson Report, *supra* note 11, at 11.

85. Original birth certificates are also available to adult adoptees upon request, but birthparents may file a veto against disclosure. If such veto is filed the birth certificate will not be released. *Id.*

86. As of January 1, 2009, adult adoptees have the right to obtain copies of their original birth certificates, and birthparents may file a non-binding preference form. *Id.*

87. Original birth certificates are available to adoptees age eighteen or older upon request, and birth parents may file a non-binding Contact Preference Form. *Id.*

88. Original birth certificates are available to adult adoptees upon reaching the age of twenty-one. *Id.* Birth parents have the right to file a Consent Preference Form and indicate whether they prefer to be contacted directly, to be contacted through an intermediary, or not to be contacted at all. Baines, *supra* note 27, at 123. If birth parents indicate that they would not like to be contacted at all they will be required to file an updated medical history. *Id.*

Tennessee,⁸⁹ have revised their laws to grant adopted adults “direct access to their birth records and/or adoption records.”⁹⁰ Two other states, Kansas and Alaska, never closed their records.⁹¹ While adoption is entirely regulated by the states, and a number of them now grant adopted individuals access to their adoption records and information about their biological parents, Washington is the only state that regulates assisted reproduction and prohibits anonymous sperm and egg donations.

On July 22, 2011, Washington passed a controversial new law that guarantees children conceived through the use of donor gametes from Washington sperm banks and egg donation agencies have access to their donors’ medical histories and full names upon reaching the age of eighteen unless the donors specifically opted out of their identification being released.⁹² As Time Magazine author Bonnie Rochman explains, “although Washington doesn’t go as far as Sweden, Austria, or the United Kingdom, which abolished anonymous donations, it’s still a significant step for many parents of donor-conceived children who yearn to answer that question most kids ask at one time or another: where did I come from?”⁹³ Although donors do have the ability to opt out of having their information released, Washington’s law still demonstrates a shift toward the availability of identifying information for donor-conceived offspring. Access to information will now be considered the rule in Washington with the opt-out provision being the exception, whereas access to information about gamete donors is the rare exception in the majority of states.

IV. EQUAL PROTECTION CONSIDERATIONS

Inconsistency in the laws of states which grant access to identifying information to adoptees, but not donor-conceived offspring, could potentially give rise to an equal protection claim on the part of donor offspring. In other words, a case similar to *Pratten* could potentially be brought in the United States. The Fourteenth Amendment to the United States Constitution sets forth the following:

89. Adoption records are made available to adult adoptees over the age of twenty-one, and birth parents can record their willingness or unwillingness to be contacted through a contact veto registry. TENN. CODE ANN. § 36-1-127 (1998). The veto is binding and if it is violated a person will be subject to criminal penalties; however, the veto does not prevent the release of the birth parent’s identity. Baines, *supra* note 27, at 123.

90. Donaldson Report, *supra* note 11, at 11.

91. *Id.*

92. Rochman, *supra* note 8.

93. *Id.*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁹⁴

The Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike,”⁹⁵ and concerns state action that has the effect of singling out certain persons or groups for special benefits or burdens.⁹⁶ A state that treats one group differently than others must justify both why the group receives special treatment and the importance of the state interest involved.⁹⁷ To distinguish persons as “dissimilar” there must be some permissible basis that advances the legitimate interests of society⁹⁸ as established by the purpose of the legislation. Whether there is a permissible basis and sufficient justification for the classification depends on the type of discrimination involved, which in turn will determine the level of judicial scrutiny employed by the court. The United States Supreme Court analyzes equal protection claims using one of three standards of review: the rational basis test or minimal judicial scrutiny, intermediate scrutiny, and strict scrutiny.

A. *Standards of Review*

Under the rational basis test, a classification will be upheld as long as it is rationally related to a legitimate government purpose.⁹⁹ The Court will uphold the classifications set forth in the law to achieve the legitimate government purpose unless it “cannot conceive any grounds on which to justify them,”¹⁰⁰ or the classifications are based on criteria that are “wholly unrelative to the objective of [the] statute.”¹⁰¹ The Supreme Court has explained that “[o]ne who assails the classification in such a law must carry

94. U.S. CONST. amend. XIV, § 1.

95. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

96. *See, e.g., Romer v. Evans*, 517 U.S. 620, 620–21 (1996); *Cleburne*, 473 U.S. at 440.

97. *See, e.g., Romer*, 517 U.S. at 621; *Craig v. Boren*, 429 U.S. 190, 197 (1976).

98. *Craig*, 429 U.S. at 199–200.

99. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175, 177 (1980); *Allied Stores v. Bowers*, 385 U.S. 522, 527 (1959).

100. Ann M. Reding, Note, *Lofton v. Kearney: Equal Protection Mandates Equal Adoption Rights*, 36 U.C. DAVIS L. REV. 1285, 1293 (2003).

101. *Reed v. Reed*, 405 U.S. 71, 75–76 (1971).

the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.”¹⁰² The Court has also explained that equal protection “is offended only if a classification rests on grounds wholly irrelevant to the achievement of the State’s objective. . . . [S]tatutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.”¹⁰³ The rational relationship test is highly deferential to the state, and laws are rarely declared unconstitutional for failing to satisfy this level of judicial review.¹⁰⁴

The second type of judicial review is strict scrutiny. Under strict scrutiny a law will be upheld if the state is able to prove that the law is necessary to achieve a compelling governmental purpose.¹⁰⁵ The state must present a significant reason for the classification that is set forth in the law. Additionally, it must show that it cannot achieve its objective through any less discriminatory manner, because if the law is not the least restrictive alternative then it is not “necessary” to accomplish the government’s objective.¹⁰⁶ The burden of proof rests with the state, and when applying strict scrutiny the Court will not defer to the state legislature, but will instead independently determine whether the law is necessary to achieve a legitimate government purpose.¹⁰⁷ The Court utilizes the strict scrutiny test when reviewing legislation that distinguishes people upon a suspect basis and it is likely that the classification reflects prejudice rather than a permissible government purpose.¹⁰⁸ The Court has emphasized that classifications based on immutable characteristics such as one’s race, national origin, gender, and

102. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78–79 (1911).

103. *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961).

104. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 623 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985); *Zobel v. Williams*, 457 U.S. 55, 65 (1982); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533–34 (1973).

105. *See, e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

106. *See, e.g.*, *Simon & Schuster, Inc. v. N.Y. Crime Victims Bd.*, 502 U.S. 105 (1991).

107. *Miller v. Johnson*, 515 U.S. 900, 919–21 (1995); *Burson v. Freeman*, 504 U.S. 191, 198–99 (1992); *City of Richmond v. Croson*, 488 U.S. 469 (1989).

108. *See Cleburne*, 473 U.S. at 440.

[W]hen a statute classifies by race, alienage, or national origin[, t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

Id.

the marital status of one's parents all warrant heightened judicial scrutiny.¹⁰⁹ These classifications are often referred to as "suspect" classes.

The final type of judicial review is referred to as the intermediate test or intermediate standard of review. Intermediate scrutiny is not as difficult to meet as strict scrutiny, but involves less deference to the state than the rational basis test. Under the intermediate standard of review, a law will be upheld if it is substantially related to an important or substantial government purpose.¹¹⁰ The state does not need to establish that its purpose is compelling, but the Court still must characterize the government's objective as important in order to withstand intermediate scrutiny. The Supreme Court has explained that under intermediate scrutiny the "burden of justification is demanding and it rests entirely on the State."¹¹¹ The Supreme Court has used this standard of review in cases involving gender¹¹² and illegitimacy classifications.¹¹³ The classifications for which the Court will apply intermediate scrutiny are often referred to as "quasi-suspect" classes. Courts will generally recognize additional classes as suspect or quasi-suspect and apply heightened scrutiny if an analogy can be drawn between classes that were previously judicially recognized as being suspect or quasi-suspect and the class being presently considered.¹¹⁴ Factors that the Court will consider in determining whether such an analogy exists include "whether the trait upon which the classification is based is an immutable trait, whether the class can be defined as a discrete and insular minority, and whether the class has been subjected to a history of state-sanctioned discrimination."¹¹⁵ The two original suspect classes are race and national origin. Therefore, the more analogous the class being presently considered is to race or national origin, the more likely that the Court will apply heightened scrutiny.

B. *Fundamental Rights*

An equal protection analysis is most often used to analyze government actions that draw distinctions or create classifications among people based on

109. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980); *Kahn v. Shevin*, 416 U.S. 351, 355 (1974).

110. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Lehr v. Robertson*, 463 U.S. 248, 266 (1983).

111. See *United States v. Virginia*, 518 U.S. 515, 533 (1996).

112. See *Craig*, 429 U.S. at 197.

113. See *Clark v. Jeter*, 486 U.S. 456 (1988).

114. Jennifer R. Racine, Comment, *A Fundamental Rights Debate: Should Wisconsin Allow Adult Adoptees Unconditional Access to Adoption Records and Original Birth Certificates?*, 2002 WIS. L. REV. 1435, 1445.

115. *Id.*

specific characteristics.¹¹⁶ However, equal protection is also used if the government is discriminating among people in the exercise of a fundamental right.¹¹⁷ When the Court determines that a fundamental right has been violated it will apply a heightened level of scrutiny, but if a right is not deemed to be fundamental, only the rational basis test will need to be satisfied.¹¹⁸ A right does not need to be explicitly or expressly set forth in the Constitution or its Amendments for the Court to determine that a right is fundamental. For example, the United States Supreme Court has determined that the right to privacy is a fundamental right, even though the right to privacy is not expressly set forth in the Constitution.¹¹⁹

When a right is not expressly set forth in the Constitution but the Court nonetheless finds that such right is a fundamental right, the Court concludes that the right should be protected as part of the “liberty” rights protected by the Fifth and/or Fourteenth Amendments. The Court has recognized a wide variety of fundamental rights that are not expressly set forth in the Constitution, which often involve an individual’s right to make decisions about highly personal matters. Rights that the Court has deemed to be fundamental under the right to privacy include the right to use contraceptives,¹²⁰ the right to procreate and not be sterilized,¹²¹ to marry,¹²² obtain an abortion,¹²³ educate one’s children,¹²⁴ raise one’s children and maintain a relationship with them,¹²⁵ and the right to care for, have custody of, and control the upbringing of one’s children.¹²⁶

The method used by the Court to determine whether a particular right is fundamental is unclear and implicates issues surrounding the debate over how the Constitution should be interpreted by the Supreme Court. For example, originalists believe that fundamental rights are those explicitly

116. *Equal Protection: An Overview*, CORNELL U. L. SCH. (Aug. 19, 2010, 5:15 PM), http://www.law.cornell.edu/wex/equal_protection.

117. *Id.*

118. *Id.*

119. *See* *Griswold v. Connecticut*, 381 U.S. 479 (1965) (declaring that a state law that prohibited the use and distribution of contraceptives was unconstitutional as a violation of a fundamental right).

120. *Id.* at 485–86.

121. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (declaring that a mandatory sterilization law was unconstitutional as a violation of a fundamental right, and explaining that marriage and procreation are “basic civil rights of man”).

122. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

123. *Roe v. Wade*, 410 U.S. 113, 152–55 (1973).

124. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

125. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

126. *Troxel v. Granville*, 530 U.S. 57, 66–67 (2000).

stated in the text of the Constitution and that it is improper for the Court to declare any other rights fundamental.¹²⁷ On the other hand, non-originalists believe that it is permissible for the Court to attempt to protect fundamental rights not expressly set forth in the Constitution.¹²⁸ When determining whether a right should be deemed a fundamental right, the Court has often looked to history and tradition and explained that fundamental rights are those liberties that are “deeply rooted in this Nation’s history and tradition.”¹²⁹ In the case of *Washington v. Glucksberg*, the Supreme Court looked to history and tradition and rejected the claim that a law prohibiting assisted suicide violated a fundamental right.¹³⁰ Justice Rehnquist wrote for the majority that “for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.”¹³¹ Some Justices rely on “reasoned judgment” and consider whether certain interests are of such importance to society that they should be deemed to be fundamental rights.¹³² It is also significant that the Court has never described economic rights as fundamental, and when considering the nature of a particular decision at issue, the Court has been more likely to find that personal, intimate, and life-defining rights, such as the right to marry or procreate, are fundamental rights.

C. *Equal Protection and Donor-Conceived Offspring*

Donor offspring in the states that grant adoptees full access to information pertaining to their genetic origin but do not grant similar rights to donor offspring would seek to have the Court apply a heightened-level of scrutiny when determining whether the state’s classification and disparate treatment of adoptees and donor-conceived offspring violates equal protection. Therefore, donor offspring would argue that they are members of a suspect or quasi-suspect class, or that the right to access information pertaining to one’s genetic origin is a fundamental right. If donor-conceived offspring were not successful in establishing that the Court should apply strict or intermediate scrutiny, it is unlikely that the laws of the states that grant adoptees the right to access their adoption records without providing

127. See Eric A. Posner, *Why Originalism Is So Popular*, THE NEW REPUBLIC, Jan. 14, 2011, <http://www.tnr.com/article/politics/81480/republicans-constitution-originalism-popular#>.

128. *Id.*

129. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

130. *Washington v. Glucksberg*, 521 U.S. 702, 711 (1997).

131. *Id.*

132. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

donor-conceived offspring the right to receive identifying information about their donors would be deemed to be an unconstitutional violation of equal protection. This is because the rational basis test is deferential to the state legislatures.

Adoptees seeking to have access to their original birth certificates have brought equal protection claims and tried to convince courts to apply heightened scrutiny by arguing that they are members of a suspect or quasi-suspect class and that there is a fundamental right to access information in original birth certificates.¹³³ However, when comparing adoptees to non-adoptees, courts have refused to recognize adoptees as members of a suspect or quasi-suspect class, and in the 1970s adoptees unsuccessfully challenged the constitutionality of sealed adoption records in two class action lawsuits.¹³⁴ In 1975, an adoptee activist group in Illinois known as Yesterday's Children initiated a class action case claiming that sealed records violated adoptees' constitutional rights under the First, Fifth, Ninth, Thirteenth, and Fourteenth Amendments.¹³⁵ However, the District Court abstained from deciding the case and the Seventh Circuit upheld that abstention.¹³⁶ In 1977, a New York adoptee activist group known as ALMA filed another class action suit and claimed violations under the First, Fourth, Ninth, Thirteenth, and Fourteenth Amendments.¹³⁷ Part of the claim was that sealed records discriminate against adoptees—members of a suspect class.¹³⁸ The Second Circuit upheld a district court ruling against ALMA and the United States Supreme Court denied certiorari.¹³⁹ Lastly, at least one court has held that adopted status is not an immutable trait because a person's status as an adoptee is a product of the legal system as opposed to a product of his/her birth.¹⁴⁰

The court rulings in adoption cases do not necessarily mean that courts would not apply heightened scrutiny to an equal protection claim brought by donor offspring by holding that they are members of a suspect or quasi-suspect class or that the right to receive information about one's genetic origin is a fundamental right. Donor offspring could establish that they are

133. See *Yesterday's Children v. Kennedy*, 569 F.2d 431 (7th Cir. 1977); *ALMA Soc'y, Inc. v. Mellon*, 459 F. Supp. 912, 917 (S.D.N.Y. 1978), *aff'd sub nom. Rhodes v. Laurino*, 601 F.2d 1239 (2d Cir. 1979).

134. *Racine*, *supra* note 114, at 1444.

135. *Yesterday's Children*, 569 F.2d at 431–32.

136. *Id.* at 436.

137. *ALMA Soc'y*, 459 F. Supp. at 914.

138. *Id.* at 915.

139. *Id.* at 917; *ALMA Soc'y, Inc. v. Mellon*, 444 U.S. 995 (1979).

140. See *Mills v. Atlantic City Dep't of Vital Statistics*, 372 A.2d 646, 653 (1977).

members of a suspect or quasi-suspect class by arguing that a person's status of being donor-conceived is an immutable trait because donor offspring have no control over how they were conceived and cannot change the way they were conceived. In the *Pratten* case, the court ruled that conception by anonymous gamete donation, like race, is a personal characteristic that is immutable, and that it is improper for the adoption laws to draw a distinction between adoptees and donor offspring based on an immutable trait.¹⁴¹ Because one's status as a donor offspring is a product of the way in which he/she was conceived rather than a product of the legal system, there may be a stronger argument that the status of being donor-conceived is an immutable trait. Donor offspring could also argue that they have been subject to a history of state-sanctioned discrimination. However, because assisted reproductive technologies have only existed since the late 1970s, it may be difficult to argue that donor offspring have been subject to a long history of discrimination.

Alternatively, if donor offspring are unable to establish that they are members of a suspect or quasi-suspect class, they could argue that the right to receive identifying information about one's genetic origin is a fundamental right, thus invoking heightened scrutiny. However, at this point in time "no court has ever declared that donor offspring have a fundamental right to [receive] identifying information about [their] donors."¹⁴² It might also be difficult to establish—by looking to history and tradition—that there is a fundamental right to receive identifying information about one's genetic origin when assisted reproductive technologies are so new. Still, there are arguments for why a court should recognize the right to receive information about one's genetic origin as a fundamental right. A donor-conceived individual's decision about whether or not to seek information about his/her gamete donor can be characterized as a personal, intimate, and life-changing decision. Donor offspring could argue that the nature of the decision to seek out such information is of the same personal and intimate nature as the decision about whether to marry, procreate, or raise one's children in a certain way, all of which have been characterized as fundamental rights.

Unless a court would apply heightened scrutiny to an equal protection claim brought by donor offspring it is unlikely that donor offspring in the United States would achieve the same result as the *Pratten* case and the state's disparate treatment of adoptees and donor offspring would be valid.

141. *Pratten v. British Columbia (Att'y Gen.)*, 2011 BCSC 656, para. 234 (Can. B.C.).

142. Julie L. Sauer, Comment, *Competing Interests and Gamete Donation: The Case for Anonymity*, 39 SETON HALL L. REV. 919, 937 (2009).

This is because the rational basis standard of review is so deferential to the state legislatures and legislation is presumed to be valid.¹⁴³ The Court would only need to determine that the distinction made between donor offspring and adoptees is rationally related to a legitimate state interest. The best interests of the child have consistently been the focus of adoption law in America,¹⁴⁴ and current adoption laws “reflect a set of policy choices that revolve around the overall goal of protecting the best interests of the child.”¹⁴⁵ The adoption system seeks out suitable parents for children whose own birth parents are unwilling or unable to raise them. Strict regulations are in place to protect the best interests of the child throughout the process, and while the institution of adoption equally benefits the adoptive parents, the state is concerned with promoting the interests of the child.

In recent years adoptees have asserted that they have a right to a “complete identity,” including access to their genetic origins and medical histories.¹⁴⁶ As a result, some state legislatures have been prompted to pass laws that give adoptees the right to obtain identifying information about their birth parents.¹⁴⁷ Such changes in the law indicate that some state legislatures have concluded that an adopted child’s best interests include the right to complete information about his or her personal identity and medical history.¹⁴⁸ States with open adoption statutes have recognized the unique

143. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

144. Lynne Marie Kohm, *Well Conference on Adoption Law: What’s My Place in this World? A Response to Professor Ellen Waldman’s What Do We Tell the Children?*, 35 CAP. U. L. REV. 563, 568 (2006) (citing WALTER WADLINGTON & RAYMOND C. O’BRIEN, *FAMILY LAW IN PERSPECTIVE* 198 (2001)).

145. Paula J. Manning, *Fifth General Issue of Gender and Sexuality Law: Baby Needs a New Set of Rules: Using Adoption Doctrine to Regulate Embryo Adoption*, 5 GEO. J. GENDER & L. 677, 712 (2004).

146. Adoptees, like donor-conceived offspring, have struggled with a lack of information about their genetic origins. Adoptees have higher rates of psychological treatment than non-adopted individuals, which can be attributed to more complex identity issues that are faced by adoptees. Cahn, *supra* note 31, at 319 (citing ADAM PERTMAN, *ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA* 85 (2000)). Upon reaching adulthood, adopted individuals often face substantial psychological obstacles because restricted access to their original birth certificates and adoption records hinders the individuals’ search for their personal identities. Susan Whittaker Hughes, Note, *The Only Americans Legally Prohibited from Knowing Who Their Birth Parents Are: A Rejection of Privacy Rights as a Bar to Adult Adoptees’ Access to Original Birth and Adoption Records*, 55 CLEV. ST. L. REV. 429, 432 (2007). When adopted individuals expend efforts to locate and access their original birth and adoption records it is primarily as a means to gain an understanding of their own personal identities and existence. *Id.* at 434–35. Helen Hill, an adult adoptee who played an instrumental role in the passage of Oregon’s law that grants adoptees access to their original birth certificates, explained above, describes a feeling of “core loneliness” that results from a “sense of humiliation and shame” that is created through sealed adoption records. Randall Sullivan, *The Bastard Chronicles: Part One: Helen Hill’s Crusade*, ROLLING STONE, Feb. 15, 2001, at 53.

147. Donaldson Report, *supra* note 11, at 12.

148. *Id.* at 13.

psychological struggles faced by adopted children when they are deprived of the opportunity to connect with their genetic histories, and have concluded that it is in their best interest to have access to their adoption records upon reaching an age of sufficient maturity to be able to handle such information.¹⁴⁹ The legislative purpose of such open adoption statutes can thus be said to provide access to necessary information to protect the psychological well-being of adopted individuals.

If the legislative purpose of open adoption statutes is in fact to promote the best interests of the adopted child, to determine whether equal protection is violated by a failure to provide such information to donor offspring it must be determined whether the distinctions between donor offspring and adoptees advance or are rationally related to such a legislative purpose. If adoption law reflects policy decisions made to protect the best interests of an existing child, the relevant question is whether the law should also be required to protect the same interests of future children who will be born through the use of assisted reproduction. Many similarities exist between adoption and assisted reproduction. Both allow for the creation of alternative families outside of the traditional marriage and biological context, and involve “self-conscious choices to become parents.”¹⁵⁰ Adoptees and donor-conceived offspring are also very similar in many respects. Although the circumstances of their birth may be different, individuals in both groups usually have one or two social parents and rarely know the identity of both biological parents. Although adoptees generally have no genetic relationship to either social parent whereas a donor offspring is usually genetically related to at least one parent, individuals in both groups struggle to establish their personal identities when they lack information about at least one half of their genetic makeup.

Donor-conceived children and adults, like adoptees, become angry and frustrated by lack of information about genetic parents and feel as though they are missing a piece of their personal identity. The desires of donor-conceived offspring to find the missing pieces and the personal struggles endured are the same as those experienced by adoptees who have asserted the right to a complete identity. However, in many states adoptees are the only ones given the rights necessary to overcome these struggles:

[L]awmakers, social workers, birth mothers, adoptees, and their advocates, have worked hard to dismantle adoption laws that originally promoted secrecy and denied adoptees access to their own birth records. . . . Children

149. *Id.*

150. Cahn, *supra* note 31, at 324–25.

created through collaborative reproduction, however, do not have the safeguards and protection of the adoption system; they will not be protected by longstanding adoption laws or the recent reforms.¹⁵¹

Still, with the rational basis test being highly deferential, it is likely that a court would find that the classification between donor offspring and adoptees is sufficiently related to the state's interest of protecting the best interests of adopted children.

Many differences also exist between the adoption system and assisted reproduction that the government could use to justify its adoption statutes without conferring similar rights on donor offspring. Adoption concerns the interests of existing children and "is a solution that solves the problem of a deserving child in need of parents and a family."¹⁵² On the other hand, the purpose of assisted reproduction is to solve the problem of individuals who cannot procreate naturally and merely desire to have a child. While adoption is concerned with serving the best interest of the child, gamete donation is arguably concerned with serving the interests of consumers who desire to become parents.¹⁵³ Adoption is a public institution subject to state oversight and is highly regulated, whereas assisted reproduction is largely unregulated and occurs privately in clinics or doctors' offices.¹⁵⁴ Donors' interests are protected by private contracts and gametes can be obtained through the private market with little to no oversight.¹⁵⁵ More secrecy tends to surround gamete donation than adoption, and while many parents disclose that their children are adopted, they tend to be much less likely to disclose that their children were conceived through gamete donation.¹⁵⁶

Lastly, the interests of the individuals affected by assisted reproduction and adoption are arguably different because donor-conceived offspring are typically raised by at least one genetically-related parent and perhaps may have genetically-related siblings, whereas adopted children typically do not live with anyone to whom they are genetically related.¹⁵⁷ The fact that a donor-conceived individual has a genetic relation to the family and "the fact that one parent bears and gives birth to the child may make the child seem

151. Manning, *supra* note 145, at 679.

152. Kohm, *supra* note 144, at 565.

153. Cahn, *supra* note 31, at 327.

154. Cahn, *supra* note 37, at 206.

155. *Id.*

156. Cahn & Singer, *supra* note 77, at 189.

157. Cahn, *supra* note 37, at 207.

more like the parents' 'own' than an adopted child would be."¹⁵⁸ While many adoptees struggle with questions about why their biological parents chose to give up their child, donor offspring do not have to face this particular issue.¹⁵⁹ State governments could point to the differences that exist between adoption and assisted reproduction to justify its laws that distinguish between the two groups: "Because the circumstances of assisted conception differ significantly from adoption, legislatures could arguably balance these competing rights differently but legitimately."¹⁶⁰

CONCLUSION

Donor-conceived offspring's ability to bring a successful equal protection claim in the United States and reach a result similar to that achieved by the plaintiff in the Canadian case of *Pratten v. British Columbia* depends entirely on the standard of review employed by a court when reviewing the laws of states that grant adoptees access to information about their genetic origins but do not grant the same information to donor offspring. Donor offspring would seek to achieve a heightened level of judicial scrutiny by claiming that they are members of a suspect or quasi-suspect class because their status of being donor-conceived constitutes an immutable trait, or that access to information about one's genetic origin is a fundamental right. However, similar arguments have been raised by adoptees seeking to have access to their original birth certificates and have been rejected by the courts. Perhaps judicial action is not the best way for donor offspring to attempt to obtain access to information about their donors in states that grant access to the same type of information to adult adoptees, particularly if they are unable to convince the court to apply heightened scrutiny.

Many similarities exist between donor offspring and adoptees, and constitutional law has not been the means by which adoptees have been successfully able to change the law:

Constitutional law has proved to be an awkward vehicle for articulating and evaluating the claims of adoptees to information about their biological families. Courts have unsuccessfully attempted to balance the rights of

158. Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 LAW & SOC'Y REV. 257, 259 (2002).

159. *Id.*

160. Elizabeth Siberry Chestney, Note, *The Right to Know One's Genetic Origin: Can, Should, or Must a State That Extends This Right to Adoptees Extend an Analogous Right to Children Conceived With Donor Gametes?*, 80 TEX. L. REV. 365, 378 (2001).

adoptees against those of their biological and adoptive parents, rather than recognizing and attempting to mediate the overlapping identity issues at stake.¹⁶¹

Legislative action is what has been successful in creating change in the realm of adoption law. Since constitutional law has not proven to be successful in changing adoption law to grant adoptees access to their original birth certificates, it is also unlikely to be successful in changing the law to confer additional rights on donor-conceived offspring to have access to similar information. A claim that constitutional law and judicial action is not the proper venue by which the law should grant donor offspring the right to receive identifying information about their donors is consistent with the originalist approach to judicial review. Also referred to as judicial modesty or judicial minimalism, this approach insists that the Court should be cautious when adjudicating issues pertaining to complex social issues.

Judicial minimalists insist that it is important for the Court to both respect precedent and recognize “the inherent limits on the judiciary’s ability to cure societal ills.”¹⁶² Those advocating this position argue that “the political principle that governmental policymaking . . . decisions as to which values among competing values shall prevail, and as to how those values shall be implemented, ought to be subject to control by persons accountable to the electorate.”¹⁶³ In other words, decisions pertaining to the values of society should be decided by the legislature rather than the Court.¹⁶⁴ The determination of whether individuals should have access to information about their genetic origins will arguably depend on society’s values and judgments about the importance of such information. Therefore, minimalists would argue that only the legislature and not the courts should appropriately decide the issue. They would argue that donor offspring should petition their legislators to encourage the passage of laws similar to the new law passed in Washington. Adoption laws could serve as a template for laws pertaining to families created through the use of donor gametes, and donor offspring could argue that “[i]f adopted children are now seen as having rights to genealogical information from their ‘missing parent,’ this recognition should

161. Cahn & Singer, *supra* note 77, at 153.

162. Caprice L. Roberts, Symposium, *Alternative Visions of the Judicial Role: Asymmetric World Jurisprudence*, 32 SEATTLE U. L. REV. 569, 575 (2009).

163. MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 9 (1982) (footnotes omitted).

164. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971) (“[A] court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society.”).

be extended to the interests of children conceived via third-party gametes. They too should be given the right to learn about the ‘missing piece’ of their family tree.”¹⁶⁵

Regardless of the means by which the change occurs, donor offspring should be entitled to receive the same information as adult adoptees in states such as Alaska and Kansas. Assisted reproductive technologies can be used to give the gift of parenthood to individuals or couples who would not otherwise be able to have children on their own. However, lawmakers must consider the best interests of the children who are ultimately created in addition to individuals’ desires to become parents. Lawmakers should abolish donor anonymity and recognize the fact that children conceived through the use of assisted reproduction and donor gametes come into being not only because of the choice and desire of their parents, but also through the actions of a third person,¹⁶⁶ the identity of whom the resulting child should have the right to know. Eliminating donor anonymity “would constitute social recognition of the fact that children come into the world through the actions of specific persons, which can now include both ‘intentional’ parents (those who plan their conception) and genetic providers.”¹⁶⁷ Abolishing donor anonymity is necessary to protect the best interests of those innocent individuals conceived through the use of assisted reproduction and the conscious decisions of both their social parents and gamete donors.

165. Waldman, *supra* note 27, at 532.

166. Shanley, *supra* note 158, at 268.

167. *Id.* at 268–69.