Contractual Chaos: State-by-State Disparities and the Search for Equitable Enforcement of Surrogacy Agreements

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"Surrogacy contracts have been left in a state of chaotic stagnancy, with vastly differing levels of enforcement as a product of state discretion with no signs of uniformity. Surrogacy laws across the states, if they exist in a given state at all, occupy a spectrum of enforcement with the most polarized of ends, and no sense of uniformity or cohesion. 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."[1]

I. INTRODUCTION

The choice to have a child is one of the most important decisions an individual or couple can make.[2] As a matter of public policy and common-law tradition, courts have historically held in favor of promoting procreation and conferring upon citizens the freedom to decide how to raise their children.[3] Throughout American history, Congress has passed legislation seeking to reinforce the

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1. Brett Thomaston, Comment, *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, 1161-62 (2016).

2. *See* Obergefell v. Hodges, 576 U.S. 644, 666 (2015) (explaining importance of family planning and basis in Constitution). Writing for the majority, Justice Kennedy describes marriage, along with choosing when to procreate and how to raise a child, as one of the most intimate decisions a person can make in their lifetime. *See id.* (outlining significance of family decisions).

3. *See id.* (describing importance of family unit); Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (detailing fundamental right to marry embedded in Due Process Clause); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (discussing Fourteenth Amendment rights pertaining to personal liberty). *Meyer* was one of the first Supreme Court cases to establish the idea that choosing how to raise one's child was a fundamental right protected by the Fourteenth Amendment. *See* 262 U.S. at 399 (emphasizing importance of choice in child rearing). The *Meyer* Court stated:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id.

significance of the family unit by providing benefits to people who are married and have children.[4]

While Congress has strengthened the family unit in many ways, both the legislature and judiciary have reinforced heteronormative societal attitudes by systematically excluding certain individuals from such benefits and protections.[5] The exceptions in legal protection for married couples and families largely stem from preconceived notions about how and with whom people should have children.[6] Although *Obergefell v. Hodges* was a landmark victory for the LGBTQIA+ movement, many same-sex and nonbinary couples still face challenges in family planning.[7] While some of these barriers flow from deeply held prejudices about who should have children, the barriers are also a result of rapidly evolving procreative medical advancements.[8] As an increasing number of people faced infertility and other barriers to natural reproduction, the medical field adapted by creating new ways—such as in vitro fertilization, sperm donation, and surrogacy—to provide infertile, same-sex, and nonbinary couples with more

4. *See* 26 U.S.C. § 6013 (allowing married couples to file federal taxes jointly); 26 U.S.C. § 24 (establishing $1,000 child tax credit for qualifying taxpayers); 26 U.S.C. § 21 (providing tax relief to taxpayers with dependent children); 25 U.S.C. § 2206 (detailing intestacy for children and spouses of decedent's estate); 29 U.S.C. § 2612 (allowing paid family and medical leave for parents of biological, adoptive, and foster care children); 18 U.S.C. § 3524 (explaining custody arrangements and visitation rights for parents).

5. *See* United States v. Windsor, 570 U.S. 744, 749-55 (2013) (outlining Defense of Marriage Act and appellants' refusal of spousal status).

6. *See Obergefell*, 576 U.S. at 646-47 (detailing history of societal views value toward marriage). Justice Kennedy explained that marriage is the keystone of society, and although there should be no difference in how same-sex, nonbinary, and heteronormative couples are viewed, there has been a long history of government institutions devaluing these relationships, resulting in instability for same-sex and nonbinary couples. *See id.*; *see also* Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (explaining right to privacy and need to prevent government from interfering with procreation); Buck v. Bell, 274 U.S. 200, 205 (1927) (providing background of state statute allowing sterilization of "feeble minded" individuals).

7. *See Obergefell*, 576 U.S. at 681 (holding same-sex couples have constitutional right to marry); Caitlin Conklin, Note, *Simply Inconsistent: Surrogacy Laws in the United States and the Pressing Need for Regulation*, 35 WOMEN'S RTS. L. REP. 67, 69 (2013) (explaining barriers couples face due to uncertainty of surrogacy laws); Taylor E. Brett, Comment, *The Modern Day Stork: Validating the Enforceability of Gestational Contracts in Louisiana*, 60 LOY. L. REV. 587, 595 (2014) (detailing challenges same-sex couples face in family planning). This Note will intentionally use the term "same-sex" paired with "male" or "female" to refer to couples where both individuals were born with the same biological structures. *See Same-Gender and Same-Sex Are Not Interchangeable Terms*, MOUNTAIN XPRESS (Mar. 24, 2010), https://mountainx.com/opinion/letters/same-gender_and_same-sex_are_not_interchangeable_terms/ [https://perma.cc/PM78-FUW7]. It is important to distinguish "same-sex" from "same-gender"—which refers to the gender identity of the people in the relationship—when discussing issues of gestation and biological function. *See id.* While same-sex and same-gender are not always synonymous, this Note—for purposes of clarity and consistency—will use the term "same-sex" exclusively as it discusses primarily issues of biological function. *See id.*

8. *See* Ian McCallister, Survey, *Modern Reproductive Technology and the Law: Surrogacy Contracts in the United States and England*, 20 SUFFOLK U. TRANSNAT'L L. REV. 303, 303 (1996) (explaining advancements in reproductive medical technology); *see also* PBS, *Milestones in the American Gay Rights Movement*, AM. EXPERIENCE, https://www.pbs.org/wgbh/americanexperience/features/stonewall-milestones-american-gay-rights-movement [https://perma.cc/3UU4-GJNR] (outlining history of gay rights movement and reluctance to grant gay individuals equal rights); *infra* note 40 (detailing specific challenges gay male couples face in surrogacy arrangements).

opportunities to have biological children.[9] Despite rapidly evolving medical technology, Congress's reluctance to keep up with newly developed reproductive practices has resulted in many couples remaining unable to have children through these avenues.[10]

Moreover, couples seeking to contract with surrogates or gestational carriers (GCs) are often met with myriad challenges due to uncertainty in the law.[11] Laws governing surrogacy contracts in the United States are controlled at the state level.[12] This governance structure means there is little to no consistency between states regarding the status of surrogacy and GC agreements.[13] This lack of consistency gives rise to a host of issues surrounding presumptions of parentage at birth, custody arrangements, and adoption.[14] Many states have completely banned surrogacy contracts due to public policy concerns.[15] While some states have more lenient laws, other states merely have minimal guidance.[16] Some states have enacted statutes that impose civil penalties on parties to commercial surrogacy contracts, whereas others have indicated that they will allow surrogacy agreements as long as the parties freely enter into the contract.[17] The lack of

9. *See* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 838-40 (2000) (describing new medical technology aimed at strengthening reproductive access).

10. *See* Brett, *supra* note 7, at 595 (arguing same-sex couples disproportionately affected by inadequate laws regarding surrogacy contracts).

11. *See* Thomaston, *supra* note 1, at 1157, 1161-62 (explaining disparities in state laws governing surrogacy contracts). Thomaston argues that couples seeking to create surrogacy agreements are unable to freely contract because many states legislatures believe these agreements are void against public policy. *See id.* (outlining states' objections to surrogacy contracts).

12. *See id.* at 1159 (acknowledging states control laws governing surrogacy contracts). Thomaston explains that there are varying degrees of control among states, with some prohibiting surrogacy contracts entirely. *See id.* at 1162 (noting differences in state laws).

13. *See* Brock A. Patton, Note, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 514-20 (2010) (detailing categories of regulation among states). Patton groups states together according to the rigidity of surrogacy laws and explains that while some prohibit all forms of surrogacy contracts, others have a more moderate approach whereby intended parents can seek judicial authorization of surrogacy agreements. *See id.* (categorizing states by level of restriction).

14. *See generally* 1 LEXISNEXIS PRACTICE GUIDE: MA FAMILY LAW § 11.07 (highlighting birth mother must legally relinquish rights to child upon birth).

15. *See* Patton, *supra* note 13, at 514-15 (noting commercial surrogacy contracts void in some states). Patton discusses multiple states' approaches to commercial surrogacy contracts—where the surrogate receives a profit for her services above the cost of medical expenses and other pregnancy-related expenses. *See id.* (describing states view commercial surrogacy and selling babies similarly).

16. *See* Patton, *supra* note 13, at 514-20 (categorizing states by rigidity of surrogacy laws). Many complete-ban states manifest a clear policy opposition by imposing criminal penalties on those who engage in the practice. *See also* Barbara Cohen, *Surrogate Mothers: Whose Baby Is It?*, 10 AM. J. L. & MED. 243, 247 (1984) (noting many states apply statutes prohibiting black market adoptions to surrogacy contracts).

17. *See* N.Y. DOM. REL. LAW § 123 (Consol. 2020) (imposing civil penalties for commercial surrogacy contracts). New York has one of the most stringent statutory schemes governing surrogacy contracts and has continually invalidated commercial surrogacy contracts for public policy reasons. *See* Katherine Drabiak et al., *Ethics, Law and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 303 (2007) (noting New York among states categorically holding commercial surrogacy contracts unenforceable). Conversely, California's highest court has upheld surrogacy and GC agreements where parental intent is clear. *See* Adeline A.

federal regulation creates uncertainty for many intended parents (IPs) for their plans for having children.[18]

This Note examines surrogacy laws in three key states: New York, Massachusetts, and California.[19] While these states are generally considered some of the most socially progressive in the country, their surrogacy laws are also among the most disparate.[20] In using these three states as a sample, this Note illustrates the wide spectrum of surrogacy laws and enforcement of surrogacy agreements.[21] New York, Massachusetts, and California have each either adopted limited statutory protections, failed to provide guidance whatsoever, or legalized some form of surrogacy through case law.[22] Lastly, this Note advocates for federal regulation of surrogacy and GC contracts in the United States—following the intent doctrine—to eradicate many of the barriers that IPs currently face.[23]

Allen, *Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human*, 41 HARV. J.L. & PUB. POL'Y 753, 756 (2018) (showing California emphasizes freedom to contract when examining surrogacy agreements).

18. *See* Allen, *supra* note 17, at 753 (explaining surrogacy law remains unregulated federally). Allen, in discussing the lack of federal regulation and generally insufficient state legislative frameworks, notes:

> The practice is unregulated at the federal level, and disagreement among the states has led to 'jurisdictional chaos.' Indeed, the surrogacy industry has been called the 'Wild, Wild West' by a prominent surrogacy attorney, headed to a federal prison for her involvement in baby-selling schemes masquerading as legitimate surrogacy arrangements.

Id. at 756-57.

19. *See infra* Section II.F (demonstrating disparities in surrogacy laws between New York, Massachusetts, and California). This Section outlines each state's approach to the regulation of surrogacy and GC agreements, highlighting the lack of a clear statutory framework under which parties can act with any reasonable sense of certainty. *See infra* Section II.F (outlining each state's legal framework).

20. *See infra* Section II.F (highlighting discrepancies in nature of laws among three states).

21. *See infra* Section II.F (illustrating vast spectrum of laws governing enforcement of surrogacy contracts).

22. *See infra* Section II.F (showing lack of comprehensive statutory guidance). All three states have gaps in their laws governing surrogacy and GC agreements. *See infra* Section II.F. While New York recently passed a law that allows for prebirth judicial authorization of gestational carrier agreements, there are still no protections for individuals seeking to enforce traditional surrogacy contracts. *See infra* Section II.F(1) (displaying deficiencies in New York law). Additionally, both California and Massachusetts, while somewhat different in their enforcement of these agreements, have both declined to provide a robust statutory framework for any form of surrogacy or GC contracts. *See infra* Section II.F(2)-(3) While these states have varying levels of protections for intended parents of children born from surrogacy, rules for enforcement are often left up to the courts. *See infra* Section II.F.

23. *See infra* Section III.C (arguing current legal framework insufficient to meet many people's family planning needs).

II. HISTORY

A. Regulation of Marriage and Families in the United States

From the founding of this country, the United States considered marriage to be a revered institution.[24] Cultural beliefs and societal attitudes surrounding marriage have shaped legislation throughout U.S. history.[25] As a result, laws traditionally favored heteronormative couples by allowing them to enjoy the protections and benefits of marriage.[26] A byproduct of this favoring led to the exclusion of LGBTQIA+ couples from these benefits and protections, including tax deductions, inheritance rights, and insurance benefits.[27]

Throughout the twentieth century, the Supreme Court reformed the law through its decisions to allow more people to enjoy marital benefits.[28] Before *Obergefell* in 2015, many states did not recognize marriages between same-sex couples.[29] While a same-sex couple could enjoy married legal status in

24. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (describing marriage vital personal right essential to ordered liberty). The Supreme Court, in holding that laws prohibiting interracial marriage are unconstitutional, explained that marriage is a basic civil right that cannot be stripped away without due process of law. *See id.*; *see also* Obergefell v. Hodges, 576 U.S. 644, 666 (2015) (emphasizing significance of family unit); Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (noting right to marry of fundamental importance); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (discussing liberty involving right to marry and raise children); Griswold v. Connecticut, 381 U.S. 479, 488 (1965) (emphasizing significance of marriage).

25. *See* Justin T. Wilson, Note, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 567 (2007) (describing hesitance to recognize same-sex marriage). Wilson discusses the religious foundations of marriage and disparate understandings of marriage between proponents and opponents of same-sex marriage. *See id.* at 571-74 (outlining arguments on both sides).

26. *See* United States v. Windsor, 570 U.S. 744, 763-65 (2013) (explaining barriers to marriage same-sex couples face). Justice Kennedy explained that same-sex couples who seek to affirm their commitment to one another face tremendous barriers and are unable to receive the same protections and benefits that heteronormative couples enjoy. *See id.*; *see also Obergefell*, 576 U.S. at 656-60 (describing historical view of sanctity of marriage between man and woman). Additionally, Justice Kennedy noted that many opponents of same-sex marriage believe that legalizing it will somehow diminish the sanctity of heteronormative marriage. *See Windsor*, 570 U.S. at 763-64 (acknowledging opponents' aversion to equal marriage rights).

27. *See Windsor*, 570 U.S. at 753 (describing denial of federal tax exemptions from same-sex couples). Prior to 2015, same-sex couples who were legally married in one state could not only face the delegitimization of their marriage across state lines, but also refusal of federal benefits. *See id.* at 746, 768.

28. *See Griswold*, 381 U.S. at 488, 505 (emphasizing importance of marriage and freedom to make decisions concerning procreation); *Loving*, 388 U.S. at 12 (determining antimiscegenation statutes violate Fourteenth Amendment); *Zablocki*, 434 U.S. at 390-91 (holding child-support-based restrictions on marriage unconstitutional); *Windsor*, 570 U.S. at 775 (holding Defense of Marriage Act unconstitutional). In overturning the Defense of Marriage Act, the Supreme Court held that the statute impermissibly targeted a protected class for no legitimate state purpose. *See Windsor*, 570 U.S. at 775 (holding existing law unconstitutional); *Obergefell*, 576 U.S at 681 (holding same-sex marriage federally protected). *Obergefell* marked a victory for same-sex couples across the United States who were then able to legally marry and benefit from federal tax deductions, inheritance rights, and other protections. *See* 576 U.S. at 681 (emphasizing sanctity of marriage).

29. *See Obergefell*, 576 U.S at 681 (holding restrictions on same-sex marriage unconstitutional).

Massachusetts or Connecticut, other states would not recognize the marriage.[30] Additionally, these married couples were not entitled to federal married legal status.[31] While *Obergefell* solved many of these problems by legalizing same-sex marriage federally, same-sex and other LGBTQIA+ individuals still face barriers to equal treatment in many facets of married life—namely procreation.[32]

B. Advancements in Medical Technology and Challenges for LGBTQIA+ Individuals

As an increasing number of couples face reproductive challenges, the medical field has adapted by creating assisted reproductive technology (ART) that aid people in conceiving children.[33] One such ART achieves conception by implanting genetic material from the donor father or both parents into the surrogate mother.[34] Surrogacy gained immense popularity in the late 20th century, as it not only assisted heteronormative couples facing fertility challenges, but also served as a viable method for same-sex couples to conceive biological children of their own.[35]

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30. *See* Obergefell v. Hodges, 576 U.S. 644, 654-55 (2015) (explaining posture of case). In *Obergefell*, the Supreme Court consolidated many cases involving the failure of state officials to enforce marriage licenses validly obtained in other states. *See id.* at 653-655. (noting state officials failed to uphold other states' laws).

31. *See id.* at 675 (noting same-sex couples denied benefits afforded to heteronormative couples).

32. *Compare* Eric A. Feldman, Baby M *Turns 30: The Law and Policy of Surrogate Motherhood*, 44 AM. J. L. & MED. 7, 15 (2018) (detailing historical restrictions for same-sex couples), *with* Conklin, *supra* note 7, at 84 (discussing courts' increasing protection of same-sex couples). Conklin mentions that, in an attempt to remedy historical barriers to procreation, some courts have begun to look favorably upon surrogacy agreements involving same-sex couples. *See* Conklin, *supra* note 7, at 84 (mentioning courts' lenience for same-sex couples). These agreements typically include a provision whereby both parents adopt the child upon the birth-mother's relinquishment of legal rights to the child at birth. *See id.* (outlining process of surrogate mother relinquishing parental rights); 1 LEXISNEXIS PRACTICE GUIDE: MA FAMILY LAW § 11.07 (noting presumption of parentage at birth).

33. *See What Is Assisted Reproductive Technology?*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 8, 2019), https://www.cdc.gov/art/whatis.html [https://perma.cc/EJQ6-Q9Y3] (defining ART); McCallister, *supra* note 8, at 303-10 (explaining courts' and legislatures' reactions to technological advancements); 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, 657 (2003) (discussing disparity between legislation and medical advancements). One reason the law in this area is so unsettled is because there is a mismatch between legislatures and the medical field. *See* Plant, *supra*, at 657 (citing Massachusetts case discussing need for process of establishing parentage). As new reproductive technologies and medical solutions emerge, legislatures have continually not kept the same pace in passing laws regulating these new technologies, leaving the public with vast uncertainty. *See id.* at 661-62 (discussing Massachusetts Supreme Judicial Court acting when legislature silent).

34. *See* Thomaston, *supra* note 1, at 1157-58 (explaining surrogacy arrangement). In a typical surrogacy agreement, sperm from one of the intended parents is implanted into the surrogate mother, who will then carry and deliver the child. *See id.* (outlining insemination process). In this arrangement, the surrogate's own egg is fertilized, thus maintaining the surrogate's genetic link to the baby. *See id.*; *see also* Patton, *supra* note 13, at 509, 511 (describing standard surrogacy involving sperm from intended parent); Mimi Yoon, Note and Comment, *The Uniform Status of Children of Assisted Conception Act: Does It Protect the Best Interests of the Child in a Surrogate Arrangement?*, 16 AM. J. L. & MED. 525, 528 (1990) (explaining traditional surrogacy method).

35. *See* Feldman, *supra* note 32, at 8-10 (discussing 30th anniversary of "Baby M" case); Courtney G. Joslin, *Surrogacy and the Politics of Pregnancy*, 14 HARV. L. & POL'Y REV. 365, 367 (2020) (noting permissive surrogacy laws create access for same-sex couples); Rachel Rebouché, *Contracting Pregnancy*, 105 IOWA L. REV.

Though surrogacy serves as a solution for many people, the failure of legislatures to consistently address the enforceability of agreements between IPs and surrogates has created problems.[36] As states have historically regulated family law at the state level, couples seeking to conceive using a surrogate face tremendous uncertainty.[37] If couples contract with surrogates in different states, they are unfortunately left having to guess whether a court will enforce the agreement if the surrogate mother decides to keep the baby.[38] Even in situations where the IPs and surrogate reside in the same state, the lack of state legislation in some states creates a confusing legal landscape that IPs and surrogates struggle to navigate.[39]

LGBTQIA+ couples—particularly same-sex male couples—face unique challenges due to the uncertainty of enforcement of surrogacy agreements.[40] While same-sex female couples also deal with difficulties when using ART, lesbian couples are generally not inhibited by the inability to gestate and are not subject to intrusion by a third party asserting parental rights to their baby.[41] Same-sex male couples, however, are unable to carry a child without the involvement of a surrogate or GC.[42] While sperm donors legally agree to sever their rights to any children born using their genetic material, there is no symmetrical protection for gay fathers seeking to have a child using a surrogate because of the biological

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1591, 1640-41 (2020) (explaining surrogacy and GC agreements open doors for same-sex couples); Angie Godwin McEwen, Note, *So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 VAND. J. TRANSNAT'L L. 271, 274 (1999) (discussing popularity of surrogacy among couples facing conception challenges); Cohen, *supra* note 16, at 244 (citing infertility statistics among couples in childbearing age); *see also* Thomaston, *supra* note 1, at 1159 (discussing introduction of modern surrogacy over past fifty years).

36. *See* Thomaston, *supra* note 1, at 1161-67 (illustrating disparities in surrogacy contract enforcement between states). Thomaston breaks down states into three categories: states that expressly prohibit surrogacy contracts, states that partially permit surrogacy, and states that have been silent on the issue. *See id.* The disparities among states leave couples seeking to enter surrogacy agreements with a great degree of uncertainty regarding enforcement. *See id.* at 1167 (outlining uncertain consequences of disparate laws among states); *see also* Garrison, *supra* note 9, at 839 (describing inability of legal field to adapt to medical advancements).

37. *See supra* note 36 (explaining inconsistent state regulation of surrogacy).

38. *See supra* note 36 (stressing high degree of uncertainty regarding enforceability of surrogacy contracts).

39. *See* Thomaston, *supra* note 1, at 1161-67 (describing jurisdictional disparities leaving parents questioning parental rights).

40. *See* Perri Koll, Note, *The Use of the Intent Doctrine to Expand the Rights of Intended Homosexual Male Parents in Surrogacy Custody Disputes*, 18 CARDOZO J.L. & GENDER 199, 200-01 (2011) (noting gay male couples face distinct challenges with surrogacy); Anne R. Dana, Note, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 356-57 (2011) (explaining differences between struggles of gay and lesbian couples).

41. *See* Dana, *supra* note 40, at 356-57 (noting involvement of third party necessary for gay couples); Koll, *supra* note 40, at 201 (explaining necessity of surrogate not present for lesbian couples). While two female people in a same-sex relationship may face other issues of infertility that impede reproduction, they are not limited in the ability to gestate by virtue of the composition of their relationship. *See* Dana, *supra* note 40, at 356-57 (explaining surrogate unnecessary in same-sex female couple where gestation possible).

42. *See supra* note 40 (discussing biological impediments for gay fathers versus lesbian mothers).

differences between males and females.[43] As only individuals with a uterus can carry a child, same-sex male fathers seeking to reproduce biologically will always require a surrogate who must legally relinquish parental rights at birth.[44] Because states do not universally enforce surrogacy and GC agreements, this inconsistency opens the door for birth mothers to renege and decide to keep the baby.[45] Some states' emphasis on gestation and the connection between birth mother and baby leaves many same-sex male fathers in a fragile and uncertain position regarding the right to their intended children.[46]

C. Surrogacy and GC Agreements

Both surrogate and GC agreements involve IPs contracting with a female person to carry a child to term—regardless of the fetus's biological relationship to her—and relinquish parental rights at birth.[47] IPs, with the intent to receive parental rights at birth, utilize a surrogate to conceive a biological child.[48] The surrogate is the woman who carries the child and is also referred to as the birth mother.[49] In a surrogacy arrangement, the surrogate has a genetic tie to the baby.[50] By contrast, in a GC agreement, the GC has no genetic tie to the child.[51]

The difference between altruistic and commercial surrogacy raises various policy concerns, such as possible exploitation of lower income women, commodification of reproduction, and equal protection issues.[52] In an altruistic

43. *See* Dana, *supra* note 40, at 377-78 (detailing legal severance of parental rights of sperm donors). There is a universally established rule that sperm donors, upon donation, agree to relinquish any claim of parentage over any child born from their sperm. *See id.* (noting universally accepted rule stating sperm donors not legal parents). Conversely, because males cannot gestate, contracting with a surrogate or GC requires the presumption and hope that the birth mother will voluntarily relinquish her rights to the child at birth. *See id.* at 378 (explaining reliance on biological mother's decision relinquishing parental rights). Because many states do not universally enforce surrogacy and GC agreements, there must be a great deal of trust that the birth mother will honor the private agreement upon the birth of the baby. *See id.* (noting surrogate must relinquish parental rights to fulfill agreement).

44. *See id.* at 378 (noting presence of surrogates' claim to legal parentage).

45. *See id.* (illustrating risk of birth mother deciding to assert claim to legal parentage).

46. *See id.* at 379-80 (emphasizing society's view of gestation worthy of protection); *see also* Koll, *supra* note 40, at 201 (describing risk of birth mothers asserting legal rights).

47. *See supra* notes 34-35 (illustrating typical surrogacy and gestational carrier agreements).

48. *See Intended Parent*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining intended parent). *Compare id.*, *with Biological Mother*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining biological mother).

49. *See Surrogate Mother*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining surrogate mother); *Birth Mother*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining birth mother).

50. *See* Patton, *supra* note 13, at 509-11 (discussing typical surrogacy relationship). In the standard surrogacy relationship, the birth mother maintains a genetic link to the child, as she provides the egg. *See id.*

51. *See* Thomaston, *supra* note 1, at 1157-58 (defining gestational surrogacy); McEwen, *supra* note 35, at 276 (explaining elements of GC agreement); Patton, *supra* note 13, at 511 (outlining types of GC agreements). Unlike in a traditional surrogacy arrangement where the surrogate is the biological mother of the child, the fetus in a GC arrangement is not genetically related to the birth mother. *See* Conklin, *supra* note 7, at 70 (highlighting genetic tie between fetus and surrogate mother).

52. *See* Nick Stanley, *Freedom of Family: The Right to Enforceable Family Contracts*, 31 J. AM. ACAD. MATRIMONIAL L. 223, 226 (2018) (explaining difference between altruistic and commercial surrogacy). While courts and scholars tend to disfavor commercial surrogacy, most women would not become surrogates without

surrogacy agreement, the IPs compensate the surrogate for her medical and living expenses but do not provide compensation beyond costs associated with the pregnancy.[53] In commercial surrogacy agreements, the IPs provide the surrogate mother with compensation beyond her medical and living expenses, essentially allowing her to profit from the pregnancy.[54]

D. Public Policy Concerns

Many theorists consider commercial surrogacy agreements void as against public policy because of potential inequalities in bargaining power between the IPs and surrogate mother.[55] These concerns stem from traditional perceptions of who would have the resources to pay another person to carry their child and, conversely, what type of person would be willing to grow another couple's baby in their womb.[56] Further, because states want to avoid facilitating a "baby buying" industry, many have either refused to enact protections for surrogacy agreements or have outlawed them altogether.[57]

Many states have also expressed concern surrounding the protection of the bond between birth mother and baby.[58] Most states prioritize the protection and

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the additional financial compensation as an incentive. *See* Jessica H. Munyon, Note, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Contracts*, 36 SUFFOLK U. L. REV. 717, 718 (2003) (noting eighty-nine percent of women would not become surrogates without compensation).

53. *See* Stanley, *supra* note 52, at 226 (discussing altruistic surrogacy).

54. *See id.* (describing commercial surrogacy); *see also* Patton, *supra* note 13, at 514-15 (noting complete-ban states prohibit commercial surrogacy contracts under public policy). Many states and legal scholars find commercial surrogacy morally objectionable because they equate it to buying and selling babies. *See* Cohen, *supra* note 16, at 250 (highlighting statutory manifestation of policy against baby buying); Patton, *supra* note 13, at 514-15 (describing some states' view of commercial surrogacy).

55. *See* Joslin, *supra* note 35, at 371 (explaining feminist concerns about surrogacy). Joslin notes that many feminist advocates feel that traditional surrogacy arrangements should be disfavored because of the inherent disparity in bargaining power between IPs and women who choose to be surrogates. *See id.* Many feel that surrogacy allows people who have money to prey on women who enter these agreements for financial considerations and treat them as breeders. *See id.*

56. *See id.* (discussing concerns about bargaining power). Feminist theorists, as well as some states, are concerned that the women who can afford to hire a surrogate may also have more resources and education than the surrogate. *See id.* (noting surrogacy allows "an elite economic class to exploit a poorer group of women"). Women who agree to be surrogates are traditionally thought to come from lower socioeconomic backgrounds, and some states are concerned that these women may not feel empowered to make a rational decision regarding her relinquishment of parental rights. *See id.* (stating surrogates may not feel empowered to change their minds).

57. *See supra* note 36 (explaining various approaches to surrogacy regulation). While there are many states that will not enforce surrogacy contracts, a handful go so far as to impose criminal penalties for entering into these agreements. *See* Thomaston, *supra* note 1, at 1162-63 (noting states with criminal statutes). The language of many state statutes indicates a strong public policy against the so-called "selling of children." *See* Cohen, *supra* note 16, at 250. Some courts have gone so far as to conclude that surrogacy contracts are akin to buying livestock—a practice that should never be legalized or normalized for humans. *See id.* (comparing "baby buying" to chattel transactions).

58. *See* Cohen, *supra* note 16, at 254 (noting New York court held prebirth orders against public policy). Some states find that prebirth orders of parentage to IPs are void against public policy because they take away from the surrogate's natural maternal instinct. *See id.*; *see also* Allen, *supra* note 17, at 777 (describing surrogate's connection to baby she carries even if not genetically linked).

needs of children, arguing that it is beneficial for the baby to stay with the birth mother, even when the birth mother and baby are not genetically related.[59] Additionally, many states stand firmly against commodifying reproduction.[60] This rationale is rooted in the feminist theory claiming women's bodies should not be commercialized.[61] Under this theory, many believe that even if a surrogate or GC freely contracts with IPs to carry their child, the surrogacy relationship is premised on the exploitation of the woman as a vessel to carry a child.[62]

Alternatively, proponents of surrogacy and GC agreements argue that failing to support surrogacy arrangements presents an equal protection issue.[63] While children born to married women by sperm donation are presumptively the legal child of her husband, states do not afford women who face infertility the same presumption of legal parentage.[64]

E. Approaches to Regulation of Surrogacy and GC Agreements

Surrogacy and GC contracts vary in how each state enforces them per their legislation, common law, and public policy.[65] Laws concerning enforcement can largely be categorized within one of three primary approaches to surrogacy and GC agreements: strict prohibition (Group A), moderate approach (Group B), and lack of clear guidance (Group C).[66] States in Group A have either adopted laws that strictly prohibit surrogacy or GC contracts, or case law suggests the state's

59. *See supra* note 58 (explaining states' emphasis on bond between birth mother and baby).

60. *See* Brett, *supra* note 7, at 598 (discussing opposition to surrogacy contracts for commodifying reproduction).

61. *See* Joslin, *supra* note 35, at 370-71 (describing feminist theorists' opposition to commodifying women's bodies). Though reproductive choice—including the choice to carry another person's baby—is a cornerstone of feminist theory, many feminist scholars believe that there is no free choice for the surrogate if the IPs are in a better educational or financial position. *See id.* at 372 (noting many believe surrogacy contrary to feminism in limiting bodily autonomy).

62. *See id.* at 370-72 (noting argument of imbalance of power in surrogacy relationship).

63. *See* Phillip Lapointe, Note, *Extending the Marital Presumption to Same-Sex Couples: The Effect on Parentage for Married Same-Sex Male Couples Using a Surrogate*, 22 J. GENDER RACE & JUST. 127, 129-31 (2019) (outlining equal protection issue in uneven presumptions of parentage). While husbands whose wives are inseminated by a sperm donor have presumptive legal rights to the child, wives who are IPs of children born out of surrogacy are not presumptively the legal mother. *See* Munyon, *supra* note 52, at 735 (highlighting difference in treatment between male and female IPs using surrogates).

64. *See* Lapointe, *supra* note 63, at 129-31 (revealing possible equal protection concern).

65. *See* Patton, *supra* note 13, at 509, 513-14 (explaining "jurisdictional chaos" arising from lack of consistency among states). Patton separates states into three categories: complete ban states, moderate approach states, and jurisdictional preauthorization states. *See id.* at 514-19; *see also* Cohen, *supra* note 16, at 247-56 (outlining specific state statutes and public policy concerns); Thomaston, *supra* note 1, at 1161-68 (illustrating disparities among state laws).

66. *See* Patton, *supra* note 13, at 514-19, 521-23 (explaining complete ban, moderate approach, judicial preauthorization, and states without laws); Cohen, *supra* note 16, at 247 (explaining some states apply laws prohibiting everything from black market adoption to commercial surrogacy); Allen, *supra* note 17, at 754-58 (describing states with little to no legal framework addressing surrogacy contracts).

public policy does not support enforcement of surrogacy contracts.[67] Within Group A states, there is still great variety in the types of laws prohibiting surrogacy and GC agreements.[68] Some states ban commercial surrogacy agreements, others prohibit any type of surrogacy arrangements, and some even go so far as to criminalize surrogacy contracts of any kind.[69] Group B states are more lenient in that they allow some iterations of surrogacy or GC agreements under certain circumstances.[70] Some Group B states only allow GC agreements while others will allow surrogacy agreements where the birth mother is also the biological mother.[71] Moreover, some Group B states prohibit commercial surrogacy contracts because of a strict public policy against commodifying reproduction.[72]

Most states fall into Group C, where there is so little guidance that many people are left to guess how, if at all, the courts will enforce their surrogacy contracts.[73] For many of these states, enforceability of these agreements is a matter of first impression, and judges will look to established contract and adoption law to resolve disputes over legal parentage.[74] Even in states that have manifested

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67. *See In re* John, 103 N.Y.S.3d 541, 545 (2019) (explaining commercial surrogacy agreements against public policy); Patton, *supra* note 13, at 514-15 (describing restrictive laws in Florida, Michigan, and Kentucky); Ky. Rev. Stat. Ann. § 199.590 (LexisNexis 2023) (prohibiting surrogacy contracts). Kentucky explicitly prohibits surrogacy contracts by stating that:

> A person, agency, institution, or intermediary shall not be a party to a contract or agreement which would compensate a woman for her artificial insemination and subsequent termination of parental rights to a child born as a result of that artificial insemination . . . . Contracts or agreements entered into in violation of this subsection shall be void.

Id. Michigan, like Kentucky, bans surrogacy agreements, citing the state's public policy. *See* MICH. COMP. LAWS SERV. § 722.855 (LexisNexis 2023) (banning surrogacy contracts according to public policy).

68. *See* Surrogate Parenting Assocs., Inc. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209, 214 (Ky. 1986) (explaining surrogate agreement not within scope of statute prohibiting buying children). Even in Kentucky, where surrogacy seems to be prohibited by statute, there is a great deal of variation in surrogacy agreements for which the statute does not account. *See id.* (demonstrating lack of statutory clarity); *see also infra* note 67 (describing restrictive laws in Group A states).

69. *Compare* R.R. v. M.H., 689 N.E.2d 790, 796-97 (Mass. 1998) (holding commercial surrogacy contracts unenforceable), *with* N.Y. DOM. REL. LAW § 122 (Consol. 2020) (establishing public policy against all surrogacy contracts), *and* N.Y. DOM. REL. LAW § 123 (Consol. 2020) (creating criminal penalty for repeat offenses).

70. *See* P.M. v. T.B., 907 N.W.2d 522, 541-42 (Iowa 2018) (holding definition of biological parent under statute includes parents with full genetic ties). The Iowa Supreme Court enforced the GC agreement at issue only because the surrogate mother had no genetic ties to the baby. *See id.*; *see also In re* Gestational Agreement, 449 P.3d 69, 72 (Utah 2019) (holding GC agreements enforceable when validated by tribunal). In enforcing the GC agreement between a same-sex couple, the Utah Supreme Court overturned the state statute requiring the IPs to be one man and one woman, concluding that it violated the Equal Protection Clause. *See In re Gestational Agreement*, 449 P.3d at 84 (noting inherent inequality of existing statute).

71. *See* Thomaston, *supra* note 1, at 1163-65 (explaining states with moderate approach).

72. *See id.* at 1164 (noting many states' strict public policy against commercial surrogacy).

73. *See id.* at 1166-67 (describing how many states' lack of legal framework confusing for individuals and courts alike).

74. *See* Allen, *supra* note 17, at 756 (describing jurisdictional chaos due to lack of federal regulation); *see also* J.F. v. D.B., 879 N.E.2d 740, 741-42 (Ohio 2007) (holding Ohio's lack of defined public policy allows enforcement of surrogacy agreements). The Ohio Supreme Court noted that the freedom to contract is limited

an intent to support surrogacy contracts, there is often such a weak statutory scheme that individuals are left questioning the enforceability of their agreements.[75] While approaches to surrogacy contracts can be loosely broken down into Groups A, B, and C, continuous changes to these laws cause a great deal of confusion for people looking to use surrogacy as a method of reproduction.[76]

Legal scholars have parsed out these general approaches by states into categories of parentage presumption, including marital, gestational, genetic, three-parent, and intent.[77] The marital approach grants a presumption of parentage to the legal spouse of an individual who gives birth to the child.[78] The gestational approach presumes that the individual who gave birth to the child is the child's legal parent.[79] The genetic approach, by contrast, presumes that people with whom the child shares DNA are the legal parents.[80] The three-parent model

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by the state's public policy, but the surrogacy contract in question could not contravene public policy if there was no enumerated public policy. *J.F.*, 879 N.E.2d at 741-42.

75. *See infra* note 112 (discussing Massachusetts case law affording some protection while offering little guidance); *see also* Thomaston, *supra* note 1, at 1163-64 (illustrating confusion lack of clear statutory scheme causes).

76. *See infra* note 112 (illustrating legal landscape in Massachusetts); *Parentage Proceedings Under the Child-Parent Security Act*, N.Y. STATE UNIFIED CT. SYS. (2021), https://www.nycourts.gov/LegacyPDFS/forms/familycourt/pdfs/Child-Parent-SecurityAct-Summary.pdf [https://perma.cc/65G5-PFAQ] (discussing new Child-Parent Security Act recently passed in New York).

77. *See* Dana, *supra* note 40, at 380 (noting presumption of child born with married parents); *id.* at 381 (explaining gestational presumption dictating legal rights); *id.* at 382 (commenting genetic presumption enforces biological bonds to child); Koll, *supra* note 40, at 221 (defining three-parent model solution to parentage disputes). The intent doctrine examines surrogacy and GC agreements to determine what the individuals intended at the time ART was first employed. *See* Dana, *supra* note 40, at 382-84 (noting intent doctrine's benefits of creating certainty and establishing lifelong bonds). This approach often allows for prebirth orders that allow the IPs to create parental bonds with the child beginning immediately at birth. *See id.* (asserting intent doctrine provides children with most committed parents). The presumption of parentage refers to the legal acknowledgment at birth of the parent-child relationship's validity that is typically manifested in custody presumptions. *See* Johnson v. Calvert, 851 P.2d 776, 779 (Cal. 1993) (discussing departure from legal parentage derived from marital status).

78. *See* Dana, *supra* note 40, at 380 (defining marital presumption). This presumption is criticized as it favors men in heteronormative couples and is gendered in nature. *See id.* (noting "presumption operates in a gendered way"). While men are afforded the benefit of this presumption when their wives give birth, women are not presumed to be the legal mothers of children that the husband fathers outside of the marriage. *See id.* This presumption is restrictive, as it only recognizes children born to a husband and wife within a marriage—failing to grant IPs parental rights to babies birthed by surrogates. *See id.* Further, this presumption deprives men—with whom a married woman procreates—of rights to their biological children. *See generally id.* (providing arguments for one-sided nature of marital presumption).

79. *See id.* at 381 (noting gestational presumption grants legal parentage to individual who gives birth to child). This approach is widely disfavored, especially by advocates of ART, because it completely precludes the possibility of legal surrogacy. *See id.* (mentioning presumption's inherent exclusion of IPs in surrogacy cases). Moreover, this approach reinforces harmful stereotypes about women as breeders and men as incapable of being nurturing or caring for a child. *See id.* at 381-82 (detailing perpetuation of harmful stereotypes).

80. *See id.* at 382 (defining genetic presumption). This approach, while perhaps more modern than the gestational and marital presumptions, still fails to account for many iterations of parental relationships such as stepparents, adoptive parents, and IPs using ART. *See id.* (noting shortcomings for modern family structures). While this approach does provide protections for IPs in GC agreements, it does not afford any protections for IPs in traditional surrogacy agreements. *See id.* (detailing emphasis on genetic link to child).

allows for more than two parents to claim legal rights to the child born in a surrogacy or GC arrangement.[81] Finally, the intent doctrine places significance on the surrogacy or GC agreement and honors the motivation of the parties upon signing.[82] The statutes and case law in New York, Massachusetts, and California, evince that there is no clear consensus about which approach is universally acceptable according to public policy.[83]

F. New York, Massachusetts, California, and the Progressive and Feminist Approach

Examining the laws of New York, Massachusetts, and California help illustrate legal disparities on a granular level, as each of these states adopts a unique approach to surrogacy contracts.[84] Not only do the laws of these states differ substantially from each other, but the laws are also constantly evolving to reflect changes in public policy.[85] Additionally, New York, Massachusetts, and California are three of the most politically progressive states in the country; observing the vast inconsistencies in laws between these states that promote similar policies for most social issues demonstrates how disparate the surrogacy landscape is in the United States.[86]

Progressive feminist scholars are generally divided on the issue of surrogacy through ART as a legitimate method of reproduction because of concerns about

81. *See* Koll, *supra* note 40, at 221-22 (explaining three-parent model). While the three-parent model may be a helpful mechanism in some parenting arrangements, most IPs asserting legal rights to their children are not open to the concept of a surrogate or GC remaining a part of their child's life. *See id.* at 221-22 (noting pitfalls of three-parent model).

82. *See* Dana, *supra* note 40, at 383 (outlining intent approach and benefits). The intent doctrine recognizes the significant time, energy, money, and emotion involved for the IPs in using ART to reproduce. *See id.* (noting benefits of intent doctrine in creating certainty).

83. *See infra* Section II.F (detailing differences in New York, Massachusetts, and California).

84. *See infra* Section II.F (discussing surrogacy laws in New York, Massachusetts, and California).

85. *See* Joslin, *supra* note 35, at 372-75 (discussing shift toward permissive legislation).

86. *See Political Ideology by State*, PEW RSCH. CTR., https://www.pewforum.org/religious-landscape-study/compare/political-ideology/by/state [https://perma.cc/34D7-UJYL] (categorizing states according to political ideology); *see also* Andrea Michelson, *How the States with the Best Access to Abortion Services Compare to the Worst*, INSIDER (Dec. 8, 2020), https://www.insider.com/us-states-with-best-access-to-abortion-compared-to-worst-2020-12 [https://perma.cc/F9HV-G9DJ] (noting Massachusetts, California, and New York among top states for safe abortion access). As two of the most progressive states, California and New York have enacted statutes—expanding access to safe abortions—to ensure their residents' reproductive rights will be protected in the post-*Roe* era. *See* Michelson, *supra* (outlining expansion of rights). Similarly, Massachusetts has stricken archaic laws criminalizing abortion access and codified the protections established in *Roe v. Wade*. *See id.* (commenting Massachusetts among states enacting access with some restrictions); An Act Relative to Reproductive Health, ch. 155 (2018) (codified in scattered sections of MASS. GEN. LAWS ch. 112, 272) (eradicating outdated restrictive abortion laws). New York, Massachusetts, and California are also ranked among the most liberal in the country in their approaches to comprehensive, state-funded health care for low-income residents. *See* Michael LaPick, *Best and Worst States for Healthcare for Low-Income Individuals*, HEALTH CARE INSIDER (June 10, 2021), https://healthcareinsider.com/best-states-low-income-healthcare-361593 [https://perma.cc/SC6T-7N6A] (ranking best states for low-income healthcare access).

exploitation of poorer women and commodifying women's bodies.[87] While one might presume that progressive feminists would generally support surrogacy, given that it promotes bodily autonomy and free choice, support for surrogacy agreements among feminist activists is fractured.[88] In the late 1980s, most feminists opposed the practice of surrogacy, as they believed it reduced women to vessels of reproduction.[89] Many feminists also argued that surrogacy arrangements would open the door for wealthier people to exploit poorer women and women of color who are agreeing to act as surrogates for financial benefit.[90] Further, some feminist activists argued that women who act as surrogates can neither give true informed consent to relinquish parental rights because they could not have predicted the bond they would feel with their child, nor give voluntary consent if a couple with more resources exploits them.[91] Conversely, many feminists supported surrogacy as a key principle of feminism through the idea that women have autonomy over their bodies and can choose how and when to reproduce.[92]

1. New York

New York has historically been one of the most restrictive states regarding the enforcement of surrogacy agreements, manifesting a clear policy against

87. *See* Joslin, *supra* note 35, at 370-71 (noting concerns around reproductive rights and exploitation of low-income women); Munyon, *supra* note 52, at 727-28 (arguing women cannot possibly foresee struggles of parting with newborn). *But see* Joslin, *supra* note 35, at 372 (explaining surrogacy grants women control of their bodies).

88. *See infra* notes 90-94 (outlining arguments of feminists in support and opposition of surrogacy agreements).

89. *See* Joslin, *supra* note 35, at 370-71 (noting position of feminists against surrogacy in response to *Baby M* case). Many feminists argued that "surrogacy degraded the female reproductive function" and further depersonalized women's role in reproduction. *See id.*; *see also* Munyon, *supra* note 52, at 724 (detailing feminist argument against surrogacy due to symbolic harm of selling babies).

90. *See* Joslin, *supra* note 35, at 371 (outlining feminists' position against surrogacy). Feminists' concern was that elite women who were in the position to pay surrogates would exploit women from lower socioeconomic backgrounds, reducing them to breeders. *See id.*; *see also* Munyon, *supra* note 52, at 725 (noting some feminist scholars liken surrogacy to prostitution).

91. *See* Munyon, *supra* note 52, at 727-28 (explaining argument of no voluntary informed consent). The arguments that there can be no completely voluntary consent and that surrogacy is comparable to prostitution—considered among the most extreme—rest on the assumption that the birth mother, at the time of contracting, could not have possibly foreseen the hormonal attachment she would feel to the child at birth, and therefore her willingness to enter into the contract could not have been motivated by true informed consent. *See id.* Similarly, some feminists argue that, even if the birth mother feels that she wants to terminate her parental rights when the child is born in accordance with the agreement, she would still be improperly induced by the financial benefit of the contract. *See id.* (outlining argument demonstrating surrogacy contrary to feminist agenda).

92. *See* Joslin, *supra* note 35, at 372 (describing some feminists' argument showing surrogacy gives women control); Munyon, *supra* note 52, at 723 (noting supporters feel surrogacy gives people options). Many believe that surrogacy, along with other medical technology, can help people have more options and make more informed decisions about procreation. Munyon, *supra* note 52, at 723 (explaining choice-centered feminist argument favoring surrogacy contracts). As reproductive choice is at the cornerstone of feminist policy, many argue that surrogacy should be viewed no differently than access to contraception, abortion, and artificial insemination. *Id.* (noting argument surrogacy provides women bodily autonomy).

commodifying reproduction through commercial surrogacy.[93] Not only has New York formally codified its antisurrogacy position, but it also enacted both civil and criminal penalties for people who assist in creating surrogacy contracts.[94] Yet the state, in aiming to protect birth mothers, does not hold a birth mother's involvement in a surrogacy contract against her when determining the legal custody of the child.[95] If a birth mother has executed a valid surrender of her parental rights, however, courts will still grant custody to the IPs as adoptive parents.[96]

New York courts have consistently held that commercial surrogacy contracts are unenforceable.[97] In the 1990 case, *In Re Adoption of Paul*, the court found that the surrogate mother—who was seeking to terminate her parental rights in advance of giving birth—needed to relinquish the $10,000 payment to effectively terminate her rights to the child.[98] The court reasoned that the birth mother could not freely and voluntary give up her parental rights as long as she was receiving the payment.[99] The birth mother was thus left in the position to either not be able to terminate her rights to a child she did not want or give up the money for which she bargained.[100]

93. *See* Conklin, *supra* note 7, at 79 (describing New York's harsh attitude towards surrogacy agreements); N.Y. DOM. REL. LAW § 122 (Consol. 2020) (codifying state public policy against surrogacy agreements); Drabiak, *supra* note 17, at 303 (ranking New York among strictest in nation on surrogacy); *see also* Joseph R. Williams, *New Surrogacy Law Brings Opportunity but Practitioners Beware*, N.Y. STATE BAR ASS'N (Mar. 9, 2021), https://nysba.org/new-surrogacy-law-brings-opportunities-but-practitioners-beware/ [https://perma.cc/T-7YF-2B5C] (noting Child-Parent Security Act only applies to GC agreements). In passing the Child-Parent Security Act, the New York state legislature made clear that the protections only apply when the birth mother has no genetic ties to the child and only received a reasonable fee. *See* Williams*, supra* note 93 (explaining New York legislation). The New York state policy against commodifying reproduction through commercial surrogacy contracts is manifestly clear in the enactment of this new act. *See id.*

94. *See* N.Y. DOM. REL. LAW § 123 (Consol. 2020) (outlining civil and criminal penalties). This statute states that: (1) no person shall knowingly aid or assist someone in creating a surrogacy contract for profit; (2) violators will be subject to a penalty of up to $10,000; and (3) repeat offenses shall be considered a felony. *See id.* (explaining criminal penalties).

95. *See* Conklin, *supra* note 7, at 79 (stating birth mother's involvement will not affect her possibly custody rights).

96. *See* N.Y. DOM. REL. LAW § 124 (Consol. 2020) (outlining determination of parental rights). The statute states "that in any dispute involving a genetic surrogate who has executed a valid surrender or consent to the adoption, nothing in this section shall empower a court to make any award that it would not otherwise be empowered to direct." *Id.*

97. *See* Itskov v. New York Fertility Inst., Inc., 813 N.Y.S.2d 844, 845 (N.Y. App. Term 2006) (noting surrogacy in New York void against public policy); *In re* John, 103 N.Y.S.3d 541, 545 (N.Y. App. Div. 2019) (explaining commercial surrogacy contracts in New York void and unenforceable); *In re Adoption* of Paul, 550 N.Y.S.2d 815, 817 (Fam. Ct. 1990) (citing New York Statute prohibiting payment of surrogacy services beyond medical expenses); Doe v. N.Y. City Bd. of Health, 782 N.Y.S.2d 180, 183 (N.Y. App. Div. 2004) (explaining New York prohibits traditional surrogacy even when no payment involved).

98. *See In re Adoption of Paul*, 550 N.Y.S.2d at 818-19 (holding surrogate mother could only terminate rights if she relinquished $10,000).

99. *See id.* (noting concerns behind commercial surrogacy).

100. *See id.* (explaining $10,000 might unfairly induce surrogate mother to relinquish parental rights).

On the other hand, courts in New York have historically produced more ambiguous holdings on the issue of noncommercial surrogacy or GC agreements.[101] While some courts have continued to hold that surrogacy contracts are unenforceable, other courts have been more lenient in cases where the IP has a genetic tie to the baby.[102] For example, in *In re John*, a single, gay father utilized a GC who carried an embryo comprised of his sperm and an anonymous donor's egg.[103] In holding that the father could legally adopt his child and the GC could relinquish parental rights, the court reasoned that nothing in the state's adoption statute prohibits a child from having only one parent and that forcing the GC to remain the legal parent would not be in the child's best interest.[104]

Conversely, in *McDonald v. McDonald*, the court held that a mother who was not genetically related to her children was the legal parent because she both carried them in her uterus and intended to be their parent.[105] The dispute over custody arose out of a divorce proceeding, during which the husband argued that his estranged wife should not have custody of their children conceived using an egg donor.[106] The court, while holding that the wife was the mother because she carried the children in her uterus, noted that this was a true egg-donation arrangement where the genetic mother had no intention of claiming legal parentage.[107]

This ambiguity—highlighted in the above cases—has encouraged many New York couples to contract with surrogates outside of the state.[108] Recently, however, New York created a pathway for IPs to secure parental rights to their biological child via GC agreements.[109] The Child-Parent Security Act allows IPs to

101. *See* Conklin, *supra* note 7, at 79-80 (illustrating evolution of case law); McDonald v. McDonald, 608 N.Y.S.2d 477, 480 (N.Y. App. Div. 1994) (granting legal rights to mother who received egg donation). In *McDonald*, the biological father attempted to gain legal custody of his child, claiming that his wife had no rights because she did not have genetic ties to the baby. *See* 608 N.Y.S.2d at 479. The court held that because the birth mother carried the child, she had legal rights even though she was not genetically the baby's biological parent. *See id.* at 480.

102. *Compare Doe*, 782 N.Y.S.2d at 184-85 (holding issuance of postbirth order appropriate for IPs and GC), *and McDonald*, 608 N.Y.S.2d at 480 (holding birth mother legal mother, even with egg donation), *with Itskov*, 813 N.Y.S.2d at 845 (holding surrogacy contract illegal where surrogate has genetic tie). While courts in New York will not typically enforce these agreements, some look to the language of the contract to find the intent of the parties during adoption proceedings. *See In re John*, 103 N.Y.S.3d at 548 (looking to evidence of parties' intent).

103. *See In re* John, 103 N.Y.S.3d 541, 543 (N.Y. App. Div. 2019) (delineating underlying facts of case).

104. *See id.* at 550 (agreeing GC maintaining legal parentage not in child's best interest).

105. *See McDonald*, 608 N.Y.S.2d at 480 (holding wife unequivocally legal parent of twin infants).

106. *See id.* at 478-79 (outlining egg donation arrangement for conception).

107. *See* McDonald v. McDonald, 608 N.Y.S.2d 477, 480 (N.Y. App. Div. 1994) (highlighting gestational connection and intent of parents at conception).

108. *See* Conklin, *supra* note 7, at 81-82 (noting surrogacy agencies in New York match IPs with out-of-state surrogates). The strict ban on surrogacy agreements in New York did not achieve the policy goal of reducing surrogacy, as couples are still spending the money to match with surrogates in states with more lenient laws. *See id.* (explaining IPs continued contracting with out-of-state surrogacy agencies).

109. *See Parentage Proceedings Under the Child-Parent Security Act*, *supra* note 76 (explaining steps for creating valid GC agreement); *see also* Briana R. Iannacci, Article, *Why New York Should Legalize Surrogacy: A Comparison of Surrogacy Legislation in Other States with Current Proposed Surrogacy Legislation in New York*, 34 TOURO L. REV. 1239, 1250-51 (2018) (explaining requirements for surrogacy contracts established in

obtain judicial preauthorization of parentage by submitting a verified petition.[110] If all statutory requirements are met, the court shall issue a judgment declaring that only the IPs appear on the birth certificate of the child.[111]

2. Massachusetts

While Massachusetts does not have clear statutory guidance, the Massachusetts Supreme Judicial Court (SJC) addressed the enforceability of surrogacy contracts in several key cases, where the court noted that there is no public policy opposing traditional surrogacy agreements.[112] In *R.R. v. M.H.*, the Massachusetts SJC outlined a number of conditions courts should consider when deciding whether to enforce surrogacy contracts, such as: the advanced informed consent of the birth mother's husband; a prior successful pregnancy of the birth mother carried to term without health defects; an evaluation of the soundness and capacity of the IPs; and independent advice of counsel.[113]

Later, in *Culliton v. Beth Israel Deaconess Medical Center*, the SJC granted a prebirth order allowing the IPs in a GC agreement to obtain birth certificates

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Act). The Act mandates that GC agreements shall not: apply to children conceived from sexual intercourse; provide payment beyond living and medical expenses; limit the ability of the GC to make medical decisions for herself or the fetus while in utero; or prohibit the GC from terminating the pregnancy or reducing the number of embryos in her uterus. *See* Iannacci, *supra*, at 1250-51 (delineating requirements of Child-Parent Security Act).

110. *See* Williams, *supra* note 93 (explaining process for obtaining judicial preauthorization). Under the Child-Parent Security Act, IPs must create an agreement in strict compliance with all statutory requirements, such as informed consent and independent representation of the surrogate. *See id.*; *see also* N.Y. FAM. CT. ACT § 581-402 (Consol. 2019) (enumerating requirements for valid GC agreement).

111. *See* Williams, *supra* note 93 (explaining process under Child-Parent Security Act); *id.* (listing requirements under Act).

112. *See* R.R. v. M.H., 689 N.E.2d 790, 797 (Mass. 1998) (noting commercial surrogacy contracts unenforceable). The SJC—in holding that commercial surrogacy contracts are contrary to public policy in Massachusetts—opined that there is nothing inherently objectionable about a typical surrogacy agreement where the surrogate does not earn a profit. *See id.* (explaining agreements involving no compensation beyond medical expenses permissible); Smith v. Brown, 718 N.E.2d 844, 846 (Mass. 1999) (holding prebirth order appropriate in GC agreement between relatives where all parties consent). The SJC continued to suggest that the probate and family court should consider a clear protocol whereby parties to a GC agreement can enter prebirth orders of parentage to avoid the time requirement after birth. *See Smith*, 718 N.E.2d at 844 (noting preference for method of establishing order prior to birth); Culliton v. Beth Isr. Deaconess Med. Ctr., 756 N.E.2d 1133, 1138-39 (Mass. 2001) (granting prebirth order of birth certificates to ensure certainty). In *Culliton*, the court allowed the IPs of twins in a GC agreement to obtain a prebirth order of a birth certificate. *See* 756 N.E.2d at 1138-39 (explaining need for expediency in establishing parentage). The court cited a myriad of policy rationales, such as ensuring certainty after the child is born so that someone is entitled to make medical decisions and allowing the baby to inherit from its legal parents in case one dies before a postbirth order is executed. *See id.* at 1139 (mentioning benefit of granting parental rights and responsibilities to IPs immediately upon birth); *see also* Guardianship of Keanu, 174 N.E.3d 1228, 1237-38 (Mass. App. Ct. 2021) (noting lack of legislative clarification demonstrates need for clear agreements). Where the intended and biological parents did not execute a formal legal document and no adoption occurred after the birth, the appeals court allowed the IP to keep the child in her custody as a guardian, solely because the biological parents were deemed unfit by clear and convincing evidence. *See Guardianship of Keanu*, 174 N.E.3d at 1238-39 (noting reason why IP remained child's legal guardian).

113. *See R.R.*, 689 N.E.2d at 797 (suggesting criteria for evaluation of surrogacy contracts).

naming the IPs as legal parents to their twins.[114] Here, both the IPs implanted their genetic material into the GC and sought prebirth judicial authorization to remove the GC from the child's birth certificate.[115] In granting the prebirth order, the court emphasized a number of supporting factors including the fact that both IPs were genetically linked to the twins; the GC's agreement and stipulation favoring IPs; lack of contention; and waiver of any potentially contradictory provisions in the contract.[116]

Most recently in 2021, the Massachusetts Appeals Court suggested the legislature should enact clearer guidelines for surrogacy and GC agreements in a case dealing with the contested guardianship of a child conceived through surrogacy.[117] In *Guardianship of Keanu*, the intended mother and the biological mother exchanged messages on Facebook, but they never executed a formal agreement with an attorney and failed to follow through with surrendering parental rights and adoption following the birth.[118] The court granted the intended mother custody because the biological mother was unfit; however, the court warned individuals entering into surrogacy agreements that these agreements are not universally enforceable in Massachusetts.[119] The court emphasized the informal nature of the agreement, lack of express contract, and legal ambiguity surrounding surrogacy agreements in warning that parties intending to use surrogacy as a legitimate form of ART should make their intentions clear by executing written surrogacy and GC contracts.[120]

While the Massachusetts legislature has unsuccessfully attempted to enact laws protecting parties involved in surrogacy agreements, courts' willingness to enforce surrogacy and GC contracts creates a more workable framework for

114. *See Culliton,* 756 N.E.2d at 1138-39 (allowing prebirth order with agreement from all parties to expedite transition upon birth).

115. *See id.* at 1135 (noting embryo genetically linked to both IPs). The IPs and GC sought a prebirth order so that they did not have to worry about changing the child's birth certificate once he was born. *See id.* at 1136-38 (outlining reasons for prebirth order).

116. *See id.* at 1138 (outlining factors for court's decision).

117. *See Guardianship of Keanu*, 174 N.E.3d at 1238-39 (suggesting need for clearer legislative guidance on surrogacy agreements). The court cautioned individuals seeking to enter surrogacy agreements that courts have not unequivocally held that these agreements are enforceable. *See id.* (noting lack of clarity).

118. *See* Guardianship of Keanu, 174 N.E.3d 1228,*id.* 1230-35 (Mass. App. Ct. 2021) (outlining conversation between intended and biological mother through Facebook Messenger). The biological mother, once the child was born, granted guardianship to the intended mother. *Id.* at 1234-35. Upon seeing that the intended mother was parenting the child in ways she did not agree with, the surrogate mother attempted to terminate the intended mother's guardianship. *Id.*

119. *See id.* at 1238-39 (noting susceptibility of informal surrogacy contracts). The court cautioned IPs that, because there is no clear statutory framework in Massachusetts, IPs need to clearly document their intentions with the surrogate in writing to avoid a court invalidating the surrogacy arrangement. *See id.* (suggesting parties document clear intentions regarding surrogacy agreements).

120. *See id.* at 1238 (warning IPs about great ambiguity regarding enforcement of surrogacy and GC agreements). The court appeared to signal to the legislature the need for clarity in this area of the law, as the court emphasizes that while the IPs were granted custody in this case, the general confusion pertaining to enforcement of surrogacy and GC contracts often results in lengthy litigation and uncertainty for IPs, birth parents, and children alike. *See id.* at 1239 (noting negative impacts on children and families).

parties looking to use surrogacy for reproduction.[121] Massachusetts courts also look to existing adoption and custody statutes for guidance in surrogacy cases.[122]

3. California

California, unlike New York and Massachusetts, provides generous protections for IPs under its statutes and case law.[123] Under the California Family Code, IPs must establish that they have some link to the child through ART.[124] The applicable statute states, "[t]he parties to the assisted reproduction agreement for gestational carriers shall attest, under penalty of perjury, and to the best of their knowledge and belief, as to the parties' compliance with this section in entering into the assisted reproduction agreement for gestational carriers."[125] The final clause of the statute dictates that agreements executed in accordance with these requirements are presumptively valid and cannot be revoked or rescinded, absent a court order.[126] In establishing a clear process through which IPs can obtain a prebirth order of parentage, the statute codifies California's public policy of transparency and protection for parties to a surrogacy contract.[127]

To promote clarity and certainty for IPs, California courts have directly addressed the enforcement of surrogacy contracts.[128] In *Johnson v. Calvert*, the California Supreme Court granted a prebirth order of legal parentage to the IPs because they were also the full biological parents of the child.[129] In *Johnson*,

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121. *See* S.B. 2502, 190th Leg., (Mass. 2017) (attempting to enact statute granting prebirth legal parentage to intended parents); *supra* note 112 (detailing Massachusetts case law increasing protections for surrogacy and GC agreements).

122. *See* MASS. GEN. LAWS ch. 210, § 1 (2022) (detailing circumstances for proper adoption); MASS. GEN. LAWS ch. 46, § 4B (2022) (establishing legal parentage of husband whose wife conceived via artificial insemination); MASS. GEN. LAWS ch. 215, § 1 (2022) (granting equity power to courts to decide family law issues); R.R. v. M.H., 689 N.E.2d 790, 796 (Mass. 1998) (interpreting state adoption statutes); Munyon, *supra* note 52, at 734 (noting courts interpreting adoption statutes for surrogacy contracts).

123. *See* CAL. FAM. CODE § 7613 (Deering 2022) (enumerating presumption of legal parentage when woman conceives using ART); CAL. FAM. CODE § 7962 (Deering 2022) (requiring specific provisions in surrogacy agreements); *see also* K.M. v. E.G., 117 P.3d 673, 680 (Cal. 2005) (holding gestational mother's female partner and egg donor legal parent of child); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Cal. Ct. App. 1998) (holding IPs responsible for care of child IPs intended to create); Johnson v. Calvert, 851 P.2d 776, 787 (Cal. 1993) (holding IPs legal parents under intent doctrine).

124. *See* § 7962(e) (outlining requirements for parties to assisted reproduction agreement).

125. *Id.*

126. *See* § 7962(i) (noting agreements under statute presumptively valid). As such, any lack of compliance with the requirements set forth in the statute would rebut the presumption of validity. *See id.*; *see also* C.M. v. M.C., 213 Cal. Rptr. 3d 351, 358 (Cal. Ct. App. 2017) (describing presumption of legal parentage upon statutory compliance); Cook v. Harding, 879 F.3d 1035, 1037-38 (9th Cir. 2017) (discussing legislative intent codifying GC agreement protection).

127. *See* § 7962(e) (establishing path to enforceable surrogacy contract).

128. *See Johnson*, 851 P.2d at 787 (granting parties privacy to enter into surrogacy agreements); *K.M.*, 117 P.3d at 682 (holding parents cannot waive responsibility for children resulting from ART); *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 903 (Cal. Ct. App. 1994) (granting parental rights to birth mother with genetic tie to child).

129. *See* Johnson v. Calvert, 851 P.2d 776, 787 (Cal. 1993) (dismissing arguments of opposing party); *see also* McCallister, *supra* note 8, at 306 (describing *Johnson* holding). The court in *Johnson* held that the GC

there was a dispute between the IPs—who were both genetically related to the child—and the birth mother when she refused to relinquish her parental rights upon the child's birth.[130] *Johnson* supports the notion that California courts should look to the intent of the contracting parties and uphold surrogacy and GC agreements when all parties freely and voluntarily consented at the time of contracting.[131]

Since *Johnson*, California courts further expanded protections for IPs by allowing a presumption of legal parentage even where the IPs are not genetically linked to the child, not married, and are of the same gender.[132] *In Re Marriage of Buzzanca* expanded the presumption of legal parentage for IPs who are not genetically linked to the child; the court reasoned that the IPs should be granted legal parentage because of their role in initiating conception and intention to be the child's parents.[133] In this case, the surrogate was implanted with an egg and sperm from an anonymous donor.[134] When the IPs' relationship started to break down after implantation, only the intended mother—not the intended father nor the surrogate—wanted to parent the child.[135] The court, in holding that the IPs were the legal parents of the child notwithstanding the absence of a genetic relationship, reasoned that the parental presumption attached to the initiation of the insemination process with the surrogate.[136] The courts in *Dunkin v. Boskey* and *Elisa B. v. Superior Court* interpreted the intent doctrine to also include unmarried IPs and same-sex partners under the same theory used in *Johnson*—that the intent to parent should be the paramount consideration in determining legal parentage of a child born from surrogacy.[137] These cases, while greatly expanding IPs' rights in California, underscore the need for legislative action to promote explicit clarity and a comprehensive framework for IPs looking to use surrogacy as a valid mechanism to have children.[138]

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agreement was valid and enforceable against any potential claims of the surrogate. *See* McCallister, *supra* note 8, at 306 (outlining holding of court).

130. *See Johnson*, 851 P.2d at 778 (recounting deterioration of relationship between IPs and GC).

131. *See* Munyon, *supra* note 52, at 737 (detailing *Johnson* holding and how court interpreted statute).

132. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Cal. Ct. App. 1998) (holding genetically unrelated parents presumed legal parents of child under *Johnson* intent doctrine); Dunkin v. Boskey, 98 Cal. Rptr. 2d 44, 47, 56 (Cal. Ct. App. 2000) (holding unmarried parties legal parents); Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005) (holding same-sex partners presumed legal parents); *see also* Koll, *supra* note 40, at 211-14 (explaining evolution of intent doctrine in California courts); CAL. FAM. CODE § 7611(d) (Deering 2022) (granting legal parentage when parent welcomes child into home).

133. *See In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 293 (explaining IPs presumed legal parents under intent doctrine).

134. *See id.* at 283 (detailing agreement between parties).

135. *See id.* (noting intended mother only party seeking parental rights of child).

136. *See id.* at 293 (applying intent doctrine imputing parental responsibilities to both IPs as "causal inseminators").

137. *See Dunkin*, 98 Cal. Rptr. 2d at 56-57 (explaining intent of parent key consideration in determining parentage); *Elisa B.*, 117 P.3d at 670 (noting mother's willingness to accept and raise children).

138. *See supra* Section II.F.3 (outlining development of case law in California).

III. ANALYSIS

A. Possible Approaches to Parentage Presumptions

The vast disparities in enforcement of surrogacy and GC agreements among states necessitate uniformity and clarity so that couples seeking to have a child through ART do not have to face the possibility of losing a child they intend to raise.[139] Currently, IPs in many states do not have a viable, legally-protected method by which to reproduce biologically.[140] States take a variety of approaches in attempting to create a uniform policy of enforcement, but none except the intent doctrine provides a comprehensive framework sufficient to eradicate existing concerns about legal parentage.[141] While the intent doctrine is the most protective of the tests, federal regulation is necessary to adequately address the disparities among states and the unique struggles gay fathers face.[142]

1. Marital Presumption

The marital presumption grants legal parentage to the spouse of the birth mother.[143] This approach is rooted in a traditional, property-law rationale that assumes the husband should have legal rights to the child.[144] The key issue with the marital presumption is that it creates a gender imbalance that automatically grants men legal parentage of any children their wives may conceive outside of the marriage, but it does not automatically grant women legal parentage to children their husbands conceive with other women.[145] This imbalance presents an issue with birth mothers in surrogacy and GC contracts because the presumption essentially allows the birth mother's spouse to assert legal right to a child to whom he is not genetically related and never had any intention to parent.[146] The marital presumption also deepens the divide between protections for gay and

139. *See supra* note 36 (illustrating jurisdictional chaos grouping states by approaches to surrogacy and displaying lack of clarity).

140. *See, e.g.*, *supra* Section II.F (exemplifying lack of legal framework and barriers to enforcement of surrogacy contracts in three states); *see also supra* notes 69-70 (comparing state laws prohibiting different types of surrogacy).

141. *See* Dana, *supra* note 40, at 380-85 (outlining various approaches to enforcement).

142. *See id.* (describing problems solved by intent test); *see also infra* Section III.C (advocating for federal regulation of surrogacy contracts).

143. *See* Dana, *supra* note 40, at 380 (describing marital presumption). Courts initially introduced the marital presumption to compliment the legal presumption of parentage based on gestation for the mother by providing the father with an immediate legal claim to any child born to his wife. *See id.*; *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 285 (Cal. Ct. App. 1998) (noting marriage one way to determine parentage). The court noted that one way to determine parental rights is to see if the partner is "marrying, remaining married to, or attempting to marry the child's mother when she gives birth." *See In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 285 (explaining paths to determine legal parentage).

144. *See In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 285 n.5 (detailing historical foundation for marital presumption).

145. *See id.* (outlining gendered impact of marital presumption).

146. *See id.* at 285 (highlighting disparity in protection between husbands and wives).

lesbian couples because a lesbian woman's spouse is the presumed parent of any child to whom she gives birth, whereas neither spouse in a gay couple is able to gestate.[147] Not only is the marital approach inherently unfair, but it also creates a potential Equal Protection Clause violation because of the protections it affords to lesbian couples but not gay couples.[148]

2. Gestational Presumption

The next approach—the gestational presumption—grants automatic legal rights to the birth mother based on her gestation of the child.[149] This test neither addresses the challenges presented by modern-day ART, nor is the test gender neutral, as men are biologically unable to gestate.[150] This approach plays into the antiquated societal belief that women are naturally nurturing and better equipped to parent and raise a child.[151] While the gestational presumption may have been more useful prior to the invention of DNA testing and modern ART, gestation is no longer the most accurate predictor of a genetic link between parent and child.[152] This approach also fails to address the challenges gay couples face and places too much emphasis on the role of gestation in surrogacy relationships.[153]

3. Genetic Presumption

The genetic presumption provides slightly more protection than the gestational presumption in that the genetic presumption does not rely on the role of a woman in gestation to determine legal parentage, but the genetic test still fails to address the issues posed by same-sex couples when only one partner can be genetically linked to the child.[154] The genetic presumption also contradicts the longstanding rule that men who donate their sperm cannot claim any legal rights to a child to whom they are genetically related.[155] Overall, the genetic presumption cannot possibly provide a sufficient legal framework under which same-sex couples can be ensured legal rights to their intended children.[156]

147. *See* Dana, *supra* note 40, at 380-81 (noting same-sex female and same-sex male couples affected disproportionately due to males' inability to gestate).

148. *See id.* at 381 (introducing potential equal protection violation due to disparity of impact).

149. *See id.* (describing how gestation presumption works).

150. *See id.* at 381-82 (explaining pitfalls of gestation presumption).

151. *See* Dana, *supra* note 40, at 382 (critiquing societal stereotype of women's uniquely maternal quality).

152. *See id.* (explaining origin of gestational presumption). Before DNA tests and ART, gestation was often the only way to determine the genetic link between a child and their parent. *See id.*

153. *See id.* (noting gestational approach outdated).

154. *See id.* (detailing shortcomings of genetic presumption). Further, a genetic presumption is increasingly complicated with the invention of ooplasmic transfers in which two eggs are merged and then inseminated—creating the potential for a child to be genetically linked to three people. *See id.*

155. *See* Dana, *supra* note 40, at 382 (noting contradiction of genetic presumption for sperm donors).

156. *See id.* (stating genetic presumption not comprehensive legal protection for those in surrogacy arrangements).

4. Three-Parent Model

Legal scholars have also proposed the three-parent model, under which the birth mother retains a limited role while both IPs are granted legal rights to the child.[157] This approach works well in situations where same-sex couples wish to have the second biological parent involved in the child's life and enjoy legal protections.[158] Conversely, same-sex parents may not want to welcome the intrusion of a third parent into their child's life.[159] For parents in the latter scenario, the three-parent model does not present an adequate solution when only one partner is genetically related to the child and the other biological parent attempts to assert legal rights.[160]

5. Intent Doctrine

The last approach is the intent doctrine, established in *Johnson v. Calvert*, which looks to the intent of the parties when drafting the surrogacy or GC agreement.[161] The intent doctrine incorporates many of the benefits of the previous approaches—such as maintaining a genetic link and presuming legal parentage of married couples—while still honoring the agreement made between the parties.[162] This approach protects both same-sex and heterosexual couples utilizing ART and aims to achieve many public policy goals, such as freedom of choice and bodily autonomy.[163] By looking to the intent of the parties at the time of contracting, states would empower surrogates to freely make agreements with

157. *See* Koll, *supra* note 40, at 221 (explaining three-parent model increasing in popularity within United States). This model benefits same-sex couples, as the model allows both IPs to have legal rights to the child and would not create restrictions based on genetics or gestation. *See id.* at 222 (elucidating how same-sex parents may involve third parent).

158. *See id.* at 222 (noting Pennsylvania court's support of lesbian couple wanting biological father involved in child's life).

159. *See id.* (explaining limited scenarios where three-parent model works).

160. *See id.* (noting challenges presented by three-parent model).

161. *See* Johnson v. Calvert, 851 P.2d 776, 783 (Cal. 1993) (looking to intent of parties in GC agreement). The court noted that a woman entering a surrogacy or GC contract is not looking to exercise her right to make procreative choices for herself, but rather to provide a valuable service to another couple. *See id.* at 787 (determining IPs had no intent to donate genetic material). The birth mother in this arrangement is not providing the service so that she can assert parental rights, thus, the intent of the parties in the original contract should be enforced. *See id.* (finding evidence sufficient to show intent in line with GC contract); *see also* Dana, *supra* note 40, at 382-84 (explaining *Johnson* intent doctrine); Koll, *supra* note 40, at 223 (outlining use of intent doctrine).

162. *See* Dana, *supra* note 40, at 380 (describing marital presumption); *supra* note 143 (outlining problems with genetic presumption); *supra* notes 157-159 (noting benefits of three-parent model); *see supra* note 161 (explaining intent doctrine).

163. *See supra* note 161 (explaining benefits of intent doctrine); *see also supra* note 92 (noting feminist argument of protecting bodily autonomy); Joslin, *supra* note 35, at 372 (outlining feminists' argument declaring surrogacy provides sense of control); Munyon, *supra* note 52, at 723 (noting supporters feel surrogacy gives people options). Many believe that surrogacy, along with other forms of ART, provides people with more options and allows them to make more informed decisions about procreation. *See id.* at 723, 723 n.43 (noting benefits of surrogacy). As reproductive choice is at the cornerstone of feminist policy, many feminist theorists argue that society should view surrogacy no differently than access to contraception, abortion, and artificial insemination. *See id.* (noting argument surrogacy provides women bodily autonomy).

couples and use the surrogate's own bodies as they choose.[164] Furthermore, the key benefit of the intent doctrine is the welfare of the child, who will be in a home with two parents who intended to give birth to and raise them.[165] This approach provides a clear framework that would establish legal parentage prior to birth, further allowing the child to immediately bond with their parents from day one.[166]

B. Current Challenges and Public Policy

While all the approaches discussed above aim to increase certainty, all but the intent doctrine rest on archaic presumptions about who should and should not be a parent.[167] The marital and gestational approaches raise potential Equal Protection violations, as the two tests are implemented in ways that benefit intended fathers, but not intended mothers.[168] Courts try to apply these approaches to surrogacy and GC situations but are left with little or no statutory guidance.[169]

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164. *See supra* note 92 (noting policy goals presented in feminist theory).

165. *See* Dana, *supra* note 40, at 383 (noting IPs' deep desire to have child).

166. *See id.* (arguing benefits of intent doctrine).

167. *See id.* at 380-81 (explaining marital presumption grants legal rights to married spouse); *id.* at 381 (noting gestational presumption grants legal rights to person who gestates); *id.* at 382 (commenting genetic presumption emphasizes biological bonds to child); Koll, *supra* note 40, at 221 (defining three-parent model implemented to resolve parentage disputes). The intent doctrine examines surrogacy and GC agreements to determine how the parties intended to assign legal parentage at the time of drafting. *See* Dana, *supra* note 40, at 383 (noting benefits of intent doctrine include creating certainty and establishing lifelong bonds). This approach often promotes judicial prebirth orders that enable IPs to create parental bonds with the child beginning at birth. *See id.* (noting positive effect of parental certainty). Looking at these approaches, both the gestational and marital presumptions clearly grant legal parentage based on narrow, outdated beliefs about women's bodies and their role as men's property. *See id.* at 380 (outlining structure of marital approach). This approach automatically presumes any children of the wife are the husband's, but the wife is not afforded the same presumption for children biologically related to her husband. *See id.* This extremely gendered approach is rooted in the same archaic property principles that created the presumption that children of the marriage should adopt the father's surname as proof that they belong to him. *See generally id.* Similarly, the gestational approach operates under the assumption that women must want to parent children that come from their wombs, even when the baby may be genetically related to someone else. *See id.* at 381-82 (defining gestational presumption).

168. *See* Dana, *supra* note 40, at 380 (noting gender disparities in marital presumption). Not only does the marital presumption slight women in heteronormative couples, but it also does not operate equally for same-sex couples. *See id.* at 380-81 (explaining women same-sex couples benefit while men same-sex couples left behind). While the non-gestating female partner in a same-sex couple would be the presumed legal parent under this approach, the unrelated male partner in a same-sex couple will not be the presumed second parent due to the necessary involvement of a surrogate or GC who would be the presumed parent at birth. *See id.* at 381 (explaining disparities between application for same-sex couples).

169. *See* Guardianship of Keanu, 174 N.E.3d 1228, 1238 (Mass. App. Ct. 2021) (highlighting lack of statutory guidance); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 285 (Cal. Ct. App. 1998) (noting marriage one way to determine parentage). The court, in deciding legal parentage, noted that one way to approach determining parental rights is to see if the partner is "marrying, remaining married to, or attempting to marry the child's mother when she gives birth." *See In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 285. *K.M.* applied the genetic presumption to determine legal parental rights: "We relied, therefore, on the provisions in the UPA regarding presumptions of paternity and concluded that 'genetic consanguinity' could be the basis for a finding of maternity just as it is for paternity." K.M. v. E.G., 117 P.3d 673, 678 (Cal. 2005). Conversely, the court in *Johnson* cited to proposed legislation that underscored the gestational approach, stating that "in its key components, the

The failure of legislatures to keep up with medical advancements forces courts to interpret surrogacy and GC arrangements under sperm-and-egg-donation and adoption statutes that do not directly address some of the unique concerns surrogacy agreements raise.[170]

Further, the public policy concerns surrounding surrogacy and GC contracts heavily influence legislatures' unwillingness to create clear guidance.[171] The public policy debate about surrogacy is rooted in misguided understandings about women and their bodies.[172] Some of the arguments against the use of

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proposed legislation provides that 'a woman who gives birth to a child is the child's mother' (USCACA, § 2) unless a court has approved a surrogacy agreement before conception." Johnson v. Calvert, 851 P.2d 776, 794 (Cal. 1993) (citing to proposed legislation). The *Johnson* court, among others, have applied the intent doctrine to GC and surrogacy agreements to honor the original intent of the parties. *See id.* at 787 (emphasizing IPs never intended to merely donate genetic material but intended to parent child); *see also In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 288 (granting intended mother legal rights based on consent to initiation of insemination); *supra* Section II.F.2. (noting lack of statutory guidance in Massachusetts); *supra* Section II.F.3. (explaining lack of consistent statutory guidance in California).

170. *See* MASS. GEN. LAWS ch. 210, § 1 (2022) (detailing circumstances for proper adoption); MASS. GEN. LAWS ch. 46, § 4B (2022) (establishing legal parentage of husband whose wife conceived via artificial insemination); MASS. GEN. LAWS ch. 215, § 1 (2022) (providing equity power of courts to decide family law issues); R.R. v. M.H., 689 N.E.2d 790, 796 (Mass. 1998) (interpreting state adoption statutes); Munyon, *supra* note 52, at 734 (noting courts interpreting adoption statutes for surrogacy contracts).

171. *See* Patton, *supra* note 13, at 514-15 (explaining complete-ban states prohibit commercial surrogacy contracts for public policy reasons). Many states disfavor commercial surrogacy contracts in which the birth mother receives payment beyond her medical and living expenses. *See id.* (describing states' stance of commercial surrogacy contracts akin to selling babies); Drabiak, *supra* note 17, at 303 (noting New York among states categorically invalidating commercial surrogacy contracts); Allen, *supra* note 17, at 756 (noting California's emphasis on freedom to contract in surrogacy agreements); Cohen, *supra* note 16, at 254 (noting New York court held prebirth orders against public policy). Some states find that prebirth orders of parentage to IPs are void against public policy because they deprive the surrogate of the opportunity to make a fully informed decision once she gives birth. *See* Cohen, *supra* note 16, at 254 (noting natural maternal connection created by gestation and childbirth). This view rests on the assumption that women are somehow incapable of foreseeing the bond they will feel with a baby that is born from their womb. *See id.*; *see also* Allen, *supra* note 17, at 777 (describing surrogate's connection to baby she carries even if not genetically linked).

172. *See Johnson*, 851 P.2d at 791 (outlining public policy arguments). The court in *Johnson* noted that proponents of surrogacy argue that "gestational surrogacy, like the other reproductive technologies that extend the ability to procreate to persons who might not otherwise be able to have children, enhances 'individual freedom, fulfillment and responsibility.'" *Id.* The court also pointed out that some constitutional scholars even suggest that the use of surrogates and GCs is constitutionally protected under the right to procreate and that limitations of this right can only be constitutional with a showing of a compelling state interest. *See id.* (noting some scholars argue all procreative methods constitutionally protected). Conversely, opponents of surrogacy argue that paying poorer women to gestate is a form of financial exploitation that should be outlawed. *See id.* at 792 (noting predatory nature of commercial surrogacy agreements). This argument suggests that the only reason women would think about acting as a surrogate or GC is because they need money and not because they want to aid a family facing fertility challenges. *See id.* (highlighting argument of exploitative nature of commercial surrogacy arrangements). Further, many opponents assert that paying women money for having a child reduces the childbearing process to a commodification of reproduction, essentially paying money for babies. *See id.* (detailing argument surrogacy reduces women to breeders). This argument is founded on the presumption that women cannot rationally decide what to do with their own bodies and assumes that women are not freely exercising agency in making decisions about their bodies. *See id.* The dissenting judge in *Johnson* discusses the New York State Task Force on Life and the Law:

surrogates and GCs, including the commodification of reproduction and lack of voluntariness, assume that all people with a uterus not only feel the same about motherhood and reproduction, but are also somehow biologically unable to make an informed decision when intoxicated with the hormones of childbirth.[173] Legislatures should understand that surrogacy promotes rights to bodily autonomy, especially in states such as New York, Massachusetts, and California that have comprehensive legal access to abortion and other reproductive services.[174]

C. The Need for Federal Regulation

While the intent doctrine is arguably the best legal framework for the enforcement of surrogacy and GC agreements, jurisdictional disparities still present confusion for many couples looking to reproduce using a surrogate or GC.[175] Because of this chaotic legal landscape, federal regulation is the only way to ensure couples have a clear idea of where and how their legal parental rights will be enforced under a surrogacy or GC contract.[176] As many couples contract with

> The New York State Task Force on Life and Law sums up the broad range of ethical problems that commercial surrogacy arrangements are viewed to present: 'The gestation of children as a service for others in exchange for a fee is a radical departure from the way in which society understands and values pregnancy. It substitutes commercial values for the web of social, affective and moral meanings associated with human reproduction. . . . . This transformation has profound implications for childbearing, for women, and for the relationship between parents and the children they bring into the world. . . . . Surrogate parenting allows the genetic, gestational and social components of parenthood to be fragmented, creating unprecedented relationships among people bound together by contractual obligation rather than by the bonds of kinship and caring. . . . Surrogate parenting alters deep-rooted social and moral assumptions about the relationship between parents and children . . . . [It] is premised on the ability and willingness of women to abdicate [their parental] responsibility without moral compunction or regret [and] makes the obligations that accompany parenthood alienable and negotiable.'
>
> *Johnson*, 851 P.2d at 793 (quoting New York State Task Force on Life and the Law, Surrogate Parenting: Analysis and Recommendations for Public Policy (May 1988)).

173. *See supra* note 92 (outlining various feminist policy arguments); Munyon, *supra* note 52, at 727-28 (suggesting lack of informed consent). The argument that a woman cannot intelligently and voluntarily enter into an agreement to be a surrogate or GC because she could not possibly foresee the maternal bond she would feel with her child before it is born perpetuates two extremely harmful gender stereotypes. *See* Munyon, *supra* note 52, at 727-28 (noting position ignores meaning of informed consent). First, it suggests that a woman's primary function is to be a mother and reproduce, and that her connection with a child she birthed—whether genetically related to her or not—can overcome all prior rational decisions. *See id.* Second, it implies that one must give birth to a baby to establish a meaningful parental bond. *See generally id.* (discussing varying opinions about ability to voluntarily consent). In the surrogacy context, this is particularly harmful to same-sex male couples seeking to use surrogacy to reproduce because it suggests that neither parent will be able to adequately bond with the baby in the same way a birth mother would. *See generally id.* This argument also stigmatizes women with fertility issues by insinuating that even if the child is genetically their own, they could not possibly have the same connection with the child without going through the birthing process. *See generally id.*

174. *See* Michelson, *supra* note 86 (showcasing New York, Massachusetts, and California's comprehensive abortion laws).

175. *See supra* notes 15-18 (noting key differences in laws governing surrogacy contracts among states).

176. *See supra* note 65 (pointing out jurisdictional chaos and need for federal regulation); *see also* Thomaston, *supra* note 1, at 1168-73 (noting sources of federal power for regulation). While domestic relations are typically regulated at the state level, the Commerce Clause, Due Process Clause, and Tenth Amendment provide

surrogates outside of their home state, it is critical there be some level of uniformity among states to avoid the confusion and disparate enforcement that has ensued for far too long.[177]

A review of the surrogacy laws in New York, Massachusetts, and California demonstrates the dire need for federal regulation that would create some certainty surrounding surrogacy and GC agreements.[178] While these states have made some progress by providing a limited legal pathway for IPs in GC agreements through statutes and case law, there is still a great deal of uncertainty for people using traditional and commercial surrogacy.[179] Federal regulation is the only concrete solution that would provide clarity and assurance for individuals looking to utilize surrogacy to reproduce, and Congress should therefore enact legislation to create a transparent framework under which individuals can draft legally enforceable surrogacy and GC agreements.[180]

possible sources of congressional power through which surrogacy and GC contracts could be federally regulated. *See* Thomaston, *supra* note 1, at 1173.

177. *See supra* Part II (detailing history of issues arising from lack of federal regulation).

178. *See supra* Section II.F (detailing disparate landscape of surrogacy laws).

179. *See* Williams, *supra* note 93 (establishing clear path to parentage for IPs using GC). New York's Child-Parent Security Act only applies to individuals using GCs, meaning that any person in an agreement with a surrogate has no legal recourse under New York law if the surrogate decides not to relinquish parental rights after the birth of the child. *See id.* (noting Act only applies to GC agreements). For same-sex male couples who have no gestational abilities and heteronormative couples where the female partner cannot produce eggs, traditional surrogacy is often the only viable option if there is no other egg donor. *See id.*; N.Y. DOM. REL. LAW § 123 (Consol. 2020) (outlining civil and criminal penalties for commercial surrogacy). Section 123 states that no person shall knowingly aid or assist someone in creating a surrogacy contract for profit and that violators will be subject to a penalty of up to $10,000; repeat offenses will be considered a felony. *See* N.Y. DOM. REL. LAW § 123 (explaining criminal penalties for commercial surrogacy in New York); R.R. v. M.H., 689 N.E.2d 790, 797 (Mass. 1998) (noting commercial surrogacy contracts unenforceable). The SJC held that commercial surrogacy contracts are contrary to public policy in Massachusetts but stated there is nothing inherently objectionable about a traditional surrogacy contract. *See* R.R. v. M.H., 689 N.E.2d at 797 (explaining compensation beyond medical expenses unacceptable); Guardianship of Keanu, 174 N.E.3d 1228, 1237-39 (Mass. App. Ct. 2021) (noting need for clear agreements). While the IPs were granted legal rights in this case, it was largely because the birth parents were deemed unfit to parent under the Department of Children and Families' standards, and not because there was a clearly enforceable surrogacy contract. *See Guardianship of Keanu*, 174 N.E.3d at 1237-39 (signaling legislature to enact clear statutory framework for IPs).

180. *See* Allen, *supra* note 17, at 756-57 (noting continuing lack of federal regulation perpetuates jurisdictional chaos); Thomaston, *supra* note 1, at 1168 (explaining congressional source of power to regulate surrogacy). While surrogacy has historically been regulated at the state level, Congress could regulate surrogacy and GC agreements by using its power under the Commerce Clause and Due Process Clause. *See* Thomaston, *supra* note 1, at 1168 (locating constitutional power of Congress to regulate). While there are many public policy arguments against surrogacy, opposition likely stems from a lack of uniform guidance and public misconceptions about surrogacy's role and function in society. *See id.* at 1185 (noting ignorance leads to negative sentiment toward surrogacy arrangements). Courts in many states are signaling Congress to enact comprehensive legislation that would instruct how these agreements should be enforced. *See id.* at 1189-90 (arguing courts "begging for legislative guidance").

IV. CONCLUSION

While surrogacy can be a lifechanging opportunity for individuals facing barriers to procreation, the current legal landscape governing the enforcement of surrogacy laws creates a challenging and uncertain environment for IPs. The woeful lack of transparency and concrete standards means that IPs are often put in the position to gamble on the legal rights to their children. People who attempt to use surrogacy to reproduce generally cannot reproduce on their own, either because of fertility challenges or because both parties are male and thus cannot gestate. When individuals contract with a surrogate or GC, the IPs are often dependent on her to honor the agreement without legal recourse if she decides to assert parental rights at birth. The lack of clear legal guidance has resulted in IPs pursuing lengthy and costly litigation to resolve disputes over parentage with the birth mother. Not only are IPs often in the dark about surrogacy laws in their home state, but the disparities of surrogacy laws among states also makes confidently contracting with a surrogate or GC across state lines virtually impossible. To eradicate the jurisdictional divide and lack of transparency, Congress should enact a comprehensive legal framework codifying the intent doctrine so that agreements between IPs and birth mothers will be enforced consistently in every state. Federal regulation is the only clear path to ensure that IPs can assert legal rights to their intended children. Not only would federal regulation create certainty for IPs entering surrogacy and GC agreements, but the intent doctrine is also the only way to ensure that the child is able to bond with their parents from the day they are born.