not need to say the last part out loud for us to hear it: *Haven't we done enough for you people?*

The last parallel I wanted to highlight today is the notion of returning the abortion question to the states. This aspect of the decision has gotten attention in the public discourse, and it is perhaps the most troubling if you stop to consider what comes next. *Plessy* spent a great deal of time emphasizing that its decision was only about Louisiana's choice to consign Homer Plessy to a separate, colored-only railroad car. This is not a railroad that travels across the country, the Court says. No, the train that Mr. Plessy was riding on had both of its termini within the state of Louisiana—and so, the Court says, this is Louisiana's business. What they want to do in their great state is up to them. If they want to say that Homer Plessy cannot ride alongside white people, *No harm, no foul.*

The premise of *Dobbs* is essentially the same: the notion that it is acceptable, and in fact preferable, to leave individual autonomy and dignity up to the states—as though the choice to recognize one's full humanity, and to *not* recognize one's full humanity, are entitled to equal dignity under our Constitution. That those choices are morally, constitutionally, and legally equivalent. The Constitution simply has nothing to say about which choice a state makes.

That, I think, is troubling, because when we look at Professor Delgado's work, writing in the context of the Court's race discrimination jurisprudence and the retreat from *Brown* reflected by the Court's affirmative action and minority contracting decisions, Professor Delgado posits that where the Court is going with race discrimination law is not only back to *Plessy*. We are in fact headed all the way back to *Dred Scott*. We have seen that timeline accelerate stunningly quickly in the context of abortion and reproductive freedom. Immediately after *Dobbs*, we have seen dozens of states act to ban abortion outright. We have now seen the introduction of a bill that would be a national ban on abortion. But national ban is a bit of a misnomer, because it is really only a ban in those states that are exercising what Justice Alito just said was their constitutional choice to protect the right to abortion.

That is the nature of the thing. Every advancement is met by, oftentimes, a more intense retraction and entrenchment of the forces of white supremacy and patriarchy. We are seeing that today happen at a disturbing pace as we awaken each day.

STATE SHOPPING FOR A BABY: A CALL FOR FEDERAL SURROGACY LEGISLATION

WENXIAO (KALEY) MI*

INTRODUCTION

The incredible strides made in the field of assisted reproductive technology (ART)[1] over the past several decades have helped countless individuals throughout the world actualize their dreams of starting a family using surrogacy. Social acceptance of surrogacy has also increased,[2] with many societies even welcoming the practice. Technological advancements and changing social norms have helped facilitate a growing need for surrogacy.

In response to the growing demand for and acceptance of surrogacy, American law has evolved to grapple with complex issues arising from this relatively new means of assisted procreation. The practice of surrogacy has always been controversial as it implicates substantial issues like parenthood, reproductive freedom, bodily autonomy, and commodification of reproductive capacity. The controversies surrounding surrogacy have shaped the legal framework's development, leaving surrogacy law in a confused state.

As of December 2023, the United States Congress has not enacted federal surrogacy laws. Instead, myriad state statutes and court decisions govern surrogacy in the United States. This fragmented legal system has fueled rampant forum shopping behavior: parents wanting a baby through surrogacy compare different states' laws and select the state that

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1 Although variations in the definition of ART exist, the Centers for Disease Control and Prevention (CDC) defined ART as "all fertility treatments in which either eggs or embryos are handled." DIV. REPROD. HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, 2015 ASSISTED REPRODUCTIVE TECHNOLOGY FERTILITY CLINIC SUCCESS RATES REPORT 3 (2017).

2 *See* Sarah Mortazavi, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 Geo. L.J. 2249, 2250 (2012).

provides the most favorable terms concerning contract enforceability, parental rights, and other substantive requirements. Forum shopping by intended parents has generated significant problems, such as legal uncertainties that fail to protect intended parents' expectation interests and inadequate procedural safeguards for surrogates' numerous rights.

This Note will focus on the problems generated by the current patchwork state system that governs the practice of surrogacy in the United States and demonstrate the need for uniform legislation at the federal level. Part I provides background information about surrogacy and explains the existing legal landscape. Part II identifies the major problems arising from this legal landscape and analyzes the detrimental effects of forum shopping in the surrogacy context. Part III discusses two model acts that seek to achieve uniformity and explores the surrogacy regimes in the United Kingdom and Ukraine as representative examples. Finally, drawing lessons from these examples, this Note argues that the solution to the problems articulated in Part II is uniform legislation at the federal level and offers some detailed drafting recommendations.

I. Background of Surrogacy in the United States

A. Understanding Surrogacy Arrangements: Traditional and Gestational Surrogacy

"Traditional surrogacy" refers to the procedures used for surrogacy before the public had ready access to vitro fertilization (IVF). In traditional surrogacy arrangements, a woman volunteers to be the surrogate, donates her own egg, becomes impregnated through artificial insemination, and carries the baby through pregnancy to full term on behalf of the intended parents.[3] Because the surrogate mother uses her own egg, this arrangement requires a surrogate mother to relinquish her parental rights over her biological baby, and, should the surrogate mother change her mind about the surrogacy arrangement, legal disputes may arise. The landmark surrogacy case, *In re Baby M*,[4] in which a surrogate mother found it emotionally impossible to relinquish custody of her child to the intended parents, exemplifies the potential custody disputes stemming from these arrangements.

In the *Baby M* case, William Stern and Mary Beth Whitehead signed a traditional

3 Alexus Williams, Comment, *State Regulatory Efforts in Protecting a Surrogate's Bodily Autonomy*, 49 SETON HALL L. REV. 205, 208 (2018).

4 *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

surrogacy contract.[5] The contract terms stated that Mrs. Whitehead would become pregnant using her own egg and Mr. Stern's sperm through artificial insemination.[6] Once Mrs. Whitehead delivered the baby, she would then renounce her parental rights, allowing Elizabeth Stern (Mr. Stern's wife) to adopt the child.[7] However, after Mrs. Whitehead gave birth and relinquished the child to the Sterns, she "became deeply disturbed, disconsolate, stricken with unbearable sadness," and threatened to commit suicide.[8] She asked the Sterns to return the baby to her, "even if only for one week," and promised that she would thereafter surrender the child back to the Sterns.[9] The Sterns, frightened by the depth of Mrs. Whitehead's despair, agreed to Mrs. Whiteman's request and turned the baby over to her with the understanding that she would return the baby after one week.[10] Instead, Mrs. Whitehead refused to return the baby to the Sterns.[11] Four months later, the baby was forcibly removed from Mrs. Whitehead and finally returned to the Sterns.[12] Mr. Stern filed an action to enforce the contract, but the Supreme Court of New Jersey deemed the contract as contrary to public policy and invalidated it.[13] The court first held that Mrs. Whitehead, the surrogate, was the natural mother of the child.[14] However, upon remand, after evaluating the baby's best interests, the trial court awarded the Sterns custody rights and awarded visitation rights to Mrs. Whitehead.[15]

The legal uncertainties surrounding a surrogate's parental and custody rights in traditional surrogacy, illustrated by the *Baby M* case, complicate the enforcement of traditional surrogacy arrangements. A traditional surrogate is both the genetic and the gestational parent, strengthening the argument that the surrogate also has parental rights to

5 *Id.* at 1235.

6 *Id.*

7 *Id.*

8 *Id.* at 1236–37

9 *Id.*

10 Baby M, 537 A.2d at 1237.

11 *Id.*

12 *Id.*

13 *Id.* at 1234.

14 *Id.*

15 *In Re* Baby M, 542 A.2d 52, 53 (Ch. Div. 1988).

the child.[16] Under these agreements, before the intended parents can establish their official status as the child's legal parents, the surrogate must agree to terminate her parental rights and the intended parents must complete an adoption process.[17] As the number of procedural requirements increase, the risk of potential legal complications increases, too.

Today, for multiple reasons, gestational surrogacy, wherein a pre-embryo is implanted in the surrogate's womb, has largely replaced traditional surrogacy.[18] Unlike traditional surrogacy, gestational surrogates do not use their egg for fertilization and thus retain no genetic ties to the babies they carry.[19] This feature also fulfills many families' wish that the baby carry a genetic link to both intended parents. Finally, gestational surrogacy provides more legal certainty about the parental status of all parties to the agreement, as many states are willing to honor the parties' intentions as expressed in the surrogacy contract when determining parental and custody rights.[20] As a result, gestational surrogacy has gradually become the prevailing practice.[21] This paper will exclusively focus on gestational surrogacy for this reason.

B. Contracting Parties in Surrogacy Arrangements

1. Surrogates' Motivations for Engaging in Surrogacy

Surrogacy may be altruistic or commercial, depending upon whether the surrogate receives monetary compensation for her services. Most women report altruistic intentions as at least one of the reasons behind their decision to become surrogates, including "wanting

16 Williams, *supra* note 3, at 211.

17 *Id.*

18 Erin Y. Hisano, *Gestational Surrogacy Maternity Disputes: Refocusing on the Child*, 15 LEWIS & CLARK L. REV. 517, 527 (2011).

19 *Gestational Surrogacy Fact Sheet*, N.Y. STATE DEP'T OF HEALTH (2021), https://health.ny.gov/community/pregnancy/surrogacy/gestational_surrogacy_fact_sheet.htm [https://perma.cc/RG9B-PKHN].

20 *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) ("We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.").

21 Hisano, *supra* note 18, at 527.

to help a childless couple," "enjoyment of pregnancy," and "self-fulfillment."[22] However, it is difficult to accurately document the motivations of surrogates, particularly given how social norms dictating acceptable behavior may distort participants' self-reporting of subjective motivations.[23]

Regardless of their stated motivations, it is probably fair to say that compensation remains a motivating factor for many surrogates.[24] The average base compensation for a first-time surrogate ranges from $35,000 to $55,000, with additional allowances and reimbursements for other possible expenses, such as airfare, lodging, meals, and further costs.[25] Compensation is thus a substantial consideration which is likely factored into the surrogates' decision-making process. Since the emergence of surrogacy arrangements, concerns about coercion and commodification of women's bodies have continually stirred up debate on whether commercial surrogacy should be legally permissible.[26] This Note will not focus on the moral and philosophical controversies of surrogacy; rather, it will accept surrogacy as an increasingly popular social practice and discuss ways to protect surrogates' interests in surrogacy arrangements, despite the lack of consensus on the ethical issues related to surrogacy.

2. Intended Parents' Rationale for Pursuing Surrogacy

Individuals turn to the practice of surrogacy for a variety of reasons. For same-sex male

22 Vasanti Jadva et al., *Surrogacy: The Experiences of Surrogate Mothers*, 18 HUM. REPROD. 2196, 2199 (2003) ("The most common motivation reported by 31 (91%) women was 'wanting to help a childless couple.'"). *See also* HEATHER JACOBSON, LABOR OF LOVE: GESTATIONAL SURROGACY AND THE WORK OF MAKING BABIES 38 (2016) (reporting "all the surrogates in [the author's] study spoke of their enjoyment of pregnancy and the joy they derived from giving [intended parents] their much desired children").

23 Jadva et al., *supra* note 22, at 2203.

24 *See* Philip J. Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCH. 117, 118 (1983) (reporting that most surrogates would not have participated without receiving financial compensation).

25 *Surrogate Compensation,* CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/about-surrogacy/surrogate-compensation/ [https://perma.cc/P88A-S7XP]. Compensation for surrogate mothers varies between different surrogacy agencies, but most are within a similar range. *See, e.g.*, *Compensation*, FAM. CHOICE SURROGACY, https://familychoicesurrogacy.com/compensation/ [https://perma.cc/68TX-ATLU] (base compensation of $40,000 to $50,000); *Surrogate Compensation*, CTR. FOR SURROGATE PARENTING, https://www.creatingfamilies.com/surrogates/compensation/ [https://perma.cc/43Z4-AV9K] (base compensation of up to $50,000).

26 *See, e.g.*, Williams, *supra* note 3, at 217–18.

couples or single men, surrogacy provides a family-building option otherwise unattainable: a baby with a genetic link to them.[27] As perceptions of alternative family compositions have become more inclusive and diverse, surrogacy has gained more popularity among the LGBTQ+ community as a method by which to start a family.[28]

An increasing number of married couples and single women have turned to surrogacy as a form of family building as well.[29] Infertility is one of the major reasons intended parents opt for surrogacy, but it is not the only one.[30] For women who can conceive but cannot carry a fetus to full-term due to age or health issues, surrogacy gives them access to parenthood without physical risk and emotional distress.[31] And, of course, people can turn to surrogacy as a matter of pure personal preference,[32] choosing not to carry their own child despite having the physical ability to do so.

3. Surrogacy Arrangements: Agencies and Contracts

In the United States, many intended parents work with a surrogacy agency.[33] These agencies often provide a wide range of services to help clients navigate their surrogacy process, such as finding a suitable surrogate and acting as intermediaries between intended parents and surrogates.[34] With the assistance of surrogacy agencies, surrogacy parties usually find a surrogacy attorney to help them complete the proper legal process and safeguard their rights. With a surrogacy attorney's assistance, intended parents and a surrogate typically enter into a contract clearly outlining their respective rights and obligations. This legal

27 Shir Dar et al., *Assisted Reproduction Involving Gestational Surrogacy: An Analysis of the Medical, Psychosocial and Legal Issues: Experience From a Large Surrogacy Program*, 30 HUM. REPROD. 345, 351 (2015).

28 Rachel Rebouché, *Contracting Pregnancy*, 105 IOWA L. REV. 1591, 1640 (2020).

29 Comm. on Ethics, Am. Coll. of Obstetricians & Gynecologists, Comm. Op. No. 660: Family Building Through Gestational Surrogacy, 127 OBSTETRICS & GYNECOLOGY e97, e97 (2016).

30 *10 Reasons People Use a Surrogate Mother*, FAM. TREE SURROGACY CTR., https://familytreesurrogacy.com/blog/people-use-surrogate-mother/ [https://perma.cc/JX8Z-4W5W].

31 *Id.*

32 *Id.*

33 Jordan Stirling Davis, *Regulating Surrogacy Agencies Through Value-Based Compliance*, 43 J. CORP. L. 663, 665–66 (2018).

34 *Id.* at 666.

document ensures both parties have adequate legal protection should any disputes arise in the course of the surrogacy process.

There is not a universal template for surrogacy contracts. Based on local state law and their individual situations, surrogacy parties draft a contract together that reflects their mutual understanding. A standard surrogacy contract should address certain key issues, including the specific rights and obligations of each party, any financial compensation and reimbursements, the surrogate's health-related conduct during the pregnancy, the potential risks associated with surrogacy, and agreements regarding "what-if" scenarios that implicate the health or general welfare of the surrogate or fetus.[35]

Surrogacy is currently governed by state law in the United States.[36] In states where courts hold surrogacy agreements enforceable, such contracts establish the baseline rights and obligations of each party. In states where courts are hostile to surrogacy contracts and hold them void, surrogacy parties sometimes still draft letters of understanding reflecting the terms of their agreement even though such letters are technically unenforceable.[37]

C. The Current Legal Landscape of Surrogacy in the United States

Despite the growing practice of commercial surrogacy in the United States, no federal legislation guiding the contracting process or regulating the agencies that facilitate surrogacy for either domestic or international surrogacy arrangements exists. Unlike other interstate activity, which is generally regulated by some uniform federal legislation implemented under the Commerce Power, Congress has thus far failed to pass any type of law regulating the practice of surrogacy.[38] The lack of federal law has left the regulation of surrogacy in the United States in a state of confusion, or "jurisdictional chaos," as aptly described by one author examining state legislative discrepancies in respect to commercial surrogacy.[39]

35 *Intended Parents: Understanding Surrogacy Contracts*, SURROGATE.COM, https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/understanding-surrogacy-contracts/ [https://perma.cc/3Q67-2URY].

36 *See* Katherine Drabiak et al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 301 (2007).

37 *Gestational Surrogacy Law Arizona*, SURROGATE.COM, https://surrogatefirst.com/pages/gestational-surrogacy-law-arizona/ [https://perma.cc/R2P7-D6RP].

38 Drabiak et al., *supra* note 36, at 302.

39 *Id.*

In the United States, surrogacy is currently governed by diverging state statutes and guided by court opinions. There are some states with statutes that expressly authorize surrogacy, some that enforce surrogacy contracts under certain circumstances, and some that declare surrogacy contracts unenforceable and void as against public policy.[40] The legal limbo in many states with the discrepancies in regulations between jurisdictions has given rise to abundant forum shopping.[41] This "patchwork surrogacy law regime" produces complex challenges regarding legal and logistical barriers, resulting in significant hurdles to safeguarding the rights and interests of surrogates and intended parents throughout the country. [42]

States view surrogacy agreements with varying degrees of friendliness. On one end of the spectrum, the states considered the most "surrogate-friendly" either have statutes permitting and recognizing gestational surrogacy or have a longstanding history of favorable rulings in surrogacy disputes.[43] These states typically allow compensated surrogacy agreements and "grant pre-birth orders regardless of intended parents' marital status, sexual orientation, and in some cases, genetic relationship to the baby."[44] These states include California,[45] Colorado,[46] Connecticut,[47] Delaware,[48] District of Columbia,[49]

40 *See* discussion *infra* p. 6-10 and accompanying notes 45-83.

41 *See* Sangeeta Udgaonkar, *The Regulation of Oocyte Donation and Surrogate Motherhood in India*, *in* Making Babies: Birth Markets and Assisted Reproductive Technologies in India 74, 89 (Sandhya Srinivasan ed., 2010) (discussing surrogacy laws in the United States).

42 Austin Caster, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477, 479 (2011).

43 *Intended Parents: Surrogacy Laws by State*, SURROGATE.COM, https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/surrogacy-laws-by-state/ [https://perma.cc/QV2F-5H8C].

44 *Id.* A pre-birth order is a legal document that establishes the parental rights of the intended parents to the baby to be born pursuant to the surrogacy agreement.

45 CAL. FAM. CODE §§ 7960–7962 (West 2020).

46 COLO. REV. STAT. §§ 19-4.5-101 to -114 (2021).

47 CONN. GEN. STAT § 7-48a (2022).

48 DEL. CODE ANN. tit. 13, §§ 8-801 to -810 (2022).

49 D.C. CODE §§ 16-401 to -412 (2023).

Idaho,[50] Maine,[51] New Hampshire,[52] New Jersey,[53] Nevada,[54] Vermont,[55] and Washington.[56] California in particular is considered one of the most "surrogate-friendly" states due to comprehensive statutory law[57] and longstanding case law that supports the practice of gestational surrogacy.[58]

At the other end of the spectrum, the three states considered least friendly towards surrogacy are Louisiana, Michigan, and Nebraska.[59] In Nebraska, all commercial surrogacy contracts are void and unenforceable.[60] The practical result is that Nebraska courts only permit altruistic (uncompensated) surrogacy, but any underlying surrogacy contract is still void and thus unenforceable.

Even more hostile to surrogacy are Michigan and Louisiana. Michigan wholly prohibits all surrogacy contracts, agreements, or arrangements.[61] Moreover, parties who enter into compensated surrogacy contracts are subject to criminal penalties.[62] Like Nebraska, Michigan does not criminalize altruistic surrogacy agreements, but any contracts drawn up for the process are unenforceable.

50 IDAHO CODE §§ 7-1601 to -1612 (2023).

51 ME. STAT. tit. 19-A, §§ 1931–1939 (2015).

52 N.H. REV. STAT. ANN. §§ 168-B:1–22 (2023).

53 N.J. REV. STAT. §§ 9:17-61–:17-71 (West 2018).

54 NEV. REV. STAT. §§ 126.500–.810 (2021).

55 VT. STAT. ANN. tit. 15C, §§ 801–809 (2021).

56 WASH. REV. CODE §§ 26.26A.700–.785 (2023).

57 *See* Surrogacy and Donor Facilitators, Assisted Reproduction Agreements for Gestational Carriers, and Oocyte Donation, CAL. FAM. CODE §§ 7960–7962 (West 2020); Establishing Parent and Child Relationship, CAL. FAM. CODE § 7613 (West 2020); Independent Adoptions, CAL. FAM. CODE §§ 8800–8823 (West 2020); Stepparent Adoptions, CAL. FAM. CODE §§ 9000–9007 (West 2020).

58 *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

59 *The US Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/ [https://perma.cc/983V-KKFB].

60 NEB. REV. STAT. ANN. § 25-21,200 (2023).

61 MICH. COMP. LAWS § 722.855 (2023).

62 *Id.* § 722.859.

Louisiana has the most restrictive laws, limiting gestational surrogacy to married heterosexual couples who use their own gametes and thus are both genetically related to the child.[63] Couples who satisfy this requirement must also comply with onerous contractual and procedural requirements, including a bar on financial compensation for the surrogate and a court's advanced approval of the agreement.[64] All other individuals—such as unmarried persons, same-sex couples, and heterosexual couples who need a donor gamete—cannot legally complete a gestational surrogacy in Louisiana. Surrogacy agreements not in compliance with the statutory requirements "shall be absolutely null and unenforceable in the state of Louisiana as contrary to public policy."[65] Furthermore, any person who enters into or assists with an unlawful surrogacy agreement in any way is subject to criminal penalties.[66] The onerous requirements in these three states either eliminate gestational surrogacy as an option, or, at minimum, create substantial hurdles for intended parents seeking to build their family with the help of a surrogate.

Most states fall somewhere between the two extremes described above. These states have favorable statutory or case law regarding surrogacy, but, for various reasons, provide less legal certainty to intended parents than the states in the first category. The different statutory schemes among these states give rise to varying degrees of "surrogacy-friendliness" with respect to the legal status of gestational surrogacy and the procedural requirements entailed by the practice, creating confusion for intended parents trying to choose a state to commence the surrogacy process.

For example, gestational surrogacy is considered legal in South Dakota because no state statute or published case law prohibits it.[67] Due to the lack of express authorization for the practice, many questions remain unanswered, such as whether a hearing is required to obtain pre-birth orders or whether pre-birth orders are obtainable if no party lives in South Dakota.[68]

Virginia permits gestational surrogacy by statute but imposes a significant number

63 LA. STAT. ANN. § 9:2720 (2023).

64 *See* LA. STAT. ANN. §§ 9:2720–2720.13 (2023).

65 LA. STAT. ANN. § 9:2720(C) (2023).

66 LA. STAT. ANN. § 14:286(C) (2023).

67 *Gestational Surrogacy in South Dakota*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/south-dakota/ [https://perma.cc/D8NJ-4C3H].

68 *Id.*

of restrictions on eligibility, procedure, and compensation.[69] In North Dakota, gestational surrogacy is permitted by statute, but only when "the embryo is conceived by using the egg and sperm of the intended parents."[70] Moreover, the statute simply states, "A child born to a gestational carrier is a child of the intended parents for all purposes and is not a child of the gestational carrier and the gestational carrier's husband, if any."[71] Although North Dakota's statute establishes the general legality of gestational surrogacy, it fails to clarify many issues that are important to intended parents and surrogates, such as whether both intended parents can be named as legal parents in a pre-birth order in the case that neither of the intended parents are genetically related to the child.[72]

In Massachusetts, the legal status of gestational surrogacy is confirmed through case law.[73] Therefore, many requirements, such as the requirement of a hearing for obtaining pre-birth orders, are left to local judges' discretion. Similarly, gestational surrogacy in Ohio is also governed by published case law, which holds gestational surrogacy agreements generally enforceable.[74]

Several states fall on the more restrictive end on the "surrogacy-friendliness" spectrum; they are not considered surrogacy-friendly because the legal status of surrogacy is murky, but they also do not legally prohibit surrogacy. In these states, there is often considerable mismatch between the law and actual practice. This gray area, combined with inconsistent case law, has produced considerable uncertainties concerning the procedural requirements and legal status of intended parents and surrogates.

In Idaho, Tennessee, and Wyoming, gestational surrogacy is routinely practiced and considered permitted because no state statute or published case law expressly prohibits it.[75] However, intended parents in these states confront many legal hurdles and onerous

69 VA. CODE ANN. § 20-158.

70 N.D. CENT. CODE ANN. §14-18-01(2) (2023). Traditional surrogacy agreements are void in North Dakota. *See id*. § 14-18-05.

71 N.D. CENT. CODE ANN. §14-18-08 (West 2021).

72 *Gestational Surrogacy in North Dakota*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/north-dakota/ [https://perma.cc/DZB2-SYZM].

73 *See, e.g.*, Culliton v. Beth Isr. Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001); Hodas v. Morin, 814 N.E.2d 320 (Mass. 2004).

74 J.F. v. D.B., 879 N.E.2d 740, 741 (2007).

75 TENN. CODE ANN. §36-1-102 (48).

restrictions, which may add undue stress and legal risks to the family building process. For example, under Tennessee and Idaho case law, the surrogate will be established as the legal mother on the birth certificate unless both intended parents use their own egg and sperm.[76] This requirement makes it more difficult for same-sex couples and intended parents who cannot use their own egg or sperm to establish their legal status as the child's parent. In Wyoming, statutes prohibit issuance of pre-birth parentage orders until after the child's birth, adding to the intended parents' burden of completing post-birth procedures.[77]

In more "surrogacy-restrictive" states like Arizona and Indiana, courts are hostile to surrogacy contracts.[78] Arizona and Indiana's state legislatures have enacted statutes declaring gestational surrogacy contracts void and unenforceable, deeming such contracts to be against public policy.[79] Consequently, some surrogacy parties do not draft surrogacy agreements, leaving them without recourse or a legal record of their understanding of respective rights and obligations if any disputes arise. Some parties still prepare letters of understanding to reflect the terms upon which they agree.[80] In other surrogacy-restrictive states like Virginia, surrogacy contracts may be enforced depending on certain circumstances, but the availability of pre-birth orders may depend on the intended parents' marital status and other factors.[81] Despite these restrictions on surrogacy agreements' legal enforceability, surrogacy is still practiced in these states, and some courts have started to grant pre-birth parentage orders establishing the legal parental rights of intended parents.[82]

In summary, the fifty states and the District of Columbia vary widely in terms of their surrogacy-friendliness and surrogacy-restrictiveness. While a few states expressly authorize

76 *See In re* Adoption of Male Child A.F.C., 491 S.W.3d 316 (Tenn. Ct. App. 2014*); In re* Doe, 372 P.3d 1106 (Idaho 2016).

77 WYO. STAT. ANN. § 14-2-811 (West 2023).

78 *The US Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/ [https://perma.cc/983V-KKFB].

79 ARIZ. REV. STAT. ANN. § 25-218 (West 2023); IND. CODE ANN. §31-20-1-1 (West 2023).

80 *Gestational Surrogacy in Arizona*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/arizona/ [https://perma.cc/M4VC-UWFJ].

81 *Gestational Surrogacy in Virginia*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/virginia/ [https://perma.cc/5X73-VYW8].

82 *Gestational Surrogacy in Arizona*, *supra* note 80; *Gestational Surrogacy in Indiana*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/indiana/ [https://perma.cc/5NWX-QDEG].

the practice of gestational surrogacy, most states have not comprehensively addressed the enforceability and legal requirements of gestational surrogacy contracts, leaving inadequate guidance for intended parents. Because surrogacy laws are not federalized, "[s]tate regulation of surrogacy contracts has left intended couples battling a hydra with fifty heads, leaving in its wake an omnipresent sense of uncertainty and unprecedented inconsistencies and inequities."[83]

II. Problems with Forum Shopping in the Surrogacy Context

In the absence of a uniform federal surrogacy law, it has become increasingly common for intended parents to engage in a kind of "forum shopping." "Forum shopping has been defined as a litigant's attempt 'to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.'"[84] In the context of surrogacy, forum shopping refers to the tendency of intended parents to "shop" for the friendliest laws under which to make and enforce surrogacy arrangements. Forum shopping can be motivated by a variety of factors, including the availability of pre-birth parentage orders, treatment of same-sex couples, legality of compensation, procedural requirements, and costs.

Many surrogacy agencies catalyze and proliferate forum shopping behaviors, made possible by patchwork surrogacy laws.[85] Surrogacy agencies tend to cluster in states with favorable laws and take advantage of state regulatory disparities for commercial advantage.[86] These agencies explicitly encourage forum shopping to attract clients from all over the United States. Surrogacy agencies bridge physical distance between themselves and their clients by advertising their services on the internet and providing virtual or phone consultations. Surrogacy agencies provide intended parents with information on different states' surrogacy laws and advise them to embark upon their surrogacy journeys in "the best states."[87] Nonetheless, the lack of uniform surrogacy laws regarding the surrogacy

83 Brett Thomaston, *A House Divided Against Itself Cannot Stand: The Need to Federalize Surrogacy Contracts as a Result of a Fragmented State System*, 49 J. MARSHALL L. REV. 1155, 1167 (2016).

84 Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) (quoting *Forum shopping*, BLACK'S LAW DICTIONARY (5th ed. 1979)).

85 Thomaston, *supra* note 83, at 1179.

86 Drabiak et al., *supra* note 36, at 308.

87 *Surrogacy by State*, SURROGATE.COM, https://surrogate.com/surrogacy-by-state/ [https://perma.cc/UW48-QS9G] (providing articles on surrogacy laws and processes for each state).

procedure and surrogacy parties' rights causes many problems for the individuals involved in surrogacy agreements.

A. Legal Uncertainties and Expectation Interests

There is currently no clear and consistent regulatory framework when it comes to surrogacy in the United States. The inconsistencies across state laws create confusion for intended parents hoping to build a family via surrogacy, making surrogacy a "riskier endeavor than it need be."[88] Each state has a different approach to surrogacy, which means that intended parents and surrogates need to expend considerable time and energy understanding the legal status of surrogacy and relevant procedural requirements. In addition, while some states have enacted statutes expressly authorizing surrogacy (provided certain requirements are met), other states do not have statutes enumerating requirements in detail and simply leave any disputes to a judge's discretion. As a result, even in "surrogacy-friendly" states, it is possible for surrogacy parties to encounter legal uncertainties as to whether a particular surrogacy contract will be declared enforceable and how custody of the child will be adjudicated. Hence, surrogacy parties are often forced to gamble with one of the most important decisions of their lives, hoping that their contract will be held enforceable.

The harms of forum shopping are well-documented, with the key objection being that "it instinctively, 'leads to disparate treatment' of the litigants."[89] As such, "forum shopping undermines the foundational underpinnings of the court system itself, and leaves in its wake inequity, inconsistency, and confusion."[90] This reality of surrogacy in the United States contradicts the quintessential goal of contract law: to protect contracting parties' expectation interests.[91] As stated in the Restatement (Second) of Contracts, "judicial remedies . . .serve to protect one or more of the following interests of a promisee . . . [the party's] . . . 'expectation interest' . . . 'reliance interest' . . . [and] 'restitution interest.'"[92]

88 Makenzie B. Russo, The Crazy Quilt of Laws: Bringing Uniformity to Surrogacy Laws in the United States 49 (2016) (B.A. thesis, Trinity College) (on file with the Trinity College Digital Repository).

89 Thomaston, *supra* note 83, at 1178 (quoting Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 197 (2013)).

90 *Id.*

91 *Cf.* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 118(A) (5th ed. 2011) (observing that "the purpose of contract law is often stated as the fulfillment of those expectations that have been induced by the making of a promise").

92 RESTATEMENT (SECOND) OF CONTS. § 344 (AM. L. INST. 1981).

In the context of surrogacy contracts, the expectation interests of intended parents may involve biological parenthood, legal rights to the baby, legal compliance throughout the process, and enforcement of their financial agreements. As surrogacy agreements are contracts, they should be afforded the same protections to which other types of contracts are entitled.[93] The goals of ensuring equitable results and protecting parties' expectation interests thus necessitate a uniform legal framework regarding surrogacy that can be applied in a consistent and equitable manner.

B. Inadequate Protection for Surrogacy Parties

Due to the lack of federalized, uniform surrogacy legislation, contracting parties do not have a standard against which to measure the "terms" of their surrogacy arrangement. The legal and medical complexities of surrogacy highlight the problems with the lack of such a standard. Moreover, as surrogacy pregnancy is often divorced from the legally protected status of motherhood, surrogacy contracts sometimes raise concerns about commodification and exploitation of surrogates' bodies.[94] In states with fewer requirements for the surrogacy process, surrogates may also be vulnerable to undue influence by intended parents due to economic and power disparities.[95] The lack of legal safeguards can potentially threaten surrogates' rights to informed consent and bodily integrity.

Stiver v. Parker illustrates the lack of legal safeguards for surrogates.[96] In this case, Judy Stiver signed a contract to bear a baby as the surrogate for Alexander Malahoff.[97] At the time that the agreement was signed, the Michigan legislature had yet to criminalize commercial surrogacy contracts.[98] Stiver was artificially inseminated with Malahoff's un-

93 *See* Thomaston, *supra* note 83, at 1175 (contending that contract law should protect expectation interests in surrogacy contracts); *see also* Brock A. Patton, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 510–12 (2010) (discussing the use of contracts in defining surrogacy arrangements).

94 *See* Caitlin Conklin, *Simply Inconsistent: Surrogacy Laws in the United States and the Pressing Need for Regulation*, 35 WOMEN'S RTS. L. REP. 67, 88–89 (2013).

95 Pamela Laufer-Ukeles, *The Disembodied Womb: Pregnancy, Informed Consent, and Surrogate Motherhood*, 43 N.C. J. Int'l L. 96, 105 (2018).

96 *See* Stiver v. Parker, 975 F.2d 261 (6th Cir. 1992).

97 *Id.* at 263.

98 *Id.* at 269.

tested semen and gave birth to a baby.[99] The baby was diagnosed with severe birth defects, and Stiver alleged that Malahoff's semen was the source of the disease-causing virus.[100] Stiver sued the surrogacy broker, the doctors, and a lawyer who participated in the surrogacy program for negligence since Malahoff's failure to be tested for the virus caused their serious emotional and financial losses.[101] At the time, there was little legislative guidance on the subject of surrogacy.[102] Hence, since the contracting parties failed to properly stipulate the legal duties and rights of each party, the court had to decide whether the defendants owed a duty of care to the surrogate.[103] Although the court eventually entered a judgment in favor of the surrogate,[104] had there been a thorough legal framework guiding the contracting process for parties involved in surrogacy, the surrogate's rights would have been more easily vindicated.

Additionally, surrogates' economic interests are inadequately protected against the backdrop of the existing legal framework. In states where commercial surrogacy contracts are unenforceable, surrogates lack legal mechanisms to ensure any promised compensation for their time and effort when a dispute arises.[105] This is especially concerning given that most surrogates are lower-middle class and are thus more vulnerable to economic exploitation.[106] Combined with social stigma around demanding financial recompense for surrogacy, unenforceability of commercial surrogacy contracts in certain states leaves surrogates in a disadvantaged position when negotiating adequate compensation for the valuable service they provide.

Even in surrogacy-friendly states, a lack of guidelines on fair compensation renders surrogates vulnerable to economic exploitation. Commercial surrogacy agencies exacerbate the problem, prioritizing their own financial gain over surrogates' economic interests. Disparate state treatment of surrogacy has caused commercial surrogacy agencies to cluster

99 *Id.* at 263.

100 *Id.* at 264–66.

101 *Id.* at 264.

102 Stiver v. Parker, *supra* note 96, at 269.

103 *Id.* at 268.

104 *Id.*

105 *See* Drabiak et al., *supra* note 36, at 303.

106 *Id.* at 304.

in the surrogacy-permissive jurisdictions.[107] But just because surrogacy-friendly states' permissive laws impose fewer restrictions on surrogacy, that does not mean that these states' laws adequately protect surrogates. Surrogacy agencies often attempt to weaponize the rhetoric of "surrogacy as an altruistic act" in order to reduce surrogates' economic bargaining power.[108] Hence, surrogates are vulnerable to exploitation and are often at the mercy of these agencies in negotiating surrogacy contracts.

Just as the current legal framework fails to protect surrogates' interests, it also fails to protect intended parents' interests in the surrogacy process. For example, the outcome of the custody battle in the *Baby M*[109] case failed to align with the expectations of the intended parents, the Sterns, largely due to the surrogate's breach of contract, marked by her impulsive and unpredictable actions. While there was no consensus on whether Mrs. Whitehead was actually an "unfit or incompetent mother,"[110] a rigorous screening process that thoroughly evaluated Mrs. Whitehead's mental and emotional fitness to be a surrogate could have forewarned the Sterns about the risks involved and helped prevent the deviation from their expectations. Thus, the Sterns also could have avoided the tremendous emotional distress and litigation costs in the legal battle that ensued. However, as of today, only a few states explicitly require medical evaluations and mental fitness consultations for surrogates.[111] Most states lack a comprehensive legal framework that addresses the risks with respect to the surrogate's mental and emotional fitness. As a result, they fail to ensure the fulfillment of contractual obligations to safeguard the expectation interests of the intended parents.

Moreover, the lack of regulation of the growing number of surrogacy agencies jeopardizes the rights of both intended parents and surrogates. Operating without licensing requirements, commercial surrogacy agencies focus on "producing children for money."[112] In fact, "this lack of law and regulation has permitted ART agencies to take advantage of their clients to the extent of delayed or lost reproductive cycles, and, in some of the

107 *Id.* at 308.

108 *Id.* at 304.

109 *See* Baby M, 537 A.2d.

110 *Id.*

111 *See, e.g.*, COLO. REV. STAT. § 19-4.5-104 (2021).

112 Davis, *supra* note 33, at 676.

most egregious cases where fraud is involved, theft of millions of dollars."[113] These market failures need to be addressed urgently.

C. Surrogacy as a Federal Constitutional Right

Forum shopping can lead to the inconsistent application of constitutional rights and undermine equal protection under the law.[114] While some states' courts recognize the validity of surrogacy contracts in general,[115] others refuse to provide the intended parents with a legal cause of action, reasoning that such contracts are against public policy and thus unenforceable.[116] The inconsistency and unpredictability of the makeshift state regulatory scheme do not align with the significance of the constitutional rights at stake for the expectant parents.

From a constitutional law perspective, there are strong arguments for treating surrogacy as a fundamental right. In a series of landmark decisions, the Supreme Court has interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments to afford substantive protections against undue government intrusion in private matters related to procreation, marriage, and parentage.[117] The Court has also invoked the Equal Protection Clause of the Fourteenth Amendment to supplement these substantive due process guarantees in cases in which a state attempts to restrict certain groups' exercise of protected fundamental rights.[118]

113 REPORT ACCOMPANYING A RESOLUTION TO ADOPT THE ABA MODEL ACT GOVERNING ASSISTED REPROD. TECH. AGENCIES 112A 4-5 (AM. BAR. ASS'N 2016) (reporting on ART and ART regulation to the ABA House of Delegates).

114 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 75 (1938) (finding that the *Swift* doctrine that enabled forum shopping "had prevented uniformity in the administration of the law of the state" and "rendered impossible equal protection of the law").

115 *E.g.*, Johnson v. Calvert, 851 P.2d 776, 783 (Cal. 1993) (opining that "the agreement is not, on its face, inconsistent with public policy").

116 *E.g.*, Baby M, 537 A.2d at 1246. *But see* New Jersey Gestational Carrier Agreement Act, N.J. REV. STAT. § 9:17-65 (2018).

117 *E.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.").

118 *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down miscegenation statutes that criminalized interracial marriage on the ground that the racial classification violated the Fourteenth Amendment's Equal Protection and Due Process Clauses).

In *Carey v. Population Servs. Int'l.*, the Court held that prohibitions on the distribution of nonprescription contraceptives violated the Due Process Clause of the Fourteenth Amendment and recognized that "decisions whether to accomplish or to prevent conception are among the most private and sensitive."[119] Then, in *Eisenstadt v. Baird*, another case regarding the right to contraception, the Supreme Court stated, "if the right to 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."[120]

Surrogacy is, by definition, a means to achieve parenthood. Following the Court's line of reasoning in *Carey* and *Eisenstadt*, the Constitution should similarly afford protection to personal decisions relating to surrogacy, as it also concerns the fundamental right of procreation. In fact, many state courts deciding surrogacy cases have recognized a constitutional right to procreate along these lines.[121]

State statutes invalidating surrogacy agreements restrict individuals' exercise of their fundamental rights involving procreation and family relationships. Under the Fourteenth Amendment, when a fundamental right is at stake, the government must demonstrate a "compelling state interest" to justify infringement upon the right, and any regulation must be "narrowly tailored" to serve the compelling state interest.[122] However, some states have arguably unconstitutionally deprived surrogacy parties of their fundamental right of procreation. The outright criminalization of commercial surrogacy in Michigan,[123] for example, hardly seems "narrowly tailored" to support any purported state interest in regulating surrogacy as a means of procreation.

Under the Fourteenth Amendment's Equal Protection Clause, laws that implicate rights embodied in family relationships and procreation cannot treat one class of persons differently from others.[124] For same-sex couples and individuals who struggle with infertility, gestational surrogacy represents their only chance to bear or beget a child who

119 *Carey*, 431 U.S. at 685.

120 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

121 *E.g.*, J.R. v. Utah, 261 F. Supp. 2d 1268, 1277 (D. Utah 2002).

122 Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

123 MICH. COMP. LAWS § 722.859 (2014).

124 *See, e.g.*, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541–42 (1942) (holding that the forced sterilization of habitual criminals violates the Fourteenth Amendment's Equal Protection Clause).

is genetically linked to them. Denying "[t]heir singular opportunity to procreate through gestational surrogacy necessarily implicates their fundamental right to bear children, thereby invoking the protections of the United States Constitution."[125]

This interpretation of the fundamental right to bear children as including surrogacy can be seen in the state context. In *J.R. v. Utah,* plaintiffs brought a facial challenge to Utah Code Ann. § 76-7-204 (which prohibited surrogacy agreements and declared the surrogate to be the child's mother for all legal purposes), arguing that the statute was unconstitutional on equal protection grounds because it deprived the infertile of their only opportunity for genetic parenthood.[126] Plaintiffs also challenged the surrogate's designation as the legal mother on equal protection grounds because, according to Utah law and administrative practice, genetic fathers could be listed on the birth certificate as the legal father, while the genetic mothers could not be listed as the legal mother.[127] The plaintiffs argued that this disparity "operate[d] to deny the genetic/biological mother the equal protection of the laws guaranteed by the Fourteenth Amendment."[128] The court agreed.[129] Again, surrogacy laws should be federalized to realize equal protection in this way.

Abortion jurisprudence can also provide insight into the current legal state of privacy and family planning. In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court revisited the question of whether abortion is a fundamental right constitutionally protected under substantive due process.[130] In *Dobbs*, the Court overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which previously recognized[131] and affirmed[132] a constitutional right to abortion. In *Dobbs*, the Court reasoned that the Constitution does not expressly guarantee abortion rights.[133]

125 J.R., 261 F. Supp. 2d at 1274.

126 *Id.* at 1272.

127 *Id*.

128 *Id.* at 1274.

129 *Id.* at 1294.

130 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

131 *See generally* Roe v. Wade, 410 U.S. 113 (1973).

132 *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

133 Dobbs, 142 S. Ct. at 2242.

As the first decision in recent history in which the Court overruled precedents establishing a fundamental right,[134] the *Dobbs* ruling marks a seismic shift in substantive due process jurisprudence, and in particular, reproductive rights, forecasting a highly precarious legal future for surrogacy. While the *Dobbs* majority explicitly states that "nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion,"[135] this uncommon revocation of a constitutional right still raises widespread concerns about the longevity of constitutional protections for other fundamental rights concerning privacy and family, such as the rights to contraception, same-sex intimacy, and same-sex marriage. Although the Supreme Court has yet to address surrogacy or the use of ART, the *Dobbs* decision portends a murky legal outlook for surrogacy as a fundamental right. The likelihood that the Court would recognize surrogacy as constitutionally protected under the fundamental right of procreation is considerably weaker after *Dobbs*.

The existing piecemeal approach to addressing surrogacy fuels rampant forum shopping and renders some states' efforts to safeguard individuals' constitutional rights ultimately inadequate. While issues touching upon family relations are generally reserved to the states, surrogacy involves federal constitutional issues of parentage, procreation, and privacy that can be properly addressed by Congress,[136] potentially under the Commerce Clause, the Spending Clause, or the Enforcement Clause of the Fourteenth Amendment. Although the ramifications of *Dobbs* are not completely clear, it is undeniable that substantive due process rights and equal protection guarantees related to procreation are imperiled in the post-*Dobbs* era. Hence, it is more imperative than ever that Congress exercise its legislative authority to enact laws to protect or otherwise regulate surrogacy practices.

III. A Federal Legislative Solution to Safeguard the Rights of the Surrogacy Parties

A. Past Attempts at Uniformity: The Model Acts

While Congress has yet to enact a uniform law regulating commercial surrogacy, a few law commissions have proposed model acts that would align the law with the growing social acceptance of surrogacy and address conflicts and inconsistencies in state surrogacy laws. While none of these proposals have successfully led to the implementation of a

134 Kelsey Y. Santamaria, CONG. RSCH. SERV., LSB10820, *Privacy Rights Under the Constitution: Procreation, Child Rearing, Contraception, Marriage, and Sexual Activity* (Sep. 14, 2022).

135 Dobbs, 142 S. Ct. at 2239.

136 Caster, *supra* note 42, at 505.

national legal framework, they mark an important starting point for establishing more consistent legal standards governing surrogacy contracts and shed light on the need for federal legislation.

1. The Uniform Parentage Act

As the second half of the twentieth century saw society gradually become more open-minded towards non-marital children, the law also became more egalitarian in its treatment of marital and non-marital children.[137] In an attempt to fill the statutory void in family law, the National Conference of Commissioners of Uniform State Laws promulgated the Uniform Parentage Act ("UPA") in 1973 in order to provide equal protection for all children.[138]

The UPA was amended in 2002 to include a provision on surrogacy agreements and to establish the parentage of children born out of surrogacy contracts.[139] Further revisions to the UPA in 2017 modernized some of the rules governing gestational surrogacy in order to keep the UPA in line with the developing law.[140] For example, by applying its surrogacy provisions to same-sex couples, the 2017 UPA cures the constitutional infirmity in some state laws and upholds same-sex couples' equal protection rights.[141]

The UPA, as revised in 2002 and 2017, sets forth a set of rules governing surrogacy agreements. The UPA requires the surrogate to have attained twenty-one years of age, given birth to at least one child, gone through medical and mental health evaluations, and have independent legal representation throughout the surrogacy period.[142] There are also similar requirements for intended parents regarding their ages, medical and mental evaluations, and independent representation.[143] The UPA enumerates procedural requirements to ensure

137 Harry D. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q., 1 (1974).

138 UNIFORM PARENTAGE ACT, Prefatory Note (UNIF. L. COMM'N 2017). ("A core principle of UPA (1973) was to ensure that 'all children and all parents have equal rights with respect to each other,' regardless of the marital status of their parents.") (internal citation omitted).

139 *Id.* Art. 8.

140 *Id.*

141 *Id.* Prefatory Note.

142 *Id.* § 802.

143 *Id.*

the validity and enforceability of surrogacy contracts, such as mandating that both parties receive independent legal counsel and that the agreement be executed before any medical procedure occurs.[144] The UPA also regulates surrogacy agreements' content by, for example, explicitly providing for the intended parents' parental rights, allocating surrogacy-related medical expenses, and preserving the surrogate's right to terminate pregnancy.[145] For example, the UPA states that each intended parent is a legal parent of the child, while the surrogate or her spouse is not.[146]

Though the UPA seeks to establish the uniform regulation of surrogacy, a minority of states have adopted it.[147] Since the UPA is designed to be adopted on a voluntary basis and is open to modifications, there is no effective mechanism to enforce this uniform legal framework across all jurisdictions.[148] Because the goal of nationwide uniformity cannot be achieved, the UPA's good-faith attempt at unvaried regulation of surrogacy law only has only a limited impact.

2. The ABA Model Act

> *We join the chorus of judicial voices pleading for legislative attention to the increasing number of complex legal issues spawned by recent advances in the field of assisted reproduction. Whatever merit there may be to a fact-driven case-by-case resolution of each new issue, some overall legislative guidelines would allow the participants to make informed choices and the courts to strive for uniformity in their decisions.*[149]

In recognition of problems arising from modern developments of ART, the American

144 UNIF. PARENTAGE ACT § 803.

145 It is worth noting that as *Dobbs* removed federal protection for abortion rights, the decision concerning termination of pregnancy or selective reproduction has become more complex in states where abortion is limited, banned, or criminalized. *See generally* Dobbs, 142 S. Ct 2228; HUMAN RIGHTS WATCH, HUMAN RIGHTS CRISIS: ABORTION IN THE UNITED STATES AFTER DOBBS (2023) https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs [https://perma.cc/4Q27-M3YS].

146 UNIF. PARENTAGE ACT § 803.

147 *Id.* § 803 cmt.

148 Thomaston, *supra* note 83, at 1183.

149 *American Bar Association Model Act Governing Assisted Reproductive Technology February 2008*, 42 FAM. L.Q. 171, 172 (2008) (quoting *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998)).

Bar Association ("ABA") identified the need to provide a guiding framework to ". . . give assisted reproductive technology (ART) patients, participants, parents, providers, and the resulting children and their siblings clear legal rights, obligations, and protections."[150] Additionally, the ABA noticed the rapid growth of surrogacy agencies and the corresponding lack of oversight:

> Such [surrogacy] agencies can be owned and operated by anyone without professional training or affiliation. There have been documented cases in which the owners of such agencies have misappropriated and absconded with client funds and otherwise inadequately or negligently administered their programs to the detriment of their clients and their donors/surrogates. Regarding such agencies there is a significant gap in the licensing and regulation that governs most other aspects of the ART process[.][151]

In response to these issues, the ABA Model Act Governing Assisted Reproductive Technologies ("ABA Model Act") was born in 2008.[152] The ABA Model Act offers two models for states: Alternative A, a judicial preauthorization model,[153] and Alternative B, an administrative model.[154] Alternative A allows a prospective surrogate and intended parents who meet certain procedural and substantive requirements to commence a judicial proceeding to validate their gestational agreement in advance.[155] The court has the discretion to reject the contract regardless of whether it fulfills all of the statutory requirements.[156] This is a major drawback to Alternative A, as judicial discretion could lead to inequitable results among similarly situated parties without reasonable justification.[157]

150 *Id.* at 171.

151 MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY AGENCIES, Prefatory Note (AM. BAR ASS'N, DRAFT OCT. 2013).

152 *See generally American Bar Association Model Act*, 42 FAM. L.Q. 171.

153 The requirements in Alternative A are substantially similar to those established by the 2002 version of the UPA, which provides that gestational agreements are only enforceable if submitted to a court for approval in advance. The 2017 amendment to the UPA removed this requirement. *American Bar Association Model Act*, 42 FAM. L.Q.at 188–89.

154 *Id.* at 188.

155 *Id.* at 189.

156 *See* Paul G. Arshagouni, *Be Fruitful and Multiply, By Other Means, if Necessary: The Time has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 817 (2012).

157 *Id.* at 818.

In contrast, Alternative B allows for self-executing agreements without prior judicial approval.[158] In other words, a surrogacy agreement is enforceable so long as it meets the eligibility and contractual requirements set forth in Alternative B.[159] This model reduces the administrative burden of obtaining court approval and eliminates the possibility of judicial arbitrariness that exists under Alternative A.

The surrogate's eligibility requirements imposed by Alternative B are similar to those set forth by the UPA, including the surrogate's minimum age, prior childbirth requirement, medical and mental health evaluations, and consultation with independent legal counsel, among others.[160] The ABA Model Act also mandates that the surrogate ". . . has, or obtains prior to the embryo transfer, a health insurance policy that covers major medical treatments . . ." and that ". . . the policy may be procured by the intended parents on behalf of the gestational carrier . . .," which serves to protect the surrogate's interests.[161] Under Alternative B, the intended parents are required to contribute at least one of the gametes, demonstrate a medical need for the surrogacy arrangement, complete a mental health evaluation, and secure independent legal consultation.[162]

Like the UPA, the ABA Model Act explicitly provides for the parental rights of the intended parents and the surrender of custody by the surrogate and her legal spouse (if applicable).[163] In addition to the contractual requirements, the ABA Model Act allows provisions that require the surrogate to undergo medical exams and treatments recommended by the physician and to abstain from activities that are reasonably believed to be harmful to the pregnancy.[164] The ABA Model Act also requires the intended parents to pay reasonable compensation and reimburse the surrogate for reasonable expenses relating to the surrogacy.[165] By setting forth substantive and procedural requirements, the ABA Model Act clearly establishes the recommended practices for the safety and interests of all parties and establishes much-needed predictability.

158 *See American Bar Association Model Act*, 42 FAM. L.Q. at 194.

159 *Id.*

160 *Id.* at 193.

161 *Id.*

162 *Id.*

163 *Id.* at 195.

164 *American Bar Association Model Act*, *supra* note 158, at 194.

165 *Id.*

The ABA Model Act is an exciting stepping stone towards better protection of surrogate parties' interests. However, since the ABA lacks the legislative authority to promulgate a set of uniform standards that apply nationwide, the ABA Model Act provides only a basis by which legislators can craft laws governing surrogacy. Hence, in light of the adoption and enforcement challenges encountered by the UPA and the ABA Model Act, the best solution to eliminate forum shopping and achieve uniformity is clear: federal legislation.

B. International Examples of Uniform Regulation

In considering the promulgation of surrogacy regulations at the federal level, it is helpful for the United States to look to international examples of uniform surrogacy regulation. Surrogacy laws in the United Kingdom and Ukraine shed light on the potential benefits of and considerations for a federal solution in the United States.

1. The United Kingdom

Surrogacy in the United Kingdom is governed by the Surrogacy Arrangements Act 1985 ("SAA")[166] and the Human Fertilisation and Embryology Acts 1990 (as amended)[167] and 2008 ("HFE").[168] The SAA, enacted almost four decades ago, outlaws commercial surrogacy while leaving altruistic surrogacy lawful.[169] It prohibits surrogacy advertisement by individuals or for-profit companies, but permits an exception for non-profit organizations who can lawfully provide assistance to intended parents and surrogates.[170] In essence, the Act criminalizes third parties financially benefitting from surrogacy.[171] While commercial surrogacy is forbidden, it is nevertheless legal for intended parents to reimburse the surrogate for reasonable expenses incurred by reason of pregnancy.[172]

166 Surrogacy Arrangements Act 1985, c. 49, §§ 1, 2 (UK) https://www.legislation.gov.uk/ukpga/1985/49 [https://perma.cc/2XHW-WT96].

167 Human Fertilisation and Embryology Act 1990, c. 37 (UK) https://www.legislation.gov.uk/ukpga/1990/37/contents [https://perma.cc/VHL9-Z63R].

168 Human Fertilisation and Embryology Act 2008, c. 22 (UK) https://www.legislation.gov.uk/ukpga/2008/22/section/22 [https://perma.cc/46UW-4XG8].

169 Surrogacy Arrangements Act, *supra* note 166.

170 *Id.*

171 *Id.*

172 *Id.*

Pursuant to the SAA, surrogacy contracts are not legally enforceable in the United Kingdom.[173] Although not legally binding, it is still common practice for intended parents and surrogates to sign a written agreement as a statement of intention documenting the details of the arrangement.[174] In cases where disputes arise between the intended parents and the surrogate, the agreement is non-binding and the court would solely consider the child's best interests in adjudicating the disputed issues.[175] According to British law, the surrogate is the legal parent of the child at birth.[176] In order to gain legal parenthood, the intended parents need to obtain the surrogate's (and the surrogate's legal partner's, if applicable) consent and apply to a court for a parental order.[177]

In tandem, the HFE is focused on providing rights to intended parents in surrogacy arrangements.[178] The HFE introduced parental orders as an avenue for intended parents to gain legal parenthood to children that carry a genetic link to at least one of the intended parents without having to go through the adoption process.[179] The law allows married couples (including same-sex couples), couples in an enduring relationship or civil partnership, and single individuals to apply for a parental order and be treated as legal parents.[180] By clearly prescribing the legal requirements for parental order applications, these HFE provisions make the parentage question more predictable and thus can more effectively protect the expectation interests of intended parents and surrogates.

The SAA and the HFE have many strengths that could inform surrogacy legislation in the United States. Although the United Kingdom's laws are more restrictive compared to those in most "surrogacy-friendly" states in the United States, as the SAA prohibits commercial surrogacy and does not legally recognize surrogacy contracts, adopting such a uniform legal regime in the United States would block forum shopping behavior by ensuring consistent and equitable results across the nation. The HFE also reflects legislative efforts to develop the existing legal framework to accommodate modern societal norms

173 *Id.*

174 Bianca Olaye-Felix et al., *Surrogacy and the law in the UK*, 99 POSTGRADUATE MED. J. 358, 359 (2023).

175 *Id.*

176 *Id.*

177 *Id.* at 360.

178 *Id.* at 359.

179 Human Fertilisation and Embryology Act, *supra* note 168, § 54.

180 *Id.*

and technological advances. In particular, the HFE casts light on the potential benefit of parental orders as a mechanism to prevent unnecessary litigation concerning parental rights and protect surrogate parties' expectation interests.

2. Ukraine

Ukraine is another country with nationwide regulations on surrogacy. Ukraine is one of the most popular international surrogacy destinations, second only to the United States.[181] Ukraine's surrogacy law plays a prominent role in its popularity as a surrogacy destination. Ukraine's law alleviates any concern for uncertainties regarding parental rights and eliminates the need for burdensome court proceedings.

Ukraine's surrogacy law is highly permissive and sets forth enumerated rights and interests of intended parents. Gestational surrogacy is completely legal in Ukraine, provided that a few eligibility requirements are satisfied.[182] The law mandates that the parties sign a Written Informed Consent for participation in surrogacy.[183] The contracts between surrogates and intended parents are enforceable as long as they are executed in written form before a notary.[184] The law also states that the intended parents are recognized as the legal parents from the moment an embryo is created in the surrogate's body.[185] After the surrogate has given her informed consent to the arrangement, she cannot rescind on the agreement, and her name never appears on the child's birth certificate.[186] The surrogate must be within the age range of eighteen to thirty-six years old, have previously given

181 *Surrogacy During the War in Ukraine*, SURROGACY360 (Sept. 6, 2022), https://surrogacy360.org/resources/surrogacy-during-the-war-in-ukraine/#:~:text=Now%20Ukraine%20is%20one%20of,only%20to%20the%20United%20States [https://perma.cc/SJ7W-39G6].

182 For example, the prospective surrogate has to be healthy, of full age, free of medical contra-indications, and must have given birth to a healthy child before. *Legislation of Ukraine*, INT'L REPROD. TECH. SUPPORT AGENCY (IRTSA) (2023), http://www.irtsa.com.ua/en/legislation/ukraine.html [https://perma.cc/4L8B-ZRE4].

183 *See* Conklin, *supra* note 94, at 92.

184 Ukrainian Ministry of Justice Act on "Alterations to Civil Registration Regulations in Ukraine" No. 1154/5 from 22.11.2007, paragraph 10, article 3 (Ukr.).

185 Family Code of Ukraine, Article 123, Part 3, https://zakon.rada.gov.ua/laws/show/en/2947-14#Text [https://perma.cc/2X67-6SAH].

186 *See* Conklin, *supra* note 94, at 92.

birth to a healthy child, and must be free of hereditary diseases or harmful habits, such as alcoholism or drug addiction.[187]

Despite the benefits of Ukraine's surrogacy law for intended parents, the law has some glaring drawbacks. One such limitation is the law's stipulation that only married heterosexual couples can participate in the surrogacy process.[188] The limited eligibility denies surrogacy as an available family-building option for single individuals, same-sex couples, and unmarried heterosexual couples. In addition, advocates for women's rights decry the lack of safeguards for the health and interests of surrogates in Ukraine.[189] Ukrainian legislation does not explicitly provide for the surrogate's right to make decisions regarding medical procedures related to the pregnancy, does not require mental evaluation of any surrogate parties, and does not require that each party obtain an independent legal consultation prior to commencement of the surrogacy arrangement.[190] These gaps in Ukraine's law highlight the competing interests that inherently exist in surrogacy agreements. The interests of both the intended parents and the surrogate must be carefully weighed in crafting any equitable surrogacy legislations. Such key considerations of the surrogate include the surrogate's right to bodily and reproductive autonomy, the intended parents' expectation interests and right to procreate, and the state interest in preventing commodification and exploitation of women's reproductive capacity.

Despite these clear drawbacks, Ukraine's legal regime affords certainty to the surrogate parties and contains provisions that are friendly to intended parents. The United States could look to Ukrainian surrogacy legislation as an example, albeit one-sided, as it clearly delineates parental rights and has nationwide application.

C. Recommendations for U.S. Federal Surrogacy Legislation

It is imperative for Congress to adopt a uniform federal law to address the "jurisdictional

187 *Legislation of Ukraine*, *supra* note 182.

188 *Id.*

189 Kate Baklitskaya & Magdalena Chodownik, *Lack of Regulation and COVID-19 Leaves Ukrainian Surrogate Mothers and Babies in Limbo*, NEW E. EUR. (Dec. 24, 2020) https://neweasterneurope.eu/2020/12/24/lack-of-regulation-and-covid-19-leaves-ukrainian-surrogate-mothers-and-babies-in-limbo/ [https://perma.cc/UVL5-T99A].

190 *Legislation of Ukraine*, *supra* note 182.

chaos"[191] in the sphere of surrogacy regulation and provide adequate protections for parties engaging in surrogacy arrangements. While none of the model acts and foreign surrogacy laws discussed above are paragons, they serve as valuable base models for federal legislation governing surrogacy practices in the United States.

The ABA Model Act outlines some eligibility and procedural requirements governing the surrogacy process that should be adopted in the federal legislation. For example, the provisions regarding the surrogate's age, prior childbirth experience, physical and mental evaluations, and independent legal counsel are good baseline requirements.[192] Additionally, Congress should follow Alternative B as proposed by the ABA Model Act, which makes surrogacy contracts self-executing (given that all of the requirements are fulfilled).[193] Compared to the judicial preauthorization model in Alternative A, Alternative B eliminates the burden of judicial oversight; adopting Alternative B both promotes judicial economy and diminishes the potential of inconsistent outcomes for similarly situated individuals. While prior approval from the courts in Alternative A theoretically decreases ex-post legal disputes, all the substantive and procedural requirements, if duly fulfilled, should constitute adequate protection for all parties and minimize litigation risk.

The United States should consider the strengths and shortcomings of the laws in the United Kingdom and Ukraine in its own approach to federal surrogacy legislation. The United Kingdom holds a rather conservative stance towards surrogacy, banning all commercial surrogacy and declaring surrogacy agreements legally unenforceable.[194] The unenforceability of surrogacy contracts leaves both the surrogates and intended parents in an uncertain situation and at risk of exploitation. One party has no avenue of remediation if the other party reneges on their agreement or otherwise fails to meet the conditions upon which they agreed, just as what happened in the United States in *Baby M*.[195] Despite these shortcomings of the United Kingdom's surrogacy legislation, the United States can use the HFE as a model to protect intended parents' expectation interest regarding their parental rights. Enacting a law inspired by the HFE, which enables intended parents to be listed on

191 Drabiak, *supra* note 36, at 302.

192 *See* UNIFORM PARENTAGE ACT § 802 (UNIF. L. COMM'N 2017); *see American Bar Association Model Act*, 42 FAM. L.Q.

193 *See American Bar Association Model Act*, 42 FAM. L.Q. at 192–197.

194 Surrogacy Arrangements Act 1985, c. 49, § 2 (UK) https://www.legislation.gov.uk/ukpga/1985/49 [https://perma.cc/2XHW-WT96].

195 *See generally* Baby M, 537 A.2d 1227.

their genetic child's birth certificates,[196] would prevent situations in which intended parents have to legally adopt their child.

By comparison to the United Kingdom's surrogacy laws, Ukraine's law reflects a more permissive attitude towards surrogacy, even if it is unbalanced in its considerations for intended parents and surrogates. Congress should nevertheless follow Ukraine's example with respect to establishing a clear delineation of the rights of surrogate parties. Drawing lessons from Ukraine's approach, which favors intended parents over surrogates, Congress should seek to strike a balance between advancing intended parents' expectation interests and protecting surrogates' reproductive autonomy. This can be achieved by, for example, mandating independent legal counsel for potential surrogates before any procedure is done to ensure they are adequately educated on what surrogacy entails, have equal bargaining power in negotiating any surrogacy agreement, and are able to give true informed consent.

Establishing uniform federal legislation in the United States would eliminate forum shopping in the surrogacy context. Predictable, uniform surrogacy regulation would diminish the need for intended parents to track down surrogacy-friendly states, ensure consistent treatment across jurisdictions, and elevate the standards of protection afforded to surrogacy parties across the nation. For example, a comprehensive legal framework could address questions like access to surrogacy for same-sex couples and unmarried individuals, guidelines for fair compensation, requirements for obtaining legal parenthood, surrogates' medical decision-making rights, etc. Moreover, federal legislation could address the market failures in the surrogacy industry by imposing licensing requirements and operating standards on surrogacy agencies to ensure the rights of the other stakeholders are protected.

In discussing potential federal surrogacy legislation, it is important to acknowledge that surrogacy remains a highly contentious topic in the United States, both in stances toward how it should be regulated and in its public perception. The current discordant state laws suggest that any proposed bills outlining expansive surrogacy rights and protections for both intended parents and surrogates is unlikely to gain the congressional support it needs to become federal law. A possible alternative path would be for the Supreme Court to recognize surrogacy as a fundamental constitutional right as part of privacy rights and/or parental rights, which makes it subject to regulation by the federal government, not the states.

The lack of uniformity among states' approaches to surrogacy regulation reflects

196 *See* Conklin, *supra* note 94, at 91.

diverging public opinions over ethical and legal issues relating to surrogacy. Critics of surrogacy often express concerns over commodification of women and children, exploitation of the economically vulnerable, or moral objections to ART as a whole.[197] While some of these concerns are persuasive, they should not hinder the creation of a uniform surrogacy regulatory regime. In fact, some of these criticisms could be addressed by a uniform surrogacy regulatory regime. Establishing detailed, equitable federal surrogacy laws would ensure fairness to all parties and would promote judicial economy. As exemplified by the United Kingdom's and Ukraine's nationwide surrogacy laws, a uniform regulatory framework does not necessarily have to lie on either extreme end of the permissiveness-restrictiveness spectrum. The primary objective of federal surrogacy legislation should be to define the parameters of surrogacy contracts and protect the parties involved from exploitation and coercion.

CONCLUSION

The surrogacy industry's unbridled growth in the United States has outpaced Congress's ability to regulate it. This dearth of federal legislative guidance has resulted in a state-by-state piecemeal approach to regulating surrogacy in the United States. As courts struggle to maintain consistency in their rulings, confusion surrounding parties' rights and obligations grows. In response, surrogacy parties and agencies attempt to circumvent surrogacy-restrictive jurisdictions. This widespread forum shopping has produced inconsistent and inequitable treatments across the nation. Ultimately, the current system is unable to keep up with changing family planning practices, provide predictability for those involved in the surrogacy process, or safeguard the rights of surrogates and intended parents. As the law stands, surrogates are often vulnerable to exploitation and are left without remedy if the intended parents fail to fulfill any agreed-upon obligations. On the other hand, states that deem surrogacy contracts unenforceable or that lack clear provisions on parental rights force the intended parents to gamble with their expectation of sole parental rights to their genetic child.

The solution is clear: the implementation of uniform surrogacy legislation at the federal level. A nationwide law would provide legal clarity to surrogate parties as to their rights, fortify the right to equal protection across state lines, and eradicate forum shopping to ensure that contracting parties are not left to the mercy of courts' differing interpretations. The United States can learn from the examples of the United Kingdom and Ukraine's legal

197 Christine Metteer Lorillard, *Informed Choices and Uniform Decisions: Adopting the ABA's Self-Enforcing Administrative Model to Ensure Successful Surrogacy Arrangements*, 16 CARDOZO J.L. & GENDER 237, 249–53 (2010).

regimes concerning surrogacy, adopting their strengths and avoiding their downfalls in order to minimize legal confusion, protect surrogacy parties' rights, and reflect growing societal acceptance of surrogacy. In considering these examples and looking to models like the UPA and the ABA Model Act, federal surrogacy legislation could finally curb forum shopping in the surrogacy context, strengthen protections for surrogates, and safeguard the interests of intended parents as they navigate the path to building a family.

Now is the time to focus on comprehensive, federal surrogacy legislation. In *Dobbs*, the Supreme Court chipped away at substantive due process jurisprudence. Arguably, *Dobbs* left many fundamental rights concerning parentage, procreation, and bodily autonomy in a precarious position. As such, it is more urgent than ever that Congress takes legislative action to protect the right to procreation and parental rights for all individuals seeking to pursue parenthood through surrogacy, ensuring their right to equal protection.

Surrogacy will likely always be an area replete with ethical issues, ranging from imbalanced power dynamics to reproductive autonomy. This reality should not be an excuse for Congress to turn a blind eye to the inadequacy of market forces and the need for legislative cohesion at the federal level. The legal clarity provided by a uniform surrogacy law would safeguard intended parents' and surrogates' expectation interests, clarify the parties' rights and obligations, and facilitate judicial efficiency.