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## **A House Divided Against Itself Cannot Stand: The Need to Federalize Surrogacy Contracts as a Result of a Fragmented State System, 49 J. Marshall L. Rev. 1155 (2016)**

Brett Thomaston

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# A HOUSE DIVIDED AGAINST ITSELF CANNOT STAND: THE NEED TO FEDERALIZE SURROGACY CONTRACTS AS A RESULT OF A FRAGMENTED STATE SYSTEM

BRETT THOMASTON\*

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## I. INTRODUCTION

Abraham Lincoln famously addressed the Nation's divide in slavery laws by stating, "[a] house divided against itself cannot stand."<sup>1</sup> The principles and spirit of this heroic creed can be equally applied to the current status of surrogacy laws across the United States.<sup>2</sup> A reliance on state law has created a makeshift system riddled with inefficiency and inequitable results.<sup>3</sup> Continuing down this doomed road will all but certainly lead to surrogacy contracts perpetually inhabiting the twilight zone of the law.<sup>4</sup> Federal regulation should be implemented to create a more uniform and equitable landscape for surrogacy contracts.

Surrogacy has evolved in a myriad of ways as a result of technological and scientific advances in the field of medicine.<sup>5</sup> These medical advances have not only made surrogacy procedures more accessible, but more reliable and inexpensive as well.<sup>6</sup> This

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1. Abraham Lincoln, House Divided Speech, ABRAHAM LINCOLN ONLINE, [www.abrahamlincolnonline.org/lincoln/speeches/house.htm](http://www.abrahamlincolnonline.org/lincoln/speeches/house.htm) (last visited Mar. 24, 2016).

2. *Compare* Civil War Facts, CIVIL WAR TRUST, [www.civilwar.org/education/history/faq/](http://www.civilwar.org/education/history/faq/) (last visited Mar. 24, 2016) (supporting the argument that the Civil War began because the Nation was sharply divided between pro-slavery and anti-slavery states), *with* Caitlin Conklin, Note, *Simply Inconsistent: Surrogacy Laws in the United States and the Pressing Need for Regulation*, 35 WOMEN'S RTS. L. REP. 67, 74-86 (2013) (discussing three broad regulatory schemes that have produced major problems for the enforcement of surrogacy contracts).

3. *See* Paul G. Arshagouni, *Be Fruitful and Multiply, By Other Means, if Necessary: The Time has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 844 (2012) (discussing the fractured market and increased inefficiencies that result from inconsistencies in state laws governing surrogacy contracts while characterizing the state system as a "patchwork quilt").

4. *Id.*

5. *See* *In re F.T.R.*, 349 Wis. 2d 84, 104 (2013) (stating, "[t]he ability to create a family using [assisted reproductive technology] has seemingly outpaced legislative responses to the legal questions it presents, especially the determination of parentage); *see also* Donald D. Moreland, Note, *Reproductive Technology Outpacing Connecticut Lawmakers*, 14 QUINNIPIAC PROB. L.J. 287, 288-90 (1999) (suggesting reproductive technology and medicine are progressing faster than the legislature can enact laws to regulate them).

6. Moreland, *supra* note 5, at 288.

progress has not been limited to the medical arena, however, but has inevitably spilled over into the legal realm as well.<sup>7</sup> This spillover can be attributed to the increasingly prevalent issue of infertility.<sup>8</sup> As of February 2015, roughly 6.7 million women between the ages of fifteen and forty-four had an impaired ability to get pregnant and carry a baby to term.<sup>9</sup> This number represents approximately 10.9% of women in that age group.<sup>10</sup>

The complexities and intricacies of the surrogacy process are not just limited to the medical procedure itself, as much of the controversy has been focused on the legal issues surrounding surrogacy contracts.<sup>11</sup> These issues stem from the distinct and disparate degrees of enforceability as a result of polarizing public policies.<sup>12</sup>

There are two primary forms of surrogacy arrangements: traditional and gestational.<sup>13</sup> Traditional surrogacy contracts are those “in which a woman provides her own egg, which is fertilized by artificial insemination, and carries the fetus and gives birth to a child for another person.”<sup>14</sup> Gestational surrogacy contracts are

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7. See *In re F.T.R.*, 349 Wis. 2d at 105 (addressing the courts’ issues concerning surrogacy contracts, commenting that many courts have problems resolving issues surrounding surrogacy contracts and too often use whatever policy and analysis they want).

8. See *Almost One in Six Couples Face Infertility*, REUTERS, [www.reuters.com/article/2013/01/11/us-couples-infertility-idUSBRE90A13Y20130111](http://www.reuters.com/article/2013/01/11/us-couples-infertility-idUSBRE90A13Y20130111), (last visited Sept. 14, 2016) (demonstrating how serious the problem of infertility has become). The article states, “[c]lose to one in six U.S. couples don’t get pregnant despite a year of trying- after which doctors typically recommend evaluation for infertility.” *Id.* Infertility rates increased roughly six and a half percent from 1992 to 2009-2010. *Id.* The overall consensus is that infertility is on the rise. *Id.*

9. Infertility, CENTERS FOR DISEASE CONTROL AND PREVENTION, [www.cdc.gov/nchs/fastats/infertility.htm](http://www.cdc.gov/nchs/fastats/infertility.htm) (last visited Oct. 9, 2016).

10. *Id.*

11. See Caitlin Conklin, Comment, *Simply Inconsistent: Surrogacy Laws in the United States and the Pressing Need for Regulation*, 35 WOMEN’S RTS. L. REP. 67, 68 (2013) (stating that parties to a surrogacy relationship will often draft a contract, but its enforceability was usually questionable).

12. Compare *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993) (holding that gestational surrogacy contracts are consistent with the state’s public policy and therefore enforceable) with *In re Marriage of Moschetta*, 30 Cal.Rptr.2d 893, 897-901 (1994) (emphasizing the state’s polarized views on the enforceability of surrogacy contracts). The court in *Johnson* enforced a gestational surrogacy contract by adopting a test that analyzed the parties’ intent. *Johnson*, 851 P.2d at 777. On the other side of the spectrum, the court in *Moschetta* refused to enforce a traditional surrogacy contract, thereby permitting the surrogate mother to keep the child and ignore the contract. *In re Marriage of Moschetta*, 30 Cal.Rptr.2d at 849-95.

13. E.g. Emily Gelmann, *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, 160-61 (2011) (explaining the two types of surrogacy agreements).

14. *In re Baby*, 447 S.W.3d 807, 818 (Tenn. 2014) (quoting *Black’s Law*

those, “in which one woman (the genetic mother) provides the egg, which is fertilized, and another woman (the surrogate mother) carries the fetus and gives birth to the child.”<sup>15</sup>

“[T]raditional surroga[cy] contracts have not been well received in the common law courts.”<sup>16</sup> However, there has been a drastic decline in traditional surrogacy contracts because of in vitro fertilization and improvements in biomedical technologies, which have made gestational surrogacy the overwhelming favorite for intended parents.<sup>17</sup> In addition, the courts have struggled to enforce traditional surrogacy contracts in light of the parties’ genetic ties to the child in conjunction with public policy demands.<sup>18</sup> Roughly 95% of surrogacy contracts today are gestational, meaning that the surrogate mother has no genetic ties to the fetus in most surrogacy relationships.<sup>19</sup>

Commercial surrogacy contracts are those surrogacy contracts in which the surrogate mother receives compensation beyond just the reasonable expenses necessarily incurred throughout the term of the contract.<sup>20</sup> These types of surrogacy contracts have led to a plethora of feverish objections sounding in exploitation and commodification of both the mother and child.<sup>21</sup> First-time surrogates can earn up to \$35,000 for their services.<sup>22</sup> This paper

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*Dictionary* 1582 (9th ed. 2009)).

15. *Id.*

16. Weldon E. Havins & James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating “Non-Traditional” Gestational Surrogacy Contracts*, 31 MCGEORGE L. REV. 673, 677 (2000).

17. Elizabeth Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 121 (2009).

18. See *In re Marriage of Moshetta*, 30 Cal.Rptr.2d at 903 (presenting the issue that most courts struggle with when asked to enforce traditional surrogacy contracts). Courts are reluctant to enforce traditional surrogacy contracts because the surrogate mother is the genetic mother of the child. *Id.* “Couples who cannot afford in-vitro fertilization and embryo implantation, or who resort to traditional surrogacy because the female does not have eggs suitable for in vitro fertilization, have no assurance their intentions will be honored in a court of law. For them and the child, biology is destiny.” *Id.* See also Arshagouni, *supra* note 3, at 802 (stating, “[m]any of the concerns raised in traditional surrogacy, in particular those concerning a woman contracting to give up parental rights for her biological child, do not exist in gestational surrogacy.”).

19. Scott, *supra* note 17, at 139.

20. Brock A. Patton, Note, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 509 (2010).

21. See Havins and Dalessio, *supra* note 16, at 683-84. (presenting a counterargument to commercial surrogacy contracts, suggesting that exchanging payment in excess of the reasonable fees necessary to carry out the contract terms will exploit economically disadvantaged women who are in a position of inferior bargaining power and who enter into these contracts only as a last resort for income).

22. *How Much Do Surrogates Get Paid?*, CIRCLE SURROGACY, [www.circlesurrogacy.com/surrogates/how-much-do-surrogates-get-paid](http://www.circlesurrogacy.com/surrogates/how-much-do-surrogates-get-paid) (last

will address the federalization of commercial gestational surrogacy contracts exclusively.

This comment will explain the necessity for federal regulation of surrogacy contracts by analyzing the current state of surrogacy laws across the United States. This will be accomplished by examining the fragmented state system and how this largely ignored area of the law has been a feeding ground for widespread forum shopping and inconsistent results. This comment will then address the public policy reasons in support of enforcing these contracts. Next, this comment will examine the avenues of congressional power for regulating these types of contracts. Lastly, this comment will propose that the federal government implement legislation containing key language from the Federal Arbitration Act (FAA), combined with portions of Illinois' Gestational Surrogacy Act. The purpose of such legislation will be to instill a national public policy in favor of enforcing surrogacy contracts.

## II. THE CURRENT LANDSCAPE OF SURROGACY CONTRACTS

Surrogacy, viewed by many as a modern concept, arguably has its origins dating back thousands of years to Biblical times.<sup>23</sup> Nevertheless, the legal aspects of surrogacy are in fact very modern, having a very brief history spanning less than fifty years.<sup>24</sup> During this time, surrogacy contracts have been governed at the state level.<sup>25</sup> This section will first provide a brief history of surrogacy and surrogacy contracts, as well as the major distinctions between the two types of surrogacy contracts.<sup>26</sup> This section will then discuss the current composition of surrogacy laws across the United States by breaking them down into three broad categories.<sup>27</sup>

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visited Oct. 9, 2016).

23. *History of Surrogacy - When and Where Did it All Begin*, SURROGATE MOTHERS, [www.surrogatemothers.org/history-of-surrogacy-when-and-where-did-it-all-begin](http://www.surrogatemothers.org/history-of-surrogacy-when-and-where-did-it-all-begin) (last visited Oct. 9, 2016); *Genesis: 16* (King James). Genesis 16 tells the story of Abram and his wife Sarai, who is unable to bear children. *Id.* Sarai suggests that Abram sleep with her Egyptian slave Hagar, and then raise the child as their own. *Id.*

24. *See* History of Surrogacy, FIND SURROGATE MOTHER, [www.findsurrogatemother.com/surrogacy/information/history](http://www.findsurrogatemother.com/surrogacy/information/history) (last visited Mar. 27, 2016) (stating that the first surrogacy contract in the United States was brokered in the 1970's).

25. Usha R. Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 25-26 (2009).

26. *See infra* Part II Section A (giving a brief history of surrogacy contracts and distinguishing the two types of surrogacy contracts).

27. *See infra* Part II Section B (providing the current status of surrogacy laws across the United States by funneling them into three broad categories).

### A. A Brief History of Surrogacy Contracts

The emergence of surrogacy contracts in the United States began in the 1970s.<sup>28</sup> The first surrogacy contract was drafted in 1976.<sup>29</sup> However, the first glimpse of commercial surrogacy was not seen until 1980.<sup>30</sup> Shortly thereafter, the first reported baby born through gestational surrogacy in the United States was delivered in 1981.<sup>31</sup> Surrogacy became increasingly popular in the early 1990s, and has continued to become more prevalent in the United States.<sup>32</sup>

The history of an individual surrogacy contract oftentimes begins with the heart breaking news to a couple that they are unable to either conceive or carry a child to term.<sup>33</sup> This can stem from any number of reasons, including incapacity of the reproductive organs, age, or past medical procedures such as hysterectomies.<sup>34</sup> However, rapid advancements in medical reproductive technology have provided hope and opportunity to these couples in the form of surrogacy.<sup>35</sup> There are two types of surrogacy: traditional and gestational.<sup>36</sup>

#### 1. Traditional Surrogacy

“Surrogacy is the use of one woman’s gestational capacity to assist in the development of a child intended for someone else to parent.”<sup>37</sup> The defining characteristic of traditional surrogacy is that the surrogate is the biological mother of the baby.<sup>38</sup> This is because the surrogate’s egg is used and not the intended mother’s, making the surrogate both the egg donor and the biological

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28. Conklin, *supra* note 2, at 70-71.

29. *Id.*

30. *Id.*

31. *Id.*

32. *History of Surrogacy- Surrogacy Stories Throughout Time*, INFORMATION ON SURROGACY, <http://information-on-surrogacy.com/history-of-surrogacy> (last visited 3/26/16). From the time the first surrogacy contract was written in 1976 until 1988, roughly 600 babies were born using surrogacy. *Id.* However, between the years 1988 and 1992, that number skyrocketed to over 5,000 births in just that four year period. *Id.* Since then, the number of babies born via surrogacy has continued to grow at an exponential rate. *Id.*

33. Havins & Dalessio, *supra* note 16, at 673.

34. *Id.*

35. *Id.*

36. Alyssa James, Note, *Gestational Surrogacy Agreements: Why Indiana Should Honor Them and What Physicians Should Know Until They Do*, 10 IND. HEALTH L. REV. 175, 178 (2013).

37. Arshagouni, *supra* note 3, at 800.

38. Brittnay M. McMahon, *The Science Behind Surrogacy, Why New York Should Rethink its Surrogacy Contracts Laws*, 21 ALB. L.J. SCI. & TECH. 359, 361 (2011).

mother.<sup>39</sup> This was commonly achieved by artificial insemination.<sup>40</sup>

## 2. Gestational Surrogacy

Gestational surrogacy involves fertilization by manually combining the sperm and the egg, a process known as in vitro fertilization (IVF).<sup>41</sup> The result of this process is that the surrogate, also referred to as the gestational carrier, has no genetic ties to the child.<sup>42</sup> While the female surrogate has no genetic ties to the child, the genetic makeup of the child can still be formed in a number of ways.<sup>43</sup> Intended parents and surrogates alike have turned to contract law to protect their expectation interests.<sup>44</sup>

### *B. The Current Composition of Surrogacy Contracts as Governed By State Statutory Law*

Surrogacy contracts have been left in a state of chaotic stagnancy, with vastly differing levels of enforcement as a product

39. *Id.* at 361-62.

40. *Id.* at 361

41. *In Vitro Fertilization: IVF*, AM. PREGNANCY ASS'N, <http://americanpregnancy.org/infertility/in-vitro-fertilization/> (last updated Sept. 2, 2016). There are 5 basic steps to IVF and embryo transfer process” *Id.* First, the eggs are monitored and stimulated through the use of fertility medications. *Id.* Second, the eggs are collected. *Id.* Third, the sperm is secured and prepared to be combined with the eggs. *Id.* Forth is the process of insemination, which is when the sperm and eggs are mixed together and then monitored. *Id.* If the fertilization is successful, and cell division is occurring, the fertilized eggs are considered embryos. *Id.* Fifth, the embryos are transferred to the uterus. *Id.*

42. *Id.*

43. Patton, *supra* note 20, at 511.

First, the egg of the contracting female that is fertilized by the sperm of the contracting male may be implanted in the surrogate. Second, an egg provided by a donor that is fertilized by the sperm of the contracting male, may be implanted in the surrogate. Third, an egg provided by the contracting female is fertilized by the donor sperm may be implanted in the surrogate. Finally, the egg of a donor that has been fertilized by the sperm of another donor may be implanted in the surrogate.

*Id.*

44. See Denise E. Lascarides, Note, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 HOFSTRA L. REV. 1221, 1246-47 (1997) (emphasizing that mutual gain is a key benefit to a contractual relationship). Common sense dictates that parties do not enter into contractual relations to injure themselves, economically or otherwise. *Id.* at 1247. Maintaining a presumption of mutual gain is argued as necessary in order to further the court’s practice of analyzing only the adequacy of consideration. *Id.*



of state discretion with no signs of uniformity.<sup>45</sup> Surrogacy laws across the states, if they exist in a given state at all,<sup>46</sup> occupy a spectrum of enforcement with the most polarized of ends, and no sense of uniformity or cohesion.<sup>47</sup> As a result of the total lack of consistency within the state system, there is a massive hurdle to overcome for couples wishing to have a child using this process.<sup>48</sup> Eris would undoubtedly feel a sense of accomplishment after looking at the current statutory situation of surrogacy contracts.<sup>49</sup> Nonetheless, these statutes can be placed in three broad categories.<sup>50</sup>

1. *States that Expressly Forbid All Surrogacy Contracts by Statute*

One group of states places a total ban on surrogacy contracts, explicitly deeming them void and unenforceable.<sup>51</sup> For example, Indiana invalidates all surrogacy contracts, expressly forbidding “enforce[ment] of any term of a surrogate agreement that requires a surrogate to [become pregnant].”<sup>52</sup> North Dakota also expressly forbids surrogacy contracts and declares them void when, “a woman agrees to become a surrogate or to relinquish that woman’s rights and duties as a parent of a child conceived through assisted conception.”<sup>53</sup>

Some states go as far as to impose criminal and civil penalties for entering into or assisting in a surrogacy contract.<sup>54</sup> Michigan, for instance, is oftentimes referred to as having the harshest penalties for entering into and aiding in a surrogacy contract.<sup>55</sup> Michigan statutes expressly proclaim, “[a] person shall not enter

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45. See *Gestational Surrogacy Law Across the United States*, CREATIVE FAMILY CONNECTIONS, [www.creativefamilyconnections.com/us-surrogacy-law-map](http://www.creativefamilyconnections.com/us-surrogacy-law-map) (last visited Oct. 9, 2016) (displaying what seems to be a stained glass image of the United States, which, upon a closer look, is in fact visually conveying the current breakdown of surrogacy laws state by state).

46. Conklin, *supra* note 2, at 68-69. Some states have no statute governing surrogacy contracts. *Id.*

47. See *id.* at 74-86 (explaining various regulatory structures employed by certain states).

48. See Arshagouni, *supra* note 3, at 808 (arguing that intended parents have a very hard road to traverse if they wish to utilize the services of a surrogate).

49. *Eris*, GREEK MYTHOLOGY, [www.greekmythology.com/Other\\_Gods/Eris/eris.html](http://www.greekmythology.com/Other_Gods/Eris/eris.html) (last visited Mar. 27, 2016). “Eris is the Greek goddess of chaos, strife, and discord.” *Id.*

50. See Arshagouni, *supra* note 3, at 805-808 (categorizing surrogacy statutes into three broad areas: total ban, regulated in some fashion, and statutory silence).

51. Patton, *supra* note 20, at 514.

52. IND. CODE ANN. § 31-20-1-1 (West 2015).

53. N.D. CENT. CODE ANN. § 14-18-15 (West 2015).

54. Patton, *supra* note 20, at 514.

55. Arshagouni, *supra* note 3, at 806.

into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract for compensation.”<sup>56</sup> A woman who enters into such an agreement is guilty of a misdemeanor punishable by a fine of up to \$10,000 or up to a year of imprisonment.<sup>57</sup> Michigan imposes a felony on any person who otherwise takes part and assists in the surrogacy contract, with a fine of up to \$50,000, imprisonment up to five years, or both.<sup>58</sup>

The District of Columbia invalidates all surrogacy contracts, providing, “[s]urrogate parenting contracts are prohibited and rendered unenforceable in the District.”<sup>59</sup> Similar to Michigan, criminal and civil penalties can be imposed, with fines reaching up to \$50,000 and terms of imprisonment up to five years.<sup>60</sup>

## 2. *States that Permit Surrogacy Contracts to Some Extent*

The range of enforceability among the states that allow surrogacy contracts to some extent varies wildly.<sup>61</sup> There are a number of key aspects within a surrogacy contract that have created a sharp divergence among the states.<sup>62</sup> However, even among these facially analogous state regulations, there are innumerable variations and distinctions embedded within the statutes that render each and every state’s enforceability unique.<sup>63</sup> This free-for-all has created an unnavigable labyrinth of minute yet critical distinctions.<sup>64</sup>

One key intersection of divergence is the perpetual debate regarding traditional versus gestational surrogacy, where many states forbid traditional surrogacy yet permit gestational surrogacy.<sup>65</sup> Utah, for example, provides for the enforcement of gestational surrogacy contracts while forbidding traditional surrogacy.<sup>66</sup> Likewise, Nevada enforces gestational surrogacy contracts while forbidding traditional surrogacy.<sup>67</sup>

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56. MICH. COMP. LAWS ANN. § 722.859(1) (West 2015).

57. § 722.859(2) (West 2015).

58. § 722.859(3) (West 2015).

59. D.C. CODE § 722.859 (2015).

60. *Id.*

61. Arshagouni, *supra* note 3, at 805.

62. *See id.* at 805-13 (pointing out vast number of differences between various state statutes, wherein there is discord even among the simplest of provisions).

63. *Id.*

64. *Id.*

65. *See* McMahon, *supra* note 38, at 370 (stating, “[s]ome states legally distinguish between traditional and gestational surrogacy.”).

66. *See* UTAH CODE ANN. § 78B-15-801 (West 2015) (discussing gestational surrogacy throughout the section, but not traditional surrogacy in any way, essentially indirectly banning traditional surrogacy agreements).

67. *See* NEV. REV. STAT. ANN. § 126.500-810 (West 2015) (providing for the enforcement and validity of gestational surrogacy contracts while prohibiting traditional surrogacy). The title of the statute is “Gestational Agreement

Even between these two statutes, however, there is a mind numbing number of differences, as Utah law requires the intended parents be observed at home to evaluate their compatibility and competency for parenthood, not unlike the process that potential parents undergo for an adoption.<sup>68</sup> In addition, Utah requires medical evidence that the intended mother is unable to bear a child or cannot do so without a significant risk to her health.<sup>69</sup> Neither of these requirements is mandated under Nevada law.<sup>70</sup>

Commercial surrogacy, another significant source of divergence, is the subject of a heated debate within the surrogacy realm, which is reflected in the states' statutory language.<sup>71</sup> For example, Florida enforces gestational surrogacy contracts as binding and valid.<sup>72</sup> However, express limitations on compensation are implemented by providing, "the commissioning couple may agree to pay only reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related to prenatal, intrapartal, and portpartal periods."<sup>73</sup>

Similarly, Virginia bases the enforceability of surrogacy contracts on the contingency that, "[a]ll the parties have voluntarily entered into the surrogacy contract and understood its terms and the nature, meaning, and effect of the proceeding and understand that any agreement between them for payment of compensation is void and unenforceable."<sup>74</sup> Washington places a dual layer of protection against compensation.<sup>75</sup> It first provides that, "[n]o person, organization, or agency shall enter into, induce, arrange, procure, or otherwise assist in the formation of a

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Authorized." *Id.* While there is express authorization of a gestational surrogacy contract, there is no mention of traditional surrogacy agreements. *Id.*

68. UTAH CODE ANN. § 78B-15-803(2)(c) (West 2015).

69. UTAH CODE ANN. § 78B-15-803(2)(b) (West 2015).

70. *See* McMahon, *supra* note 38, at 370-72 (explaining key distinctions between varying statutes that permit surrogacy contracts to some extent); *see also* NEV. REV. STAT. ANN. § 126.500-810 (West 2015) (demonstrating that Nevada does not have a requirement for a home observation or showing of medical necessity from the intended parents).

71. *See* Adam P. Plant, Commentary, *With a Little Help From My Friends: The Intersection of the Gestational Carrier Surrogacy Agreement, Legislative Inaction, and Medical Advancement*, 54 ALA. L. REV. 639, 652 (2003) (stating, "these states [that prohibit commercial surrogacy contracts] purport to ensure that financial pressures do not affect parenthood choices and, thereby, subscribe to an anticommodification view of surrogacy."). Some opponents to commercial surrogacy contracts fear the formation of a "baby selling" market. *Id.*

72. FLA. STAT. ANN. § 742.15 (West 2015).

73. *Id.*

74. VA. CODE ANN. § 20-160(B)(4) (West 2015).

75. *See* WASH. REV. CODE ANN. § 26.26.230 (LexisNexis 2015) (stating that compensation is not allowed in the procurement of surrogacy contracts); *see also* WASH. REV. CODE ANN. § 26.26.240 (LexisNexis 2015) (stating that surrogacy contracts for compensation will be void as against public policy).

surrogate parentage contract, written or unwritten, for compensation.”<sup>76</sup> The statute then goes on in a completely different, albeit successional section to proclaim, “[a] surrogate parentage contract entered into for compensation, whether executed in the state of Washington or in another jurisdiction, shall be void and unenforceable in the state of Washington as contrary to public policy.”<sup>77</sup>

Although this sea of invalidation and skepticism may seemingly appear to leave surrogacy on the brink of annihilation, there are those states that enforce surrogacy contracts to a great extent, such as New Hampshire.<sup>78</sup> New Hampshire provides that, “[a] gestational agreement that conforms to [this statute] is a legal contract that is presumed to be valid and enforceable and is legally enforceable by the court.”<sup>79</sup> New Hampshire is not the only state to step forward and advocate for the enforcement of surrogacy contracts, as states like Illinois have developed a similarly progressive statute providing for enforceability and validity.<sup>80</sup>

In fact, many consider Illinois’s Gestational Surrogacy Act (“GSA”) to be the gold standard of surrogacy legislation.<sup>81</sup> Supporters of the Illinois statute suggest it is superior in that it thoroughly addresses many of surrogacy contracts’ most pivotal aspects, such as the requirements for a surrogate.<sup>82</sup> In Illinois, a surrogate is required to be at least twenty one years old, have given birth to at least one child, complete a medical and mental health evaluation, undergo legal consultation, and obtain a health insurance policy.<sup>83</sup>

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76. § 26.26.230.

77. § 26.26.240.

78. N.H. REV. STAT. ANN. § 168-B:10 (2015).

79. *Id.*

80. *See* 750 ILL. COMP. STAT. ANN. 47/25 (West 2015) (stating, “[a] gestational surrogacy contract shall be presumed enforceable for purposes of State law.”).

81. *See* Gelmann, *supra* note 13, at 191 (stating, “[w]hile there are numerous considerations in the creation of a commercial gestational surrogacy contract, the Illinois Gestational Surrogacy Act is a thorough and thoughtful statute that seeks to protect the interest of the gestational surrogate, intended parents, and the resulting child.”); Chelsea VanWormer, Comment, *Outdated and Ineffective: An Analysis of Michigan’s Gestational Surrogacy Law and the Need for Validation of Surrogate Pregnancy Contracts*, 61 DEPAUL L. REV. 911, 912-13 (2012). “In contrast to [Michigan’s Surrogate Parentage Act], Illinois’s Gestational Surrogacy Act (GSA) is arguably the most comprehensive surrogacy legislation.” *See also* Arshagouni, *supra* note 3, at 809 (arguing that Illinois’s Gestational Surrogacy Act is superior to most if not all other states’ surrogacy laws). “In 2004, Illinois passed its Gestational Surrogacy Act (GSA), one of the more comprehensive statutory regimes allowing for the enforceability of gestational surrogacy agreements.” *Id.*

82. 750 ILL. COMP. STAT. ANN. 47/20 (West 2015).

83. *Id.*

The GSA also provides comprehensive requirements for the intended parents.<sup>84</sup> Intended parents are required to demonstrate a medical need for the surrogate's services.<sup>85</sup> In addition, they must "contribute at least one of the gametes<sup>86</sup> resulting in a pre-embryo that the gestational surrogate will attempt to carry to term."<sup>87</sup> In terms of the mandated written contract,<sup>88</sup> it allows reasonable compensation and,<sup>89</sup> perhaps most importantly, states that the contract must "provide for the express written agreement of the gestational surrogate to surrender custody of the child to the intended parent or parents immediately upon the birth of the child."<sup>90</sup> Despite significant progress in Illinois and New Hampshire, the expansive variation in state statutes that permit surrogacy contracts to some extent render this category one that is vast in size and erratic in content.<sup>91</sup>

### 3. *The Abyss: Statutory Silence Regarding Surrogacy Contracts*

"Roughly half of the states have no statutes or case law specifically addressing surrogacy contracts. As such, it is entirely unclear how enforceable such contracts would be in those states."<sup>92</sup> In many of these states, a surrogacy dispute could be a case of first impression.<sup>93</sup> Frighteningly, these state courts have no statutory guidance when deciding these cases.<sup>94</sup>

In the Ohio Supreme Court case of *J.F. v. D.B.*,<sup>95</sup> the court demonstrated the virtually unchecked discretion of courts in these states and their ability to wield an unchallenged sword of public policy.<sup>96</sup> There, the intended father entered into a commercial

84. *Id.*

85. *Id.*

86. Gamete, NATURE SCITABLE, [www.nature.com/scitable/definition/gamete-gametes-311](http://www.nature.com/scitable/definition/gamete-gametes-311) (last visited Mar. 27 2016). "[Gametes] are . . . referred to as sex cells. Female gametes are called ova or egg cells, and male gametes are called sperm." *Id.*

87. Arshagouni, *supra* note 3, at 810. In conjunction with the necessity to demonstrate a medical need for the surrogacy, some classes of individuals will necessarily be excluded from being able to utilize a surrogate. *Id.* For example, "[a] single woman who has had a radical hysterectomy or lacks both a uterus and ovaries for some other reason would be prevented from having a child through gestational surrogacy." *Id.*

88. 750 ILL. COMP. STAT. ANN. 47/25 (West 2015).

89. *Id.*

90. *Id.*

91. See Arshagouni, *supra* note 3, at 805 (contending that the states' responses to surrogacy contracts have been inconsistent and widespread).

92. *Id.* at 808.

93. Patton, *supra* note 20, at 521.

94. *Id.*

95. *J.F. v. D.B.*, 879 N.E.2d 740 (Ohio 2007).

96. See *id.* at 741-42 (demonstrating the Court's ability to create its own public policy each time a surrogacy dispute comes to light).

gestational surrogacy contract with a surrogate, whereby eggs from a nonparty were artificially inseminated with the intended father's sperm.<sup>97</sup> After giving birth to triplets, a custody dispute arose and led the parties to a breach of contract suit in the Ohio courts.<sup>98</sup>

The trial court held for the surrogate mother, concluding, "the provisions of the surrogacy contract that require [the surrogate mother] to relinquish parental rights . . . violate Ohio's public policy and cannot be enforced."<sup>99</sup> After the court of appeals reversed, the Ohio Supreme Court was faced with an issue that it openly admitted to having no guidance from the legislature or precedent to consider.<sup>100</sup> The Supreme Court opined that written contracts seemed to be the logical and appropriate way to enforce surrogacy agreements.<sup>101</sup> The Court held that the surrogacy contract did not violate public policy because there was no preexisting public policy regarding surrogacy contracts to violate.<sup>102</sup>

Cases like *J.F.* have sprung up across the country in states that have shunned surrogacy out of the legislative landscape.<sup>103</sup> State regulation of surrogacy contracts has left intended couples battling a hydra with fifty heads,<sup>104</sup> leaving in its wake an omnipresent sense of uncertainty and unprecedented inconsistencies and inequities.<sup>105</sup> As a result, because Congress has the authority to regulate surrogacy based on numerous authorities, it should enact federal legislation that promotes a public policy aimed at enforcing surrogacy contracts because doing so will protect the parties' expectation interests.<sup>106</sup>

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97. *Id.* at 740.

98. *Id.*

99. *Id.*

100. *Id.* at 741. "Furthermore, as far as we can tell, neither the General Assembly nor any other governmental body in Ohio has ever enunciated a public policy concerning gestational surrogates." *Id.*

101. *Id.* "A written contract defining the rights and obligations of the parties seems an appropriate way to enter into surrogacy agreements. If the parties understand their contract rights, requiring them to honor the contract they entered into is manifestly right and just." *Id.*

102. *Id.* at 741-42.

103. See *Raftopol v. Ramey*, 12 A.3d 783, 804 (Conn. 2011) (holding, "intended parents who are parties to a valid gestational agreement acquire parental status and are entitled to be named as parents on the replacement birth certificate, without respect to their biological relationship."). The court added that the complex legal issues surrounding surrogacy have not been able to keep pace with the unparalleled speed at which the technology is changing. *Id.* at 801.

104. See Hydra, ENCYCLOPEDIA BRITANNICA, [www.britannica.com/topic/Hydra-Greek-mythology](http://www.britannica.com/topic/Hydra-Greek-mythology) (last visited Sept. 4, 2016) (defining a hydra as a creature of Greek mythology with multiple snake-like heads).

105. See Arshagouni, *supra* note 3, at 809 (describing the "proverbial map" that surrogacy law is splattered across and the resulting inconsistencies).

106. See *infra* Part III (arguing for federal regulation of surrogacy

### III. THE LEGAL FOUNDATIONS AND SOCIAL JUSTIFICATIONS FOR FEDERALIZING SURROGACY CONTRACTS

The prerequisite concern for federal regulation of commercial surrogacy contracts is the source of Congress's power to actually regulate these types of contracts, which is largely governed by the Commerce Clause<sup>107</sup> as well as the Due Process Clause under the 14th Amendment.<sup>108</sup> Furthermore, the Tenth Amendment<sup>109</sup> does not bar federal regulation.<sup>110</sup> Public policy strongly favors congressional intervention in the form of regulation because the current state based scheme abandons the cornerstone and principle function of contract law: protecting the parties' expectation interests.<sup>111</sup> While there have been attempts to implement uniform regulation at the state level, these valiant efforts demonstrate the necessity of regulation at the federal level.<sup>112</sup>

#### A. *The Sources of Congressional Power to Regulate Surrogacy Contracts*

It is squarely within Congress's power to regulate surrogacy contracts.<sup>113</sup> There are, in fact, a number of permissible avenues that Congress could pursue.<sup>114</sup> Opponents to federal regulation of surrogacy contracts present a seemingly strong Constitutional challenge, but those challenges fail after a brief glimpse into the merits of their arguments.<sup>115</sup>

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contracts).

107. U.S. CONST. art. I, § 8.

108. U.S. CONST. amend. XIV, § 2.

109. U.S. CONST. amend. X.

110. See *infra* Part III(A)(3).

111. See Craig Dashiell, Note, *From Louise Brown to Baby M and Beyond: A Proposed Framework for Understanding Surrogacy*, 65 RUTGERS L. REV. 851, 890 (2013) (proposing that a statutory framework enforcing surrogacy contracts would not disrupt the expectation interests of the parties, but instead, would preserve them).

112. See Patton, *supra* note 20, at 530 (exploring a previous attempt at uniform regulation and why federal regulation is the necessary solution in wake of such ineffective attempts).

113. See Gelmann, *supra* note 13, at 168 (stating, "[n]ot only is it important that the federal government takes steps to regulate commercial gestational surrogacy contracts, it is well within the federal government's power to do so").

114. Conklin, *supra* note 2, at 89.

115. See Gelmann, *supra* note 13, at 171-72 (supplying the argument that the Tenth Amendment mandates surrogacy contracts continue to be regulated at the state level).

### 1. The Commerce Clause

The Commerce Clause states, “Congress shall have the power . . . to regulate commerce . . . among the several States.”<sup>116</sup> The expansive reach of the Commerce Clause was the topic of heated debate for much of the nineteenth and twentieth centuries within the Supreme Court, beginning with *Gibbons v. Ogden*.<sup>117</sup> In that opinion delivered in 1824, Chief Justice Marshall interpreted the language of the Constitution to mean that the Commerce Clause could be used to regulate interstate and intrastate commerce, so long as the activity had a substantial impact on interstate commerce.<sup>118</sup>

The Supreme Court contributed to this rationale in its decision *Wickard v. Filburn*.<sup>119</sup> This opinion introduced the Aggregation Principle, which is of significant importance to the issue at hand, as Justice Jackson stated,

[E]ven if [a party’s] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this is irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’<sup>120</sup>

The practical effect of the Aggregation Principle is that Congress can use the Commerce Clause to reach seemingly “trivial” and individual conduct when the activity of all those similarly situated, regarded as a whole, has a substantial impact on interstate commerce.<sup>121</sup> The Court has utilized this “substantial

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116. U.S. CONST. art. I, § 8.

117. *Gibbons v. Ogden*, 22 U.S. 1, 74 (1824).

118. *See id.* at 74 (providing the forum for which Chief Justice Marshall utilized judicial review to interpret the Commerce Clause). “The word ‘among’ means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.” *Id.* He further provided that while, “[t]he completely internal commerce of a State . . . may be considered as reserved for the State itself[,]” he concluded that, “[c]omprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one.” *Id.* To solidify this principle, he stated quite plainly that, “[t]he power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States.” *Id.* at 75.

119. *See Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (holding that the commerce clause affects home grown wheat intended solely for home consumption).

120. *Id.* at 125.

121. *See id.* at 127-28 (introducing the Aggregation Principle as a way to further extend the reach of the Commerce Clause). In *Wickard*, Congress was able to regulate the home consumption of a farmer’s own grown wheat. *Id.* The Court stated, “[t]hat [the individual’s] own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where . . . his contribution, taken with that of many others



effect on interstate commerce” standard in cases subsequent to *Wickard* and is still relevant for Commerce Clause inquiries.<sup>122</sup>

Lastly, the Commerce Clause has been used to regulate purely intrastate activity, such as the individual cultivation and consumption of marijuana.<sup>123</sup> To fortify its reasoning, the Supreme Court held that, “case law firmly establishes Congress’s power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”<sup>124</sup> The Court reasoned that, “[w]e need not determine whether [the] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”<sup>125</sup>

The combined logic, rationale, and holdings of these cases suggest that surrogacy contracts fall under the umbrella of Congress’s power to regulate via the Commerce Clause.<sup>126</sup> First, surrogacy contracts can be enormously complex, including up to 5 parties, most of whom, if not all, almost always reside in different states.<sup>127</sup> In addition, the surrogacy process can be very expensive, with some estimates putting a price tag of over \$93,000 on the entirety of the surrogacy process.<sup>128</sup> For commercial surrogacy contracts, as is the topic of this comment, the standard compensation for a surrogate is upwards of \$30,000.<sup>129</sup> The very nature of surrogacy contracts, as well as the considerable costs involved, demonstrate that surrogacy contracts can hardly be

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similarly situated, is far from trivial.” *Id.*

122. *See* U.S. v. Lopez, 514 U.S. 549, 558-59 (1995) (providing, “Congress’s commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.”).

123. *See* Gonzales v. Raich, 545 U.S. 1, 6-8 (2005) (explaining the Compassionate Act as it pertained to the exemptions from criminal prosecution for “physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medical purposes with the recommendation or approval of a physician.”).

124. *Id.* at 17.

125. *Id.* at 22.

126. *See* Gelmann, *supra* note 13, at 170 (furthering the proposition that since 1939, the Supreme Court has liberally interpreted the Commerce Clause to ensnare a wide variety of economic activity).

127. *See id.* at 168 (explaining the complexity of surrogacy contracts by looking to the number of potential parties involved). “At its most complex, surrogacy arrangements can involve as many as five parties- two commissioning or intended parents, an egg donor, a sperm donor, and a gestational carrier.” *Id.*

128. *Surrogacy Financial Information*, FAMILY SOURCE CONSULTANTS, [www.familysourcesurrogacy.com/welcome-intended-parents/surrogacy-process/surrogacy-costs/](http://www.familysourcesurrogacy.com/welcome-intended-parents/surrogacy-process/surrogacy-costs/) (last visited Oct. 16, 2015).

129. Compensation, FAMILY SOURCE CONSULTANTS, [www.familysourceurrogacy.com/surrogates/compensation/](http://www.familysourceurrogacy.com/surrogates/compensation/) (last visited Oct. 16, 2015).

characterized as trivial or individualistic, and have a substantial effect on interstate commerce.<sup>130</sup>

## 2. *The Due Process Clause of the Fourteenth Amendment*

The Due Process Clause of the Fourteenth Amendment provides a second avenue for congressional regulation of surrogacy contracts.<sup>131</sup> Privacy, which the Supreme Court has interpreted to include decisions pertaining to, but certainly not limited to, procreation, marriage, and sexual activity, is a fundamental right protected by Constitution.<sup>132</sup> *Griswold v. Connecticut* established the privacy right, using it to protect a married couple's decision to use contraception.<sup>133</sup>

*Eisenstadt v. Baird* expanded upon the right to privacy by holding that it is not limited to married couples, but instead, extends to individuals.<sup>134</sup> In 1973, the privacy right set out in *Griswold* was extended to reach decisions pertaining to abortion in *Roe v. Wade*.<sup>135</sup> Justice Blackmun stated, "the right of personal privacy includes the abortion decision."<sup>136</sup> Finally, this privacy right has been extended beyond the realm of procreation and reproduction and into the wide world of family relations.<sup>137</sup>

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130. See *Wickard*, 317 U.S. at 114-15 (contrasting the fairly simplistic nature of the activity being regulated under the Commerce Clause in *Wickard* to the extremely complex and expensive activity involved in surrogacy contracts).

131. U.S. CONST. amend. XIV, § 1.

132. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (exhibiting the origins of the constitutionally protected privacy right). Although this right is not explicitly found anywhere in the Constitution, Justice Douglas found an alternative to protecting this fundamental right. *Id.* "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.*

133. *Id.* at 485-86. The Supreme Court premised their decision on the pivotal question, "[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraception? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." *Id.* The Court further fortified the existence of a fundamental right to privacy by stating, "[this case] concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 485.

134. See *Eisenstadt v. Baird*, 405 U.S. 438, 443 (expanding the boundaries of the *Griswold* privacy right by holding that it applies to both married couples and individuals alike).

135. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding, "[a] state criminal abortion statute [such as the Texas statute in question], that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.").

136. *Id.* at 154.

137. See *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (developing the *Griswold* privacy right beyond just decisions relating to procreation, and into family relations to some extent).

Due Process is not a formulaic equation to which rigid lines have been attached, and thus, may permissibly be extended to include protection for surrogacy contracts.<sup>138</sup> The Supreme Court's decisions relating to the fundamental right of privacy "establish that the Constitution protects the sanctity of the family precisely because the institution of family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."<sup>139</sup> Surrogacy contracts are intrinsically related to having a child and promoting family ideals.<sup>140</sup> The "sanctity of the family"<sup>141</sup> has inevitably progressed as a result of advances in medical technology.<sup>142</sup> The privacy right impacts every party to a surrogacy contract; thus, surrogacy contracts should not be denied the same protection afforded to abortion or family relations.<sup>143</sup>

### 3. *The Tenth Amendment: A Bystander in the Path to Congressional Authority to Regulate*

The Tenth Amendment states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."<sup>144</sup> Opponents to federal regulation of surrogacy contracts argue that the Tenth Amendment prohibits such a practice because these contracts fall into the area of family law.<sup>145</sup> Family law has traditionally been regarded as being within the states' kingdom of regulation.<sup>146</sup>

However, this assertion ignores the modern trend of federal regulation penetrating the permeable boundaries of family law.<sup>147</sup> Family affairs are no longer exclusively the dominion of state governments, but instead, are comprised of a "blend of state and

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138. *Id.* at 494 (citing *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). "Due process has not been reduced to any formula; its contents cannot be determine by reference to any code." *Id.*

139. *Id.* at 503.

140. *See* Patton, *supra* note 20, at 512 (demonstrating the nature of the intended parents motivation for entering into a surrogacy contract).

141. *Moore*, 431 U.S. at 503.

142. *See* Gelmann, *supra* note 13, at 174 (explaining the cause and effect type relationship that surrogacy contracts have with the medical industry and its rapid technological progress).

143. *See id.* (expounding upon the notion that procreative interests have been granted significant constitutional protection).

144. U.S. CONST. amend. X.

145. Gelmann, *supra* note 13, at 171-72.

146. *Id.*

147. *See* Patton, *supra* note 20, at 529 (explaining that historically, the federal government only interfered with family related issues when state legislation intruded upon federal legislation, therefore violating the Supremacy Clause). However, the modern trend has contradicted this notion in a combination of state and federal legislation governing family affairs. *Id.*

federal laws.”<sup>148</sup> “Family regulation in the United States has become a shared project of the state and federal governments.”<sup>149</sup> Over the past five decades, Congress has passed regulations on family issues under the Commerce Clause and the Due Process Clause of the Fourteenth Amendment.<sup>150</sup>

The federal government has delved deeper into the realm of family law in part because of their recognition that American society has become highly mobile, with the ability to travel being much more readily available.<sup>151</sup> Because the geographical dynamics of families has assumed a more nationalized temperament, regulation at the federal level has become more appropriate because, “[t]he national government can . . . speak with greater moral authority.”<sup>152</sup> Congress’s willingness to step in and regulate family affairs eviscerates any use of the Tenth Amendment in opposition of federal legislation regulating surrogacy contracts.<sup>153</sup> Surrogacy contracts should be regulated at the federal level because it is the only way to protect the parties’ expectation interests, a result that state regulation has yet to consistently produce.<sup>154</sup>

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148. *Id.* Congress has enacted legislation such as the Child Abuse Prevention and Treatment Act of 1974 and Adolescent Family Life Act of 1982 in its campaign to secure a more solid foothold in family relations. *Id.* More recent legislative enactments include such laws as the Uniform Child Custody Jurisdiction and Enforcement Act, which became effective in 2011. *Id.*

149. Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL’Y 267, 271 (2009).

150. *Id.* at 270.

151. *See id.* at 333-34 (stating “[w]ith the increasing mobility of families and individuals in the United States and around the world, it no longer makes sense to assume that families are closely connected to particular communities and within the jurisdiction of a single state.”). The author further stated that, “[t]he growth of a body of national family law is an important response to this change and an acknowledgment of the very real ways in which we now feel ourselves to be members of a broader national community.” *Id.* at 333. Finally, the author concluded that, “[u]niform national law is especially important to coordinate different state laws in an era when individuals and families move easily across state borders and around the world.” *Id.* at 333-34.

152. *See id.* at 333 (accompanying the assertion that society has become more nationalized as a result of increased individual and family mobility).

153. *See Patton, supra* note 20, at 529 (laying out a clear and concise counter-argument against the Tenth Amendment as an obstacle to Congress’s power to regulate surrogacy contracts).

154. *See Conklin, supra* note 2, at 93-94 (suggesting that federal regulation is needed because of the countless inadequacies yielded by a state based system of regulation).

*B. A Public Policy Mandating the Validity and  
Enforceability of Surrogacy Contracts Protects the  
Parties' Expectation Interests*

Congress needs to uphold the quintessential role of contract law: protecting the parties' expectation interests.<sup>155</sup> "As a rule, parties have the right to contract as they see fit, so long as their agreement does not violate the law or public policy."<sup>156</sup> This is known as the freedom of contract.<sup>157</sup> Federal regulation of surrogacy contracts would make such contracts legal because the Supremacy Clause preempts state law where applicable, leaving only public policy to dispute.<sup>158</sup>

*1. Protecting the Parties' Expectation Interests is a  
Quintessential Role of Contract Law*

Protecting the parties' expectation interests, as derived from the freedom to contract, is a fundamental and primary role of contract law.<sup>159</sup> "The freedom to contract is 'a vital aspect of personal liberty that ensures the right of competent persons to enter into contracts or decline to do so, as long as the contract is not illegal or against public policy.'<sup>160</sup> However, unlike many other areas of law, such as torts, contract law adamantly protects expectation interests.<sup>161</sup> Federal regulation of surrogacy contracts

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155. See *Reformed Church of Ascension v. Theodore Hooven & Sons, Inc.*, 764 A.2d 1106, 1109 (Pa. Super. Ct. 2000) (arguing that the policy of contract law is to protect the expectation interests of the parties involved therein).

156. *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 129 (Tex. 2004).

157. See *Wood Motor Co., Inc. v. Nebel*, 238 S.W.2d 181, 185 (Tex. 1951) (purporting to establish the public policy driven idea of freedom of contract).

158. See U.S. CONST. art. VI, cl. 2 (stating, "[t]his Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); see also *Soo Line R. Co v. City of Minneapolis*, 38 F. Supp. 2d 1096, 1098 (D. Minn. 1998) (explaining the concept of preemption as it pertains to the Supremacy Clause). Any state law that violates or is contrary to an act of Congress is invalid. *Id.*

159. See *Sonny Arnold, Inc. v. Sentry Sav. Ass'n*, 633 S.W.2d 811, 815 (Tex. 1982) (tailoring the Court's analysis to comply with the freedom of contract where the contract pertains to real property).

160. *Dick Broad. Co. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 673 (Tenn. 2013).

161. See *Carlson v. Sharp*, 994 P.2d 851 (Wash. 1999) (contrasting the fundamental ideas of tort law and contract law). Contract law, unlike tort law, seeks to protect expectations. *Id.* at 853. "[T]he law of contracts [is] designed to enforce expectations created by agreement, and the law of torts, which is designed to protect citizens and their property by imposing a duty of reasonable care on others[, does not.]" *Id.* The court further illuminated this distinction by stating, "[in contrast to tort law,] contract law protects

would adequately protect the parties' expectation interests by equitably and consistently enforcing such contracts and recognizing them as consistent with public policy.

While the notion of protecting expectation interests is prevalent throughout common law, it is also enforced by other sources of law such as the Restatement (Second) of Contracts.<sup>162</sup> "Judicial remedies under the rules stated in the Restatement serve to protect [the party's] . . . 'expectation interest.'"<sup>163</sup> Furthermore, a party's expectation interest is the starting point for assessing damages in the event of a breach of contract.<sup>164</sup> The robust support found throughout common law, as well its foundational usage as it pertains to remedies and damages in the Restatement, strongly support the notion that protecting the parties' expectation interests is a quintessential role of contract law and should not be treaded upon.<sup>165</sup> Surrogacy contracts, by their very nature of being contracts, must be afforded the same protections that contract law seeks to provide to all other contracts.<sup>166</sup> Parties that enter into surrogacy contracts presumably do so willingly and well informed, thus, contract law should protect that relationship and intent through enforcement of the contract.<sup>167</sup>

## 2. *Expectation Interests in the Current State Based Regulatory Scheme*

### a. The Only Consistent Results Are Inequitable Results

The current state based regulatory scheme of surrogacy contracts presents a lack of protection of the parties' expectation interests. This is demonstrated by two of the most well recognized

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expectation interests." *Id.*

162. See RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. b (1981) (stating, "[i]n principle . . . a party's expectation interest represents the actual worth of the contract to him rather than to some reasonable third person.").

163. *Id.* at § 344.

164. See *id.* at § 347 (stating, "the injured party has a right to damages based on his expectation interest.").

165. See *Wood Motor Co., Inc.*, 238 S.W.2d at 185 (suggesting that the freedom of contract is quintessential in contract law).

166. See Patton, *supra* note 20, at 510-12 (describing the historical beginnings of surrogacy contracts, as well as some of the aspects of these contracts).

167. See *CGU Life Ins. Co. of Am. v. Metro. Mortg. Sec. Co., Inc.*, 131 F. Supp. 2d 670, 676 (E.D. Pa. 2001) (stating, "[a]s a general rule, contract law protects the expectation interests of contracting parties based on voluntary agreement that defines their relationship."); see also *Hahn v. Atl. Richfield Co.*, 625 F.2d 1095, 1104 (3d Cir. 1980) (contrasting contract law to tort law by asserting that contract law seeks to protect parties' expectation interests, based on the voluntary agreement that the parties entered into); see also *Kobsic v. Erie Ins. Exch.*, 7 Pa. D. & C.5th 48, 62 (2009) (arguing that the purpose of contract law is to compensate the aggrieved party based upon his expectation interests, as defined in the contract).

and frequently cited surrogacy contracts cases.<sup>168</sup> First is *Baby M*, the intended parents, a married couple, entered into a traditional surrogacy contract with a surrogate because the wife of the intended couple was infertile.<sup>169</sup> The surrogate agreed to be artificially inseminated with the intended father's sperm and carry the baby to term.<sup>170</sup> Upon the baby's delivery, the surrogate was to give it to the intended parents in exchange for \$10,000.<sup>171</sup>

After the surrogate delivered the baby, the relationship between the intended parents and surrogate soured, which resulted in the surrogate fleeing the state with the baby and authorities not finding her for over four months.<sup>172</sup> Essentially, the surrogate failed to honor the contract.<sup>173</sup> The trial court held that the contract was valid, and enforced it by terminating the surrogate's parental rights and giving permanent parentage and custody to the intended parents.<sup>174</sup> Although the trial court held that the contract was valid, it essentially deemed the contract irrelevant to its decision, basing it almost entirely on the baby's best interests.<sup>175</sup> The New Jersey Supreme Court held that the surrogacy contract was invalid because it conflicted with state statutory law,<sup>176</sup> as well as New Jersey public policy.<sup>177</sup> In the end, although the Court invalidated the surrogacy contract, the intended parents were awarded custody, and the surrogate was granted visitation rights.<sup>178</sup>

Secondly, in *Johnson v. Calvert*,<sup>179</sup> the facts presented a gestational surrogacy contract whereby the intended parents, a

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168. See Arshagouni, *supra* note 3, at 802-03 (illustrating the significance and prevalence of *Baby M* and *Johnson* in academic writings, as well as the case law itself).

169. *In re Baby M*, 537 A.2d 1227, 1235 (N.J. 1988).

170. *Id.*

171. *Id.*

172. *Id.* at 1236-38.

173. Havins & Dalessio, *supra* note 16, at 675.

174. *In re Baby M*, 537 A.2d at 1237-38.

175. *Id.* at 1238.

176. *Id.* at 1240. The Court held that,

The surrogacy contract conflicts with: (1) laws prohibiting the use of money in connection with adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions.

*Id.*

177. See *id.* at 1246-50 (invalidating the contract, as the Court relied most heavily on the public policy rationale that, "to the extent possible, children should remain with and be brought up by both of their natural parents."). The Court also focused quite heavily on the commercial nature of the contract as it pertains to the life of a human being. *Id.*

178. Gelmann, *supra* note 13, at 163.

179. *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993).

married couple, entered into a gestational surrogacy contract with a surrogate.<sup>180</sup> The surrogate agreed to be artificially inseminated with an embryo created by the sperm and egg of the intended parents in exchange for \$10,000.<sup>181</sup> At some point during the pregnancy, relations deteriorated between the parties,<sup>182</sup> which led to the surrogate demanding full payment of the \$10,000 or else she would not honor the contract.<sup>183</sup>

Each party filed suit.<sup>184</sup> The trial court held the contract to be valid and enforceable, opining that the intended parents were, “the child’s genetic, biological and natural father and mother,”<sup>185</sup> and that the surrogate had, “no parental rights to the child.”<sup>186</sup> After the Court of Appeals affirmed, the Supreme Court of California held that the intended parents were the rightful parents of the child by utilizing a test of their own creation: the intent test.<sup>187</sup> Interestingly, although the Court found the surrogacy contract did not directly violate public policy on its face, it largely ignored the contract, looking to it only in the course of implementing its novel and newly created test.<sup>188</sup>

Although these cases were decided during the beginnings of the modern cultivation of surrogacy contracts, they evidence the seemingly unchecked and unlimited power that judges have in ruling on these matters in many instances.<sup>189</sup> *Baby M* and *Johnson* may be factually different to some extent,<sup>190</sup> but the core issues are

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180. *Id.* at 778.

181. *Id.*

182. *Id.* The intended parents discovered that the surrogate had failed to disclose to them that she had suffered several stillbirths and miscarriages before entering into the contract. *Id.* The surrogate felt isolated and abandoned. *Id.* She also felt that the intended parents did not work hard enough to solidify the requisite insurance policy that was agreed upon. *Id.*

183. *Id.* The surrogate essentially held the baby hostage by demanding payment of her compensation immediately, while threatening not to honor the agreement and keep the child if her demands were not complied with. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *See id.* at 782 (creating the intent test as a means of determining parentage in gestational surrogacy contracts). The intent test provides that, “[when] genetic consanguinity and giving birth . . . do not coincide in one woman . . . she who intended to bring about the birth of a child that she intended to raise as her own--is the natural mother under California law.” *Id.*

188. *See id.* at 782-83 (explaining that the commercial gestational surrogacy contract, on its face, does not directly violate public policy on its face). However, the Court refused to acknowledge it as enforceable in the traditional sense. *Id.* Instead, the Court makes up the intent test out of thin air, which only looks to the contract as providing evidence of the parties’ intents. *Id.* at 783.

189. *See Conklin, supra* note 2, at 72 (arguing that the statutory guidelines are weak if present at all, causing a ripple effect in the court system with judges using their own biased and unfettered discretion).

190. *See Gelmann, supra* note 13, at 165 (explaining the factual differences between the cases). Primarily, *Baby M* dealt with a traditional surrogacy



identical.<sup>191</sup> These cases may have, “set the stage for the current surrogacy market,”<sup>192</sup> but the stage was set more suitably for *The Divine Comedy*,<sup>193</sup> as opposed to societal enlightenment and legislative progress.<sup>194</sup>

#### b. Forum Shopping

The current state based regulatory scheme has given way to widespread forum shopping.<sup>195</sup> “Forum shopping has been defined as a litigant’s attempt ‘to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.’”<sup>196</sup> The harms of forum shopping are many and true, with the essential objection being that it instinctively, “leads to disparate treatment” of the litigants.<sup>197</sup> Forum shopping undermines the foundational underpinnings of the court system itself, and leaves in its wake inequity, inconsistency, and confusion.<sup>198</sup>

Over the past thirty years, the crippling effects of forum shopping in the realm of surrogacy have been commercialized and advertised to an extent unparalleled in any other industry or area of law.<sup>199</sup> Surrogacy agencies such as Simple Surrogacy have sprung up across the United States in response to the growing popularity and demand for surrogacy relationships.<sup>200</sup> These surrogacy agencies have promulgated and exacerbated the effects

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contract, while *Johnson* dealt with a gestational surrogacy contract. *Id.*

191. *See id.* (supporting the core similarities in *Baby M* and *Johnson*). The Courts in both cases struggled intensely with the public policy implications of their decisions. *Id.*

192. Conklin, *supra* note 2, at 72.

193. *See* *Divine Comedy*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Divine\\_Comedy](https://en.wikipedia.org/wiki/Divine_Comedy) (last visited Mar. 27, 2016) (summarizing Dante’s *Divine Comedy*). The play presents a unique vision of the afterlife, as the main character, Dante, journeys through the “three realms of the dead”, being Hell, Purgatory, and Paradise. *Id.*

194. *See id.* (supporting the analogy that, much like Dante, surrogacy contracts have been figuratively condemned to endure the nine circles of hell and the seven levels of purgatory before finally attaining the legislative respect and societal acceptance they deserve).

195. *See* Conklin, *supra* note 2, at 82 (suggesting that forum shopping is rampant as a result of surrogacy agencies and the contracts they render).

196. Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) (quoting Black’s Law Dictionary 590 (5th ed. 1979)).

197. Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 197 (2013).

198. *See id.* (assessing forum shopping in the context of bankruptcy litigation).

199. *See* Conklin, *supra* note 2, at 82 (supporting the argument that surrogacy agencies have engaged in the business of not only promoting surrogacy contracts, but forum shopping in order to do so).

200. *See* About Us, SIMPLE SURROGACY, [www.simplesurrogacy.com](http://www.simplesurrogacy.com) (last visited Mar. 27, 2016) (providing background information on the surrogacy agency, which was founded in 2002).

and presence of forum shopping in surrogacy contracts by explicitly inviting parties to forum shop in order to take advantage of certain states' laws and avoid others.<sup>201</sup> This open invitation to forum shop is made perfectly clear with Simple Surrogacy's illustrious boasts about its exclusive Texas Advantage.<sup>202</sup> The Texas Advantage lays out a comprehensive roadmap for the rationales and benefits of contracting in Texas, and advertises that it will seek out surrogates in states that have favorable surrogacy laws.<sup>203</sup> In sum, surrogacy agencies are catalyzing and proliferating the effects and existence of the already rampant forum shopping produced by a makeshift state regulated system.<sup>204</sup>

Inequitable results are plainly clear at just a quick glance at court decisions such as *Baby M* and *Johnson*, and even more so by observing the emotional roller coaster and accompanying unpredictability produced by state based regulation.<sup>205</sup> For instance, the Court in *Johnson v. Calvert* brushed the contract aside and implemented its own unique analysis.<sup>206</sup> At the other

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201. *Why Choose Us?*, SIMPLE SURROGACY, [www.simplesurrogacy.com/why-choose-us/](http://www.simplesurrogacy.com/why-choose-us/) (last visited Mar. 27, 2016) The service is located in every state where surrogacy is supported. *Id.*

202. *See Texas Advantage*, SIMPLE SURROGACY, [www.simplesurrogacy.com/why-choose-us/texas-advantage/](http://www.simplesurrogacy.com/why-choose-us/texas-advantage/) (last visited Mar. 27, 2016) (explaining the Texas Advantage and its pertinent characteristics).

203. *See generally id.* (laying out the service's Texas Advantage). The website states, "[w]e will be able to match you with a surrogate in any state where surrogacy is legally favorable." *Id.* *See also* *FAQ's*, FAMILY SOURCE CONSULTANTS, [www.familysourcesurrogacy.com/faqs/](http://www.familysourcesurrogacy.com/faqs/) (last visited Sept. 14, 2016) (solidifying the existence of additional surrogacy agencies that promulgate forum shopping). Family Source Consultants, although they do not put a title to it like Simple Surrogacy does, advertises Illinois as a place for parties in a surrogacy contract to come in order to have their contract enforced. *Id.* They bluntly claim:

Keep in mind, even if you live somewhere where surrogacy or 'paid surrogacy' is considered illegal (or the laws are undefined) this does not mean you cannot pursue surrogacy to build your family. It simply means that you will want to work with a Surrogate who is willing to deliver in a "surrogacy-friendly" state.

*Id.*

204. *See* Conklin, *supra* note 2, at 82 (stating, "[t]hese agencies do not perform any of the medical procedures; they solely exist to match intended parents with surrogates who live in states where surrogacy is legal."). Furthermore, "[t]he point of these agencies is to help intended parents forum shop." *Id.*

205. *See* Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2316-20 (1995) (arguing for the singularity and emotional input that surrogacy contracts embody). These are not just ordinary contracts for ordinary goods or services. *Id.* at 2327.

206. *See Johnson*, 851 P.2d at 783 (supporting the validity of the contract by stating, "the agreement is not, on its face, inconsistent with public policy," yet refuses to accept the parties' expectation interests pursuant to the contract as binding).

end of the spectrum, the surrogate in *Baby M* threatened to kill herself and the baby after fleeing to Florida for four months; a situation brought about because the surrogacy laws in New Jersey were not stout enough to provide the intended parents with a legal cause of action, or a public policy supportive of their cause.<sup>207</sup> In sum, the parties' expectation interests are undermined and oftentimes blatantly ignored by the courts; the inevitable result of a fragmented state regulatory scheme that produces rampant forum shopping and inequitable results.<sup>208</sup>

3. *Opposition to a Public Policy Establishing the Validity and Enforceability of Surrogacy Contracts*

a. Commodification

Opponents to a public policy promoting the validity and enforceability of surrogacy contracts advance a number of arguments that cast surrogacy contracts as capitalist manipulations of innocent and hapless surrogates.<sup>209</sup> The first major objection to surrogacy contracts is commodification.<sup>210</sup> One such application of commodification applies to the child.<sup>211</sup> The primary argument advanced by this theory is that babies will become nothing more than commodities on a "baby selling market," being bought and sold like ordinary commodities.<sup>212</sup>

This subjective fear has left many unconvinced.<sup>213</sup> First, as a more technical defense, the word commodity is inappropriately layered into an argument in which it has no place.<sup>214</sup> Commodity, whether defined broadly as something being bought or sold, or narrowly as a fungible,<sup>215</sup> it is clearly not appropriate in

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207. *In re Baby M*, 537 A.2d at 1237.

208. See Conklin, *supra* note 2, at 72 (supporting the aforementioned conclusion by stating the current state regulation complex "leav[es] judges to base decisions on scant statutory guidance," and as a result, "[this] inconsistency in regulations stemming from these cases has caused many people, who wish to have a baby via surrogate, to forum shop.").

209. See Epstein, *supra* note 205, at 2325 (suggesting that arguments against surrogacy contracts dwell well beyond the traditional grounds for negating a contract).

210. See Arshagouni, *supra* note 3, at 829 (listing commodification as a, "[m]isguided [c]oncern for the [c]hild.").

211. *Id.*

212. See *id.* (supplying the commodification argument as it pertains to buying and selling children).

213. See *id.* (contending that the argument of commodification lacks merit).

214. See Epstein, *supra* note 205, at 2326 (providing support for the counterargument that commodification is a misnomer).

215. U.C.C. 1-201(18) (1990). Defined by the U.C.C. as "goods of which any unit, by nature or usage or trade, is the equivalent of any other like unit; or goods that be agreement are treated as equivalent." *Id.*

this context and is nothing more than a misnomer that stands in the path of the logical conclusion that, “[n]o one wants to ‘commodify’ children in ways that treat them as fungible goods to be sold and consumed in the ordinary course of business.”<sup>216</sup>

Following a less technical approach, many feel commodification fails as a tenable argument against surrogacy contracts because it is not the baby being bought or sold, just the parental rights associated therewith, since children are not “owned” by their parents or anyone else for that matter.<sup>217</sup> “If we accept the determination that any child resulting from a gestational surrogacy agreement is lawfully the child of the intended parents from the very beginning of the process, there can be no actual or perceived commodification of the child.”<sup>218</sup> Gestational surrogacy contracts, by their very nature also terminate any force this argument has.<sup>219</sup> A gestational surrogacy contract is one for services, not goods.<sup>220</sup> Therefore, this argument is equally defeated by a linguistic analysis as well as a simple investigation into how a gestational surrogacy fundamentally operates.<sup>221</sup>

#### b. Economic Exploitation

A second argument against a public policy in favor of the validity and enforceability of surrogacy contracts is economic exploitation of the surrogate.<sup>222</sup> Some argue that this small subset seems to perpetually hold onto the idea that surrogates are forced into surrogacy contracts as a result of their occupation of the lowest economic stratosphere of society.<sup>223</sup> This argument is made in the face of overwhelming and proven evidence that, although compensation is given in exchange for their services, there is a plethora of ulterior motives that motivate surrogates to enter into these agreements.<sup>224</sup>

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216. Epstein, *supra* note 205, at 2327-28.

217. Arshagouni, *supra* note 3, at 829.

218. *Id.* at 834.

219. *See id.* (arguing that, in a gestational surrogacy contract, the child is always that of the intended parents, and therefore, the surrogate has nothing to sell). The compensation is nothing more than payment for the surrogate’s gestational services. *Id.*

220. *Id.*

221. *See id.* (concluding the counterargument by stating, “[a]sking the gestational surrogate to acknowledge an existing legal reality in writing is hardly baby-selling.”).

222. Lascarides, *supra* note 44, at 1234.

223. *Johnson*, 851 P.2d at 785.

224. *See* Havins & Dalessio, *supra* note 16, at 688 (supplying a number of alternative reasons why women decide to become surrogates). The primary alternative is mere altruism. *Id.* This may simply be a woman wanting to help a couple get pregnant as a sympathetic and selfless acknowledgment of their plight. *Id.* The surrogate may also want to experience pregnancy and

The counterarguments to economic exploitation of the surrogate are resounding, echoing the unavoidable existence in altruistic motives for acting as a surrogate.<sup>225</sup> More intuitively, however, the very notion that intended parents would journey to modern day Hooverville's<sup>226</sup> in order to find the woman that they want to carry their child into this world, is fanciful.<sup>227</sup> "The last thing that an acquiring couple wants is a surrogate whose lifestyle and conduct could harm their child. Their interest is in choosing a woman able to fend for herself. It is not in their interest to find a woman whom they can exploit."<sup>228</sup>

The courts have long recognized the argument of economic exploitation of the surrogate to be lacking merit.<sup>229</sup> Namely, the Court in *Johnson v. Calvert* went so far as to say that such notions of economic exploitation do nothing more than resurrect the stigma that encumbered women's rights and attainment of "professional status under the law."<sup>230</sup> To presume, as proponents of this proposition do, that, "the mere fact that a woman chooses to enter into such a contract shows that she occupies a subordinate sphere and has allowed herself to become debased, or at least exploited, by the biological father, and perhaps the wife as well," cannot be accepted as legitimate.<sup>231</sup>

These naked assertions against a public policy favoring surrogacy contracts can be encapsulated as the subjective disapproval of a small subset of opinionated individuals.<sup>232</sup> "Much of the . . . opposition to surrogacy stems from a subjective view that this sort of practice is inherently immoral."<sup>233</sup> However, the Supreme Court has refused to accept morality as means to ratify

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childbirth without having to raise a child, while concurrently having some input on the family that will raise the child. *Id.*

225. See Lascarides, *supra* note 44, at 1235-36 (postulating the non-economic reasons for surrogates to enter into these relationships, such as, "an altruistic desire to provide an infertile couple [with] a baby.").

226. See *Hoovervilles*, HISTORY, [www.history.com/topics/hoovervilles](http://www.history.com/topics/hoovervilles) (last visited Mar. 27, 2016) (describing Hoovervilles as shantytowns that appeared during the Great Depression). These shantytowns were inhabited by those struck hardest by the Great Depression, one commonality among its residents being unemployment. *Id.*

227. See Epstein, *supra* note 205, at 2317 (contending that intended parents have no interest in seeking out poor, irresponsible, and ambitionless woman to act as their surrogate).

228. *Id.*

229. See *Johnson*, 851 P.2d at 785 (addressing the economic exploitation argument as it pertained to the surrogate in that case).

230. See *id.* (suggesting that the argument of economic exploitation does nothing more than send women's rights into a regression).

231. Epstein, *supra* note 205, at 2318.

232. See Arshagouni, *supra* note 3, at 841 (contending that these arguments against such a public policy is nothing more than disapproval by a very small group of people of what the government is regulating).

233. *Id.*

government action.<sup>234</sup> The individuals advancing these blind accusations should take a second to consider, “[n]o one thinks that surrogate agreements are a first choice. They are a desperate last hope.”<sup>235</sup> A public policy favoring the validity and enforceability of surrogacy contracts should be established in order to protect the parties’ expectation interests.<sup>236</sup>

### *C. Failed Attempts at Uniform Regulation*

“Allowing individual states to dictate their respective policies towards commercial surrogacy contracts is both ineffective and problematic.”<sup>237</sup> In response, the Uniform Parentage Act (“UPA”),<sup>238</sup> along with various other attempts at uniform regulation, have valiantly attempted to establish more uniformity within surrogacy contract law, even though each has inevitably floundered because of fundamental flaws contained therein.<sup>239</sup> The UPA, last amended in 2002, permits the use of surrogacy contracts, making it better than most state statutes, and pushes in the general direction of uniform regulation.<sup>240</sup>

One of the key limitations of the UPA is that it only applies to opposite-sex couples.<sup>241</sup> Another point of contention is the requirement of a “home study”, similar to that of an adoption proceeding, which raises concerns that the UPA doesn’t truly give the intended parents legal parentage at the moment of the child’s birth, but instead, requires the parenting rights be transferred to them.<sup>242</sup> However, the primary shortcoming of the UPA is the voluntary nature of its adoption by the states.<sup>243</sup> By its very nature of being voluntary, there is no enforcement mechanism to promote uniform adoption of the UPA.<sup>244</sup> Even if the states were required

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234. *See* *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (stating, “[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause.”).

235. Epstein, *supra* note 205, at 2319.

236. *See id.* at 2340-41 (concluding that surrogacy contracts need to be enforced and presumed valid).

237. Patton, *supra* note 20, at 529.

238. *Uniform Parentage Act*, UNIFORM LAW COMMISSION, [www.uniformlaws.org/shared/docs/parentage/upa\\_final\\_2002.pdf](http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf) (last visited Mar. 27, 2016).

239. *See* Patton, *supra* note 20, at 519-20 (pointing out the critical flaws of the Uniform Parentage Act).

240. *See id.* at 520 (indicating that the UPA permits the use of surrogacy contracts, but has still been adopted by very few states).

241. Arshagouni, *supra* note 3, at 814.

242. *See id.* at 815 (arguing that, “if we accept that the intended parents are the lawful and actual parents of the child from the moment of the child’s personhood, complete with all the rights and obligations of parenthood, then adoption is inapplicable.”).

243. Patton, *supra* note 20, at 520.

244. *Id.*

to adopt the UPA, each state is free to alter or delete any portion that it wants, effectively allowing the state to reduce it to mere rhetoric.<sup>245</sup> In the end, this good faith attempt has fallen short of achieving uniform regulation, which is evidenced by the minuscule number of states that have adopted it.<sup>246</sup>

Another attempt at uniform regulation of surrogacy contracts is the ABA Model Act Governing Assisted Reproductive Technologies. (“ABA Act”).<sup>247</sup> The ABA Act provides two Alternatives: Alternative A and Alternative B.<sup>248</sup> Alternative A, for all practical purposes, is the functional equivalent of the UPA, and falls short for all of the same reasons.<sup>249</sup> Alternative B, on the other hand, is much more attractive for a myriad of reasons, namely, because it “allows for self-executing agreements without any requirement for prior judicial approval.”<sup>250</sup> The major drawback to Alternative B is that it permits traditional as well as gestational surrogacy agreements.<sup>251</sup>

Traditional surrogacy contracts have received extremely negative responses from the courts and there are no signs of this judicial hostility lightening.<sup>252</sup> There are many fundamental and critical distinctions between traditional and gestational surrogacy contracts, namely, the genetic relation of the surrogate to the child in traditional surrogacy, that these two types of surrogacy require differential treatment.<sup>253</sup> These attempts at uniform regulation should act as lessons in shaping a type of legislation that can protect the parties’ expectation interests while ensuring enforcement of its provisions: federal regulation.<sup>254</sup>

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245. *Id.* at 530.

246. *Uniform Law Commission Legislative Fact Sheet- Parentage Act*, UNIFORM LAW COMMISSION, [www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act) (last visited Sept. 14, 2016). The Uniform Parentage Act has been enacted by a total of 11 states: “Alabama, Delaware, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming”. *Id.*

247. *American Bar Association Model Act Governing Assisted Reproductive Technology*, ABA, <http://apps.americanbar.org/family/committees/artmodelact.pdf> (last visited Mar. 27, 2016).

248. Arshagouni, *supra* note 3, at 817.

249. *Id.*

250. *Id.* at 818.

251. *Id.* at 819.

252. *See* Havins & Dalessio, *supra* note 16, at 680-81 (stating that although there have been a select few cases that have protected traditional surrogacy contracts, “[t]hese sagacious decisions float alone in a sea of judicial hostility to traditional surrogacy contracts.”).

253. Arshagouni, *supra* note 3, at 819.

254. *See* Patton, *supra* note 20, at 530 (looking back at the sources of failure of previous attempts at uniform regulation in an attempt to formulate a model of regulation that ensures the proper enforcement of surrogacy contracts).

#### IV. THE PROCEDURAL AND SUBSTANTIVE COMPONENTS OF A PROPOSED FEDERAL STATUTE GOVERNING SURROGACY CONTRACTS

A lack of federal guidance has led to a monumental misunderstanding of surrogacy, which has in turn caused surrogacy contracts to be disfavored without reason. Public policy has proven to be uncertain at best as a result of this irrational fear. However, it is because of this confusion in public policy that federal legislation regulating these contracts must do so with the utmost care and precision. Congress has the ability to speak with an unwavering resound, able to captivate a national audience while bestowing guidance and enlightenment to uncertain minds.

Regulation of surrogacy contracts must bear procedural and substantive weight. Procedurally, federal regulation of surrogacy contracts should be modeled after the Federal Arbitration Act (“FAA”),<sup>255</sup> because of the striking similarities in public policy opposition faced by arbitration and surrogacy alike. In addition, such a regulation would provide undeniable support for a public policy favoring the validity and enforcement of surrogacy contracts for the states to follow. Substantively, Illinois’ Gestational Surrogacy Act (“GSA”) supplies a premium example of what a federal regulation should entail.

##### *A. Federal Regulation Based on the Federal Arbitration Act*

In response to widespread refusal by the courts to enforce arbitration clauses that parties bargained for in their contracts, Congress adopted the FAA in 1925.<sup>256</sup> This judicial practice stemmed from a historical fear created by the English courts that they would lose jurisdiction by enforcing arbitration clauses.<sup>257</sup> After that same fear was blindly accepted and implemented in the American court system, Congress enacted the FAA.<sup>258</sup>

The FAA was initially intended to be a “simple procedural rule for federal courts.”<sup>259</sup> However, the Supreme Court interpreted § 2, which has undeniably become the most powerful section of the FAA, to not just apply to state courts, but to, “eclipse contrary state law.”<sup>260</sup> Section 2 of the FAA states:

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255. 9 U.S.C. § 1 et seq. (2015).

256. Karon A. Sasser, Comment, *Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 CUMB. L. REV. 337, 340 (2001).

257. *Id.*

258. *Id.*

259. David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1219 (2013).

260. *Id.*



A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>261</sup>

Federal regulation in support of a public policy upholding the validity and enforceability of surrogacy contracts should include a provision as close to § 2 of the FAA as possible.<sup>262</sup> First, it will provide a clear public policy for the states to follow, and in doing so, thwart any attempts by state legislatures or courts to undercut the enforceability of surrogacy contracts. In *Southland Corp. v. Keating*,<sup>263</sup> the Court stated:

[i]n enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration . . . Congress thus mandated the enforcement of arbitration agreements.<sup>264</sup>

It is essential that federal regulation promoting surrogacy contracts declare a national policy because it is not unreasonable to anticipate that some states will nevertheless be hesitant to enforce them.<sup>265</sup>

Second, it would drive home the foundational cornerstone of contract law: enforcement of the parties' expectation interests.<sup>266</sup> The Supreme Court opined, "the purpose of the [FAA] was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislations."<sup>267</sup> Expectation interests arguably play an even larger role in surrogacy contracts because of the nature of the agreement,

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261. 9 U.S.C.A. § 2 (2015).

262. See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (restating the well-established notion that § 2 of the FAA was enacted by Congress to eliminate the singling out of arbitration provisions as unenforceable and establish them as equal to other contracts).

263. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

264. *Id.* at 10.

265. See *id.* at 14 (offering grounds for comparison, in that Congress faced this identical issue when it enacted the FAA). "The problems Congress faced were . . . twofold: the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements." *Id.*

266. See *id.* at 13-14 (highlighting one of the primary objectives of the FAA).

267. *Id.* at 13 (citing *Metro Indus. Painting Corp. v. Terminal Constr. Corp.*, 287 F.2d 382, 287 (2d Cir. 1961) (Lumbard, Chief Justice, concurring)).

rendering the inclusion of a provision similar to § 2 of the FAA in federal regulation of surrogacy contracts beyond necessity.<sup>268</sup>

Third, certain portions of § 2 play unique and powerful roles that have proven to be quintessential in interpreting and enforcing the FAA, and cannot easily be replicated.<sup>269</sup> One example is the savings clause.<sup>270</sup> Such a provision would foreclose surrogacy contracts from being voided for public policy reasons at the state level, yet invalidate them for legitimate reasons such as, “generally applicable contract defenses, such as fraud, duress, or unconscionability.”<sup>271</sup> Another example is the inclusion of commerce in a fairly unique way.<sup>272</sup> The Supreme Court has interpreted this language to “not [function] as an inexplicable limitation on the power of the federal courts, but a necessary qualification on a statute intended to apply in [S]tate and federal courts.”<sup>273</sup>

Congress need not reinvent the wheel when crafting federal legislation for the regulation of surrogacy contracts. Although the task of crafting federal regulation that protects the expectation interests of parties to surrogacy contracts seems daunting, the FAA is a proven model for success.<sup>274</sup> The FAA has managed to establish a bright line rule in favor of a public policy upholding the enforceability of arbitration clauses by creating a duty for the courts to enforce them with a feverish passion.<sup>275</sup> The inclusion of a provision modeled after § 2 of the FAA would achieve the

268. See Arshagouni, *supra* note 3, at 800 (summing up the sensitive nature of surrogacy contracts by stating, “[s]urrogacy is the use of one woman’s gestational capacity to assist in the development of a child intended for someone else to parent.”).

269. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746-48 (2011) (articulating some of the key language from the FAA’s § 2, and how it has allowed the Court to interpret it in favor of protecting the parties’ expectation interests).

270. 9 U.S.C.A. § 2. “save upon such grounds as exist at law or in equity for the revocation of any contract.” *Id.*

271. See *AT&T Mobility LLC*, 131 S. Ct. at 1746 (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)) (stressing the importance of making the distinction between invalidating surrogacy contracts as void against public policy, as opposed to fraudulent or similar equitable defenses); see also *Horton*, *supra* note 259, at 1219-20 (expanding on the FAA’s savings clause). “According to the conventional wisdom, the last two words of this savings clause are pivotal, and only permit courts to strike down arbitration provisions under rules that are broad enough to govern ‘any contract.’” *Id.* at 1219. The exact definition of this language remains unsolved. *Id.* at 1219-20. However, it has been interpreted to include such rules as, “fraud, duress, and mistake.” *Id.* at 1220.

272. 9 U.S.C. § 2 (2015). “A written provision in any . . . contract evidencing a transition involving commerce to settle by arbitration.” *Id.*

273. *Southland Corp.*, 465 U.S. at 14-15 (emphasis added).

274. See *Horton*, *supra* note 259, at 1228 (stating, “[i]ronically, FAA preemption, though widely seen as illegitimate, is ‘now well-established.’”).

275. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

preemption function and public policy clarification that is a requisite to piecing together the fragmented state system that exists today.<sup>276</sup>

### *B. The Substance: Illinois' Gestational Surrogacy Act*

Federal regulation seeking to protect the expectation interests of parties to surrogacy contracts must answer the question many states will inevitably ask: how?<sup>277</sup> Illinois' Gestational Surrogacy Act ("GSA") is the answer.<sup>278</sup> The GSA was enacted in 2005 in response to growing concern about surrogacy in an age of rapid technological progress.<sup>279</sup> The bill was met with unprecedented favor,<sup>280</sup> as it received 113 yeas and zero nays in the Illinois House at its third reading, and received fifty-three yeas and zero nays in the Illinois Senate.<sup>281</sup>

The GSA is strong for a vast number of reasons, but one area that shines brighter than the others is the provision that lays out the requirements for a gestational surrogacy contract to be valid.<sup>282</sup> A gestational surrogacy contract is presumed enforceable if it satisfies the requirements set forth in that section.<sup>283</sup> The GSA permits commercial surrogacy contracts, and requires the compensation agreed upon therein to be, "placed in escrow with an independent escrow agent prior to the gestational surrogate's commencement of any medical procedure."<sup>284</sup>

In addition to the requirements imparted on the written contract itself, the GSA sets forth requirements for both the intended parents and the surrogate as well.<sup>285</sup> The intended parents must meet four requirements, including verification that, "he, she, or they have a medical need for the gestational surrogacy as evidenced by a qualified physician's affidavit attached to the gestational surrogacy contract."<sup>286</sup> The surrogate must meet six

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276. See Horton, *supra* note 259, at 1239-40 (clarifying how preemption applies to § 2 of the FAA). "FAA preemption does not hinge on a mechanical application of the words of the statute but rather on accomplishing . . . the FAA's objectives." *Id.* at 1240.

277. See generally A.H.W. v. G.H.B., 772 A.2d 948, 954 (N.J. Ch. 2000) (submitting that the best way to protect the interests of the parties to a surrogacy contract is to follow the legislation as closely as possible).

278. 750 ILL. COMP. STAT. ANN. 47/1-75 (West 2015).

279. Jeremy J. Richey, Comment, *A Troublesome Good Idea: An Analysis of the Illinois Gestational Surrogacy Act*, 30 S. ILL. U. L.J. 169, 178 (2005).

280. H.B. 4962, 93d Gen. Assem. (Ill. 2004).

281. Richey, *supra* note 279, at 178.

282. 750 ILL. COMP. STAT. ANN. 47/25 (West 2015).

283. *Id.*

284. *Id.*

285. 750 ILL. COMP. STAT. ANN. 47/20 (West 2015).

286. Compare *id.* (permitting either or both intended parents to satisfy the medical necessity requirement) with UTAH CODE ANN. § 78B-15-803(2)(b) (West 2015) (accepting evidence only of the intended mother's medical

requirements, including being at least twenty-one years old and having given birth to at least one child.<sup>287</sup> In terms of parentage, “[t]he intended parent is deemed the child’s legal parent for the purposes of state law immediately upon the birth of the child, and the child is considered the legitimate child of the intended parent.”<sup>288</sup>

The few scattered objections to the GSA are either contrary to standard contract law or rendered moot as a result of federal regulation.<sup>289</sup> First, it is contended that the reasonable compensation provision of the GSA<sup>290</sup> is too vague and can lead to limitless compensation.<sup>291</sup> This argument largely ignores the objective theory of contracts,<sup>292</sup> which is a foundational piece of contract law, “overwhelmingly followed in common law jurisdictions.”<sup>293</sup> A second proposed weakness of the GSA is that it lacks a residency requirement.<sup>294</sup> States such as Texas have variations of a residency requirement, which usually requires one or more parties to reside in the state for some number of days in order to be valid.<sup>295</sup> Federal regulation eliminates any forum shopping concerns that may give rise to such residency requirements.<sup>296</sup> Arguments asserting weaknesses in the GSA do little to discredit the widely promulgated recognition of the GSA as the “most comprehensive surrogacy legislation.”<sup>297</sup>

Courts around the country are literally begging for legislative guidance and assistance.<sup>298</sup> Surrogacy contracts are currently

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necessity to satisfy the requirement). Statutes similar to Utah’s essentially ignore the intended father’s medical necessity, implicitly excluding couples where the medical necessity is with the intended father. *Id.*

287. 750 ILL. COMP. STAT. ANN. 47/20 (West 2015).

288. VanWormer, *supra* note 81, at 918-19 (2012).

289. See Richey, *supra* note 279, at 185-89 (providing a number of arguments opposing the GSA).

290. 750 ILL. COMP. STAT. ANN. 47/25(d)(3). “A gestational surrogacy contract shall be presumed enforceable . . . even though it contains . . . [an] agreement of the intended parent or parents to pay the gestational surrogate reasonable compensation.” *Id.* (emphasis added).

291. Richey, *supra* note 279, at 185.

292. Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1119-20 (2008). “The objective theory of contracts provides that mutual assent to a contract is determined by reference to external acts and manifestations, not by evidence of subjective, internal intention.” *Id.*

293. See *id.* (presenting what is universally recognized as the objective theory of contracts).

294. Richey, *supra* note 279, at 189.

295. TEX. FAM. CODE ANN. § 160.755(b)(1) (West 2015). “A person may maintain a proceeding to validate a gestational agreement only if . . . the prospective gestational mother or the intended parents have resided in this state for the 90 days preceding the date the proceeding is commenced.” *Id.*

296. See Conklin, *supra* note 2, at 94 (supporting the argument that federal regulation will alleviate forum shopping).

297. See VanWormer, *supra* note 81, at 917-18 (describing the high-points of the GSA).

298. “We encourage our General Assembly to follow the lead of other state

imprisoned by a fragmented state system that has produced rampant forum shopping and inequitable results. Federal regulation of surrogacy contracts is the only pardon that can free them. Congress has the power to regulate surrogacy contracts using the Commerce Clause or the Due Process Clause of the Fourteenth Amendment. Congress should display resounding approval for a public policy favoring the validity and enforceability of surrogacy contracts because doing so will function as a preservation and promotion of the parties' expectation interests.

This comment proposes a federal regulation modeled after the FAA and GSA. The FAA provides the critical procedural components necessary to blanket the states in a uniform public policy and preempt state statutes to the contrary. The GSA provides a model framework for the substantive contents of a federal regulation seeking to enforce surrogacy contracts. Naturally, the legislature will have to struggle to tailor a statute specifically to surrogacy contracts, but these laws equip Congress with the outlook and tools necessary to finally align the law with not just technology, but contemporary logic and moral enlightenment.

## V. CONCLUSION

Surrogacy contracts are a relatively new phenomenon in the United States. Thus far, regulation of these contracts has been left to the states. However, sharply contrasting public policies and legislative ignorance have created a patchwork system, wherein enforcement of surrogacy contracts varies ferociously. The unfortunate result has been rampant forum shopping and inequitable results. Federal regulation of surrogacy contracts has the potential to create a clear public policy favoring the enforceability of these contracts, and in doing so, protect the parties' expectation interests. Federal legislation should contain a provision as closely related to § 2 of the FAA as possible, as it has proven to be invaluable in establishing public policy and instructing the courts to enforce arbitration clauses. Furthermore, the GSA provides an exceptional framework for substantive guidance. Federal regulation of surrogacy contracts will not only resolve the legal quandary that plagues them, but also the social

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legislatures that have enacted statutes to address the fundamental questions related to surrogacy." *In re Baby*, 447 S.W.3d 807, 840 (Tex. 2014). "The General Assembly is better suited than the courts . . . to determine what kind of regulation to impose." *In re C.K.G.*, 173 S.W.3d 714, 731 (Tenn. 2005). "It is apparent, after examining the paternity statute in detail, that the statute is simply an inadequate and inappropriate device to resolve parentage determinations of children born from this type of gestational surrogacy." *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1137 (Mass. 2001).

pitfalls that state regulation has produced.

