

**THE SCIENCE BEHIND SURROGACY: WHY NEW
YORK SHOULD RETHINK ITS SURROGACY
CONTRACTS LAWS**

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I. INTRODUCTION

In 1992, the New York State Legislature enacted legislation pertaining to surrogate parenting contracts.¹ The relevant provisions deemed such contracts void and unenforceable as contrary to public policy.² However, it is the opinion of this author that New York State should permit and enforce gestational surrogacy contracts, even those involving fees for expenses incurred as a result of the pregnancy, because gestational surrogacy is scientifically different from traditional surrogacy and so should be treated differently legally. New York State should examine laws from other states that permit and regulate these types of contracts, and implement beneficial provisions in new legislation, which would regulate gestational surrogacy contracts in such a way as to alleviate major public policy concerns.

This article explains the scientific differences between traditional and gestational surrogacy. It also gives an overview of statutory law in other states, and gives recommendations for new legislation in New York that permits gestational surrogacy contracts. In doing so the parentage, contract, and public policy issues to be considered in creating new surrogacy contract legislation are discussed. Finally, this article addresses the call for a federal standard for surrogacy agreements.³ It concludes that maintaining state autonomy is important, that states are capable of protecting their citizens in these matters and states should continue to

¹ N.Y. DOM. REL. LAW §§ 121–124 (McKinney 2011).

² *Id.* § 122.

³ See Katherine Drabiak, et al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J. L. MED & ETHICS 300, 301 (2007) (“[N]o uniform federal legislation exists that regulates the legality or enforceability of commercial surrogacy contracts. Individual state laws are widely disparate.”).

implement their own surrogate parenting laws.⁴

II. SURROGACY EXPLAINED

A. Traditional Surrogacy

In traditional surrogacy, the surrogate “carrier” is the biological mother of the baby.⁵ Traditional surrogacy is achieved by a process called intrauterine insemination (IUI), commonly known as artificial insemination.⁶ This process begins by monitoring the carrier’s ovulation cycle.⁷ On the day of the carrier’s ovulation, she and the intended father go to an agreed upon clinic, where the intended father gives his sample.⁸ The sperm are then separated from the seminal fluid, and are inserted directly into the uterus of the surrogate carrier.⁹ It can take up to six attempts of this process to achieve pregnancy in the carrier.¹⁰ The intended mother’s egg is not used to achieve pregnancy in this type of surrogacy.¹¹ Traditional surrogate carriers are both the egg donor *and* carrier, and so they are the biological mothers of the babies they carry.¹²

Laws that prohibit surrogacy agreements, such as New York’s, are implemented due in part to concerns that the intended parents are forcing the surrogate to give up her parental rights to the child.¹³ In the case of

⁴ *But see id.* at 306 (arguing the benefit of a Federal standard to regulate surrogacy).

⁵ See Tammy Belmont, *Traditional Surrogacy: A Summary of the Traditional Surrogacy Process*, JUSTMOMMIES.COM (Nov. 29, 2006, 1:22 PM), <http://www.justmommies.com/boards/lofiversion/index.php/t411993.htm>.

⁶ See Raymond Anchan & Elizabeth Ginsburg, *Gestational Carrier Pregnancy*, available at http://www.uptodate.com/patients/content/topic.do?topicKey=-.aFV.7djDxZSjOF&selectedTitle=1~7&source=search_result; Belmont, *supra* note 5; *FAQ Intra-Uterine Implantation*, UCSF MED. CENTER, http://www.ucsfhealth.org/education/intra-uterine_implantation/ (last visited Mar. 16, 2011).

⁷ See Belmont, *supra* note 5.

⁸ *Id.*

⁹ See *id.* See also, STEDMAN’S MEDICAL DICTIONARY 714 (5th Lawyer’s ed. 1982) (defining artificial insemination); *Artificial Insemination for Infertility*, Intrauterine insemination – IUI, ADVANCED FERTILITY CENTER OF CHI., <http://www.advancedfertility.com/insem.htm> (last visited March 16, 2011) (explaining the sperm washing component of artificial insemination).

¹⁰ Belmont, *supra* note 5.

¹¹ *Id.*

¹² Anchan & Ginsburg, *supra* note 6; Belmont, *supra* note 5 (discussing that traditional surrogates are the biological mothers of the children they carry).

¹³ See, e.g., ARIZ. REV. STAT. ANN. § 25-218 (d) (2011) (“[A]greement or arrangement in which a woman agrees to the implantation of an embryo not related to that woman or agrees to conceive a child through natural or artificial insemination and to voluntarily relinquish her parental rights to the child.”); D.C. CODE § 16-401 (2010) (“A woman agrees to, or intends to, relinquish all parental rights and responsibilities and to consent to the adoption of a child born as a result of insemination or in vitro fertilization as provided in this chapter.”); MICH. COMP. LAWS ANN. § 722.853 (West 2010) (“It is presumed that a contract, agreement,

traditional surrogacy, it's clear that the surrogate is the biological mother of the child and so she does have parental rights to the child.¹⁴ This author agrees that there is a risk in traditional surrogacy of the surrogate being forced to give up a child she wants to keep. However, this article addresses gestational surrogacy, a type of surrogacy fundamentally different from traditional in that the surrogate is in no way biologically related to the child.

B. Gestational Surrogacy

Whereas traditional surrogacy is commonly used when the intended mother is infertile,¹⁵ gestational surrogacy is used in different situations. Gestational surrogacy is used where the intended father is infertile or single, or where the intended mother has absent or blocked fallopian tubes, endometriosis, an absent or nonfunctioning uterus or medical conditions associated with pregnancy-related mortality or morbidity.¹⁶ In addition to different reasons for using gestational surrogacy versus traditional surrogacy, a very different process occurs in pregnancies resulting from gestational surrogacy.

Gestational surrogacy involves in vitro fertilization (hereinafter "IVF").¹⁷ "IN VITRO" fertilization in Latin translates to fertilization "in glass."¹⁸ The sperm and egg from the intended parents (rarely donor eggs and sperm are used) are joined outside of the carrier's body to create an embryo.¹⁹ Once an embryo exists, it can either be cryogenically preserved (frozen) or transferred to the uterine cavity of the surrogate carrier.²⁰ If the initial embryo transfer does not result in pregnancy, preserved embryos that survive the thawing process can be transferred to the uterus of the carrier each ovulation period until pregnancy is achieved.²¹ Here, the surrogate

or arrangement in which a female agrees to conceive a child through natural or artificial insemination by a person other than her husband, or in which a female agrees to surrogate gestation, includes a provision, whether or not express, that the female will relinquish her parental or custodial rights to the child.").

¹⁴ *Traditional Surrogacy: Information on Traditional Surrogate Mothers*, INFO. ON SURROGACY, <http://www.information-on-surrogacy.com/traditional-surrogacy.html> (last visited March 16, 2011).

¹⁵ The traditional surrogate uses their own eggs to create a child. See Belmont, *supra* note 5; Anchan & Ginsburg *supra* note 6.

¹⁶ Anchan & Ginsburg, *supra* note 6; Richard Paulson, *In Vitro Fertilization*, UPTODATE.COM, http://www.uptodate.com/patients/content/topic.do?topicKey=~vOYvH1AMXyPAGQ&selectedTitle=2~113&source=search_result (last updated Sept. 24, 2010).

¹⁷ Anchan & Ginsburg, *supra* note 6.

¹⁸ *STEDMAN'S MEDICAL DICTIONARY* 209410 (27th ed. 2000).

¹⁹ Anchan & Ginsburg, *supra* note 6; Paulson, *supra* note 16.

²⁰ Paulson, *supra* note 16.

²¹ *The Gestational Surrogacy Process: An Overview of a Typical IVF Cycle*, ALL ABOUT

carrier *does not* donate the egg.²² As such, she has *no* genetic connection to the baby.²³

Because the surrogate carrier has no biological connection to the child, she therefore has no parental rights to said child. Laws that have a blanket prohibition on surrogacy agreements ignore this critical fact. Because the two forms of surrogacy are so different and raise different concerns, they should be distinguished legally.

III. OVERVIEW OF CURRENT NEW YORK SURROGACY LAWS

Initially, New York did not prohibit surrogacy contracts. Prior to the enactment of the current surrogacy laws in New York, the Nassau County Surrogate's Court in 1986 decided in *Matter of Adoption of Baby Girl L.J.* that a surrogacy contract was not prohibited by then existing law.²⁴ In that case, the surrogate mother agreed to be inseminated with the father's sperm, relinquish her rights to the child to the father and his spouse when the child was born, all in exchange for a fee of \$10,000.²⁵ The court in that case decided it was "for the legislature to determine if such payments should be disallowed so as to prevent such practices in the future," and upheld the contract.²⁶

In 1988, however, the New Jersey Supreme Court ruled commercial surrogacy contracts were unenforceable as against public policy.²⁷ In *Baby M.*, like *Baby Girl L.J.*, a married woman was the surrogate mother and agreed to be inseminated with the father's sperm, relinquish her rights to the child to the father, and accept a fee of \$10,000.²⁸ After the child was born, the woman refused to give the child to the father.²⁹ The New Jersey Supreme Court ruled that the contract was unenforceable as against public policy, because it was degrading to women and surrogacy contracts "guarantee[] permanent separation of the child from one of its natural

SURROGACY.COM, <http://www.allaboutsurgogacy.com/gsprozess.htm> (last visited Mar. 16, 2011) [hereinafter *The Gestational Surrogacy Proces*]; Fotini Antonia Skouvakis, Comment, *Defining the Undefined: Using a Best Interests Approach to Decide the Fate of Cryopreserved Preembryos in Pennsylvania*, 36 PENN ST. L. REV. 885, 886 (2005).

²² Anchan & Ginsburg, *supra* note 6; *The Gestational Surrogacy Process*, *supra* note 21.

²³ Anchan & Ginsburg, *supra* note 6. See generally *The Gestational Surrogacy Process*, *supra* note 21 (explaining that the surrogacy process includes an increase of egg production by the donor through the use of fertility drugs, retrieval of the eggs from the donor, followed by the transfer of the eggs to the uterus of the surrogate, followed by insemination, and then finally testing the surrogate for pregnancy).

²⁴ 505 N.Y.S.2d 813, 817–18 (N.Y. Sur. Ct., Nassau Co. 1986).

²⁵ *Id.* at 814.

²⁶ *Id.* at 815, 818.

²⁷ *Matter of Baby M.*, 537 A.2d 1227, 1234 (N.J. 1988).

²⁸ *Id.* at 1234.

²⁹ *Id.* at 1237.

parents.”³⁰

Two years later, a New York court followed suit with New Jersey’s decision. In deciding *In re Adoption of Paul*, the Kings County Family Court invalidated a surrogacy contract.³¹ The court looked to the current adoption laws in New York because there was no law applicable to surrogacy agreements.³² The court determined that the fee to be paid for the “adoption” of the child was illegal, stating that “[s]uch remuneration to a mother, in exchange for her surrender of the child for adoption, violates New York’s well-established policy against trafficking in children.”³³ The court in this case also found the rationale of the New Jersey Supreme Court in *Matter of Baby M.* to be “compelling,” and further cited similarities between New Jersey’s adoption laws and their own, in coming to their decision.³⁴

Because the New York state courts were divided on the issue of surrogacy contracts, as seen in the disparity between the previously discussed New York cases, then-governor Mario Cuomo called upon the Task Force on Life and the Law (hereinafter “Task Force”) to make a recommendation for legislation on the surrogacy contract issue.³⁵ The Task Force made the recommendation that all surrogacy contracts should be void and unenforceable, including gestational surrogacy contracts.³⁶ The Task Force unanimously concluded that:

[T]he practice could not be distinguished from the sale of children and that it placed children at significant risk of harm. They also agreed that surrogacy undermines the dignity of women, children, and human reproduction. The Task Force rejected the notion that rights as fundamental as the right of a parent to a relationship with his or her child should be bought and sold or waived irrevocably in advance of the child’s birth.³⁷

Prior to the enactment of N.Y. Domestic Relations Law Article 8, the Legislature and Governor Cuomo received several letters regarding the difference between traditional surrogacy and gestational surrogacy.³⁸

³⁰ *Id.* at 1246–47.

³¹ 550 N.Y.S.2d 815, 818 (N.Y. Fam. Ct., Kings Co. 1990).

³² *Id.* at 817.

³³ *Id.* (citing *In re Adoption of Anonymous*, 286 A.D. 161 (N.Y. App. Div. 2d Dept., 1955)).

³⁴ *Id.*

³⁵ Robert Hanley, *Seven-Week Trial Touched Many Basic Emotions*, N.Y. TIMES, Apr. 1, 1987, <http://www.nytimes.com/1987/04/01/nyregion/seven-week-trial-touched-many-basic-emotions.html>.

³⁶ *Reports and Publications*, N.Y.S. DEPT. OF HEALTH, http://www.health.ny.gov/regulations/task_force/reports_publications/ (last visited Mar. 16, 2011); Legis. B. Jacket, L. 1992, ch 308.

³⁷ *Reports and Publications*, *supra* note 36.

³⁸ See Legis. B. Jacket, L. 1992, ch. 308. See, e.g., Letter from G. Oliver Koppell, Member of Assembly, July 2, 1992, B. Jacket, L. 1992, ch. 308 (recommending Governor

Specifically, Western New England School of Law wrote to the Governor “[a] principal defect of [the bill] is that it fails to distinguish between gestational surrogacy and [traditional] surrogacy.”³⁹ The letter included a discussion of the difference between the two forms of surrogacy.⁴⁰ It also noted that if the Legislature was concerned about trafficking in children, “gestational surrogate carriers [could not] ‘sell’ parental rights in the same way as [an egg] donor” because the surrogate had no biological ties to the child.⁴¹

The advice contained in the letters was ignored. Following the submission of these items, and upon the Task Force’s recommendation, the New York State Legislature enacted NY Domestic Relations Law Article 8 prohibiting surrogate parenting contracts.⁴²

Article 8 Section 122 of the N.Y. Domestic Relations Law declares all surrogate parenting contracts “contrary to the public policy of this state . . . void and unenforceable.”⁴³ The law does not prohibit women from voluntarily relinquishing their children after birth.⁴⁴ However, under Section 123 of the legislation, the payment of fees other than reasonable medical expenses incurred because of pregnancy and childbirth to the surrogate, and the payment of fees to individuals who “act as brokers for the arrangements” are prohibited.⁴⁵

As enforcement, civil penalties can be imposed on individuals for entering into such prohibited fee agreements.⁴⁶ The penalized parties can be the surrogate carrier (whether the egg donor or not), her husband (if she is married), “a genetic father and his wife, and, if the genetic mother is not the birth mother, the genetic mother and her husband,” and they can be subjected to a fine of up to \$500.00 for violating the section.⁴⁷ Should an individual or entity outside of the noted group assist in the arrangement for a fee, they will be subject to a fine of up to \$10,000.00, and will have to

Cuomo not sign the legislation but require provisions for gestational surrogacy); Letter from Western New England School of Law, July 9, 1992, B. Jacket, L. 1992, ch. 308 (urging the Governor to require provisions for gestational surrogacy).

³⁹ Letter from Western New England School of Law, *supra* note 38.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See N.Y. DOM. REL. LAW § 122 (McKinney 2011).

⁴³ *Id.*

⁴⁴ See *id.* (making only contracts to relinquish right void and against public policy and not addressing voluntary relinquishment). See also Task Force on Life & Law, *Executive Summary of Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy*, N.Y.S. DEP’T OF HEALTH, http://www.health.ny.gov/regulations/task_force/reports_publications/select_reports/executive_summary_of_assisted_reproductive_technologies.htm (last updated July 2007).

⁴⁵ Task Force on Life & Law, *supra* note 44; N.Y. DOM. REL. § 123.

⁴⁶ N.Y. DOM. REL. § 123(2).

⁴⁷ *Id.* § 123(2)(a).

forfeit whatever fee they received from the parties of the agreement to the state.⁴⁸ If an outside individual or entity violates Section 123 after previously being fined for violation of the same, that person is then guilty of a felony.⁴⁹

Section 124 of the N.Y. DOMESTIC RELATIONS LAW deals with determining parentage in suits arising out of surrogate parenting contracts.⁵⁰ These provisions make it clear that the state does not distinguish between traditional surrogacy and gestational surrogacy. Section 124 provides that in any action involving a parentage dispute, “the court shall not consider the birth mother’s participation in a surrogate parenting contract as adverse to her parental rights, status, or obligations”⁵¹ Because section 122 does not differentiate between traditional and gestational surrogacy, the application of Section 124 could result in a gestational surrogate mother receiving parental rights, even though she is not the biological mother, should she decide she wants to keep the child she carried.

As a result, New York’s current law treats traditional and gestational surrogacy contracts exactly the same, flatly prohibiting both. In addition, the law ultimately penalizes the contracting parties by classifying them as felons for more than one offense, and imposing substantial civil penalties.⁵²

IV. WHAT HAVE OTHER STATES DONE?

A. *Many, Like New York, Prohibit Both Types of Contracts.*

Like New York, a handful of other states either prohibit surrogacy contracts, refuse to enforce them, or both. For example, Arizona, The District of Columbia, Indiana, Michigan, and Nebraska prohibit and/or do not enforce surrogacy contracts.⁵³

Section A of the Arizona Revised Statutes Section 25-218 prohibits a person to “enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract.”⁵⁴ Section D defines surrogate parentage contract to include any “contract, agreement or arrangement in which a woman agrees to the implantation of an embryo not related to that woman or agrees to conceive a child through natural or artificial

⁴⁸ *Id.* § 123(2)(b).

⁴⁹ *Id.*

⁵⁰ *Id.* § 124.

⁵¹ *Id.* § 124(1).

⁵² *Id.* § 123(2)(b).

⁵³ ARIZ. REV. STAT. ANN. § 25-218 (2011); D.C. CODE § 16-402 (2011); IND. CODE ANN. § 31-20-1-1 (West 2010); MICH. COMP. LAWS ANN. § 722.855 (West 2010); NEB. REV. STAT. § 25-21, 200 (2010).

⁵⁴ ARIZ. REV. STAT. ANN. § 25-218(A).

insemination and to voluntarily relinquish her parental rights to the child.”⁵⁵ Thus, the statute fails to address the differences between traditional and gestational surrogacy, and the fact that a gestational carrier is not the biological mother of the child.

The District of Columbia likewise prohibits surrogacy contracts, and will not enforce them.⁵⁶ Like Arizona, D.C. defines surrogate parenting contracts as contracts for both traditional and gestational surrogacy where the surrogate agrees to renounce her parental rights to the child.⁵⁷ Unlike Arizona, D.C. has provisions for both civil and criminal penalties for any party to a surrogate parenting contract or anyone who helps arrange such a contract.⁵⁸

Indiana has effectively stated that it will not enforce surrogacy contracts at all.⁵⁹ For example, Indiana will not enforce a term of a contract that requires the surrogate carrier to undergo a medical examination.⁶⁰ In addition, Indiana will not enforce terms that require the surrogate to become pregnant.⁶¹ Furthermore, Indiana law states that an agreement formed with such terms is void.⁶²

Michigan mirrors New York in simply stating that all surrogacy contracts are “void and unenforceable as contrary to public policy.”⁶³ Michigan however, presumes “that a contract, agreement, or arrangement in which a female agrees to conceive a child [for others] . . . includes a provision, whether or not express, that the female will relinquish her parental or custodial rights to the child.”⁶⁴

Nebraska’s statutes define a surrogate parenthood contract as “a contract by which a woman is to be compensated for bearing a child of a man *who is not her husband*.”⁶⁵ It further declares such contracts void and unenforceable.⁶⁶

⁵⁵ *Id.* § 25-218(D).

⁵⁶ D.C. CODE § 16-402(a).

⁵⁷ *See id.* § 16-401(4).

⁵⁸ *Id.* § 16-402(b) (stating that parties to the agreements, or anyone who assists in creating the agreement, can be subject to “a civil penalty not to exceed \$10,000 or imprisonment for not more than 1 year, or both”).

⁵⁹ *See* IND. CODE ANN. § 31-20-1-1 (West 2010).

⁶⁰ *Id.* § 31-20-1-1(4).

⁶¹ *Id.* § 31-20-1-1(2).

⁶² *Id.* § 31-20-1-2 (“A surrogate agreement described in section 1 of this chapter that is formed after March 14, 1988, is void.”).

⁶³ MICH. COMP. LAWS ANN. § 722.855 (West 2010).

⁶⁴ *Id.* § 722.853(i).

⁶⁵ NEB. REV. STAT. § 25-21, 200(2) (2010) (emphasis added).

⁶⁶ *Id.* § 25-21,200(1).

B. Others Allow Both, But Differ in Their Legal Requirements.

Unlike New York State, Virginia and Washington permit both types of surrogacy contracts, provided they are for uncompensated surrogacy.⁶⁷ These states recognize the potential for abuse of the child's rights, the rights of the intended parents, and, in the case of traditional surrogacy, the rights of the surrogate mother. Accordingly, their state laws regarding surrogate parenting contracts are lengthy and detailed in the regulation of such contracts.⁶⁸ Virginia does not allow agreements for compensated surrogacy.⁶⁹ It does, however, allow surrogacy agreements for uncompensated surrogacy.⁷⁰ These agreements must be approved by the court to have their provisions enforced outright.⁷¹ Should the agreement not be approved by the court, the contract is governed by separate provisions of Virginia's Domestic Relations Law,⁷² not specifically relevant to this article. The relevant provision of Virginia's law states:

Prior to the performance of assisted conception, the intended parents, the surrogate, and her husband shall join in a petition to the circuit court of the county or city in which at least one of the parties resides. The surrogacy contract shall be signed by all the parties and acknowledged before an officer or other person authorized by law to take acknowledgments.⁷³

The court must then review the contract, hold a hearing regarding the contract, and continue to supervise the arrangement until after the birth of the child.⁷⁴ The law also requires that the contract is entered into voluntarily by all parties,⁷⁵ the contract spells out the medical and ancillary costs allocations,⁷⁶ and the intended mother is infertile or unable to bear a child.⁷⁷ Unlike other states, however, Virginia requires the *surrogate* to have had "at least one pregnancy, and . . . experience[] at least one live birth."⁷⁸

Washington, like Virginia, has declared surrogacy contracts entered into for compensation as void and unenforceable, leaving contracts for uncompensated surrogacy enforceable.⁷⁹ Washington also distinguishes

⁶⁷ See VA. CODE ANN. § 20-159(A) (West 2010); WASH. REV. CODE ANN. § 26.26.230 (West 2011).

⁶⁸ See, e.g., VA. CODE ANN. §§ 20-158-20-165; WASH. REV. CODE ANN. § 26.26.021.

⁶⁹ VA. CODE ANN. § 20-160(B)(4).

⁷⁰ *Id.*

⁷¹ *Id.* § 20-159(B).

⁷² *Id.*

⁷³ *Id.* § 20-160(A).

⁷⁴ *Id.* § 20-160(A)-(B), (D).

⁷⁵ *Id.* § 20-160(B)(4).

⁷⁶ *Id.* § 20-160 (B)(5).

⁷⁷ *Id.* § 20-160 (B)(8).

⁷⁸ *Id.* § 20-160 (B)(6).

⁷⁹ WASH. REV. CODE ANN. § 26.26.240 (West 2010).

between traditional and gestational surrogate carriers.⁸⁰ Washington has a specific provision regarding the surrogate carrier herself, to protect women of the state.⁸¹ The law provides that the surrogate carrier may not be “an unemancipated minor female or a female diagnosed as having an intellectual disability, a mental illness, or developmental disability.”⁸² The surrogate contract provisions also provide that a parent-child relationship is established between a child and a woman or a child and a man by a valid surrogate parenting contract under which the man or woman is the intended parent of the child.⁸³

C. Still Others Allow Gestational, But Prohibit Traditional, Surrogacy Agreements.

Some states legally distinguish between traditional and gestational surrogacy. While these states don't permit traditional surrogacy contracts, they do permit gestational. These states include Utah, Nevada and North Dakota.⁸⁴

Utah is one of the several states that only allows surrogacy contracts for gestational surrogacy. Utah's statute states that “[t]he gestational mother's eggs may not be used in the assisted reproduction procedure [and] . . . [i]f the gestational mother is married, her husband's sperm may not be used in the assisted reproduction procedure.”⁸⁵ Additionally, the intended parents must be married⁸⁶ “and both spouses must be parties to the [surrogacy contract].”⁸⁷ Utah's law requires all parties to be at least twenty-one years old,⁸⁸ and that the surrogate mother may not be receiving any state assistance, such as Medicaid.⁸⁹

Finally, Utah only enforces surrogacy agreements that are “validated as provided in *Section 78B-15-803*.”⁹⁰ This section adds stringent requirements for the contracts. First, the intended parents must be observed at home to be sure they meet the “standards of fitness applicable to adoptive parents.”⁹¹ The statute also requires that the gestational carrier

⁸⁰ *Id.* § 26.26.210 (2)-(3).

⁸¹ *See id.* § 26.26.220.

⁸² *Id.*

⁸³ *Id.* § 26.26.101(1)(d), (2)(f).

⁸⁴ *See* UTAH CODE ANN. § 78B-15-801 (West 2010); NEV. REV. STAT. ANN. § 126.045 (West 2010); N.D. CENT. CODE ANN. §§ 14-18-05, 14-18-08 (West 2009).

⁸⁵ UTAH CODE ANN. § 78B-15-801(7), (8).

⁸⁶ *Id.* § 78B-15-801(3).

⁸⁷ *Id.*

⁸⁸ *Id.* § 78B-15-801(6).

⁸⁹ *Id.* § 78B-15-801(2).

⁹⁰ *Id.* § 78B-15-801(4).

⁹¹ *Id.* § 78B-15-803(2)(c).

have had at least one previous pregnancy and birth,⁹² and that the intended mother is unable to bear a child or is unable to bear a child without serious risk to herself or the child.⁹³ This must be shown by “medical evidence.”⁹⁴ All parties to the contract must attend counseling with a mental health professional to discuss the meaning and effects of entering into such an agreement and the professional must provide a signed certificate attesting to the counseling sessions.⁹⁵ The parties to the agreement must enter into the contract voluntarily and must understand the agreement,⁹⁶ and, finally, the surrogate’s consideration must be “reasonable.”⁹⁷

The state of Nevada also permits gestational surrogacy contracts, but prohibits traditional surrogacy contracts.⁹⁸ However, Nevada has one requirement placed on the former that limits the number of gestational surrogacy contracts that are permissible. Specifically, only two persons who are legally married can enter into a surrogacy contract in that state.⁹⁹ Nevada also does not allow payment to the surrogate for anything other than “medical and necessary living expenses related to the birth of the child as specified in the contract.”¹⁰⁰ Nevada’s law specifically states minimum requirements for what must be in the surrogacy contract.¹⁰¹ For example, Nevada requires the surrogacy contract to have provisions specifying the rights of each party with regards to “(a) Parentage of the child; (b) Custody of the child in the event of a change in circumstances; and (c) The respective responsibilities and liabilities of the contracting parties.”¹⁰² The law also has a provision requiring the individuals named as the intended parents in the contract to be “treated in law as a natural parent under all circumstances.”¹⁰³

North Dakota’s surrogacy laws, while prohibiting traditional surrogacy agreements,¹⁰⁴ are silent on the issue of the validity of gestational carrier agreements.¹⁰⁵ The statute relevant to traditional surrogate contracts declares surrogate contracts as void.¹⁰⁶ In addition, the statute pronounces

⁹² *Id.* § 78B-15-803(2)(f).

⁹³ *Id.* § 78B-15-803(2)(b).

⁹⁴ *Id.*

⁹⁵ *Id.* § 78B-15-803(2)(d).

⁹⁶ *Id.* § 78B-15-803(2)(e).

⁹⁷ *Id.* § 78B-15-803(2)(h).

⁹⁸ *See* NEV. REV. STAT. ANN. § 126.045(1), (3), (4)(a)-(c) (West 2010) (authorizing gestational surrogacy using the sperm and egg from the intended parents only).

⁹⁹ *Id.* § 126.045(1).

¹⁰⁰ *Id.* § 126.045(3).

¹⁰¹ *See id.* § 126.045.

¹⁰² *Id.* § 126.045(1).

¹⁰³ *Id.* § 126.045(2).

¹⁰⁴ N.D. CENT. CODE ANN. § 14-18-05 (West 2009).

¹⁰⁵ *Id.* § 14-18-08.

¹⁰⁶ *Id.* § 14-18-05.

the surrogate's husband as the father of the resulting child if he is a party to the surrogate agreement.¹⁰⁷ However, the section dealing with gestational carrier contracts merely says that the intended parents are the parents of any child resulting from such a contract.¹⁰⁸ It does not specify whether North Dakota prohibits these types of contracts, permits them, or will or will not enforce them.¹⁰⁹ It can be inferred that because the statute does not expressly prohibit gestational carrier agreements, it permits them.

As the above states illustrate, permitting gestational surrogacy contracts is possible while still prohibiting traditional surrogacy contracts. The states also demonstrate the different ways in which it is possible to regulate gestational surrogacy contracts to alleviate public policy concerns. This author strongly suggests that New York amend its domestic relations law to differentiate between the two types of surrogacy, and permit gestational surrogacy contracts, as the above states have done.

V. RECOMMENDATIONS FOR NEW YORK STATE LEGISLATION

A. *New York Should Permit Gestational Surrogacy Contracts.*

New York State should amend its Domestic Relations Law and combine aspects of other states' laws to allow for, and enforce, gestational surrogacy contracts. For example, Utah amended its Uniform Parentage Act in 2005 specifically to allow for gestational surrogacy agreements.¹¹⁰ New York should explicitly list gestational surrogacy agreements as distinct from traditional surrogacy agreements. Not only are the procedures involved in traditional and gestational surrogacy different, but there is a fundamental difference in that the surrogate carrier is the biological mother in traditional surrogacy, and has *no biological connection* to the child in gestational surrogacy.¹¹¹

Statutes that prohibit both types of surrogacy agreements ultimately punish those seeking assistance with conceiving for also attempting to obtain assurance that they aren't wasting their time and money on a surrogate who ends up trying to keep their child.¹¹² Other states that prohibit both types of surrogacy contracts define any type of surrogacy as where a woman bears a child for a man who is not her husband, or

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* § 14-18-08.

¹⁰⁹ *See id.*

¹¹⁰ UTAH CODE ANN. § 78B-15-801(1) (2010); Office of Legis. Research and Gen. Counsel, Utah State Leg., Digest of Legis., 2005 Gen. Sess. of the 56th Leg., at 96, available at [http://www.le.state.ut.us/session/2005/pdfdoc/digest 2005.pdf](http://www.le.state.ut.us/session/2005/pdfdoc/digest%202005.pdf).

¹¹¹ *See supra* Part I.a-b.

¹¹² *See, e.g.*, D.C. CODE § 16-402 (2011) (providing for fines and imprisonment for anyone who attempts to form a surrogacy contract).

voluntarily gives up her rights to her child.¹¹³ These definitions ignore both modern familial structures,¹¹⁴ and the simple fact that the carrier in gestational surrogacy is not the resulting child's mother.¹¹⁵

Because the surrogate mother is not the biological mother of the child, she therefore should have no parental rights to the child.¹¹⁶ Allowing only gestational surrogacy contracts, as opposed to traditional surrogacy contracts, alleviates much of the necessary regulation that would be required to protect the rights of the mother in a traditional surrogacy contract.

Furthermore, because New York prohibits surrogacy agreements, prospective parents must not only locate a surrogate mother outside of their home state, but find a surrogate mother within a state that permits surrogate parenting contracts to ensure that the contract will be enforced.¹¹⁷ After entering into a surrogate parenting contract out of state, the intended parents may be required to travel out of state for further proceedings. Some states require surrogacy contract hearings for the contract to be valid, in addition to other court proceedings and court supervision of the surrogacy process.¹¹⁸ Because the surrogate carrier likely will give birth in her home state, the intended parents will then have to travel again to the surrogate carrier's state to see and take home their child.¹¹⁹ The costs to the intended parents could be extremely high because of the "out of state" factor, "[w]ith payments totaling over \$65,000,"¹²⁰ when they could be significantly reduced to typical pregnancy costs if they could remain in-state. New York State should want in-state contracts, so that it can regulate them accordingly to protect and help its own citizens.

B. New York Should Adopt Virginia Provisions for Gestational Surrogacy Contracts.

New York should adopt Virginia's Domestic Relations Law provisions, which require all parties to the gestational surrogacy contract to appear

¹¹³ See, e.g., NEB. REV. STAT. § 25-21, 200(2) ("[A] surrogate parenthood contract shall mean a contract by which a woman is to be compensated for bearing a child of a man who is not her husband."); MICH. COMP. LAWS ANN. § 722.853(i) (West 2010) ("Surrogate parentage contract' . . . in which a female agrees to surrogate gestation, and to voluntarily relinquish her parental or custodial rights to the child.").

¹¹⁴ See *infra* Part IV.e.

¹¹⁵ See *supra* Part I.b.

¹¹⁶ See Anchan & Ginsburg, *supra* note 6 (noting that the gestational carrier has no genetic connection to the embryo and her role does not involve raising the child).

¹¹⁷ See *Out of State Birth: Points to Consider*, ALL ABOUT SURROGACY, <http://www.allaboutsurgacy.com/outofstatebirth.htm> (last visited Mar. 16, 2011).

¹¹⁸ See, e.g., VA. CODE ANN. § 20-160(A), (B), (D) (West 2010).

¹¹⁹ See *Out of State Birth: Points to Consider*, *supra* note 117.

¹²⁰ See Drabiak, *supra* note 3, at 306.

before a court in which at least one party resides to review and sign the contract before the court prior to the commencement of the surrogacy process.¹²¹ Virginia was wise to include provisions to allow the courts to monitor the arrangement because this helps ensure the parties understand what they are agreeing to, that the parties are fair and that the parties uphold their end of the contract. Requiring the parties to come before a court prior to the commencement of the contract is something that this author thinks would resonate with the parties. It would be better for the parties to realize that they were unwilling to accept the terms of the contract *before* it is entered into, rather than after.

Another provision of Virginia's Domestic Relations Law requires the surrogate mother to undergo a medical examination to determine that pregnancy would not be a risk to her physical or mental health.¹²² Whereas Indiana will not enforce terms of surrogacy contracts that require a surrogate to undergo such an examination,¹²³ it would be prudent for New York to adopt this provision, as it protects the health of the surrogate carrier. Furthermore, it is in New York's best interest to protect all New York citizens involved in these contracts, and adopting these two provisions would be beneficial.

C. *New York Should Spell Out Contract Requirements.*

New York should adopt Nevada's Domestic Relations Law provision requiring the surrogacy contract to specify child custody in the event of a "change of circumstances" and to state the responsibilities of the parties to the contract.¹²⁴ In addition, New York should adopt Washington's Domestic Relations provisions establishing parent-child relationships between the child and intended parents where there is a valid surrogacy contract.¹²⁵ Requiring these specific details be included in the surrogacy contract is a very practical concept. In addition to lessening the number of issues to be decided by the court should a suit arise, it puts the parties to the contract on notice of things they may not have (but probably should have) thought of prior to entering into a surrogacy contract. Ultimately it is beneficial to both the courts and the parties to the contract, a balance that is in turn good for public policy.

¹²¹ VA. CODE ANN. § 20-160(A) (West 2010). *See also supra* text accompanying notes 68-78 (discussing Virginia's surrogacy statutes).

¹²² *Id.* § 20-160(B)(6).

¹²³ IND. CODE ANN. § 31-20-1-1(4) (West 2010). However, not enforcing a term requiring a surrogate to become pregnant, for example, is absurd. The pregnancy is the whole point of the agreement. *See e.g., id.* § 31-20-1-1(2).

¹²⁴ NEV. REV. STAT. ANN. § 126.045(1)(b) (West 2010).

¹²⁵ WASH. REV. CODE ANN. § 26.26.101(1)(d), (2)(f) (West 2011).

Statutes prohibiting surrogacy as a whole, potentially because of issues regarding the surrogate mother's rights to the child, don't address gestational surrogacy agreements where the surrogate mother is not the biological mother of the child.¹²⁶ However, state statutes that *do* permit surrogacy agreements also specifically spell out the procedures for determining parentage.¹²⁷ This puts the parties to the agreement on notice, and establishes guidelines should a lawsuit result from the agreement.¹²⁸ Washington was prudent to include such provisions because it preemptively solved parentage issues in doing so.¹²⁹ In permitting gestational surrogacy contracts, New York should also have specific procedures for determining parentage of the resulting child.

Statutes permitting surrogacy agreements and enforcing those agreements clearly require the surrogate mother to abide by the contract.¹³⁰ Those states that prohibit surrogacy contracts leave the hopeful parents helpless when the surrogate mother decides not to carry out the agreement by deciding to keep the child.¹³¹ This can be severely emotionally damaging to the intended parents. Ideally in the states where surrogacy contracts are prohibited, the hopeful parents will have a female family member willing to help them and be a surrogate carrier for them. However, even family members can change their mind and decide to keep the child. Not only is this emotionally damaging to the intended parents, but it can also have treacherous effects on the extended family. It is especially damaging in gestational surrogacy situations where the surrogate decides to keep the child even though she is not the biological mother of the child. These potential problems should be addressed in gestational surrogacy laws to avoid the emotional trauma of the parties, and the legal costs and time of

¹²⁶ See N.Y. DOM. REL. LAW § 124(1) (McKinney 2010) (“[T]he court shall not consider the birth mother’s participation in a surrogate parenting contract as adverse to her parental rights, status, or obligations . . .”).

¹²⁷ See, e.g., NEV. REV. STAT. ANN. § 126.045(1)(a); VA. CODE ANN. § 20-159(A)-(B) (stating that a surrogate may relinquish all rights to a child, and providing that any surrogacy contracts must be approved by a court or must fulfill specific provisions throughout the statute); WASH. REV. CODE ANN. § 26.26.101(1)(d), (2)(f).

¹²⁸ See, e.g., NEV. REV. STAT. ANN. § 26.045(1)(c) (noting that the surrogacy contract must lay out all parties’ respective rights and responsibilities); VA. CODE ANN. § 20-159 (stating that a surrogate may relinquish her control of the child through a contract using the provisions laid out in said statute); WASH. REV. CODE ANN. § 26.26.101(1)(d), (2)(f) (noting that a surrogate may contract who the intended parent is, however it must be a valid contract).

¹²⁹ See WASH. REV. CODE ANN. § 26.26.101(1)(d), (2)(f).

¹³⁰ See NEV. REV. STAT. ANN. § 126.045(1)(c); VA. CODE ANN. § 20-159(A) (providing that parties can establish a surrogacy contract where the surrogate relinquishes all rights to the child); WASH. REV. CODE ANN. § 26.26.101(1)(d), (2)(f) (establishing how parentage can be established in a valid surrogate contract).

¹³¹ They also may provide for punishments as well. See N.Y. DOM. REL. LAW § 123(2)(b).

litigating them.

D. New York Should Permit Fees in Addition to Necessary Medical Expenses.

New York should implement Washington's provisions defining compensation as any payment of money "except payment of expenses incurred as a result of the pregnancy."¹³² If regulated properly, the statute would deny the ability of contracting parties to pay sums of money for a child as opposed to paying only for expenses of the surrogate that the intended mother would have incurred had she become pregnant herself. For example, the Nevada provisions anticipate the possibility of additional living expenses for the surrogate carrier due to her pregnancy.¹³³ If so regulated, the statute would prevent the public policy concern of trafficking in children by expressly denying the surrogate the right to require large compensatory fees.

Fees for medical expenses are clearly appropriate, because the prospective parents would have paid the same expenses had they not needed a surrogate to have a child. Examinations, prescriptions, vitamins, necessary procedures relating to the pregnancy all fall within this category. This includes fees for the in vitro fertilization procedure and those procedures related to in vitro fertilization because they are necessary to the arrangement.¹³⁴

Other fees should be limited. One "lump sum" fee simply for carrying the child should not be permitted in surrogacy contracts. For example the surrogate should not be allowed to require a \$10,000 fee for her services. However, in some circumstances, fees in addition to medical expenses are appropriate.

One example of such a circumstance is where the surrogate mother unexpectedly carries more than one child for the intended parents, the parents may want to contract for providing an allowance for larger maternity clothing to accommodate the surrogate mother. In this situation had the intended mother carried the children, this would have been an expense anyway. Another circumstance in which additional fees are appropriate is where the intended parents plan an out-of-state birth for the surrogate mother, such as bringing her to their home state for the birth if she lives in another state. Compensation for travel and even childcare for any children she may have would be appropriate in that situation.

¹³² WASH. REV. CODE ANN. § 26.26.210(1).

¹³³ NEV. REV. STAT. § 126.045(3) (2011) ("It is unlawful to pay or offer to pay money or anything of value to the surrogate except for the medical and necessary living expenses related to the birth of the child as specified in the contract.").

¹³⁴ See Anchan & Ginsburg, *supra* note 6.

Additionally, pregnancies also occasionally come with unexpected illness. In a situation where the surrogate mother is bed ridden because of pregnancy related illness, the intended parents may want to provide an allowance for a home nurse and/or housekeeper to assist the surrogate in her necessary activities for the period in which she is bed-ridden. The intended mother may have required the same assistance had she become pregnant and subsequently ill herself.

Proper legislation allowing for surrogacy contracts in gestational surrogacy situations would prevent a “black market” in children.¹³⁵ Not permitting general compensatory fees that have no specific calculated use ideally would prevent surrogate mothers from turning surrogacy into a business. Holding the parties responsible for accounting for every exchange of money furthers this, and prevents children from simply being sold to hopeful parents.

E. New York Should Avoid Restrictions Other States Place on the Intended Parents.

New York should not restrict gestational contracts to married couples only. Allowing surrogacy contracts for married couples only keeps single individuals from being able to contract, and also keeps non married lifetime partners from contracting. For some people starting a family does not require being married.¹³⁶ In addition, provisions such as these seem to put forth the idea that married individuals have an essential right to contract for gestational surrogacy, whereas others do not. However, it is the opinion of this author that married couples have no more of an essential “right[] to conceive”¹³⁷ a child than do unmarried couples or single persons.

New York also should not require that the intended mother be infertile. Where statutes only allow for surrogacy agreements where the female in a relationship is infertile, single males and single females are left out of the class of citizens afforded the right to contract for surrogacy.¹³⁸ When these citizens seek a child, artificial insemination may be available to them, but it may not work. In the event that artificial insemination doesn’t work, if New York has only permitted surrogacy contracts where the female is infertile, other citizens are left with the option of risking surrogate

¹³⁵ See Paula M. Barbaruolo, *The Public Policy Considerations of Surrogate Motherhood Contracts: An Analysis of Three Jurisdictions*, 3 ALB. L.J. SCI. & TECH. 39, 63 (1993) (comparing surrogacy contracts to adoption laws).

¹³⁶ See Ronni Berke, *Single Men Turning to Surrogates*, CNN (Dec. 23, 2008, 5:53 PM), <http://www.cnn.com/2008/HEALTH/12/23/single.men.parenting/index.html>.

¹³⁷ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

¹³⁸ See, e.g., VA. CODE ANN. § 20-160(B)(8) (West 2011) (allowing a court to approve a surrogacy contract if “[t]he intended mother is infertile.”).

parenting without a definitive agreement that the surrogate will give them the child upon birth.

F. New York Should Avoid Certain Provisions Other States Have Implemented With Regards to the Surrogate.

New York should avoid some restrictions placed on the surrogate implemented by other states. For example, Utah requires the surrogate to have had at least one previous pregnancy and birth.¹³⁹ Requiring the surrogate to have had at least one previous child helps ensure that the surrogate understands what to expect when she carries a child for others. However, this type of restriction limits the number of women available to assist the intended parents, likely even those closest to them. New York should also avoid employing a restriction requiring the surrogate to be married, as Virginia did up until April of 2010.¹⁴⁰ Again the reasoning is the same. This type of restriction would probably severely limit the number of women available to assist the intended parents.

Additionally, New York should avoid defining surrogacy contracts as those where a woman carries a child for a man who is not her husband, as other states have.¹⁴¹ These statutes seem to be more to protect traditional family values, specifically that women generally only carry the children of their husbands, rather than protecting the interests of a resulting child. In the majority of situations however, the core problem often is that women cannot become pregnant with their husbands and therefore seek the assistance of other women.

Ultimately, New York should permit gestational surrogacy contracts, but should be very careful about the way in which they regulate them.

VI. SURROGACY CONTRACT LAWS SHOULD BE FASHIONED ON A STATE-BY-STATE BASIS

A. The Argument For Uniform Commercial Surrogate Rules

The authors of the article *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity* call for a federal standard for surrogacy laws in the United States.¹⁴² In that article, the authors simply stated that “a uniform federal standard should be implemented.”¹⁴³ Arguments identified among advocates of uniform surrogacy standards have three main components: the

¹³⁹ UTAH CODE ANN. § 78B-15-803(2)(f) (West 2010).

¹⁴⁰ VA. CODE ANN. § 20-160(B)(6) (1991) (amended 2010).

¹⁴¹ *See, e.g.*, NEB. REV. STAT. § 25-21,200 (2010).

¹⁴² Katherine Drabiak, et al., *supra* note 3, at 306.

¹⁴³ *Id.*

first is that surrogacy should be allowed on a commercial, or fee-based, basis; the second is that because intended parents use commercial agencies outside of their home state to locate a carrier, surrogacy amounts to interstate commerce; and the third is that because surrogacy amounts to interstate commerce, the federal government should regulate it.¹⁴⁴ Indeed, one proponent of a uniform federal approach argues that “[c]ommercial surrogacy is a matter of interstate commerce involving compensation and multi-state transactions which must be addressed on the federal level.”¹⁴⁵ What is ignored, however, is the possibility for individual state regulation of non-commercial surrogacy.¹⁴⁶

The authors of the article argue that leaving surrogacy contract issues to the states to decide only furthers the ability of commercial agencies to avoid penalties under state and federal law.¹⁴⁷ The article states “[t]he disparity between categorizing commercial surrogacy as criminal in one state to adamant legal enforcement in others allows the agencies operating across state lines to utilize the law of the most supportive jurisdictions, and in this way circumvent the federal government’s regulation of interstate commerce.”¹⁴⁸

The authors also argue for a federal standard for commercial surrogacy because surrogacy agencies are reducing financial bargaining power of surrogates.¹⁴⁹ Though the authors limit their argument to ethical considerations involving commercial surrogacy agencies that use “the Internet as a means of advertising and attracting business,”¹⁵⁰ their grounds for concern are based on the way in which the “agencies attempt to reduce the financial bargaining power of potential surrogates by using both the disparities in state law and the cultural rhetoric surrounding the value of children.”¹⁵¹ It appears as though the authors are saying that placing a value on this service is acceptable, as long as that value is determined by the federal government.¹⁵²

The article further argues that commercial surrogacy requires a federal

¹⁴⁴ See generally *id.* at 306–08 (discussing the need for federal legislation and suggesting regulatory schemes in surrogacy matters).

¹⁴⁵ *Id.* at 308.

¹⁴⁶ See *id.* (mentioning only that state disparities concerning commercial surrogacy is an issue needing some form of federal regulation, with no mention of a solution where states can regulate non-commercial surrogacy).

¹⁴⁷ *Id.* at 303, 306.

¹⁴⁸ *Id.* at 303.

¹⁴⁹ *Id.* at 301–02.

¹⁵⁰ *Id.* at 301.

¹⁵¹ *Id.*

¹⁵² See *id.* at 306–08 (proposing for alternative federal regulatory schemes, three of which would allow for compensation for surrogacy agreements.).

standard because it amounts to interstate commerce.¹⁵³ The authors identify “the traditional belief that children are priceless gifts, and it is somehow distasteful to place a specific monetary value on them.”¹⁵⁴ However, they state that “[c]ommercial surrogacy agency businesses clearly involve interstate commerce, since agencies explicitly induce parents to their forum state by promising the most supportive legislation The commercial surrogacy process mirrors the exchange of ‘valuable consideration’ and interstate commerce outlined for comparable transactions, yet no corresponding federal legislation exists.”¹⁵⁵ The article then notes that surrogacy should be federally regulated because poor surrogates cannot negotiate a fair contract because of the “stigma [associated with] identifying financial motivation” for becoming a surrogate.¹⁵⁶ In arguing for federal regulation of this so-called interstate commerce, it appears as though the authors are reducing surrogacy to merely a financial enterprise and ignoring the sentimental and altruistic underpinning of surrogacy.

This author recognizes that some surrogates likely carry a child for the intended parents for the financial gain. However, it is the opinion of this author that a federal standard is not the answer to this issue; that surrogacy contract legislation can protect surrogates and intended parents while maintaining state autonomy by leaving this domestic relations matter to the states to decide.

B. Why Surrogacy Contract Law Should Be Determined On a State By State Basis.

In *Stanley v. Illinois*, the U.S. Supreme Court stated that “[t]he right[] to conceive . . . ha[s] been deemed [an] ‘essential,’ ‘basic civil right[] of man,’ and [a] ‘(r)ight[] far more precious . . . than property rights.’”¹⁵⁷ Though the right to conceive has been deemed “essential” by the Supreme Court,¹⁵⁸ creating a federal standard for surrogacy agreements to protect this right would restrict the individual states in exercising their right to create their own domestic relations laws. Article I of the United States Constitution lists the powers vested in Congress, which do not include domestic relations matters.¹⁵⁹ The Tenth Amendment of the United States Constitution states “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

¹⁵³ See *id.* at 306, 308.

¹⁵⁴ *Id.* at 305.

¹⁵⁵ *Id.* at 306.

¹⁵⁶ *Id.* at 304.

¹⁵⁷ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *May v. Anderson*, 345 U.S. 528, 533 (1953)) (parentheses and last ellipsis in original).

¹⁵⁸ *Id.*

¹⁵⁹ See U.S. CONST. art. I, § 8.

respectively, or to the people.”¹⁶⁰

Domestic relations laws are not listed under the powers vested in Congress, and so are left to the states.¹⁶¹ Statutory provisions involving surrogacy contracts are generally found within the “domestic relations” sections of state laws.¹⁶² Given the text of the Constitution, and the sections of state statutes where surrogacy contracts appear (domestic relations), surrogacy contracts should be matters left to decision by the states. If the states happen to enact the same type of surrogacy law that every other state does, having uniform surrogacy laws implies that a majority of citizens agree on the status of surrogacy agreements because “[s]erving constituents is a crucial part of a legislator’s ongoing duties.”¹⁶³ But forcing a federal standard across the United States would, however, appear to violate the rights of the states to decide what is best for their citizens with regards to surrogacy agreements.¹⁶⁴

VII. CONCLUSION

There are obvious differences between traditional surrogacy and gestational surrogacy, and so these types of surrogacy should be treated differently at law. Because gestational surrogate mothers have no biological ties to the child,¹⁶⁵ permitting gestational surrogacy agreements alleviates the issue of women selling their own children for a profit.¹⁶⁶ New York State should look to a combination of laws from other states in creating new legislation permitting gestational surrogacy contracts that are enforceable in the courts.¹⁶⁷ With proper regulation, New York can both permit gestational surrogacy contracts and avoid the threats of child trafficking and creating a “breeding class.”¹⁶⁸ New York State should

¹⁶⁰ U.S. CONST. amend. X.

¹⁶¹ Compare U.S. Const. art. I § 8 (listing the enumerated powers of Congress), with U.S. Const. amend. X (explaining that all powers not expressly granted to the United States or prohibited to the States are within the powers of the States to legislate).

¹⁶² See, e.g., N.Y. DOM. REL. LAW § 124 (McKinney 2010); VA. CODE ANN. § 20-160 (West 2011); WASH. REV. CODE ANN § 26.26.210(4) (West 2011).

¹⁶³ United States v. Brewster, 408 U.S. 501, 557 (1972).

¹⁶⁴ But see Katherine Drabiak, et al., *supra* note 3, at 308 (proposing a federal regulatory scheme which would “eliminat[e] the state-by-state variation.”).

¹⁶⁵ Anchan & Ginsburg, *supra* note 6.

¹⁶⁶ See, e.g., Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND. L.J. 205, 211, 231 (1992) (discussing “feminist” concerns that women will turn surrogacy into an enterprise); Letter from John M. Kerney on Behalf of the New York State Catholic Conference, June 30, 1992, Bill Jacket, L 1992, ch 308 (urging Governor Cuomo to sign into law Article 8 of the NY Domestic Relations Law because surrogate motherhood involves a woman selling her child for profit).

¹⁶⁷ See *supra* part IV.

¹⁶⁸ Jessica H. Munyon, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U. L. REV. 717, 717–19 (2003) (stating that

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permit and enforce gestational surrogacy contracts, even those involving fees for expenses incurred as a result of the pregnancy other than medical expenses.

This approach may not be proper for every state, however, and so creating a federal standard for surrogacy contracts is not appropriate.¹⁶⁹ New York should permit and enforce these contracts even though historically there has been opposition to them, as we can see from the enactment of the current surrogacy agreement laws.¹⁷⁰ Indeed, Supreme Court Justice Brennan has said: “We are not an assimilative, homogenous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else’s unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncrasies.”¹⁷¹

high compensatory fees make surrogacy attractive to poor women).

¹⁶⁹ *But see* Katherine Drabiak, et al., *supra* note 3, at 306 (explaining that “a uniform federal standard should be implemented” to better structure surrogacy).

¹⁷⁰ *See, e.g.*, N.Y. DOM. REL. LAW §§ 122-124 (McKinney 2010).

¹⁷¹ *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).