

# Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy

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## INTRODUCTION

Assisted reproductive technology (ART) has made great strides in furthering many Americans' dreams of becoming parents. The law has come to fully embrace ART in many of its forms—particularly when it comes to a married couple's use of a technology like in vitro fertilization (IVF).<sup>1</sup> Even more morally and ethically controversial forms of ART have gained sway. Surrogacy arrangements, not so long ago relegated to the black market, are now recognized as valid and are legally enforceable in more than a dozen states.<sup>2</sup> Some traditionally conservative states,

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1. See, e.g., LA. REV. STAT. ANN. § 40:34(B)(1)(a)(viii) (2012) (recognizing the intended parents of a child born through surrogacy to be the parents for purposes of the birth certificate); *id.* § 40:32 (requiring that those intended parents be married). See generally Ann MacLean Massie, *Restricting Surrogacy to Married Couples: A Constitutional Problem? The Married-Parent Requirement in the Uniform Status of Children of Assisted Conception Act*, 18 HASTINGS CONST. L.Q. 487 (1991) (discussing the marriage requirement and potential constitutional issues that might arise).

2. See Sarah Mortazavi, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2258–60 (2012) (categorizing states that either permit, regulate, or ban “commercial” and/or “altruistic” surrogacy contracts).

such as Louisiana, are wrestling even today with drafting laws to sanction surrogacy in a limited form.<sup>3</sup> Thousands of families are said to have created families through surrogacy last year alone.<sup>4</sup>

The law's evolution in accepting these modern families is laudable, but there is much work left to be done. State laws relating to surrogacy frequently continue to perpetuate discrimination based on marital status. In the relatively small number of states that do sanction some form of surrogacy, state law will often recognize and enforce a surrogacy arrangement only when the intended parents are married.<sup>5</sup> The result of this marriage requirement is a body of American surrogacy law that frequently suffers from serious constitutional defects. The Constitution permits some disparate treatment of groups, but discrimination based on marital status in a fundamental matter such as family formation fails to satisfy constitutional standards and must not be tolerated.<sup>6</sup>

This Article seeks to push states that open the door to surrogacy as a permissible reproductive avenue to begin affording the right to married and unmarried intended parents alike. Narrowly tailoring rules that recognize the practical realities of the widespread use of surrogacy arrangements is necessary to eliminate unconstitutional treatment of all the actors involved in the surrogacy process.

Part I of the Article will describe America's history with surrogacy as a reproductive technology and detail the current regulatory scheme. From *Baby M*<sup>7</sup> to a wider acceptance of gestational surrogacy, the last thirty years have brought about a serious evolution in societal and legal views on surrogacy. Part II will detail state-sanctioned discrimination in surrogacy, focusing particularly on marital status-based discrimination. Part III will consider the scrutiny that should obtain when surrogacy regulations come under constitutional attack. The appropriate level of scrutiny in this area is woefully indeterminate, leaving courts, scholars, and litigants alike stuck in a morass of uncertainty. Finally, Part IV will demonstrate that even those American states that have progressively sanctioned some form of surrogacy have occasionally done so unconstitutionally. Regimes with a marriage requirement are scrutinized on equal protection grounds and are shown to fall short of what is constitutionally required.

Limitations on the use of surrogacy in this country abound, in part because Americans simply have not fully embraced the notion excoriated thirty years ago as the "rental of the womb."<sup>8</sup> The technology is within our hands.<sup>9</sup> Attitudes about the

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3. See, e.g., S. Con. Res. 81, 2010 Leg., Reg. Sess. (La. 2010) (calling for a reevaluation and revision of Louisiana surrogacy rules in light of national trends toward sanctioning gestational surrogacy and the evolution of reproductive technology since the last legislative modification to Louisiana surrogacy rules).

4. See Nara Schoenberg, *Born in the USA*, CHI. TRIB., Apr. 13, 2011, available at [http://articles.chicagotribune.com/2011-04-13/health/ct-news-surrogate-mom-20110413\\_1\\_surrogacy-center-for-surrogate-parenting-international-parents](http://articles.chicagotribune.com/2011-04-13/health/ct-news-surrogate-mom-20110413_1_surrogacy-center-for-surrogate-parenting-international-parents); see also Helene S. Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 NW. U. L. REV. 465, 465 (2006).

5. See *infra* Part II.

6. See *infra* Parts III–IV.

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

8. See, e.g., Emily Gelmann, "I'm Just the Oven, It's Totally Their Bun": *The Power*

legitimacy of families created in nontraditional ways have undergone a necessary and profound change.<sup>10</sup> But still, Americans find “something profoundly frightening” in the use of ART<sup>11</sup>—especially surrogacy. ART has come a long way in the last several decades.<sup>12</sup> I argue here that the progress we have made is laudable, but we must evolve more quickly to recognize the realities of surrogacy, to eradicate unconstitutional treatment of intended parents, and to bring American treatment of surrogacy into line with what the Constitution has protected for centuries.

### I. THE UNITED STATES’ EXPERIENCE WITH SURROGACY

Surrogacy appeared on the national radar in America around 1988, when America wept with the families involved in the “Baby M” case.<sup>13</sup> There, William and Elizabeth Stern, a wealthy biochemist and doctor, sought to have a biological child.<sup>14</sup> Because Mrs. Stern had been diagnosed with multiple sclerosis, however, she feared that pregnancy might cause a significant and life-threatening aggravation of her condition.<sup>15</sup> The Sterns, therefore, sought out a surrogate who would help them in return for compensation.<sup>16</sup> And they rather quickly found one. Mary Beth Whitehead, a former employee of a bar and a go-go dancer,<sup>17</sup> with a husband who worked in sanitation, agreed to carry a child to term for the Sterns for the sum of \$10,000.<sup>18</sup> The parties contracted, in advance, that Mary Beth Whitehead would be inseminated with William Stern’s sperm, gestate any resulting child, and relinquish all rights to the child to the Sterns upon the child’s birth.<sup>19</sup> All apparently went

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*and Necessity of the Federal Government to Regulate Commercial Gestational Surrogacy Arrangements and Protect the Legal Rights of Intended Parents*, 32 WOMEN’S RTS. L. REP. 159, 184 (2011); Flavia Berys, Comment, *Interpreting a Rent-a-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangements Go Sour*, 42 CAL. W. L. REV. 321, 322 (2006); Iris Leibowitz-Dori, Note, *Womb for Rent: The Future of International Trade in Surrogacy*, 6 MINN. J. GLOBAL TRADE 329, 343 (1997).

9. See JUDITH F. DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW 36 (2006) (describing the development of reproductive technologies).

10. See *infra* text accompanying notes 42–45.

11. See, e.g., Gilbert Meilaender, *Products of the Will: Robertson’s Children of Choice*, 52 WASH. & LEE L. REV. 173, 185 (1995) (quoting JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 3 (1994) (internal quotation marks omitted)).

12. See DAAR, *supra* note 9, at 25–37.

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

14. *Id.* at 1249; see also Kurt Heine, *A Bitter Summary of Surrogacy’s Pitfalls*, PHILA. DAILY NEWS, March 13, 1987, at 04.

15. *Baby M*, 537 A.2d at 1235.

16. See *id.* at 1236.

17. See Mike Kelly, *25 Years After Baby M*, REC., March 30, 2012, at A01; Adrian Lee, *‘She Knows Who I Am’ Baby M Case Mocks Warmth of Motherhood*, PHILLY.COM (March 19, 1987), [http://articles.philly.com/1987-03-19/news/26222097\\_1\\_sterns-surrogate-mother-judge-harvey-r-sorkow](http://articles.philly.com/1987-03-19/news/26222097_1_sterns-surrogate-mother-judge-harvey-r-sorkow).

18. See Lee, *supra* note 17; see also Heine, *supra* note 14.

19. *Baby M*, 537 A.2d at 1235.

according to plan, until the child was born.<sup>20</sup> Mary Beth Whitehead took one look at the baby and changed her mind.<sup>21</sup> She could not bring herself to relinquish to the Sterns the child she considered her daughter. She refused<sup>22</sup> the \$10,000 and told the Sterns of her intent not to honor their contract.<sup>23</sup> The Sterns, of course, sought enforcement of the bargain they had made with Mary Beth Whitehead—an agreement to allow them to rear a child that was biologically Mr. Stern’s—in the state of its making, New Jersey.<sup>24</sup> Fearful that the contract would be enforced in a manner that deprived her of rights to her genetic child, Mary Beth Whitehead fled to Florida with the child as the nation looked on in awe and horror.<sup>25</sup>

A multistate custody battle began—one that would last years, cost tens of thousands of dollars, and expose just how out-of-touch and deficient American surrogacy rules—or the lack thereof—were in the 1980s.<sup>26</sup> In the end, the Sterns were awarded custody of Baby M, with rights of visitation recognized in Mary Beth Whitehead because of her role as genetic mother (and surrogate).<sup>27</sup>

The true contribution of *Baby M* lies not so much in its holding. Indeed, the court’s ultimate conclusion that surrogacy agreements must not be enforced is of questionable utility in modern times.<sup>28</sup> The *Baby M* court rejected surrogacy, at least in part, because in the case before it the surrogate contributed genetic material to the child’s creation.<sup>29</sup> Enforcing the surrogacy contract would, therefore, have forced a genetic mother to comply with an agreement she made, in advance of a child’s birth—at perhaps an economically vulnerable time—to relinquish her own child.<sup>30</sup> In other words, *Baby M* makes sense as a traditional surrogacy case.

These days, however, most surrogacy arrangements are gestational.<sup>31</sup> The same risks and societal concerns do not necessarily arise in this alternate form of surrogacy. In gestational surrogacy, the surrogate merely acts as a carrier for the child.<sup>32</sup> Her role is gestational in nature, and, by definition, she is not genetically related to the child she gestates, who is the genetic child of the intended parents.<sup>33</sup>

20. See *id.* at 1236; see also Carolyn Acker, *Surrogate Cried ‘Hysterically’ After Baby Left, Husband Says*, PHILA. INQUIRER, Jan. 8, 1987, at B05.

21. See *Baby M*, 537 A.2d at 1236; see also Acker, *supra* note 20.

22. Acker, *supra* note 20; Carolyn Acker, *Whitehead Says She’ll Fight Till End for Baby M*, PHILA. INQUIRER, Apr. 3, 1987, at A01.

23. *Baby M*, 537 A.2d at 1237.

24. See *id.*

25. See *id.*; see also Barbara Beck, *Baby M’s Mother Gives Birth to Book Hires Surrogate Writer to Help Tell-All*, PHILA. DAILY NEWS, March 8, 1989, at 41 (referring to Mary Beth Whitehead as the “world’s most notorious surrogate mother”); Heine, *supra* note 14.

26. See Heine, *supra* note 14; Joseph F. Sullivan, *Lawyer and Guardian Ask for Fees for Baby M Trial*, N.Y. TIMES, July 15, 1987, at B2.

27. See *Baby M*, 537 A.2d at 1259–64.

28. See, e.g., *A.H.W. v. G.H.B.*, 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000) (distinguishing gestational surrogacy agreements from the more abhorred agreements to engage in traditional surrogacy).

29. See *Baby M*, 537 A.2d at 1246–51.

30. See *id.*

31. See *Symposium: Panel I*, 8 RUTGERS J.L. & PUB. POL’Y 934, 939 (2011).

32. CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, *ASSISTED REPRODUCTIVE TECHNOLOGY* § 5.1–3 (2d. ed. 2011).

33. *Id.* It is possible, of course, that the child resulting from gestational surrogacy not be genetically related to the intended parents either—in the case of use of donor gametes. Such

*Baby M* likely did not speak to gestational surrogacy. While the decision prohibits the use of surrogacy agreements in rather sweeping language, one of its central rationales is the impropriety of forcing a woman to relinquish her genetic child for pay.<sup>34</sup> In a gestational surrogacy, the surrogate does not have any genetic connection to the child, making the relinquishment bargain she makes less offensive.<sup>35</sup> More importantly, and more pragmatically, one can be reasonably confident that the *Baby M* court did not intend to speak to matters of gestational surrogacy, simply because the technology on which gestational surrogacy depends either didn't exist, or was in stages of infancy, at the time *Baby M* was decided in 1988. Gestational surrogacy relies on the use of in vitro fertilization, a reproductive technology that was first successfully employed in the United States in 1981.<sup>36</sup> *Baby M*'s lessons should, therefore, be interpreted narrowly, as limited to traditional surrogacy.

Nonetheless, there is a strong argument that much of *Baby M*'s rationale extends to gestational surrogacy as well. One of the traditional concerns about upholding surrogacy is governmental acceptance of the "renting of the womb."<sup>37</sup> Essentially, the fear is that surrogacy will be used to exploit women in weaker socioeconomic classes, commodifying both their bodies and the reproductive process.<sup>38</sup> Some suggest that concern should compel the law to act to ban all forms of surrogacy, or at least all compensated forms.<sup>39</sup>

In the wake of *Baby M*, many state legislatures did precisely that. Today, seven states and the District of Columbia have clear legislative bans on both traditional and gestational surrogacy.<sup>40</sup> Still four more states prohibit all forms of surrogacy by judicial decision.<sup>41</sup>

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a relationship is still considered to be a "gestational" rather than a "genetic" surrogacy, however, the critical feature of the former being only that the surrogate is not genetically related to the child. *See id.*

34. *See Baby M*, 537 A.2d at 1246 (noting the surrogacy's invalidity stems from the "basic premise[] that the natural parents can decide in advance of birth which one is to have custody of the child," which contravenes the policy that the child's best interests should determine custody); *id.* at 1246-47 (stating that the state's ultimate goal is that "children should remain with and be brought up by both of their natural parents" and "that the rights of natural parents are equal concerning their child, the father's right no greater than the mother's"); *id.* at 1248 (describing "the strength of [a mother's] bond with her child").

35. *See, e.g.,* Brittnay M. McMahon, *The Science Behind Surrogacy: Why New York Should Rethink Its Surrogacy Contracts Laws*, 21 ALB. L.J. SCI. & TECH. 359, 373 (2011) (arguing that New York, specifically, should amend its laws to allow for *gestational* surrogacy rather than *traditional* surrogacy because of the inherent differences in the procedures, namely that the surrogate is unrelated to the fetus in gestational surrogacy).

36. *See Timeline: The History of In Vitro Fertilization*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/timeline/babies/2/>; *see also* Walter Sullivan, 'Test-Tube' Baby Born in U.S., *Joining Successes Around the World*, N.Y. TIMES, Dec. 29 1981, at C1.

37. *See supra* note 8 and accompanying text.

38. *See* Beverly Horsburgh, *Jewish Women, Black Women: Guarding Against the Oppression of Surrogacy*, 8 BERKELEY WOMEN'S L.J. 29, 35, 51-54 (1993).

39. *Id.* at 35.

40. *See* ARIZ. REV. STAT. ANN. § 25-218(A) (2007) ("No person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract."); D.C. CODE § 16-402(a) (2001) ("Surrogate parenting contracts are prohibited and rendered unenforceable in the District."); IND. CODE ANN. §§ 31-9-2-126 to -127, 31-20-1-1 to -3

The last ten years, however, have brought a slight change in tide toward fuller American acceptance of multiple forms of assisted reproductive technologies, including surrogacy.<sup>42</sup> As of the year 2000, even the Uniform Parentage Act approves of the use of gestational surrogacy,<sup>43</sup> a procreative method it refused to recognize as advisable ten years earlier.<sup>44</sup> And to date, nearly a dozen states have passed legislation that sanctions some form of surrogacy, most frequently in its gestational and uncompensated form.<sup>45</sup>

Nonetheless, surrogacy is still underaccepted in this country, particularly compared with our international peers.<sup>46</sup> Indeed, scientists are said to be close to perfecting uterine transplants, a process they say is exciting because it will prevent infertile women from being forced to resort to surrogacy.<sup>47</sup>

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(LexisNexis 2007); LA. REV. STAT. ANN. § 9:2713(A) (2005) (“A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy.”); MICH. COMP. LAWS ANN. § 722.855 (2011) (“A surrogate parentage contract is void and unenforceable as contrary to public policy.”); NEB. REV. STAT. ANN. § 25-21,200 (LexisNexis 2004); N.Y. DOM. REL. LAW § 122 (McKinney 2010) (“Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.”); N.D. CENT. CODE § 14-18-05 (2009) (“Any agreement in which a woman agrees to become a surrogate or to relinquish that woman’s rights and duties as parent of a child conceived through assisted conception is void.”); *see also* KINDREGAN & MCBRIEN, *supra* note 32, § 5.4. This number is both confusing and, perhaps, deceptive. States enact various statutes but they are occasionally held unenforceable by the state’s courts under constitutional guarantees; for an example, *see id.* § 5.4, at 159–60, for a discussion of Arizona’s statutory ban on surrogacy and the state court’s judgment holding that the statute violates equal protection. For an alternate discussion of states allowing or banning surrogacy, *see* Mortazavi, *supra* note 2, at 2258–62.

41. *See* KINDREGAN & MCBRIEN, *supra* note 32, § 5.4. This number is as equally troublesome due to different courts within the same state issuing varying judgments on traditional surrogacy and gestational surrogacy. For an alternate discussion of key state jurisprudence, *see* Mortazavi, *supra* note 2, at 2258–62.

42. *See Assisted Reproductive Technology (ART)*, CDC.GOV, <http://www.cdc.gov/art/> (describing a doubling in the use of ART over the course of the last decade).

43. *See* UNIF. PARENTAGE ACT § 801 (amended 2002), 9B U.L.A. 362 (2001 & Supp. 2012).

44. *Compare id.*, with UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 2, 9C U.L.A. 122 (2001).

45. *See* Mortazavi, *supra* note 2, at 2258–70 (canvassing the patchwork approach to surrogacy among the fifty states: statutory, jurisprudential, and absent laws).

46. *See id.* at 2270–71 (noting that certain countries allow altruistic surrogacy—namely Brazil, Greece, Holland, Israel, South Africa, Canada, Australia, and the United Kingdom). Furthermore, Russia and Ukraine allow both altruistic and commercial surrogacy. *See id.* at 2272. India’s lack of regulation has made it “a popular destination” for commercial and altruistic surrogacy. *Id.* at 2271–72.

47. *See Hospital Plans to Offer First Uterus Transplant*, NBCNEWS.COM, Jan. 15, 2007, [http://www.msnbc.msn.com/id/16637583/ns/health-womens\\_health/t/hospital-plans-offer-first-uterus-transplant/#.UE\\_5tmie7cY](http://www.msnbc.msn.com/id/16637583/ns/health-womens_health/t/hospital-plans-offer-first-uterus-transplant/#.UE_5tmie7cY); Fiona Macrae, *Britain’s First Womb Transplant Could Be Carried Out in Just Two Years*, MAIL ONLINE (July 12, 2012), <http://www.dailymail.co.uk/health/article-2172420/Britain-s-womb-transplant-carried-just-TWO-YEARS.html>.

## II. PENALIZING SINGLETONS AND COHABITANTS—THE MARRIAGE REQUIREMENT

Despite the general American reticence toward recognizing and enforcing gestational surrogacy arrangements, some states have taken steps to affirm some surrogacy.<sup>48</sup> Both Florida and Louisiana have statutes appearing to do just that.<sup>49</sup>

Florida's surrogacy legislation, passed in 1993,<sup>50</sup> allows both traditional and gestational surrogacy. Oddly, Florida law allows even unmarried couples to use traditional surrogacy.<sup>51</sup> Gestational surrogacy agreements, on the other hand, are only permitted under Florida law when the intended parents are "legally married."<sup>52</sup>

Louisiana's rules are even odder. First, it is unclear whether gestational surrogacy is permissible in Louisiana at all. The only state statute directly addressing surrogacy is Louisiana Revised Statute section 9:2713, which provides that:

A. A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy.

B. "Contract for surrogate motherhood" means any agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child.<sup>53</sup>

This statute arguably prohibits all surrogacy in Louisiana. However, it was passed immediately in the wake of *Baby M*, when the country was outraged over the possibility that Mary Beth Whitehead might lose custody of her genetic child because of an agreement she made to act as a surrogate. The statute sought to prevent a *Baby M*-style debacle from occurring in Louisiana. Its terms, however, are limited to banning compensated surrogacies involving insemination,<sup>54</sup> a process that only traditional surrogacy arrangements utilize.<sup>55</sup> The statute may not speak at

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48. See, e.g., WASH. REV. CODE ANN. § 26.26.230 (West 2005) (prohibiting "the formation of a surrogate parentage contract . . . for compensation"); see also Mortazavi, *supra* note 2, at 2258–62 (classifying states that permit, regulate, or ban "commercial" and/or "altruistic" surrogacy contracts).

49. See FLA. STAT. ANN. § 742.15 (West 2010) (establishing that Florida sanctions only altruistic surrogacy agreements); LA. REV. STAT. ANN. § 9:2713 (2005); see also *infra* notes 54–56 and accompanying text (explaining the apparent discrepancy between the Louisiana statute's plain language and its interpretation).

50. See Act of May 15, 1993, ch. 93–237, 1993 Fla. Laws 2405.

51. See FLA. STAT. ANN. § 63.213 (West 2012) (permitting "preplanned adoption agreements" which constitute a "transfer of custody of a child" and also a "consent of a mother to place her biological child for adoption" utilizing whatever "fertility technique" is specified in the agreement without a requirement of marriage of the resulting parents).

52. FLA. STAT. ANN. § 742.15.

53. LA. REV. STAT. ANN. § 9:2713.

54. See *id.*

55. See Anne R. Dana, *The State of Surrogacy Laws: Determining Legal Parentage for*

all to gestational surrogacy, wherein IVF technology, not insemination, is used.<sup>56</sup> Indeed, that technology was virtually unknown at the time of the Louisiana statute's 1987 passage, largely because the first successful IVF procedure in this country was conducted in 1981.<sup>57</sup> Further bolstering the interpretation that section 9:2713 prohibits only traditional surrogacy in Louisiana are a couple of well-hidden statutes in the vital statistics area of Louisiana legislation, which provide that if a "husband and wife, joined by legal marriage recognized as valid" agree with a relative by blood or affinity for that relative to act as a surrogate, the married couple/intended parents will be listed as the child's parents on the birth certificate.<sup>58</sup> The statute does not directly provide that gestational surrogacy agreements are enforceable in Louisiana, nor does anything else in Louisiana law, but it is certainly some indication that these arrangements are not viewed in the same abhorrent manner as are traditional surrogacy agreements.<sup>59</sup>

Importantly, to the extent Florida and Louisiana sanction surrogacy agreements at all, they sanction them only for married intended parents.<sup>60</sup> Unmarried intended parents may be able to conceive and deliver a child naturally, but the use of a surrogate is unavailable based solely on marital status. This form of discrimination cannot pass constitutional muster, even on a relatively sparse background of successful challenges to marital status-based discrimination.

### III. THE STANDARD OF SCRUTINY SUBTERFUGE

Much like the debates that rage on over the constitutionality of bans on same-sex marriage, discussions about the constitutionality of surrogacy limitations are frequently unfocused and unproductive because those debating cannot come to common ground about a basic, threshold issue: What level of scrutiny applies when assessing whether surrogacy limitations meet constitutional muster? It is nearly axiomatic at this point that governmental infringement upon the right to procreate must satisfy standards of strict scrutiny.<sup>61</sup> The U.S. Supreme Court held as early as the 1940s that the right to procreate—or, more specifically, the right to liberty in making procreative decisions—is a fundamental right.<sup>62</sup> Fundamental rights require that the government tread lightly, infringing upon personal autonomy only where necessary.<sup>63</sup> It would seem, then, that as surrogacy statutes necessarily relate to

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*Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 360–61 (2011) (distinguishing and elaborating on the differences between traditional and gestational surrogacy); Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 149 (2000).

56. See Dana, *supra* note 55, at 360–62.

57. See *supra* note 36 and accompanying text.

58. LA. REV. STAT. ANN. § 40:34(B)(1)(a)(viii) (2012) (recognizing the intended parents of a child born through surrogacy to be the parents for purposes of the birth certificate); *id.* § 40:32 (requiring that those intended parents be married).

59. Compare LA. REV. STAT. ANN. § 9:2713 (2005), with LA. REV. STAT. ANN. § 40:34.

60. See FLA. STAT. ANN. § 742.15 (2010); LA. REV. STAT. ANN. §§ 40:32, 34(B)(1)(a)(viii).

61. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

62. See *id.*

63. See, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam)



human procreation, they must be viewed through the lens of heightened scrutiny. Unfortunately, however, the question is far from settled.

The difficulty boils down to whether the fundamental right of freedom in procreative decision making is limited to traditional coital reproduction, or whether it extends to include procreation through more modern technological means, some of which require collaborators in the reproductive process. Scholars have staked out positions in favor of a narrow view of what liberty in procreation means, an exceptionally expansive one, and even an intermediate approach.<sup>64</sup> Because the U.S. Supreme Court has yet to elaborate on the contours of freedom in procreation in a case involving ART, the issue is far from settled, and debate rages on.

*A. Answering the Unanswered Question: Is Access to ART a Constitutionally Protected Right?*

Those who advocate a narrow view of the right to freedom in reproductive decision making rest largely on the notion that fundamental rights include only those that are deeply rooted in tradition and history and that ART, of course, is not so rooted.<sup>65</sup> Focusing on gestational surrogacy specifically, the IVF technique on which it relies has been in existence for about forty years and has been relatively reliable for an even shorter period.<sup>66</sup> Further, some argue that Supreme Court precedent protecting reproductive autonomy actually protects that autonomy only when it implicates concerns about bodily integrity.<sup>67</sup> Viewed in this manner, *Roe v. Wade*<sup>68</sup> protects the right to choose abortion only because a woman cannot be coerced to use her body to carry a child to term.<sup>69</sup> *Carey v. Population Services International*<sup>70</sup> protects the right to use contraception for the same reasons.<sup>71</sup> And *Skinner v. Oklahoma ex rel. Williamson*<sup>72</sup> protects against forced sterilization only because it would involve an affirmative intrusion upon the body.<sup>73</sup> Moreover, proponents of this narrow interpretation view rights to reproductive autonomy as negative rights rather than positive ones.<sup>74</sup> Viewed through such a lens, the

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(“[E]qual protection analysis requires strict scrutiny of a legislative classification . . . [when it] interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.” (footnotes omitted)).

64. See *infra* Part III.A.

65. See, e.g., I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1165–67 (2008).

66. See *Timeline: The History of In Vitro Fertilization*, *supra* note 36; see also DAAR, *supra* note 9, at 36 (dating the first successful birth following in vitro fertilization to 1978); Sullivan, *supra* note 36.

67. See, e.g., Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1464–67 (2008).

68. 410 U.S. 113 (1973).

69. See Rao, *supra* note 67, at 1464–65.

70. 431 U.S. 678 (1977).

71. See Rao, *supra* note 67, at 1464–65 (describing the Supreme Court’s contraception cases as “provid[ing] only a limited right to prevent conception,” entangled with “concerns about bodily integrity and inequality”).

72. 316 U.S. 535 (1942).

73. See Rao, *supra* note 67, at 1464–65.

74. See, e.g., Meilaender, *supra* note 11, at 180.

government may not be permitted to restrain individuals in their exercise of reproductive rights, but it is “under no obligation to provide the services or resources that would make such exercise possible.”<sup>75</sup> Some might argue that the recognition of surrogacy contracts is one such “service” that a state may legally withhold.<sup>76</sup> For these scholars, then, the right to reproductive autonomy that the U.S. Supreme Court has recognized is an exceptionally narrow one.

Some advocate an equally extreme, yet wholly expansive, view of the right to liberty in procreation.<sup>77</sup> Emphasizing the “centrality of reproduction to personal identity, meaning, and dignity,”<sup>78</sup> these scholars argue that if the constitutional right to liberty in the procreative process means anything, it means that individuals’ decisions to “have and rear offspring” must be protected.<sup>79</sup> For that right to function in a developing society, it too must be reinterpreted in light of modern reproductive possibilities and limitations.<sup>80</sup> If individuals are naturally limited by infertility, and “if there is an available medical procedure that will ‘cure,’ or at least alleviate, [it],” then a “couple’s right to access that procedure” has been described as robust enough to include “a right to access any other medical treatment which would allow for an ability to live a full life.”<sup>81</sup> For some, then, the Constitution protects nearly all forms of reproduction, including use of the IVF technology needed to accomplish genetic surrogacy and even more aggressive uses of reproductive technology.<sup>82</sup>

Finally, at least one scholar has articulated a position in between these two extremes. Radhika Rao has argued that the constitutionally protected right to procreate does not encompass new, nonhistorically rooted, and artificial forms of reproduction such as those involving the use of IVF.<sup>83</sup> In other words, she argues that there is no protected right to use ART.<sup>84</sup> Nonetheless, Rao maintains that the government must regulate in a manner that gives all persons “an equal right[] [to access ART], even if no one retains an absolute right.”<sup>85</sup> For Rao, then, ART regulation comes down to a question of whether a governing authority acts evenhandedly.<sup>86</sup> Thus, restrictions on access to ART may be permissible and may

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75. *Id.*

76. *Id.*

77. *See, e.g., id.* at 178–79; *see also* ROBERTSON, *supra* note 11, at 22–42.

78. ROBERTSON, *supra* note 11, at 30.

79. *Id.* at 126.

80. *See generally* Gregory Dolin, Dorothy E. Roberts, Lina M. Rodriguez & Teresa K. Woodruff, *Medical Hope, Legal Pitfalls: Potential Legal Issues in the Emerging Field of Oncofertility*, 49 SANTA CLARA L. REV. 673, 676–80 (2009) (describing cases and other American authorities implying, but not explicitly recognizing, a right to reproduce that extends to the use of ART).

81. Gregory Dolin, *A Defense of Embryonic Stem Cell Research*, 84 IND. L.J. 1203, 1220 (2009).

82. *See* Rao, *supra* note 67, at 1459 (explaining that some scholars view preimplantation genetic diagnosis of embryos and cloning as potentially protected reproductive activities).

83. *Id.* at 1462–68.

84. *Id.*

85. *Id.* at 1460 (emphasis omitted).

86. *Id.* at 1489.

likewise be unconstitutional, depending on whether they draw lines between classes.<sup>87</sup>

*B. Standards of Scrutiny in the Face of Uncertainty*

The coming of the recognition of a fundamental right that extends beyond coitus and into reproductive technologies like surrogacy may well be imminent. In one of the most recent pronouncements on the matter, a federal district court in Utah held that a couple's "singular opportunity to procreate through gestational surrogacy necessarily implicates their fundamental right to bear children, thereby invoking the protections of the U.S. Constitution and the Utah Constitution."<sup>88</sup> Still, this Article does not seek to solve the long-mystifying question as to whether access to ART holds a place among the constitutionally protected procreative liberties. Rather, I argue that the standard does not matter. Legislation that discriminates among unmarried individuals, effectively denying them a right to use surrogates in the reproductive process, is likely unconstitutional even if the inclusion of surrogacy and other forms of ART among constitutionally protected rights is ultimately rejected. In the marital status discrimination context, scholars have overfocused on the status of ART as protected, largely ignoring that the question may well not be determinative of the constitutionality of the legislation at hand.

Much has changed in the reproductive technology arena since the Supreme Court's decision in *Eisenstadt v. Baird*.<sup>89</sup> Nonetheless, this seminal case on marriage-based discrimination provides a number of important insights for surrogacy, although it was decided well before surrogacy became controversial in the United States. In *Eisenstadt*, the Court struck down a Massachusetts statute prohibiting the distribution of contraceptives for the purpose of preventing pregnancy to unmarried persons only; distribution could be freely made to married persons under the statute.<sup>90</sup> In so ruling, the U.S. Supreme Court noted that the Constitution does not deprive a state of the ability to treat different categories of persons differently.<sup>91</sup> But when a state statute places persons in different classes, the Constitution does deny that state "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."<sup>92</sup> There must be a rational relationship between the classification's differing treatment and the objective of the statute.<sup>93</sup>

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87. *Id.*

88. *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1274 (D. Utah 2002) (citing Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 856 (2000)); see also DeLair, *supra* note 55, at 181; Terrence Theophilus Griffin, Note, *Surrogacy Agreements: Permitting Americans to Structure Work and Home*, 53 WAYNE L. REV. 1063, 1078–81 (2007).

89. 405 U.S. 438 (1972).

90. *Id.* at 440–43.

91. *Id.* at 447.

92. *Id.*

93. See *id.*

The protection *Eisenstadt* affords may appear to provide little comfort. In the surrogacy context, there is little doubt that the bar to upholding surrogacy legislation in the face of an equal protection attack has been set especially low. One scholar, Richard F. Storrow, has even suggested that “discrimination on the basis of marital status is likely to survive low-level rational basis scrutiny in many contexts,” and that “‘an uncommonly silly law’ might have a rational basis.”<sup>94</sup> Nonetheless, equal protection does pose an obstacle;<sup>95</sup> even proffering a rational basis for marital status discrimination in light of the importance of procreative liberty in American jurisprudence may simply be too high a burden for states to shoulder should surrogacy statutes come under constitutional attack. Moreover, “society’s commitment to equal treatment and interpretivism’s commitment to consistency in the law” require more.<sup>96</sup>

Storrow’s concerns about the likelihood of much marital status discrimination surviving strict scrutiny are legitimate but are unlikely to prove worrisome in the surrogacy context specifically. Surrogacy bears upon one of the most significant civil liberties afforded mankind.<sup>97</sup> But even if there is no fundamental right to access surrogacy as a means of reproducing, and thus heightened scrutiny is not triggered,<sup>98</sup> marital status discrimination likely fails to survive even a rational basis review.

#### IV. THE CASE AGAINST THE LEGALITY OF MARITAL STATUS-BASED DISCRIMINATION

To survive any level of constitutional scrutiny, states banning unmarried persons from accessing surrogacy must legitimate their bans by articulating the state interest in restricting the use of surrogacy. Because few constitutional challenges to surrogacy have been lodged to date, states’ articulated interests in other statutes limiting rights in the procreative context prove particularly instructive. *Eisenstadt v. Baird*,<sup>99</sup> one of the first cases requiring a state to articulate its reasons for procreative regulation, provides a helpful starting point in examining frequently advanced state interests.

In *Eisenstadt*, the State of Massachusetts proffered a number of different possibilities as to its interest in the Massachusetts contraception statute, and it is

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94. Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 330 (2006).

95. See Jamie L. Zuckerman, *Extreme Makeover—Surrogacy Edition: Reassessing the Marriage Requirement in Gestational Surrogacy Contracts and the Right to Revoke Consent in Traditional Surrogacy Agreements*, 32 NOVA L. REV. 661, 677 (2008) (“[B]eing born into a two-parent traditional family certainly does not guarantee that the child will grow up in that environment.” (citing Massie, *supra* note 1, at 511)).

96. Storrow, *supra* note 94, at 330.

97. See *supra* text accompanying note 88.

98. When a fundamental right is at issue, rational relationship review is jettisoned in favor of a requirement that legislation withstand strict scrutiny. See, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (per curiam).

99. 405 U.S. 438 (1972).

rather clear that the majority thought it impossible to guess at the true legislative intent.<sup>100</sup> Nevertheless, articulated possibilities include that the Massachusetts legislature sought to “protect purity” and “preserve chastity” with a statute limiting the use of contraceptives to married persons—that its aim was essentially to discourage premarital sex.<sup>101</sup> The Court quickly dismissed this proffered purpose, both because the Court believed it highly unlikely that the Massachusetts legislature sought to punish premarital sex with pregnancy and because, even if the legislature did, such a justification would not withstand even rational basis review because the same statute allowed unmarried persons to receive contraceptives to prevent disease (rather than pregnancy).<sup>102</sup> As a result, a ban of the distribution of contraceptives solely to single persons could hardly be said to be reasonably tied to any desire to discourage premarital sex.<sup>103</sup>

The State next sought to save its statute by maintaining that its purpose was to protect the public health by limiting distribution of medical products—“potentially harmful articles.”<sup>104</sup> Noting that the statute was placed in a section of the Massachusetts Criminal Code titled “Crimes Against Chastity, Morality, Decency and Good Order,”<sup>105</sup> the majority found it almost laughable that the State would attempt to claim “an interest in health.”<sup>106</sup> Moreover, even “[i]f health were the rationale of [the statute], the statute would be both discriminatory and overbroad.”<sup>107</sup> If contraceptives needed to be regulated for health reasons, then that need existed for married and unmarried persons alike.<sup>108</sup>

Finally, the Court considered whether the statute might be upheld as a simple contraceptive ban and whether a state essentially declaring contraceptives “immoral” was permissible.<sup>109</sup> Punting on the question of whether a state has the right to legislate morality in this manner, the Court held that the legislature must afford the same protection against the societal ills of contraception to both married and unmarried persons alike.<sup>110</sup>

None of the State’s proffered objectives, then, survived an equal protection challenge. Even under the rational basis review employed in *Eisenstadt*, the State’s attempt to discriminate based solely on marital status failed.<sup>111</sup> *Eisenstadt* is

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100. *See id.* at 447–53.

101. *See id.* at 447–49.

102. *Id.*

103. *Id.* at 449 (“[T]he Massachusetts statute is thus so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim.”).

104. *Id.* at 450.

105. *Id.* (quoting *Baird v. Eisenstadt*, 429 F.2d 1398, 1401 (1st Cir. 1970) (internal quotations omitted)).

106. *Id.* (quoting *Baird*, 429 F.2d at 1401).

107. *Id.*

108. *Id.* (stating that the “need is as great for unmarried persons as for married persons”) (quoting *Commonwealth v. Baird*, 247 N.E.2d 574, 581 (Mass. 1969) (Whittemore & Cutter, JJ., dissenting in part)).

109. *Id.* at 452 (quoting *Baird*, 429 F.2d at 1402).

110. *Id.* at 453 (“[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.”).

111. *Id.* at 447 (“The question for our determination in this case is whether there is some ground of difference that *rationaly explains* the different treatment accorded married and

particularly instructive in the surrogacy context, not only because it relates to family creation and the right to either create or prevent parenthood, but also because states' objectives are just as dubious under the surrogacy statutes, which treat persons differently based on marital status.

Neither Florida nor Louisiana's preserved legislative history documents provide any insight as to the purpose of the marriage requirement in either state's laws.<sup>112</sup> Nonetheless, one can arrive at a number of persuasive possibilities with relative ease. Indeed, many of them mirror those articulated in *Eisenstadt* and other procreative right cases.

#### A. Sex and Morality

It cannot be persuasively argued that either Florida or Louisiana prohibits unmarried couples from entering into gestational surrogacy agreements because those states view "sexual activity outside of marriage [as] corrosive of the social fabric."<sup>113</sup> Such a view relies on the notion that sexual desires should be expressed only within the confines of marriage because of its procreative effects.<sup>114</sup> The very existence of surrogacy statutes, however, assumes that marriage and procreation through sexual intercourse do not necessarily come hand in hand.<sup>115</sup> Essentially, family creation through surrogacy has nothing to do with sex. As a result, channeling sexual activity in marriage is not a legislative aim that can support discriminatory surrogacy statutes.

#### B. Physical and Mental Health

Also, as the State did in *Eisenstadt*, Florida and Louisiana may offer a health justification in support of their discriminatory legislation. Pregnancy involves risks to the physical health of the woman giving birth<sup>116</sup>—risks that, in the case of a surrogate, are attributable solely to her agreement to act as a surrogate and to carry

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unmarried persons under [the statute in question]." (emphasis added)).

112. See Act of May 15, 1993, ch. 93-237, 1993 Fla. Laws 2405; Act of Sept. 1, 1987, 1987 La. Acts 1433.

113. Storrow, *supra* note 94, at 319.

114. See *id.* at 318 ("Marriage has been an important component of social systems worldwide for millennia. Its value to contemporary American society is primarily as a socially sanctioned locus for sexual activity, procreation, and support for children.").

115. See *id.* at 319.

116. *Health Problems in Pregnancy*, NAT'L INSTS. HEALTH, <http://www.nlm.nih.gov/medlineplus/healthproblemsinpregnancy.html>; *Pregnancy Complications*, WOMENSHEALTH.GOV, <http://www.womenshealth.gov/pregnancy/you-are-pregnant/pregnancy-complications.cfm>.

a child to term.<sup>117</sup> Thus, the argument goes, sanctioning surrogacy might encourage women to cavalierly approach such risky behavior.<sup>118</sup>

More persuasively, surrogacy arrangements almost without doubt lead to some psychological trauma, likely for the woman acting as a surrogate, the intended parents, and, eventually, even the child born through surrogacy.<sup>119</sup> *Baby M* certainly demonstrated as much. The intended parents and surrogate in that case fought a bitter custody battle that spanned the Eastern Seaboard.<sup>120</sup> The surrogate, Mary Beth Whitehead, appeared on television in iconic images with a tear-soaked face, mascara running down her cheeks, begging a judge not to enforce the surrogacy contract she signed.<sup>121</sup> After the New Jersey Supreme Court held surrogacy agreements to be void as against public policy,<sup>122</sup> *Baby M* herself felt it necessary to take action, as an adult, to create a familial link to her intended mother through adoption.<sup>123</sup> For all of the players involved then, surrogacy has significant psychological impacts. *Baby M* involved a traditional surrogacy arrangement. The detrimental mental health impact for both the surrogate and the child are likely diminished when a gestational surrogacy goes awry.<sup>124</sup> Nonetheless, no one would seriously argue that the possibility of emotional trauma is entirely eliminated merely because the surrogate is not genetically related to the child she carries. The possibility of both the physical and emotional trauma to the surrogate, intended

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117. See MAGDALINA GUGUCHEVA, COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA 17–24 (2010) (discussing the short- and long-term risks to women who act as surrogates, all of which are related solely to the process of surrogacy and becoming pregnant); cf. *Surrogate Pregnancy*, INTENDED PARENTS, INC., [http://intendedparents.com/Info/Surrogate\\_Pregnancy.asp](http://intendedparents.com/Info/Surrogate_Pregnancy.asp) (noting that gestational surrogacy “presents less risk for intended parents”).

118. See Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2361–67 (1995); Horsburgh, *supra* note 38, at 54.

119. See generally *In re Baby M*, 537 A.2d 1227 (N.J. 1988); see also Karen Busby & Delaney Vun, *Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 17 (2010) (describing feminist arguments that surrogates cannot possibly anticipate “the full potential of the traumas they could experience upon surrender of the child”).

120. See Robert Hanley, *At the Baby M Visitation Hearing, Bitter and Anguished Testimony*, N.Y. TIMES, March 29, 1988, at B1; Jennifer Weiss, *Now It's Melissa's Time*, N.J. MONTHLY, Mar. 2007, at 70, 70–71 (describing the acrimonious dispute between the parties stretching from Florida to New Jersey).

121. See Acker, *supra* note 20; Leighton Mark, *Surrogate Mother Mary Beth Whitehead Testifying at Hearing* (photograph), available at <http://www.corbisimages.com/stock-photo/rights-managed/U87336030-29/surrogate-mother-mary-beth-whitehead-testifying-at?popup=1> (1987); see also *Baby M*, 537 A.2d at 1236–37 (stating that Mary Beth Whitehead “realized, almost from the moment of birth, that she could not part with this child” to the point of tears, depression, and perhaps almost suicide).

122. *Baby M*, 537 A.2d at 1234.

123. Weiss, *supra* note 120, at 72.

124. See, e.g., R.J. Edelmann, *Surrogacy: The Psychological Issues*, 22 J. REPROD. & INFANT PSYCHOL. 123, 125 (2004) (noting that traditional surrogates may have increased mental health risks because of the genetic link to the child and because traditional surrogates are less likely to receive mental health counseling during the surrogacy process).

parents, and child, then, may be a justification offered by states restricting the use of gestational surrogacy.

For the same reasons articulated in *Eisenstadt*, however, a health justification for discriminatory surrogacy legislation likely cannot withstand even rational basis review. The Florida provision is found in the midst of a relatively lengthy act permitting and promising enforcement of surrogacy agreements.<sup>125</sup> The placement of the requirement limiting the use of surrogacy services to married intended parents militates strongly against the notion that it has anything to do with health.<sup>126</sup> The Louisiana statute is in the Vital Statistics portion of the Louisiana Revised Statutes, which regulate the information to be included on Louisiana birth certificates.<sup>127</sup> Birth certificates are, of course, largely about protecting public health,<sup>128</sup> and so the argument for a health purpose for this statute is facially stronger than it was in *Eisenstadt*. Still, a health purpose cannot save either statute. They both sanction the use of gestational surrogacy arrangements, wholly accepting the notion that the benefits of surrogacy as an alternative to traditional means of creating a family outweigh the inherent risks to the surrogate, the intended parents, and the child. The trouble, of course, is that the statutes sanction the use of surrogacy only when the intended parents are married.<sup>129</sup> And much like in *Eisenstadt*, that classification and differing treatment cannot be said to bear in any way on protecting health. If surrogacy has a significantly detrimental impact on the participants thereto, then it must be banned as a family-creating alternative altogether.<sup>130</sup> Allowing and enforcing its use for only some families dependent upon marital status, however, is unconstitutional.

Moreover, a marriage requirement for intended parents cannot be said to even approach the accomplishment of any health purpose. Requiring marriage for the intended parents is not likely to impact the surrogate's health.<sup>131</sup> Whatever physical and emotional effects she will suffer from carrying a child to term and then relinquishing the child as required by a gestational surrogacy agreement are likely to be suffered regardless of the marital status of the intended parents.<sup>132</sup> The same goes for the intended parents themselves—the joys and traumas they experience as a result of the surrogacy process are likely to be wrapped up in many things, but

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125. See Act of May 15, 1993, ch. 93–237, 1993 Fla. Laws 2405.

126. The marriage requirement for surrogacy is codified in Title 43 Domestic Relations and Chapter 742 Determination of Parentage. See FLA. STAT. ANN. § 742.15 (West 2010).

127. See LA. REV. STAT. ANN. § 40:33 (2012) (establishing the registry for, among other things, “the safety and preservation of all vital records covering the births, deaths, [and] marriages . . . made and received under this Chapter”); see also *id.* § 40:34(B) (enumerating the contents of a birth certificate).

128. See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 743 (2008) (describing the public-health based initial purpose of birth certificate creation).

129. See FLA. STAT. ANN. § 742.15; LA. REV. STAT. ANN. § 40:34.

130. See *Eisenstadt v. Baird*, 405 U.S. 438, 450–51 (1972) (finding that prohibiting contraceptives based on health concerns must apply equally to married and unmarried persons).

131. See *supra* text accompanying notes 119–27 (describing the physical and emotional difficulties for the *surrogate*, not the intended parents).

132. See *supra* text accompanying notes 119–27.



their own marital status is not one of them.<sup>133</sup> Even with respect to the eventual child, any harm suffered as a result of the creation and enforcement of a surrogacy contract will no doubt be present regardless of the intended parents' marital status at the time of conception.<sup>134</sup> A child of surrogacy may experience feelings of confusion and abandonment upon learning that the woman who carried him to term relinquished him to be parented by another.<sup>135</sup> Those feelings are well known to many adoptees and should not be minimized. They are frequently long lasting and life affecting.<sup>136</sup> Still, they are no doubt far less substantial for children of gestational surrogacy, given the lack of genetic connection between the surrogate and the resulting child. No genetic bond is present, and the emotional bond created between surrogate and child during the pregnancy and delivery is more felt by the surrogate than the unborn or newborn resulting child; if such a bond is felt by the child at all, it likely fades quickly. There simply is no sociological evidence to support an assertion that a voluntary arrangement made by a loving intended parent with a woman who volunteers surrogacy services has any long-lasting impact on the resulting child. Further, even if it were proven that children born as a result of surrogacy agreements suffer emotionally throughout their lives, that harm would flow to all children of surrogacy, regardless of their intended parents' marital status. Children are unlikely to know or care much about their parents' marital status at the time of their creation. Arguments in favor of requiring intended parents to be married to protect the resulting children of surrogacy simply fall short of their mark.

Health justifications for marriage-based discrimination in surrogacy simply cannot withstand even low-level constitutional scrutiny. The discriminatory restrictions on access are not rationally related to protecting the physical or mental health of any of the parties involved.

### *C. Dual-Parent Child Rearing and Child Support*

One might argue that requiring intended parents utilizing surrogacy to be married ensures that the resulting child will be both raised and financially supported by two adults. And in most states, of course, those adults could only be a man and a woman. Conservatives would likely argue then, as they do in the same-

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133. See, e.g., SURROGACY UK, WELCOME TO SURROGACY UK: FOR INTENDED PARENTS 19–24 (2012) (portraying different stories and emotional reactions, none of which depend on the marital status of the parents).

134. See Olga B.A. van den Akker, *Psychosocial Aspects of Surrogate Motherhood*, 13 HUM. REPROD. UPDATE 53, 55–58 (2006) (discussing the potential effects of surrogacy on the resulting children, intended parents, and surrogates, none of which depend on the intended parents' marital status).

135. *Id.* at 56; see also Erin Y. Hisano, Comment, *Gestational Surrogacy Maternity Disputes: Refocusing on the Child*, 15 LEWIS & CLARK L. REV. 517, 522–23 (2011).

136. See, e.g., David M. Brodzinsky, Dianne E. Schechter, Anne M. Braff & Leslie M. Singer, *Psychological and Academic Adjustment in Adopted Children*, 52 J. CONSULTING & CLINICAL PSYCHOL. 582, 587 (1984); Rachel Levy-Shiff, *Psychological Adjustment of Adoptees in Adulthood: Family Environment and Adoption-Related Correlates*, 25 INT'L J. BEHAV. DEV. 97, 102 (2001).

sex marriage context, that requiring the intended parents to marry is the only way to ensure that the child will be raised by a man and a woman.<sup>137</sup> Although no state has so argued in a judicial surrogacy dispute thus far, scholars have proffered the additional possibility that a state may attempt to justify a limitation on the use of surrogacy to married intended parents by arguing that it is the only way to ensure that there are two adults bound for a child's support.<sup>138</sup> The problem, of course, is that requiring the intended parents to be married at the time the parties embark upon surrogacy does not, in fact, ensure the child's continued support or care by two parents.

With regard to care, requiring the initial marriage of the intended parents most certainly does not ensure the child's future in that precise family dynamic. Indeed, to suggest that requiring marriage at the outset of a surrogacy arrangement is even rationally related to ensuring the child a two-parent upbringing is a difficult argument to make given today's reality. No child is ensured a two-parent upbringing, and, with a divorce rate looming around fifty percent,<sup>139</sup> there is little to no evidence that marriage contributes to a couple's longevity.<sup>140</sup> Moreover, to the extent a state seeks to use the marriage requirement to embed both a man and a woman in the child's life permanently, rather than allowing less traditional families to parent a child through surrogacy, it may have an uphill battle. The debate as to the success of children raised in nontraditional family structures continues in the same-sex marriage context.<sup>141</sup> Perhaps all that can intelligently be said about the conflicting, and often partisan, studies published to this point is that there is insufficient evidence to show, one way or another, what family form is "best" for children. As a result, a marriage limitation in surrogacy cannot be proffered as a justification that bears any rational relationship to providing a permanent, positive, two-parent upbringing for children.

Requiring marriage to force the resulting child's support on not one, but two, individuals is a stronger purported rationale for a marriage requirement in surrogacy, but it is still not one that can survive an equal protection analysis.<sup>142</sup>

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137. Cf. Dennis Prager, *Conservatives and Gays: Where Do We Stand?*, NAT'L REV. ONLINE (May 9, 2012, 12:00 AM), <http://www.nationalreview.com/articles/299401/conservatives-and-gays-where-do-we-stand-dennis-prager#>.

138. See, e.g., Massie, *supra* note 1, at 526–29 (arguing that restricting surrogacy to married intended parents promotes a legislature's goal of protecting a child's best interests).

139. See, e.g., FELDSTEIN FAMILY LAW GRP., DIVORCE FACT SHEET 1 (2012) <http://www.separation.ca/pdfs/divorcefacts.pdf>.

140. See *supra* note 95.

141. See generally Henny Bos, Naomi Goldberg, Loes van Gelderen & Nanette Gartrell, *Adolescents of the U.S. National Longitudinal Lesbian Family Study: Male Role Models, Gender Role Traits, and Psychological Adjustment*, 26 GENDER & SOC'Y 603, 604–06 (2012) (discussing the competing arguments of whether nontraditional families affect a child's psychological development); A. Brewaeys, I. Ponjaert, E.V. Van Hall & S. Golombok, *Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families*, 12 HUM. REPROD. 1349, 1349–50 (1997).

142. Cf. Storrow, *supra* note 94, at 331 (“The exclusion of unmarried couples from entering into surrogacy agreements . . . appears to conflict with important constitutional tenets opposed to state interference with procreative choices and provides no corresponding enhancement of our society's interest in securing two-parent support for each child.”).

Already, state law will provide a parent for a child resulting from surrogacy and will often provide two parents—namely, the woman who gives birth (the surrogate) and, if she is married, her husband.<sup>143</sup> Of course, that result is exactly what surrogacy statutes seek to avoid; in sanctioning surrogacy arrangements, the law typically seeks to shift responsibility for support of the child from the historical, traditional parents—the woman who gives birth and her husband—to the intended parents.<sup>144</sup> “The aim of surrogacy legislation is not to identify the parties responsible for a child in the first instance[,]”<sup>145</sup> but to place the responsibility for support of the child on the person or persons to whom the child has a genetic link. There really is no serious risk, then, that a child born of surrogacy will have no legal parent to whom to look for support.<sup>146</sup> And while in theory more parents, and thus more hands to look to for support, could only help a child, that position has failed to gain any sway in many other parentage contexts. Dual paternity, for instance, in which the law establishes the parent-child link and imposes a support obligation on multiple men with biological or other legal connections to a child, has been rejected in all but one state.<sup>147</sup> Moreover, single parent adoptions are now legal in all fifty states,<sup>148</sup> further undermining the notion that the state acts stridently to ensure a child two parents for financial support. Thus, where the law could attempt more intrusive means of ensuring a multiplicity of parents to provide support in other contexts, it has been intentionally constructed not to do so. Surrogacy legislation stands alone in attempting to ensure a child’s adequate support by assuming that marriage is the only vehicle through which that might be done. The approach is inconsistent with the policies underlying child support doctrines in other contexts, is inequitable because it prevents single persons and unmarried couples from utilizing a significant method of family creation, and is violative of equal protection because it is not rationally related to its objective.

Marital status-based limitations on access to surrogacy simply fail to survive even rational basis review. In the way of a shift in the tide toward greater

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143. See, e.g., LA. CIV. CODE ANN. art. 184 (2007) (woman who gives birth is the legal mother of a child); Shapo, *supra* note 4, at 474; see also Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 313–14 (2003) (describing the presumption of paternity in favor of the husband of the mother at the time she gives birth).

144. Storrow, *supra* note 94, at 322.

145. *Id.*

146. See Krista Sirola, Comment, *Are You My Mother? Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania*, 14 AM. U. J. GENDER SOC. POL’Y & L. 131, 157 (2006) (discussing the Uniform Parentage Act’s protection of financial recourse for a child born through a surrogacy agreement); see also Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1192–98 (2010).

147. See Melanie B. Jacobs, *Overcoming the Marital Presumption*, 50 FAM. CT. REV. 289, 294 & 296 n.31 (2012) (citing and discussing state law in Louisiana as the sole American family law regime which has created a system of dual paternity).

148. Jessica R. Feinberg, *Friends as Co-Parents*, 43 U.S.F. L. REV. 799, 805–06 (2009). See generally William L. Pearce, *In Defense of the Argument that Marriage Should Be a Rebuttable Presumption in Government Adoption Policy*, 5 J.L. & FAM. STUD. 239, 250 (2003).

acceptance of the possibility of ART as encompassed within the domain of constitutionally protected fundamental procreative rights, marital status-based limitations should almost certainly fall.

#### CONCLUSION

Multiple justifications for limiting the use of reproductive technologies are offered by states in defense of discriminating against those who have not chosen marriage before becoming parents. And discriminatory treatment under the law is occasionally permissible. But it is time that the American states recognize that “a law limiting [surrogacy] to married persons . . . should fail because it [treats] the very same act—the use of a particular technology—differently based upon the marital status or sexual preference of the persons involved, with no real basis for the distinction other than societal disapproval or prejudice.”<sup>149</sup> Limitations of or a wholesale rejection of surrogacy as a family-creating device based on disapproval and prejudice, rather than any legitimate risk of harm to third parties or the resulting children themselves, is constitutionally unsound. That surrogacy is newer, less understood, and therefore naturally viewed more skeptically than other methods of family formation, including adoption, is not a sufficient basis for assuming that it presents any more flaws or risks than the more well-known and well-used procreative methods. In the absence of any evidence that requiring the marriage of intended parents protects traditional coital reproduction, the physical or mental health of any of the parties involved, or even facilitates the collection of child support from multiple parents, we must begin to escape the crippling fear<sup>150</sup> of assisted reproduction that leads us to unequal, discriminatory, and unconstitutional treatment of those wishing to build families.

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149. Rao, *supra* note 67, at 1475–76.

150. *See supra* text accompanying note 11.