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BORN TO NO MOTHER: *IN RE ROBERTO*  
*D.B.* AND EQUAL PROTECTION FOR  
GESTATIONAL SURROGATES  
REBUTTING MATERNITY

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I. INTRODUCTION

When asked to identify his or her mother, an individual would most likely be able to specify one woman, maybe two or three, and unequivocally identify her, or them, as the individual’s mother.<sup>1</sup> However, when asked what makes that woman his or her mother, an individual might offer a variety of responses, e.g., she raised me, she gave birth to me, I have her eyes, she married my father, she adopted me, and so on.<sup>2</sup> To many people, motherhood is a fairly straightforward concept; yet, when one attempts to define it, the simplicity quickly disappears.<sup>3</sup>

A case recently decided by the Maryland Court of Appeals—the state’s highest court—illustrates the complexity of defining motherhood and raises interesting questions about the ways in which the law seeks to delineate parentage.<sup>4</sup> On August 23, 2001, a woman gave birth to twin girls at Holy

1. See, e.g., *Elisa B. v. Super. Ct.*, 117 P.3d 660, 666 (Cal. 2005) (holding that under the Uniform Parentage Act a child may have two female parents); Marsha Garrison, *Law For Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 852 (2000) (suggesting that depending on how one defines “mother” a child may have three mothers—a genetic mother, a gestational mother, and an intended mother).

2. See generally Pamela Laufer-Ukeles, *Gestation: Work For Hire or the Essence of Motherhood? A Comparative Legal Analysis*, 9 DUKE J. GENDER L. & POL’Y 91 (2002) (arguing that different definitions of motherhood are based on competing ethical outlooks on what it means to be a “mother”); Peggy Orenstein, *Your Gamete, Myself*, N.Y. TIMES, July 15, 2007, (Magazine), at 34.

3. See Martha Albertson Fineman, *Preface to MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD*, at ix, x (Martha Albertson Fineman & Isabel Karpin eds., 1995) (explaining that one’s experience of “mother” is pivotal in shaping familial and social understandings, but that “mother” also has social and political dimensions that vary across and within cultures); see also Garrison, *supra* note 1, at 893 (asserting that the perception of parenthood is shifting to one of functional status, rather than one derived from biology or legal entitlements).

4. See *In re Roberto d.B.*, 923 A.2d 115, 125 (Md. 2007) (overruling the Montgomery County Circuit Court and relying on the state equal rights amendment to hold that courts must interpret Maryland’s paternity statute, which allows men to rebut paternity based on evidence of the lack of a genetic relationship, to apply equally to women).

Cross Hospital in Silver Spring, Maryland.<sup>5</sup> This woman, a gestational surrogate, had no genetic relation to the newborns and would soon institute a legal challenge seeking to deny maternity.<sup>6</sup> With the assistance of a physician, the newborns' unmarried, biological, and intended father, Roberto d.B., used his sperm and a donor's eggs to create two embryos.<sup>7</sup> The embryos then were implanted into the surrogate with whom Roberto had contracted to carry the embryos, bring them to term, and give birth.<sup>8</sup> Neither Roberto nor the surrogate had any intention at the time of the agreement or at the time of birth that the surrogate would in any capacity serve as a mother to the children.<sup>9</sup>

State law requires the records departments of Maryland hospitals to submit information regarding births to the Maryland Division of Vital Records ("MDVR").<sup>10</sup> Thus, when the gestational surrogate gave birth, the hospital followed this procedure, as well as a Maryland statute that requires that the birth certificate list the birth mother's name unless there is a court order providing otherwise. Consequently, the hospital listed the gestational surrogate's name on the twins' birth certificates.<sup>11</sup> The MDVR did not object to Roberto's request to remove the gestational carrier's name, but by law it could not do so without a court order.<sup>12</sup> Both Roberto and the

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5. See Caryn Tamber, *Md. Court of Appeals Rules in Case of the Motherless Twins*, DAILY RECORD (Baltimore, Md.), May 17, 2007, at 1B (explaining that the woman, whose name is not listed in court papers, was identified as the mother on the twins' birth certificate against her wishes).

6. See *id.* (indicating that the legal controversy over parentage arose from the birth itself and not the surrogacy agreement).

7. See Arthur S. Leonard, *Mom Can Dispute Maternity*, GAY CITY NEWS, May 24, 2007, [http://gaycitynews.com/site/news.cfm?newsid=18384009&BRD=2729&PAG=461&dept\\_id=568860&rfti=6](http://gaycitynews.com/site/news.cfm?newsid=18384009&BRD=2729&PAG=461&dept_id=568860&rfti=6) (last visited July 21, 2007).

8. See *In re Roberto d.B.*, 923 A.2d at 130-31 (noting that although the specifics of Roberto's surrogacy contract are not at issue in the case, for-profit surrogacy contracts are illegal in Maryland because for-profit surrogacy is interpreted as purchasing custody of a child).

9. See Leonard, *supra* note 7 (observing that Roberto was fit to act as a single parent in the eyes of the court).

10. See MD. CODE ANN., HEALTH-GEN. § 4-208(a)(1) (West 2000) (providing that the administrative head of an institution in which births occur must report each birth within seventy-two hours of its occurrence); *In re Roberto d.B.*, 923 A.2d at 117 n.1 (describing the role of the Maryland Division of Vital Records as issuing certified copies of birth, death, fetal death and marriage certificates for events that occur in Maryland).

11. See HEALTH-GEN. § 4-208(a)(7) (allowing court orders to modify determinations of parentage when a court of competent jurisdiction has ruled on the parentage of a child).

12. See HEALTH-GEN. § 4-211(a)(2) (West 2000) (providing that a revised birth certificate can be issued when there is additional information or a change in the marital status of the parents); see also Leonard, *supra* note 7 (noting that when paternity is unknown, Maryland law allows for "father" to be left blank on a birth certificate and that in the case of an abandoned baby the certificate will indicate "unknown parentage").

surrogate petitioned the county circuit court for an order requiring the surrogate's name to be removed from the birth certificate.<sup>13</sup> The circuit court judge refused to issue the order, ruling that Maryland case law did not support removing the surrogate's name and that to do so would not be in the best interests of the children.<sup>14</sup> When Roberto appealed, the Maryland Court of Appeals held that the state paternity statute violated the Maryland equal rights amendment by affording men, but not women, an opportunity to rebut parentage on the basis of genetic relation.<sup>15</sup>

This Comment argues that existing tests for determining legal maternity in cases of surrogate births are inadequate because such tests fail to protect gestational surrogates from compelled maternity and resulting equal protection violations. In fact, the existing theories and tests themselves frequently cause the equal protection violations.<sup>16</sup> This Comment agrees with the holding of the Maryland Court of Appeals in *In re Roberto d.B.* and asserts that the court's opinion appropriately grasps the import of equal protection in instances of gestational surrogacy.

Part II of this Comment frames the history and medical technology of gestational surrogacy. Part II also examines the four prevailing legal theories that influence or control adjudication of maternity in cases involving gestational surrogates: (1) the parties' intent; (2) the parties' genetic contributions; (3) gestational primacy—i.e., giving birth indicates legal maternity; and (4) the best interests of the child. Comparing *In re Roberto d.B.* to past cases, Part III illustrates how the four theories fail to guarantee gestational surrogates the equal protection of the laws. Part IV examines the implications that *In re Roberto d.B.* will likely have on statutory interpretation in Maryland. Finally, Part V concludes that as gestational surrogacy and other forms of assisted reproductive technology become more commonplace, any legal test for adjudicating maternity must incorporate equal protection considerations that safeguard women from compelled maternity by affording women and men equal opportunities to rebut parentage.

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13. See *In re Roberto d.B.*, 923 A.2d at 118 (explaining that the parties' petition sought an "accurate" certificate that reflected Roberto as the sole parent).

14. See *id.* at 119 n.4 (rejecting the lower court's reasoning that the gestational carrier's name should remain on the birth certificate for "health reasons"—e.g., the compilation of medical records—and noting such reasoning makes "little sense" because the father had all pertinent medical records).

15. See *id.* at 125; see also Leonard, *supra* note 7 (suggesting that the ruling in *In re Roberto d.B.* indicates that a majority of the judges on the Maryland Court of Appeals applied a very expansive interpretation of the state equal rights amendment).

16. Compare N.H. REV. STAT. ANN. § 168-B:2 (1990) (codifying gestational primacy and providing that a woman is the mother of a child to whom she gave birth), with N.H. REV. STAT. ANN. § 168-B:3 (1990) (providing men the opportunity to rebut a presumption of paternity by filing an action to dispute paternity within thirty days of the child's birth).

## II. BACKGROUND

Most laws governing surrogacy assume that the surrogate “mother” is related genetically to the child and thus fail to address the increasingly common role of gestational surrogacy as a form of assisted reproduction.<sup>17</sup>

*A. Distinguishing Gestational and Traditional Surrogacy*

A surrogate commonly is defined as one who substitutes in bringing a pregnancy to term for another person who is unable to become pregnant.<sup>18</sup> Surrogacy can be distinguished into two types: traditional and gestational.<sup>19</sup> In traditional surrogacy, the surrogate’s egg is fertilized by way of intrauterine insemination—more commonly known as artificial insemination.<sup>20</sup> A traditional surrogate possesses a genetic relation to the child she carries; thus, a child born of traditional surrogacy is the biological—both genetically and gestationally speaking—result of the male contributor and the surrogate.<sup>21</sup> Conversely, in gestational surrogacy, the surrogate bears no genetic relation to the child she carries.<sup>22</sup> In

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17. See Garrison, *supra* note 1, at 852 (observing that the law fails to provide answers to questions regarding the rights and obligations of the various parties to assisted reproduction, and concluding that when the pace of scientific change is rapid, it may be preferable to initially deal with resulting legal issues on an ad hoc basis to prevent reactive and constrictive new laws).

18. See CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE 129 n.2 (ABA Publishing 2006) (observing that many jurisdictions prohibit for-profit surrogacy but that they do not necessarily prohibit surrogacy in which the only money exchanged covers the medical and legal expenses of the surrogate); John Lawrence Hill, *What Does it Mean to Be a “Parent”?* *The Claims of Biology as the Basis For Parental Rights*, 66 N.Y.U. L. REV. 353, 396 (1991) (noting that science has distilled the traditional phases of procreation—coitus, conception, and gestation—into their component parts, wreaking havoc on prevailing conceptions of parenthood).

19. See KINDREGAN & MCBRIEN, *supra* note 18, at 129 (explaining that surrogacy first existed only in the context of assisted intrauterine insemination but science has advanced to the point of allowing a woman to bear a child with whom she has no genetic relation).

20. See *id.* at 29-30 (describing how intrauterine insemination is the oldest form of non-coital reproduction and has been called “artificial” because sperm is introduced by a mechanism other than a penis). Many courts are beginning to refer to the procedure exclusively as intrauterine insemination in an effort to avoid the judgmental connotations associated with “artificial.” *Id.*

21. See *id.* at 131 (explaining that due to the biological connection between the traditional surrogate and the child, in a traditional surrogacy agreement it is standard for the traditional surrogate to agree to surrender the child for adoption to the intended mother).

22. See *id.* at 132 (noting that there are several variations of gestational surrogacy, but in the most common manifestation a woman’s ova are retrieved and fertilized in vitro by her male partner’s sperm or that of a donor). In vitro fertilization is a procedure in which an ovum is fertilized outside the womb by sperm with the intent that the resulting embryo will later be transplanted into a uterus. *Id.* at 75. Embryos implanted in a gestational surrogate can also be the result of donor eggs and/or donor sperm. See, e.g., *Buzzanca v. Buzzanca (In re Buzzanca)*, 72 Cal. Rptr. 2d 280, 282

differentiating the two types of surrogacy, therefore, the legally and medically significant distinction is that a gestational surrogate—unlike a traditional surrogate—gives birth to a child to whom she has no genetic connection.<sup>23</sup>

### *B. Establishing a Legal Framework for Gestational Surrogacy*

Embodying both common law understandings and social notions of motherhood, the law regarding determinations of maternity in instances of traditional surrogacy is well-settled, deeming the traditional surrogate the mother.<sup>24</sup> However, the advent and increasing occurrences of gestational surrogacy challenge these common law and social understandings of maternity.<sup>25</sup> When faced with the task of adjudicating or defining legal maternity in connection with gestational surrogacy, courts, legislatures, and legal scholars have relied on four different theories: (1) the parties' intent, (2) the parties' genetic contributions, (3) gestational primacy, and (4) the best interests of the child.<sup>26</sup>

#### *1. The Johnson Intent to Procreate Test*

When Mark and Crispina Calvert contracted with Anna Johnson to carry an embryo created from Mark's sperm and Crispina's ovum, they did so intending to parent the child to whom Anna would give birth.<sup>27</sup> When Anna asserted legal maternity based on her gestational role in the birth of

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(Cal. Ct. App. 1998) (adjudicating parentage where a husband and wife agreed to have an embryo that was unrelated genetically to either of them implanted in a surrogate).

23. See, e.g., *In re Roberto d.B.*, 923 A.2d 115, 117 (Md. 2007). Compare UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, § 2 (1989) (defining "surrogate" as an adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents), with UNIF. PARENTAGE ACT, § 3 (1973) (indicating that the natural mother is established by proof of her having given birth to the child).

24. See, e.g., *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988) (holding that contracts for traditional surrogacy conflict with New Jersey adoption statutes because they implicate the payment of money for a child, finding that such contracts are void as a matter of public policy, and, in light of such holdings, deeming the surrogate the mother of the child); see also KINDREGAN & MCBRIEN, *supra* note 18, at 132 (explaining that because there is a genetic connection, courts are unlikely to enforce a contract's surrender provisions against a surrogate mother who is also the biological mother of the child).

25. See Alayna Ohs, Note, *The Power of Pregnancy: Examining Constitutional Rights in a Gestational Surrogacy Contract*, 29 HASTINGS CONST. L.Q. 339, 340 (2002) (observing that gestational surrogates often are described as providing a service whereas traditional surrogates are viewed as "baby-sellers").

26. See Amy M. Larkey, Note, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 621 (2003) (opining that although many state legislatures have yet to deal explicitly with the issue of gestational surrogacy, existing theories might give potential parents a sense of legal predictability).

27. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

the child, the Calverts claimed that their genetic relationship to the child made them the legal and natural parents.<sup>28</sup> As the first court to determine a parentage dispute arising from gestational surrogacy, in *Johnson v. Calvert*, the California Supreme Court sided with the Calverts and held that the parties' intentions regarding parentage—as expressed in the surrogacy contract—determined maternity.<sup>29</sup> Thus, because the parties formed and entered the surrogacy agreement with the understanding that Anna would gestate the embryo and that Crispina would be the mother for all legal purposes, the court followed the contract and deemed Crispina the mother.<sup>30</sup>

## 2. *The Belsito Genetics Test*

In *Belsito v. Clark*, an Ohio court of common pleas employed a different test, holding that legal maternity should be determined primarily on the basis of genetic relation between woman and child.<sup>31</sup> After Anthony and Shelly Belsito conceived a child in vitro and had the embryo implanted in Shelly's younger sister, Carol Clark, who had agreed to serve as their gestational surrogate, the Belsitos sought a pre-birth parentage order declaring themselves the sole natural and legal parents.<sup>32</sup> The court rejected the intent to procreate test formulated in *Johnson*, reasoning that intent could often be hard to prove or lead to unreasonable or unacceptable results; instead, the *Belsito* court held that the test for identifying natural parents should be rooted in genetics.<sup>33</sup> The court further stated that for

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28. *Id.* at 778 (observing that blood tests excluded Anna as the genetic mother, and noting the parties agreed to a court order providing the child would remain with the Calverts with visitation by Anna until the matter was fully resolved).

29. *See id.* at 782 (labeling the intended parents the “prime movers”—the instigators or commissioning parties—of the procreative relationship).

30. *See id.* (holding that although genetic relationship and birth both are recognized under California law as acceptable means of establishing maternity, when the two means do not coincide in one woman, she who intended to bring about the birth of a child and intended to raise the child as her own is the mother).

31. 67 Ohio Misc. 2d 54, 61-62 (1994) (discarding the *Johnson* intent to procreate test for three reasons: (1) difficulty in application, (2) public policy, and (3) *Johnson's* failure to recognize and emphasize the genetic provider's right to consent to procreation).

32. *Id.* at 58 (explaining that Shelly sought the parentage order from the court when she learned that, according to Ohio law, the woman who gave birth to the child would be listed on the birth certificate as the child's mother). Additionally, Shelly learned that because Carol, the surrogate, and Tony, the genetic father, were not married to each other, the child would be considered illegitimate under the law. *Id.* At no point, however, did Carol attempt to establish herself as the legal mother of the child. *Id.* at 56.

33. *See id.* at 62 (considering that even when parties have a written agreement, disagreements regarding intent can arise if the terms of the contract are unclear or if one party claims there was pressure to enter the contract). The court dismissed intent because such a test could lead to a situation in which a child has two mothers if the non-genetic gestational carrier and the female genetic provider both intend to procreate

determinations of legal parentage, a birth test, premised on gestation and the process and fact of giving birth, should be secondary to genetics.<sup>34</sup> In other words, the *Belsito* court concluded that genetics, then gestation, are the key elements to determinations of legal maternity.<sup>35</sup>

### *3. Pre-birth Parentage Orders and Assertions of Equal Protection in Response to Gestational Primacy and Best Interests Standards*

The *Baby M* case, in which the New Jersey Supreme Court deemed the traditional surrogate the child's mother but awarded custody to the intended mother—the natural father's wife—based on the best interests of the child, drew national attention to the issue of surrogacy.<sup>36</sup> After *Baby M*, a handful of state legislatures across the nation enacted statutes governing surrogate births.<sup>37</sup> Exemplifying the theory of gestational primacy, which posits that the gestational mother is always the legal mother, many such state laws established rigid determinations and definitions of maternity.<sup>38</sup> Post-*Baby M* statutes unequivocally confirmed the birth mother as the legal mother.<sup>39</sup>

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and raise the child. *Id.*

34. See *id.* at 65 (distinguishing between natural parents—genetic providers—and legal parents—caretakers—such that giving birth must still be relevant to determining legal parentage because a genetic mother may waive her claim to maternity).

35. See *id.* (concluding that the birth test should be subordinate to genetics in determining legal maternity because a genetic test favors the natural mother and implicitly advancing the idea that a “natural” mother-child relationship—i.e., one premised on genetics—supercedes all other forms of such a relationship).

36. See Cori Anne Natoli, *Baby M, Away From the Spotlight, Turns 13*, THE RECORD (Bergen County, NJ), Mar. 28, 1999, at N07 (reflecting on the media circus that followed both the trial and Melissa Stern—a.k.a. Baby M—throughout her childhood in the form of frequent requests for interviews); Iver Peterson, *Ruling in Baby M Case is Due Today*, N.Y. TIMES, Mar. 31, 1987, at B2 (observing that legal scholars nationwide followed the case).

37. See, e.g., N.H. REV. STAT. ANN. § 168-B:2 (1990) (providing that a woman is the mother of a child to whom she has given birth); see also Angie Welling, *Pair Sue for Parent Status*, DESERET NEWS (Salt Lake City, UT), Sept. 18, 2002, at A01 (asserting that the Utah legislature was uninformed and reactionary when, in 1989, it passed a statute rendering for-profit surrogacy contracts void and providing that the surrogate mother is the mother for all legal purposes).

38. See Brief for Boston Fertility Society et al. as Amici Curiae Supporting Plaintiffs at 35, *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133 (Mass. 2001) (No. SJC-08600) (explaining that states use the gestational primacy approach in an effort to discourage gestational surrogacy agreements under the belief that such an approach makes intended parents less likely to enter surrogacy agreements).

39. See, e.g., WIS. STAT. ANN. § 69.14(h) (West 2003) (providing that information about the surrogate mother shall be entered on the birth certificate and the information about the genetic father shall be omitted from the birth certificate); IND. CODE ANN. § 31-20-1-1 & -2 (1997) (declaring enforcement of any surrogate agreement that requires a surrogate to waive parental rights or duties to violate public policy and stating that any surrogacy contract formed after March 14, 1988 is void).

Two cases illustrate the varying degrees to which courts are willing to equivocate on gestational primacy.<sup>40</sup> In *Culliton v. Beth Israel Deaconess Medical Center*, the Massachusetts Supreme Judicial Court held that trial courts have the authority to consider requests for pre-birth determinations of parentage in cases of gestational surrogacy.<sup>41</sup> After Marla Culliton and her husband Steven successfully conceived an embryo in vitro and had that embryo implanted in a gestational surrogate, they petitioned for a court order declaring themselves the natural and legal parents of any children resulting from that embryo.<sup>42</sup> The Supreme Judicial Court declared the Cullitons the lawful parents of the twins born to the gestational surrogate.<sup>43</sup>

Unlike *Culliton*, however, in *A.H.W. v. G.H.B.* a New Jersey Superior Court refused to issue a pre-birth parentage order to genetic parents employing a gestational surrogate.<sup>44</sup> The *A.H.W.* court held that to issue a pre-birth order would conflict with New Jersey law providing that a birth mother may not surrender her rights until seventy-two hours after the birth.<sup>45</sup>

In some instances, rather than seeking pre-birth parentage orders, genetic mothers employing gestational surrogates raised equal protection claims challenging the constitutionality of statutes codifying gestational primacy.<sup>46</sup> For example, in *Soos v. Superior Court*, the genetic mother of triplets born with the assistance of a gestational surrogate brought suit alleging an equal protection violation when, under state law, her husband could prove paternity by offering DNA evidence, but she was precluded from doing so

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40. Compare *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1141 (Mass. 2001) (entering a parentage order deeming the genetic parents the legal parents of twins carried by a gestational surrogate), with *A.H.W. v. G.H.B.*, 772 A.2d 948, 953 (N.J. Super. Ct. Ch. Div. 2000) (holding that although the surrogate is extremely likely to surrender her parentage rights as planned, she must not be compelled to do so in a pre-birth order).

41. 756 N.E.2d at 1139 (observing that unwanted consequences of legal parentage, such as the responsibility to make medical decisions for the child, can be minimized or avoided when lower courts consider petitions for pre-birth parentage orders).

42. *Id.* at 1138 (explaining that the gestational surrogate agreed with the order sought and that the hospital did not contest plaintiffs' complaint or petition).

43. *Id.* at 1141.

44. See 772 A.2d at 954 (concluding that a court order for the pre-birth termination of the surrogate's parental rights is the equivalent of enforcing an agreement to surrender a child and is contrary to New Jersey statutes and precedent set in *Baby M.*).

45. *Id.* (explaining that due to emotional and physical changes in the mother that occur at birth, New Jersey law stipulates the voluntary surrender of a child is invalid if occurring within seventy-two hours after the birth of the child).

46. See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1293 (D. Utah 2002) (concluding that a statute presuming the surrogate is the mother for all legal purposes has no conclusive effect in light of genetic evidence); *Soos v. Superior Ct.*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1995) (holding that an Arizona statute allowing a biological father to prove paternity and automatically granting a surrogate the status of legal mother violated equal protection).

because the surrogate was declared the legal mother in accordance with state law.<sup>47</sup> The *Soos* court held that by affording a procedure for proving legal parentage to the genetic father, but not the genetic mother, the state denied the mother the equal protection of the laws.<sup>48</sup>

The *J.R. v. Utah* decision further illustrates the intersection of equal protection doctrine and surrogacy.<sup>49</sup> In *J.R.*, the genetic mother alleged that a Utah statute was unconstitutional because the statute conclusively presumed the surrogate to be the legal mother.<sup>50</sup> In response, the State of Utah asserted that the surrogacy statute served two important governmental purposes: (1) protecting the best interests of the child, and (2) protecting the surrogate's health and well-being.<sup>51</sup> The plaintiffs argued that rather than protect the gestational surrogate, the Utah statute forced parenthood upon someone who did not want it.<sup>52</sup> The *J.R.* court held that the state may presume that the birth mother is the legal mother, but upon presentation of genetic evidence to the contrary, that presumption must dissolve.<sup>53</sup> The *J.R.* court invalidated the specific section of the Utah statute requiring the birth mother to be the legal mother.<sup>54</sup>

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47. See 897 P.2d at 1358 (explaining that the parentage controversy arose during a marriage dissolution in which the biological father argued that he and the surrogate are the legal mother and father, and that the biological mother lacks standing to claim custody); see also ARIZ. REV. STAT. ANN. § 25-218 (1989) (stating that a surrogate is the legal mother of a child born as a result of a surrogacy contract and that if she is married, her husband is presumed the legal father, but that this presumption is rebuttable).

48. *Soos*, 897 P.2d at 1361 (finding that the state showed no compelling interest to justify the dissimilar treatment of men and women similarly situated—the genetic mother and father).

49. See 261 F. Supp. 2d at 1294 (concluding that the application of the Utah statute deeming the surrogate the legal mother violates the Fourteenth Amendment's equal protection guarantee, because it allows the genetic father, but not the genetic mother, to be listed on the birth certificate of a child born to a gestational surrogate).

50. *Id.* at 1274 (detailing plaintiffs' assertion that the Utah record-keeping scheme, which treats the genetic parents differently, denies the genetic mother the Fourteenth Amendment's equal protection guarantee).

51. *Id.* at 1280 (explaining defendants' assertion that the statute was enacted to ensure that a child born of a surrogacy agreement would enter the world with at least one easily identifiable legal parent—the birth mother).

52. *Id.* at 1287 (considering plaintiffs' argument that the role of a gestational surrogate is to assist others in building their families, before concluding that the Utah statute in effect compels maternity).

53. *Id.* at 1294 (asserting that the state cannot deny the existence of a parental relationship based entirely on the fact that the parent is a woman).

54. See *id.* at 1296 (finding that after reviewing the statute as a whole, the remaining sections—those dealing with the contractual aspects of surrogacy agreements—may stand, because they further the legislative purpose of precluding enforcement of such contracts when the parties are in dispute).

III. OVERLOOKING EQUAL PROTECTION: THE FOUR PREVAILING THEORIES REGARDING DETERMINATIONS OF LEGAL MATERNITY IN CASES OF GESTATIONAL SURROGACY FAIL TO PROTECT AGAINST COMPELLED MATERNITY

Writing for the majority in *In re Roberto d.B.*, Chief Judge Robert M. Bell of the Maryland Court of Appeals stated: “what has not been fathomed exists today.”<sup>55</sup> Chief Judge Bell, referring to scientific advances in assisted reproductive technology allowing novel forms of procreation, accurately portrayed the evolving technological advancements.<sup>56</sup> Chief Judge Bell noted that the Maryland paternity statute did not anticipate the potential legal issues arising from reproductive technology, and that such issues would continue to arise unless the laws were construed in light of new technology.<sup>57</sup> In other words, the rapidly advancing technologies that enable assisted reproduction were not contemplated in 1984 when Maryland enacted its paternity statute.<sup>58</sup> Despite the less sophisticated medical technology of the time, given that the “chauvinistically titled” statute was enacted twelve years after Maryland’s equal rights amendment, it is probable that legal scholars realized the sex discrimination inherent in the statute.<sup>59</sup> The science is new, but the mandate of equal protection is

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55. 923 A.2d 115, 122 (Md. 2007) (illustrating the antiquities of the Maryland paternity statute by articulating that it does not provide for a situation where the parents are unmarried, much less a situation where children are conceived through assisted reproductive technology).

56. *See id.* (determining that whether the reasons for not bearing a child in the traditional sense are biological or not, adoption is no longer the only option for building a family outside of coital procreation); *see also* JUDITH F. DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW 36 (LexisNexis 2006) (observing that although medical treatment for infertility can be traced back to fifth-century B.C. writings, Louise Brown, born on July 25, 1978, was the first child conceived and delivered following in vitro fertilization).

57. *In re Roberto d.B.*, 923 A.2d at 122 (maintaining that the Maryland statute, as it currently exists, codifies gestational primacy and prevents rebuttals of maternity, which restricts, rather than protects, intended parental relationships). These restrictions go against the statute’s legislative purpose to achieve and protect the best interests of the child. *Id.* *See also* Tamber, *supra* note 5, at 1B (describing a conversation with a law professor in which the professor described the *In re Roberto d.B.* holding as a “rather simple and brilliant solution to a situation not contemplated by Maryland law”).

58. *Compare* MD. CODE ANN., FAM. LAW § 5-1006 (West 1984) (providing that proceedings to disestablish paternity may be initiated during pregnancy), *with* MD. CODE ANN., HEALTH-GEN. § 4-208 (1982) (establishing the birth mother as the child’s mother).

59. *See In re Roberto d.B.*, 923 A.2d at 137 n.1 (Harrell, J., dissenting) (addressing how the mechanisms for resolving questions of parenthood are framed only in terms of determining who is the father, as opposed to considering both parents, and concluding that this chauvinism sends mixed messages about the establishment of the titles of parent, father, and mother). The *In re Roberto d.B.* court observed that the Maryland Court of Appeals consistently holds that the State violates the Maryland equal rights amendment by imposing a burden or granting a benefit based on sex without a substantial basis for the action. *Id.* at 122-23.

not.<sup>60</sup>

Although neither *Johnson* nor *Belsito* explicitly involved equal protection arguments, these oft-cited cases created a framework for the evaluation of gestational surrogacy that completely disregards issues of equal protection.<sup>61</sup> The *Johnson* “intent to procreate” test fails to safeguard the rights of a gestational surrogate who does not want to be the mother of any child born from the surrogacy arrangement.<sup>62</sup> Likewise, although the ultimate holding of *Belsito* supports the decision of the Maryland Court of Appeals in *In re Roberto d.B.*, the *Belsito* court’s logic poses problems for a gestational surrogate who wishes to unequivocally end her involvement upon birth.<sup>63</sup> Similarly, statutes codifying the theory of gestational primacy that compel legal maternity on the gestational surrogate violate the surrogate’s equal protection rights by preventing her from rebutting maternity the way a non-genetic male could do with regard to paternity.<sup>64</sup> Finally, when a court deems a gestational surrogate the legal mother, believing that doing so achieves the best interests of the child, the court misapplies the best interests standard and inappropriately ignores the surrogate’s right to equal protection of the laws.<sup>65</sup> *In re Roberto d.B.* remedies the problems of all four theories currently used to determine legal

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60. See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1287 (D. Utah 2002) (asserting that the assumption that women can be forced to accept the “natural” status of motherhood typifies women in a manner that has frequently triggered equal protection issues); see also *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (holding that the governmental objective to protect women based on archaic stereotypes is illegitimate).

61. See *Johnson v. Calvert*, 851 P.2d 776, 785 (Cal. 1993) (noting an equal protection claim is not articulated and that the facts do not necessitate invoking one, because of the situational differences between a woman who voluntarily agrees to gestate a fetus and a wife who provides the ovum for fertilization); see also Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 263 (2003) (arguing that fast-moving developments in reproductive technology force courts to reconsider what constitutes a parent, highlighting the importance of having courts address issues of equality and differences in reproduction).

62. See *Johnson*, 851 P.2d at 779 (concluding that presentation of blood test evidence—i.e., genetics—is one means of establishing maternity, and proof of having given birth is another); see also *Soos v. Super. Ct.*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1995) (Gerber, J., concurring) (arguing that compelling motherhood on a surrogate imposes burdens and duties that far exceed her contract because a surrogate’s agreed upon role is to carry the child, not to nurture or raise it).

63. See *Belsito v. Clark*, 67 Ohio Misc. 2d 54, 67 (1994) (formulating the law in a manner that gives weight to both genetic connection and birth in determinations of maternity because of the distinction between natural and legal mothers).

64. See Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 525 (1996) (observing that the application of a gestational primacy test interferes with the private and personal aspects of reproduction by mandating motherhood).

65. See, e.g., Hill, *supra* note 18, at 403 (asserting that, although studies indicate the importance to a child of developing a secure relationship with at least one parent figure early in childhood, there is no evidence suggesting that a child must form this relationship with a gestational parent).

maternity by requiring that males and females be afforded equal opportunities to rebut parentage.<sup>66</sup>

*A. The Intent to Procreate Test Fails to Provide an Adequate Solution to Cases Like In re Roberto d.B. Where Existing Laws May Not Sanction Parties' Intent*

Intent alone is an insufficient legal test for adjudications of maternity in instances where the parties' intent may challenge traditional gender norms or stray from traditional family structures.<sup>67</sup> Because the court in *Johnson* dealt with a situation in which a husband and wife wanted to have a child with their genetic pattern and took steps to achieve that result, the court formulated an intent to procreate test that safeguards the intended parents should parentage be contested.<sup>68</sup> The intent to procreate standard provides better protection than all other standards because families established through assisted reproductive technologies are families of choice as well as intent, and respecting the parties' intentions is the best way to ensure parentage is by choice.<sup>69</sup> However, as the facts of *In re Roberto d.B.* illustrate, one's intent to procreate can sometimes result in arrangements where existing law thwarts the parties' procreative intentions.<sup>70</sup> For example, gestational surrogacy is not an option for an unmarried couple in Virginia because that state's law requires the intended parents to be married.<sup>71</sup> Because legal regulation of surrogacy often embodies social

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66. See 923 A.2d 115, 122-23 (Md. 2007).

67. See Dalton, *supra* note 61, at 265 (hypothesizing that sex discrimination in parentage determinations is "grounded in gendered constructions of parenthood" as opposed to reproductive differences grounded in biology because of social understandings of what constitutes a family).

68. See *Johnson v. Calvert*, 851 P.2d 776, 786 (Cal. 1993) (explaining that to the extent tradition has a bearing on the case, both legal and historical tradition favor the claim of the couple to procreate and form a family of their own).

69. See Coleman, *supra* note 64, at 505 (asserting that the intent rule treats the interests of both the intended mother and the gestational surrogate as worthy of equivalent protection); Larkey, *supra* note 26, at 623 (noting that an intent-based theory for determining legal maternity is attractive because it is unambiguous and provides those entering surrogacy agreements with confidence that the terms of their agreements will be upheld); see also Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 135 (2000) (observing that many academics support an intent-based theory for determining legal maternity because such a theory prioritizes the commissioning mother's bid for legal maternity regardless of genetic or gestational connection).

70. See 923 A.2d at 117 (demonstrating that the development of assisted reproduction technology leads to the law being tested because it creates novel questions of law, which tend to be matters of first impression when adjudicated); see also Hurwitz, *supra* note 69, at 131-32 (observing that ten percent of women of childbearing age in the United States—over six million women—are unable to conceive and carry a pregnancy to term, resulting in the scope of reproductive technologies broadening and the use of such technologies increasing).

71. See VA. CODE ANN. § 20-156 (West 1991) (defining "intended parents" to

notions of what constitutes a good or desirable family arrangement, parties' intentions would be unlikely to sway a court interpreting statutes requiring the intended parents be married.<sup>72</sup> Thus, the *Johnson* court's determination that maternity be decided in accordance with the parties' intent becomes irrelevant when, as in *In re Roberto d.B.*, the parties' intent goes against the grain of social understandings of parenthood and family composition—intent will not trump existing law.<sup>73</sup>

The *Belsito* court's rejection of an intent-based test, because such a standard could lead to "unacceptable results," provides an example of a court ruling in accordance with social understandings of family composition.<sup>74</sup> By terming a hypothetical arrangement in which two females intended to parent a child "problematic," the *Belsito* court implicitly accepted the popular notion that a family must consist of a male and female parent, a husband and a wife.<sup>75</sup> When a court faced with adjudicating parentage in a case of assisted reproductive technology expresses disapproval of nontraditional family arrangements, such disapproval makes clear that the parties' intentions warrant little merit should such intentions deviate from the social norm.<sup>76</sup> Further, because assisted reproductive technology itself challenges traditional understandings of procreation, even if the intended parents are heterosexual and married, the break from conventional reproduction may be enough for

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mean a man and a woman, married to each other, providing that all surrogacy agreements must be approved by a court, and mandating that if a court vacates the order approving the surrogacy contract, the gestational surrogate is the mother of the child and her husband, if any, is the father).

72. See *Johnson*, 851 P.2d at 788 (Lucas, C.J., concurring) (arguing that the "multiplicity of considerations at issue in a surrogacy situation" require careful, non-adversarial analysis and that the legislature, not the judiciary, is suited best to reflect the social values at stake).

73. See *In re Roberto d.B.*, 923 A.2d at 136 (Cathell, J., dissenting) (asserting that the presence of a father is invaluable to a child's development and that there is similar, or greater, value in having a mother involved in rearing children, and concluding a child will be affected adversely if it has no mother); see also Garrison, *supra* note 1, at 894 (reporting that most Americans believe children need both a father and a mother and that children are better off in a two-parent household).

74. See *Belsito v. Clark*, 67 Ohio Misc. 2d 54, 62 (1994) (asserting that even in fact patterns where intent is clear, the *Johnson* intent to procreate test may bring about unacceptable results, results contrary to the social values expressed in enunciated public policy of current law).

75. See, e.g., Garrison, *supra* note 1, at 887 (charging that concern about the impact of single parenting on children and its resultant social costs has led to paternity reform and revision of child support standards).

76. See *id.* at 893-94 (declaring that in recent years, more so than at any other point in history, courts have held that parents' rights are secondary to children's interests because children are increasingly viewed in legislation and litigation as the rights-bearing party and that one such right includes the right to know and be cared for by both of their parents).

a court to override the parties' intentions.<sup>77</sup>

The dispute in *Johnson* centered on the determination of the natural mother.<sup>78</sup> While the California Supreme Court ultimately based its holding that Crispina was the natural mother on the parties' intent, the language and reasoning used by the court clearly indicates the court's view that both Anna and Crispina had solid ground on which to assert maternity.<sup>79</sup> Consider, then, what might have happened had the case not involved a heterosexual, married couple employing a gestational surrogate but a gay male couple.<sup>80</sup> Because the determination in such a case would not turn on choosing between two women, but rather determining if a child could have no mother at birth, the case would likely have turned on an interpretation and application of California adoption law; in other words, the court would likely have viewed the surrogate as the mother and she would have needed to surrender the child for adoption.<sup>81</sup> Alternatively, because the *Johnson* court structured its opinion on the fact that two women both asserted maternity, the court may have employed different reasoning or reached a different decision regarding parentage if it had been faced with a single male individual contracting with a gestational surrogate.<sup>82</sup>

In either of the hypothetical instances proposed above, where there is not a second woman vying for maternity, the *Johnson* court's language is not clear regarding whether the parties' intent would be dispositive to determining parentage.<sup>83</sup> The *Johnson* court stated that California law

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77. See, e.g., *A.H.W. v. G.H.B.*, 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000) (noting that the parties' detailed agreement "reflects their shared intent and desired outcome for the case" but nonetheless refusing to issue a pre-birth parentage order mirroring that intent because to do so would conflict with existing statutes regulating adoption laws).

78. See *Johnson v. Calvert*, 851 P.2d 776, 779 (Cal. 1993) (explaining that under the California Civil Code, §§ 7001-02, the "parent and child relationship" means the legal relationship existing between a child and his natural or adoptive parents, incident to which the law imposes rights, privileges, duties and obligations). The court in *Johnson* viewed the term "natural mother" as referring to a mother who is not an adoptive mother. *Id.* at 782 n.9.

79. See *id.* at 782 (assessing that the court had to determine intent only after it was satisfied that both women presented acceptable proof of maternity under the California Civil Code).

80. See *id.*

81. See *id.* at 784 (elucidating Ms. Johnson's argument that the surrogacy contract violates policies underlying California adoption statutes because it in effect constitutes a pre-birth waiver of parental rights).

82. See *id.* at 783 (explaining that the child would not have been born but for the actions of the intended parents, who are a married couple desiring children with their own genetic makeup).

83. See *id.* at 782; see also Jeffrey M. Place, *Gestational Surrogacy and the Meaning of "Mother"*: *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), 17 HARV. J.L. & PUB. POL'Y 907, 908 (1994) (asserting that the *Johnson* court reached intent only because it incorrectly concluded that gestation was sufficient proof of maternity).

provides for a rebuttable presumption of paternity based on genetic evidence and assumed that maternity, as well, may be rebutted.<sup>84</sup> However, the *Johnson* court's assumption is merely dicta and has had no effect on the California paternity statute, which currently makes no mention of maternity or its possible rebuttal.<sup>85</sup> Throughout the *Johnson* opinion, the language betrays the assumption of heterosexual couples setting in motion the procreative events.<sup>86</sup> Moreover, the most important fact to the *Johnson* court's ultimate disposition of the case is the fact that two women both presented evidence satisfactorily establishing maternity.<sup>87</sup> While the *Johnson* intent to procreate test functions well in situations in which courts must make determinations between two women as to natural motherhood—one an intended parent and the other not—it fails to protect the gestational surrogate in instances where state law compels legal motherhood despite, and in direct contradiction to, the intentions expressed in the surrogacy agreement.<sup>88</sup> Therefore, a gestational surrogate relying solely on previously expressed intentions to disavow maternity may not succeed in her rebuttal.<sup>89</sup>

Although the ruling by the court of appeals in *In re Roberto d.B.* effectively enforces the surrogacy contract because the decision mirrors the parties' intent, that case does not create an intent to procreate test for all women giving birth in Maryland.<sup>90</sup> By ignoring intent and focusing on the legal doctrine of equal protection, the Maryland Court of Appeals correctly

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84. See *Johnson*, 851 P.2d at 781.

85. See CAL. FAM. CODE § 7555 (1992) (providing that there is a rebuttable presumption, affecting the burden of proof, of paternity if the court finds that genetic testing precludes the possibility of paternity).

86. See *Johnson*, 851 P.2d at 782 (discussing Mark and Crispina's aim to bring a child into the world and noting that had Anna at any time manifested a desire to be a mother she would not have been the chosen gestational surrogate). The court declined to accept the contention of the *amicus curiae*, the ACLU, that the child has two mothers because a recognition of parental rights in a third party would diminish Crispina's role as the mother. *Id.* at 781 n.8.

87. See *id.* at 781 (observing that presumptions contained in California Civil Code § 7004, which describes situations in which evidence points to a particular man as natural father, do not apply to the issue before the court). The *Johnson* court stated that there was no need to resort to evidentiary presumptions to ascertain the identity of the natural mother, and found that it must undertake a purely legal determination between the two claimants. *Id.*

88. See, e.g., *A.H.W. v. G.H.B.*, 772 A.2d 948, 953 (N.J. Super. Ct. Ch. Div. 2000) (rejecting the intended parents' and gestational surrogate's joint claim that the surrogate merely acted as an incubator and terming that argument a "simplistic comparison" because it ignores the fact that there are human emotions and biological changes involved in pregnancy).

89. See *id.* at 954.

90. See *In re Roberto d.B.*, 923 A.2d 115, 125 n.15 (Md. 2007) (reasoning that the paternity statute merely establishes the process by which men, and now women, can challenge parentage and observing that the paternity statute does not consider intent as a factor to take into account).

held that the name of the gestational surrogate need not be listed on the birth certificate of the child she delivers.<sup>91</sup> The *In re Roberto d.B.* ruling is significant because it illustrates a successful assertion of equal protection to safeguard the parties' intent.<sup>92</sup> Unlike the *Belsito* court, the court of appeals did not shy away from the nontraditional aspects of Roberto d.B.'s intent to be a single parent.<sup>93</sup> Moreover, unlike *Johnson* or *Belsito*, *In re Roberto d.B.* does not attempt to define "mother" and thus avoids the social values arguments that appear in *Johnson* and *Belsito*.<sup>94</sup> The absence of such arguments reinforces the holding of *In re Roberto d.B.* because no questions are raised regarding the applicability of equal protection to nontraditional family structures, unlike *Johnson* and *Belsito*, where it is unclear whether the tests enunciated would apply to nontraditional family forms.<sup>95</sup> The *In re Roberto d.B.* plaintiffs' equal protection arguments carried more legal weight than a mere assertion of intent because they were rooted in the long-accepted legal doctrine of equal protection, further bolstered by the doctrine's codification in the Maryland equal rights amendment.<sup>96</sup>

*B. The Genetics Test Does Not Safeguard Against Instances of Compelled Motherhood in Cases Where the Egg Donor Is Unknown or the Genetic Mother Is Unable or Unwilling to Fulfill the Role of Legal Mother*

As in *Johnson*, the *Belsito* court's analysis and reasoning fails to protect a gestational surrogate from compelled motherhood.<sup>97</sup> Despite interpreting an Ohio law similar to the Maryland statute declared unconstitutional in *In re Roberto d.B.*, the court in *Belsito* merely subordinated the birth test to the genetics test—ruling that while genetics must be the key factor, birth is

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91. *See id.* at 124 (concluding that because the Maryland equal rights amendment forbids the granting of more rights to one sex than the other, the paternity statutes in Maryland must be construed to apply equally to men and women).

92. *See id.* at 118 (noting the gestational surrogate's contention that under the surrogacy agreement she had a reasonable expectation that her role in the lives of the twin girls would terminate upon delivery of the children).

93. *See id.* at 117.

94. *See id.* at 125 n.15.

95. *See id.* at 123-24 (concluding that the basic principle of the Maryland equal rights amendment is that sex is not a permissible factor in determining the legal rights of women, or men, and that treatment of any person by the law may not be based upon the circumstances that such a person is of one sex or the other).

96. *See id.* at 124 (holding that the equality between the sexes demanded by the Maryland equal rights amendment focuses on rights of individuals under law that encompass all forms of privileges, immunities, benefits and responsibilities of citizens).

97. *See Belsito v. Clark*, 67 Ohio Misc. 2d 54, 58 (1994) (asserting that the law will impose the duties of a child-parent relationship only upon those individuals who can be found to be a natural or adoptive parent). *But see* OHIO REV. CODE ANN. § 3111.02 (West 2000) (enunciating that maternity may be established by identifying the natural mother through the birth process or by other means, including genetic testing).

nevertheless still a determinant of maternity.<sup>98</sup> Creating a fallible legal test, the *Belsito* court split its holding between the identification of natural and legal parents when a child is conceived in vitro and carried by a surrogate.<sup>99</sup> The *Belsito* court determined that natural parentage must always be determined by genetics, but also concluded that legal parentage may be settled by genetics first, or by birth second.<sup>100</sup> Because women cannot rebut maternity but men can rebut paternity, the *Belsito* holding created a legal framework likely to result in equal protection violations when the birth test compels maternity.<sup>101</sup> Although no longer equal to genetics, under the court's reasoning the birth test still plays a very important role in determining legal maternity.<sup>102</sup> Thus, had Shelly died during Carol's pregnancy, Carol would have been the legal mother under both Ohio law and the court's reasoning, creating a situation of forced maternity because Carol did not wish or intend to be the mother. The *Belsito* genetics test therefore fails to safeguard the rights of a gestational surrogate who wishes not to assume the legal status of mother in three instances: (1) in the event of the death of the egg provider and intended mother, (2) in instances where the egg donor is unknown, and (3) in instances where the natural mother waives her rights after implantation but before birth.<sup>103</sup> Recall the hypothetical gay male couple or the imagined single male mentioned above in regard to the inadequacies of the *Johnson* intent to procreate test. Because both of these scenarios could create situations in which an unknown egg donor is used, the gestational surrogate would be compelled

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98. See *Belsito*, 67 Ohio Misc. 2d at 59-60 (observing that for millennia giving birth was synonymous with providing the genetic makeup of the child, and explaining that although science now facilitates separation of the two, birth and genetics are still valid and reliable ways of determining maternity).

99. See *id.* at 66 (holding that natural parentage to a child born of a surrogate is determined by genetics and that legal parentage may be determined by birth where the genetic parents have waived their rights and decided not to raise the child); see also Dawn Wenk, Note, *Belsito v. Clark: Ohio's Battle with "Motherhood,"* 28 U. TOL. L. REV. 247, 268 (1998) (elucidating that the Ohio court adopted a two-part natural parent/legal parent determination instead of the California one-step intent test because the court reasoned an intent test could be difficult to apply).

100. See *Belsito*, 67 Ohio Misc. 2d at 64-65.

101. See OHIO REV. CODE ANN. § 3111.03 (West 2006) (providing that a presumption of paternity can only be rebutted by clear and convincing evidence that includes the results of genetic testing).

102. See *Belsito*, 67 Ohio Misc. at 66 (concluding that the natural parents of a child delivered by a gestational surrogate who has been impregnated through in vitro fertilization shall be determined by genetics, but that if the natural parents relinquish or waive their rights to be the legal parents, the birth mother shall be the legal mother).

103. See, e.g., Michelle Pierce-Gealy, "Are You My Mother?": *Ohio's Crazy-Making Baby-Making Produces a New Definition of "Mother,"* 28 AKRON L. REV. 535, 563 (1995) (arguing that if prenatal testing discloses significant fetal abnormalities, the genetic parents may be more likely to waive their rights as natural parents, leaving the gestational surrogate in a position of compelled legal maternity under the *Belsito* court's holding).

to assume the status of legal mother under the logic of the *Belsito* opinion simply because she is the birth mother. Although a natural mother may waive her parental rights to a child, a legal mother may not.<sup>104</sup> Thus, the *Belsito* genetics test, in conjunction with the birth test, effectively ends the option of employing a gestational surrogate for gay male couples or single male individuals, and instead requires them to resort to adopting the child from the surrogate to end her status as legal mother.<sup>105</sup>

The *Belsito* court correctly observed that surrogacy was causing the law to adapt and wondered if the genetics test, the birth test, or some other means would be used to identify those with the legal status of natural mother.<sup>106</sup> Failing to foresee the insufficiencies of their decision, the *Belsito* court did not, however, imagine or speculate that in some instances where the surrogate asserts her equal protection rights, all those means might fail, and the child might end up with no legal mother when a surrogate rebuts maternity.<sup>107</sup>

By deciding the issue of legal maternity on the basis of equal protection rather than genetics or birth, in *In re Roberto d.B.* the Maryland Court of Appeals posited a framework that solves the inadequacies of the *Belsito* court's split methodology.<sup>108</sup> Under *In re Roberto d.B.*, should the genetic and intended mother die during the gestational surrogate's pregnancy, the surrogate could rebut maternity.<sup>109</sup> Similarly, again because the *In re Roberto d.B.* reasoning has nothing to do with genetics, a gestational surrogate would be protected from compelled maternity in instances of both known and unknown egg donors.<sup>110</sup> Because the opinion of the court of appeals is rooted in equal protection, rather than a genetic or birth test, *In re Roberto d.B.* establishes precedent for the protection of gestational surrogates from compelled maternity and remedies the potential problems

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104. See *Belsito*, 67 Ohio Misc. 2d at 63 (noting that in adoption proceedings the natural mother may waive her rights and responsibilities in order to establish a new legal parent or parents).

105. See *id.* (acknowledging that a court adjudication of adoption clearly ends the rights and responsibilities of the natural parents and establishes parental rights of the adoptive parents). But see OHIO REV. CODE ANN. § 3107.03 (West 1996) (defining persons who may adopt as a husband and wife acting together, an unmarried individual, or a married individual acting alone if his or her spouse is a parent of the minor; thus, the Ohio definition excludes same-sex couples seeking to adopt as a couple).

106. See *Belsito*, 67 Ohio Misc. 2d at 60.

107. Compare *id.* (questioning how the law will adapt determinations of maternity to fit cases in which the birth mother did not provide the genetic imprint for a child), with *In re Roberto d.B.*, 923 A.2d 115, 121 (Md. 2007) (concluding that Maryland law accommodates a birth certificate on which the mother is not identified).

108. See *In re Roberto d.B.*, 923 A.2d at 119 n.4.

109. See *id.* at 124.

110. See *id.* at 121.

of the *Belsito* court's fallible split test for determining maternity.<sup>111</sup>

*C. Because Men Can Rebut Paternity in the Absence of a Genetic Relationship, Statutes Embodying a Theory of Gestational Primacy Violate a Gestational Surrogate's Rights to Equal Protection*

The presence of equal protection language in *Soos* represents an important departure from the intent-and-genetics-based language found in cases adjudicating parentage between the gestational surrogate and the genetic parents.<sup>112</sup> The holding of the Arizona Court of Appeals in *Soos* correctly invalidated an Arizona statute that unequivocally made the gestational surrogate the legal mother because the statute violated genetic mothers' equal protection rights.<sup>113</sup> By affirming the trial court's holding that there was no compelling state interest justifying summary denial of a genetic mother's rights, the Arizona Court of Appeals appropriately recognized that codifying gestational primacy leads to equal protection violations because such codifications unequivocally assign maternity to the woman giving birth, therefore creating different procedures for establishing maternity than for paternity.<sup>114</sup>

However, as much as the *Soos* opinion illustrates the introduction of equal protection doctrine to parentage determinations arising after surrogate births, the *Soos* court did not apply equal protection analysis for the purpose of protecting a gestational surrogate from compelled maternity.<sup>115</sup> In other words, the issue in *Soos* leads to an assertion of equal protection for the purpose of proving maternity, not rebutting maternity—an important distinction in light of the fact that much legal regulation of surrogacy attempts to achieve families with both a mother and a father.<sup>116</sup>

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111. *See id.* at 124 (holding that the Maryland paternity statute must be interpreted to extend the same proceedings—disavowals of parentage based on genetic testing—to women and maternity as it applies to men and paternity).

112. *See Soos v. Super. Ct.*, 897 P.2d 1356, 1359 (Ariz. Ct. App. 1995) (emphasizing that the court is not dealing with the constitutional questions that arise when a surrogate mother wishes to keep the child she bore and limiting the court to the question of whether a statute can withstand constitutional scrutiny when it affords a genetic father the opportunity to prove paternity but does not afford a genetic mother the same opportunity).

113. *See id.* at 1360 (explaining that although a gender-based distinction is at issue, the Arizona surrogacy statute must be tested using strict scrutiny because of the ways in which it abridges the mother's fundamental right to procreate and infringes upon her fundamental right to custody and control of her children).

114. *See id.* at 1358.

115. *See id.* at 1360-61 (asserting that because the Arizona statute precludes the genetic mother from demonstrating a genetic relationship she is denied equal protection of the laws).

116. *See, e.g.*, FLA. STAT. § 742.15 (1993) (providing that a contract for gestational surrogacy shall not be binding and enforceable unless the gestational surrogate is eighteen years of age or older and the commissioning couple are legally married and

The *Soos* holding utilizes the same equal protection doctrine central to *In re Roberto d.B.*, but does so for the purpose of protecting the genetic mother's constitutional rights rather than the rights of the gestational surrogate.<sup>117</sup> Therefore, *Soos* rejects Arizona's codification of gestational primacy not for the sake of safeguarding the gestational surrogate's right to equal protection or protecting her from compelled motherhood.<sup>118</sup> This is a problem that *In re Roberto d.B.* rectifies by explicitly holding that women must be afforded the same rights given to men with respect to rebutting parentage.<sup>119</sup>

Conversely, although the issue in *J.R. v. Utah*, like in *Soos*, centered on proving the legal maternity of the genetic mother, the *J.R.* plaintiffs pushed the boundaries of *Soos* by contending that the Utah statute forcing legal parenthood infringed on the surrogate's right to make procreative decisions.<sup>120</sup> Because such logic prevents compelled maternity, the *J.R.* court rightly maintained that to give effect to the Fourteenth Amendment's guarantee of equal protection, the Constitution's protection of procreative choice—a fundamental right implicating Due Process—must be at least as strong when a woman decides to give birth to a child as when she decides not to do so.<sup>121</sup> Such an assertion comes closer to calling for a full rebuttal of legal maternity than any of the language used by the Arizona Court of Appeals in *Soos*.<sup>122</sup> By asserting the surrogate's right to a full rebuttal of

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are both eighteen years of age or older). Compare *Soos*, 897 P.2d at 1359 (discussing the aspects of the Arizona statute that allow a man to prove paternity and gain custody in light of a proved genetic link with a child), with *In re Roberto d.B.*, 923 A.2d at 121 (discussing the aspects of the Maryland statute that allow a man to rebut paternity by proving the absence of a genetic relation with a child).

117. See *Soos*, 897 P.2d at 1361 (concluding that the state denied the mother equal protection of the law by affording the father a procedure for proving paternity, but not affording the mother any means to prove maternity).

118. See *id.* (McGregor, J., concurring) (agreeing with the trial court's reasoning for holding the statute unconstitutional because it imposes the burdens of motherhood on a surrogate who does not intend maternity and did not contract for it).

119. See *In re Roberto d.B.*, 923 A.2d at 125 (concluding that the procedures set forth in the paternity statute work quite well with respect to men and must now be made available to women as well to avoid equal protection violations).

120. See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1274 (D. Utah 2002) (concluding that with a statutory presumption that a surrogate is the mother of children born to her, the state has in effect declared that the surrogate engaged in procreation even though the resulting children are neither her genetic nor intended children).

121. See Ohs, *supra* note 25, at 350 (charging that surrogacy contracts necessarily involve the surrogate's right to bodily integrity because such contracts involve pregnancy, which significantly alters a woman's body for nine months); see also Coleman, *supra* note 64, at 525 (arguing that gestational primacy interferes with private reproductive choices).

122. See *J.R.*, 261 F. Supp. 2d at 1279 n.10 (suggesting that a state-imposed burden on affirmative procreative choice must withstand the same degree of scrutiny as a state-imposed burden on the choice to seek or have an abortion because both implicate deeply personal aspects of fundamental civil liberties such as privacy).

maternity, the *J.R.* plaintiffs used equal protection logic to protect the rights of both the genetic mother and the gestational surrogate.<sup>123</sup>

With its rejection of gestational primacy, the court in *In re Roberto d.B.* rightly held that the mere fact of giving birth cannot equal maternity without resulting in equal protection violations because men are not similarly deemed fathers in such an unequivocal manner.<sup>124</sup> Unlike those advanced in *Soos* and *J.R.*, the equal protection arguments in *In re Roberto d.B.* were asserted for the exclusive purpose of rebutting maternity—not for the purpose of establishing another woman as the true legal mother.<sup>125</sup> *In re Roberto d.B.*, therefore, is the only case in which equal protection served solely to protect a gestational surrogate rather than to protect the intended, genetic mother.<sup>126</sup> The departure from equal protection arguments asserted on behalf of a genetic mother is significant because it illustrates the important role of equal protection in safeguarding nontraditional families of choice, created with the use of assisted reproductive technology, from restrictive legal presumptions of maternity.<sup>127</sup>

Although neither *Culliton* nor *A.H.W.* directly address issues of equal protection, the presuppositions made by the court in each case illustrate the manner in which gestational primacy violates equal protection.<sup>128</sup> When considered in light of the equal protection logic of *Soos*, *J.R.*, and *In re Roberto d.B.*, it is clear that the *Culliton* and *A.H.W.* courts' implicit

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123. *See id.* at 1287.

124. *See* 923 A.2d at 120 (explaining that under the Maryland paternity statute alleged fathers can deny paternity by demonstrating the lack of a genetic relationship to a child).

125. *Compare J.R.*, 261 F. Supp. 2d at 1272 (describing the plaintiffs' contention that the Utah statute, conclusively presuming the surrogate mother to be the mother of the child, violates the genetic mother's right to equal protection because her husband can prove parentage but she cannot), *and Soos v. Super. Ct.*, 897 P.2d 1356, 1359-60 (Ariz. Ct. App. 1995) (explaining that under an Arizona statute a man can prove paternity and gain custody by proving a genetic link with a child), *with In re Roberto d.B.*, 923 A.2d at 121 (discussing the aspects of a Maryland statute that allows a man to rebut paternity by proving the absence of a genetic relation with a child).

126. *See Leonard*, *supra* note 7 (asserting that the holding of the Maryland Court of Appeals that no mother's name need appear on the birth certificate is unprecedented).

127. *See Marjorie Maguire Shultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 302 (viewing medical progress as expanding the potential for expression and effectuation of procreative intentions, and asserting that legal rules governing procreative arrangements should recognize the legitimacy of individual efforts); *see also Leonard*, *supra* note 7 (observing that the equal protection reasoning in *In re Roberto d.B.* offers a useful approach for gay men seeking to have children through surrogacy).

128. *See, e.g., Larkey*, *supra* note 26, at 612-13 (arguing that the *A.H.W.* court refused to recognize the biological differences between gestational surrogacy and traditional surrogacy because the court did not consider the lack of genetic relation between the surrogate and the child, and that this refusal resulted in the court denying a pre-birth parentage order and compelling maternity for the first seventy-two hours after birth).

acceptance of gestational primacy results in equal protection violations of both the genetic mother and the gestational surrogate because, unlike men, the women in *Culliton* and *A.H.W.* had no opportunity to assert or rebut maternity until after maternity was assigned to the surrogate.<sup>129</sup>

Moreover, because the theory of gestational primacy equates maternity with gestation while equating paternity with genetics, gestational primacy results in unequal and dissimilar determinations of parentage.<sup>130</sup> Although some feminist scholars argue that defining maternity based on genetics and overlooking gestation degrades women by equating motherhood with fatherhood, the fact remains that gestational primacy leads to unequal parentage determinations by considering different factors for men—genetics, and women—birth.<sup>131</sup> The logic of *In re Roberto d.B.* remedies the problems imposed by theories of gestational primacy because equal protection reasoning in determinations of maternity allows gestational surrogates to play an important part in creating families, thus valuing gestation, but does not posit that gestation is the *sine qua non* of maternity or motherhood.<sup>132</sup>

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129. See Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 815-16 (2007) (asserting that whatever sex role differences in family relations custom may engender, government may not entrench such differences by using law to restrict women's bodily autonomy and life opportunities in ways that government does not restrict men's bodily autonomy and life opportunities, and concluding that laws imposing gender-specific burdens on women's parenting relations are constitutionally suspect because they do not apply equally to men).

130. See Garrison, *supra* note 1, at 913 (asserting that a gestation-based approach to maternity relies on traditional stereotypes of female nurturance, and concluding that the equal protection clause mandates a similar approach to maternity and paternity determinations).

131. See, e.g., Katha Pollitt, *When Is a Mother Not a Mother (Surrogate Mother Case of Anna Johnson)*, 251 THE NATION 843 (1990) (asserting that the general pattern in society is to recognize women's experiences to the extent that they are identical to men's and to devalue or ignore women's experiences to the extent that they are different, and concluding that this is why the mother's non-genetic contributions to maternity—gestation and birth—are degraded). *But see* Garrison, *supra* note 1, at 917 (observing that to rely on gestation as the determinant of motherhood, and genetics as the determinant of fatherhood, undesirably introduces a gender-specific element to determinations of parentage).

132. See *In re Roberto d.B.*, 923 A.2d 115, 125 n.14 (Md. 2007) (noting that the woman who belongs on the birth certificate depends entirely on the definition accorded to the term "mother"); see also Siegel, *supra* note 129, at 834 (concluding that legislatures can vindicate equal citizenship values through policies that promote the equal freedom of men and women in reproduction and parenting).

*D. Compelling Maternity on a Gestational Surrogate Based on a Best Interests of the Child Standard Results in a Misapplication of that Standard and Unconstitutionally Infringes Upon the Rights of the Surrogate*

Because the best interests standard is a wholly fact-based standard and therefore only legitimate when invoked on a case-by-case basis, the best interests test should not be used to conclusively and summarily override a gestational surrogate's right to equal protection of the laws.<sup>133</sup> Responding to the state of Utah's argument regarding the well-being of the child, the *J.R.* court labeled the best interests of the child standard as totally fact-driven and noted that the Utah statute required no fact finding to decide that in all instances the gestational surrogate is the legal mother.<sup>134</sup> Therefore, the *J.R.* court appropriately dismissed the best interests standard asserted by the defense because it effected a legislative predetermination of the best interests of the child that violated the surrogate's rights.<sup>135</sup> Although the Utah statute allegedly protected the best interests of the child by ensuring that a child born of a surrogacy agreement enters the world with at least one easily identifiable legal parent, thus preventing the child from being orphaned at the whim of the genetic parents, the statute in fact prevented the child from having full legal relationships with his two genetic, intended parents.<sup>136</sup> Thus, statutes that attempt to regulate surrogacy in accordance with the best interests of the child rarely achieve the child's best interests and instead complicate matters by forcing litigation to resolve parentage and protect the rights of the intended parents and the surrogate.<sup>137</sup>

Like the court in *J.R.*, in *In re Roberto d.B.* the Maryland Court of Appeals correctly held that the best interests of the child standard did not apply to the matter of maternity before the court because the context in which the case arose did not warrant an application of the best interests

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133. See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1285 (D. Utah 2002) (determining that although a child's welfare is a paramount consideration in any parentage proceeding it is not the sole consideration to the exclusion of parental rights).

134. See *id.* at 1284-85.

135. See *id.* at 1286-87 (stating that the state's concern for the child, however compelling it may be, cannot sustain a legislative act that would immediately and without discussion rewrite the facts of parenthood to suit legislative preferences as to matters of public policy); see also Garrison, *supra* note 1, at 917 (noting that although the gestator's contributions to fetal development are vital, such contributions do not induce the sort of attachment on the part of the child that has led courts to protect children's established relationships).

136. See *J.R.*, 261 F. Supp. 2d at 1280 n.14 (pointing out that if the Utah statute mandating motherhood for the surrogate is enforced according to its terms, neither the surrogate nor the state can force the intended, biological parents to take responsibility for the child).

137. See Shultz, *supra* note 127, at 397 (concluding that honoring the plans, expectations, and rights of adults who will be responsible for a child's welfare is more likely than legislative presumptions to correlate with positive outcomes for parents and children alike).

standard.<sup>138</sup> More specifically, the *In re Roberto d.B.* court rightly held that because the best interests standard depends on the circumstances of the case, the standard cannot justify legislative presumptions that uniformly and unequivocally mandate maternity for a gestational surrogate.<sup>139</sup> Gender-based and gender-biased presumptions asserted to protect the child's best interests violate the principles of equal protection by: (1) introducing gender stereotypes into determinations of parentage to the detriment of both traditional and nontraditional families, and (2) establishing different and unequal procedures through which men and women can either assert or rebut parentage.<sup>140</sup>

#### IV. THE EXPANSIVE INTERPRETATION AND APPLICATION OF THE STATE EQUAL RIGHTS AMENDMENT IN *IN RE ROBERTO D.B.* WILL LIKELY HAVE FAR-REACHING IMPLICATIONS

The complete reliance by the Maryland Court of Appeals on equal protection to adjudicate the issue of maternity before the court in *In re Roberto d.B.* provides a critical legal lens through which to view gendered parentage statutes.<sup>141</sup> Because of the court's expansive interpretation of the state equal rights amendment, *In re Roberto d.B.* will likely spur change in legal understandings of the statutory interpretation and construction of gendered statutes.<sup>142</sup> For example, the *In re Roberto d.B.* court held that the text of the Maryland paternity statute setting forth procedures for paternity

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138. See 923 A.2d 115, 129 (Md. 2007) (holding that the best interests standard is inappropriate unless a fact-finder deems a parent unfit or there is some exceptional circumstance exposing the child to harm).

139. See *id.* at 130 (concluding that in balancing court-created and statutorily-created standards governing parentage where no parent has been found unfit, constitutional rights are the ultimate determinative factor—not the non-constitutional best interests standard).

140. See Shultz, *supra* note 127, at 341-42 (observing that concerns about the well-being of children focus on the fact that in procreative arrangements made by adults the children get no say, but noting that children's best interests are not ordinarily protected by letting children make decisions, and concluding that the state should intervene only as a last resort).

141. See *In re Roberto d.B.*, 923 A.2d at 124 (holding that because Maryland's equal rights amendment forbids the granting of more rights to one sex than the other, Maryland's paternity statutes must be construed to apply equally to both males and females); see also Siegel, *supra* note 129, at 817 (asserting that sex equality analyses must be skeptical of the traditions and customs that shape the sex and family roles of men and women, and concluding that critical engagement of tradition is a crucial part of any sex equality outlook).

142. See Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1241 (2005) (concluding that courts are justified in subjecting gendered statutes to rigorous standards of review under state equal rights amendments because the text and legislative history of such amendments illustrate legislators' intent to provide greater protection than that previously afforded sex discrimination under state constitutions).

rebuttals need not be rewritten to include women or maternity explicitly, but nonetheless must be interpreted to extend such procedures to women, casting Maryland's gendered statute as gender-blind.<sup>143</sup> The requirement that a statute explicitly mentioning men must now be read to implicitly include women essentially has the same effect as removing the male-specific language because the understood application of such language to women in effect negates any specific reference to males.<sup>144</sup> *In re Roberto d.B.*, therefore, stands as important precedent for any future case in which Maryland courts must interpret gendered laws because the case affirms that the state equal rights amendment forbids legal determinations on the basis of sex, absent a compelling government interest.<sup>145</sup>

Moreover, *In re Roberto d.B.* illustrates the extent to which state equal rights provisions can be used to thwart legislative attempts to control family composition.<sup>146</sup> Although the Maryland equal rights amendment was central to the *In re Roberto d.B.* court's holding, twenty-two states explicitly prohibit sex discrimination in their state constitutions, and all states are subject to the Fourteenth Amendment's guarantee of equal protection.<sup>147</sup> However, women will more likely be successful in rebutting maternity under a state equal rights provision than the Fourteenth Amendment because state provisions generally require strict scrutiny, compared to the intermediate scrutiny applied under the federal Equal Protection Clause.<sup>148</sup> For example, a state court in a state without an

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143. *In re Roberto d.B.*, 923 A.2d at 125; see also Wharton, *supra* note 142, at 1282 (concluding that sex-neutral standards applied in a non-biased fashion that seek to undermine traditional gender roles are beneficial to both women and society at large).

144. See Shultz, *supra* note 127, at 394-95 (concluding that the creation of parentage rules that offset even biological differences—e.g., pregnancy—will ultimately lead to greater gender freedom and flexibility because such rules will not treat men as secondary to women's perceived dominance in the realm of procreation and childrearing).

145. See *In re Roberto d.B.*, 923 A.2d at 122-23 (holding that any action by the State that, without a substantial basis, imposes a burden on, or grants a right to, one sex and not the other, violates the Maryland equal rights amendment because the amendment prohibits the conferring or denying of rights in a sex-based manner).

146. See Wharton, *supra* note 142, at 1203 (maintaining that due to serious inadequacies in the protection offered by the U.S. Constitution, state equal rights amendments are important tools for combating sex discrimination, and as such have frequently been used to successfully challenge state laws that contain sex-based distinctions regarding the rights and responsibilities of unwed parents and their children); see also Siegel, *supra* note 129, at 817-18 (claiming that a sex equality approach to reproductive rights is the best way to challenge gender-differentiated norms that structure parenting).

147. See Wharton, *supra* note 142, at 1202-04.

148. See Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP. L. REV. 907, 940-41 (1997) (concluding that most litigation brought under state equal rights provisions involves statutes or judicial doctrines that discriminate or allegedly discriminate against men in favor of women—e.g., spousal support—and asserting that the reason for such male-centered litigation is that women's issues have been addressed adequately in federal legislation).

explicit prohibition of sex discrimination in its state constitution could more easily hold that compelling motherhood on a gestational surrogate satisfies an important governmental objective of maintaining desirable family structures because such a court needs only to satisfy the federal standard of review required by the Fourteenth Amendment, not the higher level of scrutiny mandated by a specific prohibition of sex-based distinctions.<sup>149</sup> Therefore, *In re Roberto d.B.* demonstrates the value of a state equal rights amendment in holding gender distinctions impermissible under law.<sup>150</sup>

## V. CONCLUSION

Relying on the equal protection principles codified in the Maryland equal rights amendment, *In re Roberto d.B.* protects the rights of a gestational surrogate, and, more broadly, signals an important step toward recognizing and respecting the rights of women who help others achieve the desire to be a parent.<sup>151</sup> As assisted reproduction continues to challenge gender norms and traditional family structures, and more courts are faced with novel questions of law presented by the use of assisted reproductive technology, the courts will be well-served by *In re Roberto d.B.*'s application of equal protection principles to gestational surrogacy because such principles will become increasingly relevant to interpretations of parentage statutes.<sup>152</sup>

In the years and decades to come, science will only further advance, resulting in greater access to and use of assisted reproductive technologies.<sup>153</sup> With advancing medical science comes greater legal

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*But see* Wharton, *supra* note 142, at 1203 (asserting that the combination of an emerging conservative majority on the U.S. Supreme Court and the insulation of sex discrimination from heightened scrutiny under the Fourteenth Amendment impacts women more heavily than men in areas of reproduction).

149. *See* Wharton, *supra* note 142, at 1214 (explaining that legal scholars use the fact that the Fourteenth Amendment was meant to prohibit racial discrimination, not sex discrimination, to justify the less rigorous standard of review for sex discrimination under it, but concluding that the difference in standards reflects a pervasive intuition that the problem of sex discrimination is not as grave, harmful, or significant in American history as that of race discrimination).

150. *See In re Roberto d.B.*, 923 A.2d 115, 123 n.15 (Md. 2007) (explaining that Maryland courts interpret the Maryland equal rights amendment to require the application of a strict scrutiny standard when reviewing gender-based discrimination claims).

151. *See id.* at 118.

152. *See* Dalton, *supra* note 61, at 263 (arguing that courts construct parenthood as a gendered status by inappropriately using traditional, biological reproduction as the benchmark against which all parents are judged, and determining that technological developments resulting in nontraditional paths to parenthood make non-gendered, equality-based analyses important to legal determinations of parenthood because assisted reproductive technologies challenge traditional understandings of parenthood).

153. *See* Shultz, *supra* note 127, at 396 (asserting that objections to assisted

responsibility to ensure that all those choosing assisted reproductive technologies to create a family have adequate legal protections. Moreover, because assisted reproduction frequently involves parties other than the intended parent or parents, the law must not and cannot ignore the rights of such third parties.<sup>154</sup> As legislators adapt family law—paternity statutes, surrogacy laws, and statutes regulating pre-birth parentage orders—to reflect new and increasingly used medical science, legislators must consider how to best frame the law to protect heterosexual, two-parent families, same-sex or single-parent families, and any third parties that may play a part in creating such families.<sup>155</sup> Any legal standard guiding adjudications of parentage must apply equally to men and women, as well as to traditional and nontraditional families, or else the law risks favoring convention over innovation, the past over the future.

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reproductive technology range from fear that human, scientific control of procreation represents arrogance, to anxiety about the depersonalization of sex, procreation, and childrearing, and concluding that whether individuals will be allowed access to the range of choices now scientifically possible depends on resolution of public debate regarding how the law should accommodate new understandings of parenthood).

154. See Hurwitz, *supra* note 69, at 132 (observing that from 1992 to 1996 births of children conceived from donor eggs grew at a compound annual rate of twenty-five percent and from 1993 to 1996 births of children carried by gestational surrogates increased at a compound annual rate of thirty-four percent).

155. See *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1137 (Mass. 2001) (finding that existing Massachusetts parentage statutes are an inadequate and inappropriate vehicle through which to resolve parentage determinations of children born through gestational surrogacy because those statutes do not consider reproductive advances made in recent years); see also Jane C. Murphy, *Protecting Children by Preserving Parenthood*, 14 WM. & MARY BILL RTS. J. 969, 983 (2006) (asserting that designing an ideal, uniform parentage statute will not address all of the complex political, socioeconomic, and scientific issues that affect the legal recognition of parentage, and concluding that legal reform must be comprehensive).