American University Journal of Gender, Social Policy & the Law

Volume 28 | Issue 3 Article 3

2020

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Amanda Grau
American University Washington College of Law

A WELL-ROUNDED ARGUMENT: HOW SKINNER AND OBERGEFELL MAKE MEDICAL REQUIREMENTS FOR SURROGACY CONTRACTS UNCONSTITUTIONAL

AMANDA GRAU*

* Amanda Grau is a dual Juris Doctor and Master of Arts candidate at American University's Washington College of Law and School of International Service. She graduated from Murray State University in 2015. While there, she reported on campus sexual assault and Title IX issues as the News Editor for the Murray State News. Amanda would like to thank Alix Bruce, her Note & Comment Editor, for their invaluable feedback and editing genius, as well as the rest of the JGSLP staff. This article would not have been published without you.

INTRODUCTION

Between 1999 and 2013, more than 18,400 infants were successfully delivered via gestational surrogacy in the United States.[1] Gestational surrogacy, or a surrogacy agreement in which all of the genetic material originates from people other than the surrogate, is becoming increasingly popular.[2] Commercial surrogacy is a gestational surrogacy arrangement in which the surrogate is paid a fee beyond compensation for medical bills during their pregnancy.[3] Altruistic surrogacy, or surrogacy in which the surrogate is not paid a fee beyond compensation for medical bills, is also used in the United States.[4] As technology improves, so does the number of infants born to surrogates; 3,432 were born in 2013 compared to just 727 in 1999.[5] There is no federal surrogacy regulation in the United States, and

1. *See* CENTERS FOR DISEASE CONTROL & PREVENTION, KEY FINDINGS: USE OF GESTATIONAL CARRIERS IN THE UNITED STATES (2019), https://www.cdc.gov/art/key-findings/gestational-carriers.html (indicating substantial growth over the last two decades in surrogacy births as gestational science improves) [hereinafter Key Findings]).

2. *See* ALEX FINKELSTEIN ET AL., SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING, COLUM. L. SCH. SEXUALITY & GENDER L. CLINIC 5 (2016) (distinguishing between "traditional" surrogacy, where the surrogate is a biological parent, and "gestational" surrogacy, where a surrogate carries other people's genetic material).

3. *See id.* at 3, 5 (arguing that LGBTQ+ persons' parenting desires need to be balanced with surrogates' rights).

4. *See id.* at 4-5 (analyzing the proposed New York statute that would allow commercial surrogacy).

5. *See* KEY FINDINGS, *supra* note 1 (acknowledging the recent increase of

states vary on whether surrogacy contracts are legal.[6] There is a broad spectrum of surrogacy regulations across states; though the vast majority of states allow commercial surrogacy, many regulate who may engage in surrogacy and under what conditions, while two states ban it completely.[7]

Florida and Illinois, generally considered "surrogate-friendly" states, have statutes that only allow commercial surrogacy in cases where the intended parent cannot carry the child to term for medical reasons.[8] Section 742.15 in Florida's statute (hereafter "Florida statute") is gendered, specifying that the intended mother must have some medical need to use a surrogate.[9] Illinois Statute 47/20 (hereinafter "Illinois statute") is gender-neutral but still requires the parent to have a medical need for a commercial surrogacy contract to be enforceable.[10] By enforcing a medical need requirement, these state statutes unconstitutionally infringe upon an individual's right to procreate.[11] In the wake of *Skinner v. Oklahoma* (hereinafter *Skinner*) and *Obergefell v. Hodges* (hereinafter *Obergefell*), it is unconstitutional for state surrogacy statutes to deny persons the right to procreate based on a lack of medical need because it effectively restricts the right of LGBTQ+ people, whether single or as a couple, to procreate.[12]

This Comment will argue that gender-specific statutes unconstitutionally limit the right to procreate for non-female people and same-sex couples.[13]

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surrogates used for assisted reproduction).

6. *See Intended Parents Surrogacy Laws by State*, SURROGATE.COM, https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/surrogacy-laws-by-state/ (last visited Sept. 26, 2019) (emphasizing that the lack of federal regulation makes surrogacy law confusing).

7. *See id.* (distinguishing between states that are "surrogacy friendly," from those that are not).

8. *See* 750 ILL. COMP. STAT. 47/20 (2017) (stating in gender-inclusive terms that a medical need is required for a valid surrogate contract); *see also* FLA. STAT. § 742.15 (1993) (stating in gender-specific terms that the intended mother must have a medical need for a valid surrogate contract).

9. *See* FLA. STAT. § 742.15 (emphasizing that a "commissioning mother" must not be able to carry the pregnancy to term because the gestation will harm her health).

10. *See* 750 ILL. COMP. STAT. 47/20 (2017) (requiring an intended parent – "he, she, or they" – to have a physician's affidavit).

11. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) (enforcing the right to marry and all enshrined rights for same-sex couples); *see also* Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 538 (1942) (incorporating the right to procreate under the Fourteenth Amendment).

12. *See Obergefell*, 135 S. Ct. at 2599 (holding that same-sex couples are entitled to right to marriage and its benefits); *see also Skinner*, 316 U.S. at 541 (holding that any limit on the right to procreate must undergo strict scrutiny).

13. *See Skinner,* 316 U.S. at 536 (explaining that the right to procreation is

Part I provides an overview of the variations in surrogacy law across the United States and a brief history of surrogacy contract litigation.[14] Part I also provides an overview of Supreme Court cases that speak to the various fundamental rights attributed to marriage and the right to procreate.[15] Part II argues that under *Skinner*, both the Florida and Illinois statutes are unconstitutional because they limit the right to procreate for LBGTQ+ people.[16] Part II further argues that the right of LGBTQ+ people to procreate via a surrogacy contract was reaffirmed under *Obergefell* as a right encompassed in the fundamental right to marry.[17] As such, the Florida and Illinois statutes are unconstitutional under *Obergefell* because they limit this right which is guaranteed to all married couples, no matter their gender.[18] Part II will also discuss *In re Gestational Agreement*, where the Supreme Court of Utah in August 2019 reaffirmed the United States Supreme Court's *Obergefell* rulings, thus showing the movement of the states toward inclusive surrogacy law.[19] Part III will conclude that the Florida and Illinois statutes are unconstitutional under *Skinner* and *Obergefell*.[20]

I. BACKGROUND

A. Variations in U.S. Surrogacy Law

As reproductive science improves, surrogacy grows in popularity in the

fundamental to the survival of the human race).

14. *See Obergefell,* 135 S. Ct. at 2597 (recognizing the differences imposed on LGBTQ+ people when laws deny same-sex marriage).

15. *See Obergefell,* 135 S. Ct. at 2599 (ensuring the right to marry for all people regardless of sexual orientation); *see also* Carey v. Population Servs., Int'l, 431 U.S. 678, 684-85 (1977) (protecting the right of autonomous childbearing decisions), Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (combining parts of the Bill of Rights in a penumbral right to privacy in intimate relations).

16. *See Skinner,* 316 U.S. at 541 (mandating that the right to procreate is a fundamental right that requires strict scrutiny).

17. *See Obergefell*, 135 S. Ct. at 2585 (emphasizing that the Due Process and Equal Protection Clauses together protect the liberty interest found in the right to marry for all people).

18. *See id.* at 2599 (arguing that the right to marry is fundamental because it includes other fundamental rights such as the right to procreate and make autonomous decisions in childrearing).

19. *See* In re Gestational Agreement, 2019 UT 40, 449 P.3d 69, 78, 80, 84 (Utah 2019) (overturning a Utah statute with a gendered medical need requirement).

20. *See Obergefell*, 135 S. Ct. at 2599 (ruling that the right to marry includes the right to procreate and applies to same-sex couples and different-sex couples equally); *see also Skinner*, 316 U.S. at 541 (stating the importance of strict scrutiny of procreation-limiting laws to ensure there is no discrimination).

United States.[21] Surrogacy is especially appealing to LGBTQ+ people and couples, who make up about 4.5 percent of the United States population.[22] The United States is growing in popularity as a destination for surrogacy tourism as well, a phenomenon in which an infertile person or couple forms a contract with a surrogate in another country to carry a child to term.[23] Other popular destinations for surrogacy, like India and Nepal, have recently banned commercial surrogacy, leaving few options for those in need of a surrogate.[24] These bans frequently lead people to contract with a surrogate on the black market.[25] The United States offers a legal alternative for international surrogate-seekers.[26]

Despite the growing popularity, the legal surrogacy landscape in the United States is varied; there is no one uniform federal regulatory structure and each state's regulations differ.[27] Commercial surrogacy, the practice in

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21. *See* KEY FINDINGS, *supra* note 1 (noting the significant increase in births via gestational surrogacy over the last two decades).

22. *See* LGBT DEMOGRAPHIC DATA INTERACTIVE, THE WILLIAMS INSTITUTE, UCLA SCHOOL OF LAW (2019), https://williamsinstitute.law.ucla.edu/visualization/ lgbt-stats/?topic=LGBT#density (showing that on average, members of the LGBTQ+ community make up only 4.5 percent of state populations with D.C. as an outlier at 9.8 percent); see also Surrogate, About Surrogacy: Gay Surrogacy – Surrogacy for LGBT Couples, https://surrogate.com/about-surrogacy/types-of-surrogacy/can-lgbt-couples-pursue-surrogacy/ (last visited Mar. 27, 2020) (explaining that surrogacy provides LGBTQ+ people with the ability to have biological children).

23. Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, N.Y. TIMES, July 6, 2014, https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html (describing the influx of surrogacy tourism into the United States).

24. *See Nepal Joins India and Thailand in Commercial Surrogacy Ban*, CONCEIVE ABILITIES (June 17, 2016), https://www.conceiveabilities.com/about/blog/nepal-joins-india-and-thailand-in-commercial-surrogacy-ban (discussing recent bans on commercial surrogacy in the international community).

25. *See* Ian Johnson & Cao Li, *China Experiences a Booming Underground Market in Surrogate Motherhood*, N.Y. TIMES, Aug. 3, 2014, https://www.nytimes.com/2014/08/03/world/asia/china-experiences-a-booming-black-market-in-child-surrogacy.html (uncovering the surrogacy black market in China, where embryos are implanted in a surrogacy-friendly country).

26. *See* Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, N.Y. TIMES, July 5, 2014, https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html (explaining that some parents wish the child to have citizenship from their country of origin, while some wish their child to be born in the U.S. and receive American citizenship).

27. *See Gestational Surrogacy Law Across the United States*, CREATIVE FAMILY CONNECTIONS (2016), https://www.creativefamilyconnections.com/us-surrogacy-law-map/ (alerting potential commissioning parents to the various pitfalls in each state and

which the surrogate is paid a fee beyond compensation for medical bills, is widely debated amongst the states.[28] All states allow altruistic surrogacy, or surrogacy in which the surrogate mother is not paid a fee beyond compensation for medical bills, but differ on the limits and requirements for engaging a surrogate.[29] For clarity, gestational surrogacy and traditional surrogacy are distinct, and both can be commercial or altruistic agreements.[30] Gestational surrogates carry a fetus created from the egg of a donor or a contracting person.[31] A traditional surrogate provides the egg. Both gestational and traditional surrogates carry a fetus that is not their biological child.[32]

As surrogacy becomes commonplace, state regulations are evolving as well.[33] For example, *In re Baby M*, decided in 1988, instigated the first major wave of regulatory court cases and legislation across the country.[34] The case involved a traditional surrogate breaking her surrogacy contract, arguing that she had a constitutional right to contact her biological child.[35] The court ruled that commercial surrogacy contracts, or exchanging money for surrogacy beyond medical expenses, were void as a matter of law and against public policy.[36]

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urging them to obtain legal representation when engaging in a surrogacy agreement).

28. *See* Alex Finkelstein, *supra* note 2, at 5 (noting that the line between "reasonable expenses" and "payment for services" is constantly being redrawn by courts).

29. *See id.* (explaining that altruistic surrogacy is sometimes referred to as "uncompensated surrogacy" and commercial surrogacy as "compensated surrogacy").

30. *See id.* (noting that gestational surrogacy, or "full surrogacy," requires the assisted reproductive technology).

31. *See id.* (clarifying that traditional surrogacy, or "partial surrogacy," is an arrangement in which the surrogate provides the genetic material necessary to conceive the child).

32. *See* KEY FINDINGS, *supra* note 1 (noting that gestational carrier cycles were more likely to result in pregnancy and live births in comparison to non-gestational carrier cycles).

33. *See* Diane S. Hinson & Maureen McBrien, *Surrogacy Across American*, 32 FAMILY ADVOCAT. 32, 34 (2011), https://creativefamilyconnections.com/wp-content/uploads/2017/05/SurrogacyAcrossAmerica.pdf?x20128 (separating states into "red light," "proceed at your own risk," "squeeze into the statutory box," and "green light" groups).

34. *See* In re Baby M, 537 A.2d 1227, 1240 (N.J. 1988) (holding surrogate contracts invalid as a matter of law and policy).

35. *See id.* (arguing that public policy mandates a child should receive nurturing from both natural parents).

36. *See id*. (assuming that the money exchanged was essentially for buying the child from the biological mother, not for contracting her services as a surrogate).

Arizona was the first state to ban surrogacy contracts as a matter of public policy following the decision.[37] Michigan, New York, and the District of Columbia followed close behind.[38] While states like New York enforce the ban on commercial surrogacy with a fine, D.C.'s 1993 ban made it a criminal offense punishable by imprisonment.[39] In 2017, D.C. repealed the 1993 ban and replaced it with surrogacy-friendly legislation.[40]

Unlike D.C. and Arizona, California's Supreme Court ruled in favor of enforcing surrogacy contracts in *Johnson v. Calvert*.[41] In 1993, the Calverts, a married cisgender, hetero-presenting couple, sued for the parental rights of their biological child after the contracted gestational surrogate tried to claim parental rights for herself.[42] The California Supreme Court upheld the agreement in favor of the intended parents, using the parties' intent at the time the contract was created as a basis for the decision.[43]

Today, five states–New York, Michigan, Louisiana, Arizona, and Indiana–completely ban commercial surrogacy.[44] The remaining forty-five states vary in what they allow, from states with no regulations whatsoever

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37. *See* Hinson & McBrien, *supra* note 33, at 32 (showing the wave of anti-surrogacy legislation that swept the country post-*Baby M*).

38. *See id*. (explaining that Michigan and D.C. criminalized commercial surrogacy).

39. *See id.* at 34 (explaining that D.C. was the only jurisdiction with no surrogacy because it was illegal for attorneys to assist).

40. *See* Michael Alison Chandler, *With New Surrogacy Law, D.C. Joins Jurisdictions That Are Making It Easier for Gay and Infertile Couples to Start Families*, WASH. POST (June 3, 2017), https://www.washingtonpost.com/local/social-issues/with-new-surrogacy-law-dc-joins-jurisdictions-that-are-making-it-easier-for-gay-and-infertile-couples-to-start-families/2017/06/03/845c90d4-3c99-11e7-8854-21f359183e8c_story.html (celebrating D.C.'s reversal of surrogacy criminalization).

41. *See* Johnson v. Calvert, 851 P.2d, 776, 778 (Cal. 1993) (granting the intended parents sole custody because their intent when making the agreement was to become the parents of the child, while the surrogate's intent was not).

42. *See id.* (stating that the surrogate, Anna, threatened to keep the child if the payment balance was not given to her); *see also LGBTQ+ Definitions,* Trans Student Educational Resources (2019), http://www.transstudent.org/definitions (defining "cisgender" as people that identify with their assigned gender and "presenting" as the physical manifestation of gender identity).

43. *See Johnson*, 851 P.2d at 781-82 (reasoning that the historical common law approach equates gestation with genetic relationship, which is not always the case).

44. *See Gestational Surrogacy Law Across the United States*, Creative Family Connections (2016), https://www.creativefamilyconnections.com/us-surrogacy-law-map/ (citing the states that still enforce laws making it illegal for surrogates to be paid beyond medical fees); *but see* Vivian Wang, *Battle Over Paid Surrogacy in New York Pits Progressives Against Feminists*, N.Y. TIMES, June 12, 2019 at A17 (recognizing the New York movement toward legalization of commercial surrogacy).

(like Oregon) to states that essentially require a trial before allowing a pre-birth order.[45] Most states with legislation pertaining specifically to gestational surrogacy contracts model their statutes from Article 8 of the Uniform Parentage Act (hereafter "Article 8"), an optional regulation for genetic and gestational surrogacy agreements.[46] Article 8 lays out regulations for surrogacy agreements, requiring safeguards such as allowing traditional surrogates to withdraw consent within seventy-two hours of transferring the child, with the goal of protecting surrogates' rights.[47] Article 8 has been through several iterations since its initial inception; most recently, the Uniform Law Commission revised the gendered 2002 version in 2017 to adopt gender-neutral phrasing and remove the marriage requirement.[48]

Despite Article 8 and states' movement toward legalizing commercial surrogacy, there is still uncertainty for many couples hoping for a surrogacy agreement.[49] Florida and Illinois both allow commercial surrogacy, but are key examples of states with statutes that create uncertainty for LGBTQ+ couples seeking a commercial surrogacy agreement.[50]

Florida's statute is distinguishable from the Illinois statute as it is facially gender-specific; Illinois's statute is facially gender-neutral.[51] In Florida, the statute requires:

(a) The commissioning mother cannot physically gestate a pregnancy to

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45. *See generally* Mary P. Byrn & Steven H. Snyder, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L. Q. 633, 634 (Fall 2005) (defining "pre-birth orders" as parentage orders that formally declare that the intended parents will be the legal parents of the child upon its birth).

46. *See* Uniform Parentage Act, UNIFORM LAW COMMISSION, Art. 8 (2017) (providing states with a framework for regulating surrogacy in their own statutes).

47. *See id*. § 814(a)(2) (2017) (allowing a seventy-two-hour window after birth for a surrogate to withdraw consent without liability).

48. *See* Uniform Parentage Act, UNIFORM LAW COMMISSION, Art. 8 § 801(b) (2002) (requiring that "the man and the woman" who are the intended parents both be parties to the gestational agreement); *see generally* Amendments to the Uniform Parentage Act as Last Amended in 2002 With Prefatory Note and Comments, 37 FAM. L. Q. 5, 30 (requiring marriage to engage a surrogate).

49. *See Gestational Surrogacy Law Across the United States*, CREATIVE FAMILY CONNECTIONS (2016), https://www.creativefamilyconnections.com/us-surrogacy-law-map/ (noting that how surrogacy laws are written is not always how they are practiced).

50. *See* FLA. STAT. § 742.15 (1993) (allowing commercial surrogacy on its face but restricting LGBTQ+ people from surrogacy via statutory phrasing); *see also* 750 ILL. COMP. STAT. 47/20 (2017) (allowing commercial surrogacy through gender-neutral phrasing but requiring a medical need requirement).

51. *See* FLA. STAT. § 742.15(2)(a)-(b) (1993) (using the gendered term "mother" for surrogacy requirements); *see also* 750ILL. COMP. STAT. 47/20 (2017) (using "he, she, or they" for nongendered surrogacy requirements).

> term;
> (b) the gestation will cause a risk to the physical health of the commissioning mother; or
> (c) the gestation will cause a risk to the health of the fetus.[52]

The Florida statute specifies "mother" as the individual required to have a medical need for a surrogate.[53] This gendered term limits surrogacy contracts to cisgender, hetero-presenting couples because it does not include men.[54] Although the phrase "cannot physically gestate a pregnancy to term" could be construed to include men, the term "mother" expressly excludes them from surrogacy contracts.[55]

In contrast, the Illinois statute requires:

> (b) The intended parent or parents shall be deemed to have satisfied the requirements of this Act if he, she, or they have met the following requirements at the time the gestational surrogacy contract is executed:
> (1) he, she, or they contribute at least one of the gametes resulting in a pre-embryo that the gestational surrogate will attempt to carry to term;
> (2) he, she, or they have a medical need for the gestational surrogacy evidenced by a qualified physicians affidavit attached to the gestational surrogacy contract and as required by the Illinois Parentage Act of 2015.[56]

Illinois uses the gender-inclusive phrasing "he, she, or they" to refer to the commissioning parent or parents.[57] The statute does not expressly define "medical need," leaving it instead to medical practitioners to determine whether the threshold is met.[58] Both statutes similarly place a limit on who is able to engage in a commercial surrogacy contract, regardless of the gender pronouns used.[59]

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52. *See* FLA. STAT. § 742.15(2)(a)-(c) (1993) (specifying that the commissioning "mother" must have a medical need in order to legally enter into a surrogacy contract).

53. *See* FLA. STAT. § 742.15(2)(a)-(b) (phrasing the requirement with gendered pronouns in a way that restricts access to surrogacy contracts to hetero-presenting couples).

54. *See* FLA. STAT. § 742.15(2)(a)-(c) (excluding all people who are not "commissioning mothers" with a medical need as defined in the statute from engaging in a surrogacy agreement).

55. *See* FLA. STAT. § 742.15(2)(a)-(b) (restricting men or male-identifying people from engaging a surrogate by explicitly using the gendered term "mother").

56. *See* 750 ILL. COMP. STAT. 47/20 (2017) (using gender-neutral terms that would allow men and same-sex couples to be parties in a surrogacy contract).

57. *See id*. (requiring a "medical need" without defining what can fulfill that requirement, i.e. the inability to physically gestate a pregnancy).

58. *See* Nancy Ford, The New Illinois Gestational Surrogacy Act, 93 ILL. B.J. 240, 245 (2005) (explaining that no state included cisgender men's inability to become pregnant in the definition for the medical need required by statute).

59. *See generally* COURTNEY G. JOSLIN ET AL., STATUTORY PROVISIONS REGARDING

B. Constitutional Cases for Surrogacy

The Fourteenth Amendment of the United States Constitution guarantees the right to due process and equal protection under the law.[60] The government may not strip a person of life, liberty, or property without due process of the law, and all people must be protected equally.[61] The Supreme Court has incorporated the Fourteenth Amendment to protect many other rights, including the right to procreate and the right to marriage.[62] Further, strict scrutiny is required for any law that may infringe upon a fundamental right.[63] To meet the high standard for strict scrutiny, a statute must be narrowly tailored and support a compelling government interest.[64]

Skinner v. Oklahoma was the first case to discuss the constitutionality of statutes regulating the right to procreate generally.[65] In *Skinner*, the Court scrutinized an Oklahoma statute that allowed the state to perform vasectomies on defendants convicted of two or more felonies involving moral turpitude.[66] The Supreme Court ruled that there was a constitutional right to procreate, adding it to the list of fundamental rights requiring the judiciary to apply strict scrutiny.[67] The Court held that the statute violated the equal protection clause of the Fourteenth Amendment.[68] *Skinner* also mandated that strict scrutiny is required for any law that may infringe upon

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THE PERMISSIBILITY AND ENFORCEABILITY OF SURROGACY AGREEMENTS, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 4:2 (2019) (listing statutes of the various states regarding surrogacy).

60. *See* U.S. CONST. amend. XIV, § 1 (prohibiting states from making laws that limit life, liberty, or property).

61. *See id.* (precluding states from enacting laws that affect people unequally).

62. *See* Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 538, 538-43 (1942) (incorporating the right to procreate via the Fourteenth Amendment so that it cannot be taken without due process of the law).

63. *See* D.C. v. Heller, 554 U.S. 570, 687(2008) (J. Breyer, dissenting) (outlining the requirements of strict scrutiny when ruling on cases involving fundamental rights).

64. *See id.* at 688 (dissenting to the proposal that strict scrutiny should be used for gun regulation cases).

65. *See Skinner,* 316 U.S. at 538-43 (ruling the right to procreate to be a fundamental right that requires strict scrutiny when regulated by state laws).

66. *See id.* (explaining that "moral turpitude" here was a felony involving robbery but that "moral turpitude" essentially applies to all felonies, even someone who steals twenty-dollars from a stranger).

67. *See id.* at 540 (holding that strict scrutiny is required to restrict the power of evil or reckless people).

68. *See id.* at 538 (infringing on the fundamental right of procreation also infringes on the right to marriage).

the fundamental right to procreate.[69]

In a recent case, *In re Gestational Agreement*, Utah's Supreme Court dug deeper into the right to procreate by overturning the state's gestational agreement statute.[70] The Court found the gendered medical need requirement of the statute unconstitutional.[71] *In re Gestational Agreement* was a joint petition brought by a married same-sex couple along with the couple's surrogate and her husband, requesting that the court validate their gestational agreement.[72] On appeal, Utah's Supreme Court reversed the lower court's decision.[73] The Court reasoned that under *Obergefell*, the gendered Utah statute unconstitutionally limited valid gestational surrogacy contracts to cisgender couples.[74] By specifying that the intended *mother* must have a medical need for a surrogacy contract, the gendered statute effectively barred same-sex male-identifying couples from exercising their marital right to have children.[75]

Obergefell holds that same-sex couples have a constitutional right to the "[c]onstellation of benefits that the States have linked to marriage."[76] Justice Kennedy includes contraception, childrearing, and procreation in a list of the "most intimate" choices included in the right to marry.[77] The right to make these decisions, in addition to choosing to enter into marriage, are part of the Constitution through the Fourteenth Amendment.[78] Under the Due Process

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69. *See id.* (holding that strict scrutiny is required when looking at the infringement of a fundamental right); *see also* D.C. v. Heller, 554 U.S. 570, 688 (2008) (J. Breyer, dissenting) (outlining the requirements of strict scrutiny when ruling on cases involving fundamental rights).

70. *See* In re Gestational Agreement, 449 P.3d 69, 74 (Utah 2019) (overturning the Utah statute requiring the "intended mother" have a medical need).

71. *See* UTAH CODE ANN. § 78-15-803(2)(b) (West 2008) (defining "medical need" as an intended mother that is unable to bear a child without risk to her health or the child's).

72. *See* In re Gestational Agreement, 449 P.3d 69 (Utah 2019) (explaining that there was standing for the court to hear the case despite it not being adversarial).

73. *See id*. at 80 (arguing that surrogacy and the right to have children are provided by the right to marriage).

74. *See id.* at 77 (holding that the Utah code conditions a valid gestational contract on the requirement that one parent be female).

75. *See id.* at 79 (reasoning that the Utah code violated *Obergefell* by depriving same-sex male couples the ability to be parties in valid gestational agreements).

76. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2590 (2015) (referring to the multiple rights that the Court connects to the right to marriage, including the right to procreate).

77. *See id.* at 2599 (concluding that same-sex couples have the right to make decisions regarding family life in addition to the right to marry).

78. *See id*. at 2607 (stating that the decision to marry and raise children is based on

Clause of the Fourteenth Amendment, due process of law is required for a State to deprive a person of life, liberty, or property.[79] *Obergefell* also held that the Equal Protection Clause secures the protection of the right to marry for all people, regardless of sexual orientation.[80] *Obergefell* holds that through the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the right to marry is a fundamental right guaranteed to all people, and same-sex couples cannot be denied that right.[81]

Most recently, the U.S. Supreme Court heard *Pavan v. Smith*, a 2017 case hinging on an Arkansas statute which mandated that a surrogate and her husband be listed as the mother and father on a child's birth certificate.[82] The suit was brought by two same-sex couples who conceived their children through sperm donation.[83] Leigh Jacobs and Terrah Pavan each gave birth, but the statute barred their wives from being listed as a legal parent.[84] The Supreme Court ruled the statute unconstitutional because it denied marital benefits to same-sex couples.[85]

II. ANALYSIS

A. Medical Need Requirements Are Unconstitutional Under Skinner Because They Bar the Right to Procreate

Florida and Illinois' statutory requirement of "medical need" in order to engage in a valid surrogacy contract is unconstitutional and unenforceable

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romantic and personal considerations).

79. See *id.* at 2597 (naming the fundamental liberties – life, liberty, and property – protected by the Bill of Rights that cannot be taken by a State without due process of law).

80. *See id.* at 2591 (connecting the Fourteenth Amendment's Due Process Clause and Equal Protection Clause to show that together they fully capture the protection of the right to marry).

81. *See Obergefell*, 135 S. Ct. at 2602 (explaining that the right to marry is part of the liberty interest and equal protection of the laws guaranteed by the Fourteenth Amendment).

82. *See* Pavan v. Smith, 137 S. Ct. 2075, 2077 (2017) (overturning the lower court judgment to deny legal parentage to the same-sex spouses of the biological mothers); *see also* ARK. CODE ANN. § 20-18-401(e)-(f)(1) (West 2014) (defining the terms "mother" and "father," as the woman who gave birth and her husband).

83. *See Pavan,* 137 S. Ct. at 2077 (seeking a declaration that the Arkansas birth certificate law is unconstitutional).

84. *See id.* (denying legal parentage to same-sex couples because the legislature emphasized biological parentage in the statute).

85. *See id.* (holding the Arkansas statute unconstitutional because it denied same-sex couples the "constellation of benefits" *Obergefell* guaranteed to all marriages).

under Supreme Court precedent because it broadly limits the right to procreate without a substantial government interest.[86] *Skinner* supports the argument that it is unconstitutional to block the right to procreate through the Equal Protection Clause of the Fourteenth Amendment.[87] The Fourteenth Amendment prohibits State laws from unequally infringing on people's rights, such as the right to procreate.[88] Surrogacy contracts, therefore, are preserved in the right to procreate established in *Skinner's* holding.[89]

1. The Florida Statutory Requirement That a Person Must Have a Medical Need to Before Entering into a Valid Surrogacy Contract Is Unconstitutional Under Skinner Because It Bars a Group of People from Their Right to Procreate.

The fundamental idea behind the *Skinner* holding is that procreation is a basic human right.[90] According to the Supreme Court, marriage and procreation are fundamental rights that speak to the basic existence and survival of our species.[91] When surrogacy statutes, like Florida's, limit the right to procreate via surrogacy solely to a medical need, the right to procreate is stripped from individuals that are physically healthy but are unable to bear children for other reasons.[92]

Medical need requirements heavily affect same-sex couples and other members of the LGBTQ+ community who were historically, and are currently, plagued with legal issues surrounding the parentage and custody

86. *See* FLA. STAT. ANN. § 742.15 (West 1993) (requiring that a commissioning mother medically cannot carry a fetus or doing so would risk her physical health); *see also* 750 ILL. COMP. STAT. 47/20 (2017) (requiring the intended parents have a medical need for a surrogate); *see also* Skinner v. State of Oklahoma ex rel. Williamson, 316 U.S. 535, 538 (1942) (protecting the right to procreate via the Fourteenth Amendment's Equal Protection Clause).

87. *See Skinner*, 316 U.S. at 537 (holding it unconstitutional to strip someone of their fundamental right to procreate).

88. *See* U.S. CONST. amend. XIV, § 1 (requiring states to provide equal protection under the law for all people).

89. *See Skinner,* 316 U.S. at 541 (holding procreation to be a fundamental right).

90. *See id.* (incorporating the right to procreate under the Equal Protection Clause of the Fourteenth Amendment).

91. *See id.* (acknowledging the far-reaching effects that denying the right to procreate has on a race or group of people).

92. *See* FLA. STAT. ANN. § 742.15 (2)(a)-(c) (West 1993) (limiting valid surrogacy contracts to only women with a medical need); *see also* 750 ILL. COMP. STAT. 47/20 (a)(2)(2017) (limiting surrogacy contracts to people with a medical need, effectively barring healthy same-sex couples and single men from procreating).

of their children.[93] The primary effect of these statutes is that they limit, or in many cases completely bar, LGBTQ+ people from having children by invalidating the contract formed between the intended parent(s) and the surrogate.[94] This is an unconstitutional check on the procreation rights of the LGBTQ+ community because it affects them more acutely than it does any other group, thus violating the Fourteenth Amendment.[95] The Fourteenth Amendment was incorporated under the Equal Protection Clause by the Supreme Court in *Skinner* to include the right to procreate; therefore, every person's right to procreate must be equally protected under the law.[96]

Florida's statute uses gendered language that limits who can procreate via surrogacy.[97] The statute unconstitutionally keeps people not in cisgender, hetero-presenting relationships from procreating.[98] The statute's deprivation of the LGBTQ+ community's right to procreate as a minority group is similar to how people of color were strategically denied their procreational right in *Skinner*.[99] The Supreme Court explicitly stated that the Oklahoma statute at bar in *Skinner* was problematic at its core because it granted the State broad power to grant certain individuals immunity from the practice, but then stripped others of their right to have children.[100]

The *Skinner* Court expands further by looking to the future ramifications of routinely depriving a group of people of the right to procreate.[101]

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93. *See* Courtney G. Joslin et al., *Statutory Provisions Regarding the Permissibility and Enforceability of Surrogacy Agreements*, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAM. L. 236, 247 (Aug. 2019) (stating problems LGBTQ+ couples face when trying to have children, many of which are not immediately resolvable because case law is focused on hetero-presenting relationships).

94. *See* In re Gestational Agreement, 449 P.3d 69, 73 (Utah 2019) (holding that the gendered Utah surrogacy statute unconstitutionally barred the rights of the same-sex couple seeking to gain legal parentage of their child born from a surrogacy contract).

95. *See Skinner,* 316 U.S. at 541 (resolving that the right to procreate is a Constitutional right protected by the Fourteenth Amendment's Equal Protection Clause).

96. *See id.* (arguing that the right to procreate is a basic human right, and therefore is protected equally under the law).

97. *See* FLA. STAT. ANN. § 742.15 (2)(a)-(b) (West 1993) (limiting the right to procreate by not including all gender-identifying people in the statute).

98. *See id.* (implying that only cisgender women can participate in a surrogacy agreement by using the term "mother" in the statute).

99. *See id.* (mandating that the intended mother have a physician-documented medical need for a surrogate).

100. *See Skinner,* 316 U.S. at 541 (holding it unconstitutional to deprive a person of the basic liberty of procreation).

101. *See id.* (arguing that depriving a group of the right to procreate can cause that group to disappear entirely).

Depriving a group of this right causes irreparable injury to minority groups because it allows a dominant majority to regulate who in the minority is allowed to procreate, potentially limiting the number of minority births.[102] As a minority group, LGBTQ+ people are just as at risk of injury today at the hands of the cisgender, hetero-presenting majority.[103] The Court requires statutes infringing on the right to procreate to undergo strict scrutiny because of lasting, potentially devastating future effects on the LGBTQ+ community.[104] Strict scrutiny is required for any law that may infringe upon a fundamental interest, but the Florida statute is neither narrowly tailored, nor backed by a compelling government interest.[105] The statute affects all people seeking to have children through a surrogacy contract and does not take steps to protect surrogates–the party the state has an interest in protecting.[106]

The Florida statute unconstitutionally limits members of the LGBTQ+ community from exercising the right to procreate, a fundamental right as set out in *Skinner*, because it is not narrowly tailored.[107] Despite the Fourteenth Amendment's Equal Protection Clause, the statute broadly prevents this minority group from engaging a surrogate and having children.[108] The statute effectively bars all non-cisgender, hetero-presenting members of the LGBTQ+ community from procreating by delegitimizing any efforts they make toward having children.[109] There is no narrow-tailoring: all people

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102. *See id.* (maintaining that the ramifications cause irreparable damage to minorities).

103. *See* LGBT Demographic Data Interactive, THE WILLIAMS INSTITUTE, UCLA School of Law (Jan. 2019), https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density (showing that LGBTQ+ people make up only 4.5 percent of state populations on average).

104. *See Skinner*, 316 U.S. at 541 (invoking the Constitution's guarantee of just and equal laws to require strict scrutiny for State sterilization laws).

105. *See* D.C. v. Heller, 128 S. Ct. 2783, 2851 (2008) (J. Breyer, dissenting) (outlining that strict scrutiny requires a statute to be narrowly tailored and support a compelling government interest and pointing out the deviation from the requirements in the majority holding).

106. *See* FLA. STAT. ANN. § 742.15 (1)-(2)(West 1993) (making no mention of avenues for LGBTQ+ people to enter legitimate surrogacy contracts).

107. *See* id. (providing no statutory exceptions or alternatives for LGBTQ+ persons to lawfully engage a surrogate); *see also Skinner,* 316 U.S. at 541 (stating that the Constitution provides equal protection under the law and State laws cannot unequally target minorities).

108. *See* FLA. STAT. ANN. § 742.15 (2)(a)-(b)(West 1993) (specifying that "mothers" have the medical need instead of using genderless terms or not requiring a medical need at all).

109. *See* In re Gestational Agreement, 449 P.3d 69, 73 (Utah 2019) (holding a Utah

without uteruses are uniformly barred from engaging a surrogate, whether single or in a same-sex relationship, because they are not cisgender women with a medical need.[110]

Further, there is no reasonable government interest for the gendered medical restriction in the Florida statute.[111] Those opposed to commercial surrogacy argue that a medical need requirement supports the state interest in protecting surrogates from exploitation.[112] This argument falls flat in Florida because the legislature has not taken steps to institute viable protections for surrogates, although there is a model code to support such legislation.[113]

Article 8 of the Uniform Parentage Act is a model for states' surrogacy legislation, and still, Florida chose not to follow the map the Act lays out.[114] Florida does not include provisions in its surrogacy statute to directly protect surrogates during the course of an agreement, such as mandating legal aid, bodily autonomy for the surrogate, or the ability to terminate the contract at will.[115] The statute instead focuses heavily on who is *not* allowed to be a party in a gestational surrogacy contract, showing the true intentions of the statute: to bar LGBTQ+ people from engaging a surrogate.[116]

Florida's statute is sloppy regarding the safety and welfare of surrogates when contrasted with the Uniform Parentage Act.[117] The Florida statute

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statute unconstitutional for broadly stopping gay men from becoming the legal parents of their child born from a gestational surrogate).

110. *See* FLA. STAT. § 742.15 (2)(a)-(b) (1993) (using a gendered term for the medical need requirement in a way that bars same-sex couples, non-binary people, and male-identifying people from legally engaging in a surrogacy contract).

111. *See* D.C. v. Heller, 128 S. Ct. 2783, 2851 (2008) (Breyer, J., dissenting) (requiring a narrowly-tailored provision and a compelling government interest for strict scrutiny of laws that limit fundamental rights).

112. *See* Wang, *supra* note 44, at A17 (explaining the negative response to commercial surrogacy legalization because of the commodification of women's bodies).

113. *See* FLA. STAT. § 742.15 (1) (1993) (providing no protection for contracted surrogates beyond an age limit).

114. *See* Uniform Parentage Act, UNIFORM LAW COMMISSION, Art. 8 §§ 808(a)-(c) (2017) (creating a model statute dedicated to ethical and inclusive surrogacy contracting).

115. *See* FLA. STAT. § 742.151515 (1), (2)(a) (1993) (neglecting to statutorily require medical or legal payments for the surrogate or regulate contract termination).

116. *See id.* § (2)(a)-(c)(excluding people who are not a "commissioning mother" with a medical need and dividing them into three categories: (1) cannot physically gestate a pregnancy, (2) the gestation causes a health risk to the mother, or (3) causes a health risk to the fetus).

117. *See* Uniform Parentage Act, Art. 8 § 808(a) (requiring a surrogacy agreement allow surrogates to make independent health decisions, including terminating the

requires surrogates to be eighteen, but does not require contracts to include any protections for the surrogate's health or wellbeing.[118] The Uniform Parentage Act offers requirements that surrogates be twenty-one years old, complete medical and mental-health evaluations, and have independent legal representation in the contracting process.[119] In comparison, the current version of the Florida statute provides a surrogate little to no legal protection if they enter into a contract, no matter if the intended parents have a medical need or not.[120]

The Florida gestational surrogacy statute limits the right to procreate without meeting the strict scrutiny standards *Skinner* requires.[121] The statute is not narrowly tailored and it bars an entire population from procreating without stipulating any reasonable limits on the law.[122] Further, the Florida statute does not support a compelling government interest because it does not provide any substantial legislative protections for contracted surrogates.[123] The absence of a compelling government interest and the failure to narrowly tailor the statute unconstitutionally interferes with the fundamental right to procreate.[124]

2. The Illinois Statutory Requirement That a Person Must Have a Medical Need to Enter into a Valid Surrogacy Contract Is Unconstitutional Under Skinner Because It Bars a Group of People from Their Right to

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pregnancy).

118. *See* FLA. STAT. § 742.15(1) (1993) (requiring that a surrogate be eighteen before participating in a contract, with no mention of a medical exam, psychological exam, or legal aid).

119. *See* Uniform Parentage Act, Art. 8 § 808(a)-(c) (requiring surrogates and intended parents to be twenty-one years old, to complete medical and mental-health evaluations, and have independent legal representation).

120. *See* FLA. STAT. § 742.15 (1)-(4) (1993) (overlooking the need for contracted legal protections for surrogates).

121. *See* Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 540-41 (1942) (subjecting statutes regarding the fundamental right of procreation to strict scrutiny); *see also* FLA. STAT. ANN. § 742.15 (1)-(2)(b) (1993) (limiting surrogacy contracts to "mothers" with a medical need with no measure to include LGBTQ+ people).

122. *See Skinner,* 316 U.S. at 540 (mandating that laws limiting the right to procreation must undergo strict scrutiny).

123. *See* Uniform Parentage Act, Art. 8 § 808(a)-(c) (requiring surrogacy agreements to protect surrogates' rights and interests); *see also* FLA. STAT. ANN. § 742.15(1) (West 1993) (requiring only that a person be at least eighteen years old to become a surrogate).

124. *See Skinner,* 316 U.S. at 535, 538 (designating procreation a fundamental right protected by the Equal Protection Clause).

Procreate Despite Its Non-Gendered Language.

The Illinois surrogacy statute unconstitutionally limits LGBTQ+ people from procreating, against the Equal Protection Clause of the Fourteenth Amendment, because it requires a medical need in order to engage in a surrogacy contract without providing an alternative for healthy LGBTQ+ individuals or couples.[125] As the Court states in *Skinner,* statutes limiting the right to procreate, such as the Illinois surrogacy statute, cause irreparable injury to the people they affect.[126] These statutes can cause the groups they affect to "[w]ither and disappear."[127] *Skinner* acknowledged the high risk of minority populations devastated by a statute the white majority created that was focused on sterilizing the imprisoned.[128] That risk also rings true for the LGBTQ+ community today, who are affected by statutes created in predominantly cisgender, hetero-presenting legislatures.[129] These statutes have dramatic and irreversible impacts on the LGBTQ+ community when they mitigate a person's ability to have children or claim children as their own.[130]

When applied, the medical need requirement in the Illinois statute severely limits the right to procreate for members of the LGBTQ+ community because healthy people in same-sex couples do not meet the requirement and may not be able to procreate without the help of a surrogate.[131] The Illinois statute utilizes gender-neutral pronouns that makes the statute seem, on its face, inclusive.[132] Yet, the statute limits the right to procreate to cisgender, hetero-presenting couples because it requires that there be a medical need in

125. *See id.* (explaining that, as a basic right, the right to procreate cannot be limited by state law in a way that disproportionately affects a minority group).

126. *See id.* at 541 (stating that in reckless hands, the ability to deny the right to procreate causes damage to groups of people).

127. *See id.* (referring to the power dynamic between the majority white community and minority communities of color).

128. *See id.* (stating that "[i]n evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear").

129. *See* In re Gestational Agreement, 449 P.3d 69, (Utah, Aug. 1, 2019) (acknowledging that the medical requirement prevented LGBTQ+ people from engaging a surrogate).

130. *See id.* at 84 (holding that barring same-sex couples from claiming legal parentage was against the Equal Protection Clause); *see also* Pavan v. Smith, 137 S. Ct. 2075, 2080 (2017) (holding that barring the mother's same-sex spouse from being listed on the birth certificate violated the Fourteenth Amendment).

131. *See* 750 ILL. COMP. STAT. 47/20 (2017) (limiting procreation for LGBTQ+ people by instituting a medical need requirement).

132. *See id.* (using the pronouns "he, she, or they" to refer to intended parents).

order to legally engage a surrogate.[133] The Illinois statute does not expressly define a medical need, instead deferring to medical practitioners to decide whether a medical need exists.[134] Without a definition of medical need, the limits of the statute are ambiguous and make the right to procreate, at best, uncertain for LGBTQ+ people.[135]

As it is worded now, the Illinois statute bars healthy men, same-sex couples, and other queer couples from engaging in a surrogacy contract.[136] The statute obstructs an LGBTQ+ person's right to procreate in a way that leaves the same right of the cisgender, hetero-presenting majority unscathed.[137] When the statute was passed in 2005, it restricted the right to procreate via surrogate in such a way that only cisgender, hetero-presenting couples would be able to take advantage of the medical technology.[138] The statute's medical need requirement makes it virtually impossible for male members of the LGBTQ+ community to engage a surrogate for their own procreative needs because it is unlikely a medical professional would deem it medically necessary.[139] The Illinois legislature has not fixed the statute to remove the medical need requirement, although it amended various other sections of the Parentage Act between 2005 and today, despite the obvious drawbacks.[140] Currently, the statute violates the Equal Protection Clause of the Fourteenth Amendment because it unequally affects a specific group of people.[141]

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133. *See id.* (requiring persons wanting to commercially contract for a surrogate to have a medical need, regardless of their gender).

134. *See id.* (requiring a physician's affidavit to confirm the medical need in addition to a mental health evaluation).

135. *See* Ford, *supra* note 58, at 245 (recognizing the unlikelihood that medical practitioners would acknowledge having male genitalia as a legitimate medical need for a surrogate).

136. *See* 750 ILL. COMP. STAT. 47/20 (2017) (restricting valid surrogacy contracts to those with a confirmed medical need).

137. *See id.* (limiting surrogacy contracts to people with a uterus).

138. *See* Ford, *supra* note 58, at 245 (2005) (noting that the newly-passed Surrogacy Act would likely not allow men, whether hetero-presenting or gay, and no matter if they are single or in a couple, to procreate via surrogacy in Illinois).

139. *See id.* (stating that there is a great challenge for a same-sex couple to have children via surrogate in Illinois and have joint parental rights under the curtain phrasing of the statute because of the medical need requirement); see also 750 ILL. COMP. STAT. 47/20 (2017) (requiring a physician to confirm a medical need for a surrogate).

140. *See* 750 ILL. COMP. STAT. 47/20 (2017) (showing no substantive adjustments to the medical need requirement since its inception in 2005).

141. *See* Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (explaining that states cannot unequally legislate away the right to procreate).

The right to procreate is guaranteed to all people through the Equal Protection Clause of the Fourteenth Amendment.[142] Under *Skinner*, the Illinois statute must be narrowly tailored and further a compelling government interest in order to meet the strict scrutiny standard.[143] The Illinois statute is not narrowly tailored because it unequally affects a broad class of people.[144] The statute serves as a barrier to any person who is not cisgender and hetero-presenting and their right to have children.[145] Although the gender-neutral language of the statute seems inclusive, the medical requirement still effectively bars many members of the LGBTQ+ community from procreating because, as healthy people not in a cisgender, hetero-presenting relationship, they do not have a medical need for a surrogate.[146]

Further, the Illinois statute is not advancing a compelling government interest.[147] The medical requirement in the Illinois statute serves no legitimate purpose, as it does not protect surrogates and does not protect the intended parents.[148] The Illinois statute lists requirements that do serve a legitimate purpose, such as psychological evaluations for the surrogate and the intended parents, health insurance for the surrogate, and independent legal counsel for both parties.[149] These stipulations provide logical supports for both parties to insure a successful surrogacy agreement, unlike a medical requirement.[150] The medical requirement does not protect the surrogate because its only purpose is to prevent people who want to have children from

142. *See id.* (holding the Oklahoma legislation unconstitutional on the grounds that procreation is fundamental for the survival of humanity).

143. *See id.* (explaining that State statutes regarding sterilization require strict scrutiny because the laws can invidiously affect some groups of people).

144. *See* 750 ILL. COMP. STAT. 47/2020 (2017) (mandating a medical need to engage in a legitimate surrogacy contract but failing to define what a "medical need" is).

145. *See Skinner,* 316 U.S. at 541 (arguing that a statute cannot essentially bar a minority from procreating because there is no opportunity for a person to regain what the law takes from them through other means).

146. *See* 750 ILL. COMP. STAT. 47/2020 (2017) (requiring a medical need for a legitimate surrogacy contract, effectively cutting off the possibility for members of the LGBTQ+ community to procreate).

147. *See Skinner,* 316 U.S. at 541 (requiring strict scrutiny for statutes that limit the right to procreate).

148. *See* 750 ILL. COMP. STAT. 47/2020 (2017) (listing requirements that protect the interests of the surrogate and the intended parents outside of the medical requirement).

149. *See id.* (requiring protections for the surrogate and the intended parents for a legal surrogacy contract).

150. *See id.* (creating a legitimate support system for both parties by requiring health insurance for the surrogate and legal counsel for both parties).

engaging in commercial surrogacy.[151]

Statutes with a provision requiring a medical need in order to engage in a valid commercial surrogacy contract strips same-sex couples and other members of the LGBTQ+ community of their right to procreate, regardless of whether the statute contains gender-neutral language.[152] Statutorily requiring a medical need keeps physically and mentally healthy LGBTQ+ couples (two cisgender men, for example) from procreating because a doctor could decide there is not a legitimate medical need for a surrogate.[153] Barring a person from having children is not reversible and, as noted in *Skinner*, the effects of such a law last for generations.[154] Like the Oklahoma statute in *Skinner*, the Illinois statute blocks people from having children and causes them to suffer irreparable damage by limiting their ability to fulfill their desire to have children.[155]

B. Medical Need Requirements Are Unconstitutional Under Obergefell Because They Deprive Same-Sex Couples of the Right to Participate Equally in Marital Benefits.

Procreation and childrearing are among the many protected benefits included in the right to marry that the Supreme Court held to be protected for all people, regardless of sexual orientation or gender identity.[156] Supreme Court decisions over the last several decades confirm that the Constitution allows people the right to make decisions for themselves in their homes and relationships without government interference.[157] Gestational surrogacy

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151. *See* Uniform Parentage Act, UNIFORM LAW COMMISSION, Art. 8 § 808(a)-(c) (providing protection for surrogates without limiting who has the right to procreate via surrogate).

152. *See* FLA. STAT. § 742.15 (1993) (barring men from engaging in a valid surrogacy contract because they are not the intended mother with a medical need); *see also* 750 ILL. COMP. STAT. 47/20 (2017) (barring people from engaging in a valid surrogacy contract because they do not medically need a surrogate).

153. *See* Ford, *supra* note 58, at 245 (noting that no state included a potential father's inability to become pregnant in the definition of a medical need for a surrogate).

154. *See* Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (stating that the statute in question causes irreparable injury that deprives those affected of a basic liberty).

155. *See id.* (holding that depriving people of a basic liberty is unconstitutional under the Fourteenth Amendment).

156. *See* Obergefell v. Hodges, 135 U.S. 2584, 2590 (2015) (holding that states cannot bar LGBTQ+ people from the right to marry because it is protected by the Fourteenth Amendment).

157. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (combining aspects of the First, Third, Fifth, and Ninth Amendments to create a penumbral right to privacy);

statutes with medical requirements, like the Florida and Illinois statutes, interfere with people's privacy and childbearing rights because they prevent LGBTQ+ couples from legally engaging a surrogate.[158]

Gendered gestational requirements, like the Florida statute, deprive LGBTQ+ people of their rights to procreate and privacy, and are therefore unconstitutional under *Obergefell*.[159] Non-gendered gestational medical requirements, like the Illinois statute, still set conditions on the benefits of marriage that disparately affect LGBTQ+ people.[160] Across the board, medical requirements unequally rob a group of people of their right to procreate and the other benefits included in the right to marry, and are thus unconstitutional.[161]

1. The Gendered Florida Statutory Requirement That a Person Must Have a Medical Need to Enter into a Valid Surrogacy Contract Is Unconstitutional Under Obergefell Because It Bars LGBTQ+ Couples from the Benefits of Marriage.

Florida's gendered medical requirement unconstitutionally bars LGBTQ+ persons from the benefits of marriage because it does not restrict cisgender, hetero-presenting persons in the same way.[162] This differential treatment was held unconstitutional in *Obergefell*, whose holding was reaffirmed in *Pavan*.[163] Further, it denies LGBTQ+ couples the marital rights established in Supreme Court precedent regarding marriage and family.[164] The right to

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see also Carey v. Population Servs., Int'l, 431 U.S. 678, 683-85 (1977) (protecting the right to make autonomous childbearing choices).

158. *See* FLA. STAT. ANN. § 742.15 (West 1993) (requiring a doctor to examine the intended mother and decide whether she has a medical need); *see also* 750 ILL. COMP. STAT. 47/20 (2017) (requiring a doctor's exam to determine if a person can engage a surrogate).

159. *See* In re Gestational Agreement, 449 P.3d 69, 74 (Utah 2019). (stating that state laws that deny LGBTQ+ people the marital benefits given to cisgender couples are unconstitutional under *Obergefell*).

160. *See id.* at 74, 78 (recognizing that it is impossible to read gendered language in a statute as gender-neutral).

161. *See* Obergefell v. Hodges, 135 U.S. 2584, 2590 (2015) (recognizing that the right to marriage includes numerous other benefits that cisgender, hetero-presenting people enjoy).

162. *See* Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017) (applying *Obergefell* to the gendered Arkansas statute in question).

163. *See id*. (affirming *Obergefell* and holding statutes which deny same-sex couples the liberties afforded to cisgender couples to be unconstitutional).

164. *See Obergefell*, 135 U.S. at 2599 (stating Supreme Court precedents for individual autonomy in contraception, procreation, and childrearing).

privacy in marital affairs and the right to make independent decisions on childbearing are included in the list of fundamental marital rights.[165] These rights, given to cisgender, hetero-presenting couples without unconquerable restrictions, cannot be taken from LGBTQ+ people without contravening the Constitution.[166]

The Florida gestational surrogacy statute is clearly unconstitutional under *Obergefell* because its gendered medical need requirement restricts LGBTQ+ persons far more severely than cisgender, hetero-presenting persons.[167] While the statute harshly limits a female-identifying individual's ability to engage a surrogate, it completely eradicates a male-identifying individual's ability to engage a surrogate.[168] Through this statute, Florida has relegated the LGBTQ+ community to a lower-class life that cisgender heterosexual people would find unendurable: married but without complete control over their own childbearing decisions.[169]

Florida's statute unconstitutionally strips half of the LGBTQ+ population of its ability to have children by not using inclusive terminology and not creating an avenue for LGBTQ+ people to engage a surrogate.[170] It also unconstitutionally denies same-sex couples the benefits afforded to cisgender, hetero-presenting couples by the state against the Supreme Court's holding in *Pavan*.[171]

2. The Gender-Neutral Illinois Statutory Requirement That a Person

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165. *See* Griswold v. Connecticut, 381 U.S. 479, 490 (1965) (forbidding overly broad government regulations within the zone of privacy of a marriage); *see also* Carey v. Population Servs., Int'l, 431 U.S. 678, 683-85 (1977) (acknowledging that the right to make childbearing decisions is at the heart of the penumbral right to privacy).

166. *See* In re Gestational Agreement, 449 P.3d 69, 74 (Utah 2019) (noting that men in a same-sex marriage could not meet the Utah surrogacy requirement for the "mother's" medical need).

167. *See Obergefell,* 135 U.S. at 2590 (holding state statutes that treat LGBTQ+ persons differently than cisgender persons to be unconstitutional); *see also* FLA. STAT. ANN. § 742.15 (West 1993) (limiting valid surrogacy contracts to "mothers" with a medical need).

168. *See In re Gestational Agreement,* 449 P.3d at 74 (holding the gendered Utah surrogacy statute unconstitutional because it barred the petitioners, a same-sex male-identifying couple, from becoming the legal parents of their child).

169. *See Obergefell,* 135 U.S. at 2601 (acknowledging the imbalance between LGBTQ+ people and cisgender people in the ability to live one's life the way they wish).

170. *See* Pavan v. Smith, 137 S. Ct. 2075, 2078-79 (2017) (holding an Arkansas requirement that only a male spouse can be on a birth certificate unconstitutional because it treated same-sex couples differently than cisgender couples).

171. *See id.* (referring to the "constellation of benefits" bestowed on cisgender couples by the state that cannot be unconstitutionally denied to LGBTQ+ people).

Must Have a Medical Need to Enter into a Valid Surrogacy Contract Is Unconstitutional Under Obergefell Because It Bars LGBTQ+ Couples from the Benefits of Marriage.

Like the Florida statute, the Illinois surrogacy statute requiring intended parents to have a medical need unconstitutionally places an unequal burden on the shoulders of LGBTQ+ people without due process of law.[172] Unlike the Florida statute, the Illinois statute is gender-neutral and seems to be inclusive on its face.[173] Nonetheless, the medical requirement bars many LGBTQ+ couples from procreation entirely without due process of law, while cisgender, hetero-normative couples have access to alternative avenues for overcoming procreation hurdles.[174] As such, the statute is unconstitutional under *Obergefell*, which holds that infringement of marital rights based on sexual orientation is a violation of the Due Process Clause and the Equal Protection Clause under the Fourteenth Amendment.[175]

Obergefell holds that choices concerning contraception, procreation, and childrearing fall under the right to marry, and are thus individual and fundamental rights protected by the Constitution.[176] The exclusion of same-sex couples – and thereby LGBTQ+ people generally – from marriage and the rights included in that marriage is unconstitutional.[177] The gender-neutral Illinois statute still restricts same-sex couples' procreation choices in a way that many hetero-presenting couples would find intolerable.[178] A statute that unequally restricts the fundamental rights of a specific group of people, like the Illinois statute does, is unconstitutional under *Obergefell*.[179]

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172. *See* FLA. STAT. ANN. § 742.15 (West 1993) (limiting the ability of male-identifying people to legally engage a surrogate); *see also* 750 ILL. COMP. STAT. 47/20 (2017) (using gender-neutral terms to restrict the ability of LGBTQ+ people to engage a surrogate).

173. *See* 750 ILL. COMP. STAT. 47/20 (2017) (using the gender-neutral terms "he, she, or they" to describe the surrogacy statute's medical need requirement).

174. *See Obergefell*, 135 U.S. at 2601-02 (acknowledging that it is a violation of the Equal Protection Clause to limit LGBTQ+ people's marital rights when they are not limited for others).

175. *See id.* at 2602 (holding it unconstitutional to create hurdles for LGBTQ+ people that cisgender people do not face).

176. *See id.* at 2599 (placing the fundamental rights concerning individual intimate choices named in prior cases under the umbrella of marital benefits).

177. *See id.* at 2604 (analyzing the protections of the right to marry and concluding that same-sex couples are also protected by the Fourteenth Amendment).

178. *See id.* at 2601 (noting that same-sex couples are forced to have unstable and uncertain personal lives when their constitutional rights to marry, procreate, and raise children are not protected).

179. *See id.* (holding that state laws cannot limit LGBTQ+ marriages when

For example, even if same-sex couples are able to become parties to a valid surrogacy contract, they still might not be able to list both parents as the legal guardians of the child.[180] As held in *Pavan*, it is unconstitutional to limit the marital rights of LGBTQ+ people in a way that cisgender, hetero-identifying people are not.[181] LGBTQ+ parents in Illinois may have to go through risky adoption proceedings with a traditional surrogate to ensure both parents are legal guardians of their child.[182] Unlike hetero-presenting couples, same-sex couples in Illinois cannot be certain of whether they have access to the rights the Constitution prescribes.[183] This difference between the lives of same-sex couples and hetero-presenting couples is unconstitutional because, as stated in *Obergefell*, the Equal Protection Clause of the Fourteenth Amendment guarantees the right to procreate, regardless of sexual orientation.[184]

The Illinois statute also restricts LGBTQ+ procreation rights in violation of the Fourteenth Amendment's Due Process Clause by denying LGBTQ+ people their liberty in making autonomous choices in marriage.[185] In relation to marital rights and the benefits included in that right, the Due Process Clause and the Equal Protection Clause are bound together; if one is infringed upon, the other is as well.[186] Illinois restricts the right of LGBTQ+ people to procreate if it creates barriers to engage a surrogate without due process of law, but does not impose the same barriers as the Equal Protection Clause of the Fourteenth Amendment to cisgender, hetero-presenting people in the same degree.[187] As such, the Illinois statute is unconstitutional because it infringes on the marital and procreative rights of LGBTQ+ people against

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heteronormative marriages are not limited the same way).

180. *See* Ford, *supra* note 58, at 245 (recognizing that to get both partners in a gay relationship listed as a father, they would need to assume the risk for adoption in a traditional surrogacy agreement).

181. *See* Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017) (holding that being a "parent" on a birth certificate is a marital benefit).

182. *See* Ford, *supra* note 58, at 245 (noting that a same-sex couple, of any gender, would have to go through adoption proceedings in order to share parental rights).

183. *See Pavan,* 137 S. Ct. at 2078 (holding Arkansas's surrogacy requirement unconstitutional because it unfairly treated LGBTQ+ couples differently than cisgender couples in accordance with *Obergefell*).

184. *See Obergefell,* 135 U.S. at 2602 (holding that same-sex couples are guaranteed the right to marry as part of the liberty promised by the Fourteenth Amendment).

185. *See id.* at 2603 (expressing the interconnection between the liberty interests of the Due Process Clause and the equal rights interests of the Equal Protection Clause).

186. *See id.* (explaining that each clause is instructive of the other).

187. *See Pavan,* 137 S. Ct. at 2078 (affirming *Obergefell* by holding that statutes preventing LGBTQ+ people from enjoying marital benefits are unconstitutional).

the Fourteenth Amendment.[188]

As written, the Illinois statute is unconstitutional because it unequally restricts the marital benefits of LGBTQ+ people in violation of the Fourteenth Amendment's Due Process Clause and Equal Protection Clause.[189] It does not comply with the *Obergefell* or *Pavan* holdings because it treats LGBTQ+ people differently than cisgender, hetero-presenting people.[190]

III. POLICY RECOMMENDATION

The best argument for legislation restricting surrogacy, or banning it entirely, is to protect surrogates from exploitation and the commodification of human bodies.[191] This argument, typically made by cisgender, hetero-presenting people, fails to recognize that it is possible to both protect surrogate interests and allow them bodily autonomy while also giving LGBTQ+ people the ability to legally have children.[192]

Surrogates are certainly at risk for exploitation.[193] While contracting parents tend to be older, wealthy, more highly educated, from larger cities, and more well-traveled, surrogates tend to be younger than the intended parents, poorer, from a small town or suburb, and typically have no higher education.[194] The disparity between surrogates and intended parents immediately puts surrogates at a disadvantage.[195] The ethical questions of

188. *See* U.S. CONST. amend. XIV, § 1 (prohibiting states from infringing on the rights to due process and equal protection of the law).

189. *See Obergefell,* 135 U.S. at 2598 (acknowledging that the benefits and rights encompassed in the right to marriage are rooted in history and precedent).

190. *See id.* at 2599 (explaining that there is a right to autonomous choice regarding marriage and its benefits).

191. *See* Wang, *supra* note 44, at A17 (explaining the push-back against a New York bill which would legalize commercial surrogacy in the state).

192. *See* Alex Finkelstein et al., *Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking*, COLUM. L. SCH. SEXUALITY & GENDER L. CLINIC, 40 (2016) (noting that LGBTQ+ interests can be balanced with surrogate interests).

193. *See* Leslie Morgan Steiner, *Who Becomes a Surrogate?*, ATLANTIC (Nov. 25, 2013), https://www.theatlantic.com/health/archive/2013/11/who-becomes-a-surrogate/281596/ (explaining that American surrogates tend to be younger and poorer than the intended parents).

194. *See id.* (specifying that American surrogates are 28 years old on average, tend to make less than $60,000 a year, and typically already have two or three biological children).

195. *See* Wang, *supra* note 44, at A17 (quoting Gloria Steinem who recently spoke out vehemently against the New York bill to legalize commercial surrogacy, alongside

surrogacy are debated globally, and because many countries ban surrogacy for domestic or foreign LGBTQ+ people, LTGBQ+ people look toward the United States to start their families.[196]

Although there is risk for exploitation, those risks can be substantially mitigated by thoughtful legislation regulating the surrogacy industry.[197] Arguments for banning surrogacy do not recognize the risk for illegal surrogacy, which is certainly more likely to result in the exploitation and the creation of hazardous conditions for the surrogate.[198] Instead, regulations can make sure surrogacy is conducted ethically and all parties are protected.[199] The Uniform Parentage Act proposes regulations protecting the physical and mental health and safety of the surrogate.[200] It states that surrogates must have independent legal counsel of their choice and that the agreement should provide the surrogate with the ability to make her own health and welfare decisions, including the decision to terminate the pregnancy.[201]

Surrogates, just like people generally, have the right to bodily autonomy and to make their own decisions regarding procreation and childrearing.[202] While it is not the government's job to tell people how to carry out their rights, it must provide protection to people's fundamental rights guaranteed in the Constitution.[203] The government should regulate surrogacy in order to

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prominent feminists).

196. *See* Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, N.Y. TIMES, (July 6, 2014), at A1 (describing the influx of foreigners into the United States for the purpose of engaging in commercial surrogacy services).

197. *See* Uniform Parentage Act, UNIFORM LAW COMMISSION, Art. 8 § 804(a)(8) (2017) (providing states with a framework for regulating surrogacy to protect surrogates and intended parents from exploitation, such as requiring each party's rights to be included in the agreement).

198. *See* Ian Johnson & Cao Li, *China Experiences a Booming Underground Market in Surrogate Motherhood*, N.Y. TIMES (Aug. 3, 2014), at A4 (uncovering the Chinese surrogacy black market, where surrogates are sent to Thailand for embryo implantation then flown back to China to live in secrecy until the birth).

199. *See* Uniform Parentage Act, *Profanatory Note*, (laying out main goals to protect the interests of both the surrogate and the intended parents through well thought-out regulations).

200. *See id.* Art. 8, § 804(7) (providing requirements for the intended parents and the surrogate in order to engage in a legal surrogacy contract).

201. *See id*. (specifying that a legal surrogacy agreement must allow the surrogate to make autonomous decisions regarding the health and welfare of herself and the pregnancy).

202. *See* Obergefell v. Hodges*,* 135 S. Ct. 2584, 2599 (2015) (restating the penumbra of rights included in the right to privacy, including bodily autonomy).

203. *See id.* (arguing that an ability, promise, and desire to procreate is not and has

protect surrogates' right to bodily autonomy and to protect LGBTQ+ people's right to procreate.[204]

CONCLUSION

Gender-specific statutes unconstitutionally limit the right to procreate for non-female identifying people and same-sex couples, whether the statute is gender-neutral or not.[205] The *Skinner* holding demonstrates that both Florida and Illinois set unconstitutional statutory limits on LGBTQ+ people's right to procreate.[206] *Obergefell* reaffirms the right to procreate, including it as one of the numerous rights now under the right to marry umbrella.[207]

As such, the Florida and Illinois statutes unconstitutionally limit the right to procreate which is guaranteed to all married couples no matter their gender identity or sexual orientation.[208] Further, there is no reasonable government interest in a medical requirement for commercial surrogacy agreements.[209] As they are currently written, the Florida and Illinois statutes are unconstitutional and illegal.[210]

In re Gestational Agreement, decided by the Supreme Court of Utah in August 2019, reaffirms the United States Supreme Court's *Obergefell* rulings.[211] The holding exemplifies the movement toward developing surrogacy precedent that is both constitutional and inclusive of all couples.[212] Along with other slowly updating state statutes, it also shows that the state

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not been a prerequisite for a valid marriage in any state).

204. *See id.* (acknowledging the Supreme Court precedent of protecting people's right to make their own decisions regarding their health and wellbeing).

205. *See* Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 540 (mandating the right to procreate); *see also Obergefell,* 135 S. Ct. at 2599 (ensuring the right to marry for all people regardless of sexual orientation).

206. *See Skinner,* 316 U.S. at 540 (mandating that the right to procreate is fundamental and therefore requires strict scrutiny if regulated by the government).

207. *See Obergefell,* 135 S. Ct. at 2599 (mandating the right to marry as a fundamental right regardless of sexual orientation).

208. *See id.* at 2599 (arguing that the right to marry is fundamental because it includes other fundamental rights).

209. *See* D.C. v. Heller, 128 S. Ct. 2783, 2851 (2008) (Breyer, J., dissenting) (requiring that laws infringing on fundamental rights be narrowly tailored with a compelling government interest).

210. *See Obergefell,* 135 S. Ct. at 2599 (recognizing the right to procreate as protected under the right to marry).

211. *See* In re Gestational Agreement, 1449 P.3d 69, 82 (Utah 2019) (overturning the Utah surrogacy statute because it limited the right to procreate).

212. *See id.* (holding that LGBTQ+ couples have a constitutionally-protected right to procreate within the right to marry).

interest in guarding surrogates against exploitation can be protected with truly inclusive statutes.[213]

213. *See generally* VA. CODE ANN. § 20-162 (West 2019) (changing outdated language to be gender-inclusive, allowing unmarried couples to become parents, and permitting the use of donated embryos in surrogacy).