ASSISTED REPRODUCTIVE TECHNOLOGY AFTER *ROE V. WADE*: DOES SURROGACY CREATE INSURMOUNTABLE CONSTITUTIONAL CONFLICTS?

KRISTEN BRADLEY*

Constitutional rights regarding surrogacy have largely been ignored. States differ in their approaches toward surrogate contract enforceability. Given the recent press coverage and the proliferation of alternative and assistive reproductive technology, this important question needs a definitive answer. Prior Supreme Court decisions regarding the right to privacy before the advent of assisted reproductive technology focused on procreative choices. In reality, the new technology split reproduction into two distinct issues: conception and procreation. This Note argues that the constitutional rights in surrogacy should favor the intended parents, those individuals with genetic ties to the unborn child, as opposed to the surrogate mother herself.

TABLE OF CONTENTS

* J.D. 2016, University of Illinois College of Law. B.A. Biopsychology, Cognition and Neuroscience; Spanish, December 2012, University of Michigan. I would like to thank the editors, members, and staff of the *University of Illinois Law Review* for their hard work in making edits and comments on this piece, especially my note editor Alexis Dyschkant for her thoughtful advice and Alexandra Gecas for her commitment during the editing process. Finally, I would like to thank my parents for their constant support and for always encouraging me to pursue my dreams. Any errors are mine alone.

I. INTRODUCTION

A single, Connecticut mother of two signed a surrogacy contract to carry a baby for a couple in her state.[1] The ultrasound conducted in the fifth month, however, depicted "that the fetus had a cleft palate, a brain cyst and heart defects."[2] When the couple asked the woman to have an abortion, and offered an additional $10,000 for the procedure, she "fled to Michigan, where surrogacy contracts are unenforceable."[3] The contract originally formed in Connecticut, designated the intended parents, not the surrogate, as the ones to make a decision concerning an abortion.[4] Since Michigan has such strong laws against surrogacy arrangements (surrogacy is in fact a crime), the woman gave birth to the baby there and was listed as the child's mother.[5] This is just one of a growing number of similar cases being publicized regarding the conflict with surrogacy and parental rights.[6]

A surrogate is defined as an individual "who substitutes for another who is unable to become pregnant."[7] An individual who becomes a surrogate, while she is the birth mother, may or may not have any genetic

1. Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES (Sept. 17, 2014), http://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html.

2. *Id.*

3. *Id.*

4. *In re* F.T.R., 833 N.W.2d 634, 657–58 n.12 (Wis. 2013).

5. *See* CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 179 (2d ed. 2011) (discussing criminal liability in Michigan for engaging in contractual behavior related to surrogacy as a felony with a term of imprisonment up to five years); Lewin, *supra* note 1.

6. *See* Bryan Robinson, *Fetuses and Surrogacy Lose in Legal Battle*, ABC NEWS (Aug. 14, 2008), http://abcnews.go.com/US/story?id=92627.

7. KINDREGAN & MCBRIEN, *supra* note 5, at 151.

relation to the developing fetus she carries.[8] Two of the most overlooked and complex aspects of surrogacy are the competing interests and constitutional tensions that are generated by a surrogacy arrangement.[9] These issues arise with the practical difficulty of determining who constitutes a "parent."[10] In surrogacy, there are two competing "mother" statuses, one based on genetics and one based on the intended parent(s).[11] The Constitution protects both the right to procreate and the right to an abortion.[12] Yet, what happens when those interests are simultaneously asserted from competing perspectives? Even less clear is whose constitutional right governs: the intended parents' right to procreate or the surrogate mother's right to an abortion?

In the United States there is a large disparity amongst states as to the effect and enforceability of surrogacy contracts.[13] In fact, a large number of states have not even addressed the issue by statute or case law.[14] With an absence of federal law on the topic, states are left to sort through available resources to come to their own conclusions as to whether such agreements should be legal.[15] A lot of attention is focused on the issue of determining parenthood at birth as opposed to the more crucial issue of parental rights before or during pregnancy.[16] Further, with the growth of reproductive technology, one of the biggest concerns is addressing when the rights of the intended parents and the surrogate vest, especially in dealing with the different legal and genetic interests each party may have in the child.[17]

This Note proposes that the competing constitutional rights in surrogacy have been overwhelmingly ignored and must be reconciled for surrogacy contracts to be valid. Both the right to procreate and the right to an abortion must be considered in determining whether a surrogacy agreement is valid and in which individuals those rights vest during pregnancy. This is critically important when a surrogate carries a child with

8. *Id.*

9. *See* Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 109–10 (2010); Emily Gelmann, Note, *"I'm Just the Oven, It's Totally Their Bun": The Power and Necessity of the Federal Government to Regulate Commercial Gestational Surrogacy Arrangements and Protect the Legal Rights of Intended Parents*, 32 WOMEN'S RTS. L. REP. 159, 160 (2011).

10. *See* Robinson, *supra* note 6.

11. *See* Johnson v. Calvert, 851 P.2d 776, 782–83 (Cal. 1993) (discussing commentators view on maternal rights in cases using assisted reproductive technology).

12. Roe v. Wade, 410 U.S. 113, 153 (1973); Skinner v. Oklahoma, 316 U.S. 535, 538, 541 (1942).

13. KINDREGAN & MCBRIEN, *supra* note 5, at 157–58. The authors present a map as a visual representation of the diversity in state laws regarding surrogacy across the United States. *Id.* at 158.

14. *Id.* at 157.

15. *See* Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 310 (2013); Lewin, *supra* note 1 ("There is nothing resembling a national consensus on how to handle it and no federal law, leaving the states free to do as they wish.").

16. *See* Bernstein, *supra* note 15, at 310–15.

17. *See id.* at 298–99 ("[F]rom 2004 to 2008 the number of IVF cycles used for gestational surrogacy grew by 60%, the number of births by gestational surrogates grew by 53% and the number of babies born to gestational surrogates grew by 89%."); *see also* Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 299 (1990) (addressing that "technological change requires new choices and responsibilities").

the genetic material of the intended parents as opposed to using her own biological material. Thus, this Note argues that those constitutional rights implicated by surrogacy should be construed in favor of the intended parents if the surrogate is genetically unrelated to the developing fetus. In support, Part II of this Note will set up the constitutional considerations involved in surrogacy and highlight the first judicial decision regarding surrogacy in the United States. Further, it will provide a timeline of the evolution of assisted reproductive technology in connection with surrogacy as well as develop and dissect a typical surrogacy contract in light of the different genetic and legal interests of the various parties. This Note will further address the disparity in state law by describing the three approaches taken by states in considering surrogacy contracts. Part III of this Note will distinguish the two types of surrogacy arrangements, and in doing so, will consider the goals of surrogacy and the different policy arguments that have been put forth both for and against surrogacy. Most importantly, this Note will delve in depth into understanding the constitutional considerations and implications of surrogacy agreements and how rights may be less apparent in surrogacy than in the traditional pregnancy. It will demonstrate that the Supreme Court's original decisions surrounding the right to privacy, before the advent of assisted reproductive technology, were predicated on the notion that the right to privacy referred to procreative choices. Further, it will emphasize that advanced technology effectively separated the concept of reproduction into two separate issues: conception and procreation. Finally, Part IV of this Note will argue that surrogates do not maintain the same constitutional rights when they contract to be a surrogate with genetic materials unrelated to them. Therefore, in such a scenario, it is the intended parents who maintain the fundamental right to privacy throughout pregnancy in line with their decision to procreate.

II. BACKGROUND

Baby M is the iconic case in which a court first dealt with the issue of surrogacy in the United States, in 1988.[18] The case arose in New Jersey where a husband and wife contracted with a surrogate who was artificially inseminated with the husband's sperm.[19] The surrogate was to be paid $10,000, and after the birth the wife would adopt the child and the birth mother would relinquish her rights.[20] After the baby's birth, however, the surrogate refused to hand over the baby and the father sued the surrogate to enforce the agreement they had made.[21] The Supreme Court of New Jersey held the surrogacy contract invalid "because it conflicts with the law and public policy of the State."[22] The court was concerned with

18. *In re* Baby M, 537 A.2d 1227 (N.J. 1988).
19. *Id.* at 1235.
20. *Id.*
21. *Id.* at 1237.
22. *Id.* at 1234–35.

the monetary gain by the surrogate as well as the "natural mother's irrevocable agreement, prior to birth . . . to surrender the child to the [intended] couple."[23] In contrast to adoption, where the agreement occurs after birth, the court highlighted, this arrangement occurs entirely pre-birth and pre-conception.[24] These issues mirror the conflicts the court found with state statutory provisions including "laws prohibiting the use of money in connection with adoptions," and "laws requiring proof of parental unfitness . . . before termination of parental rights is ordered or adoption granted."[25] The effect of this decision granted the father and the wife custody of the child based on the child's best interests and remanded the case for determination of the surrogate mother's visitation rights.[26]

The constitutional implications heavily based in surrogacy merit greater emphasis, as the competing interests of the surrogate and intended parents are crucial to resolving concerns regarding surrogacy contracts.[27] Such rights are important to analyze, as the technological innovations in reproductive health have fast tracked surrogacy as an increasingly popular mechanism for reproduction.[28] It is especially crucial to articulate the competing interests of the different parties depending on the type of surrogacy involved.[29] An understanding of what a typical surrogacy contract consists of aids in highlighting where these concerns arise in the course of parties' contracting for surrogacy.[30] Further, surrogacy challenges the concept of parenthood and it is important to address how a parent is defined.[31] Finally, uncovering where states draw the line between the legal and genetic rights of the surrogate and intended parents aids in understanding the reasons behind how they treat surrogacy contracts.[32]

A. Constitutional Implications in Surrogacy

One of the most important considerations in surrogacy is the implication of the constitutional protections afforded to individuals as related to procreation, privacy, and abortion. Both the right to privacy and the

23. *Id.* at 1240.
24. *Id.*
25. *Id.*
26. *Id.* at 1259, 1263.
27. *See generally* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (establishing the right to privacy); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (establishing the right to procreation).
28. MAGDALINA GUGUCHEVA, COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA 3 (2010), *available at* http://www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf (stating the 89% growth in number of babies born to gestational surrogates in a four-year period).
29. *See* Catherine London, Note, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391, 394 (2012).
30. Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 951, 955–56 (1996) ("Therefore, a court presented with such a contract cannot merely consider the rights of the infertile couple in isolation. Rather, it must take into account all of the parties involved and all of the ways in which they experience liberty through various categories and clauses of the Constitution.").
31. *See In re* C.K.G., 173 S.W.3d 714, 721 (Tenn. 2005).
32. Peter R. Brinsden, *Gestational Surrogacy*, 9 HUM. REPROD. UPDATE 483, 488 (2003).

right to procreate are important constitutional considerations involved in pursuing surrogacy and surrogacy agreements.[33] Further, while the right to an abortion in the context of surrogacy literature is less developed, looking at surrogacy from the pre-birth perspective plays an instrumental role.[34]

The right to privacy under the Fifth and Fourteenth Amendments is crucial to analyzing the rights of intended parents and surrogates who seek to contract together.[35] The right to privacy was first expressed in *Griswold*, specifically the extent of privacy in the marriage context as related to contraception.[36] The Fifth Amendment was considered to reflect this protection as "enabl[ing] the citizen to create a zone of privacy which [the] government may not force him to surrender to his detriment."[37] This was further extended in various contexts after the decision in *Griswold* to pertain to privacy outside of the context of marriage such as to those who were unmarried and also to children.[38]

On the other side, there is the clear relation of surrogacy to the right to procreate as established in *Skinner* under the equal protection clause of the Fourteenth Amendment.[39] The court discussed how "the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned."[40] What happens when these rights seem to cross paths? One example, which will be revisited, demonstrates the complexity and intersection of constitutional rights with surrogacy: A California couple is in a legal battle with their British surrogate who refused to abort one of the twins she is carrying for them for the purpose of selective reproduction, despite a verbal agreement between the parties to do so.[41]

Finally, the constitutional debate surrounding the right to seek an abortion further complicates issues that may arise during surrogacy, particularly in determining which party holds that right.[42] The right to abortion was most notably determined in *Roe v. Wade* as an integration of the right of privacy under both the Fourteenth Amendment and Ninth Amendment.[43] In its traditional form, the right to abortion is often considered to be associated with the ability of a woman to choose what to do

33. Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

34. Alayna Ohs, *The Power of Pregnancy: Examining Constitutional Rights in a Gestational Surrogacy Contract*, 29 HASTINGS CONST. L.Q. 339, 340 (2002).

35. Spivack, *supra* note 9, at 109.

36. *Griswold*, 381 U.S. at 485.

37. *Id.* at 484.

38. Carey v. Population Servs., Int'l, 431 U.S. 678, 693 (1977); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

39. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.").

40. *Id.* at 544.

41. Robinson, *supra* note 6.

42. Ohs, *supra* note 34, at 340.

43. 410 U.S. 113, 153 (1973).

with her own body.[44] Prior to viability of a fetus, a woman cannot be unduly burdened in asserting her right to an abortion.[45] After viability, however, a state may prohibit abortions as long as they have an exception to allow it if "necessary to preserve the life or health of the mother."[46] Since surrogacy is unlike the traditional pregnancy, as there are multiple parties, and possibly genetic interests unrelated to the surrogate at stake, it will be crucial to recognize "the role of the gestator, as separate from that of the intended mother," when dealing with constitutional considerations, such as abortion.[47] The immensely personal nature of the protections these rights afford individuals has important and unique implications in the context of surrogacy.

B. Technological Advancements and Surrogacy

The advent of a case dealing with surrogacy correlates with the growth of the use and presence of reproductive technology in the United States.[48] In the United States alone, there has been an increased growth of recognizing and accepting surrogacy, as over two thousand babies will be born through surrogacy arrangements just this year.[49] Analyzing the various legal scenarios regarding surrogacy hinges on understanding its origin in its two general forms.[50] Surrogacy can occur via *in vitro fertilization* ("IVF"), by either traditional surrogacy, or gestational surrogacy.[51] Traditional surrogacy occurs when the sperm of the biological father, or donor, is implanted into the surrogate, making the surrogate the biological mother.[52] This occurs through intrauterine insemination, which is the process by which sperm is introduced "into the female reproductive organs by means other than sexual intercourse."[53] Gestational surrogacy occurs when both an egg and sperm (of either the intended parents or of a donor(s)) is implanted into the surrogate.[54] Through IVF, the male sperm fertilizes the female egg outside of the reproductive system and is later transplanted into the reproductive system of the surrogate.[55] Today, each IVF attempt yields a thirty to fifty percent success rate.[56] Further,

44. Ohs, *supra* note 34, at 340.

45. *Id.* at 358–59.

46. In *Planned Parenthood of Se. Pennsylvania. v. Casey*, 505 U.S. 833 (1992), the Court accepted those propositions presented in *Roe*, but altered the framework of abortion as it pertains prior to viability. *Id.* at 952.

47. Ohs, *supra* note 34, at 341.

48. *See* Lewin, *supra* note 1.

49. *Id.*

50. Spivack, *supra* note 9, at 98–99.

51. Partial surrogacy is interchangeable with traditional surrogacy while full surrogacy is interchangeable with gestational surrogacy. *Id.*

52. GUGUCHEVA, *supra* note 28, at 6.

53. KINDREGAN & MCBRIEN, *supra* note 5, at 40.

54. GUGUCHEVA, *supra* note 28, at 6.

55. KINDREGAN & MCBRIEN, *supra* note 5, at 91.

56. *Infertility Treatment*, PATHWAYS TO PARENTHOOD, http://www.sydneyfertility.com.au/art.html (last visited Apr. 16, 2016).

this type of surrogacy accounts for ninety-five percent of surrogacy agreements today.[57]

The differences between traditional and gestational surrogacy create very different legal implications based on both the genetic and legal interests the different parties have in the child.[58] Traditional surrogacy seems to mirror adoption more than gestational surrogacy, as traditionally "the surrogate is both the child's birth and genetic mother [because] [t]he intended mother has no genetic, preexisting, or presumptive family relationship to the resulting child."[59] In reference, adoption occurs when a "child's legal rights . . . towards his or her natural parents are terminated and similar rights . . . towards his or her adoptive parents are substituted."[60] Thus, in surrogacy, this requires the intended mother to go through what looks much like an adoption proceeding to establish her legal right.[61] The intended father on the other hand, while his relationship conflicts with the surrogate's spouse, can establish genetic relation and paternity to the child relatively easily after birth.[62]

Gestational surrogacy and the legal standard typically applied in terms of parentage, can vary depending on whether or not a donor was used.[63] In a traditional surrogacy, where the birth mother is genetically related to the child, the intended mother will have to pursue an adoption-like proceeding to establish a parent-child relationship.[64] In contrast, in gestational surrogacy, some states will argue if the intended mother does not supply the egg, and an egg donor is used for IVF, then "the surrogate has a presumptive legal relationship with the resulting child as the birth mother."[65] Moreover, in gestational surrogacy, a situation, where intended parents may also be the biological parents, creates "equal presumptions for establishment of legal parentage" which can typically be decided for the intended parents through a judicial proceeding.[66]

Further, the increased use of scientific technology as it relates to various advances in reproductive mechanisms is important in the context of surrogacy. Apart from the various technologies making surrogacy possible, there are important medical considerations that occur throughout pregnancy of which parties to a surrogacy contract must be made aware.[67] One important procedure is amniocentesis, which makes possible the de-

57. Gelmann, *supra* note 9, at 161.
58. *See* London, *supra* note 29, at 394.
59. Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 639 (2005).
60. BLACK'S LAW DICTIONARY 49 (6th ed. 1990).
61. Snyder & Byrn, *supra* note 59, at 639.
62. *Id.*
63. *Id.* at 640.
64. *Id.*
65. *Id.*
66. *Id.* at 641.
67. Leora I. Gabry, *Procreating Without Pregnancy: Surrogacy and the Need for a Comprehensive Regulatory Scheme*, 45 COLUM. J.L. & SOC. PROBS. 415, 446 (2012).

tection of any illness or defects a fetus may have in utero.[68] An amniocentesis is a type of prenatal test, and medical procedure, designed to determine if a fetus carries any abnormalities.[69] There is a preference in favor of the surrogate as the one who has the choice to have an amniocentesis or not.[70] At the same time, it generates health risks to not only the surrogate, but also risks to the fetus, such as the possibility of miscarriage.[71] Further, if the amniocentesis reflects a fetus that is developing abnormally, the rights of all parties may come to head.[72] The intended parents may desire that the surrogate have an abortion, exercising their right to (not) procreate, but the surrogate may at the same time refuse to have an abortion, exercising her right to privacy and abortion.[73] Consider the added complication in a gestational surrogacy where the intended parents are genetically related to the embryo or fetus.[74] Thus, not only is assisted reproductive technology a relatively new industry, but one that creates unique implications for surrogates and intended parents.

C. Typical Surrogacy Contract

A typical surrogacy contract involves the intended parent(s), who seek a surrogate to bear a child on their behalf and the surrogate mother herself who actually carries out the pregnancy for the intended parent(s).[75] Often the surrogate mother will be compensated for her services, and like any contract, will negotiate and come to agreement with the intended parents as to her obligations throughout the pregnancy and after the birth of child.[76] As of 2015, the estimated compensation nationally for a first time surrogate is $38,000 and $43,000 for a repeat surrogate.[77]

Since there are no uniform statutory requirements for a surrogacy contract, and states treat those contracts differently, some reoccurring themes to consider in drafting an agreement could include asking the surrogate "(1) to refrain from smoking cigarette, drinking alcoholic beverages, . . . (2) to abort if the fetus is physiologically abnormal . . . and (3)

68. *See* John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 926–27 (1996).

69. Gabry, *supra* note 67, at 446.

70. *See* Robertson, *supra* note 68, at 926–27.

71. Gabry, *supra* note 67, at 446–47.

72. Robertson, *supra* note 68, at 927.

73. *See* Gabry, *supra* note 67, at 447.

74. Also consider this conflict from the opposite scenario, where the surrogate seeks an abortion due to unforeseen circumstances and the intended parents oppose such action. *See* Robertson, *supra* note 68, at 927.

75. The composition of the "intended parents" is subject to modification in light of the growing number of states recognizing gay marriage and other non-traditional forms of partnership. *See* Paula M. Barbaruolo, *The Public Policy Considerations of Surrogate Motherhood Contracts: An Analysis of Three Jurisdictions*, 3 ALB. L.J. SCI. & TECH. 39, 42 (1993).

76. Rao, *supra* note 30, at 955–56.

77. California, Nevada, Illinois, Colorado, and Maryland are outliers, having slightly higher compensation rates for surrogates than the national averages. *Estimated Costs of Gestational Surrogacy (In Vitro Fertilization)*, CENTER FOR SURROGATE PARENTING, INC., http://www.creatingfamilies.com/intended-parents/?Id=44#.VGwUCChFPjQ (last visited Apr. 16, 2016).

to relinquish her parental rights to the resulting child after birth."[78] Many problems can arise out of these considerations as parties present different legal interests, which can translate into a variety of conflicts throughout the contractual relationship.[79] This is most problematic when the provisions necessary for the surrogacy contract to be valid and legally sound are the same provisions that can create constitutional conflicts between the parties.[80] Further, a large concern relates to whether informed consent is feasible when there are many unknowns related to the technologies and laws surrounding surrogacy.[81]

An important moment in the history of surrogacy contract law was the recognition of "'America's first legal surrogate mother,'" Elizabeth Kane.[82] In 1979, Elizabeth Kane, a mother herself, responded to a local advertisement of a Kentucky couple seeking a surrogate.[83] She was evaluated and selected as a suitable match for the infertile couple and subsequently artificially inseminated by the husband's sperm.[84] The following year, she gave birth to a boy.[85] Elizabeth Kane expressed that she sought to become a surrogate out of a desire to help couples struggling with infertility rather than with a motive for financial gain.[86] Her experience has been thought of as one of both "'a social and psychological experiment.'"[87] While this only scratches the surface of considerations that arise in contracting for surrogacy, these are some of the more prominent aspects of those arrangements.

D. Parenthood Defined

Since surrogacy contracts challenge parental rights, it is important to discuss what constitutes a "parent" and how the concept of parenthood is challenged under these contracts. Parenthood is no longer limited to traditional conception resulting in two clear parental entities, but rather has expanded so that a child can end up with more than two parents.[88] As discussed previously, while parental rights have been constitutionally recognized, the issue of who exactly constitutes a parent has

78. Rao, *supra* note 30, at 955.

79. *Id.* at 955–56.

80. Barbara L. Keller, *Surrogate Motherhood Contracts in Louisiana: To Ban or to Regulate?*, 49 LA. L. REV. 143, 146 (1988).

81. Lewin, *supra* note 1.

82. THOMAS C. SHEVORY, BODY/POLITICS: STUDIES IN REPRODUCTION, PRODUCTION, AND (RE)CONSTRUCTION 67 (2000). Her experience was further depicted in a book she self-authored in 1988. *See* ELIZABETH KANE, BIRTH MOTHER: THE STORY OF AMERICA'S FIRST LEGAL SURROGATE MOTHER ix (1988).

83. Robert Coles, '*So, You Fell in Love with Your Baby*,' N.Y. TIMES (June 26, 1988), http://www.nytimes.com/1988/06/26/books/so-you-fell-in-love-with-your-baby.html.

84. *Id.*

85. *Id.*

86. SHEVORY, *supra* note 82, at 67; Coles, *supra* note 83.

87. KANE, supra note 82, at 278.

88. *See In re* C.K.G., 173 S.W.3d 714, 721 (Tenn. 2005) (discussing the rare but possible outcome of a child having five parental entities) (quoting John Lawrence Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 355 (1991)).

become less clear.[89] In the typical surrogacy arrangement there will be a surrogate who is the carrier of the child, who may or may not be biologically related to the resulting child, and those who intend to care for and adopt the child after birth.[90] Taken literally, a parent is defined as the "lawful father or the mother of a person."[91] The term, however, also encompasses those relationships outside of conception and birth such as those arising through adoption or guardianship.[92]

Gestational surrogacy presents additional wrinkles in defining who the parent is when the contract states one thing but the traditional use of term indicates otherwise at birth. For instance consider that a person can traditionally establish legal parenthood in one of three ways: (1) if he/she is genetically related to the child; (2) if he/she intended to create the child; (3) or if the person (woman) gave birth to the child.[93] While this can create multiple and competing interests in surrogacy, it is important for an individual who seeks to show a prima facie case[94] to establish legal parenthood under a gestational surrogacy contract. Thus, an intended parent(s) would need to demonstrate: "Entry into valid gestational carrier agreement; [i]mpregnation of a gestational carrier with the intended parent(s)' embryo(s); [and] [l]egal parentage . . . ."[95]

The classification of parenthood has critical impacts not just for purposes of declaring the child's legal parents at birth, but also for determining who has parental rights throughout the pregnancy. For instance consider *Johnson* where there was a dispute as to maternal rights.[96] While the court found that both the surrogate and intended mother (biologically related to child) demonstrated sufficient evidence of the existence of a mother-child relationship, they were limited in application as California does not recognize more than one natural mother.[97] In relying on the UPA, the court found that the woman who "intend[s] to bring about the birth of a child that she intend[s] to raise as her own—is the natural mother."[98]

Legal commentators that have approached the issue generally argue that those who actively sought procreation by means of surrogacy should be afforded the title of legal parenthood over a genetic relationship, especially in cases when the surrogate is genetically related to the child.[99] Even more convincing is that intended parents, who procreate through IVF by initiating an embryo transfer, should be afforded the protections

89. *See supra* Part II.A.
90. *See supra* Part II.C.
91. BLACK'S LAW DICTIONARY 1287 (10th ed. 2014).
92. *Id.*
93. Rachel M. Kane, *Cause of Action for Determination of Status as Legal or Natural Parents of Children Borne by Surrogate or Gestational Carrier*, 48 CAUSES OF ACTION 2d 687, § 8 (2011).
94. *Id.* at § 5.
95. *Id.*
96. Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993).
97. *Id.*; *see also* Colette Archer, *Scrambled Eggs: Defining Parenthood and Inheritance Rights of Children Born of Reproductive Technology*, 3 LOY. J. PUB. INT. L. 152, 156–57 (2002).
98. *Johnson*, 851 P.2d at 782.
99. *Id.* at 782–83.

associated with the right to procreation.[100] While commentators seek to sort through these concerns, they seem to be overlooking one of the most crucial aspects in defining parenthood.[101] What is the scope of such rights and most importantly, when do the parents' legal rights begin if we assume the intended parents are the legal parents?

E. Current State of Law

There is currently no federal law on surrogacy and states have free reign to make their own decisions regarding laws applicable to surrogacy.[102] The closest model for creating uniform rules regarding surrogacy is the Uniform Parentage Act ("UPA"); however, it is merely an "official recommendation of the Conference on the subject of parentage."[103] It provides a framework for integrating the genetic advancements in parentage with the legal rights of the parties involved in a manner consistent with equal protection[104] The UPA lays out nine articles that provide a framework for a state to adopt in defining, conceptualizing, and promulgating typical surrogacy arrangements.[105] Most notably, it provides a framework for court validation of such agreements.[106] The parties to an agreement must "commence a proceeding in the [appropriate court] to validate a gestational agreement," following which a court will determine if all requirements have been met and if so, issue an order validating the surrogacy agreement.[107] Since the most recent version of the UPA in 2002, however, only ten states have adopted those provisions.[108]

In another attempt to create a more uniform regime, the Model Act Governing Assisted Reproductive Technology was created to address the unique aspects of surrogacy and propose better guidelines for states to consider.[109] Specifically, one of its "most significant provisions, Article 7 . . . proposes two options for handling surrogacy arrangements."[110] The first is considered the "judicial preauthorization model" where a surrogacy contract is created between all parties and subject to validation by court order.[111] The second is considered the "administrative model"

100. *See* Melanie B. Jacobs, *Intentional Parenthood's Influence: Rethinking Procreative Autonomy and Federal Paternity Establishment Policy*, 20 AM. U. J. GENDER SOC. POL'Y & L. 489, 493 (2012).

101. *See Johnson*, 851 P.2d at 782–83 (discussing arguments of Professor Hill and Professor Shultz regarding the voluntary intent of parents to procreate through surrogacy).

102. Bernstein, *supra* note 15, at 310; Lewin, *supra* note 1.

103. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM PARENTAGE ACT 2 (2002).

104. *Id.* at 1–2.

105. *Id.* at 3–79.

106. *Id.* at §§ 801–09.

107. *Id.* at § 802(a).

108. MD. GEN. ASSEMB. DEP'T OF LEGIS. SERVS., LEGAL ISSUES CONCERNING ASSISTED REPRODUCTION 5 (2012), *available at* http://dlslibrary.state.md.us/publications/OPA/I/LICAR_2012.pdf (listing six states as of 2012); *see Parentage Act*, UNIF. L. COMM'N, http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act (last visited Apr. 20, 2016) (listing ten states as of 2016).

109. MD GEN. ASSEMB. DEP'T LEGIS. SERVS., *supra* note 108, at 7.

110. *Id.*

111. MODEL ACT GOVERNING ASSISTED REPROD. TECH., art.7 legislative note, §§ 701(1), 703 (2008) (discussing "Alternative A").

where a surrogacy agreement that meets all the requirements as stated in the appropriate sections, makes a court validation not necessary when the fetus is genetically related to at least one of the intended parents.[112] Since the advent of these proposals, however, there have not been any states that have chosen to adopt either of the two options presented.[113] Thus, while there have been proposals on the prospect of creating a federal, or uniform scheme, there has not been a consensus by the states on any one proposal.[114]

Due to the lack of federal regulation of surrogacy, one of the biggest concerns in the realm of surrogacy is the disparity among states concerning how they currently deal with surrogacy agreements and how they should in the future.[115] This stems largely from the "autonomy of individual states in the USA, [where] specific regulations regarding surrogate motherhood differ.[116]

> Seventeen states have laws permitting surrogacy, but they vary greatly in both breadth and restrictions. In 21 states, there is neither a law nor a published case regarding surrogacy . . . . In five states, surrogacy contracts are void and unenforceable, and in Washington, D.C., . . . surrogacy carries criminal penalties. Seven states have at least one court opinion upholding some form of surrogacy.[117]

There are three main approaches that states take in regards to how surrogacy agreements are treated: (1) Illegal and Unenforceable, (2) Unsettled, and (3) Legal and Enforceable.[118]

1. Illegal and Unenforceable

The view that a surrogacy contract is illegal and unenforceable stems from the notion that the contract is illegal for compensating the surrogate, in conflict with the state's adoption laws, or contrary to public policy and thus a court will not uphold them.[119] New Jersey, for example, is a state that treats surrogacy agreements and contracts as illegal and unenforceable.[120] The reasoning behind this is based on two premises, first, that such agreements are in conflict with adoption laws and second, that they are contrary to public policy.[121] One scenario this plays out in more significantly is when "courts are reluctant to enforce the surrender provisions against a surrogate mother who is also the biological mother of the child," making traditional surrogacy more likely to be held unen-

112. *Id.* at art.7 legislative note, § 702(2)(a) (discussing "Alternative B"); MD GEN. ASSEMB. DEP'T LEGIS. SERVS., *supra* note 108, at 7–8.

113. MD GEN. ASSEMB. DEP'T LEGIS. SERVS., *supra* note 108, at 8.

114. KINDREGAN & MCBRIEN, *supra* note 5, at 157–58 fig. 5.1.

115. Consider further complications that arise when parties who contract come from states whose laws treat surrogacy differently or in conflict with one another. *See id.*

116. Brinsden, *supra* note 32, at 488.

117. Lewin, *supra* note 1.

118. Barbaruolo, *supra* note 75, at 46–62.

119. *Id.* at 46–53.

120. *Id.* at 46.

121. *Id.*

forceable where the birth mother refuses to hand over the child.[122] Further examples of states where surrogacy agreements are not recognized include Arizona, which "bans surrogacy contracts as contrary to public policy regardless of whether the woman carrying the baby is compensated."[123] Michigan has one of the most powerful bans of surrogacy by statute and also imposes criminal penalties on an individual who is involved in a surrogacy agreement or contract.[124]

2. Unsettled Law

There are a significant number of states where surrogacy law continues to be unsettled and highly unregulated.[125] Many of these states recognize the difficulties involved in creating legislation because of the constantly changing aspects of surrogacy and are reluctant to regulate.[126] For example, Alaska, Georgia, Idaho, Kansas, Maine, Mississippi, Montana, and North Carolina all lack any cases or statutes dealing with surrogacy.[127] Many of the states that fall into this category have some restrictive measures while at the same time allowing certain aspects of surrogacy agreements to be enforced.[128] California, for example, has a lot of case law regarding surrogacy but has enacted little substantive statutes on the subject.[129] Some states, including Oregon, only mention one aspect of surrogacy, such as exempting fees for the services of a surrogate from the statute criminalizing the "buy[ing] or selling [of] a person."[130]

3. Legal and Enforceable

States that consider surrogacy agreements to be legal and enforceable typically validate the agreement if it is in accordance with state law.[131] Finally, there are states, such as Florida, that consider surrogacy agreements to be legal and enforceable.[132] In Florida, an agreement is lawful where "[p]rior to engaging in gestational surrogacy, a binding and enforceable gestational surrogacy contract shall be made between the commissioning couple and the gestational surrogate."[133] In addition, Illinois permits gestational surrogacy contracts if they are done in accordance with the state statute, making it the state which has by far the most

122. KINDREGAN & MCBRIEN, *supra* note 5, at 153.
123. *Id.* at 159.
124. This includes maximum penalties of a $50,000 fine or five-year prison term. *Id.* at 179.
125. *Id.* at 157.
126. *Id.*
127. *Id.* at 159, 171, 174–75, 182, 190.
128. Author provides an image of the United States categorizing how each state treats surrogacy agreements. *Id.* at 157–58.
129. *Id.* at 164–65.
130. OR. REV. STAT. § 163.537(1), (2)(d) (2010); *see* KINDREGAN & MCBRIEN, *supra* note 5, at 192–93.
131. *See* KINDREGAN & MCBRIEN, *supra* note 5, at 169, 171.
132. *Id.* at 169.
133. FLA. STAT. § 742.15(1) (2014).

comprehensive statutory regime.[134] The Gestational Surrogacy Act, which came into effect on January 1, 2005, sets out eligibility and requirements necessary for a contract to be enforceable under the act.[135]

The considerations above make up what continues to be a developing framework in surrogacy and demonstrates the need to consider alternative regulations. This Note will seek to provide some insight and answers into the difficulties that arise concerning the interests of the different parties especially focused on when there are competing legal and genetic interests involved.

III. ANALYSIS

Understanding the importance of surrogacy and how it functions is the foundation for uncovering the various gaps and flaws in surrogacy law as it currently stands. The different policy arguments for and against surrogacy provide insight into why states treat surrogacy differently and for what reasons. Further, there is a natural disposition to group surrogacy under the same umbrella as adoption and thus, understanding the key differences is important for developing why they cannot be equated.[136] Further, the constitutional considerations that this Note focuses on stems from understanding the foundation of surrogacy agreements and making a concerted effort at identifying what constitutional conflicts exist, when they arise, and how they can be reconciled.

A. Understanding Surrogacy

Understanding the scope and nature of surrogacy is crucial to evaluate how different states deal with surrogacy and to uncover the gaps inherent in a highly under regulated sector.[137] Distinguishing between the two recognizable forms of motherhood, genetic and gestational motherhood, conceptualizes the way different legal rights can arise.[138] Further, the policy behind proponents and opponents of surrogacy provide insight into the political nature of forms of assisted reproductive technology.[139] Finally, a look into the relationship between adoption and surrogacy demonstrates similar goals through differing pathways.[140]

134. KINDREGAN & MCBRIEN, *supra* note 5, at 171.

135. *See* 750 ILL. COMP. STAT. 47/5 (2005) (effective Jan. 1, 2005); KINDREGAN & MCBRIEN, *supra* note 5, at 171.

136. *See* Thomas J. Walsh, *Wisconsin's Undeveloped Surrogacy Law*, 85 WIS. LAW. 16, 18 (2012) *available at* http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=85&Issue=3&ArticleID=2445.

137. *See* Barbaruolo, *supra* note 75, at 42.

138. Ohs, *supra* note 34, at 350.

139. Mary Lyndon Shanley, *"Surrogate Mothering" and Women's Freedom: A Critique of Contracts for Human Reproduction*, 18 SIGNS 618, 618–19 (1993).

140. *See* Walsh, *supra* note 136, at 18.

1. Distinguishing Genetic from Gestational Motherhood

Surrogacy, unlike traditional pregnancy, requires understanding the difference between genetic and gestational motherhood as it is currently recognized. Before the boom of assisted reproductive technology, the presumption was that a gestational mother, one who physically carries a baby to term, was the genetic mother of that child.[141] In the situations considered here, however, the gestational mother and the genetic mother can no longer be presumed to be the same. Under the UPA the simplest definition of a "gestational mother" is the woman who is not genetically related to the child but who carries the baby or is the "surrogate."[142] Thus, a genetic mother is just that, the genetic mother, regardless of whether or not she physically caries the child, her genetic material (egg) is used in the surrogacy.[143] It is certainly well accepted that blood testing is a sufficient means of establishing paternity.[144] Yet, should it be just as controlling to determine maternity? Arguably in cases of surrogacy where there is a direct conflict revolving around an existing surrogacy agreement, the answer is yes.[145] This does not always solve the problems inherent in these circumstances, however, as the mother who gave birth may still have a valid claim of establishing the mother-child relationship according to some jurisdictions.[146]

Consider what happens when an anonymous donor provides the genetic material, and the child is neither related to the surrogate nor the intended parents.[147] *In re Marriage of Buzzanca* addressed this issue with the suggestion that the intended parents should be prescribed with legal authority.[148] If individuals go into surrogacy knowing who is going to be held as the natural mother, there is more clarity regarding whose legal rights take priority throughout the surrogacy and most importantly, the pregnancy. The court discussed that the scenario of a married couple or individuals consenting to surrogacy via IVF with anonymous donors is analogous to a husband consenting to artificial insemination.[149] Where the husband would be afforded legal parenthood in that case, the married couple should likewise be afforded those same rights under the same principle.[150] On the contrary, with a post-birth approach to designating legal rights in the maternal parent, the consideration of those rights dur-

141. Lynda Wray Black, *The Birth of a Parent: Defining Parentage for* Lenders *of Genetic Material*, 92 NEB. L. REV. 799, 826–27 (2014).

142. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM PARENTAGE ACT 69 (2002).

143. *See e.g.,* Johnson v. Calvert, 851 P.2d 776, 778 (1993).

144. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM PARENTAGE ACT 7 (2002).

145. *See* Johnson v. Calvert, 851 P.2d at 779.

146. *See id.* at 780–82.

147. KINDREGAN & MCBRIEN, *supra* note 5, at 155.

148. 72 Cal. Rptr. 2d 280, 298 (Cal. Ct. App. 1998); *see* KINDREGAN & MCBRIEN, *supra* note 5, at 155.

149. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d at 286.

150. *See* CAL. FAM. CODE § 7613 (West 2016); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d at 286.

ing pregnancy can be easily overlooked.[151] Thus, it is important to recognize at the outset the particular form of surrogacy entered into in order to adequately define the interests of the parties.

2. Goals of Surrogacy Law and Public Policy Arguments

There are many differing views on what the goals of surrogacy law are and whether or not the means to achieve those ends are permissible; however, very few emphasize constitutional rights implicated in surrogacy.[152] These viewpoints instead hinge heavily on a variety of policy arguments about surrogacy and are often what states rely on in making decisions about the enforceability of surrogacy arrangements.[153] Looking at some of the way contracts affect the purpose of surrogacy demonstrates how "[c]ontract pregnancy sheds important light on the necessity for any adequate account of human freedom . . . [concerning] issues that are important . . . with the meaning of new reproductive practices."[154] Moreover, many of the goals of surrogacy and adoption seem to mirror one another in many respects.[155] With these goals in mind, there should be a variety of safeguards set in place so that all parties are fully informed of the inherent risks and the terms are set fairly.[156] Typically, when a woman exercises her freedom to act as a surrogate, the contract is considered to represent that "consent is given prior to conception."[157]

a. General Policy Concerns

The psychological and financial components inherent in the utilization of assisted reproductive technology raise some of the greatest policy concerns in the context of surrogacy. Society has increasingly viewed surrogacy as the transformation of a natural experience into a commercial transaction.[158] The increasingly commercial nature of the process raises many concerns over the socioeconomic status of surrogates, the impact of financial compensation, and the potentially coercive effect of the industry.[159]

151. *See* Amy M. Larkey, Note, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 623 (2003) (illustrating theories to arrive at determination of legal maternity as focused on care of child after birth).

152. Mary Lyndon Shanley, *"Surrogate Mothering" and Women's Freedom: A Critique of Contracts for Human Reproduction*, 18 SIGNS 618, 618–19 (1993).

153. Jessica H. Munyon, Note, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U. L. REV. 717, 732–34 (2003).

154. Shanley, *supra* note 152, at 619.

155. Walsh, *supra* note 136.

156. Shanley, *supra* note 152, at 621.

157. *Id.*

158. *Surrogacy: A 21st Century Human Rights Challenge*, THE CTR. FOR BIOETHICS AND CULTURE NETWORK, http://www.cbc-network.org/issues/making-life/surrogacy/ (last visited Apr. 20, 2016).

159. *Id.*

There is an ever present concern that women are exploited and oppressed when they engage in a surrogacy arrangement.[160] Specifically, there is a debate as to whether a surrogate's demographic background affects her motivation to become a surrogate.[161] For example, commercial surrogacy agencies, like The Fertility Institutes Web, tend to portray surrogates as "financially stable" and altruistic.[162] The reality, however, is that many studies "suggest that financial motivation may be a primary factor in the decision to participate in surrogacy; additionally, because of their financial status, commercial surrogates are susceptible to financial inducement and vulnerable to exploitation."[163] Consequently, the resulting contractual relationship can be based on unequal bargaining power leaving the surrogate to agree to terms that may otherwise be considered unconscionable.[164] Accordingly, this concern of exploitation tends to be accepted by those individuals and groups who believe that surrogacy results in a woman "renting" out her body to provide services to others.[165] While some may liken surrogacy to a commercial practice aimed at taking advantage of women and depriving them of the freedom of choice, there is a strong argument that this is not the case.[166] In fact, surrogacy is seemingly encompassed in the rights the constitution protects.[167] Specifically, "[s]urrogacy arrangements . . . deserve constitutional protection because of the private relationships and procreative intention of the parties . . . . [and] parents . . . have a fundamental right to conceive and raise their child, regardless of the method by which the child was conceived."[168] If the constitution affords an individual the right to determine his or her role in procreation, a surrogate has the same uncontroverted choice of whether or not to enter into a surrogacy arrangement.

Further, the psychological aspects implicit in entering into a surrogacy arrangement have led some to believe that the concept of "precommitment" to relinquish a non-existent child is unethical and unconstitutional.[169] Largely philosophical in nature, the idea questions the ability of an individual to make decisions today that are binding on them in the future.[170] Notably, surrogates will contract even before conception as to

160. SHEVORY, *supra* note 82, at 53. Further, consider that "[e]ighty-nine percent of surrogate mothers would not have become surrogates but for the agreed compensation." Munyon, *supra* note 153, at 718.

161. Katherine Drabiak et al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 304 (2007).

162. *Id.*

163. *Id.*

164. Abigail Lauren Perdue, *For Love or Money: An Analysis of the Contractual Regulation of Reproductive Surrogacy*, 27 J. CONTEMP. HEALTH L. & POL'Y 279, 291–92 (2011).

165. Larkey, *supra* note 151, at 614.

166. *See id.*

167. *Id.* at 615.

168. *Id.* at 616.

169. Molly J. Walker Wilson, Note, *Precommitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity*, 31 J. LEGIS. 329, 334–35 (2005).

170. Dan W. Brock, *Precommitment in Bioethics: Some Theoretical Issues*, 81 TEX. L. REV. 1805, 1810 (2003).

the ultimate fate of the child they carry.[171] In contrast, in an adoption arrangement, the birth mother has until birth or shortly after to determine whether or not she will give up her child.[172] The two forms are not identical and not every surrogacy arrangement implicates the same psychological concerns. Consider for example, that adoption arises out of the traditional form of conception and is undoubtedly the biological child of the woman carrying the baby to term. In surrogacy, depending on whether it is a traditional or gestational surrogacy, the child may not be biologically related to the surrogate. Even if the child is biologically related to the surrogate, the process of conception was pre-planned and determined not by the surrogate, but by the intended parents. The differences inherent in each surrogacy arrangement merit consideration of the psychological impacts of the process in a completely different light.

b. Zeroing in on the Principal Arguments Against Surrogacy

Often courts come together on the public policy concerns inherent in surrogacy arrangements when finding reasons to invalidate surrogacy contracts.[173] The three main policy concerns include: "conflicts with existing parentage, adoption, and baby-selling statutes."[174] First, state parentage statutes typically deal with presumptions of paternity as opposed to maternity presumptions, which are usually more implicated in surrogacy than paternity concerns.[175] Consider two examples. In *Syrkowski v. Appleyard*, "the intended father sought to rebut the statutory presumption that the surrogate's husband was the child's natural father."[176] The court ultimately held for the intended father in determining that the state's Paternity Act was not created for cases of surrogacy.[177] As to maternal parentage, in *Johnson v. Calvert*, the court held that when both the birth mother and genetic mother had equal paternity claims under the state's statutes, the genetic mother had the stronger claim, as the intended parent.[178] This stemmed from the court's focus on who manifested the intent to procreate and raise the child.[179] Second, where adoption favors the informed and voluntary consent of the biological parents with many states prohibiting consent pre-birth,[180] surrogacy, on the other hand, is focused on and encourages that the parties consent before the process of concep-

171. Wilson, *supra* note 169, at 335.
172. *Id.* at 334.
173. *See* Munyon, *supra* note 153, at 717–18.
174. *Id.* at 719.
175. *Id.* at 735.
176. *Id.* at 735–36.
177. *Id.* at 736.
178. *Id.* at 737.
179. In deciding the issue, the court had to reconcile the provisions set forth in the Uniform Parentage Act with applicable California law to make a determination of parenthood. *See* Belsito v. Clark, 67 Ohio Misc. 2d 54, 61 (Ohio Ct. Com. Pl. 1994) (citing Johnson v. Calvert, 851 P.2d 776 (Cal. 1993)).
180. Barbara L. Atwell, *Surrogacy and Adoption: A Case of Incompatibility*, 20 COLUM. HUM. RTS. L. REV. 1, 18, 21 (1988).

tion begins.[181] This is further in line with current constitutional interpretations in the realm of privacy, procreation, and abortion.[182] Finally, "[e]very state prohibits baby-selling," and it is one of the greatest public policy concerns states cite as a reason for invalidating surrogacy contracts.[183] For example, in Kentucky an individual may "not be a party to a contract or agreement which would compensate a woman for her artificial insemination and subsequent termination of parental rights to a child born as a result."[184] However, some states have come to find that baby-selling statutes do not apply to surrogacy agreements.[185]

c. Policy Reasons Defending Surrogacy

At the same time there are compelling policy reasons and discourse in support of surrogacy.[186] A well-versed positive aspect of surrogacy is that, "[l]ike most technologies, reproductive and otherwise, surrogacy has transformative value."[187] Another interesting result of surrogacy contracts advanced by Zillah Eisenstein is that surrogacy "'pluraliz[es]' motherhood [which] implies the legitimizing of diverse familial relationships."[188] Assisted reproduction may not be so far out of line with the goals of the traditional family when surrogacy is thought of as a unique substitute for the process of conception.[189] Moreover, it is a manner in which families who deal with infertility can realize their desire to procreate and have a family.[190] If a woman is recognized to have control over choices regarding her person, she likewise has the choice to become a surrogate[191] and should accept that she may not be the only one with valid interests regarding the choices she makes with her body. The Supreme Court has historically recognized the choice individuals have to bear children and has expanded what that constitutes from time to time.[192] Further, altruism is cited as a large motivator in women who seek to become surrogates as indicated by psychological studies.[193] Thus, the focus on the particular goals surrounding surrogacy sheds light on the best way to interpret such agreements and how to reconcile conflicts that may arise.

181. Shanley, *supra* note 152, at 621.

182. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Ohs, *supra* note 34, at 340.

183. Atwell, *supra* note 180, at 27.

184. KY. REV. STAT. ANN. § 199.590(4) (West 2015).

185. *See* ALA. CODE § 26-10A-34(c) (1992); IOWA CODE § 710.11 (West 2015).

186. SHEVORY, *supra* note 82, at 52.

187. *Id.*

188. *Id.* at 75 n.12.

189. Robertson, *supra* note 68, at 913.

190. KINDREGAN & MCBRIEN, *supra* note 5, at 10.

191. Christine A. Bjorkman, Note, *Sitting in Limbo: The Absence of Connecticut Regulation of Surrogate Parenting Agreements and Its Effect on Parties to the Agreement*, 21 QUINNIPIAC PROB. L.J. 141, 149 (2008).

192. *See* KINDREGAN & MCBRIEN, *supra* note 5, at 12.

193. SHEVORY, *supra* note 82, at 67–68.

3. Relationship to Adoption

There are many scholars who find a vast array of similarity between adoption and surrogacy, arguing that surrogacy "agreements should not be enforced to the extent that they are incompatible with . . . state adoption statutes;"[194] however, when the two regimes are broken down there is a stronger argument that the two cannot be reconciled. Consider the core reason adoption is a protected activity: to protect the best interests of the child when the biological mother (or parents) is unwilling or cannot provide for her child.[195] This results in the relinquishing of parental rights and the legal separation of the biological mother (or parents) to the child in favor of the adoptive parent(s).[196] This requires a court to review the case and make a final decision, a function that is lacking in surrogacy in some states.[197] If the main reason adoption is protected is to aid children whose parents are unwilling or unable to care for them, how can that regime be a substitute for surrogacy, which is a prearranged, voluntary agreement to carry a child for a family who is readily able to care for them?[198] While, arguably in some sense a form of "adoption," the key interests involved in surrogacy are not consistent with those present in a traditional adoption.[199] It is difficult to imagine a world where intended parents provide their embryo to a surrogate to carry for nine months, who is then under no obligation to relinquish the child upon birth unless the protocols of the state's adoption statute are followed.[200] Thus, adoption regimes cannot adequately address the unique interests involved in surrogacy.

B. Constitutional Conflicts

How surrogacy contracts are formed, interpreted, and respected provides sharp insight into the gaps that remain and uncovers what may prove to be the greatest obstacle to accepting surrogacy. Consider the statement that "the right to privacy . . . include[s] the right to make marital and procreative choices, the right to raise one's children as one sees fit . . . [and] the right to hire a surrogate mother to conceive a child."[201] This is one way proponents of surrogacy argue on constitutional grounds for the protection of surrogacy.[202] On the other side, there are individuals

194. *See* Atwell, *supra* note 180, at 4; Walsh, *supra* note 136, at 18.

195. *See* Atwell, *supra* note 180, at 4.

196. *Id.*

197. *See id.* at 19; Walsh, *supra* note 136, at 18. *But see* NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM PARENTAGE ACT §§ 801, 803 (2002) (proposing that a court should validate the surrogacy arrangement).

198. *See* Atwell, *supra* note 180, at 11.

199. *See id.* at 15–16, 57; Shanley, *supra* note 152, at 621 (discussing how consent in surrogacy arises before birth rather than after as in adoption contracts).

200. Logically it can be argued that substituting adoption statutes in cases of surrogacy will result in invalidating some contracts, but this blatantly, incorrectly assumes that the two regimes can be used interchangeably. *See e.g.*, Atwell, *supra* note 180, at 34.

201. Spivack, *supra* note 9, at 109.

202. *Id.*

who generate the argument that, "because of her privacy right, the surrogate cannot waive the right to the child she carries, and that these rights trump the rights of the intended parents if the surrogate should change her mind at the birth of the child."[203] Yet, clearly this has been rejected in at least one instance, in *Johnson v. Calvert*, where the genetic (intended) parent was favored as having maternal parentage to the child.[204] Thus, there is merit to the proposition that a surrogate does not enjoy the same constitutional rights as if it were her own genetic material.[205] The crux of the conflict arises in understanding the right to privacy and both the right to procreate and the right to abortion from the perspective of both the surrogate mother and the intended parents.

1. Right to Privacy

The Supreme Court has made clear that while the right of privacy exists and extends to decisions an individual makes regarding procreation, it is not an absolute right.[206] *Griswold* served to extend privacy in the context of marriage, specifically holding the restraint on contraceptive use in marriages unconstitutional.[207] *Eisenstadt v. Baird* further extended this privilege, criminalizing the distribution of contraceptives to unmarried persons.[208] This marked recognition that the right to privacy as to procreative choices does not lie in the married couple alone, but is inherent in each individual.[209] *Carey v. Population Services International* even extended the right of privacy to children, thus demonstrating that the right to privacy has become malleable and inclusive over time.[210]

While the Supreme Court has not yet addressed a case on surrogacy, the increasing popularity and use of different forms of assisted reproductive technology undoubtedly implicates the right of privacy, albeit through an alternative form of procreation. At a fundamental level, surrogacy implicates the right to privacy as "a right of autonomy in making decisions on personal or family matters, such as procreation."[211] There is no indication that this right is somehow exclusively reserved to one form of procreation over another or would be unavailable to those expressing their procreative desires through an alternative form of reproduction.[212] Because of the non-traditional aspects assisted reproductive technology presents, however, surrogacy may not be so easily characterized under the right to privacy as other circumstances have been. Surrogacy impli-

203. *Id.*
204. Munyon, *supra* note 153, at 737.
205. Johnson v. Calvert, 851 P.2d 776, 787 (Cal. 1993) (in banc); *see* Ohs, *supra*, note 34, at 351 (This line of reasoning is the most persuasive in the case of gestational surrogacy.).
206. Carey v. Population Servs., Int'l, 431 U.S. 678, 686 (1977).
207. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).
208. 405 U.S. 438, 453 (1972).
209. *Id.*
210. 431 U.S. at 693.
211. Christine L. Kerian, Note, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 120 (1997).
212. *Id.* at 121.

cates these constitutional issues specifically as to determining whom this right of privacy is afforded. In the context of a traditional pregnancy, there are few conflicts that arise which cannot be quickly resolved on constitutional grounds. For example, if a woman becomes pregnant through traditional means, she has control over decisions arising throughout the pregnancy, subject to the abortion limitations addressed in *Roe* and *Casey*.[213] Is the constitutional defense of those decisions grounded in the right to privacy or the right to procreate?[214] In a traditional pregnancy, it would not matter; the woman who chose to procreate is the one whose body is affected during the pregnancy and the one who is protected by the Fifth and Fourteenth Amendments' right to privacy.[215]

Few courts have dealt exclusively with the issue of whether assisted reproduction is considered part of the right to privacy, but those that have find that such procedures can be protected to some extent.[216] An Illinois District Court held that IVF allows procreation for a woman who cannot naturally conceive, and that the right to privacy includes "the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy."[217] Further, the Uniform Status of Children of Assisted Conception Act addresses some of the concerns with the growth of assisted reproduction technologies as related to defining the parties and procedures involved.[218] In presenting guidelines for states to adopt,[219] one of the first provisions to note is Section 2, which defines maternity as "a woman who gives birth to a child is the child's mother," subject to [some] exceptions.[220] The first of those exceptions arises in Section 5 relating to surrogacy agreements.[221] When a surrogacy agreement is judicially approved before conception, the surrogate relinquishes her parental rights to the intended parents.[222] One interesting thing to note is that under Section 7 a surrogate, who has provided her own egg for the assisted reproduction, "may terminate the agreement . . . within 180 days after the last insemination."[223] Notice how this does not apply to gestational surrogacy, implying that there are different rights involved when the surrogate no longer has a genetic interest in the resulting child.[224] Finally, Section 9 states that such agreements do not limit the surrogate's right to make

213. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113, 153 (1973) (detailing the scope of the right to procure an abortion).

214. *Roe*, 410 U.S. at 155.

215. Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

216. *See* Lifchez v. Hartigan, 735 F. Supp. 1361, 1376–77 (N.D. Ill. 1990).

217. *Id.* at 1377.

218. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (withdrawn 2000), 9C U.L.A. 363 (2001).

219. *Id.* at § 11.

220. *Id.* at § 2.

221. *Id.* at § 5A.

222. *Id.*

223. *Id.* at § 7 (noting that any party, including the surrogate, may terminate the agreement before the surrogate becomes pregnant).

224. *Id.*

medical decisions.[225] It is quite possible that this shielding of the surrogate's rights is fatal to the success of the Act as applied to gestational surrogacy, when the statute carved out the right of a surrogate to terminate an agreement post conception only when it is her genetic material.[226] As of 2012 only Virginia and North Dakota have adopted the Act and only one chose this approach, the other finds surrogacy agreements void.[227] Thus, the scope of the right to privacy is less clear in the case of surrogacy but seems to suggest an interpretation that surrogates are not afforded the same protections as if they had chosen to procreate on their own.

2. Right to Procreate vs. Right to Procure an Abortion

With a foundational understanding of the right to privacy, the manner in which the right to procreation and abortion are prioritized in surrogacy merits attention. Returning to the previous case of the California couple currently in a legal battle with their British surrogate who refused to abort one of the twins she is carrying, demonstrates the messy situations that can occur when the law has not adequately dealt with the implications of competing constitutional rights.[228] Here the surrogate is refusing the procedure out of a concern regarding the health risks it poses for her.[229] Such a scenario clearly exemplifies two competing interests:

> Many surrogacy contracts incorporate provisions related to abortion and fetal reduction. The surrogate has a constitutional right to have an abortion; however, in many instances the parties to a surrogacy contract may insert a provision into the contract requiring that the surrogate waive her right to an abortion or stating that an abortion must be performed in certain circumstances.[230]

Thus, the biggest gap is how far the right to procreate extends into the sphere of assisted reproductive technology, specifically in the context of surrogacy. Interestingly, rights usually provided to a pregnant woman (in traditional pregnancy) "are not usually acknowledged as the explicit rights of a *gestator*. . . ."[231] If that is generally accepted, then the intended parents would seemingly maintain greater control over the pregnancy. However, this still leaves open the question whether a contract limiting a surrogate's right to an abortion would be held enforceable despite its infringement on her constitutional rights. Ultimately, what happens when there is not an agreement between the parties, or is the bigger problem with whether those clauses are even enforceable if it infringes upon an individual's constitutional right? If the right to procreate is the right to decide to have your own natural children, and as the court in *Baby M*

225. *Id.* at § 9.
226. *Compare id.*, *with id.* at § 7.
227. MD. GEN. ASSEMB. DEP'T OF LEGIS. SERVS., *supra* note 108, at 3.
228. Robinson, *supra* note 6.
229. *Id.*
230. Morgan Holcomb & Mary Patricia Byrn, *When Your Body is Your Business*, 85 WASH. L. REV. 647, 657 n.42 (2010).
231. Ohs, *supra* note 34, at 340.

stated, "[t]he custody, care, companionship, and nurturing that follow birth are not parts of [that] right,"[232] the issue that arises is what happens in that interim period when the individual who chose to procreate is not the one carrying the child?

Roe is the iconic case recognized as establishing abortion as a choice, while not absolute, under the umbrella of the right to privacy.[233] The court set up a trimester framework outlining the progression of a pregnancy and when a woman has a choice in whether or not to procure an abortion versus at what point the state can exert an interest in protecting either maternal health or the interest in potential life by restricting abortion.[234] *Casey* is the most recent Supreme Court case that provides a new framework.[235] State actions restricting abortion are considered on the basis of whether they constitute an undue burden on the woman's ability to procure an abortion, but the Court reaffirmed that a State may interfere after viability to protect the health of the mother or potential life without reference to this standard.[236] Both the right to procreate and the right to an abortion are implicated in surrogacy, as they would be in a traditional pregnancy, but deserve further attention and analysis.

C. Evolution of the Privacy Right as to Procreation

The changing face of assisted reproductive technology, and its impact on the law, requires looking back at how courts originally interpreted the right to privacy, including the right to procreate. The original cases concerning the right to procreate and changes in abortion legislation recognized procreative choices as synonymous with control over one's body.[237] *Roe* is rationalized on the basis of policy reasons that are applicable not to just any pregnant woman, but a pregnant women who chose to initiate procreation.[238] With the advances in assisted reproductive technology, however, and the original construction of the right to procreate, pregnancy and procreation have become two separate issues.[239]

232. *In re* Baby M, 537 A.2d 1227, 1253 (N.J. 1987).

233. Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

234. *Id.* at 114.

235. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874–76 (1992).

236. *Id.*

237. *Roe*, 410 U.S. at 152–53 (recognizing the right as related to personal decisions in the context of activities relating to marriage).

238. The policy reasons cited by the court for recognizing a right to an abortion, all relate to circumstances of an unwanted pregnancy, a pregnancy wholly distinguishable from a surrogacy agreement. For example, the court mentions the burdens of child care, distress of bearing a child that one is unfit to care for etc. *See id.* at 153.

239. Lewis v. Harris, 875 A.2d 259, 277–78 (N.J. 2005).

The Supreme Court was and remains most interested in protecting procreative rights, not control over one's body.[240] Accordingly, there is a lack of language in their decisions to sustain more than the possibility the court was focused on the woman's control over her body.[241] Therefore, privacy rights necessarily refer to procreative rights, not the right to control one's body. This is especially important in assessing the relationship contract law has to constitutional issues, especially regarding medical decision-making during a surrogate's pregnancy. Where privacy rights refer to procreative rights, the intended (genetic) parents should be granted greater constitutional protection.

1. Procreative Choice in its Early Stages

The Supreme Court first mentioned procreative liberty in 1923 in *Meyer v. Nebraska*, stemming from marriage and the family.[242] Thereafter, the right to privacy propelled its strength in the context of marriage, the family, and procreation.[243] This is largely due to the fact that originally the pregnant mother was always the genetic mother.[244] This premise is exactly what the Court relied upon when determining a woman's procreative choices in the context of abortion.[245] Close attention to the policy reasons discussed in *Roe* demonstrates the Court's understanding and intentions for determination of that right.[246] The Court lists factors why it found it unconstitutional for the State to deny choices during pregnancy including that: "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. There is also . . . distress . . . associated with the unwanted child, . . . the problem of bringing a child into a family already unable . . . to care for it."[247]

These *elements* and policy considerations are essentially nonexistent in a surrogacy arrangement; they reflect the traditional pregnancy the Court addressed.[248] If anything they support the right of the intended parents, in a surrogacy arrangement, as the ones whose constitutional

240. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

241. *See generally Roe*, 410 U.S. at 113 (evidencing the lack of language cited to that concerns clear control over one's body). The language is most often discussed in context of either another right or narrowed in scope.

242. 262 U.S. 390, 399 (1923).

243. *See supra* Part II.A.

244. Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

245. *See generally Roe*, 410 U.S. at 152–54 (discussing basis of right of privacy to encompass a woman's decision to procure an abortion).

246. *Id.* at 153. "Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a . . . greater degree of significance . . . ." *Id.* at 170.

247. *Id.* at 153.

248. *Id.* (recognizing that psychological harm may exist in surrogacy but it is a risk factor considered in voluntary act of choosing to be a surrogate, not a risk associated with an unwanted or unexpected pregnancy).

rights take priority as they promulgated the creation of the child, albeit artificially. In support of this reading, the first form of conception outside the body, using reproductive technology, occurred through IVF in 1978, five years after *Roe* was decided.[249] When the Court revisited the topic of abortion in *Casey* in 1992, it seemed to effectively avoid considering emerging forms of assisted reproductive technology.[250] Foundationally, procreation represents both the freedom individuals have to choose to reproduce and the freedom they have to elect not to,[251] and this is what the Supreme Court based its subsequent decisions on in the context of decision-making during pregnancy.

2. Intervention of Technology on Procreation and Choice

Today, technology has changed the face of pregnancy.[252] Procreative decisions have become a separate issue from control over one's body in the context of surrogacy.[253] There exists a clear "distinction between conception and procreation."[254] Where the two rights traditionally arose simultaneously, the use of a surrogate cannot conceivably implicate those rights in the same way when procreative intent arises from another individual.[255] Thus, as long as assisted reproductive technologies continue to serve as a viable and growing industry, the title of intentional and intended parenthood will play an increasing role in dictating the definition of parenthood with regards to surrogacy.[256] One scholar dissects *Skinner* to suggest that it protects only procreation based on coital pregnancy, and thus that it may not actually afford protection to assisted forms of reproduction.[257] However, it seems more logical to presume, as others have, that if individuals choose to reproduce, they may elect to do so by non-coital means and still be protected.[258] For example, there would be serious problems with allowing fertile persons the right to procreate, but not extending those same rights to infertile persons.[259] Robertson analogizes such a narrow reading of *Skinner* to how "[T]he inability to see

249. *Id.* at 113; *Infertility Treatment*, *supra* note 56.

250. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (reconsidering framework of abortion decisions).

251. Jacobs, *supra* note 100, at 491.

252. KINDREGAN & MCBRIEN, *supra* note 5, at 1–2.

253. *See* Lewis v. Harris, 875 A.2d 259, 277–78 (N.J. 2005) ("[I]t would be foolish not to recognize a certain dynamism in the evolving view of marriage and its role in society. Indeed, the basic reality of procreative capacity in right *to* marry cases to date may, in the future, take on different meaning or significance given the displacing potential of cross-cultural forces in our society, such as contraception and assisted reproductive technology.").

254. Jacobs, *supra* note 100, at 492.

255. *See Lewis*, 875 A.2d at 278 (addressing the possibility of new perspectives on the process of procreation in the future).

256. Jacobs, *supra* note 100, at 507.

257. Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1484–85 (1995).

258. *Id.* at 1476. Trial Court Judge Sorkow's statement in *Baby M*, before it went up on appeal, mirrors this line of reasoning. "[I]f one has a right to procreate coitally, then one has the right to reproduce non-coitally. If it is the reproduction that is protected, then the means of reproduction are also to be protected." *In re* Baby M, 525 A.2d 1128, 1164 (N.J. Super. Ct. Ch. Div., 1987).

259. Rao, *supra* note 257, at 1476.

should not preclude a blind person from exercising the First Amendment right to receive information."[260]

If the right to procreate extends to all forms of reproduction, there still remains a crucial question. Is it the individual(s) who *chooses* to reproduce or the surrogate (who hosts that form of reproduction) who is afforded rights throughout the pregnancy? Separate forms of motherhood generate these questions as it becomes less clear whose right it is to make medical decisions during pregnancy.[261] In one example, Florida permits gestational surrogacy contracts and provides some guidance, stating that the surrogate mother is afforded decision-making authority throughout the pregnancy but must also consent to any reasonable medical procedures regarding prenatal health.[262] On the other hand, in a surrogacy arrangement that utilized IVF, an Ohio court found in favor of the individuals who had provided the "genetic imprint for that child."[263] Thus, the intervention of technology has greatly impacted the scope of the rights inherent in procreation, separating conception and procreation.

3. The Court's Intention

From the beginning, the Supreme Court was most interested in protecting procreative rights, not control over one's body via the right of privacy. The Court emphasizes that individuals are afforded the freedom to make choices in the context of family life such as "the decision whether to bear or beget a child."[264] In fact, the Supreme Court has explicitly stated that its decisions in *Roe* and *Griswold* protect procreative rights.[265] Those decisions translated procreative rights to protect choices ranging from initiating procreation to making decisions up until childbirth. This is in fact where the right to an abortion arose; in the context of protecting procreative rights.[266] In the cases considered, abortion was always a procreative right held by the individual who initiated procreation.[267] In surrogacy, however, that is not always the case. A conclusion that *Roe* automatically protects a surrogate's right to control her body during pregnancy is not an accurate statement.

The Supreme Court in *Roe* never actually uses the phrase "right to control one's body" or anything akin to it.[268] Rather, the Court references the right as related to decisions that are personal in the context of rela-

260. *Id.*
261. Ohs, *supra* note 34, at 350.
262. FLA. STAT. ANN. § 742.15 (West 2015).
263. Belsito v. Clark, 67 Ohio Misc. 2d 54, 66 ((Ohio Ct. Com. Pl. 1994).
264. Roe v. Wade, 410 U.S. 113, 170 (1973) (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).
265. Runyon v. McCrary, 427 U.S. 160, 178 (1976).
266. *See Roe*, 410 U.S. at 153.
267. *Id.*
268. *See generally id.* at 116 (discussing the right to an abortion in the context of relationships and the family where pregnancy arises in the course of traditional conception).

tionships, procreation, and marriage.[269] When the Court revisited the issue in *Casey*, nineteen years later, it used language suggesting it could not confirm or reaffirm a right to control one's body simply stating:[270] "*if Roe* is seen as stating a rule of personal autonomy and bodily integrity . . . ."[271] Thus, while the right to privacy seems broad on its face, it is clear that the Supreme Court has not created an absolute right.[272] In fact, the Court made one intriguing statement: "[I]t is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions."[273] This seems to suggest that the Court was explicitly focused on extending protection to individuals regarding the way they desired procreation to fit into their relationships.

Casey discusses the importance of the *Roe* decision on women's participation in economic and social life because of the options for reproductive control, including abortion.[274] It seems such emphasis on the role *Roe* played in changing the face of abortion decisions boils down specifically to a women's liberty interest to make reproductive choices.[275] Further, there is a reoccurring theme in the cases focusing on "personal decisions concerning . . . the meaning of procreation . . . ."[276] This seems to suggest that decisions intimately related to deciding whether or not to procreate (such as abortion) were the intended consequences of constitutional protection. Concerns of this decision-making authority are complicated in the context of surrogacy. Many of the policy reasons in the extension of liberty interests to decisions surrounding a women's abortion right are those based on unexpected or unwanted pregnancies,[277] two descriptions far from defining a pregnancy pursuant to a gestational surrogacy agreement.[278] Reproductive choices may very well include surrogacy, but decisions by a surrogate in a gestational surrogacy are less about reproduction and more about her conscious decision to aid another in their choice to reproduce; a seemingly small difference but one that merits an important distinction.

269. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

270. *See id.* at 835.

271. *See id.* (emphasis added).

272. *Roe*, 410 U.S. at 153.

273. *Id.* at 154 (justifying this on the fact that the Court does not recognize an absolute right to "do with one's body as one pleases").

274. *Casey*, 505 U.S. at 835 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

275. *See id.* at 860–61.

276. *Id.* at 853; *see also* Carey v. Population Servs., Int'l, 431 U.S. 685 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

277. *See Casey*, 505 U.S. at 852–53.

278. *See supra* text accompanying notes 246–47.

4. Privacy Rights Equals Procreative Rights

As it stands, privacy rights necessarily refer to procreative rights in the context of surrogacy. The Supreme Court's decisions cannot be assumed to extend in the same way in the context of assisted reproductive technology when "the only method of procreation the Supreme Court has . . . consider[ed]" is "natural" procreation.[279] Procreative rights originated in the context that the same individual who carried the child was the one who chose or chose not to procreate. If we rely on the Court's interpretation and translate it to the era of assisted reproductive technology, then legal parenthood should be determined by intent, maintaining the Court's emphasis on the desire or decision whether or not to procreate.[280] As the Supreme Court was, and remains, most concerned about protecting the right to procreate, then surrogacy presents a unique situation as to who is afforded decision making authority during pregnancy and childbirth. "A woman who enters into a gestational surrogacy arrangement is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service . . . ."[281] Consider that if the Court's decisions support the right to privacy as equal to procreative rights, then it is the intended parents, who exercise their right to procreation through surrogacy, whose decisions necessarily govern throughout the surrogate's pregnancy.[282] When the intended parents begin seeking out a surrogate to facilitate their decision to procreate, and enter into a contractual arrangement, however, they unavoidably implicate another individual who is entitled to constitutional protection. This is even trickier after conception, when a variety of different concerns can arise related to medical decision-making authority during pregnancy.

In the cases regarding the definitive recognition of a right to privacy, the Supreme Court has addressed it as to specific protections: contraception, marriage, abortion, and the right to refuse medical treatment.[283] While the right to refuse medical treatment may stand out as a privacy right the Court recognizes outside of procreative choice, again it is a narrow scope of a right over one's body that is protected.[284] The Court does assess such considerations from the viewpoint of the appropriate amount of a State's intrusions into an individual's body, but never actually reiter-

279. MICHELLE N. MEYER, STATES' REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGIES 2 (2009), *available at* http://ssrn.com/abstract=2127377 (last visited Feb. 22, 2016).

280. Mary Patricia Byrn & Lisa Giddings, *An Empirical Analysis of the Use of the Intent Test to Determine Parentage in Assisted Reproductive Technology Cases*, 50 HOUS. L. REV. 1295, 1307 (2013).

281. Johnson v. Calvert, 851 P.2d 776, 787 (Cal. 1993).

282. *See, e.g.*, Roe v. Wade, 410 U.S. 131, 170 (1973).

283. *See* Cruzan v. Dir., Miss. Dept. of Health, 497 U.S. 261 (1990); Carey v. Population Servs., Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942).

284. *Cruzan*, 497 U.S. at 278 ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.").

ates that as the right to control one's body.[285] If these are the circumstances the Supreme Court has carved out, does that preclude a surrogate, who did not have the original intent to procreate from asserting the right to privacy throughout pregnancy?[286] With the advance of technology, it is not clear when and how fundamental rights fit into these new circumstances.[287] For example, based on the intended parents' procreative desires, they likely have specific views on procedures or medical treatment they would expect a surrogate to respect during pregnancy and childbirth. Could a contract force a surrogate to give up their right to refuse or select certain medical treatment or procedures?

Surrogates, as any individual, have the freedom to contract.[288] One of the biggest concerns, however, is whether a surrogate can contractually surrender her constitutional rights to the intended parents. In one sense, in a contract where the surrogate relinquishes her decision-making authority with respect to procedures and medical treatment, she has effectively "jeopardize[d] her autonomy, psychological well-being, and bodily integrity that are normally protected."[289] It would be difficult to argue that a surrogate is suddenly devoid of all rights to her bodily integrity upon becoming a surrogate.[290] On the other hand, since surrogacy is unlike a traditional pregnancy, a surrogate should arguably be able to comprehend, and have the opportunity to negotiate with the intended parents, regarding each party's expectations that may impact the surrogate's rights.[291]

As previously mentioned, there is a lack of precedent addressing surrogacy contracts, let alone medical decision-making during surrogacy.[292] The lack of clarity in this area makes determining these issues difficult. Since surrogacy is currently considered on a state by state basis, whether the terms of a surrogacy contract are appropriate or unconscionable will vary widely.[293] Based on the analysis of the right of privacy, it is not impossible to conclude that a surrogate, who agrees via a contract to carry a child for another, will in some respects be limited as to her autonomy throughout the pregnancy. An important distinction based on the type of surrogacy, traditional or gestational, affects this analysis in an important way. A traditional surrogacy, that utilizes the genetic material of the surrogate mother,[294] likely will be regarded as providing the

285. *Id.* at 287 (O'Connor, J., concurring).

286. *See Carey* 431 U.S. at 684–85; *see also* Rao, *supra* note 30, at 955–56.

287. Roger J. Chin, *Assisted Reproductive Technologies Legal Issues in Procreation*, 8 LOY. CONSUMER L. REP. 190, 200 (1996) ("[C]ourts have no explicit guidance from long-held 'traditions' that are often scrutinized to establish a due process right.").

288. Lisa L. Behm, *Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States*, 2 DEPAUL J. HEALTH CARE L. 557, 559 (1999).

289. Katherine Drabiak-Syed, *Waiving Informed Consent to Prenatal Screening and Diagnosis? Problems with Paradoxical Negotiation in Surrogacy Contracts*, 39 J.L. MED. & ETHICS 559, 562 (2011).

290. Ohs, *supra* note 34, at 350.

291. *Id.*

292. *See supra* Part II.E.

293. Behm, *supra* note 288, at 581.

294. GUGUCHEVA, *supra* note 28, at 6.

surrogate with greater contractual rights. This is in line with the decisions that support procreative decisions; a surrogate who uses her own genetic material has an exponentially greater role in the procreative decision making process. As a result, this likely renders her rights equal if not greater to the rights afforded to the intended parents throughout the pregnancy as she is exercising her right to procreation as well. On the other hand, in a gestational surrogacy,[295] the surrogate does not have any genetic interest in the procreative decision. Thus, the intended parents initiate procreation and are entitled to any choices that must be made stemming from the exercise of that right.[296] If the Supreme Court intended to protect procreative rights under the right of privacy, it would be contradictory to protect intended parents' rights to procreate by any method, and then take away their decision-making authority for the term of the surrogate's pregnancy. In fact, it would seem to follow that a surrogate's choice to enter into such an arrangement "includes the power to alienate her constitutionally protected personal and parental privacy rights."[297] With the uncertainty in this area, however, it is in the best interests of each party to a surrogacy arrangement to contract for and prospectively consider what would happen in the event certain medical situations arose. Parties need to be clear in communicating and contracting for these concerns until there is more substantive state or federal authority supporting this proposition.

Ultimately the language in *Eisenstadt*, [298] *Griswold*, [299] and other cases, suggests that the right of privacy centers on an individual's conscious choice to procreate. Even if the right to privacy encompasses control over one's body, the analysis the Court has done on the right to procreation shows that it was meant in the traditional context, and today, with advances in technology, applies to the individuals whose intent and decision it was to procreate.[300] Thus, there seems to be evidence giving weight to the interpretation that the court was most interested in, and continues to be most interested in, protecting procreative choices and the choices that stem from an individual's exercise of those rights.

IV. RECOMMENDATION

This Note recommends that in a gestational surrogacy where the surrogate mother bears no genetic relation to the developing fetus, the constitutional and legal interests must be weighed in favor of the intended parents who brought about procreation. This, in a sense, creates a bias as to the right to procreation, but surrogacy is not like the traditional

295. *Id.*
296. *See* Johnson v. Calvert, 851 P.2d 776, 787 (Cal. 1993).
297. Rao, *supra* note 257, at 1494.
298. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Chin, *supra* note 265, at 206–07.
299. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that forbidding the use of contraceptives to married persons is unconstitutional).
300. Byrn & Giddings, *supra* note 280, at 1306–07.

pregnancy in which a mother can seek to exercise her constitutional right to privacy, including abortion, without considering other competing interests or without the ties of an existing contractual relationship.[301] Thus the determination of legal parentage, when it is less clear in the context of assisted reproductive technology and surrogacy, should emphasize both the intent of the parties, and the genetic interests involved in order to adequately prioritize the rights of the individuals.[302] Importantly, as Professor Robertson states, "the right to procreate should [likewise] extend to persons who cannot conceive or bear children."[303]

Such a recommendation adequately addresses the problems that have arisen with the advancement of assisted reproductive technology and especially in the context of surrogacy. The constitutional conflict between the two competing "mother" statuses, one based on genetics, and one based on the intended parent(s),[304] is at the root of those concerns.[305] The Supreme Court's original interpretation that procreative choices were equivalent to control over one's body supports a decision that the intended parents have superior rights over the surrogate in a gestational surrogacy.[306] When assisted reproductive technology threatened reproductive decisions, it became apparent the heart of the Supreme Court's interest was in protecting procreative rights.[307] Based on language in the Court's decisions and the dissection of the underlying policy goals of protecting a right to procure an abortion, the Court demonstrated its intent in protecting the sphere of procreative choices.[308] By establishing that the intended parents have greater constitutional interests in the child they purport to create, the right to privacy correctly protects procreative rights in this form of reproduction.

Further, while states continue to reach different results on the enforceability of surrogacy agreements based on their case law and evaluation of different statutes,[309] this Note demonstrates how resolving the constitutional conflict from the outset can lead to a greater number of enforceable surrogacy arrangements. When a contractual relationship does exist between the parties, the contract should be clear to declare the relationship of the parties to the genetic material, and distinguish the sur-

301. *See generally Johnson*, 851 P.2d at 782–83 (discussing Professor Schultz's interpretation of surrogacy and the right to procreate as related to steps parents take to seek out artificial reproductive technologies as compared to the traditional form of pregnancy).

302. Byrn, *supra* note 270, at 13.

303. *Johnson* 851 P.2d at 791 (quoting John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 411 (1983).

304. *See id.* at 782–83 (discussing commentators view on maternal rights in cases using assisted reproductive technology).

305. *See* Roe v. Wade, 410 U.S. 113, 153 (1973); Skinner v. Oklahoma, 316 U.S. 535, 538, 541 (1942).

306. *Roe*, 410 U.S. at 152–53 (recognizing the right as related to personal decisions in the context of activities relating to marriage).

307. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

308. *See supra* Part III.C.

309. KINDREGAN & MCBRIEN, *supra* note 5, at 157–58.

rogacy as either traditional or gestational. Further, with the reconciliation of the constitutional rights issues, the parties should be clear to recognize their specific, and protected interests, in any medical procedures and decisions that may arise during pregnancy and childbirth. In a gestational surrogacy, when parties consent to an agreement prior to conception this constitutional line of reasoning is preserved and those rights begin at the time of conception. Thus, surrogates do not enjoy the same constitutional protections as if it were their own genetic material.[310] When contracting for surrogacy, the parties must recognize that in the event of a conflict surrounding certain provisions, in the agreement, the right to privacy will be biased in favor of the intended parent if it is a gestational surrogacy. In a traditional surrogacy arrangement, where the birth mother is also the genetic mother, some of these constitutional concerns begin to fall away. There is a stronger argument for this constitutional line of reasoning to apply in the case where there may be two parental entities, but the birth mother is genetically related to the developing fetus. When a surrogate volunteers to utilize her own genetic material for the surrogacy, she has a much closer connection to the decision to procreate and this likely would be superior to the intended parents' interests. Thus, the constitutional conflicts in a gestational surrogacy can be adequately and fairly reconciled.

V. CONCLUSION

While assisted reproductive technology presents new challenges in both the medical and constitutional sphere it is not an insurmountable conflict. The advancements in reproductive technology have implicated individuals' constitutional rights in new ways, especially in the context of surrogacy. While there is some literature and legal exploration in this area, it is highly under regulated likely because it implicates constitutional rights in a completely new way and a way that is not readily apparent. The right to privacy and procreation are fundamental rights and liberty interests, but were originally founded and justified on the basis of notions of traditional pregnancy. Thus, when intended parents contract or seek out a surrogate, if the surrogate is not genetically related to the embryo, the intended parents are the legal parents for all aspects of the pregnancy and after the birth. As such, when the right to privacy is preserved in the individuals who decided to procreate, surrogacy can continue to be a viable, legal, and more clearly defined method of procreation.

310. Ohs, *supra* note 34, at 351.