NOTES

Signed, Sealed, Delivered—Not Yours: Why the Fair Labor Standards Act Offers a Framework for Regulating Gestational Surrogacy

Over the past several decades, gestational surrogacy has emerged as a rapidly growing industry. Such growth has prompted an enormous amount of debate among scholars, human rights advocates, economists, and the media over a wide array of legal and ethical issues. This debate is perhaps most evident in the divergence of state approaches to the regulation of gestational surrogacy—for example, some states ban the practice entirely, others allow only altruistic arrangements, and many states simply do not address surrogacy at all. The fractured landscape of surrogacy regulation has resulted in artificially high costs and, often, uncertainty for all parties involved. As such, the time has arrived for federal regulation of commercial surrogacy arrangements. This Note proposes that the Fair Labor Standards Act, originally enacted to prevent labor abuses and ensure wage and hour protection, offers a tenable statutory framework for regulating commercial surrogacy arrangements, as federal oversight will promote accountability among parties and further legitimize the surrogacy industry.

> *And God blessed them, and God said to them, "Be fruitful and multiply, and fill the earth."*
> —Genesis[1]

INTRODUCTION

In February of 1985, William ("Bill") Stern entered into a life-changing contract.[2] As the only child of Holocaust survivors, Bill desperately hoped to continue his family's bloodline.[3] Unfortunately, his wife, Elizabeth, suffered from multiple sclerosis and feared that a pregnancy would jeopardize her health.[4] The substantial delay involved in adoption, coupled with Bill's desire for a biological child, ultimately led the Sterns to the Infertility Center of New York ("ICNY") operated by Michigan attorney Noel Keane.[5] Established in 1981, ICNY selected potential surrogates through a screening process and—for a substantial brokerage fee[6]— provided infertile couples the opportunity to interview a variety of preapproved surrogate candidates, furnished the contract between the parties, and arranged for doctors to artificially inseminate the surrogate mother with the contracting father's sperm.[7] Keane,

1. *Genesis* 1:28.

2. *In re* Baby M, 537 A.2d 1227, 1235 (N.J. 1988); *see also* Carol Sanger, *Developing Markets in Baby-Making:* In the Matter of Baby M, 30 HARV. J.L. & GENDER 67, 68 (2007).

3. Sanger, *supra* note 2, at 68.

4. *In re Baby M*, 537 A.2d at 1235.

5. *Id.* After arranging his first surrogacy contract in 1976, Keane developed a nationwide surrogacy business. By 1987, Keane had arranged several hundred surrogacy agreements. James S. Kunen, *Childless Couples Seeking Surrogate Mothers Call Michigan Lawyer Noel Keane—He Delivers*, PEOPLE (Mar. 30, 1987), http://people.com/archive/childless-couples-seeking-surrogate-mothers-call-michigan-lawyer-noel-keane-he-delivers-vol-27-no-13/ [https://perma.cc/RVS5-W8EF].

6. For example, the Sterns paid $7,500 for ICNY's services. *See In re Baby M*, 537 A.2d at 1235.

7. *Id.*; Sanger, *supra* note 2, at 84. ICNY selected surrogates based on the results of a detailed questionnaire regarding a potential surrogate's health and income, as well as a

hailed in 1987 by *Time* magazine as "America's undisputed father of surrogate motherhood," solicited potential surrogate mothers to apply to ICNY through classified advertisements, television talk shows, and radio appearances.[8]

The Sterns sought ICNY's services after seeing a newspaper ad for surrogate mothers and recalling Keane's prior television appearances.[9] After reviewing hundreds of surrogate applications provided by ICNY, the Sterns selected Mary Beth Whitehead, a married mother of two who had expressed a desire to give another couple the "gift of life and the joys of parenthood" as their surrogate.[10] The Sterns selected Mary Whitehead specifically because they believed that her husband's vasectomy indicated the Whiteheads' evident desire to avoid having more children of their own.[11] Thus, on February 6, 1985, Bill and Whitehead executed a surrogacy contract, which provided for Whitehead's artificial insemination by a physician with Bill's sperm in exchange for $10,000 to be paid upon Whitehead's immediate surrender of custody of the child to Bill and immediate termination of her parental rights.[12]

Unfortunately, a dispute arose as soon as Whitehead gave birth to a healthy baby girl, who subsequently became known "around the world as Baby M."[13] Having developed an emotional bond to the baby, Whitehead refused to fulfill her contractual obligation and instead fled the state with Baby M.[14] Three months later, police located Whitehead in Florida and executed a court order requiring her to surrender custody of the baby to the Sterns.[15] The Sterns subsequently sought

psychological evaluation of a potential surrogate's ability to provide informed consent. *See* Sanger, *supra* note 2, at 85.

8. Kunen, *supra* note 5.

9. Sanger, *supra* note 2, at 85.

10. *Id.* at 86.

11. *Id.*

12. *In re Baby M*, 537 A.2d at 1265–69; *see also* Clyde Haberman, Baby M *and the Question of Surrogate Motherhood*, N.Y. TIMES (Mar. 23, 2014), http://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html?_r=0 [https://perma.cc/9HKQ-LTK2] (explaining that $10,000 in 1985 is equivalent to $22,000 today). The average rates of compensation for surrogates today are discussed *infra* Section I.A. Further, it is worth noting that while the contract gave Elizabeth Stern sole custody of the child in the event of Bill Stern's death, Elizabeth was not party to the surrogacy contract—presumably to avoid violating New Jersey's baby-selling statute. *See* N.J. STAT. ANN. § 9:3-54, *repealed by* 1993 N.J. Laws ch. 345, § 20 (prohibiting the payment or acceptance of money in connection with any placement of a child for adoption).

13. Sanger, *supra* note 2, at 68.

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

15. *Id.*

enforcement of the entire surrogacy contract, specifically the termination of Whitehead's parental rights, in New Jersey.[16]

Following a six-week trial, the court declared the surrogacy contract valid, emphasizing the child's best interests, and ordered the termination of Whitehead's parental and custodial rights.[17] On appeal, however, the New Jersey Supreme Court rejected the trial court's rationale and declared surrogacy contracts "illegal, perhaps criminal, and potentially degrading to women."[18] New Jersey's condemnation of surrogacy contracts as counter to both public policy and state law immediately sparked a national debate over the legal and ethical implications of surrogacy contracts.[19]

Nearly thirty years have passed since the New Jersey Supreme Court delivered its verdict in *In re Baby M.* Although the surrogacy[20] industry in the United States has evolved from its marginalized roots into a multimillion-dollar business,[21] the "legal, moral, and ethical issues" (such as the potential for exploitation, the commodification of children, and the often uncertain nature of establishing legal parentage) inherent in commercial surrogacy contracts remain wholly unresolved.[22] Commercial surrogacy refers to a surrogacy arrangement[23] in which the commissioning couple agrees to pay the surrogate a fee for her services, as opposed to altruistic surrogacy arrangements where a surrogate carries a child to term without the

16. *Id.* The distinction between custodial and parental rights (i.e., legal parentage) is particularly important, as the two are not coextensive. A parent who has lost physical custody of a child remains the child's legal parent until his or her parental rights are legally terminated. *See, e.g.*, *In re* Jones, 340 N.E.2d 269, 273 (Ill. App. Ct. 1975) (explaining that a custody proceeding focuses on the best interests of the child, while a termination of parental rights proceeding involves determining whether a parent is unfit such that a permanent termination of a relation between the parent and child is warranted).

17. *In re Baby M*, 537 A.2d at 1237–38.

18. *See id.* at 1234, 1238 (while the court ultimately granted Bill Stern custody, the court remanded the case for proper determination of Whitehead's visitation rights—thereby recognizing Whitehead's parental rights).

19. *See* Sanger, *supra* note 2, at 69.

20. Henceforth, unless otherwise specified, the term "surrogacy" refers to the practice itself—that is, a woman carrying a child to term for someone else's benefit.

21. *See* Morgan Holcomb & Mary Patricia Byrn, *When Your Body Is Your Business*, 85 WASH. L. REV. 647, 651 (2010) (estimating that for-profit surrogacy agencies "are at the center of a $75–150 million-per-year industry").

22. Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 115 (1997); *see also* J.K. MASON, MEDICO-LEGAL ASPECTS OF REPRODUCTION AND PARENTHOOD 267–68 (2d ed. 1998) (noting the clear economic distinction between the Sterns, a comfortable middle-class couple, and Whitehead, a high-school dropout married to an alcoholic, as illustrative of surrogacy's potentially exploitative effects).

23. Throughout this Note, "arrangement" will be used to denote the general agreement between parties, while "contract" will refer to the legally binding agreement between parties. Both terms, however, are used to refer to formal agreements.

expectation of compensation.[24] Opponents of such arrangements argue that the practice threatens traditional notions of family formation and fragments the role of motherhood.[25] Other commentators condemn commercial surrogacy on the grounds that it relegates women and children to reproductive commodities, and is tantamount to both prostitution and "baby-selling."[26] These opponents further maintain that commercial surrogacy contracts should uniformly be void because such contracts "cannot properly[ ] be based upon true best interests determinations" of individual children.[27] However, advocates for commercial surrogacy believe that it offers a viable alternative reproductive method for otherwise infertile couples.[28] And, some scholars advocate for the regulation of the commercial surrogacy industry to *minimize* the potentially exploitative effects on surrogates.[29]

The differing jurisdictional approaches to both commercial and altruistic surrogacy further complicate the matter in the United States.[30] State legislatures' responses to surrogacy as a general practice range from full acceptance and enforcement of commercial contracts and altruistic agreements to outright bans on any form of surrogacy accompanied by criminal penalties.[31] Even among states that permit some form of surrogacy, there is no uniform approach—some states allow compensation of surrogates while others only permit altruistic arrangements.[32] More importantly, the majority of states have yet to adopt any position on the legality of surrogacy at all.[33]

---

24. *See, e.g.*, FLA. STAT. ANN. § 742.14(4) (West 2017); VA CODE ANN. § 20-160(b)(4) (West 2017).

25. FINKELSTEIN ET AL., COLUMBIA LAW SCH. SEXUALITY & GENDER LAW CLINIC, SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING 41 (2016) (" 'Surrogacy upsets the moral framework in which reproduction is regarded as a 'natural family,' " and is an " 'invalid' form of family formation." (citing ELLY TEMAN, BIRTHING A MOTHER: THE SURROGATE BODY AND THE PREGNANT SELF 7 (2010))).

26. *See, e.g.*, David M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulating of the Surrogacy Industry's Global Marketing of Children*, 43 PEPP. L. REV. 265, 269 (2016); *see also* Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 822 (2012) (recognizing that some scholars categorize surrogacy services as a commodity).

27. Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 467 (2004).

28. Kerian, *supra* note 22, at 115.

29. *See generally* Stephen Wilkinson, *The Exploitation Argument Against Commercial Surrogacy*, 17 BIOETHICS 169 (2003).

30. *See* Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, A.B.A. J., Mar. 2011, at 53, 57.

31. FINKELSTEIN ET AL., *supra* note 25, at 9.

32. *Id.*

33. Arshagouni, *supra* note 26, at 800.

Accordingly, parties who wish to procreate by means of surrogacy must navigate a legal minefield. The drastically different state approaches to surrogacy as a general practice have increased the potential for custody disputes, introducing an element of uncertainty for both prospective parents and surrogates.[34] Likewise, the inconsistency among states has increased the cost of all surrogacy arrangements—whether commercial or altruistic—by artificially limiting the supply of legally available gestational surrogates and the cost of assisted reproduction.[35] Yet, while the dangers of a fractured market illustrate the pressing need for uniform regulation of gestational, commercial surrogacy, the question remains as to how to establish a system that accommodates such a wide range of competing interests.[36]

This Note argues that there is no need to create a new system to regulate gestational, commercial surrogacy agreements because the Fair Labor Standards Act ("FLSA") provides an existing framework that accounts for the needs of intended parents[37] and surrogates. As previously stated, opponents argue that gestational, commercial surrogacy is inherently exploitative and that it therefore puts women of lower socioeconomic status at risk of abuse.[38] Originally enacted in the New Deal era, the FLSA was explicitly designed to protect such populations: vulnerable members of the labor force.[39] Characterizing surrogates as employees and requiring intended parents to adhere to the FLSA's minimum wage requirement will protect gestational, commercial surrogates from exploitation and promote reproductive autonomy by allowing women to choose the occupation of gestational surrogacy. Subjecting the intended parents and potential surrogates to federal oversight will also foster a degree of accountability between the contracting parties, thereby mitigating the risk of heartbreaking legal battles like the one between the Sterns and the Whiteheads in *In re Baby M*.[40] Since the FLSA covers only employees, not independent contractors, the statute provides the contracting parties with a degree of flexibility if the arrangement is an altruistic one among friends or

34. *See infra* Section II.C.

35. Arshagouni, *supra* note 26, at 800, 808.

36. *See, e.g.*, Dominique Ladomato, *Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation*, 23 HASTINGS WOMEN'S L.J. 245, 265 (2012) ("[R]egulation of . . . surrogacy contracts should be federal in nature.").

37. The term "intended parents" refers to the individuals who will raise the child after a surrogate gives birth. *See* FINKELSTEIN ET AL., *supra* note 25, at 5.

38. *See infra* Section II.A.

39. *See* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LAB. REV., June 1978, at 22, 24–28.

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

family rather than an arms-length transaction (i.e., a gestational, commercial surrogacy contract). Finally, regulating such surrogacy agreements under a preexisting statutory framework will circumvent challenges to Congress's constitutional authority to regulate surrogacy.[41]

This Note will analyze the current legal landscape governing gestational, commercial surrogacy as well as the viability of regulating it under the FLSA, demonstrating that regulation under the statute will promote uniformity without raising constitutional concerns and that such uniformity will, in turn, protect both surrogates and intended parents. Part I provides a brief overview of the surrogacy industry, and outlines the three main legal approaches to surrogacy as a general practice in the United States. Part II first presents and rebuts two of the most common arguments proffered by opponents of gestational, commercial surrogacy: that the practice exploits the surrogate and ultimately threatens the child. Part II then demonstrates why the lack of a uniform regulatory scheme poses a pressing problem for both intended parents and surrogates. Finally, Part III posits that the FLSA offers an appropriate framework for regulating the gestational, commercial surrogacy industry. In proposing this framework of regulation, Part III explains how the FLSA—which from its inception has restricted freedom of contract to resolve issues implicating public policy—offers a suitable vehicle for regulating gestational, commercial surrogate contracts. This Note concludes that the increasing prevalence of gestational surrogacy arrangements indicates that the question is no longer whether the practice should be regulated; rather, the question today is simply *how* to regulate it. The answer to that question lies within the FLSA.

I. MODERN FAMILIES: AN OVERVIEW OF SURROGACY IN THE UNITED STATES

Surrogacy, defined as "carrying a child to term for the benefit of someone else," is no longer practiced only at the fringes of society.[42] The advent of assisted reproductive technology ("ART") has catapulted commercial surrogacy, gestational or otherwise, into a "booming global business," with the Permanent Bureau of the Hague estimating that the industry grew one thousand percent internationally between 2006 and 2010.[43] Despite the increasing frequency of surrogacy

41. *See infra* Section III.B.

42. Arshagouni, *supra* note 26, at 799.

43. *See* FINKELSTEIN ET AL., *supra* note 25, at 6.

arrangements—both commercial and altruistic—the United States lacks a uniform federal stance and leaves regulation to the states, resulting in fifty different approaches that "run the gamut from acceptance to prohibition."[44] Such variance has spawned a litany of legal and ethical consequences, thus warranting federal interference. This Part begins by offering background on the technicalities of surrogacy as a general practice and the nature of the industry in the United States, and then details the three primary approaches states follow in regulating surrogacy.

A. The Booming Baby Business

Surrogacy comes in two forms: traditional and gestational.[45] Under a traditional surrogacy arrangement, the surrogate provides the egg, thereby becoming the child's "genetic progenitor."[46] By contrast, gestational surrogacy refers to an agreement in which the surrogate is impregnated via ART and bears no genetic relationship to the child.[47] Unlike traditional surrogacy, gestational surrogacy arrangements do not implicate concerns about a surrogate's ability to contractually abdicate her parental rights because, by definition, the surrogate lacks a natural, genetic relationship to the child.[48] Although gestational surrogacy only became possible in 1978 with the advent of in vitro fertilization ("IVF"), the Centers for Disease Control and Prevention ("CDC") found that between 1999 and 2013, gestational surrogacy arrangements resulted in the birth of approximately 18,400 children.[49] Because gestational surrogacy is preferred in most cases, and is far more common than traditional surrogacy, this Note only pertains to gestational surrogacy arrangements—commercial or otherwise.[50]

---

44. Richard F. Storrow, *Surrogacy: American Style*, *in* SURROGACY, LAW AND HUMAN RIGHTS 193, 216 (Paula Gerber & Katie O'Byrne eds., 2015).

45. FINKELSTEIN ET AL., *supra* note 25, at 5.

46. Arshagouni, *supra* note 26, at 801. For example, because Whitehead provided the egg, *In re Baby M* dealt with a traditional surrogacy arrangement. 537 A.2d 1227, 1236 (N.J. 1988).

47. FINKELSTEIN ET AL., *supra* note 25, at 5.

48. Arshagouni, *supra* note 26, at 802.

49. *ART and Gestational Carriers*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/art/key-findings/gestational-carriers.html (last updated Aug. 5, 2016) [https://perma.cc/JQD4-3YCK]. Additionally, the number of gestational carrier cycles more than tripled between 1999 (727) and 2013 (3,432), and statistics suggest that ninety-five percent of surrogacies today in the United States are gestational. *See id.*; *see also* Diane S. Hinson & Maureen McBrien, *Surrogacy Across America*, FAM. ADVOC., Fall 2011, at 32, 35; Marsha Darling, *Commercial Surrogacy and the Cost of Reproductive "Freedom*,*"* COUNCIL FOR RESPONSIBLE GENETICS, http://www.councilforresponsiblegenetics.org/GeneWatch/GeneWatchPage.aspx?pageId=357 (last visited Oct. 21, 2017) [https://perma.cc/NY9E-GWNS] (noting that the number of babies born to gestational surrogates increased by eighty-nine percent from 2004–2008).

50. *See* Storrow, *supra* note 44, at 200.

Gestational surrogacy agreements are either altruistic or commercial. Altruistic surrogacy refers to situations in which a surrogate agrees to carry a child without asking for compensation, with the potential exception of reimbursement for legal, medical, and other pregnancy-related expenses.[51] Commercial surrogacy involves the payment of a surrogate beyond reimbursement for such expenses.[52] Despite the varied manner in which states approach commercial surrogacy contracts, gestational surrogacy is a universally expensive undertaking. In any given arrangement, intended parents must anticipate inevitable medical, legal, and health insurance costs. Moreover, in states that permit commercial surrogacy, intended parents will incur fees paid to the surrogates, as well as a surrogacy agency's fees—if, of course, the parties choose to use an agency. In the United States, medical costs range between $20,000 and $80,000; legal fees between $3,000 and $15,000; agency charges between $6,000 and $54,000; and average payments to surrogates between $20,000 and $55,000.[53] Since for-profit surrogacy agencies facilitate the vast majority of commercial surrogacy contracts in the United States, such agencies are "at the center of a $75–150 million-per-year industry."[54] Accordingly, even in states that only permit altruistic surrogacy arrangements, it is reasonable to anticipate that "some money will change hands."[55]

B. Divergent State Law Approaches

While regulation of surrogacy in the United States "stands as a microcosm of the rest of the world, with the whole range of global attitudes towards surrogacy subsumed within its borders," the fifty state approaches to regulation of the practice are divisible into roughly three categories: (1) surrogacy is expressly prohibited; (2) surrogacy is

51. *See, e.g.*, FLA. STAT. ANN. § 742.15(4) (West 2017); VA. CODE ANN. § 20-160(B)(4) (West 2017); WASH. REV. CODE ANN. § 26.26.230 (West 2017).

52. *See* FINKELSTEIN ET AL., *supra* note 25, at 5 (defining commercial surrogacy as "surrogacy arrangements in which the surrogate is paid a fee above and beyond reimbursement for 'reasonable expenses' ").

53. *Id.* Although beyond the scope of this Note, whether the cost of surrogacy should be covered by insurance and to what degree surrogates should report income to the Internal Revenue Service are also of interest when discussing the cost of any form of surrogacy. *See* Storrow, *supra* note 44, at 206–07 (examining how some states have treated insurance coverage for surrogates, and the extent to which compensated surrogate mothers can expect to pay federal and state income taxes).

54. Holcomb & Byrn, *supra* note 21, at 651.

55. Storrow, *supra* note 44, at 206.

expressly allowed; and (3) surrogacy has not yet been addressed. [56] The following sections detail each approach in turn.

1. States Banning Surrogacy

Although the modern legislative landscape favors legalizing some form of surrogacy, five states still explicitly ban the practice in its entirety.[57] Bans on surrogacy involve either an outright prohibition—via legislative or judicial action—or an imposition of penalties on the intended parents, the surrogate, and the surrogacy agency.[58] The majority of states that ban all forms of surrogacy are primarily concerned with eliminating commercial surrogacy contracts, although state bans vary in degree.[59] For example, New York imposes a civil penalty of up to $500 on the parties to a commercial surrogacy contract and fines an agency that facilitates such a contract up to $10,000.[60] Similarly, until April 2017, the District of Columbia levied a civil penalty of up to $10,000 and a criminal penalty of up to a year imprisonment for brokering surrogacy contracts.[61] Perhaps the state with the harshest ban is Michigan, in which the relevant portion of its statute forbidding surrogacy provides:

> (2) A participating party . . . who knowingly enters into a surrogate parentage contract for compensation is guilty of a *misdemeanor punishable by a fine of not more than $10,000.00 or imprisonment for not more than 1 year*, or both.
>
> (3) A person other than a participating party who induces, arranges, procures, or otherwise assists in the formation of a surrogate parentage contract for compensation is guilty of a *felony punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years*, or both.[62]

By contrast, several states purport to ban surrogacy by declaring all forms of surrogacy contracts void, but, at the same time, these

---

56. *Id.* at 193.

57. *See id.* at 198; *see also* D.C. CODE ANN. § 16-402(b) (West 2017) (repealed Apr. 7, 2017); IND. CODE ANN. § 31-20-1-1 (West 2017); MICH. COMP. LAWS ANN. § 722.859 (West 2017); N.Y. DOM. REL. LAW § 123 (McKinney 2017); *In re* Baby M, 537 A.2d 1227, 1264 (N.J. 1988) (invalidating a surrogacy contract because such an agreement conflicted with the laws and public policy of New Jersey).

58. *See* Storrow, *supra* note 44, at 199 (discussing the different means by which states have discouraged or prohibited surrogacy).

59. *See id.*

60. N.Y. DOM. REL. LAW § 123.

61. D.C. CODE ANN. § 16-402(b) (repealed Apr. 7, 2017).

62. MICH. COMP. LAWS ANN. § 722.859 (emphasis added). Although challenged on due process grounds in 1992, this statute was upheld and remains in full force today. *See* Doe v. Attorney Gen., 487 N.W.2d 484, 486 (Mich. Ct. App. 1992) (rejecting the notion that the Michigan statute "violates the due process guarantee of freedom from government interference in matters of marriage, family, procreation, and intimate association").

statutes do not impose civil or criminal punishment.[63] While such laws leave parties without recourse if a dispute arises, the absence of punishment does allow individuals to arrange for procreation via surrogacy and simply rely on adoption laws, rather than parentage orders, to finalize the desired parentage designations.[64] To illustrate, a couple in Indiana seeking to enforce a surrogacy contract via a state judicial proceeding would be unable to do so, as the relevant statute provides that "it is against public policy to enforce any term of a surrogate agreement."[65] However, that same couple would not be penalized for using a surrogate's services and ultimately acquiring legal parentage of the child through adoption laws.[66] This so-called "adoption model" of surrogacy lacks the assurance of parentage embodied in a true surrogacy contract. Nevertheless, this workaround provides an alternative—albeit a contractually unenforceable one—to both commercial and altruistic surrogacy in states that facially appear to ban the practice in its entirety.[67]

2. States Where Surrogacy Is Expressly Permissible

Currently, fourteen states have statutes that authorize some form of gestational surrogacy.[68] However, a great deal of variation exists within these surrogacy-friendly states. For example, Florida, New Hampshire, Texas, Utah, and Virginia provide for the enforcement of gestational surrogate contracts, but require that intended parents be married, reside within the respective state, and possess a medical need for surrogacy.[69] Other states require a showing that at least one of the intended parents bears a genetic relationship to the child.[70] In a similar

63. *See, e.g.*, NEB. REV. STAT. ANN § 25-21,200(1) (LexisNexis 2017).

64. *See* Storrow, *supra* note 44, at 199 (noting that such laws do not serve as true surrogacy bans because parties may still agree to the creation of a child and carry out their aims through adoption law).

65. IND. CODE ANN. § 31-20-1-1 (West 2017).

66. *See id.*

67. *See* Storrow, *supra* note 44, at 199–200 ("[The adoption model] asks that we remove the taint of payment for the surrender of a child from the arrangement, not that we disallow the arrangement entirely.").

68. *See* FINKELSTEIN ET AL., *supra* note 25, at 9. This Note is only concerned with the legality of gestational surrogacy; however, certain "surrogacy friendly" jurisdictions that permit gestational surrogacies still forbid traditional surrogacy arrangements. *See, e.g.*, N.D. CENT. CODE ANN. § 14-18-05 (West 2017); TEX. FAM. CODE ANN. § 160.754 (West 2017).

69. *See* FLA. STAT. ANN. § 742.15(1) (West 2017); N.H. REV. STAT. ANN. § 168-B:17 (2017); TEX. FAM. CODE ANN. §§ 160.754(b), 160.756(b)(2); UTAH CODE ANN. § 78B-15-803(2)(b) (LexisNexis 2017); VA. CODE ANN. § 20-160(B)(8) (West 2017); *see also* Arshagouni, *supra* note 26, at 806 (explaining that "medical need for surrogacy" generally means that the intended mother cannot safely carry a child to term).

70. *See, e.g.*, VA. CODE ANN. § 20-160(B)(8).

vein, some states heavily regulate who can serve as a surrogate, while others impose no such restrictions.[71] Certain states require—where applicable—that a surrogate's husband expressly agree to the terms of a contract, while others do not require that a surrogate's spouse provide consent to the surrogacy arrangement.[72]

Moreover, the process of establishing legal parentage (i.e. parental rights) varies greatly from state to state.[73] California, the most surrogacy-friendly state in the country,[74] permits parents to file for parentage orders before a child is born.[75] This line of reasoning, announced by the California Supreme Court in *Johnson v. Calvert*, recognizes the rights of intended parents in all surrogate agreements.[76] However, courts in other states, such as Florida, Texas, and Virginia, will not issue a birth certificate granting parental rights unless the intended parents file a petition with a court after the child's birth.[77] The consequences of the various state approaches to determining parental rights are discussed *infra* in Section II.C.

With regard to compensation, surrogacy permissive states are likewise "all over the proverbial map."[78] Florida forbids compensation of gestational surrogates beyond any "reasonable living, legal, medical, psychological, and psychiatric expenses" incurred during and after the pregnancy.[79] Other states forbid individual brokers or agencies from

71. *See, e.g.*, UTAH CODE ANN. § 78B-15-803(2)(b) (requiring the gestational mother to have had at least one pregnancy and delivery prior to entering into a surrogacy agreement); VA. CODE ANN. § 20-160(B)(8) (providing that the surrogate mother must submit to a home study by a local department of social services); WASH. REV. CODE ANN. § 26.26.220 (West 2017) (forbidding an unemancipated minor from entering into a surrogacy contract).

72. *Compare* 750 ILL. COMP. STAT. ANN. 47/25(c)(2) (West 2017) (requiring consent of surrogate's husband), *with* NEV. REV. STAT. ANN. § 126.770(1)–(2) (West 2017) (consent of legal spouse or domestic partner not required).

73. *See* FINKELSTEIN ET AL., *supra* note 25, at 9. *Compare* 750 ILL. COMP. STAT. ANN. 47/25(c)(4)(i) (requiring a surrogacy contract to provide for the "express written agreement of the intended parents to accept custody of the child immediately upon his or her birth"), *with* VA. CODE ANN. § 20-160(D) (stating that intended parents "shall file a written notice with the court that the child was born to the surrogate within 300 days after the last performance of assisted conception" before the court will enter an order directing the state to issue a new birth certificate naming the intended parents as the parents of the child).

74. *See* Arshagouni, *supra* note 26, at 807 (stating that "California has the most permissive approach toward surrogacy services").

75. *See* CAL. FAM. CODE § 7962(e) (West 2017).

76. 851 P.2d 776 (Cal. 1993) ("[S]he who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.").

77. *See* FLA. STAT. ANN. § 742.16(1) (West 2017); TEX. FAM. CODE ANN. § 160.760 (West 2017); VA. CODE ANN. § 20-160(D).

78. Arshagouni, *supra* note 26, at 808.

79. FLA. STAT. ANN. § 742.16(1); *see also* VA. CODE ANN. § 20-160(D); WASH. REV. CODE ANN. § 26.26.230 (West 2017).

brokering any surrogacy contract in exchange for compensation.[80] In a different vein, Maine recently updated its Parentage Act to allow for a surrogate's compensation that is "reasonable" and "negotiated in good faith."[81] Nevada and Utah likewise take a more permissive approach to the compensation of surrogates and have provisions similar to Maine's governing the compensation of surrogates.[82]

3. States Where Surrogacy Is Not Clearly Addressed

Despite the increasing prevalence of gestational surrogacy, the vast majority of states have yet to explicitly address the legal status of the practice. Such uncertainty creates complex disputes, forcing intended parents and potential surrogates to discern from adoption statutes or case law the enforceability of a potential surrogacy arrangement, altruistic or otherwise. For example, commentators consider Oregon a surrogacy-friendly state because the state issues prebirth parentage orders.[83] Similarly, Iowa appears to implicitly condone surrogacy by explicitly excluding surrogacy from its statute defining human trafficking.[84] Yet, neither Oregon nor Iowa have squarely issued an opinion on surrogacy. Conversely, an attorney general opinion from Kentucky suggests that surrogacy contracts violate Kentucky's ban on selling children.[85] Roughly thirty-one states have similarly opaque approaches to surrogacy. Without relevant case law or statutes, the degree of enforceability of surrogacy contracts remains uncertain in over half the states.[86]

Such uncertainty has produced a variety of complex disputes with uncertain outcomes. To illustrate, in 2015, a Pennsylvania judge ruled that an intended mother—with no biological connection to the gestational child—could not disavow the surrogacy contract that she and her husband (the intended father) had entered into prior to divorcing each other and thus had to remain the legal mother of the

80. *See, e.g.*, N.H. REV. STAT. ANN. § 168-B:16(IV) (2017); WASH. REV. CODE ANN. § 26.26.230.

81. Maine Parentage Act, ME. REV. STAT. ANN. tit. 19-a, § 1932(4) (2016).

82. *See* NEV. REV. STAT. ANN. § 126.810 (West 2017); UTAH CODE ANN. § 78B-15-803(2)(h) (LexisNexis 2017).

83. FINKELSTEIN ET AL., *supra* note 25, at 11.

84. *See* IOWA CODE ANN. § 710.11 (West 2017) ("A person commits a class 'C' felony when the person purchases or sells or attempts to purchase or sell an individual to another person. This section does not apply to a surrogate mother arrangement.").

85. *See* Op. Att'y Gen. No. 81-18 (Ky. 1981); *see also* 85 Op. Att'y Gen. 348 (Md. 2000) (suggesting surrogacy agreements are unlawful due to their close relation to adoption-for-pay agreements).

86. *See* Arshagouni, *supra* note 26, at 808 (finding that "it is entirely unclear how enforceable such [surrogacy] contracts would be in those states").

child.[87] Because Pennsylvania had no statute addressing the enforceability of such a contract, it was unclear from the outset whether the intended mother or the intended father would prevail. Even more recently, a gestational surrogate appealed to the Iowa Supreme Court in hopes of gaining custody of the child she delivered.[88] As this small sampling of stories illustrates—and as discussed in greater detail *infra*—the legal uncertainty surrounding the enforceability of surrogacy contracts has the potential to devastate surrogates, intended parents, and, of course, the children born through such arrangements.

II. WOMB SERVICE: THE ETHICAL AND LEGAL IMPLICATIONS OF UNREGULATED COMMERCIAL SURROGACY

The rapid growth of the commercial surrogacy industry has prompted a number of arguments in opposition to the practice. This Part presents and rebuts two of the most oft-cited objections to commercial surrogacy: (1) surrogacy is an exploitative practice that harms the women who serve as surrogates; and (2) commercial surrogacy is detrimental to the children borne of such arrangements because it reduces them to commodities. After evaluating these objections, this Part concludes that the most effective means of avoiding any potential—albeit unlikely—exploitation of surrogates or commodification of children is to bring surrogacy into the fold of federal regulation.

A. Service or Servitude?

Opponents of commercial surrogacy frequently attack the practice on moral grounds, arguing that compensating surrogates is an inherently exploitative practice.[89] Of primary concern to many is the presumed socioeconomic inequity between a surrogate and the intended parents—the fear that widespread commercial surrogacy will perpetuate an "unacceptable class distinction whereby rich, barren

87. William J. Giacomo & Angela DiBiasi, *Mommy (and Daddy) Dearest: Determining Parental Rights and Enforceability of Surrogacy Agreements*, N.Y. ST. B. ASS'N J., July/Aug. 2015, at 18, 18; Jessica Grose, *The Sherri Sheppard Surrogacy Case Is a Mess. Prepare for More Like It.*, SLATE (Apr. 28, 2015, 5:54 PM), http://www.slate.com/blogs/xx_factor/2015/04/28/sherri_shepherd_surrogacy_case_there_s_little_consensus_on_the_ethical_dimensions.html [https://perma.cc/SE3H-X97P].

88. Ellen Trachman, *Extreme Surrogacy Nightmare Heads to Iowa Supreme Court*, ABOVE L. (June 28, 2017, 4:42 PM), http://abovethelaw.com/2017/06/extreme-surrogacy-nightmare-heads-to-iowa-supreme-court/ [https://perma.cc/QA82-B8PC].

89. *See, e.g.*, Wilkinson, *supra* note 29, at 170.

women benefit at the expense of poor, fertile women."[90] Proponents of this view worry that "a pool of surrogates could well be created on the model of working class prostitution."[91] Many further oppose the practice because they believe that prospective surrogates cannot fully grasp ex ante the physical and psychological risks associated with carrying another couple's child to term.[92] Under this view, a surrogate's inability to provide informed consent would invalidate any type of surrogacy contract at the outset. However, these arguments all rest on the paternalistic assumption that the majority of gestational surrogates are of a lower socioeconomic status than the intended parents, lack alternative means of earning an income, and are thus ripe for exploitation.[93]

Despite the dismal predictions about its consequences, the exploitative nature of commercial surrogacy has yet to be substantiated by empirical data.[94] Recent studies do not suggest a growing pool of desperate, reproductive prostitutes.[95] On the contrary, the available research suggests that surrogates are generally Caucasian, Christian women in their late twenties or early thirties, many of whom have achieved some degree of higher education and who are generally "mature, experienced, stable, self-aware, and extroverted non-

90. Weldon E. Havins & James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating "Non-Traditional" Gestational Surrogacy Contracts*, 31 MCGEORGE L. REV. 673, 688 (2000).

91. *See* Wilkinson, *supra* note 29, at 181 (quoting Bob Brecher, *Surrogacy, Liberal Individualism and the Moral Climate*, *in* MORAL PHILOSOPHY AND CONTEMPORARY PROBLEMS 195 (J.D.G. Evans ed., 1987)). *But see* Arshagouni, *supra* note 26, at 823 ("[P]rostitution and surrogacy are fundamentally different, both in process and purpose.").

92. *See* Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 24 (1989) ("The most frequent argument . . . against contracts of surrogate motherhood is that they are not truly voluntary, because the surrogate mother doesn't know what she is getting into and would not sign such a contract unless she was desperate.").

93. *See* Arshagouni, *supra* note 26, at 823 ("It has been argued that the great majority of gestational surrogates are substantially of lower socioeconomic status than the intended parents.").

94. As the surrogacy industry has experienced expansive growth only in recent decades, the available empirical studies on surrogate mothers focus on relatively small sample sizes. *See, e.g.*, Todd D. Pizitz et al., *Do Women Who Choose to Become Surrogate Mothers Have Different Psychological Profiles Compared to a Normative Female Sample?*, 26 WOMEN & BIRTH e15, e20 (2013) ("Replicating this study with a larger sample size would be a valuable area of future research [on the psychological profiles of surrogate mothers]."). As such, there is a possibility—although, a rather unlikely one based on the data that has already emerged—that the risk of consequences is still omnipresent and might be revealed in later studies with larger sample sizes.

95. *See* FINKELSTEIN ET AL., *supra* note 25, at 34–35 ("[M]ost women in developed countries who agree to become either altruistic or commercial surrogates are Caucasian, Christian, and in their late 20s-early 30s." (citing Karen Busby & Delaney Vun, *Revisiting* The Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 42–43 (2010))).

conformists."[96] One study of American surrogate mothers found that eleven out of the seventeen women surveyed had some form of college education, thirteen of the women were Caucasian, and four were Hispanic.[97] Although surrogate mothers tend to come from working-class backgrounds with modest, rather than low, income levels, "no empirical study . . . indicates that any surrogate mothers became involved with surrogacy because they were experiencing financial distress."[98] Thus, while surrogates are not typically in the same economic class as the intended parents, they do not turn to surrogacy as a means of escaping destitution—rather, women who elect to become surrogates do so of their own volition, simply preferring surrogacy to other available employment options.[99]

Moreover, the available empirical data on the psychological profiles of surrogates indicates that the modern surrogate mother is a far cry from the trapped reproductive servant portrayed by opponents of commercial surrogacy. To illustrate, recent research on the psychological profiles of potential surrogates revealed that "surrogate mother candidates appear to be a composite of being both bold and tender, [and] sufficiently hardy to manage the role of surrogacy[ ] as well as [to] understand[ ] the importance of emotional boundary-setting related to pre-natal attachment."[100] Similarly, a longitudinal study on the psychological well-being of surrogates surveyed twenty surrogates ten years after the surrogacy process and found that none of the surrogates surveyed "expressed regrets about their involvement."[101] In fact, the relevant research suggests that surrogates tend to form

96. Lina Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 AM. U. J. GENDER SOC. POL'Y & L. 555, 560 (2013) (citing Karen Busby & Delaney Vun, *Revisiting* The Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 51–52 (2010)); *see also* Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21, 31 (2005) (noting that "women of color are greatly underrepresented among surrogate mothers").

97. Karen Busby & Delaney Vun, *Revisiting* The Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 43 (2010) (discussing Melinda M. Hohman & Christine B. Hagan, *Satisfaction with Surrogate Mothering: A Relational Model*, 4 J. HUM. BEHAV. SOC. ENV'T 61 (2001)).

98. *Id.* at 44; *see also* Storrow, *supra* note 44, at 214 ("The data reveal that surrogate mothers in the United States are not poverty-stricken but are instead educated women who prefer surrogacy to other options they have to earn income.").

99. *See* Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1234–35 (2013) (explaining that many military wives, who move often but have good health benefits, often choose to serve as surrogates to double their household incomes); *see also* Peng, *supra* note 96, at 562 ("There was no evidence in any study . . . that indicated the women were being pressured or coerced into becoming surrogates.").

100. Pizitz et al., *supra* note 94.

101. *See, e.g.*, V. Jadva et al., *Surrogate Mothers 10 Years On: A Longitudinal Study of Psychological Well-Being and Relationships with the Parents and the Child*, 30 HUM. REPROD. 373, 373 (2014).

stronger emotional bonds with the intended parents than with the fetus;[102] accordingly, surrogates who feel acknowledged for the altruistic aspects of their work report an even higher degree of satisfaction with the process.[103] Few women report that money is their sole reason for entering the surrogacy contract.[104] Indeed, many report that they enjoy being pregnant or are fulfilled by the ability to give life to a childless couple.[105] However, unregulated regimes lack mechanisms by which to ensure that *all* potential surrogates are psychologically capable of bearing someone else's child and have access to the necessary social support throughout the process.[106]

Related to the issue of exploitation is the inherent tension between a surrogate's reproductive autonomy and the nature of pregnancy, which by definition has "an intense and long-term impact on the surrogate."[107] Once a surrogate contract is executed, "[a surrogate's] body is literally being used for someone else's purposes in a constant and inseparable manner."[108] Accordingly, some scholars also view commercial surrogacy as a form of "reproductive slavery," whereby women are reduced to commodities.[109] However, likening surrogacy to slavery "only works if the surrogate is coerced against her will."[110] The empirical data illustrates that gestational surrogates in the United

---

102. *See* Laufer-Ukeles, *supra* note 99, at 1234 ("[T]hese emotional bonds are between adults rather than with the fetus the surrogate carries and the baby she births.").

103. *See id.* at 1233 ("Most surrogate mothers, and especially the ones who are particularly satisfied with the process, report continued relationships and contact with the commissioning couple . . . .").

104. This sentiment should, however, be tempered by the observation that "surrogates may be influenced by social pressure to construct their motivations as altruistic because that is more socially acceptable than to state money as their sole motivation." Peng, *supra* note 96, at 564 (citing HELENA RAGONÉ, SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART 71–73 (1994)).

105. *See* Kerian, *supra* note 22, at 116 ("Surrogacy is about mature, independent, rational human beings seeking to benefit one another.").

106. *See, e.g.*, Peng, *supra* note 96, at 563 ("[S]urrogates may not receive as much social support as other mothers during pregnancy . . . which could cause them to be more vulnerable than they otherwise would be.").

107. FINKELSTEIN ET AL., *supra* note 25, at 30.

108. Laufer-Ukeles, *supra* note 99, at 1236. Laufer-Ukeles further elaborates: "There is no going home at the end of the day; there are no breaks and one cannot really quit or get a new job without complete upheaval and the suffering involved in undergoing an abortion." *Id.*

109. Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391, 398–99 (2012). Commentators that liken commercial surrogacy to slavery have further suggested that commercial surrogacy perpetuates racial exploitation because it "enables white couples to procure the services of minority women to serve as surrogates and bear white offspring." *Id.* at 407–08; *see, e.g.*, Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139 (1990).

110. Arshagouni, *supra* note 26, at 838.

States volunteer to serve as surrogates.[111] And principles of decisional autonomy dictate that surrogates are entitled to choose whether to gestate a child.[112]

If such critiques of commercial surrogacy are rooted in any truth, then it is all the more evident that regulation thereof is necessary. Even the most adamant critics of commercial surrogacy recognize the need for regulation to minimize any potential exploitative effects on surrogates.[113] For example, Professor Stephen Wilkinson argues that commercial surrogacy does lead to the exploitation of poor women.[114] Yet he continues to state that "we should seek to avoid the exploitation in other ways: by ensuring that surrogates are well paid."[115] And while surrogates are not "financially distressed," studies do indicate that surrogates are generally less affluent than most intended parents.[116] For example, in 1994, unmarried surrogates' income levels ranged from $16,000–$24,000 ($26,494–$39,741 in 2017), while the median household income at the time was $32,264 ($53,426 in 2017) and the poverty threshold for a single person was $7,547 ($12,497 in 2017).[117] While relatively slight when one accounts for the fact that households encompass more than one person, such an imbalance has the potential to perpetuate a gap between the contracting parties' bargaining powers—a gap that cannot be closed by unregulated freedom of contract.[118] The presence of unequal bargaining powers in an unregulated regime may prove "dangerous and detrimental to the

111. *See* Kerian, *supra* note 22, at 139 ("[W]omen who choose to be surrogates do so willingly."); Peng, *supra* note 96, at 566 ("[S]tudy after study has consistently failed to find . . . objective indicia of exploitation in the vast majority of surrogacy arrangements.").

112. *See* London, *supra* note 109, at 402–03 (explaining that surrogacy is a "predictable outgrowth" of feminist advancements allowing women to postpone childbearing and take ownership of their own reproductive capacities).

113. *See* Wilkinson, *supra* note 29, at 185–86 ("[M]y own view is that commercial surrogacy could be rendered non-exploitative by regulations . . . ."); *see also* Smolin, *supra* note 26, at 265–66 (arguing that the legal systems governing adoption should be applied to gestational and traditional surrogacy arrangements to avoid violating international prohibitions on the sale of human beings).

114. *See* Wilkinson, *supra* note 29, at 186 ("[P]ermitting commercial surrogacy may allow poor women to be exploited . . . .").

115. *Id.*

116. Peng, *supra* note 96, at 564.

117. *Id.* (discussing HELENA RAGONÉ, SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART 54–55 (1994)); *see also* U.S. CENSUS BUREAU, INCOME, POVERTY, AND VALUATION OF NONCASH BENEFITS: 1994, at 25 (1994), https://www.census.gov/library/publications/1996/demo/p60-189.html [https://perma.cc/TZT3-PX23]. The 2017 values were calculated via DOLLARTIMES, https://www.dollartimes.com/calculators/inflation.htm (last visited Nov. 4, 2017) [https://perma.cc/4DG4-XTAZ].

118. *See* Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423, 440 (2014) (noting that the "unfettered and unregulated freedom of contract may prove to be very dangerous and detrimental to the women and children who are involved").

women who are involved in surrogacy agreements."[119] As such, regulating commercial surrogacy contracts will not proliferate abuse of surrogates—rather, a uniform system of federal regulation is essential to avoid any feared exploitation.

B. In the Best Interest of Whom?

In addition to concern for the well-being of the surrogate mothers, opponents further argue that commercial surrogacy threatens the rights, well-being, and best interests of the children borne through such arrangements.[120] First, commentators assert that no one can represent the best interests of the child during preconception negotiations, as it is "practically impossible" to determine what a child's best interests are before that child is even conceived.[121] Many opponents worry that a child born to a surrogate will ultimately suffer higher levels of psychological problems than a natural born child due to the absence of a biological connection with their birth mother.[122] Other child psychologists posit that children will suffer "emotional anguish" upon learning that they were given up by their birth mother in exchange for money.[123]

However, longitudinal studies do not illustrate any recurring pattern of psychological disorders among surrogate children.[124] For example, Professor Susan Golombok of Cambridge University found that children born to surrogates were "generally well-adjusted," and that behavioral issues arose only in circumstances where a child's mother displayed signs of emotional distress about the child's biological origins.[125] To rebut arguments that children born to surrogates are

---

119. *Id.*

120. *See* Browne-Barbour, *supra* note 27, at 442–43 ("[P]reconception arrangements cannot be based upon a true best interest determination [for the child].").

121. *Id.* at 443, 472 ("Preconception agreements protect the interests of the commissioners, the gestational woman and brokers. Yet, who protects the best interest of a child produced through such arrangements?"). While custody is determined in the United States based on the "best interest of the child" standard, very few courts actually apply this standard when faced with disputed surrogacy contracts. *See* FINKELSTEIN ET AL., *supra* note 25, at 22 ("[C]ourts faced with disputes surrounding surrogacy contracts have looked more often at issues related to the adults who entered the contract.").

122. *See* Arshagouni, *supra* note 26, at 834 ("One of the primary concerns of those opposed to surrogacy involves the potential harms that may be visited upon the children.").

123. Jennifer L. Watson, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers Be Compensated for Their Services?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 529, 549 (2007).

124. *See* Arshagouni, *supra* note 26, at 836 ("The feared adverse effects on the children have not significantly materialized.").

125. Susan Golombok et al., *Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment*, J. CHILD PSYCHOL. & PSYCHIATRY 653, 657 (2013) ("[T]he

distressed to discover their biological origins, commentators point to the fact that children are rarely embarrassed to learn that they are the product of IVF.[126] Accordingly, there is little reason to assume that children born to surrogates would be devastated to learn that their parents paid a woman to gestate them.[127] To the contrary, some scholars suggest that children "may even feel special when they discover just how much effort and money their parents invested in bringing about their creation."[128]

Moreover, concerns for the best interests of the child are inherently intertwined with the fear that commercial surrogacy reduces children to traded commodities whose interests cannot be represented by "adult-centered" market mechanisms.[129] Under this approach, commentators believe that compensation will induce surrogates to act as carriers for couples who offer the best terms and highest compensation—not for the couples who are best suited to raise children.[130] Other opponents liken surrogacy to "baby-selling," and argue that at its core, commercial surrogacy is nothing more than the sale of children for valuable consideration.[131] Those who view commercial surrogacy as the commodification of children further fear that a child born deformed or with genetic defects may be treated as an "unwanted commodity."[132] Yet, if a commercial surrogacy contract is legally enforceable, intended parents will also be bound by its terms and, thus, cannot simply cast off a child with undesired maladies.

Objections to commercial surrogacy as the commodification of children fail when applied to the context of gestational surrogacy. Unlike under the terms of a traditional surrogacy contract, a

---

difference in adjustment that was identified for surrogacy children was not indicative of a psychological disorder."); *see also* Arshagouni, *supra* note 26, at 836 (noting that children born via surrogacy "display essentially the same level of psychosocial development as children born through natural conception").

126. *See* Posner, *supra* note 92, at 24.

127. Watson, *supra* note 123, at 550.

128. *Id.*

129. *See* FINKELSTEIN ET AL., *supra* note 25, at 19 (noting that "market mechanisms are adult-centered and focus on bargaining power between adults [so] they cannot properly account for the rights and best interests of children").

130. *See* Watson, *supra* note 123, at 548.

131. *See* Smolin, *supra* note 26, at 278–79 ("[S]ale of children is transfer of a child for remuneration or any other consideration.").

132. *See* FINKELSTEIN ET AL., *supra* note 25, at 20 (explaining that a child can lose his or her right to nationality and identity when the intended parents find out about a birth defect while the surrogate is pregnant and subsequently abscond their responsibility for the child, resulting in loss of protection by international agreements such as the U.N. Convention on the Rights of the Child); Kerian, *supra* note 22, at 156–57 ("Krimmel contends that, 'creating a child without desiring it fundamentally changes the way we look at children . . . .' " (quoting Herbert T. Krimmel, *The Case Against Surrogate Parenting*, HASTINGS CTR. REP., Oct. 1983, at 35, 36–37)).

gestational surrogate has no biological connection to the child she agrees to gestate.[133] Accordingly, a gestational mother has no legal parental rights or duties to sell—the child belongs to the intended parents from the outset.[134] As Judge Posner explains, "[t]he surrogate mother no more 'owns' the baby than the father does."[135] Much like a sperm donor who receives "cash, but no parental rights, in exchange for his donation," a gestational surrogate is not compensated for the delivery of her child but paid for her gestational services;[136] "[t]he fee paid to the surrogate is not to buy the child, but rather to compensate the surrogate for her gestational services."[137] By treating commercial surrogacy contracts as employment arrangements, regulating commercial surrogacy under the FLSA promotes such a view.

C. States as Laboratories: A Failed Experiment

While some may prefer to keep surrogacy beyond the reach of federal legislation, and instead allow states to act as laboratories of experimentation, a myriad of issues arise when states are permitted to take different approaches to regulating gestational surrogacy. One of the most pressing issues relating to surrogacy in the United States is the process of determining legal parentage.[138] The crux of the matter turns on whether a state will recognize the gestational surrogate as the legal mother of the child.[139] To date, jurisdictions have expressed a variety of views on the matter: some courts have endorsed biology as an "important factor in determining parentage," while others have indicated that there is no "overriding right" for a child to remain with his or her biological parents.[140] In *Johnson v. Calvert*, which has been dubbed the "second most" famous surrogacy dispute in the United States, the California Supreme Court held that when faced with two competing claims to maternity, the intention of the parties as manifested in the surrogacy contract governs the determination of legal

133. FINKELSTEIN ET AL., *supra* note 25, at 18.

134. *See, e.g.*, UNIF. PARENTAGE ACT § 801 (UNIF. LAW COMM'N 2002); Arshagouni, *supra* note 26, at 834 ("If the child is not [the gestational mother's], then she has nothing to sell.").

135. Posner, *supra* note 92, at 28.

136. *Id.*

137. Kerian, *supra* note 22, at 154.

138. *See* Storrow, *supra* note 44, at 207 ("The second main area of surrogacy regulation in the United States relates to parentage.").

139. *See id.* ("The issue at this point in the surrogacy journey is whether the law will recognize that the surrogate is *not* the legal mother . . . ."); *see, e.g.*, J.R. v. Utah, 261 F. Supp. 2d 1268 (D. Utah 2003) (deeming it unconstitutional for a state to presume the gestational surrogate is the legal mother); Belsito v. Clark, 644 N.E.2d 760, 767 (Ohio Ct. Com. Pl. 1994) ("The answer of this court is that the individuals who provide the genes of that child are the natural parents.").

140. FINKELSTEIN ET AL., *supra* note 25, at 21.

parentage.[141] Accordingly, it is wise for intended parents to enter a surrogacy contract in a surrogacy-permissive state that also recognizes intended parents as the *only* legal parents of the child.

However, executing a surrogacy contract in a state that recognizes the parental rights of intended parents does not foreclose the possibility of a dispute if a surrogacy contract goes awry. While the U.S. Constitution requires all states to give "full faith and credit" to the acts and judgments of their sister states, this guarantee only protects intended parents who are able to obtain prebirth declarations of parentage.[142] A prebirth declaration of parentage "provides intended parents with the most expeditious route to parentage recognition because it renders amendment of the birth certificate and adoption unnecessary after the child is born."[143] Judgments of legal parentage obtained prior to birth entitle parents to recognition of legal parentage in whichever state they ultimately settle.[144] But not all surrogacy-permissive states permit prebirth parentage orders. For example, New Hampshire recognizes the right of a surrogate mother to keep the child up to seventy-two hours after birth, and Texas requires that intended parents get prebirth judicial approval of surrogacy contracts and file notice of the birth in order to validate their parental rights.[145] Ultimately, without a prebirth parentage order, other states are not bound to recognize the legal rights of intended parents under the Full Faith and Credit Clause.

Simply traveling to a surrogacy-permissive jurisdiction does not eliminate the legal uncertainty implicated by surrogacy contracts. Cross-border issues may arise when the intended parents and the surrogate mother reside in different states and the child is born in a third.[146] To illustrate, a Connecticut couple discovered that their child

141. 851 P.2d 776, 783–87 (Cal. 1993); Storrow, *supra* note 44, at 207.

142. U.S. CONST. art. IV, § 1; *see also* Storrow, *supra* note 44, at 211 ("Where intended parents have obtained judgment of parentage, they are entitled to recognition of that judgment by the state in which they ultimately settle.").

143. Storrow, *supra* note 44, at 211. By determining that the intended parents are the legal parents of the child prior to the child's birth, prebirth parentage orders give intended parents "immediate and sole access to and control over the child and its postnatal care." Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 634 (2005). Additionally, prebirth parentage orders enable the intended parents to put their names on the original birth certificate and hospital records, which in turn "allows the hospital to discharge the child directly to the intended parents, rather than to the surrogate." *Id.* at 634–35. Prebirth determination of parentage can also have "a solidifying effect on the child's insurance coverage" under the intended parents' policies. *Id.* at 635.

144. Storrow, *supra* note 44, at 211.

145. N.H. REV. STAT. ANN. § 168-B:25(IV) (2017); TEX. FAM. CODE ANN. §§ 160.756, 160.760 (West 2017).

146. *See* Storrow, *supra* note 44, at 210.

carried by a surrogate would require multiple heart surgeries.[147] The intended parents offered the surrogate $10,000 to abort the baby.[148] Since the contract was executed in Connecticut, which recognizes intended parents as the parents of a child born to a surrogate, the surrogate had no legal rights to the child.[149] So, the surrogate fled to Michigan to give birth to the child, as Michigan does not recognize or enforce surrogacy contracts.[150] Since the Connecticut couple lacked a prebirth parentage order, Michigan was under no obligation to recognize their parental rights. After giving birth, the surrogate ultimately gave "Baby S" up for adoption.[151] Such scenarios demonstrate that the individual state laws banning gestational surrogacy have resulted in significant hardship to intended parents and surrogates alike—all while failing to accomplish such states' intended goals of eliminating the practice.[152] In this realm, states have failed as laboratories of legislative experimentation; accordingly, the time has come for federal regulation of commercial surrogacy.

147. Erik Ortiz, *Surrogate Mom Offered $10k to Abort Baby with Disabilities*, N.Y. DAILY NEWS (Mar. 25, 2013, 2:24 PM), http://www.nydailynews.com/life-style/health/surrogate-mom-offered-10k-abort-baby-disabilties-article-1.1279997 [https://perma.cc/4F3R-GNAH].

148. *Id.*

149. *See* CONN. GEN. STAT. ANN. § 7-48a (West 2017) ("[T]he intended parent or parents under the gestational agreement shall be named as the parent or parents of the child."); Raftopol v. Ramey, 12 A.3d 783, 791 (Conn. 2011) (holding that the surrogate mother did not have parental rights that required termination because she bore no biological relationship to the child, had not adopted the child, and did meet the criteria in the artificial insemination statutes).

150. Ortiz, *supra* note 147.

151. Further complicating the matter was the fact that the Connecticut couple had used an anonymous egg donor. As Michigan law recognized only the biological father's paternity, the surrogate was able to put her own name on the child's birth certificate. *Id.*

152. The Connecticut case is one of many examples illustrating the hardships associated with the various state approaches to surrogacy and recognition of parental rights. *See, e.g.*, Prashad v. Copeland, 685 S.E.2d 199 (Va. Ct. App. 2009) (extending full faith and credit to custody orders issued in North Carolina granting a same-sex couple full custody over a child born to a surrogate in Virginia, which limited the availability of surrogacy to married heterosexual couples). Further, failing to recognize the intended parents as the legal parents of the child can adversely impact the surrogate and the child; for example, in the event that the intended parents change their minds prior to a child's birth, the surrogate may be forced to choose between raising an unwanted child or abandoning the baby. *See, e.g.*, Brianne Richards, Note, "*Can I Take the Normal One?" Unregulated Commercial Surrogacy and Child Abandonment*, 44 HOFSTRA L. REV. 201, 203 (2016) (noting that it is not an isolated incident when intended parents change their minds regarding a surrogacy agreement if they divorce prior to the surrogate giving birth).

III. REVISITING LABOR LAW: A PROPOSAL TO REGULATE SURROGACY UNDER THE FAIR LABOR STANDARDS ACT

This Note is by no means the first to suggest adopting a uniform, federal approach to the regulation of gestational surrogacy.[153] Indeed, the goal of this Note is not to resolve the litany of moral, ethical, economic, and political issues implicated by commercial surrogacy in one fell swoop. Instead, this Note suggests that a framework for regulating commercial surrogacy contracts *already* exists in the form of the FLSA. And, though this Note does not purport to offer an exhaustive method for implementing this framework,[154] it does hope to inspire support for viewing commercial surrogates as employees entitled to protection under the FLSA.

To demonstrate why the FLSA provides a tenable framework for regulating commercial surrogacy agreements, this Part briefly explores the history of the FLSA. Then, it asserts that the United States Department of Labor ("USDOL") should promulgate a rule that brings gestational surrogates under the umbrella of FLSA protection. Regulating surrogacy in such a manner will preclude the potential exploitation of surrogates, protect the expectations of both intended parents and surrogates, and preempt challenges to Congress's constitutional authority—all without foreclosing the possibility of altruistic surrogacy arrangements where desired.

A. The History of the Fair Labor Standards Act

A brief examination of the history of the FLSA helps demonstrate precisely why the statute is uniquely suited to govern commercial surrogacy contracts. At its core, the FLSA was designed to protect the most vulnerable members of the workforce from exploitation. It was enacted in June of 1938 following months of congressional debates, amendments, and years of judicially stymied struggles to enact federal protections against labor abuses.[155] Congressional efforts to establish federal labor standards were first blocked in 1918, when the Supreme Court struck down a law preventing

153. *See, e.g.*, Arshagouni, *supra* note 26, at 846 (arguing that "we should adopt a federal gestational surrogacy act"); Havins & Dalessio, *supra* note 90, at 690–91 (proposing model legislation for regulating gestational surrogacy contracts); Margalit, *supra* note 118, at 440 (advocating that surrogacy agreements be "premised upon a regulated, narrower notion of freedom of contract").

154. This Note is limited to the argument that the FLSA offers a tenable framework; thus, this Note will not discuss issues such as state contract law, which would surely be implicated by this proposal.

155. *See* Grossman, *supra* note 39, at 22.

products manufactured by child laborers from moving in interstate commerce on the grounds that it exceeded Congress's power under both the Commerce Clause and the Tenth Amendment.[156] Throughout the 1920s, the Court continued to void social legislation on similar constitutional grounds.[157]

However, the wave of New Deal legislation in the 1930s tipped the scales in favor of those advocating for federal wage and hour standards.[158] President Roosevelt's administration developed the National Industrial Recovery Act ("NIRA"), which suspended antitrust laws to reduce competition and enable the enforcement of fair labor practices.[159] Yet the success of the NIRA was short lived: on "Black Monday," May 27, 1935, the Court invalidated the NIRA's restrictive trade practices and progressive labor provisions.[160] Less than a year later, in *Morehead v. New York*, the Court inflicted another crushing blow on labor reform by declaring that a New York state law, which mandated minimum wages for female employees, violated freedom of contract and was therefore beyond the sphere of both state and federal control.[161]

Notwithstanding the Court's clear resistance to federal labor legislation, the Democratic Party continued to promise national labor reforms during the 1936 presidential election and suggested resorting to a constitutional amendment if needed to eliminate child labor and substandard working environments.[162] President Roosevelt interpreted his landslide win in the 1936 election as widespread support for New Deal legislation.[163] The final version of the FLSA, approved by

156. Hammer v. Dagenhart, 247 U.S. 251, 275–76 (1918).

157. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923) (striking down a District of Columbia law that set minimum wages for female workers as exceeding Congress's constitutional authority).

158. *See* Grossman, *supra* note 39, at 22–23.

159. *Id.* at 22. For example, under the President's Reemployment Agreement, employers signed more than 2.3 million agreements that guaranteed minimum wage and maximum workweeks to approximately 16.3 million employees. *Id.*; *see also* 2 FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 300, 308–12 (1938) (explaining the purposes and foundations of the recovery program on July 24, 1933 and issuing the President's Reemployment Agreement on July 27, 1933).

160. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) ("On both the grounds we have discussed, the attempted delegation of legislative power, and the attempted regulation of intrastate transactions which affect interstate commerce only indirectly, we hold the code provisions here in question to be invalid."); Grossman, *supra* note 39, at 23 ("All nine justices agreed that the act was an unconstitutional delegation of government power to private interests.").

161. 298 U.S. 587, 610–11 (1936).

162. John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 464 (1939).

163. Grossman, *supra* note 39, at 23.

President Roosevelt on June 25, 1938, set a rigid scale for hours and wages and prohibited child labor for those younger than sixteen.[164]

The FLSA was almost immediately challenged on constitutional grounds. However, in *United States v. Darby*, the Court declared the FLSA a permissible exercise of Congress's commerce power, explaining that it "extends to those activities intrastate which so affect interstate commerce."[165] The Court reasoned that the FLSA was an appropriate means by which Congress could achieve its legitimate end—that is, its desire to suppress "nationwide competition in interstate commerce by goods produced under substandard labor conditions."[166] Thus, *United States v. Darby* definitively established Congress's power to regulate wage and hour conditions under the FLSA, concluding that "legislation aimed at a whole [congressional objective] embraces all its parts."[167]

Today, the FLSA remains the primary mechanism for addressing potential employer abuses at the federal level.[168] The FLSA requires covered employers to pay eligible employees a minimum wage and an overtime premium at one-half the employees' regular rate of pay for hours worked in excess of forty hours per week.[169] When employers and employees are covered by the FLSA, its wage and hour provisions are mandatory and cannot be waived via contract, regardless of the parties' wishes.[170] The purpose behind the wage and hour provisions is, in effect, to ensure that workers with the lowest level of bargaining power are still able to hold their employers to a baseline standard of decency in the workplace.

However, FLSA protections extend only to "employees" engaged in interstate commerce.[171] The FLSA defines "employee" rather circularly as "any individual employed by an employer."[172] According to guidance from the USDOL, individual employees engage in interstate commerce when they "perform work involving or related to the movement of persons or things, whether tangibles or intangibles, and including information and intelligence" between states.[173] Engaging in

164. Forsythe, *supra* note 162, at 473.

165. 312 U.S. 100, 118 (1941); *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555–56 (1985) (holding that applying the FLSA to state and local governments did not violate the Tenth Amendment).

166. *Darby*, 312 U.S. at 123.

167. *Id.*

168. TIMOTHY P. GLYNN ET AL., EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 838 (3d ed. 2015).

169. 29 U.S.C. §§ 206(a)–(b), 207(a)(1) (2012).

170. *See* GLYNN, *supra* note 168, at 838.

171. 29 U.S.C. §§ 206(a), 207(a)(1); *see also* GLYNN, *supra* note 168, at 839.

172. 29 U.S.C. § 203(e)(1).

173. 29 C.F.R. § 779.103 (2017).

interstate communication while working also satisfies the interstate commerce requirement.[174] Even individual employees not personally engaged in interstate commerce will be covered if employed by an "enterprise engaged in commerce."[175] Accordingly, the vast majority of parties who use brokerage agencies to facilitate their surrogacy contracts would satisfy the commerce requirement.

Consistent with the FLSA's stated goal of protecting workers with lower levels of bargaining power, independent contractors cannot avail themselves of the FLSA's wage and hour protections. Independent contractors tend to have more specialized skills and thus, more bargaining power than the average worker.[176] Jurisdictions apply a wide range of multifactor tests to determine whether an individual is an employee or an independent contractor, but under each test the amount of control that an employer exerts over the employee is the most determinative factor.[177] The FLSA also contains a number of exemptions for otherwise covered workers—including individuals employed in "white collar" professions, managers, and administrators.[178] Such exemptions further highlight the fact that the FLSA's protections exist mainly to protect the most vulnerable members of the labor force.

B. Why the Fair Labor Standards Act?

The FLSA provides a suitable framework for regulating commercial surrogacy agreements for four primary reasons. First, the FLSA's remedial background makes it an apt candidate for regulating commercial arrangements. Second, FLSA coverage also benefits intended parents, as it encourages the parties to use agencies and articulate contractual obligations ex ante. Third, the FLSA is flexible such that parties who wish to enter altruistic arrangements will not be subjected to federal oversight. Fourth, regulating commercial surrogacy under a preexisting framework forecloses constitutional challenges.

First, the FLSA was enacted to prevent historic abuses of labor and to guarantee protections for workers with lower levels of bargaining

174. GLYNN, *supra* note 168, at 839.

175. 29 U.S.C. §§ 206(a), 207(a)(1).

176. *See, e.g.*, Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 184, 192 (S.D.N.Y. 2003) (applying the "economic reality test" to determine that Duane Reade delivery workers were employees and thus entitled to FLSA protections because the delivery workers' actions were integral to Duane Reade's business).

177. *See, e.g.*, McCary v. Wade, 861 So. 2d 358 (Miss. Ct. App. 2003) (applying the common-law test to determine that a lumber hauler was an independent contractor because he purchased his own tools and set his own delivery schedule).

178. 29 U.S.C. § 213.

power.[179] As discussed *supra* in Section II.A, one of the most oft-cited arguments by opponents of commercial surrogacy is that the practice is inherently exploitative because it puts women of lower socioeconomic status at risk of abuse.[180] Requiring intended parents to adhere to the FLSA's minimum wage requirements will ensure that surrogates are appropriately compensated and assured a baseline level of working conditions—thereby protecting surrogates from any perceived exploitation, compensatory or otherwise. Characterizing surrogates as employees will not relegate surrogates to reproductive slaves or prostitutes; rather, providing surrogates with employee status will promote reproductive autonomy by allowing women to choose to enter into the recognized occupation of gestational surrogacy.[181] Indeed, recognizing surrogacy as a profession under the FLSA legitimizes what many women already see as a viable and desirable—not essential—means of earning a living.[182] As one study of American surrogates found, "far from being 'used' or exploited" the participants made it very clear that they *wanted* to serve as surrogates, often in spite of the negative reactions of friends and family.[183]

Regulating commercial surrogacy as a form of legitimate employment under the FLSA would likely encourage intended parents and surrogates to use surrogacy agencies in order to satisfy the interstate commerce requirement. Promoting the use of surrogacy agencies ensures that most, if not all, gestational, surrogate candidates undergo screening and psychological counseling before agreeing to a contract.[184] Such screenings allow both parties to be fully informed about what the process will entail and to agree on how to handle conflicts before they might arise, avoiding the difficult scenarios exemplified by the situation of the Connecticut couple discussed in Section II.C.[185]

Second, intended parents would also benefit from FLSA coverage. Since the FLSA only covers employees, not independent contractors, the intended parents will have to exercise a certain degree

179. *See* GLYNN, *supra* note 168, at 838.

180. These arguments are addressed at length *supra* Section II.A.

181. While this Note acknowledges that endorsing surrogacy under the FLSA may not bar states from criminalizing the practice, regulating the market in the vast majority of states will likely reduce the cost of surrogacy; the lack of a uniformly legalized surrogacy regime "artificially limits the supply of surrogacy agencies, medical specialists, and gestational surrogates, thereby further increasing costs." Arshagouni, *supra* note 26, at 808.

182. *See* Peng, *supra* note 96, at 562.

183. *Id.*

184. *See* Holcomb & Byrne, *supra* note 21, at 650–52 (explaining that surrogacy agencies screen all parties involved and "arrange for any necessary medical and psychological testing").

185. *See supra* notes 146–148 and accompanying text.

of control over the surrogate's activities during the pregnancy to remain under the FLSA's coverage. Such control could include selecting the surrogate's doctor, maintaining the ability to attend appointments, and mandating that the surrogate communicate with the intended parents throughout the pregnancy about diet and exercise. Providing intended parents with greater control in exchange for steady payment to the surrogate would foster a degree of accountability among the parties.[186] Subjecting the contracting parties to federal oversight will further increase consistency among states, by, for example, enabling intended parents to obtain prebirth parentage orders that eliminate any possibility of confusion about parental rights after the child's birth.[187] And, extending FLSA coverage to commercial surrogates will encourage all parties to detail their wage, hour, and other expectations in the contract itself, reducing the possibility that a surrogate candidate might renege or later demand more compensation.[188] Given that many surrogates and intended parents do not know one another prior to entering into a contract, providing a sense of security to both parties is critical to the success of the surrogacy.[189]

Additionally, a more uniform system will help reduce the cost of surrogacy by making it more accessible,[190] which, in turn, will offset hesitations that intended parents might have about paying surrogates a minimum hourly wage.[191] In the vast majority of cases, subjecting intended parents to minimum wage requirements would not increase the cost of a surrogacy agreement. Currently, in jurisdictions that permit payment of surrogates, the average surrogate earns anywhere between $20,000 and $55,000.[192] Assuming a surrogate is in a jurisdiction where the minimum wage is $7.25, paying a surrogate for nine months of labor—deducting eight hours a day for sleep and

186. Holding parties accountable for their contractual obligations is critical to avoiding the emotional custody battles detailed *supra* Section II.C.

187. *See* Snyder & Byrn, *supra* note 143, at 634 (discussing how prebirth parentage orders benefit the intended parents by granting them "immediate and sole access to and control over" the baby once it is born).

188. *See, e.g.*, *supra* notes 146–147 and accompanying text; *see also* Mike Kilen, *Who is Baby H's Parent? Iowa Legal Battle Pits Surrogate Against Couple Who Hired Her*, DES MOINES REG. (Aug. 29, 2017, 8:14 PM), http://www.desmoinesregister.com/story/news/2017/08/29/who-baby-hs-parent-iowa-legal-battle-pits-surrogate-against-couple-who-hired-her/580737001/ (last updated Sept. 5, 2017, 12:01 PM) [https://perma.cc/55PL-RV94].

189. *See* Laufer-Ukeles, *supra* note 99, at 1232 (discussing the realities of the relationships between surrogate mothers and intended parents).

190. *See supra* note 181.

191. *See id.* at 846 ("A federal approach would achieve uniformity more quickly, and it would obviate any forum shopping within the United States.").

192. FINKELSTEIN ET AL., *supra* note 25, at 7. This range does not include the associated medical, agency, legal, or other costs.

including overtime[193]—amounts to $42,920. This amount is well within the established range of fees currently paid to surrogates.[194]

Third, bringing surrogates under the FLSA's protections will not eliminate altruistic surrogacy arrangements or foreclose the possibility of flexible agreements. If the intended parents and the surrogate know and trust one another prior to entering the agreement, the parties can readily avoid the FLSA's coverage by maintaining an independent contractor relationship.[195] In such a situation, the intended parents will likely feel more comfortable relinquishing a degree of control to the surrogate, as opposed to in a commercial transaction brokered by a surrogacy agency.[196] Ultimately, the purpose of providing surrogates with FLSA coverage is to protect the rights of a potential surrogate by characterizing her as an employee—entitling her to greater protections and assured compensation. Regulating surrogacy under the FLSA reserves a degree of flexibility for situations in which such protection is unnecessary, for example, where a friend or relative offers to serve as a surrogate.

Finally, there are enormous advantages to regulating surrogate agreements under a preexisting statutory framework. As detailed earlier in this Note, proponents of the FLSA fought long and hard to obtain the Court's stamp of constitutional approval.[197] Having the USDOL promulgate a rule through the notice-and-comment process pursuant[198] to its powers under the Administrative Procedure Act will avoid challenges to Congress's constitutional authority to regulate labor.[199] As Congress has delegated the authority to the USDOL to

193. *See infra* note 205 and accompanying text.

194. FINKELSTEIN ET AL., *supra* note 25, at 7. Even in states with higher minimum wage rates, such as California, the cost of a surrogate would be $58,800 (((10.5 x 8.0) + (15.75 x 8.0)) x 280 = 58,800). *See* CAL. LAB. CODE § 1182.12 (West 2017). And, perhaps the most famous intended parents of 2017 are paying their surrogate $45,000—just slightly more than an arrangement under the minimum wage calculations that this Note proposes. *See* Maria Puente, *Reports: Kim Kardashian and Kanye West Hire a Surrogate to Carry 3rd Baby*, USA TODAY (June 21, 2017, 6:30 PM), https://www.usatoday.com/story/life/people/2017/06/21/reports-kim-kardashian-and-kanye-west-hire-surrogate-carry-3rd-baby/103083250/ [https://perma.cc/7MAX-Z5BB].

195. *See* 29 U.S.C. § 206(a) (2012) ("Every employer shall pay . . . his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce . . . .").

196. *See*, *e.g.*, Laufer-Ukeles, *supra* note 99, at 1226 ("What makes surrogate motherhood so difficult to navigate is that it is a transaction in commercial intimacy, and it is hard to take account of commerciality and intimacy simultaneously.").

197. *See supra* Section III.A.

198. Using the notice-and-comment process is a critical component of this proposal, as the process permits opponents the opportunity to voice concerns and requires the USDOL to consider such comments. *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

199. *See* 5 U.S.C. § 553 (2012) (establishing procedural requirements for informal rulemaking by agencies).

promulgate rules carrying the force of law in this area, such a rule extending FLSA protection to surrogates would only be subject to highly deferential review under *Chevron v. Natural Resources Defense Council.*[200] Such a rule would, admittedly, announce a new position on whether surrogacy constitutes a form of legitimate employment subject to federal regulation. However, it is not inconsistent with the agency's past rulemaking actions, as the agency has continually regulated labor and wage conditions since *United States v. Darby* soundly established its authority to do so.[201] Nor would such a rule rise to the level of such extraordinary impact on an entire sector of the economy such that the agency's interpretation of its authority to regulate the labor conditions of covered surrogates be impermissible.[202]

Moreover, a USDOL rule governing surrogacy is quite reasonable in light of several of the USDOL's recent revisions to federal regulations for domestic workers.[203] In 2013, the USDOL extended federal overtime and minimum wage protection to previously exempted domestic workers by (1) eliminating provisions exempting third-party employers from paying minimum wage and overtime to domestic workers and (2) narrowing the definition of "companionship services." These changes illustrate a willingness to provide previously exempted domestic workers with FLSA coverage.[204] Moreover, the USDOL has promulgated a rule providing that where employees are required to be on duty for twenty-four hours or more, employers and employees may agree to exclude "a bona fide regularly scheduled sleeping period of not

200. 468 U.S. 1227 (1984). This Note acknowledges that the status of *Chevron* deference has been subject to much debate since Justice Gorsuch's appointment to the Supreme Court. However, as this Note goes to press, *Chevron* remains intact; thus, this Note applies the doctrine as it stands today.

201. 312 U.S. 100, 118 (1941).

202. *Cf.* King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (denying Chevron deference to the IRS's interpretation of 26 U.S.C. § 36B, finding "[i]t is especially unlikely that Congress would have delegated this decision to the IRS," given the massive political and economic significance of the issue).

203. Domestic service employment means "services of a household nature performed by a worker in or about a private home." U.S. DEP'T OF LABOR, FACT SHEET #79D: HOURS WORKED APPLICABLE TO DOMESTIC SERVICE EMPLOYMENT UNDER THE FAIR LABOR STANDARDS ACT 1 (2016), https://www.dol.gov/whd/regs/compliance/whdfs79d.htm [https://perma.cc/DW92-HR3H]. Section 202(a) provides the USDOL with the authority to regulate such employment, as it provides that "the employment of persons in domestic service households affects commerce." 29 U.S.C. § 202(a) (2012).

204. LEE HANSEN, CONN. GEN. ASSEMBLY, 2015-R-0276, NEW FEDERAL DOMESTIC WORKER REGULATIONS 1 (2015), https://www.cga.ct.gov/2015/rpt/pdf/2015-R-0276.pdf [https://perma.cc/9LS8-G7GD]. Companionship services "means the provision of fellowship and protection for an elderly person or person with an illness, injury, or disability who requires assistance in caring for himself or herself." U.S. DEP'T OF LABOR, FACT SHEET: APPLICATION OF THE FAIR LABOR STANDARDS ACT TO DOMESTIC SERVICE, FINAL RULE 1 (2013), https://www.dol.gov/whd/regs/compliance/whdfsFinalRule.htm [https://perma.cc/SD8W-MQRB].

more than eight hours worked."[205] This provision in particular provides a model for devising a similar rule with regard to surrogates and overtime payments.

In sum, the fractured nature of the commercial surrogacy industry and its resulting consequences for intended parents, surrogate candidates, and children borne through such arrangements indicate the need for federal regulation in this area. While this Note acknowledges that bringing commercial surrogacy under the FLSA's purview would be a substantial undertaking, the FLSA nevertheless offers a means of protecting the interests of both surrogates and intended parents. And, multiple features of the FLSA—including the overarching goal of the statute, and the DOL's rulemaking authority and willingness to regulate domestic workers—indicate that the FLSA provides a *feasible* method for beginning to establish a uniform approach to regulating gestational, commercial surrogacy.

CONCLUSION

The increasing availability of gestational surrogacy in recent years has triggered an enormous amount of discussion among scholars, human rights advocates, economists, and the media. The vast range of opinions about whether commercial surrogacy is exploitative or empowering to the surrogate, harmful or helpful to the child, and whether intended parents or the gestational surrogate are entitled to parental rights are all reflected within the United States' borders.[206] However, the legal minefield posed by the fifty different approaches to regulating commercial surrogacy has resulted in artificially high costs and uncertainty as to the parental status of both surrogates and intended parents. Accordingly, the time has come for federal regulation of surrogacy contracts.

The FLSA, which was enacted specifically to prevent labor abuses and to ensure basic minimum wage and overtime protection, provides a preexisting statutory framework for regulating commercial surrogacy arrangements. Both intended parents and surrogates will benefit from the predictability promoted by federal oversight, and because the FLSA governs only employees—not independent contractors—regulation under the FLSA will not foreclose altruistic arrangements where desired by the contracting parties. Since it is soundly established that the FLSA was enacted pursuant to Congress's

205. 29 C.F.R. § 785.22 (2017).

206. *See* Storrow, *supra* note 44, at 206 (explaining that the United States "constitutes a microcosm of the wider global variation in the regulation of surrogacy").

constitutional authority,[207] extending FLSA coverage to surrogates through the USDOL's rulemaking authority will circumvent constitutional challenges to federal power over surrogacy arrangements. As such, the FLSA offers a tenable framework for regulating commercial surrogacy.

*Zoe M. Beiner**

207. *See* United States v. Darby, 312 U.S. 100, 118–22 (1941) (noting that Congress exercises its granted power when it regulates interstate commerce, and that this power extends to interstate activities, such as labor standards, which affect interstate commerce); *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 560 (1985) (holding that the Commerce Clause gives Congress the power to regulate wage rates and employment hours under the FLSA).

* J.D. Candidate, 2018, Vanderbilt University Law School; B.A., 2015, University of Florida. To the staff and editorial board of the *Vanderbilt Law Review*, thank you for your hard, diligent work and unwavering commitment to excellence. A special thanks to Professor Barbara Rose, Miron Klimkowski, Margo Wilkinson Smith, Julie Rooney, Kourtney Kinsel, and Alexa Ortiz for their thoughtful feedback and tremendous insights. And, of course, the greatest of thanks to my wonderful parents, Stan and Judith Beiner—I owe any and all accomplishments to you both.