

Constitutional Issues in Assisted Reproduction

by

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Introduction

This article is published as part of a two-volume collection of articles analyzing constitutional issues in family law; it will address constitutional issues in the area of assisted reproduction technology (ART). It is probably true that many attorneys practicing in the area of assisted reproduction have spent a good portion of their practices involved in counseling clients about the legal intricacies of family formation in various contexts. It is also probably safe to assume that rarely have those practitioners had to consult the U.S. Constitution to deal with a particular case, client, or challenging issue. Even if these practitioners have an appellate practice involved in drafting appellate briefs addressing various aspects of family formation, it would also probably be unusual to have had these briefs center on constitutional issues, including claims of a substantive due process violation of a fundamental right or even that an applicable statute was allegedly unconstitutional either on its face or as applied. Simply put, constitutional issues do not arise with any degree of frequency even in a family law practice that heavily involves complex family formation issues.

In fact, many readers of this article may wonder whether the Constitution has any relevancy to any area of family law since this area of practice more than most areas of the law involves private relationships and arrangements between individuals with limited state involvement. Indeed, federal courts go out of their

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way to avoid most matters of family law practice and dispute, leaving those issues whenever possible in the state court systems.¹ As the U.S. Supreme Court stated in the foundational case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Constitution protects the individual's right to be free from "abuse of governmental power."² In most family law situations, and in assisted reproduction in particular, the parties are voluntarily entering into contractual arrangements to support their individual goals of family formation. The state is not compelling any of them to do any of this. The question in these situations is then whether judicial enforcement of the contractual arrangements represents an exercise of state power sufficient to support any need to worry about constitutional infringements. Scholars continue to debate the reach of constitutional protections in these matters.³ Yet, no court has thus far decided whether judicial enforcement of a provision in a surrogacy contract would constitute state action and, indeed, the cases refusing to enforce surrogacy contracts have done so on public policy grounds rather than a constitutional basis.⁴

That does not mean, however, that the U.S. Constitution and its application to these various family law situations should be completely out of mind or not in the background of the advocacy, analysis, and drafting of contracts and pleadings, or the structuring of arguments in family formation cases. In fact, the areas where constitutional issues would most likely loom the largest in a family law practice would probably be in the area of

¹ See *Ankenbrandt v. Richards*, 504 U.S. 689, 714 (1992) (concluding that the states have "virtually exclusive primacy . . . in the regulation of domestic relations).

² 505 U.S. 833, 898 (1992).

³ For example, I. Glenn Cohen has argued that enforcement of a contact related to assisted reproduction involving waivers of constitutional rights would not constitute state action. I. Glenn Cohen, *The Constitution and the Right Not to Procreate*, 60 *STAN. L. REV.* 1135 (2008). Judith Daar, on the other hand, has argued that enforcement of embryo disposition agreements could constitute state action. Judith Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 *AM. J. L. & MED.* 455, 465 (1999).

⁴ Deborah L. Forman, *Abortion Clauses in Surrogacy Contracts: Insights from a Case Study*, 49 *FAM. L.Q.* 29, 37-39 (Spring 2015) [hereinafter "*Abortion Clauses*"].

family formation.⁵ Whenever a third party – someone other than a biological or legal parent – seeks to establish a parent-like relationship with a child, that triggers constitutional issues and concepts, most recently articulated in the seminal case of *Troxel v. Granville*,⁶ a case that built on a long and complicated precedential history of U.S. Supreme Court cases, with the fundamental right grounded in substantive due process of a parent to parent a child unhindered by governmental or other third-party interference.

Many of the constitutional issues in these cases have involved the right of a parent to determine who has access to or will have input on the upbringing of his or her child, a third party who is not a parent but is seeking to divest a legal parent of custody or to obtain court-ordered visitation with the child, or whether parentage can be established with one person rather than another person. In the area of LGBTQ+ family situations, and following the relatively recent right of persons of the same sex to marry,⁷ the issue of who is a legal parent, who can become a legal parent, and the right to adopt children⁸ has been fraught with equal protection and due process considerations as well as other complications. The area of assisted reproduction raises many of these same family formation constitutional challenges, as well as many other constitutional issues, several of which will be discussed in this article.

At the outset, it is essential to define what is included in the notion of assisted reproduction technology. The U.S. Centers for Disease Control and Prevention (CDC) defines ART to include “all fertility treatments in which both eggs and sperm are handled” to establish a pregnancy without sexual intercourse.⁹ Donor insemination, which typically does not involve manipulation of eggs, is – from a legal if not a medical perspective – none-

⁵ Gary A. Debele, *Custody and Parenting by Persons Other than Biological Parents: When Non-Traditional Family Law Collides with the Constitution*, 83 N.D. L. REV. 1227 (2007).

⁶ 530 U.S. 57 (2000).

⁷ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁸ *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

⁹ CENTERS FOR DISEASE CONTROL AND PREVENTION, 2008 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES 3 (2010).

theless often considered an ART procedure.¹⁰ All of these technologies give individuals a chance to procreate when they would otherwise be considered infertile.¹¹ The most complicated ART procedures, both from a medical and legal perspective, are traditional and gestational surrogacy, which will be the primary focus of this article looking at constitutional issues in ART. Traditional surrogacy, a medical technology developed before gestational surrogacy, occurs when a woman is artificially inseminated with another man's semen for the purpose of carrying a child to term for another woman or man who intends to raise the child as their own. Gestational surrogacy differs medically from traditional surrogacy in that it involves harvesting ova from either the intended mother or a third party and then fertilizing them outside the womb via in vitro fertilization. After fertilization, the embryo is implanted in the surrogate's uterus for her to carry to term and give birth, presumably for the intended parents to raise as their own.¹²

Numerous law review articles have delved deeply into the legal complications that arise in many of these ART procedures.¹³ These complex legal issues have to do with the drafting of the contracts that undergird all of these actions as well as the processes that are used to secure the legal determination of parentage in those situations where someone other than the intended parent is giving birth to the child. In the United States, these procedures occur in a dizzying array of legal systems, some with no regulation, some with prohibitions of various procedures,

¹⁰ Susan L. Crockin & Gary A. Debele, *Ethical Issues in Assisted Reproduction: A Primer for Family Law Attorneys*, 27 J. AM. ACAD. MATRIM. LAW. 289 (2015).

¹¹ Michelle Elizabeth Holland, *Forbidding Gestational Surrogacy: Impeding the Fundamental Right to Procreate*, 17 U.C. DAVIS J. JUV. L. & POL'Y 2, 4 (Summer 2013).

¹² *Id.* at 6.

¹³ For the most current and in-depth survey of how surrogacy law and practice has evolved to its current status in the United States, see Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIF. L. REV. 401 (2021). This article has many citations to the rich literature that has emerged over the years discussing surrogacy law and practice. For a much less detailed and more practitioner-focused article addressing establishing parentage in surrogacy cases, see Michelle A. Keeyes, *ART in the Courts: Establishing Parentage in ART Conceived Children (Part 2)*, 15 WHITTIER J. OF CHILD AND FAMILY ADVOCACY 189 (2016).

and others with elaborate statutory frameworks that require compliance.¹⁴ These issues are even more complicated when the parties live in different states or countries. Scholars debate the impact of power imbalances between the parties involved,¹⁵ ethical issues that are raised with regard to compensation for participants,¹⁶ and the selection decisions that can now be made as

¹⁴ For the most recent and comprehensive look at the various statutes enacted in the United States, see Joslin, *supra* note 13. This article is groundbreaking in that it moves beyond the traditional surveys of state laws that have analyzed whether the state statute bans or permits surrogacy to more closely consider the different ways in which jurisdictions regulate surrogacy and how these statutory provisions in the different states further the principles of equality and liberty. *Id.* at 403. In her highly elaborate and useful “new typology,” she considers not only whether states ban or allow surrogacy, but what forms of surrogacy are allowed – gestational and genetic surrogacy. *Id.* at 432. She considers what kinds of protections are offered for intended parents, including status-based criteria (sex, sexual orientation, or marital status; medical need; genetic relatedness to the intended child); required evaluations; and procedural rules (timing of and procedures for determinations of parenthood). *Id.* at 433-42. She does the same kind of analysis for what kinds of protections are offered for surrogates, including independent counsel; bodily decision-making and control during pregnancy; termination of surrogacy agreements; and compensation. *Id.* at 442-52. Professor Joslin correctly concludes that variations in the law of surrogacy hold profound implications for the participants themselves. *Id.* at 455-63

¹⁵ See Isa Elfers, *Alienation, Commodification, and Commercialization: A Feminist Critique of Commercial Surrogacy Agreements Through the Lens of Labor Exploitation and U.S. Organ Donation Law*, 33 HASTINGS J. GENDER & L. 151 (2022) (describing how surrogacy promotes exploitation on race, class, gender, and nationality lines); Jenny Gunnarsson Oayne, Elzbieta Korolczuk & Signe Mezinksa, *Surrogacy Relationships: A Critical Interpretative Review*, 125 UPPSALA J. MED. SCIENCES 183 (discussing the relationships between intended parents and surrogates through research garnered through interviews); Ronli Sifris, *Commercial Surrogacy and the Human Right to Autonomy*, 23 J.L. & MED. 365 (2015) (exploring the competing interests of the resulting child, surrogate, and intended parents).

¹⁶ See Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155 (2014) (arguing that there should not be increased protections for surrogacy, and it should remain available solely to those who can afford it); Mohan Rao, *Why All Non-Altruistic Surrogacy Should Be Banned*, 47 ECON. & POL. WEEKLY 15 (2012) (arguing all compensated surrogacy should be banned to specifically alleviate exploitation in global surrogacy markets); Julie Shapiro, *For a Feminist Considering Surrogacy, Is Compensation Really the Key Question*, 89 WASH. L. REV. 1345 (2014) (analyzing surrogacy compensation and the potential for exploitation from a feminist perspective).

genetic materials are manipulated in more and more sophisticated ways as medical technology advances faster than does medical and legal regulation.

The focus of this article will not be on that plethora of legal complexities. Rather, the scope of this article will be to highlight for practitioners in this area of practice the potential constitutional issues that should be considered, thought about, and processed when drafting the contracts and pursuing legal parentage. The expectation is not that these considerations will dramatically change the dynamic of the proceedings, but that they might inform the negotiations of the contracts and be addressed in the establishment of parentage so that contracts and parentage determinations are as legally sound as possible.

The constitutional issues in ART are myriad and complex. Indeed, the process of moving from initiation of an ART process to the culmination of obtaining a court order establishing legal parentage provides many opportunities for constitutional issues to arise. The nature and impact of these issues on the practice of ART is the focus of this article. As discussed in Part I, there can be preliminary and legally complex considerations as to who can be determined to be a legal parent if ART is used to conceive and give birth to a child. Part II explores the issue of who should be allowed to have access to ART procedures and to use them to build a family. These are issues that need to be considered at the start of the process and also later in the process when legal parentage is either being established or challenged.

The drafting of the contracts also raises potential constitutional issues that need to be considered and addressed in the contracts, and these considerations are the subject of Part III. The topics that frequently get addressed in these contracts include the following: the scope and enforceability of the right of the parties to contract to various aspects of the ART arrangement, as well as concerns as to reproductive autonomy; the right of the surrogate to travel without restriction; the right of the surrogate to make medical decisions about her body balanced with the right of intended parents to regulate the surrogate's behavior during the pregnancy; payment terms for the services that are being provided; how the issues of selective reduction and abortion during the pregnancy will be addressed. These initial contract drafting considerations can raise significant constitutional issues. En-

enforcement of all aspects of these contracts can also raise constitutional issues. Careful planning needs to occur to address these potential constitutional issues throughout the contract drafting phase of the process and the subsequent legal proceedings needed to establish parentage.

Constitutional issues also abound after the ART process is completed, and these issues are addressed in Part IV. Questions exist as to who owns, can control, and can use the genetic material that is produced and often cryopreserved long after the initial ART process is complete. These genetic materials include sperm, eggs, and embryos. Disputes can arise as to how the materials are characterized, including the often thorny issue of whether the embryo or a fetus is to be considered a person and the implications of such a designation. Also to be carefully considered are whether these genetic materials can be disposed of or used, and who gets to decide those issues. Divorcing spouses dispute rights of possession and use and families agonize about use and disposition in posthumous situations after a donor or owners of cryopreserved genetic material has passed away. Parties to these contracts may have a right to procreate and a right not to procreate, and these rights are often in substantial conflict. A still largely unspoken issue is the right of children who are born of these processes to know their genetic origins and to build relationships with potential siblings.

The constitutional issues lurking in ART practices and procedures are many and complex.

I. ART and Legal Parentage

Since the goal of any ART procedure is to create a legally recognized child for an intended parent or couple, the logical starting point for analysis of constitutional issues in ART is to determine who can be a legal parent following an ART procedure. In the United States, parentage is determined by individual state laws and procedures based on an assumption that the court where legal parentage will be adjudicated has personal jurisdiction over the parties and subject matter jurisdiction of over the proceeding. Jurisdiction will hinge on who is allowed to

commence a parentage action and the substantive law of that jurisdiction will be applied to determine parentage.¹⁷

Determining who can be considered a legal parent has become an increasingly complicated endeavor, and disputes about that issue not only are governed by state family law doctrine, but are also significantly impacted by a large body of constitutional jurisprudence. In his seminal recent article about these trends and developments, Yale law professor Doug NeJaime looks to longstanding trends in state family law and constitutional jurisprudence affecting parentage that has been accruing since the 1920s.¹⁸ He argues that these two strands of law are significantly interconnected and that ultimately constitutional substantive due process jurisprudence can and should support legal parentage under state family law more focused on function and parentage roles assumed by the parties rather than simply biological, genetic, or marital connections and presumptions.¹⁹ Under NeJaime's thesis, state family laws and constitutional principles can both be used to bestow legal parentage on heterosexual and same sex couples, whether married or not, and regardless of whether the intended parents have a biological or genetic connection to the subject child.²⁰

It is certainly well beyond the scope of this article to delve deeply into the ongoing constitutional debate on who can become a legal parent. However, Professor NeJaime encapsulates in copious detail the constitutional aspects of parentage of which

¹⁷ For a general discussion of the topic of parentage and how it has been analyzed over the years both through various state statutory regimes and constitutional laws and considerations, see Michael J. Higdon, *Constitutional Parentage*, 103 IOWA L. REV. 1483 (2018), and Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261 (2020).

¹⁸ Parental rights cases: *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); Parental recognition cases: *Stanley v. Ill.*, 405 U.S. 645 (1971); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1982); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). Parental rights cases in recent decades: *Troxel v. Granville*, 530 U.S. 57 (2000); *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013); *Pavan v. Smith*, 137 S. Ct. 2075 (2017); *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017).

¹⁹ See generally NeJaime, *supra* note 17, at 264-78.

²⁰ *Id.*

ART practitioners should be aware.²¹ He challenges the conventional assumption that the Constitution only protects biological parent-child relationships. Instead, he asserts an affirmative case for constitutional protection of nonbiological parents based on a close read of the changing legal landscape created by the U.S. Supreme Court first through its decisions on unmarried fathers and foster parents from several decades ago,²² to the more recent decisions regarding the constitutional rights of same-sex couples, who ordinarily include at least one party who would be a nonbiological parent.²³

NeJaime grounds his analysis in a fundamental liberty interest in parental recognition that he asserts now reaches nonbiological parents. He sees the earlier precedents arising from claims by unmarried fathers and foster parents as supporting a more contemporary approach to parentage based on a notion of functional parentage. This functional vision of parenthood, he argues, has increasingly arisen as a formal matter in family law and is reflective of important constitutional commitments in ways that shed light on the parent-child relationships that merit recognition as a matter of due process. In other words, in NeJaime's view, the development of a functional view of parentage in family law commands a view of due process that also supports such parentage status as a matter of constitutional law.²⁴

²¹ *Id.* Another slightly earlier article makes similar arguments, asserting that it is time for the U.S. Supreme Court to bring order to the varying approaches among the states in recognizing constitutional protections afforded to variously situated parents. To come up with support for the Supreme Court expanding the constitutionally protected definition of parentage in the context of the modern family, he looks to actions taken in many states to expand the notion of who is a parent in the context of artificial insemination and the treatment of sperm donors and husbands of artificially inseminated women; the treatment of egg donors, gestational surrogates, and intended mothers; same-sex parentage; and the long-prevalent concept of the psychological parent. Through this analysis, he seeks to recognize the limited role of biology in twenty-first century parenthood, the important link between parental identity and intact families, the importance of safeguarding familial equality, and the rise in recognition of functional parenthood. Higdon, *supra* note 17.

²² See *supra* cases cited at note 18.

²³ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁴ NeJaime, *supra* note 17, at 269-70.

Even if practitioners of ART are not routinely in the trenches litigating contested parentage disputes between biological parents and involved third parties or same sex couples who never married or established legal parentage as to children born during their relationships, issues of who can be a legal parent can arise in the parentage establishment phase of the surrogacy matter where an intended parent without marital status or a genetic or biological connection to the subject child desires to have legal parentage established. A functional view of parentage seems to be gaining traction across the country, but it is not firmly established in more than a handful of states; the marital and biological presumptions still seem to be the majority view.²⁵ Hence, ART practitioners need to be aware of these constantly evolving trends as to who has a parental presumption and how legal parentage will be determined in the jurisdiction where the ART proceeding is venued. The issue is at least something to be considered when embarking on an initial ART contract and then when considering the subsequent process for the establishment of parentage.

For example, questions can arise as to whether the surrogacy laws in the jurisdiction where the contract is drafted, where the parties reside, where the transfers of genetic material will occur, or where the child is born will determine whether a person involved in the surrogacy process is a parent or a legal stranger.²⁶ The applicable state statute may determine whether a person can make decisions about their own body or whether they can be compelled to undergo unwanted invasive medical procedures.²⁷ The details of a state's surrogacy laws also implicate the scope of fundamental liberty interests, including the right to form families of choice and reproductive autonomy.²⁸ The implicated state statutes may well determine whether a court will recognize same sex parentage, unmarried parents, or parents without a biological or genetic connection to the child. At the present time, many jurisdictions permit surrogacy regardless of the marital status, gender, sexual orientation, or genetic connection of the intended

²⁵ *Id.* at 319-43.

²⁶ Joslin, *supra* note 13, at 404.

²⁷ *Id.*

²⁸ *Id.*

parents. Other states limit legal protection based on the identity of the intended parents.²⁹

Thought will need to be given to not only whether parentage can be established, but how it can be established: Will it be based on marriage? Will a parentage proceeding be needed, either pre-birth or post-birth, and who can bring such a proceeding in the appropriate jurisdiction? Will an adoption be necessary, and if so, who can bring an adoption proceeding in the appropriate jurisdiction? Will a surrogate and her partner or spouse need to have parental rights terminated? If either or both of the intended parents lack a biological or genetic connection to the child, is the applicable state parentage process open to only marital or biological/genetic presumptions, or has the state broadened legal parentage to include the closeness of the relationship between the intended parent and the child or the notion of functional parentage as a basis to establish legal parentage? These are all questions the ART practitioner must be constantly considering when moving forward with a procedure that will involve the establishment of parentage for an intended parents without a marital relationship or a biological or genetic connection.

II. Access to Reproduction

The prior section of this article focused on the constitutional question of who can be recognized as a legal parent as a matter of substantive due process, and the importance of that preliminary question in ART practice. This section focuses on a more practical constitutional consideration: who should be allowed access to the ART process? Here the focus is on limits that states attempt to impose on ART processes and whether these are potentially violative of a fundamental right to procreate, enter into a contract, or choose types of medical care. Common restrictions imposed by states are based on marital status, health considerations and the requirement of a showing of infertility before accessing the processes, limits to various kinds of medical procedures

²⁹ *Id.* at 404 n.10. For a discussion of the constitutional implications of marriage-only allowance of parentage in some statutes, see Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 484 (2017) (“When viewed through a constitutional analysis that is pro-equal liberty, anti-stigma, and dynamic, marriage-only [assisted reproductive technology] rules present a serious constitutional claim.”).

or access to medical care, and the right to reasonable compensation for services performed.³⁰ The panoply of restrictions are extensive, and it is of the utmost importance that practitioners review the applicable statutory provisions prior to engaging in drafting a surrogacy agreement. Such restrictions arguably prompt a substantive due process claim grounded in the fundamental right to procreate or an equal protection claim if access to ART is denied based on a particular classification such as marital status, sexual orientation, gender, and perhaps even financial circumstances.³¹

As previously described, states have the authority to determine whether specific ART processes are allowed and who is able to access them. Currently, a minority of states limit gestational surrogacy access to married couples.³² Distinctions based on marital status in statutes regulating ART are vulnerable to equal protection clause challenges. Because the state of being unmarried is not a suspect class, states may argue that married and unmarried couples are not similarly situated, and therefore,

³⁰ For a more robust review of the myriad of state statutes restricting ART processes, see Anne R. Dana, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 388-90 (2011).

³¹ Radhika Rao skillfully grapples with these two concepts, the fundamental right to procreate and equal access to reproductive technologies, in *Assisted Reproductive Technology and Reproductive Equality*, 76 GEO WASH. L. REV. 1457 (2008). She ultimately concludes that asserting a fundamental right to procreate would create a slippery slope, protecting all types of ARTs, including sex-selection, cloning, and preimplantation genetic determination. She determines it would be too extreme to constitutionally protect all ARTs, because some practices require regulation or they become harmful to society. Hence, access to ART should not be protected under the fundamental right to procreate, but instead be protected under the lens of reproductive equality. She finds, "all persons must possess an *equal* right, even if no one retains an *absolute* right, to use ARTs." *Id.* at 1460.

³² See, e.g., FLA. STAT. § 742.15; LA. REV. STAT. § 9:2718.1(6) (defining intended parents as a married couple); TEX. FAM. CODE § 160.754(b) (stating "the intended parents must be married to each other"). Louisiana and Texas also require the surrogate's spouse, if applicable, to be a party to surrogacy contracts. LA. REV. STAT. § 9:2720(a). Texas states the gestational mother's "husband if she is married" must be a party, seemingly excluding a wife in a same-sex couple. TEX. FAM. CODE § 160.754(a).

the equal protection clause is not applicable.³³ While this may be compelling for some relationships, many long-term, cohabiting couples are similarly situated to married couples.³⁴ Therefore, under an equal protection analysis, these distinctions should be analyzed to determine if they are rationally related to a legitimate government interest. There are a multitude of potential government interests to which these distinctions could be related, including increasing the amount of children with married and genetically related parents.³⁵ These government interests rely on the assumption that having married and genetically related parents is the best for children. Nonetheless, many statutes and regular practices among states work against these two aims, including adoption schemes and divorces among families with children, making it unlikely these are legitimate government ends.³⁶ Therefore, statutes that restrict ART access to married couples are at a risk of reversal on equal protection grounds.

Additionally, a small minority of states restrict ART access based on sexual orientation,³⁷ and these direct statutory distinctions have been vulnerable to equal protection clause claims.³⁸ Further, as scholars point out, the interaction between parentage

³³ See Linda S. Anderson, *Legislative Oppression: Restricting Gestational Surrogacy to Married Couples Is an Attempt to Legislate Morality*, 42 U. BALT. L. REV. 611, 627-28 (2013); Andrea B. Carroll, *Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy*, 88 IND. L.J. 1187, 1193-95 (2013) (discussing marital requirements in surrogacy state statutes and how much of the debate surrounds what level of scrutiny they should be under).

³⁴ For examples of state statutes that recognize common law marriage between long-term, cohabiting couples, see COL. REV. STAT. § 14-2-109.5; N.H. REV. STAT. ANN. § 457.39; KAN. STAT. ANN. § 23-2502.

³⁵ Anderson, *supra* note 33, at 638-42.

³⁶ Linda S. Anderson posits a strong argument that these statutes are not rationally related to any government objective, but instead are attempts to legislate morality and traditional ideals about family life. *Id.*

³⁷ FLA. STAT. § 742.13(2) (stating a commissioning couple must be a “mother and a father” functionally excluding couples containing two mothers or two fathers); LA. REV. STAT. § 9:2718.1(6) (defining intended parents as a married couple that “exclusively contribute their own gametes to create their embryo,” functionally excluding same-sex couples from being considered intended parents and partaking in surrogacy).

³⁸ D.M.T. v. T.M.H., 129 So. 3d 320 (Fla. 2013) (finding Fla. Stat. § 742.13 unconstitutional under the equal protection clause for sexual orientation discrimination).

statutes and judicial interpretation often work to restrict LGBTQ partners from exclusive parentage of children.³⁹ As Anne R. Dana artfully highlights, the reproductive biology of gay male couples makes it so “a non-anonymous third party” must always be present to produce a genetically related child, since a surrogate is necessary to carry the child whether the surrogate’s egg, or a donor egg, is utilized.⁴⁰ Therefore, this third party is available to assert a competing parentage right.⁴¹ With no other party to assert a right to motherhood other than the surrogate, gay male couples’ exclusive parentage is threatened by a third party, a burden that is not always present for other heterosexual or homosexual couples.⁴² While we are not aware of any lawsuits having yet been filed, it would seem that the differential treatment of gay male couples utilizing surrogacy could render parentage statutes at risk of equal protection challenges, because it appears to be irrational to provide avenues for gay and lesbian couples to establish full, exclusive parentage without challenges from third parties, and not also provide this to gay male couples.⁴³ When practitioners assist gay male couples in reproduction through surrogacy, they should be fully apprised of their state’s stance on enforcing surrogacy agreements and be equipped to advise about the potential for the surrogate to assert a competing parentage right.⁴⁴

³⁹ Dana, *supra* note 30 (emphasizing how the law disadvantages gay, male couples seeking exclusive parentage rights to children born out of surrogacy).

⁴⁰ *Id.* at 357.

⁴¹ *Id.*

⁴² Lesbian couples often are able to establish parentage for each partner based on one partner’s consent to the artificial insemination of the other, which triggers a presumption of parentage, or through one partner obtaining genetic parentage and the other obtaining parentage through gestation and birth. *Id.* at 377. Absent extenuating circumstances, there is no need for a non-anonymous third party. *Id.* Heterosexual couples are either able to utilize traditional forms of reproduction or traditional parentage statutes.

⁴³ To witness this issue in action, see *A.G.R. v. D.R.H.*, 2009 N.J. Super. Unpub. LEXIS 3250, where the court voids a gestational surrogacy agreement based on the reasoning found in *In re Baby M*, 537 A.2d 1227 (N.J. 1988), and confers rights on the gestational parent over the biologically related father’s male spouse.

⁴⁴ See *C.M. v. M.C.*, 7 Cal. App. 5th 1188, 213 Cal. Rptr. 3d 351 (2017) (denying a surrogate mother a parentage right to any of the triplet babies she birthed for an intended father); *P.M. v. T.B.*, 907 N.W.2d 522 (Iowa 2018).

Instead of challenging statutes that restrict access to ART based on their differential treatment of similarly situated persons, some scholars have argued that restricting access to ART violates the fundamental right to procreate.⁴⁵ This creates issues for jurisdictions that restrict access to ART, since those restrictions would interfere with a fundamental right. Scholars establish a fundamental right to procreate under case law such as *Skinner v. Oklahoma*,⁴⁶ *Eisenstadt v. Baird*,⁴⁷ and *Roe v. Wade*,⁴⁸ all of which are deeply tied to the right to make family planning choices for oneself and the right to privacy. With the recent overturn of *Roe*, the right to procreate likely cannot be established under the right to privacy. Therefore, some scholars argue the fundamental right to procreate is established under the line of cases that “protects child-rearing.”⁴⁹ Establishing access to ART as a fundamental right protected by the right to procreate is significant, because it opens up the door for more individuals to challenge restrictions to ART due to inability to afford the procedures or infertility status. Consequently, there is still an avenue to challenge restrictions against ART as violative of a fundamental right to procreate.

Securing access to ART under the fundamental right to procreate may create unintended, undesired consequences, such as the state being required to procure surrogates to ensure all have access to ART.⁵⁰ Alternatively, access to ART may be based in another right: the fundamental right to contract.⁵¹ As described

⁴⁵ Whether there exists a fundamental right to procreate is a contested matter. Scholars have utilized case law that establish constitutional protections for contraception, abortion, and sterilization, as establishing both the right to “avoid reproduction” and an affirmative “right to reproduce.” Rao, *supra* note 31, at 1463.

⁴⁶ 316 U.S. 535 (1942).

⁴⁷ 405 U.S. 438 (1972).

⁴⁸ 410 U.S. 113 (1973) (overruled by *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 142 S. Ct. 2228 (2022)).

⁴⁹ Rao, *supra* note 31, at 1463. See *Meyer*, 262 U.S. 390 (establishing a right to choose whether a child learns a foreign language); *Pierce*, 268 U.S. 510 (1925) (establishing the right to choose whether a child attends private school); *Yoder*, 406 U.S. 205 (1972) (establishing the right to decide if a child will attend school after eighth grade.).

⁵⁰ Christine Straehle, *Is There a Right to Surrogacy?*, 33 J. APPLIED PHILOSOPHY 146, 150 (2015).

⁵¹ *Id.* at 151-52.

in the next section, autonomy in contracting is a revered right found in the Constitution and upheld through a long history of judicial review. Therefore, states that restrict access to ART are ultimately restricting parties from contracting for services.⁵² Finding the right to access ART as a fundamental right procured through the right to contract is advantageous, because it does not create unintended consequences obligating the state to procure surrogates, does not rely on the parties' classification under some status, and is not vulnerable to challenges presented from *Roe*'s overturn and the right to privacy's precarious status. Nonetheless, the right to contract can be restricted in light of public policy concerns regarding the exploitative nature of surrogacy agreements, which many states have used to justify finding surrogacy agreements void and unenforceable.⁵³ While protecting access to surrogacy as a part of the fundamental right to contract avoids some pitfalls latent in securing the right under the right to procreate, it is also vulnerable to other shortcomings.⁵⁴

The former analysis focused on restricting individuals from access to ARTs generally, but some statutory and federal schemes operate to restrict individuals from specific types of ART. With fast-paced advances in medicine, new technologies have arisen which allow prospective parents to access a variety of procedures.⁵⁵ Some of these, including selective reduction, can

⁵² *Id.* at 151 (“The nature of the contract is one of employment: both parties enter a contract on the assumption that the prospective surrogate agrees to engage in reproductive labour on behalf of the commissioning parents. In exchange, the latter agree to compensate the surrogate for her labour.”).

⁵³ Straehle argues against this notion, finding restricting surrogacy is “too blunt a tool to address the vulnerability to harm of women’s interests in gendered societies. *Id.* at 155.

⁵⁴ Many scholars also deny there is any fundamental right connected to accessing ARTs and that the ARTs deserve no special constitutional protections. *See* Fields, *supra* note 16, at 1177-81.

⁵⁵ *See* Henry T. Greely, *The Death of Roe and the Future of Ex Vivo Embryos*, J.L. & BIOSCIENCES, July-Dec. 2022, at 1, 7. Greely proposes with the overturn of *Roe*, there will be an increase in use of new medical procedures in ARTs, specifically preimplantation genetic testing (“PGT”). *Id.* Most parents who become pregnant traditionally rely on prenatal testing to determine if the fetus has a likelihood of disability, and have the option to choose abortion care based on the results. *Id.* With the loss of abortion care in many jurisdictions, some parents committed to not having a child with a severe disability may turn to PGT to test embryos prior to implantation. *Id.* at 8.

be constitutionally challenged, which will be discussed in the next section. Others, like genetic modification, are implicitly regulated⁵⁶ and subject to constitutional challenges based on lack of access.⁵⁷ Tandice Ossareh posits that the lack of access to these advanced medical services can be challenged by classifying the ability to choose one's own medical treatments as a fundamental right.⁵⁸ Also, parents generally have significant rights in raising children,⁵⁹ and therefore have a right to make medical decisions inherent in raising children, which may include decisions about the ART techniques used in creating them. Nonetheless, the state has a compelling interest in ensuring child health and safety in the medical sphere,⁶⁰ which may overcome any right parents have to partake in genetic modification, mitochondrial transfer, preimplantation genetic testing, or other ever-evolving technologies in ART. As technologies continue to emerge and become more mainstream, practitioners should be aware of restricted ac-

⁵⁶ Tandice Ossareh, *Would You Like Blue Eyes with That: A Fundamental Right to Genetic Modification of Embryos*, 117 COLUM. L. REV. 729, 744-47 (2017) (describing how a "federal ban on public funding" for research into genetic modification, and other advanced medical procedures like mitochondrial-replacement therapy, functionally restricts access to services, since the research is not fully developed to safely perform procedures).

⁵⁷ Services like preimplantation genetic testing are not yet regulated in the United States, though other countries choose to regulate the practice. Greely, *supra* note 55, at 8. Instead, medical providers can choose whether to offer the service. Michelle Bayefsky, *Who Should Regulate Preimplantation Genetic Diagnosis in the United States?*, 20 AM. MED. ASS'N. J. ETHICS 1160, 1164 (2018). This is a contested practice, nonetheless, due to the possibility PGT is used unethically to select for traits like sex, height, hair color, or eye color. *Id.* at 1160.

⁵⁸ Ossareh, *supra* note 56, at 752. Ossareh's analysis relies on the fact that the right to this new technology is deeply rooted and carefully asserted. *Id.* at 754-59. Also, some scholars interpret the Court's decision in *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261 (1990), as not only establishing a right to refuse medical treatment, but an affirmative right to determine one's medical treatment absent state interference. See generally Kathy L. Cerminara, *Cruzan's Legacy in Autonomy*, 73 SMU L. REV. 27, 28-29 (2020) (describing how the Court's decision in *Cruzan* has been interpreted as establishing both a right to deny and affirmatively request medical intervention).

⁵⁹ See *Meyer*, 262 U.S. 390; *Pierce*, 268 U.S. 510; *Yoder*, 406 U.S. 205.

⁶⁰ *Prince v. Massachusetts*, 321 U.S. 158, 166 ("Acting to guard the general interest in youth's wellbeing, the state as *parens patriae* may restrict the parent's control.").

cess to specific ART procedures and whether the inability to access implicates parents' medical autonomy and rights to childrearing free from state intervention.

Ultimately, a practitioner may keep these constitutional challenges in mind when faced with a client who is being denied the right to access ART either based on their marital status, sexual orientation, due to financial circumstances, medical infertility, or because the medical service is regulated and restricted. Through equal protection clause challenges and substantive due process rights claims, clients may have remedial rights.

III. Drafting the Terms of the Contracts

At the very heart of surrogacy law and practice is the notion that there is a tension between freedom of contract and public policy considerations. In addition to the Contract Clause of the Constitution,⁶¹ long-standing common law has provided that individuals are free to enter into contracts, and in general, courts respect freedom of contract and enforce contracts.⁶² But the law also has long recognized that certain contracts are unenforceable as against public policy and that certain contractual terms are not properly predicated on the parties' consent, such as, for example, contracts to kill or harm someone; contracts can be voided as being against public policy, so this constitutional right is clearly not absolute.⁶³

At least with regard to surrogacy in the United States, there is a robust, if not pervasive, view that the law should allow parties to enter into various ART contracts and then leave the par-

⁶¹ CONST. art. I, § 10 ("No state shall . . . pass any . . . Law impairing the Obligation of Contracts.").

⁶² See generally *P.M. v. T.B.*, 907 N.W.2d 522 (Iowa 2018) (enforcing a surrogacy contract); *Cook v. Harding*, 879 F.3d 1035 (9th Cir. 2018) (upholding a California statute that provides for the enforceability of surrogacy contracts); Rachel Rebouché, *Bargaining About Birth; Surrogacy Contracts in a Pandemic*, 100 WASH. U. L. REV. (forthcoming, 2023) (providing an overview about the increasing trend of allowing and respecting surrogacy agreements among states).

⁶³ RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 179 (*Am. Law Inst.* 1981); 4 WILLIAM BLACKSTONE, COMMENTARIES *162. For a detailed discussion of the topic of surrogacy and the limits of the right to contract, see Adeline A. Allen, *Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human*, 41 HARV. J. L. & PUB. POL'Y 753, 760-69 (2018).

ties to their own devices — a view of the sanctity of the right to contract that is grounded in the Constitution and centuries of accumulated common law.⁶⁴ This application of notions of the right to contract being central to surrogacy law and practice was most dramatically stated and widely disseminated by the California Supreme Court in its landmark and oft-cited decision of *Johnson v. Calvert*, which held that a surrogate who had agreed to relinquish all rights to the biological child she carried for the intended parents had no parental rights to the child.⁶⁵ After this case, surrogacy arrangements came to be widely viewed through the lens of freedom of contract where the parties' intent would govern the interpretation of the contract and also be the focus of resolution of any disputes between the parties. The arrangement to which the commissioning parents and the birth mother consent and contract before pregnancy and birth, based on their freedom to contract with each other, is generally controlling.⁶⁶

When it comes to drafting the contracts in the ARTs arena, it often becomes a question of what can and cannot be regulated. Areas that have long been regulated by contract without much controversy have included medical care for the surrogate, the lifestyle of the surrogate during the pregnancy, travel restrictions placed upon the surrogate after reaching a certain stage in the pregnancy, and until recently, provisions regarding selective reduction and abortion.⁶⁷ There has long been a robust academic debate about whether contractual regulation of these kinds of matters are enforceable as a matter of contract and constitutional law,⁶⁸ but the provisions continue to be central elements of various kinds of ART contracts. As one scholar has pointed out, many such provisions are inserted into contracts that purport to

⁶⁴ Joslin, *supra* note 13, at 429-32. Joslin has a rich discussion of the notion of “neoliberal ideology” that has a significant ongoing role in how ART law is practiced in this county and how statutes get enacted to protect the view. See also Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 25, 25 (2014); Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 218 (2017).

⁶⁵ 851 P.2d 776 (Cal. 1993).

⁶⁶ *Id.* at 782-85.

⁶⁷ Joslin, *supra* note 13, at 419.

⁶⁸ For examples of arguments on all sides of these debates, see *id.* at 418-19 nn. 113-124.

control behavior and actions by the surrogate, even though the parties and their attorneys know that there is likely no effective way to enforce some of these provisions.⁶⁹

Individuals can generally waive many, if not most, constitutional protections, as long as their waiver is knowing, intelligent, and voluntary.⁷⁰ Case law has specifically provided that various constitutional rights are waivable.⁷¹ Individuals can often waive these rights with very little formality, even though serious consequences may result. While it is not clear if there would be a constitutional dimension to a contract enforcement or other such dispute in a surrogacy matter, policy considerations would certainly come into play and it seems reasonable to assume that the policy assessment would be influenced significantly if any of the rights and claims in dispute had constitutional protection.⁷²

Assuming a fundamental right to contract, several contractual provisions raise constitutional issues. The most commonly used contracts in ART include donor contracts involving eggs, sperm, or fully formed embryos, as well contracts between intended parents and either gestational surrogates or traditional surrogates. Most of the constitutional issues involving contract terms that implicate constitutional considerations are found in surrogacy contracts. Such topics include compensation for the surrogate, the right to make medical decisions affecting the surrogate's body and the related right to regulate the behavior of the pregnant surrogate, such as the surrogate's right to travel during the course of her pregnancy, and provisions regarding the selective reduction or abortion of a fetus being carried by the pregnant surrogate.

⁶⁹ See Rachel Rebouché, *Contracting Pregnancy*, 105 IOWA L. REV. 1591, 1596-97 (2020).

⁷⁰ *Brady v. United States*, 397 U.S. 742, 746 (1969). See also Cohen, *supra* note 3, at 53.

⁷¹ See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (Fourth Amendment); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (Fifth Amendment); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (Sixth Amendment).

⁷² *J.B. v. M.B.*, 751 A.2d 613, 619 (N.J. Super. Ct. App. Div. 2000) ("Although we do not decide this case on constitutional grounds, constitutional principles are a source of public policy."). See also Forman, *Abortion Clauses*, *supra* note 4, at 39.

A. *Compensation*

It is common for contracts involving surrogates to include provisions regarding compensation for the services to be provided by the surrogates. Some state laws prohibit compensation, making it difficult for intended parents to work with surrogates other than close relatives (who may be reluctant to enter into the surrogacy process for purely altruistic reasons).⁷³ Other states do not prohibit compensation.⁷⁴ In fact, commentators generally suggest that allowing compensation is critical to allowing surrogacy to flourish.⁷⁵ Requiring intended parents to rely solely on relatives to be surrogates or requiring intended parents to locate altruistic surrogates will severely curtail the numbers of intended parents who could pursue parentage through ART. Such compensation restrictions could thus be viewed as a restriction on procreation, potentially raising constitutional issues.⁷⁶

B. *Healthcare Decisions*

Surrogacy contracts commonly include provisions regarding payment of related medical and therapy expenses, as well as obligations by all parties to submit to medical and mental health evaluations and to share the resulting information from the evaluations with the other parties. Such contractual provisions highlight the rights of surrogates and the duties of intended parents that are often in tension – surrogates have a right to make healthcare decisions affecting themselves and affecting the pregnancy while intended parents must assume responsibility for the health and welfare of any child born of the process.⁷⁷ As a result,

⁷³ Rebouché, *supra* note 69, at 1603-04.

⁷⁴ For a discussion of trends in state laws regarding compensation in surrogacy, see Joslin, *supra* note 13, at 452-55.

⁷⁵ See Andrea B. Carroll, *Family Law and Female Empowerment*, 24 *UCLA WOMEN'S L.J.* 1, 7 (2017) (arguing for the importance of valuing women's work in surrogacy, through compensation, to advance reproductive autonomy and respect for predominately women's work).

⁷⁶ For a view of an author who is generally opposed to compensation for ethical and moral reasons, see Fields, *supra* note 16.

⁷⁷ See Rebouché, *supra* note 69, at 1600-02, for a discussion of the concept of "genetic essentialism" which underlies this tension between the parties to surrogacy contracts in terms of making prenatal health care and pregnancy-related medical decisions. Genetic essentialism is the belief that our genes and our DNA are the essence of who we are as human beings, and this doctrine

these contracts often include seemingly contradictory provisions that protect a surrogate's right to access and implement medical care to protect herself in the surrogacy process, but also provisions that require the surrogate (and also often her spouse or partner and the intended parents) to undergo prenatal medical testing and psychological evaluation and to share the test results and medical records with the participants and often the matching agency and fertility clinic.⁷⁸ As Dean Rebouché points out, these contradictory and often unenforceable provisions that create competing constitutional rights are inserted in these contracts with knowledge that they may not be enforceable. They are inserted with the hope that any disputes that arise on these topics can get resolved. Indeed, resolution of such disputes often occurs through involvement of medical and mental health providers and the lawyers who represent the parties and help them navigate through the process with the threat of financial consequences to either party or specific performance if the contract provisions are violated or disregarded.⁷⁹

Despite the constitutional dimension to these rights, increasing numbers of state laws that allow surrogacy to occur, but de-

underpins the prevalent expectation in surrogacy contracts that they will include prenatal testing provisions and pregnancy-related medical and behavioral expectations and placing many of these decisions that affect the health and behavior of the surrogate in the hands of the intended parents.

⁷⁸ *Id.* at 1594-95.

⁷⁹ *Id.* at 1595. As reflective of these challenges in balancing these often contradictory and conflicting interests in surrogacy contracts, at least three entities with an interest in this area of practice have issued guidelines and requirements of these contracts: The American Society of Reproductive Medicine (ASRM) has recommended to balance a surrogate's right to refuse or accept medical interventions against the intended parents' rights to information and behavior requirements. ETHICS COMM. FOR THE AM. SOC'Y OF REPRODUCTIVE MED., *Consideration of the Gestational Carrier: An Ethics Committee Opinion*, 110 ASRM PAGES 1017 (2018). The American Bar Association's 2008 Model Act Governing Assisted Reproductive Technology suggests that surrogacy contracts include both clauses requiring surrogates to undergo certain testing and exams yet also include provisions about the surrogates right to medical autonomy. AM. BAR ASSOC., *American Bar Association Model Act Governing Assisted Reproductive Technology* (Feb. 2008), https://www.lcc.mn.gov/lcs/meetings/10112016/artmodelact_snyder.pdf. The Uniform Law Commissions Uniform Parentage Act (UPA) of 2017 attempts to seek the same reconciliation of these competing interests. Unif. Parentage Act (2017). Rebouché, *supra* note 69 at 1608-09.

scribe how it is to be done, require medical and psychological evaluation of surrogates as well as counseling for or evaluation of intended parents. Contracts are allowed or required to specify how a surrogate's prenatal care and prenatal screening is delivered, as well as providing restrictions on surrogate behavior that might harm the fetus. At the same time, state laws guarantee that surrogates can choose their treating physician and make all decisions concerning their pregnancy. Statutory provisions sometimes address remedies attempting to provide clarity about the consequences of violating contract terms even though the likelihood of their enforcement is uncertain at best – often as a result of the existence of constitutional protections in conflict with both the terms of the contracts and the statutory provisions.⁸⁰

C. *Health and Lifestyle Restrictions*

Many surrogacy contracts also address contractual obligations by the surrogates to abide by health and lifestyle requirements as part of prenatal care that are imposed by the intended parents — impacting and in many respects curtailing the surrogate's right to autonomy in making medical and lifestyle decisions during the pregnancy. An increasing number of statutes that allow for surrogacy have codified contract provisions that have long been common in these contracts that regulate during-pregnancy behavior. Examples include requiring the surrogate to abstain from any activities that the intended parents or physicians reasonably believe to be harmful to the pregnancy and the future health of the child, including smoking, drinking alcohol, using nonprescribed drugs, using prescription drugs not authorized by a physician aware of the carrier's pregnancy, exposure to radiation or any other activities proscribed by a health care provider.⁸¹ Contractual provisions whereby surrogates give up their sole right to make these determinations to intended parents through contractual negotiations could certainly raise constitutional issues.

⁸⁰ *Id.* at 1605-06.

⁸¹ *Id.* at 1607.

D. Travel Restrictions

Individual rights to travel have long been viewed as a basic right enshrined in the Constitution. Surrogacy contracts often impose travel restrictions on the surrogate after she reaches a certain stage of the pregnancy. The recently issued *Dobbs v. Jackson Women's Health Organization*⁸² decision that eviscerates abortion rights and which is the subject of the next section of this article, brought this matter to the forefront of constitutional rights for another reason when Justice Kavanaugh in his concurring opinion reacted to concerns that women's rights to travel from abortion-restrictive states to states without such prohibitions would somehow be curtailed by this decision.⁸³ The dissent in the same decision stated that the majority's holding invites a host of questions about interstate conflicts and raises the particular question of whether after the *Dobbs* decision a state can bar a woman from traveling to another state to obtain an abortion.⁸⁴ Both the dissent and the concurrence by Justice Kavanaugh reference a constitutionally protected right to interstate travel.

Like the right to privacy, which the Supreme Court recognized in 1965 as allowing married couples to use contraception and which provided the basis for *Roe*, the right to travel is not explicitly mentioned in the Constitution.⁸⁵ The right to travel has nonetheless been the subject of longstanding precedents inferred from the structure of the Constitution and related to rights such

⁸² 597 U.S. ___, 142 S. Ct. 2228 (2022).

⁸³ *Dobbs*, 142 S. Ct. at 2304-10 (Kavanaugh, J., concurring).

⁸⁴ *Id.* at 2337 (citing David Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. __ (forthcoming 2023)).

⁸⁵ As I. Glenn Cohen and Melissa Murray pointed out shortly after the *Dobbs* decision was handed down, many of the seminal decisions based on the right to privacy are potentially at risk. These include: *Griswold v. Connecticut*, 381 U.S. 479 (1975) (right to contraception); *Lawrence v. Texas*, 539 U.S. 558 (2003) (right to engage in same-sex sex), and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (right to same-sex marriage). While Justice Alito in his majority opinion went out of his way to state that this decision as to abortion concerned no other right, Justice Clarence Thomas in his concurrence urged the Court to reconsider all of the Court's substantive due process precedents, which he asserted were "demonstrably erroneous." I. Glenn Cohen & Melissa Murray, *The End of Roe v. Wade and New Legal Frontiers on the Constitutional Right to Abortion*, JAMA, July 8, 2022, <https://jamanetwork.com/journals/jama/fullarticle/279425>.

as those promoting interstate commerce or granting privileges and immunities.⁸⁶ While the surrogate agrees to terms and conditions restricting travel when she signs on to the contract, these are constitutionally protected rights that are being regulated by these contracts. How conceded rights will coexist with travel restrictions being imposed by various states seeking to curtail abortion access by their citizens remains to be seen and will present ongoing drafting challenges to ART lawyers.⁸⁷

E. *Selective Reduction and Abortion*

Perhaps long the most controversial provisions in surrogacy contracts have involved issues of selective reduction and abortion — a contractual topic made all the more fraught in light of the recent *Dobbs* decision, and the cascading reaction by state courts and legislatures grappling with individual state laws dealing with abortion. This topic seems to call into play the balancing of competing constitutional interests in a most basic way: the rights of intended parents to procreate versus the surrogate's liberty rights to make medical decisions that affect her own health and body.

Selective reduction provisions have long been common in surrogacy contracts, especially in the early years of surrogacy when the medical technology necessitated the implantation of multiple embryos to ensure that a viable pregnancy would occur, increasing the chances of multiple fetuses in gestation and often accompanied by complex medical challenges. Medical technology has since improved, but selective reduction provisions re-

⁸⁶ Naomi Cahn, June Carbone, & Nancy Levit, *Is it Legal to Travel for Abortion After Dobbs?* BLOOMBERG LAW NEWS, July 11, 2022, <https://www.bloomberglaw.com/us-law-week/is-it-legal-to-travel-for-abortion-after-dobbs>.

⁸⁷ Cahn, Carbone, and Levit raise what they refer to as the complicated question of whether a person who has an abortion in a state that legally allows the procedure and returns home to a restrictive state can be prosecuted criminally for pursuing the abortion in another state. It has long been assumed that a state cannot ordinarily prosecute a person for something that occurred in another state; however, these are not ordinary times. These authors suggest that Congress could (and should) enact legislation that protects the right to travel for abortion care, which ensures that no one who assists a person in accessing their right to travel can be prosecuted, and that providing accurate information about legal rights associated with abortion enjoys First Amendment protection. *Id.*

main a common contractual term since many intended parents would prefer to parent only one or two children, and have children free of major birth defects or other such complications. This necessitates including a contractual provision obligating the surrogate to engage in a medical selective reduction if more than one or two children are possible or severe birth defects are discovered prior to viability.

The abortion provision is even more complicated given that criteria for when a fetus would be aborted of necessity need to be spelled out in the contract. A major question has always existed whether such an abortion mandate was enforceable, because a surrogate had a constitutional right to decide whether to abort and no one could envision a doctor undertaking an abortion over the objection of the pregnant surrogate. Specific performance is never usually considered a remedy to enforce such contractual terms, leaving damages and financial consequence as the only viable remedy.⁸⁸

In *Dobbs*, the Supreme Court majority not only upheld Mississippi's ban on abortion at fifteen weeks gestational age, but went further and explicitly overruled *Roe v. Wade*, which recognized the right of a patient, in consultation with her physician, to choose an abortion, and also overruled *Planned Parenthood v. Casey* which affirmed *Roe's* core holding.⁸⁹ The majority's concerns with *Roe* and *Casey* were based on three concerns: (1) the Constitution makes no reference to abortion and no such right is implicitly protected by any constitutional provision; (2) the right to abortion is not deeply rooted in this nation's history and tradition nor implicit in the concept of ordered liberty, and hence not a fundamental right protected by substantive due process, and (3) whether to allow abortion and under what conditions are to be resolved like most important questions in our democracy,

⁸⁸ See Emma Cummings, *The (Un)Enforceability of Abortion and Selective Reduction Provisions in Surrogacy Agreements*, 49 CUMB. L. REV. 85, 117-19 (2018) (discussing the issues associated with ordering specific performance of selective reduction clauses); but see Julia Dalzell, *The Enforcement of Selective Reduction Clauses in Surrogacy Contracts*, 27 WIDENER COMMW. L. REV. 83 (2018) (arguing for specific performance of selective reduction clauses).

⁸⁹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

through the legislative process, and in this instance, by the state legislatures.⁹⁰

The *Dobbs* decision arguably applies to both medication and surgical abortions as well as physicians and clinics that provide ART services, including in vitro fertilization. In the area of medication abortions, executive orders and agency rules are being issued in the face of state laws and regulations, setting up litigation to determine whether state attempts to restrict medical abortions are preempted by federal rules and regulations governing such medical practices.⁹¹ Medical professionals at clinics that perform surgical abortions are trying to figure out what they can and cannot do in terms of abortion procedures. The handling of embryos in IVF procedures, many of which are destroyed in the process or when used for medical or other reasons, raise concerns based on the repeated references in *Dobbs* to “the unborn human being,” “potential life,” and “the life of the unborn,” which many state anti-abortion statutes declare begins at the point of fertilization.⁹² The same logic may encompass prohibiting the destruction of embryos.⁹³

In a post-*Dobbs* world, contractual provisions in surrogacy contracts addressing abortion and selective reduction have become much more complicated and fraught with anxiety for the lawyers and their clients. No longer are these issues and concerns limited to enforceability, but now such provisions (long viewed by many practitioners as essential terms of these contracts) bring with them the spectre of potential civil and criminal penalties that could be imposed on the parties, the lawyers, and the medical providers as a result of even including a selective reduction or abortion provision in the contracts. ART practitioners are now debating whether to continue to include these provisions at all in their contracts, or whether to add additional provisions requiring the surrogate to travel to another state to undergo selective reduction or abortion if that is required by the desires of the intended parents and the terms of the contracts. Being either a party to such contracts or being the drafting attor-

⁹⁰ Cohen & Murray, *supra* note 85, at E1.

⁹¹ *Id.* at E1.

⁹² *Dobbs*, 142 S. Ct. at 2241, 2243, 2284.

⁹³ Cohen & Murray, *supra* note 85, at E2.

ney to such contracts arguably puts all of the participants in legal jeopardy.

IV. Right to Use and Access Genetic Materials

Constitutional issues are also implicated in the area of regulating who has the right to use, control, and dispose of the genetic material involved in ART processes. With the improved ability to retrieve and store indefinitely eggs, sperm, and embryos, these ongoing disposition issues have become enormously complicated. Adding to the complication is how to characterize the embryos and non-viable fetuses. Are non-viable fetuses simply inanimate property, persons, or given special status due to their potential to become people?⁹⁴ The legal status of embryos bears heavily on dispositional decisions made when couples separate,⁹⁵ but also raises crucial questions such as whether an embryo, through an appointed next friend, has standing to raise legal claims on its own.⁹⁶ Because courts have determined fetuses are not persons under the law, it follows that embryos also should not be considered persons, though scholars and interested parties to actions still present arguments to the contrary.⁹⁷

These constitutional issues are most frequently raised in the context of divorcing or separating couples. After couples who have created and stored embryos split up, they must decide how

⁹⁴ Mark W. Myott, *Neutral Grounds*, 10 GEO. J.L. & PUB. POL'Y 619, 624 (2012). See I. Glenn Cohen & Eli Y. Adashi, *Embryo Disposition Disputes: Controversies and Case Law*, 46 HASTINGS CTR. REP. 13, 15 (2016) (exploring the implications of classifying an embryo as a child and applying the best interests standard to its disposition).

⁹⁵ See June Carbone & Naomi Cahn, *Embryo Fundamentalism*, 18 WM. & MARY BILL RTS. J. 1015, 1021 (2010).

⁹⁶ Sara I. Salehi, *Do Embryos Have Constitutional Rights? Doe v. Obama*, 63 S.C. L. REV. 1091, 1095 (2012) (discussing the cases following *Doe v. Obama* and the failure of courts to address whether frozen embryos may bring actions alleging infringement of constitutional rights).

⁹⁷ Deborah L. Forman, *Embryo Disposition, Divorce, & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 423-24 (2013) [hereinafter "*Embryo Disposition*"]. See *Roe*, 410 U.S. at 158 ("the word 'person,' as used in the Fourteenth Amendment, does not include the unborn"). It not clear whether *Dobbs* also operates to amend the Court's decisions on fetal personhood, since Justice Alito states "our decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests." *Dobbs*, 142 S. Ct. at 2256.

to divide the stored genetic materials. Many courts have grappled with these issues and academics have generated a plethora of articles analyzing how these decisions should be made when one of the parties wants to receive and procreate with the genetic material and the other party does not want that to occur.⁹⁸ Courts have generally adopted three approaches to these claims: the balancing approach, the contract approach, and the contemporaneous consent approach.⁹⁹ Courts that adopt the contract approach will only rely on a contract that is unambiguous and contemplates the situation the parties are currently in, emphasizing the importance of comprehensive and clear embryo disposition contracts.¹⁰⁰ Without an unambiguous contract, courts often turn to the balancing approach, which is where constitutional rights come into play.¹⁰¹

The balancing approach contemplates the clash of the constitutional right to procreate versus the constitutional right not to procreate. Reaching well-reasoned resolutions are not easy. Sometimes neither party desires to procreate, but the parties cannot agree on whether to continue storing the genetic material, who will pay for the ongoing storage costs, or whether to destroy the material, donate it for medical research, or donate it to other persons for procreation. These are all considerations that an embryo disposition contract can consider and adequately address, avoiding consequent litigation.¹⁰² Nonetheless, when the constitutional right to procreate clashes with the constitutional right

⁹⁸ See generally Cohen & Adashi, *supra* note 94; Mary Joy Dingler, *Family Law's Coldest War: The Battle for Frozen Embryos and the Need for a Statutory White Flag*, 43 SEATTLE U. L. REV. 293 (2019); Caroline Strohe, *The Fate of Frozen Embryos After Divorce: A Call for Courts to Properly Balance Procreative Freedom*, 66 LOY. L. REV. 263 (2020); Mary Ziegler, *Beyond Balancing: Rethinking the Law of Embryo Disposition*, 68 AM. U. L. REV. 515 (2018).

⁹⁹ See Forman, *Embryo Disposition*, *supra* note 97, at 383-88; Carissa Pryor, *What to Expect When Contracting for Embryos*, 62 ARIZ. L. REV. 1095, 1098-109 (2020); Strohe, *supra* note 98, at 275-82. See also Cohen & Adashi, *supra* note 94, at 13 (discussing the intersection of the embryo "personhood" movement and embryo disposition disputes, causing courts to consider the best interests of the "child" instead of the parties' constitutional rights to procreate or not procreate).

¹⁰⁰ Pryor, *supra* note 99, at 1098.

¹⁰¹ See *id.*

¹⁰² Myott, *supra* note 94, at 627-28 (explaining the significance of embryo disposition contracts containing duration provisions, specific disposition provi-

not to procreate, courts generally favor the right not to procreate.¹⁰³ Nonetheless, as the legal status of embryos continues to be debated, and faced with the push to consider embryos as persons, courts could turn away from considering the potential parents' constitutional rights, but instead analyze the best interests of the embryo, or "child."¹⁰⁴

Other families make similar decisions in posthumous situations where the owner of the genetic material has passed away and a surviving spouse, partner, parent, or other relative must decide whether to use the stored genetic material for procreation after the owner is deceased, indefinitely store the material, have it destroyed, or donate it for further procreation. Deciding the disposition of genetic material posthumously is emotionally taxing, indicating the importance of contracting regarding the fate of this material at the time of initial storage.¹⁰⁵ Any restriction to posthumous conception, such as requiring the decedent's consent prior to death, may implicate a liberty interest in procreation, though it is highly unclear whether posthumous conception would be treated similarly to traditional conception or even more popularized forms of ART.¹⁰⁶ When surviving spouses utilize the genetic material to posthumously conceive, parentage must be

sions, and allowing both progenitors the ability to choose their preferred disposition clause).

¹⁰³ Forman, *Embryo Disposition*, *supra* note 97, at 382, n.14 (engaging in an interesting exploration of cases where the right to procreate has overcome the right not to procreate, and demonstrating that the decision often turns on what a previous contract contemplates, and not a constitutional judgment).

¹⁰⁴ See Cohen & Adashi, *supra* note 94, at 13 (considering the intersection of the embryo "personhood" movement and embryo disposition disputes, which may cause courts to consider the best interests of the "child" instead of the parties' constitutional rights to procreate or not procreate). The plaintiff in *McQueen v. Gadberr*y attempted to advance this argument, though the court denied embryos' "special character," and instead characterized them as marital property. 507 S.W.3d 127, 132 (Mo. Ct. App. 2016).

¹⁰⁵ See Ellen Trachman & William E. Trachman, *The Walking Dead: Reproductive Rights for the Dead*, 3 SAVANNAH L. REV. 91 (2016).

¹⁰⁶ Cohen & Adashi, *supra* note 94, at 15-19. Some scholars argue for a framework of presumed consent, much like in the realm of organ donation, to avoid any restriction to posthumous conception. Hilary Young, *Presuming Consent to Posthumous Reproduction*, 27 J. L. & HEALTH 68 (2014); Trachman & Trachman, *supra* note 105, at 102-06. So long as an individual did not expressly state their genetic material cannot be used for posthumous conception, it is allowed. *Id.*

determined, and states have differentiating stances on whether a deceased individual can be the parent of a posthumous conceived child.¹⁰⁷ The unclear parentage of posthumously conceived children also raises significant estate planning concerns that practitioners should be aware of prior to advising any client contemplating posthumous conception.¹⁰⁸ When posthumously conceived children are treated differently than non-posthumously conceived children, specifically in the allocation of benefits, constitutional principles of equality are also at issue.¹⁰⁹

Missing from all of these decisions are the rights of children born of these stored genetic materials and whether those children have constitutionally protected rights and interests to know their genetic origins. The United Nations Convention on the Rights of the Child has plainly stated children have a right to know their identity, which includes their family relations.¹¹⁰ Nonetheless, courts have held, specifically in relation to adoptions, that children have no fundamental right to know their parent's identities,¹¹¹ though it is strongly recommended by medical and ethical professionals that this information be shared.¹¹² Children's constitutional rights often come into conflict with their parents' constitutional rights to rear their children and make

¹⁰⁷ Jessica Knouse, *Liberty, Equality, and Parentage in the Era of Posthumous Conception*, 27 J.L. & HEALTH 9 (2014).

¹⁰⁸ For a comprehensive discussion on estate planning concerns relating to posthumous conception, see Benjamin C. Carpenter, *Sex Post Facto: Advising Clients Regarding Posthumous Conception*, 38 ACTEC L.J. 187 (2012).

¹⁰⁹ Knouse, *supra* note 107 (arguing that in posthumous conception scenarios, the framework should be switched from parent and child to provider and dependent to allow for posthumous conceived children to recover benefits from a deceased parent).

¹¹⁰ Alexandra Harland, *Surrogacy, Identity, Parentage, and Children's Rights – Through the Eyes of a Child*, 59 FAM. CT. REV. 121, 121 (2021).

¹¹¹ See *In re Adoption of S.J.D.*, 641 N.W.2d 794, 803 (Iowa 2002) (stating, in relation to adoption, "although recognizing that adoptees have a general right to privacy and to receive information, the courts have rejected the argument that adoptees have a fundamental right to learn the identities of their biological parents. The courts maintain that no constitutional or personal right is unconditional and absolute to the exclusion of the rights of all other individuals. The right to privacy and to information asserted by adoptees directly conflicts with the right to privacy of birth parents to be left alone.").

¹¹² See Ethics Committee of the American Society for Reproductive Medicine, *Informing Offspring of Their Conception by Gamete or Embryo Donation: A Committee Opinion*, 100 FERTILITY & STERILITY 45 (2013).

parenting decisions.¹¹³ Therefore, whether children would have a prevailing constitutional right to learn of any siblings born through ART, or any say in future disposition of genetic material that shares their genetic origins, is unlikely when presented with a parent unwilling to share that information and decision-making power.

Conclusion

Constitutional issues abound in the area of assisted reproduction. The issues emerge in the preliminary question of who can be determined to be a legal parent in the absence of a marital relationship between intended parents or a genetic or biological connection to the child. Indeed, the timely topic of functional parentage is at the heart of this determination for many persons seeking to build families through assisted reproduction. Securing access to all of these newly advancing medical technologies dealing with retrieval and storage of genetic material and the use of such materials to create children in ways previously unimaginable raise complex and critically important constitutional issues based on doctrines of equal protection and substantive due process — who has the right to procreate, and under what circumstances and conditions?

The contracts involved in these assisted reproduction processes have many terms and provisions that in and of themselves raise potential constitutional issues — the right to compensation, the right to travel, and the right to make medical decisions and lifestyle choices, as well as who gets to decide and under what conditions selection reduction, abortion, and other manipulations of the involved genetic material can occur. All raise serious and complex constitutional issues. Finally, the increasingly common and often fraught disputes that arise between divorcing couples and family members of deceased persons who left behind cryopreserved genetic material — and who should be allowed to use these materials for reproductive purposes — have constitutional dimensions that must be addressed and considered. It is critical for attorneys counseling clients in this area to discuss these constitutional issues with them and to draft provi-

¹¹³ See *In re Adoption of S.J.D.*, 641 N.W.2d at 803, for an example of such a constitutional clash.

sions that would survive constitutional scrutiny in the event of future disputes. ART attorneys should also support enshrining such protections in comprehensive state statutory schemes that lay out what terms can be included and enforced in these contracts, perhaps heading off potential future constitutional challenges that could arise in future disputes.

Family law attorneys have long espoused a central concern for the best interests of the children involved in their disputes. Indeed, that doctrine is at the heart of statutes and case law addressing the placement and rearing of children by their parents. The state has a role in protecting children under the doctrine of *parens patriae* and parents have long had a fundamental right to parent to their children without undue interference by the state or other third parties. The area of assisted reproduction is now also raising that important issue of what rights do children born of these processes have to know their genetic origins and to pierce confidentiality provisions placed in donor contracts and surrogacy arrangements. These issues have not yet been litigated in ART, but much like the demands of adopted children to know their biological origins, that day will no doubt come in this area of family formation, with constitutional arguments being used to support the demands.

The days when family law attorneys need not consider or seriously ponder the rarified jurisprudence of constitutional law are probably gone. Current parentage laws and practices are evolving quickly and seeping into all areas of family law attorneys' practices. It is essential for family law attorneys to spot these issues in their practices and to understand and counsel their clients on the many implications.

