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SURROGACY AND WINDSOR'S PENUMBRAS

Susan Frelich Appleton*

INTRODUCTION

This symposium, *Compensated Surrogacy in the Age of Windsor*,¹ explores what the Supreme Court's invalidation of Section 3 of the federal "Defense of Marriage Act" (DOMA) in *United States v. Windsor*² means for the legal treatment of commercial surrogacy arrangements.³ As a scholar with a longstanding interest in family law generally and parentage and assisted reproduction in particular, I found much to appreciate in the symposium contributions—especially those insights that come from examining the issues through the always revealing lenses of feminism,⁴ critical race theory,⁵ heteronormativity,⁶ and outsider narrative.⁷

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1. 89 WASH. L. REV. 1069–1373 (2014).

2. 133 S. Ct. 2675, 2696 (2013).

3. Like contributors to the symposium, I use "compensated" and "commercial" interchangeably and would contrast this type of surrogacy with arrangements described as "altruistic," in which the surrogate donates her services and receives no pay. See, e.g., Kellye Y. Testy, *Foreword: Compensated Surrogacy in the Age of Windsor*, 89 WASH. L. REV. 1069, 1070 & n.9 (2014). Of course, one could consider further distinctions. For example, to what extent does mere reimbursement for medical expenses constitute "compensation" even if we would not label the arrangement "commercial"? For purposes of my analysis, I assume that a commercial or compensated surrogate receives a fee for her services, in addition to reimbursement for her expenses.

4. Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077 (2014); Julie Shapiro, *For a Feminist Considering Surrogacy, Is Compensation Really the Key Question?*, 89 WASH. L. REV. 1345 (2014); see also Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1155 (2014) (raising concerns about the commodification of, inter alia, birthmothers).

5. Khiara M. Bridges, *Windsor, Surrogacy, and Race*, 89 WASH. L. REV. 1125 (2014).

6. Anthony C. Infanti, *The House of Windsor: Accentuating the Heteronormativity in the Tax Incentives for Procreation*, 89 WASH. L. REV. 1185 (2014).

7. Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235 (2014). Placing contemporary law reform efforts in historical and political contexts also

Despite the value of the analyses presented, however, the “prompt”—*Windsor*’s implications for commercial surrogacy—originally struck me as both superficial and contrived. Perhaps I was thinking too much like a lawyer, reacting to the fact that nothing in the *Windsor* opinions directly compels a shift for surrogacy. Put differently, it is not immediately obvious that *Windsor*’s rejection of DOMA’s Section 3 has any bearing on state surrogacy laws. Accordingly, for me, Professor Field got it exactly right when she wrote:

Windsor has little relevance to surrogacy, which will continue to be governed by state rather than federal law. States do, and will, follow a wide spectrum of policies on surrogacy, ranging from banning it and making it illegal to promoting it by enforcing surrogacy contracts as ordinary commercial transactions. The legalization of gay marriage need not affect states’ surrogacy laws.⁸

Nonetheless, stepping back and situating *Windsor* and surrogacy in broader conversations about gender, marriage, and family law can open additional ways to understand the question posed by this symposium. From this wider perspective, Justice Kennedy’s analysis in *Windsor* (like various constitutional guarantees) might be said to have “penumbras” and “emanations” that reach beyond the case’s direct impact or precedential role.⁹ Below, I briefly consider two such penumbral matters pertaining to surrogacy, *Windsor*’s politics and its repronormativity, before turning to a more extended look at a third, *Windsor*’s federalism.

Even with this expanded frame, the path from *Windsor* to significant surrogacy reform largely remains uncertain and obscure. *Windsor*’s reasoning about marriage and dignity¹⁰ promises only inclusion in the system of family law as it is, not fundamental transformation of that system itself.¹¹

proves illuminating. See Terry J. Price, *The Future of Compensated Surrogacy in Washington State: Anytime Soon?*, 89 WASH. L. REV. 1311 (2014).

8. See Field, *supra* note 4, at 1155.

9. Most readers will recognize that I am borrowing terms made famous by *Griswold v. Connecticut*, 381 U.S. 479 (1965). Unable to identify a constitutional provision securing a right to privacy, including the protection of married couples’ use of contraception, the majority cited the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution and invoked their “penumbras, formed by emanations from those guarantees that help give them life and substance.” *Id.* at 484.

10. 133 S. Ct. at 2692–96.

11. See also, e.g., Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535 (1993).

I. *WINDSOR*'S POLITICS

Although *Windsor* stems from the judicial branch, the case has political ramifications. First, *Windsor* now looms large in the social movement for LGBTQ rights, spurring marriage-equality advocacy, legislation, and court rulings within the states. In the United States today, same-sex couples have access to marriage in more than 37 jurisdictions.¹² Just as Justice Scalia's *Windsor* dissent predicted,¹³ the portions of the majority opinion that explain how DOMA demeans same-sex couples and their families have proved influential in challenges to state marriage exclusions, with several courts invoking *Windsor* to invalidate such laws.¹⁴ Now that one federal court of appeals has refused to embrace this expansive reading of *Windsor*, the Supreme Court has agreed to review the constitutionality of state bans on same-sex marriage and marriage recognition.¹⁵

Second, beyond its implications for the rapidly developing law and politics of marriage equality, *Windsor*'s emanations might reach even farther, as suggested by the argument animating this symposium. This argument seems to proceed as follows: To the extent *Windsor* "legitimizes" same-sex couples, it creates increased demand for reproductive arrangements that allow such couples to become parents. In turn, this demand generates political pressure for reforms that would facilitate and regularize such family formation. For example, New York, which became a marriage-equality state by legislation before *Windsor*,¹⁶ now faces pressure to reconsider its prohibition on compensated surrogacy, enacted back in 1992.¹⁷ A chief proponent of a more permissive approach to surrogacy is a New York state senator who, with his husband, had a child with the help of a gestational surrogate in California.¹⁸ *Windsor* might well fuel such efforts to relax the legal

12. According to the advocacy organization Freedom to Marry, same-sex couples can marry in 37 states, D.C., and some counties in Missouri. *Where State Laws Stand*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/where-state-laws-stand> (last visited Feb. 13, 2015).

13. 133 S. Ct. at 2709–10 (Scalia, J., dissenting).

14. *E.g.*, *Latta v. Otter*, 771 F.3d 456, 468, 473–74 (9th Cir.), *stay denied*, 135 S. Ct. 345 (2014); *Baskin v. Bogan*, 766 F.3d 648, 659, 671–72 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); *Bostic v. Rainey*, 760 F.3d 352, 377 (4th Cir.), *cert. denied*, 135 S. Ct. 286 (2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1207–08 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014).

15. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted sum. nom.* *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015).

16. New York enacted its Marriage Equality Act in 2011. N.Y. DOM. REL. L. §§ 10-a, 10-b, 11, 13 (McKinney, Westlaw, through 2015 legislation).

17. N.Y. DOM. REL. LAW §§ 122–23 (McKinney, Westlaw, through 2015 legislation).

18. *See Anemona Hartocollis, And Surrogacy Makes 3: In New York, a Push for Compensated*

treatment of surrogacy, although the revision that *Windsor* works in *federal* law would seem to be a much less influential force here than *state-level* developments that open marriage to same-sex couples. Of course, we might think of *Windsor* as catalyst in the expansion of marriage at the state level¹⁹ and hence as potential catalyst for surrogacy reforms as well.

Will such *Windsor*-inspired pressure produce surrogacy reforms? Possibly. We might consider, for example, how the demand for less onerous divorce rules and the frequent evasion of restrictive laws through the practice of migratory divorce sparked the move for divorce reform and ultimately brought no-fault divorce statutes to the states.²⁰ If “[f]amily law follows family life,”²¹ as Joanna Grossman and Lawrence Friedman contend in their history of modern family law, then a growing practice of compensated surrogacy (including resort to out-of-state arrangements) should produce a more supportive legal environment. Further, LGBTQ advocates have become politically influential and could make surrogacy reform their next priority after marriage equality.²²

Still, I see significant stumbling blocks. With the fault system of divorce, a consensus had emerged that the existing regime caused significant harm and provided at most illusory benefits.²³ Likewise, the shift represented by *Windsor* came in response to inferences of DOMA’s great harm and the absence of evidence that change would pose a problem.²⁴ Surrogacy restrictions like New York’s, however, differ from both of these precursors.

First, surrogacy restrictions were enacted amidst worries about the exploitation of women and the commodification of children.²⁵ Whatever the increased demand for compensated surrogacy, we have not reached a consensus that such restrictions reflect misguided concerns or cause

Surrogacy, N.Y. TIMES, Feb. 20, 2014, at E1 & E6, <http://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html>.

19. See *supra* notes 12–15 and accompanying text.

20. See, e.g., JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 159–80 (2011).

21. *Id.* at 2.

22. See *DeBoer v. Snyder*, 772 F.3d 388, 415 (6th Cir. 2014), *cert. granted sum. nom.* Obergefell v. Hodges, 135 S. Ct. 1039 (2015).

23. See, e.g., GROSSMAN & FRIEDMAN, *supra* note 20, at 163.

24. See, e.g., *Windsor*, 133 S. Ct. at 2694.

25. See, e.g., Anita L. Allen, *Privacy, Surrogacy, and the Baby M Case*, 76 GEO. L.J. 1759 (1988); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1928–36 (1987).

more harm than good.²⁶ Second, in contrast to the law felled by *Windsor*, basic anti-surrogacy laws do not seek to demean and disadvantage gays.²⁷ They reflect not anti-LGBTQ animus, which inflicts dignitary harms,²⁸ but instead protective policies that were seen at the time of enactment to trump the competing interests of even different-sex married (but infertile) couples and enterprising would-be “surrogates” themselves.²⁹ In other words, when states like New York enacted surrogacy restrictions, they did so for the purpose of protecting women and children; moreover, they found the need for such protection to outweigh the interests of likely surrogacy consumers (then envisioned to be married different-sex couples with a fertile husband and an infertile wife³⁰) as well as the interests of women who might feel eager to serve as gestational carriers for others.

True, some surrogacy laws might need fine-tuning today, given *Windsor*'s condemnation of DOMA's discriminatory purpose. For example, some states limit surrogacy to married couples³¹—a category that at one time excluded all same-sex couples—and others assume that intended parents will be a man and a woman.³² Yet, even before *Windsor*, courts in several states insisted that paternity and parentage laws be read in a gender-neutral way, when possible. This approach to statutory construction has extended legal recognition as parents to same-

26. See, e.g., Field, *supra* note 4; Shapiro, *supra* note 4. See also *Hiring a Woman for Her Womb, Room for Debate*, N.Y. TIMES, Sept. 22, 2014, <http://www.nytimes.com/roomfordebate/2014/09/22/hiring-a-woman-for-her-womb> (presenting different positions, as articulated by two lawyers, an ethicist, a law professor, and a professor of obstetrics and psychiatrist).

27. The *Windsor* majority finds telling evidence of DOMA's discriminatory purpose in the name itself: the Defense of Marriage Act. 133 S. Ct. at 2693.

28. See *id.*

29. See generally Field, *supra* note 4.

30. This stereotype derives from the highly publicized *Baby M* case that prompted legislation in several states. See *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (holding compensated traditional surrogacy contract void and enforceable).

31. E.g., TEX. FAM. CODE § 160.754(b) (2003).

32. For example, an early model law, the Uniform Status of Children of Assisted Conception Act, promulgated by the National Conference of Commissions of Uniform State Laws (now called the Uniform Law Commission or ULC) in 1988, included the following provision for those states opting to permit surrogacy:

“Intended parents” means a man and woman, married to each other, who enter into an agreement under this [Act] providing that they will be the parents of a child born to a surrogate through assisted conception using egg or sperm of one or both of the intended parents.

UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 1(3) (1988). The language makes clear that same-sex couples would be ineligible as “intended parents.” The ULC's more recent model also contemplates a cross-sex couple as intended parents without requiring their marriage. UNIF. PARENTAGE ACT § 801(b) (2002).

sex couples and facilitated the intended results of assisted-reproduction arrangements for such families.³³ To the extent that such developments eliminate discriminatory barriers to surrogacy, they address any *Windsor*-related problems. Accordingly, states that still follow gendered rules of paternity and parentage might well need to move to a gender-neutral approach. By contrast, *Windsor* does not compel revision of those restrictions that apply to all surrogacy consumers and reflect more general protective policies aimed at commodification and exploitation. The possibly increased demand for surrogacy in *Windsor*'s wake does not alter this conclusion.

To see why we should not expect to see protective policies evaporate in the face of *Windsor*, consider this analogous question: Because many same-sex couples add children to their families by adoption, should we expect to see post-*Windsor* relaxation of various protective *adoption* laws—such as requirements for waiting periods³⁴ and home studies,³⁵ which apply regardless of the sexual orientation or gender of the adopters? Of course not. Similarly, the rise of gay married couples and their possible demand for surrogacy do not diminish concerns about commodification and exploitation—concerns that prompted restrictions back when different-sex couples were surrogacy's principal consumers.

To conclude otherwise would suggest that the extra quantum of male privilege possessed by gay couples would produce political success where it has eluded different-sex couples with fertility-challenged wives. Such speculation seems far-fetched. Hence, once surrogacy restrictions are purged of any elements that target sexual minorities,³⁶ I see no reason to expect additional reforms stemming from *Windsor*.

33. See, e.g., *Elisa B. v. Superior Ct.*, 117 P.3d 660, 665 (Cal. 2005) (recognizing mother's former partner under gender-neutral reading of paternity statute); *Chatterjee v. King*, 280 P.3d 283, 285 (N. Mex. 2012) (applying presumption of paternity to recognize as second parent mother's former partner who held out adopted child as her own); *In re Roberto d. B.*, 923 A.2d 115, 125 (Md. 2007) (using gender-neutral reading of state law to allow intended father's name alone to appear on birth certificate of child born to gestational surrogate and conceived with donated egg); see also *D.M.T. v. T.M.H.*, 129 So. 3d 320, 328 (Fla. 2013) (post-*Windsor* case using gender-neutral reading of paternity law).

34. See, e.g., 750 ILL. COMP. STAT. ANN. 50/9 (Westlaw, through 2015 legislation) (requiring valid surrender of child for adoption to take place no sooner than seventy-two hours after birth).

35. See, e.g., IOWA CODE § 600.8 (Westlaw, through 2015 legislation) (specifying the requirements of "preplacement investigation" and report).

36. Here, my argument suggests the familiar distinction between discriminatory intent and disparate impact. See, e.g., Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 494–95 (2003) (identifying three types of questions about "[t]he relationship between equal protection and facially neutral practices with discriminatory effects"). In any event, *Windsor* makes clear that anti-gay animus played a pivotal role in its analysis. See *Windsor*, 133 S. Ct. at 2693.

II. *WINDSOR*'S REPRONORMATIVITY

Second, *Windsor* shares at least attenuated connections with surrogacy because of the repronormativity reflected in the majority opinion. I use this term, which derives from Katherine Franke's scholarship, to underscore the centrality of children and parenthood in *Windsor*'s vision of marriage and also the centrality of marriage in *Windsor*'s understanding of parenthood and children.³⁷

While rejecting a model of marriage that depends exclusively on procreation,³⁸ the majority opinion nonetheless gave the children of gay and lesbian couples a prominent place in its analysis. According to the majority, one of DOMA's fatal flaws lay in its effect on children:

[Section 3 of DOMA] humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.³⁹

In these sentences, the Court writes as if all, or at least most, of the married couples marginalized by DOMA have children—despite the childless marriage of Edith Windsor, who brought the case. In this way, the majority's effort to celebrate diversity in marriage reinforces a vision of marriage tied to children and childrearing.

Whatever its direct legal effect, then, *Windsor* stands out as a high-profile cultural and social artifact that sends strong signals about marriage norms. *Windsor* could have invalidated DOMA without mentioning children, citing their numbers, or expressing empathy for their feelings. The stakes for childless same-sex couples could have amply justified the outcome, as Windsor's own tax burden demonstrates.⁴⁰ The Court made a choice, citing a marriage-equality argument designed to tug at the heartstrings of those who might find

37. Although Katherine Franke famously uses "repronormativity" to critique the centrality of motherhood in feminist agendas, I use the term more broadly here, to call attention to the *Windsor* Court's assumptions about marriage. *Windsor* not only emphasizes the place of children in marriage; it also suggests that, without marriage, children suffer emotional harm. Put differently, while Franke challenges the centrality of motherhood in legal feminism, I point out centrality of parenthood in *Windsor*'s rationale. See Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 183 (2001).

38. Justice Alito's dissent criticizes the majority on this ground. See *Windsor*, 133 S. Ct. at 2718–19 (Alito, J., dissenting) (describing two understandings of marriage, one based on procreation and the other based on consent, and asserting that Congress and the states may choose which to endorse through their enactments).

39. *Id.* at 2694.

40. See *id.* at 2683–85.

“second-tier marriage”⁴¹ a not especially compelling problem (or even well-deserved marginalization) when it disadvantages only adults.⁴²

In so doing, the *Windsor* majority entrenched a limited view of family, realizing a hazard that some observers have identified in contemporary gay rights advocacy.⁴³ This symposium’s premise—linking *Windsor* to surrogacy—not only illuminates this feature of *Windsor*, but also strengthens it. This paradigm excludes many family forms, for example, unmarried couples and individuals who might use surrogacy, unmarried and married couples who want no children, and a host of other affiliations and domestic situations, from friendships to polyamory.⁴⁴ A robust commitment to pluralism among families would decenter married couples and families with children—understanding these as just a few of many possible familial arrangements.

Whatever its merits or problems—as a matter of substance or judicial strategy—*Windsor*’s repronormativity only returns us to the issue of *Windsor*’s politics. Even if *Windsor*’s repronormativity could be said indirectly to increase demand for surrogacy, translating such demand into concrete pro-surrogacy reforms remains unlikely, especially where demand by different-sex couples has failed to achieve that end. In the meantime, the argument itself has troubling implications for family pluralism.

III. WINDSOR’S FEDERALISM

The *Windsor* majority’s compassion for families headed by same-sex married couples, its antisubordination theme,⁴⁵ and its professed concern for humiliated children⁴⁶ have all largely eclipsed its encomium to

41. *Id.* at 2684.

42. Later opinions have picked up on *Windsor*’s child-focused reasoning. *See, e.g.*, *Baskin v. Bogan*, 766 F.3d 648, 659, 671–72 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014); *DeBoer v. Snyder*, 772 F.3d 388, 422 (6th Cir. 2014) (Daughtrey, J., dissenting), *cert. granted sum. nom.* *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015).

43. *See, e.g.*, NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2009); Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); *see also* Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007).

44. *See, e.g.*, POLIKOFF, *supra* note 43; Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004); Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685 (2008); *see also* Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223 (2004).

45. *See supra* notes 10, 13–14, and accompanying text.

46. *See supra* note 39 and accompanying text.

federalism.⁴⁷ This part of the opinion emphasizes the traditional control of families and family relationships by the states, in turn prompting a skeptical look at Congress's intervention through DOMA.⁴⁸ Most federal district courts and courts of appeals, in relying on *Windsor* to invalidate state bans both on same-sex marriage and on recognition of such marriages performed elsewhere, have glossed over the Court's reaffirmation of federalism in family law. Instead, these courts have stressed *Windsor*'s condemnation of unequal treatment.⁴⁹

The current regulation of surrogacy epitomizes the federalist or localist approach to family law that *Windsor* embraces. In fact, taken seriously, this strand of the *Windsor* opinion poses difficulties for those who now ask the Supreme Court to require all states to license and recognize marriages of same-sex couples. A majority of the U.S. Court of Appeals for the Sixth Circuit pointed out this problem in the case currently under consideration by the Supreme Court.⁵⁰ Assuming that marriage-equality advocates will nonetheless prevail when the Supreme Court decides this case, gendered entry requirements for marriage will join many other aspects of family law in which state rules have had to yield to federal constitutional protections. For example, states no longer exercise unfettered control over limitations on contraception⁵¹ and abortion,⁵² the parental status of unmarried fathers,⁵³ the treatment of nonmarital children,⁵⁴ and visitation by grandparents and other third parties.⁵⁵ Add to constitutional constraints the often-used power of Congress to shape state family laws by attaching conditions to federal funding⁵⁶ or in enacting family-affecting statutes on taxation, welfare, and employment benefits,⁵⁷ and it becomes tempting to agree completely

47. 133 S. Ct. at 2689–93.

48. *See id.*

49. *See supra* note 14 (citing illustrative cases) and accompanying text. The principal outlier is the opinion from the U.S. Court of Appeals for the Sixth Circuit, to which the Supreme Court has granted review. *See supra* note 15 and accompanying text.

50. *DeBoer v. Snyder*, 772 F.3d 388, 413–15 (6th Cir. 2014), *cert. granted sum. nom.* *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015).

51. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

52. *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

53. *See Stanley v. Illinois*, 405 U.S. 645 (1972); *Caban v. Mohammed*, 441 U.S. 380 (1979).

54. *See Levy v. Louisiana*, 391 U.S. 68 (1971); *Gomez v. Perez*, 409 U.S. 535 (1973).

55. *See Troxel v. Granville*, 530 U.S. 57 (2000).

56. *E.g.*, 42 U.S.C. § 667(a)–(b) (2012) (child support guidelines); 42 U.S.C. §§ 673b, 675(5) (2012) (Adoption and Safe Families Act).

57. *See* JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 45–59 (2014) (examining various

with those who see federalism in family law as a myth.⁵⁸

Against this background of extensive federal authority and influence, however, the “legal patchwork”⁵⁹ or “maze of laws, state by state”⁶⁰ applicable to surrogacy today provides a telling counterexample. Surrogacy helps sustain the traditional story that family law belongs to the states.

The state-by-state variation in laws governing surrogacy⁶¹ results in several predictable consequences. First, supporters of surrogacy have pursued several different paths toward eliminating bans and decreasing restrictions. Some have focused their reformist efforts on state legislatures.⁶² Others have called for a national statute allowing surrogacy⁶³ or the elimination of most limitations through judicial recognition of a constitutional right to procreate by means of surrogacy.⁶⁴ Yet, law reform projects do not always yield hoped-for outcomes and, in any event, take time.⁶⁵

Thus, a second, more practical and immediately available response for those in restrictive states entails arrangements that take advantage of the laws of more surrogacy-friendly jurisdictions. For example, Professor Nicolas, who lives in Washington (which bans surrogacy), describes how such considerations figured in his and his husband’s plans to have a child.⁶⁶ First, he considered attempting to locate a surrogate in California because of its especially hospitable laws.⁶⁷ Ultimately, for reasons of proximity and costs, he chose to work with a woman in nearby Oregon, where he found compensated surrogacy flourishing “in

federal laws affecting families).

58. *Id.* at 17–66 (challenging canonical narrative of family law as local, not federal, law); Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787 (2015) (critiquing the “myth” of “family law localism”).

59. Nicolas, *supra* note 7, at 1239.

60. Tamar Lewin, *Surrogates and Couples Face Maze of Laws, State by State*, N.Y. TIMES, Sept. 18, 2014, at A1, <http://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html>.

61. For a survey of the various state approaches and their categorization into six identifiable groupings, see Nicolas, *supra* note 7, at 1240–45.

62. See, e.g., Hartocollis, *supra* note 18, at E1; Price, *supra* note 7.

63. E.g., Caitlin Conklin, Note, *Simply Inconsistent: Surrogacy Laws in the United States and the Pressing Need for Regulation*, 35 WOMEN’S RTS. L. REP. 67, 92–94 (2013).

64. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 32–40 (1993); Nicolas, *supra* note 7, at 1279–98.

65. See Price, *supra* note 7.

66. Nicolas, *supra* note 7, at 1245–55.

67. *Id.* at 1245.

the shadows,” that is, despite the absence of explicitly relevant law.⁶⁸

The phenomenon of traveling to a state with more attractive laws occurs frequently in family law. Other examples, past and present, include migratory divorce before the advent of no-fault statutes⁶⁹ and today's efforts to avoid local abortion regulations.⁷⁰

The likelihood that state surrogacy restrictions would prompt evasion in this familiar fashion surfaced for consideration as soon as New Jersey began to contemplate legislative responses invited by the provocative *Baby M* case in 1988.⁷¹ As part of that process, the New Jersey Bioethics Commission consulted me about the conflict of laws implications of a ban on surrogacy that the state was contemplating. My analysis, later revised for publication as a law review article,⁷² concluded that New Jersey would have considerable difficulty limiting surrogacy so long as those eager to participate in such arrangements could find more permissive jurisdictions. Accordingly, I wrote:

[A]ssuming residents of a restrictive state truly want to participate in surrogacy, the existence of more hospitable jurisdictions will significantly limit local control. Absent federal legislation or a single uniform act (without alternatives) adopted by all the states, restrictive states can hope to achieve their goals only through resort to untested extensions of criminal law or creative solutions making the family formed through surrogacy vulnerable to continuing risks.⁷³

Subsequent case law confirmed my suspicions. Consider *Hodas v. Morin*,⁷⁴ in which a couple from Connecticut commissioned a New York

68. *Id.* at 1246–49.

69. *See, e.g.*, David P. Currie, *Suitcase Divorce in the Conflict of Laws*: Simons, Rosenstiel, and Borax, 34 U. CHI. L. REV. 26 (1966).

70. *See, e.g.*, Jackie Calmes, *Activists Help Pay for Patients' Travel to Shrinking Number of Abortion Clinics*, N.Y. TIMES, Nov. 27, 2014, <http://www.nytimes.com/2014/11/28/us/advocates-help-pay-for-travel-to-a-shrinking-number-of-abortion-clinics.html>; Samantha Liss, *Out-of-State Abortion Providers Ready to Treat More Missouri Women*, ST. LOUIS POST-DISPATCH, Sept. 25, 2014, http://www.stltoday.com/lifestyles/health-med-fit/medical/out-of-state-abortion-providers-ready-to-treat-more-missouri/article_871a4f64-2579-5dd1-b380-ef042ed28e06.html.

71. 537 A.2d 1227 (N.J. 1988) (holding compensated traditional surrogacy contract void and unenforceable).

72. Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399, 401 (1990).

73. *Id.* at 401. The reference to alternatives stems from the Uniform Status of Children of Assisted Conception Act, which offered enacting states two options, Alternative A, permitting but regulating surrogacy, and Alternative B, making surrogacy agreements void—in turn undermining the uniformity that might be achieved by this so-called uniform act. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1988).

74. 814 N.E.2d 320 (Mass. 2004).

woman to serve as a gestational carrier and bear for them a child conceived with their genes, with the embryo transfer taking place in Connecticut. Connecticut had no controlling authority on the subject, but New York “expressly prohibit[ed] gestational carrier agreements in order to protect women against exploitation as gestational carriers and to protect the gestational carrier’s potential parental rights,”⁷⁵ thus expressing “a ‘fundamental policy’ on a matter in which it [had] a great interest.”⁷⁶ By contrast, Massachusetts, based on precedent, allowed the name of intended, genetic parents to be entered on the birth certificate even when another woman bears the child,⁷⁷ facilitating the objectives of those entering a gestational surrogacy arrangement. Among these disparate laws, the parties wanted Massachusetts law to govern parentage and the birth certificate, and they included a choice of law provision to that effect in their agreement.⁷⁸

Using the Restatement (Second) of Conflict of Laws, the Supreme Judicial Court of Massachusetts followed the parties’ contractual choice of law.⁷⁹ The court deemed purely manufactured connections—the agreement that the birth would take place at a Massachusetts hospital, if possible, and the administration of some prenatal care in that state—sufficient to justify this choice of law.⁸⁰ Accordingly, the parties to the contract completely evaded New York’s restriction even though the court conceded that the gestational surrogate, who lived in that state, came within the scope of its protective policy.⁸¹

As *Hodas* illustrates, what makes a regime appealing to participants in a surrogacy arrangement is not merely the absence of a prohibition or criminal sanctions. Rather, state parentage rules play a vital role as well. For this reason, California’s doctrine of intent-based parentage has attracted many surrogacy participants.⁸²

Windsor’s assertions about federalism in family law fit quite

75. *Id.* at 325.

76. *Id.*

77. *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1139 (Mass. 2001).

78. *Hodas*, 814 N.E.2d at 322.

79. *Id.*

80. *Id.*

81. *See id.* at 325.

82. *E.g.*, *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993); *see Lewin, supra* note 60 (“California has the most permissive law [in the U.S.], allowing anyone to hire a woman to carry a baby and the birth certificate to carry the names of the intended parents. As a result, California has a booming surrogacy industry, attracting clients from around the world.”). Another aspect of the regulatory regime, fees and costs, explains why American reproductive tourists often go abroad—although this practice takes us away from the question of federalism.

comfortably with significant variation in surrogacy and parentage laws across this country, along with the experimentation and travel that such variation invites. Thus, this penumbral link between *Windsor* and surrogacy supports, rather than challenges, the present patchwork, with its mix of restrictive and permissive laws.⁸³

CONCLUSION

The conversation about the appropriate legal treatment of surrogacy began in earnest over twenty-five years ago with the *Baby M* litigation and its aftermath. Although the conversation has continued, inconsistency and discord persist. Some states have opted for a restrictive regime, others have taken a permissive approach, and still others have remained silent. Scholars, commentators, and the public remain divided as well.⁸⁴

Windsor's invalidation of Section 3 of DOMA does nothing to settle these longstanding contests. Indeed, precisely because *Windsor*'s significance lies in its move toward full inclusion of gay and lesbian couples in mainstream family law, this landmark case spells no major break with the past for surrogacy. If we look beyond *Windsor*'s direct legal impact, we find that its penumbras—its political, social, and cultural signals; its promotion of a repronormative understanding of marriage and family; and its approval of family law federalism—might refresh our conversations about surrogacy, adding timely talking points, but without significantly disrupting surrogacy's status quo.

83. See *supra* notes 60–61 and accompanying text.

84. See, e.g., *Hiring a Woman for Her Womb*, *supra* note 26.