

Equality, Gestational Erasure, and the Constitutional Law of Parenthood

by

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Abstract

This article calls into question the abundance of academic writing that criticizes, as inconsistent with equality principles, the constitutional law of parenthood. Some of this criticism, concerned with gender stereotypes, argues that the current doctrine's preferential treatment of gestational mothers inexcusably discriminates against fathers. Other critics focus on how the Supreme Court's approach to gestational investment excludes same sex partners from parental rights. Both of these critiques argue that the work of gestation has been overvalued. They both endorse a kind of gestational erasure, but they differ sharply on where they root the essence of parenthood. Those concerned about equal treatment for fathers root parenthood in genetics. Those concerned about equal treatment for same sex partners root parenthood in parental investment. This article highlights the tension between these positions and challenges those willing to erase the relevance of gestation at both a normative and practical level. It explains how discounting the relevance of gestation will have serious consequences for the law of abortion, adoption, and custody, placing already vulnerable women at more risk of being controlled by men they want to escape. Further, this article argues that the current constitutional doctrine, which recognizes the salience of gestation, necessarily incorporates what LGBTQ advocates argue must be incorporated into decisions about parenthood: parental investment. What is inconsistent with LGBTQ equality in parenthood is not a regime that recognizes gestational investment, but one that reifies the genetic essentialism on which the gender-stereotype critique relies.

INTRODUCTION

In the last ten years there has been a flurry of academic writing criticizing the constitutional law of parenthood. This scholar-

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ship assails what it sees as “separate spheres ideology,”¹ “maternalist norms,”² “regressive tendencies,”³ and, the Supreme Court’s “partial and incomplete”⁴ approach to gender equality in the parenthood context. In short, this scholarship argues that the Supreme Court has used biological differences between men and women to justify preferential parental treatment for mothers. The last decade has also seen remarkable movement in state courts towards securing greater parental rights for same sex partners of legal parents. This change has also been rooted in notions of equality. An emerging body of law suggests that same sex partners should be treated as opposite sex partners in the law of parenthood.

These two strands of this equality reasoning, one centered on a critique of treating fathers differently than mothers and the other centered on a critique of treating same sex parents differently than opposite sex parents, share an interest in discounting what the Supreme Court has, to date, been willing to reward: gestational labor. But they differ sharply on where they root the essence of legal parenthood. Those concerned about equal treatment for fathers inevitably root legal parenthood in genetics: parenthood is a genetic fact; everything else is social construction. Those concerned about equality for same sex parents root legal parenthood in function: parenting is a verb; relationship, not genes, should matter to questions of parenthood. There is thus an inherent tension between the arguments that suggest mothers and fathers should automatically be treated equally and those that suggest same sex partners must be treated as opposite sex partners are.

The response to this tension in state legislatures and courts has been mostly, though not uniformly, to expand the class of potential parents to enable more men to claim parenthood by virtue of genetics and more same sex parents to claim

¹ Cary Franklin, *Biological Warfare: Constitutional Conflict over ‘Inherent Differences’ Between the Sexes*, 693 SUP. CT. REV. 1, 14 (2018).

² Kristin Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race and Nation*, 123 YALE L.J. 2134, 2205 (2014).

³ Courtney M. Cahill, *The New Maternity*, 133 HARV. L. REV. 2221, 2231(2020).

⁴ Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2268 (2017).

parenthood based on function. For instance, notwithstanding Supreme Court precedent sanctioning the marital presumption of paternity, most states allow a genetic father to sue for paternity in order to overcome the marital presumption.⁵ The 2017 Uniform Parentage Act and many state courts now allow an adult who has functioned as a parent to sue for parental rights even if the legal parent does not want to share them.⁶ In the language of equality scholarship, states have responded to equality arguments by ratcheting up: affording the privileges that were formerly reserved for a few (those who gestated children) to more potential legal parents.⁷ In ratcheting up in this manner, current trends have diminished the salience of gestational labor.

This article challenges, at both a normative and practical level, those willing to discount gestational investment. It explains how discounting the relevance of gestation will have serious consequences for the law of abortion, adoption, and custody, placing already vulnerable women at more risk of being controlled by men they want to escape. Further, and possibly more controversially, this article argues that the current constitutional doctrine, which recognizes the salience of gestation, necessarily incorporates what LGBTQ advocates argue must be incorporated into decisions about parenthood: parental investment. Honoring gestation as investment is a means of recognizing parenthood as a verb. Ultimately, conceptualizing parenthood as a set of rights that flow from the obligations one has accepted, not a status one acquires through sex, allows the law to incorporate new family forms, honor those who take care of children,

⁵ See, e.g., 2017 UNIF. PARENTAGE ACT §§ 602, 607 (giving standing to a man alleging himself to be the genetic father); see also Ill. Parentage Act of 2015, 750 ILL. COMP. STAT. §§ 46/602, 46/617 (giving standing to a man alleging himself to be the genetic father and allowing genetic testing to overcome the presumption of parentage based on marriage or a previous adjudication of parentage).

⁶ 2017 UNIF. PARENTAGE ACT § 609 (establishing standing in a parentage action of an individual who can establish the elements of de facto parentage).

⁷ For more on ratcheting up and down, see Lois Seidman, *The Ratchet Wreck, Equality's Leveling Down Problem*, 2330 GEO. FAC. PUBL'NS 1 (2020); see also Deborah Brake, *When Equality Leave Everyone Worse Off: The Problem of Leveling Down*, 46 WM. & MARY L. REV. 513 (2004).

and render irrelevant the moralism that has traditionally linked legal parenthood to sexual activity.

The article proceeds as follows. Part I summarizes both the Supreme Court doctrine that vests greater rights in the gestator at birth and the gender-stereotype critique of that doctrine. It unpacks how much the gender-stereotype critique relies on genetic essentialism to confer parental status and it explains how the gender-stereotype critique perpetuates a different kind of sex inequality, one that undervalues and ignores the work that women have disproportionately done. From caretaking to clerical work to emotional support, the law – and many other disciplines – have a long history of treating what women do as somehow inevitable, unworthy of formal recognition or compensation.⁸ The Supreme Court's attention to gestational labor has been an exception to that pattern. Part I concludes with a discussion of paternity law. It is paternity law that best justifies genetics as the root of parenthood, but as Part I explains, paternity law is a normatively and practically feeble foundation on which to rest a modern or workable approach to parental rights.

Part I is descriptive and then normative. Part II takes a predictive turn and explores the likely ramifications, for the law of abortion, adoption, and custody, of elevating genetics over gestation as the source of parenthood. It highlights how the story that the gender-stereotype critique tells (or refuses to tell) about gestation bears a striking resemblance to the stories that antiabortion activists tell (or refuse to tell) about gestation, and it demonstrates how the gender-stereotype critique leads to a legal regime in which gestators have fewer rights to terminate their

⁸ See Katharine B. Silbaugh, *Turning Labor into Love: Housework and the Law*, 99 *Nw. U.L. REV.* 1, 36-54 (1996) (exploring the numerous ways in which courts and governmental agencies treat women's domestic labor as freely given, not work entitled to compensation); see also ANN OAKLEY, *THE SOCIOLOGY OF HOUSEWORK* (1972) (exploring how sociology as a discipline refused to consider women's work as a subject worthy of study); Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein and Tushnet's Constitutional Law Commentary*, 89 *COLUM. L. REV.* 264, 267-69 (1989) (detailing how traditional treatment of women's inequality fails to address how women's work is routinely ignored as work); Nancy C. Staudt, *Taxing Housework*, 84 *GEO. L.J.* 1571, 1589-1605 (1996) (explaining how the failure to tax housework bars women from the kind of wage protections that men enjoy).

pregnancy, less ability to extinguish their parental rights if they want their child to be adopted, and significantly less freedom to escape an unwanted connection to a man with whom they once had sex. Part II concludes with a discussion of how those who advocate for greater father's rights in the custody context rely on the same genetic essentialism that the gender-stereotype technique does. Reifying that genetic essentialism will lead courts to where fathers' rights groups want to go, away from basing parental determinations on demonstrated parental investment.

Part III returns to the tension between the gender essentialism of the gender-stereotype critique and the factors that LGBTQ equality advocates say should be the source of parenthood. Part III argues that it is not gestation, but genetics, that should be dismissed as a source of parenthood. Contrary to those who argue, on behalf of LGBTQ equality, that honoring gestation is part of the problem for LGBTQ parents, Part III suggests that honoring gestation is more aptly seen as part of the solution for a parental regime that honors those who invest in children. At birth, it is the gestator who has indisputably invested more.⁹ It is the equality claims of genetic fathers, much more than the traditional deference to gestational investment, that pose the greatest threat to LGBTQ parenting equality. If the law is to take parental investment seriously in conferring parental rights, it should take gestational investment seriously as well. This does not give the gestator greater parental rights forever, only during the time when her relative investment is so much greater.¹⁰

⁹ It is possible that an expectant non-gestating parent spends a great deal of money on behalf of the yet unborn child or uses labor to construct goods that the child would eventually use, but any of that investment would have value regardless of the child's eventual existence. Furniture and diapers, not to mention investing in making oneself healthier for the sake of the coming child, have value that exists apart from the child. The gestator's investment has no comparable external value. She invests her time and labor and health for nothing in return except the birth of the child.

¹⁰ See *infra* text accompanying notes 13-16 (discussion of unwed father cases). Moreover, as discussed *infra* text accompanying note 129, the vast majority of gestators consent to share parental rights (with partners) before birth or just after. So vesting greater rights in the gestator only when she does not consent to share only affects those situations in which the gestator has reasons not to share.

Part IV concludes by suggesting that ultimately, though courts and recent parentage acts appear to be ratcheting up by treating more potential parents like gestators, an embrace of gestational erasure may well result in a kind of ratcheting down - treating no one as particularly privileged with regard to parental status. If current trends continue, parentage questions may just become best interest of the child free-for-alls in which no one gets preferential treatment as a parent. Under such a regime, it is unlikely that genetic fathers will emerge with significantly more rights, though gestators who want to escape toxic relationships with former sexual partners will be significantly worse off and, because they are not genetically related, potential LGBTQ parents will still be at a comparative disadvantage for parenthood because they will never be able to claim the genetic connection in which genetic fathers root their entitlement.

I. Constitutional Parental Rights and the Gender-stereotype Critique

A. The Doctrine and Its Critics

In an (in)famous line of cases, the Supreme Court vested primary parental rights of a sexually conceived child born to an unmarried woman in the gestator of the child.¹¹ Without the legal act of marriage serving as an agreement to share parental status, the Court has held that unwed fathers can be treated differently than unwed mothers, at least up until the time that the

¹¹ The qualifiers “sexually conceived” and “unmarried” are critically important. Parental rights for children produced non-sexually are governed by reproductive technology contracts (sperm donation or surrogacy), not constitutional law. To date the Supreme Court has not suggested any constitutional problem with those contracts. Marriage is and always has been treated as an agreement that included the rights and obligations of parenthood for the spouse of the woman who gave birth during the marriage. See Katharine K. Baker, *Bargaining or Biology - The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL’Y 1, 25 (discussing the way in which the marital presumption of paternity, which for centuries was all but irrefutable, has always treated marriage as a kind of contract for parental status of any children born to the marriage). For purposes of this article, it is important to underscore that both men and same sex partners can secure equal parental rights at birth either through contract or marriage. See *infra* text accompanying notes 125-126.

biological mother's and the genetic father's investment in the children can be considered similar.¹² Investing in a post-birth relationship with his genetic issue makes a genetic father similarly situated to the woman who gave birth to the child and has continued to rear it.¹³ But at birth, he is not similarly situated.

In *Caban v. Mohammed*,¹⁴ the Court found that because the father had, with the consent of the mother, “come forward and participated in the rearing of the child[ren]” (aged 4 and 6), he was entitled to equal treatment as a parent.¹⁵ The mother's greater gestational investment became less important over time because the effort both genetic parents put into parenting after the children were born diminished the relative weight of the mother's greater initial contribution. In contrast, the father in *Lehr v. Robertson*¹⁶ had spent no time with his child after it was born and the Court found the father and mother were dissimilarly situated. The biological mother had blocked the genetic father's access to the child and the relationship between the two genetic parents had clearly soured. Because he was never able to develop a relationship with his genetic issue, Mr. Lehr was never able to render himself similarly situated to the mother. Equal protection did not demand comparable treatment.

Equality champions question cases like *Lehr* and a line of citizenship cases that suggest biological mothers can be treated differently than genetic fathers.¹⁷ Professor Douglas NeJaime questions the “organiz[ation of] family around the biological

¹² The unwed genetic fathers who lost their constitutional claims to parental status include Leon Quilloin, *Quilloin v. Wolcott*, 434 U.S. 246 (1978); Jonathon Lehr, *Lehr v. Robertson*, 463 U.S. 248 (1983); Michael H., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

¹³ In *Michael H.*, 491 U.S. 110, a plurality of the Court endorsed the traditional exception to this premise. If the law has already conferred parental status on the husband of the mother and neither husband nor wife wants to disrupt the legal status of the assigned parents, then the genetic father cannot necessarily establish paternity, even if he has a relationship with the child.

¹⁴ 441 U.S. 380 (1979).

¹⁵ *Id.* at 392-93.

¹⁶ 463 U.S. 248 (1983).

¹⁷ For explication and criticism of the citizenship cases, see Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 705-06 (2014) (arguing that the citizenship cases use a “rigid notion of biological sex and outdated and stereotypical conceptions of fathering”); see also Collins, *supra* note 2.

mother”¹⁸ because of its “troubling implications in terms of both gender and sexual orientation.”¹⁹ Professor Clare Huntington, who has argued that unwed parents should have equal parenting time at birth,²⁰ questions the values that influence what she calls “deeply normative judgments, for example that giving birth creates a connection between mother and child.”²¹ Comparably, Professor Cary Franklin criticizes citizenship cases that allow a genetic father who had a relationship with his child (though had not legally registered as a father) to be treated differently than a biological mother “who long ago lost touch with, or indeed never even met” her child.²² The citizenship cases, like the unwed father cases, treat most mothers and fathers differently by making it easier for a U.S. citizen gestator than an unwed U.S. citizen genetic father to convey citizenship on children.²³ Professor Kristin Collins suggests this disparate treatment is rooted in “maternalist norms.”²⁴ Professor Courtney Cahill suggests that the constitutional law of maternity is “regressive” because of the way in which it makes assumptions about mothers’ connection to children whom they gestate.²⁵

All of these authors argue that by vesting greater parental control in the person who has given birth, courts reinforce problematic stereotypes about women’s caretaking ability and women’s deeper bonds with children. For purposes of this article, one can concede that vesting greater rights in a gestator may reinforce some of these stereotypes. If there were no independent reason for vesting greater rights in the gestator, reinforcing those stereotypes would arguably be cause for changing the doctrine. But, as the next section will detail, the preferential treatment of

¹⁸ NeJaime, *supra* note 4, at 2314.

¹⁹ *Id.* at 2309.

²⁰ Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 227 (2015).

²¹ Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 292 (2018).

²² Franklin, *supra* note 1, at 27.

²³ See *Nguyen v. INS*, 533 U.S. 53, 57 (2001); *Miller v. Albright*, 523 U.S. 420, 441 (1998) (both holding that a genetic child of an American father who was not born in the United States does not have a right based on his genetic parentage to be considered a citizen).

²⁴ Collins, *supra* note 2, at 2205.

²⁵ Cahill, *supra* note 3, at 2229.

gestators is solidly grounded in valid notions of desert. Vesting gestators with greater rights at birth reflects gestators' wildly disproportionate investment in pregnancy.

B. *Gestational Investment and the Attempt to Erase It*

The routine, normal costs that a gestator incurs during pregnancy are breast pain, dizziness, fatigue, insomnia, hemorrhoids, leg cramps, varicose veins, urinary incontinence, and nausea – often for weeks at a time and only sometimes limited to mornings.²⁶ Common complications from pregnancy, complications that put the gestational woman's health and/or life at risk, include anemia, depression, ectopic pregnancy, gestational diabetes, sciatica, high blood pressure, and preclampsia/toxemia.²⁷ Potential genetic fathers and same-sex partners incur none of these symptoms and risks, nor do they have to curtail alcohol or drug use, monitor their diet, take appropriate vitamins, get sufficient sleep, or stay off their feet. Gestators are advised to attend at least sixteen medical appointments over the course of nine months and there are usually extra ultrasounds and "routine" emergency visits necessitated by odd pains, curious wetness, spotting, or bleeding.

Just as important, there are significant criminal and civil ramifications to being pregnant.²⁸ Genetic fathers and other potential parents either physically cannot, or practically never are, charged with these crimes or civil violations. In some jurisdictions, gestators are prosecuted for crimes like manslaughter and endangering a fetus because they take recreational drugs or

²⁶ See generally RONALD S. GIBBS ET AL., DANFORTH'S OBSTETRICS AND GYNECOLOGY (10th ed. 2008) (detailing the very long list of physical ramifications of pregnancy, many of which are very unpleasant).

²⁷ See U.S. Dep't Health & Human Servs., *Pregnancy Complications*, WOMEN'S HEALTH, <https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/pregnancy-complications> (last visited May 8, 2022).

²⁸ Several commentators have argued that the law's regulation of pregnant women's behavior itself violates equality principles. See, for instance, MICHELLE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* (2018). I take no position on the validity of those laws here. My point is merely that, at present, there are profoundly asymmetrical legal duties associated with impending parenthood.

drink too much while pregnant.²⁹ These gestators may or may not be committing these acts with another expectant parent, drinking and drugging together, but the other expectant parents are not prosecuted. Their inability or decision not to get pregnant translates into an inability to commit the crimes of endangerment. In the civil arena, judges in some states commit addicted pregnant people to mental health facilities, even though non-pregnant addicts would never be committed to such facilities.³⁰ Then there are the gestators who believe they are less far along in their pregnancy than they actually are, and take abortifacients, later to be prosecuted criminally for manslaughter and sometimes murder.³¹ Gestators, usually young girls, in denial about their pregnancy, not sure what is happening to them, who give birth alone and scared, usually into a toilet, are prosecuted for murder and sent to jail.³² Presumably, if the genetic fathers were with these young women when they gave birth into toilets they could be prosecuted as accomplices, but that virtually never happens. Genetic fathers, same-sex partners, parents, uncles, friends - everyone but the gestator - can distance themselves from the fetuses and the responsibilities that the law imposes on those who gestate them. Gestators are uniquely responsible as a matter of criminal and civil law for the health of the babies they are producing.

To suggest, as most equality proponents do, that gestation should not be relevant to parental rights is to erase this labor, performed exclusively by women (and the incredibly few trans pregnant men who now gestate), and ignore the physical and legal risk that gestators alone incur. Perhaps it is a sign of great progress in our battle against stereotypes that we can now think that a woman who gestated a child for nine months, ate for it, slept for it, risked her own life for it, felt it kick and summersault and hiccup, has no “connection”³³ with and “never met”³⁴ the

²⁹ Lynn Paltrow & Jeanne Flaven, *Arrests of and Forced Interventions on Pregnant Women in the United States*, 38 J. HEALTH POLS., POL'Y & L. 299, 313-14 (2013).

³⁰ *Id.*

³¹ *Id.*

³² For these accounts in the women's own words, see CHERYL MEYER & MICHELLE OBERMAN, *WHEN MOTHERS KILL: INTERVIEWS FROM PRISON* (2008).

³³ See Huntington, *supra* note 21.

child, but those are remarkable statements nonetheless. Perhaps gestating women do not necessarily feel an emotional bond with the infant to whom they give birth – but they clearly have felt the child. They had no choice. The connection between gestator and child is hardly just “normative.”³⁵ And no one else, even if they have made a genetic contribution, has been connected to the child in the same way.

Professor NeJaime questions the “gendered logic of reproductive biology”³⁶ and thereby implies it is a cerebral, social construction, i.e. “logic,” that has gendered the law’s approach to reproduction. But of course it is not just logic that genders reproduction, it is gestation. NeJaime rejects the relevance of gestation and celebrates the acceptance of surrogacy contracts because the law’s willingness to sever gestation from parental status for surrogates “undermines the salience of a key justification [i.e. gestation] for gender-differentiated parental recognition.”³⁷ But gestational labor is treated very differently in surrogacy contracts than it is in cases of sexual reproduction.³⁸ Gestational surrogates can get paid for their gestational labor. Gestational mothers who conceive sexually cannot. NeJaime elides this critical distinction. The idea that we should celebrate surrogacy contracts because they undermine the salience of gestation for parenthood runs the risk of discouraging attention to the salience of gestation in the 98.7% of pregnancies that result from sexual intercourse.³⁹ If a child is conceived sexually neither genetic parent can alienate their parental rights pre-birth and they cannot receive compensation for alienating their parental

³⁴ See Franklin, *supra* note 1, at 27.

³⁵ See Huntington, *supra* note 21.

³⁶ See NeJaime, *supra* note 4, at 2314.

³⁷ *Id.* at 2304.

³⁸ See Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. Rev. 2037, 2053-56 (discussing how the Uniform Parentage Act and case law assume without explaining that contracts should be enforced in situations involving non-sexual conception, but not in cases of sexual conception).

³⁹ For the statistics on how many children are conceived sexually, see Centers for Disease Control, *Assisted Reproduction, 2016 ART Reports*, <https://mail.google.com/mail/u/0/#search/jwenger%40kentlaw.iit.edu/p2?projector=1> (“Today, approximately 1.7% of infants in the United States are conceived using ART”).

rights post-birth. They would be criminally responsible for baby-selling if they did so.⁴⁰ That women can now freely alienate their gestational labor, in the rare instances when they are allowed to get paid for doing so, hardly means that the law should discount the importance of gestational labor when the law prohibits women from getting paid for it.

Professors David Fontana and Naomi Schoenbaum, building on the work of Professor Dara Purvis, argue that some men do make investments comparable to what the gestator does during gestation. Professor Purvis suggests that men should be awarded parental rights at birth if, prior to birth, the intended father made an investment, by, for instance, requesting paternity leave and/or acquiring furniture and/or reducing safety risks to the child once born.⁴¹ Fontana and Schoenbaum argue that equality demands that the law take into account the work that expectant fathers do to contribute to pregnancy, work that they say includes quitting smoking, exercising their core muscles in anticipation of carrying and feeding a new baby, buying goods that the child will need, and accompanying the mother to medical appointments.⁴² They suggest that the Court's reliance on "overbroad stereotypes"⁴³ about the work men do not do has resulted in a profound mistake in the law of equality and pregnancy. Instead of comparing "a pregnant woman and a man [who can never face] similar physical complications," the law should be comparing "a pregnant woman and an expectant father."⁴⁴

⁴⁰ See, e.g., MISS. CODE § 97-3-52 (2013), This is not the place to go into a full analysis of why the law does not recognize pre-birth contracts for parental rights and responsibilities with regard to sexually produced children. Men are not allowed to sign away their parental rights in such circumstances either. Suffice it to say that such contracts are thought to encourage the commodification of children, the exploitation of women, and the abandonment of children by genetic fathers. Perhaps these policy concerns are outdated, but if the law continues to prohibit women from alienating their gestational labor for sexually produced children and starts refusing to honor their gestational labor with greater parental rights, the law will be erasing all salience of that labor.

⁴¹ Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 681 (2013) (Purvis' list of potential investments by intended fathers is more lengthy).

⁴² David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy* 119 COLUM. L. REV. 1, 33 (2019).

⁴³ *Id.* at 14.

⁴⁴ *Id.* at 25.

Certainly, non-gestator expectant parents can invest in a child they are expecting. These authors are right to celebrate the importance of non-gestators helping to share the burdens of an upcoming birth. But to suggest that such investments rise to the level of constitutional importance because they are comparable to gestational investment is an entirely different matter. There is a meaningful difference between choosing to quit smoking or drinking in solidarity with one's partner and being civilly and criminally responsible if one does not do so. There is a meaningful difference between exercising your core muscles in preparation for holding a baby, and having your core muscles overwhelmed beyond all recognition by the exponential growth in one's torso. There is a meaningful difference between accompanying someone who is cramping and spotting and being the person who is actually cramping and bleeding. Those differences are not just rooted in stereotype.

Moreover, as a matter of biology, not stereotype, the male and female investments in a zygote are not equal. Egg producers use many more resources to produce one egg than sperm producers use to produce one sperm because the egg provides the food reserves that the fertilized egg initially needs to grow.⁴⁵ Those food reserves are just as essential to the reproduction process as is the genetic parents' DNA, but the egg, and only the egg, has those food reserves. Thus, even though any child shares equal amounts of genetic material from egg and sperm providers, the female gamete contributes much more to the child than the male gamete.⁴⁶ There is disproportionate female investment even before conception. The law may choose to ignore that greater

⁴⁵ RICHARD DAWKINS, *THE SELFISH GENE* 141-42 (1976) (explaining the biological differences in male and female gametes).

⁴⁶ The market of gametes clearly rejects the notion that male and female gametes are of equal value. Men can get paid as little as \$75 for donating sperm (which can be done on a lunch break). Women get paid between \$5,000 and \$25,000 for eggs; the process involves surgery and is much more arduous. See Brooke Edwards, *The High Cost of Giving Up Your Eggs*, NYU LIVEWIRE (Apr. 30, 2007), http://journalism.nyu.edu/publishing/archives/livewire/archived/high_cost_eggs/ [<https://perma.cc/9JCF-JTL8>] (suggesting that the going rate for egg donation in New York city was \$8000 and in California certain egg donors got paid as much as \$25,000); Ethics Comm. of the Am. Soc'y for Reprod. Med., *Financial Compensation of Oocyte Donors*, 88 *FERTILITY & STERILITY* 305, 306, 308 (2007).

investment, but acknowledging that investment – that biological fact - is not a “maternalist norm.”⁴⁷ Indeed, that this fact is so little-known is a useful metaphor for illustrating how women’s greater contributions to pregnancy are rendered invisible by the focus on genetic contribution alone as the origin of parenthood. Equality frames encourage reductionist approaches to what should matter for parental status and the gender-stereotype critique assumes that the only thing that should matter is genetics, thus rendering invisible the disproportionate work that gestators do.

C. *The Unpersuasive Response of Paternity Law*

Defenders of the gender-stereotype critique might respond by noting that even if the genetic father does not participate equally in gestation, at birth – if the child was conceived sexually – he is equally responsible for the child financially. The law of paternity holds the genetic father of a sexually produced child accountable for child support once the genetic connection is established. In practice, as will be discussed more extensively below, most genetic fathers are only held responsible if the mother wants them to be,⁴⁸ but they can be held financially responsible based on genetics alone.⁴⁹

⁴⁷ See Collins, *supra* note 2.

⁴⁸ When a child is produced sexually, it is the mother alone who knows who the genetic father might be and, at least given the state of the law currently, she has considerable control over whom to share that information with. At birth, the law will automatically hold the gestator responsible for the child (unless she has signed a valid gestational surrogacy contract.) If, at birth, she has not disclosed the relevant information about the genetic father, the law has no way of knowing who the genetic father might be. Putative father registries can inform men who have registered as potential fathers about any legal proceedings involving a child whom they think they might be genetically related to, but if a man does not know that the woman with whom he had sex is pregnant, he has no way of knowing that he should register as a putative father. See, e.g., *Putative Father Registries*, ACAD. OF ADOPTION & ASSISTED REPRODUCTION ATT’YS (2018), <https://adoptionart.org/adoption/birth-expectant-parents/putative-father-registries>.

⁴⁹ See 2017 UNIF. PARENTAGE ACT (citing statutes assigning parentage based on genetics); Baker, *supra* note 38, at 2051-52 (The genetic regime “assigns parentage based on the fact that two people had sex and if that sex produced a child, there is no defense to parentage”).

As I have argued elsewhere, paternity law, and the genetic essentialism on which it relies, penalizes men for engaging in reproductive sex.⁵⁰ Paternity law holds men accountable for child support even when the sex that produced the child was procured by fraud or if the man was a victim of statutory rape.⁵¹ Contracts absolving a genetic father of responsibility for a child are enforceable if a man ejaculates into a test tube but are unenforceable if he ejaculates during intercourse.⁵² Paternity law is rooted as much in the policing of sex as in the protection of children and it imposes strict liability on men who engage in reproductive sex.

Moreover, most of the time, paternity law fails at its purported goal of privatizing dependency and getting resources to children. From its inception, paternity law has been more about protecting the public fisc than protecting children or honoring the rights of fathers.⁵³ In the United States, the extensive paternity-based child support enforcement apparatus authorized by Congress in the 1980s and 90s was established for precisely that purpose.⁵⁴ Congress began to mandate that states increase paternity enforcement as it grew increasingly worried about how much money was being spent on aid to children.⁵⁵ Congress rewards states with high paternity establishment rates because it believes that the more genetic fathers that can be identified, the less the

⁵⁰ See Baker, *supra* note 38, at 2053.

⁵¹ *Id.*

⁵² *Id.* at 2054-56; see also *Ferguson v. McKiernan*, 940 A.2d 1236, 1245 (Pa. 2007) (invoking what that court calls the “common sense distinction between reproduction via sexual intercourse and the non-sexual clinical options for conception.” The court goes on to hold that different rules for parental responsibility follow from that distinction).

⁵³ *Id.* at 2043-45 (describing the origins of rules holding the genetic progenitor responsible for the financial support of a child born to an unmarried woman). The rules came from the Pope because at that time it was local parishes, not the state, that assumed most of the responsibility for caring for the poor. *Id.*

⁵⁴ *Id.* at 2048-49 (describing Congressional action on child support enforcement in the 1970s and 80s).

⁵⁵ See Leslie J. Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1304 (citing Social Service Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (codified at 42 U.S.C. §§ 651-669 (2012))).

chance a child will become dependent on the state.⁵⁶ But the vast majority of child support that gets paid in this country gets paid by parents who willingly accepted – with the consent of the other legal parent – parental status.⁵⁷ Most of these fathers pay what they owe voluntarily.⁵⁸ The child support that does not get paid is usually owed by genetic fathers who do not have enough money to pay what the state says they owe.⁵⁹ Naming these genetic fathers as legal fathers, vesting them with the rights so that the state can impose on them obligations, does little to get resources to the children who need those resources. Eighty-eight percent of noncustodial parents who live in poverty are in arrears on child support and that arrearage constitutes a majority of the unpaid child support in this country.⁶⁰

In short, paternity law does not work. Its origins lie in a moralistic attempt to regulate extramarital sex in order to dimin-

⁵⁶ Jana Singer, *Marriage, Biology and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 252 (2006).

⁵⁷ The paternity of most children born to unmarried mothers is established in the hospital or shortly thereafter by the signing of a voluntary acknowledgement of paternity. FY2009 Annual Report to Congress, OFF. CHILD SUPPORT ENFORCEMENT (Dec. 1, 2009) (In 2009, 1.17 million of the 1.81 million children born to unwed mothers had their parentage established by a VAP). See also Ronald Mincy et al., *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 67 J. MARRIAGE & FAM. 611 (2005) (paternity of most children born to unmarried mothers is established by VAP).

⁵⁸ See Leslie J. Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 476 (demonstrating that most child support that gets paid gets paid voluntarily). Plenty of parents contest the amount of child support they owe – the dollar amount they owe may feel involuntary - but that is distinct from disputes about whether someone owes child support at all. It is possible that some men accept parental status only because they know that if the mother wanted to sue them in paternity, she could. Perhaps, if we got rid of paternity law, far fewer men would willingly accept parental responsibility. If policy-makers are worried about there being too many single mothers if we dispense with paternity law, that undercuts those who suggest that it is courts, not the fathers themselves, who are responsible for fathers' more limited time with children.

⁵⁹ Tonya Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 646 (2012) (“About 26% of noncustodial fathers are poor (about 2.8 million) and the vast majority of this group (approximately 88%) does not pay any child support”).

⁶⁰ *Id.* at 646, 649.

ish the state's responsibility for children and it does not deliver on its espoused goal of getting more resources to children. It is a remarkably thin reed on which to rest the argument that genetic fathers and gestators should be treated equally at birth.

II. The Foreseeable Consequences of Gestational Erasure

As this article goes to press, the dangers of rooting parenthood in genetics and discounting the relevance of gestation, even in the name of equality, are paramount. In a post *Roe v. Wade*⁶¹ world, with state legislatures having much more power over abortion regulation, how the law treats the salience of gestation becomes critical to abortion law. No doubt, conservative state legislatures will simply outlaw as much abortion as they can. But other states, particularly progressive states that may be most attuned to concerns over gender stereotypes, will have to confront issues and balancing tests that *Roe* had previously settled. As state legislatures take on the responsibility of weighing the relative interests at stake in abortion regulation, they will hear a notable overlap between the rhetoric of the anti-abortion movement and the rhetoric of the gender-stereotype critique regarding the salience of gestation. This rhetoric may influence state legislators' willingness to protect the power that the Supreme Court has previously afforded to gestators. This could have ramifications not only for abortion law, but for adoption and custody law as well.

A. *The Rhetorical Parallels Regarding Gestational Erasure*

Most people are familiar with the story that anti-abortionists tell with pictures. Many of us have seen the billboards or the blogs depicting a grainy picture of something that looks like a very small baby inside a sack. There is only one character in this story, only one image in the picture: the fetus.⁶² What one never

⁶¹ 410 U.S. 113 (1973) (finding a constitutional right to terminate a pregnancy in the first two trimesters).

⁶² The pictures provide an image that corresponds to the idea that the fetus is a child. In fact, the mass of cells at the time most abortions are performed, in the first weeks of pregnancy, looks nothing like those pictures, which usually convey an image taken at 19 weeks of pregnancy. See CELESTE M. CON-

sees on the billboards is the corresponding pictures or descriptions of a woman at 10 or 15 or 20 weeks pregnant. She is growing and changing just as the fetus is, but her evolution is irrelevant to their story.

Comparably, the gender-stereotype critique, while it generally protects a gestating woman's right to bodily integrity and hence abortion, neglects to explore or explain what the process of gestation might mean for the gestator. It assumes that the investment the gestator makes is worth nothing more than the right to cease making that investment. Once she gives birth, the gender-stereotype critique suggests she sacrifices the greater right she had to control the child's destiny. Thus, birth – when the child leaves the gestator's body – becomes a kind of magic moment at which equal parental rights attach.

In relying on one magic moment – birth – as the onset of parental rights, the gender-stereotype critique shares much with the stories anti-abortionists tell about pregnancy. For anti-abortionists, the magic moment is conception. In the words of the vigorously pro-life former Surgeon General, C. Everett Koop, once sperm meets egg, “that one cell with its 46 chromosomes contains the whole genetic code . . . written in DNA molecules, that will, if not interrupted, make a human being just like you or me.”⁶³

The former Surgeon General's suggestion that gestation is a passive process, an exercise in *not interrupting*, provides a classic example of gestational erasure. For the gender-stereotype critique the magic moment is birth, not conception, but both accounts ignore the process between conception and birth.⁶⁴ Pro-

DIT, *DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE* 213 (1990). Over 91% of abortions are performed before 13 weeks, well before any fetus has matured to look like the common pictures. See Centers for Disease Control, *Abortion Surveillance Findings and Reports*, https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm (last visited May 8, 2022).

⁶³ C. Everett Koop, *A Physician Looks at Abortion*, in *THOU SHALT NOT KILL . . . THE CHRISTIAN CASE AGAINST ABORTION* 9 (Richard Ganz ed., 1978).

⁶⁴ Most proponents of the stereotype critique maintain that a gestating woman should retain the right to terminate a pregnancy, that such a right is grounded in her bodily integrity, autonomy, or a thick conception of equality that would afford women the right to terminate an unwanted pregnancy in order to participate as full market actors and citizens. See, e.g., Fontana &

life advocates argue that morality should compel us to focus on conception and ignore gestation. The gender-stereotype critique argues that equality should compel us to focus on birth and ignore gestation.

As scholars have noted before, equality frames are particularly ill-suited to analyze the reality of pregnancy. Writing from an international perspective over twenty years ago, Professor Kim Lane Scheppelle suggested that constitutionalizing the law of gestation and abortion changes how it can be presented.⁶⁵ The law, particularly constitutional law, is not good at taking into account women's "whole life situation . . . [and] . . . the many factors" with which gestators must contend.⁶⁶ The way constitutional courts resolve issues, especially equality issues, is usually through analogic reasoning; they find "other cases [that] might be reasonably judged as similar to the case at hand."⁶⁷ Scheppelle identifies two main problems with this for abortion jurisprudence. "First, there are no perfect or even reasonably good analogies to pregnancy and abortion."⁶⁸ Second, "drawing bright lines is particularly problematic because pregnancy is a gradual and developmental process."⁶⁹ Magic moments, like conception and birth, are bright lines: gradual processes on either

Schoenbaum, *supra* note 42, at 43-46 (explaining that even within their equality paradigm giving expectant fathers' rights, women retain an autonomy interest that allows her to terminate the pregnancy). For more on these theories of where women's right to abort comes from, see Ruth Bader Ginsburg, *Some Thought on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985) (suggesting that the court in *Roe* focused too much on autonomy and not enough on equality); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 274 (1992) ("Because *Roe* and its progeny treat pregnancy as a physiological problem, they obscure the extent to which . . . [it] impose[s] material deprivation and dignity injustices on those who perform its work").

⁶⁵ Kim L. Scheppelle, *Constitutionalizing Abortion*, in *ABORTION RHETORIC: PUBLIC POLICY IN CROSS-CULTURAL PERSPECTIVE* 29 (Marianne Githens & Dorothy McBride Stetson, eds, 1997) ("making abortion a constitutional question changes how abortion can be represented and how competing arguments can be staged").

⁶⁶ Condit, *supra* note 62, at 177.

⁶⁷ Scheppelle, *supra* note 65, at 47.

⁶⁸ *Id.*

⁶⁹ *Id.* at 49.

side of a bright line do not matter to magic moment analysis. This allows both sides to avoid trying to find reasonable analogies for gestation because they simply erase its relevance from their analysis.

B. *Abortion and Father's Rights*

To be clear, most gender-stereotype advocates accept that a woman's right to bodily integrity gives her the right to terminate her pregnancy during gestation,⁷⁰ but affording genetic fathers full parental rights at birth suggests that the balancing usually employed in abortion analysis, the state's interest in the life of the fetus versus the woman's interest in bodily integrity, is incomplete.⁷¹ If the genetic father has such a robust interest in the child once born, then the genetic father also has an interest that must be balanced against the gestator's bodily integrity and autonomy. That is a balancing, both the genetic father and the state on one side and the gestator on the other, that is much more likely than the current balancing to come out against the gestator's interest in terminating the pregnancy.

Vesting the sperm provider with equal rights at birth poses other dangers to abortion rights as well. When a child is conceived sexually, the human reproductive process, not gendered logic or separate spheres ideology, vests key pieces of information in the gestating mother alone. Absent in utero genetic testing or purchased gametes, the gestator is the only person who can know with certainty who the genetic father is and even she may not be sure.⁷² Antiabortion advocates attempt to eliminate this informational asymmetry by endorsing laws that require a pregnant woman to disclose her pregnancy to her sexual part-

⁷⁰ See *supra* note 64.

⁷¹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (balancing "the woman's right to terminate her pregnancy before viability" with "the other side of the equation [which] is the interest of the State in the protection of potential life").

⁷² See, e.g., *In re Parentage of G.E.M.*, 890 N.E.2d 944 (Ill. App. Ct. 2008) (in disputed paternity case involving a signed VAP, the mother acknowledged sexual relationships with three different men "at or near the time of conception").

ner.⁷³ The gender-stereotype critique has yet to wrestle with this informational asymmetry. But if “equality requires treating those traditionally excluded from the parentage regime as full participants,”⁷⁴ equality law presumably should work to eradicate the informational advantage that biology, not just law, gives gestating women. If the right to abortion is rooted *only* in bodily integrity, then perhaps there is nothing wrong with forcing a woman to disclose her pregnancy to the potential father. Her bodily integrity is not affected by imposing on her a duty to disclose her pregnancy to others.

To date, the Supreme Court has upheld a woman’s unilateral power to keep information about her pregnancy private. The Court has justified giving a woman this unilateral power because of the enormous impact that pregnancy has on a gestator.⁷⁵ The Court has also recognized that disclosing a pregnancy to a sexual partner can trigger violence against the pregnant woman.⁷⁶ It is worth noting that the Court’s concerns about violent men are every bit as stereotypical as whatever assumptions they may make about maternal bonding. The vast majority of men are not violent when they learn they may be a genetic father. But that stereotypical fear of violent men looms large in the abortion jurisprudence that has vested gestators with the right to control the information about their pregnancies. If the primary concern is with eradicating gender stereotypes in the name of equality, it is hard to justify the gestator’s right to keep her pregnancy private.⁷⁷

⁷³ Pro-life activists have long endorsed spousal notification requirements in abortion law. Up until now, the Supreme Court has struck those notification requirements down. See *infra* note 75 and text accompanying.

⁷⁴ NeJaime, *supra* note 4, at 2332.

⁷⁵ See *Casey*, 505 U.S. at 896 (“It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty than on the father’s”); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (striking a spousal notification requirement because “only one of the two marriage partners can prevail . . . [A]s between the two, the balance weights in her favor”).

⁷⁶ *Casey*, 505 U.S. at 888-95 (discussing the threat of domestic violence with a spousal notification provision).

⁷⁷ If the law were to mandate disclosure of a known pregnancy to the genetic father, gestators who did not want to disclose would have an incentive not to confirm that they were pregnant. They cannot disclose what they do not know. This could be a serious mistake from a public health standpoint. Refus-

The ineluctably gendered, biological realities of gestation have always made equality frames in the pregnancy context difficult. The constitutional law of both abortion and parenthood has struggled with this problem, landing imperfectly, but definitively on the side of vesting gestators with more control both during pregnancy and right after, when the gestator's investment in the child is unmistakably greater than anyone else's. Those who insist that gestators should not have rights at birth suggest that a bodily integrity or autonomy distinction can justify the difference between honoring her rights during the pregnancy and not honoring them at birth. But bodily integrity will not necessarily trump both the genetic father's *and* the state's interest in having the child carried to term and it does not explain why a gestator should not have to disclose the pregnancy to a genetic father. The genetic father's rights will be meaningless if he is not made aware that he can exercise them. If he has a constitutional right at birth, presumably he has a right to the information that would allow him to exercise that right. As will be clear below, affording a genetic father a right to that information will mean that the law can force a gestator to become irreversibly entwined with the genetic father.

C. The Impact on Adoption Law

A woman's right not to disclose her pregnancy to the genetic father is critical to the current law of adoption. The right not to disclose her pregnancy to the genetic father has allowed countless women to secure an adoption for a child they have just gestated without having to assume parental obligations themselves. It has also allowed pregnant women to escape relationships with men they did not want in their lives. If the genetic father knows he is the father, he can prevent the gestator from placing a child with an adoptive family and he can force her to be a mother, even if he assumes primary parenting responsibility as the father.

In oral arguments in *Dobbs v. Jackson's Women's Health*, Justice Amy Coney Barrett made much of safe haven laws, which, in theory, allow women to relinquish parental rights of a

ing to confirm one's pregnancy is bad for the health of the gestator and the fetus alike.

child to whom they have given birth without any penalty.⁷⁸ But Justice Coney Barrett failed to acknowledge how much power a genetic father may have to deprive a pregnant woman of that right to relinquish parenthood. If a potential father knows the woman with whom he had sex got pregnant, he can register with a putative father registry and hold the state to a burden to notify him of any legal proceedings — including adoption proceedings — regarding the child. He can file an independent paternity action for a child he believes is his genetic issue. In doing so, he can compel the woman who has given birth to be a mother.

A man who establishes himself as a legal father can sue the gestational mother for maternity, just as she could sue him for paternity.⁷⁹ He cannot compel her to exercise custodial rights, but he can compel her to pay for the child and — possibly much more importantly — he can put her in a position of (i) leaving the child with a man whom she did not think fit to be a parent and/or (ii) fighting for custodial rights that she does not want, and/or (iii) sharing parenthood with a man she wants to escape.⁸⁰ In all of these scenarios, she will likely be forced to maintain some kind of relationship with the genetic father. And that may be exactly what he wants. As Professor Jennifer Hendricks has shown, there is considerable evidence that some men who learn they are genetic fathers refuse consent to adoption as a way “not of mak-

⁷⁸ Oral Argument at 54:07, *Dobbs v. Jackson Women’s Health Org.*, (No. 19-1392), https://www.supremecourt.gov/oral_arguments/audio/2021/19-1392. For an example of a safe haven law, *see, e.g.*, 325 ILL. COMP. STAT. 2/1 – 2/55 (2015). Notably, the Illinois Safe Haven Law requires that the agency trying to place a baby left at a safe haven check the putative father registry, 325 ILL. COMP. STAT. 2/50(h)(1). If the putative father is located and comes forth to name the mother, she is no longer free not to be a mother.

⁷⁹ If safe haven laws were interpreted to allow the mother to relinquish parental rights and responsibilities even if the father comes forward and sues her for support, that would render paternity laws very problematic for gender equality advocates. Mothers would be free to abandon their children, but fathers would not.

⁸⁰ Letting the genetic father assume full custodial rights would mean that the genetic father could rear the child with the belief that their mother simply abandoned them because she wasn’t exercising custodial rights as opposed to the story many adoptees get told, which is that their birth mother was trying to ensure that they had a better home.

ing or preserving a connection to the child, but of maintaining control over the mother.”⁸¹

Consider the mother in *Lehr* – Lorraine Robertson - who clearly did not want Jonathan Lehr, the genetic father, to be part of her or her child’s life. She refused to allow Jonathan to develop a relationship with his genetic issue. It is easy to tell a story about Loraine as a conniving, deceitful woman, who, in order to prioritize her own desires, was willing to subvert her child’s and the child’s genetic father’s interest in a loving parent-child relationship.⁸² That is the story that unnerved the dissent and probably most advocates of the gender-stereotype critique. The accuracy of that story largely depends on the facts that were bitterly contested between the parties with regard to how much effort the genetic father, Jonathan, actually put into trying to establish a relationship with the child.⁸³ Lorraine maintained that he did not try to establish a parental relationship until she had married another man, who moved to adopt the child.

The uncontested facts tell a story that has not gotten as much attention. Loraine was a young single mother, whose father had been killed in Viet Nam and who was estranged from her mother and stepfather. Helen Lehr, Jonathan Lehr’s mother,

⁸¹ Jennifer Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 532 (2017). In *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558 (2013), an unwed father case the Supreme Court decided under the Indian Child Welfare Act, the genetic father had testified that he agreed to relinquish his parental rights only because he thought that by doing so he could eventually re-establish a relationship with the mother. He then revoked his consent, but the operative point is that he used his right to consent as a means of maintaining contact with the mother, not creating a relationship with the child. See also Esther Rosenfeld et al., *Confronting the Challenge of High Conflict Personality in Family Court*, 52 FAM. L.Q. 79 (2020) (discussing the problem of parents keeping a marital relationship alive by continually challenging custody arrangements).

⁸² Courts routinely describe women as “lying” or “deceitful” in cases in which they refused a man’s wish to maintain a relationship with her during pregnancy. See Mary Burbach & Mary Ann Lamanna, *The Moral Mothers: Motherhood Discourse in Biological Father and Third Party Cases*, 2 J.L. & FAM. STUD. 153, 164 (2000) (discussing cases in which courts criticize women who are trying to escape a relationship with the genetic father of child).

⁸³ Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2363-64 (2016) (discussing dispute between the parties in *Lehr*).

took pity on Loraine and “took her under her wing.”⁸⁴ It was in the context of that parent/child like relationship between Helen and Lorraine, that Jonathan and Lorraine started dating. It was not a stable relationship. They moved in together and then broke up and moved in together again and then broke up. Loraine became pregnant and the child was born in 1976. Jonathan visited Lorraine in the hospital but not after that.

The gender-stereotype critique, and those who endorse joint custody at birth, would assign Jonathan equal rights once the child was born. That would leave Lorraine with having to abandon the child or stay stuck where she was, unable to move with her child, lest she disrupt Jonathan’s parental rights, unable to avoid a relationship with Jonathan, with whom she would have to negotiate parenting responsibilities, and trapped raising her child in the context of adult relationships that were at best extremely difficult and at worst incestuous. The only way to avoid him would be to avoid the child. Adherents of the gender-stereotype critique who believe in abortion rights would presumably advise Lorraine to abort the pregnancy if she wanted to avoid those toxic relationships. She would have unilateral control to truncate the genetic father’s relationship with a child if she aborted, but no control once the child was born. Under this view, the work she does in gestation gives her *less* control than she had before she did the work of gestation.

Loraine Robertson wanted to keep the child and move away from Jonathan. Consider the dissent in a more recent case of a gestator who brought her pregnancy to term, but wanted to put her child up for adoption. The gestator in *In re Adoption of J.S.* made plans for a different couple to adopt the child.⁸⁵ When the genetic father found out, he tried to block the adoption, but failed to fill out an affidavit averring that he could and intended to provide for the child. Utah law required an alleged genetic father trying to block adoptions to submit such an affidavit. The question presented to the Utah Supreme Court was whether the affidavit requirement constituted gender discrimination under the equal protection clause because women who carried a child

⁸⁴ *Id.*

⁸⁵ *In re Adoption of J.S.*, 358 P.3d 1009 (Utah 2014).

to term did not need to fill one out if they wanted to keep the child. The majority found no equal protection violation because

mothers express their commitment to their offspring through the voluntary decision to carry a child to term – a decision that commits them to the statutory responsibility of caring and providing for the child as a legal parent . . . [The statute] requires a parallel commitment [from men] in the form of a written affidavit. The parallelism may not be perfect . . . but it is not unconstitutional.”⁸⁶

The dissent rejected that approach. Citing *United States v. Virginia*⁸⁷ and *Bradwell v. Illinois*,⁸⁸ the dissent suggested that the majority’s assumption that gestating the child indicates a commitment to the child is a gender stereotype forbidden under equal protection principles. The dissent argued that the majority’s reliance on the mother’s decision not to abort the child was unrealistic because the decision to carry the child to term for so many women is involuntary. That is, because, in practice, so many women do not have access to a safe and legal abortion, or they find out about their pregnancy too late, they should be treated just like men who do not have a right (yet) to decide whether the child will be brought to term.⁸⁹ It is the decision to gestate, not the gestation itself, that the dissent thinks is critical and because, in states hostile to abortion, women are not free to make a decision about gestation, women are similarly situated to men (who cannot make that decision either). The dissent in *J.S.* thus creates yet a third magic moment. For the antiabortionists, the magic moment is conception, when the genetic parents’ comparable genetic contributions meet.⁹⁰ For much of the gender-stereotype critique the magic moment is birth, when both men

⁸⁶ *Id.* at 1011.

⁸⁷ 518 U.S. 515 (1996) (cited *passim*) (notably, though not mentioned by the dissent, the Court in *Virginia* suggested that “women’s admission would require accommodations [to] . . . physical training programs for female cadets”). *Id.* at 540. The dissent in *J.S.* must have thought that the physical differences between men and women that the Court suggested could justify different training programs were more significant, as differences, than pregnancy is from not being pregnant.

⁸⁸ 83 U.S. 130 (1872) (deciding that a restriction keeping women from practicing law does not violated equal protection) (cited at *Adoption of J.S.*, 358 P.3d at 1038 n.37, 1044).

⁸⁹ *Adoption of J.S.*, 358 P.3d at 1043.

⁹⁰ *But see supra* notes 45-46 and text accompanying (explaining that women must invest more in any one ova than men invest in any batch of sperm).

and women are equally genetically connected to the child just born. For this dissent, the magic moment is the decision to gestate, which, in states hostile to abortion, does not exist for either men or women so they are similarly situated. Again, equality frames reduce gestation to magic moments in order to make the comparisons that equality analysis demands, but those magic moments bear little resemblance to the gradual, complicated, and varied reality of gestation. For this dissent, the gestator's eight to nine months of gestation did nothing to suggest she should be treated differently than the genetic father. And because he should be entitled to parental status, she should be forced to be a parent also.

In coming to the defense of women against what it sees as pernicious stereotype, the dissent in *J.S.* also fails to note that, in this case, the mother was quite sure that she wanted the child to be adopted by another couple, not be raised by the genetic father and herself. The dissent never acknowledges that parental rights cases are usually zero sum affairs. What the genetic father gains in terms of rights, the gestator loses in terms of control.⁹¹ The actual women in these cases gestate the children for nine months and want to be rewarded for that labor with decision-making authority at birth. The dissent in *J.S.* and others whose primary concern is gender stereotypes, would deny them that right in the name of protecting them from harmful maternal stereotypes. The gender equality critiques not only require that the work of gestation be ignored, gestators must lose rights as the pregnancy progresses in order to combat gender stereotypes.

⁹¹ This was true of the unwed father cases (*Caban*, *Quilloin*, *Lehr* and *Michael H.*, discussed *infra* at notes 132-136 and accompanying text), though not the citizenship cases. The mother in *Caban* wound up with less control over her own life because she had to continue to navigate a relationship with the genetic father of her children (who was in New York while she was living in Puerto Rico). As discussed, Lorraine Robertson would have been forced to maintain a relationship with Jonathan Lehr if he had been able to become the legal father. Comparably, in *Michael H.*, Carol, the mother – and Gerald, the marital, legal father – would have lost control over their established family if Michael H. had been declared the father. That same kind of dynamic is not at issue in most of the citizenship cases because granting citizenship to the child of a genetic father who is a U.S. citizen a court would not be affecting the rights of any U.S. citizen mother by conferring citizenship on the child.

D. Gender Equality and Custody Battles

The debates surrounding parental rights at birth often grow, as children grow, into debates around appropriate custody standards for mothers and fathers.⁹² Gender-stereotype critiques argue that courts differential treatment of mothers and fathers in custody determinations is a reflection of gender stereotypes. In contrast, many women's and mothers' groups argue that the differential treatment is rooted in differential investment.

Today, fathers in middle class and upper middle class families - who are much more likely to have custody rights determined in a divorce proceeding because they are much more likely to have married - are awarded more custodial time than they used to be.⁹³ This greater custodial time reflects the transformation of gender norms for married couples. Men in two parent households now do more caretaking than they did fifty years ago, though, on average, they still do much less than women.⁹⁴

⁹² When divorcing parties agree to share custody, which the vast majority of divorcing couples do, courts readily concur in whatever agreement parents come to. Most divorcing couples work out reasonable shared custody arrangements. Custody questions become hard when the parties do not agree. Then courts need defaults. Which default promotes equality best? One that assumes an equality of investment that often does not exist, or one that recognizes inequality in fact, so as to reward the parent who has invested disproportionately?

⁹³ Maria Cancian et al., *Who Gets Custody Now? Demographic Changes in Children's Living Arrangements After Divorce*, 51 *DEMOG.* 1381, 1390 (2014) (noting that the percentage of fathers getting full shared or partial shared custody in Wisconsin increased dramatically from 1988 to 2008); Timothy Grall, *Custodial Mothers and Fathers and Their Child Support: 2015*, *CURRENT POPULATION REP.*, U.S. CENSUS 2 (2020) ("Fathers have become more likely to be custodial parents over the past 22 years, increasing from 16 percent in 1994 to 19.6 percent in 2016").

⁹⁴ Fifty years ago, mothers did 75% more childcare than did fathers. A.W. Geiger et al., *6 Facts About U.S. Moms*, *PEW RES. CTR.* (May 8, 2019), <https://www.pewresearch.org/fact-tank/2018/05/10/facts-about-u-s-mothers/>. Today, in homes in which both parents work full-time (roughly 46% of two parent households), see Eileen Patten, *How American Parents Balance Work and Family Life When Both Work*, *PEW RES. CTR.* (Nov. 4, 2015), <https://www.pewresearch.org/fact-tank/2015/11/04/how-american-parents-balance-work-and-family-life-when-both-work/>), mothers spend 30% more time on childcare and housework than men. Juliana M. Horowitz, *Who Does More Work at Home When Both Parents Work? Depends on Which One You Ask*, *PEW RES. CTR.* (Nov. 5, 2015), <https://www.pewresearch.org/fact-tank/2015/11/05/who-does-more-at-home-when-both-parents-work-depends-on-which-one->

Using a best interest of the child standard, courts reward fathers who have invested in caretaking with more custodial time.

This increased amount of custodial time after divorce is not enough for most men's rights groups, who routinely fight for more custodial time than they are awarded under a best interest of the child standard. Since the 1980s, in state legislatures across the country, men's rights groups, in the name of equality, have fought for more joint custody.⁹⁵ Women's rights groups have fought back, usually with a counter-proposal for a gender-neutral "primary-caretaker" standard, which awards the person who was primarily responsible for childcare with more custody.⁹⁶ The women's groups have not had success with the primary caretaker standard, but neither have men achieved the forced equality of a joint custody standard. As Elizabeth Scott and Robert Emery have explained, in most states this has resulted in a "gender-war" stalemate.⁹⁷

Most legislatures refuse to take sides in this gender war and settle for the status quo "best interest of the child" standard, though the vast majority of best interest statutes list factors like "time spent with the child" and/or "caretaking" as factors that should be considered in a best interest analysis.⁹⁸ In other words, the best interest standard encourages the recognition of the parent who invested most. That is why fathers get more custodial time than they used to, but still less than many women. Women's

you-ask/. In the 54% of two parent household in which the mother works part-time or not at all, those numbers will be even more disproportionate.

⁹⁵ See Sharon Jayson, *More Dads Demand Equal Custody*, USA Today, June 14, 2014, <https://www.usatoday.com/story/news/nation/2014/06/14/fathers-day-divorce-custody-partner-husbands-wives/10225085/>; *Fathers Child Custody Rights*, CUSTODYXCHANGE, <https://www.custodyxchange.com/custody/fathers-child-custody-rights.php> (last visited May 9, 2022) (describing why fathers should get equal rights because they are fathers, not because of their demonstrated commitment). For a fuller account of the men's rights groups efforts, see Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79 (2016).

⁹⁶ Elizabeth Scott & Robert Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best Interest Standard*, 77 L. & CONTEMP. PROBS. 69, 76 (2014).

⁹⁷ *Id.* at 70.

⁹⁸ See, e.g., 750 ILL. COMP. STAT. 5/602.7 (b)(3) (instructing courts to take into account "the amount of time each parent has spent performing caretaking functions" in the best interest analysis).

rights advocates tend to be satisfied enough with a best interest standard because women still tend to be awarded custody that is somewhat proportional to their disproportionate investment.⁹⁹

Men's rights groups fighting for joint custody standards implicitly argue that it is their genetic connection that entitles them to equal time. Anything other than equal time, they suggest, must reflect gender stereotype. But if the only reason men receive less custodial time is because of separate spheres ideology and gendered logic, why would the men's rights groups fight a gender-neutral primary caretaker standard? The primary caretaker standard and the assessment of relative investment within the best interest standard, both of which fathers groups fight, ask a court to assess hours spent caretaking. This is not ideology; it is math.¹⁰⁰

The gender-stereotype critique might argue that it is a sexist gender ideology that creates the preferences that lead many parents to divide labor in a gendered fashion. Perhaps it is the law's job to combat that ideology by refusing to honor those preferences. But ignoring the differentiated patterns of work in order to effectuate gender equality perpetuates a different kind of well-documented inequality, ignoring the work that women do.¹⁰¹

⁹⁹ Scott & Emery, *supra* note 96, at 75.

¹⁰⁰ In a recent article, Ann Alstott, Anne Dailey, and Douglas NeJaime have argued that parenthood decisions should be based not on primary caretaking (which they suggest is too mechanistic and insufficiently attentive to the child's psychological development), but on a judicial determination of psychological parenthood. Ann L. Alstott et al., *Psychological Parenthood*, 106 MINN. L. REV. ___ (2022). No doubt, this proposal allows for a more nuanced, holistic approach to parental status determinations than a primary caretaker standard and it tries to narrow the problems with vagueness that plague best interest determinations. The authors suggest that courts rely heavily on psychological experts to determine psychological parenthood. *Id.* at 11-12. This approach envisions a deep faith in psychological experts, though they acknowledge that historically family law's reliance on experts has opened the door to bad science and various biases. *Id.* Perhaps more tellingly for this article, these authors conclude that at birth, before any parent has an opportunity to develop what experts would label a psychological relationship with the child, the law uses biology (which I take to mean genetics) to determine parenthood in cases of sexual reproduction. They adopt this approach in the name of "certainty," though in doing so they vest genetic fathers with equal rights and thus erase a mother's greater gestational investment. *Id.* at 11, 31.

¹⁰¹ See *supra* note 8.

Moreover, to the extent joint custody embodies a belief that it should be genetics not investment that determines custodial time, a joint custody presumption simply substitutes its own problematic ideology, genetic essentialism. As will be made more clear below, the genetic essentialism ideology is especially dangerous for those concerned about parental rights for LGBTQ parents.

For many parents in low income communities in which gender norms are still quite entrenched, honoring genetic parenthood with a presumption of joint custody in the name of equality is even harder to justify. In her comprehensive and sympathetic ethnographic work in the inner city, Kathryn Edin finds that men in her studies maintain strong allegiance to “traditional sex roles.”¹⁰² Parenting by most non-married straight couples is far more gendered, far less mutual and far less cooperative than it is in most married relationships. As Naomi Cahn and June Carbone note, “egalitarian norms . . . do[] not reflect working-class realities . . . [Norms of] interdependence and sharing . . . fail[] to express the implicit terms of working-class relationships.”¹⁰³ Treating most unmarried parents as equal partners in the parenting project suggests a paradigm very different from “the terms the parties have chosen for themselves.”¹⁰⁴ As Edin and her co-author, Timothy Nelson, concluded after studying parenting attitudes of unwed genetic parents in the inner-city, “she, he, and the community at large assign her – not them - ultimate parental responsibility.”¹⁰⁵ In many communities, unwed genetic fathers “leave all the hard jobs – the breadwinning, the discipline, and the moral guidance – to the moms.”¹⁰⁶

Without a deep allegiance to genetic essentialism, why should equality principles demand that the law award custodial time to a genetic father when he has left all the hard parenting

¹⁰² KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* 203 (1st ed. 2005).

¹⁰³ June Carbone & Naomi Cahn, *Marriage Markets: How Inequality Is Remaking the American Family* 118 (2014).

¹⁰⁴ June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 59 (2016).

¹⁰⁵ KATHRYN EDIN & TIMOTHY NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 81 (1st ed. 2013).

¹⁰⁶ *Id.* at 18.

jobs to the mother? That would be treating unalikes alike.¹⁰⁷ It would mean that the disproportionate work that the mother has done, the breadwinning, the discipline, and the moral guidance, should be discounted, or erased, in the name of securing equality.

The calls to override women's disproportionate caretaking with presumptions of joint custody parallel the calls to erase women's gestational contribution at birth. In both cases, equality advocates argue that equality demands erasure of women's investment in children so as to effectuate a more equal approach to parenting. The argument for equal parental rights at birth is the argument for joint custody regardless of investment. Gestational erasure paves the way for erasure of the caretaking work that many women continue to disproportionately perform. In contrast, the primary caretaker standard and the Supreme Court doctrine that honors gestation are functional standards. They look at who has done the work of parenting. They treat parenting as a verb, not a genetic constant. The overlap between the "women's groups" argument and the calls for same sex parent equality is clear. Parental investment should be rewarded with corresponding parental rights. Part III elaborates on that overlap.

III. Taking LGBTQ Parenting Rights Seriously

To this point, this article has focused mostly on the gender-stereotype critique and its willingness to sanction gestational erasure. As suggested earlier, an LGBTQ equality critique has also sanctioned gestational erasure because so many LGBTQ parents cannot or do not get pregnant. Ultimately, though, the LGBTQ critique must distance itself from the gender equality critique because the gender equality critique roots parenthood in a genetic connection to the child that LGBTQ parents will never share. To paraphrase what the Massachusetts Supreme Judicial Court wrote regarding linking marriage to genetic parenthood, the genetic essentialism in the gender-stereotype critique "singles out

¹⁰⁷ See ARISTOTLE, *THE NICOMACHEAN ETHICS* 112 (David Ross et al. eds., 1991) ("[t]his is the origin of quarrels and complaints – when either equals have are awarded unequal shares, or unequals equal shares."); Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CALIF. L. REV. 1, 5 (1974) ("Thus, a law is justly applied when applied to all those and only those who are alike in satisfying the criteria specified in the law . . .").

the one unbridgeable difference between same-sex and opposite-sex couples” and makes it critical to parenthood.¹⁰⁸

At present, courts that champion the LGBTQ parental equality argument appear confused about the inherent tension between the sex equality and LGBTQ equality critiques. Consider two fairly recent state Supreme Court decisions implicitly rejecting, in the name of LGBTQ equality, the relevance of genetics. The high courts of both New York and Maryland, relying on what they read as the equality mandate implicit in the legalization of same-sex marriage, directed their states to adopt a functional test for parentage so that a same sex partner could sustain a claim for parental rights.¹⁰⁹ The courts held that unmarried same sex partners should be treated as unmarried opposite sex partners. Did these courts mean to suggest that same sex partners who cannot have a genetic connection to a child must be treated as opposite partners who do? What does the legalization of same sex marriage say about how the law must treat the non-genetically related non-married opposite sex partner? *Obergefell* and statutes legalizing same sex marriage *require* providing same sex partners with a functional path to parenthood *only* if they require that the law treat a partner who *is not* genetically related to her partner’s child as a partner who *is* genetically related to his partner’s child. The 2017 Uniform Parentage Act¹¹⁰ and some courts that have recognized more than two parents¹¹¹ seem to have

¹⁰⁸ Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 962 (Mass. 2003) (the Massachusetts Supreme Judicial Court was referring to why procreation should not be considered the essence of marriage, but the logic equally applies to why genetics should not be considered the essence of parenthood).

¹⁰⁹ Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490 (N.Y. 2016) (suggesting that their previous decision rejecting functional parenthood was “unsustainable” in light of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)); Conover v. Conover, 146 A.3d 31, 49 (Md. 2016) (suggesting the Maryland legislature’s adoption of same sex marriage “undermined” the courts’ previous rejection of functional parenthood).

¹¹⁰ See generally 2017 UNIF. PARENTAGE ACT § 612 [hereinafter 2017 UPA] (detailing the nature of proceedings to adjudicate parentage in which many different “kinds” of parents [genetic, presumptive, de facto etc.] are considered as equally entitled to consideration under a “best interest” standard).

¹¹¹ Naomi Cahn & June Carbone, *Parents, Babies, and More Parents*, 92 CHI-KENT L. REV. 9, 20-35 (2017) (discussing cases in which courts have recognized three parents and not treating genetic parents as entitled to greater rights than functional parents).

adopted this approach, but no state has reckoned with everything this might require.

Among other things, suggesting that parents who are not genetically related must be treated as parents who are genetically related would seem to mandate the elimination of paternity law, which requires treating genetic parents as uniquely entitled to and responsible for parental status.¹¹² It also calls into question the Supreme Court's illegitimacy doctrine, much of which demands that states treat children as the legal offspring of their genetic parents.¹¹³ It would also suggest that the *Obergefell* Court meant to override decades of family law that has treated step-parents (who have functioned as parents) differently than legal parents.¹¹⁴ A comprehensive investment approach to parenthood, like the one endorsed in this article, would require all of these changes, but it seems unlikely that either the courts in New York or Maryland were demanding such changes.

A. *Liberty or Equality?*

Although a champion of these opinions and the LGBTQ equality critique, Professor NeJaime has more recently suggested

¹¹² The Massachusetts Supreme Judicial Court has held that same sex partners should not be treated as (genetically related) opposite sex partners when it comes to child support. See *T.F. v. B. L.*, 813 N.E.2d 1244, 1250 (Mass. 2004) (holding that a former partner who agreed to co-parent a child but left the relationship before the child was born not responsible for child support because “‘Parenthood by contract’ is not the law in Massachusetts”).

¹¹³ See generally Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647 (2015) (exploring how the illegitimacy cases rely on genetics as the root of parenthood and are therefore inconsistent with emerging trends in family law that honor reproductive technology contracts and alternative families that do not share genetic connections).

¹¹⁴ The 2017 UPA and many states resist holding step parents (who often function as parents) responsible for any child support for fear that people would not be willing to marry a parent with children for whom they might some day be found responsible. The 2017 UPA allows only the person alleging him or herself to be a de facto parent to initiate a proceeding (§ 609) because of “concerns that stepparents might be held responsible for child support.” 2017 UPA § 609 cmt, at 51-52. Twenty years ago, the ALI Principles expressed a comparable concern, see AMERICAN LAW INSTITUTE, PRINCIPLES OF FAMILY DISSOLUTION § 3.03, cmt. to Reporters note, at 420 (2001) (codifying the idea that a functional parent can assert rights but not be held involuntarily responsible for obligations).

that same sex partners' parental rights should flow not just from equality principles, but from the substantive due process rights that the Supreme Court has found in family members.¹¹⁵ Exploring various Supreme Court cases, including the unwed fatherhood cases, *Moore v. City of East Cleveland*¹¹⁶ and *Smith v. Organization of Foster Families for Equality and Reform*,¹¹⁷ NeJaime argues that the Supreme Court has afforded some protection to established family-like relationships, regardless of whether they fall into traditional, legally recognized family forms.¹¹⁸ He uses this nuanced understanding of how relationship has mattered constitutionally to argue that same sex parents may have constitutionally protected liberty interests in their relationships with the children they have parented.

There are important differences between this liberty-based due process approach to parental rights and the equality approach to parental rights, but there is also significant overlap, as people familiar with unwed fatherhood cases know. Abdiel Caban, in *Caban v. Mohammed*, and Jonathan Lehr, in *Lehr v. Robertson*, made both due process and gender-based equal protection claims to parenthood.¹¹⁹ Caban won on his equal protection claim so the Court did not decide his due process claim.¹²⁰ Lehr lost on both. Caban's and Lehr's due process claims built on Peter Stanley's winning claim that unwed fathers have a lib-

¹¹⁵ Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 275 (2020) ("This article takes the crucial first step of building the case for a liberty interest that includes non-biological parent-child bonds").

¹¹⁶ 431 U.S. 494 (1977) (describing the protection of an extended family's right to live in the same home).

¹¹⁷ 431 U.S. 816 (1977) (assuming a liberty interest in foster parents who developed a relationship with foster child).

¹¹⁸ NeJaime, *supra* note 115, at 305-13.

¹¹⁹ Peter Stanley, the genetic father in *Stanley v. Illinois*, 405 U.S. at 658, and Leon Quilloin in *Quilloin v. Walcott*, 434 U.S. 246, 255-56 (1977), also made equal protection arguments but they focused more on the problem with treating wed fathers differently than unwed fathers, not on any problem with treating mothers differently than fathers. (Caban made the gender equality argument for the first time in the Supreme Court and the Court declined to evaluate it. *Caban*, 441 U.S. at 254, n.13).

¹²⁰ *Caban*, 441 U.S. at 395, n.16 ("express[ing] no view" on Caban's substantive due process claim because of the ruling under the Equal Protection clause).

erty interest in their parental status.¹²¹ Stanley had lived with two of his three children – invested in a relationship with them – for most of their lives and the Court held that the state could not presume him unfit as a parent just because he and the mother never married.¹²² In contrast, the Court dismissed Jonathan Lehr’s due process claim because Lehr had not developed a relationship with his genetic child.¹²³ It was the absence of that relationship that also rendered him dissimilarly situated to the mother.¹²⁴

Together, the unwed father cases make clear that relationship matters to both the potential parent’s liberty interest and gender equality claims. The stronger a potential parent’s relationship with the child, (i) the more the potential parent’s liberty interest obligates the state to let him be heard on questions of parental status and (ii) the more similarly situated he is to the gestational mother for equal protection analysis. For purposes of this article though, it is important to underscore the differences between an equality approach and a due process approach. The equality approach encourages severing gestation from parental rights analysis in order to make the gestator seem similarly situated to other potential parents. A due process approach suggests that one’s liberty interest in parenthood grows in proportion to one’s investment with a child. It leaves room for, and indeed may require, honoring gestation.

¹²¹ Because he won his due process claim, the Court did not decide Stanley’s equal protection claim.

¹²² Leon Quilloin made a claim comparable to Stanley’s but lost. He argued that his liberty interest in a parental relationship with his genetic child gave him the right to block the adoption of the child by the mother’s new husband. The Supreme Court held that because he had “never exercised actual or legal custody over his child and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child” he did not have a protectable liberty interest in a relationship with the child. *Quilloin*, 434 U.S. at 256.

¹²³ Genetics gave him no more than the kind of process that New York had given him, which was the opportunity to register with a putative father registry. *LEHR*, 463 U.S. at 263-64.

¹²⁴ *Id.*

B. *Building a Liberty Interest*

Currently, if a potential parent is not the gestator who has already invested at birth, the only way to make an investment worthy of a parental liberty interest is by (i) having an amicable enough relationship with a gestator who is willing to allow the functional parental relationship with the child to develop or (ii) having a legal right that entitles one to invoke the law to force the gestator to allow the functional parental relationship to develop.¹²⁵ Today, that legal right to compel action on the part of the legal parent can come from (a) marital status (the marital presumption), or from (b) some other jointly executed legal formality indicating shared parental rights with the gestator (adoption, a reproductive technology contract assigning parental rights, a signed VAP or parenting agreement), or from (c) genetics. The legal formalities in options (a) and (b) are available to opposite sex and same sex partners equally.¹²⁶ It is only (c), genetics, that is not. Thus, there are two critical distinguishing characteristics of the parental right rooted in genetics. First, it will always be unavailable to a same sex partner. Second, it is the only path that does not require the consent of the gestator or legal parent.¹²⁷

¹²⁵ The exceptions to this rule are gestational surrogacy agreements and adoptions by single parents. In those instances it is not the gestator, but the legal parent (who has gone through legal formalities to become the legal parent), with whom the potential parent must forge a relationship so that the legal parent allows a parent-child relationship to develop in someone other than themselves.

¹²⁶ To the extent that some states resistant to LGBTQ rights generally make these legal formalities difficult for LBTO parents, the equality principles expressed by the Supreme Court in *Obergefell* and the high courts of New York and Maryland arguably should control. Certainly, if a non-genetically related opposite sex partner has a root to parenthood through a legal formality like marriage or adoption or contract, a non-genetically related same sex partner should be afforded the ability to engage the same formality. For a survey of different state treatment of same sex partner parenthood opportunities, see Susan Hazeldean, *Illegitimate Parents*, 55 U.C. DAVIS L. REV. 1583 (2022).

¹²⁷ In practice, an alleged genetic father does not even have to prove a gestator's consent to the sexual act that produced the child. Proving genetic connection is remarkably easy and in most states all that is required to prove paternity even if the gestator did not consent to the sex that resulted in the pregnancy. Statutes that allow a gestator to dismiss the claims of an alleged father if the pregnancy was the result of a sexual assault still require the ges-

Same sex partners who want to rely on investment as a source of parenthood are ineluctably dependent on a legal parent to let a relationship with the child develop. Genetic progenitors are not. Why should genetic progenitors have rights independent of the gestator when same sex partners do not? If the law is concerned with treating same sex partners like opposite sex partners, then it should treat partners who share a genetic connection to the child like partners who do not. It should eliminate genetics, not gestation as a source of parenthood. Then opposite sex partners and same sex partners would be treated equally.¹²⁸

Of course, eliminating genetics as a source of parenthood and equalizing the position of same sex and opposite partners, which is a kind of ratcheting down, still leaves a system that the equality champions are most suspicious of: A regime in which the gestator has more rights than other potential parents at birth. But a parental approach that takes parental investment seriously demands such an approach. At birth, she has by far the most significant connection with the child. Even if stereotype has exaggerated its power; even if some women reject the children they

tator to prove the sexual assault. For instance, the 2017 UPA requires that a woman alleging the alleged father committed sexual assault in the conception of the child must prove it by clear and convincing evidence, 2017 UPA § 614(2). Proving sexual assault is notoriously difficult. See Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 235-45 (2015). It is exponentially more difficult to prove sexual assault than to prove genetic connection and if the gestator fails to prove sexual assault, she runs the risk of being labelled a non-cooperative parent, who may be less worthy of custodial time. See Joan Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation*, 35 L. & INEQUALITY 311 (2017) (discussing how women's allegations of abuse can backfire).

¹²⁸ This is a kind of ratcheting down, taking rights that genetic progenitors currently have away, but the opposite approach, ratcheting up by providing same sex partners with the same standing as opposite sex partners would likely create mayhem. If the overriding concern is equality and genetic progenitors have standing based on one sexual encounter, then presumably anyone who had sex with the gestator, regardless of whether that sex resulted in a pregnancy, should have standing to sue for parenthood. The law could not grant standing only to those who had sex that resulted in pregnancy because that would inevitably exclude all same sex partners. Ratcheting down, by eliminating genetics, rather than ratcheting up by granting standing to everyone who behaved like the genetic progenitor (i.e., had sex with the person who became pregnant) is a much more manageable approach to parental status.

have just gestated; even if physical and emotional connection are different, as compared to everyone else in the world, at birth, the gestator has more of a relationship to the child than anyone else. If constitutional rights stem from relationship, it is hard to see how the law could countenance the discounting of gestation.

To the extent equality proponents are concerned about the specter of gestators having grossly superior power as parents, it is important to note that the vast majority of gestators agree to share that power through the legal formalities previously mentioned. Marriage, a VAP, a reproductive technology contract or some other formal indication that the parties agree to share parenting responsibilities all trigger a co-parent's rights.¹²⁹ Most gestators are eager to share the rights and obligations that they earn during gestation. It is what critics see as a facial affront to gender equality, much more than gestators' demonstrated monopoly on parental status at birth, that seems to generate so many of the equality critiques.

That perceived facial affront to notions of gender equality is an affront only if one supports an underlying genetic essentialist ideology. Taking LGBTQ parenting seriously requires rejecting that ideology. Honoring gestation is not an affront to notions of LGBTQ parenting equality because honoring gestation takes investment not genetics as the starting point for parental rights. The gender essentialism implicit in the gender-stereotype critique is much less compatible with an investment-based approach to parental status than is a regime that vests substantial rights in a gestator at birth. An investment approach that incorporates gestation treats parenting as a verb and refuses to "single[] out the one unbridgeable difference between same-sex and opposite-sex couples" to make it critical to parenthood.¹³⁰

¹²⁹ Most children born in this country are born to married gestators and thus they have two parents at birth. See *Unmarried Child-Bearing*, NATIONAL CENTER FOR HEALTH STATISTICS, CENTERS FOR DISEASE CONTROL, <https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> (last visited May 9, 2022) (approximately 60% of children born in the United States are born to married gestators). The majority of children born to unmarried gestators have another legal parent who signed a Voluntary Acknowledgment of Paternity very shortly after birth. FY2009 Annual Report to Congress, *supra* note 57.

¹³⁰ *Goodridge*, 798 N.E.2d at 962. See *supra* discussion in text at note 108.

IV. CONCLUSION

In the introduction, I suggested that in response to the gender-stereotype critique and the LGBTQ equality critique many courts and state legislatures have begun to ratchet up by affording the privileges that were formerly reserved for a few (gestators) to more potential legal parents. The trend is to expand the class of people who can claim parental status. In Part III, I suggested that the far more sensible approach is to ratchet down and take away the rights the law currently grants genetic progenitors. This would treat genetic progenitors and same sex partners equally, but still honor the disproportionate work that gestators do. Even if one does not accept the ratcheting down analysis in Part III, contemporary practice indicates that the current attempt to ratchet up may, in many instances, result in a different kind of ratcheting down, one that takes away preferential treatment for gestators and does not afford anyone preferential treatment as a parent. As explained below, this will likely not afford those previously excluded from parenthood substantial rights, though it could cause some gestators real harm.

In cases in which parental status is contested, and courts use the kind of expansive approach to standing endorsed by the 2017 Uniform Parentage Act, courts are instructed to or have simply decided to use a best interest of the child standard to determine parental status.¹³¹ This standard has not been much help to genetic fathers claiming a constitutional right to parental status. It was the best interest of the child standard that Abdiel Caban, Leon Quilloin, Jonathan Lehr, and Michael H. all challenged as unconstitutional. Before reaching the Supreme Court, Abdiel Caban had an opportunity to convince a court that the adoption of his genetic children by their mother's new husband was not in the children's best interest. He lost.¹³² Leon Quilloin had an op-

¹³¹ See 2017 UPA § 613(a) (“The court shall adjudicate parentage in the best interest of the child based on . . . [a list of factors including “(6) other equitable factors.”]); Baker, *supra* note 11, at 13-14 (discussing cases in which courts use a best interest standard to assign parental status); Cahn & Carbone, *supra* note 111, at 28-29 (discussing courts' use of best interest standard in cases involving three parents).

¹³² *Caban*, 441 U.S. at 384 (Caban, who had visitation rights at the time of the adoption hearing, presented evidence suggesting that the adoption by the mother's new husband should not go forward).

portunity to argue that his legitimation petition was in his child's best interest. He lost.¹³³ Jonathan Lehr was never given the opportunity to prove that the adoption of his genetic child by someone else was not in the child's best interest, but the family court judge made very clear that had Jonathan tried, he would have lost.¹³⁴ That was why, on appeal, the New York courts found there was no abuse of discretion in not letting Lehr's paternity petition proceed.¹³⁵ And under California law, Michael H., as an interested party, had an opportunity to prove that continued contact with his genetic child would be in the child's best interest.¹³⁶ Michael, and all of these genetic fathers, argued they were constitutionally entitled to something more than just a best interest of the child adjudication to determine parenthood.

The reason Caban was the only one of these genetic fathers to win was not because he proved it was in the child's best interest that he be considered the father. He won because New York gave the genetic mother but not the genetic father the right to veto an adoption. If instead of granting both a genetic father and

¹³³ *Quilloin*, 434 U.S. at 251 (the lower court concluded that granting either Quilloins' visitation petition or his request for visitation would not be in the child's best interest).

¹³⁴ The trial court wrote that "even if a thorough and complete investigation into the illicit relationship between the mother and the putative father . . . were made and certain unfavorable information concerning the mother's mental and emotional instability were revealed, it is difficult to see how such information, no matter how derogatory, could in any way be significant . . . to the court's decision as to whether or not the stepfather's application for the adoption of this child should have been approved [as in the best interest of the child.] In the Matter of Jessica Martz, an Infant, 102 Misc. 2d 102, 115 (N.Y. Fam. Ct. 1979). At the Supreme Court, Lehr was implicitly arguing that the best interest determination was unconstitutional in his case because he had a constitutional right to be treated as a father, in which case his consent to adoption would have been needed.

¹³⁵ 463 U.S. at 254-55.

¹³⁶ Section 4601 of the California Civil Code gave *Michael H.*, as an interested party, the right to petition for visitation rights if he could establish that it was the best interest of the child. If he had been found to be the legal father, visitation would have been presumed to be in the child's best interest, but that presumption could have been rebutted. *See Michael H.*, 491 U.S. at 133 (Stevens, J. concurring in the judgment). It was section 4601 that swayed Justice Stevens into joining the plurality and finding against any greater constitutional right in *Michael* because his relationship gave him a right to petition for visitation rights under a best interest standard.

a genetic mother the right to veto an adoption, states simply eliminate the parental veto provision, there is no equality problem. Then states can do as the 2017 Uniform Parentage Act suggests, and just conduct best interest of the child determinations among everyone who might have an interest in parenting a particular child. But all of the genetic father claimants, including Caban, lost under that standard.¹³⁷

In the citizenship context, the Supreme Court has already endorsed ratcheting down to ensure equality. In *Sessions v. Morales-Santana*,¹³⁸ the Supreme Court invalidated a provision of the Immigration and Nationality Act that imposed a lesser residency requirement on a U.S. citizen gestational mother than on a U.S. citizen genetic father whose child was born abroad. The Supreme Court held that the differential treatment with regard to residency for mothers and fathers violated the equal protection clause, but instead of treating unwed fathers as the statute treated unwed mothers, the Court held that unwed mothers should be held to the same residency requirements as unwed fathers. Equality principles were satisfied once the court ratcheted down, just as they will be if states simply refuse to let any adult assume presumptive rights as a parent. Parentage hearings can just be best interest of the child free-for-all in which all potential parents are treated equally.

If that is the case, the future of parentage law is going to depend on how willing courts are to endorse meaningful multi-parent parenthood. To date, when presented with competing claims to parenthood from multiple parents, courts have used something like a parental investment standard to award primary custody rights to one person.¹³⁹ Because equal sharing of physi-

¹³⁷ Proponents of giving courts discretion to confer parentage under a best interest test have suggested that courts “have shown themselves capable of making these determinations” NeJaime, *supra* note 115, at 371 (citing Carlos Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL’Y & L. 623, 653-56 (2012)). The men in the unwed father cases would likely contest that observation.

¹³⁸ 137 S. Ct. 1678 (2017).

¹³⁹ See Cahn & Carbone, *supra* note 111, at 52 (“As courts decide actual disputes among potential parents, they are implementing the three-parent doctrine in a manner that accords primary parenting rights to one adult rather than granting shared decision-making rights to multiple adults. As they understand,

cal and decision-making custodial rights becomes logistically and emotionally untenable the more parents there are, the less likely it is that multiple parents can secure equal parental rights.¹⁴⁰ Equal parenting rights and responsibilities are feasible if there are only two parents, but that equality of rights and obligations becomes rapidly less feasible as the number of parents increases. If the trend to consider more additional potential parents continues to lead courts to use a best interest standard heavily influenced by a parental investment standard, then genetic fathers will secure more rights only if they invest significantly more in parenting (a process over which they have limited control if the genetic father and gestator did not live together at the birth of the child.)

In a best interest of the child free-for-all at birth, a gestator is still likely to be able to prevail as the primary custodian at birth. Consider a gestator like Lorraine Robertson.¹⁴¹ As a gestator she will also be a lactator who can claim that breast-feeding is in the child's best interest.¹⁴² She will get primary custody because joint physical custody is usually not in an infant's best interest.¹⁴³ She will have to struggle with the contentious

one parent typically has consistently provided care and stability for the child, and that is the parent who should be given more rights”).

¹⁴⁰ *Id.* at 40 (courts that have recognized more than two parents do not “assign equal rights concerning decision-making authority, nor do they grant equal amounts of custodial time following dissolution of the parental relationship.”); see also Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 714 (2008) (suggesting that a more inclusive parenthood regime is also one that is likely to lead to a more hierarchal parenthood regime). Many parents choose to parent in groups of three or four. There is nothing inevitable about the number two. But the fact that some groups choose to parent together and do so successfully does not mean that a court can meaningfully or successfully compel groups of three or four to parent together. If a court is involved, the parents have already proven themselves incapable of working out the day-to-day decisions that parents sharing custody must work out in order for a shared custody arrangement to be successful. This is why the courts tend to resort to a more hierarchal award of custodial rights.

¹⁴¹ See *supra* notes 82-84.

¹⁴² See *The Benefits of Breastfeeding for Baby & for Mom*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/articles/15274-the-benefits-of-breastfeeding-for-baby--for-mom> (last visited May 9, 2022).

¹⁴³ Marsha K. Pruett & J. H. DiFonzo, *Closing the Gape: Research Policy, Practice, and Shared Parenting*, 52 FAM. CT. REV. 152, 161-62 (2014); Bruce Smyth et al., *Legislating for Shared Time Parenting After Parental Separation:*

relationship she has with the genetic father, who may well try to prevent her from developing a romantic relationship with someone else, but if she has the fortitude, she will be free to develop a relationship with another adult whom she can then let develop a functional parent relationship with the child. That new functional parent will present much like Robertson's new husband did in the original case and those two will likely retain primary custody because they will have invested the most. Men like Lehr will emerge with some visitation rights, but the primary parents will be the gestator and her new partner.

Gestators like the mother in *In re Adoption of J.S.*,¹⁴⁴ who do not want to keep the child, will instead treat the potential adoptive parents like intended parents, inviting them to doctor's appointments and encouraging them to make the kind of investments that those who are in favor of equal rights for genetic fathers at birth argue entitle fathers to equal rights at birth.¹⁴⁵ Again, the genetic father can make a claim for parenthood and courts may not be willing to dismiss him entirely, but if the question of who should be the primary parents is made using a best interest of the child standard, it is hard to see how the adoptive parents will not seem better suited as parents than the genetic father, who will have been estranged from the gestational process and whom the gestator can testify will be a bad parent. The adoptive parents will present as making all the same kind of investments as same sex partners do. To award primary parental right to the genetic father over the adoptive couple is to suggest that there is something inferior to the kinds of investment that same sex partners make, at least when compared to genetic connection.

In both of those situations, the visitation rights of the genetic father will act as a significant restriction on the parental autonomy of the primary parents, though people who favor multiple-parenthood may think that is a reasonable compromise. The gestators who will be most disadvantaged by this best interest of the child free-for-all regime are the ones who want to parent on their

Insights from Australia?, 77 L. & CONTEMP. PROBS. 109, 141 (2014) (both suggesting that benefits of significant shared custody can be reduced or reversed if child is too young, which is generally thought to be younger than age 4).

¹⁴⁴ See *supra* notes 85-86 and accompanying text.

¹⁴⁵ See Fontana & Schoenbaum, *supra* note 42; Purvis, *supra* note 41.

own, or who end up parenting on their own, or who have not found an appropriate adoptive family yet. It is these parents who are likely to have to share extensively with the genetic fathers they are trying to avoid. Courts are much more likely to afford that genetic father significant rights if the gestational mother is parenting on her own.¹⁴⁶ In cases in which the genetic parents are already so estranged that she is actively trying to hide her pregnancy from and exclude him, the result is likely to be a deeply contentious (and therefore bad for the child) relationship between the parents.

Thus, despite the influence of arguments that ground themselves in principles of equality, what will emerge for a parentage system that treats everyone who might have a parental interest as equally entitled to sue for parental status is a world with less equal parenting and more potential fighting, but not very different results in terms of custodial time awarded. Most potential parents who have been denied significant parental rights under a regime that rewards the work of gestation will continue to be denied significant parental rights under a regime that erases it, but for a different reason – because such a denial will be in the child’s best interest.

It is the gestators who want to abort their pregnancies, or parent alone or have their child adopted without having to worry about interference from men with whom they once had sex who will be most affected by a regime that erases gestation. They will be forced to share with men they want to escape. Just as important, erasing gestation in order to treat genetic parents on par with gestators puts same sex partners at an inherent disadvantage. Gestational erasure elevates the relevance of genetics and leaves LGBTQ parents having to fend off claims from genetic parents instead of just arguing on equal terms for parental rights based on investment.

¹⁴⁶ In sperm donation situation, courts have been more influenced by a genetic father’s professed intent to parent than a gestational mother’s intent that she not share parental rights. Susan Boyd, *Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility*, 25 WINDSOR Y.B. ACCESS JUST. 63, 70 (2007).

