

ESSAY #2

**Public Policy 3000
Constitutional Issues**

**Fall 2002
Prof. Berry**

A. Instructions

- (1) **Sources:** You are not expected to conduct research outside of the course materials. If you do, be sure to include citations to any outside sources you use.
- (2) **Approach:** In developing your arguments, focus on showing your mastery of the assigned course materials (the Robinson text, the Georgia case, the provisions of the U.S. Constitution and of the Georgia Constitution that we've studied) that are relevant to the question. You should refer to these sources when, for example, they support your argument or when you want to distinguish the facts of this problem from the facts of a case in the materials, and so forth. But there's no need to expend any of your allotted 1000 words on extensive quotes—you can just refer to the relevant sources in shorthand and state the point in your own words, for example, "As the majority opinion in the Barnette case indicates . . ."
- (3) **Due date:** Monday, October 28, by 4:00 p.m.
- (4) **Mode of submission:** Either by hard copy in my mailbox in Room 110 DM Smith Building OR by email to roberta.berry@pubpolicy.gatech.edu (be sure to copy and paste as well as attach your essay).
- (5) **Word limit:** 1000 words.
- (6) **Late penalty:** One letter grade for every 24 hours late.
- (7) **Honor code:** Your work must be entirely your own. After you begin writing, you are not to consult with anyone else about the question.

B. Question

Several members of the Legislature of the State of Delta (a state of the United States) are concerned about an in vitro fertilization (IVF) clinic that has opened recently. A brochure for the clinic states that its services include fertilizing human eggs with human sperm, then growing the fertilized eggs through several cell divisions until they reach the "pre-embryo" stage. Clinic physicians then insert several pre-embryos into a woman's uterus; in about 50% of these attempts, one or two of the pre-embryos develop into newborn children. The brochure explains that clients can purchase sperm and eggs from the clinic's donor banks, or they can provide their own sperm and eggs for the IVF procedure, or they can purchase one and provide the other.

The legislators think it's fine for infertile married couples to make use of the services of an IVF clinic, but they have other concerns. For one, the clinic brochure depicts clients meeting with clinic counselors and physicians, and these clients appear to include not only couples, but women alone, men alone, and same-sex couples. The brochure also states that, for those clients who are unable—or who choose not to—gestate their children, the clinic can provide contact information for "surrogate mothers." As the brochure explains, clients can contract with these surrogate mothers to have clients' pre-embryos inserted in their uteruses, to then gestate the resulting children, and to then turn the children over to the clients. The brochure refers to State of Delta laws that regulate surrogacy contracts, including a law that permits surrogate mothers to elect to keep the children they gestate as their own if they feel unable to surrender them when the time comes (in this case, they must return the surrogacy contract fee to the clients).

The legislators consult the Legislature's Office of Legal Counsel (OLC), and are shocked when an OLC attorney reports, after researching State of Delta law, that none of the clinic's services appears to violate current law. The legislators decide to draft legislation to address the issues they are concerned about.

The legislators draw up three proposals and bring them to the OLC, explaining that they want to know whether any or all of these proposals, if enacted into law, might be struck down as unconstitutional under the U.S. Constitution or under the State of Delta Constitution*. Right now, their plan is to introduce either Proposal (1) or (2), and Proposal (3)—but their decision as to how to proceed will depend, in part, on the results of OLC's analysis. These are their three proposals, which consist of legislative findings followed by the prohibited conduct:

Proposal (1): In light of the serious problem in the State of Delta of unwed mothers who disproportionately draw upon the welfare and other social services of the state, and whose example encourages other single women to become pregnant out of wedlock, thereby increasing the drain on welfare and other social services, now therefore be it enacted that: It shall be unlawful for any IVF clinic doing business in this state to provide any of its services to any person who is not lawfully married.**

Proposal (2): In light of the serious problem in the State of Delta of fathers failing to provide their children with adequate support, both emotional and financial, or of abandoning their children altogether, and in light of the resulting harm to these children and drain upon the welfare and other social services of the State of Delta, now therefore be it enacted that: It shall be unlawful for any IVF clinic doing business in this state to provide any of its services to any single male client or any same-sex male couple.

Proposal (3): In light of the legitimate concern of the State of Delta in the moral welfare of its citizens and in light of the importance of the bond between mother and child throughout human history—as chief example of and anchor for the concepts of love, loyalty, and devotion—and in light of the threat to this bond posed by the example of mothers turning over their children to others pursuant to payment for their gestational services, now therefore be it enacted that: It shall be unlawful for any person to enter into or aid or abet the entering into of any contract of surrogacy to be performed in any part within this state.

You are a staff attorney in the OLC. Your supervising attorney asks you to take your pick of **any two** of the above proposals (she'll handle the other one) and analyze whether the proposals might be struck down under the U.S. Constitution or the State of Delta Constitution if the proposals were enacted into law and later challenged in court. Include the best arguments on both sides, and then offer your conclusions in a sentence or two.

*The State of Delta Constitution is identical, in all relevant respects, to the Constitution of the State of Georgia.

**The State of Delta recognizes lawful marriage only between heterosexual couples.