

Artificial Reproductive Technology and
Gendered Notions of Parenthood After
Obergefell: Analyzing the Legal Assumptions
that Shaped the *Baby M* Case and the Hodge-
Podge Nature of Current Surrogacy Law

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I.	<i>OBERGEFELL</i> AND THE RIGHT TO HAVE CHILDREN	2
II.	<i>BABY M</i> AND ITS DISREGARD FOR NONBIOLOGICAL MOTHERS.....	6
III.	GENDERED NOTIONS OF PARENTHOOD UNDERPINNING <i>BABY M</i>	9
IV.	<i>BABY M</i> AS PERMISSION FOR STATES TO MAINTAIN DISCRIMINATORY POLICIES	17
V.	PROCREATIVE INTENT AS THE APPROPRIATE TEST	19
VI.	NAVIGATING A WEB OF CONFLICTING LAWS.....	21
VII.	ON THE GROUND REALITIES COMPLICATING SURROGACY	24
VII.	RECOMMENDATIONS FOR REFORM	27
	A. <i>Neutralize Marital Presumption Statutes</i>	27
	B. <i>Parental Rights Should Be Determined with a Broader Intent Test</i>	28
	C. <i>Restrictions on Same-Sex Reproduction Should Be Brought as Constitutional Violations</i>	29
	1. Violation of Substantive Due Process	29

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2. Violation of Equal Protection	30
VII. CONCLUSION	32

I. *OBERGEFELL* AND THE RIGHT TO HAVE CHILDREN

*Obergefell v. Hodges*¹ went much further than giving same-sex couples the opportunity to marry in all fifty states. The decision identified the right to marry as one part of a “unified whole,” extending a set of family-related rights to gay and lesbian individuals that heterosexual people had enjoyed for generations:

A . . . basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. The U.S. Supreme Court has recognized these connections by describing the varied rights as a unified whole: “[T]he right to marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause.”²

Linking these various family rights to the right to marry is not a new phenomenon. In 1923, *Meyer v. Nebraska* articulated that the Fourteenth Amendment “denotes not merely freedom from bodily restraint but also the right . . . to marry, establish a home and bring up children.”³ Considered by the Supreme Court as “far more precious . . . than property rights,” the rights of procreation and raising a family have been repeatedly held to be protected by the Due Process Clause, Equal Protection Clause, and the Ninth Amendment.⁴ *Carey v. Population Services* affirmed this tradition of safeguarding these rights as parts of a connected whole:

While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions “relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-542 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S., at 453-454; *id.*, at 460, 463-465 (WHITE, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and

1. 135 S. Ct. 2584 (2015).
 2. *Id.* at 2600 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)).
 3. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).
 4. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (recognizing a right to procreation, regarding it as one of the “basic civil rights of man”); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *May v. Anderson*, 345 U.S. 528, 533 (1953).

education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, [262 U.S. 390, 399 (1923)].”⁵

Placing “the same level of importance” on decisions pertaining to marriage, procreation, and raising a family, *Zablocki v. Redhail* also notes that binding these rights together as a complete package makes sense.⁶ Recognizing a right to privacy for marriage and not for raising children, or vice versa, is not logical because they are so tightly intertwined.⁷

This Article argues that, through its extension of marriage equality, *Obergefell* levels the playing field for all of these associated privacy rights as well. The recognition of homosexual individuals as people who are entitled to a right to procreate and a right to raise children means that the law must accommodate the biological constraints of same-sex reproduction. The doctrine of equal protection does not require that people assert the same rights in the same way. In the case of gay couples looking to have genetic children, they cannot biologically assert their right to procreate the way heterosexual couples can. Biological differences surely cannot mean that same-sex couples deserve fewer opportunities to raise a family. Unfortunately, however, that is the current reality. Regulation of same-sex reproduction continues to uphold an inherently unequal system in all but eight states and the District of Columbia.⁸

Many same-sex couples rule out adoption because they want biological children.⁹ With sperm donation, lesbians can have babies that are biologically tied to both partners—one woman can provide the egg and the other can deliver the baby.¹⁰ The only option for gay male couples is surrogacy. This Article focuses on gestational surrogacy, by far the most common form of surrogacy in the United States. In gestational surrogacy, an embryo is created through in vitro fertilization (IVF) either with donated gametes or those of the parents, and a surrogate mother who is unrelated to the child carries the baby to term.¹¹

5. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684-85 (1977).

6. 434 U.S. 374, 386 (1978).

7. *Id.*

8. Diane S. Hinson, *Parentage Rights for Same-Sex Parents*, FAM. ADVOC., Spring 2016, at 42-43, 45.

9. David Lat, *How Two Men Make a Baby*, ESQUIRE (June 24, 2016), <http://www.esquire.com/news-politics/a45722/gay-parents-surrogacy/>.

10. Anne R. Dana, *The Changing Face of Families: The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL’Y 353, 356-57 (2008).

11. Magdalena Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS 7 (2010), <http://www.councilforresponsiblegenetics.org/pagedocuments/kaevj0a1m.pdf>.

This is significantly different than the generally outdated alternative, traditional surrogacy, in which a woman would make a contract to use her own egg for the pregnancy and deliver the baby. Traditional surrogates, therefore, are both the birth mothers and the genetic mothers. Because of the legal restrictions on surrogacy that will be discussed, there is not much current reliable data on gestational surrogacy in the United States. However, it is clear that the surrogacy market is “exploding,” having “nearly doubled from 2004 to 2008, producing a total of 5,238 babies over just four years.”¹² In 2011, the Society for Assisted Reproductive Technology reported that 1593 babies were born through gestational surrogacy in United States. This number increased from 1353 in 2009 and 738 in 2004.¹³

Couples thinking about surrogacy first need to make sure that the process is legal where they live. Until April 2017, the District of Columbia, which had the highest percentage of same-sex couples per every 1000 households in the last federal census, criminalized surrogacy agreements under an outdated law that threatened a \$10,000 fine, a year in prison, or both.¹⁴ The new D.C. law legalizes commercial surrogacy and protects the parental rights of the intended parents, regardless of their sexual orientation.¹⁵ Recently, Washington state followed suit and repealed its longtime criminal ban on commercial surrogacy.¹⁶ Senate Bill 6037, signed into law by Washington’s governor in March 2018, provides legal protection for women serving as surrogates, in addition to strengthening the rights of gay, lesbian, and nonbiological parents.¹⁷ The goal of this new law is to ensure that surrogacy contracts are agreed to knowingly and carefully, with legal oversight.¹⁸ Due to moral and religious objections, three states—New York, New Jersey, and

12. *Id.*

13. Deborah L. Cohen, *Surrogate Pregnancies on Rise Despite Cost Hurdles*, REUTERS (Mar. 18, 2013, 4:41 PM), <https://www.reuters.com/article/us-parent-surrogate/surrogate-pregnancies-on-rise-despite-cost-hurdles-idUSBRE92H11Q20130318>.

14. D.C. CODE ANN. § 16-402 (West 2001) (repealed 2017); Abigail M. Cooke & Gary J. Gates, *United States Census Snapshot: 2010*, WILLIAMS INST. (2010), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf>.

15. D.C. CODE ANN. § 16-403; Michael Alison Chandler, *With New Surrogacy Law, D.C. Joins Jurisdictions that Are Making It Easier for Gay and Infertile Couples to Start Families*, WASH. POST (June 3, 2017), https://www.washingtonpost.com/local/social-issues/with-new-surrogacy-law-dc-joins-jurisdictions-that-are-making-it-easier-for-gay-and-infertile-couples-to-start-families/2017/06/03/845c90d4-3c99-11e7-8854-21f359183e8c_story.html?utm_term=.230cc5b23583.

16. *Washington’s Uniform Parentage Act Signed into Law*, SEATTLE LESBIAN (Mar. 13, 2018), <http://theseattlelesbian.com/washingtons-uniform-parentage-act-signed-law/>.

17. *Id.*

18. *Id.*

Michigan—still prohibit commercial surrogacy entirely.¹⁹ New York, which was home to 48,932 same-sex couples in 2010, the second-highest number in the country, considers commercial surrogacy contracts to be contrary to public policy, void, and unenforceable.²⁰ Moreover, these numbers of same-sex couples are likely lower than the reality due to confidentiality concerns and confusion over the terms used by the census to identify same sex partners.²¹ Especially in the wake of *Obergefell* and the overwhelming social acceptance of homosexuality, these numbers are expected to increase substantially by the next census, and with them, the need for assisted reproductive technology.

In the states where surrogacy is allowed, the process is more difficult for same-sex parents than for heterosexual parents. Louisiana blatantly rejects same-sex parenthood by restricting commercial surrogacy to heterosexual parents only.²² In the thirty-four states where surrogacy contracts are technically legal for same-sex parents but unprotected or frowned upon, partners may have to undergo post birth-legal procedures to ensure legal rights without guaranteed results.²³ Often, the outcomes of these procedures depend on the practices of individual counties or courts.²⁴ Legally, surrogacy is most cumbersome for gay men, who must choose which father will provide the sperm for IVF and which will have no biological tie to the child. The significance of this choice cannot be overstated. The legal process of establishing parental rights for nonbiological parents is so uncertain that it may not be worth the risk.²⁵ Though *Obergefell's* recognition of same-sex marriages at both the state and federal level bolstered the concept of parental rights for same-sex parents, the extent of those rights have, in reality, continued to rely on state law. The purpose of this Article is to demonstrate that *Obergefell* requires states to engage in a comprehensive restructuring of the way courts determine parental rights that eradicates gendered notions of parenthood and opens the doors to equal rights for nonbiological parents in same-sex couples. The most effective way to accomplish this is to equalize the marital presumption across genders and invoke a pure intent-based test to determine parentage in surrogacy cases. Many

19. Hinson, *supra* note 8.

20. N.Y. DOM. REL. § 122 (Consol. 2014); see Cooke & Gates, *supra* note 14.

21. Gary J. Gates, *Same-Sex Couples in US Census Bureau Data: Who Gets Counted and Why*, WILLIAMS INST. (Aug. 2010), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Who-Gets-Counted-Aug-2010.pdf>.

22. H.B. 1102 § 2720.2.A(1), 2016 Reg. Sess. (La. 2016).

23. Hinson, *supra* note 8.

24. *Id.*

25. *Id.*

articles have already been published that outline the gendered conceptions of parenthood upheld by courts and support an intent-based approach to surrogacy. This Article argues that the preference for biological connection, specifically the assignment of legal meaning to the maternal gestation period, violates *Obergefell* by continuing to marginalize same-sex parents and imposing a gendered paradigm on modern parenthood.

II. *BABY M* AND ITS DISREGARD FOR NONBIOLOGICAL MOTHERS

New Jersey's *In re Baby M* case thrust surrogacy into the national limelight for the first time in 1987.²⁶ The case concerned a traditional surrogate, who was the biological mother of the baby. In contrast to gestational surrogates, who carry the baby for the nine-month period and are not genetically related to the child, Mary Beth Whitehead had signed an agreement to be inseminated with William Stern's sperm and deliver the baby.²⁷ She also agreed to relinquish her maternal rights to William's wife, Elizabeth, for whom pregnancy was unsafe because she suffered from multiple sclerosis. When Mary Beth decided to keep the child after she was born, the Sterns sued to gain full parental rights. In the infamous decision, the New Jersey court ruled that the surrogacy contract violated the state's policy against "baby-selling" and recognized surrogate Mary Beth as the legal mother.²⁸ William was eventually awarded custody and Mary Beth received visitation rights, but Elizabeth, the intended nonbiological mother, was not allowed to adopt the baby.²⁹ In fact, Elizabeth's interests barely factored into the court's decision at all.

Before *Baby M*, not one state had passed a statute on surrogacy.³⁰ Legislatures had started to address the issue and largely supported regulation, a much more moderate stance than the prohibition and criminalization couples confront today.³¹ Because there was no relevant law, the court shoehorned the case into the realm of adoption law, a space wholly inadequate to provide sound judgment on the more complicated parentage issues raised by surrogacy.³² In adoption cases, the identity of the legal mother is uncontested or irrelevant. What is in question is the ability of the biological mother to provide for her children. Surrogacy

26. *In re Baby M*, 109 N.J. 396 (N.J. 1988).

27. *Id.*

28. *Id.* at 425.

29. *Id.* at 411.

30. Dana, *supra* note 10, at 366.

31. *Id.*

32. *In re Baby M*, 109 N.J. at 422-34.

cases, on the other hand, are typically brought when a surrogate mother does not want to give up the child, requiring a court to scrutinize whether the biological or intended mother should have legal rights. By analyzing the Baby M case under adoption law, the court was able to skirt any comprehensive discussion of who actually held legal mother status.

Under adoption statutes, it was easy for the court to hold that the Sterns' contract with Mary Beth violated New Jersey law because adoption law dictates that (1) the exchange of money is forbidden; (2) proof of parental unfitness or abandonment is required before termination of parental rights is ordered and an adoption is granted; and (3) the surrender of custody and consent to adoption is revocable in private placement adoptions.³³ According to the court, the Sterns' payment of \$7500 to the infertility center was baby-selling, which is "illegal and perhaps criminal" in New Jersey.³⁴ With a contract deemed unenforceable from the get-go, Elizabeth, whose claim to the baby was entirely contractual, had no rights left to assert. The court then jumped over the question of legal motherhood entirely, assumed that Mary Beth was the legal mother, and spent most of its time analyzing whether there were grounds for terminating her parental rights.³⁵ The message conveyed by this approach is clear: the nonbiological parent has no legal standing.

In her article on surrogacy law and its discriminatory effect on gay fathers, attorney Anne Dana identifies the New Jersey court's reliance on adoption law as the primary reason it could sidestep the whole issue of legal motherhood and conclude that Mary Beth was the legal mother.³⁶ While this is certainly true, Dana's analysis misses a major negative impact of the court's choice: Mapping this case onto the adoption law framework also allowed the court to disregard Elizabeth's constitutional claims.

Adoption law does not provide a legal space for the intended mother in surrogacy cases. It considers the biological mother, who for a wide range of reasons chooses not to raise her child, and the adoptive mother, who is able to care for the child, but not the mother who has procreative intent before the baby is born but cannot conceive on her own. Because Elizabeth did not serve a role legally recognized by adoption law, the court did not need to address her procreative intent or consider whether she also had a constitutional right to procreate and raise children. The

33. *Id.* at 422-34.

34. *Id.* at 422.

35. Dana, *supra* note 10, at 365.

36. *Id.* at 365-66.

court did respect the constitutional rights of the biological parents, which adoption law acknowledges—William’s constitutional right to procreate and Mary Beth’s right to companionship with her child were clearly factored in to the court’s holding. However, by taking advantage of adoption law, the court allowed itself to ignore Elizabeth’s constitutional rights and establish precedent for discounting nontraditional forms of parenthood.

In the whole opinion, the court briefly entertained just one claim of Elizabeth’s—an equal protection claim brought under New Jersey’s Artificial Insemination statute.³⁷ The statute declares that if “a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.”³⁸ The Sterns argued that Elizabeth was in the same position as the nonbiological father, a claim that the court rejected.

Though Dana argues correctly in her article that the New Jersey court was chiefly interested in finding a family for Baby M “without disrupting established notions of motherhood or traditional ideas of family formation,” she does not acknowledge how far the court was willing to go to preserve these ideals. The court dismissed the Sterns’ argument that Elizabeth should receive the same treatment as a hypothetical nonbiological father, basing its reasoning on the fact that surrogacy is much more time-intensive than sperm donation. If Elizabeth had been implanted with Mary Beth’s egg, the court said, become pregnant, and invested the same amount of time in the baby’s development as Mary Beth had, then she might have a solid case.³⁹

This position does not make sense. The Sterns opted for surrogacy in the first place because Elizabeth’s multiple sclerosis put her at risk for severe pregnancy complications. Pregnancy had never been an option for her. The court’s inclination to interpret Elizabeth’s decision not to conceive the baby herself to mean that she was less dedicated to the baby than Mary Beth reveals a misunderstanding of the service surrogacy provides and a profound insensitivity to the plight of infertile women. Dana’s contention that the court was chiefly interested in saving the traditional family could be bolstered by discussing the court’s willingness to suggest that a woman who cannot conceive has no place in the conventional American family at all.⁴⁰

37. *In re Baby M*, 109 N.J. at 459.

38. N.J. STAT. ANN. § 9:17-44 (West 2018).

39. *In re Baby M*, 109 N.J. at 450.

40. Dana, *supra* note 10, at 365.

III. GENDERED NOTIONS OF PARENTHOOD UNDERPINNING *BABY M*

Projecting a deeply flawed double standard on mothers and fathers, the court's dismissal of Elizabeth's equal protection claim shows a knee-jerk reaction to the idea that motherhood can be disjointed from biology in the way that fatherhood often is. The *Baby M* court exposed an entrenched set of prejudiced ideas about parenthood, the role gender plays, and a suspicion of nontraditional maternity that had molded cases concerning parental rights since the 1970s.

Historically, American courts have been much more comfortable detaching biology from fatherhood than from motherhood.⁴¹ Until the 1970s, fatherhood was defined by marriage. A mother's husband was always presumed the legal father of her children, regardless of their true paternity.⁴² This legal premise has been called the marital or legitimate presumption. A series of court decisions, most famously *Stanley v. Illinois* in 1972, began to recognize legal rights that complicated this presumption, including those of unmarried fathers who had relationships with married women.⁴³ The Court in *Stanley* held that the Constitution forbids a state from removing children from their father's custody without notice and an opportunity to be heard.⁴⁴ In response, many states adopted versions of the Uniform Parentage Act (UPA), which extended legal standing to every child and parent regardless of their marital status, after it was passed in 1973.⁴⁵ Though these statutes still relied on biological connection as the strongest indicator of legal fatherhood, social determinants could help a father's case. Under the UPA, receiving the child into the home and "openly hold[ing] out the child as his natural child" assists a biological father in establishing legal rights.⁴⁶

As the law continued to recognize extramarital parent-child relationships, a clear dual pattern emerged for fatherhood in the years leading up to the *Baby M* decision. A biological father looking to avoid child support or other duties has a hard time establishing that he is not responsible for his child.⁴⁷ However, when an unmarried biological father wants to be responsible for his child in some capacity, courts demand

41. *Id.* at 380.

42. See Paula Roberts, *Truth and Consequences: Part II: Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55 (2003).

43. *Stanley v. Illinois*, 405 U.S. 645 (1972).

44. *Id.* at 658.

45. UNIF. PARENTAGE ACT § 2 (UNIF. LAW COMM'N 1973).

46. *Id.* § 4(a)(4)-(5).

47. Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 625-29 (2009).

strong proof of a desire to be engaged in the child's life.⁴⁸ *Lehr v. Richardson*, a case involving a father contesting his daughter's adoption, makes this quite clear:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "[coming] forward to participate in the rearing of his child," *Caban*, 441 U.S., at 392, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "[acts] as a father toward his children." *Id.* at 389, n. 7. But the mere existence of a biological link does not merit equivalent constitutional protection.⁴⁹

According to *Lehr*, a state is liable only for protecting a father's "inchoate interest" in involving himself in his child's life.⁵⁰ The 1976 amendments to the New York Domestic Relations Law enabled an unmarried father to easily receive notice of adoption by mailing a postcard to the putative father registry.⁵¹ The father in *Lehr* did not send the postcard, rarely saw his daughter, and never provided financial support for her well-being. The court in *Lehr* held that the state does not offer protection for fathers who fail to assume the socially accepted duties of parenthood, including "personal, financial, or custodial responsibility."⁵² In essence, unmarried, biological fathers who do not perform their fatherhood abdicate parental rights.⁵³

Professor Janet Dolgin points out that the court's argument was essentially a farce. The father in *Lehr* actually "never ceased his efforts to locate" his daughter and was prevented from developing a relationship with her by the mother, who continuously hid her.⁵⁴ When the father did eventually locate them, the mother threatened him with arrest if he attempted to see his daughter. This highlights the pervasive suspicion of the dedication of unmarried fathers in American family law and predicts

48. *Id.*

49. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (holding that an unmarried father who has no significant relationship with his biological child does not have a constitutional right to notice and an opportunity to be heard before his child is adopted).

50. *Id.*

51. N.Y. DOM. REL. § 111-a (Consol. 2014).

52. *Hodgson v. Minnesota*, 497 U.S. 417, 446 (1990) (citing *Lehr*, 463 U.S. at 257, 262).

53. *Lehr*, 463 U.S. at 262 (declaring that when a father "accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development" and that "[i]f he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie").

54. Janet Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 662 (1993).

the holding of *Michael H. v. Gerald D.*,⁵⁵ which pits an unmarried biological father against the mother's husband.

In *Michael H.*, a 1989 Supreme Court case, the biological father Michael was prohibited from claiming legal rights to his daughter Victoria. The court decided to grant parental rights to Gerald, the mother's husband, instead. The court grounded its reasoning in "the historic respect" and "sanctity . . . traditionally accorded to the relationships that develop within the unitary family."⁵⁶ In this case, Michael had sufficiently performed his fatherhood by developing a relationship with Victoria. However, his lack of a legal tie to Victoria's mother made him the lesser of two father figures both performing their role. Fortifying the marital unit from intrusion from this second-class father was the paramount interest of the court, which argued that Michael's failure to marry Victoria's mom "appropriately" limited "whatever substantive constitutional claims might otherwise exist" for him.⁵⁷

While using a similar argument, *Michael H.* furthers a notion of biological fatherhood distinct from the one upheld by *Stanley*. The *Stanley* court asserted that the state chips away at the "integrity of the family unit" by assuming unmarried fathers are unfit to raise their children and refusing to recognize their legal status.⁵⁸ *Michael H.* acknowledges a biological father's rights but uses the concept of family integrity to protect the contractual, marital unit at the expense of the genetic, biological unit.

Baby M, *Lehr*, and *Michael H.* create a seemingly conflicting legal landscape—however, because of different, and often unfair, notions of fatherhood and motherhood, the cases are not actually diametrically opposed. The focus on nonbiological determinants of parenthood in *Lehr* and *Michael H.* seems to frustrate the preference for biology conveyed in *Baby M* and the wave of anti-surrogacy legislation it initiated. Biological differences between men and women—and the gendered stereotypes arising from them—can explain why *Baby M* protects biological ties over all else, while *Lehr* and *Michael H.*, which both concern the rights of fathers, do the same for social and contractual ties. Until the advent of gestational surrogacy in 1985, giving birth was conclusive evidence of a mother's connection to her baby. "The mother carries and bears the child, and in this sense her parental relationship is

55. *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989).

56. *Id.*

57. *Id.* at 129.

58. *Stanley v. Illinois*, 405 U.S. 645, 645 (1972).

clear,” the *Lehr* court reasoned. “The validity of the father’s parental claims must be gauged by other measures.”⁵⁹

For the Supreme Court, biological differences sometimes justify the application of unequal laws for men and women. In *Schlesinger v. Ballard*, the Court upheld a federal statute dictating mandatory discharge for male naval officers who were not promoted within a specific time period. Female officers were not subject to the rule and could continue as officers without being promoted for the same time period. The reasoning was based in the idea that female naval officers received less opportunity to prove themselves professionally because they were barred from participation in combat, sea duty, and jobs involving aircrafts.⁶⁰ Because women were “not similarly situated with respect to opportunities for professional service,” the differential treatment did not amount to “archaic and overbroad generalizations” amounting to sex discrimination.⁶¹ The court determined that the “complete rationality” of the statute was highlighted by the fact that women who held jobs in the corps that allowed women, including Medical, Dental, Judge Advocate General’s, and Medical Service Corps, were subject to the same discharge rule as the men.⁶² Therefore, when women were “similarly situated,” the same rules applied.⁶³

The Supreme Court extended the “similarly situated” model to parental rights in *Parham v. Hughes*.⁶⁴ In *Parham*, a biological father sought to sue for the wrongful death of his son, who died with his mother in a car accident.⁶⁵ The Court upheld the constitutionality of a statute that prevented fathers who were not married to the mothers of their children from bringing a cause of action.⁶⁶ Though the father did not complete the necessary administrative steps to “legitimate” his son in the eyes of the law, he had formed a close relationship with the child, signed the birth certificate, provided financial assistance, and his son had taken his name. Nevertheless, the Court used the *Schlesinger* framework to assert that mothers and fathers of children born outside the context of marriage are “not similarly situated.”⁶⁷ Unlike the identity of the mother, which will

59. *Lehr v. Robertson*, 463 U.S. 248, 260 (1983).

60. *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

61. *Id.*

62. *Id.* at 509.

63. *Id.* at 508.

64. *Parham v. Hughes*, 441 U.S. 347 (1979).

65. *Id.* at 347.

66. *Id.* at 354-55.

67. *Id.* at 355.

always be clear, “the identity of the father will frequently be unknown.”⁶⁸ Like in *Schlesinger*, the different positions of the parents meant that the statute did not “invidiously discriminate” against unmarried fathers.⁶⁹

The use of the *Schlesinger* line of reasoning exposes the Court’s surrender to harmful gender bias. The father in *Parham* had proclaimed his paternity emphatically: he had signed the birth certificate, paid child support, interacted with his son daily, passed on his name, and brought the suit for wrongful death. This was not a situation in which paternity was contested or unknown. However, the father’s claim to his child was so weak compared to that of the mother that it was unsalvageable in the eyes of the Court, despite sufficient and compelling evidence that this father suffered a serious loss due to the death of his son. In every relevant respect, the father and mother actually were “similarly situated”—they both were devoted parents, provided support for their son’s well-being, and played major roles in his daily life.

In Justice White’s passionate dissent in *Parham*, he calls out the ludicrous and prejudiced notion that fathers are less likely to suffer a loss from a child’s wrongful death.⁷⁰ It is “blanket discrimination” to punish a dedicated father for a totally false, “presumed lack of affection” when his only mistake was not knowing that he needed to take the administrative steps to “legitimate” his son.⁷¹ If a devoted father, who has performed his fatherhood to society’s standards and the best of his ability, does not have an equal claim to his child, then it seems that biological mothers and fathers will never truly be “similarly situated.”

The court relied on this line of *Schlesinger* precedent to justify the unequal treatment of mothers and fathers in a series of immigration cases.⁷² Under United States law, it is much more cumbersome for the child of an American father born abroad to attain citizenship than the child of an American mother.⁷³ When the law was challenged in 2001 by Joseph Boulais, a father who had raised his Vietnamese son in Texas since he was six years old, it became clear that the logic of *Parham* still appealed to the Court.⁷⁴ Unwilling to accept that the law reflected a harmful stereotype painting fathers as less likely to form a relationship with their kids, the *Nguyen* court rejected Boulais’ equal protection

68. *Id.*

69. *Id.*

70. *Id.* at 366.

71. *Id.* at 366-367.

72. See *Fiallo v. Bell*, 430 U.S. 787, 799 (1977); *Miller v. Albright*, 523 U.S. 420 (1998); *Nguyen v. INS*, 533 U.S. 53 (2001).

73. 8 U.S.C. § 1409(c) (1988).

74. *Nguyen*, 533 U.S. 53.

claim.⁷⁵ The “moment of birth,” the Court explained, constitutes a “critical event in the statutory scheme and tradition of citizenship law,” solidifying the mother’s “knowledge of the child” and establishing “the fact of parenthood” in a way that is not guaranteed to the father.⁷⁶ Once again, birth is understood as an event that automatically triggers a bond only available to mothers and prevents mothers and fathers from being “similarly situated.”

The “similarly situated” model has been used multiple times to uphold discriminatory and outdated notions of fatherhood, motherhood, and parenthood in general.⁷⁷ In *Amy G. v. M.W.*, the biological father and his wife had been raising the three-year-old son since he was one month old.⁷⁸ Using the *Schlesinger* logic, the court built on the holding in *Nguyen* to diminish a biological father’s connection to his child as arising from “nothing more than a fleeting encounter.”⁷⁹ This is inherently different, the court offers, than the nine-month gestational period a mother undergoes.⁸⁰ “Because of this inherent difference between men and women with respect to reproduction, the wife of a man who fathered a child with another woman is not similarly situated to a man whose wife was impregnated by another man,” the court concluded.⁸¹ Baked into this argument is the presumption that there is meaning in the fact that fathers do not bring babies to term, hinting at a paternal tendency to be less emotionally and psychologically invested in children than mothers are. This kind of thinking about parental roles castigates mothers who do not form bonds with their children, dismisses fathers who do, and imposes an outdated, prejudiced perception of parenthood on modern relationships.

The “similarly situated” logic is also harmful because it gives credence to the concept that parenthood exists in a gendered binary, where mothers and fathers have traditional roles and develop relationships with their children that are limited by their gender. This legal framework leaves no space for women to have an “inchoate interest” in forming a bond with their children.⁸² The maternal interest in a parent-child relationship is automatically assumed and etched into

75. *Id.* at 53.

76. *Id.* at 68.

77. *See also* Kendrick v. Everheart, 390 So. 2d 53 (Fla. 1980); Ganim v. Roberts, 204 Conn. 760 (Conn. 1987).

78. *Amy G. v. M.W.*, 47 Cal. Rptr. 3d 297, 298-99 (Cal. Dist. Ct. App. 2006).

79. *Id.* at 308.

80. *Id.*

81. *Id.*

82. *Id.*

family law as a non-rebuttable fact.⁸³ As Professor John Hill writes in his article on parental rights, the “presumption of biology” is the “once monolithic and still pervasive legal principle that the mother of the child is the woman who bears the child.”⁸⁴ This is demonstrated by the fact that the rights of biological mothers must be affirmatively undone regardless of marital status, either voluntarily or revoked by a judge due to a determination of unfitness.⁸⁵ This notion of a legally protected mother-child relationship naturally triggered at birth led the *Baby M* court to see the practice of surrogacy, which separates babies from their birth mothers, as against public policy. The presence of an automatic bond with the child at birth forces mothers to carry a heavier burden, while the absence of one puts fathers at a legal disadvantage or helps them avoid parental duties.

These cases on paternal rights reflect Professor Janet Dolgin’s position that there have been three reigning perceptions of fatherhood since the early nineteenth century: fathers by choice (a man who chooses to stay in a household chooses fatherhood), fathers by marriage (a man assumes the parental role as the mother’s husband), and fathers by behavior (a man who develops a relationship with his children and provides for them is a parent).⁸⁶ Though Dolgin acknowledges that the cases triggered by *Stanley* do not prefer one approach to the other, taken together, these perceptions indicate that there is an ingrained assumption that “a father’s relationship to his children is a *cultural* creation—and a choice—not the automatic correlate of a biological tie.”⁸⁷ Biology, according to this paradigm, dictates nothing for fathers. Dolgin outlines the negative implications of this assumption, many of which are apparent in the cases outlined above, including the tendency to think fathers will be less engaged in their kids’ lives.⁸⁸

These perceptions of fatherhood would not necessarily result in negative stereotypes if courts would also apply Dolgin’s three categories

83. UNIF. PARENTAGE ACT § 106 (UNIF. LAW COMM’N 2002). This law offers the “extraordinarily rare” circumstance of disputed maternity as the reason that the “new UPA is otherwise written in terms applicable to the determination of paternity.” The updated legislation upholds the decision of the original 1973 Act “not to burden these already complex provisions with unnecessary references to the ascertainment of maternity” while carving out a new exception for gestational surrogacy and other forms of reproductive technology in article 7 and bracketed article 8.

84. John Lawrence Hill, *What Does It Mean to Be a “Parent”?* *The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 370 (1991).

85. UNIF. PARENTAGE ACT § 25 (UNIF. LAW COMM’N 1973).

86. Dolgin, *supra* note 54, at 648.

87. *Id.*

88. *Id.* at 650-53.

to mothers. As discussed previously, courts assume parental rights on birth mothers without considering choice, marriage, or behavior. This Article supports a complete restructuring of the way courts determine disputed parental rights into a system that does not derive meaning from the circumstances of birth. Unaffected by the historical tendency to value a mother's biological connection over a father's, parents of both genders can truly be "similarly situated." This restructuring would also affect the status of nonbiological parents in situations where reproductive technology is used. Without a focus on a biological link for mothers or fathers, the psychological and social elements of parenthood would determine which relationships acquire legal standing.

Of course, this begs the question: why isn't a parent with a stronger biological tie to their child entitled to a stronger legal claim? The answer lies in the simple fact that a long gestation period or blood relation does not make a more committed parent. As many legal theorists and professors have suggested, including John Hill⁸⁹ and Marjorie Schultz,⁹⁰ the intention to have a baby is a much better indication of a parent's ability or desire to provide for a child than biological connection. Professor Schultz argues:

Parenting relationships are among the most significant in life, both to the individuals involved and to the society whose future depends upon its children. While conception may occur quickly and without much deliberation, parenthood competently performed is an unusually important, substantial and long-term activity. Parenting involves such large amounts of time, energy and money that deep commitment to the task seems highly desirable. The needs and dependency of a child are no doubt powerful motivators. Nevertheless, people perform major and responsible tasks better when they feel a desire, exercise a choice, and make a commitment.⁹¹

This is not to say that people do not feel innately and naturally bound to biological family. However, most parental rights are not under dispute. In the situation where parental rights are up for debate, psychological and social indicators can reflect a deliberate intention to be a committed parent that genes cannot. Additionally, if it is true that mothers are more dedicated because of their longer biological investment in the children they conceive, or fathers who provide sperm for IVF are more committed than those that don't, it will be shown through the

89. Hill, *supra* note 84.

90. Marjorie Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (1990).

91. *Id.* at 322-23.

relationships they develop with their children and the plans they make to provide for them.

Of course, the conventional use of the marital presumption proves that judges and lawmakers do not actually think that all parental relationships should stem from biological connection. In *Michael H.*, the court protected the rights of the nonbiological father figure against the biological father. The *Parham* and *Lehr* courts did not acknowledge unmarried biological fathers' constitutional rights, despite genuine attempts to develop relationships with their children. Like in *Johnson v. Calvert*, a case discussed in Part V, courts that use an intent-based test as Hill and Schultz suggest will be able to rise above these outdated gendered notions of parenting roles and the conservative preference for biological ties.

IV. *BABY M* AS PERMISSION FOR STATES TO MAINTAIN DISCRIMINATORY POLICIES

Part III outlined the gendered notions of parenthood that shaped the outcome of *Baby M* and laid the groundwork for a legal system deeply uncomfortable with nontraditional motherhood. The New Jersey court rejected two types of nontraditional mothers—a mother who raises nonbiological children and a mother who does not develop a relationship with her biological children. The case also exposes the overt sexism of the common law marital presumption. While courts are quick to sever the bond between biological father and child to protect the marital unit, the same was not true when the court was asked to separate a child from its biological mother. Because the law does not see a wife as the mother of her husband's children, the marital presumption could not help Elizabeth Stern attain legal status, even though she was married to the biological father and trying to adopt the baby. On the other hand, if Mary Beth, the surrogate and biological mother, had been given full parental rights, her husband Richard could have been easily recognized as *Baby M*'s legal father, despite him having no intention of conceiving or raising the child.

In addition to normalizing gendered assumptions, *Baby M* also tainted surrogacy in the eyes of the public and lawmakers. There was a lack of knowledge surrounding reproductive technology that created a pervasive sense of discomfort with the topic.⁹² IVF and other technologies were not yet commonly used; the methods were constantly

92. Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 116-26 (2009).

changing, and the risks uncertain.⁹³ The belief that surrogacy was morally reprehensible, encouraged the sale of babies, and exploited low-income women flowed easily from the New Jersey court's decision.⁹⁴ As the political conversation focused on the emotional distress of the surrogate who had to give up her baby, not that of the nonbiological mother who could not have children, disapproval of the practice reverberated around the country. Though no state had enacted a single surrogacy statute before *Baby M*, seventy surrogacy bills were introduced in twenty-seven state legislatures even before the New Jersey court issued its opinion.⁹⁵ By 1988, six states had declared all surrogacy contracts void, prohibited them completely, and in some instances, made them criminal.⁹⁶ Other legal opposition took the form of statutes banning payment to surrogates and fertility agencies, or overtly giving surrogates the right to revoke the contract after the baby was born.⁹⁷ In addition to mobilizing anti-surrogacy sentiment across the country, the precedent set by *Baby M* continues to stymie progress that could be made in gestational surrogacy law.

Though the *Baby M* case should only govern situations involving traditional surrogacy, where the birth mother is also the genetic mother, courts in New Jersey and other oppositional states have continued to rely on the decision to invalidate gestational surrogacy contracts.⁹⁸ In 2009, the New Jersey Superior Court relied heavily on *Baby M* to grant parental rights to a gestational surrogate, Angelia, who had agreed to deliver twins for her brother Donald and his partner Sean.⁹⁹ Angelia, who was represented by the same attorney who represented the surrogate in *Baby M*, alleged that she had been coerced into the arrangement. Judge Francis Schultz equated the two cases, citing the following passage from *Baby M*¹⁰⁰:

The surrogacy contract is based on principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the

93. *Id.*

94. *Id.*

95. *See* Dana, *supra* note 10, at 366.

96. *Id.*

97. *Id.*

98. Stephanie Saul, *New Jersey Judge Calls Surrogate Legal Mother of Twins*, N.Y. TIMES (Dec. 30, 2009), <http://www.nytimes.com/2009/12/31/us/31surrogate.html>.

99. *Id.*

100. *Id.*

child; it takes the child from the mother regardless of her wishes and maternal fitness.¹⁰¹

Judge Schultz then conflated traditional and gestational surrogacy without assessing their profound differences. He wrote, “Would it really make any difference if the word ‘gestational’ was substituted for the word ‘surrogacy’ in the above quotation? I think not.”¹⁰² Equating traditional and gestational surrogacy to prevent same-sex couples from enjoying full parental rights implies discriminatory cultural conditioning.¹⁰³ Widespread homophobia and suspicion of two-dad families led legal scholar Fred Bernstein to predict this result in 2002. “No gay man who employs a surrogate can be assured of success,” he wrote.

Commentators have correctly observed that, had the father of ‘Baby M.’ . . . been gay, he would not have stood a chance of obtaining custody from Whitehead. Without “another woman [Elizabeth, the father’s wife] ready to be the child’s mother, . . . Whitehead would not have been referred to as a ‘surrogate uterus’; she would have been the mother.”¹⁰⁴

V. PROCREATIVE INTENT AS THE APPROPRIATE TEST

Some courts, however, do make the necessary distinction between traditional and gestational surrogacy. In the few years after *Baby M* was decided, IVF technology developed significantly, and gestational surrogacy became increasingly effective.¹⁰⁵ The introduction of a kind of surrogacy that enabled the intended mother to also be the genetic mother assuaged oppositional fears about baby-selling and the emotional distress of the surrogates.

This shift also had a major legal impact, crystallized in 1993 by California’s *Johnson v. Calvert* case.¹⁰⁶ Mark and Crispina Calvert wanted a baby, but Crispina had been forced to undergo a hysterectomy nine years prior.¹⁰⁷ She could not deliver a baby, but her ovaries could still produce eggs.¹⁰⁸ The couple signed an agreement with a gestational surrogate, Anna, who would carry an embryo fertilized with Mark’s sperm and Crispina’s egg, agreeing to pay her \$10,000 and buy a

101. *In re Baby M*, 109 N.J. 396, 441-42 (N.J. 1988).

102. *A.G.R. v. D.R.H.*, 2009 N.J. Super. Unpub. LEXIS 3250, at *1, *11-12 (N.J. Super. Ct. Ch. Div., Dec. 23, 2009); see Saul, *supra* note 98.

103. See Dana, *supra* note 10, at 356.

104. Fred A. Bernstein, *This Child Does Have Two Mothers . . . and a Sperm Donor with Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1, 16 (1996).

105. See Dana, *supra* note 10, at 366.

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

107. *Id.* at 778.

108. *Id.*

\$200,000 life insurance policy on Anna's life. Relations deteriorated after Anna became pregnant, ending in Anna threatening to refuse to give up the baby unless the Calverts paid her an additional sum of money. The couple sued, seeking legal recognition of their parental rights.

Unlike the *Baby M* court, the *Johnson* court upheld the surrogacy agreement, declaring that, when the genetic mother was not the same as the birth mother, the woman who "intended to procreate the child" and raise as her own was the natural mother.¹⁰⁹ The court acknowledged that both Anna and Crispina had equally "adduced evidence of a mother and child relationship," one through birth and the latter through blood.¹¹⁰ In order to break this maternal "tie," the court felt compelled to use the surrogacy contract as a demonstration of intent. Though the baby's birth required Anna's consensual participation, the court found that the couple's affirmative steps to undergo IVF and find a surrogate initiated the procreative relationship. The intent of the Calverts undermined any claim Anna had to the baby because they were the "prime movers" of the procreative process, and Crispina had intended on being the child's mother from the beginning of the agreement.¹¹¹ In direct opposition to *Baby M*, the *Johnson* court ruled that "recognizing the intending parents as the child's legal, natural parents should best promote certainty and stability for the child."¹¹²

The California court was able to arrive at this decision because it did not try to fit surrogacy into the framework of adoption.¹¹³ This move enabled the court to sidestep the entire policy issue of baby-selling because parental rights were not exchanged. Anna was never the mother of the child, in the court's view, because she did not have procreative intent. The payments the Calverts made to Anna were not for the renunciation of rights, but for her services. The court also pointed to the fact that there was no evidence that surrogacy exploited poor women any more than working for low wages or undesirable employment could. Most importantly, perhaps, the court demonstrated how discounting a surrogate's consensual role in the process promotes a sexist ideology: "The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the

109. *Id.* at 782.

110. *Id.* at 781.

111. *Id.* at 782-83.

112. *Id.* at 783.

113. *Id.* at 784.

reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law.”¹¹⁴

Anne Dana points out that, although the court ultimately relied on intent, the test the court used required a biological contest of sorts.¹¹⁵ Because the gestational surrogate had given birth and the intended mother, Crispina, had used her own egg, the court perceived that the women were tied for a maternal claim. The court needed the biological connection of Crispina’s egg to reach this tie and open the doors for the intent test. Dana emphasizes how risky it would be for gay fathers to rely on this kind of test because they will never have a rival maternal claim to a surrogate.¹¹⁶ This accurately underscores the judicial assumption of a mother-figure in a parenting duo and how quickly courts can establish precedent that excludes gay fathers from parenthood.

VI. NAVIGATING A WEB OF CONFLICTING LAWS

Baby M and *Johnson* are the two landmark cases guiding surrogacy law in this country and they represent polar opposite ends of the spectrum. A strange feature of the current climate surrounding surrogacy is the relative ambivalence of American law outside of these two cases and the few others they support. Twenty-one states have neither published statutes nor cases on the topic of surrogacy.¹¹⁷ Surrogacy agreements can move forward in these states only because there is nothing explicitly preventing them. However, since there are no laws protecting their rights, intended parents in these silent states risk the possibility that a court will not consider them the child’s legal parents.¹¹⁸ Even less available is guidance on what happens when the rights of same-sex parents are challenged.

The statutes and cases that do exist create a jumble of conflicting and incoherent laws on the rights of parents using assisted reproductive technologies.¹¹⁹ California has led the effort to reform state family law to include assisted reproductive technology and determine parentage

114. *Id.* at 785.

115. Dana, *supra* note 10.

116. *Id.*

117. Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES (Dec. 17, 2014), http://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html?_r=0.

118. Linda S. Anderson, *Adding Players to the Game: Parentage Determinations When Assisted Reproductive Technology Is Used to Create Families*, 62 ARK. L. REV. 29, 52 (2009).

119. Dana, *supra* note 10.

through procreative intent, not genetics.¹²⁰ Unsurprisingly, California also has the most liberal stance on gestational surrogacy, allowing commercial contracts and protecting the rights of all intended parents, regardless of marital status, sexual orientation, or biological connection to the child.¹²¹ In California, nonbiological parents do not need to adopt their children to establish their parental rights.¹²²

As the previous Part demonstrated, New Jersey remains hostile to gestational surrogacy, along with Michigan and New York, which maintain that most forms of surrogacy are against public policy. While Michigan allows “altruistic” surrogacy (surrogacy without compensation), an intermediary who helps a couple and a surrogate sign a contract could be charged with a felony and up to \$50,000 in fines.¹²³ A surrogate and intended parents can be charged with a misdemeanor.¹²⁴ Similarly, New York, which considers all surrogacy contracts void and unenforceable, also punishes intermediaries, including doctors and lawyers.¹²⁵ A provision in the surrogacy statute explicitly says that New York courts “shall not consider the birth mother’s participation in a surrogate parenting contract as adverse to her parental rights, status, or obligations.”¹²⁶ It is as if *Baby M* stamped motherhood into stone—despite years of technological advances, in these states, the fact of birth still remains the deciding factor for maternity.

Louisiana bans any form of surrogacy from which same-sex couples could benefit. House Bill 1102, which took effect in August 2016, only allows noncommercial surrogacy agreements in which the embryo is created “using the gametes of the intended parents.”¹²⁷ This closes off the practice to same-sex couples, who need a donated egg or sperm.¹²⁸ The bill identifies genetic connection to both parents as a compelling state interest because it does not want to have to subject parents to “the current need to go through extended proceedings to adopt their own child.”¹²⁹ Rather than rid nonbiological parents of the burden of

120. See Jessica Arons, *Future Choices: Assisted Reproductive Technologies and the Law*, CTR. FOR AM. PROGRESS 27-29 (Dec. 2007), https://cdn.americanprogress.org/wp-content/uploads/issues/2007/12/pdf/arons_art.pdf.

121. CAL. FAM. CODE § 7960 (West 2016).

122. *Id.*

123. MICH. COMP. LAWS SERV. § 722.859 (West 2014); MICH. COMP. LAWS SERV. § 722.857 (West 2014); see also *Jane Doe v. Atty. Gen.*, 487 N.W.2d 484 (Mich. Ct. App. 1992).

124. *Jane Doe*, 487 N.W.2d at 490 n.3.

125. N.Y. DOM. REL. § 121 (Consol. 2014).

126. *Id.* § 124.

127. H.B. 1102 § 2720.2.A(1), 2016 Reg. Sess. (La. 2016).

128. *Id.*

129. *Id.* § 2718.

adopting their own children, Louisiana instead tackled the problem by excluding all couples that would need to go through the adoption process. Additionally, parties who can enter into a surrogacy contract in Louisiana are subject to an invasive process to “determine an applicant’s suitability,” including full criminal background checks of both intended parents, the surrogate, and her husband, if she is married.¹³⁰ The punishment for violating the law is similarly harsh to other hostile states—a fine of up to \$50,000 or imprisonment for up to ten years, or both.¹³¹

Indiana and Nebraska nullify surrogacy contracts, but do not penalize the participants. Interestingly, Nebraska law defines surrogacy agreements through the lens of traditional marriage, declaring that they constitute any “contract by which a woman is to be compensated for bearing a child of a man who is not her husband.”¹³² Although Nebraska refuses to recognize the contracts, it bewilderingly also acknowledges the rights of a biological father of a child born through a surrogacy arrangement. Statutory nullification of the contracts does not mean that surrogacy is not practiced in these states. It just means that the contract cannot be used to protect the interests or rights of any of the participating parties, leaving open the crucial question of parentage.

Intended parents must grapple with a confusing jumble of rules in states where commercial surrogacy is legal, but regulated. North Dakota allows surrogacy and protects the rights of the intended parents but does not contemplate surrogacy with donated gametes.¹³³ Florida allows traditional surrogacy in addition to gestational and refers to surrogacy as “pre-planned adoptions.”¹³⁴ A “commissioning couple” in Florida must use at least one of their own gametes for a surrogacy contract to be enforceable.¹³⁵ Illinois, one of the few states that has comprehensive law on surrogacy, allows gestational contracts when at least one of the intended parents carries a genetic tie to the child.¹³⁶ Illinois sets out a number of requirements for the parties of a contract to fulfill, including medical evaluations and regulations on payment.¹³⁷ If all of the requirements are satisfied, the intended parents get full rights when the

130. *Id.* § 2720.4.

131. *Id.* § 286.

132. NEB. REV. STAT. §§ 25-21, 200 (1988).

133. N.D. CENTURY CODE § 14-18-01 (2005).

134. FLA. STAT. § 63.213 (2012).

135. FLA. STAT. § 742.13(2) (1993).

136. 750 ILL. COMP. STAT. ANN. 47/25 (West 2005).

137. *Id.*

baby is born. If not, the determination of parentage is left up to the court.¹³⁸

Some states are entirely unique in their approach to surrogacy. In Tennessee, contracts are neither allowed nor prohibited by state law.¹³⁹ The law merely defines the practice, and what little case law exists has held that it is in the unborn child's best interest for the gestational carrier to be the legal mother.¹⁴⁰ Unless the parents both use their own egg and own sperm, the carrier is considered the legal mother in Tennessee.¹⁴¹ This law, like so many others, requires intended parents to be heterosexual and medically able to produce gametes. Like Tennessee, Mississippi permits surrogacy because no statute or case law prohibits it, but courts have been favorable to the practice for married heterosexual couples only.¹⁴²

The list of diverging laws is extensive. The point in enumerating the various state laws is to demonstrate how confusing and tricky the system is for intended parents. It is also crucial to understand how easy it is for states to write same-sex couples out of the practice of surrogacy amidst all this legal confusion. By regulating the specifics of where a gamete comes from—an intended parent or a donor—the state asserts a high level of control over the dominion of same-sex reproduction. As previously mentioned, there are twelve states that create hurdles for same-sex couples entering surrogacy agreements, either through a preference for genetically related parents, a ban on donated gametes, or statutory silence on whether a nonbiological parent would be entitled to legal rights.

VII. ON THE GROUND REALITIES COMPLICATING SURROGACY

When trying to understand the importance of legal standing for nonbiological parents, it is crucial to consider the difficult realities of surrogacy. If surrogacy is legal in the couple's home state, or, if they can find a willing surrogate in another state that allows surrogacy, intended parents must add \$98,000 to \$140,000 to the traditional medical and lifestyle costs of expecting a baby.¹⁴³ These expenses include the surrogate mother fee, agency fee, and costs of IVF, fertility treatments,

138. *Id.*

139. TENN. CODE ANN. § 36-1-102(50) (West 2016).

140. *Id.*

141. *Id.*

142. *See* Hinson, *supra* note 8.

143. *See* Lat, *supra* note 9.

and a lawyer to draft the surrogacy contract.¹⁴⁴ The process is not easier once a couple comes up with the money. Due to long waitlists, they may have to wait half a year or longer to be matched with a surrogate after signing with an agency.¹⁴⁵ Once matched, intended parents usually want to develop personal rapport with the woman who will carry their baby. Couples often go through two or three surrogates over the course of many months until they find a surrogate they feel comfortable with.¹⁴⁶

Gamete donor selection is next. For lesbian couples, sperm donation is fairly uncomplicated and frequently anonymous.¹⁴⁷ Egg donation is more involved. Gay male partners often receive a lot of information about possible donors, requiring them to weigh crucial factors, including past fertility success, genetic dispositions to illness, and other physical and psychological characteristics.¹⁴⁸ Even once the surrogate and gamete donor are chosen, a baby is far from guaranteed. The live birth rate for women under age thirty-five is about 42% for each IVF cycle, dwindling down to 13%-18% for women older than forty.¹⁴⁹ This means that more than half the time, couples who have paid tens of thousands of dollars for a baby and waited many months will have to start the process over again.

In the states where surrogacy is allowed for same-sex parents, the process of establishing parental rights for nonbiological parents is so uncertain that it may not be worth the risk.¹⁵⁰ Even if two parents are legally married, a nonbiological parent of a surrogate child is often not listed on a birth certificate and must depend on the whim of a judge to grant a pre- or post-birth parentage order.¹⁵¹ Many states have a policy against giving these orders to nonbiological parents. In these states, the child is at risk. If anything happens to the biological parent, the child is effectively without a legal guardian.¹⁵² Nonbiological parents may need to travel to friendlier states to establish rights or adopt their own children through second-parent or stepparent adoption, yet another long, invasive, and costly process.¹⁵³ The law varies so much across states and counties that parents may not realize adoption is necessary. In the event of

144. *Id.*

145. *Id.*

146. *Id.*

147. *See* Dana, *supra* note 10.

148. *Id.*

149. *In Vitro Fertilization*, AM. PREGNANCY ASS'N (July 28, 2017, 8:40 AM), <http://americanpregnancy.org/infertility/in-vitro-fertilization/>.

150. *See* Hinson, *supra* note 8.

151. *Id.*

152. *Id.*

153. *Id.*

divorce or dissolution of the relationship, a nonbiological parent who has not adopted is a legal stranger to their child, with no standing to seek a custody arrangement. Unsurprisingly, the same states that are hesitant to grant parentage orders are unlikely to be favorable to adoption by nonbiological parents.¹⁵⁴

The legal landscape is not reassuring. Currently, of the forty-seven states where surrogacy is not explicitly prohibited, one state, Louisiana, bans same-sex couples from using surrogacy altogether, and eleven others require same-sex couples to overcome significant challenges due to the legal obstacles nonbiological parents face.¹⁵⁵ In the thirty-five states left over, surrogacy is often possible but legally risky for nonbiological parents, including many same-sex couples and heterosexual couples suffering from infertility.¹⁵⁶ In an effort to equalize legal claims over their children, some same-sex couples would rather have a baby from two donated gametes so that the child is not biologically tied to either parent. Eight states will not provide parentage orders to either parent in this case.¹⁵⁷ As parents are the pivotal caretakers and decision-makers in the lives of young children, the danger of having kids without any legal parent is abundantly clear.

All of these facts demonstrate a simple truth: it is difficult to become parents of a surrogate baby. The road to parenthood is long, cautious, and expensive for all intended parents, but it is often much more cumbersome for same-sex couples. The fact that after this long, strenuous process, the legal status of nonbiological parents is still questioned is a vestige of discrimination left by a pre-*Obergefell* framework that marginalizes nontraditional families.

Restrictions on surrogacy and parental rights for nonbiological parents grew out of a family law regime that upheld prejudiced ideas of maternal and paternal roles rooted in biology. Mothers are expected to automatically form a bond with the children they give birth to, a concept that leads many to find surrogacy morally reprehensible. On the flip side, courts use the fact that paternity is more biologically rebuttable than maternity to justify their expectation that fathers will be less engaged in their children's lives than mothers.

154. *Id.*

155. *Id.* These eleven states include Alaska, Arizona, Idaho, Indiana, Iowa, Mississippi, Montana, Nebraska, Tennessee, Virginia, and Wyoming.

156. *Id.*

157. *Id.* The eight states include Arizona, Idaho, Iowa, Louisiana, Mississippi, Nebraska, Tennessee, and Virginia.

The fact that the marital presumption literally defines paternity through maternity reveals the law's tendency to devalue the father-child connection. This focus on biology as the determinant of familial relationships precludes surrogacy and gamete donation as a viable means of creating a family in many states, violating *Obergefell's* guarantee of equal rights.

VII. RECOMMENDATIONS FOR REFORM

A. *Neutralize Marital Presumption Statutes*

This Article argues that *Obergefell* requires all states to accommodate the biological constraints of same-sex reproduction through its guarantee of equal family-related rights. Because *Obergefell* obligates states to recognize same-sex marriages, a natural and effective strategy would be to gender-neutralize the state marital presumption statutes to include married same-sex couples. UPA provisions in state statutes generally follow the marital presumption—a biological mother and her husband will be the legal parents of the children born in their marriage, regardless of the husband's genetic tie to the children. The creation of the husband's parenthood is grounded in his intent to raise the children. Consider, for example, part of Ohio's marital presumption statute:

- (A) A man is presumed to be the natural father of a child under any of the following circumstances:
 - (1) The man and the child's mother are or have been married to each other, and the child is born during the marriage or is born within three hundred days after the marriage is terminated by death, annulment, divorce, or dissolution or after the man and the child's mother separate pursuant to a separation agreement.¹⁵⁸

Federal law dictates same-sex marriages must be afforded the same legal benefits and protections as heterosexual marriages. If state legislatures continue to regulate parenthood with statutes designed for heterosexual couples, gay and lesbian parents will be left out and marginalized, which defies constitutional law. In an age of 99.9% accurate paternity tests, states no longer have to worry about paternity being unknown.¹⁵⁹ The marital presumption should no longer run

158. OHIO REV. CODE ANN. § 3111.03 (West 2006).

159. Charles Nelson De Ray, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give His Opinion*, 35 BOS. COLL. L. REV. 747, 748 (1994).

through the mother. Both parents should be recognized as legal parents through their marriage to each other. In the American legal system, the marital presumption remains “one of the strongest and most persuasive known to the law.”¹⁶⁰ Advocates for family equality should monopolize its lasting strength and modify it to expand legal parenthood. Changing the presumption to grant rights to parents based on their mutual commitment to each other wipes away the outdated notions of traditional gendered parenthood. As in the example below, a revised statute without gendered labels, like mother, father, man, and woman, could give courts the freedom to presume that a nonbiological gay father, for instance, was the legal parent of his child just by virtue of being married to his husband:

- (A) A *parent* is presumed to be the *natural parent* of a child under any of the following circumstances:
 - (1) The *parent* and [*their*] *spouse* are or have been married to each other, and the child is born during the marriage or is born within three hundred days after the marriage is terminated by death, annulment, divorce, or dissolution or after the parents separate pursuant to a separation agreement.

B. Parental Rights Should Be Determined with a Broader Intent Test

This Article also argues that in order to comply with *Obergefell*, courts must invoke a broader intent test than what California used in *Johnson v. Calvert* to make determinations of parental rights. With no way to procreate without a woman, the rights of gay fathers are best protected by a test that assesses procreative intent only, leaving biology out of the equation entirely. A test that depends purely on the intent of the couple as reflected in the surrogacy contract is much less likely to crumble when confronted with a challenge based in the surrogate’s right to procreate and raise her children. A pure intent test does not engage in weighing whose constitutional rights are more important, an argument surrogates are likely to win due to the traditional judicial tendency to see birth-mothers as innately connected to the kids they deliver.

As the previous Part of this Article has shown, a gay male couple’s procreative intent must be extremely strong in order to have a baby through gestational surrogacy. Every male couple that wants to have a non-adoptive child must find an egg donor, a surrogate, and hundreds of thousands of dollars to cover the cost of reproductive technology. They must be willing to overcome the skepticism American culture has about

160. Richard B. v. Sandra B., 625 N.Y.S.2d 127, 129 (N.Y. App. Div. 1995).

households without a mother. There is no gay couple using a surrogate that has not deliberately planned for a child over the course of a few years. For gay men, having children requires so many steps that their procreative intent will always be a stronger claim than a surrogate's under a pure intent test.

C. Restrictions on Same-Sex Reproduction Should Be Brought as Constitutional Violations

Along with many articles published on parental rights before *Obergefell* was decided, this Article paves the way for constitutional scholars and impact litigators to develop robust equal protection and substantive due process arguments on behalf of gay fathers. The arguments below can be used against wholesale bans on surrogacy, provisions prohibiting the use of donor gametes, and restrictions on the rights of the nonbiological parent.

1. Violation of Substantive Due Process

In *Carey v. Population Services*, the court highlights the fundamental nature of the rights of procreation and raising children. “The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices,” which include marriage, procreation, contraception, childrearing, and family relationships.¹⁶¹ The Court confirmed that any legislation limiting the right to procreate or any related family rights is subject to strict scrutiny review, stating that where a decision as fundamental as whether to procreate is involved, “regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.”¹⁶² Surrogacy is the only method gay male couples can use to have non-adoptive children. A legal system that encourages adoption as the only suitable route for every gay father “undervalues desires for a biological legacy—desires that have persisted across time, culture, race, and class.”¹⁶³ Banning surrogacy severely infringes a gay man's individual right to procreate.

It is not clear what compelling state interests could justify an outright ban on gestational surrogacy today. Doctors around the country perform IVF and embryo transfers with a high degree of safety, so public

161. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977).

162. *Id.* at 686.

163. Bernstein, *supra* note 104, at 6.

health is not a compelling interest.¹⁶⁴ The practice is not dangerous for the surrogate or the child. Additionally, *Johnson v. Calvert* and other cases that use the procreative intent test show that prohibitions on buying and selling parental rights in adoption law do not apply to surrogacy. Though money is exchanged, surrogacy is clearly not baby-selling because a surrogate is paid in order to compensate her for her service as a carrier and to cover medical and legal costs. There is nothing to ground the idea that the legalization of surrogacy will open the floodgates for a baby-market or lead to people viewing children as commodities.¹⁶⁵

Another objection to surrogacy is that it exploits low-income women by coercing them into using their bodies for work. There has been no evidence that most surrogates come from a particular economic strata, are underpaid, or find surrogacy to be undesirable work.¹⁶⁶ In fact, many surrogates admit that they enjoy being pregnant, making money, and they are glad to be a part of an altruistic effort to provide a baby to an otherwise childless couple. Additionally, many are drawn to the flexibility being a surrogate affords them because they can stay home with their own kids while they are pregnant.¹⁶⁷

Compelling justifications for banning the use of donated eggs or sperm in surrogacy arrangements are even less apparent. Health is not a concern and the use of donated gametes for IVF and sperm implantation is commonplace. As for explaining barriers to granting nonbiological parents rights, it is difficult to imagine a reason beyond the presumption that to be a committed parent, one must be a biological parent. Logically, this presumption cannot be justified in light of the many circumstances of devoted adoptive and stepparents.

2. Violation of Equal Protection

The judicial preference for biological connection, which benefits any couple that includes a woman, infringes upon a gay male couple's constitutional right to parenthood guaranteed by the Fourteenth Amendment. By limiting procreative opportunities and making the process of formalizing parental rights more expensive, risky, and labor-intensive for nonbiological parents, gay males have to contend with a system specifically cumbersome for their group. This is exactly the kind of legal disparity based on group status the Court has deemed

164. DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 78 (2006).

165. *See Johnson v. Calvert*, 851 P.2d 776, 785 (Cal. 1993).

166. *Id.*

167. Dana, *supra* note 10, at 364.

unconstitutional. *Romer v. Evans* declared, “the principle that government and each of its parts remain open on impartial terms to all who seek its assistance” is essential “both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection.”¹⁶⁸ In practical terms, this principle means that “a law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”¹⁶⁹ It should not be harder for gay fathers to seek protection of their parental rights than lesbian mothers or heterosexual parents because of immutable facts, like reproductive biology. While the laws restricting nonbiological parents are applied equally to both homosexual and heterosexual people, the laws are inherently unequal. The legal focus on biology discriminates against gay male couples in particular because reproduction for them necessarily includes a nonbiological parent. This violates the concept introduced in *Yick Wo v. Hopkins* and reiterated by *Romer* and *Skinner* that “the guaranty of ‘equal protection of the laws is a pledge of the protection of equal laws.’”¹⁷⁰

Another equal protection claim, grounded in arguments furthered by *United States v. Windsor* and *Obergefell*, could be brought on behalf of the children of gay fathers who have used surrogacy or other assisted reproductive technologies.¹⁷¹ The government cannot uphold statutes that denigrate same-sex families by making parenting more complicated and a child’s life less stable. Like the Defense of Marriage Act, which was found to be unconstitutional in *Windsor*, laws relegating nonbiological gay fathers to a second-class claim on parental rights “make it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”¹⁷² The personal stories of the plaintiffs in *Obergefell*, including April DeBoer and Jayne Rowse, reveal a similar argument. As a same-sex couple, DeBoer and Rowse could not legally adopt their children because their home state of Michigan only allowed opposite-sex or single parent adoption. Each child could only have one woman as their legal parent. “If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent,” the Court

168. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

169. *Id.*

170. *Id.* at 633-34; see *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

171. *United States v. Windsor*, 570 U.S. 744 (2013).

172. *Id.* at 828.

explained.¹⁷³ “And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt.”¹⁷⁴ Michigan’s discriminatory adoption policy had the same effect as current laws that refuse to grant legal parenthood to nonbiological fathers. These prejudiced limitations create oppressive uncertainty in the lives of the children and their fathers.

VII. CONCLUSION

The gender-biased conception of parenthood upheld by the marital presumption does not leave room for same-sex marriage, especially for gay male marriage, where there is no mother from whom to derive legal rights. These outdated ideas have no place in a time when the bounds of the traditional family are expanding and where the law has started to safeguard those changes at a federal level. Surrogacy bans and regulations on donor gametes expose a judicial attachment to a conception of the American family that is no longer the only available model. They also reveal an unwillingness to allow the law to accommodate reproduction within the marriages that *Obergefell* has clearly legalized. This Article reaches beyond suggesting possibilities for change by claiming that those reforms are not merely beneficial but required by law. A country that promises to protect the right to marry and raise children for individuals of every sexual orientation cannot legally uphold a system that makes it more difficult for same-sex couples to be parents.

173. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).

174. *Id.*