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Commercial Surrogacy Agreements and the Commerce Clause: Creating Certainty through Federal Regulation

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Introduction

Over the last half decade the use of surrogate carriers to aid infertile couples in starting a family has risen drastically. From 2004 to 2008 the number of infants born as a result of surrogate parenting agreements nearly doubled.¹ Even without the statistics one can notice a marked change in the popularity of surrogacy from simply observing the portrayal of surrogacy agreements in entertainment. From major motion pictures such as Baby Mama², to popular reality television shows like TLC’s The Little Couple³, surrogacy agreements are becoming part of pop culture. Despite the spike in popularity, the vast majority of states remain with no legislation addressing the legality, regulation and enforcement of surrogate parenting agreements. This lack of legislation forces reluctant judges to legislate from the bench when the validity of these agreements is questioned. These judges are often forced to make decisions with little or no guidance, using a hodgepodge of Constitutional rights and various state laws regarding adoption and baby selling to make a decision that could have easily been settled on beforehand via legislation. This not only wastes the time of the judiciary, but it puts an innocent child’s ultimate disposition, custody and care needlessly at risk.

There is a great deal of evidence that surrogacy as an industry needs to be regulated, but how and by whom? While family law issues are historically handled at a state level, commercial surrogacy companies have created a mercantile industry within the family law context. These companies operate with profit as the ultimate goal. This sets them apart from other areas of

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¹ Magdalina Gugucheva, Council for Responsible Genetics, Surrogacy in America 4 (2010).
² Baby Mama, (Universal Pictures 2008).
³ The Little Couple: Three Shops and a Baby Doc (TLC television broadcast Feb. 9, 2010)
family law and creates an opportunity for the Federal Government to provide the regulation the industry desperately needs. Because commercial surrogacy companies provide a service for a fee and often operate over state lines, Congress should be able to regulate the industry under their Commerce Clause power. Federal regulations should force each state to legislatively decide whether or not the state chooses to uphold surrogacy agreements and provide a model starting point with guidelines that states that choose to uphold such agreements must follow. Because each state should ultimately be able to draft legislation based on the beliefs of its constituency, the goal would not necessarily be uniformity across the nation. The goal instead would be to create a level of certainty so parties would not blindly enter into these agreements leaving the custody and care of an innocent, unborn child in the balance.

This article begins in Part I by discussing the judicial results of this lack of legislation and the reasoning behind why more certainty in the law regarding surrogacy agreements is necessary. Part II discusses the business of surrogacy and explains why it should be considered a commercial industry eligible for regulation under Congress’ Commerce Clause power. Part III discusses the history of the Commerce Clause and how it has been used to achieve goals that had an arguably more tangential relationship with interstate commerce than the commercial surrogacy industry. Part IV will discuss how Congress has already enacted legislation regarding other areas of family law, proving that family law is not always a state issue that is off-limits to the Federal Government. Finally, Part V will discuss the specifics of the regulations Congress should promulgate in order to bring more certainty to this unreasonably unregulated area of law.

I. The Need for Regulation

\[^{4}\text{U.S. CONST. art. 1, } \S\ 8, \text{ cl. 3.}\]
The reasoning behind regulation of the commercial surrogacy industry often revolves around uniformity. Numerous scholars have argued that uniformity of surrogacy laws between the states is needed in order to avoid the problems of contract enforceability and forum shopping. The real problem, however, is one of uncertainty rather than uniformity. It is the absence of laws rather than the variation of laws that potentially harms prospective parents, surrogates and children. The majority of states have a complete lack of legislation regarding enforceability and regulation of surrogacy agreements. This lack of legislation leaves decisions of enforceability in the hands of an often reluctant judiciary, forcing judges to legislate issues of public policy from the bench. This problem is entirely avoidable. Surrogacy is not an ever evolving technology that the legislature is ill-equipped to understand; it is simply an issue that most legislatures choose not to deal with. While the exact specifics of the process may evolve, the issue of whether or not to enforce surrogacy agreements has remained the same since the legality of these agreements was first questioned decades ago.

_in re Baby M_ was decided by the New Jersey Supreme Court in 1988 amongst controversy and voyeuristic intrigue. In _Baby M_, the Court found that traditional surrogacy agreements were unenforceable as a matter of public policy in the state of New Jersey. A traditional surrogacy agreement is one in which the surrogate mother is both the gestational and

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7 In re Baby M, 109 N.J. 396, 537 A.2d 1227 (1988): The Baby M case was so popular and controversial a movie revolving around the facts of the case was produced: BABY M (ABC Circle Films, 1988).

genetic parent of the resulting child.\(^9\) In a traditional surrogacy agreement a woman is artificially inseminated with a man’s sperm and agrees to relinquish parental rights upon the child’s birth.\(^10\) In *Baby M*, Mary Beth Whitehead was artificially inseminated with Mr. William Stern’s sperm.\(^11\) Mrs. Whitehead agreed once the resulting child was born she would relinquish her maternal rights so that the infertile Mrs. Stern could adopt the child.\(^12\) The problem arose when Mrs. Whitehead changed her mind and refused to give the child to the Sterns.\(^13\) In a story juicy enough to be transformed into a television movie\(^14\), the child was eventually recovered from Mrs. Whitehead and her husband in Florida, returned to the Sterns, and a trial regarding the parental rights and enforceability of the surrogacy agreement began.\(^15\)

The trial court found that the surrogacy agreement was valid and granted custody of the child to the Sterns.\(^16\) The Supreme Court agreed with the trials court’s ultimate decision regarding custody, but had a very different opinion and analysis of the validity and enforceability of the surrogacy agreement.\(^17\) The Supreme Court decision stated that “a contractual agreement to abandon one’s parental rights…will not be enforced” finding that surrogacy agreements were akin to the sale of a child and that “[a]lmost every evil that prompted the prohibition on the payment of money in connection with adoption exists here.”\(^18\)
While the court in *Baby M* adamantly opposed surrogacy agreements, it was careful to assert that the “Legislature remains free to deal with this most sensitive issue as it sees fit,” inviting the Legislative Branch of the State’s Government to draft laws that would help resolve the issue.\textsuperscript{19} This is an invitation the New Jersey Legislature has never accepted. Ultimately, the decision in *Baby M* remains good law in New Jersey and traditional surrogacy agreements are void as against state law and public policy.\textsuperscript{20}

The same reasoning the *Baby M* court used to void traditional surrogacy agreements was recently adopted by a trial court in New Jersey when dealing with the issue of gestational surrogacy agreements.\textsuperscript{21} A gestational surrogacy agreement is one in which the surrogate or gestational carrier is not genetically related to the child she is carrying.\textsuperscript{22} Gestational surrogacy is now by far the most common form of surrogacy and is the basis for the commercial surrogacy industry.\textsuperscript{23} One of the reasons that gestational surrogacy is more common is because the lack of a genetic relationship between the surrogate and the child would seemingly give the surrogate a weaker chance of proving a legal relationship with the child if the agreement was to ever be challenged in court. The court in *A.G.R. v. D.R.H. & S.H.*, dismissed this reasoning and decided

\footnotesize{\textsuperscript{19} Id. at 468, 537 A.2d at 1264.  \\
\textsuperscript{21} A.G.R. v. D.R.H. & S.H., Docket No. FD-09-001838-07, Superior Court New Jersey, Hudson County (Dec. 23, 2009) (Angelina Robinson agreed to be a gestational carrier for her brother and her brother’s husband, Sean Hollingsworth. Hollingsworth provided the sperm and the egg was supplied by an anonymous donor. Ms. Robinson eventually gave birth to twin girls, but refused to follow the agreement and challenged custody under the theory that gestational agreements were invalid in the state of New Jersey. The court agreed, holding that traditional surrogacy agreements had been invalidated in *Baby M* and that a gestational surrogacy agreements was not distinguishable from a traditional one).  \\
\textsuperscript{22} DOLGIN, supra note 9, at 63.  \\
\textsuperscript{23} See UNIF. PARENTAGE ACT § 806 cmt.(amended 2002), 9B U.L.A.363 cmt. (Supp. 2002) (stating traditional surrogacy is generally disapproved of by medical facilities practicing assisted reproduction).}
that in the state of New Jersey there is no legal difference between gestational surrogacy and traditional surrogacy.\textsuperscript{24}

The court’s decision in \textit{A.G.R. v. D.R.H.} is an excellent example what type of results can be expected when a state legislature remains silent on the issue of surrogacy. The court stated:

\begin{quote}
It was pointed out in \textit{Baby M} that the Parentage Act was silent as to acknowledging surrogacy agreements and that Court suggested that the silence of the Legislature suggested that the Legislature chose not to recognize surrogacy. If that interpretation of the Legislature’s silence is correct, the additional twenty-one years of silence as to surrogacy agreements speaks even louder.\textsuperscript{25}
\end{quote}

Left with only legislative silence, the court in \textit{A.G.R. v. D.R.H.} was forced to rely on a twenty-one year old precedent with an almost certainly distinguishable set of facts. This is not a solid enough basis to rely upon when dealing with the custody and care of an innocent child. With the passage of twenty-one years since the decision in \textit{Baby M} and the rising use of gestational surrogacy around the United States, the New Jersey State Legislature could have easily promulgated laws that reflected its position in regards to surrogacy agreements. The legislature could have reasoned that traditional agreements were void while gestational agreements were legal or it could have reasoned that all agreements were void; the specifics of the legislation is not of ultimate importance. What is important is the certainty that would have accompanied the legislation. If the parties in \textit{A.G.R. v. D.H.R.} were knowledgeable of legislation that stated all surrogacy agreements are void in New Jersey, they would have been left with the options of either executing their agreement in another state, not entering into an agreement at all, or disobeying the law. Regardless of the option they ultimately chose, there would at least be relative certainty regarding the outcome of their decision. What they were instead left with was guesswork and tenable precedential connections that left the custody and care of an innocent


\footnotesize{25} \textit{Id.} at 4.
child in limbo for as long as the appeals process takes. This uncertainty should not be acceptable.

Similar to New Jersey, California courts have crafted surrogacy laws without the help of the legislature. California courts, however, have reached vastly different results. In Johnson v. Calvert, the Supreme Court of California found that surrogacy agreements did “not offend the state or federal Constitution or public policy.” In Johnson, the intended parents provided their egg and sperm and a gestational surrogate agreed to carry the child to term and relinquish parental rights upon birth. After the deterioration of the relationship between the parties the courts had to decide the fate of the child. The Supreme Court of California upheld the surrogacy agreement and reasoned that “[b]ecause two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties’ intentions as manifested in the surrogacy agreement.” Because the intended parents were the ones who desired to have a child, they were found to be the legal parents of the child.

This same intent based reasoning was used to decide that lawful parents of a child born to a surrogate in In re Marriage of Buzzanca. The difference in the Buzzanca case was that the intended parents had no genetic ties to the child. Regardless of the lack of a genetic

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26 See THE SELECT SURROGATE supra note 6.
28 Id. (It is important to note that the child the surrogate was carrying in this case was genetically related to both the intended mother and intended father).
29 Id. at 782. (The surrogate had parental rights because she had carried the child; the intended mother had parental rights because she was genetically related to the child. Because this was a “tie” the court relied on the intent of the parties).
30 Id.
31 In re Marriage of Buzzanca, 72 Cal. Rptr.2d 280 (Cal. Ct. App. 1998) (The Buzzancas entered into a gestational surrogacy agreement where both the egg and sperm were from anonymous donors. The Buzzancas intended on becoming the parents of the resulting child, Jaycee, but when they divorced John Buzzanca disclaimed any parental responsibility. Luanne Buzzanca claimed that she and John were Jaycee’s lawful parents. Neither of the donors or the gestational surrogate claimed parental responsibility. The trial court found that Jaycee had no parents. The Appellee court reversed, finding that John and Luanne Buzzanca were Jaycee’s lawful parents because they initiated the process and were the intended parents).
32 Id.
relationship, the court found that intent still governed the parentage decision.\textsuperscript{33} The court stated that even though the intended parents were not biologically related to the child “they are still her lawful parents given their initiating role as the intended parents in her conception and birth.”\textsuperscript{34}

While the decisions in both \textit{Buzzanca} and \textit{Johnson} have firmly established California’s acceptance of surrogacy agreements, the courts were relatively reluctant in deciding these policy issues. In \textit{Johnson}, the court stated:

\begin{quote}
We are all too aware that the proper forum for resolution of this issue is the Legislature, where empirical date, largely lacking from this record, can be studied and rules of general applicability developed. However, in light of our responsibility to decide this case, we have considered as best we can its possible consequences.\textsuperscript{35}
\end{quote}

The \textit{Buzzanca} court echoed this statement, finding:

\begin{quote}
As jurists we recognize the traditional role of the common (i.e., judge formulated) law in applying old legal principles to new technology.... However, we still believe it is the Legislature, with its ability to formulate general rules based on input from all its constituencies, which is the more desirable forum for lawmakers.\textsuperscript{36}
\end{quote}

The Legislature in California never accepted these invitations to intervene and the common law decisions in \textit{Buzzanca} and \textit{Johnson} remain the law in California.\textsuperscript{37}

California and New Jersey are both excellent examples of the types of issues that face the courts if legislatures fail to enact laws regarding surrogacy. The California courts’ precedents have been firmly established, leaving California as a haven for surrogacy agreements.\textsuperscript{38} The New Jersey Courts may still be left to sort out issues of gestational surrogacy with potential appeals of the \textit{A.G.R. v. D.H.R.} decision, but for now their common law precedents have been

\begin{itemize}
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.} at 293.
\item \textsuperscript{35} \textit{Johnson}, 851 P.2d at 784-85.
\item \textsuperscript{36} \textit{Buzzanca}, 72 Cal Rptr.2d at 293.
\item \textsuperscript{37} \textit{See} THE SELECT SURROGATE \textit{supra} note 6.
\item \textsuperscript{38} \textit{See} THERESA M. ERICKSON, SURROGACY AND EMBRYO, SPERM AND EGG DONATION: WHAT WERE YOU THINKING?: CONSIDERING IVF AND THIRD PARTY REPRODUCTION 68 (“courts in California provide the most favorable legal forum for surrogacy and egg donation for couples/individuals in California, in the entire country, and throughout the world”).
\end{itemize}
established as well.\textsuperscript{39} The laws in these two states were established by putting the custody and care of innocent children in the balance while lengthy court battles played out. This is cause for concern in the states that currently have neither surrogacy laws enacted by the legislature or case law that is on point. This is the case for the majority of states.\textsuperscript{40} Without legislation each state will have to wait until a child’s fate hangs in the balance to determine what one court decides the law should be. This lack of certainty regarding a child’s fate is a problem that is too important to ignore, yet it has been ignored by the majority of state legislatures. Given the majority of states’ failures to act, Congress should intervene and force the states to take action one way or another. Congress should be able to take action and regulate this industry just as it would any other industry that engages in interstate commerce. In order to form the basis for federal regulation using Commerce Clause power\textsuperscript{41}, Congress would need to ensure that the formation of commercial surrogacy agreements actually affects interstate commerce.

II. Surrogacy as a Business

In certain situations, surrogacy agreements remain completely within the family law context and do not affect interstate commerce whatsoever. Take for example an infertile couple who live in a state such as California where surrogacy agreements are upheld by the courts. This hypothetical California couple decides that they would like to have a surrogate carry their child and they know of a relative or close friend who would perform the service out of the kindness of her heart. Everything goes according to plan; the child is born and is adopted by the infertile couple. This scenario does occur and if this was the only way surrogate agreements played out


\textsuperscript{40} \textit{See ALL ABOUT SURROGACY; THE SELECT SURROGATE supra note 6.}

\textsuperscript{41} U.S. CONST. art. 1, § 8, cl. 3.
there would be little argument that they had any effect on interstate commerce. However, many surrogacy agreements come to fruition in a vastly different way. Commercial surrogacy agreements involve advertisements in different forms of media; financial compensation for the surrogate; fees paid to a third party agency; and, most importantly, couples from one state paying surrogates and agencies located in other states. These commercial surrogacy companies conduct their business over state lines without regulation, and business is booming.

In a recent ABC broadcast, one surrogacy agency calling itself Growing Generations was profiled. The journalist described the company’s process as a “mixture of courtship and shopping online”. One intended parent even compares the process to “the Sears Christmas catalog”. While a login name and password are required to get to the actual “shopping” part of Growing Generations’ website, a casual visitor to the site is still able to see how the broadcast’s analogies are quite fitting. At growinggenerations.com a potential parent is given a brief overview of the process. As outlined on the website, the process starts with a 90 minute consultation in the growing generations’ office, or via Skype. At this consultation the intended parents will receive an explanation of the program, details regarding the medical procedures, and be given an opportunity to meet the staff. Once the process of admissions is complete the intended parents will be eligible to be matched with a surrogate. This is where the comparison to a combination of courtship/shopping online is quite fitting. An intended parent can search

43 Id.
44 Id.
47 Id.
48 Id.
online through a variety of potential surrogates and choose one deemed to be most fitting. According to growinggenerations.com, this program ranges from between $115,000 and $165,000. The website states, “[w]hile some agencies may quote lower costs, our experience has shown that almost everyone spends within 10-20% of the same amount. However, the service you’ll receive during the process varies greatly.” The website then goes on to include a section of all the questions intended parents should ask followed by impressive answers to those questions regarding this particular agency. Growinggenerations.com is an agency that specifically targets gay and lesbian couples in their advertisements; however, it appears from the ABC broadcast and the website that the company will provide services for heterosexual couples as well. Upon a survey of other agencies’ websites, it also appears that growinggenerations.com is amongst a multitude of agencies all with very similar procedures and very similar claims.

Conceptual Options is another commercial surrogacy agency that is easily found with a quick “surrogacy” Google search. Conceptual Options website contains an overview of the process, frequently asked questions complete with answers as to why Conceptual Options is the best choice, a rundown of the surrogacy fees, and even pictures and descriptions of employees of the agency. The same basic format is used for Center for Surrogate Parenting, Inc., Circle

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49 Id.
50 Id.
51 Id.
52 Id.
53 Id.
54 Id.; Nightline supra note 42.
56 CONCEPTUAL OPTIONS supra note 55.
Surrogacy, Family Creations, Agency for Solutions, etc.\textsuperscript{57} The list goes on and on. It is obvious that if an intended parent has the requisite funds, they are not lacking options when it comes to commercial surrogacy. The question seemingly becomes not whether or not this activity is truly a business, but instead how big of a business it actually is.

While exact statistics regarding the amount of revenue commercial surrogacy agencies produce yearly is nearly impossible to pin down, it has been found that “the assisted reproductive industry [as a whole has] annual revenues of nearly $7 billion.”\textsuperscript{58} Focusing only on surrogacy contracts that have been actually recorded reveals that, as of 2001, surrogacy accounted for less than 0.7\% of the total attempts at assisted reproductive technology.\textsuperscript{59} Over the years the number of recorded surrogacy contracts has risen from 571 in 2001\textsuperscript{60}, to 738 in 2004, to nearly 1400 in 2008.\textsuperscript{61} Assuming that this rise directly correlates with the rise in all assisted reproductive technology would mean that surrogacy still accounts for only 0.7\% of the total assisted reproductive technology industry.\textsuperscript{62} If the percentage remains the same, the revenue for the surrogacy industry would be around $49 million annually. If the percentage rose with the production, the revenue this industry is producing could be greater than $100 million per year. These figures are only estimates because it is difficult to come up with any completely reliable statistics, but it seems obvious that this is an industry that generates multimillion dollars worth of revenue annually.

\textsuperscript{60} Id.
\textsuperscript{61} GUGUCHEVA supra note 1.
\textsuperscript{62} SPAR supra note 59.
One interesting aspect of this multimillion dollar a year business is that supply and demand do not function as they do in other markets. Basic principles of economics propose that as demand increases, prices rise causing new suppliers to enter the market, which ultimately causes prices to fall. It has been argued, however, that “[i]n the fertility trade… supply is limited by the expertise involved, and demand doesn’t function as it does in other markets…[w]here fertility is concerned, demand knows no limits”. Demand having “no limits” may be a bit of an exaggeration. There are “built-in constraints” in the system such as a lack of insurance coverage and the idea that doctors can refuse to treat patients. However, while these constraints on the industry may alter the number of people that actually go through with the surrogacy process, they will not necessarily alter peoples’ desperation and desire for a child. This desperation means that some couples are willing to pay whatever price is asked of them until they achieve their goal or in some cases completely drain themselves of all their assets.

The fact that supply and demand functions differently in the area of reproductive technologies and surrogacy is another reason this industry is in need of regulation. Some argue that the desperation of infertile couples can actually be a positive influence on the market because the consumer loyalty leads to forced innovation. However, regardless of the reasoning behind the innovation or the causes of the monopolistic tendencies of the industry, the fact remains that if infertile couples are willing to pay whatever price is charged for fertility services the suppliers will be more hesitant to lower prices. So while competition works to some extent

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63 SPAR supra note 59, at 4.
67 SPAR supra note 59, at 4-5.
to keep prices within the same ballpark from agency to agency, the fact that demand has little
limit in the surrogacy context will hypothetically cause the cost of the process to remain the same
for the potential parents, while at the same time the cost of technology for the agencies actually
goes down. With the sense of financial and budgetary reasoning taken out of the consumer’s
equation, the industry will continue to reap more and more unregulated profits.

Another interesting aspect of the commercial surrogacy industry that sets it apart from
other industries in the United States is that the revenue comes from consumers/intended parents
that live in every state in the union, yet these profits are funneled into a minority of states.\(^69\)

While the vast and ever changing commercial surrogacy industry makes it difficult to locate
every surrogacy agency in the United States, there are websites that attempt to provide links to as
many agencies as possible. Surrogate Mothers Online, LLC is an organization consisting of
“dedicated surrogate mothers, egg donors, and parents via surrogacy who want to provide
support and information for those interested in surrogacy.”\(^70\) In keeping with this goal, they have
a state by state list of surrogacy agencies on their website in order to help potential parents
search for the agency that is right for them.\(^71\) According to Surrogate Mother’s Online website,
the majority of states have no surrogacy agencies and very few have more than two. Florida has
the second most surrogacy agencies of any state with ten and California has three times more
surrogacy agencies than any other state with thirty.\(^72\)

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\(^{69}\) See Agencies and Consultants, SURROGATE MOTHERS ONLINE, LLC,
shows the disparity in agency location).

\(^{70}\) About Us, SURROGATE MOTHERS ONLINE, LLC, http://www.surromomsonline.com/whois.htm (last visited Dec. 3,
2010).

\(^{71}\) Agencies and Consultants, SURROGATE MOTHERS ONLINE, LLC supra note 69 (SURROGATE MOTHERS ONLINE
claims to not be affiliated with any professionals in the industry, so while this list may not be exhaustive, it should
give a pretty accurate indication of where the majority of surrogacy agencies are located).

\(^{72}\) Agencies and Consultants, SURROGATE MOTHERS ONLINE, LLC supra note 69 (list includes: (2) in Arkansas,
three (30) in California, one (1) in Colorado, three (3) in Connecticut, ten (10) in Florida, seven (7) in Idaho, five
(5) in Illinois, four (4) in Maryland, six (6) in Massachusetts, one (1) in Minnesota, one (1) in Mississippi, one (1) in
The fact that California has three times as many surrogacy agencies as any other state may not seem like it is cause for any concern or regulation at first glance. It seems safe to say that California has more than three times as many movie or television studios as any other state. Some states have more naturally grown and harvested crops than others. Some states receive more revenue from tourism than others. The point is not that all states should receive equal revenue from the products and services they produce. The point is that when California, Texas and Florida create laws permitting businesses to form in those states that would not be permitted in Michigan, Indiana or numerous other states, it causes money from Michigan, Indiana, etc. to flow into California, Texas, Florida, etc. This flow of commerce and currency from one state to another is a completely acceptable activity in the United States and one that has been encouraged since the founding of our nation. What activity such as this does give rise to, however, is the ability for the Federal Government to regulate such activity under its constitutionally enumerated power to regulate interstate commerce.

III. History of the Commerce Clause

Article 1, Section 8, Clause 3 of the United States Constitution states that “The Congress shall have power to…regulate commerce with foreign nations, and among the several states and with the Indian tribes.” Congress has used this power to regulate multiple industries and areas of law, many of which have arguably had a very tenuous connection with “commerce…among...
the several states.”

In order to show how Congress is able to use this clause in a variety of contexts it is important to discuss the history of this ever evolving, manipulable power.

The first Supreme Court case to truly discuss the application of the Commerce Clause was the 1824 case of *Gibbons v. Ogden.* The issue in *Gibbons* was whether New York was allowed to grant exclusive rights of navigating state waters to certain steamboat operators. Although the granting of this exclusive right only applied to waters contained within the boundaries of the state of New York, the Court found that “[t]he power of Congress… comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with ‘commerce with foreign nations, or among the several States, or with the Indian tribes.’” In this case the Court used the Commerce Clause to grant very broad powers to Congress stating, “[t]he power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several States. It does not stop at the external boundary of a State.” The court found that the navigation of New York waters was connected with commerce among the several states and therefore ruled in favor of Gibbons.

This extremely broad interpretation of Congress’s Commerce Clause power was restricted somewhat in 1895 by the Court’s decision in *United States v. E.C. Knight.*

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76 Id.
77 *Gibbons v Ogden,* 22 U.S. 1 (1824) (New York granted Robert Fulton and Robert Livingston exclusive rights to navigation of the waters of the state. Fulton and Livingston gave a license to Aaron Ogden, allowing him to operate a steamboat service in New York. Thomas Gibbons operated a competing steamboat company. Ogden filed a complaint asking that Gibbons be restrained from operating his steamboats in New York waters. The United States Supreme Court found that Congress’s power to regulate interstate commerce extended to navigation and found for Gibbons.
78 Id.
79 Id. at 75.
80 Id. at 2.
81 Id.
82 *United States v. E.C. Knight,* Co., 156 U.S. 1 (1895) (The Sherman Antitrust Act was passed in 1890 with one of its goals as preventing monopolies. In 1892, the American Sugar Refining Company gained control of E.C. Knight and 98% of the sugar refining industry in the United States. The United States sued E.C. Knight under the Sherman Antitrust Act and won the case on the basis that the company had monopolized the sugar refining industry in the United States.)
Knight revolved around the Sherman Act and the Federal Government’s ability to control monopolies. The United States wanted to prevent a monopoly of the sugar manufacturing industry from forming, claiming that the Sherman Act and the Commerce Clause gave the United States the power to regulate the manufacture of sugar. The Court narrowed its prior decision in Gibbons that Congress had the power to regulate “every species of commercial intercourse,” finding instead that “the power to control the manufacturing of a given thing…may result in bringing the operation of commerce into play, [but] it does not control it, and affects it only incidentally and indirectly.” Because Congress’ power to regulate interstate commerce was found not extend to the manufacturing of products, even when this manufacturing ultimately led to the production of goods that were bought and sold among the several states, the Court ruled in favor of E.C. Knight. This decision “clearly articulated [the Court’s] position that the Commerce Clause limited Congress’ reach to interstate commerce and not to other activities, be they commercial or non-commercial in nature.”

This limitation on Congress’ reach lasted until the late 1937 and the decision in N.L.R.B. v Jones & Laughlin Steel Company. In N.L.R.B. v Jones, the Court found that the National Act in order to prevent American Sugar Refining Company’s acquisition of E.C. Knight. The United States Supreme Court found for E.C. Knight, reasoning that the act of manufacturing sugar was completely local and separate from the distribution of sugar and, therefore, was beyond the reach of the Sherman Act and Congress’ power to regulate interstate commerce).

83 Id.
84 Id.
85 Gibbons, 22 U.S. at 74.
86 E.C. Knight, 156 U.S. at 12.
87 Id. at 17-18.
89 Id.; N.L.R.B. v Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (The National Labor Relations Act (NLRA) was enacted in 1935 and created the National Labor Relations Board (NLRB). One of the NLRB’s duties is to investigate unfair labor practices. Jones and Laughlin Steel Corp. had fired employees who attempted to unionize and the NLRB found that these employees must be rehired and given back pay. Jones contested the NLRB’s ruling, claiming the NLRA was unconstitutional. The United States Supreme Court found that Congress’ Commerce Clause power allowed it to regulate labor relations and ruled in favor of the NLRB).
Labor Relations Act was constitutional and gave Congress the power to regulate labor relations. In its decision the Court noted:

> [a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.  

This “substantial relations” test was used in future cases to give Congress “virtually unlimited power under the Commerce Clause over intrastate activity.” For example, in *Wickard v. Filburn*, the Court found that it was within Congress’ Commerce Clause power to regulate how much wheat a farmer could grow even if that wheat was grown entirely for personal family use and was not going to be sold.

The Court continued to provide Congress with seemingly unlimited Commerce Clause power into the 1960s, even allowing Congress to use this power to regulate public accommodations under the Civil Rights Act. In *Heart of Atlanta Motel Inc v United States*, the Court found that a motel’s racial discrimination interfered with interstate commerce. In its decision the Court relied on a rational basis test, asking “(1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a

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90 *Id.*
91 *Id.* at 624.
92 Mark, III *supra* note 88, at 679-80.
93 *Wickard* v. *Filburn*, 317 U.S. 111 (1942) (In order to stabilize the price of wheat, the United States passed the Agricultural Adjustment Act in 1938, placing production quotas on the amount of wheat farmers could grow. Filburn admittedly produced wheat exceeding the legislatively allotted amount, but argued that this wheat was for private consumption. The United States Supreme Court found that if Filburn had not produced wheat for his family, he would have had to purchase it on the open market and, therefore, this excess production affected interstate commerce. Consequently, the Court ruled that the Agricultural Adjustment Act was constitutionally applied in this case and Filburn had to follow the production quotas).
94 *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964) (Title II of the Civil Rights Act of 1964 banned racial discrimination in public places. The Heart of Atlanta Motel refused to rent rooms to black people. This was a direct violation of the Civil Rights Act, but Heart of Atlanta claimed that the Act’s requirements exceeded Congress’ authority over interstate commerce. The United States Supreme Court held that the Civil Rights Act was constitutionally applied finding that 75% of the Heart of Atlanta’s business came from out of state and, therefore, it was engaged in interstate commerce and could be regulated by Congress).
95 *Id.*
basis, whether the means it selected to eliminate that evil are reasonable and appropriate.”\textsuperscript{96} The Court answered both of these inquiries affirmatively and Congress’ boundless Commerce Clause power was maintained.

The Supreme Court eventually did erect a boundary around Congress’ Commerce Clause power for the first time since 1937 in the 1995 case, \textit{United States v Lopez}.

\textsuperscript{97} In Lopez, the Court struck down a law that made it a federal crime to possess a firearm near a school.\textsuperscript{98} In doing so, the Court found that the law was “a criminal statute that by its terms ha[d] nothing to do with commerce or any sort of economic enterprise….\textsuperscript{99} In its decision the court identified three broad categories of activity that Congress is allowed to regulate using its Commerce Clause Power:

First, Congress may regulate the use of the channels of interstate commerce…Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities…Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.\textsuperscript{100}

The Court again used this rationale to strike down portions of the Violence Against Woman Act,\textsuperscript{101} a federal law concerning victims of gender-motivated violence, in \textit{United States v. Morrison}.\textsuperscript{102} In Morrison, the Court focused on the third category of activity that Congress was

\textsuperscript{96} Id. at 258.
\textsuperscript{97} Mark, III supra note 88, at 683-84; United States v. Lopez, 514 U.S. 549 (1995) (The Gun-Free School Zones Act of 1990 made it a federal offense to possess a gun in a school zone. Alfonso Lopez, Jr. a senior in high school in Texas was caught with a gun in a school zone and charged with a violation of the Act. Lopez challenged the Act's constitutionality. The United States Supreme Court found that possession of a gun in a school zone is not an economic activity that substantially affects interstate commerce and, therefore, ruled in favor of Lopez).
\textsuperscript{98} 18 U.S.C. § 922 (q)(1)(a); Lopez, 514 U.S. 549.
\textsuperscript{99} Lopez, 514 U.S. at 561 (internal quotations omitted).
\textsuperscript{100} Id. at 558-59 (internal quotations and citations omitted).
\textsuperscript{102} United States v. Morrison, 529 U.S. 598 (2000) (Brzonkala was allegedly raped by Morrison and Crawford. Morrison and Crawford were never charged due to lack of evidence. Brzonkala filed suit under the Violence Against Women Act. The constitutionality of the Act was challenged and the case was eventually heard on appeal in the United States Supreme Court. The Supreme Court held that the Act unconstitutional, finding that crimes against women did not have a substantial effect on interstate commerce).
allowed to regulate using its Commerce Clause power and found that, like *Lopez*, the activityCongress was attempting to regulate was noneconomic, violent crime which had only an attenuated and not a substantial effect on interstate commerce.\(^\text{103}\)

While it appeared from *Lopez* and *Morrison* that the Court was beginning to limit and narrow Congress’ Commerce Clause power, any progress made in those two cases was arguably wiped out by *Gonzalez v Raich*.\(^\text{104}\) In *Gonzales*, the Court relied heavy on *Wickard v Filburn* and its very broad reading of the Commerce Clause and found that Federal law could be applied to criminalize the manufacture, distribution and possession of marijuana even where the state has approved its use for medical purposes.\(^\text{106}\) In comparing *Gonzales* to *Wickard* the court stated that “In both cases, the regulation is squarely within Congress’ commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.”\(^\text{107}\) In his dissenting opinion in *Gonzales*, Justice Thomas forcefully stated:

> Respondents … use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.\(^\text{108}\)

\(^{103}\) *Id.*

\(^{104}\) *Gonzales* v. *Raich*, 545 U.S. 1 (2005) (California legalized the medical use of marijuana in 1996; however, marijuana was still illegal under the federal Controlled Substances Act (CSA). Raich and Monson used homegrown medical marijuana. Monson’s plants were destroyed by the federal Drug Enforcement Agency (DEA). Raich and Monson filed suit claiming the DEA’s enforcement of the CSA against them was an unconstitutional extension of Congress’ Commerce Clause power. The United States Supreme Court disagreed and ruled in favor of the government, finding that Congress may ban the intrastate use of marijuana even in states that have approved its use); ROBERT A. LEVY & WILLIAM MELLOR, THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY EXPANDED GOVERNMENT AND ERODED FREEDOM 46 (2008) (discussing *Gonzales* and its effect on the progress made in *Lopez* and *Morrison*).


\(^{106}\) *Gonzales*, 545 U.S. 1.

\(^{107}\) *Id.* at 19.

\(^{108}\) *Id.* at 57 (Thomas, J., dissenting).
The *Gonzales* case once again proved that Congress’ Commerce Clause power is almost limitless. As Professor Robert A. Levy put it “[i]n the aftermath of [Gonzales v.] Raich, it is difficult to know what congressional action, if any, could ever exceed the scope of the Interstate Commerce Clause.”\[109\] If one is to have faith in the notion that *Lopez* and *Morrison* will still be followed after the *Gonzales* decision, then it is arguable that entirely noneconomic activities are probably outside the scope of the Commerce Clause. However, viewing *Lopez* and *Morrison* in light of *Gonzales*, not only would an activity have to be entirely noneconomic to be outside of the Commerce Clause scope, it would also have to have no potential to become economic in any way. The marijuana in *Gonzales* and the wheat in *Wickard* were not items that were for sale in any way; it was their potential for interstate sale that allowed Congress to draw enough of a substantial connection to interstate commerce to be able to regulate them. Regardless of the whether *Gonzales* is viewed as an anomaly or as a return to the extremely broad interpretation the Commerce Clause received before *Lopez*, Congress’ Commerce Clause power should still extend to regulation of any for-profit business that operates over state lines.

This paper’s examination of the Court’s history of decisions regarding the Commerce Clause is not used for the purpose of arguing that Congress and the Supreme Court have interpreted the Commerce Clause too broadly, or that Congress and the Supreme Court have interpreted the Commerce Clause correctly. Rather, the argument is that given the Supreme Court’s past interpretations of the Commerce Clause, one would assume that a Federal law aimed at regulating an industry consisting of for-profit businesses that operate over state lines, such as the commercial surrogacy industry, would be held to be an acceptable exercise of Congress’ Commerce Clause power.

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\[109\] LEVY supra note 104, at 47.
When faced with difficult moral and ethical issues and a test as maneuverable and manipulable as the “substantial effects” test, it is difficult to determine with certainty what the Court would decide. However, since the Court held that non-business, noneconomic activities such as growing wheat\textsuperscript{110} and marijuana\textsuperscript{111} for personal use, restrictions on labor relations\textsuperscript{112}, and violations of the Civil Rights Act\textsuperscript{113} all fell under the category of interstate commerce, it would seem quite irrational that the Court would find a truly mercantile industry operating over state lines not to be an even more fitting example of interstate commerce, regardless of underlying family law issues and the altruistic motives of the participants.

IV. Federal Regulation of Family Law

Even though it appears the Commerce Clause gives Congress the power to regulate the commercial surrogacy industry, one reason Congress may be hesitant to involve themselves in the issue is that, as the court stated in Morrison, family law is an “area[] of traditional state regulation.”\textsuperscript{114} The court in Morrison specifically referred to “marriage, divorce and childrearing” in the context of areas of traditional state concern.\textsuperscript{115} While the business aspects of the commercial surrogacy industry arguably distinguish its practices from the traditional characteristics of marriage, divorce and childrearing, it is important to discuss how the federal government has involved itself in family law issues in the past to show that even though family law is usually handled by the states, it is not an area of law that is “off limits” to the federal

\textsuperscript{110} Wickard, 317 U.S. 111.
\textsuperscript{111} Gonzales, 545 U.S. 1.
\textsuperscript{112} N.L.R.B. v Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
\textsuperscript{113} Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).
\textsuperscript{114} United States v. Morrison, 529 U.S. 598, 615 (2000).
\textsuperscript{115} \textit{Id}. at 615-16.
government. As Professor Sylvia Law opined, “[f]amily law is not inherently state or federal. The key question is: When is federal intervention in family law wise?”116

Simply put, federal intervention in family law is a wise decision when state law is not working. This is especially true when the individual that the law is not working to protect is the most vulnerable type of individual in need of the most protection, i.e. a child. One such example of federal intervention is the Parental Kidnapping Protection Act (PKPA).117 Originally enacted in 1980, the general purpose of the PKPA was to address the problems associated with divergent state laws regarding child custody.118 Congress had found that there were a growing number of custody disputes which involved courts and laws of different states.119 These state laws were often inconsistent and confusing.120 Because of the confusing state laws, parties to a custody hearing were often taking the child whose custody was at issue to a different jurisdiction and courts of these separate jurisdictions were not giving full faith and credit to decisions of other jurisdictions.121 Because of these problems:

[Congress found that it was necessary] to establish a national system for locating parents and children who travel from one such jurisdiction to another and are concealed in connection with such disputes, and to establish national standards under which the courts of such jurisdictions will determine their jurisdiction to decide such disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions.122

In short, there was a concern that conflicting state laws were not providing adequate protection to children involved in custody disputes, so Congress decided to enact federal legislation. In spite

118 Id. at § 7, 94 Stat 3568.
119 Id.
120 Id.
121 Id. at § 7, 94 Stat 3568-69.
122 Id. at § 7, 94 Stat 3569.
of concern over tradition and federalism, Congress used its power under the Full Faith and Credit Clause to enact a law that addressed “a problem that the states have not been able to solve on their own [that was] resulting [in] instability in families.”\(^{123}\)

Another example of Congress enacting legislation involving family law issues is the Adoption Assistance and Child Welfare Act (AACWA).\(^{124}\)

The AACWA requires affected jurisdictions to facilitate permanent placement for children as a condition to receiving federal funding for their foster care and adoption assistance programs. The central purpose of the legislation is to remove children from long term foster care, either by uniting them with their parents or by placing them with adoptive parents or in some other permanent arrangement.\(^{125}\)

The AACWA was basically the establishment of a grant program through appropriations that provides states with funds if they meet certain federal standards.\(^{126}\) In enacting the AACWA, Congress did not force the states to comply with federal laws, Congress simply used its Spending Power under the Taxing and Spending Clause to encourage states to follow these standards.\(^{127}\) Even though the AACWA is described as more of a “contract” between the federal government and the states\(^{128}\) than legislation that directly creates federal law, it is still important in the context of this discussion. The AACWA is further evidence that Congress will intervene in family law issues if it feels that states are unable to solve the problem. In the case of AACWA, Congress felt states were not solving the problem of long term foster care and lack of funding for adoptions so they gave the states an incentive to follow a stricter set of guidelines.

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\(^{125}\) In re Application of L.L., 653 A.2d 873, 888 (1994) (internal citations and quotations omitted).


In 1988, Congress once again decided to federally regulate family law in passing the Family Support Act (FSA). The FSA was enacted to revise Aid to Families with Dependent Children which was a program that provided financial assistance to children of low income families. One of the specifics of the FSA was that if states were to receive welfare funds they must enact procedures that allowed for genetic testing in contested paternity actions. The purpose of the genetic testing and many of the FSA’s other mandatory procedures was to have a more effective means of establishing paternity and ultimately create an overall more effective welfare policy. The result of establishing these mandatory procedures was the elimination of the assumption of marital paternity. There is no evidence that Congress was aware of the destruction of this widely followed presumption when it enacted the FSA. However, the fact remains that Congress decided the issue of welfare was important enough to regulate an area of law that had historically been reserved for the states and in doing so eliminated “one of the strongest presumptions known to law.”

The FSA also created the U.S. Commission on Intestate Child Support which recommended criminal sanctions for failure to make support payments. As a result of this recommendation, Congress used its Commerce Clause Power and passed the Child Support

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133 Elizabeth G. Patterson, Unintended Consequences: Why Congress Should Tread Lightly When Entering the Field of Family Law, 25 GA. ST. U. L. REV. 397, 429-431 (2008) (arguing that the marital presumption of paternity was a reflection of social policies and by enacting these genetic testing requirements, Congress implicitly altered the “integrity and privacy of the family unit”).
134 Id. at 429.
Recovery Act (CSRA) of 1992, which made it a federal criminal offense to willfully fail to pay a child support payment for a child who lives in another state or to travel to another state with the intent to evade a support obligation. While the CSRA has faced constitutional challenges in lower courts and portions of the act have been found to be unconstitutional in some circuits, the circuits who have addressed the CSRA have found that it does not offend the commerce clause.

The issue in the CSRA is similar to the issue of commercial surrogacy in that both involve activities that are concurrently family law and interstate commerce issues. The CSRA involves the family law issue of child support while at the same time involving the aspect of paying money over state lines or crossing state lines to avoid paying money. Commercial surrogacy involves the family law issue of reproduction and procreation while at the same time is directly related to the issue of sending money over state lines to pay for a specific service. The major difference between the CSRA and commercial surrogacy is that child support payments governed by the CSRA are payments between individuals for domestic reasons while commercial surrogacy is the payment to a for profit business in return for a service. While constitutional challenges to the CSRA will most likely continue to develop, as of the moment the CSRA has found not to offend the commerce clause. The CSRA is more than just another example of Congress enacting legislation which regulates family law issues, it is also an example of an activity that is arguably less commercial than for profit surrogacy agreements, being enacted using Congress’ commerce clause power.

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138 See, e.g. United States v. Klinzing, 315 F.3d 803 (7th Cir.2003); United States v. Monts, 311 F.3d 993 (10th Cir.2002); United States v. King, 276 F.3d 109 (2d Cir.2002); United States v. Lewko, 269 F.3d 64 (1st Cir.2001); United States v. Faasse, 265 F.3d 475 (6th Cir.2001) (en banc).
The CSRA, PKPA, AACWA, and FSA are just four examples of Congress’ federal intervention into family law regulation.\textsuperscript{139} In fact, Congress has even attempted to regulate surrogacy agreements on two separate occasions.\textsuperscript{140} Family law may traditionally be an area of state regulation, but “tradition is not its own justification.”\textsuperscript{141} As demonstrated in multiple pieces of Federal Legislation, Congress will regulate family law when they feel an issue warrants regulation and the states have been unable to do so. The question arguably becomes not whether Congress can regulate commercial surrogacy, but instead what regulations Congress should enact.

V. Proposed Regulation Specifics

As discussed above, there is a strong need for regulation and certainty regarding the enforceability of gestational surrogacy agreements. Given the history of Congress’ use of its power to regulate interstate commerce and the business like nature of commercial surrogacy arrangements, Congress should be able to use the Commerce Clause to force states to enact some regulations in the area. Further, this would not be unchartered water for Congress as it has regulated other family law issues in the past. The issue, therefore, is not whether Congress has the power to enact legislation regarding surrogacy agreements, but instead what this legislation should entail.

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\textsuperscript{141} Law, supra note 116, at 180 (citing Oliver W. Holmes, The Path of Law, 10 HARV. L. REV. 457, 469 (1897).
Currently, twenty-three states including the District of Columbia have enacted statutes that address surrogate parenting agreements. Of those twenty-three states, eleven authorize surrogacy with differing degrees of restrictions. Seven of the states as well as the District of Columbia ban all surrogacy contracts. The remaining states’ surrogacy laws either ban some surrogacy agreements and permit others, or simply address parentage questions. The reasoning as to why more states have not drafted legislation can be based on a multitude of factors, one of which may be the idea that some find the practice of surrogacy to be immoral. This idea that Congress should take action and force states to enact surrogacy laws is not based on moral judgments. Congressional action should not force a state that currently bans surrogacy agreements to now enforce them. Nor should Congressional action force a state that currently validates surrogacy agreements to now find all such agreements void. At a certain level these decisions should be left up to the states and its constituents to decide what is best for each state. What is unacceptable at the current time is the twenty-seven states that have taken no action whatsoever. Regardless of the legislators’ and constituents’ moral stances, these states should have legislation on the books in order to create a level of certainty when entering into surrogacy

agreements. That is where the federal regulations come in: forcing states to make a legislative decision.

The National Conference of Commissioners of Uniform State Laws (NCCUSL) has promulgated two uniform laws addressing the legality and enforceability of surrogacy agreements.\textsuperscript{146} The first was the Uniform Status of Children of Assisted Conception Act (USCACA), promulgated in 1988.\textsuperscript{147} The USCACA set forth two alternatives.\textsuperscript{148} Alternative A allowed surrogacy agreements if they were approved beforehand by the court and the parties follow the court authorization procedure.\textsuperscript{149} Alternative B provided that all surrogacy agreements are void; however, recognizing that “such agreements will continue to be achieved even though they are not enforceable at law…[Alternative B] makes a provision for maternity and paternity of children who are born pursuant to such agreements.”\textsuperscript{150}

The USCACA was met with little acceptance prompting the National Conference of Commissioners on Uniform State Laws to replace it with the Revised Uniform Parentage Act (UPA) in 2000.\textsuperscript{151} The UPA, as amended in 2002, is now “the official recommendation of the Conference on the subject of parentage”.\textsuperscript{152} The UPA replaced the words “surrogate mother” used in the USCACA with the words “gestational mother”\textsuperscript{153} The UPA also eliminated Alternative B. The comments to the 2002 UPA states that the reasoning behind eliminating Alternative B was that:


\textsuperscript{147} USCACA, 9C U.L.A. 363 supra note 146.

\textsuperscript{148} USCACA, 9C U.L.A. 363 supra note 146.

\textsuperscript{149} USCACA, 9C U.L.A. 363 supra note 146, at 373.


\textsuperscript{151} Spivack supra note 146.

\textsuperscript{152} UPA, Prefatory Note, 9B U.L.A. 4, 6 (Supp. 2010).

\textsuperscript{153} UPA, art. 8 cmt., 9B U.L.A. 75 (Supp. 2010).
[t]he scientific state of the art and the medical facilities providing the technological capacity to utilize a woman other than the woman who intends to raise the child to be the gestational mother, guarantee that such agreements will continue to be written. [The UPA] recognizes that certainty and initiates a procedure for its regulation by a judicial officer.\footnote{UPA, § 801 cmt., 9B U.L.A. 75, 77 (Supp. 2010).}

In short, this comment means that since people will enter into these contracts anyway, there is no need to ban them or find them to be void. There are many valid arguments as to why gestational surrogacy agreements should not be void; however deciding to validate these agreements because people will enter into them anyway seems to be a rather weak argument. Under this reasoning there would be almost no conceivable act that could be prohibited, nor any contract void for public policy reasons. People will continue to break the law and enter into unenforceable contracts in spite of legislation, that doesn’t mean laws should cease to exist, simply because people won’t follow them. Regardless of some of the faulty reasoning for eliminating Alternative B, the regulations of gestational agreements are basically the same as the regulations under USCACA. The intended parents and the gestational mother, and her husband if she is married must enter into a written agreement, petition for the agreement to be validated, then go through the court’s validation procedure including verification of the ninety day residency requirements for both the gestational mother and the intended parents.\footnote{UPA art. 8, 9B U.L.A. 75, 75-88 (Supp. 2010).}

According to the NCCUSL website, nine states have adopted the revised and amended version of the UPA.\footnote{A Few Facts About the...Uniform Parentage Act (Last Revised or Amended 2002) UNIFORM LAW COMMISSIONERS, THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upa.asp (last visited Dec. 6, 2010).} However, out of the states that have adopted the UPA, only Utah, Washington and Texas statutorily permit gestational agreements.\footnote{See Wash. Rev. Code § 26-26-240; Tex. Code Ann., Family Code § 160.754; Utah Code Ann. § 78B-15-802.} The remaining states have
either omitted the gestational agreement section from their version of the UPA or have explicitly invalidated surrogacy agreements. New Mexico has even inserted specific language that “The New Mexico Uniform Parentage Act does not authorize or prohibit a [gestational] agreement” None of the states have adopted the “Gestational Agreement” section of the UPA as it is written. Overall, in the ten years since the UPA was adopted and the eight years since it has been amended it has done little to advance enforceability of gestational agreements. The vast majority of the states that have decided to adopt the amended and revised UPA have still avoided the issue of gestational agreements.

The most recent attempt at drafting a uniform act was the ABA’s Model Act on Assisted Reproductive Techniques (Model Act). The Model Act presents two alternatives to the regulation of gestational surrogacy agreements. “Alternative A is based on a judicial preapproval model. This alternative is very similar to the UPA in that it requires express approval and validation by a judge in order for a gestational agreement to be valid. “Alternative B provides an [A]dministrative [M]odel.” The Administrative Model lays out eligibility requirements that must be fulfilled in order for the gestational agreement to be valid, but it does not require preapproval by a judge. “The Administrative model was intended to

159 See N.D. Cent. Code § 14-18-05.
160 NM St. §40-11A-801.
164 Id.
165 Id.
166 Id.
167 Id.
provide a more ‘streamlined, user-friendly’ model to establish parentage in surrogacy arrangements, which is faster and less expensive for the intended parents, and also provides greater consistency and judicial economy.”\textsuperscript{168} The Model Act also does not specifically refer to the intended parents as “the man and the woman,” leaving the Model Act open to the interpretation that it could include homosexual couples.\textsuperscript{169} The language, however, is still somewhat ambiguous as to whether or not homosexual couples are indeed covered by the Model Act.\textsuperscript{170}

This paper proposes that none of these uniform acts should be adopted as they are currently written. Congress should, however, take each of these uniform acts into account when ultimately drafting legislation and creating regulations that states will eventually have to adopt. The legislation Congress does enact should be careful not to restrict the agreements to such a degree that they become impossible to legally execute. The goal in creating this legislation is to create certainty, not more complications and litigation. What follows are some factors Congress should consider when drafting this legislation.

First, Congress should look to the USCACA’s two option approach to guide it in drafting legislation that allows for states to choose whether or not they would validate gestational agreements. While it seems reasonable given the precedent that Congress would be able to adopt uniform regulations under its Commerce Clause power that would uniformly validate or invalidate surrogacy agreements in all fifty states, allowing states to choose will lessen the chances that states will actually take issue with the regulations. Giving states the option will


\textsuperscript{170} See Lorillard \textit{supra} note 162, at 241-244 (discussing whether or not the Model Act precludes gay couples).
help to balance the powers of state and federal government more evenly and hopefully lead to
less litigation on the Constitutionality of the regulations.

Second, Congress should strongly base the majority of this legislation on the
Administrative Model set forth in the Model Act.171 This will help to move these agreements
along efficiently as each party will only have to meet with independent counsel rather than
petition the court for preauthorization. The problem with using the Administrative Model is that
it becomes more difficult to avoid contests in surrogacy agreements. Without a judge watching
over the process from the beginning, a party may choose to not comply with the agreement. This
is why it is important the legislation should require injunctive relief of specific performance on
the part of any noncompliant party, except for when this would require the gestational mother to
become impregnated against her will.172 This will allow courts to enforce the agreements that
become contested without having to burden themselves with agreements between cordial and
complying parties.

While the Administrative Model should be looked to by Congress when deciding what
the requirements of the parties should be, this does not mean that the parties should be
disallowed from requesting preauthorization by court. The parties to the surrogacy agreement
should have the option to have a court validate the agreement beforehand and maintain exclusive
and continuing jurisdiction similar to the UPA and Alternative A of the Model Act.173 This will,
of course, be more expensive to the parties, but it will also provide a greater degree of certainty.
This type of judicial oversight should not be required, but it should certainly be an option.

171 Kindregen supra note 162, at 223-25.
172 Kindregan supra note 162, at 225.
173 UPA art. 8, 9B, U.L.A. 75, 75-88 (Supp. 2010); Kindregan supra note 162, at 221-223.
Third, in Alternative A of the Model Act, there is a 90-day residency requirement in order to avoid forum shopping.\textsuperscript{174} Enforcement of a residency requirement is easily accomplished when the agreement is preauthorized by the courts. The problem is enforcing this residency requirement when the parties meet only with independent counsel and the surrogacy agency. This problem could be avoided by including in the legislation a requirement for forum selection clauses in surrogacy agreements that are not preauthorized by courts. Forum selection clauses have been found enforceable by the Supreme Court\textsuperscript{175} and are generally enforced by state courts as well.\textsuperscript{176} This is especially true if there is a “reasonable relationship” between the transaction at issue and the selected forum.\textsuperscript{177} In the case of surrogacy agreements this “reasonable relationship” should be formed by having the agency that facilitated the agreement located in the forum selected for litigation. By adding a requirement of a forum selection clause to the other requirements set forth in the Administration Model of the Model Act, contested agreements could be litigated in the same forum in which they were formed. This would both quell the fears of out of state residents flooding surrogate friendly states’ hospitals\textsuperscript{178} and allow parties to be more certain of the agreement’s enforceability regardless of the state they choose to reside in.\textsuperscript{179} While this arguably could flood surrogate friendly states’ courthouses, this seems unlikely. Although the certainty federal regulation will bring to this area of law is much needed

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\textsuperscript{174} Kindregan \textit{supra} note 162, at 220.
\textsuperscript{176} \textit{See} Jens Dammann & Henry Hansmann, \textit{Globalizing Commercial} Litigation, 94 CORNELL L. REV. 1, at 39 (2008) (“most state courts now enforce [forum selection] clauses provided they are reasonable and do not deprive a litigant of his day in court”).
\textsuperscript{178} \textit{See} Michelle Ford, 10 BARRY L. REV. 81, 96 (2008) (discussing forum shopping and overcrowding of hospitals because of non-uniform surrogacy laws).
\textsuperscript{179} States such as Michigan that impose criminal penalties on parties to a surrogacy agreement may still be problematic to residents who form a surrogacy agreement. However, this would not relate to the agreement’s ultimate enforceability. If a resident of Michigan formed one of these agreements and it was contested, the forum selection clause would still govern the settlement of the dispute. The criminal penalties would be a separate issue and an example of the fact that there will still be some states where it will not be in the resident’s best interests to form a surrogacy agreement. \textit{See} Mich. Comp. Laws Ann. § 722.859.
in order to avoid any potential problems for innocent children, this is not an area over flooded
with litigation as it is.  The extra cases a court will be forced to litigate due to their state’s
decision to enforce surrogacy agreements would be quite nominal.

Fourth, the Model Act seems to ambiguously allow homosexual couples to be parties to
gestational agreements. However, the aim with this federal legislation should be certainty;
consequently, Congress should ensure that if a state decides to choose to validate surrogacy
agreements, their state legislation must unambiguously set forth in their state legislation whether
or not the act includes unmarried individuals. At this point many states have laws which
invalidate homosexual marriages; therefore, it stands to reason that those same states would
potentially choose not to adopt this legislation if it specifically included homosexual couples. It
would be unfortunate for a state to invalidate gestational surrogacy agreements altogether
because they didn’t believe in homosexual relationships. Therefore, allowing states to choose
whether or not to include unmarried individuals should eliminate the difficult decisions faced by
some states whose constituents support gestational agreements yet oppose gay marriage.

Finally, states’ options regarding enforcement of surrogacy agreements will not be a
plethora of unfettered choices. States must either choose to enforce surrogacy agreements or
forbid them. States that choose to forbid surrogacy agreements must make this forbiddance
explicitly clear by statute. States that choose to enforce surrogacy agreements must make this
explicitly clear by statute as well. The specifics of the federal regulations should be based

David P. Hamilton, She’s Having Our Baby: Surrogacy is on the Rise as In-Vitro Improves, WALL ST. J., Feb. 4,
2003, at D1. (In 2003 it was estimated that only 24 surrogates and 65 intended parents had challenged surrogacy
agreements).

This is an argument for more effective policy. As the constitutionality of the Defense of Marriage Act is played
out in the courts, states may eventually have to recognize gay marriage and when and if that occurs, the legislation
should be adapted accordingly to unambiguously allow homosexual couples to be covered by the regulations. It is
quite plausible that if homosexual couples were unambiguously included in this act as a matter of federal policy than
only states allowing gay marriage would allow gestational surrogacy. This would be a decrease in the number of
states that currently seem to allow gestational surrogacy.
primarily on the Administrative Model of the Model Act with some alterations, as discussed above. States that choose to enforce surrogacy agreements should use these federal regulations as the ground floor. They may decide to enact more restrictive regulations if they so choose, but they should be required to enact regulations at least as restrictive as the ones set forth by Congress. In doing so this will avoid the uncertainty that currently plagues this area of law. If a state still chooses to remain apathetic regarding the issue of surrogacy agreements and enacts no legislation within one year of the promulgation of the Federal Regulations, the Federal Regulations themselves will take effect for that particular state. This model will promote efficient regulations, certainty of parentage, and states’ rights and therefore should be a reasonable way to solve the current state of flux and uncertainty regarding enforceability of surrogacy agreements.

Conclusion

The lack of regulation of surrogacy agreements leads to uncertainty and judicial activism. This is entirely unneeded. When the disposition, custody and care of innocent children are at stake, action must be taken. With the majority of state legislatures failing to take any steps towards a resolution of this issue, the Federal Government must intervene.

The larger the business of commercial surrogacy grows the easier Federal Government intervention becomes. Because this business has grown so large and because the money being exchanged is interstate, Congress can regulate the industry using its Commerce Clause power. Congress has used this power to regulate industries with a much more tenuous connection to interstate commerce than commercial surrogacy; therefore, there is no reason why Congress cannot use this power to create certainty in the area of surrogacy agreements.
Using the Uniform Status of Children of Assisted Conception Act, Uniform Parentage Act and the Model Act on Assisted Reproductive Technologies, Congress should enact legislation forcing states to either follow the Federal Regulations or ban surrogacy outright. In doing so fewer children will be forced to go through unnecessary parentage and custody battles and parties to surrogacy agreements and their attorneys will be more knowledgeable of the legality and the risks involved when entering into surrogate agreements.