ARTICLES

ABORTION, PARENTHOOD, AND EQUALITY

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ABSTRACT

This Article reveals how the most common sex equality arguments for abortion—those grounded in anti-stereotype principles—are internally inconsistent because they themselves rely on stereotypes. Equal Protection arguments for abortion rights that assume that compelled motherhood is different than compelled fatherhood, that compelled gestation necessarily leads to compelled motherhood and that compelled child-bearing leads to compelled child-rearing fail to acknowledge that all of those assumptions, however true as a matter of social fact, rely on stereotypes. Arguments for abortion rights cannot rely on differences between how motherhood and fatherhood are experienced without relying on gendered stereotypes about parenthood. Gestation, on the other hand, is not a stereotype. It is a physiological burden that only those with the ability to gestate endure. Unless equality arguments for abortion rights are willing to incorporate stereotypes into their analysis in order to provide opportunity for women who conform to gendered norms, Equal Protection arguments for abortion rights must ground themselves in the physiological, not social, reality of the consequences of gestation.

INTRODUCTION

The Supreme Court's decision in *Dobbs v. Jackson's Women's Health Org.*[1] had a dramatic effect on the electorate. After the decision, women flocked to register to vote in proportions much greater than men.[2] Most of those women, and millions of other Americans, were motivated to vote post-*Dobbs* because they believed that abortion restrictions disproportionately burdened women. That reasoning often goes something like this: Abortion restrictions compel women to be mothers because compelled gestation leads to compelled motherhood, and compelled motherhood leads to compelled caretaking.

That understanding of what abortion restrictions do to women parallels the most prominent scholarly arguments for why abortion is a sex equality right. This essay reveals that however much this reasoning reflects common sense and how people think, Equal Protection arguments for abortion rights that rely on it make three assumptions that are elsewhere condemned in much sex equality scholarship. First, the reasoning above assumes that compelling motherhood is somehow different than compelling fatherhood. Second, the argument assumes a link between gestation and legal motherhood. Third, the argument assumes that compelled child-bearing will lead to compelled child-rearing. All of those assumptions are routinely criticized by sex equality scholars, particularly those who believe that ridding the law of sex stereotypes is the primary goal of antidiscrimination law.

To be clear, these three assumptions are perfectly understandable. Compelling men into fatherhood does not usually define men's lives as much as compelling women into motherhood defines women's lives.[3] Linking motherhood to gestation reflects the exceedingly common practice of gestators accepting legal responsibility for the children they gestate.[4] And compelling child-bearing does, in the vast majority of cases, lead to child-rearing. Gestators almost always accept both legal and caretaking responsibility for the children they gestate.[5] Thus, the assumptions made by many sex equality arguments for abortion rights are well grounded in social facts. But social facts are findings rooted in social practice; they do not reflect a truth about how all women or all men behave. In other words, they are stereotypes. To ask courts to incorporate these social facts into constitutional decision-making regarding abortion is to ask the law to rely on the very stereotypes the law is supposed to condemn.[6]

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1. 597 U.S. 215 (2022).

2. *See* Francesca Parish and Nate Cohn, *After Roe's End Women Surged in Signing Up to Vote in Some States*, N.Y. TIMES (Aug. 25, 2022), perma.cc/526V-6HZ7. In Kansas, 70% of new voter registrants were women in the months after *Dobbs*; in Pennsylvania, 60% of new voters were women.

3. Men are much less likely to assume significant child-care responsibilities then women, particularly if they were compelled into parenthood through paternity law. *See* Annie E. Casey Foundation, *Child Well-Being in Single Parent Households*, THE ANNIE E. CASEY FOUNDATION (Aug. 1, 2022), perma.cc/7JXT-696B.

4. *See infra* note 84.

5. *Id.*

6. *See* JEB v. Alabama, 511 US 127, 138 (1994) ("We shall not accept as a . . . [a justification for sex distinctions] . . . 'the very stereotype the law condemns.'").

For the past 25 years, many prominent scholars argued that gendered stereotypes are the primary evil that sex equality law should combat.[7] The law must not assume them. Further, several scholars have suggested that courts should be especially careful not to use physiological differences between men and women to justify different treatment of men and women because of the historical tendency to use physical differences as an excuse for stereotypical thinking. [8] However, in the abortion context, the effort to avoid focusing on the physiological differences inherent in gestation leads scholars to focus instead on differences between motherhood and fatherhood. But allowing the law to rely on differences between motherhood and fatherhood incorporates gendered stereotypes of parenting into law.

This essay argues that instead of sidestepping the physiology of gestation, Equal Protection arguments for abortion rights should lean into the physiological process that distinguishes gestators from non-gestators. Compelled child-bearing triggers sex equality concerns because gestation is physiologically taxing, dangerous work.[9] Instead of ignoring that burden, sex equality arguments should

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7. *See* Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 YALE L. J. 1065, 1070–71 (2023) ("Sex Equality's crown jewel is the anti-stereotyping principle"); Robin Dembroff, Issa Kohler-Hausmann and Elise Sugarman, *What Taylor Swift and Beyonce Teach Us About Sex and Causes*, 169 U. PA. L. REV. ONLINE 1, 11 (2020) (the only reason we prohibit group-based discrimination is because "the reproduction of certain generalizations, stereotypes and norms leads to inequality."); Cary Franklin, *The Anti-Stereotype Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 88–91, 108 (2010) (describing ascendance of the anti-stereotype principle and suggesting it provided more guidance around which forms of regulation were a cause for concern than did an anti-subordination principle); Mary Anne Case, *"The Very Stereotype the Law Condemns:" Constitutional Sex Discrimination Law As a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1472 (2000) (American antidiscrimination law values "anti-stereotyping above all."); David H. Gans, *Stereotyping and Difference: Planned Parenthood v Casey and the Future of Sex Discrimination Law*, 104 YALE L. J. 1875, 1876 (1995) ("Stereotyping is the central evil that the Court's equal protection doctrine seeks to prevent.").

8. *See* Franklin, *supra* note 7, at 146 ("equal protection [analysis] should be particularly alert to the possibility of sex stereotyping in contexts where 'real' differences are involved, because these are the contexts in which sex classifications have most often been used to perpetuate sex-based inequality."); Cahill, *supra* note 7, at 1102, 1147 ("real differences arguments function like sex stereotypes: they overgeneralize about bodies and their capabilities"); Naomi Shcenbaum, *Rethinking Sex as Biology Under the Equal Protection*, U.C. DAVIS L. REV. at 5, 71 (forthcoming 2024) (advocating for a "new act of sex equality jurisprudence based in a social understanding of sex . . .[because] . . . [t]he discrimination women face is not about bodies, but about biases."). *See also* Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex and Gender*, 144 U. PA. L. REV. 1, 2 (1995) ("By accepting . . . biological differences, equality jurisprudence reifies as foundational fact that which is really an effect of normative gender ideology.").

9. The routine physiological constraints associated with gestation include "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." *See* Katharine K. Baker, *Equality, Gestational Erasure and the Constitutional Law of Parenthood*, 35 J. AM. ACAD. MATRIMONIAL LAWS. 1, 9 (2022). All of these conditions are what the U.S. Equal Employment Opportunity Commission (EEOC) considers "normal," not "complications" from pregnancy. *See* Deborah Widiss, *Gilbert Redux: The Interaction of the PDA and the AADA*, 46 U.C. DAVIS L. REV. 961, 1008 (2013) (citing EEOC regulations). Physical recovery from pregnancy involves its own distinct set of physiological impairments stemming from hormonal re-adjustment and the body's attempt to provide all the nutrients that an infant needs with breast milk instead of a gestator's blood. *See generally What to Expect While*

highlight how the physiology of reproduction disproportionately burdens women. By restricting access to abortion, states compel only those with female anatomy to bear the burdens of protecting fetal life.[10] Focusing on this "real difference" between those who gestate and those who do not is where arguments for abortion rights should start.

The analysis in this essay begins in Part I with a brief explication of what so much of abortion analysis leaves out: the law of parenthood. It shows how the law has compelled both mothers and fathers into parenthood for centuries, though the law has used different variables for imposing motherhood and fatherhood. Traditionally, gestation compelled motherhood in women; marriage or genetics compelled fatherhood in men. An explanation of the law of parenthood reveals that the law compels legal fatherhood as much as it compels legal motherhood, even if many fathers experience fatherhood differently than many women experience motherhood.

The discussion of the modern law of parenthood also reveals that gestation, genetic connection, and marriage are no longer the sole means of determining legal parenthood. Contemporary parenthood law relies on other variables, including contract, functional relationship, and formal registration to determine parenthood. Sex equality scholars have argued that with other variables prevalent, the law should cease rooting parenthood in gestation because it exacerbates stereotypes about mothers. But if the law cannot assume that motherhood follows gestation, then compelling gestation does not necessarily compel motherhood.

Part II unpacks the third problematic assumption in the predominant sex equality arguments for abortion: a willingness to conflate child-bearing with child-rearing. From the argument for abortion rights originally penned by Ruth Bader Ginsburg to more contemporary arguments, including those recently submitted to the Supreme Court in *Dobbs v. Jackson Women's Health*,[11] sex equality arguments for abortion often conflate the physiological burdens of gestation with the

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Healing After Birth, CLEVELAND CLINIC (Oct. 31, 2022), https://perma.cc/Y3BW-NX3N. In addition to the burdens associated with this obvious physical transformation, 8.6–14% of gestators experience some form of postpartum depression. *See* Karen Carlson, Saba Mughal, Yusra Azhar, & Waquar Siddiqui, *Postpartum Depression*, NAT'L INST. FOR HEALTH (Oct. 7, 2022), https://perma.cc/THA9-KNJV.

10. Some people may contest the idea that there is any such thing as "female" anatomy. Somewhere between 0.18 and 1.7% of the population do not have anatomies that distribute cleanly into the bimodal distribution that we tend to associate with male and female bodies. *See* Edward Schiappa, *Defining Sex,* 85 L. & CONTEMP. PROB. 9, 15 (2022) (describing incidence of differences in sexual development). The fact that we now know that "sex-linked characteristics" are not as perfectly bimodally distributed as sex equality advocates first thought, and the fact that the category of "woman" is now openly contested raises a host of problems for sex-based equality theories. This essay assumes that it is permissible for sex equality law to draw categories around the greater than 98% of the population that falls into the bimodal distribution, in part because failure to do so results in half of those within that distribution being penalized for their body's ability to gestate. Gestators have no constitutional protection as gestators. Women, as women, do.

11. Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, & Reva Siegal as Amici Curaie in Support of Respondents, Dobbs v. Jackson's Women's Health Organization, 597 U.S. 215 (2022) (No. 19-1392).

social burdens of parenthood. In doing so, these arguments make a leap between the biological and social aspects of parenthood. They assume that women who gestate will mother the children they gestate. But compelled mothering only presents a sex equality problem if gestators feel compelled to mother in ways that genetic progenitors do not feel compelled to father. Scholars who champion an anti-stereotype approach to sex equality (whom I will refer to as "anti-stereotype theorists") insist that the law must not rely on such differences in women's and men's approaches to parenthood because the differences between motherhood and fatherhood are rooted in stereotypes. Thus, Part II concludes by showing that a doctrinal sex equality argument for abortion ultimately should rely not on an anti-stereotype principle, but instead on an anti-subordination principle that emphasizes physiological differences between gestators and non-gestators.

The critique that follows does not in any way endorse the reasoning or result in *Dobbs* or *Geduldig v. Aiello*,[12] the pregnancy case on which *Dobbs* relies to dispense with an Equal Protection claim.[13] I also acknowledge that regulation of pregnancy has sometimes been and still can be rooted in stereotypes.[14] But gestation is not just a stereotype; it is a physiological condition. Those concerned about restoring robust abortion rights and about the law's treatment of gestators generally, must be wary of relying on an anti-stereotyping approach to equality that insists on de-emphasizing the physiological reality of gestation.

I. A VERY BRIEF HISTORY OF THE LAW OF PARENTHOOD

A. MOTHERHOOD, FATHERHOOD AND GENETIC CONNECTION

Questions of legal parenthood have always been gendered. Until the late 20th century, gestation determined motherhood and, for most children, marriage determined fatherhood.[15] A woman who gave birth, whether or not she was married, became a legal mother when the child she was gestating was born. The law never answered the question of whether gestation or genetics was the controlling factor for motherhood because, until the 1990s, it was not possible to sever gestation from genetic connection in the gestator.[16] Genetics was the controlling factor for

12. 417 U.S. 484 (1974). For a discussion of *Geduldig*, see *infra* text accompanying notes 46–49.

13. *Dobbs*, 597 U.S. at 236–37 (suggesting that any sex based equal protection claim to abortion is inconsistent with Supreme Court precedent, citing *Geduldig*).

14. *See infra* note 68.

15. The marital presumption of paternity was legally and then practically irrefutable for centuries. *See* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. OF L. & PUB POL'Y 1, 22–23 (2004) (discussing history of marital presumption of paternity). All states still presume that the spouse of a gestator is the parent of a child. *See generally* Uniform Parentage Act 2017 § 204(a)(1)(A) (UNIF. L. COMM'N 2017). In the mid-20th century, the marital presumption determined fatherhood for over 95% of children born in this county. By 1970 it was 90%. Today it is 60%, but much less for children of color. *See* Carmen Solomon-Fears, *Nonmarital Births: An Overview*, CONGRESSIONAL BUDGET OFFICE (July 30, 2014), https://perma.cc/4J6Z-Z5X2.

16. This changed with the advent of gestational surrogacy. At that point, it may have become important to determine whether it was genes or gestation that might determine motherhood but, as discussed *infra* note 20 and text accompanying, when genes are severed from gestation, neither controls

only one category of parenthood: the legal fatherhood of children born to unmarried mothers.

As I have explained elsewhere, this incorporation of genetics into the law of parenthood started at the insistence of the Pope in the 13th century, who wanted to relieve the Church of the financial burdens associated with caring for children of unmarried mothers.[17] Neither the Pope nor anyone else in the 13th century understood much about genetic reproduction, but they understood that sex led to pregnancy. Those pregnancies often led to children who needed to be supported. Local parishes originally assumed that burden. Later, governments did.[18] Both the church and the government tried to put more of the burden of caring for those children on the men who had the sex that led to pregnancy.

In the 20th century in the United States, as the rate of unmarried motherhood increased, the federal government grew eager to lessen the fiscal burden of caring for children who needed support.[19] Rooting the fatherhood of children born to unmarried mothers in genetics is a way to ease that financial burden. It is also a way to discourage extramarital sex. This may explain why, for children conceived sexually, courts have held men responsible in paternity regardless of whether they intended to be a parent, were promised that they would not be sued in paternity, or were fraudulently induced into having unprotected sex.[20] Men are held responsible for child support as long as they had the sex (with an unmarried woman) that resulted in gestation. Thus, compelled fatherhood is as rooted in the moralistic regulation of sex as some argue abortion restrictions are.[21]

Because the law has chosen, since the 13th century, to compel fatherhood in the genetic fathers of sexually conceived children born to unmarried mothers, any argument that compelled motherhood presents a sex equality problem must explain why compelled motherhood is somehow different than compelled fatherhood. Compelled legal fatherhood may not have been as effective as compelled legal motherhood, for reasons both scientific (without genetic testing, there is no effective way of identifying the sex that resulted in the pregnancy)[22] and social

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the parenthood question. *See* Johnson v. Calvert, 851 P.2d 776, 777 (Cal. 1992) (vesting parenthood in those who intended to be the parents, not genetics or gestation).

17. *See* Katharine K Baker, *The DNA Default and its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037, 2043–44 (2016) (tracing history of paternity law).

18. *Id.* at 2043–46.

19. *Id.* at 2048–50 (discussing Congressional involvement in paternity establishment).

20. *See id.* at 2050–56 (noting cases). For children conceived with modern reproductive technologies, notions of intent to parent, not genetic connection, tend to control. *See infra* Part IB.

21. Professor Reva Siegel argued that abortion restrictions "impair the possibility of sexual pleasure for women." *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 371 (1992). This is undeniably true, but paternity law creates a similar restriction on men's sexual pleasure. It is the burden of gestation that creates the greater impairment of sexual pleasure for women. But that, again, is a physiological distinction.

22. *See* DAVID L. FAIGMAN, DAVID H. KAYE, MICHAEL J. SAKS, & JOSEPH SANDERS, MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 19–1.4 (1997) (noting that it was not until the 1990s that genetic testing allowed more reliable determinations of paternity).

(masculinity norms may have allowed men to abandon their financial, social and/or custodial responsibilities without fear of social sanction), but the law has a long history of trying to compel parenthood equally for both sexes. If abortion restrictions inhibit "women's autonomy to determine her life course, and thus to enjoy equal citizenship stature,"[23] why is it that men's autonomy is not similarly restricted? Answers to that question almost always devolve into distinctions between motherhood and fatherhood, but those distinctions are steeped in stereotypes.

B. GESTATION AND MOTHERHOOD

Modern technology offers a means of eliminating the different ways in which the law has compelled parenthood for men and women. The law could, relatively easily and inexpensively, root all parentage decisions in genetics. Anti-stereotype theorists often assume that this is the appropriate equality-respecting course.[24] But the law of modern parenthood has not embraced genetic testing as the solution to sex equality dilemmas in the law of parenthood—quite the opposite. Technological innovations have instead made the law of parenthood more complicated.[25] For children conceived by means other than sexual intercourse, contract—or preconception intent—governs most parenthood questions for both men and women.[26] In other words, when gestation and genetic connection are severed, neither control the parenthood question. LGBTQIA+ parents who are not gestators or married to gestators[27] rely on legal formalities, like reproductive technology contracts, voluntary acknowledgements of parenthood, or parenting agreements to establish legal parenthood.[28] Moreover, courts are wary of relying on genetics even for some sexually conceived children if there is someone else willing to assume parental status. In situations in which someone other than the genetic parent is the presumptive parent through marriage, has otherwise been functioning as a parent, or has willingly accepted legal responsibility as a parent, courts often use a Best Interest of the Child analysis, not a genetic test, to determine parenthood.[29]

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23. *See* Gonzales v. Carhart, 550 U.S. 124, 172 (Ginsburg, J., dissenting).

24. For commentators who implicitly assume that genetic connection should define parenthood, *see infra* notes 39–41 and *see generally* Baker, *supra* note 9, at 2 ("[T]hose concerned about equal treatment for fathers [at birth] inevitably root legal parenthood in genetics.").

25. *See infra*.

26. *See* Uniform Parentage Act 2017, § 703 (UNIF. L. COMM'N 2017) (defining "parent" as someone who, together with the gestator, consents to being—and intends to be—a parent). For a discussion of the jurisprudence using the intent standard, *see* Baker, *supra* note 17, at 2053–56.

27. The Supreme Court has held that the marital presumption must apply to same sex couples if it applies to opposite sex couples, thus solidifying the idea that the marital presumption is not a proxy for genetic connection at all. *See* Pavan v. Smith, 582 U.S. 563, 566–67 (2017).

28. A regime that simplified the law of parenthood by rooting all determinations in genetics would be a giant step backward for LGBTQIA+ parenting rights as well as for the interests of those who seek to conceive using genetic material that is not their own.

29. *See* Uniform Parentage Act 2017 § 613 (UNIF. L. COMM'N 2017) (instructing courts to weigh age of the child, nature and length of the relationship between alleged parent and child, and other "equitable" factors to determine parenthood).

The variety of ways in which the law now determines parenthood leaves the legal relevance of gestation in some doubt, especially because the Supreme Court's willingness to root parenthood in gestation has grown increasingly controversial. In several Equal Protection cases, the Court has sanctioned the idea that gestation renders the gestator dissimilarly situated from a non-gestator genetic parent and thus entitled to greater parental rights at birth.[30] Anti-stereotype theorists routinely criticize this line of cases giving gestators greater rights.[31]

One case in particular has been subject to almost universal criticism. In *Nguyen v. INS*, the Court upheld an immigration regulation that required American genetic fathers, but not American gestators, to take affirmative steps to establish parenthood of a child born overseas.[32] The genetic father's claim to parenthood was particularly compelling in *Nguyen* because he had functioned as a father to his genetic son for 16 years, from the time his son came to the United States.[33] What the father did not do was acknowledge paternity (and therefore accept legal responsibility as a parent) before the child turned 18.[34] The INS defended its rule by suggesting that taking steps to secure parental status helped ensure that fathers had an opportunity to develop "real, everyday" parental relationships.[35] Formal legal steps to secure parenthood were not thought necessary for the gestator because, according to the INS, the gestator "knows that the child is hers and has an initial point of contact with" them.[36] Thus, the gestator already had "an opportunity . . . to develop a real, meaningful relationship" with the child.[37]

The majority in *Nguyen* held that "the difference between men and women in relation to the birth process is a real one, and the principle of Equal Protection does not forbid Congress to address the problem at hand in a manner specific to each gender."[38] That is, the Court held that assumptions about relationships between parent and child could follow from the fact of gestation for the mother, even if the same assumptions did not flow from genetic connection for the father.

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30. These cases include: Quilloin v. Wolcott, 434 U.S. 246 (1978) (finding that the genetic father who had not developed a relationship with his son was not entitled to block adoption of his son by another man); Lehr v. Robertson, 463 U.S. 248 (1983) (holding that genetic father was not similarly situated to the gestator at birth and therefore not necessarily entitled to equal treatment as a parent); Michael H. v. Gerald D., 491 U.S. 110 (1989) (concluding that the genetic father of a child born to a married woman was not necessarily entitled to legal fatherhood based on their genetic connection); Miller v. Albright, 523 U.S. 420 (1998) (holding that gestators are not similarly situated to genetic fathers with regard to conveyance of citizenship); Nguyen v. INS, 533 U.S. 53 (2001) (finding that a genetic father having more difficult requirements than a gestator to establish citizenship for their child does not violate equal protection).

31. *See infra* notes 39–41.

32. Nguyen, 533 U.S. 53 (2001).

33. *Id.* at 57.

34. *Id.* at 60.

35. *Id.* at 65.

36. *Id.*

37. Nguyen, 533 U.S. at 65.

38. *Id.* at 73.

Anti-stereotype theorists have lambasted the *Nguyen* holding, finding it "maternalist,"[39] reflecting "separate spheres"[40] ideology, and antithetical to sex equality principles.[41] The dissent in *Nguyen*, which was written by Justice O'Connor and joined by Justice Ginsburg, expressed a similar sentiment, arguing that there was no reason other than "an overbroad sex-based generalization" to suggest that genetic fathers present at birth would not develop a relationship with their children.[42] Quoting from an earlier dissent by Justice Ginsburg in another sex discrimination immigration case, Justice O'Connor's dissent underscored that even though stereotypes might "hold true for many, even most, individuals," they cannot be used as a matter of sex equality law.[43] The *Nguyen* dissent added that because "our States' child custody and support laws no longer assume that mothers alone are 'bound' to serve as the 'natural guardians' of nonmarital children[,]" the majority's tacit assumption that "mothers must care for these children and fathers may ignore them, quietly condones the 'very stereotype the law condemns.'"[44]

The majority in *Nguyen* held that it was permissible to link parenthood to gestation, even if, in doing so, the law vests parenthood in gestators more readily than it vests parenthood in non-gestators.[45] The dissent in *Nguyen* suggests that

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

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

41. Courtney M. Cahill, *The New Maternity*, 133 HARV. L. REV. 2221, 2233 (2020) ("[B]iological reasoning . . . is in fact a sex-role stereotype."). For other critics, *see* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L. J. 2260, 2283 (2017) (criticizing the conflation of biological and social parenthood); Clare Huntington, *Postmarital Family Law: A Legal Structure of Nonmarital Families*, 67 STAN. L. REV. 167, 227 (2015) (arguing that unwed parents should have equal parenting rights at birth); Clare Huntington, *The Empirical Turn in Family Law,* 118 COLUM. L. REV. 227, 292 (2018) (questioning the normative judgment that giving birth might create a connection between gestator and child). *See also* Caroline Rogus, *Conflating Women's Biological and Sociological Roles: The Ideal of Motherhood, Equal Protection, and the Implications of the Nguyen v. INS Opinion*, 5 U. PA. J. CONST. L. 803 (2003). By effectively erasing the relevance of gestation, these equality advocates do precisely what Professors Franklin and Siegel criticize the Court for doing in *Dobbs*: they make the pregnant woman "vessel-like." Cary Franklin & Reva Siegel, *Equality Emerges as a Ground for Abortion Rights In and After* Dobbs, *in* ROE V. DOBBS: THE PAST, PRESENT AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION 22 (Lee C. Bollinger & Geoffery Stone, eds. 2024).

42. 533 U.S. at 86 (O'Connor, J., dissenting). Of course, at birth, no one but the gestator knows whether the man who is with her is necessarily the genetic father of the sexually conceived child. The gestator is the only one who knows the slate of potential genetic fathers. The dissent thus made imperfect assumptions about genetic parenthood.

43. *Id*. at 90 (quoting Miller v. Albright, 523 U.S. 420, 460 (1998) (Ginsburg, J., dissenting)).

44. *Id*. at 92 (quoting JEB v. Alabama, 511 U.S. 127, 138 (1994)) (internal quotation marks omitted).

45. Regardless of what one thinks of the *Nguyen* holding, it is clear that both the majority and the dissent, like so much of the sex equality argument for abortion, ignore the relevance of a critical question: where does parenthood come from in this context? One cannot know whether the INS rule in Nguyen presented unacceptable sex discrimination without knowing how the INS determined parenthood. If all the INS cared about for the regulation in *Nguyen* was a genetic link, then the INS should have given the plaintiff the right to establish parenthood through genetic connection. If what the INS cared about was a relationship at birth, then the gestator had a relationship already, and the genetic father did not. Perhaps the INS should have given the father an opportunity to prove the existence of a functional relationship after birth, though then the agency would have to decide what constituted a

the link between gestation and parenthood is impermissible as it depends on stereotypes implying that gestators are more suitable parents. Professor Kristen Collins has argued that the Supreme Court "quietly abandon[ed] the logic of . . . *Nguyen*"[46] in *Sessions v. Morales–Sontana* when it held that the INS could not impose different residency requirements on mothers and fathers wanting to claim citizenship for their genetic children born overseas.[47] But if *Morales-Sontana* rejected the notion that the law can link parenthood to gestation, not genetics, then men and women are now similarly situated in how the law compels parenthood. And if men and women are similarly situated with regard to how the law compels parenthood, then the only reasons why women are distinctly hurt when compelled into parenthood are rooted in either the physiology of gestation or stereotypes about motherhood and fatherhood.

II. EQUAL PROTECTION AND ABORTION

A. PREGNANCY AND EQUAL PROTECTION

Any discussion of Equal Protection and abortion must include a discussion of Equal Protection and pregnancy because the question of whether pregnancy triggers Equal Protection reached the Court before it was ever asked to decide whether abortion presents an Equal Protection concern.

Women's rights advocates first planned to convince the Supreme Court that discrimination on the basis of pregnancy was sex discrimination in a case called *Struck v. Secretary of Def.*[48] In that case, Navy regulations required all pregnant women to leave the service.[49] The plaintiffs, led by then-advocate Ruth Bader Ginsburg, argued that the Navy's rule reflected a "sex-based stereotype,"[50] that

significant enough relationship and whether it had to be coupled with a genetic link. These more complicated parental status determinations are costly. *See* Katharine K. Baker, *Where Do Families Come From? The Law of Family Definition*, 49 BYU L. REV. 1249 (2024) (analyzing different costs associated with different ways of defining parenthood). The INS was not compelled to define parenthood in a particular way. At the time and still, the constitutional jurisprudence of parenthood allows and/or requires the government to sometimes rely on genetic connection to determine parenthood (in the context of child support), sometimes rely on formal registration (in the context of intestacy) and sometimes rely on functional parental relationship (in the context of certain social welfare benefits and some fathers' rights cases). *See* Katharine K Baker, *Making Some Sense of the Constitutional Family*, 72 WASH. U. J.L. & POL'Y 1, 6–16 (2023) (discussing different means of defining family). There is no established hierarchy between these different means of determining parenthood. Instead, as the Court has indicated, different contexts justify different definitions. *Id.* at 20–26.

46. Kristen Collins, *Equality, Sovereignty, and the Family in Morales-Santana*, 131 HARV. L. REV. 170, 199 (2017).

47. *See* Sessions v. Morales-Santana, 582 U.S. 47, 77 (2017). *Morales-Sorena* presented substantially different facts than *Nguyen* because both the genetic father and the gestational mother had formerly registered as parents.

48. *See* Struck v. Sec'y of Def., 460 F.2d 1372 (9th Cir. 1971), *vacated,* 409 U.S. 1071 (1972).

49. *Id.*

50. Brief for Petitioner at 10, Struck v. Secretary of Def., 409 U.S. 1701 (1972) (No. 72-178), 1972 WL 135840, at *10.

treating all pregnancies identically was "dehumanizing,"[51] and that pregnancy must be treated like any other disability.[52] The Navy changed its policy, allowing Ms. Struck to stay in the service while pregnant, before the Supreme Court could decide the case.[53]

Two years later, Ginsburg had another opportunity to make her argument about pregnancy in *Geduldig v. Aiello*.[54] *Geduldig* involved a medical insurance policy that excluded pregnancy.[55] Advocate Ginsburg argued that the exclusion of a "uniquely female condition" was sex discrimination "since it [was] based on a sex-linked characteristic."[56] She also suggested that the exclusion was rooted in stereotype because it relied on the "mythology that pregnancy-related disabilities are unique."[57] But the Court didn't see any stereotype problem in making distinctions based on pregnancy, because pregnancy, not stereotype, is what grounded the different treatment.[58] Not all women get pregnant, and, in the Court's view, men's inability to get pregnant meant that men and women were not similarly situated, so there was no sex equality problem in making distinctions based on gestation. Using language that confounded many feminists at the time, the Court dismissed the discrimination claim because the statute did not discriminate between women and men, only between "pregnant women" and "nonpregnant persons."[59] In *Dobbs*, the majority cited *Geduldig* to dismiss the sex equality argument for abortion rights.[60] Because being pregnant is not a condition that triggers sex equality concerns, wanting to terminate a pregnancy does not trigger those concerns either.[61]

B. STEREOTYPES, ABORTION AND *DOBBS*

Even before *Dobbs,* scholars had done extensive work critiquing the Court's reasoning in both *Geduldig*, which refused to see gestation as a sex equality

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51. *Id.* at 17 ("Any rule by an employer that seeks to deal with all pregnant employees in an identical fashion is dehumanizing to the individual woman involved and is by its very nature arbitrary and discriminatory.").

52. *Id.* ("Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination.").

53. *See* Neil S. Siegel & Reva B. Siegel, Struck *by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination,* 59 DUKE L.J. 771, 778 (2010) (describing history of the *Struck* case).

54. *See* Geduldig v. Aiello, 417 U.S. 484 (1974).

55. *Id.*

56. Brief for the American Civil Liberties Union, the Center for Constitutional Rights and the National Organization of Women as Amici Curiae Supporting Respondents, Geduldig v. Aiello, 417 U. S. 484 (1974) (No. 73-640), 1974 WL 185753, at *19.

57. *Id.* at 8–11 (stating "pregnancy related disabilities are, for legal purposes, identical to all other disabilities").

58. *See* 417 U.S. at 496.

59. *Id.* n.20. The phrase "pregnant persons," which is often now used as an inclusive term incorporating the fact that trans men can get pregnant, arguably undermines the notion that pregnancy discrimination is sex discrimination. *See supra* note 10; Emma Green, *The Culture War Over 'Pregnant People,'* THE ATLANTIC (Sept. 17, 2021), https://perma.cc/JE68-XMDX.

60. 597 U.S. 215, 236 (2022).

61. *See id.*

concern, and *Roe v. Wade*,[62] which avoided seeing gestation as a sex equality concern and grounded a gestator's right to terminate a pregnancy in privacy and liberty.[63] These scholars tended to argue that the Court had failed to see that gestation should trigger sex equality concerns because of the way that gestation affects women's lives socially, both during and after pregnancy.

One of the first advocates for this change in focus was then-Judge Ruth Bader Ginsburg, who wrote a widely cited law review article de-emphasizing the importance of physiology to abortion rights arguments.[64] Her original ideas have been amplified and made considerably richer by contemporary scholars, including those who filed the sex equality amici brief in *Dobbs*.[65] Weaving theory and doctrine together, the brief suggested that *Geduldig* has been implicitly overturned and that abortion regulations now must be evaluated with an exacting scrutiny that the restrictions cannot survive.[66] What follows is an analysis of these arguments as they progressed.

1. Ruth Bader Ginsburg's Original Argument

Approximately ten years after *Roe v. Wade* was decided, Ruth Bader Ginsburg wrote:

> It is not a sufficient answer to charge it all to women's anatomy—a natural, not man-made phenomenon. Society, not anatomy, 'places a greater stigma on unmarried women who become pregnant than on the men who father their children.' Society expects, but nature does not command, that 'women take the major responsibility . . . for child care' and that they will stay with their children, bearing nurture and support burden alone, when fathers deny paternity or otherwise refuse to provide care or financial support for unwanted offspring.[67]

It is worth unpacking that paragraph almost forty years later because so much of it is either no longer true or reflects what many anti-stereotype theorists have since criticized in contemporary constitutional jurisprudence. The anatomy distinction, which Ginsburg dismissed, is mostly the same as it was forty years ago, unless the fact that some transgender men now get pregnant undermines the idea that pregnancy discrimination is sex discrimination.[68] But much else has changed.

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62. 410 U.S. 113 (1973).

63. *Id.* at 153.

64. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985).

65. Brief for National Women's Law Center and 72 Additional Organizations Committed to Gender Equality as Amicus Curiae Supporting Respondents, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392), 2021 WL 4441329, at *9, *32–33.

66. *Id.* at *9, *12.

67. Ginsburg, *supra* note 64, at 382–83.

68. The recently passed Pregnant Workers Fairness Act (PWFA), 42 U.S.C.A. § 2000gg (West, Westlaw through Pub. L. No. 118-106), by using the gender-neutral term "pregnant worker" in its title, suggests that pregnancy discrimination might be distinct from sex discrimination, but the Act itself uses Title VII's definition of sex. The Equal Employment Opportunity Commission, which is responsible for

The stigma associated with unmarried women becoming pregnant has decreased substantially, to almost nothing in many communities, especially some communities of color. In 2021, 40% of children in this country were born to unmarried mothers, compared to just 22% in 1985.[69] For women without a college degree and for most women of color, unmarried motherhood is far more common than married motherhood.[70] If, as the data clearly shows, low-income women of color are the ones made most vulnerable by abortion restrictions,[71] then the justification for their right to terminate pregnancies should be rooted in something other than stigma associated with unmarried gestation.

Justice Ginsburg's sex equality justification for abortion rights soon moved from the stigma associated with unmarried gestation to the burdens of parenting, highlighting that society imposes a duty of caretaking on mothers—not fathers—and suggesting fathers often shirk both their caretaking and financial responsibilities as fathers. In doing so she did exactly what she later, as a dissenting justice, criticized the INS rule for doing in *Nguyen*.[72]

The INS regulation at issue in *Nguyen* assumed, as Justice Ginsburg says society did, that (i) "women take the major responsibility . . . for child care,"[73] and therefore will likely have a relationship with their offspring, that (ii) women often "bear[] [the] nurture and support burdens alone"[74] and therefore they should be entitled to convey citizenship at birth, and that (iii) because "fathers [often] deny

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enforcing the Act, suggests that the PWFA still considers pregnancy discrimination to be sex discrimination. 29 C.F.R. § 1636.3(b)(15) ("The PWFA uses the term 'pregnancy, childbirth, or related medical conditions,' which appears in Title VII's definition of 'sex.' Because Congress chose to write the PWFA using the same language as Title VII, § 1636.3(b) gives the term 'pregnancy, childbirth, or related medical conditions' the same meaning as under Title VII.")

69. Michelle J.K. Osterman, Brady E. Hamilton, Joyce A. Martin, Anne K. Driscoll, & Claudia P. Valenzuela, *Births: Final Data for 2021*, 72:1 Nat'l Vital Statistics Reports 1, 5 (2023) (40% of births in the United States were nonmarital in 2021); CARMEN SOLOMON-FEARS, CONG. RSCH. SERV., NONMARITAL BIRTHS: AN OVERVIEW 25 (2014), https://perma.cc/E9PV-SNFL (22% of births were nonmarital in 1985).

70. In 2016, the nonmarital birth rate for women with less than a high school degree was 62%; for women who completed high school or earned a GED (but did not go to college), the nonmarital birth rate was 59%; for women who attended some college or earned an associate's degree (but did not earn a bachelor's degree), the nonmarital birth rate was 43%. ELIZABETH WILDSMITH, JENNIFER MANLOVE, & ELIZABETH COOK, DRAMATIC INCREASE IN THE PROPORTION OF BIRTHS OUTSIDE OF MARRIAGE IN THE UNITED STATES FROM 1990 TO 2016 (2018), https://perma.cc/K7TV-2233. For non-Hispanic Black women, regardless of education level, the rate was 69% in 2016. *Id*. There is considerable evidence that single motherhood has always been less stigmatized in the Black community. *See* Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 465 (2014) (discussing views of Black maternalists).

71. The Centers for Disease Control and Prevention (CDC) reports that low-income women of color are particularly likely to be impacted by *Dobbs*. *See* Katherine Kortsmit, Michele G. Mandel, Jennifer A. Reeves, Elizabeth Clark, H. Pamela Pagano, Antoinette Nguyen, Emily E. Petersen, & Maura K. Whiteman, *Abortion Surveillance—United States, 2019*, 70(9) MORBIDITY AND MORTALITY WEEKLY REPORT 1 (2021), https://perma.cc/3D6C-UHD5.

72. *See supra* notes 42–44 and accompanying text.

73. *See* Ginsburg, *supra* note 64, at 382 (quoting Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 57 (1977)).

74. *Id*. at 383.

paternity or otherwise refuse to provide care or financial support for unwanted offspring,"[75] they can be compelled to take affirmative acts to register as fathers. The majority in *Nguyen* found all three of these assumptions permissible. Justice Ginsburg, in her writing on abortion, found those assumptions not only permissible, but integral to an analysis of abortion as an equality right. Her equality argument for abortion relies on the very same stereotypes she later insisted that the law condemn in the *Nguyen* dissent.

In his criticism of the *Nguyen* holding, Professor Douglas NeJaime argued that the Court impermissibly "translated differences in the biological dimensions of parenthood into differences in the social dimensions . . . ."[76] This is exactly what Justice Ginsburg did in her Equal Protection argument for abortion, and it is what many subsequent scholars do as well.

2. Franklin and Siegel

In her path-breaking 1992 article, *Reasoning from the Body*, Professor Reva Siegel argued that "[t]he Court typically reasons about reproductive regulation in physiological paradigms, as a form of state action that concerns physical facts of sex rather than social questions of gender."[77] In an important 2010 article on the origins of anti-stereotype theory as the foundation of sex equality doctrine, Professor Cary Franklin argued that "*Roe* treated abortion as a purely physiological phenomenon, concentrating on female bodies and fetal bodies instead of inquiring if and when the regulation of pregnant women enforced stereotypes about women's family roles and deprived them of the decisional autonomy accorded to men."[78] Franklin suggests that equality demands directing the analytical focus away from the body because it is the way in which pregnancy steers women into motherhood, not anything inherent in making distinctions based on pregnancy, that constitutes sex discrimination.[79] More recently, post-*Dobbs*, Professors Franklin and Siegel have combined their analyses to suggest that their sex equality arguments for abortion continue to hold considerable promise.[80]

The problem with deflecting the gaze away from the body and focusing on stereotypes regarding how pregnancy defines women as maternal is that analyses that do so almost always then rely on stereotypes about parenthood. Franklin and Siegel discuss abortion regulation as "instrumentaliz[ing] women's lives in the

75. *Id.*

76. NeJaime, *supra* note 41, at 2283 (criticizing the Supreme Court's holding in *Nguyen*).

77. Siegel, *supra* note 21, at 264.

78. Franklin, *supra* note 7, at 128.

79. Stereotypes surrounding pregnancy include assumptions about how all pregnant people behave. For instance, the regulation at stake in *Struck*, *supra* notes 48–52, which assumed all pregnant service members were incapable of working in the Navy, relied on stereotypes about pregnancy. In contrast, focusing on pregnancy itself means focusing on sex-linked physiological characteristics. *See supra* notes 54–59 and text accompanying.

80. Franklin & Siegel, *supra* note 41 (elaborating on the strength of the anti-stereotype approach to securing abortion rights).

service of *family care*;" regulating "decisions about *motherhood*;" and "coercing . . . women to serve as *mother*s."[81] They conflate gestation with the work of motherhood, the biological with the social dimensions of parenting.

Professor Siegel originally argued that "if abortion-restrictive regulation is evaluated in light of actual social practice, it is clear that such regulation coerces women to perform, not only the work of childbearing, but the work of child-rearing as well."[82] In support of this proposition, she marshaled robust historical evidence that abortion regulation in the 19th century stemmed from beliefs that women should be confined to their roles as wives and mothers.[83] This historical frame was taken up by Justice O'Connor in her opinion in *Planned Parenthood v. Casey*, when she wrote that the state cannot insist "upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture,"[84] and by Justice Ginsburg in her dissent in *Gonzales v. Carhart*, when she wrote that abortion restrictions inhibit "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[85] That autonomy, she wrote, was "central[] to women's lives."[86]

This frame, which roots the right to abortion in the power of social forces to coerce gestators into motherhood, suggests that social forces, not law, operate differently on gestators and non-gestators. If compelling gestation denies women's autonomy in ways that compelling fatherhood does not deny men's autonomy, it must be because gendered forces (which might also be called stereotypes) compel gestators to assume a maternal role. But to acknowledge the power of those gendered forces is to make the link between gestation and parenting that anti-stereotype theorists condemn. Critics of *Nguyen* insist that the law cannot assume that caretaking follows gestation without making a comparable assumption about caretaking following genetic connection (to a father).[87] Some of these critics even cite the practice of gestational surrogacy as proof that caretaking need not follow gestation.[88]

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81. *Id*. at 5, 7, 17 (first and third emphasis added).
82. Siegel, *supra* note 21, at 371.
83. *Id*. at 280–322.
84. 505 U.S. 833, 852 (1992).
85. 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).
86. *Id*. at 191.
87. *See supra* notes 39–44 and text accompanying.
88. I have previously argued that the law should not make too much of the disruption caused by gestational surrogacy, *see* Baker, *supra* note 9, at 11–12, but other scholars suggest that the existence of surrogacy undermines "the salience of a key justification for gender-differentiated parental recognition." NeJaime, *supra* note 41, at 2305; *see also* Cahill, *supra* note 41, at 2229 (suggesting that the constitutional law of parenthood is regressive because of the assumptions it makes about gestators being mothers). There are important distinctions between those who can get paid for their gestational labor (surrogates) and those who cannot get paid (women who conceive sexually). Most women who want access to abortion have conceived sexually because non-sexual reproduction is never unplanned. I would argue that the fact that gestation can be severed from motherhood for some exceptional women who can get paid for their labor should not be particularly relevant to how most unpaid gestation should

To be clear, as a matter of history and contemporary practice, and certainly as a question of contemporary averages, Franklin and Siegel are completely right. Child-rearing is exceedingly likely to follow child bearing, and gestators are much more likely to shoulder the burdens of motherhood and have it define their life course than are men to let their genetic connection significantly restrict their autonomy or define their life course.[89] But highlighting these social facts, however obvious they are as a matter of history and contemporary practice, and however many millions of women might benefit from the law recognizing them, highlights how average and not exceptional women and men behave.[90] This is exactly what anti-stereotype theorists suggest is problematic, because incorporating stereotypes that "may hold true for many, even most, individuals,"[91] runs the risk of perpetuating the stereotypes sex equality doctrine is supposed to expunge. If ridding the law of stereotypes—not helping empower women who have been disempowered because of their gestational work—is the central aim of sex equality doctrine, then history and contemporary practice reflecting how most pregnant people behave may not be relevant because those practices just reflect stereotypes.

3. *Cal Fed*, *Hibbs* and the *Dobbs* Equal Protection Brief

The potential danger of exacerbating stereotypes by incorporating them into legal reasoning is not new to women's equality movements. From protective labor legislation, to statutory rape law, to caretaking leave policies, feminists have always debated whether special treatment for women is worth the stereotypes it might exacerbate.[92] One of the more renowned examples of this tension

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be treated in law. Admittedly, this would be making law around the averages, not the exceptional. *See infra* text accompanying notes 93–94.

89. In 2019, only about 115,000 of the approximately 3.7 million children born in the United States were relinquished for adoption. *See Joyce A. Martin, Brady E. Hamilton, Michelle J.K. Osterman, & Anne K. Driscoll, Births: Final Data for 2019, 70 NAT'L VITAL STATISTICS REPORTS, no.2, Mar. 2021, at 1, 2*; EUN KOH, RYAN HANLON, LAURA DAUGHTERY, & ABIGAIL LINDER, NAT'L COUNCIL FOR ADOPTION, ADOPTION BY THE NUMBERS 5 (2022). That is .03%. For children not relinquished for adoption, women are much more likely than are men to assume primary responsibility for caring for them. *See supra* note 3.

90. United States v. Virginia, 518 U.S. 515, 541–42 (1996) (stating that equality demands attention to exceptional—not average—women); *see also* Cahill, *supra* note 7, at 1102 (suggesting that sex equality law must not "substitute the law of averages for the law of one . . . .").

91. *See* Nguyen v. INS, 533 U.S. 53, 90 (2001) (O'Connor, J., dissenting) (quoting Miller v. Albright, 523 U.S. 420, 460 (1998) (Ginsburg, J., dissenting)).

92. For protective labor debate, *see* Deborah Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 982–83 (2013); for statutory rape, *compare* Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 187-199 (1982) (criticizing gendered enforcement of statutory rape) *with* Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15 (1994) (suggesting that statutory rape law must take account of the way in which girls' consent is constructed); for caretaking leave, *see* Dinner, *supra* note 70, *passim* (discussing tension between neomaternalists and other feminists over potential stereotyping effects of family leave legislation).

among feminists has proved critical to the doctrinal argument for abortion as an equality right.

In *California Federal Savings and Loan Association v. Guerra* ("*Cal Fed*"),[93] which was decided before the Family and Medical Leave Act ("FMLA")[94] was passed, a bank challenged a California law that required employers to provide up to four months of leave for pregnancy-related conditions but did not require comparable leave for fathers or men with other disabling conditions.[95] Plaintiffs argued that the provision affording special leave for pregnancy was inconsistent with the anti-discrimination mandate in the Pregnancy Discrimination Act ("PDA"),[96] which Congress had passed to make clear that *Geduldig*'s reasoning should not be applied to sex discrimination as defined in Title VII.[97] In *Cal Fed*, some feminist amici, including Professor Herma Kay Hill, argued that the California statute did not violate equality principles by singling pregnancy out for more generous treatment because the statute helped ease the way for women's equal participation in the workplace.[98] This is an anti-subordination argument. Other feminist amici, including Professor Wendy Williams, argued that unless the California statute granted comparable leave to men, it violated basic sex equality principles under Title VII because it would discriminate against men.[99] This is a formalism or anti-stereotyping argument because it rejects the idea that stereotypes about how men and women will behave as parents can justify different treatment.

The *Cal Fed* court sided with Professor Hill and anti-subordination theory, not Professor Williams and anti-stereotype theory. In an opinion by Justice Marshall, the Court found that the statute was "narrowly drawn to cover only the period of actual physical disability [due to pregnancy] . . . [and did] not reflect archaic or stereotypical notions about pregnancy or abilities of pregnant workers."[100] The PDA's mandate that pregnancy discrimination be treated as sex discrimination

93. *See* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).

94. 29 U.S.C. § 2601 *et seq*. (2012) (providing up to twelve weeks of unpaid leave for taking care of one's own or family member's medical needs).

95. 479 U.S. at 275–79.

96. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)).

97. 479 U.S. at 277 n.5, 284 (stating "[i]t is well established that the PDA was passed in reaction to this Court's decision in General Electric Co. v. Gilbert, 429 U.S. 125 (1976)," which was itself dependent on the logic of *Geduldig*).

98. *See* Brief for Equal Rights Advocates, the California Teachers Association, the Northwest Women's Law Center, and the San Francisco Women Lawyers Alliance as Amici Curiae Supporting Respondents, Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, (1987) (No. 85-494), 1986 WL 728374, at *8.

99. *See id*.; Brief for the National Organization for Women; NOW Legal Defense and Education Fund; National Bar Ass'n, Women Lawyers' Division, Washington Area Chapter; National Women's Law Center; Women's Law Project; & Women's Legal Defense Fund as Amici Curiae Supporting Neither Party, Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (No. 85-494), 1986 WL 728368, at *11–12.

100. 479 U.S. at 290 (emphasis omitted).

provided "'a floor [but] . . . not a ceiling.'"[101] That is, California was free to treat pregnancy more generously than it treated other disabilities, but it was not free to treat pregnancy worse. The Court justified this different treatment by focusing on the physiology of gestation.[102]

Though *Cal Fed* was a Title VII employment case, it assumed constitutional importance when Justice Ginsburg cited it in her critically important *United States v. Virginia*[103] decision. In *Virginia*, though holding that any distinctions based on sex must be justified with an "exceedingly persuasive" rationale, Justice Ginsburg suggested that such rationales could include justifications like the one for the leave policy in *Cal Fed*, which she said "promot[ed] equal opportunity for women" by giving women more leave than men.[104] Notably, and critically, this is Justice Ginsburg shifting her concern from anti-stereotyping to anti-subordination.

Justice Ginsburg in *Virginia*, like Justice Marshall in *Cal Fed,* emphasized the need to provide more generously for pregnant women in order to combat the (routine, if not ubiquitous) subordinating effects of pregnancy.[105] Doing this *required* relying on stereotypes about pregnancy. For instance, the California regulation that the Court upheld in *Cal Fed* grouped all pregnant women together (thus stereotyping them), and it treated pregnancy differently than it treated other disabilities.[106] It did not require individualized assessment of how much leave each woman needed (which Advocate Ginsburg, in *Struck*, had argued the law must do in the name of combating stereotypes),[107] and it did not treat pregnancy as Ginsburg had argued the law must—like any other disability.[108] It singled out gestation for "favor [and] special protection."[109]

Cal Fed figures prominently in the brief filed by the Equal Protection Constitutional Law Scholars in *Dobbs*.[110] These scholars argue that *Virginia* and *Cal Fed,* along with *Nevada Department of Human Resources v. Hibbs*,[111] implicitly

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101. *Id.* at 285 (quoting Cal. Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985)).

102. *See id.* at 290. Justice Marshall did not once refer to caretaking or motherhood in his opinion. *Id.*

103. United States v. Virginia, 518 U.S. 515, 533 (1996).

104. "'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' see California Fed. Sav. & Loan Ass'n. v. Guerra, 479 U.S. 272, 289 (1987), [and] to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." *Id.* at 533–534 (alteration in original) (footnotes omitted) (citations omitted).

105. 479 U.S. at 290.

106. *Id.* at 275, n.1 (explaining that statute requires employers to provide up to four months of unpaid pregnancy leave, with no mention of requiring individual women to prove that they needed four months of unpaid leave).

107. *See* Siegel & Siegel, *supra* note 53, at 779.

108. *See id.* at 779–80.

109. In *Struck*, Advocate Ginsburg emphasized that the pregnant plaintiff "seeks no favors or special protection." *Id.* at 779.

110. *See* Brief of Equal Protection Constitutional Law Scholars, *supra* note 11, at 8–10.

111. Nevada Dep't of Hum. Res. v. Hibbs, 538 U.S. 721 (2003); *id.* at 3, 10–11.

overturned *Geduldig* and that the Court therefore had to treat abortion regulations as it had refused to evaluate pregnancy discrimination in *Geduldig*: as a sex equality issue.

Hibbs is a case reminiscent of many early sex discrimination cases that used male plaintiffs to highlight how sex-based stereotypes permeate the law. William Hibbs, the male plaintiff, was a state of Nevada employee who sought leave to care for his wife.[112] He sued the state for not giving him the full caretaking leave to which he said he was entitled under the Family and Medical Leave Act ("FMLA").[113] Mr. Hibbs' entitlement to money damages turned on whether Congress had the power, under Section 5 of the Fourteenth Amendment, to enforce the Equal Protection Clause's equality mandate by abrogating sovereign immunity for a state that violated the FMLA.[114]

In an opinion by Justice Rehnquist, which spoke extensively about stereotypes with regard to taking leave,[115] the Supreme Court held that Congress did have such power.[116] Congress could force states to provide identical caretaking leave policies for women and men because of the pervasive stereotypes that assign caretaking duties to women but not men.[117] Unlike Justice Marshall's decision in *Cal Fed*, which spoke exclusively about pregnancy and not at all about caretaking, Justice Rehnquist's decision in *Hibbs* spoke exclusively about caretaking and not at all about pregnancy. It had to. Mr. Hibbs could not get pregnant.

In suggesting that together *Cal Fed,* as incorporated into *Virginia*, and *Hibbs*, with its interpretation of women's equality under the Fourteenth Amendment, overruled *Geduldig*, the amici brief of the Equal Protection Constitutional Law Scholars again conflates the biological with the social dimensions of parenting.[118] *Hibbs* is related to *Cal Fed* only if one assumes, as anti-stereotype theorists insist the law must not, that caretaking responsibilities inevitably follow from gestation.

That Congress has the power to draft legislation in order to combat stereotypes with regard to caretaking does not necessarily mean that legislation regarding child-bearing implicates equality concerns, unless it is permissible to conflate social and biological roles. Anti-stereotype theorists insist that child-bearing and

112. Nevada Dep't of Hum. Res. v. Hibbs, 538 U.S. at 725.

113. *Id.*

114. Nevada argued that it could not be responsible for money damages because it had not waived its sovereign immunity as a state for purposes of the FMLA. Plaintiffs argued that because the FMLA was passed in order to ensure equality under the Fourteenth Amendment, Congress had the power to override the state's claim of sovereign immunity. *See id.* at 726–27.

115. *See, e.g.*, *id.* at 736 ("Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men."); *id.* at 737 ("Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees . . . .").

116. *Id.* at 735 ("[T]he States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.").

117. Nevada Dep't of Hum. Res. v. Hibbs, 538 U.S. at 733–35.

118. *See* NeJaime, *supra* note 41.

child-rearing are distinct.[119] *Nguyen* was wrongly decided, according to them, because the law cannot assume that bearing a child means one is uniquely situated with regard to that child or that one will rear the child. That kind of thinking, they maintain, suggests gendered stereotypes. But if the law should not make the link between child-bearing and caretaking, then legislation like the FMLA, which pertains to caretaking, does not speak to legislation like abortion restrictions, which pertain to child-bearing.

The key to the sex equality argument for abortion rights turns on *Cal Fed* and *Virginia*, but not *Hibbs*. *Cal Fed* held that assuming certain things about pregnant women, like that they might need or deserve substantial leave for pregnancy because of the physiological burdens of gestation, is permissible as a matter of sex equality.[120] *Cal Fed* allows states to treat gestation differently from other disabilities because the anti-discrimination principle in the PDA is not an anti-stereotype mandate but an anti-subordination principle, a substantive effort to promote women's equal opportunity given the "actual physical disability" [121] that gestation creates. Indeed, *Cal Fed* can be read to permit the gestator-only parental leave policies that *Hibbs* struck down.[122] Treating gestators differently from others is critical to women's equality, not because pregnant people are just like those who do not get pregnant, but because they are different from those who do not get pregnant.

Gestating children and giving birth to them is hard work.[123] It is work that gestators do and non-gestators do not do. Compelled pregnancy is a burden on those who gestate.[124] To restrict abortion access is to compel gestators alone to suffer the physiological costs of protecting fetal life.[125] As Professor Jennifer Hendricks has argued, "[w]omen should have at least as much right as dead people [who are not forced to donate organs in order to save a life] to reserve their bodies for themselves."[126]

The physiological costs of pregnancy often translate into significant medical and economic disadvantages. In addition to the physical dangers and disabilities of pregnancy itself, childbirth and postpartum recovery are taxing. Women take

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119. *See, e.g.*, *id.* at 2329; *supra* notes 39–41.

120. *See* 479 U.S. at 289–90.

121. *Id.* at 290.

122. *See Hibbs*, 538 U.S. at 753 (Kennedy, J. dissenting) (noting the female-only pregnancy leave policies that the majority declared unconstitutional).

123. *See, e.g.*, Baker, *supra* note 9, at 9.

124. *See id.* at 10–11.

125. This understanding of why abortion restrictions violate equality principles builds on the argument originally advanced by Judith Jarvis Thompson and developed in the legal literature by Donald Regan and Robin West. *See* Judith Jarvis Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFS. 47, 56–59 (1971) (explaining why abortion restrictions violate equality principles); *see generally*, Donald Regan, *Rewriting Roe v Wade,* 77 MICH. L. REV. 1569 (1979); Robin West, *West J., Concurring in the Judgement*, in WHAT ROE V. WADE SHOULD HAVE SAID (Jack M. Balkin ed., 2005). All of these authors emphasize the physiological burdens of gestation.

126. JENNIFER HENDRICKS, ESSENTIALLY A MOTHER: A FEMINIST APPROACH TO THE LAW OF PREGNANCY AND MOTHERHOOD 155 (2023).

three times more (unpaid) FMLA leave at childbirth than the men who take FMLA leave at childbirth,[127] and only 66.5% of men take any leave at the birth of their first child.[128] Medical experts suggest that by three weeks post-delivery, when most fathers who take paternity leave have already returned to work, gestators are only halfway to full physiological recovery.[129]

Equal Protection scholars who insist that stereotypes are the "central evil"[130] that equality doctrine must combat likely view the extra leave gestators take (and the medical advice about that leave) as rooted in stereotypes. After all, not all gestators feel the need to take that much leave. Perhaps the women who take it are just complying with the stereotype that they should take leave to care for their children. To support extra leave for those who give birth is to run the risk of exacerbating those stereotypes. But if one is less exclusively concerned with stereotypes and more concerned with helping gestators compete in a world with non-gestators, then one can support extra leave for gestators in order to help ameliorate the physiological and economic burdens that gestators face as a result of gestation. Directing the analytical focus away from the body suggests we should assume the stereotype explanation and not worry about the physiological differences, but if it is physiology that makes a gestator more likely to want and need leave than a non-gestator, the anti-stereotype approach denies the burdens gestators face.

CONCLUSION

There are two sentences in the first Section of the Fourteenth Amendment. The first states that anyone born on U.S. soil is an American Citizen.[131] The second guarantees citizens equal protection of the law.[132] This first sentence conveys rights on gestators because gestators have the ability to control where a child is born. It is a right that flows from physiology and geography, not stereotypes. Unless somehow the sex equality jurisprudence of the last fifty years negates the first sentence of the Fourteenth Amendment, different treatment of gestators and non-gestators is built into the Fourteenth Amendment itself.

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127. *See* Jan Herr, Rodha Roy, & Jacob Alex Klerman, *Gender Differences in Needing and Taking Leave*, U.S. DEP'T OF LABOR, CHIEF EVALUATION OFF. (Nov. 2020), https://perma.cc/9BBM-YRKA ("On average women take 54 days of leave from work for reasons related to a new child, three times longer than men (18 days for a new child)."); Zachary Sherer, *College-Educated Women and Non-Hispanic White Women More Likely to Work During First Pregnancy*, U.S. CENSUS BUREAU (Sept. 16, 2021), https://perma.cc/28LJ-QPWM. All FMLA leave is unpaid.

128. Sherer, *supra* note 127; *see also DOL Policy Brief: Paternity Leave,* U.S. DEP'T OF LABOR, https://perma.cc/875A-4NV8 ("Seven in ten U.S. fathers taking parental leave took ten days of leave or less.").

129. *See What to Expect While Healing After Birth*, *supra* note 9.

130. *See* Gans, *supra* note 7, at 1876.

131. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

132. *Id.* ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

This Article has argued that sex equality arguments for abortion rights should lean into the distinction between gestators and non-gestators—not dismiss and condemn them as stereotypes. Gestation is not just a stereotype; it is a physiological burden that allows gestators to convey citizenship in ways non-gestators cannot and that should allow gestators to terminate pregnancies in ways that non-gestators cannot.

Sex equality arguments for abortion rights that insist on de-emphasizing the relevance of anatomy and emphasizing the gendered burdens of parenthood for women end up relying on stereotypes about motherhood and fatherhood. To paraphrase and reverse the argument that Justice Ginsburg originally made, if the argument for abortion rights is not rooted in "anatomy," it becomes rooted in what "society expects" of women, and what society expects is a stereotype of how mothers are supposed to behave.[133]

This Article has not argued the Equal Protection arguments for abortion rights that incorporate those stereotypes are wrong or unpersuasive. Many, many people find them compelling. But they are inconsistent with the popular trend in Equal Protection scholarship which insists that stereotypes are the essential foe of gender equality. Unless equality arguments for abortion rights are willing to incorporate stereotypes into their analysis in order to provide opportunity for women who conform to gendered norms,[134] they must take physiology more seriously. Compelled pregnancy presents an equality problem because of how it forces women to disable themselves. This disability constitutes a burden regardless of stereotypes surrounding pregnancy and regardless of whether it leads to compelled parenthood. Compelled pregnancy is a subordinating and gendered burden that equality principles should prohibit.

133. See Ginsburg, supra note 64, at 382–83.

134. Justice Ginsburg incorporated gendered stereotypes into her analysis in *Virginia* when she endorsed the idea of requiring separate living facilities and different physicality requirements for female cadets once they were admitted to VMI. United States v. Virginia, 518 U.S. 515, 540 (1996). This grouping of all women together based on behavior bred by social norms (stereotypes) is permissible, according to Ginsburg, "to promote equal employment opportunity." *Id.* at 533 (citation omitted).