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STRADDLING THE COLUMBIA: A CONSTITUTIONAL LAW PROFESSOR'S MUSINGS ON CIRCUMVENTING WASHINGTON STATE'S CRIMINAL PROHIBITION ON COMPENSATED SURROGACY

Peter Nicolas*

INTRODUCTION

I have spent most of my professional life as a law professor at the University of Washington specializing in constitutional law, yet when asked as a child what I wanted to be when I grew up, neither “lawyer” nor “professor” rolled off my tongue. Instead, when queried by adults or other children, I succinctly and matter-of-factly stated that I wanted to be a “mommy.” At that young age, I only had two primary role models: my mother, who at the time was a full-time mommy, and my father, who was a doctor. My squeamishness about blood and guts certainly made being a “mommy” the natural default choice.

I was, of course, teased a bit by my contemporaries for my gender-bending choice of a career path and told by adults that only *girls* could be mommies. Indeed, when I was growing up even young girls were encouraged to think about a future that included something other than motherhood. To avoid unwelcome future attention to myself I was thus quickly socialized to suppress my desire to “mother” children. As I grew older and came to the self-realization that I was gay, these early life lessons likewise counseled in favor of keeping that little bit of information to myself as well.

I soon learned that the combined forces of law and biology together served as significant roadblocks for a gay man interested in becoming a legal parent to a child. The law in many states has long been hostile to gay parenting, with some states prohibiting adoption in the first instance by gay individuals¹ or same-sex couples,² and other states prohibiting

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1. See FLA. STAT. § 63.042(3) (West, Westlaw through 2014 Sp. “A” Sess.); Act of May 25, 1987, ch. 343, 1987 N.H. LAWS 379.

so-called second-parent adoption, whereby one same-sex partner adopts the natural or adopted child of the other.³ Moreover, neither I nor my future partner could be a “mother” in the gestational or genetic sense of the word since as men we lack two critical ingredients for creating human life, wombs and eggs.⁴ Thus, if I was to achieve my goal of becoming a “mother” in the nurturing sense of that word,⁵ I was going to need the assistance of one or more women. I thus ventured into the complex legal and medical world of becoming a parent through the assistance of a surrogate and an egg donor.

In this Article, I recount—through both the prisms of an intended parent and a constitutional law scholar—my successful efforts to become a parent via compensated surrogacy and egg donation. Part I of this Article provides a narrative of my experience in becoming a parent via compensated surrogacy, and the various state and federal legal roadblocks and deterrents that I encountered along the way, including Washington State’s criminal prohibition on compensated surrogacy as well as federal guidelines issued by the U.S. Food and Drug Administration regarding the use of sperm by gay donors in the process of in vitro fertilization. Part II of this Article considers the extent to which laws that criminalize or otherwise restrict one’s ability to enter into surrogacy arrangements run afoul of either the substantive protections of the Due Process Clause or the guarantees of the Equal Protection Clause. Part III of this Article considers the extent to which laws that stand in the way of intended parents establishing legal parentage of children born via surrogacy violate those same constitutional guarantees.

I conclude that laws that restrict one’s ability to enter into surrogacy arrangements violate both the long-recognized fundamental right to procreate⁶ as well as a more specifically articulated fundamental right to

2. See MISS. CODE ANN. § 93-17-3(5) (West, Westlaw through 2014 Reg., 1st, and 2d Extraordinary Sess.); N.C. GEN. STAT. ANN. § 48-2-301(c) (West, Westlaw through ch. 1–117 2014 Reg. Sess.); *Adoption of Meaux*, 417 So. 2d 522, 523 (La. Ct. App. 1982); *In re Adams*, 473 N.W.2d 712, 714 (Mich. 1991); *In re Adoption of M.C.D.*, 42 P.3d 873, 878 (Okla. Civ. App. 2001); *In re Guardianship of O.G.M-K.*, 787 N.W.2d 848, 850 (Wis. Ct. App. 2010).

3. See *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 822 (Ky. Ct. App. 2008); *In re Adoption of Luke*, 640 N.W.2d 374, 383 (Neb. 2002); *Boseman v. Jarrell*, 704 S.E.2d 494, 502 (N.C. 2010); *In re Bonfield*, 780 N.E.2d 241, 247 (Ohio 2002); *In re Interest of Angel Lace M.*, 516 N.W.2d 678, 680 (Wis. 1994).

4. One of us, of course, could by providing sperm serve as the genetic father to a child.

5. For an excellent overview of the ways in which men can be mothers in this sense, see Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J.L. & GENDER 57 (2012).

6. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

procreate with the assistance of third parties, while laws that stand in the way of intended parents establishing legal parentage of children born via surrogacy violate the fundamental right to care for and have custody of one's children.⁷ In addition, I demonstrate that some of these restrictive statutory schemes can also be challenged on the ground that they violate the equal protection rights not only of those seeking to have children via surrogacy, but also the children born to them.

I. MY JOURNEY TO PARENTHOOD VIA COMPENSATED SURROGACY

A. *Criminalizing Commercial Surrogacy: The Washington State Approach*

After graduating from law school and clerking for a federal judge, I had the good fortune of relocating to Seattle, Washington after securing a teaching job at the University of Washington School of Law. During the years I have lived in Washington, the state legislature enacted a series of laws designed to further the rights of sexual minorities, including a statewide antidiscrimination law,⁸ a statewide domestic partnership registry,⁹ and ultimately, a state law extending full marriage rights to same-sex couples.¹⁰

After my then-domestic partner (now husband) and I had been together for a decade, we began to explore the possibility of becoming parents via surrogacy. We learned that there were two types of surrogacy, traditional and gestational. With traditional surrogacy, the surrogate allows her eggs to be artificially inseminated with the sperm of an intended father, with the result being that the surrogate has not only a gestational but also a genetic connection to the resulting child.¹¹ In contrast, with gestational surrogacy an embryo is created through the process of in vitro fertilization using the eggs of another woman, either

7. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

8. See Act of Jan. 31, 2006, ch. 4, 2006 Wash. Sess. Laws 12 (codified at WASH. REV. CODE § 49.60.030 (2012)).

9. See Act of Apr. 21, 2007, ch. 156, 2007 Wash. Sess. Laws 616 (codified at WASH. REV. CODE §§ 26.60.010–26.60.070, (2012)).

10. See Act of Feb. 13, 2012, ch. 3, 2012 Wash. Sess. Laws 199 (codified at WASH. REV. CODE §§ 26.04.010–26.04.070).

11. See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 894 (Cal. Ct. App. 1994); *In re C.K.G.*, 173 S.W.3d 714, 720 (Tenn. 2005); *In re Paternity of F.T.R.*, 833 N.W.2d 634, 643 (Wis. 2013).

those of the intended mother or a third-party egg donor. This embryo is implanted in the surrogate, who subsequently gives birth to a child to whom she has no genetic connection.¹² We also learned that either type of surrogacy arrangement could be either “altruistic” or “uncompensated” on the one hand or “commercial” or “compensated” on the other. With altruistic surrogacy, the surrogate receives no compensation (save for that necessary to cover any expenses associated with the pregnancy and birth), while with commercial surrogacy the surrogate receives a fee for serving as a surrogate.¹³ Altruistic surrogacy often involves a close friend or family member serving as a surrogate, while commercial surrogacy involves a person that the intended parents met solely for the purpose of arranging a surrogate birth.

While trying to wrap our heads around the different types of surrogacy, we were surprised to learn that, despite the otherwise favorable legal atmosphere for same-sex couples in Washington State, Washington law not only renders compensated surrogacy contracts unenforceable,¹⁴ but actually makes it a *crime* to enter into them.¹⁵ Specifically, under Washington law, entering into such contracts is a “gross misdemeanor”¹⁶ punishable by up to 364 days in prison and a fine of up to \$5,000.¹⁷ Moreover, custody of the child born via the surrogacy arrangement would be left to the discretion and uncertainty of a judge applying a multi-factored statutory test.¹⁸ Uncompensated surrogacy, in contrast, is not a crime under Washington law. In 2011, when we were in the midst of exploring surrogacy, the Washington House of Representatives voted in favor of a bill that would have decriminalized surrogacy, regulated and provided for the enforcement of gestational surrogacy agreements, and left traditional surrogacy arrangements unregulated.¹⁹ However, the bill failed to advance in the Washington Senate. Thus, unless someone within the state was willing to serve as a surrogate for us without being compensated for her efforts, a rather unlikely—and in my mind, unreasonable—prospect, we had to look outside of the state in search of a jurisdiction with a more favorable legal

12. See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d at 894; *In re C.K.G.*, 173 S.W.3d at 720; *In re Paternity of F.T.R.*, 833 N.W.2d at 643.

13. See *In re Paternity of F.T.R.*, 833 N.W.2d at 657 & n.10.

14. See WASH. REV. CODE § 26.26.240 (2012).

15. See *id.* §§ 26.26.230–26.26.250.

16. See *id.* § 26.26.250.

17. See WASH. REV. CODE § 9.92.020 (2012).

18. See WASH. REV. CODE § 26.26.260.

19. See H.B. 1267, 63d Leg., Reg. Sess. (Wash. 2011).

atmosphere for surrogacy.

B. A Legal Patchwork: A Survey of the Law of Surrogacy in the United States

Since pursuing surrogacy in our home state was not an option, we had to select another state or country in which to pursue surrogacy. For us, the key consideration was to select a jurisdiction with favorable laws on the issue, or, if not favorable, at least not hostile to surrogacy.

There are a handful of foreign countries where compensated surrogacy is lawful, far less expensive than in the United States, and that cater to foreigners, including India, Thailand, and Mexico.²⁰ Yet, even if we were willing to overlook our desire that the surrogate live close enough to us that we could attend key appointments and the birth of our future child, there were other reasons to pursue surrogacy domestically. For starters, the child would be considered born “out of wedlock” to a U.S. father and a foreign mother. Under U.S. immigration laws, establishing U.S. citizenship for such a child is somewhat more complicated than for a child born out-of-wedlock to a U.S. mother or “in wedlock” to an opposite-sex U.S. couple.²¹ Second, judgments of parentage in sister states are entitled to Full Faith and Credit under the U.S. Constitution even in states that otherwise would not permit same-sex parentage of a child to be established in the first instance.²² In contrast, recognition of a judgment of parentage from a foreign country (if one were even available) would be recognized only at the discretion of each individual U.S. state.²³

Having turned our focus stateside, we were still faced with a wide spectrum of legal regimes from which to choose.²⁴ We discovered that

20. See Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, N.Y. TIMES, July 6, 2014, at A1. India has since modified its laws so as to permit only married opposite-sex couples to pursue surrogacy there. See *India Bans Gay Foreign Couples from Surrogacy*, TELEGRAPH (Jan. 18, 2013, 2:57 PM), <http://www.telegraph.co.uk/news/worldnews/asia/india/9811222/India-bans-gay-foreign-couples-from-surrogacy.html>.

21. See 8 U.S.C. §§ 1401, 1409 (2012). These laws have been upheld by the U.S. Supreme Court despite their sex-based classifications. See *Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001).

22. See U.S. CONST. art. IV, § 1; *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232–33 (1998); *Finstuen v. Crutcher*, 496 F.3d 1139, 1151–56 (10th Cir. 2007); *Henry v. Himes*, No. 1:14–CV–129, 2014 WL 1418395, at *17, 18 n.24 (S.D. Ohio Apr. 14, 2014), *rev'd on other grounds sub nom.* *DeBoer v. Snyder*, Nos.14-1341, 3057, 3464, 5291, 5297, 5818, 2014 WL 5748990 (6th Cir. Nov. 6, 2014); *Embry v. Ryan*, 11 So. 3d 408, 409–10 (Fla. Dist. Ct. App. 2009).

23. See *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185, 190 (1912).

24. We were engaged in the process of selecting a state in which to pursue surrogacy in 2011 and 2012, but there have since been some significant changes in state laws. The overview that follows presents the current state of affairs rather than the precise state of affairs in 2011 and 2012 to make

state laws governing surrogacy can be divided into roughly six categories, ranging from criminalization of surrogacy at one extreme to detailed laws providing for the full enforceability of surrogacy agreements at the other and a variety of other approaches—including no substantive law one way or the other on the issue—in between. Balancing our desire for legal certainty against competing considerations, we ultimately selected one of the in-between jurisdictions whose substantive law was neither hostile nor clearly favorable to surrogacy arrangements.

The first group of states to be crossed off the list were those on one extreme that, like Washington,²⁵ not only declared all contracts for compensated surrogacy unenforceable but made entering into any such contracts a punishable civil or criminal offense.²⁶ This included Michigan,²⁷ New York,²⁸ and Washington, D.C.²⁹ Also off the list were a second set of states that, while not making compensated surrogacy arrangements a punishable offense, had statutes or case law declaring surrogacy contracts to be unenforceable. This included Arizona,³⁰ Indiana,³¹ Nebraska,³² and New Jersey,³³ and for traditional surrogacy

it of greater utility to researchers as well as those currently considering surrogacy.

25. See WASH. REV. CODE §§ 26.26.230–26.26.250 (2012).

26. Excluded from this list are states, such as Kentucky, Maryland, and Oklahoma that criminalize only compensated traditional surrogacy. See KY. REV. STAT. ANN. § 199.590 (West, Westlaw through 2014 legislation); *In re Roberto d.B.*, 923 A.2d 115, 130–31 (Md. 2007); Family Law: Adoption—Although Surrogacy Contract Involving Payment of Fee to Birth Mother Is Illegal and Unenforceable Under Maryland Law, Invalid Payments Do Not Bar Approval of Adoption Petition, 85 Op. Md. Att’y Gen. 348, 366 n.22 (2000); Is a Surrogate Gestation Contract a Violation of Oklahoma’s Trafficking in Children Statutes?, 83 Op. Okla. Att’y Gen. 162 (1983). Also excluded from the list is Virginia, which does not criminalize surrogacy but does make it a crime for third parties who facilitate such contracts to earn a fee. See VA. CODE ANN. § 20-156 (West, Westlaw through 2014 Reg. Sess. & 2014 Special Sess.).

27. See MICH. COMP. LAWS ANN. § 722.859 (West, Westlaw through 2014 Reg. Sess. Act 282) (mandating up to one year in prison and \$10,000 fine for contracting parties, and up to five years in prison and \$50,000 fine for third parties facilitating such contracts).

28. See N.Y. DOM. REL. LAW §§ 121–123 (McKinney, Westlaw through 2014 legislation) (imposing \$500 civil penalty for those entering into them, with greater civil and criminal penalties for third parties facilitating such contracts).

29. See D.C. CODE §§ 16-401, 16-402 (West, Westlaw through Sept. 1, 2014) (imposing up to one year in prison and \$10,000 fine for anyone involved in the contracting process).

30. See ARIZ. REV. STAT. ANN. § 25-218(A) (West, Westlaw through 2d Reg. & Special Sess. 2014).

31. See IND. CODE ANN. §§ 31-20-1-1, 31-20-1-2 (West, Westlaw through 2d Reg. Sess. and 2d Technical Sess. 2014).

32. See NEB. REV. STAT. ANN. § 25-21,200 (West, Westlaw through 2014 Reg. Sess.).

33. See *In re Baby M*, 537 A.2d 1227, 1240 (N.J. 1988); *A.H.W. v. G.H.B.*, 772 A.2d 948, 952–54 (N.J. Super. Ct. Ch. Div. 2000).

contracts only, Louisiana³⁴ and North Dakota.³⁵ Many of the states in this second group have statutory provisions that take the further step of explicitly declaring the surrogate to be the legal mother and—if she is married—her husband the legal father,³⁶ thus complicating the establishment of legal parentage.

A third group of states had laws somewhat more favorable to surrogacy arrangements, but these states overregulate the process to the point that surrogacy is not a realistic option in those states for many people. Specifically, Florida,³⁷ Texas,³⁸ Utah,³⁹ and Virginia⁴⁰ have detailed statutes making surrogacy agreements entered into that satisfy the statutes' requirements valid and enforceable, but they contain various provisions that make them of limited utility for most couples. For example, the Florida⁴¹ and Virginia⁴² statutes do not apply to agreements that provide compensation beyond expenses related to the surrogacy process.⁴³ The Virginia statute requires that a “home study”—a typical requirement for people seeking to adopt a child—be done of both the surrogate and the intended parents.⁴⁴ Furthermore, in Texas⁴⁵ and

34. See LA. REV. STAT. ANN. § 9:2713 (West, Westlaw through 2013 Reg. Sess.).

35. See Assisted Conception Act, ch. 184, § 5, 1989 N.D. Laws 562 (1989) (codified at N.D. CENT. CODE ANN. § 14-18-05 (West, Westlaw through 2013 Reg. Sess.)).

36. See, e.g., ARIZ. REV. STAT. ANN. § 25-218(B)–(C) (West, Westlaw through 2d Reg. & Special Sess. 2014); N.D. CENT. CODE ANN. § 14-18-05 (West, Westlaw through 2013 Reg. Sess.).

37. See FLA. STAT. ANN. § 742.15 (West, Westlaw through 2014 Sp. “A” Sess.).

38. See TEX. FAM. CODE ANN. §§ 160.751–160.763 (West, Westlaw through 3d Called Sess. 2013).

39. See UTAH CODE ANN. §§ 78B-15-801 to 78B-15-809 (West, Westlaw through 2014 Gen. Sess.).

40. See VA. CODE ANN. §§ 20-156 to 20-165 (West, Westlaw through 2014 Reg. Sess. & 2014 Special Sess.).

41. See FLA. STAT. ANN. § 742.15(4) (West, Westlaw through 2014 Sp. “A” Sess.). The statute, however, allows for compensation for “living” expenses, which some interpret as allowing you to pay for the surrogate’s monthly rent or mortgage and similar expenses during the pregnancy in an amount that often parallels the compensation given to surrogates in states where there are no restrictions on compensation. See, e.g., *Gestational Surrogacy: Price List (2014)*, DREAMABABY.COM, <http://www.dreamababy.com/downloads/Gestational%20Surrogacy%20Price%20List.pdf> (last visited July 16, 2014); *Intended Parents and Parents Via Surrogacy: IP in Florida—“No Compensation”?*, ALLABOUTSURROGACY.COM, <http://www.allaboutsurrugacy.com/forums/index.php?showtopic=55448> (last visited July 12, 2014).

42. See VA. CODE ANN. §§ 20-156, 20-160(B)(4), 20-162(A) (West, Westlaw through 2014 Reg. Sess. & 2014 Special Sess.).

43. See, e.g., *Gestational Surrogacy: Price List (2014)*, *supra* note 41 (describing “living expenses”).

44. See VA. CODE ANN. § 20-160.

45. See TEX. FAM. CODE ANN. § 160.756 (West, Westlaw through 3d Called Sess. 2013).

Virginia,⁴⁶ the agreement is enforceable only if pre-approved by a court. These statutes also contain a variety of other requirements for a surrogacy contract to be valid, such as proof that surrogacy is a medical necessity for the intended parents,⁴⁷ that the surrogate has had at least one prior pregnancy and delivery,⁴⁸ a minimum age of the participants,⁴⁹ informed consent of medical risks for the surrogate,⁵⁰ psychological evaluations of the participants,⁵¹ and the like.⁵²

A fourth group of states have enacted statutory provisions that facilitate parentage determinations where surrogacy is involved by either explicitly providing that the intended parents are the legal parents or explicitly providing a mechanism for amending birth certificates where surrogacy arrangements are involved. This includes Arkansas,⁵³ Connecticut,⁵⁴ North Dakota⁵⁵ and for uncompensated surrogacy only, Washington.⁵⁶ But these statutes otherwise do not provide detail on the requirements, if any, for an enforceable surrogacy contract.⁵⁷

46. See VA. CODE ANN. § 20-160.

47. See FLA. STAT. ANN. § 742.15(2) (West, Westlaw through 2014 Sp. “A” Sess.); TEX. FAM. CODE ANN. § 160.756(b)(2); UTAH CODE ANN. § 78B-15-803(2)(b) (West, Westlaw through 2014 Gen. Sess.); VA. CODE ANN. § 20-160(B)(8).

48. See UTAH CODE ANN. § 78B-15-803(2)(f); TEX. FAM. CODE ANN. § 160.756(b)(5); VA. CODE ANN. § 20-160(B)(6).

49. See FLA. STAT. ANN. § 742.15(1) (eighteen years); UTAH CODE ANN. § 78B-15-801(2)(i) (twenty-one years).

50. See TEX. FAM. CODE ANN. § 160.754(d).

51. See UTAH CODE ANN. § 78B-15-803(2)(d); VA. CODE ANN. § 20-160(B)(7).

52. In addition to these various limitations, these statutes also require that the couple be in a legally recognized marriage. See FLA. STAT. ANN. § 742.15(1); TEX. FAM. CODE ANN. § 160.754(b); UTAH CODE ANN. § 78B-15-801(3); VA. CODE ANN. § 20-156, 20-159 (defining “Intended parents”). At the time we were pursuing surrogacy, these states all had constitutional amendments refusing to permit or recognize same-sex marriages. See FLA. CONST. art. I, § 27; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A. Given recent decisions declaring that these state constitutional amendments violate the federal constitution, see *Kitchen v. Herbert*, 755 F.3d 1193, 1213 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 639–40 (W.D. Tex. 2014); *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014), this limitation is no longer of consequence for same-sex couples pursuing surrogacy in these states.

53. See ARK. CODE ANN. § 9-10-201 (West, Westlaw through 2014 2d Extraordinary Sess.).

54. See CONN. GEN. STAT. ANN. § 7-48(a) (West, Westlaw through 2014 Reg. Sess.). The Connecticut provision encompasses gestational surrogacy only.

55. See N.D. CENT. CODE §§ 14-18-01, 14-18-08 (West, Westlaw through 2013 Reg. Sess.). The North Dakota provision encompasses gestational surrogacy only.

56. See WASH. REV. CODE § 26.26.101(1), (8) (2012).

57. See, e.g., *Raftopol v. Ramey*, 12 A.3d 783, 785 n.4 (Conn. 2011) (leaving open what the requirements are for an enforceable contract).

A fifth group of states—California,⁵⁸ Delaware,⁵⁹ Illinois,⁶⁰ Nevada,⁶¹ and New Hampshire,⁶²—go the furthest in providing for the enforcement and facilitation of gestational surrogacy contracts. Unlike the statutes in some of the states that make surrogacy contracts enforceable but heavily regulate them, these statutes do not require court pre-approval of the agreement. The California statute has the most modest requirements, essentially requiring only that the parties be represented by separate legal counsel,⁶³ while the Nevada statute is nearly as hands-off, requiring only separate legal representation⁶⁴ and a medical evaluation of the surrogate.⁶⁵ The Delaware, Illinois, and New Hampshire statutes contain a variety of requirements in addition to representation by separate legal counsel⁶⁶ and medical evaluation of the surrogate,⁶⁷ such as that the surrogate be at least twenty-one years old,⁶⁸ have given birth to one child,⁶⁹ and undergone a mental health evaluation,⁷⁰ and that the intended parents have undergone a mental health evaluation.⁷¹ In addition, the Delaware and Illinois statutes require that the surrogate have health insurance,⁷² and the Illinois statute specifies that at least one

58. See CAL. FAM. CODE § 7962 (West, Westlaw through 2014 Reg. Sess. ch. 531). Prior California case law had declared such contracts to be enforceable. *Johnson v. Calvert*, 851 P.2d 776, 784–85 (Cal. 1993).

59. See DEL. CODE ANN. tit. 13, §§ 8-801 to 8-813 (West, Westlaw through 2014 ch. 428).

60. See 750 ILL. COMP. STAT. ANN. 47 / 1–75 (West, Westlaw through 2014 Reg. Sess. Act 98-925).

61. See NEV. REV. STAT. ANN. §§ 126.710–126.810 (West, Westlaw through 2013 Reg. & Special Sess.).

62. See N.H. REV. STAT. ANN. §§ 168-B:1 to 168-B:21 (West, Westlaw through ch. 330 of 2014 Reg. Sess.).

63. See CAL. FAM. CODE § 7962.

64. See NEV. REV. STAT. ANN. § 126.740(1)(b), (2).

65. See *id.* § 126.740(1)(a).

66. See DEL. CODE ANN. tit. 13, § 8-806(a)(5), (b)(2) (West, Westlaw through 2014 ch. 428); 750 ILL. COMP. STAT. ANN. 47 / 20(a)(5), (b)(4) (West, Westlaw through 2014 Reg. Sess. Act 98-925); N.H. REV. STAT. ANN. § 168-B:9(V).

67. See DEL. CODE ANN. tit. 13, § 8-806(a)(3); 750 ILL. COMP. STAT. ANN. 47 / 20(a)(3); N.H. REV. STAT. ANN. § 168-B:9(III).

68. See DEL. CODE ANN. tit. 13, § 8-806(a)(1); 750 ILL. COMP. STAT. ANN. 47 / 20(a)(1); N.H. REV. STAT. ANN. § 168-B:9(I).

69. See DEL. CODE ANN. tit. 13, § 8-806(a)(2); 750 ILL. COMP. STAT. ANN. 47 / 20(a)(2); N.H. REV. STAT. ANN. § 168-B:9(II).

70. See DEL. CODE ANN. tit. 13, § 8-806(a)(4); 750 ILL. COMP. STAT. ANN. 47 / 20(a)(4); N.H. REV. STAT. ANN. § 168-B:9(IV).

71. See DEL. CODE ANN. tit. 13, § 8-806(b)(1); 750 ILL. COMP. STAT. ANN. 47 / 20(b)(3); N.H. REV. STAT. ANN. § 168-B:8(I).

72. See DEL. CODE ANN. tit. 13, § 8-806(a)(6); 750 ILL. COMP. STAT. ANN. 47 / 20(a)(6).

of the intended parents provide the gametes⁷³ and that there is a medical necessity for pursuing surrogacy.⁷⁴ Assuming the statutory requirements are satisfied, the statutes in these five states allow for a pre-birth order, or “PBO,” whereby the legal parentage of the intended parents is determined in a proceeding that takes place before the child is born.⁷⁵ Moreover, like many of the states in the fourth group, these states have statutory provisions declaring that the intended parents, not the surrogate and her husband, are the child’s legal parents.⁷⁶

In the remaining states, the legislatures have taken no position on the enforceability of surrogacy agreements. In two states—New Mexico⁷⁷ and Tennessee⁷⁸—the legislatures have taken the unusual step of enacting statutes declaring this official neutrality. In the other states, the legislature has either enacted no statutes whatsoever on the subject or only enacted statutes addressing discrete issues, such as statutes declaring that surrogacy arrangements do not violate state criminal statutes prohibiting baby selling⁷⁹ or statutes addressing intestate succession where surrogacy is involved.⁸⁰ In some of these states, courts have issued opinions declaring or strongly implying that surrogacy contracts are enforceable, including Maryland,⁸¹ Massachusetts,⁸² Ohio,⁸³ Pennsylvania,⁸⁴ Tennessee,⁸⁵ and Wisconsin,⁸⁶ although what

73. See 750 ILL. COMP. STAT. ANN. 47 / 20(b)(1).

74. See *id.* at 47 / 20(b)(2).

75. See CAL. FAM. CODE § 7962(e) (West, Westlaw through 2014 Reg. Sess. ch. 531); DEL. CODE ANN. tit. 13, § 8-611(b); 750 ILL. COMP. STAT. ANN. 47 / 35; NEV. REV. STAT. ANN. § 126.720(4) (West, Westlaw through 2013 Reg. & Special Sess.); N.H. REV. STAT. ANN. § 168-B:12.

76. See CAL. FAM. CODE § 7962(f)(1); DEL. CODE ANN. tit. 13, § 8-804; 750 ILL. COMP. STAT. ANN. 47 / 15; NEV. REV. STAT. ANN. § 126.670; N.H. REV. STAT. ANN. § 168-B:5, 7.

77. See N.M. STAT. ANN. § 40-11A-801 (West, Westlaw through 2014 2d Reg. Sess.).

78. See TENN. CODE ANN. § 36-1-102 (West, Westlaw through 2014 2d Reg. Sess.).

79. See IOWA CODE ANN. § 710.11 (West, Westlaw through 2014 Reg. Sess.); OR. REV. STAT. ANN. § 163.537 (West, Westlaw through 2014 Reg. Sess.); W. VA. CODE ANN. § 61-2-14h(e)(3) (West, Westlaw through 2014 2d Extraordinary Sess.).

80. See COLO. REV. STAT. ANN. § 15-11-121 (West, Westlaw through 2014 2d Reg. Sess.); MINN. STAT. ANN. §§ 524.1-201, 524.2-120, 524.2-121 (West, Westlaw through 2014 Reg. Sess.); N.M. STAT. ANN. § 45-2-121 (West, Westlaw through 2014 2d Reg. Sess.).

81. See *In re Roberto d.B.*, 923 A.2d 115, 131 (Md. 2007).

82. See *Hodas v. Morin*, 814 N.E.2d 320, 324–27 (Mass. 2004); *Culliton v. Beth Isr. Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1137–38 (Mass. 2001).

83. See *J.F. v. D.B.*, 879 N.E.2d 740, 741 (Ohio 2007); *S.N. v. M.B.*, 935 N.E.2d 463, 471 (Ohio Ct. App. 2010). The Ohio courts have left open, however, the question whether *traditional* (as contrasted with gestational) surrogacy agreements are enforceable. See *J.F.*, 879 N.E.2d at 742.

84. See *J.F. v. D.B.*, 897 A.2d 1261, 1280 (Pa. Super. Ct. 2006).

85. See *In re Baby*, No. M2012-01040-SC-R11-JV, 2014 WL 4815211, at *20 (Tenn. Sept. 18, 2014).

exactly is required for such an agreement to be enforceable is not entirely clear.

All other states in this final group occupy a sort of “No Man’s (or in this case, perhaps more appropriately “Woman’s”) Land” in which surrogacy contracts are neither clearly enforceable nor clearly unenforceable. In these states, the extent to which courts will assist in the process—such as by issuing PBOs—is not something that you can find by simply doing a Westlaw or LexisNexis search because there have been no cases that have resulted in binding appellate court decisions on the enforceability of surrogacy contracts. Rather, surrogacy in these states occurs in the shadows, so to speak, with intended parents and surrogates working in conjunction with a small group of experienced attorneys and trial court judges to facilitate such arrangements.

Given this national state of affairs, the closest state with the most favorable legal environment for surrogacy was California. Yet while relatively close, realistically it was too far away to allow for regularly attending key appointments, and certainly too far to get to quickly on short notice for an unexpectedly early birth. Moreover, the estimated costs for pursuing gestational surrogacy in California using one of its more popular agencies is \$150,000 or more, and that assumes everything goes right on one’s first try.⁸⁷ If we had unlimited resources and the money was mostly going to the people doing the hardest and riskiest work—the surrogate and the egg donor—it would be worth the cost to become a parent. But with only twenty-five percent of that amount going to those two individuals, it was a good deal primarily for the surrogacy agencies, doctors, lawyers, pharmacies, and psychologists involved in the process.⁸⁸ These intermediaries do important work and deserve to be reasonably compensated for it, but the ratio struck me as a bit off. With California off the list and the other states with positive law too far away to meet our criteria, we started to take a look at one of the states where surrogacy occurs in the shadows closer to home, in Oregon.

86. See *In re Paternity of F.T.R.*, 888 N.W.2d 634, 638 (Wis. 2013).

87. See *Cost of Hiring a Surrogate*, GROWING GENERATIONS, <http://www.growinggenerations.com/surrogacy-program/intended-parents/surrogacy-cost/> (last visited July 14, 2014).

88. See, e.g., *Egg Donation: Compensation*, GROWING GENERATIONS, <http://www.growinggenerations.com/egg-donor-program/egg-donors/egg-donor-pay/> (last visited July 14, 2014); *Cost of Hiring a Surrogate*, *supra* note 87; *Surrogacy: Compensation*, GROWING GENERATIONS, <http://www.growinggenerations.com/surrogacy-program/surrogates/surrogate-mother-pay/> (last visited July 14, 2014). See generally Lewin, *supra* note 20, at A1. At the time we were engaged in the surrogacy process, the fee paid to the surrogate was several thousand dollars lower.

C. *Surrogacy in the Shadows: The Oregon Approach*

The largest city in Oregon—Portland—is located just across the border from Washington State and in good traffic is just under a three-hour drive away from Seattle. It is located in between California and Washington State not only geographically but, so far as surrogacy goes, legally. There are no statutes or court decisions addressing the enforceability of surrogacy contracts or the availability of PBOs, save for a statute making clear that paying a surrogate a fee does not violate the state’s criminal child-selling statutes.⁸⁹

A good sign that compensated surrogacy arrangements occur in an “in-the-shadows” jurisdiction is the presence of surrogacy agencies as well as doctors and lawyers specializing in surrogacy, and a quick internet search turned up several of each in Oregon. I spoke at length with the directors of three surrogacy agencies in Oregon, as well as a few attorneys and a couple of clinics specializing in surrogacy arrangements, all of whom assured me that despite the absence of published law on the issue of surrogacy, in practice—at least at the trial court level in Portland—judges routinely signed PBOs declaring intended parents the legal parents of children born to surrogates within the state. Moreover, relative to California, gestational surrogacy was a bargain in Oregon, costing about half as much even though the surrogates and egg donors earned about the same amount, with the biggest difference being the fees charged by the surrogacy agencies and the lawyers in the two states.⁹⁰

Yet pursuing surrogacy in a state without an established statutory scheme governing surrogacy was not without some risk, and thus the “market price” for the intermediaries perhaps reflects this risk. Unlike states such as California, which have statutes making clear that the intended parents—not the surrogate and her husband if she is married—are the legal parents of the child, Oregon’s statutory scheme is more traditional. If a woman gives birth to a child, her name *must* appear on the child’s original birth certificate.⁹¹ Moreover, her husband is rebuttably presumed to be the child’s father,⁹² and a challenge to that

89. See OR. REV. STAT. ANN. § 163.537 (West, Westlaw through 2014 Reg. Sess.).

90. See, e.g., *Anticipated Expenses*, FUTURE FAMILIES NW, LLC, <http://www.futurefamiliesnw.com/anticipated-expenses.html> (last visited Oct. 27, 2014); *Costs*, GREATEST GIFT SURROGACY CENTER NW, <http://ggscnw.com/intended-parents/costs/> (last visited Oct. 27, 2014).

91. See OR. REV. STAT. ANN. § 432.088(8) (West, Westlaw through 2014 Reg. Sess.).

92. See OR. REV. STAT. ANN. § 109.070(1)(a) (West, Westlaw through 2014 Reg. Sess.).

presumption cannot be brought by anyone other than the woman or her husband so long as they are married and cohabiting.⁹³ This presumption meant that if the surrogate and her husband decided to keep the child, the statutory scheme would seem to conclusively provide that they were the legal parents.

However, the statutory scheme in Oregon—while not expressly making reference to surrogacy arrangements (as do the statutes in the fourth group of states)—did seem to have a mechanism for having a court declare someone other than the birth mother and her husband to be a child’s legal parents. With respect to the birth mother, even though state law provides that the birth mother’s name must appear on the original birth certificate, it further provides that if a court determines that a woman other than the birth mother is the genetic mother, the court can order the birth certificate amended to remove the birth mother’s name and have the original placed under seal.⁹⁴ Moreover, although the birth mother’s husband is ordinarily listed as the legal father on the original birth certificate, if a court order declares someone else to be the father then that person’s name shall appear on the *original* birth certificate.⁹⁵

Of course, these sorts of concerns only come into play when things go wrong, and in the overwhelming majority of surrogacy arrangements, everything goes smoothly, even in states where surrogacy occurs in the shadows. Indeed, the absence of cases addressing the enforceability of surrogacy contracts that is one of the hallmarks of a “shadow” jurisdiction is a sign that surrogacy arrangements in those states have thus far gone smoothly, since it is typically only when disputes arise between surrogates and intended parents that either appellate court decisions are published or corrective legislation enacted.⁹⁶

Yet the fact that there is no formal law regulating surrogacy in states such as Oregon does not mean that the situation is akin to the “Wild Wild West” as some have written about the surrogacy process in such jurisdictions.⁹⁷ The intermediaries in the surrogacy process—the surrogacy agencies, lawyers, and doctors—have filled that vacuum with

93. *See id.* § 109.070(2).

94. *See* OR. REV. STAT. ANN. § 432.088(8).

95. *See id.* § 432.088(9)(d).

96. *See generally infra* Part II.C.1. On occasion, the surrogate and the intended parents are not in a dispute with one another, but instead are in a dispute with a state agency that refuses to amend the birth certificate to reflect the intent of the parties. *See, e.g.,* J.R. v. Utah, 261 F. Supp. 2d 1268, 1269 (D. Utah 2002).

97. *See, e.g.,* Alexander N. Hecht, *The Wild Wild West: Inadequate Regulation of Assisted Reproductive Technology*, 1 HOUS. J. HEALTH L. & POL’Y 227, 228 (2001).

their own unwritten law that in many ways incorporates many of the safeguards that can be found in states that have detailed statutory regimes governing surrogacy. Indeed, these intermediaries have a powerful incentive to self-regulate to ensure successful surrogacy journeys, since they stand to lose if a dispute results in negative appellate court precedent or statutory law.

Thus, I learned that all of the agencies have similar criteria for would-be surrogates that are designed to weed out those who might be unprepared to give up custody of the child they give birth to. These include requirements that the surrogate already have had at least one child that she is parenting and that she undergo a psychological examination and criminal background check.⁹⁸ Many of the agencies are run by former surrogates who know from experience what it takes to be a surrogate, and thus have a good nose for quickly sifting would-be surrogates.⁹⁹

Moreover, even if an agency approves a surrogate and she is matched with intended parents, the reproductive medicine clinics have their own criteria that are often more stringent than those of the surrogacy agencies. For example, although some agencies will still work with traditional surrogates, most reproductive medicine clinics will not.¹⁰⁰ Since traditional surrogacy cases—in which the surrogate has a genetic link to the resulting child—are far more likely to result in custody disputes,¹⁰¹ this extra level of screening likewise has the effect of minimizing possible custody disputes. In addition, our reproductive medicine clinic required that the parties submit a copy of their signed surrogacy contract, which necessarily added a third level of screening—that of the attorneys. The back-and-forth of the attorneys in negotiating the terms of the contract ensured that important topics likely to result in possible disputes were fully considered and resolved.

To be sure, these safeguards are by no means foolproof. Intended parents and surrogates could circumvent the agency screening by finding

98. See, e.g., *Becoming a Surrogate*, NW SURROGACY CENTER, LLC, http://www.nwsurrogacycenter.com/becoming_a_surrogate_mother.html (last visited July 22, 2014); *Surrogates*, FUTURE FAMILIES NW, LLC, <http://www.futurefamiliesnw.com/surrogates.html> (last visited July 22, 2014); *Surrogates*, GREATEST GIFT SURROGACY CENTER NW, <http://ggscnw.com/surrogates/> (last visited July 22, 2014).

99. See, e.g., *About Us*, FUTURE FAMILIES NW, LLC, <http://www.futurefamiliesnw.com/about-us.html> (last visited July 22, 2014); *About Us*, GREATEST GIFT SURROGACY CENTER NW, <http://ggscnw.com/about-us/> (last visited July 22, 2014).

100. See, e.g., *Frequently Asked Questions*, OR. REPROD. MED., <http://www.oregonreproductivemedicine.com/main-faq> (last visited July 22, 2014).

101. See Lewin, *supra* note 20, at 14.

one another through websites, much like internet-based dating.¹⁰² Moreover, if they decided to pursue traditional surrogacy, they would not even need the assistance of a doctor¹⁰³ and could even forego entering into a contract, thus circumventing the clinic and attorney screening. But this does not necessarily make the state of affairs in Oregon inferior to that in states with detailed statutory regimes in place. After all, those statutory regimes typically allow someone who cannot or does not wish to meet the criteria to “opt out,” the consequence being simply that they cannot rely on the automatic enforceability and parentage provisions. In a state such as Oregon, opting out potentially means being denied the assistance of the small handful of intermediaries whose assistance is often crucial for a successful surrogacy journey.

D. A Closer Look at the Matching Process: The Search for a Surrogate and an Egg Donor

After doing our due diligence, we settled on Oregon and began the process of being matched with a surrogate. We selected a small agency in Oregon run by two women who had been surrogate mothers and egg donors on several occasions. As two men about to engage in a process that some view as exploitative of women in general or lower income women in particular, we were drawn to the fact that these women had themselves served as surrogates and seemed to be interested in making sure that both the surrogates and the intended parents were treated fairly. They accomplished this by keeping their own overhead and in turn their fees low—they worked out of their own homes and not in a fancy office building—while compensating the surrogates at rates comparable to those at other agencies both within and outside the state.

The process of matching intended parents and surrogates is an idiosyncratic one designed to ensure compatibility. The agency needed enough information about us as a couple that the prospective surrogates could decide whether they felt comfortable carrying a child for us. For surrogates—at least those that pass the psychological screening process—this is about more than just compensation; it is about helping a couple that they truly feel comfortable helping to become parents. Surrogates can thus screen out intended parents for any reason, including based on such characteristics as the age, religion, or sexual orientation of

102. See, e.g., *Surrogate Mothers Online: Virtual Classifieds*, SURROGATE MOTHERS ONLINE, <http://www.surromomsonline.com/classifieds/index.htm> (last visited June 19, 2014).

103. See Anthony Miller, *Baseline, Bright-Line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage*, 34 MCGEORGE L. REV. 637, 671 (2003).

the intended parents, their plans for childcare (daycare versus nanny versus stay-at-home parent) or even their favorite color or television show.

Beyond filling out this dating-style profile, we had to decide whether we were seeking to match with a traditional or a gestational surrogate, as well as whether we wanted to be matched with an experienced or a first-time surrogate. The biggest advantages of selecting a traditional surrogate and a first-time surrogate are cost. Traditional surrogacy costs approximately \$30,000 less because it avoids both the expenses of compensating a third-party donor for her eggs and the medical fees associated with in vitro fertilization, while first-time surrogates are compensated approximately \$5,000 to \$10,000 less than experienced ones. Yet like many intended parents pursuing surrogacy, our biggest fear was that the surrogate would decide for some reason to retain custody of the child, and thus the extra expenses associated with selecting gestational surrogacy and an experienced surrogate were an insurance policy against this risk that was worth the premium.

With an experienced surrogate, you know that she has been through and thus can handle the complex legal, medical, and emotional aspects of surrogacy, including allowing the intended parents to take custody of the child to whom she gives birth. And with gestational surrogacy, the surrogate lacks the genetic link that—when coupled with gestation—makes traditional surrogacy a riskier proposition, since the woman is giving away what in a very real sense is her child. Accordingly, even jurisdictions that are otherwise “surrogacy friendly” differentiate between gestational and traditional surrogacy, treating the latter as more akin to a woman giving a child up for adoption who can change her mind up to and shortly after birth and thus not determining parentage pre-birth.¹⁰⁴ Due to the psychological and legal complexities associated with the merger of genetics and gestation, ever since medical science has been able to separate gestational from genetic motherhood, gestational surrogacy has become the preferred method for surrogates and intended parents alike.¹⁰⁵

104. See, e.g., *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 898–901 (Cal. Ct. App. 1994).

105. See, e.g., Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 296–97 (2013); Kim Willoughby, *ART: Enter the Lawyer*, 32 FAM. ADVOC., Spring 2010, at 36, 37–38; *Using a Surrogate Mother: What You Need to Know*, WEBMD, <http://www.webmd.com/infertility-and-reproduction/guide/using-surrogate-mother> (last visited Oct. 27, 2014). In this regard, the biblical story of Sarah, Abraham, and Hagar was a cautionary tale so far as traditional surrogacy is concerned. While Hagar became pregnant and gave birth, she did not really want to give up the child and Sarah became jealous of Hagar, and after Sarah was miraculously cured of her infertility

Next, we had to answer a series of four questions that the agency said were critical to making a good match. First, what type of relationship did we want with the surrogate during the process: did we want to attend every appointment, be present for the birth and be in regular contact, or did we want a more arm's length relationship? Second, what type of relationship did we want with the surrogate after the child was born: did we want her to be like an extended member of the family, have no contact post-birth, or something in between? Third, how many embryos did we want to transfer at a time? Fourth, what are our views on abortion due to the discovery of a birth defect during the pregnancy? Or an abortion through the process of "selective reduction" whereby multiple embryos are transferred and if more than are desired successfully implant, the excess ones are aborted. The only "right" answers to these questions, they stressed, were honest answers, since discovery of a difference of opinion on any of these can lead to tensions and conflict.

Of all these questions, the abortion question is perhaps the most challenging one to grapple with. It is the one most likely to result in a serious conflict between a surrogate and intended parents.¹⁰⁶ People have a hard time sorting out their own views on abortion, and indeed many couples do not completely see eye-to-eye on the issue. Yet we not only had to come to terms with this issue individually and as a couple, but we also had to find a surrogate with similar views on the issue. Moreover, this all had to be done in the abstract, not knowing how we would feel in the moment should we be confronted with such a decision.

With our surrogate search underway, we now had to turn our attention to the other half of the equation: finding an egg donor. We had already selected a reproductive medicine clinic in Oregon, and although we were free to find an egg donor on our own or through an independent agency, they had their own in-house egg donor program. In addition to searching for a specific egg donor, we had several other difficult decisions to make, some of which overlapped with the questions asked by the surrogacy agency. Did we want to transfer one or multiple embryos, and would we choose to selectively reduce if more than the desired number implanted? Would only one of us be contributing the sperm used to create the embryos, or did they want us to fertilize half of the eggs with sperm from each of us and implant one embryo fertilized by each of us in the surrogate (or select a single embryo at random)? Did we want to

and bore a child herself, she banished Hagar and the son she bore. See *Genesis* 16:4–16, 21:1–14.

106. See, e.g., Elizabeth Cohen, *Surrogate Offered \$10,000 to Abort Baby*, CNN HEALTH (Mar. 6, 2013, 2:58 PM), <http://www.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/>.

pick an egg donor and go through the process right away, freeze the embryos, and then thaw them once we found a surrogate? Or did we want to wait until we found a surrogate and then do a “fresh” cycle in which the menstrual cycles of the two women are coordinated, the eggs extracted and fertilized from the donor and then implanted into the surrogate? Did we want the embryos tested for genetic abnormalities (which also happened to test for the sex of the embryos)?

Having answered this new set of inquiries, we were ready to begin the search for an egg donor within the clinic’s in-house program. While egg donation can occur with a known donor, it is far more common for it to occur anonymously, with the intended parents having photographs of the donor, her medical and personal history as well as that of her family, and her answers to a series of questions designed to give the intended parents insight into her personality.

On the one hand, the search for an egg donor is far easier than the search for a surrogate: the clinic had an electronic searchable database in which you could enter desired criteria—such as eye color, hair color, ethnicity, whether they had successfully donated eggs in the past, and even sexual orientation—and it would bring up results, akin to a dating website. But unlike with dating websites or the surrogate matching process, this is a one-way match: egg donors do not know anything about the individuals or couples that will receive the eggs, and at least at our clinic, could not limit the categories or types of individuals or couples that their eggs could go to. Thus, as long as we were happy with a given egg donor’s profile, we could just pick her and she would be matched with us.

Yet on the other hand, the search for an egg donor is so much harder than the search for a surrogate because this person will be contributing half of the genetic makeup of your future child. Although those who have not gone through the process might assume that intended parents are focused primarily on the egg donor’s looks and intellect, for us the egg donor’s personal and family medical history took center stage.¹⁰⁷ Indeed, the amount of medical history we were given resulted in near decision-making paralysis. How could we live with ourselves if we picked an egg donor with a bee allergy, a grandfather who died of heart disease, a grandmother who died of breast cancer, or a father who had

107. A recent study indicates that recipients of egg donation are increasingly interested in a donor’s health, intelligence, and athletic ability, and decreasingly interested in whether or not the donor resembles the recipient or is from the same gene pool. See Homero Flores et. al., *Beauty, Brains, or Health: Trends in Ovum Recipient Preferences*, 23 J. WOMEN’S HEALTH 830, 832–33 (2014).

diabetes and our future child was diagnosed with one of those ailments at some point down the road?

Those who have not gone through the process of egg donation may also be under the impression that there is a great deal of price discrimination based on the looks, intelligence, or ethnicity of the egg donor. There are certainly plenty of news stories that sensationalize this belief as well as the occasional private advertisement by intended parents offering large sums of money to Ivy League egg donors.¹⁰⁸ Yet the truth is that at reputable agencies, there is no price discrimination except for a modest premium for those who have successfully donated eggs once before.

Although the absence of price discrimination is in part grounded in law, it is primarily a result of self-regulation by the fertility industry. No federal law regulates compensation to those who donate eggs for fertility purposes, and only a handful of state laws in any way regulate egg donor compensation under these circumstances.¹⁰⁹ Specifically, Louisiana law prohibits any compensation to any egg donors,¹¹⁰ Indiana law makes it a crime to compensate an egg donor more than \$4,000 plus expenses,¹¹¹ and Florida law provides that “[o]nly reasonable compensation” is permitted.¹¹² Nevada law, while not setting any specific limit on the amount of compensation, provides that the amount cannot be tied to the “purported quality or genome-related traits of the gametes of embryos.”¹¹³ The more significant restriction on the amount of compensation given to egg donors are the ethical guidelines of the American Society of Reproductive Medicine, which are binding on all

108. See, e.g., Melinda Henneberger, *The Ultimate Easter Egg Hunt: ‘Ivy League Couple’ Seeks Donor with ‘Highest Scores’*, WASH. POST (Mar. 21, 2013), <http://www.washingtonpost.com/blogs/she-the-people/wp/2013/03/21/the-ultimate-easter-egg-hunt-ivy-league-couple-seeks-donor-with-highest-percentile-scores/>; Gina Kolata, *\$50,000 Offered to Tall, Smart Egg Donor*, N.Y. TIMES (Mar. 3, 1999), <http://www.nytimes.com/1999/03/03/us/50000-offered-to-tall-smart-egg-donor.html>; Kevin Su, *Not by the Dozen*, YALE HERALD (Feb. 21, 2014), <http://yaleherald.com/news-and-features/not-by-the-dozen/>.

109. Some states prohibit compensation when eggs are to be used for medical research, but not when donated for fertility purposes. See, e.g., CAL. HEALTH & SAFETY CODE § 125350 (West, Westlaw through 2014 Reg. Sess. ch. 531); MASS. GEN. LAWS ANN. ch. 111L, § 8(b) (West, Westlaw through 2014 2d Annual Sess. ch. 283). Arizona law does not prohibit compensation for egg donors but requires health warnings to be given to them. See ARIZ. REV. STAT. ANN. §§ 36-1701 to 36-1703 (West, Westlaw through 2014 2d Reg. & 2d Special Sess.).

110. See LA. REV. STAT. ANN. § 9:122 (West, Westlaw through 2013 Reg. Sess.).

111. See IND. CODE ANN. § 35-46-5-3 (West, Westlaw through 2d Reg. Sess. & 2d Technical Sess. 2014).

112. FLA. STAT. ANN. § 742.14 (West, Westlaw through 2014 Sp. “A” Sess.).

113. NEV. REV. STAT. ANN. § 126.810(2) (West, Westlaw through 2013 Reg. & Special Sess.).

member clinics of its affiliated organization, the Society for Assisted Reproductive Technology. Under those guidelines, compensation in excess of \$5,000 requires “justification” and compensation in excess of \$10,000 is “not appropriate.”¹¹⁴ Indeed, so influential are those guidelines that they are currently the subject of a class action lawsuit brought on behalf of egg donors claiming that they violate federal antitrust laws.¹¹⁵

As intended parents seeking out a surrogate and egg donor, not only do you have to make decisions that can dictate your child’s future, but you often have to do so under time pressure. On multiple occasions, we would receive a profile from our surrogacy agency or a new egg donor profile would pop up in the clinic’s database, and before we had a chance to make a decision—often as quickly as 24 hours later—the surrogate or egg donor would no longer be available because another set of intended parents had been more decisive.

A couple of months into our search, we were matched with a surrogate located in Portland, Oregon. Our surrogate was unmarried and had previously served as a traditional surrogate, which made her the ideal surrogate from the standpoint of intended parents who harbored the typical fear that a surrogate and her husband might have a change of heart and decide to keep the child. As an unmarried woman there was no husband entitled to the presumption of paternity, meaning that even if she for some reason were to try to retain custody, at least the genetic father between us would be able to establish legal paternity. Moreover, if she was able to give up custody in a situation in which she was both the genetic and gestational mother, doing so when she was solely the gestational mother would seem to be a foregone conclusion. The matching process consisted of us liking one another’s profiles, followed by a telephone conference, and finally an in-person meeting with her and her son. As with dating, we later learned that the reason she chose to match with us was idiosyncratic: a picture of my partner and me at Disney World holding hands with the Disney characters “Chip” and “Dale” that was included in our profile had sold her on us.

Soon after matching, our surrogate was hospitalized with what turned out to be a serious thyroid condition. The condition required radioactive iodine treatment that would make pregnancy unsafe for the resulting

114. Am. Soc’y for Reprod. Med., *Ethics Committee Report: Financial Compensation of Oocyte Donors*, 88 FERTILITY & STERILITY 305, 308 (2007).

115. See *Kamakahi v. Am. Soc’y for Reprod. Med.*, No. C 11-01781 SBA, 2013 WL 1768706 (N.D. Cal. Mar. 29, 2013). If my biological clock ticking was not enough of a motivator to move ahead quickly with the process, the prospect of a successful antitrust lawsuit certainly was!

child for six to eight months following the treatment. In her message to us, she wrote that if we preferred not to wait and instead match with another surrogate, she would understand, and ended that sentence with a sad-face emoticon. Our agency gave us the option of matching with someone else but we felt so comfortable with her that we decided we would rather delay the process than start the matching process over from scratch. And just as with the idiosyncratic nature of the “Chip ‘n’ Dale” photograph, there was something about that sad-face emoticon that made our decision clear.

Our surrogate’s recovery period gave us ample time to match with a suitable egg donor. Like our surrogate, our egg donor was also an unmarried woman from Portland, Oregon. We initially preferred to have an experienced egg donor since we would know something about her fertility, but could not find an experienced egg donor whose profile clicked with us, and so we ultimately selected a first-time egg donor whose medical history and other traits made her the ideal match for us.

E. Straddling the Columbia

With our surrogate and egg donor selected, it was time to get the lawyers involved in the process. In addition to hiring a lawyer to represent us, we had to pay the legal fees of the attorneys independently selected by both the egg donor and the surrogate to represent them.

The contract with the egg donor was fairly straightforward, and indeed was a form contract that the clinic had drafted by an attorney for use in its in-house egg donor program. There were three key aspects of the contract. First, that the donor acquired neither parental rights nor responsibilities over any children born as a result of the donation. Second, that if the donor subsequently experienced any significant major changes in family medical history she would convey that information to us via the clinic so that our child would have a complete medical history. And third, that if the child resulting from the egg donation suffered from any medical or psychological conditions that might be genetically linked to the egg donor, we would convey that information to the donor via the clinic so that she could make informed decisions regarding having children of her own in the future.

In contrast, the surrogacy contract was somewhat more complex. As an initial matter, fully circumventing both Washington’s criminal and civil law regarding surrogacy would require care and planning. Washington State does not, as a general matter, purport to apply its

criminal law to the conduct of its citizens that takes place wholly outside of the state,¹¹⁶ and even if it did, it is doubtful that doing so would be consistent with the limits of due process.¹¹⁷ This meant, however, that to avoid liability, we could not “enter into”¹¹⁸ the contract within the territorial boundaries of the state, meaning that unlike the egg donor contract—which we reviewed and signed in Washington State—we would have to travel to Oregon to sign the contract. Indeed, throughout the entire surrogacy process, I felt a weight come off my shoulders each time I crossed the Columbia River that serves as the border between Washington State and Oregon.

Circumventing Washington’s civil law on surrogacy would take somewhat more planning. While we could easily avoid criminal liability by taking care to ensure that the contract was not entered into within the state, the civil aspect of Washington’s surrogacy law addressed not formation but subsequent enforcement of surrogacy contracts, declaring such contracts to be “void and unenforceable in the state of Washington.”¹¹⁹ Moreover, even if the contract was entered into out-of-state, the civil provision made clear that it applied to all such contracts, “whether executed in the state of Washington or in another jurisdiction.”¹²⁰ This meant that if a surrogate gave birth in Washington State, the contract would not be enforceable. In addition, on our attorney’s advice—which was consistent with my thinking as someone who has taught Conflict of Laws—we did not consider matching with surrogates who resided in Washington State, even if they were willing to relocate to Oregon in the final weeks of pregnancy. This is because our joint status as citizens of Washington State might be problematic even if enforcement were sought in Oregon, since in a conflict-of-laws analysis a court in Oregon might apply Washington law and declare the contract invalid even if it would be valid under the state’s own laws and even if we had a choice of law clause in our contract.¹²¹

116. See WASH. REV. CODE § 9A.04.030 (2012).

117. See *Bigelow v. Virginia*, 421 U.S. 809, 822–25 (1975). *But see* Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 626–40 (2007) (contending that the due process limitation is not entirely clear cut, and considering other constitutional limitations on extraterritorial application of a state’s criminal law).

118. WASH. REV. CODE § 26.26.230 (2012). We, and anyone else involved, also could not “induce, arrange, procure, or otherwise assist in the formation of” such a contract within the state. *Id.*

119. *Id.* § 26.26.240.

120. *Id.*

121. See, e.g., *Hodas v. Morin*, 814 N.E.2d 320, 324–27 (Mass. 2004) (engaging in a conflict-of-laws analysis to decide whether to give effect to parties’ choice-of-law provision in surrogacy

On the other hand, upon completion of the surrogacy process in Oregon, it was clear that Washington would recognize the newly created parent-child relationship. If our parentage was established by means of a judicial proceeding in Oregon, Washington would be obliged under the Full Faith and Credit Clause to recognize the judgment.¹²² Moreover, as one of us would be the genetic parent of the child, that parent could sign an acknowledgment of paternity in Oregon, and Washington law would give that acknowledgement full legal effect.¹²³ Finally, even if the out-of-court judicial proceedings only established the non-parentage of the surrogate and the parentage of the genetic father, because we were registered domestic partners, by operation of Washington law the other partner would likewise be deemed a legal parent under one of several statutory provisions enacted by the legislature in 2011,¹²⁴ the same year in which it tried but failed to repeal the criminal prohibition on surrogacy.¹²⁵ First, the legislature expanded the ancient presumption of paternity—whereby a husband is presumed to be the father of any children born to his wife—to same-sex relationships.¹²⁶ Second, the legislature further provided that a person is presumed to be the parent of a child if, for the first two years of the child’s life, he resides in the same house as the child and holds him out as his own.¹²⁷ Third, the legislature provided that a person who consents to assisted reproduction by his domestic partner that results in the birth of a child is the legal parent of the child.¹²⁸ These three¹²⁹ provisions meant that it is not necessary in Washington State for the non-biological partner to adopt the child to establish legal parentage, although to ensure recognition in less gay-

contract); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 187(2)(b), 188(2) (1971).

122. See U.S. CONST. art. IV, § 1; *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232–33 (1998); *Finstuen v. Crutcher*, 496 F.3d 1139, 1151–56 (10th Cir. 2007); *Henry v. Himes*, No. 1:14-CV-129, 2014 WL 1418395, at *17, *18 n.24 (S.D. Ohio Apr. 14, 2014), *rev’d on other grounds sub nom.* *DeBoer v. Snyder*, Nos.14-1341, 3057, 3464, 5291, 5297, 5818, 2014 WL 5748990 (6th Cir. Nov. 6, 2014); *Embry v. Ryan*, 11 So. 3d 408, 409–10 (Fla. Dist. Ct. App. 2009).

123. See WASH. REV. CODE § 26.26.350.

124. See Act of May 11, 2011, ch. 283, 2011 Wash. Sess. Laws 1758 (codified at WASH. REV. CODE ch. 26.26).

125. See Terry J. Price, *The Future of Compensated Surrogacy in Washington State: Anytime Soon?*, 89 WASH. L. REV. 1311, 1326–36 (2014).

126. WASH. REV. CODE §§ 26.26.101(5), 26.26.116(1)(a).

127. See *id.* §§ 26.26.101(5), 26.26.116(2).

128. See *id.* §§ 26.26.101(7), 26.26.710, 26.26.715, 26.26.720.

129. A fourth provision indicates that a person who is an intended parent in a “valid surrogate parentage” contract is also a legal parent, but that provision—which cross-references the statutory provisions governing surrogacy for a definition of validity—was not available to us. See *id.* § 26.26.101(8).

friendly states some sort of judicial decree that would be entitled to Full Faith and Credit would be needed, such as an order adjudicating parentage based on one of the above statutory provisions.¹³⁰

Our surrogacy agreement was thus carefully drafted to address the above concerns, as well as many others designed to protect the well-being of the child that would be born as a result of the agreement. Thus, under the terms of the contract, our surrogate agreed that she would not have any parental rights or responsibilities with respect to the child, and that she would cooperate in obtaining a PBO establishing our legal parentage. She also agreed to the following list of restrictions, among others: (1) not to travel outside of Oregon in her last trimester of pregnancy; (2) not to smoke, drink alcohol, or use illegal drugs; and (3) not to consume raw fish, food or drink containing artificial sweeteners, or more than one cup of caffeinated beverage per day. She also agreed—within the confines of what she considered to be acceptable reasons for procuring an abortion—to undergo an abortion at our request if one of those situations she deemed acceptable arose, and also agreed not to undergo an abortion against our wishes unless necessary to protect her health. In other words—and within limits set by her—she delegated her fundamental right to abort or not abort to us. While this last provision may seem shocking to some, in a sense it is consistent with why the U.S. Supreme Court recognized the abortion decision to be a fundamental right in the first instance: that restricting the right to an abortion may thrust unwanted maternity and its attendant harms to the pregnant woman.¹³¹ Since the remainder of the contract made clear that we, not the surrogate, would take on parental responsibilities of any child born to her as a result of the arrangement, there was a certain degree of logic in her likewise transferring her abortion right to us. Moreover, she was still exercising her fundamental right, in the sense that she was agreeing to have or not have an abortion on terms acceptable to her. The contract did not contemplate specific performance, and at least some states explicitly declare such provisions in surrogacy contracts unenforceable,¹³² but in

130. *See id.* § 26.26.625. In a similar vein, courts in New York have held that where one partner in a same-sex couple is the genetic father of a child born to a surrogate in India, the fact that the underlying surrogacy arrangement would be a crime in New York was no bar to allowing the other partner to adopt the child. *See In re Adoption of J.J.*, 984 N.Y.S.2d 841 (N.Y. Fam. Ct. 2014).

131. *See Roe v. Wade*, 410 U.S. 113, 153 (1973).

132. A handful of states have provisions that restrict abortion-related provisions in surrogacy contracts. Specifically, Texas and Utah law provide that surrogacy agreements cannot limit the surrogate's right to make decisions to safeguard the health of the embryo or fetus. *See* TEX. FAM. CODE ANN. § 160.754(g) (West, Westlaw through 3d Called Sess. 2013); UTAH CODE ANN. § 78B-15-808(2) (West, Westlaw through 2014 Gen. Sess.).

my mind surrogacy contracts are less about enforceability and more a vehicle for having conversations about difficult topics and making sure that everyone is on the same page. In fact, since our surrogacy agency had already pre-screened us all on the abortion issue, this provision generated no back-and-forth during the contract negotiation process. Rather, we spent most of our time discussing a provision regarding our surrogate's handling of cat litter!

Of course, the surrogacy contract also imposed obligations upon us. We agreed to take custody of any child our surrogate bore pursuant to the agreement. While this may not seem like much of an obligation on intended parents, it is protective of the surrogate. On occasion, a child will be born with a serious medical condition or the intended parents will break up and may not wish to take custody of the child.¹³³ The surrogate's interest in *not* becoming an unintended parent is thus one that needs protection. In addition, we agreed to pay all of her medical expenses associated with the surrogacy process, her health insurance premiums,¹³⁴ her maternity clothing expenses, housekeeping and childcare expenses, a fee for undergoing an embryo transfer, and her compensation for serving as a surrogate. While it is often assumed that this last item is paid to the surrogate only upon relinquishment of the child to the intended parents, that is not the case: the surrogate is paid that fee for the physical process of gestating and the attendant pain and suffering, and thus receives that fee in ten monthly installments during the term of the pregnancy. Accordingly, she is entitled to the compensation even if, say, she miscarries late in the pregnancy.

Other provisions in the surrogacy contract are designed to address various eventualities should they arise. We agreed to name guardians for our children in our wills in the event that we died before the surrogate gave birth. We agreed to purchase a life insurance policy for our surrogate to protect her child's financial well-being in the event that she died for any reason while pregnant. We also agreed to pay additional compensation for each additional fetus that she carried, as well as compensation in the event that she had to undergo a C-Section or suffered partial or full loss of her reproductive function. These last two

133. See Lewin, *supra* note 20, at A1; Hollie McKay, *Can Sherri Shepherd Walk Away from Unborn Surrogate Child?*, FOX NEWS (July 22, 2014), <http://www.foxnews.com/entertainment/2014/07/22/can-sherri-shepherd-walk-away-from-unborn-surrogate-child/>.

134. State laws vary widely on whether a surrogate's health insurance will cover the medical expenses associated with a surrogate birth, with some courts upholding decisions by insurers not to cover such expenses, *see, e.g.*, *Spectrum Health Hosp. v. Lehr*, No. 298688, 2011 WL 3962997 (Mich. Ct. App. Sept. 18, 2011), and others holding that insurers cannot exclude maternity coverage for surrogates, *see, e.g.*, *MercyCare Ins. Co. v. Wis. Comm'r of Ins.*, 786 N.W.2d 785 (Wis. 2010).

items, to my mind, have a shockingly low “market” value, with the going rate of compensation in the United States being only \$3,000 for the former and \$5,000 for the latter.¹³⁵

In cases involving challenges to state laws prohibiting same-sex marriage, one of the “rational bases” offered in support of limiting marriage to opposite-sex couples is that since same-sex couples have to go through so much care and planning to have children, they are not as much in need of the protections of marriage as are opposite-sex couples, whose natural procreation is often unplanned and thus the resulting children need the protections that come automatically with marriage.¹³⁶ Having gone through so much care and planning to become a parent via surrogacy, and despite my strong belief that prohibitions on same-sex marriage are unconstitutional, I was starting to become reluctantly convinced that—at least under rational basis review—this was not such a bad defense of such laws!

Our surrogacy contract was drafted, negotiated, and signed within Oregon, and set forth criteria designed to prevent ever having to enforce the contract within Washington State. We had thus successfully circumvented Washington State’s criminal prohibition on compensated surrogacy agreements, while at the same time laying the groundwork for having our parent-child relationship recognized by Washington State.

F. Becoming Pregnant and Giving Birth

With the legal formalities complete, it was time to get started with the process of creating human life. In general, the surrogacy process is unregulated by the federal government. However, because the process of in vitro fertilization involves the transfer of human tissue—specifically a sperm and egg—from one pair of people to another person, reproductive medicine clinics are required to follow federal regulations issued by the U.S. Food and Drug Administration.¹³⁷

Pursuant to those regulations, before transferring a fertilized embryo to the surrogate, the donors of the sperm and egg must be tested for a

135. See, e.g., *Anticipated Expenses*, *supra* note 90; *Surrogacy Procedure*, COASTAL SURROGACY, http://www.coastalsurrogacy.com/sg_par_costs.php (last visited Oct. 27, 2014); *Surrogate Benefit Package—Gestational Surrogacy*, GROWING GENERATIONS, http://www.growinggenerations.com/wordpress/wp-content/uploads/2013/02/Sample-BP-for-GG_Website_20130815.pdf (last visited Oct. 27, 2014).

136. See *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1111–13 (D. Haw. 2012); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *Morrison v. Sadler*, 821 N.E.2d 15, 23–24 (Ind. Ct. App. 2005).

137. See 21 C.F.R. §§ 1271.1–1271.90 (2014).

variety of communicable diseases, including HIV, at or within seven days of when the sperm and egg are retrieved from the donors.¹³⁸ In addition, the donors of the sperm and egg are required to answer a series of questions designed to identify whether their “social behavior” includes “risk factors” for communicable diseases.¹³⁹ The regulations themselves do not specify what constitute “risk factors,” but technically non-binding “guidance”¹⁴⁰ issued by the FDA includes among the list of risk factors that the sperm donor has had sex with another man in the preceding 5 years.¹⁴¹

Despite the fact that my partner and I tested negative for HIV and numerous other communicable diseases multiple times both before and after the clinic collected and froze sperm for use in the in vitro fertilization process, because of the positive question regarding sex with another man in the preceding five years, the FDA requires the sperm sample to be labeled with a “[b]iohazard” warning label¹⁴² and the phrase “WARNING: Advise recipient of communicable disease risks.”¹⁴³ Moreover, the sperm donor is deemed ineligible,¹⁴⁴ meaning that his sperm cannot be implanted into another person.¹⁴⁵ In contrast to this five year period of ineligibility for sexually active gay men, the FDA guidelines impose only a twelve-month period of ineligibility for those other than gay men who have had sexual intercourse with someone who is HIV positive or have otherwise been exposed to an HIV infection risk, or who have undergone tattooing or body piercing using non-sterile equipment.¹⁴⁶

A small loophole in the FDA regulations nonetheless permits but strongly discourages people in the position of our surrogate from moving ahead with the process even if a clinic has determined someone to be an ineligible donor under the regulations. Pursuant to those regulations, if the sperm donor is a “directed reproductive donor”—meaning that the

138. *See id.* § 1271.80(a), (b); *id.* § 1271.85(a), (c).

139. *See id.* § 1271.75(a)(1); FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: ELIGIBILITY DETERMINATION FOR DONORS OF HUMAN CELLS, TISSUES, AND CELLULAR AND TISSUE-BASED PRODUCTS 14 (2007), available at <http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Tissue/ucm091345.pdf> [hereinafter ELIGIBILITY DETERMINATION FOR DONORS].

140. ELIGIBILITY DETERMINATION FOR DONORS, *supra* note 139, at 1.

141. *Id.* at 14.

142. 21 C.F.R. § 1271.90(b)(4)(ii).

143. *See id.* § 1271.90(b)(3)(ii)(B).

144. *See id.* § 1271.50.

145. *See id.* § 1271.45(c).

146. *See* ELIGIBILITY DETERMINATION FOR DONORS, *supra* note 139, at 15–16.

sperm donor and the recipient knew one another *prior* to the donation taking place¹⁴⁷—the transfer can proceed.¹⁴⁸ To invoke this loophole, we and our surrogate were required to sign two documents provided to us by the clinic. The first was entitled “Statement of Relationship,” in which we confirmed that we had met at least once in person, thus establishing that we were “known” to one another. And the second was entitled “Communicable Disease Testing/Risk Factor Waiver,” in which the surrogate acknowledged that she was at an increased risk of becoming infected with HIV or various other communicable diseases because the sperm was from a man who has had sex with another man. We were fortunate our clinic was willing to do this, as some clinics use the FDA’s guidance as a basis for refusing to provide reproductive services to any gay men.¹⁴⁹

After a long wait and plenty of paperwork, our surrogate and egg donor were medically cleared to proceed with the process. Because we were proceeding with a “fresh” transfer, the two women began taking medications designed to synchronize their menstrual cycles, since the surrogate would need to be at the right point in her cycle for the embryo to implant following the extraction and fertilization of eggs from the egg donor. In addition, the egg donor began taking medications that would help stimulate the maturation and release of multiple eggs. Over the course of approximately a one-month period, both our surrogate and egg donor would make regular visits to the clinic. During that month, I often wondered if the paths of these two women from Portland—who did not know one another—ever crossed.

The days leading up to the day when the eggs would be extracted from our donor were nerve-wracking. Since she was a first-time donor who did not have children of her own, she lacked a fertility track record, and there was thus no guarantee that she would produce quality eggs. Yet the egg donor and the fertility clinic are compensated for their efforts, not the results, and with this step in the process costing around \$30,000 for the donor and clinic fees combined, it was one that we and most intended parents could ill afford to repeat a second or third time.

On retrieval day, we received a call notifying us that they had

147. See 21 C.F.R. § 1271.3(l).

148. See *id.* § 1271.65(b)(ii).

149. See Leland Traiman, *Guidelines But No Guidance: Gayspermbank.com vs. FDA*, 9 J. GENDER RACE & JUST. 613, 614–15 (2006); Beth Littrell, *Fertility Industry Bias Against Gays and Lesbians*, Opinion, N.Y. TIMES (Sept. 14, 2011, 11:31 AM), <http://www.nytimes.com/roomfordebate/2011/09/13/making-laws-about-making-babies/fertility-industry-victimizes-gays-and-lesbians>.

retrieved nearly thirty eggs! That did not mean, however, that we would have that many embryos, as some eggs are too immature to be fertilized, some, though mature, fail to fertilize, and those that successfully are fertilized stop growing before they can be implanted or frozen. We ultimately ended up with five embryos. The doctor—after following careful protocol to ensure that the embryos in fact belonged to us and not some other couple¹⁵⁰—implanted one of those in our surrogate, and subsequently froze four others for possible future use.¹⁵¹

Soon thereafter, a positive pregnancy was confirmed, first by our surrogate using a home pregnancy test and then several weeks later by the doctor by performing an ultrasound. From that point forward, the pregnancy was for the most part no different than any other pregnancy, save for a couple of key differences for which there were creative workarounds.

First, despite the relatively long drive, we were able to make sure at least one of us was able to attend all of the ultrasounds. One of the challenges when attending an ultrasound with a surrogate—as opposed to one’s wife—is that the process requires the woman to be in a certain state of undress, which is awkward in what otherwise has developed as an arm’s length relationship. Yet medical providers in Portland seemed familiar enough with the surrogacy process to have a solution, a “modesty” shield that allowed the intended parents to see the ultrasound monitor while shielding the surrogate’s body from view.

Second, one of the miracles of nature is that when a baby is born, she

150. It is quite rare to have an embryo transfer error, but it does happen. *See, e.g., Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19, 25 & n.2 (N.Y. App. Div. 2000) (holding that custody of a child born as a result of such an error belongs to the intended parents rather than the gestating woman and her husband, but noting that things might have been different had a great deal of time passed before the error was discovered).

151. When couples that have created embryos together via in vitro fertilization divorce, disputes sometimes arise regarding the disposition of those embryos. Some courts have held that these cases involve a balancing of competing fundamental rights: the fundamental right of one spouse to procreate versus the fundamental right of the other not to procreate, with the courts often ruling in favor of the spouse seeking not to procreate, particularly if the other spouse still has a viable way to otherwise procreate. *See In re Marriage of Witten*, 672 N.W.2d 768, 780 (Iowa 2003); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992). Other courts have held that the fundamental right not to procreate is sufficiently strong that prior written agreements regarding the disposition of embryos are unenforceable. *See A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000). However, some courts say that such agreements should generally be binding. *See Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002); *Szafranski v. Dunston*, 993 N.E.2d 502 (Ill. App. Ct. 2013) (noting that even fundamental rights can be waived by contract). Because of this risk, the clinic we used requires all couples to sign documents declaring our intent for disposition of the embryos in the event of a subsequent divorce.

is able to recognize the voice of her gestational mother as well as anyone else who lived with her. We learned that in cases of surrogacy or the adoption of newborns, the inability to recognize any familiar voices sometimes resulted in some degree of psychological anxiety for newborn children.¹⁵² Our solution was for my partner and me to each record our voices reading bedtime stories to our future child and upload them to an MP3 player. We sent that, along with a pair of “belly buds”—speakers that a woman can attach directly to her stomach—to our surrogate, who played them to our child regularly during the last trimester, when children *in utero* can both hear and remember voices around them.

Third, partway through the third trimester, our attorney filed a declaratory judgment action in a state court in Portland, seeking to have parentage established pre-birth. Our surrogate, through her attorney and consistent with our contractual agreement, consented to the issuance of the order, and with our future child still *in utero*, a judge issued an order declaring our intended parentage and directing the state Department of Health to issue a birth certificate post-birth that reflected that state of affairs.

Finally, in the last month of pregnancy, our surrogate started to have contractions. Of course, each time this happened it was not a quick drive down the street but instead a nearly 200-mile drive to Portland. The first time was a false alarm, then after a hiatus from contractions of about a week, we received a call from our surrogate just after eleven o’clock at night that she was on her way back to the hospital. Things moved quickly, and unfortunately we were not able to make it to Portland in time for the birth (for which I will continue to harbor resentment at the drafters of Washington’s surrogacy law for some time to come). But our surrogate’s doula was kind enough to call at the moment of birth and play the sound of our daughter’s first cry over the car’s speakerphone.

At the hospital, everything went smoothly. Our surrogate was holding our daughter for us, with her doula and son present to keep her company. Our attorney had already faxed the court order to the hospital, which had a separate room next to our surrogate’s room for us and our daughter. Our surrogate checked out of the hospital about twelve hours later and returned to her pre-surrogacy life. We spent a few nights at the hospital learning the ropes of feeding and changing, and then it was back to Seattle to begin our new adventure as parents.

152. See, e.g., Gail Steinberg & Beth Hall, *Bonding and Attachment: How Does Adoption Affect a Newborn?*, PACT’S POINT OF VIEW, <http://www.pactadopt.org/app/servlet/documentapp.DisplayDocument?DocID=235> (last visited Oct. 27, 2014).

G. *Legally Motherless*

In general, our experience as new parents is no different than that of other couples: sleepless nights, lots of diaper changes, and countless photos of adorable moments in our daughter's daily life. Nonetheless, as a male couple we encountered a few practical and legal challenges along the way.

For starters, in every pre-birth class we took or parenting book we read, we were bombarded with the message "breast is best," referring to the campaign to encourage parents to feed their children breast milk, not formula, due to the many health benefits of the former. These messages made us (and the many women who are physically unable to produce sufficient breast milk) feel guilty, for we were cognizant of the fact that no matter how hard either of us tried to mother, the limitations of nature would prevent either of us from producing breast milk. Wanting our daughter to receive a good start in life, we broached the topic with our surrogate, who agreed to pump, freeze, and ship breast milk to us on a periodic basis. As a result of this arrangement, we were able to provide her with a partial breast milk diet for almost the first six months of her life. As with the gestational process, we compensated our surrogate for her efforts in this regard, yet as with surrogacy, the discomfort of pumping breast milk is not something a woman goes through solely for the modest compensation one receives.¹⁵³

Second, I was surprised to learn that despite my role as my daughter's primary caregiver, I was not entitled to a single day of paid parental leave at the University of Washington. Under the University's official policy, what everyone on campus refers to as paid parental leave is officially a medical leave of up to twelve weeks to recover from giving birth. Under this policy, female employees who adopt children (or whose children are born to a surrogate) and all male employees are denied paid parental leave, even if they are a child's primary or sole caregiver.¹⁵⁴

153. Breast milk is currently valued on the private "market" at about \$1.00 to \$2.50 per ounce when sold directly between producer and consumer and between \$4.00 and \$5.00 per ounce when purchased from private or non-profit milk banks. See Judy Dutton, *Liquid Gold: The Booming Market for Human Breast Milk*, WIRED MAG. (May 17, 2011, 10:05 PM), http://www.wired.com/2011/05/ff_milk/all/.

154. This policy raises a whole host of constitutional questions that are beyond the scope of this paper. The policy on its face technically discriminates on the basis of pregnancy status and not sex, and thus is presumptively subject only to rational basis review. See *Geduldig v. Aiello*, 417 U.S. 484 (1974). Yet if—as I strongly suspect—its true purpose was to deny paid leave to male employees, and if evidence of that true purpose could be uncovered, it would be subject to intermediate scrutiny as a sex-based classification, despite the fact that it also discriminates against female employees. Cf. *Hunter v. Underwood*, 471 U.S. 222, 232 (1985) ("[A]n additional purpose to

Finally, government agencies still find it hard to grasp the concept of someone being legally motherless.¹⁵⁵ On more than one occasion I would be asked by a government agency “where the mother was,” and when I responded that she had no legal mother, I would get a snide response, “well she had to come out of somewhere.” Indeed, I am listed as my daughter’s mother on one Washington State public health record because their computer system does not allow for the possibility of someone without a mother. Ironically, thanks to this little bit of bureaucratic inertia and in spite of Washington State’s efforts to prevent

discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks.”). Moreover, to the extent that this policy, on its face, denies the bonding time associated with paid parental leave to a certain class of children, namely, those who are adopted or born via surrogacy arrangements, it should also be subjected to heightened scrutiny when examined from the vantage point not of the parents, but instead the children harmed by such a policy. *See* United States v. Windsor, ___ U.S. ___, 133 S. Ct. 2675, 2694 (2013) (declaring the federal Defense of Marriage Act unconstitutional, and noting the injuries the law poses to the children of same-sex couples); *Pickett v. Brown*, 462 U.S. 1, 7–8 (1983) (noting that heightened scrutiny applies to illegitimacy classifications, reasoning that it is unjust to punish children for their parent’s conduct); *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (applying heightened scrutiny to laws that discriminate against children of illegal aliens, employing the same logic). In all events, the policy is surprisingly regressive when compared with other universities, which provide paid leave to any parent, male or female, and regardless of whether their child is born naturally or the result of surrogacy or adoption, so long as the parent meets the definition of “primary caregiver.” Examples include *Faculty Parental Leave*, SYRACUSE U., HUM. RESOURCES, <http://humanresources.syr.edu/resources/faculty/faculty-parental-leave/> (last visited Oct. 19, 2014); *FAQ: Paid Parental Leave*, U. OF MD., FAC. HANDBOOK, http://www.faculty.umd.edu/faculty/leave_ppl_faq.html (last visited Oct. 19, 2014); *Interim Faculty Parental Leave Policy*, CASE W. RES. U., https://www.case.edu/president/facsen/pdfs/Paid_Parental_Leave_interim_policy_Faculty.pdf (last visited Oct. 19, 2014); *Leaves of Absence for Reasons of Pregnancy, Childbirth, and Child Care*, SARAH LAWRENCE C., HUM. RESOURCES, http://www.slc.edu/offices-services/human-resources/time-off/Childcare_Leave.html (last visited Oct. 19, 2014); *Paid Parental Leave*, DUKE U., HUM. RESOURCES, http://www.hr.duke.edu/policies/time_away/loa/parental.php (last visited Oct. 19, 2014); *Parental Leave*, TUFTS U., <https://wikis.uit.tufts.edu/confluence/display/wfb/Parental+leave> (last modified Aug. 26, 2014); *Parental Leave*, VAND. U., HUM. RESOURCES (July 1, 2014), <http://hr.vanderbilt.edu/policies/ParentalLeave.php>; *Parental Leave Policy*, ADAMS ST. U. 1–4, <http://www.adams.edu/president/parentalleavepolicy.pdf> (last visited Oct. 19, 2014); *Parental Leave Policy–Staff*, WASH. & LEE U., HUM. RESOURCES, <http://www.wlu.edu/human-resources/benefits/time-off-leave-and-disability/parental-leave/parental-leave-policy-staff> (last visited Oct. 19, 2014); *Parental Leave–Staff*, WAKE FOREST U., HUM. RESOURCES POLICIES & PROCS. 1 (2013), <http://hr.wfu.edu/files/2013/08/WFU-Section-V-1-Parental-Leave-Staff-8.2.13.pdf> (last visited Oct. 19, 2014); *Staff Handbook: Other Paid Leaves*, WESLEYAN U., HUM. RESOURCES, <http://www.wesleyan.edu/hr/handbook/otherpaid.html> (last visited Oct. 19, 2014); *Staff Handbook: Time-Off Benefits & Leave Plans*, SMITH C., http://www.smith.edu/hr/handbook_512.php (last visited Oct. 19, 2014). In all events, I am grateful to the law school’s administration, which made significant efforts to offset the negative effects of the University’s official leave policy.

155. This same phenomenon appears in some court rulings in which parties are trying to establish parentage that does not involve a legal mother. *See In re Paternity of Infant T.*, 991 N.E.2d 596, 599–601 (Ind. Ct. App. 2013); *In re Roberto d.B.*, 923 A.2d 115, 132 (Md. 2007) (Cathell, J., dissenting); *id.* at 142 (Harrell, J., dissenting); *In re C.K.G.*, 173 S.W.3d 714, 729 (Tenn. 2005).

compensated surrogacy from taking place, I was—both in a nurturing sense and at least on one official document—able to accomplish my goal of becoming a “mother” after all.

II. THE RIGHT TO PROCREATE VIA SURROGACY

A. Introduction

One of the more contested areas in federal constitutional law concerns the ability of federal courts to recognize and enforce unenumerated “fundamental” rights. Ever since the nation’s founding, Supreme Court Justices have sparred on the question whether the power to do so even exists.¹⁵⁶ Moreover, even when the Court has felt empowered to recognize such rights, Justices have found that power grounded in different provisions of the Constitution,¹⁵⁷ including the Due Process,¹⁵⁸ Equal Protection,¹⁵⁹ and Privileges or Immunities¹⁶⁰ Clauses, as well as the “penumbras” of the Bill of Rights¹⁶¹ and the Ninth Amendment.¹⁶² Indeed, some established fundamental rights—such as the right to marry—have been grounded in different constitutional provisions in different cases.¹⁶³

Much of the Court’s vacillation in the early-to-mid-twentieth century amongst various constitutional hooks for recognizing and enforcing unenumerated “fundamental” rights can be explained as a conscious effort by the Court to avoid reliance on the Due Process Clause. This is because invocation of that clause in the economic substantive due

156. Compare *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387–89 (1798) (Opinion of Chase, J.) (contending that federal courts have the power to strike down a law even if it does not violate a right expressly enumerated in the U.S. Constitution), with *id.* at 398–99 (Opinion of Iredell, J.) (contending that the federal courts can only strike down a law if it violates a right expressly enumerated in the U.S. Constitution). See generally *Washington v. Glucksberg*, 521 U.S. 702, 755–65 (1997) (Souter, J., concurring).

157. See *Glucksberg*, 521 U.S. at 755–65 (Souter, J., concurring) (“American constitutional practice in recognizing unenumerated, substantive limits on governmental action . . . has [not] rested on any single textual basis.”).

158. See *Roe v. Wade*, 410 U.S. 113, 153 (1973).

159. See *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964); *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535, 541 (1942).

160. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3059–88 (2010) (Thomas, J., concurring) (identifying privileges or immunities clause as basis for incorporating and applying Second Amendment against the states); *Saenz v. Roe*, 526 U.S. 489, 502–04 (1999) (right to travel).

161. See *Griswold v. Connecticut*, 381 U.S. 479, 483–85 (1965).

162. See *id.* at 487 (Goldberg, J., concurring).

163. Compare *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (Due Process Clause), with *Zablocki v. Redhail*, 434 U.S. 374, 382 (1978) (Equal Protection Clause).

process cases of the so-called *Lochner* era had only recently been repudiated by the Court.¹⁶⁴ In general, modern Supreme Court precedent has since re-characterized most previously recognized fundamental rights as being grounded in the Due Process Clause even if they were previously recognized under a different constitutional provision,¹⁶⁵ although a few lines of fundamental rights precedent continue to rely upon one of the other clauses.¹⁶⁶

If a law infringes upon a fundamental right that has already been established as such by the U.S. Supreme Court, one can proceed directly to the application of the appropriate level of scrutiny to determine whether it passes constitutional muster. Traditionally, laws infringing upon fundamental rights are said to be subject to strict scrutiny, and will be upheld only if they are narrowly tailored to further a compelling

164. See Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 112, 123 (2007); G. Edward White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 VA. L. REV. 17, 65–72 (1988).

165. Thus, for example, the right to procreate, although originally recognized as fundamental under the Equal Protection Clause, see *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535 (1942), has since been re-characterized as being a fundamental right under the Due Process Clause, see *Lawrence v. Texas*, 539 U.S. 558, 573–74 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–51 (1992) (joint opinion); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–85 (1977); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

166. Constitutional scholarship and precedent does recognize one important difference between fundamental rights protected solely by the Equal Protection Clause and those protected by the Due Process Clause. If a right is deemed fundamental under the Due Process Clause, infringements upon that right are subject to heightened scrutiny even if the government is evenhanded and infringes upon *everyone's* ability to exercise that right. In contrast, fundamental rights protected by the Equal Protection Clause can be infringed upon or even eliminated by the government without raising any constitutional concerns, so long as it does so evenhandedly; it is only if it infringes upon or denies the right to some individuals but not others that the government's conduct is subject to heightened scrutiny. The right to an abortion is a paradigmatic example of a due process fundamental right: even if the government is evenhanded in denying the right to everyone, the law is subject to heightened scrutiny. In contrast, the right to vote is a paradigmatic example of an equal protection right: the government need not extend that right at all for particular governmental positions, but once it chooses to extend that right, it must do so evenhandedly, with the failure to do so being subject to heightened scrutiny. See Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27, 30–37 (1996); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1168–69 (1988); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1412–20 (2010). Since declaring something to be an equal protection fundamental right is somewhat weaker medicine than declaring it to be a due process right, in some instances, where the government is denying an alleged fundamental right to some people but not others, the Court might invoke the Equal Protection Clause rather than the Due Process Clause, reserving its stronger medicine for a later point in time in which the government more broadly denies the right at issue. See *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 111–12 (1949) (Jackson, J., concurring); *Skinner*, 316 U.S. at 543–45 (Stone, C.J., concurring); *id.* at 546–47 (Jackson, J., concurring).

governmental interest.¹⁶⁷ However, the Court has explicitly articulated a lower level of scrutiny—the undue burden test—for laws infringing upon the fundamental right to obtain an abortion.¹⁶⁸ Moreover, the Court has recited a test in a case involving the fundamental right to marry that sounds akin to the intermediate scrutiny employed in the class-based equal protection context for sex and legitimacy classifications,¹⁶⁹ and has failed to articulate an explicit standard of review in its more recent fundamental rights cases,¹⁷⁰ leading some lower courts to recognize an emerging test—at least for some newly recognized fundamental rights—that seems more akin to intermediate scrutiny.¹⁷¹ Moreover, unlike in the class-based equal protection context, where one must show an intent to discriminate against a given class—not mere discriminatory effects against a given class—in order to make out a constitutional claim,¹⁷² where fundamental rights are involved, it suffices to show that a law affects, burdens, or interferes with a fundamental right without showing an intent specifically to do so.¹⁷³

Yet, it is not always clear whether a litigant’s claim falls within the scope of an existing fundamental right or if instead the litigant is seeking

167. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Roe*, 410 U.S. at 155–56; *Griswold*, 381 U.S. at 497 (Goldberg, J., concurring).

168. Although in its early cases, the Court applied strict scrutiny to laws infringing upon the right to obtain an abortion, see *Roe*, 410 U.S. at 155–56, it subsequently replaced it with the undue burden test, see *Casey*, 505 U.S. at 874–79 (joint opinion); *id.* at 929–30 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 964–65 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). A more recent case had language suggesting that the Court was applying some form of heightened rational basis review. See *Gonzales v. Carhart*, 550 U.S. 124, 158, 166 (2007); *id.* at 187 (Ginsburg, J., dissenting).

169. See *Zablocki v. Redhail*, 434 U.S. 374, 383–88 (1978). In another case involving the fundamental right to marry, the Court applied a heightened form of rational basis review, but that was because the case involved the special context of constitutional rights in the prison setting. See *Turner v. Safley*, 482 U.S. 78, 89–91, 96–99 (1987).

170. See *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (noting that the majority opinion failed to apply strict scrutiny review); *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) (noting that the majority opinion failed to articulate the appropriate standard of review, and contending that it should be strict scrutiny).

171. See *Cook v. Gates*, 528 F.3d 42, 51–56 (1st Cir. 2008); *Witt v. Dep’t of Air Force*, 527 F.3d 806, 817–19 (9th Cir. 2008); cf. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 479–84 (9th Cir. 2014) (in the equal protection context, similarly interpreting the Court’s silence on the level of scrutiny as applying an intermediate level of review).

172. See *Washington v. Davis*, 426 U.S. 229, 239–42 (1976).

173. See *Casey*, 505 U.S. at 877 (joint opinion) (noting, in the abortion context, that either intent or effect suffice); *Romer v. Evans*, 517 U.S. 620, 631 (1996) (distinguishing laws that “burden” a fundamental right and those that “target” a suspect class); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457–58 (1988) (distinguishing a law that “interferes” with a fundamental right from one that “discriminates” against a suspect class).

to establish a new, as-yet unrecognized fundamental right. This is because a claimed right can be broadly described in a way that makes it fit within an existing line of fundamental rights precedents, or it can be narrowly described in a way that sets it apart from previously recognized fundamental rights. The distinction between the two characterizations is of critical importance in determining the appropriate level of constitutional scrutiny to apply to the law. If a court concludes that a litigant's claim falls within the scope of an existing fundamental right, it can simply proceed to apply strict or some other form of heightened scrutiny to the law. Yet if a court instead concludes that a litigant's claim seeks to establish a new fundamental right, it must first determine whether such a right exists and only if it concludes that it does then apply some heightened form of scrutiny to the law.

A perfect example of such rights-framing ambiguity exists in the recent string of cases challenging state laws prohibiting same-sex marriage. Some courts characterize the right at issue generally as "marriage," and proceed to apply the heightened scrutiny employed by the Court in its trilogy of cases¹⁷⁴ in which it has treated marriage as a fundamental right,¹⁷⁵ while others contend that the existing fundamental right to marry refers to opposite-sex marriage, characterize the right at issue narrowly as "*same-sex* marriage," and proceed to apply the Court's precedents for determining whether or not to recognize a new fundamental right.¹⁷⁶

In addition to the lack of consensus regarding how to frame a right for purposes of fundamental rights analysis, lower courts are not of one mind on what they are supposed to look to in deciding whether the right exists. Thus, lower courts split on whether they must find that the right at issue is deeply rooted in the nation's history and tradition,¹⁷⁷ or if contemporary practice is also a relevant consideration.¹⁷⁸

174. See *Turner*, 482 U.S. at 78; *Zablocki*, 434 U.S. 374; *Loving v. Virginia*, 388 U.S. 1 (1967).

175. See *Kitchen v. Herbert*, 755 F.3d 1193, 1209–18 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 651, 658–59 (W.D. Tex. 2014); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.5 (N.D. Cal. 2012); *In re Marriage Cases*, 183 P.3d 384, 420–21, 421 n.33, 429–30 (Cal. 2008).

176. See *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1071, 1094–96 (D. Haw. 2012); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 674–75 (Tex. Ct. App. 2010); *Conaway v. Deane*, 932 A.2d 571, 617–24 (Md. 2007); *Andersen v. King Cnty.*, 138 P.3d 963, 976–99 (Wash. 2006); *Hernandez v. Robles*, 855 N.E. 2d 1, 9–10 (N.Y. 2006); *Baehr v. Lewin*, 852 P.2d 44, 55–57 (Haw. 1993).

177. See *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1239–44 (11th Cir. 2004).

178. See *Cook v. Gates*, 528 F.3d 42, 54 (1st Cir. 2008); *Williams*, 378 F.3d at 1252–59 (Barkett, J., dissenting); *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 377 F.3d 1275, 1308–09 (11th Cir. 2004) (Barkett, J., dissenting from denial of rehearing en banc).

This split amongst the lower courts follows from a degree of doctrinal confusion in the Court's own fundamental rights precedents, and is important for addressing the constitutionality of laws that either prohibit or deter people from pursuing surrogacy, as well as laws that prevent such persons from establishing legal parentage of the children born via surrogacy.

B. The Framing and Recognition of Fundamental Rights

Much of the confusion surrounding both the question of framing rights for purposes of fundamental rights analysis as well as the appropriate sources to look to in determining whether to recognize such rights, so framed, can be traced to the Court itself wavering on both of these issues over the course of the past several decades as shifting majorities have decided fundamental rights cases. Differences of opinion regarding these two inquiries almost certainly reflect the Justices' predisposition in favor or against recognition of unenumerated fundamental rights. If one's judicial philosophy is hostile to the recognition of such rights, insisting on narrowly framing the right at issue and asking whether the right, so framed, is deeply rooted in history and tradition will result in only rarely recognizing such rights. In contrast, if one's judicial philosophy favors recognition of such rights, allowing for broad framing of the right at issue and/or consideration of modern trends in addition to history and tradition, makes recognition of fundamental rights far more likely.

In general, the Court's cases prior to its 1986 decision in *Bowers v. Hardwick*¹⁷⁹ tended to frame the right at issue in somewhat more general terms. Thus, for example, when considering in *Skinner v. Oklahoma*¹⁸⁰ a challenge to a law providing for the sterilization of convicted criminals, the Court spoke generally of the right to "procreation."¹⁸¹ When the Court in *Griswold v. Connecticut*¹⁸² considered the constitutionality of a state law prohibiting married couples from obtaining contraception, the Court framed the right at issue as the right to "privacy surrounding the marriage relationship."¹⁸³ When considering the constitutionality of laws prohibiting interracial marriage in *Loving v. Virginia*,¹⁸⁴ marriage by

179. 478 U.S. 186 (1986).

180. 316 U.S. 535 (1942).

181. *Id.* at 541.

182. 381 U.S. 479 (1965).

183. *Id.* at 486.

184. 388 U.S. 1 (1967).

those with outstanding child support obligations in *Zablocki v. Redhail*,¹⁸⁵ and marriage by prisoners in *Turner v. Safley*,¹⁸⁶ the Court framed the right at issue in all of those cases more generally as the right “to marry,”¹⁸⁷ not more narrowly as the rights to *interracial* marriage, *deadbeat dad* marriage, and *prisoner* marriage.¹⁸⁸ And when the Court in *Roe v. Wade*¹⁸⁹ considered the constitutionality of laws prohibiting or severely restricting the ability to obtain an abortion, the Court characterized the fundamental right at issue as a “right of personal privacy” that was broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.¹⁹⁰

In recognizing the rights at issue in these pre-*Bowers* cases as fundamental, the Court stressed the fact that the rights at issue were deeply rooted in history. Thus, for example, in *Griswold*, the Court described the right to marital privacy at issue in the case as “a right of privacy older than the Bill of Rights.”¹⁹¹ And in *Roe*, the Court carefully examined the history of abortion regulation, and found pertinent that there had been a long history at common law and in early U.S. history of only limited regulation of abortion before states started to enact more restrictive abortion laws,¹⁹² that the *Roe* Court described as being “of relatively recent vintage.”¹⁹³ Thus, in these various pre-*Bowers* cases, history was pertinent because it demonstrated that the laws at issue curtailed liberties that had a long history of being exercised free of governmental interference. As Cass Sunstein has explained, in this regard the substantive aspect of the Due Process Clause has been interpreted by the Court “to protect traditional practices against short-run departures . . . brought about by temporary majorities who are insufficiently sensitive to the claims of history.”¹⁹⁴

185. 434 U.S. 374 (1978).

186. 482 U.S. 78 (1987).

187. *See id.* at 95; *Zablocki*, 434 U.S. at 383; *Loving*, 388 U.S. at 12.

188. *See* *Kitchen v. Herbert*, 755 F.3d 1193, 1209–18 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 651, 658–59 (W.D. Tex. 2014); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.5 (N.D. Cal. 2012); *In re Marriage Cases*, 183 P.3d 384, 420–21 & n.33, 429–30 (Cal. 2008).

189. 410 U.S. 113 (1973).

190. *Id.* at 129, 152–53.

191. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

192. *See* *Roe v. Wade*, 410 U.S. at 113, 132–36, 138–41 (1973).

193. *Id.* at 129.

194. Sunstein, *supra* note 166, 1163 (1988); *accord* *Lawrence v. State*, 41 S.W.3d 349, 377 n.12 (Tex. Ct. App. 2001) (Anderson, J., dissenting) (citing Sunstein, *supra* note 166, at 1171); *Dean v. D.C.*, 653 A.2d 307, 342 (D.C. 1993) (Ferren, A.J., concurring in part and dissenting in part)

In 1986, the Court in *Bowers* considered a due process challenge to a state law that made sodomy a crime—whether consensual or not and whether between persons of the same or opposite sex—as applied to consensual sodomy between two persons of the same sex.¹⁹⁵ In *Bowers*, the Court rejected a more general framing of the right at issue as a right to “private sexual conduct between consenting adults,” instead framing the rights inquiry more specifically as one of whether there was “a fundamental right upon homosexuals to engage in sodomy.”¹⁹⁶ Having so framed the right, the Court then concluded that it was not deeply rooted in history but instead that proscriptions against sodomy have “ancient roots,” noting that it was a criminal offense at common law and in all of the thirteen colonies, that when the Fourteenth Amendment was ratified all but five states criminalized sodomy, that until 1961 all fifty states criminalized it, and that at the time of the decision about half of the states still criminalized sodomy.¹⁹⁷ In a separate concurring opinion, Chief Justice Burger added to the majority’s historical analysis, writing that “[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization.”¹⁹⁸ Specifically, he noted that “[c]ondemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards” and that “[h]omosexual sodomy was a capital crime under Roman law.”¹⁹⁹

Three years later, the Court, in *Michael H. v. Gerald D.*,²⁰⁰ considered a substantive due process challenge to a state law that conclusively presumes a woman’s husband to be the father of any children born to her during the marriage, with only a limited time period (two years) for either the husband or wife—but not third persons—to use blood tests to challenge the presumption.²⁰¹ The challenge to the statute was brought by a man who had an affair with a married woman and claimed to be the genetic father to a child she bore.²⁰² While the dissent argued for a more general framing of the question as “whether parenthood is an interest

(quoting Sunstein, *supra* note 166, at 1163); *Watkins v. U.S. Army*, 875 F.2d 699, 718 (1989) (Norris, C.J., concurring in the judgment) (quoting Sunstein, *supra* note 166, at 1163 (1988)).

195. *See Bowers v. Hardwick*, 478 U.S. 186, 186 n.1, 187–88 (1986).

196. *Id.* at 190–91.

197. *Id.* at 192–94.

198. *Id.* at 196 (Burger, C.J., concurring).

199. *Id.* at 196–97.

200. 491 U.S. 110 (1989).

201. *See id.* at 117–18 (plurality opinion).

202. *See id.* at 113–16 (plurality opinion).

that historically has received our attention and protection,”²⁰³ the plurality penned by Justice Scalia framed it more narrowly as “the power of the natural father to assert parental rights over a child born into a woman’s existing marriage with another man,”²⁰⁴ or alternatively, “the rights of the natural father of a child adulterously conceived.”²⁰⁵ On the issue of framing for substantive due process claims, the plurality more generally wrote that “[w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”²⁰⁶ With respect to the appropriate source to look to in determining whether such a right existed, the plurality cited both *Roe* and *Bowers* for the proposition that “historical traditions” were the appropriate focal point.²⁰⁷ Noting that the law at issue—the presumption of legitimacy and the fact that it could not be challenged by anyone other than the husband or wife (and in many cases, not even by them)—was a fundamental principle of common law and the law of most states for much of U.S. history, akin to the sodomy laws at issue in *Bowers* and in stark contrast to the absence of such a longstanding history for restrictive abortion laws of the sort at issue in *Roe*, the plurality rejected the natural father’s substantive due process claim.²⁰⁸

In *Michael H.*, however, only four Justices agreed that the framing of rights for purposes of fundamental rights analysis must always be at a very specific level. On this point, Justices O’Connor and Kennedy wrote separately to note that this approach “may be somewhat inconsistent with our past decisions in this area,” and, citing the Court’s decisions in *Griswold*, *Loving*, and *Turner*, wrote that “[o]n occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be ‘the most specific level’ available.”²⁰⁹ Three years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*²¹⁰—in a decision reaffirming the right of a woman to decide whether or not to terminate her pregnancy—these two moderate Justices in their “joint opinion” with Justice Souter, once again rejected the idea that fundamental rights should always be framed “at the most specific

203. *Id.* at 139 (Brennan, J., dissenting).

204. *Id.* at 125 (plurality opinion).

205. *See id.* at 127 n.6.

206. *Id.*

207. *See id.*

208. *See id.* at 124–27, 126 n.6.

209. *Id.* at 132 (O’Connor, J., concurring in part).

210. 505 U.S. 833 (1992).

level” possible.²¹¹ They wrote that “such a view would be inconsistent with our law,” noting that “interracial marriage” was illegal in most States for much of U.S. history but the Court nonetheless concluded that laws prohibiting it violated the substantive component of the due process clause.²¹² Indeed, at one point the joint opinion used breathtakingly general language to describe the rights substantively protected by the Due Process Clause, writing that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”²¹³

While the Court in *Casey*, just like the Court in *Michael H.*, was unable to get a majority of Justices to agree upon a methodology for framing and identifying fundamental rights, five years later, in *Washington v. Glucksberg*,²¹⁴ an opinion for the Court finally set forth such a methodology. At issue in the case was whether a law making it a crime to assist someone in committing suicide ran afoul of a fundamental right guaranteed by the substantive component of the Due Process Clause.²¹⁵

In *Glucksberg*, the Court held that identifying fundamental rights requires a two-part inquiry: First, the court must articulate a “careful description” of the right at stake and second, it must ask whether the right, so described, is “objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”²¹⁶ With respect to the “careful description” prong, the Court appeared to equate “careful” with precise or narrow, holding that the right at issue was not properly framed more generally as the “right to die” or the right to “control of one’s final days,” but more specifically as “a right to commit suicide which itself includes a right to assistance in doing so.”²¹⁷ Having so narrowly and specifically framed the right, the Court canvassed the historical record and, having found that assisting suicide was criminalized at common law, in the colonies, and most of the states at the time the Fourteenth Amendment was ratified, concluded that the right was thus not deeply rooted in history and tradition, and, accordingly, that it was not a fundamental right protected by the Due

211. *Id.* at 847–48 (joint opinion).

212. *Id.*

213. *Id.* at 851.

214. 521 U.S. 702 (1997).

215. *Id.* at 705–07.

216. *Id.* at 720–21.

217. *Id.* at 722–24.

Process Clause.²¹⁸ Thus, *Glucksberg* seemed to resolve the debate over framing and recognizing fundamental rights in favor of rather narrow framing and a focus on deep-rooted history and tradition.

However, the continued vitality of the *Glucksberg* methodology has been uncertain since the Court issued its 2003 opinion in *Lawrence v. Texas*,²¹⁹ in which the Court overruled its earlier decision in *Bowers* and declared that laws criminalizing sodomy violate the substantive component of the due process clause. In overruling *Bowers*, the *Lawrence* Court criticized several aspects of the methodology framed in that case. First, with respect to framing the right at issue, the *Lawrence* Court held that *Bowers* framed the right at issue too narrowly—as the right to engage in homosexual sodomy—and suggested instead that it should be more broadly framed as the right to engage in sexual activity in private within the confines of a personal relationship.²²⁰ Next, the Court made two important methodological points with respect to the *Bowers* Court’s historical analysis. First, in considering the historical record, the *Lawrence* Court, while acknowledging the long-standing presence of laws criminalizing sodomy, noted that there was a history of nonenforcement of such laws against consenting adults acting in private, and that this nonenforcement—despite facial applicability—was tantamount to a history of non-interference with the right at issue.²²¹ Second, the Court noted that these early laws were targeted at sodomy generally, not specifically toward homosexual sodomy, and that it was not until the last third of the twentieth century that legislatures began to enact laws specifically targeting homosexual sodomy,²²² thus echoing *Roe*’s focus on the laws at issue being of “relatively recent vintage.”²²³ Third, in contrast to Chief Justice Burger’s focus on early history, the *Lawrence* Court noted that “our laws and traditions in the past half century are of most relevance here,” which the Court described as

218. *See id.* at 710–16, 723, 728. The *Glucksberg* Court acknowledged *Casey*’s broad statement that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,” but held that this statement was simply a general description of those rights that the Court had found in the past to be protected by the due process clause, and not a prescriptive test for identifying such rights. *Id.* at 726–27 (quoting *Casey*, 505 U.S. at 851).

219. 539 U.S. 558 (2003).

220. *See id.* at 566–67. In addition, the Court also cited *Casey*’s broad statement that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

221. *See id.* at 569–70, 572–73.

222. *See id.* at 570.

223. *See Roe v. Wade*, 410 U.S. 113, 129 (1973).

showing “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex” that “should have been apparent when *Bowers* was decided.”²²⁴ The Court then proceeded to consider a variety of more contemporary developments extant at the time *Bowers* was decided that demonstrated this “emerging awareness,” including (1) the 1955 Model Penal Code’s recommendation that there be no criminal penalties for sexual relations conducted in private; (2) that soon thereafter, Illinois and other states repealed their criminal penalties for consensual sodomy; (3) that states with sodomy laws on the books were not enforcing them; and (4) that sodomy laws were repealed in the United Kingdom and that the European Court of Human Rights declared such laws to violate the European Convention on Human Rights.²²⁵ The *Lawrence* Court thus concluded that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”²²⁶

Lawrence thus seemed, in effect, to overrule or at least modify *Glucksberg* in that it both indicated that the framing should not be unduly narrow and that it did not require an exclusive focus on deep-rooted history and tradition. But this conclusion is not universally accepted, in large part because lower courts are split on the question whether *Lawrence* is even a fundamental rights case.²²⁷ This is because *Lawrence*, while criticizing *Bowers*, never *explicitly* articulated that it was recognizing a fundamental right and did not *explicitly* state that it was applying strict or some other form of heightened scrutiny, and instead merely concluded that the law at issue furthers “no legitimate state interest,” the language of rational basis review.²²⁸ Indeed, in his dissent in *Lawrence*, Justice Scalia characterized the majority’s decision as merely overturning *Bowers*’ holding that sodomy laws are justified by a legitimate governmental interest, and that the majority left intact the *Bowers* Court’s holding that it was not a fundamental right, and thus, presumably, the methodology it employed for framing and recognizing

224. *Lawrence*, 539 U.S. at 571–72.

225. *See id.* at 572–73.

226. *Id.* at 572 (citation omitted).

227. Compare *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1236–38 (11th Cir. 2004) (not a fundamental rights case), and *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 815–17 (11th Cir. 2004) (same), with *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 817–18 (9th Cir. 2008) (treating it as a not-quite-fundamental right subject to intermediate scrutiny), *Cook v. Gates*, 528 F.3d 42, 55 (1st Cir. 2008) (same), *Williams*, 378 F.3d at 1252–56 (Barkett, J., dissenting) (fundamental rights case), and *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 377 F.3d 1275, 1304–07 (11th Cir. 2004) (Barkett, J., dissenting from denial of rehearing en banc).

228. *Lawrence*, 539 U.S. at 578; *see also id.* at 586, 594 (Scalia, J., dissenting).

fundamental rights.²²⁹

Some lower court judges, in line with Justice Scalia's dissent, note that *Lawrence* never engaged in the *Glucksberg* two-step analysis, did not explicitly say it was overruling *Glucksberg*, and did not explicitly state that it was recognizing a fundamental right or applying strict scrutiny.²³⁰ They thus treat *Lawrence* as merely a case holding that the law at issue did not pass rational basis review under the Due Process Clause, and continue to apply *Glucksberg*'s methodology.²³¹ Accordingly, in addition to requiring that the right at issue be narrowly framed,²³² these courts reject an examination of contemporary trends when conducting fundamental rights analyses.²³³

Yet other lower court judges—noting that the *Lawrence* Court clearly placed its decision within its due process fundamental rights line of cases and required the government to *justify* the law, a hallmark of heightened rather than rational basis review—conclude that *Lawrence* was either a fundamental rights case applying strict scrutiny²³⁴ or something akin to a semi-fundamental rights case applying something like intermediate scrutiny.²³⁵ These judges thus conclude that *Lawrence*, coming after *Glucksberg*, must be viewed as clarifying or modifying both aspects of the *Glucksberg* analysis. First, with respect to the level at which rights must be framed, these judges conclude that *Glucksberg*'s “careful description”²³⁶ requirement is not synonymous with framing the liberty interest in the narrowest fashion possible.²³⁷ And second, with

229. See *id.* at 586, 594 (Scalia, J., dissenting).

230. See *Reliable Consultants, Inc. v. Earle*, 538 F.3d 355, 360–62 (5th Cir. 2008) (Garza, J., dissenting from denial of rehearing en banc); *Witt*, 548 F.3d at 1273–75 (O'Scannlain, J., dissenting); *Seegmiller v. LaVerkin City*, 528 F.3d 762, 769–72 (10th Cir. 2008); *Muth v. Frank*, 412 F.3d 808, 817–18 (7th Cir. 2005); *Williams*, 378 F.3d at 1234–38; *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 815–17 (11th Cir. 2004).

231. See *Reliable Consultants, Inc.*, 538 F.3d at 360–62 (Jones, C.J., dissenting from denial of rehearing en banc); *Witt*, 548 F.3d at 1273–75 (O'Scannlain, J., dissenting); *Seegmiller*, 528 F.3d at 769–72; *Muth*, 412 F.3d at 817–18; *Williams*, 378 F.3d at 1234–38; *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, at 815–17 (11th Cir. 2004).

232. See *Witt*, 548 F.3d at 1273–75 (O'Scannlain, J., dissenting); *Williams*, 378 F.3d at 1239–50; *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, at 816–17 (11th Cir. 2004).

233. See *Williams*, 378 F.3d at 1239–44.

234. See *id.* at 1252–59 (Barkett, J., dissenting); *Lofton v. Sec'y of Dep't of Children and Family Services*, 377 F.3d 1275, 1308–09 (11th Cir. 2004) (Barkett, J., dissenting from denial of rehearing en banc).

235. See *Cook v. Gates*, 528 F.3d 42, 51–56 (1st Cir. 2008); *Witt*, 527 F.3d at 817–19.

236. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations omitted).

237. See *Cook*, 528 F.3d at 54; *Williams*, 378 F.3d at 1252–59 (Barkett, J., dissenting); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 377 F.3d 1275, 1308–09 (11th Cir. 2004) (Barkett, J., dissenting from denial of rehearing en banc).

respect to the role of history and tradition, these courts hold that they provide a starting point but not always the ending point, with contemporary trends and practices also being a valid consideration.²³⁸

With the impact that *Lawrence* had on *Glucksberg* thus unsettled, in the pages that follow I will address the fundamental rights claims following both the *Glucksberg* methodology as well as any potential modifications that *Lawrence* has made to that methodology.

C. *The Fundamental Right to Enter into Surrogacy Arrangements*

One of the most long-standing fundamental rights recognized by the U.S. Supreme Court is the right to procreate, which was first recognized by the U.S. Supreme Court in 1942 in *Skinner v. Oklahoma*.²³⁹ At issue in *Skinner* was a state law that provided for the sterilization of those convicted three times of certain crimes but not those convicted of other crimes.²⁴⁰ The Court described the right at issue as “a right which is basic to the perpetuation of a race—the right to have offspring.”²⁴¹ The Court treated the problem as one of equal protection, and held that where what are involved are rights fundamental to the human race—which it denominated as “[m]arriage and procreation”—strict scrutiny was applicable.²⁴² In explaining the importance of strict scrutiny in the procreation context, the Court reasoned not only that “[t]he power to sterilize, if exercised, may have subtle, far-reaching and devastating effects” but that “[i]n evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.”²⁴³

Although in *Skinner*, the Court invoked the Equal Protection Clause, subsequent cases have characterized the right at issue there as protected by the substantive component of the Due Process Clause.²⁴⁴ Moreover, *Skinner* and the right to procreation recognized therein have served as the building block of many other subsequently recognized fundamental rights. Thus, for example, *Loving* relied on *Skinner*'s dicta regarding

238. See *Cook*, 528 F.3d at 54; *Williams*, 378 F.3d at 1252–59 (Barkett, J., dissenting); *Lofton v. Sec’y of Dep’t of Children and Family Services*, 377 F.3d 1275, 1308–09 (11th Cir. 2004) (Barkett, J., dissenting from denial of rehearing en banc).

239. 316 U.S. 535 (1942).

240. *Id.* at 536–37.

241. *Id.* at 536.

242. *Id.* at 541.

243. *Id.*

244. See *Lawrence v. Texas*, 539 U.S. 558, 573–74 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–51 (1992) (joint opinion); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684–85 (1977); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

“[m]arriage and procreation”²⁴⁵ for its conclusion that marriage was a fundamental right protected by the Due Process Clause.²⁴⁶ And the Court’s cases regarding contraception and abortion—all of which involve the right *not* to procreate—are derivative of and rely upon the right *to* procreate recognized in *Skinner*.²⁴⁷

So strong is the right to procreate recognized in *Skinner* and so stringent is the strict scrutiny associated with infringements on that right that lower courts have felt compelled to strike down laws even in circumstances in which the government’s rationale for restricting that right seems reasonable. Thus, courts have struck down probation conditions that prevent those convicted of nonsupport of existing children²⁴⁸ or possession of child pornography from fathering children,²⁴⁹ or probation conditions that prohibit a woman from getting pregnant who has been convicted of drug use and possession,²⁵⁰ child endangerment,²⁵¹ or child neglect resulting in death.²⁵²

Since surrogacy arrangements are nearly always pursued by couples who are otherwise unable to procreate without the assistance of third parties,²⁵³ the most certain way to have laws declared unconstitutional that make it a crime to enter into surrogacy arrangements, or that otherwise seek to deter them, is to frame the right at issue as the right to procreate and to apply the strict scrutiny associated with infringements upon that right.

Yet the same rights-framing quandary that courts are grappling with in cases challenging the constitutionality of laws prohibiting same-sex marriage is present in cases challenging laws prohibiting surrogacy.

245. See *Skinner*, 316 U.S. at 541 (emphasis added).

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

247. See *Roe*, 410 U.S. at 152–53; *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965); *id.* at 502–03 (White, J., concurring); *id.* at 496–97 (Goldberg, J., concurring) (reasoning that if it were constitutional to criminalize the use of contraception, it would likewise be constitutional for the government to forcibly sterilize people who have had two children).

248. See *State v. Talty*, 814 N.E.2d 1201, 1203–07 (Ohio 2004).

249. See *United States v. Scalise*, 398 F. App’x 736, 742 (3d Cir. 2010); *United States v. Loy*, 237 F.3d 251, 269 (3d Cir. 2001).

250. See *People v. Zaring*, 10 Cal. Rptr. 2d 263 (Cal. Ct. App. 1992).

251. See *People v. Pointer*, 199 Cal. Rptr. 357, 364–66 (Cal. Ct. App. 1984).

252. See *Trammel v. State*, 751 N.E.2d 283, 288–91 (Ind. Ct. App. 2001).

253. The one exception is so-called “social surrogacy,” in which a woman otherwise able medically to become pregnant and give birth hires a surrogate to avoid either ruining her figure or impacting her career. See Sarah Elizabeth Richards, *Should a Woman Be Allowed to Hire a Surrogate Because She Feels Pregnancy Will Hurt Her Career?*, ELLE (Apr. 17, 2014), <http://www.elle.com/life-love/society-career/birth-rights>.

Thus, while some courts have characterized laws that restrict surrogacy as falling within the established fundamental right to procreate,²⁵⁴ others declare that this pre-existing right is about *natural* procreation, and that what is at issue is a newly claimed fundamental right to procreate with the assistance of technology and third parties.²⁵⁵ Moreover, where only one of the intended parents seeks to use their genetic material in the process—such as in a traditional surrogacy scenario or where third-party donor eggs or sperm will be used—courts have held that only the procreative rights of that intended parent are at stake since the other intended parent is not, strictly speaking, procreating.²⁵⁶

If *Lawrence*—through its criticism of *Bowers* for narrowly describing the right at issue as the right to engage in homosexual sodomy instead of more broadly as the right to engage in sexual activity in private within the confines of a personal relationship²⁵⁷—has modified *Glucksberg*'s “careful description” requirement,²⁵⁸ it would follow that in cases challenging laws that criminalize or otherwise restrict access to surrogacy, framing the right at issue as the right to procreate would be the appropriate level of generality. From the standpoint of a couple whose only hope of procreating is through the assistance of a surrogate, a law that criminalizes that assistance is no different than the law providing for the sterilization of convicted felons in *Skinner*: in both instances, the government's action prevents the target's ability to procreate. Thus, laws criminalizing or otherwise restricting surrogacy should be deemed constitutional only if they satisfy strict scrutiny.

As explained above, however, some courts conclude that *Lawrence* was not a fundamental rights case, and that *Glucksberg*'s more conservative approach to framing still governs.²⁵⁹ Recall that in *Glucksberg*, the Court framed the right at issue in that case as the right to

254. See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1277–78 (D. Utah 2002); *Belsito v. Clark*, 644 N.E.2d 760, 766 (Ohio Ct. Com. Pl. 1994); *Doe v. Attorney Gen.*, 487 N.W.2d 484, 486 (Mich. Ct. App. 1992).

255. See *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1095 n.20 (D. Haw. 2012); *T.M.H. v. D.M.T.*, 79 So. 3d 787, 818–19 (Fla. Dist. Ct. App. 2011) (Lawson, J., dissenting).

256. *In re Baby M*, 537 A.2d 1227, 1253–54 (N.J. 1988).

257. See *Lawrence v. Texas*, 539 U.S. 558, 566–67 (2003).

258. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations omitted).

259. See *Reliable Consultants, Inc. v. Earle*, 538 F.3d 355, 360–62 (5th Cir. 2008) (Garza, J., dissenting from denial of rehearing en banc); *Witt v. Dep't of the Air Force*, 548 F.3d 1264, 1273–75 (9th Cir. 2008) (en banc) (O'Scannlain, J., dissenting); *Seegmiller v. LaVerkin City*, 528 F.3d 762, 769–72 (10th Cir. 2008); *Muth v. Frank*, 412 F.3d 808, 817–18 (7th Cir. 2005); *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1234–38 (11th Cir. 2004); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 815–17 (11th Cir. 2004).

commit suicide “which itself includes a right to assistance in doing so,”²⁶⁰ and then examined the extent to which law historically criminalized *assisting* suicide even when it left the act of committing or attempting to commit suicide alone unregulated.²⁶¹ Applying *Glucksberg*’s methodology to a case involving a law restricting surrogacy, a court might frame the right at issue more narrowly as a right to procreate which itself includes a right to assistance in doing so, and examine the extent to which there is a deep-rooted right to procure the assistance of a third person for the purpose of procreating.²⁶² It would seem, however, that under *Glucksberg*, at least for framing purposes,²⁶³ one would not need to separately frame a right to procreate via traditional surrogacy and a right to procreate via gestational surrogacy. After all, even *Glucksberg*, while narrowly framing the issue, did not contend that for framing purposes it was necessary to distinguish, say, between assisted suicide by means of a gun versus by poison.

Yet even if *Glucksberg*’s more conservative approach to framing still controls where fundamental rights are involved, I believe that the right to surrogacy would itself be found to be an independent fundamental right, and thus that the same heightened scrutiny applied to infringements upon other fundamental rights would follow. This is because the right to procure the assistance of a surrogate has an unparalleled history of being exercised free from governmental interference.

1. *The History of Surrogacy*

Laws criminalizing or even regulating surrogacy, either in the United States or elsewhere, are both rare and—to quote *Roe*—“are of relatively recent vintage.”²⁶⁴ The practice of surrogacy itself, although sometimes thought of as a relatively new phenomenon brought about by the advent of medical science, has been around in some form for much of recorded history.

Indeed, surrogacy first appears in the Bible, where the book of *Genesis* recounts at least two instances of it. The first instance is the story of Sarah—the wife of Abraham—who was unable to bear

260. See *Glucksberg*, 521 U.S. at 722–24 (emphasis added).

261. See *id.* at 711–19.

262. Cf. *id.* at 723 (framing the due process issue as the right at issue in that case as the right to commit suicide “which itself includes a right to assistance in doing so”).

263. There might be different compelling governmental interests where traditional surrogacy is involved, however, that might justify restricting or prohibiting it under strict scrutiny analysis while leaving gestational surrogacy unregulated. These interests are discussed below.

264. 410 U.S. 113, 129 (1973).

children.²⁶⁵ They resolved their infertility problem by enlisting Sarah's servant, Hagar, to serve as what would today be the equivalent of a traditional surrogate.²⁶⁶ Similarly, when Jacob's two wives, Rachel and Leah, were unable to bear children, their servants likewise served as traditional surrogates.²⁶⁷

For most of the period between Biblical times and the present, surrogacy was treated as an unregulated private matter that was neither expressly permitted nor expressly prohibited by the law. It was only in the early 1980s that governments began to even consider regulating surrogacy. The first governments to do so—the United Kingdom²⁶⁸ and Victoria, Australia²⁶⁹—established committees in 1982 to study the issue as a reaction to the first “test tube babies” being born in those two countries.²⁷⁰ In 1984, those committees both recommended the

265. *Genesis* 16:1.

266. *Genesis* 16:1–16. At the time these Biblical events took place, artificial insemination—the procedure used for impregnating modern-day traditional surrogates—had not yet developed, and so these early instances of surrogacy involved the intended father engaging in an act of sexual intercourse with the surrogate. *See Doe v. Doe*, 710 A.2d 1297, 1306 (Conn. 1997). While this would at first blush seem to violate Biblical proscriptions against adultery, the Biblical definition of adultery did not encompass sexual activity between a married man and an unmarried woman. *See* Peter Nicolas, *The Lavender Letter: Applying the Law of Adultery to Same-Sex Couples and Same-Sex Conduct*, 63 FLA. L. REV. 97, 105–06 (2011); Pamela Laufer-Ukeles, *Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis*, 9 DUKE J. GENDER L. & POL'Y 91, 120 (2002). These Biblical surrogates also differ from modern-day surrogates in that the former were indentured servants and thus not free to refuse their masters' request that they serve as surrogates, while the latter are free to choose whether or not to serve as surrogates to intended parents.

267. *See Genesis* 30:1–10. In recent debates over a bill to criminalize surrogacy in Kansas, opponents of the bill contended that it would have the effect of criminalizing the Immaculate Conception, characterizing the Angel Gabriel as, in effect, a surrogacy broker between God and the Virgin Mary. *See* Bryan Lowry, *Kansas Lawmakers Hear Testimony on Bill Making Surrogacy Contracts Illegal*, THE WICHITA EAGLE (Jan. 27, 2014), <http://eprod.kansas.com/news/politics-government/article1132756.html> (last visited June 11, 2014); *Luke* 1:26–38, 2:1–40. However, the story of the Immaculate Conception, whereby Mary and Joseph raised Jesus perhaps suggests that Mary was not a surrogate in the sense we think of the term today, but rather that God was the equivalent of a “sperm donor.”

268. *See* DEP'T OF HEALTH & SOCIAL SECURITY, REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY, 1984, PARL. cmnd. 9314, at iv, 4 (U.K.) [hereinafter THE WARNOCK REPORT], available at http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf (last visited Nov. 8, 2014).

269. *See* Explanatory Memorandum, Current Issues Brief No. 5: Assisted Reproductive Treatment Bill 2008 (Vict.) 16 (Austl.).

270. *See* THE WARNOCK REPORT, *supra* note 268, at iv, 4; *History of Assisted Reproductive Treatment in Victoria*, VICTORIAN ASSISTED REPROD. TREATMENT AUTHORITY, <http://www.varta.org.au/history-of-art-in-victoria/> (last visited July 16, 2014).

enactment of laws prohibiting surrogacy.²⁷¹ That same year, the Victorian Parliament assented to a comprehensive law regulating assisted reproduction, including surrogacy, declaring surrogacy contracts—whether or not entered into for compensation—to be unenforceable and imposing criminal penalties for those entering into such arrangements,²⁷² but the portions of the law dealing with surrogacy did not take effect at that time.²⁷³

Around this same time, three highly visible instances of surrogacy were taking place in England, Australia, and the United States that served as catalysts for laws restricting or regulating surrogacy. In 1985, in *Baby Cotton*,²⁷⁴ a court in England resolved a custody issue in a case involving compensated traditional surrogacy. There was no dispute between the surrogate and the intended parents regarding custody, but a local social services agency intervened and sought to prevent the couple—who was from the United States—from taking custody of the child and taking her out of England.²⁷⁵ The judge ruled that the arrangement was proper and that the couple could take the child out of England, and public outrage over the case resulted in the enactment of the Surrogacy Arrangements Act of 1985,²⁷⁶ which made it a criminal offense for third parties—such as surrogacy agencies—to take part in commercial surrogacy. The law, however, did not make it an offense for the surrogate or intended parents to enter into such arrangements.

That same year, one U.S. state, Arkansas, became the first state in the country to enact any legislation on the issue of surrogacy,²⁷⁷ but the statute was designed to facilitate rather than restrict surrogacy. It declared that in the case of an unmarried surrogate impregnated using artificial insemination, the intended mother—not the surrogate—is presumed to be the legal mother of the child²⁷⁸ (the statute was subsequently expanded to include the same presumption in situations in which the surrogate is married).²⁷⁹ The following year, Victoria,

271. See THE WARNOCK REPORT, *supra* note 268, at ¶¶ 8.18–8.19; Explanatory Memorandum, *supra* note 269, at 20.

272. See *Infertility (Medical Procedures) Act 1984* (Vict.) paras 11, 12, 13, 30 (Austl.).

273. See Explanatory Memorandum, *supra* note 269, at 20.

274. See Diana Brahams, *The Hasty British Ban on Commercial Surrogacy*, 17 HASTINGS CENTER REP. 16, 16–17 (1987) (discussing *Baby Cotton* case).

275. See *id.* at 16.

276. Surrogacy Arrangements Act of 1985, c. 49 (U.K.).

277. See Joanna K. Budde, Comment, *Surrogate Parenting: Future Legislation to Eliminate Present Inconsistencies*, 26 DUQ. L. REV. 633, 653 (1988).

278. See Act of Apr. 15, 1985, No. 904, §§ 1–2, 1985 Ark. Acts 1931, 1932.

279. See Act of Mar. 17, 1989, No. 647, § 1, 1989 Ark. Acts 1505, 1506–07 (codified at ARK.

Australia put portions of its laws regulating surrogacy into effect,²⁸⁰ but it was not until 1988—following a high-profile instance of surrogacy in Australia which one sister served as the surrogate for the other—that the full force of the 1984 law was put into effect.²⁸¹

In the United States, the spark for implementing restrictive surrogacy legislation was the *Baby M*²⁸² case in New Jersey. Like *Baby Cotton*, *Baby M* involved compensated traditional surrogacy, but unlike in *Baby Cotton*, the surrogate in *Baby M* had a change of heart and sought custody of the child shortly after giving birth in 1986.²⁸³ In 1987, a New Jersey trial court held the surrogacy contract enforceable, awarded custody to the intended father—who was also the genetic father—terminated the surrogate’s parental rights, and granted the intended mother’s petition to adopt the child.²⁸⁴ But in 1988, New Jersey’s Supreme Court reversed the decision, declaring the surrogacy contract to be unenforceable as contrary to public policy, and declaring the intended father and the surrogate to be the legal parents of the child.²⁸⁵ It refused to terminate the surrogate’s parental rights, although it awarded custody to the intended father and visitation to the surrogate.²⁸⁶

Like the issue of same-sex marriage in the last decade, the *Baby M* case was highly publicized.²⁸⁷ Both while it was winding its way through the New Jersey courts and in its aftermath, several state legislatures stepped in and enacted laws prohibiting surrogacy, or at least making surrogacy contracts unenforceable. Louisiana became the first state in the nation to do so,²⁸⁸ enacting in 1987 a law declaring surrogacy

CODE ANN. § 9-10-201 (West, Westlaw through 2014 2d Extraordinary Sess.).

280. See Proclamation, *Infertility (Medical Procedures) Act 1984*, 67 VICT. GOV’T GAZETTE 3011, 3011–12 (Aug. 6, 1986).

281. See Proclamation of Commencement, *Infertility (Medical Procedures) Act 1984*, G16 VICT. GOV’T GAZETTE 1053, 1123 (May 4, 1988); Explanatory Memorandum, *supra* note 269, at 20–21.

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

283. *Id.* at 1236–37.

284. See *id.* at 1237–38; *In re Baby M*, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987).

285. *In re Baby M*, 537 A.2d 1227.

286. See *id.* When *Baby M* herself reached the age of majority, she successfully moved to have the surrogate’s parental rights terminated and the intended mother’s adoption petition approved. See Jennifer Weiss, *Now It’s Melissa’s Time*, NEW JERSEY MONTHLY MAG. (Mar. 2007), <http://web.archive.org/web/20070526004403/http://www.njmonthly.com/issues/2007/03-Mar/babym.htm>.

287. See, e.g., Barbara Kantrowitz et al., *Who Keeps ‘Baby M’?*, NEWSWEEK, Jan. 19, 1987, at 44; Mary Shaughnessy, *All For Love of a Baby*, PEOPLE, Mar. 23, 1987, at 50.

288. See Linda S. Anderson, *Legislative Oppression: Restricting Gestational Surrogacy to Married Couples Is an Attempt to Legislate Morality*, 42 U. BALT. L. REV. 611, 623 n.64 (2013); Robert D. Arenstein, *Is Surrogacy Against Public Policy? The Answer Is Yes*, 18 SETON HALL L.

contracts unenforceable, but not imposing any civil or criminal penalties for entering into such contracts.²⁸⁹ It was quickly followed in 1988 and 1989 by several other state laws declaring surrogacy contracts to be unenforceable,²⁹⁰ including Nebraska²⁹¹ Indiana,²⁹² North Dakota,²⁹³ and Arizona.²⁹⁴

In the wake of *Baby M*, several other states went further, not merely declaring such contracts unenforceable but imposing criminal penalties on those who entered into and/or those who helped to facilitate surrogacy agreements. The year *Baby M* was decided, Florida²⁹⁵ and Michigan²⁹⁶ enacted statutes criminalizing both entering into and serving as an intermediary for surrogacy agreements in terms that were broad enough to encompass traditional as well as gestational surrogacy, while that same year Kentucky enacted a similar law that only encompassed traditional surrogacy.²⁹⁷ In 1989, Utah²⁹⁸ and Washington State²⁹⁹

REV. 831, 832 (1988); Robert L. Geltzer et al., *National Conference on Birth, Death, and Law*, 29 JURIMETRICS J. 403, 416 n.49 (1989).

289. See Act of July 9, 1987, No. 583, 1987 La. Acts 1433 (codified at LA. REV. STAT. ANN. § 9:2713 (West, Westlaw through 2013 Reg. Sess.)).

290. In tracing this early history, I am indebted to the then-contemporary research found in MARTHA A. FIELD, *SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES* 157–69 (expanded ed. 1990) and in Arenstein, *supra* note 288, at 832.

291. See Act of Feb. 10, 1988, No. 674, § 1, 1988 Neb. Laws 572 (codified at NEB. REV. STAT. ANN. § 25-21,200 (West, Westlaw through 2014 Reg. Sess.)).

292. See Act of Mar. 5, 1988, No. 175, 1988 Ind. Acts 2050; Act of July 1, 1997, No. 1, 1997 Ind. Acts 255 (codified at IND. CODE ANN. §§ 31-20-1-1 to 31-20-1-2 (West, Westlaw through 2d Reg. Sess. & 2d Technical Sess. 2014)).

293. See Assisted Conception Act, ch. 184, § 5, 1989 N.D. Laws 561, 562 (codified at N.D. CENT. CODE ANN. § 14-18-05 (West, Westlaw through 2013 Reg. Sess.)).

294. See Act of Apr. 28, 1989, ch.114, 1989 Ariz. Sess. Laws 393 (codified at ARIZ. REV. STAT. ANN. § 25-218 (Westlaw through 2d Reg. & Special Sess. 2014)).

295. See Act of July 1, 1988, ch. 88-143, 1988 Fla. Laws 749 (codified at FLA. STAT. ANN. § 63.212(1)(i), (6) (West, Westlaw through 2014 Sp. “A” Sess.)). The penalty for violating the statute is up to five years in prison. See FLA. STAT. ANN. § 775.082(3)(d) (West, Westlaw through 2014 Sp. “A” Sess.).

296. See Act of June 27, 1988, No. 199, 1988 Mich. Pub. Acts 493 (codified at MICH. COMP. LAW ANN. § 722.859 (West, Westlaw through 2014 Reg. Sess. Act 282)). The penalty for violating the statute was up to one year in prison and a \$10,000 fine for the contracting parties and up to five years in prison and a \$50,000 fine for third parties helping to arrange such agreements. See *id.*

297. See Act of Mar. 11, 1988, ch. 52, § 1, 1988 Ky. Acts 193, 193–94 (codified at KY. REV. ST. ANN. § 199.590 (West, Westlaw through 2014 legislation)). The penalty for violating the statute is up to \$2,000 and six months in prison, and provides that “[e]ach day such violation continues shall constitute a separate offense.” See KY. REV. ST. ANN. § 199.990(2) (West, Westlaw through 2014 legislation). The Kentucky law was preceded by a case holding that traditional surrogacy arrangements do not violate state law prohibiting the sale of children. See *Surrogate Parenting Associates, Inc. v. Com. ex rel. Armstrong*, 704 S.W.2d 209 (Ky. 1986).

298. See Prohibition of Surrogate Parenthood Contracts, ch. 140, § 1, 1989 Utah Laws 333, 333

enacted statutes criminalizing both entering into and serving as an intermediary for surrogacy agreements in terms that were broad enough to encompass traditional as well as gestational surrogacy. In 1990, New Hampshire enacted a law facilitating surrogacy, but it included a provision imposing criminal penalties on intermediaries who earned a fee for facilitating surrogacy agreements.³⁰⁰ In 1992, New York enacted a law imposing a civil penalty on those entering into compensated surrogacy contracts of either sort and imposing civil and criminal penalties on intermediaries.³⁰¹ In 1993, Washington, D.C. enacted a statute that imposed criminal penalties on those entering into or facilitating surrogacy agreements of any sort: traditional or gestational, compensated or uncompensated.³⁰²

Around this same period, the federal government briefly flirted with the possibility of prohibiting surrogacy on a nationwide basis. Between 1987 and 1989, a series of bills were introduced that would impose federal criminal penalties for those entering into and/or those brokering surrogacy agreements, but none progressed in Congress.³⁰³ No bills on

(codified at UTAH CODE ANN. § 76-7-204 (West, Westlaw through 2014 Reg. Sess.)). Violations of the statute were classified as a Class A misdemeanor. *See id.* The legislation had a sunset provision of July 1, 1991 to allow a legislative committee to study the issue further, but the sunset provision was repealed before it could kick in. *See* Removal of Sunset Date from Surrogate Parenthood Law, ch. 116, § 1, 1991 Utah Laws 413, 413 (codified at UTAH CODE ANN. § 76-7-204).

299. *See* Act of May 13, 1989, ch. 404, 1989 Wash. Sess. Laws 2178 (codified at WASH. REV. CODE §§ 26.26.230–26.26.250 (2012)). Violations of the statute are treated as a gross misdemeanor punishable by up to 364 days in prison and a fine of up to \$5,000. *See* WASH. REV. CODE § 9.92.020 (2012). The legislative history of the Washington law makes clear that it was a reaction to the *Baby M* case. *See* Substitute S.B. 5071, 51st Leg., Reg. Sess. (Wash. 1989), reprinted in FINAL LEGISLATIVE REPORT, 51ST WASHINGTON STATE LEGISLATURE, 1989 REGULAR, FIRST AND SECOND SPECIAL SESSIONS 183 (1989); Jim Simon, *Surrogate-Motherhood Ban Packs Hearing in Senate*, SEATTLE TIMES, Jan. 20, 1989, at E1.

300. *See* Act of Apr. 10, 1990, ch. 87, 1990 N.H. Laws 117 (codified at N.H. REV. STAT. ANN. §§ 168-B:16, 168-B:30 (1990)).

301. *See* Act of July 17, 1992, ch. 308, 1992 N.Y. Laws 2943 (codified at N.Y. DOM. REL. LAW § 123 (McKinney, Westlaw through 2014 legislation)). The statute imposed a \$500 civil penalty on those entering into surrogacy agreements, a \$10,000 civil penalty for the first conviction of a third party facilitating such agreements, and criminal punishment for subsequent convictions of third party facilitators. *See id.* The New York statute was preceded by a handful of court decisions holding that traditional surrogacy agreements run afoul of law prohibiting the sale of children. *See* Anonymous v. Anonymous, No. P-8572/91, 1991 WL 228555 (N.Y. Fam. Ct. Oct. 1, 1991); *In re Adoption of Paul*, 550 N.Y.S.2d 815 (N.Y. Fam. Ct. 1990). *But see In re Adoption of Baby Girl L.J.*, 505 N.Y.S.2d 813 (N.Y. Sur. Ct. 1986).

302. *See* Surrogate Parenting Contracts Act of 1992, 40 D.C. Reg. 582 (Jan. 4, 1993) (codified at D.C. CODE §§ 16-401 to 16-402 (West, Westlaw through Sept. 1, 2014)). Violations of the statute are punishable by up to one year in prison and a \$10,000 fine. *See id.*

303. *See* Commercialized Childbearing Act of 1989, H.R. 1188, 101st Cong. (1989); Anti-Surrogate Mother Act of 1989, H.R. 576, 101st Cong. (1989); Surrogacy Arrangements Act of

the issue have been introduced in Congress since 1989.

Following this spurt of legislative activity in the years immediately following *Baby M*, states stopped enacting laws criminalizing surrogacy and instead began enacting laws designed to facilitate surrogacy arrangements, the details of which were discussed in Part I of this Article. Since 1993, only one state has enacted a law prohibiting or criminalizing any aspect of surrogacy. In 2010, Virginia enacted a law that, while generally facilitating surrogacy arrangements, imposed criminal penalties on intermediaries who earn a fee for facilitating surrogacy agreements.³⁰⁴ Florida effectively decriminalized compensated surrogacy by enacting laws in 1993³⁰⁵ and 2003³⁰⁶ providing for gestational and traditional surrogates, respectively, to be compensated for “living expenses,” with that term being generously construed.³⁰⁷ In 2005, Utah repealed its criminal penalties for surrogacy and replaced them with a statutory scheme to facilitate surrogacy arrangements.³⁰⁸ In 2014, New Hampshire repealed its law imposing criminal penalties on intermediaries who earned a fee for facilitating surrogacy agreements.³⁰⁹ In the last several years, serious efforts to repeal the prohibitory laws in New York,³¹⁰ Washington State,³¹¹ and Washington, D.C.³¹² have been mounted, while laws introduced in Kansas³¹³ and Louisiana³¹⁴ that would have criminalized surrogacy

1989, H.R. 275, 101st Cong. (1989); Anti-Surrogate Mother Act of 1987, H.R. 3264, 100th Cong. (1987); Surrogacy Arrangements Act of 1987, H.R. 2433, 100th Cong. (1987). *See generally* FIELD, *supra* note 290, at 155–56.

304. *See* Act of Apr. 13, 2010, ch. 712, 2010 Va. Acts 1291 (codified at VA. CODE ANN. § 20-165 (West, Westlaw through 2014 Reg. Sess. & 2014 Special Sess.)). In addition, while not involving the enactment of new laws by state legislatures, Attorneys General in Maryland and Oklahoma opined that compensated traditional surrogacy agreements violate state laws prohibiting the sale of children. *See* 85 Md. Op. Att’y Gen. 348 (2000); 83 Okla. Op. Att’y Gen. 162 (1983).

305. *See* Act of May 15, 1993, ch. 93-237, 1993 Fla. Laws 2405 (codified at FLA. STAT. ANN. § 742.15 (West, Westlaw through 2014 Sp. “A” Sess.)).

306. *See* Act of May 30, 2003, ch. 2003-58, 2003 Fla. Laws 520 (codified at FLA. STAT. ANN. § 63.213 (West, Westlaw through 2014 Sp. “A” Sess.)).

307. *See, e.g., Intended Parents & Parents Via Surrogacy: IP in Florida—“No Compensation”?*, *supra* note 41 (Florida surrogates in online discussion board describing reasonable living expenses as including rent or mortgage payments, utility bills, and the like); *Gestational Surrogacy Price List (2014)*, *supra* note 41 (Florida surrogacy agency website quantifying reasonable living expenses as ranging between \$10,000 and \$30,000).

308. *See* Uniform Parentage Act, ch. 150, § 100, 2005 Utah Laws 1014, 1034.

309. *See* Act of July 21, 2014, ch. 248, 2014 N.H. Laws C. 248 (S.B. 353).

310. *See* S. 4617, 2013–2014 Leg., Reg. Sess. (N.Y. 2013).

311. *See* H.R. 1267, 62d Leg., Reg. Sess. (Wash. 2011).

312. *See* Legis. B. 20-32 (D.C. 2013).

313. *See* S. 302, 2013–2014 Leg., Reg. Sess. (Kan. 2014); Amy Hawley, *Lawmakers Decide on*

under some or all circumstances failed to become law.

Taking all of these developments into account, today only three U.S. jurisdictions—Michigan, Washington, and Washington, D.C.—impose criminal penalties on those entering into compensated gestational as well as traditional surrogacy arrangements. Three other states, Kentucky, by an explicit statute, and Maryland and Oklahoma, by Attorney General interpretation, impose criminal penalties only on those entering into compensated traditional surrogacy arrangements. One other state, New York, imposes only civil penalties on those entering into surrogacy agreements. Historically, only two other states, Florida and Utah, have *ever* imposed any sort of penalty for entering into compensated surrogacy arrangements of any sort. Moreover, in the last few years, serious efforts have been mounted to repeal the restrictive laws still in place in Washington, Washington, D.C., and New York.³¹⁵

Moreover, to the extent that some of these laws encompass gestational surrogacy, it probably was not their intended target. The first reported case of successful gestational surrogacy was in 1985,³¹⁶ and by 1988—when the *Baby M* case was decided—there had only been a total of three births to gestational surrogates in the United States.³¹⁷ Thus, when these laws were being considered, gestational surrogacy was still in its infancy and legislators may not have been focused on the distinctions between traditional and gestational surrogacy.

This brief spurt of anti-surrogacy legislative activity was the very sort of “short-run departure[] . . . brought about by temporary majorities who are insufficiently sensitive to the claims of history”³¹⁸ that the substantive component of the Due Process Clause was designed to protect. Just as with the prohibitions on same-sex marriage in modern times, the public reaction to something they were unfamiliar with

Surrogacy Bill, KSHB KAN. CITY, <http://www.kshb.com/news/local-news/lawmakers-decide-on-surrogacy-bill> (last visited June 17, 2014).

314. See H.R. 187, 2014 Leg., Reg. Sess. (La. 2014); Letter from Bobby Jindal, Governor of La., to Alfred Speer, Clerk of the H.R. (May 30, 2014), *available at* <http://legis.la.gov/Legis/ViewDocument.aspx?d=911932> (notifying Mr. Speer of his veto of H.R. 187).

315. See *supra* notes 310–312.

316. See FAITH MERINO, GLOBAL ISSUES: ADOPTION AND SURROGATE PREGNANCY 38 (2010).

317. See Tom Paulson, ‘Host Womb’ Babies Born in Tacoma—Woman Gives Birth to Her Own Nephews After Embryo Transfer, SEATTLE POST-INTELLIGENCER, Mar. 15, 1988, at A1.

318. Sunstein, *supra* note 166, at 1163; accord *Watkins v. U.S. Army*, 875 F.2d 699, 718 (9th Cir. 1989) (Norris, C.J., concurring in the judgment) (quoting Sunstein, *supra* note 166, at 1163); *Lawrence v. State*, 41 S.W.3d 349, 377 n.12 (Tex. Ct. App. 2001) (Anderson, J., dissenting) (citing Sunstein, *supra* note 166, at 1171); *Dean v. District of Columbia*, 653 A.2d 307, 342 (D.C. 1993) (Ferren, A.J., concurring in part and dissenting in part) (quoting Sunstein, *supra* note 165, at 1163).

resulted in knee-jerk reactive legislation from politicians across the political spectrum. Thus, the bills in Congress that would have criminalized surrogacy on a nationwide basis had a range of cosponsors from across the political spectrum, from the very conservative Robert K. Dornan, Henry Hyde, and Newt Gingrich to the very liberal Barbara Boxer, Nancy Pelosi, and Marcy Kaptur.³¹⁹ In New Jersey, when the *Baby M* trial was taking place, a group of feminists that included Betty Friedan, Meryl Streep, Carly Simon, Nora Ephron, and Gloria Steinem wrote a letter endorsing the surrogate's custody claim and in opposition to compensated surrogacy.³²⁰ When New York outlawed surrogacy in the wake of the *Baby M* case, it was a result of a concerted effort involving the New York Catholic Conference working with the New York Civil Liberties Union and the National Organization for Women.³²¹ And in Washington State, the anti-surrogacy law garnered support from across the political spectrum,³²² with self-proclaimed feminists split on the issue.³²³

Moreover, that surrogacy has taken place for so much of history free of any governmental interference,³²⁴ and that even at the peak of anti-surrogacy sentiment only a handful of states enacting legislation

319. See Commercialized Childbearing Act of 1989, H.R. 1188, 101st Cong. (1989); Anti-Surrogate Mother Act of 1989, H.R. 576, 101st Cong. (1989); Surrogacy Arrangements Act of 1989, H.R. 275, 101st Cong. (1989); Anti-Surrogate Mother Act of 1987, H.R. 3264, 100th Cong. (1987); Surrogacy Arrangements Act of 1987, H.R. 2433, 100th Cong. (1987). See generally FIELD, *supra* note 290, at 155–56.

320. See Iver Peterson, *Fitness Test for Baby's Mother Unfair, Feminists Say*, N.Y. TIMES, Mar. 20, 1987, at B1.

321. See Anemona Hartocollis, *And Surrogacy Makes 3*, N.Y. TIMES, Feb. 20, 2014, at E1; SUSAN MARKENS, *SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION* 139–70 (2007).

322. See *Bill Banning Paid Child-Bearing Deals Advances*, SEATTLE TIMES, Mar. 9, 1989, at B11 (noting support of anti-surrogacy laws by both Democrats and Republicans); Simon, *supra* note 299, at E1 (noting support of anti-surrogacy laws by both Democrats and Republicans).

323. See Simon, *supra* note 299, at E1.

324. A few lower court decisions have held that it is not enough for there to be a history of non-interference with the right, but instead there must be a history of affirmative protection of the right at issue; in other words, positive statutes declaring the right at issue to be a protected one. See *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1244–45 (11th Cir. 2004); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 816 n.15 (11th Cir. 2004). But as most lower courts have correctly noted, the Supreme Court's decisions do not require a showing of a history of affirmative protection of the right at issue, and point out that if this were in fact a requirement, the contraception and abortion cases would have been decided differently since there was no history of statutes affirmatively protecting those rights. See *Cook v. Gates*, 528 F.3d 42, 53–54 (1st Cir. 2008); *Williams*, 378 F.3d at 1257–58 (Barkett, J., dissenting); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 377 F.3d 1275, 1308–09 & 1309 n.49 (11th Cir. 2004) (Barkett, J., dissenting from denial of rehearing en banc).

restricting surrogacy, makes its claim to being a practice deeply rooted in history and tradition far more compelling than virtually any other claimed fundamental right that the Court has considered. Thus, for example, in *Roe*, the Court found that the right to abortion was deeply rooted in history and tradition despite the fact that states began to restrict the right as early as 1821; that by the time the Fourteenth Amendment was ratified, thirty-six states and territories had enacted laws restricting the right; and that in the 1950s a large majority of states prohibited abortion in most instances.³²⁵ In finding the right to procure an abortion to be a protected one, the *Roe* Court focused on the fact that the right was freely exercised at common law at the time the Constitution was adopted and early in the nineteenth century.³²⁶ In contrast, the *Bowers* Court, in rejecting the claimed right, focused on the fact that sodomy was criminalized at common law and by all of the original colonies, by nearly all of the states at the time the Fourteenth Amendment was ratified, by all fifty states until 1961, and by about half of the states at the time of the decision.³²⁷ Similarly, in *Glucksberg*, in rejecting the claimed right, the Court focused on the fact that suicide and assisted suicide were criminalized at common law, by the original colonies, by a majority of the states at the time the Fourteenth Amendment was ratified, and by nearly all states at the time of the decision.³²⁸ Surrogacy, having been unregulated until the late 1980s and then only briefly and by a handful of states, makes the arguments for treating it as a right deeply rooted in history and tradition indisputable given these guideposts.³²⁹

Moreover, as indicated above, in *Lawrence*, the Court held that even if laws are on the books, their non-enforcement is a relevant consideration, since non-enforcement is tantamount to non-interference. Yet as Justice Scalia noted, there was still some enforcement of sodomy laws historically, with his research turning up “203 prosecutions for consensual, adult homosexual sodomy reported in the West Reporting system and official state reporters from the years 1880–1995” and “records of 20 sodomy prosecutions and 4 executions during the colonial

325. See *Roe v. Wade*, 410 U.S. 113, 139–40 (1973); *id.* at 174–76 (Rehnquist, J., dissenting).

326. See *id.* at 140.

327. See *Bowers v. Hardwick*, 478 U.S. 186, 192–94 (1986).

328. See *Washington v. Glucksberg*, 521 U.S. 702, 710–16 (1997).

329. Cf. *Latta v. Otter*, No. 1:13-cv-0482, 2014 WL 1909999, at *13 (D. Idaho May 13, 2014), *aff'd*, 2014 WL 4977682 (9th Cir. Oct. 7, 2014) (noting, in a case involving a challenge to a law prohibiting same-sex marriage, that “[f]ar from a uniform pattern of laws rejecting the practice [found in *Glucksberg*], a fast-growing number of states now recognize that same-sex and opposite-sex marriages are equal”).

period.”³³⁰ In contrast, there is no record whatsoever of *anyone* in the United States ever being prosecuted, let alone convicted, for entering into a surrogacy arrangement. Thus, any weight to be accorded to even this brief period of interference with the right to enter into surrogacy arrangements is negated by the non-enforcement of these laws.

In addition, *Lawrence* indicated that consideration should also be given to contemporary developments that demonstrate an “emerging awareness” that a particular right is worthy of protection.³³¹ In this regard, one could argue that actual decriminalization of surrogacy in some states, coupled with efforts to decriminalize in others, and the various laws enacted to facilitate surrogacy arrangements in states that previously had no law on the subject, collectively demonstrate an “emerging awareness” that surrogacy is a protected right.

Finally, for purposes of recognizing surrogacy as a fundamental right, it is not necessary to distinguish between compensated and uncompensated surrogacy. While it is true that in *Lawrence*, the Court distinguished between the uncompensated sexual activity at issue in the case before it and the compensated sexual activity where prostitution is involved, noting that the case before it “does not involve . . . prostitution,”³³² that does not mean that activities that involve compensation can never fall within the scope of a fundamental right. After all, the rights to an abortion or to contraception do not lose their protected status merely because the person seeking to exercise that right has to pay a third party, such as a doctor or a pharmacist, to procure the abortion or to obtain the contraception.³³³ Rather, the limiting proviso in *Lawrence*, which also referred to a variety of other things that the case did not involve, including minors, coercion, or legal recognition of a relationship,³³⁴ was designed to cabin the scope of *Lawrence* itself and, perhaps, to respond to a Pandora’s Box that Justice Scalia claimed was opened by the decision.³³⁵ Indeed, prostitution stands in stark

330. *Lawrence v. Texas*, 539 U.S. 558, 597 (2003) (Scalia, J., dissenting).

331. *Id.* at 571–72.

332. *See id.* at 578.

333. *See, e.g., Williams v. Att’y Gen. of Alabama*, 378 F.2d 1232, 1242 (11th Cir. 2004) (“For purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item. . . . [P]rohibitions on the *sale* of contraceptives have been analyzed as burdens on the *use* of contraceptives. . . . Because a prohibition on the distribution of sexual devices would burden an individual’s ability to use the devices, our analysis must be framed not simply in terms of whether the Constitution protects a right to *sell* and *buy* sexual devices, but whether it protects a right to *use* such devices.” (emphasis in original)).

334. *See Lawrence*, 539 U.S. at 578.

335. *See id.* at 590 (Scalia, J., dissenting) (“State laws against bigamy, same-sex marriage, adult

contrast to surrogacy—compensated or not—in that the former has a long history of being criminalized in the United States while the latter does not. Prostitution also stands in stark contrast to consensual sodomy in that prostitution laws have been consistently enforced and have remained in force while sodomy laws have been steadily repealed over time and even when on the books have not been enforced. This is not to say that the distinction between compensated and uncompensated surrogacy is irrelevant. Instead, the presence or absence of compensation, as I discuss in the next section, is pertinent in assessing the governmental objectives and the means for accomplishing them when applying strict scrutiny to such laws.

In sum, no matter which of the various approaches to framing and recognizing fundamental rights is employed, laws prohibiting or restricting access to surrogacy infringe upon a fundamental right protected substantively by the Due Process Clause. Yet, to be clear, I am not contending that all of the restrictive laws discussed in Part I of this Article fall within the scope of that right. Rather, only those laws that actually prohibit parties from entering into surrogacy agreements—such as those laws that impose criminal penalties on parties entering into them—or those laws designed to discourage parties from proceeding with surrogacy arrangements—such as the FDA regulations that seek to deter women from serving as surrogates to gay men³³⁶—can be said to infringe upon the broader right to procreate or the narrower right to procreate through the assistance of a surrogate. In contrast, those laws that merely declare such agreements to be unenforceable, I would argue, are outside the scope of these two fundamental rights. This is because the substantive component of the Due Process Clause protects only “negative liberties,” meaning that it only requires that the government leave people alone; it does not require the government to affirmatively

incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision.”).

336. The mere fact that a law does not prohibit the exercise of a fundamental right, but instead seeks to make it more difficult or burdensome to exercise that right, does not insulate it from constitutional attack. Thus, for example, in the abortion context, the Court has held that “[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place *substantial obstacles* in the path of a woman seeking an abortion before the fetus attains viability.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (emphasis added). In the same-sex marriage context, one court has noted that if laws like the Defense of Marriage Act are designed to discourage same-sex couples from having children by making it less desirable, harder, or more expensive to do so, they are subject to challenge on the ground that they infringe upon the fundamental right to procreate. *See Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 341 (D. Conn. 2012).

act.³³⁷ Thus, while challenges to laws criminalizing surrogacy and the FDA regulations further the negative liberty of procreating without governmental interference, challenges to the laws declaring surrogacy contracts to be unenforceable seek to get the government to affirmatively act to enforce such agreements, which would not be consistent with the history of substantive due process.³³⁸ Those laws that present barriers to establishing parentage are somewhat more complex and are treated separately in Part III of this Article.

2. *Application of Strict Scrutiny*

To conclude that surrogacy is either a free-standing fundamental right or a subset of the fundamental right to procreate is not the end of the analysis. As the handful of courts to consider the issue have correctly noted, this does not mean that all laws regarding surrogacy are thereby declared unconstitutional; rather, it means that they must be subjected to strict scrutiny,³³⁹ meaning that the law must be narrowly tailored to further a compelling governmental interest.³⁴⁰

With respect to laws criminalizing or otherwise prohibiting compensated surrogacy, courts have identified four arguably compelling

337. See *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 194–99 (1989); *Sandage v. Bd. of Comm'rs of Vanderburgh Cnty.*, 548 F.3d 595, 596–97 (7th Cir. 2008); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 815, 817 (11th Cir. 2004); Cain, *supra* note 166, at 37–40.

338. This is not to say that the laws declaring surrogacy contracts unenforceable are not subject to constitutional challenge on some other ground. For example, as indicated in Part I, some of the laws render such agreements enforceable only when entered into by an opposite-sex couple, not when entered into by a same-sex couple. Such laws discriminate on the basis of sexual orientation, and are thus subject to a class-based equal protection challenge using the as-yet undetermined “heightened” level of scrutiny that the Court appears to apply to such classifications. See *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 479–84 (9th Cir. 2014). Arguments that same-sex parents are inferior to opposite-sex ones have been rejected in recent litigation regarding same-sex marriage, and thus would likely be rejected as a basis for justifying such laws. See *Bostic v. Schaefer*, 760 F.3d 352, 383 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014); *Geiger v. Kitzhaber*, Nos. 6:13-cv-0184 & 6:13-cv-02256-MC, 2014 WL 2054264, at *12 (D. Or. May 19, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 651, 653 (W.D. Tex. 2014); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 319 (D. Conn. 2012).

339. See *Doe v. Attorney Gen.*, 487 N.W.2d 484, 486 (Mich. App. 1992).

340. See *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). Although the Court has applied a lower level of scrutiny to laws restricting the right to an abortion, and although, as discussed above, *Lawrence* may be ushering a new mid-tier level of scrutiny for some types of rights protected substantively by the Due Process Clause, the default rule remains, as articulated in *Glucksberg*, that strict scrutiny applies to infringements upon fundamental rights. In any event, the Court's application of intermediate scrutiny in recent years is not significantly different from strict scrutiny. See generally *United States v. Virginia*, 518 U.S. 515 (1996); *id.* at 570–74, 596 (Scalia, J., dissenting).

governmental interests: first, protecting women—particularly lower-income women—from exploitation;³⁴¹ second, preventing children from becoming mere commodities;³⁴² third, preventing future emotional harm to children who later learn they were born as the result of a commercial transaction;³⁴³ and fourth, avoiding the emotional disruption to a surrogate that results from her being separated from the child she gives birth to.³⁴⁴

To be sure, all of these interests sound like perfectly reasonable ones for the government to be concerned about, and one could easily speculate that, at least in some instances, compensated surrogacy might create some of the above enumerated risks. And if one were applying traditional rational basis review, such “rational speculation unsupported by evidence or empirical data” would suffice.³⁴⁵ Yet where, as here, strict scrutiny is involved, reasoned speculation does not suffice; there must be evidence that the law will actually further these interests.³⁴⁶ Yet as some courts have noted, there is no empirical evidence showing that surrogacy arrangements result in the exploitation of poor women or the commodification of children.³⁴⁷

Moreover, even if prohibiting surrogacy will, in some instances, further these interests, a ban on *all* surrogacy arrangements, regardless of the presence or absence of these dangers, is too over-inclusive to satisfy

341. *See Doe*, 487 N.W.2d at 487.

342. *See Soos v. Superior Court of Maricopa*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (Gerber, J., specially concurring); *Doe*, 487 N.W.2d at 486–87.

343. *See Doe*, 487 N.W.2d at 487.

344. *See Soos*, 897 P.2d at 1361 (Gerber, J., specially concurring).

345. *F.C.C. v. Beach Commc'ns*, 508 U.S. 307, 315 (1993).

346. *See Bernal v. Fainter*, 467 U.S. 216, 227–28 (1984); *Kitchen v. Herbert*, 755 F.3d 1193, 1218–19, 1222–23 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014). Similarly, in the abortion context, in applying the undue burden test, several courts have held that when an abortion restriction is justified on the ground of furthering maternal health, the strength of those grounds must be assessed—by resort to evidence—and balanced against the burden on women seeking an abortion. *See Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 911–14 (9th Cir. 2014); *Planned Parenthood of Wis. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013). *But see Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 590, 593–96 (5th Cir. 2014) (holding that the strength of the regulation’s rationale plays no role in the undue burden analysis); *Planned Parenthood of Wis., Inc.*, 738 F.3d at 799–800 (Manion, J., concurring in part and in the judgment) (same).

347. *See J.R. v. Utah*, 261 F. Supp. 2d 1268, 1288–89 (D. Utah 2002); *Johnson v. Calvert*, 851 P.2d 776, 785 (Cal. 1993). This is not to say that a woman’s financial state in no way impacts her decision to serve as a surrogate, but as the *Calvert* Court explained, there is “no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment.” *Calvert*, 851 P.2d at 785.

strict scrutiny's narrow tailoring requirement. Thus, for example, if one is concerned about the risk that poor women might be exploited by surrogacy arrangements, there are more fine-tuned ways short of an outright ban on compensated surrogacy to further that interest. One such alternative would be court preapproval of surrogacy contracts in which the judge can make an individualized determination about the possibility of exploitation.³⁴⁸ This distinction between a blunt and a fine-tuned approach is akin to the way the Court has applied strict scrutiny in its race-based affirmative action cases and its cases involving the application of presumptions regarding parental fitness. The Court has held that race-based affirmative action grounded in diversity requires an individualized assessment of each applicant rather than blunt tools such as quotas,³⁴⁹ and that a state cannot apply a blunt presumption—such as that unwed fathers are presumed to be unfit to raise their children—to terminate parental custody rights, but must instead hold an individualized hearing on parental fitness.³⁵⁰

Moreover, laws that permit uncompensated surrogacy while prohibiting compensated surrogacy do not necessarily avoid the risk of exploitation. After all, when one family member is in need of the assistance of a surrogate, family pressure could easily be placed on a female family member in a position to serve as their uncompensated surrogate. In contrast, an unrelated surrogate in an arm's length relationship with intended parents is in a much better position to walk away from a situation that she feels uncomfortable about.³⁵¹

If one is concerned about the commodification of children and the emotional harms that surrogacy could cause such children in the future, one can enact restrictions calculated to further that specific goal, such as laws that prohibit variable compensation for an egg donor's traits or that impose caps on compensation for egg donors and surrogates, or laws that

348. See *J.R.*, 261 F. Supp. 2d at 1288 n.34.

349. See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

350. See *Stanley v. Illinois*, 405 U.S. 645, 646–47, 654–58 (1972). In litigation regarding the right to same-sex marriage and parenting, lower courts have relied on *Stanley* for the proposition that where heightened scrutiny is involved, courts cannot rely on broad generalizations about the fitness of gays and lesbians to parent. See *Kitchen v. Herbert*, 755 F.3d 1193, 1225–26 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 651, 654 (W.D. Tex. 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 479 (E.D. Va. 2014); *In re Adoption of Doe*, 2008 WL 5070056, at *32–*33 (Fla. Cir. Ct. Aug. 29, 2008); *Florida Dep't of Health & Rehabilitative Servs. v. Cox*, 627 So. 2d 1210, 1227–29 (Fla. Dist. Ct. App. 1993), *approved in part, quashed in part*, 656 So. 2d 902 (1995).

351. See, e.g., Tim Barlass, *When Altruistic Surrogacy Goes Wrong*, SYDNEY MORNING HERALD (Aug. 10, 2014), <http://www.smh.com.au/national/when-altruistic-surrogacy-goes-wrong-20140809-101bo5.html>.

prohibit sex-selective embryo implantation. If one is concerned about the emotional harm to a surrogate of being separated from the child, mandatory psychological screening of the sort present in some of the statutes examined in Part I is a more fine-tuned way to minimize those risks. Additionally, a state could distinguish between traditional and gestational surrogacy, for the risks of such harm seem far more acute for the former than the latter.

For similar reasons, the FDA regulations declaring any man who has had sex with another man in the past five years to be an ineligible donor are too blunt a tool to survive strict scrutiny. The governmental interest—preventing women from contracting HIV and other sexually transmitted diseases—is easily a compelling one. Yet there are far more fine-tuned ways to further this objective, such as requiring the donor’s semen sample to be frozen and testing the donor for HIV and other sexually transmitted diseases several months later, when the risk of a false negative is no longer a realistic risk.³⁵² Indeed, the FDA regulations, targeted against a specific group, gay men, raise in a very real way the eugenics concerns that the *Skinner* Court invoked for applying strict scrutiny to laws infringing upon the right to procreate.³⁵³

Moreover, for two additional reasons, those anti-surrogacy statutes imposing *criminal* liability on any actor are particularly vulnerable when strict scrutiny is applied. First, in virtually every major case in the Court’s fundamental rights line of cases³⁵⁴—as well as in the Court’s interracial marriage and cohabitation cases³⁵⁵—the Court struck down laws that imposed criminal sanctions. In these cases the Court, or at least individual Justices, often noted that the criminal nature of the laws made

352. See John G. Culhane, *Bad Science, Worse Policy: The Exclusion of Gay Males from Donor Pools*, 24 ST. LOUIS U. PUB. L. REV. 129, 137–44 (2005).

353. See *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535, 541 (1942); Luke A. Boso, Comment, *The Unjust Exclusion of Gay Sperm Donors: Litigation Strategies to End Discrimination in the Gene Pool*, 110 W. VA. L. REV. 843, 872–73 (2008); Alissa Stockage, Note, *Regulating Multiple Birth Pregnancies: Comparing the United Kingdom’s Comprehensive Regulatory Scheme with the United States’ Progressive, Intimate Decision-Making Approach*, 18 MICH. ST. J. INT’L L. 559, 583 (2010).

354. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner*, 316 U.S. 535; *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

355. See *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964). Although the portions of these two decisions in which the Court made note of the laws’ criminal sanctions were formally decided on equal protection grounds, they were subsequently characterized by the Court as being part of the Court’s fundamental rights line of cases.

them particularly vulnerable.³⁵⁶ Indeed, in recent challenges to laws prohibiting same-sex marriage or adoption, or laws prohibiting gays from serving in the military, lower court judges have noted the civil nature of these laws in distinguishing them from the Court's fundamental rights cases.³⁵⁷

Second, as indicated above, while some of the anti-surrogacy laws impose criminal liability on intermediaries who help facilitate surrogacy contracts, others go further and impose criminal liability on those entering into the surrogacy contract; in other words, the surrogate and the intended parents. Drawing an analogy to the abortion context, in which the Court applies not strict scrutiny but the more relaxed "undue burden" standard, this would be the equivalent of imposing criminal liability not only on the doctor who performs an outlawed abortion, but also on the pregnant woman who has the abortion performed on her. Yet, neither the Supreme Court nor any lower court has ever upheld an abortion law that imposed criminal liability on the woman seeking an abortion, but only on third parties who perform or facilitate abortions. Indeed, a lower court recently struck down an abortion law for its unprecedented criminalization of the conduct of the woman procuring the abortion.³⁵⁸

In sum, legislatures are not prohibited from enacting sensible regulatory schemes in an effort to protect would-be surrogates and the children born to them. But they cannot further these interests by using the blunt tool of prohibition, particularly when coupled with criminal sanctions. Rather, they must enact fine-tuned and highly individualized regulations designed to minimize infringing upon the fundamental right to procreate.

III. THE RIGHT TO ESTABLISH LEGAL PARENTAGE OF CHILDREN BORN VIA SURROGACY

Even in states that have not enacted laws prohibiting people from entering into surrogacy contracts, there remain other potential barriers to

356. See *Lawrence*, 539 U.S. at 575–76 (2003); *id.* at 581–82 (O'Connor, J., concurring); *Loving*, 388 U.S. at 11 (1967); *id.* at 13 (Stewart, J., concurring); *McLaughlin*, 379 U.S. at 192 (1964); *id.* at 198 (Stewart, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting).

357. See *Witt v. Dep't of the Air Force*, 548 F.3d 1264, 1270 (9th Cir. 2008) (en banc) (O'Scannlain, J., dissenting); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004); *Hernandez v. Robles*, 855 N.E.2d 1, 16–18 (N.Y. 2006); *Andersen v. King Cnty.*, 158 Wash. 2d 1, 51–52, 138 P.3d 963, 990 (Wash. 2006).

358. See *McCormack v. Hiedeman*, 694 F.3d 1004, 1010–14 (9th Cir. 2012); *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1144–45 (D. Idaho 2013).

becoming a parent via surrogacy. While these states do not stand in the way of intended parents' right to procreate—if by procreation one literally means creating human life using your genetic material—they do stand in the way of the intended parents' ability to establish legal parentage of the children produced as a result of surrogacy. In some states, this has been accomplished by laws specifically declaring that a surrogate mother is the legal mother of any child born to her and that her husband—if she is married—is the legal father.³⁵⁹ Other statutory schemes, while not specific to surrogacy, provide that maternity is established by giving birth to a child and that a woman's husband, if the woman is married, is presumed to be the legal father.³⁶⁰ Moreover, in some of these statutory regimes, these presumptions can only be challenged—if at all—by the woman, her husband, and perhaps the child itself, not by third persons.³⁶¹ These laws thus stand in the way of intended parents establishing legal parentage of children genetically related to one or both of them—and not genetically related to the surrogate or her husband—either if there is a dispute between the intended parents and the surrogate³⁶² or, in some instances, even if the surrogate supports the efforts of the intended parents to establish parentage.³⁶³

The question thus arises, is there a fundamental right not only to procreate via surrogacy, but also to have one's legal parentage to the children born via surrogacy established by the state? There are a number of ways to argue such a right. The first is to contend that establishment of legal parentage is part and parcel of the fundamental right to procreate, and therefore statutory schemes that prevent intended parents who are also the genetic parents from establishing legal parentage infringe upon that right. The second is to argue that establishment of legal parentage is part of a separate fundamental right—the right to care, custody, and control of one's children. And the third is to make a class-based equal protection argument, either from the standpoint of the intended parents or the children born of surrogacy arrangements. I consider each of these arguments in turn.

359. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-218(B)–(C) (Westlaw through 2d Reg. & Special Sess. 2014); N.D. CENT. CODE ANN. § 14-18-05 (West, Westlaw through 2013 Reg. Sess.).

360. *See, e.g.*, LA. CIV. CODE ANN. art. 184–185 (West, Westlaw through 2013 Reg. Sess.).

361. *See, e.g.*, LA. CIV. CODE ANN. art. 187, 191, 197 (West, Westlaw through 2013 Reg. Sess.).

362. *See, e.g.*, *Soos v. Superior Court of Maricopa*, 897 P.2d 1356, 1359–61 (Ariz. Ct. App. 1994).

363. *See, e.g.*, *J.R. v. Utah*, 261 F. Supp. 2d 1268 (D. Utah 2002).

A. *Fundamental Right to Establish Legal Parentage*

A few courts have interpreted the establishment of legal parentage as part and parcel of the fundamental right to procreate, and have thus held that statutory schemes that prevent intended parents who are also the genetic parents from establishing legal parentage infringe upon that right.³⁶⁴

On the one hand, such an interpretation makes sense. The fundamental right to procreate would seem to be of little utility if one could not have legal parentage, and therefore custody of, the children that result from the act of procreation, whether done through natural means or via assisted reproduction. Moreover, just as the Court in *Griswold* held that unenumerated rights can be found in the penumbras of the Bill of Rights and that these penumbral rights are “necessary in making the express guarantees fully meaningful,”³⁶⁵ so too the Court has recognized that unenumerated rights themselves have penumbras. Thus, for example, in *Carey v. Population Services International*,³⁶⁶ the Court held that the right to *use* contraceptives recognized in *Griswold* includes a penumbral right to the purchase and sale of the same free of governmental interference.³⁶⁷

There is, however, a problem with such an argument, even if as a general matter it is correct to argue that unenumerated rights have penumbral extensions. As indicated in Part II, the substantive component of the Due Process Clause protects only “negative liberties,” meaning that it only requires that the government leave people alone, but does not require the government to affirmatively act.³⁶⁸ In a case such as *Carey*,

364. Typically, these courts do not cite the right to procreate, standing alone, but rather appear to mix the precedents involving the right to procreate with the right to care, custody, and control of one’s children. See *T.V. v. New York Dep’t of Health*, 929 N.Y.S.2d 139, 150–53 (N.Y. App. Div. 2011); *J.R.*, 261 F. Supp. 2d at 1275–78; *Belsito v. Clark*, 644 N.E.2d 760, 766 (Ohio Ct. Com. Pl. 1994); *Soos*, 897 P.2d at 1359–61.

365. *Griswold v. Connecticut*, 381 U.S. 479, 483–84 (1965).

366. 431 U.S. 678 (1977).

367. See *id.* at 687–88; accord *Williams v. Attorney Gen. of Ala.*, 378 F.2d 1232, 1242 (11th Cir. 2004) (“For purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item. . . . [P]rohibitions on the *sale* of contraceptives have been analyzed as burdens on the *use* of contraceptives. . . . Because a prohibition on the distribution of sexual devices would burden an individual’s ability to use the devices, our analysis must be framed not simply in terms of whether the Constitution protects a right to *sell* and *buy* sexual devices, but whether it protects a right to *use* such devices.” (emphasis in original)).

368. See *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 194–99 (1989); *Sandage v. Bd. of Comm’rs of Vanderburgh Cnty.*, 548 F.3d 595, 596–97 (7th Cir. 2008); *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 815, 817 (11th Cir. 2004); Cain, *supra* note 166, at 37–40.

enforcing both the “core” right at issue—the right to use contraceptives—and the penumbral right—the right to purchase and sell the same—involve negative liberties in that the government is not being asked to affirmatively act, but merely to refrain from interfering with the exercise of the underlying rights. In contrast, holding that the fundamental right to procreate includes a penumbral right to have the government declare the legal parentage of the intended parents *is* requiring the government to affirmatively act, akin to arguing that the government must also enforce surrogacy contracts in the first instance. In the contraception or abortion contexts, this would be the equivalent of holding that those fundamental rights include a penumbral right to have the government pay for contraception and abortions, which the Court has clearly rejected.³⁶⁹

A more doctrinally sound way to challenge the constitutionality of these statutory schemes on fundamental rights grounds is to invoke the related but distinct fundamental right to care, custody, and control of one’s children. This long-standing right was first established during the *Lochner* era in a pair of cases that predate *Skinner* and that have gone on to serve as the foundation for most modern substantive due process jurisprudence.³⁷⁰ First, in *Meyer v. Nebraska*,³⁷¹ the Court declared unconstitutional a state law making it a crime to teach any subject prior to the eighth grade in any language other than English, holding that the Due Process Clause protects the right “to marry, establish a home and bring up children,”³⁷² and that the law at issue interfered with this right.³⁷³ Two years later, in *Pierce v. Society of Sisters*,³⁷⁴ the Court struck down a state law that required all children between eight and sixteen years of age to attend public schools (as contrasted with private schools), concluding that “[u]nder the doctrine of *Meyer v. Nebraska*,” the law “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their

369. See *DeShaney*, 489 U.S. at 196 (citing *McRae* for the more general proposition that “the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual”); *Harris v. McRae*, 448 U.S. 297, 317–18 (1980).

370. See *Washington v. Glucksberg*, 521 U.S. 702, 761–63 (1997) (Souter, J., concurring) (providing a historical overview of the development of the Court’s modern substantive due process line of cases).

371. 262 U.S. 390 (1923).

372. *Id.* at 399.

373. *Id.* at 402–03.

374. 268 U.S. 510 (1925).

control.”³⁷⁵ In *Troxel v. Granville*³⁷⁶—a case involving a challenge to a Washington State statute that allowed any nonparent third party to petition for visitation rights—the Supreme Court recently reaffirmed the continued vitality of these early precedents. In *Troxel*, the Court cited *Meyer* and *Pierce* and held that “[t]he liberty interest at issue in [the] case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”³⁷⁷

In its decisions summarizing the rights recognized as fundamental under the Due Process Clause, the Court itself has treated the rights to procreate and to care, custody, and control of one’s children as independent rights.³⁷⁸ Moreover, lower courts considering substantive due process challenges to statutory schemes that stand in the way of intended parents establishing legal parentage have distinguished the two rights from one another,³⁷⁹ and have held that such statutory schemes interfere with the right to care, custody, and control of one’s children.³⁸⁰

The distinction is not merely semantic, but converts what would otherwise appear to be a demand that the government affirmatively act into a demand for governmental non-interference, which aligns the relief sought with the theoretical limitations of substantive due process. Here, the underlying fundamental right is the right to care, custody, and control of one’s children free of governmental interference. Yet in these cases, the government—by enforcing legal presumptions that make the surrogate and her husband the child’s legal parents—is interfering with the intended parents’ fundamental right to care, custody, and control of their children.

Assuming that it is sound to view this as part of the fundamental right to care, custody, and control of one’s children, the application of these presumptions would likely fail strict scrutiny for reasons similar to those examined in the previous section, specifically, that the presumptions are too blunt a tool to further any conceivable governmental interests. In justifying the application of these presumptions to deny intended parents who are genetically related to children born to a gestational surrogate the

375. *Id.* at 534–35.

376. 530 U.S. 57 (2000).

377. *Id.* at 65.

378. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (referring in the disjunctive to “[t]he rights to conceive and to raise one’s children”); accord *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990).

379. See, e.g., *In re Baby M*, 537 A.2d 1227, 1253–54 (N.J. 1988).

380. See *D.M.T. v. T.M.H.*, 129 So. 3d 320, 335–39 (Fla. 2013); *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1275–78, 1293–98 (D. Utah 2002).

ability to establish legal parentage, two governmental interests have typically been invoked: first, that surrogacy agreements result in a custody decision that may not be in the best interests of the child; and second, that such a presumption protects the surrogate's emotional well-being by protecting her interest in a relationship with the child.³⁸¹ Yet courts have correctly rejected these justifications, noting that conclusive presumptions that the surrogate and her husband are the legal parents—in lieu of an individual hearing to determine what custody arrangement is in the child's best interest or the impact on a surrogate's well-being—fail the narrow tailoring requirement of strict scrutiny.³⁸²

There is, however, a serious hurdle to overcome in arguing that the fundamental right to care, custody, and control of one's genetic children encompasses a right to establish that parentage in the face of these statutory presumptions. The presumption that a woman who gives birth to a child is the child's mother,³⁸³ as well as the presumption that her husband is the child's father, have a longstanding historical pedigree at common law as well as in historical U.S. practice.³⁸⁴

Indeed, as indicated in Part II of this Article, the U.S. Supreme Court, in *Michael H. v. Gerald D.*,³⁸⁵ rejected a substantive due process challenge, brought by a man purporting to be the natural father of a child, to a state law that conclusively presumed a woman's husband to be the father of a child, with only a limited time period for either the husband or wife, but not third persons, to use blood tests to challenge the presumption.³⁸⁶ In so holding, the Court relied on the longstanding historical pedigree of the presumption and the fact that it could not historically be challenged by anyone other than the husband or wife (and in many cases, not even by them).³⁸⁷ The natural father invoked a series of cases that grew out of the Court's *Meyer* and *Pierce* line of cases in which the Court held that the natural father of a child born to an unwed mother has a right to establish legal parentage to that child.³⁸⁸ In that line

381. *See J.R.*, 261 F. Supp. 2d at 1284–88, 1284 n.24, 1288 n.34 (D. Utah 2002).

382. *See id.* (considering various rationales for such presumptions and demonstrating that such presumptions are not narrowly tailored to further those rationales).

383. *See In re F.T.R.*, 833 N.W.2d 634, 644 (Wis. 2013); *D.M.T.*, 129 So. 3d at 355–56 (Polston, C.J., dissenting); *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 679 (N.Y. Sur. Ct. 2009); *In re C.K.G.*, 173 S.W.3d 714, 728 (Tenn. 2005); *Barabas v. Rogers*, 868 S.W.2d 283, 286 (Tenn. Ct. App. 2003).

384. *See Michael H. v. Gerald D.*, 491 U.S. 110, 124–26 (1989).

385. 491 U.S. 110 (1989).

386. *See id.* at 124–27.

387. *See id.*

388. *See id.* at 123, 128–29.

of cases, the Court held that by virtue of his biological link to the child, such a father has an inchoate right that develops into a full-fledged fundamental due process right to care, custody, and control if he takes affirmative steps to develop that relationship³⁸⁹ (a line of cases that would certainly be directly on point in the situation in which an intended genetic father claimed parentage to a child born to an *unwed* surrogate mother). The Court rejected the purported natural father's reliance on this line of cases,³⁹⁰ treating this in effect as a historical gloss on the scope of the fundamental right to care, custody, and control of one's children. In other words, because as a matter of historical practice, the government has always interfered with the right of natural fathers in this circumstance, the right to challenge such laws cannot be said to be a fundamental right deeply rooted in history and tradition.

Michael H. is a potentially insurmountable obstacle in trying to argue that intended parents have a fundamental right to establish legal parentage. True, the *Michael H.* case took place in the context of an adulterous affair and thus the presumption served its historic purposes in promoting marital harmony and the legitimization of children,³⁹¹ neither of which would likely be implicated in the surrogacy context. Yet, while that distinction might be relevant had the Court held that the fundamental right to care, custody, and control was implicated but that the presumption furthered compelling governmental interests, that is not what the Court held. Rather, the Court held that the longstanding existence of this presumption meant that the right to care, custody, and control was not even implicated in the case, thus allowing the government to pursue any rational objectives.³⁹²

However, if, as was considered in Part II, *Lawrence* in fact refined the *Glucksberg* inquiry to permit a consideration not merely of longstanding history and tradition, but also more contemporary legal developments, there is a strong basis for concluding that in the surrogacy context, there is an "emerging awareness" that the intended parents should be able to establish their legal parentage. Recall that in *Lawrence*, the Court reasoned that "our laws and traditions in the past half century are of most relevance here," which the Court described as showing "an

389. See *Lehr v. Robertson*, 463 U.S. 248, 256–62 (1983); *Caban v. Mohammed*, 441 U.S. 380, 389, 397 (1979) (decided on equal protection grounds but subsequently recharacterized as due process); *Quilloin v. Walcott*, 434 U.S. 246, 254–55 (1978); *Stanley v. Illinois*, 405 U.S. 645, 651 (1961).

390. See *Michael H.*, 491 U.S. at 123, 128–29.

391. See *id.* at 124–25.

392. See *id.* at 129–32.

emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”³⁹³ The Court also held that “[t]his emerging recognition should have been apparent when *Bowers* was decided.”³⁹⁴ The Court described this “emerging awareness” as consisting of: (1) the 1955 Model Penal Code’s recommendation that there be no criminal penalties for sexual relations conducted in private; (2) that between that point in time and the decision in *Bowers*, half of the states repealed their criminal penalties for consensual sodomy; (3) that states with sodomy laws on the books were not enforcing them; and (4) that sodomy laws were repealed in the United Kingdom and that the European Court of Human Rights declared such laws to violate the European Convention on Human Rights.³⁹⁵

In a variety of ways, contemporary legal developments regarding the establishment of legal parentage in the surrogacy context track the guideposts identified in *Lawrence* as constituting an “emerging awareness.”³⁹⁶ The 2002 version of the Uniform Parentage Act similarly contains provisions designed to deal with the possibility that a child will be born to a gestational carrier, and accordingly provides for the intended parents, rather than the surrogate and her husband, to be recognized as the legal parents of the child.³⁹⁷ At least twenty-five percent of the states now have provisions in their parentage statutes indicating that where a surrogacy arrangement is involved, the woman who gives birth is not the legal mother and her husband is not the legal father, but instead the intended parents are the legal parents.³⁹⁸ At least an equal number, while not enacting statutory provisions specific to

393. *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003).

394. *Id.* at 572.

395. *See id.* at 571–73.

396. *Id.* at 572.

397. *See* Uniform Parentage Act, §§ 201, 801–809, 2002 Wash. Sess. Laws 3, 11–12, 68–78 (2002).

398. *See* ARK. CODE ANN. § 9-10-201 (West, Westlaw through 2014 2d Extraordinary Sess.); CAL. FAM. CODE § 7962(f)(1) (West, Westlaw through 2014 Reg. Sess. ch. 531); CONN. GEN. STAT. ANN. § 7-48a (Westlaw through 2014 Reg. Sess.); DEL. CODE ANN. tit. 13, § 8-804 (West, Westlaw through 2014 ch. 428); FLA. STAT. ANN. § 742.16(7) (West, Westlaw through 2014 Sp. “A” Sess.); 750 ILL. COMP. STAT. ANN. 47 / 15 (West, Westlaw through 2014 Reg. Sess. Act 98-925); N.H. REV. STAT. ANN. §§ 168-B:5, 168-B:7 (West, Westlaw through ch. 330 of 2014 Reg. Sess.); NEV. REV. STAT. ANN. § 126.670 (West, Westlaw through 2013 Reg. & Special Sess.); N.D. CENT. CODE ANN. § 14-18-08 (West, Westlaw through 2013 Reg. Sess.); TEX. FAM. CODE ANN. § 160.753 (West, Westlaw through 3d Called Sess. 2013); UTAH CODE ANN. § 78B-15-807 (West, Westlaw through 2014 Gen. Sess.); VA. CODE ANN. § 20-158(D) (West, Westlaw through 2014 Reg. Sess. & 2014 Special Sess.); WASH. REV. CODE § 26.26.101(1), (8) (2012).

surrogacy, have enacted more general provisions for challenging the presumptions of legal maternity³⁹⁹ and paternity⁴⁰⁰ that are well-suited for the surrogacy context, some of which allow third parties to bring the contest.⁴⁰¹ Thus, the number of states that have done away with the rigid common law presumptions has approached at least the fifty percent mark, the percentage of states that had repealed their sodomy laws at the time of *Bowers* and that the *Lawrence* Court indicated made it “apparent” that there was an “emerging awareness” that the right was a protected one.⁴⁰² Finally, in 2014, the European Court of Human Rights declared that even though France did not need to permit surrogacy within the country, France’s refusal to recognize French intended parents as the legal parents of children born outside of France to surrogate mothers violated the European Convention on Human Rights.⁴⁰³

In sum, although the ability of intended parents to establish legal parentage of children born to a surrogate may not be a component of the fundamental right to procreate, it is potentially a component of the fundamental right to care, custody, and control of one’s children. However, this latter argument is sound only to the extent that *Lawrence* in fact modified the Court’s pre-existing framework for recognizing fundamental rights so as to focus not only on history and tradition, but also contemporary legal trends.

Moreover, the due process claim is likely of greatest utility in the gestational surrogacy scenario in which the intended parents are both the genetic parents. Where one of the intended parents is not a genetic parent—either because a traditional surrogate is involved or a third party

399. See, e.g., COLO. REV. STAT. ANN. § 19-4-122 (West, Westlaw through 2014 2d Reg. Sess.); MAINE REV. STAT. ANN. tit. 22, § 2761(3-A) (West, Westlaw through 2014 Reg. Sess.); MONT. CODE ANN. § 50-15-221 (West, Westlaw through 2013 Sess.); OHIO REV. CODE ANN. § 3111.17 (West, Westlaw through 2013–2014 legislation); OR. REV. STAT. ANN. § 432.088(8) (West, Westlaw through 2014 Reg. Sess.); S.D. CODIFIED LAWS § 34-25-16.7 (West, Westlaw through 2014 Reg. Sess.); W.V. CODE ANN. § 16-5-10(e) (West, Westlaw through 2014 2d Extraordinary Sess.); WYO. STAT. ANN. § 35-1-410(d) (West, Westlaw through 2014 Budget Sess.); P.R. LAWS ANN. tit. 31, § 463 (Westlaw through 2011) .

400. See, e.g., OHIO REV. CODE ANN. § 3111.04; OR. REV. CODE ANN. § 432.088(9); S.D. CODIFIED LAWS § 34-25-13.1.

401. See, e.g., COLO. REV. STAT. ANN. § 19-4-122; OHIO REV. CODE ANN. §§ 3111.04, 3111.17; S.D. CODIFIED LAWS § 25-8-57 (West, Westlaw through 2014 Reg. Sess.); P.R. LAWS ANN. tit. 31, § 463.

402. *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100, 1107–08 (E.D. Cal. 2012); *Marin Alliance for Med. Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1157 (N.D. Cal. 2011).

403. See *Mennesson v. France*, App. No. 65192/11, (Eur. Ct. H.R. June 26, 2014), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145389>; *Labassee v. France*, App. No. 65941/11 (Eur. Ct. H.R. June 26, 2014), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145180>.

egg donor—courts have held that the non-genetic intended parent’s fundamental rights are not at stake since those rights, at least at the outset, are not grounded in genetic parentage.⁴⁰⁴ Moreover, much of the “emerging awareness” discussed above with respect to statutory developments has involved primarily gestational, not traditional, surrogacy.⁴⁰⁵

That is not to say that it would be of no use in other scenarios. If, for example, a same-sex male couple works with a gestational surrogate, the due process claim would result in a declaration of the genetic father’s legal parentage and the surrogate’s non-maternity, thus leaving the child with one legal parent, the genetic father, who could then consent to adoption by his same-sex partner.

B. *The Backstop of Equal Protection*

It is conceivable that if a state law provided *both* that a surrogate is conclusively presumed to be the legal mother of a child she gives birth to *and* that her husband, if she is married, is conclusively presumed to be the child’s father, that a court would reject a substantive due process challenge to such a statutory scheme. Given the uncertain effect that *Lawrence* had on *Glucksberg*’s fundamental rights methodology, a court might very well hold, following the logic of *Michael H.*, that there is no substantive due process right for the child’s genetic parents to challenge those presumptions and establish parentage.

However, it is rare today for a state to rigidly apply both the presumptions of maternity and paternity. In particular, in recent decades, several states, while maintaining their conclusive presumptions that the woman who gives birth to a child is its mother, have made the presumption that her husband is the father a rebuttable presumption that can be challenged by a person alleging to be the genetic father.⁴⁰⁶ Thus,

404. See *D.M.T. v. T.M.H.*, 129 So. 3d 320, 339 (Fla. 2013); *In re T.J.S.*, 16 A.3d 386, 392 (N.J. Super. App. Div. 2011); *Johnson v. Calvert*, 851 P.2d 776, 785–86 (Cal. 1993); *In re Baby M*, 537 A.2d 1227, 1253–54 (N.J. 1988). This is not to say that the non-biological intended parent never obtains this fundamental right vis-à-vis the child, but until his or her legal parentage is established via adoption or by other means, it is the genetic parents whose right to care, custody, and control is at issue.

405. See, e.g., DEL. CODE ANN. tit. 13, §§ 8-801 to 8-813 (providing a statutory scheme for recognizing gestational surrogacy agreements while leaving traditional surrogacy agreements unregulated); 750 ILL. COMP. STAT. ANN. 47 / 1–75 (same); NEV. REV. STAT. ANN. §§ 126.710–126.810 (same); N.H. REV. STAT. ANN. §§ 168-B:1 to 168-B:21 (same); UTAH CODE ANN. §§ 78b-15-801 to 78b-15-809 (same).

406. See Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 622–23 (2009).

in these states, when a child is born to a surrogate, the law is such that the intended father can establish his parentage while the intended mother cannot, despite the fact that both of them are the genetic parents. In these circumstances, courts have held that it violates the Equal Protection Clause to treat men and women differently in this way.⁴⁰⁷ Thus, even if due process does not require a state to soften its rigid presumptions of maternity and paternity, once it relaxes one of those presumptions, the Equal Protection Clause requires it to equally relax the other, which has the effect of allowing intended parents to establish legal parentage.

Where the situation involves same-sex rather than opposite-sex parents, there are a few ways in which the equal protection doctrine can similarly be invoked to require the state to allow them to establish their legal parentage. First, where same-sex female couples are involved, it is sometimes the case that one woman will serve as the gestational mother using the eggs of her partner.⁴⁰⁸ In this circumstance, courts have held that to the extent the state allows a genetic father to file a declaration of paternity, it is sex-based discrimination in violation of the Equal Protection Clause not to likewise allow the gestating mother's female partner to file a declaration of maternity, resulting in both women being treated as legal mothers.⁴⁰⁹

Second, to the extent that a state's statutory scheme permits opposite-sex couples to establish legal parentage of a child born to a surrogate even when one of them is not genetically related to the child but denies that right to same-sex couples, such a law is subject to challenge on the ground that it discriminates against the latter on the basis of sexual orientation.⁴¹⁰ It would thus be subject to what appears to be an evolving form of "heightened" scrutiny that the Court has applied to such classifications.⁴¹¹

407. These courts alternatively apply either the intermediate scrutiny associated with sex discrimination or the strict scrutiny on the theory that the fundamental rights to procreate or to care, custody, and control are involved. *See* J.R. v. Utah, 261 F. Supp. 2d 1268, 1270, 1294 (D. Utah 2002); T.V. v. N.Y. Dep't of Health, 929 N.Y.S.2d 139, 150–53 (N.Y. App. Div. 2011); Soos v. Superior Court of Maricopa, 897 P.2d 1356, 1359–61 (Ariz. Ct. App. 1994). *But see* *In re* T.J.S., 16 A.3d at 391–97 (applying heightened scrutiny but concluding that it satisfies that scrutiny). In some instances, courts have so interpreted their statutory schemes to avoid the constitutional issue. *See In re* Paternity and Maternity of Infant R., 922 N.E.2d 59, 60–62, 62 n.4 (Ind. App. 2010); *In re* Roberto d.B., 923 A.2d 115, 119–26 (Md. 2007).

408. *See, e.g.,* K.M. v. E.G., 117 P.3d 673, 675 (Cal. 2005).

409. *See In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 689–90 (N.Y. Sur. Ct. 2009).

410. *See D.M.T.*, 129 So. 3d at 341–44 (citing *In re* Adoption of X.X.G., 45 So. 3d 79, 92 (Fla. Dist. Ct. App. 2010)).

411. *See* *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 479–84 (9th Cir. 2014).

Finally, the discrimination can be litigated from the standpoint of the children whose interest in having their legal parentage established. The Supreme Court has applied intermediate scrutiny to laws that discriminate on the basis of illegitimacy and that discriminate against the children of illegal aliens, reasoning that it is unjust for children to suffer legal disadvantages for a status over which they have no control.⁴¹² And by analogy, children of same-sex couples have no control over their status as such, and thus discrimination against them should likewise be subject to heightened scrutiny, even if discrimination against the parents based on sexual orientation is entitled only to rational basis scrutiny.

CONCLUSION

The desire to procreate and raise children is an innate part of human nature, such that the efforts of states such as Washington and a handful of other states to prevent people otherwise unable to procreate from becoming parents via compensated surrogacy is doomed to failure. I, like countless people before and after me, have found ways to circumvent these anachronistic anti-surrogacy laws.

By targeting an innate part of human nature, these laws infringe upon two of the oldest and most fundamental protected constitutional rights: the rights to procreate and to care, custody, and control of one's children. Although Washington and other states certainly have an interest in regulating the practice of surrogacy for the purpose of furthering the well-being of surrogates, intended parents, and the children born of those relationships, the substantive gloss on the Due Process Clause does not allow them to deny people the ability to exercise these fundamental rights by means of prohibition, nor does it allow states to discourage the practice by placing barriers in the way of intended parents who seek to establish legal parentage of children born via surrogacy.

412. *See* *Pickett v. Brown*, 462 U.S. 1, 7–8 (1983) (noting that heightened scrutiny applies to illegitimacy classifications, reasoning that it is unjust to punish children for their parent's conduct); *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (applying heightened scrutiny to laws that discriminate against children of illegal aliens, employing the same logic).