

The New Face of Birth Tourism: Chinese Nationals, American Surrogates, and Birthright Citizenship

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KEY TAKEAWAYS

Lax U.S. laws governing international surrogacy allow foreign nationals, including those from China, to “rent a womb” from American women with little oversight.

The resulting children gain and maintain the full rights of American citizenship through a dubious interpretation of the Fourteenth Amendment.

Such cross-border surrogacy for hire is not regulated at the national level in the U.S., and about half of U.S. states openly encourage this industry.

When parents prepare for the birth of a child, it is common to research the best hospital or birth center. But imagine foreign nationals going so far as to ask which *country* they should choose when deciding where to conceive and give birth to a child. The U.S. already has a problem with birth tourism when foreign women in late pregnancy enter the United States on tourist visas or illegally to give birth, thereby giving their children U.S. citizenship. Now foreign nationals have another “pathway”—through permissive U.S. surrogacy laws.¹

Lax U.S. laws governing international surrogacy allow foreign nationals, including those of states hostile to our interests or with abysmal human-rights records like China, to “rent a womb” from American women. By combining “ingredients”—egg and sperm—foreign couples can contract out nearly every step of

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procreation with little oversight. The resulting children gain and maintain the full rights of American citizenship through a dubious interpretation of the Fourteenth Amendment.

While banned in several other countries, such cross-border surrogacy for hire is not regulated at the national level in the U.S. Worse, about half of U.S. states openly encourage this industry.

International Commercial Surrogacy

Commercial surrogacy is a highly lucrative form of third-party reproduction. It involves hiring a woman to gestate a child for a fee—up to \$60,000. In international commercial surrogacy, the intended parents are foreign nationals who use a surrogate in or transported to the United States. No federal laws govern this practice, except for a few Food and Drug Administration regulations on the cryopreservation and transportation of reproductive material from one nation to another. All told, many foreign nationals prefer to come to the United States for the entirety of their fertility treatments rather than shipping their egg and sperm here; they are even free to ship a foreign national to be the carrier along with them, although this is likely rare.

Surrogacy agencies in the United States serve as mediators between the intended parents and the surrogate, the *in vitro* fertilization lab, and other necessary services. Many states, such as California, New York, Washington, Florida, and Michigan, have detailed surrogacy laws and Uniform Parentage Acts that preemptively list the intended parents on the birth certificate. This occurs whether the intended parents are biologically related or not biologically related to the child.

Given the United States' current interpretation of birthright citizenship under the Fourteenth Amendment, a surrogate-born child gains a birth certificate from the state in which the child was born and with it the full rights of U.S. citizenship at birth. These rights include the right to apply for a Social Security number and a passport. This applies even if the child's genetic and legal parents are foreign nationals who intend to raise them in their country of origin. With no regulations or tracking data in place, U.S. authorities have no idea who these children or their parents are.²

Many countries, including Australia, Brazil, Britain, Canada, China, Denmark, France, Germany, India, Italy, Nepal, New Zealand, Portugal, Spain, Thailand, and Taiwan, ban international commercial surrogacy altogether. They recognize the potential harms of international surrogacy for the surrogate mother and the child she bears with countless examples of exploitation, neglect, and little regard for the child involved. A few nations,

like Mexico, allow altruistic (unpaid) international surrogacy. Other nations lack reliable access to reproductive technology and laws to govern the practice either way.

The Rent-a-Womb Industry: From China to the United States

In October 2023, the American Society for Reproductive Medicine (ASRM) released an illuminating report detailing the demographic makeup of parties to international commercial surrogacy contracts.³ Drawn from the Assisted Reproductive Technology Clinic Outcome Reporting System for the years from 2014–2020, the study examined the number of gestational carrier cycles performed in the United States. “Gestational carrier cycles” refers to the number of attempted implantations of an embryo into a surrogate. In this study, the intended parents were foreign nationals who traveled to the United States to conceive and gestate their child in an American surrogate.

While we don’t know exactly how many children have been born in the United States to foreign nationals using American surrogates, the ASRM report does tell us how many times foreign nationals tried.⁴ In recent years, the number of surrogacy cycles increased from 3,538 cycles in 2014 to 8,145 cycles in 2019. In 2020, the total number of cycles decreased marginally to 6,909 because of travel restrictions related to COVID-19.

The report found that the international “rent-a-womb” industry is disproportionately fueled by Chinese nationals (13.4 percent) with France (2.9 percent) as the next highest nationality represented.

Of the foreign nationals, the purchasing parents were most likely to be Asian men over the age of 42. Foreign nationals in the report are also far more likely (75 percent vs. 54 percent of domestic intended parents) to use preimplantation genetic testing. This allows intended parents to select the “ideal” embryo based on the sex of the child. Parents may also use preimplantation genetic testing to destroy embryos with genetic problems such as Tay Sachs disease, Down syndrome, or cystic fibrosis. Additionally, 75 percent of foreign intended parents used clinics in California.

These findings confirm what anecdotal data already indicated: Foreign nationals, of which Chinese nationals represent the largest percentage, are choosing states with the most permissive surrogacy laws. Why is China such a large customer?

Commercial surrogacy is illegal in China. In 2016, China lifted its restrictive one-child policy, but little changed in the childbearing outcomes of its citizens. Desperate to spur childbearing amid a looming demographic

crisis, some provinces have even lifted restrictions that made it difficult and costly for children of unmarried parents to obtain a *hukou*—the household registration document that largely determines the child’s access to education and social services. The changes enable unmarried men and women to bear children without a financial penalty. This opened the door further for the Chinese to commission surrogate-born children in the United States. Nevertheless, birth rates continue to decline.

Of those Chinese men and women who desire more children, many are past childbearing age, cannot find a willing partner, or are dealing with other fertility issues. Many clients hiring surrogates in the United States are no doubt well-meaning actors who simply desire a child to love that would also carry on their family name and take care of them in their old age—responsibilities traditionally given to offspring in China. But surrogacy itself perpetuates inequalities in childbearing as only wealthy Chinese can afford this option, and no laws protect the involved parties—the surrogate mother, the child, or the intended parents—from abuse by bad actors.

Fertility organizations and agencies in the U.S. encourage this international market with China. The ASRM, for example, has a Chinese Special Interest Group that aims to “provide opportunities for further training, research, and clinical studies in the field of reproductive medicine within and outside China” and “promote the exchange of information among physicians and scientists of Chinese origin within and outside China and among the general members of the ASRM.”⁵

This working group is open to all members of the ASRM and specifically fosters research and the exchange of information on reproductive medicine with China. Further highlighting how close this relationship is between the American Society for Reproductive Medicine and China, the 2023–2024 chairman of this special interest group is a Chinese national who works at a leading university in mainland China.

Given California’s proximity to Asia and its permissive surrogacy regime, a review of top agencies in the Golden State shows extensive connections between American surrogacy agencies and China. Many websites offer language options in English and Mandarin or even in Mandarin only; employ doctors, administrators, and case workers who hail from China; and in some instances show two office locations: one in California and one in mainland China.

As detailed in a report for *The Federalist*, the commercial surrogacy market is deeply ingrained in both America and China.⁶

The Chinese “rent-a-womb” industry is now big business—especially in California. Many fertility facilities in the Golden State⁷ boast that they’re a “top

destination for international surrogacy thanks to the favorable legal, societal, and medical conditions of the United States.”

This should come as no surprise. The Los Angeles Times⁸ has covered the phenomenon as far back as 2012. NPR has filed multiple stories since 2014 (here,⁹ here,¹⁰ here,¹¹ here,¹² and here¹³). In 2019, The New York Times published a Leslie Tai op-ed¹⁴—and her documentary film¹⁵—about a California surrogacy facility that targets Chinese nationals. CNN interviewed a California surrogate about her experience carrying a child for Chinese nationals.¹⁶ So have local media outlets, not just in California,¹⁷ but in Phoenix¹⁸ and elsewhere.

It’s now common for surrogacy agencies in California¹⁹ to offer website language options in Mandarin.²⁰ In many cases, the Mandarin-language version offers different videos, images, and text. Facilities with strong ties to China through residency,²¹ education, or employment history are also common.

Even though surrogacy is illegal in China, three California facilities — Global Fertility,²² MLang Surrogacy,²³ and Sunshine Surrogacy²⁴—list offices in China. Another California agency, Angels Creation Reproductive Center,²⁵ shows an office in Japan which, given the website’s Mandarin language option, might be a front for Chinese clients.

As one Chinese national said in an interview with NPR, “as long as you know what you want and you have the money, having children in the U.S. will always bring advantages.”²⁶ The primary one? U.S. citizenship.²⁷ Once the surrogate-born U.S. citizen children turn 21, subject to some residency requirement in the U.S., they can petition for their parents and siblings to receive immigrant visas.

National Security, Citizenship, and Sovereignty Issues

Section 1 of the Fourteenth Amendment of the U.S. Constitution provides that “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state where they reside.” Heritage Foundation legal experts believe that it is incorrect to interpret this to mean that all children born in the United States, regardless of their parents’ nationality, are necessarily citizens. The Fourteenth Amendment was passed in the aftermath of the Civil War to guarantee the citizenship of freed slaves. In the era before air travel, application of birth-right citizenship to visitors was marginal.

Heritage Foundation legal scholars Amy Swearer and Hans von Spakovsky argue that, based on the legislative history at the time, the Fourteenth Amendment's birthright citizenship excludes those only temporarily present in the country. In their examination of the legal history, Swearer and von Spakovsky conclude that "neither the Supreme Court nor Congress has clarified that the U.S.-born children of illegal or non-permanent resident aliens are U.S. citizens." As a result, "the president has the constitutional authority to...direct agencies to issue passports, Social Security numbers, etc., only to those whose status as citizens is clear under the current law."²⁸

There would doubtless be legal challenges. To preempt lawsuits, Congress could legislate that for (and only for) the purpose of acquiring U.S. citizenship, the phrase "subject to the jurisdiction thereof" in the Fourteenth Amendment does not apply to people whose parents, at the time of their birth, were citizens of other nations. The proposed law could specify that to acquire citizenship at birth in the United States, a person would need to have at least one U.S. citizen parent at the time of birth.

Policy Recommendations

As noted at the outset, cross-border surrogacy for hire, although banned in several other countries, is not regulated at the national level in the U.S. Worse, about half of U.S. states openly encourage this industry. Congress therefore should:

- **Ban** international commercial surrogacy where the intended parents are foreign nationals who contract with a surrogate in the United States;
- **Pass** a law that mandates accurate reporting of commercial surrogacy contracts and contracting parties in the United States; and
- **Require**, through the Centers for Disease Control and Prevention or another relevant agency, that surrogacy agencies track and submit data on live births that result from surrogacy contracts and include the client's country of origin.

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