

Forbidding Gestational Surrogacy: Impeding the Fundamental Right to Procreate

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Introduction

The Supreme Court has declared that procreation is a fundamental right, a right fiercely protected by the strongest force of law in the United States.¹ Because the Constitution protects procreative rights, no law can be enforced at either the federal or state level that prohibits a person's ability to procreate.² Though laws can no longer violate this right through antiquated methods such as forced sterilization, numerous jurisdictions continue to pass and uphold laws that abridge this right through other, more modern means such as prohibitions against the enforcement of gestational surrogacy agreements.³

Modern technology has provided alternate avenues for a person to utilize his or her right to procreate in ways that were not achievable before.⁴ These new technologies, including gestational surrogacy, give individuals a chance to procreate when they would otherwise be considered infertile.⁵ Because there is no federal law or regulation regarding gestational surrogacy, state laws determine how or even if a person can access gestational surrogacy, and they can define which groups are permitted access to the technology.⁶ For example, some states allow prospective parents to engage in gestational surrogacy agreements, agreements that allow the prospective parents to assert parental rights over a child despite the fact that the surrogate carried and delivered the child,

¹ Compare *Griswold v. Connecticut*, 381 U.S. 479, 491 (1965) (holding that marital privacy is protected by the Constitution), with *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (expressing that procreation is necessary for society to continue).

² See *Griswold*, 381 U.S. at 493 (stating that the Ninth and Fourteenth amendments prohibit the infringement of a person's fundamental rights).

³ See, e.g., *Skinner*, 316 U.S. at 541 (holding that sterilization is not an acceptable punishment for criminal activity because it violates the fundamental right to procreate). But see ARIZ. REV. STAT. ANN. § 25-218 (1994) (taking away a woman's right to procreate by declaring the surrogate the legal mother).

⁴ See Andrea Messmer, *Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science*, 3 J. HEALTH & BIOMEDICAL L. 203, 206 (2007) (describing some of the new assisted reproductive technologies that couples are able to access).

⁵ See *id.* at 188 (emphasizing the importance of technology in helping previously infertile couples procreate).

⁶ See Miriam Pérez, *Surrogacy: The Next Frontier for Reproductive Justice*, R.H. REALITY CHECK BLOG (Feb. 23, 2010, 8:00 AM), <http://www.rhrealitycheck.org> (stating that the United States is one of the few countries that does not regulate gestational surrogacy at the federal level).

while others expressly prohibit these agreements and may even criminally prosecute individuals who attempt to enter into these agreements.⁷

This Comment argues that gestational surrogacy agreements should be enforceable in Arizona because *Soos v. Superior Court* declared Arizona's statute prohibiting surrogacy to be unconstitutional.⁸ Part II distinguishes between traditional and gestational surrogacy from a medical perspective and explains how each practice is treated differently under the law.⁹ Part II also examines the current law on gestational surrogacy in Arizona as well as the law in states that had similar statutes that were overturned on Constitutional grounds.¹⁰ Part III argues that because the statute prohibiting gestational surrogacy agreements interferes with the intended parents' fundamental right to procreate, gestational surrogacy agreements should be enforceable in Arizona.¹¹ Part IV of this Comment recommends new policies that support gestational surrogacy agreements as a constitutionally protected right and uses existing legislation from other states with more supportive gestational surrogacy policies to develop premises for future policy in Arizona.¹² Finally, Part V concludes that by removing the restrictions on gestational surrogacy, intended parents will be capable of fulfilling their fundamental right to procreate when they would otherwise be unable to utilize it due to infertility.¹³

⁷ See *Surrogacy Laws by State*, THE SELECT SURROGATE, <http://www.selectsurrogate.com/surrogacy-laws-by-state.html#AZ> (last visited Nov. 7, 2012) (surveying state surrogacy laws).

⁸ See *Soos v. Superior Court*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (arguing that Arizona's gestational surrogacy statute is unconstitutional because it violates the Equal Protection Clause).

⁹ See *infra* Part II (distinguishing between traditional and gestational surrogacy to show that gestational surrogacy agreements should be enforced).

¹⁰ See *infra* Part II (outlining the precedent for ruling that statutes prohibiting gestational surrogacy are unconstitutional).

¹¹ See *infra* Part III (reasoning that Arizona's surrogacy statute is unconstitutional because it does not afford the same protection to the intended mother as the intended father).

¹² See *infra* Part IV (suggesting that Arizona impose a more constitutionally sound statute that considers the ability of the intended mother to utilize her fundamental right to procreate through gestational surrogacy).

¹³ See *infra* Part V (concluding that gestational surrogacy is essential to maintain the fundamental right to procreate).

I. Background

A. Traditional Versus Gestational Surrogacy

Traditional surrogacy, a medical technique developed prior to 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 who intends to raise the child as her own.¹⁴ The woman intending to raise the child after it is born is usually called the intended mother, and the semen used in the artificial insemination process is often her husband's, the intended father.¹⁵ Because traditional surrogacy uses the surrogate's own ovum to conceive the child and the child is not genetically related to the intended mother, the law has been hesitant to define the intended mother as the legal mother.¹⁶

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.¹⁷ After fertilization, the fetus, or often fetuses, 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.¹⁸ Because gestational surrogacy often involves a genetic connection between the intended mother and the child, many states have

¹⁴ See *Matter of Baby M*, 537 A.2d 1227, 1234 (N.J. 1988) (describing that traditional surrogacy agreements result in the surrogate being the genetic mother of the child).

¹⁵ See *id.* (explaining a situation in which one or both of the intended parents are not genetic parents); see also Pamela Laufer-Ukeles, *Approaching Surrogate Motherhood: Reconsidering Difference*, 26 VT. L. REV. 407, 430 (2002) (designating the couple raising the child as their own as the intended parents).

¹⁶ See Denise E. Lascarides, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 HOFSTRA L. REV. 1221, 1225-26 (1997) (using the Biblical example of Samson and Delilah to explain traditional surrogacy); see also Charles P. Kindregan, Jr., *Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology*, 17 AM. U. J. GENDER SOC. POL'Y & L. 601, 605 (2009) (considering the problem with declaring a woman with no genetic tie to the child the legal mother).

¹⁷ See *S.N. v. M.B.*, 935 N.E.2d 463, 471 (Ohio Ct. App. 2010) (holding the surrogate contract valid despite the lack of genetic tie to the child); see also Kindregan, *supra* note 16, at 607 (discussing the uncertainty in determining legal maternity after embryonic transfer technology became available).

¹⁸ See Lascarides, *supra* note 16, at 1226 (demonstrating a genetic link between the intended mother and the child).

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determined that the intended mother is in fact the legal mother of the child.¹⁹

B. Arizona's Gestational Surrogacy Statute

Unlike many other states, Arizona does not recognize the parental rights of intended mothers who arrange to have children through gestational surrogacy.²⁰ Although Arizona's surrogacy statute was held to be unconstitutional by *Soos*, the Arizona legislature has yet to repeal the law, and the statute is still currently recorded.²¹ Because the statute does not recognize surrogacy contracts, the gestational surrogate is considered the legal mother of the child, regardless of the intentions of either the surrogate or the intended mother and father.²²

Despite the fact that Arizona's surrogacy statute explicitly denies the intended mother custody, the statute permits the biological father to assert his parental rights. By allowing the biological father to submit evidence of a genetic connection to the child, the statute permits him to rebut the presumption that the surrogate's husband is the legal father of the child.²³ The absence of a comparable opportunity for the biological mother to assert her parental rights was a key factor in the court's decision to hold the Arizona surrogacy statute unconstitutional in *Soos*.²⁴

C. Soos v. Superior Court

1. Facts

A married couple (hereinafter "Mother" and "Father" respectively) entered into a surrogate agreement with a woman, Ms. Ballas (hereinafter

¹⁹ See *Johnson v. Calvert*, 851 P.2d 776, 786 (Cal. 1993) (providing an example in which the intended mother was declared the legal mother of the child); accord *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1296 (D. Utah 2002) (extrapolating that because the fetus is genetically related to the intended mother, she should be the legal parent).

²⁰ See ARIZ. REV. STAT. ANN. § 25-218 (1994).

²¹ See § 25-218 (declaring that surrogacy contracts are invalid under Arizona law); see also *Soos v. Superior Court*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (ruling Arizona's surrogacy statute unconstitutional because it violated the equal protection clause).

²² See § 25-218 (reasoning that this rule ensures the child has a legal mother after birth).

²³ See *id.* (presuming the surrogate's husband to be the legal father of the child).

²⁴ See *Soos v. Superior Court*, 897 P.2d 1356, 1360 (Ariz. Ct. App. 1994) (holding the Arizona statute unconstitutional because it allowed the paternity of the child to be rebutted but not the maternity).

“Surrogate”), in which the Mother had her eggs harvested and fertilized in vitro by her husband’s sperm.²⁵ The eggs were implanted in the Surrogate’s womb and she became pregnant with triplets.²⁶ After the triplets were born, the Father declared the Surrogate the legal mother of the children and himself the legal father pursuant to Arizona’s surrogacy statute.²⁷ Because of her inability to claim legal maternity of the triplets, the Mother fought the constitutionality of the statute.²⁸

2. *Opinion*

The Arizona Court of Appeals ultimately held that Arizona’s surrogacy statute violated the Mother’s equal protection rights and was therefore unconstitutional.²⁹ Because the Mother’s fundamental rights were at stake, the court determined that the state must justify the use of the gender-based discrimination with a compelling state interest and that the use of such discrimination would directly satisfy that interest.³⁰ The court concluded that the statute was unconstitutional because it showed gender-based discrimination by denying the Mother the opportunity to assert maternity while allowing the presumption of the genetic father’s paternity to be rebutted.³¹ As a result of these violations against a woman’s

²⁵ See *id.* at 1357 (explaining that the Sooses chose surrogacy because the mother had a partial hysterectomy).

²⁶ See *id.* at 1358 (defending the legitimacy of the surrogacy agreement because the procedure was completed through a program at the Arizona Institute of Reproductive Medicine).

²⁷ See *id.* (depriving his ex-wife of custody following the dissolution of their marriage during the pregnancy).

²⁸ See *id.* at 1359 (alleging the statute violated due process, equal protection, and her privacy rights).

²⁹ See *id.* (upholding the trial court’s decision by applying a strict scrutiny standard).

³⁰ See *id.* (asserting that barring gestational surrogacy did not achieve a compelling state interest); see also *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that procreation is a fundamental right); accord *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (holding that a parent’s right to custody is a fundamental interest); *Carey v. Population Services*, 431 U.S. 678, 686 (1977) (describing the strict scrutiny test).

³¹ See *Soos v. Superior Court*, 897 P.2d 1356, 1360-61 (Ariz. Ct. App. 1994) (asserting that gender-based discrimination was clearly evident in the surrogacy statute, which led to a violation of the Equal Protection Clause).

fundamental liberty interests, the court declared the statute unconstitutional.³²

3. Issues Not Clarified in *Soos*

Despite the court's holding in *Soos* that condemned Arizona's surrogate statute as unconstitutional, current surrogacy law in Arizona is not clear.³³ The Arizona Court of Appeals upheld the trial court's ruling that one of the statutory provisions was unconstitutional but did not specify whether the statute could strike the unconstitutional provision and still stand or if the entire statute was completely invalid.³⁴ Furthermore, the Arizona legislature has not yet attempted to propose a statute that accounts for the legal arguments developed in *Soos*.³⁵ Instead, Arizona has shown that it intends to look past the *Soos* decision and continue its efforts to ban gestational surrogacy throughout the state.³⁶

D. Proposed Amendment to Arizona's Surrogacy Statute

In February 2012, Arizona proposed an amendment to its surrogacy statute, replacing the phrase "surrogate contract" with "surrogate parentage contract."³⁷ The amendment has not passed, but the proposed amendment does not account for the constitutionality concerns addressed in *Soos*.³⁸ Because Arizona's legislature has not yet repealed the unconstitutional surrogacy statute and the state's proposed amendment also discriminates based on gender, it is not clear if individuals have the right to contract for surrogacy or have the ability to claim parentage in the

³² See *id.* (denying the Father's claim that the Surrogate was the legal mother and awarding custody to the Mother).

³³ See *Arizona Surrogacy Law*, THE HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/laws-and-legislation/entry/arizona-surrogacy-law> (last visited Nov. 15, 2012) (noting the law is unresolved because the Arizona Supreme Court did not review the case).

³⁴ See *id.* (highlighting that the conflicting law stemming from the *Soos* decision was upheld by the appellate court).

³⁵ See 2012 Ariz. Sess. Laws 1 (suggesting an amendment to the current statute but not applying the rationale in *Soos*).

³⁶ See *id.* (indicating that Arizona does not intend to follow the *Soos* decision in future gestational surrogacy cases because the amendment does not follow the *Soos* decision).

³⁷ See *id.* (suggesting that the *Soos* decision was not considered when Arizona's surrogacy statute that was previously declared unconstitutional was amended).

³⁸ See *id.* (maintaining the illegality of surrogacy agreements in Arizona while retaining the presumption of maternity).

event the contract is deemed invalid.³⁹ Since *Soos*, not a single court in Arizona has dealt with gestational surrogacy or the surrogacy statute that *Soos* found unconstitutional.⁴⁰ Therefore, it is unclear what the court will do in the event of a contest of maternity between the gestational surrogate and the intended mother.⁴¹

E. States with Similar Statutes Deemed Unconstitutional

1. *Utah*

Utah had a surrogacy statute very similar to Arizona's that forbade surrogacy contracts and automatically determined that the gestational surrogate was the legal mother of any children she physically bore.⁴² In *J.R. v. Utah*, a married couple and their surrogate challenged the constitutionality of this statute after the Utah State Office of Vital Records and Statistics declined to list the couple as the children's legal parents on the twins' birth certificates.⁴³

The court determined that because the statute interfered with the parents' fundamental right to bear and raise children, it unconstitutionally imposed an undue burden on the parents.⁴⁴ After the court determined that the statute was unconstitutional, the statute was repealed and replaced with a new statute which allows gestational surrogacy agreements but imposes

³⁹ See Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 98, 101 (2010) (stating that the statute has not been repealed despite its unconstitutionality).

⁴⁰ See THE HUMAN RIGHTS CAMPAIGN, *supra* note 33 (explaining that the law is uncertain because no case regarding gestational surrogacy has been decided).

⁴¹ See *Soos v. Superior Court*, 897 P.2d 1356, 1359 (Ariz. Ct. App. 1994) (reiterating that the court is not judging a custody dispute between the intended mother and surrogate but examining the constitutionality of the statute).

⁴² See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1279 (D. Utah 2002) (assessing the constitutionality of a statute that prevented couples from being the legal parents of their own children).

⁴³ See *id.* at 1271 (adhering to Utah's surrogacy statute, the surrogate mother was listed on the birth certificate as the legal mother, and no father was included).

⁴⁴ See *id.* at 1278-79 (arguing that the state did not consider modern technologies when developing Utah's surrogacy statute).

reasonable regulations on the formation and execution of surrogacy agreements.⁴⁵

2. California

California followed the Uniform Parentage Act (hereinafter UPA) until *Johnson v. Calvert* challenged the constitutionality of California's interpretation of the UPA in 2010.⁴⁶ In *Johnson*, a married couple arranged to have a child through a gestational surrogate using the mother's ovum and father's sperm.⁴⁷ Both parties originally agreed that after the child was born, the surrogate would relinquish all parental rights and that the intended parents would pay the surrogate \$10,000 for her services and provide a \$200,000 life insurance policy.⁴⁸ Shortly before the child was born, the relationship between the intended parents and the surrogate failed. The surrogate filed an action to be declared the legal mother of the child pursuant to the UPA.⁴⁹ At trial, the court concluded that the intended parents were the child's legal parents.⁵⁰ The trial court's decision was upheld on appeal.

According to the California Civil Code, maternity can be determined through genetic testing.⁵¹ The Supreme Court of California ultimately upheld the decision of the lower courts but determined that the intent of the parties at the time the surrogacy agreement was drafted should be used to determine legal parentage of the child as opposed to

⁴⁵ Compare UTAH CODE ANN. § 76-7-204 (repealed 2005) (forcing the surrogate to be the legal mother), with UTAH CODE ANN. § 78B-15-801 (2008) (declaring surrogacy agreements valid if the intended parents are married and signatories).

⁴⁶ See UNIFORM PARENTAGE ACT LAW & LEGAL DEFINITION, <http://definitions.uslegal.com/u/uniform-parentage-act> (last visited Nov. 15, 2012) (indicating that under the UPA, maternity could be established by proof of having given birth to the child or by proof of a mother-child relationship).

⁴⁷ See *Johnson v. Calvert*, 851 P.2d 776, 777 (Cal. 1993) (explaining that the mother was able to produce eggs for implantation in the surrogate despite having a hysterectomy).

⁴⁸ See *id.* (suggesting the agreement benefitted both parties).

⁴⁹ See *id.* at 778 (detailing the deterioration of the relationship between the intended parents and the surrogate which resulted in the custody battle for the child).

⁵⁰ See *id.* at 779 (holding that because the intended parents were the child's genetic mother and father, the surrogate had no rights to claim parentage of the child).

⁵¹ See *id.* at 781 (suggesting that though the surrogate gave birth to the child, the intended mother should be able to claim maternity because can establish a parent-child relationship through her genetic connection with the child).

mechanically determining that the surrogate is the intended mother in every case.⁵² California now uses the reasoning in *Johnson* to determine the parentage of a child created through gestational surrogacy instead of automatically naming the birth mother the legal parent of the child.⁵³

II. Analysis

A. *Procreation is Protected by the Constitution as a Fundamental Right Because It Is an Intimate, Private Choice*

In determining which constitutional standard to apply, a court looks at the specific issue restricted by the statute.⁵⁴ Because Arizona's surrogacy statute limits the right to procreate, a fundamental right is at stake when the statute is enforced.⁵⁵ Since any effort by state legislatures to outlaw gestational surrogacy unconstitutionally interferes with a fundamental right, the courts should use a strict scrutiny standard like the court did in *Soos*.⁵⁶

When the Arizona state legislature drafted its surrogacy statute, it failed to consider the inherent right to privacy in marriage that is protected by the Constitution.⁵⁷ Infertile couples in Arizona are continuously deprived of the opportunity to procreate and raise their own children because the statute fails to acknowledge that procreation is a fundamental right included under the right to privacy.⁵⁸ The right of privacy was

⁵² See *id.* at 782 (holding that because the genetic mother intended to bring the child into the world to raise as her own, she was the child's legal mother).

⁵³ See *id.* at 786 (maintaining the liberty rights of the parents by denying the surrogate custody).

⁵⁴ See *Soos v. Superior Court*, 897 P.2d 1356, 1359-60 (Ariz. Ct. App. 1994) (explaining that strict scrutiny is applied to statutes that include a suspect class or fundamental right).

⁵⁵ See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (determining that legislation regarding procreation invokes a basic civil right because it is so intrinsic to a person's identity).

⁵⁶ See *Griswold v. Connecticut*, 381 U.S. 479, 503 (1965) (citing *Skinner*, 316 U.S. at 541) (explaining that strict standards are meant to ensure the equal applicability of laws and avoiding unjust interference).

⁵⁷ See *Carey v. Population Services*, 431 U.S. 678, 685 (1977) (citing privacy as a fundamental right that must not be subjected to unjustified government interference); accord *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (characterizing procreation as a fundamental privacy right); *Skinner*, 316 U.S. at 541 (linking procreation to privacy).

⁵⁸ See generally *Soos v. Superior Court*, 897 P.2d 1356 (Ariz. Ct. App. 1994) (proposing that the genetic mother was deprived the right to raise her child).

extended to include the right to bear a child because marital decisions regarding procreation concern the most intimate matters that affect a person in his or her lifetime.⁵⁹ Despite the invasive medical procedure involved in gestational surrogacy, it is still an intimate matter that involves the couple's ability to exercise its right to procreate and should be included under the privacy protection afforded to procreation.⁶⁰ Precluding gestational surrogacy would effectively sterilize infertile couples and forbid their only means of genetically producing children.⁶¹

A court looks at the issue the statute restricts in order to determine which standard to apply when analyzing a statute for constitutionality.⁶² Because the surrogacy statute limits the right to procreate, a fundamental right is at stake when the statute is enforced.⁶³ Since any effort by state legislatures to outlaw gestational surrogacy unconstitutionally interferes with a fundamental right, the courts should use a strict scrutiny standard like the court did in *Soos*.⁶⁴

As a fundamental right, procreation cannot be regulated without the justification of a substantial government interest directly related to the policy that restricts the right to procreate.⁶⁵ An equal protection analysis makes it clear that Arizona's surrogacy law cannot withstand strict constitutional scrutiny.⁶⁶ A woman's interest in proving maternity is just

⁵⁹ See, e.g., *Carey*, 431 U.S. at 685 (explaining that an individual has the right to not be encumbered by unwarranted intrusion on his or her fundamental rights).

⁶⁰ See *Johnson v. Calvert* 851 P.2d 776, 786 (Cal. 1993)(remarking that individuals who use medical procedures to procreate should be afforded the same rights as others that procreate).

⁶¹ See *Skinner*, 316 U.S. at 541 (considering the implications of sterilization as an affront on groups of individuals because it denied them of their right to procreate); see also *Soos*, 897 P.2d at 1357 (determining that without surrogacy, the intended mother was unable to have genetic children).

⁶² See *Soos*, 897 P.2d at 1359-60 (explaining that strict scrutiny is applied to statutes that include a suspect class or fundamental right).

⁶³ See *Skinner*, 316 U.S. at 541 (determining that legislation regarding procreation invokes a basic civil right because it is so intrinsic to a person's identity).

⁶⁴ See *Griswold v. Connecticut*, 381 U.S. 479, 503 (1965) (citing *Skinner*, 316 U.S. at 541) (explaining that strict standards are meant to ensure the equal applicability of laws and avoiding unjust interference).

⁶⁵ See *Soos*, 897 P.2d at 1359 (stating that the statute must withstand constitutional scrutiny to be upheld).

⁶⁶ See *id.* at 1360 (holding that because a man may contest paternity but a woman may not contest maternity of the child per the statute, it violates the Equal Protection Clause).

as significant as a man's interest in proving paternity. Arizona's surrogacy statute treats women disadvantageously compared to men because it does not allow women the same opportunity to declare parentage over a child that is provide to men.⁶⁷ Because a woman has no opportunity to assert maternity of a child under Arizona's surrogacy statute, the statute violates the Equal Protection Clause.⁶⁸

Furthermore, the state's interest in prohibiting surrogacy contracts is not sufficient to warrant the disparate treatment of men and women under the statute.⁶⁹ Though states often use laws against surrogacy in an attempt to thwart the efforts of baby brokers, the couple in *Soos* was not encouraging human trafficking by entering into surrogacy contracts.⁷⁰ Rarely do couples intend to engage in human trafficking in order to have a child of their own.⁷¹ In any event, the state's interest in protecting people from being subject to human trafficking is accounted for through federal laws such as the Trafficking Victims Protection Act.⁷² These laws already protect against baby brokering, and states do not need to outlaw gestational surrogacy to achieve the goal of discouraging human trafficking.⁷³ Although the state interest in discouraging human trafficking is important enough to be considered by federal legislation, it is not compelling enough to restrict an individual's fundamental rights through the means contemplated by the statute.⁷⁴

⁶⁷ *See id.* (analyzing that although men and women are similarly situated when wanting to achieve parenthood, women face discrimination under the current statute when they do not give birth to their child).

⁶⁸ *See id.* (citing *Reed v. Reed*, 404 U.S. 71, 92 (1971)) (explaining that the law cannot treat men and women differently when both sexes are in the same situation without violating the Equal Protection Clause).

⁶⁹ *See id.* at 1359 (explaining that the statute was modeled after Michigan's surrogacy statute which prohibits surrogacy).

⁷⁰ *See id.* (explaining that the Sooses were attempting to exercise their right to procreate through surrogacy).

⁷¹ *But see* *State v. Runkles*, 605 A.2d 111, 112 (Md. 1992) (reprimanding a couple who sold their child for \$3,500 and three ounces of cocaine).

⁷² *See generally* Trafficking Victims Protection Act, 22 U.S.C.A. §§ 7101-7113 (2000) (describing the criminal penalties attached to persons involved in human trafficking).

⁷³ *See id.* (incorporating that the purchase of children is illegal).

⁷⁴ *See Soos*, 897 P.2d at 1361 (holding that disparate treatment was not justified by the government's interests because the interests were insufficient to void the mother's parental rights).

B. A Couple's Infertility Does Not Eliminate Its Fundamental Right to Procreate, When Other Options, Including Gestational Surrogacy, Are Available Because the Law Must Adapt to Include Novel Medical Procedures Developed to Facilitate Procreation

Even if a couple is infertile, the couple has a fundamental right to procreate and may utilize technology in order to do so.⁷⁵ If a statute forbidding the enforcement of gestational surrogacy agreements is enforced, infertile couples are left without viable options to procreate and are completely denied their fundamental right to procreate.⁷⁶ Forbidding surrogacy agreements functions in the same way as forced sterilization because it renders a couple infertile and unable to produce its own genetic children.⁷⁷

Additionally, the government intrusion into a couple's life is too severe because Arizona's gestational surrogacy law limits a couple's access to reproductive technologies.⁷⁸ Most laws treat gestational surrogacy and traditional surrogacy similarly and fail to consider the fundamental differences and legal implications of merging the two.⁷⁹ Gestational surrogacy should be viewed differently under the law because it is not utilizing any genetic material from the surrogate to produce children.⁸⁰ Because a child produced through gestational surrogacy is often genetically related to both intended parents, the intended parents should be deemed the legal parents of the child.⁸¹

⁷⁵ See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1272 (D. Utah 2002) (interpreting that couples who choose gestational surrogacy to conceive are simply exercising a fundamental right).

⁷⁶ See *id.* (suggesting that surrogacy is a viable option for infertile couples to exercise their right to procreate).

⁷⁷ See generally *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (discussing that taking away the right to procreate will have devastating effects because it is intrinsic to one's identity).

⁷⁸ See *J.R.*, 261 F. Supp. 2d at 1273 (holding that the government has no justifiable interest in preventing the exercise of procreation through gestational surrogacy).

⁷⁹ See, e.g., ARIZ. REV. STAT. ANN. § 25-218 (1994) (declaring surrogacy agreements invalid without considering gestational and traditional surrogacy separately).

⁸⁰ See *J.R.*, 261 F. Supp. 2d at 1273 (determining that the statute did not intend to prevent gestational surrogacy, but traditional surrogacy).

⁸¹ See, e.g., *Soos v. Superior Court*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (stating that the biological connection between the intended mother and child affords a legal relationship).

C. *For Arizona's Surrogacy Statute to be Constitutional, the Discrepancy Between a Male's and Female's Ability to Contest the Parenthood of a Child Must Be Eliminated and Arizona Must Grant Both the Ability to Claim Their Parental Rights.*

Arizona's surrogacy statute provides a means for the intended father to assert paternity over the surrogate's husband while denying the same right to the intended mother.⁸² Because the statute affords a man the right to assert parenthood but not a woman, the statute violates the Equal Protection Clause.⁸³ A woman can be genetically related to the child, intend to raise it, and still be unable to declare legal maternity over it because there is not a similar provision that allows a woman to rebut the presumption of maternity for children produced through gestational surrogacy.⁸⁴ By not allowing women to claim maternity of children that are genetically related to them, Arizona is denying women the opportunity to form a parent-child relationship.⁸⁵

Because the intended mother is given no legal parentage authority, she must be given the opportunity to determine maternity through the biological relationship she has with her child.⁸⁶ In contrast with traditional surrogacy, gestational surrogacy often involves the use of the mother's genetic material in producing a child.⁸⁷ By using the intended mother's ovum, the surrogate does not have any genetic connection to the child and should not be declared the legal mother.⁸⁸ Despite the complete lack of

⁸² See § 25-218 (including a rebuttable presumption that the surrogate's husband is the father of the child produced through gestational surrogacy).

⁸³ See *Soos*, 897 P.2d at 1360 (determining that because the statute does not treat similarly situated men and women the same it is inherently discriminatory).

⁸⁴ See *id.* (emphasizing that a woman is denied the opportunity to develop a relationship with her child through Arizona's surrogacy statute, despite her genetic tie to the child).

⁸⁵ See *id.* (stripping the mother of all legal methods to assert maternity).

⁸⁶ See *id.* at 1361 (indicating an increased hardship for a woman to achieve legal parentage because additional steps must be taken claim maternity when gestational surrogacy is utilized).

⁸⁷ See *id.* at 1358 (stating that the egg was obtained from the intended mother before being implanted into the surrogate).

⁸⁸ See *id.* (asserting that the surrogate cannot establish a parent-child relationship through biology because the child is not genetically related to her).

genetic tie, Arizona's surrogacy statute automatically determines that the surrogate is the legal mother of the child.⁸⁹

Instead, the intended mother should be able to assert maternity of the child through her biological connection to the child, despite the child being a product of a gestational surrogacy agreement.⁹⁰ Every parent should have the right to assert parenthood regardless of the method by which a child is born.⁹¹ Because the genetic connection produces a relationship between the intended mother and the child, a protected familial interest is at stake and the law should reflect this important relationship.⁹²

1. A Strict Scrutiny Standard Should be Applied to
Determine Whether the State's Interest Is Compelling
Enough to Support the Constitutionality of the Statute
Because the Statute Violates a Fundamental Right.

The custody and care of a child as well as the right to procreate are fundamental rights guaranteed to all individuals by the Constitution.⁹³ A parent should be free of unreasonable governmental intrusion into the privacy of his or her marriage and family life unless the state can justify the interference and interfere in a minimally intrusive way.⁹⁴ The right to procreate is ultimately linked to the parents' ability to raise the children they have created, and this right should also remain free from governmental intrusion.⁹⁵

⁸⁹ See ARIZ. REV. STAT. ANN. § 25-501 (2007) (rejecting the possibility of the intended mother to contest maternity).

⁹⁰ See *Soos*, 897 P.2d at 1360 (discussing that the state protects the father's biological link to the child while disregarding the mother's when applying its surrogacy statute).

⁹¹ See *Johnson v. Calvert*, 851 P.2d 776, 779 (Cal. 1993) (identifying the need of every child to have an established relationship with his or her mother).

⁹² See *Soos*, 897 P.2d at 1360 (adjudging that by refusing to recognize the intended mother as the legal mother, the family relationship is ignored).

⁹³ Compare *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (holding that an unwed genetic father has the right to raise his children), with *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (explaining that the right to procreation is fundamental and cannot be taken by the government).

⁹⁴ See *J.R. v Utah*, 261 F. Supp. 2d 1268, 1272 (D. Utah 2002) (recognizing that privacy protection includes decisions regarding marriage and childrearing).

⁹⁵ See *id.* at 1273 (advocating that a parent who intends to raise a child and has contributed to bring the child into being has sufficient intent to achieve parenthood).

Furthermore, since a fundamental right is involved, a statute taking away the procreative right of gestational surrogacy must pass strict scrutiny in order to be upheld.⁹⁶ Efforts to bar parentage claims following gestational surrogacy agreements revoke the only opportunity infertile couples have to produce genetic children because infertile couples cannot utilize their fundamental right to procreate absent medical technology.⁹⁷ The Arizona legislature argued that the statute fulfills the standards necessary to overcome strict scrutiny because it has a compelling state interest in excluding a rebuttable presumption of maternity, but this interest is not sufficient to forbid the enforcement of gestational surrogacy agreements.⁹⁸

2. The State Cannot Forbid Gestational Surrogacy Because it Does Not Have a Sufficiently Compelling Interest.

The state does not have any justifiable interest in barring infertile couples from accessing technology, like gestational surrogacy, that can provide these couples an opportunity to exercise their right to procreate.⁹⁹ Despite the state's admirable intentions of preventing baby brokers and human trafficking, this interest is not achieved by outlawing the enforcement of gestational surrogacy agreements.¹⁰⁰ By holding gestational surrogacy agreements void, the state may actually be perpetuating the very thing it seeks to avoid by increasing the demand for children on the black market.¹⁰¹

⁹⁶ See *Soos*, 897 P.2d at 1360 (determining that a strict scrutiny test applies despite the gender-based discrimination implied by the statute because a fundamental right is at stake).

⁹⁷ See *J.R.*, 261 F. Supp. 2d at 1274 (holding that absent the availability of gestational surrogacy, infertile couples have no opportunity to procreate, thus warranting constitutional protection).

⁹⁸ But see *Soos*, 897 P.2d at 1359 (insisting that the statute supports the state's interest in preventing baby brokers).

⁹⁹ See *J.R.*, 261 F. Supp. 2d at 1273 (explaining that the burden imposed on infertile couples who choose to bear children through gestational surrogacy is too high to be justified).

¹⁰⁰ See *Soos*, 897 P.2d at 1361 (holding that the state did not show an interest compelling enough to justify the discrimination against the intended mother).

¹⁰¹ See *J.R.*, 261 F. Supp. 2d at 1274 (inferring that infertile couples who are barred from enforcing gestational surrogacy agreements may seek alternative methods of obtaining children, possibly even through baby brokers).

By providing a legal means for infertile couples to enforce gestational surrogacy agreements, the state would be taking away the restriction that bars infertile couples from bearing their own genetic children.¹⁰² At the same time, the state would be lowering the likelihood of couples brokering babies because infertile couples will be able to fulfill their procreative needs legally through surrogacy instead of searching to adopt children.¹⁰³ By removing the demand for baby brokering, human trafficking for this purpose will drastically decrease.¹⁰⁴ The state's interest in preventing baby brokering is actually supported by legalizing gestational surrogacy agreements.¹⁰⁵

Additionally, no compelling state interest exists that is sufficient to warrant the dissimilar statutory treatment between men and women who choose to utilize gestational surrogacy in order to procreate.¹⁰⁶ Because men are allowed to rebut the presumption of paternity in children born through gestational surrogacy, women should also have the opportunity to rebut the presumption of maternity in these cases.¹⁰⁷ There is no compelling state interest in keeping women from asserting maternity over their children.¹⁰⁸ Therefore, the statute is unconstitutional and cannot be used to restrict intended mothers from asserting maternity.¹⁰⁹

¹⁰² See *Soos*, 897 P.2d at 1359 (recognizing that gestational surrogacy is necessary in providing an opportunity for couples to bear genetic children).

¹⁰³ See *id.* (countering the state's argument for voiding gestational surrogacy agreements and suggesting that outlawing these agreements actually bolsters the problem).

¹⁰⁴ Cf. *id.* (setting forth the argument that supply is accumulated based on demand therefore by lowering the demand, there will be less need for a large supply).

¹⁰⁵ See *id.* (suggesting that less people will attempt to illegally purchase a child when they are able to negotiate a legal surrogacy agreement).

¹⁰⁶ See *id.* (maintaining that the compelling state interest proposed by the Arizona state legislature is insufficient to deprive genetic parents of the right to raise their children).

¹⁰⁷ See *id.* at 1360 (holding that men and women in similar situations should be treated equally under the law because that protection is guaranteed under the Equal Protection Clause).

¹⁰⁸ See *id.* (determining that the state's interest is for children to have a legal mother).

¹⁰⁹ See *id.* (asserting that the statute fails the requirements of the Equal Protection Clause and is unconstitutional).

The statute unconstitutionally revokes the genetic mother's ability to claim legal parentage of her child.¹¹⁰ The state cannot use legislation to prevent couples from utilizing gestational surrogacy and other technology to procreate because the state does not have a viable reason for keeping intended parents from asserting parentage over children produced through gestational surrogacy.¹¹¹ Gestational surrogacy was intended to provide an alternate opportunity for couples to procreate and is vital to infertile couples who have no other alternative to produces children of their own.¹¹² In order to allow couples to fully exercise their fundamental right to procreate, Arizona must allow gestational surrogacy agreements to be enforceable when entered voluntarily, especially for couples that are otherwise infertile.¹¹³

D. Prohibiting Gestational Surrogacy and Voiding Surrogacy Agreements Violate the Due Process Rights of Both the Intended Parents and Surrogate Mother.

Not only does the statute violate the intended parents' rights under the Equal Protection Clause, it also violates the intended parents' protection under the Due Process Clause of the Fourteenth Amendment.¹¹⁴ Because Arizona's surrogacy statute does not provide an opportunity for the intended parents to assert their interest in their children, they are denied their due process rights.¹¹⁵

For the government to infringe on an individual's right to a fundamental interest, such as the right to procreate, the infringement must

¹¹⁰ See *id.* (determining that because the statute is unconstitutional on equal protection grounds, it cannot be used to restrict maternity claims by genetic mothers).

¹¹¹ See *id.* (inferring that a law favorable towards gestational surrogacy is more constitutionally sound).

¹¹² See *id.* at 1358 (reiterating that because the intended mother was infertile and could not bear genetic children but for gestational surrogacy, her right to procreate was barred by the statute outlawing gestational surrogacy).

¹¹³ See generally *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (arguing that bargained for contracts prior to the birth of the child should determine legal parenthood of the child).

¹¹⁴ See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1277 (D. Utah 2002) (confirming that the Due Process Clause was instated as an additional measure of protection against unreasonable government intervention of privacy rights).

¹¹⁵ See *id.* at 1288 (elaborating that the statute does not provide a forum for discovering the best interest of the children and, thus, does not fulfill the due process requirements of the Fourteenth Amendment).

be narrowly tailored.¹¹⁶ Arizona's surrogacy statute is not narrowly tailored because it determines parentage of children without analyzing facts specific to each individual case.¹¹⁷ Instead, the statute devises a one-size-fits-all policy for every person who enters into a gestational surrogacy agreement regardless of the parties' intentions at the time they initiated the agreement.¹¹⁸

Even if the state's interests were sufficiently compelling, the statute cannot be viewed as narrowly tailored to serve the state's interests because it is not limited to agreements that promote baby brokering.¹¹⁹ Instead of passing a statute that allows gestational surrogacy with clauses designed to limit baby brokering and unbalanced contracts, the statute completely eliminates a person's ability to enter into surrogacy agreements.¹²⁰ The state could pass a law restricting gestational surrogacy narrowly tailored to prevent baby brokerage agreements. But, as the statute currently stands, the law is unconstitutional.¹²¹

1. *The Court Does Not Consider the Best Interests of the Child When It Declares the Surrogate Mother the Natural Parent.*

By forcing parentage on the surrogate, the statute fails to accomplish the goals of the state, including considering the best interests of the children involved.¹²² Because the state asserts that it is concerned

¹¹⁶ See *id.* (concluding that a statute must serve a compelling state interest in order to survive a due process analysis).

¹¹⁷ See *id.* (denying that a statute can be narrowly tailored while completely excluding the interests of the genetic parents in its method of determining child custody).

¹¹⁸ See *id.* (determining that the surrogate is the legal parent regardless of the facts in each individual surrogacy agreement).

¹¹⁹ See *id.* (maintaining that the statute is not narrowly tailored because it affects all gestational surrogacy agreements equally instead of solely affecting the cases the state wishes to limit).

¹²⁰ See *id.* (countering the state's argument that the statute is narrowly tailored to prevent births for profit that exploit surrogate mothers).

¹²¹ See generally ARIZ. REV. STAT. ANN. § 25-218 (condemning gestational surrogacy agreements in all circumstances without providing exceptions for individuals who cannot otherwise procreate does not create a narrowly tailored law).

¹²² See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1284 (D. Utah 2002)(naming the protection of the best interests of the child among the state's compelling interests in preventing gestational surrogacy agreements).

with the best interest of the child, the relevant facts of each situation surrounding the surrogacy agreement must be considered when parentage is determined.¹²³ Instead of balancing the interests of both parties, the statute seeks to eliminate the interests of the genetic parents in favor of finding the person who gave birth to the child as the legal parent.¹²⁴

By relying on a predetermined rule to determine parentage, the statute does not consider the best interest of the child.¹²⁵ Without a means to protect the due process rights of the intended parents by creating a forum for the intended parents to contest their parental rights, the statute actually ignores the best interests of the child.¹²⁶ The statute's predetermination eliminates the genetic parents' rights to their children without a showing of abandonment or a showing that the genetic parents are unfit to raise children.¹²⁷ Ultimately, the state does not accomplish its goal of protecting the best interests of the child when it removes the child from the custody of their genetic parents when these parents have planned for them and have shown that they are fit parents.¹²⁸

In order to satisfy the state's concern for including an analysis of the best interest of the child before determining custody, evidence surrounding the surrogacy agreement must be considered on a case-by-case basis.¹²⁹ Each genetic parent should be given the opportunity to prove that he or she is a fit parent capable of raising his or her genetic child

¹²³ See *id.* (articulating that because the statute does not allow fact-finding, it cannot possibly fulfill the best interest of the child in every situation).

¹²⁴ See *id.* at 1284-85 (suggesting that the statute's unquestioned presumption of maternity disregards due process in its automatic determination of parentage).

¹²⁵ See *id.* at 1285 (noting that a child's best interest cannot be determined without acknowledging the specific circumstances surrounding the agreement).

¹²⁶ See *id.* (stressing the necessity of a custody hearing when a loss of parental rights is at stake).

¹²⁷ See *id.* (concluding that upholding a statute that automatically gives custody to the surrogate would unjustifiably abrogate the genetic parents rights without adjudication).

¹²⁸ See *id.* at 1286 (alleging that the parent-child relationship between the intended parents and their children is a genetic fact that cannot be disregarded by a statute).

¹²⁹ See *Soos v. Superior Court*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (arguing that the statute's automatic presumption of maternity does not satisfy the state's interests in providing the best home for the child because it does not evaluate the presumed parent for parental fitness).

before custody is awarded to another individual.¹³⁰ If the genetic parents are proven to be unfit parents, the court should utilize domestic law to determine the custody of the child.¹³¹

2. A Surrogacy Agreement States the Intentions of Both Parties and Should Be Considered Valid and Enforceable.

The statute does not consider the interests of the surrogate when it automatically declares the surrogate the legal parent of the child.¹³² The statute does not consider that the surrogate is likely as unwilling to raise the children produced through gestational surrogacy as the intended parents are willing.¹³³ Instead, the statute assumes that the surrogate mother wishes to raise the child and imposes a legal burden on her for which she did not contract.¹³⁴ By automatically determining the parentage of the child through statute, the state allows for the likely possibility that the surrogate does not want to raise the child and places the child in an environment that is clearly not in his or her best interest.¹³⁵ The best interest of the child can ultimately be satisfied while upholding the constitutional rights of the intended parents by honoring the agreement of the adults who planned and intended to execute the gestational agreement.¹³⁶

¹³⁰ See *id.* (suggesting that the method of determining parentage through statute is inconsistent with other custody laws because it awards custody automatically without considering all factors related to the child's interest).

¹³¹ See *id.* (seeking that parentage claims should be handled in a manner consistent with other domestic relations laws).

¹³² See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1287 (D. Utah 2002) (raising the point that a surrogate often does not intend or wish to raise the child of the intended parents).

¹³³ See *id.* (considering the impact of the statute's presumption of forcing maternity on the surrogate whether she wishes to be the legal parent of the child or not).

¹³⁴ See *Soos*, 897 P.2d at 1361 (finding that it is not in the best interest of a child to give custody to a person who does not want custody).

¹³⁵ See *id.* (suggesting that the surrogacy agreement can resolve the intent of the parties and be used to determine the best interest of the child).

¹³⁶ See *Johnson v. Calvert*, 851 P.2d 776, 783 (Cal. 1993) (suggesting that the court should honor an agreement between consenting adults instead of relying on a general statute to determine parentage).

The state would still be able to restrict surrogacy if it allowed individuals to enter into gestational surrogacy agreements.¹³⁷ By allowing gestational surrogacy agreements, the court would be able to determine the interests of both parties prior to establishing custody.¹³⁸ In the nature of the contract, the woman agreeing to be the gestational carrier of another couple's child is providing a service to that couple without expecting the burden of having to raise the child on her own.¹³⁹ Additionally, the intent of the genetic parents is made clear in surrogacy agreements.¹⁴⁰ By arranging for a person to carry the intended parents' child and contracting to ensure that the intended parents will be viewed as the legal parents, the intended parents are demonstrating their intent to procreate a genetically related child by the only means available to them.¹⁴¹ Because gestational surrogacy contracts allow the parties to bargain for terms that are mutually agreeable, they should be held enforceable with the full force of law.¹⁴²

III. Policy Recommendation

Arizona's surrogacy statute, though declared unconstitutional in *Soos*, creates two distinct problems for individuals and couples who intend to utilize gestational surrogacy.¹⁴³ The first issue is that the parents who planned for and went through medical procedures that were both physically and mentally painful in order to have a child will not be granted

¹³⁷ See *Soos*, 897 P.2d at 1361 (arguing that though Arizona's surrogacy statute is unconstitutional, a more narrow statute could be created to regulate surrogacy without infringing on constitutional rights).

¹³⁸ See *Johnson*, 851 P.2d at 787 (stipulating that citizens have the right to privacy in their procreative decision-making and that contracts arising from these decisions should be upheld).

¹³⁹ See *id.* (refuting that a surrogate is exercising her right to procreate and instead is showing consent to provide a service).

¹⁴⁰ See *id.* (reiterating that the purpose of the gestational surrogacy contract is to provide a child to the intended parents, thus outlining their expectations).

¹⁴¹ See *id.* (reasoning that the intended parents did not expect to donate their genetic material to the surrogate but that they intended to utilize the surrogate's service to complete their family).

¹⁴² See *id.* at 783 (taking into account that surrogacy contracts, when entered into with proper consent and equal bargaining power, can be used to determine the intentions of the parties and ultimately used to establish parentage).

¹⁴³ See ARIZ. REV. STAT. ANN. § 25-218 (1994) (ignoring the intent of the parties involved in the gestational surrogacy agreement).

parental rights.¹⁴⁴ Second, the statute fails to accept surrogacy agreements as valid, bargained for contracts even when these agreements were entered into freely and mutually.¹⁴⁵ The court should honor surrogacy contracts entered into willingly and intelligently in the same manner that other contracts are enforced.¹⁴⁶

In order to create a statute that considers the best interests of the parties involved and the child that is created out of the surrogacy agreement, Arizona should adopt legislation similar to the current laws in Utah and California.¹⁴⁷ After Utah overturned its surrogacy statute, a statute that was glaringly similar to Arizona's, it adopted a rule that was more favorable to gestational surrogacy agreements.¹⁴⁸ Utah currently allows couples to contract with surrogates in order to produce children that are genetically related to them as long as the contract is entered into willingly with full knowledge of the terms and conditions.¹⁴⁹ This law allows couples that are infertile to utilize modern technology without the fear of having the child they planned for and intended to raise taken away from them.¹⁵⁰

The law in California is similar, relying on the contract to devise the intentions of the parties involved in disputes over parentage of children created through gestational surrogacy.¹⁵¹ This method would be equally beneficial for Arizona because it would allow the courts to determine

¹⁴⁴ *See id.* (granting the surrogate automatic legal parental rights over children produced through gestational surrogacy).

¹⁴⁵ *See id.* (declaring any contract created to support a surrogate arrangement to be unenforceable under Arizona law).

¹⁴⁶ *See Johnson*, 851 P.2d at 783 (denying that surrogacy contracts conflict with public policy).

¹⁴⁷ *Compare* UTAH CODE ANN. § 78B-15-801 (West 2008) (enforcing gestational surrogacy contracts when the surrogate agrees in writing to relinquish her rights), *with Johnson*, 851 P.2d at 787 (concluding that whomever intends to bring a child into the world and raise it could be understood as the legal parent of the child).

¹⁴⁸ *See* § 78B-15-801 (including conditions by which parties can express their intentions).

¹⁴⁹ *See id.* (affording rights to contract for gestational surrogacy but not traditional surrogacy because the surrogate mother's ovum is not used in the process).

¹⁵⁰ *See id.* (stating that a surrogate must agree to relinquish her rights to children produced through assisted reproduction in the contract).

¹⁵¹ *See Johnson*, 851 P.2d at 785 (indicating that a surrogacy agreement should be construed to determine the intentions of the parties at the time they contracted).

whether the intended parents are capable of raising children.¹⁵² This method would also give the court the power to invalidate a contract if the court feels that the surrogate was not aware of what she was contracting for and was taken advantage of.¹⁵³ The adoption of a statute similar to the ones currently in effect in these states would replace Arizona's unconstitutional statute and provide a means for infertile couples to exercise their right to procreate.¹⁵⁴

Federal law addressing gestational surrogacy should also be established in order to protect individuals from states that seek to limit or outlaw gestational surrogacy.¹⁵⁵ Almost half of the states in this country allow gestational surrogacy in some form while only five states, including Arizona, explicitly forbid it.¹⁵⁶ Though many states remain silent on the issue, many more states are willing to validate the legitimacy of gestational surrogacy agreements than to declare these agreements void, especially in regard to married, heterosexual couples.¹⁵⁷

Laws should be created to establish a framework for gestational surrogacy agreements in order to allow couples to exercise their fundamental right to procreate without fearing that they may lose their genetic children in lengthy litigation.¹⁵⁸ The law should forbid states from completely barring gestational surrogacy while providing states the

¹⁵² See *id.* at 794 (suggesting that both parties could benefit from knowing the roles they play in the future surrogacy arrangement).

¹⁵³ See *id.* at 784 (suggesting that under coercion or duress, a surrogacy contract would be unenforceable).

¹⁵⁴ See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1273 (D. Utah 2002) (declaring that invalidating surrogacy agreements unjustifiably burdens the right to procreate when a couple's only means of having genetically related children is through gestational surrogacy).

¹⁵⁵ See Miriam Pérez, *Surrogacy: The Next Frontier for Reproductive Justice*, R.H. REALITY CHECK (Feb. 23, 2010, 7:00 AM), <http://www.rhrealitycheck.org> (stressing the disconnect between state laws on surrogacy due to the lack of federal regulation).

¹⁵⁶ See *THE SELECT SURROGATE*, *supra* note 7 (noting the trend among states to consider gestational surrogacy agreements valid).

¹⁵⁷ See *id.* (presenting an analysis of each state's position on gestational surrogacy including information on limitations on its practice when it is allowed).

¹⁵⁸ See *id.* (describing the uncertainty couples face when entering into gestational surrogacy agreements).

opportunity to regulate its practice as they see fit.¹⁵⁹ This would allow states to impose restrictions in order to fulfill their interests while providing individuals the opportunity to enter into gestational surrogacy agreements with confidence.¹⁶⁰ If individuals are comfortable entering into gestational surrogacy agreements, gestational surrogacy can be extremely beneficial and still uphold the interests of the state.¹⁶¹

Conclusion

Because *Soos* held Arizona's surrogacy statute unconstitutional, Arizona has a unique opportunity to draft a statute that provides a means for infertile couples to produce and raise genetically related children.¹⁶² Procreation is a fundamental right because it impacts our very being, linking a person to another for lifetime.¹⁶³ Surrogacy allows infertile couples to contribute genetically to the human race and be legal parents in a way they would not be able to experience without surrogacy.¹⁶⁴

Until a federal rule is created, each state is left to determine which rights a person may have and which he or she must continue to fight for.¹⁶⁵ Arizona has made a step in the right direction by determining that it is unconstitutional to automatically give maternity rights to the gestational surrogate when the intended mother is genetically related to the child and has not proven to be an unfit parent or had an opportunity to contest

¹⁵⁹ See Peter R. Brinsden, *Gestational Surrogacy*, 9 HUMAN REPRODUCTION UPDATE 483, 488 (2003)(outlining the methods by which countries that allow gestational surrogacy regulate it).

¹⁶⁰ See *Johnson v. Calvert*, 851 P.2d 776, 788 (Cal. 1993) (expressing that the legislature is in the best position to address gestational surrogacy).

¹⁶¹ See Brinsden, *supra* note 160, at 488 (providing examples of countries who utilize gestational surrogacy and successfully regulate the process).

¹⁶² See *Soos v. Superior Court*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (holding that Arizona's surrogacy statute violates both the Equal Protection and Due Process Clauses and is therefore unconstitutional).

¹⁶³ See *Johnson*, 851 P.2d at 788 (suggesting that procreation is intrinsic to the survival of the race and that the ability to participate in the perpetuation of the human race is crucial to fulfilling a societal need).

¹⁶⁴ See *id.* (suggesting that having children is the most fulfilling relationship a person can have in his or her lifetime).

¹⁶⁵ See *id.* (suggesting that the right to gestational surrogacy is fundamental and that a federal law should be created to keep states from completely revoking this right).

maternity.¹⁶⁶ Nonetheless, Arizona has yet to replace the unconstitutional statute barring gestational surrogacy with one that reflects the constitutionally sound views on gestational surrogacy outlined in *Soos*.¹⁶⁷

Arizona must ultimately determine how it will uphold the right to procreate because this right is the means by which the human race survives.¹⁶⁸ It cannot exclude infertile couples from participating in procreation, even if the couple's only means of procreating is through technological advances because this exclusion unjustly violates their fundamental rights.¹⁶⁹ Instead, Arizona should support the ability to contract for gestational surrogacy when both parties are able to come to mutually agreeable terms and join Utah, California, and other pioneer states that view surrogacy as another means of reaching the same end.¹⁷⁰

¹⁶⁶ See *Soos*, 897 P.2d at 1361 (declaring that the genetic connection between the intended parents and the child creates a protected interest that cannot be taken away absent a compelling state interest).

¹⁶⁷ See ARIZ. REV. STAT. ANN. § 25-218 (1994) (noting that the statute has not been replaced).

¹⁶⁸ See *Soos v. Superior Court*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (suggesting it is possible to have a constitutional statute permitting surrogacy).

¹⁶⁹ See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1281 (D. Utah 2002) (arguing that because medical technology is not limited to artificial insemination and traditional surrogacy, infertile couples can produce genetic children which ought to be protected as a fundamental right).

¹⁷⁰ See, e.g., UTAH CODE ANN. § 78B-15-801 (2008) (providing a means for infertile couples to contract with a willing surrogate to have genetic children); see also THE SELECT SURROGATE, *supra* note 7 (noting that twenty-three states allow gestational surrogacy).