MAKING A MOTHER: THE SUPREME COURT AND THE CONSTITUTIVE RHETORIC OF MOTHERHOOD*

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"Language is a tool to convey meaning; language is also sometimes the meaning itself. . . . Language gathers to itself ideas and, as used in legislation, creates 'laws' sometimes beyond those intended or indicated by the lawmakers."[1]

Many scholars study Supreme Court decisions, but few are attentive to the rhetoric the Court uses to articulate its holdings. This omission is perplexing: the Court's rhetoric literally becomes law, but scholars typically fixate on the substance, rather than the rhetoric, of its communications. In this Article, I argue that legal scholars should take more seriously the Court's role as a rhetorical actor. To illustrate this, I analyze the rhetorical effects of the language the Court uses to describe women and mothers in three contexts: gender discrimination, immigration, and abortion. I begin by describing the "inherited language" of motherhood—that is, the narratives, themes, and connotations that are traditionally associated with the idea of motherhood. I then use close readings and discourse analysis of landmark decisions in each substantive area to consider whether and how the Supreme Court engages with that inherited language.

My analysis reveals that the Court's relationship with the inherited language of motherhood varies across contexts. In cases dealing with gender discrimination, the Court anxiously distances itself from traditional narratives about motherhood. In immigration cases, it both embraces and rejects the inherited language. And in abortion cases, its approach has shifted: initially, the Court strongly disavowed inherited narratives, but in its most recent abortion case, Dobbs v. Jackson Women's Health Organization*, it says very little about*

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1. Martha Traylor, *Gender in Statutory Language: A Look at Its Use and Misuse*, 2 SETON HALL LEGIS. J. 17, 17 (1976).

mothers at all. My analysis also suggests the Court's attitude toward the inherited language of motherhood may be correlated with the substantive legal outcome in a case: the Court seems to most emphatically reject the inherited language in decisions that protect and reaffirm women's rights.

These findings illustrate why legal scholars should be more attentive to the Supreme Court's rhetoric. The correlation between the Court's language and substantive outcomes suggests that in some cases, the Court's rhetorical decisions might influence or even determine its legal analysis. If that is true, then scholars who are interested in case outcomes should study the Court's language. But the Court's rhetoric does not just shape case outcomes; it also alters the way we understand, engage with, and view one another. When the Court uncritically invokes traditional narratives about women and mothers, it may—for better or for worse—perpetuate and reconstitute a world where certain assumptions govern. When it actively distances itself from traditional narratives, as it does in gender discrimination cases and early abortion cases, it creates legal and rhetorical space for women to enact various modes of motherhood and womanhood. And when the Court ignores the inherited language of motherhood, it frames legal debates as if women's interests are not at stake and, in doing so, obscures women's perspectives, needs, and lived experiences. Scholars interested in the ways law shapes relationships and facilitates identity formation should pay attention to these constitutive effects.

INTRODUCTION

On June 24, 2022, the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*[2]—one of the most controversial and closely-watched cases in recent Supreme Court history. *Dobbs* involved a challenge to Mississippi's Gestational Age Act, which prohibited abortions after the fifteenth week of pregnancy.[3] Several abortion providers challenged the Act as unconstitutional under *Roe v. Wade*[4] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[5] two precedent decisions that had established and reaffirmed a constitutional right to abortion. In a dramatic (but not unexpected) opinion authored by Justice Alito, the Court held that "[t]he Constitution makes no reference to an abortion, and no such right is implicitly protected by any constitutional provision."[6] The Court therefore overturned both *Roe* and *Casey* and held that "[i]t is time to heed the Constitution and return the issue of abortion to the people's elected representatives."[7]

Dobbs had instant consequences for all Americans who can become pregnant. As soon as it was announced, the opinion validated a number of abortion restrictions that state legislatures had enacted to prepare for *Roe*'s anticipated demise.[8] These laws dramatically altered access to abortion

2. 142 S. Ct. 2228 (2022).
3. *Id.* at 2243 (citing MISS. CODE ANN. § 41-41-191 (2018)).
4. 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.
5. 505 U.S. 833 (1992) (plurality opinion), *overruled by Dobbs*, 142 S. Ct. at 2228.
6. *Dobbs*, 142 S. Ct. at 2242.
7. *Id.* at 2243.
8. Thirteen states had "trigger" laws that restricted abortion and had an effective date tied to the Court's overruling of *Roe*. Arkansas Human Life Protection Act, Act 180, 2019 Ark. Acts 746 (effective upon the state attorney general certifying the United States Supreme Court overruled *Roe*) (codified at ARK. CODE ANN. §§ 5-61-301 to -304 (2023)) (banning abortion except if necessary for mother's

procedures and sent abortion providers (and abortion seekers) scrambling to adjust their practices.[9] Surprisingly, though, the case itself said little about these sweeping consequences. The majority opinion reviewed the history of abortion law in the United States and parsed the text and meaning of the Fourteenth Amendment, but it said virtually nothing of the lived experiences or embodied realities of the people whose lives it so dramatically and immediately altered. And tellingly, Justice Alito used the word "mother" only seven times. Five times his opinion referenced state statutes that prohibited abortion except to preserve "the life of the mother."[10] One time it asserted that "the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure" from precedent.[11] And one time it referenced the

life); Act of Mar. 24, 2020, ch. 284, 2020 Idaho Sess. Laws 827 (effective thirty days after the Court overrules *Roe*) (codified as amended at IDAHO CODE § 18-622 (2023)) (banning abortion except in cases of rape or incest or when necessary for mother's life); KY. REV. STAT. ANN. § 311.772 (Westlaw through the 2023 Reg. Sess. and the Nov. 8, 2022 election) (banning abortion except to save the mother's life or prevent serious injury, effective when the Court overrules *Roe*); LA. STAT. ANN. § 40:1061 (Westlaw through the 2023 First Extraordinary Sess.) (banning abortion except to save the mother's life or prevent serious injury, effective when the Court overrules *Roe*); Act of Mar. 22, 2007, ch. 441, 2007 Miss. Laws 954 (effective ten days after state attorney general determines the Court overruled *Roe* and would likely uphold abortion ban) (codified at MISS. CODE ANN. §§ 41-41-1 to 41-41-45 (2023)) (banning abortion except in cases of rape or to save mother's life); MO. ANN. STAT. § 188.017 (Westlaw through the end of the 2023 First Reg. Sess. of the 102d Gen. Assemb.) (banning abortion except in medical emergencies, effective upon governor's proclamation that the Court overruled *Roe*); Act of Apr. 26, 2007, ch. 132, 2007 N.D. Laws 617 (effective when the legislature approves the recommendation of the attorney general that it is likely that the abortion ban would be upheld) (repealed 2023) (banning abortion except in cases of rape, incest, or when necessary to save the mother's life); Act of Apr. 12, 2022, ch. 11, 2022 Okla. Sess. Law Serv. Ch. 11 (West) (effective when Court overrules *Roe*) (codified at OKLA. STAT. ANN. Tit. 63, § 1-731.4 (Westlaw through legislation of the First Reg. Sess. of the 59th Leg. (2023) and the First Extraordinary Sess. Of the 59th Leg. (2023) effective as of October 1, 2023)) (banning abortion except to save mother's life), *invalidated by* Okla. Call for Reprod. Just. v. Drummond, 2023 OK 24, ¶ 16, 526 P.3d 1123, 1125; Act of Mar. 16, 2005, ch. 187, 2005 S.D. Sess. Laws ch. 187 § 7 361 (effective when Court overrules *Roe*) (codified at S.D. CODIFIED LAWS § 22-17-5.1 (2023)) (banning abortion except when necessary to save mother's life); Human Life Protection Act, ch. 351, 2019 Tenn. Pub. Acts 1 (effective thirty days after the Court overrules *Roe*) (codified as amended at TENN. CODE ANN. § 39-15-213 (2023)) (banning abortion except to avoid serious risk of irreversible physical harm to mother); Human Life Protection Act of 2021, ch. 800, 2021 Tex. Gen. Laws 1886 (effective thirty days after the Court overrules *Roe*) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 170A.001–.007 (2023)) (banning abortion except to avoid serious risk of substantial physical impairment of mother); Abortion Prohibition Amendments, ch. 279, 2020 Utah Laws 1981 (effective when legislative general counsel certifies that binding court precedent would allow the ban) (codified as amended at UTAH CODE ANN. §§ 76-7a-101 to 76-7a-301 (2023)) (banning abortion except in cases of rape, incest, or to avoid serious risk of irreversible physical injury to mother); Act of Mar. 15, 2022, ch. 88, 2022 Wyo. Sess. Laws 305 (effective five days after governor certifies the Court overruled *Roe*) (repealed 2023) (banning abortion except in cases of rape, incest, or to avoid irreversible physical impairment for mother).

9. *See* Mary Kekatos, *More States Ban Abortion This Week as Several 'Trigger Laws' Go into Effect*, ABC NEWS (Aug. 25, 2022, 4:05 PM), https://abcnews.go.com/US/states-ban-abortion-week-trigger-laws-effect/story?id=88837365 [https://perma.cc/33PD-9XLB].

10. *Dobbs*, 142 S. Ct. at 2253, 2260, 2266.

11. *Id.* at 2277.

dissent's discussion of the "burdens of motherhood."[12] But the majority opinion never used the language of mothers and motherhood to describe the lives, challenges, or responsibilities of people who can become pregnant.

The dissent, by contrast, placed women and mothers front and center. In the first line of their opinion, the joint dissenters emphasized "the liberty and equality of women."[13] A few sentences later, they argued that "[r]especting a woman as an autonomous being, and granting her full equality, mean[s] giving her substantial choice over this most personal and most consequential of all life decisions."[14] The dissenters also highlighted the "personal and familial costs" of unwanted pregnancy[15] and explained that in some instances, bearing an unwanted child may "destroy [a woman's] life."[16] Without access to abortion, they argued, women "incur the cost of losing control of their lives."[17] But this would be especially true for "women lacking financial resources" who "cannot get the money to fly to a distant State for a procedure."[18]

While emphasizing these embodied, lived consequences, the joint dissenters also accused the majority of reverting to what they saw as outdated, stereotypical assumptions about women. Just twelve years before *Roe*, they reminded, the Supreme Court had "described women as 'the center of home and family life,' with 'special responsibilities' that precluded their full legal status under the Constitution."[19] *Roe* and *Casey* rejected those assumptions and signaled that "the traditional view of a woman's role as only a wife and mother was 'no longer consistent with our understanding of the family, the individual, or the Constitution.'"[20] For the dissenters, overturning *Roe* and *Casey* necessarily meant reverting to a prior time, when women "'had no legal existence separate from [their] husband[s]'" and "could not—in the way men took for granted—determine how they would live their lives, and how they would contribute to the society around them."[21]

Martha Traylor has observed that the language "by which lawmakers express . . . law" also "gathers to itself ideas and . . . creates 'laws' sometimes beyond those intended."[22] Put more simply, rhetoric has constitutive, world-

12. *Id.* at 2261 ("The dissent has much to say about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women. These are important concerns.").

13. *Id.* at 2317 (Breyer, J., joined by Sotomayor & Kagan, JJ., dissenting).

14. *Id.*

15. *Id.*

16. *Id.* at 2318.

17. *Id.* at 2319.

18. *Id.* at 2318.

19. *Id.* at 2243 (majority opinion) (quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)).

20. *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 897 (1992) (plurality opinion), *overruled by Dobbs*, 142 S. Ct. 2228)).

21. *Id.* at 2329–30 (Breyer, J., joined by Sotomayor & Kagan, JJ., dissenting) (quoting *Casey*, 505 U.S. at 897).

22. Traylor, *supra* note 1, at 17.

building power: it communicates ideas, but it also establishes, maintains, and transforms communities and cultures.[23] In *Dobbs*, the majority exercised this rhetorical power by choosing words that de-emphasized women's lives, bodies, and interests. In doing so, it constructed a legal world where ungendered legal concepts and texts (substantive due process, the 14th Amendment, etc.) govern. The dissenters, by contrast, chose words that shed light on women's lived experiences. As they did so, they constructed a world where women exist and where their lives, bodies, and decisions are central to legal analyses.

Dobbs is not the first case where the Supreme Court has made constitutive rhetorical decisions. But historically, legal scholars have not paid much attention to these rhetorical effects. This omission makes sense. Because law is, first and foremost, a set of rules and restrictions, it is natural that legal scholarship and commentary would fixate on law's functional, rulemaking consequences. And because law's purpose is primarily utilitarian—to structure and order society—it is understandable that legal scholarship would emphasize the legal effects and limits of the Court's decisions rather than analyze the Court's rhetorical choices.

In recent years, though, a handful of legal scholars have begun studying law from a rhetorical angle as well. Rather than focus solely on the law's functions—for example, what it permits, what it prohibits, what rules it establishes—this law-as-rhetoric approach assumes "that the opinions written by . . . [courts] are a central, not an incidental, aspect of American . . . law and that focusing on the opinions as rhetoric can help us to understand and appraise [courts'] work."[24] The rhetorical approach thus uses rhetorical analysis to consider how courts behave as speakers, what messages their rulings communicate, how their rhetorical choices guide their substantive legal holdings, and how their messages might affect various audiences.

In this Article, I use this same rhetorical approach to study the language Supreme Court justices use to define, speak, and opine about women and mothers. In doing so, I adopt what rhetorical scholars call the constitutive rhetorical model—an interpretive method that attends to the ways language produces and reproduces the shared meanings that structure our world. Using this method, I consider what meanings and connotations the Supreme Court invokes when it describes women and mothers. I also consider how the Court's linguistic decisions about women and mothers might shape relationships,

23. *See* James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985) [hereinafter White, *Law as Rhetoric*].

24. Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2010 (2002).

transform values, and alter the way we understand and interpret women's places in the world.[25]

I begin my analysis by describing the "inherited language" of motherhood—that is, the narratives, themes, and connotations that have historically and traditionally been associated with the idea of motherhood. I then use close readings and discourse analysis to analyze the Court's rhetoric about women and mothers in three contexts that routinely implicate women's rights and interests: gender discrimination, immigration, and abortion. My analysis reveals a correlation between the Court's rhetoric and its substantive holdings: in the cases that are most protective and affirming of women's rights and interests, the Court tends to distance itself from the inherited language of motherhood. My analysis also reveals that the Court's relationship with the inherited language of motherhood varies across contexts. In gender discrimination cases, the Court strongly rejects traditional narratives about motherhood. In immigration cases, it both relies on and disavows the inherited language. And in abortion cases, its engagement with that language shifts. The Court's early abortion decisions (*Roe* and *Casey*) reject the inherited language of womanhood and motherhood, but its most recent case (*Dobbs*) ignores that language entirely.

These findings illustrate why legal scholarship should be more attentive to the Supreme Court's rhetoric. To begin, the Court's language appears to be correlated with its substantive decisions: the Court seems to reject the inherited language of motherhood most aggressively when issuing judgments that are protective of women's rights and interests.[26] This correlation suggests the possibility that the relationship is causal—that the Court's choice to endorse or disavow the inherited language actually shapes the conclusion it will reach. If this is true, then scholars interested in Supreme Court outcomes should attend to the Court's rhetorical decisions, because those decisions may influence the Court's legal analysis.

But the Court's language does more than articulate holdings. It also frames the way we understand, engage with, and view the law and each other. When the Court uncritically invokes traditional narratives about women and mothers, it may unwittingly perpetuate and reconstitute a world where those traditional

25. Until very recently, most of the Court's case law has reflected the gender binary. Because of this, my analysis focuses specifically on how the Court's language affects people who identify as women, and not on whether or how it affects nonbinary or transgender individuals. That said, the Court's language certainly affects other groups, and its rhetoric has implications for the law's (and society's) understanding of and approach to questions of sexuality and gender identity. I do not explore these effects and implications in this Article, but future researchers might consider these possibilities.

26. In previous work, I have argued that the Supreme Court's rhetoric about American exceptionalism shapes its substantive analyses. *See generally* Lucy Williams, *American Exceptionalism As/In Constitutional Interpretation*, 57 GA. L. REV. 1071 (2023). Here, I argue that the Court's language about women might do the same.

assumptions govern. When it actively distances itself from the inherited language of motherhood, it creates legal and rhetorical space for women to enact various modes of motherhood and womanhood. And when it ignores the inherited language of motherhood, it implicitly suggests that women's bodies and perspectives are irrelevant (or, at the very least, of secondary importance) to legal issues and analyses. Scholars interested in these constitutive consequences should consider whether and how the Court's language shapes society's understanding of women's roles—for better or for worse.

My purpose in this Article is not to challenge or reject the inherited language of motherhood. I recognize that many of its assumptions stem from the fact that the bodies that bear children are often sexed female. The inherited language also reflects profound social, cultural, and religious beliefs about women and their roles. I subscribe to many of these beliefs, and I have joyfully and willingly accepted many of the responsibilities the inherited language of motherhood assigns to me.[27] My purpose, then, is not to make normative claims about what women's and mothers' roles *should* be. Instead, I analyze the rhetorical effects of the Court's decisions to consider how the Court's language—traditional or otherwise—expands and constrains women's possibilities for action.

My analysis proceeds in four parts. In Part I, I describe the constitutive rhetorical approach, which is the interpretive method I use in this Article. In Part II, I conduct a broad, multidiscipline literature review of the terms "mother" and "motherhood" to identify the narratives and assumptions that have historically accompanied those terms. In Part III, I analyze several prominent Supreme Court cases on gender discrimination, immigration, and abortion to identify whether and when the Court invokes the traditional narratives and assumptions identified in Part II. In Part IV, I discuss the practical, real-world implications of the patterns I observe and propose avenues for future research.

I. THE RHETORICAL APPROACH

Most people understand "law" as an established and knowable system of rules and principles. For students, law is a collection of doctrines, rules, and tests—standards and elements that can be typed into an outline and applied to hypothetical scenarios on exams. For lawyers, it is the collection of researchable and identifiable rules that dictate the range of potential outcomes in a case. For judges, law includes precedent—principles and doctrines established in prior cases—and new rules that will govern similar scenarios. And for individuals

27. For example, my own religious community views motherhood as a sacred and divine role. I embrace and share that view.

outside of the legal field, it is the set of rules that proscribe and constrain behavior—principles that can be identified and enforced, observed or broken.

Leading legal scholars and sources likewise treat law as a system of rules or doctrines. Judge Posner, for instance, defines law as "a distinctive social institution"; "a source of rights, duties, and powers"; or "a collection of sets of propositions."[28] Roscoe Pound similarly suggests that law is, at least in part, "an idea of a rule laid down by the lawmaking organ of a politically organized society, deriving its force from the authority of the sovereign."[29] Black's Law Dictionary defines law as "[t]he regime that orders human activities and relations"; "[t]he aggregate of legislation, judicial precedents, and accepted legal principles"; "the body of rules, standards, and principles that . . . courts . . . apply in deciding controversies"; and "[t]he set of rules or principles dealing with a specific area of a legal system."[30]

In many ways, this functional understanding of law is both accurate and appropriate. Law is, in fact, a set of rules that govern human life. It is usually clearly defined and knowable: a person can consult their city's municipal code to determine whether they truly deserved a parking citation. And often, law can be abstracted and synthesized into a set of doctrines, standards, and elements. We can confidently say, for instance, that the tort of negligence involves a duty, a breach of duty, causation, and injury. It makes sense, then, that lawyers, judges, academics, and lay people typically approach law "as a system of institutionally established and managed rules."[31] It is also unsurprising that most legal research reflects this functional orientation: if law is, first and foremost, a broad and fixed system of rules, then the most obvious way to study the law is to "discern the holding[s] [or rules]" that a legal case articulates, "appraise the reasoning" behind those rules, "ascertain the[ir] implications, and evaluate . . . [their] desirability."[32]

But law is more than just a system of rules and principles. It is also a collection of ideas expressed in and through language. When legislators draft statutes, they use words (often a lot of them). Advocates use language and rhetoric to craft compelling briefs and to present persuasive oral arguments. Judges often write their decisions and articulate their holdings through words. And law students wrestle with the meanings of words (what is a "penumbra"?!) when they undertake questions of statutory interpretation or parse dense judicial opinions. Law is thus both a set of rules *and* a linguistic, rhetorical

28. RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 220–21 (1990).

29. Roscoe Pound, *More About the Nature of Law*, *in* LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY 513, 515 (Max Radin & A.M. Kidd eds., 1935).

30. *Law*, BLACK'S LAW DICTIONARY (9th ed. 2009).

31. White, *Law as Rhetoric*, *supra* note 23, at 685.

32. Chemerinsky, *supra* note 24, at 2008.

enterprise. It systematically structures our world, but it does so through the medium of language.

In this Article, I depart from the prevailing law-as-rules model and instead focus on law's rhetorical dimensions. More specifically, I consider the rhetorical significance of the language the Court uses to speak and opine about women and mothers. Existing scholarship on law and women is largely functional—it distills the Court's rules, critiques cases that affect women's rights, and proposes alternative legal frameworks.[33] This Article, by contrast, adopts a constitutive lens and analyzes how the Court's language shapes women's and mothers' identities, constructs their roles, and frames their place within society.

In the remainder of this part, I provide the theoretical framework for this rhetoric-based focus. I begin with a brief summary of the constitutive rhetorical model—a method that emphasizes the way(s) discourse constructs and shapes cultures and identities. I then apply this method to argue that law operates as a mode of constitutive rhetoric. Finally, I show how this constitutive-rhetoric lens differs from traditional, more functional approaches to legal research. I also demonstrate how a constitutive rhetorical approach fills an important—and sizeable—gap in the existing legal literature.

A. *The Constitutive Rhetorical Model*

For many decades, most rhetorical scholars adopted a method of criticism known as the Aristotelian or persuasive model. Named after Aristotle, who famously defined rhetoric as "the faculty of discovering the possible means of persuasion in reference to any subject,"[34] Aristotelian criticism begins from the assumption that human beings are rational actors who influence one another through persuasive discourse.[35] It studies this process of influence by examining

33. *See, e.g.*, Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83, 83 (1989) (arguing that the *Roe* Court failed to consider certain social, economic, and health consequences of its decision); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 705–08 (1994) (analyzing the Court's decision in *Planned Parenthood* to uphold *Roe*'s central holding under principles of institutional integrity).

34. ARISTOTLE, THE "ART" OF RHETORIC 15 (E. Capps, T.E. Page & W.H.D. Rouse eds., John Henry Freese trans., Heinemann 1926) (c. 384 B.C.E.).

35. Aristotelian philosophy views language as "one of the marks which differentiate the rational from the sensitive powers of the soul," Richard McKeon, *Aristotle's Conception of Language and the Arts of Language*, 41 CLASSICAL PHILOLOGY 193, 194 (1946), and which defines rhetoric as a persuasive art, see *supra* note 34 and accompanying text. *See also* HERBERT AUGUST WICHELNS, THE LITERARY CRITICISM OF ORATORY (1925), *reprinted in* THE RHETORICAL IDIOM: ESSAYS IN RHETORIC, ORATORY, LANGUAGE AND DRAMA 5, 39 (Donald C. Bryant ed., Cornell Univ. Press 1958) (explaining that Aristotelian criticism "conceive[s] of the public man as influencing [i.e., persuading] the men of his own times by the power of his discourse").

the strategies orators use to persuade their audiences.[36] Aristotelian analysis typically analyzes a speaker's use of the rhetorical strategies outlined in Aristotle's *Rhetoric*, including emotional and rational appeals, organization, style, topics, diction, and proofs.[37] In the end, the analysis means to help the critic "discover whether the speaker makes the best choices from the inventory to get a favorable decision from a specified group of auditors in a specific situation."[38]

The Aristotelian model "dominated the literature of rhetorical criticism" for many decades.[39] But in the 1950s and 1960s, many rhetorical scholars began to be concerned about "the inadequacies of the tradition."[40] Some worried, for instance, that the model's narrow focus on speeches neglected important nonwritten and nondiscursive rhetorical forms.[41] Others feared that the model's fixation with classical rhetorical techniques—ethos, pathos, logos, and so on—ignored the more creative, imaginative dimensions of texts.[42] Some argued the method overemphasized rationality and therefore neglected rhetoric's emotional and psychological dimensions.[43] Some also complained that it failed to "comprehend the discourse in a larger context"[44] and precluded exploration

36. These strategies include "[t]he Aristotelian concepts of 'ethos,' 'pathos,' and 'logos' and the classical canon of 'invention,' 'arrangement,' 'style,' and 'delivery.'" METHODS OF RHETORICAL CRITICISM: A TWENTIETH-CENTURY PERSPECTIVE 26 (Bernard L. Brock et al. eds., Wayne State Univ. Press, 3d ed. rev. 1990) (1972) [hereinafter METHODS]; *see also* WICHELNS, *supra* note 35, at 38–39 (explaining that Aristotelian criticism examines "[t]he speaker's personality as a conditioning factor, . . . the speaker's audience, . . . his topics, the motives to which he appealed, the nature of the proofs he offered[,] . . . the speaker's mode of arrangement and . . . of expression, . . . his manner of delivery, . . . [and] the effect of the discourse on its immediate hearers").

37. METHODS, *supra* note 36, at 26 (describing the neo-Aristotelian approach).

38. Forbes Hill, *Conventional Wisdom—Traditional Form—The President's Message of November 3, 1969*, 58 Q.J. SPEECH 373, 374 (1972); *see also* SONJA K. FOSS, RHETORICAL CRITICISM: EXPLORATION AND PRACTICE 31 (5th ed. 2017) (explaining that neo-Aristotelian criticism emphasizes questions such as, "Did the speech evoke the intended response from the immediate audience?" and, "Did the rhetor use the available means of persuasion to achieve the desired response?"); METHODS, *supra* note 36, at 27 (explaining that the purpose of neo-Aristotelian analysis is to appreciate "the progress of any identifiable influence that originates with the speaker").

39. METHODS, *supra* note 36, at 26; *see* FOSS, *supra* note 38, at 30 (describing the prevalence of neo-Aristotelianism); EDWIN BLACK, RHETORICAL CRITICISM: A STUDY IN METHOD 27 (1965) (describing neo-Aristotelian criticism as "[b]y far the dominant mode of rhetorical criticism of the present century in the United States").

40. METHODS, *supra* note 36, at 20.

41. *See* FOSS, *supra* note 38, at 30; *see also* Douglas Ehninger, *Rhetoric and the Critic*, 29 W. SPEECH 227, 228 (1965) ("As a method, [neo-Aristotelianism] is . . . limited because it is inapplicable to certain types or classes of speeches.").

42. *See, e.g.*, Ehninger, *supra* note 41, at 228.

43. *See, e.g.*, Karlyn Kohrs Campbell, *The Ontological Foundations of Rhetorical Theory*, 3 PHIL. & RHETORIC 97, 97–100 (1970) (describing objections to the neo-Aristotelian assumption that "man is capable of and subject to persuasion because he is, by nature, a rational being"); BLACK, *supra* note 39, at 34 (describing neo-Aristotelianism's commitment to "the close relationship between rhetoric and logic").

44. BLACK, *supra* note 39, at 33.

of questions unrelated to "the speech's potential for evoking intended response from an immediate, specified audience."[45]

Anxious to avoid these and other pitfalls, rhetorical scholars began shifting their attention from rhetoric's persuasive effects to its embodied, narrative, and extra-persuasive dimensions.[46] As part of this shift, some began considering how language transforms speakers, shapes human values, and alters social relationships.[47] Rather than examine how speakers use rhetorical techniques to craft compelling or persuasive arguments, these scholars considered how language shapes "the future commitments it makes for [speakers] . . . ; the choices it closes . . . ; [and] the public image it portrays to which [they] must adjust."[48] They also began studying how rhetoric shapes human values, creates shared meaning, and alters social relationships.[49]

Eventually, these efforts coalesced to form what is now known as the constitutive rhetorical model, "a theory of speech regarding the ability of language and symbols to create a collective identity for an audience."[50] The constitutive model acknowledges that rhetoric may have persuasive effects, but

45. Karlyn Kohrs Campbell, *'Conventional Wisdom—Traditional Form': A Rejoinder*, 58 Q.J. SPEECH 451, 454 (1972).

46. *See* METHODS, *supra* note 36, at 86–88 (describing the "serious break from traditional rhetoric and criticism" that developed during the 1960s); FOSS, *supra* note 38, at 32 (noting that "[d]iscussions and defenses of neo-Aristotelianism ended largely in the early 1970s" and describing the "wide variety of approaches [that] now characterize rhetorical criticism").

47. *See, e.g.*, METHODS, *supra* note 36, at 90 (describing the "experiential" approach to rhetorical criticism, which emphasizes that "everything the human can experience as meaningful is permeated with human participation" and that "*acting* in the world creates meaning"); *id.* at 182 (describing the "dramaturgical" approach, which believes that "[t]he word-thought-thing relationship is . . . reciprocal" such that "the nature of the object . . . affect[s] the selection of words [*and*] the use of a symbol system affects a person's perception of reality"); *see* FOSS, *supra* note 38, at 61–433 (describing several non-Aristotelian approaches to rhetorical criticism); Celeste Michelle Condit, *Crafting Virtue: The Rhetorical Construction of Public Morality*, *in* CONTEMPORARY RHETORICAL THEORY: A READER 306, 306–21 (John Louis Lucaites et al. eds., 1999) (arguing that rhetoric constructs humans' understandings of morality).

48. BLACK, *supra* note 39, at 35.

49. Though the constitutive model was not formally theorized until the 1950s and 1960s, its roots reach to antiquity. The early Sophists, for instance, believed that rhetoric produced "the very categories by which the world, and indeed the self, are understood." David W. Seitz & Amanda Berardi Tennant, *Constitutive Rhetoric in the Age of Neoliberalism*, *in* RHETORIC IN NEOLIBERALISM 109, 111 (Kim Hong Nguyen ed., 2017) (citing MAURICE CHARLAND, CONSTITUTIVE RHETORIC (2001)); *see also* Robert T. Craig, *Communication: Transmission and Constitutive Models*, *in* ENCYCLOPEDIA OF RHETORIC 125, 126 (Thomas O. Sloane et al. eds., 2001). Isocrates likewise held the protoconstitutive view that rhetoric has the constitutive power to "alter perceptions of reality." William L. Benoit, *Isocrates and Plato on Rhetoric and Rhetorical Education*, 21 RHETORIC SOC'Y Q. 60, 64 (1991).

50. Seitz & Tennant, *supra* note 49, at 109; *see also* Ronald Walter Greene, *The Aesthetic Turn and the Rhetorical Perspective on Argumentation*, 35 ARGUMENTATION & ADVOC. 19, 20–26 (1998) (summarizing the constitutive model and its genesis).

it does not emphasize those effects as rhetoric's primary function.[51] Instead, the constitutive model views language as a process of meaning-making and culture-building, and it "recognize[s] discourse as productive of the very categories by which the world, and indeed the self, are understood."[52] The constitutive model thus differs from the Aristotelian approach. Whereas the Aristotelian model emphasizes the techniques a speaker might use to persuade an audience (e.g., ethos, pathos, logos),[53] the constitutive model instead considers "the role of rhetoric in producing the very identity and character of [the] audience" to be persuaded.[54]

The constitutive model also differs from approaches that treat language merely as a signifier or referent. As linguistic philosopher Charles Taylor explains, "language is not just a set of words which designate things" but is rather "the vehicle of . . . reflective awareness."[55] Put differently, language allows human beings to become fully conscious of the things they experience, and it mediates the ways they recognize and react to external phenomena.[56] The

51. *See* White, *Law as Rhetoric*, *supra* note 23, at 689–90 (acknowledging that language facilitates argument and persuasion, but also noting that language—especially *legal* language—creates communities, defines values, and shapes identities).

52. Maurice Charland, *Politics: Constitutive Rhetoric*, *in* ENCYCLOPEDIA OF RHETORIC, *supra* note 49, at 616, 616 [hereinafter Charland, *Politics*].

53. Aristotle famously defined rhetoric as "the faculty of discovering in any particular case of all the available means of persuasion." GEORGE KENNEDY, THE ART OF PERSUASION IN GREECE 19 (1963). Until the 1960s, this definition was the prevailing paradigm in rhetorical studies. FOSS, *supra* note 38, at 30 ("Neo-Aristotelian criticism was virtually unchallenged as the method to use in rhetorical criticism until the 1960s.").

54. Charland, *Politics*, *supra* note 52, at 616. Maurice Charland explains the need for the constitutive model as follows:

> "[P]ersuasion" . . . implies the existence of an agent who is free to be persuaded. However, [Aristotelian] rhetorical theory's privileging of an audience's freedom to judge is problematic, for it assumes that audiences, with their prejudices, interests, and motives, are *given* and so extra-rhetorical. . . . Consequently, attempts to elucidate ideological or identity-forming discourses as persuasive are trapped in a contradiction: persuasive discourse requires a subject-as-audience who is already constituted with an identity and within an ideology. Ultimately then, theories of rhetoric as persuasion cannot account for the audiences that rhetoric addresses. However, such an account[, which the constitutive model provides,] is critical to the development of a theoretical understanding of the power of discourse.

Maurice Charland, *Constitutive Rhetoric: The Case of the* Peuple Québécois, 73 Q.J. SPEECH 133, 133–34 (1987).

55. CHARLES TAYLOR, PHILOSOPHICAL PAPERS I: HUMAN AGENCY AND LANGUAGE 228–29 (1985) [hereinafter TAYLOR, HUMAN AGENCY].

56. To illustrate this idea, Taylor uses the example of a rat that has been trained to pass through a door marked with a triangle. The rat, of course, does not have language, but it still recognizes and reacts to the triangle's shape. A human being, by contrast, can recognize the shape *and* understand that "triangle" is the proper descriptor. According to Taylor, "only beings [like the human in this example] who can describe things as triangles can be said to recognize them as triangles, at least in the strong sense." *Id.* at 228. This ability—which is made possible through language—to recognize and reflect on the world makes linguistic beings "conscious of the things they experience in a fuller way." *Id.*

constitutive model recognizes that language does more than describe and identify the world around us. It is also a medium in which meaning is generated, a "pattern of activity by which we express/realize a certain way of being in the world,"[57] and a force that allows us to "relate to things in new ways."[58]

In short, the constitutive model views rhetoric as a creative and generative force. It treats words not as mere referents or signifiers, but as "'terministic screens' that filter what people see, how people act—seemingly even the contours of their reality itself."[59] And though the constitutive model acknowledges that language may sometimes facilitate persuasion, it suggests that words are only persuasive because they have *first* generated a set of shared meanings and mutual understandings.[60] The constitutive model thus prioritizes language's ability to assign value, create communities, forge shared identities, and mediate human's experiences.

B. *Law as Constitutive Rhetoric*

The constitutive rhetorical model has gained significant traction in other fields, but in law, it is still relatively novel. Because most scholars understand the law as a system of rules and principles, most legal academics study legal language functionally—to identify the rules and principles legal texts define and articulate.[61] And the legal academics who *do* critically analyze the language of

57. *Id.* at 232.

58. CHARLES TAYLOR, THE LANGUAGE ANIMAL: THE FULL SHAPE OF THE HUMAN LINGUISTIC CAPACITY 37 (2016). In an earlier essay, Taylor explains this idea as follows:

> If language serves to express/realize a new kind of awareness; then it may not only make possible a new awareness of things, an ability to describe them; but also new ways of feeling, of responding to things. If in expressing our thoughts about things, we can come to have new thoughts; then in expressing our feelings, we can come to have transformed feelings.

TAYLOR, HUMAN AGENCY, *supra* note 55, at 232–33.

59. Seitz & Tennant, *supra* note 49, at 112 (citing KENNETH BURKE, LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD 44–62 (1966)).

60. In Burke's words, "You persuade a man only insofar as you can talk his language by speech, gesture, tonality, order, image, attitude, idea, *identifying* your ways with his." KENNETH BURKE, A RHETORIC OF MOTIVES 55 (1969).

61. *See, e.g.*, Chemerinsky, *supra* note 24, at 2008 (arguing that the study of law involves "discern[ing] the holding[s] [or rules]" that a case articulates, "apprais[ing] the reasoning" behind those rules, "ascertain[ing] the[ir] implications, and evaluat[ing] . . . [their] desirability"). Much of the recent scholarship responding to *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), exemplifies this functional, rule-based approach. *See, e.g.*, Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1095 (2023) (considering how "the doctrinal rules and reasoning used in *Dobbs*" might affect "the legal future of both a federal statutory abortion ban and the constitutional argument for fetal personhood"); Elizabeth Tobin-Tyler, *Putting Your Money Where Your Mouth Is: Maternal Health Policy After* Dobbs, 53 SETON HALL L. REV. 1577, 1579 (2023) (considering how the *Dobbs* decision will affect maternal health and "propos[ing] a post-*Dobbs* policy agenda"). *See generally* John Dinan, *The Constitutional Politics of Abortion Policy After* Dobbs*: State Courts, Constitutions, and Lawmaking*, 84 MONT. L. REV. 27 (2023) (considering how state courts and legislatures might shape abortion law after *Dobbs*).

the law tend to take an Aristotelian approach, considering whether and how legal language functions persuasively.[62] These patterns are not surprising. For many decades, Aristotelianism was the prevailing mode of rhetorical criticism in the United States, which means that most of today's legal scholars were educated in institutions that emphasized Aristotelian techniques. Further, much legal language (briefing, oral argument, etc.) is, ultimately, intended to persuade. It makes sense, then, that scholars who study legal language typically use a method designed to gauge persuasive effect.

But amidst this sea of functional, Aristotelian scholarship, a handful of legal academics have called for a different approach. In 1976, Martha Traylor gestured toward law's constitutive effects when she argued that "[l]anguage . . . is more than merely the medium by which lawmakers express the ideas they have decided should become law[; it also] gathers to itself ideas and, as used in legislation, creates 'laws' sometimes beyond those intended or indicated by the lawmakers."[63] A decade later, James Boyd White echoed Traylor's sentiments by explicitly admonishing legal scholars to adopt a constitutive lens.[64] According to White, "law is most usefully seen not . . . as a system of rules but as a branch of rhetoric."[65] More specifically, law is a type of *constitutive* rhetoric—a rhetorical process through which "our perceptions of the universe are constructed and related, in which our values and motives are defined, and which our methods of reasoning are elaborated and enacted."[66] When

62. For instance, a number of scholars have analyzed the persuasive rhetorical effects (or lack thereof) of oral argument. *See, e.g.*, Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99, 99–100 (2006) (considering how attorneys use rhetoric in oral argument to persuade judges); Timothy R. Johnson, James F. Spriggs II & Paul J. Wahlbeck, *Oral Advocacy Before the United States Supreme Court: Does It Affect the Justices' Decisions?*, 85 WASH. U. L. REV. 457, 457–59 (2007) (same); William L. Benoit, *Attorney Argumentation and Supreme Court Opinions*, 26 ARGUMENTATION & ADVOC. 22, 35–36 (1989) (examining whether the Supreme Court adopts or relies on arguments made during oral argument); Alan E. Garfield, *To Swear or Not To Swear: Using Foul Language During a Supreme Court Oral Argument*, 90 WASH. U. L. REV. 279, 279–82 (2012) (considering whether it is advantageous or harmful for lawyers to use expletives in oral argument); Eve M. Ringsmuth, Amanda C. Bryan & Timothy R. Johnson, *Voting Fluidity and Oral Argument on the U.S. Supreme Court*, 66 POL. RSCH. Q. 429, 434–35 (2013) (finding that judges are influenced by attorneys' poor performance during oral argument); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 280 (2002) (finding that oral argument has little influence on case outcome because justices' voting preferences are stable). *See generally* DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING (1976) (finding that oral argument has little influence on case outcome because justices' voting preferences are stable).

63. Traylor, *supra* note 1, at 17. Traylor analyzed the discriminatory effects of gendered language in a corpus of state laws referencing gender. *Id.* at 18–20. She categorized the laws into three groups: laws that intentionally discriminated by gender, laws whose language was not intentionally discriminatory but allowed for courts to discriminate in applying them, and laws written with the intent to avoid discrimination. *Id.* at 20–24.

64. White, *Law as Rhetoric*, *supra* note 23, at 684.

65. *Id.*

66. *Id.* at 692.

individuals practice law or engage in legal dispute, White argued, they are ultimately engaged in a meaning-making enterprise, "defining roles and actors, . . . establishing expectations . . . , and . . . constructing a social universe."[67] Law is not, then, merely a system of rules made by a political sovereign but is instead "something that lawyers themselves make all the time, whenever they act as lawyers."[68]

White's article admonished legal scholars to study these constitutive effects.[69] It also suggested several ways a constitutive approach might enhance legal analysis. First, White suggested that the constitutive approach would draw attention to the transformative potential of legal work by highlighting "the way in which [lawyers] create new meanings, new possibilities for meaning, in what [they] say," and by revealing "the way in which [the legal] enterprise is a radically ethical one, by which self and community are perpetually reconstituted."[70] A constitutive approach could also transform the way lawyers approach and understand legal texts by helping lawyers appreciate that statutes or judicial opinions are not simply "a set of orders or directions or commands" but rather texts that invite conversation about our culture, values, and identities.[71] The constitutive model would allow lawyers (and others) to view legal work as "creative, communal, and intellectually challenging" instead of "manipulative, selfish, or goal-oriented."[72] It might also change the way we teach law: not "as a set of institutions that 'we' manipulate . . . to achieve 'our policies' . . . or 'our interests' . . . , but rather as a language and a community—a world, made partly by others and partly by ourselves, in which we and others shall live."[73]

Most importantly, White suggested that a constitutive approach would provide new avenues to test and critique the law.[74] If law is a rhetorical process that builds communities and shapes values, then the best metric of whether law is "good" or "right" is the type of community the law constructs. To critique law, then, individuals need not ask whether it is internally consistent or sound, or whether it is an efficient mechanism for reaching certain political outcomes. Instead, they must simply ask: "'What place is there for me in this language, this text, this story?' . . . [W]hat voices does the law allow to be heard, [and] what relations does it establish among them? With what voice, or voices, does the law itself speak?"[75] Asking these constitutive rhetorical questions could

67. *Id.*
68. *Id.* at 696.
69. *Id.*
70. *Id.*
71. *Id.* at 697.
72. *Id.*
73. *Id.* at 699.
74. *Id.* at 697.
75. *Id.*

transform legal criticism from a highly specialized endeavor to a democratic exercise accessible to any and all in the community. One does not need an ivory-tower education or years of elite practice experience to determine "whether [their] own story, or the story of another in whom [they] have an interest, is properly told by [legal] speakers and in [legal] language."[76] Indeed, if *those* became the guiding questions of legal criticism, then ordinary people with no specialized legal training might be the *most* qualified to participate.

By all external metrics, White's article was wildly successful: it was published in a leading law review, has been cited more than one thousand times, and was later republished as a book.[77] But despite the attention it has received, few legal scholars have actually heeded its methodological call.[78] Though some have considered how law "tells stories about the culture that helped to shape it and which it in turn helps to shape,"[79] most legal scholars still analyze legal rhetoric functionally or using Aristotelian techniques. And while a number have used White's arguments to justify their own, nonfunctional approaches to legal scholarship,[80] very few actually adopt White's method of studying the law as constitutive rhetoric.

There are, of course, a few notable exceptions. In a 1988 article, for instance, Katharine Bartlett considers how custody law functions constitutively to "produce[] and reproduce[] the dispositions and values of its citizens."[81] Her analysis does not focus on "the results of any particular law—who wins a dispute"—but instead considers how custody law incentivizes legal arguments that construct and reenforce ideas about the ideal parent-child relationship.[82] Bartlett concludes that the language of custody law "emphasize[s] what is due to [parents] rather than what they owe to others."[83] This, in turn, perpetuates a society where we "conceive of parenthood in individualistic, possessory terms."[84] To counteract these negative constitutive effects, Bartlett proposes that we make conscious changes to the way we speak about custody—

76. *Id.*

77. *See* JAMES BOYD WHITE, *Heracles' Bow: Persuasion and Community in Sophocles'* Philoctetes, *in* HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 3 (1985).

78. At the time of this writing, I was able to identify only a few examples of constitutive legal scholarship. I cite and describe these articles below. *See infra* notes 81–92 and accompanying text.

79. *See, e.g.*, MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 8 (1987) (using the rhetorical method to compare the constitutive effects of abortion and divorce law in different Western countries).

80. *See, e.g.*, Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971, 975 n.11 (1991) (defending feminist narrative scholarship as an alternative to more conventional, "'standard legal scholarship' that . . . 'adopts a prescriptive approach,' 'is grounded on normative positions,' and 'is expressed in judicial discourse'" (quoting Edward Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1835 n.1 (1988))).

81. Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 293 (1988).

82. *Id.* at 294–95.

83. *Id.* at 298.

84. *Id.* at 337.

specifically, "redefin[ing] parental rights to stress the parent's relationship interests, rather than the parent's autonomy."[85] By implementing these small linguistic changes, she argues, society could harness law's constitutive effects to "construct improved meanings for our relationships with one another."[86]

In a more recent article, Lisa Pruitt likewise adopts White's constitutive approach to explore the language judges, lawyers, and statutes use to discuss and define rural places and people. According to Pruitt, the law tends to "depict rural people and places in highly idealized ways"[87]—for example, by describing rural communities as tight-knit, self-sufficient, and peaceable people[88] living in "bucolic splendor" and "scenic majesty."[89] But this idyllic language perpetuates stereotypes that are often legally harmful to rural communities. For instance, because legal rhetoric "depict[s] rural people as self-sufficient and their communities as self-contained . . . courts have sanctioned legislation that regulates urban places to a greater degree than rural ones."[90] Legal language likewise "associate[s] the rural with a lower standard of care," which often leads "[jurists] [to] fashion[] laws that . . . leave rural residents less protected from any number of harms—be they unscrupulous real estate agents, youth with guns, striking hospital workers or any array of others."[91] Pruitt admonishes judges to be more careful about how they rhetorically constitute the rural, arguing that without "a more robust sense of rural realities . . . , our laws will not do justice in, or for, rural America."[92]

Pruitt's and Bartlett's studies are powerful examples of how the constitutive rhetorical model enhances legal scholarship. Unfortunately, they are also anomalous. Despite White's impassioned call, most legal scholars persist in treating legal language functionally or, at best, persuasively. And notwithstanding the notable efforts of a few pioneering scholars, constitutive studies of legal rhetoric are few and far between. This dearth is troubling, because it reveals that the legal academy is behind other fields in applying a powerful analytic method. But the gap is also inviting, because it presents ample untapped opportunities for legal scholars to explore the constitutive model's potential.

In what follows, I seize one of these opportunities by applying White's method to judicial rhetoric about women and mothers. I begin by defining the

85. *Id.* at 298.

86. *Id.* at 297.

87. Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 168 (2006).

88. *Id.* at 225–33.

89. *Id.* at 176 (quoting State *ex rel.* City of Charleston v. Bosely, 268 S.E.2d 590, 596 (W. Va. 1980)); *see also id.* at 212–16 (describing the "idealized images of rural land . . . [that] are reflected and affirmed in many cases").

90. *Id.* at 236.

91. *Id.*

92. *Id.* at 240.

"inherited language" of motherhood—the words, norms, and connotations that have traditionally been associated with women and mothers. I then consider how the Court engages with that language in cases on gender discrimination, immigration, and abortion. My analysis does not challenge the inherited language, and it does not examine or critique the substantive rules and holdings that govern gender discrimination, immigration, or abortion. Instead, I examine how the Court's language in these areas produces and reproduces perceptions and the constructed roles of women and mothers.

II. THE INHERITED LANGUAGE OF MOTHERHOOD

According to White, any analysis of the law's constitutive effects must begin with "the inherited language"—that is, "the language or culture with which [a particular] speaker works."[93] To fully appreciate how the Court's abortion rhetoric operates constitutively, then, we must first understand the traditional cultural significance of the words the Court deploys. What connotations does its language carry? How do its words "represent natural and social facts [and] constitute human motives and values"?[94] What emotions does the Court's language evoke, and what images does it conjure? "What does it overspecify?"[95] And "[w]hat does it leave out or deny?"[96]

In this part, I explore the inherited language that the Court uses to describe mothers and women. I do this by offering a broad review of literature about mothers and motherhood. Though womanhood and motherhood are separate and distinct categories, they are often treated as "synonymous identities."[97] And as Caroline Rogus notes, "there is"—and has long been—"strong cultural support for the idea that . . . the biological and sociological concepts of motherhood are one and the same."[98] Because of this, I focus on literature about mothers specifically, even though I am generally interested in the Court's rhetoric about both women *and* mothers.

My literature review includes sources from the late 1800s to the present. It also encompasses studies from a variety of disciplines, including science, medicine, sociology, gender studies, family studies, education, English, and law. These wide-ranging sources reveal the connotations, emotions, values, and meanings that academics have historically associated with mothers and

93. White, *Law as Rhetoric*, *supra* note 23, at 701.

94. *Id.*

95. *Id.*

96. *Id.*

97. Terry Arendell, *Conceiving and Investigating Motherhood: The Decade's Scholarship*, 62 J. MARRIAGE & FAM. 1192, 1192 (2000).

98. Caroline Rogus, Comment, *Conflating Women's Biological and Sociological Roles: The Ideal of Motherhood, Equal Protection, and the Implications of the* Nguyen v. I.N.S. *Opinion*, 5 U. PA. J. CONST. L. 803, 817 (2003) (describing the danger of confusing biological motherhood and sociological motherhood).

motherhood. Some of these sources are now dated, but they are the types of sources that would have been prominent and pathbreaking when modern Supreme Court Justices were educated. They thus represent the research, studies, and norms that likely have shaped the worldviews of today's Court.

My literature review reveals that for the last 150 years, scholars, lawyers, and judges have understood "motherhood" not just as a biological role, but also as a natural, innate, social, and moral duty. Scholars have similarly associated the term "mother" with a common set of qualities, behaviors, and characteristics, including caregiving, education, socialization, and selflessness.[99] In what follows, I describe these and other themes, meanings, and connotations that comprise "the [inherited] language or culture with which [the Supreme Court] works."[100]

A. *The Qualities of a Mother*

In its most basic, technical sense, the term "mother" describes the biological status of a person who has given birth. Over time, however, the word "mother" has come to signify much more than a biological relationship.[101] Since at least the 1800s, scholars in the sciences, social sciences, education, English, law, and other fields have interpreted the word "mother" to signify not just a biological role but also a set of characteristics, behaviors, and qualities. Some researchers laud these qualities; others critique them as unfair and pernicious stereotypes. But for the most part, all agree that the term "mother" necessarily entails the embodiment of—or, perhaps, a reaction to—several agreed-upon roles and traits.

1. Mothers as Caregivers

One of these roles is that of a nurturer or caregiver. In his famous treatise *Emile*, Jean-Jacques Rousseau argued that the ideal woman is "entrusted [with] the care of the children" and raises her offspring with "loving care."[102] Many subsequent scholars have similarly equated "mothering" with "[t]he quality of . . . caregiving."[103] Scholars from all decades and fields have assumed that mothers read to, play with, laugh with, teach, and hug their children,[104] and they

99. *See* discussion *infra* Sections II.A–B.

100. *See* discussion *infra* Sections II.A–B.

101. Adria E. Schwartz, *Thoughts on the Constructions of Maternal Representations*, 10 PSYCHOANALYTIC PSYCH. 331, 332 (1993) (noting the word *mother* "no longer universally" reflects a biological relationship).

102. JEAN-JACQUES ROUSSEAU, EMILE bk. V (Barbara Foxley trans., Project Gutenberg 2019) (1762) (ebook). Rousseau was not the first to articulate this view, but his treatise *Emile* provides a paradigmatic example of the idea that mothers are caregivers.

103. Pamela Redmond Satran, *Are You a Good Mother?*, PARENTING, May 1998, at 88, 91.

104. Janet E. Harrell & Carl A. Ridley, *Substitute Child Care, Maternal Employment and the Quality of Mother-Child Interaction*, 37 J. MARRIAGE & FAM. 556, 558, 560 (1975).

have insisted that "a mother is expected to be her child's primary caregiver and to be accessible at all times."[105] They routinely present mothers as gentle figures who selflessly give to their offspring. And they often define the "maternal practice" as "the nurturing, protecting, and training of . . . children."[106]

For many years, American law likewise embraced these assumptions. As early as 1813, the Pennsylvania Supreme Court acknowledged that young children, "considering their tender age, . . . stand in need of that kind of assistance, which can be afforded by none so well as a mother."[107] And in 1830, the Maryland Supreme Court famously noted that "[t]he mother is the . . . softest nurse of infancy" and that "even a court of common law will not go so far as to hold nature in contempt" by "pul[l]ing infancy from the bosom of an affectionate mother, and plac[ing] it in the coarse hands of the father."[108]

Judicial language like this eventually crystallized into what came to be known as the "tender years doctrine," a "presumption that a mother's care is ordinarily in the best interests of a young child."[109] The tender years doctrine was widespread until the early 1900s, when many states began enacting statutes requiring judges to make custody determinations in the best interests of the child.[110] But even then, the law clung to the mothers-as-caregivers narrative. In states like Utah, this attachment was explicit; Utah law required that custody disputes be resolved in the best interest of the child, but it also specified that the best-interest determination should consider "the natural presumption that the mother is best suited to care for young children."[111] In other states, where custody statutes said nothing about mothers' natural roles as caregivers, *judges* perpetuated the mothers-as-caregivers narrative by expressing their personal or judicial views that, notwithstanding the law's neutrality, "no substitute has ever

105. Debra K. DeMeis & H. Wesley Perkins, *"Supermoms" of the Nineties: Homemaker and Employed Mothers' Performance and Perceptions of the Motherhood Role*, 17 J. FAM. ISSUES 776, 777 (1996).

106. Arendell, *supra* note 97, at 1194 (citations omitted); *see also* Sarah M. Allen & Alan J. Hawkins, *Maternal Gatekeeping: Mothers' Beliefs and Behaviors that Inhibit Greater Father Involvement in Family Work*, 61 J. MARRIAGE & FAM. 199, 204 (1999) ("[M]others have been culturally identified as the center of nurture and care in family life."); Cecilia L. Ridgeway & Shelley J. Correll, *Motherhood as a Status Characteristic*, 60 J. SOC. ISSUES 683, 689 (2004) (identifying "nurturance" as a "core task of motherhood").

107. Commonwealth v. Addicks, 5 Binn. 520, 521 (Penn. 1813).

108. Helms v. Franciscus, 2 Bland Ch. 544, 563 (Md. High Ct. Ch. 1830).

109. Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335, 335 (1982). For a general discussion of the tender years doctrine, see generally Henry H. Foster & Doris Jonas Freed, *Life with Father: 1978*, 11 FAM. L.Q. 321, 329–40 (1978) (describing the history and development of the tender years doctrine); Cathy J. Jones, *The Tender Years Doctrine: Survey and Analysis*, 16 J. FAM. L. 695 (1977) (same).

110. *See* Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 429–32 (1976–77) (describing several best interest custody statutes passed in the 1960s and 1970s).

111. *Id.* at 432 (quoting UTAH CODE ANN. § 30-3-10 (1969) (repealed)). In the early 1970s, Arizona's statute likewise established a best interest test but provided that, "other things being equal, if the child is of tender years, it shall be given to the mother." *Id.* (quoting CAL. CIV. CODE § 318 (1969) (repealed)).

been found" for "the attention, care, supervision, and kindly advice, which arise from a mother's love and devotion . . . ."[112] In theory, adopting the best interests standard might have weakened the traditional assumption that women are the best and only caregivers of children. In practice, though, "[c]ourts faced with equally skilled and loving parents continued to firmly apply the motherhood mystique"—that is, the idea that mothers are inherently well-suited for caregiving—in custody determinations.[113]

2. Mothers as Selfless

Another trait commonly associated with motherhood is selflessness. In 1913, Irish poet and novelist Nora Tynan O'Mahony wrote,

> The true mother has no thought of self: all her life, all her love, are given to her husband and children . . . . [She] may miss a great many of the careless pleasures of the childless woman of fashion; but . . . the loving possession of her children, . . . their care and nurture and instruction, . . . are more to her and far better than all the world besides.[114]

This same perception has pervaded public life and academic literature, as well. For decades, scholars have observed that "motherhood ideologies . . . typically require[] women to sacrifice themselves for their children and husbands."[115] And as Terry Arendell has noted, "[t]he prevailing ideology in North America is that . . . [t]he mother . . . is self-sacrificing and not a subject with her own needs and interests."[116] The term "mother" thus evokes images of a woman who is not

112. Mullen v. Mullen, 49 S.E.2d 349, 350 (Va. 1948); *see also* Roth, *supra* note 110, at 435 (noting that even in states that rejected the tender years presumption, "custody of a child of tender years is normally placed with the mother, if fit" (quoting Esposito v. Esposito, 195 A.2d. 295, 296 (N.J. 1963))); Gayle v. Gayle, 125 So. 638, 639 (Ala. 1930) ("Other things being equal, this court by numerous precedents holds the mother of infants of tender years best fitted to bestow the motherly affection, care, companionship, and early training suited to their needs."). For additional examples of state courts using the tender years presumption as part of a best-interests analysis, see Roth, *supra* note 110, at 434–38.

113. Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 903–04 (1998); *see also id.* at 903 (noting that "[i]n application, . . . there was little difference [between the tender years presumption and the best interests standard] because of the comparatively low expectations regarding the role of fathers in child rearing and the nearly fanatical mythologies surrounding women's roles in child care"). Many scholars critique the best interests standard for precisely this reason—because it does not effectively root out stereotypes about women and their roles. *See, e.g.*, Laura Belleau, *Farewell to Heart Balm Doctrines and the Tender Years Presumption, Hello to the Genderless Family*, 24 J. AM. ACAD. MATRIM. L. 365, 383 ("The problem with the best interests standard is the unlimited discretion of the court, which may leave judges unguided or able to hide their gender preferences under an endless list of explanations and factors.").

114. Nora Tynan O'Mahony, *The Mother*, 41 IRISH MONTHLY 529, 531 (1913).

115. Emma Gross, *Motherhood in Feminist Theory*, 13 AFFILIA 269, 271 (1998); *see also* Sara Ruddick, *Thinking About Mothering—And Putting Maternal Thinking to Use*, 11 WOMEN'S STUD. Q. 4, 4 (1983) ("[T]he ideology of motherhood . . . turns upon self-sacrifice and the sexual division of responsibility, power, and pleasure . . . .").

116. Arendell, *supra* note 97, at 1194 (citation omitted).

only nurturing, but also selfless—willing to "prioritize[] meeting the needs of dependent children above all other activities."[117]

The selfless mother is also a familiar figure in the law. Indeed, American family law is replete with examples of the selfless-mother narrative. In a 1921 divorce case, for example, the Wisconsin Supreme Court argued that "in [a mother] alone is service expressed in terms of love" and that only mothers have "the patience and sympathy required to mold and soothe the infant mind."[118] In 1945, the California Court of Appeals similarly opined that "in the vast majority of cases there is no one who will give such complete and selfless devotion, and so unhesitatingly and unstintingly make the sacrifices which the welfare of the child demands, as the child's own mother."[119] More recently, a justice on the Supreme Court of Appeals of West Virginia quoted Theodore Roosevelt's assertion that "[n]o ordinary work done by a man is either as hard or as responsible as the work of a woman who is bringing up a family of small children; for upon her time and strength demands are made . . . every hour of the day . . . [and] the night."[120] These and other instances of the selfless mother narrative are common in American family law. So common, in fact, that reviewing them prompted one family law scholar to warn, "[W]oe to the mother who did not choose to selflessly and altruistically place her children above all else, for she would be deemed a failure as a mother, and as a woman."[121]

3. Mothers as Educators

In addition to emphasizing mothers' nurturing care and selflessness, existing literature regularly presents mothers as educators. Since at least the 1800s, scholars and public figures have argued that "[t]he great work of education, in a broad sense, must, in the nature of things, come primarily to mothers."[122] They have also suggested that because mothers "stand[] nearest to [their] child, and should know his needs better than any other,"[123] mothering necessarily "includes the practice[] of . . . educating."[124] Historically, some argued that these educator responsibilities were particularly significant for mothers of female children "since schools above elementary level were largely

117. Ridgeway & Correll, *supra* note 106, at 690.

118. Jenkins v. Jenkins, 181 N.W. 826, 827 (Wis. 1921).

119. Robertson v. Robertson, 164 P.2d 52, 56 (Cal. Dist. Ct. App. 1945).

120. Arneault v. Arneault, 639 S.E.2d 720, 746 (W. Va. 2006) (Benjamin, J., concurring) (quoting Theodore Roosevelt, Remarks Before the Mother's Congress (Mar. 13, 1905)).

121. McNeely, *supra* note 113, at 901.

122. DORA HILL READ GOODALE, MOTHERS AS EDUCATORS 483 (1833) (arguing generally that women need to be educated so they can fulfill their roles as mothers); *see also* Adelaide M. Plumptre, *A Mother's Duty to the State*, 18 PUB. HEALTH J. 178, 179 (1927) ("[A] mother's duty to her children includes the guidance of the mind. . . ."); ROUSSEAU, *supra* note 102, bk. V ("[T]o train [man] in childhood, to tend him in manhood . . . are the duties of woman for all time. . . .").

123. GOODALE, *supra* note 122, at 484.

124. JODI VANDENBERG-DAVES, MODERN MOTHERHOOD: AN AMERICAN HISTORY 4 (2014).

for boys and emphasized only the classical curriculum."[125] More recently, however, scholars have assigned the duty of education to mothers of both male and female children, because "although the State has undertaken the function of education, it has not relieved—or rather, deprived—the mother of the duty of training her own child."[126]

4. Mothers as Value Transmitters

Society has also frequently associated mothers with the related responsibilities of socialization and value transmission. As part of their educational duties, mothers have been understood to bear "the main responsibility for seeing that the child's behavior is consistent with the parents' values."[127] They have also been tasked with "facilitat[ing] the infant's physical adjustment to the external world,"[128] with helping children "form their identities and learn their place in society,"[129] and with guiding them to "develop the most precious thing a man or woman can possess on earth, and that is a good character."[130] For centuries, poets and philosophers have praised and idealized these maternal responsibilities: as Ralph Waldo Emerson famously stated, "Men are what their mothers make them."[131] Scholars have also warned that neglecting these duties may have "[d]ebilitating effects on a child's personality development . . . ."[132]

125. John J. Kane, *The Changing Roles of Father and Mother in Contemporary American Society*, 11 AM. CATH. SOCIO. REV. 140, 143 (1950) (describing changes in education for boys and girls).

126. Plumptre, *supra* note 122, at 179.

127. Joan Aldous & Leone Kell, *Child-Rearing Values of Mothers in Relation to Their Children's Perceptions of Their Mothers' Control: An Exploratory Study*, 18 MARRIAGE & FAM. LIVING 72, 72 (1956) (testing whether mothers "whose values in the area of child-rearing are expressed primarily in middle-class terms would have children who perceive their mother's control as overly circumscribing their freedom").

128. Irene M. Josselyn & Ruth Schley Goldman, *Should Mothers Work?*, 23 SOC. SERV. REV. 74, 75 (1949) (considering whether mothers should work outside the home, given their essential role in childrearing).

129. Linda Rennie Forcey, *Feminist Perspectives on Mothering and Peace*, *in* MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY 355, 357 (Evelyn Nakano Glenn et al. eds. 1994); *see also* GOODALE, *supra* note 122, at 486 ("The mother who does not give her children high views of life will give them low views of life."); Marjorie L. Behrens, *Child Rearing and the Character Structure of the Mother*, 25 CHILD DEV. 225, 237 (1954) (arguing that a child's "adjustment to socialization" is "significantly related to the 'total mother person' and specifically to her character structure").

130. Frances E.W. Harper, Women's Rts. Pioneer, Enlightened Motherhood: An Address Before The Brooklyn Literary Society (Nov. 15, 1892), http://gos.sbc.edu/h/harperf.html [https://perma.cc/U8ME-HULG]; *see also* JOHN WILLIAM GIBSON & MRS. J.W. GIBSON, GOLDEN THOUGHTS ON CHASTITY AND PROCREATION 207 (1903) ("[I]f the child is to reach a wholesome, well-rounded maturity of body and mind, the quality of motherhood must be of the very best.").

131. James A. Farley, Address at the Rosary Society's Annual Communion Breakfast (May 3, 1959), *in* 105 CONG. REC. A4076 (1959) (statement of Rep. James J. Delaney) ("The philosopher Michelet: 'It is the general rule that all superior men inherit the elements of their superiority from their mothers.'").

132. Harrell & Ridley, *supra* note 104, at 556–57.

American courts have likewise endorsed the idea that mothers are value transmitters. Courts have noted, for example, that the "training—physical, intellectual, and *moral*— . . . rendered to a child by a mother" has "pecuniary value capable of measurement" and that "children . . . should . . . be entitled to recover for the damage occasioned by the loss of their mother."[133] Courts have also considered "a mother's moral values,"[134] habits, and "digressions"[135] when making custody determinations, because "a child learns by example."[136] For instance, judges have approved of mothers who provide homes where "the child hears language and observes manners born of culture and refinement, where there are pictures, flowers, and music"—presumably because these mothers help children develop good values.[137] Conversely, courts have denied custody to mothers who are "morally unfit," because a mother's "disregard for moral guidance . . . can have but ill effect on [a] young [child]."[138] These and other examples reveal how American law reflects and perpetuates the narrative of mothers as moral teachers. Because the law believes mothers can and must teach their children good values, it has consistently viewed a woman's "moral instability . . . [as] inconsistent with the duties and responsibilities of a true mother to her child."[139]

* * *

In short, the term "mother" signifies much more than a bare biological relationship. For at least 150 years, scholars, writers, poets, and public figures have assumed that mothers are self-sacrificing nurturers and caregivers. They have also consistently associated the term "mother" with the roles and responsibilities of education, socialization, and value transmission. Even courts and judges have accepted and perpetuated these narratives. American law—especially family law—has long reflected the belief that women are selfless, caregiving, and educators. And many courts and judges have explicitly endorsed

133. Russick v. Hicks, 85 F. Supp. 281, 285 (W.D. Mich. 1949) (emphasis added).

134. Brown v. Brown, 237 S.E.2d 89, 91 (Va. 1977) (noting that "[t]he moral climate in which children are to be raised is an important consideration for the court in determining custody, and adultery is a reflection of a mother's moral virtues").

135. Bogh v. Lumbattis, 280 P.2d 398, 402 (Or. 1955) (affirming a father's custody because the mother's infidelity was inconsistent with "the accepted standards of motherhood").

136. Beck v. Beck, 341 So. 2d 580, 582 (La. Ct. App. 1977).

137. *Ex parte* Burdick, 136 N.W. 988, 989–90 (Neb. 1912) (granting custody to a stepmother who "[had] a large, well-kept house, near a good school; and . . . would require strict observance of moral and religious principles as she understands them").

138. *Beck*, 341 So. 2d at 582; *see also Brown*, 237 S.E.2d. at 91–92 (affirming a custody award for a father because the mother had been involved in an adulterous relationship that was "a reflection of [her] moral values" and "rendered [her] an unfit and improper person to have the care and custody of [her] children").

139. *Bogh*, 280 P.2d at 402.

the belief that mothers are "God's own institution for the rearing and upbringing of the child."[140]

Though some modern scholars have begun challenging these connotations as stereotypical, biased, or out-of-date, these roles, qualities, and traits remain part of the inherited language surrounding motherhood. When today's scholars, judges, and lawyers write or talk about mothers, they necessarily and inevitably draw on this inherited language and conjure the image of a woman who is caring and selfless, an educator, and a socializer.

B. *The Nature of Motherhood*

In addition to assigning mothers a particular set of roles, traits, and duties, academic literature reflects and perpetuates several narratives about the nature of motherhood. These include the idea that motherhood is a woman's primary identity, that it is natural, and that it is a civic responsibility.

1. Motherhood Is Central to Women's Identity

The first motherhood narrative present in academic literature is the idea that motherhood is or ought to be a woman's primary identity. Since at least the 1800s, scholars and public figures have assumed that "[m]otherhood . . . [is] [women's] God-given purpose."[141] They have suggested that "mothering . . . [is] a primary identity for most adult women,"[142] and they have assumed that a "[w]oman ha[s] no other role [because] she need[s] none."[143] Scholars and public figures have similarly argued that motherhood both reflects and reinforces mothers' femininity. They have even suggested that women are not fully self-actualized unless they bear and raise children, because "women's psychological development and emotional satisfaction require mothering."[144]

Though feminist scholars began challenging these narratives in the 1960s,[145] the academic literature has continued to treat "womanhood and motherhood [as] . . . synonymous identities."[146] In the 1980s, Maren Lockwood Carden observed that "American women are . . . supposed to make parenthood

140. Hines v. Hines, 185 N.W. 91, 92 (Iowa 1921).

141. Maren Lockwood Carden, *The Women's Movement and the Family: A Socio-Historical Analysis of Constraints on Social Change*, 7 MARRIAGE & FAM. REV. 7, 14 (1984).

142. Arendell, *supra* note 97, at 1192.

143. Carden, *supra* note 141, at 14.

144. PATRICE DIQUINZIO, THE IMPOSSIBILITY OF MOTHERHOOD: FEMINISM, INDIVIDUALISM, AND THE PROBLEM OF MOTHERING xiii–xiv (1999).

145. *See* Carden, *supra* note 141, at 14–15 (noting that feminists in the 1960s "accept[ed] the motherhood role . . . [but also] expect[ed] their lives to include more than marriage and motherhood"); Rogus, *supra* note 98, at 817.

146. Arendell, *supra* note 97, at 1192; *see also* Harrell & Ridley, *supra* note 104, at 558 ("In our society, a mother who has preschool children will probably in most cases define her dominant role as that of mother. . . . It is argued that only when her dominant role [mothering] obligations have been met satisfactorily can other roles assumed increased significance to her . . . .").

their primary value."[147] And as recently as 1999, public scholarship acknowledged that because women have many lifestyle and career options, choosing to bear children is "the socially and biologically quintessential womanly act."[148] Indeed, the idea that "all women want to be and should be mothers" forms an essential part of what Patrice DiQuinzio calls "essential motherhood"—a pervasive "ideological formation" that defines what mothers are and should be.[149] In short, there remains "strong cultural support for the idea that . . . motherhood [is] a woman's destiny."[150]

2. Motherhood Is Natural

The academic literature also perpetuates the idea that motherhood is an innate, natural role. In 1884, for instance, the Journal of Education condemned as "without a soul" any woman who prioritized work (or, in the journal's words, "scien[ce]") over "the gift of motherhood."[151] Biologist Henry Drummond similarly argued "that the one motive of organic Nature was to make Mothers."[152] And in the 1920s and 1930s, mainstream psychoanalytic theory "stipulated that it was 'normal' for women to desire a child, and that mature femininity was intrinsically tied to biological motherhood"[153]—so much so that some doctors assumed that childlessness was a symptom of mental illness.[154]

This same narrative has persisted, though in a tempered form, into recent years. In 1986, American poet and essayist Adrienne Rich observed that "most women 'choose' to have babies, not in an atmosphere where *not* having a baby is a genuine option, but in a social context in which [women] are seen primarily as mothers and in which . . . the 'non-mothering' woman is seen as deviant."[155]

147. Carden, *supra* note 141, at 13.

148. SUSAN MAUSHART, THE MASK OF MOTHERHOOD: HOW BECOMING A MOTHER CHANGES EVERYTHING AND WHY WE PRETEND IT DOESN'T 70 (1999).

149. DIQUINZIO, *supra* note 144, at xiii–xiv.

150. Rogus, *supra* note 98, at 817.

151. *Science and Motherhood*, 20 J. EDUC. 409, 409 (1884) (internal quotation marks omitted). The article went on to argue that women who work are "the most implacable, relentless, fatalistic force that can be let loose in the school-room" and "strewing [in their] path[s] . . . hatreds, jealousies, and repulsion." *Id.*

152. HENRY DRUMMOND, THE ASCENT OF MAN 343 (1894).

153. Katarina Wegar, *In Search of Bad Mothers: Social Constructions of Birth and Adoptive Motherhood*, 20 WOMEN'S STUD. INT'L F. 77, 81–82 (1997); *see also* John Corbin, *The Forgotten Woman*, 216 N. AM. REV. 455, 464 (1922) (arguing that childless women are dissatisfied because "[n]ature prompts her, tortures her, martyrizes her with the insistent instinct of motherhood; yet her resultant activities—in society and self culture, in charity, in politics—have only the remotest relation to her true cause . . . [t]o speak of their childlessness is to touch the rawest spot in their being, which every instinct, conscious and subconscious, tells them to hide from all the world").

154. Kane, *supra* note 125, at 149–50.

155. Bronwyn Davies & D'arne Welch, *Motherhood and Feminism: Are They Compatible? The Ambivalence of Mothering*, 22 AUSTL. & N.Z. J. SOCIO. 411, 421 (1986) (quoting ADRIENNE RICH,

And as recently as 2008, a number of American sociologists found that in the United States "the cultural expectation to bear and rear children is so strong that parenthood appears normative and childlessness deviant."[156] Indeed, the idea that women who "refus[e] . . . to bear children [have] . . . a measure of cultural self indulgence [and] frivolity"[157] has had such staying power that "[a] formative tenet of the women's movement has been that there should be a conscious decision whether or not to have a child."[158]

Courts, too, have endorsed this narrative. Judges have noted that "every true mother" has "God-given instincts" and "natural impulse[s] which "impel [her] to fly . . . to the protection of her child."[159] They have also observed that "[m]otherhood, by its very nature, definition, . . . brings with it some natural or presumptively natural bonding and protective characteristics."[160] They have argued that "[m]other love is a dominant trait in even the weakest of women,"[161] and they have praised "the natural affection of motherhood."[162] They have also found that a woman's legal mistakes cannot "lessen the natural and maternal instinct she possesse[s] to discharge the duties of motherhood."[163] As one court noted, "from [the time of Adam and Eve] till [*sic*] now the deepest, the tenderest, the most unswerving and unfaltering thing on earth is the love of a mother for her child."[164] These "natural ties of motherhood," that court continued, "are not to be [legally] destroyed or disregarded, save for some sound reason."[165]

Motherhood in Bondage, *in* ON LIES, SECRETS, AND SILENCES 197 (1976)); *see also* DIQUINZIO, *supra* note 144, at xiii (noting that the "essential motherhood" ideology "clearly implies that women who do not manifest the qualities required by mothering and/or refuse mothering are deviant or deficient as women").

156. Julia McQuillan, Arthur L. Greil, Karina M. Shreffler & Veronica Tichenor, *The Importance of Motherhood in the Contemporary United States*, 22 GENDER & SOC. 477, 478 (2008).

157. Corbin, *supra* note 153, at 457.

158. Sheila Rowbotham, *To Be or Not To Be: The Dilemmas of Mothering*, 31 FEMINIST REV. 82, 82 (1989). For an excellent discussion of the "natural motherhood" narrative and its legal implications, see Rogus, *supra* note 97, at 816–23.

159. Cole v. State, 59 S.E. 24, 25 (Ga. Ct. App. 1907) (affirming a mother's battery conviction even though the mother's action—"thrust[ing] her hand up toward [a prosecutor's] face"—was motivated by the "natural impulse" to protect her son).

160. State v. Williams, No. 2009AP1347, 2010 WL 3769099, at *3 (Wis. Ct. App. Sept. 29, 2010) (quoting the trial court's analysis of a child neglect case, where the court rejected as "incomprehensible" the idea that a woman "lacked the skills to be a mother who would safeguard and protect her baby").

161. Freeland v. Freeland, 159 P. 698, 699 (Wash. 1916).

162. Cordell v. Cordell, 170 So. 218, 219 (Ala. 1936) (granting custody to a mother).

163. Evans v. Taylor, 128 S.W.2d 77, 80 (Tex. App. 1939) (preserving a mother's custody even though the mother removed her child from the state without the court's permission).

164. Moore v. Dozier, 57 S.E. 110, 111 (Ga. 1907).

165. *Id.*; *see also* Mullen v. Mullen, 49 S.E.2d 349, 354–55 (Va. 1948) ("[G]randparents are excellent people and fond of the child; but that cannot take the place of a mother's love. [And] [n]one of the training which the father received in his studies or professional duties have equipped him to give that care and attention to a . . . child which a mother can give by reason of her natural advantages.").

3. Motherhood Is a Civic Responsibility

Academic and cultural sources also reinforce the notion that motherhood is a public, social role. Since at least the 1800s, scholars have argued that the "functions and offices of maternity [are] the very basis of society."[166] They have also insisted that "mothers are repository of the fundamental principles of our national structure" and that "as a mother[, a woman] is an institution, a living source of man's beginning, a living symbol of mankind's destiny."[167] Perhaps because mothers have been tasked with educating and socializing their children, scholars have long argued that mothers bear the important responsibility of "bring[ing] up their children as free and responsible individuals who can keep alive faith in a democratic way of life."[168] In John Corbin's words, a mother's "cause is public, universal; for she is, or she should be, the mother of the finest and the best of the nation, the hope of all its future."[169]

The law similarly recognizes motherhood as an important public duty. In custody disputes and divorce cases, courts have acknowledged that "[i]n civilized society, no calling rises above that of motherhood."[170] They have likewise observed that although men "may be called to the colors," "in the care of minor children, [woman] makes her most abiding impression."[171] Courts have argued that a mother's "duty to protect her children" is a duty "by nature and [at] law."[172] They have also noted that, "because the child's character, disposition, and abilities have a corresponding impact upon society, it is of the highest importance to . . . society that . . . the benefits derived from its mother be protected."[173]

* * *

The foregoing literature review shows that the terms "mother" and "motherhood" are not merely descriptors or signifiers. They are also rhetorically charged concepts that are closely and consistently linked to a common set of values and themes. For centuries, scholars in all fields—including law—have associated mothers with caregiving, self-sacrifice, education, and value transmission. And they have defined motherhood as a central part of women's identity, a natural female role, and a public and civic responsibility.

166. GOODALE, *supra* note 122, at 485.
167. Farley, *supra* note 131.
168. Mary S. Fisher, *Safeguarding Family Values*, 16 J. EDUC. SOCIO. 259, 261 (1943).
169. Corbin, *supra* note 153, at 455.
170. Randolph v. Randolph, 1 So. 2d 480, 482 (Fla. 1941).
171. *Id.*
172. Thacker v. J.C. Penney Co., 254 F.2d 672, 679 (5th Cir. 1958).
173. Russick v. Hicks, 85 F. Supp. 281, 284–85 (W.D. Mich. 1949).

Many of these narratives reflect the realities of human experience: for much of human history, mothers have, in fact, been children's primary caregivers, educators, and value transmitters. And for many people, these narratives are closely linked with cultural traditions and religious beliefs about what women are or should be. But these inherited narratives also wield constitutive power. They do not just reflect what has happened in the past; they also construct and constrain what might happen in the future. And taken together, they make up the inherited language that today's speakers deploy when they speak of mothers and motherhood.

In the next two parts, I consider whether and how the Supreme Court engages with this inherited language. Using close readings and discourse analysis, I analyze Supreme Court cases in three substantive areas—gender discrimination, immigration, and abortion—to identify whether and how the Court invokes or responds to the inherited themes just discussed. I then consider the normative implications of the patterns I observe.

III. JUDICIAL NARRATIVES ABOUT MOTHERHOOD

Because the Supreme Court hears many cases involving women, it often has occasion to think and write about women's roles, rights, and responsibilities. This is particularly true in three substantive areas of law: cases challenging gender-based legal classifications, cases involving citizenship and immigration questions, and cases about abortion.[174] In this part, I use prominent cases from these three areas to consider whether and how the Court engages with the inherited language of motherhood. I focus, in particular, on cases from 1970 on, because these cases reflect the Court's orientation toward gender in a post-Warren Court and post-second-wave feminism "modern" world. I find that the Court responds to the inherited language in all three substantive legal contexts, but its relationship with that language is different in each area. Specifically, in gender discrimination cases, the Court consistently rejects inherited narratives;

174. Family law also raises issues relating to women's roles and responsibilities, but I do not analyze that substantive legal area here. Because family law is an obvious context to study judicial rhetoric about mothers and women, there is already a sizeable body of literature about bias and stereotypes in family courts. *See, e.g.*, Melissa L. Breger, *The (In)Visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. REV. L. & SOC. CHANGE 555, 558 (2012) (analyzing the influence of implicit gender bias in family court proceedings); McNeely, *supra* note 113, at 941–48 (describing the origins and effects of gender stereotypes in custody determinations and other family law disputes); Jennifer Bennett Shinall, *Settling in the Shadow of Sex: Gender Bias in Marital Asset Division*, 40 CARDOZO L. REV. 1857, 1877–83 (2019) (describing the effects of gender bias in divorce proceedings). Additionally, this Article is focused on Supreme Court rhetoric, and most family law cases that reach the Supreme Court are framed as constitutional issues (equal protection challenges, contracts clause challenges, etc.) rather than as pure family law issues. For these reasons, my Article does not address family law as a separate subset of case law.

in immigration cases, it has sometimes embraced those narratives; and in abortion cases, it has shifted from rejection to silence.

A. *In Gender Discrimination Cases*

In the 1970s and 1980s, the Supreme Court heard multiple challenges to laws that classified individuals on the basis of sex.[175] Because many of the challenged laws codified inherited assumptions about men and women, the resulting cases naturally invited the Court to engage with the inherited language of womanhood. And because that inherited language treats "womanhood and motherhood [as] . . . synonymous identities,"[176] the cases inevitably involved engagement with assumptions about motherhood, as well. The Court's gender discrimination cases thus provide an obvious and natural starting point for a discussion of the Court's rhetoric about women and mothers.

Below, I analyze four landmark gender discrimination cases to see whether and how the Court engages with the inherited language of womanhood and motherhood. In the first case, *Frontiero v. Richardson* (1973),[177] the Court invalidated a statute that granted automatic dependency status to wives of military members, but not to husbands.[178] In the second, *Mississippi University for Women v. Hogan* (1982),[179] the Court held that an all-female nursing university's exclusion of male applicants violated the Fourteenth Amendment's Equal Protection Clause.[180] The third, *United States v. Virginia Military Institute* (1996),[181] invalidated the Virginia Military Institute's male-only admission policy.[182] And the fourth, *Nevada Department of Human Resources v. Hibbs*

175. The Court's earliest gender cases date back to before the early 1900s. *E.g.*, Muller v. Oregon, 208 U.S. 412, 420 (1908) (upholding a state law limiting the workday for women in factories and citing in support views about the physical weakness of women); Quong Wing v. Kirkendall, 223 U.S. 59, 64 (1912) (upholding against an equal protection challenge a law that excepted small female laundry business from a fee on laundry businesses). But challenges to gender discriminatory laws did not become a prominent part of the Court's docket until the 1970s, after the civil rights movement. *See, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (striking a policy to hire men with preschool-age children but not women with preschool-age children); Reed v. Reed, 404 U.S. 71, 76 (1971) (striking a law that preferred males in appointing estate administrators); Stanley v. Illinois, 405 U.S. 645, 658 (1972) (striking a statute that assumed unwed fathers were unfit to be parents); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 648 (1974) (striking regulations preventing pregnant teachers from working after the fifth month of pregnancy). *Phillips* was the first time the Supreme Court addressed sex discrimination under Title VII. The Court's first abortion case was United States v. Vuitch, 402 U.S. 62, 66 (1971).

176. Arendell, *supra* note 97, at 1192; *see also* Rogus, *supra* note 97, at 817 (noting that there is "strong cultural support for the idea that . . . the biological and sociological concepts of motherhood are one and the same").

177. 411 U.S. 677 (1973).

178. *Id.* at 690–91.

179. 458 U.S. 718 (1982).

180. *Id.* at 733.

181. 518 U.S. 515 (1996).

182. *Id.* at 556–57.

(2003),[183] held that the Family and Medical Leave Act of 1993 ("FMLA"), which guaranteed twelve weeks of unpaid family leave for eligible state employees of both genders, was a valid exercise of Congress's enforcement powers under § 5 of the Fourteenth Amendment.[184]

In each of these cases, the Court acknowledges that for much of American history, legislators and judges have been wedded to and influenced by traditional understandings of women and mothers. But the Court also suggests that these traditional narratives have "inhibit[ed] women's progress in the workplace,"[185] limited their access to benefits, and "den[ied] opportunity to women whose talent and capacity place them outside the average description."[186] Because of this, the Court does not accept the notions that women and mothers are selfless, caregivers, and naturally suited for work in the home. Instead, it emphatically rejects the inherited language of womanhood and motherhood and instead insists that the law "must not rely on overbroad generalizations" about "the way women are."[187]

1. *Frontiero v. Richardson* (1973)

In the 1960s, Congress expanded the fringe benefits available to members of the armed services and their dependents.[188] The statute that defined eligibility for these benefits granted automatic dependency status to wives of servicemen but provided that husbands of servicewomen could qualify as dependents only if they were "in fact dependent on the member . . . for over one-half of [their] support."[189] Sharron Frontiero, a female Air Force lieutenant, was denied benefits for her husband because she could not show that she provided more than half of his support, as required by the statute. She and her husband challenged the law, arguing that it violated the Fifth Amendment's Due Process Clause by providing different benefits to similarly situated male and female servicemembers.[190]

The *Frontiero* Court begins by rehearsing a number of familiar, inherited tropes about women and mothers. It describes the "romantic paternalism" that historically consigned women to certain roles and responsibilities."[191] It also quotes Justice Bradley who, in an 1873 concurring opinion, condemned "the

183. 538 U.S. 721 (2003).

184. *Id.* at 740.

185. Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 754 (2003).

186. United States v. Virginia, 518 U.S. 515, 550 (1996).

187. *Id.*

188. *See* 37 U.S.C. § 401 (1962).

189. The relevant provisions define "dependent with respect to a member of a uniformed service" as "(1) his spouse; . . . . However, a person is not a dependent of a female member, unless he is in fact dependent on her for over one-half of his support." *Id.*

190. Frontiero v. Richardson, 411 U.S. 677, 680–81 (1973).

191. *Id.* at 684.

idea of a woman adopting a distinct and independent career from that of her husband" and asserted that "[t]he paramount destiny and mission of a woman are to fulfil the noble and benign offices of wife and mother."[192]

But if the Court demonstrates its familiarity with the inherited language of motherhood, it also takes great pains to show that it does not endorse the themes and assumptions of that language. For instance, the Court expressly disavows the notion that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[193] It likewise rejects the idea that "the domestic sphere . . . properly belongs to the domain and functions of womanhood."[194] Both narratives, the Court asserts, have forced women into a "position . . . in many respects, comparable to that of blacks under the pre-Civil War slave codes."[195] And both have contributed to the "pervasive . . . discrimination" that women "still face" in "educational institutions, in the job market, and, perhaps most conspicuously, in the political arena."[196]

The Court also compares the challenged dependency statute to the law invalidated in *Reed v. Reed* (1971).[197] In that case, the Supreme Court heard a challenge to an Idaho statute that instructed probate courts to give preference to men when assigning estate administration responsibilities.[198] Idaho had defended the statute using a number of justifications borrowed from the inherited language of womanhood and motherhood: it had insisted that the probate statute was reasonable because "men are as a rule more conversant with business affairs than . . . women"[199] and because "women are still not engaged in politics, the professions, business or industry to the extent that men are."[200]

192. *Id.* at 684–85 (quoting Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring)). In *Bradwell*, Illinois refused to grant Ms. Bradwell a law license because she was a woman, and Ms. Bradwell sued, claiming Illinois had violated the Privileges and Immunities Clause of the Fourteenth Amendment. 83 U.S. at 137–38 (majority opinion). The Court held that the right to practice law was not a privilege and immunity guaranteed by that amendment. *Id.* at 139 ("[T]he right to admission to practice in the courts of a State is not one of [the privileges and immunities belonging to citizenship].").

193. *Frontiero*, 411 U.S. at 684 (quoting *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring)).

194. *Id.*

195. *Id.* at 685. The Court highlights specific similarities:

> Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although blacks were guaranteed the right to vote in 1870, women were denied even that right . . . until adoption of the Nineteenth Amendment half a century later.

Id.

196. *Id.* at 686.

197. 404 U.S. 71 (1971).

198. *Id.* at 73.

199. *Frontiero*, 411 U.S. at 683 (quoting Brief for Respondent at 12, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-04)).

200. *Id.* at 683 (quoting Brief for Respondent, *supra* note 199, at 12–13).

The *Reed* Court emphatically rejected these narratives and instead held that Idaho's preference for men was "the very kind of arbitrary legislative choice forbidden by the Constitution."[201] The *Frontiero* Court quotes *Reed* at length and carefully recounts the rationale that motivated the *Reed* Court's holding. In doing so, it signals that it, too, is suspicious of statutory schemes that rest primarily on traditional assumptions about women and their proper roles.

The *Frontiero* Court also shows its aversion to the inherited language of motherhood by expressing concern that the challenged dependency statute may have originated, at least in part, from Congress's uncritical and traditional assumption that "as an empirical matter, wives in our society frequently are dependent on their husbands, while husbands rarely are dependent on their wives."[202] The Court also rejects the argument that "Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financial dependent on their husbands, while burdening female members with the task of establishing dependency in fact."[203] Both arguments have roots in inherited narratives about women, their capabilities, and their natural roles. And in the Court's view, both are "to say the least, questionable."[204]

The *Frontiero* Court never questions the empirical accuracy of the inherited language—it does not, for instance, deny that many women in fact depend on their husbands for financial support. Still, it worries that legislation based on traditional assumptions about women "often [has] the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."[205] The Court is thus suspicious of laws that draw on and perpetuate traditional assumptions about women and mothers—so suspicious, in fact, that it ultimately determines that *all* sex-based statutory classifications "must . . . be subjected to strict judicial scrutiny."[206]

2. *Mississippi University for Women v. Hogan* (1982)

Nearly one decade after *Frontiero* held that gender-based classifications are subject to strict scrutiny, the Supreme Court heard a challenge to an all-female admissions policy at the Mississippi University for Women.[207] The case was brought by Joe Hogan, a male applicant who was denied admission to the

201. *Id.* at 684 (quoting *Reed*, 404 U.S. at 76).
202. *Id.* at 688–89.
203. *Id.* at 689.
204. *Id.* at 690.
205. *Id.* at 687.
206. *Id.* at 688.
207. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 720 (1982).

university's nursing program.[208] Mr. Hogan challenged the all-female admissions policy as a violation of the Fourteenth Amendment's Equal Protection Clause.[209] The Fifth Circuit ruled in favor of Mr. Hogan and the Supreme Court, in a 5-4 decision, affirmed.[210]

The Court begins its opinion by reciting *Frontiero*'s rule: gender classifications are subject to heightened scrutiny. But where *Frontiero* described that scrutiny as "strict,"[211] the Court here explains that gender classifications must have an "exceedingly persuasive justification," must serve "important governmental interests," and must be "substantially related to the achievement of those objectives."[212] The Court specifies that this test "must be applied free of fixed notions concerning the roles and abilities of males and females"—that is, it must not be influenced by the assumptions of the inherited language.[213] And "if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."[214]

The Court then addresses Mississippi's stated justification for the all-female admissions policy—namely, to "compensate[] for discrimination against women" and to guarantee that women have equal access to educational opportunities.[215] Initially, this justification seems promising: unlike the statutes in *Frontiero* and *Reed*, the admissions policy does not draw on inherited assumptions about women and mothers.[216] The Court, however, is not persuaded. Although Mississippi never invokes traditional assumptions about women or mothers, the Court cannot believe that the State's policy actually intends to help women, because there is no evidence "that women lack[] opportunities to obtain training in . . . nursing or to attain positions of leadership in that field."[217] The Court likewise questions whether a policy can

208. *Id.* at 721.

209. *Id.*

210. *Id.* at 721–22.

211. *Frontiero*, 411 U.S. at 688.

212. *Hogan*, 458 U.S. at 723–24. *Hogan* was the first case to precisely articulate a level of scrutiny for sex-based classifications. Its requirement of an "exceedingly persuasive justification" and means "substantially related" to an "important governmental interest" has come to be known as "intermediate scrutiny." *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988) (citing *Hogan* to explain the intermediate scrutiny standard).

213. *Hogan*, 458 U.S. at 725.

214. *Id.*

215. *Id.* at 727.

216. In *Frontiero*, the Court worried that the challenged dependency statute reflected Congress's assumption that "the husband in our society is generally the 'breadwinner' in the family—and the wife typically the 'dependent' partner." 411 U.S. at 681. In *Reed*, appellees defended the challenged estate administration statute's preferential treatment for males on the grounds that "men [are] as a rule more conversant with business affairs than . . . women." Brief for Appellee at 12, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4); *see also supra* Section III.A.1.

217. *Hogan*, 458 U.S. at 729.

"compensate for discriminatory barriers faced by women" when "the year before the [university's] first class enrolled, women earned ninety-four percent of the nursing . . . degrees . . . in Mississippi."[218] Facing this evidence, the Court cannot accept Mississippi's stated justification for excluding men from the nursing program.[219] And so, the Court concludes that the policy's true purpose must have been to "perpetuate the stereotyped view of nursing as an exclusively women's job."[220]

The conclusion is damning for the university because the Court is suspicious of the inherited language of women and mothers. The idea that women ought to have a protected opportunity to pursue nursing training is, for the Court, an idea grounded in and inspired by the inherited narratives that mothers and women are naturally selfless, caregiving, and service oriented—traits and characteristics that would make them well suited for the nursing profession. But, as in *Frontiero*, the majority here suggests that these narratives have no place in law. The Court directs that "care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."[221] And it concludes that Mississippi's stated objective "lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women."[222] Because this objective is not divorced from "stereotypic notions,"[223] the Court holds that the admissions policy offends the Fourteenth Amendment's guarantee of equal protection.

Like in *Frontiero*, the *Hogan* Court does not discuss the empirical or normative validity of the inherited language's assumptions (though it does, at one point, suggest that those "traditional" assumptions are "often inaccurate").[224] It does not query whether women are in fact better nurses than men, and it does not ask if women have natural characteristics (selflessness, a proclivity for caregiving, etc.) that might make them better qualified for the profession. But the Court does emphatically suggest that as a matter of constitutional law, the inherited language of womanhood and motherhood cannot and should not govern. Regardless of whether that language is accurate, it, alone, cannot satisfy the constitutional requirement that gender classifications serve "important governmental objectives."[225] And so, "the

218. *Id.*

219. In the Court's words, "[A]lthough the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the *actual* purpose underlying the discriminatory classification." *Id.* at 730 (emphasis added).

220. *Id.* at 729.

221. *Id.* at 725.

222. *Id.* at 729–30.

223. *Id.*

224. *Id.* at 726.

225. *Id.* at 724. In the Court's words, if "the statutory objective itself reflects archaic and stereotypic [i.e., inherited] notions, . . . the objective itself is illegitimate." *Id.* at 725.

validity of a [gender-based] classification [must be] determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."[226]

3. *United States v. Virginia* (1996)

United States v. Virginia is perhaps the Court's most well-known case concerning gender classifications. The case involved a challenge to the admissions policy at the Virginia Military Institute ("VMI")—an elite, public school that used "adversative method[s]" to produce "citizen-soldiers."[227] VMI's unique pedagogical model incorporated "'physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.'"[228] The school enrolled only male students in part because it believed its methods were not well suited for women.[229]

In 1990, a young woman who hoped to enroll at VMI complained to the Attorney General about the school's male-only admissions policy.[230] The United States then sued VMI, arguing that the single-sex policy violated the Fourteenth Amendment's Equal Protection Clause.[231] The Fourth Circuit ruled in favor of the government but noted that some of VMI's pedagogy—specifically, its "physical training, the absence of privacy, and the adversative approach—would be materially affected by coeducation."[232] And so, the Fourth Circuit gave Virginia the option to create a parallel military institution for female students.[233]

The State responded by establishing the Virginia Women's Institute for Leadership ("VWIL").[234] Though designed to be a female version of VMI, VWIL fell short of its male counterpart in several ways: it offered fewer degrees, had fewer faculty with PhDs, and had a lower average entry SAT

226. *Id.* at 725–26.

227. United States v. Virginia, 518 U.S. 515, 520 (1996).

228. *Id.* at 522 (quoting United States v. Virginia, 766 F. Supp. 1407, 1421 (W.D. Va. 1991)).

229. *Id.* at 540 ("Virginia . . . argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women. Alterations to accommodate women would necessarily be 'radical,' so 'drastic,' Virginia asserts, as to transform, indeed 'destroy,' VMI's program.").

230. *Id.* at 523 (citing *Virginia*, 766 F. Supp. at 1408).

231. *Id.* (citing *Virginia*, 766 F. Supp. at 1408).

232. *Id.* at 525 (quoting United States v. Virginia, 976 F.2d 890, 896–97 (4th Cir. 1992)).

233. *Id.* at 525–26 (citing *Virginia*, 976 F.2d at 900) ("The [Fourth Circuit] suggested these options for the Commonwealth: Admit women to VMI; establish parallel institutions or programs; or abandon state support, leaving VMI free to pursue its policies as a private institution.").

234. *Id.* at 526.

score.[235] Virginia sought approval for its parallel school, which a divided court of appeals granted.[236] The United States then petitioned for certiorari.[237]

Throughout the appeal, Virginia used traditional narratives about women to defend the male-only policy at VMI. It argued, for example, that the school's pedagogy was not "effective for women as a group"[238] and that it would not be able to employ its signature adversative method if women were admitted. It further suggested that the method's signature "harassment, scrutiny, and pressure" would "'play out differently' when . . . imposed . . . on a late adolescent female."[239] The district court, which upheld VMI's policy, accepted and perpetuated these narratives, noting that "males tend to need an atmosphere of adversativeness" while "females tend to thrive in a cooperative atmosphere."[240]

Once again, the Supreme Court specifically rejects these inherited assumptions about women. But here, the Court's critique is more thorough and emphatic than in either *Frontiero* or *Hogan*. For example, the Court explains that in the early 1900s, "higher education . . . was considered dangerous for women."[241] It suggests that the VMI's male-only policy stemmed from this inherited belief and "reflect[s] widely held views about women's proper place."[242] With a hint of exasperation, the Court "emphasizes that time and time again since [the] turning point decision in *Reed v. Reed*, we have cautioned reviewing courts to take a hard look at generalizations or tendencies of the kind pressed by Virginia."[243] And it condemns the district court for its "findings" (the Supreme Court puts this word in scare quotes) "about typically male or typically female 'tendencies.'"[244] If the inherited language presents women as inherently soft, gentle, and nurturing—individuals who do not belong in higher education, let alone at an adversative university—the Supreme Court notes that "some women . . . are capable of all of the individual activities required of VMI cadets"[245] and "can meet the physical standards VMI now imposes on men."[246] In fact, the Court argues that contrary to inherited assumptions, "some women

235. *Id.* (citing United States v. Virginia, 852 F. Supp. 471, 476–77 (W.D. Va. 1994)).

236. *Id.* at 530.

237. For a full procedural history, see *id.* at 523–30.

238. *Id.* at 549 (quoting United States v. Virginia, 44 F.3d 1229, 1233–34 (4th Cir. 1995)).

239. Brief for the Cross-Petitioners at 35, United States v. Virginia, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107), 1995 WL 681099, at *16.

240. *Virginia*, 518 U.S. at 541 (quoting United States v. Virginia, 766 F. Supp. 1407, 1434 (W.D. Va. 1991)).

241. *Id.* at 536.

242. *Id.* at 536–37.

243. *Id.* at 541.

244. *Id.* (quoting *Virginia*, 766 F. Supp. at 1434–35).

245. *Id.* at 540–41 (quoting *Virginia*, 766 F. Supp. at 1412).

246. *Id.* (quoting United States v. Virginia, 976 F.2d 890, 896 (4th Cir. 1992)).

may prefer [VMI's adversative method] to the methodology a women's college might pursue."[247]

The Court likewise condemns the inherited language of womanhood in its assessment of VWIL. The Court notes that VWIL "uses a 'cooperative method' of education 'which reinforces self-esteem'"[248] instead of the "rigorous military training for which VMI is famed."[249] It rejects Virginia's argument that "these methodological differences are 'justified pedagogically,' based on 'important differences between men and women'" that are "real" and "not stereotypes."[250] "Estimates of what is appropriate for *most women* no longer justify denying opportunity to [*other*] women," the Court explains.[251] VMIL's soft, cooperative methods might be best suited for the inherited language's woman, but for the *law's* woman—a person who is not defined by "generalizations about 'the way women are'"—VWIL's methods are "substantially different," "significantly unequal," and inadequate to remedy Virginia's constitutional violation.[252]

As in *Frontiero* and *Hogan*, the Court does not necessarily challenge the accuracy or logic of Virginia's inherited assumptions about women. Indeed, it acknowledges that "single-sex education affords pedagogical benefits to at least some students,"[253] and it allows that "it may be assumed, for purposes of this decision, that most women would not choose VMI's adversative method."[254] But the Court also emphasizes that inherited assumptions about women and mothers may not serve as the basis for gender-based legal classifications. Accurate or not, such inherited narratives "are likely to . . . perpetuate historical patterns of discrimination."[255] They therefore cannot justify "women's categorical exclusion, in total disregard of their individual merit."[256]

4. *Nevada Department of Human Resources v. Hibbs* (2003)

The FMLA grants eligible state employees of both genders twelve weeks of unpaid leave to care for spouses with a "serious health condition."[257] It also allows employees to sue if their employers deny or interfere with the mandated leave policies.[258] In 1997, William Hibbs sued the Nevada Department of

247. *Id.* at 540 (citing United States v. Virginia, 852 F. Supp. 471, 481 (W.D. Va. 1994)).

248. *Id.* (citing *Virginia*, 766 F. Supp. at 1413–14).

249. *Id.* (citing *Virginia*, 852 F. Supp. at 476).

250. *Id.* at 549 (citing Brief for Respondents at 28, United States v. Virginia, 518 U.S. 515 (1996) (Nos. 94-1941, 94-2107)).

251. *Id.* at 550.

252. *Id.* at 550, 554.

253. *Id.* at 535 (citing *Virginia*, 766 F. Supp. at 1414).

254. *Id.* at 542.

255. *Id.* (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 139 n.11 (1994)).

256. *Id.* at 546.

257. Family and Medical Leave Act of 1993, Pub. L. No. 103–3, 107 Stat. 6 (codified as amended in scattered sections of 5 and 29 U.S.C.).

258. *Id.*

Human Resources for violating the FMLA's leave requirements.[259] The district court found that Mr. Hibbs's claim was barred by the Eleventh Amendment and granted summary judgment against him.[260] Mr. Hibbs appealed.[261]

When the case reached the Supreme Court, it presented a single issue: "[W]hether an individual may sue a State for money damages in federal court for violation of [the FMLA]."[262] The question was not as straightforward as it appeared. To resolve the appeal, the Court first had to determine whether Congress intended for the FMLA's private cause of action to abrogate states' sovereign immunity.[263] It then had to decide whether the FMLA's private cause of action was a valid exercise of Congress's § 5 enforcement power.[264] The Court ultimately answered both questions in the affirmative and held that employees could, in fact, sue States for violations of the FMLA.[265]

For our purposes, the Court's § 5 analysis is most relevant. Section 5 of the Fourteenth Amendment grants Congress "the power to enforce, by appropriate legislation, the provisions of [the Amendment]."[266] The Supreme Court has said that this power is preventive or remedial: Congress may use § 5 to "remedy or prevent unconstitutional actions," but it may not invoke § 5 to "make a substantive change in the governing law."[267] To assess the constitutionality of the FMLA's private cause of action, then, the *Hibbs* Court had to determine whether Congress had created the private cause of action to remedy or prevent a constitutional violation.[268] More specifically, it had to decide "whether Congress [did, in fact, have] evidence of a pattern of [unconstitutional gender discrimination] on the part of the States" sufficient to justify the FMLA's provisions.[269]

The Court begins its analysis by reviewing the history of state leave policies. It finds that "many state laws limit[ed] women's employment

259. Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 725 (2003).

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 726 ("Congress may . . . abrogate . . . immunity in federal court if it makes its intention to abrogate unmistakably clear . . . ."). This is an example of the clear statement rule the Court applies in cases affecting federalism. Applying this rule, the Court will not read a statute to seriously upset the balance of federalism unless Congress clearly expresses its intent to do so (and Congress has the authority to do so). *E.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

264. *Hibbs*, 538 U.S. at 726–27 (describing the scope of Congress's § 5 enforcement powers) ("Congress may . . . abrogate the States' sovereign immunity through a valid exercise of its § 5 power . . . .").

265. *Id.* at 725 ("We hold that employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family-care provision of the Act.").

266. U.S. CONST. amend. XIV, § 5.

267. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

268. *See id.* at 520 (holding that legislation enacted under § 5 must be proportionate and congruent to the alleged constitutional violation).

269. *Hibbs*, 538 U.S. at 729.

opportunities."[270] It also notes that "[s]tate laws frequently subjected women to distinctive restrictions, terms, conditions, and benefits for those jobs they could take."[271] The Court expresses concern that these laws reflected and reinforced inherited assumptions about women. Specifically,

> [s]uch laws were based on the related beliefs that (1) a woman is, and should remain, the center of home and family life, and (2) a proper discharge of a woman's maternal functions—having in view not merely her own health, but the well-being of the race—justifies legislation to protect her from the greed as well as the passion of man.[272]

These justifications reflect the inherited beliefs that motherhood is a civic responsibility and a natural part of a woman's identity. They also reflect the inherited assumptions that mothers are educators and value transmitters. Once again, the Court emphatically rejects these inherited narratives. It suggests that "differential [state] leave policies [are] not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work."[273] It also suggests that gendered discrepancies in parental leaves reflect "stereotype-based beliefs about the allocation of family duties."[274] The Court reemphasizes that these and other inherited assumptions are "invalid gender stereotypes"[275] that cannot justify a legal distinction between men and women.[276] And because many state laws reflect these "invalid" assumptions, the Court concludes that states have a "record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits."[277] The Court thus upholds the FLMA's individual cause of action as a valid exercise of Congress's § 5 enforcement powers.

In short, the Court determines that many state leave policies rely on inherited assumptions about mothers and women—that women should be primary caregivers, that motherhood is part of women's natural role, and so on.[278] The Court also concludes, as it did in *Frontiero*, *Hogan*, and *Virginia*, that these inherited assumptions do not provide a constitutionally sound basis for

270. *Id.*

271. *Id.*

272. *Id.* (first quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961); and then quoting Muller v. Oregon, 208 U.S. 412, 422 (1908)).

273. *Id.* at 731.

274. *Id.* at 730.

275. *Id.*

276. The Court quotes *Virginia* to remind the parties that "[a] State's justification for [a gender] classification 'must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.'" *Id.* at 729 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

277. *Id.* at 735.

278. *Id.* at 729–35.

gender-based legal classifications.[279] The Court's decision in *Hibbs* thus provides a strong condemnation of the inherited language of women and mothers. Indeed, the Court upholds the FMLA precisely because it believes the FMLA remedies states' unconstitutional reliance on inherited narratives.[280]

* * *

In each of the above cases, the Court demonstrates its familiarity with the inherited language of motherhood and womanhood. It recognizes that many gender classifications are grounded in deeply rooted assumptions about "women's proper place" (for example, in the home, caring for children).[281] It also observes that laws that distinguish between genders often reflect inherited beliefs that women are naturally and appropriately dependent on their husbands;[282] that women are best suited for education and employment that is gentle, cooperative, and caregiving;[283] and that women's "paramount destiny and mission [is] to fulfil the noble and benign offices of wife and mother."[284]

The Court recognizes that these inherited assumptions animate and shape the laws it assesses. But it also notes that these "gross, stereotyped distinctions between the sexes" have limited women in significant ways.[285] And so, the Court expressly, emphatically, and repeatedly repudiates the inherited language of motherhood and womanhood. It does not question whether the inherited language is accurate or true,[286] but it clearly states that as a matter of constitutional law, gender-based legal classifications may not rest on "generalizations about 'the way women are'" or "estimates of what is appropriate for *most women*."[287] It also instructs judges to approach gender-based classifications with heightened scrutiny so that legislators do not "rely on overbroad generalizations about the different talents, capacities, or preferences

279. *Id.*

280. *Id.* at 735.

281. *Virginia*, 518 U.S. at 537.

282. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 688–92 (1973) (involving a law that assumed women were more likely than men to be dependent on their spouse).

283. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 727–30 (1982) (describing the rationale behind a state nursing school's women-only admissions policy); *Virginia*, 518 U.S. at 524–25 (discussing the rationale behind a state military school's male-only admissions policy).

284. *Frontiero*, 411 U.S. at 685 (quoting Bradwell v. State of Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring)).

285. *Id.* (arguing that inherited assumptions about women have made "the position of women in our society . . . comparable to that of blacks under the pre-Civil War slave codes").

286. Indeed, in *J.E.B. v. Alabama*, another case involving a gender-based classification, the Court noted, "We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, *even when some statistical support can be conjured up for the generalization*." 511 U.S. 127, 139 n.11 (1994) (emphasis added) (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975)).

287. *Virginia*, 518 U.S. at 550.

of males and females."[288] True, the Court admits, there may be "'inherent differences' between men and women."[289] But inherited beliefs about those differences do not, without more, "justify denying opportunity to women."[290]

B. *In Immigration Cases*

Because gender classifications necessarily raise questions about men, women, and their respective roles, the Court's gender discrimination cases naturally invite it to engage with the inherited language of motherhood. But the Court also engages with that inherited language in other, more surprising contexts. One of these is immigration. On its face, immigration law appears to have little to do with gender: it raises questions about citizenship, asylum, and the statutory requirements for each, but it does not explicitly involve questions about gender roles or identities. In practice, though, some of the Court's immigration cases have profound gender implications. These cases thus provide interesting and unexpected examples of the Court's relation to the inherited language of motherhood.

In the following section, I analyze the Court's language in two immigration cases: *Nguyen v. I.N.S.* (2001)[291] and *Sessions v. Morales-Santana* (2017).[292] Both cases concerned the constitutionality of statutes governing the acquisition of citizenship for children born abroad to one American citizen and one noncitizen. But each case reached a different outcome, and each engaged with the inherited language of motherhood in a different way. In *Nguyen*, the Court upheld an immigration statute that specifies different citizenship requirements for children born to unmarried citizen fathers and children born to unmarried citizen mothers. The Court also embraced several inherited assumptions about mothers—namely, that they are natural caregivers, educators, and nurturers. In *Sessions*, by contrast, the Court struck down a provision specifying different residency requirements for citizen fathers and citizen mothers. In doing so, it explicitly rejected those same assumptions and admonished, as it did in its gender classification cases, that laws may not rely on "fixed [i.e., inherited] notions concerning [a gender's] roles and abilities."[293]

288. *Id.* at 533 (citing *Weinberger*, 420 U.S. at 643, 648).
289. *Id.*
290. *Id.* at 550.
291. 533 U.S. 53 (2001).
292. 582 U.S. 47 (2017).
293. *Id.* at 62 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

1. *Nguyen v. I.N.S.* (2001)

Nguyen v. I.N.S. involved an equal protection challenge to Title 8 U.S.C. § 1409.[294] Section 1409 lists citizenship requirements for children born outside of the United States to unmarried parents who are not both citizens.[295] Its requirements vary depending on whether the citizen parent is the child's mother or father. If the child's mother is a citizen, the child may claim citizenship if the mother was (1) a citizen when the child was born and (2) physically present in the United States for one continuous year.[296] If the child's father is a citizen, though, the child may only claim citizenship if the father (1) establishes a blood relationship by clear and convincing evidence; (2) was a citizen when the child was born; (3) agrees in writing to support the child financially; and (4) before the child is 18, is either legitimated under law, acknowledges paternity in writing, or has paternity established by court adjudication.[297]

Tuan Anh Nguyen was born in Vietnam to an American citizen father and an noncitizen mother.[298] He moved to the United States as a child and obtained permanent legal resident status.[299] When Nguyen was 22, he pled guilty to a crime, which triggered deportation proceedings.[300] He sought to avoid these proceedings by claiming citizenship,[301] but because he had not fulfilled the requirements of § 1409, he was ineligible for citizenship through his father.[302] Nguyen and his father challenged § 1409, arguing that the disparate requirements for citizen mothers and citizen fathers violated the Fourteenth Amendment's Equal Protection Clause.[303]

The Court begins its analysis by citing the standard of review for gender-based classifications: "[T]o withstand equal protection scrutiny," it explains, "it must be established 'at least that the challenged classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."'"[304] But though

294. *Nguyen*, 533 U.S. at 57 ("The question before us is whether the statutory distinction [in § 1409 between mothers and fathers] is consistent with the equal protection guarantee embedded in the Due Process Clause of the Fifth Amendment.").

295. 8 U.S.C. § 1409.

296. § 1409(c) ("[A] person born . . . outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been present in the United States . . . for a continuous period of one year.").

297. § 1409(a) (listing requirements for a child born out of wedlock to gain citizenship through a citizen father).

298. *Nguyen*, 533 U.S. at 57.

299. *Id.*

300. *Id.* (citing 8 U.S.C. § 1227(a)(2)(A)(ii)–(iii)).

301. *Id.*

302. *Id.* at 57–58.

303. *Id.* at 58.

304. *Id.* at 60 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

the Court parrots *Virginia*'s language, it notably omits the important caveat that any asserted governmental objectives must "not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[305] The omission is striking: *Virginia* emphatically and repeatedly cautioned against reliance on inherited assumptions about gender, but *Nguyen*—decided just five years later by an identical Court—says very little about stereotypes. The omission also has legal significance: because the Court backs down from its strong anti-stereotype stance, its analysis is laden with the types of gendered assumptions that *Virginia*, *Hogan*, and other prior cases so emphatically rejected.

The Court ultimately upholds § 1409 because it determines that the law's gender-disparate requirements are substantially related to the government's interest in "ensur[ing] that the child and the citizen parent have some demonstrated opportunity or potential to develop . . . a relationship that . . . provide[s] a connection between child and citizen parent and, in turn, the United States."[306] In defending this conclusion, the Court relies on inherited assumptions about women. It reasons that a mother "knows that the child . . . is hers and has an initial point of contact with him," which provides "an opportunity for mother and child to develop a real, meaningful relationship."[307] By contrast, "there is no assurance that the [citizen] father and his biological child will ever meet," and that there may be "no opportunity for father and child to begin a relationship."[308] These statements reveal the Court's commitment to the inherited assumption that mothers are naturally and inherently inclined toward close relationships with their children. That assumption, in turn, guides the Court's decision: if the government has a substantial interest in parent-child relationships, and if mothers are naturally inclined to nurture those relationships, the government fairly assumed that fathers—and *only* fathers—might need extra legal requirements.[309]

305. *Virginia*, 518 U.S. at 533.

306. *Nguyen*, 533 U.S. at 64–65 (citing Miller v. Albright, 523 U.S. 420, 438–40 (1998) (plurality opinion)). The Court also concludes that § 1409 is substantially related to the government's important interest in "assur[ing] that a biological parent-child relationship exists." *Id.* at 62. The Court's analysis of the biological-relationship interest does not engage with the inherited language of motherhood. Instead, the Court's analysis of that interest emphasizes motherhood as a biological status. Because mothers carry and deliver children, they are necessarily present when their children are born. Fathers, by contrast, may be elsewhere. From this "uncontestable," biological fact, the Court concludes that § 1409's proof-of-paternity requirements "represent[] a reasonable [way] . . . to establish the blood link between father and child . . . ." *Id.* at 62–63 (citing Lehr v. Robertson, 463 U.S. 248, 267–68 (1983)). And "[g]iven the proof of motherhood that is inherent in birth itself, it is unremarkable that Congress did not require the same affirmative steps of mothers." *Id.* at 64.

307. *Id.* at 65.

308. *Id.* at 66.

309. *Id.*

The Court likewise accepts the inherited assumption that mothers are educators, value transmitters, and bearers of profound civic responsibilities. As the Court notes, § 1409's father-specific provisions require that a citizen father demonstrate "an opportunity for a parent-child relationship [to] occur during the *formative* years of the child's minority"[310]—that is, during the years when a child may be influenced and molded. The reason, the Court argues, is that an early relationship might "ensure some tie between this country and one who seeks citizenship."[311] The Court does not impose a similar requirement on citizen mothers, presumably because it assumes that they will naturally and inherently socialize, educate, and nurture ties between their children and their country. Fathers, by contrast, do not do this naturally, which is why the Court affirms the additional, affirmative requirements that fathers perform "some act linking the child to the United States."[312]

The dissenters are quick to point out these inherited assumptions. They first lament that the majority has presented a misleading gloss of the *Virginia* standard by omitting the important caveat that heightened scrutiny "does not countenance . . . overbroad sex-based generalizations . . . even when they enjoy empirical support."[313] The dissenters then identify several instances where the majority has impermissibly endorsed inherited assumptions about women. They note, for example, that the supposed interest in "'a real, practical relationship' . . . finds support . . . in a stereotype—i.e., 'the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children.'"[314] They likewise argue that § 1409's requirements assume that "the mother . . . is bound to maintain" a relationship "as [a] natural guardian," which is "paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children."[315] States, the dissenters observe, have crafted laws that "no longer assume that mothers alone are 'bound' to serve as 'natural guardians' of nonmarital children."[316] But the majority, "rather than confronting the stereotypical [and inherited] notion that mothers must care for these children and fathers may ignore them, quietly condones the very stereotype the law condemns."[317]

310. *Id.* at 68 (emphasis added).

311. *Id.*

312. *Id.*

313. *Id.* at 76 (O'Connor, J., dissenting) (citing J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 139, n.11 (1994)).

314. *Id.* at 88–89 (quoting Miller v. Albright, 523 U.S. 420, 482–83 (1998) (Breyer, J., dissenting)).

315. *Id.* at 91–92 (emphasis omitted).

316. *Id.* at 92 (citing ARIZ. REV. STAT. ANN. § 25-501 (1999)).

317. *Id.* (citing *J.E.B.*, 511 U.S. at 138).

Though the majority does not include *Virginia*'s prohibition against stereotyping as part of its rule statement, it does briefly acknowledge the dissenters' concerns. But the majority only argues that the State's *first* interest (confirming the existence of a biological relationship) does not rely on stereotypes; it says nothing about the second, more problematic interest in ensuring a "real" relationship between citizen parent and child.[318] The majority also defines "stereotype" narrowly, as "a frame of mind resulting from irrational or uncritical analysis."[319] In doing so, it invites and creates constitutional space for any inherited assumptions that are benevolent, well meaning, or objectively accurate.

In *Frontiero*, *Hogan*, *Virginia*, and *Hibbs*, the Court unequivocally distances itself from the inherited language of motherhood and womanhood. But in *Nguyen*, it embraces many of the inherited assumptions that it previously decried. It accepts, for example, that women are naturally caregiving, naturally suited for motherhood, and naturally inclined toward a close relationship with their children. It also perpetuates the inherited assumption that mothers play an important role in children's education and socialization. The Court makes room for these assumptions by ignoring *Virginia*'s caveat against stereotyping and by defining "stereotype" narrowly. In doing so, it designates the realm of immigration as one where inherited assumptions about mothers and women are welcome, if not embraced.

2. *Sessions v. Morales-Santana* (2017)

Like *Nguyen*, *Sessions v. Morales-Santana* involved an equal protection challenge to citizenship requirements for children born abroad to one citizen parent and one noncitizen parent.[320] Title 8 U.S.C. § 1401(a)(7) (now § 1401(g)) provides that children born abroad to one citizen parent and one noncitizen parent become citizens at birth only if the citizen parent was physically present in the United States for five years prior to the birth.[321] If the citizen parent is the child's mother, however, § 1409(c) reduces the physical presence requirement to only one year.[322] Luis Ramon Morales-Santana was born abroad to an American citizen father.[323] Mr. Morales-Santana hoped to claim

318. *See id.* at 68 (majority opinion) (explaining why the State's interest in a biological relationship does not embody a gender-based stereotype but saying nothing about the State's interest in ensuring a real parent-child connection).

319. *See id.*

320. Sessions v. Morales-Santana, 582 U.S. 47, 52 (2017) ("Morales-Santana asserts that the equal protection principle implicit in the Fifth Amendment entitles him to citizenship statute.").

321. 8 U.S.C. § 1401(g).

322. *Id.* § 1409(c). For the Court's description of these statutory requirements, see *Morales-Santana*, 582 U.S. at 51.

323. *Morales-Santana*, 582 U.S. at 54 (noting that "[Morales-Santana's father] became a U.S. citizen under the Organic Act of Puerto Rico" (citations omitted)).

citizenship to avoid deportation, but his father did not satisfy the five-year physical-presence requirement necessary to confer citizenship on his son.[324] After an immigration judge ordered deportation,[325] Mr. Morales-Santana moved to reopen proceedings, arguing that § 1401(a)(7)'s gender-based citizenship requirements violated the Equal Protection Clause.[326] The case eventually reached the Supreme Court, which ruled in Mr. Morales-Santana's favor.[327]

As in *Nguyen*, the Court begins its analysis with the observation that gender-based "laws . . . are subject to review under . . . heightened scrutiny."[328] It also articulates the same, heightened standard used in *Nguyen* (the law must be "substantially related to the achievement of [important governmental] objectives"[329]). Notably, though, the Court here includes *Virginia's* important caveat that laws may not "rely on 'overbroad generalizations about the different talents, capacities, or preferences of males and females.'"[330] In doing so, the Court signals that, unlike the *Nguyen* Court, which said nothing about generalizations, it will be suspicious of inherited assumptions about motherhood.

The *Sessions* Court's suspicion is also evident in the first major section of its opinion. Immediately after discussing the facts and analyzing standing, the Court notes that "Section[] 1401 . . . date[s] from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are."[331] It also quotes disapprovingly an earlier Supreme Court decision that endorsed the inherited notion that "women are the 'center of home and family life' and therefore . . . can be 'relieved from the civic duty of jury service.'"[332] The Court's condemning language and its disapproval of stereotype-laden precedent reveals its discomfort with the inherited language of motherhood.

The Court next identifies two inherited assumptions "lurk[ing] behind"[333] the challenged statute: "[1] In marriage, husband is dominant, wife subordinate; [and 2,] the unwed mother is the natural and sole guardian of a nonmarital

324. *Id.* (noting that Morales-Santana moved from the United States only twenty days before he would have satisfied the five-year requirement).

325. *Id.* at 55 ("[T]he Government placed Morales-Santana in removal proceedings based on several convictions for offenses under New York State Penal Law . . . ."). Morales-Santana tried to avoid deportation by asserting citizenship, but the immigration judge denied his request and ordered his deportation. *Id.*

326. *Id.*

327. *Id.* at 72.

328. *Id.* at 57 (citing J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136 (1994)).

329. *Id.* at 59 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

330. *Id.* at 62 (quoting *Virginia*, 518 U.S. at 533).

331. *Id.* at 57.

332. *Id.* (quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)).

333. *Id.* at 59.

child."[334] According to the Court, immigration rules that allow children of married parents to obtain United States citizenship "only through the father" reflect the husband-is-dominant assumption.[335] And the assumption that unwed mothers are "regarded as the child's natural and sole guardian" has generated rules that make it easy for unwed mothers to pass citizenship to their children while imposing more stringent requirements on unwed citizen fathers.[336] The Court rejects each of these inherited narratives and calls both "untenable."[337]

The Court identifies and rejects other inherited narratives, as well. As the Court notes, the challenged law seeks to ensure that children have some connection to their country. But by imposing different physical-presence requirements on men and women, the law also perpetuates the assumption that mothers are better than fathers at facilitating that connection. The Court suggests, for instance, that the statute's five-year requirement for fathers reflects the assumption that men "care little about, and have scant contact with, their nonmarital children" and therefore need prolonged contact with the United States to guarantee the desired child-country connection.[338] Mothers, by contrast, are thought naturally better at caregiving, transmitting values, and socializing, and therefore "need[ed] [no] . . . prolonged residency prophylactic."[339] The Court concludes that both assumptions have "provenance in traditional notions of the way women and men are."[340] Because of this, neither provides the "exceedingly persuasive justification" necessary to survive heightened constitutional scrutiny.[341]

In short, the Court concludes that the statute's "pronounced gender asymmetry . . . was shaped by contemporary [read: inherited] maternalistic norms regarding the mother's relationship with her nonmarital child."[342] As in other cases, the Court does not question whether these norms are accurate. But it does note that such assumptions "have a constraining impact, descriptive though they may be of the way many people still order their lives."[343] Because the law is inextricably bound up with these assumptions, the Court holds that it "cannot withstand inspection under a Constitution that requires the

334. *Id.*
335. *Id.* at 61.
336. *Id.*
337. *Id.* at 59.
338. *Id.* at 62.
339. *Id.*
340. *Id.* at 66.
341. *Id.* at 59.
342. *Id.* at 70 (citing Kristan A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2205 (2014)).
343. *Id.* at 62–63.

Government to respect the equal dignity and stature of its male and female citizens."[344]

* * *

In its typical gender discrimination cases, the Court emphatically and consistently rejects the inherited language of womanhood and motherhood.[345] In immigration cases, though, its approach is more nuanced.[346] Although the Court consistently applies the heightened scrutiny established in *Virginia*, its immigration cases do not always find that inherited stereotypes offend that standard.[347] In *Nguyen*, for example, the Court wholeheartedly endorses several inherited assumptions about mothers' natural proclivities and abilities.[348] In *Sessions*, by contrast, it returns to its *Frontiero* / *Hogan* / *Virginia* / *Hibbs* approach and emphatically rejects narratives from the inherited language.[349] Though admittedly a small sample, these cases suggest that in the immigration context, the Court's relationship with the inherited language of motherhood and womanhood is unstable, evolving, and in flux.

C. *In Abortion Cases*

In *Roe v. Wade*, the Supreme Court recognized a constitutional right to abortion.[350] Since then, the Court has heard at least twenty-four challenges to laws restricting that right.[351] Initially, the Court resolved these challenges using *Roe*'s trimester framework, which permitted abortions during early pregnancy but allowed states to implement more stringent abortion restrictions as a pregnancy progressed.[352] In *Planned Parenthood v. Casey*, however, the Court abandoned the trimester framework and adopted the undue burden test, which prohibited any restrictions that made it substantially difficult for women to

344. *Id.* at 72.

345. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 685 (1973) ("[A]s a result of [inherited] notions [about women], our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes."); *see also supra* Section III.A.

346. *See supra* Section III.B.

347. *See supra* Section III.A.3.

348. *See supra* Section III.B.1.

349. *See supra* Section III.B.2.

350. Roe v. Wade, 410 U.S. 113, 164–67 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

351. At the time of this writing, a Westlaw search for "adv: SY(abort! /s (statute or regulation or restriction) & constitution!) yields 42 Supreme Court decisions post-*Roe*. Eighteen of these are not relevant: they involve procedural or jurisdictional issues or present separate constitutional issues (First Amendment challenges brought by abortion protesters, for example), but they do not involve challenges to abortion statutes.

352. *See Roe*, 401 U.S. at 164–65 (describing the "trimester framework").

obtain pre-viability abortions.[353] For nearly thirty years, the Court used *Casey*'s test to determine whether various abortion laws created undue—and therefore unconstitutional—burdens for women seeking abortions. And then, in the 2022 case *Dobbs v. Jackson Women's Health Organization*, the Court overturned both *Casey* and *Roe*, holding that there is no constitutional right to obtain an abortion and that all abortion regulation should be left to the states.[354]

In this section, I analyze the Court's rhetoric about women and mothers in *Roe*, *Casey*, and *Dobbs*—the three cases that have most profoundly shaped America's abortion landscape. In the first two cases, *Roe* and *Casey*, the Court acknowledges that inherited assumptions about women and mothers have been the "dominant . . . vision . . . in the course of our history and our culture."[355] But the Court also pushes back against that vision by highlighting the ways motherhood may not be comfortable, natural, or desirable.[356] In *Dobbs*, by contrast, the Court's rhetoric and analysis is primarily legal. The Court does not endorse or reject inherited assumptions about women but instead declines to engage with the inherited language at all.

1. *Roe v. Wade* (1973)

In 1970, Jane Roe initiated a case challenging the constitutionality of a Texas criminal abortion statute.[357] At the time, Ms. Roe was unmarried and wanted to abort her pregnancy.[358] But because Texas law prohibited abortions unless medically necessary to save the life of the expectant mother, she could not legally terminate her pregnancy in Texas.[359] Ms. Roe believed the Texas law violated her right to privacy, which she claimed was protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[360] And so, she sued the Dallas County District Attorney seeking both declaratory and injunctive relief.[361]

After two rounds of oral argument,[362] the Supreme Court ruled in Ms. Roe's favor.[363] The Court's opinion acknowledged that abortions necessarily

353. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 834 (1992) (plurality opinion), *overruled by Dobbs*, 142 S. Ct. 2228.

354. *Dobbs*, 142 S. Ct. at 2242–43.

355. *Casey*, 505 U.S at 852.

356. *Id.* at 853.

357. *Roe*, 410 U.S. at 120.

358. *Id.*

359. TEX. CRIM. STAT. § 1196 (Vernon 1925), *invalidated by Roe*, 410 U.S. at 164–66.

360. *Roe*, 410 U.S. at 120 ("She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of *personal* privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.") (emphasis added).

361. *Id.*

362. The first oral argument was held December 13, 1971. The second was held October 11, 1972. *See id.* at 113.

363. *Id.* at 164 ("The statute . . . cannot survive the constitutional attack made upon it here.").

involve competing interests: the State's interest in potential life, the State's interest in maternal health, and the woman's right to privacy.[364] It also recognized that in the abortion context, those interests are fundamentally at odds because a woman cannot exercise her right to privacy (which, the Court determined, "is broad enough to encompass a woman's decision . . . to terminate her pregnancy") without harming potential life.[365] The Court balanced these competing interests by announcing what came to be known as the "trimester framework." During the first trimester of pregnancy, "the abortion decision . . . must be left to the medical judgment of the pregnant woman's attending physician."[366] During the second trimester, the State could promote its interest in maternal health by "regulat[ing] the abortion procedure in ways that are reasonably related to maternal health."[367] And during the third trimester—after "viability"—the State could "promot[e] its interest in the potentiality of human life" by "regulat[ing], and even proscrib[ing], abortion except where necessary . . . for the preservation of the life or health of the mother."[368]

Because the issues presented in *Roe* had dramatic and tangible effects for America's women, the case naturally invited the Court to engage with the inherited language of motherhood. The majority largely rejects that language. The majority does not, for example, describe motherhood as an inevitably rewarding role but instead suggests that "[m]aternity, or additional offspring, may force upon the woman a distressful life and future."[369] It also rejects the idea that all women are natural caregivers, arguing instead that for some women, child care "tax[es] . . . mental and physical health."[370] Unlike the inherited language, which insists that women naturally crave motherhood, the majority notes some pregnancies are "unwanted" and may cause "distress[] for all concerned."[371] And where the inherited language frames motherhood as a civic responsibility, the majority instead acknowledges that for some women, pregnancy is not a civic duty but a state-imposed "detriment."[372]

364. *See id.* at 154 ("[A] state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."); *id.* at 153 (holding that the Constitution protects a right to privacy and noting that "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

365. *Id.* at 153.

366. *Id.* at 164.

367. *Id.*

368. *Id.* at 164–65.

369. *Id.* at 155. The concurrence likewise acknowledges that for many women, pregnancy and motherhood are neither natural nor rewarding: "'Certainly the interests of a woman in giving her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of . . . great[] . . . significance and personal intimacy.'" *Id.* at 170 (Stewart, J., concurring) (citing Abele v. Markle, 452 F. Supp. 224, 227 (D. Conn. 1972)).

370. *Id.* at 155 (majority opinion).

371. *Id.*

372. *Id.*

In his dissenting opinion, Justice Rehnquist takes a different, but surprising, tack. Because he believes the Constitution does not guarantee a right to abortion,[373] one might expect that he would wholeheartedly endorse the inherited language of motherhood: after all, if women are naturally suited for motherhood, it would be *un*natural—wrong, even—for the law to allow them to terminate pregnancies. Surprisingly, though, Justice Rehnquist says very little about the inherited language of motherhood. Instead, he frames the case as a purely legal dilemma. Rather than argue that abortion is transgressive because women are natural caregivers, he accuses the majority of incorrectly "find[ing] within the Scope of the Fourteenth Amendment a right that was . . . completely unknown to the drafters of the Amendment."[374] And instead of defending his position by referencing inherited narratives about what women are or should be, he simply argues that the majority has incorrectly identified a "right of 'privacy' . . . involved in this case."[375] For Justice Rehnquist, *Roe* is less about women than it is about the content and scope of the Fourteenth Amendment's Due Process Clause. Indeed, to read his opinion, one might think the case has very little to do with women at all.

The majority and dissent thus illustrate two differing approaches to the inherited language of motherhood and womanhood. The majority does not categorically condemn the use of stereotypes, as it does in its gender discrimination cases. But it implicitly pushes back against inherited assumptions about mothers by observing that that for many women, pregnancy is not comfortable, natural, or desired. The dissent, by contrast, neither accepts nor rejects the inherited language of motherhood. Instead, it frames the case in purely legal terms and, in doing so, excludes women from its analysis entirely.

2. *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)

Shortly after *Roe*, the Pennsylvania legislature enacted the Pennsylvania Abortion Control Act.[376] Among other things, the Act required women to give informed consent before receiving an abortion and required clinics to provide abortion-seeking women with certain information twenty-four hours before their procedure.[377] The Act also imposed a parental consent requirement for minors,[378] required certain record-keeping protocol,[379] and stipulated that married women could not obtain abortions without first notifying their

373. *See id.* at 172 (Rehnquist, J., dissenting).

374. *Id.* at 174.

375. *Id.* at 172.

376. 18 PA. CONS. STAT. §§ 3201–3220 (1990).

377. *Id.* § 3205(a).

378. *Id.* § 3206. The Act also provided a judicial bypass option if the minor did not wish to or could not obtain parental consent. *Id.*

379. *Id.* §§ 3207(b), 3214(a), 3214(f).

husbands.[380] In 1990, several abortion providers challenged the Pennsylvania law, arguing that its restrictions violated the Due Process Clause of the Fourteenth Amendment.[381]

The Court reaffirmed its "essential holding" from *Roe*—that women have a constitutionally protected right to abortion before viability, that the State can restrict abortion after viability, and that the State has legitimate interests in the mother's health and the fetus's potential life.[382] But it also held that *Roe*'s trimester framework was not part of that essential holding and that the framework did not adequately protect the State's interests.[383] The Court thus replaced *Roe* with a new standard: abortion restrictions would be considered constitutional if they did not "place a substantial obstacle" or "impose an undue burden" on a woman's choice.[384] Applying this standard, the Court upheld the Act's informed consent, informational, recordkeeping, and parental consent provisions but struck down the spousal notification requirement.[385]

The joint opinion in *Casey* disavows the inherited language of motherhood. Like the *Roe* Court, which acknowledged that motherhood is not pleasant or desirable for many women, the *Casey* joint opinion rejects romanticized notions of childbearing by observing that "[t]he mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear."[386] The joint opinion also challenges the idea that pregnancy is a natural or central part of a woman's identity. Rather than describe childbearing as a woman's proper role, as the inherited language would,[387] the Court argues that the decision to have children implicates "the liberty of the woman . . . in a sense unique to the human condition."[388] For the *Casey* plurality, it seems, pregnancy is not necessarily a core part of a woman's destiny, but rather an important opportunity for her to exercise and enact agency.

The joint opinion also rejects the traditional assumptions that women belong in the home and should be subordinate to their husbands. Unlike the inherited language, which believes women are "the center of home and family life,"[389] the *Casey* plurality celebrates the fact that many women can and do have roles and responsibilities outside of the home. Indeed, it affirms *Roe*'s central

380. *Id.* § 3209.

381. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845 (1992) (plurality opinion), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

382. *Id.* at 846.

383. *Id.* at 872–73.

384. *Id.* at 878.

385. *Id.* at 893–95.

386. *Id.* at 852.

387. *See* ROUSSEAU, *supra* note 102, bk. V.

388. *Casey*, 505 U.S. at 852.

389. Hoyt v. Florida, 368 U.S. 57, 62 (1961).

holding in part because "[the] ability to control their reproductive lives" has facilitated women's "ability . . . to participate equally in . . . economic and social life."[390] The plurality also expresses concern about husbands who exercise a "troubling degree of authority over [their wives],"[391] and it explicitly rejects the idea that women should be subject to or overshadowed by their husbands.[392] And unlike the inherited language, which might celebrate women who "suffer the wrongs inflicted . . . by [their] husband[s] without complaint,"[393] the *Casey* plurality insists "these views . . . are no longer consistent with our understanding of the family, the individual, or the Constitution."[394]

The *Casey* joint opinion candidly admits that "[t]here was a time . . . when a different understanding of the family and of the Constitution prevailed,"[395] and it willingly acknowledges that mothers' "sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others."[396] But still, it rejects the inherited language. Unphased by inherited language's pedigree, prestigious spokespeople, or powerful assumptions, the joint opinion insists that "however dominant [the inherited] vision has been in the course of our history and our culture," it "cannot alone be grounds for the state to insist she make the sacrifice."[397] It likewise boldly insists that woman's "destiny . . . must be shaped to a large extent on *her own* conception of . . . her place in society," and not on the place the inherited language has assigned to her.[398]

3. *Dobbs v. Jackson Women's Health Organization* (2022)

The Court's most recent pronouncement on abortion law came in the 2022 case *Dobbs v. Jackson Women's Health Organization*.[399] As explained above, *Dobbs* involved a challenge to a Mississippi law that prohibited abortion after the fifteenth week of pregnancy.[400] Because the law restricted pre-viability abortions, the Fifth Circuit concluded that it violated the constitutional right

390. *Casey*, 505 U.S. at 897.

391. *Id.* at 898.

392. *Id.*

393. ROUSSEAU, *supra* note 102, bk. V.

394. *Casey*, 505 U.S. at 897. In fact, the Court invalidates Pennsylvania's spousal notification requirement largely because it believes the provision reflects outdated, inherited assumptions about "a woman's role within the family." *Id.*

395. *Id.* at 896.

396. *Id.* at 852.

397. *Id.*

398. *Id.* (emphasis added).

399. 142 S. Ct. 2228 (2022).

400. *Id.* at 2243 (describing Mississippi's Gestational Age Act, MISS. CODE ANN. § 41-41-191 (2018), which prohibits abortion after fifteen weeks "[e]xcept in a medical emergency or in the case of a severe fetal abnormality").

to abortion articulated in both *Roe* and *Casey*.[401] The Supreme Court disagreed. In a sweeping ruling, it held that contrary to both *Roe* and *Casey*, the Constitution does not protect a woman's right to abortion.[402] The Court thus overturned *Roe* and *Casey*, reversed the Fifth Circuit, and held that the citizens of each state must decide whether and how to regulate abortion.[403]

Dobbs's reversal of the 50-year-old *Roe* precedent marked a dramatic substantive change in the Court's abortion case law. It also represents a sharp shift in the Court's relationship with the inherited language of motherhood. As explained above, the Court's gender discrimination jurisprudence and early abortion cases explicitly identify—and emphatically reject—the inherited tradition's "overbroad generalizations about the different talents, capacities, or preferences of males and females."[404] *Nguyen*, by contrast, endorses those same narratives and themes.[405] But in *Dobbs*, the Court takes a different tack entirely. Rather than endorse or reject the inherited language of motherhood, the *Dobbs* Court refuses to engage with that linguistic tradition at all.

The move is striking. The issues presented in *Dobbs* are entirely about women's ability to become—or not become—mothers. And yet the majority's opinion says almost nothing about the women its decision affects. Instead of asking whether or how access to abortion might alter women's lives and identities, the Court conducts a lengthy historical analysis to determine whether the right to abortion is an "essential component[] of our Nation's concept of ordered liberty."[406] It reviews 17th-century treatises,[407] common-law approaches to abortion,[408] and the history of state abortion statutes.[409] And it eventually reaches "[t]he inescapable conclusion that a right to abortion is not deeply rooted in the Nation's history and tradition" and therefore is not protected by the Fourteenth Amendment's Due Process Clause.[410] But in all this analysis, the Court says nothing about the women whose decisions were and are at stake.

The Court also identifies "five factors [that] weigh strongly in favor of overruling" *Roe* and *Casey*.[411] But none of these factors have much to do with

401. *Id.* at 2244.

402. *Id.* at 2242 ("The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision.").

403. *Id.* ("We hold that *Roe* and *Casey* must be overruled.").

404. United States v. Virginia, 518 U.S. 515, 553 (1996).

405. *See supra* Section III.B.1.

406. *Dobbs*, 142 S. Ct. at 2248. For the Court's entire due process analysis, see *id.* at 2246–72.

407. *Id.* at 2249.

408. *Id.*

409. *Id.* at 2252–53.

410. *Id.* at 2253.

411. *Id.* at 2265.

women. The first four—whether *Roe* and *Casey* were legally flawed,[412] poorly reasoned,[413] articulated unworkable rules,[414] and/or "led to the distortion of many important but unrelated legal doctrines"—are strictly legal inquiries that involve no consideration of women's lives or experiences.[415] The fifth—"whether overruling *Roe* and *Casey* will upend substantial reliance interests"—*could* invite some engagement with inherited assumptions about women, but the Court summarily declines this invitation.[416] Rather than consider whether and how women have relied on access to abortion, the Court notes that "[i]t is hard for anyone—and in particular, for a court—to assess . . . the effect of the abortion right on . . . the lives of women."[417] And because it is "hard," the Court simply chooses not to try.

In short, the majority neither endorses nor disavows the inherited language of motherhood. Instead, it ignores that language and frames the debate in purely legal terms. The resulting opinion gives the impression that *Dobbs* is primarily (and perhaps solely) a case about substantive due process and stare decisis. But the majority's rhetorical decisions give no indication that the case implicates or affects women's interests.

The dissenters take a different rhetorical approach. Unlike the majority, which avoids any in-depth discussion of women and mothers, the dissenters place women at the heart of their opinion. Their first sentences emphasize women's "liberty and equality" and describe women as "autonomous being[s]."[418] And later in the opinion, they accuse the majority of neglecting "any serious discussion of how its ruling will affect women" and of "know[ing] or car[ing] . . . little . . . about women's lives or about the suffering its decisions will cause."[419] This focus on women's lives, bodies, and experiences contrasts sharply with the majority's legalistic approach. It also means that, unlike the

412. *Id.* "*Roe*," the Court argues, "was . . . egregiously wrong and deeply damaging . . . . [Its] constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed. [It] was on a collision course with the Constitution from the day it was decided, [and] *Casey* perpetuated its errors." *Id.*

413. *Id.* at 2265–72. The Court argues that "the quality of reasoning in a prior case has an important bearing on whether it should be reconsidered." *Id.* at 2265. It further states, "*Roe* was incorrectly decided, but that decision was more than just wrong. It stood on exceptionally weak grounds." *Id.* at 2266.

414. *Id.* at 2272–75. "[A]nother important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner. *Casey*'s 'undue burden' test has scored poorly on the workability scale." *Id.* at 2272.

415. *Id.* at 2275.

416. *Id.* at 2276.

417. *Id.* at 2277.

418. *Id.* at 2317 (Breyer, J., joined by Sotomayor & Kagan, JJ., dissenting).

419. *Id.* They also argue that "[t]oday's Court . . . does not think there is anything of constitutional significance attached to a woman's control of her body and the path of her life." *Id.* at 2323.

majority, the dissenters engage with and respond to the inherited language of motherhood.

Not surprisingly, this engagement takes the form of rejection. Like the *Roe* and *Casey* Courts, the dissenters reject the inherited notion that women are destined to become mothers. Because of this, they do not describe pregnancy as a woman's calling, but instead present it as a choice—the "most personal and most consequential of life decisions."[420] The dissenters also reject the idea that women are most fully actualized in motherhood. They do not confine women to domestic life but instead emphasize that women can and should make decisions about "where to live, whether and how to invest in education or careers, [and] how to allocate financial resources."[421] They also insist that women are "equal citizen[s], with all the rights, privileges, and obligations that status entails."[422] The dissenters acknowledge that some women may choose to be mothers, but they insist that motherhood is not a woman's only or proper role.[423] And instead of endorsing the inherited language's concern that mothers might seek experience beyond the home, they worry that forcing women to become mothers "diminishes women's opportunities to participate fully and equally in the Nation's political, social, and economic life."[424]

The dissent also rejects inherited assumptions about women and motherhood by highlighting how motherhood might not be desirable, natural, or rewarding. Like the *Roe* and *Casey* Courts, the dissenters describe the "burdens and hazards"[425] of pregnancy—the "personal and familial costs"[426] and the "physical changes, medical treatments . . . , and medical risk."[427] They also stress that "pregnancies continue to have enormous physical, social, and economic consequences" and that "[e]ven an uncomplicated pregnancy imposes significant strain on the body."[428] Where the inherited language celebrates the naturally caring mother who willingly and selflessly educates her children, the dissenters instead emphasize the woman who, perhaps unwillingly, endures the "significant physiological change and excruciating pain" of pregnancy and childbirth.[429] And though they acknowledge that many "women happily undergo" these challenges, they refuse to accept that all women can or must.[430]

420. *Id.* at 2317.
421. *Id.* at 2344.
422. *Id.* at 2345.
423. *Id.* at 2343 (acknowledging that "many Americans, including many women, opposed [*Roe* and *Casey*] when issued and do so now" but rejecting "the traditional view of a woman's role as *only* a wife and mother" (emphasis added)).
424. *Id.* at 2344.
425. *Id.* at 2329.
426. *Id.* at 2317.
427. *Id.* at 2328.
428. *Id.* at 2338.
429. *Id.*
430. *Id.* at 2328.

The dissenters recognize that the romanticized narratives of the inherited language present motherhood as something natural and desirable. And they acknowledge that for some women, this may be true. But they also insist that inherited narratives and assumptions "do[] not lessen how far a State impinges on a woman's body when it compels her to bring a pregnancy to term."[431]

In addition to rejecting the tropes of the inherited language, the dissenters condemn the majority for tacitly endorsing those tropes. The majority does not directly engage with the inherited language of motherhood (in fact, the dissent criticizes the majority for ignoring women's interests), but the dissenters worry that the Court's interpretation of the Fourteenth Amendment relies too heavily on the social and legal norms that prevailed in 1868. Those norms were largely informed by "traditional view[s] of a woman's role as only a wife and mother."[432] Because of this, the laws of 1868 "deprived women of any control over their bodies" and "prevented women from charting the course of their own lives."[433] The dissenters worry that the majority's reliance on these norms perpetuates traditional, old-fashioned assumptions. "[T]imes [have] changed," they argue, "[a] woman's place in society [has] changed,"[434] and "[t]he state [can]not now insist on the historically dominant 'vision of the woman's role.'"[435]

If the majority is silent about the inherited language of women, the dissenters are anything but. Unlike the majority, they firmly insist that the case implicates women's lives and interests. They also reject the inherited narratives that present pregnancy as women's natural or highest destiny, and they insist that adherence to traditional assumptions "consigns women to second-class citizenship."[436] In short, they condemn both the majority's substantive holding and its rhetorical approach: the former because they believe the Constitution does, in fact, protect a right to abortion; the latter because they fear that the majority's failure to engage with the inherited language of motherhood improperly excludes women from the equation.

* * *

The Court's abortion cases illustrate a unique shift in its relationship with the inherited language of women and motherhood. In *Roe* and *Casey*, the Court's rhetorical stance is comparable to its position in *Virginia*, *Frontiero*, and *Hogan*. The Court acknowledges that inherited narratives have formed the "dominant . . . vision [of women] . . . in the course of our history and our

431. *Id.*
432. *Id.* at 2343.
433. *Id.* at 2333.
434. *Id.* at 2325.
435. *Id.* at 2330.
436. *Id.* at 2325.

culture."[437] But it also notes that many women do not fit neatly within that vision, because their pregnancies are difficult or undesired, because they seek lives and employment outside the home, or because they are "[unable] to provide for the nurture and care of the infant."[438] The *Roe* and *Casey* Courts thus reject the inherited language of motherhood and insist that "the common-law [i.e., inherited] status of . . . women [is] repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution."[439]

In *Dobbs*, by contrast, the Court disengages from the inherited language entirely. Rather than endorse inherited narratives, as it does in *Nguyen*, or reject them, as it does in *Roe* and *Casey*, the *Dobbs* Court says very little about women. Instead, it frames its opinion as a legal inquiry about stare decisis and the scope of substantive due process. The resulting opinion neither perpetuates nor refutes inherited ideas about what women and mothers should be. Instead, it implies that in the area of abortion rights, women might not be relevant at all.

IV. IMPLICATIONS

The Supreme Court's gender, immigration, and abortion cases have received ample scholarly attention. But until now, much of this attention has been functional, rather than rhetorical. Countless studies analyze the rules and standards articulated in cases like *Virginia*, *Nguyen*, and *Roe*. Countless others criticize the Court's reasoning, condemn its holdings, or propose alternative legal rules. But very few contemplate the rhetorical significance of the language the Court uses to communicate its decisions.

This Article has begun to fill that gap by considering whether and how the Court engages with the "inherited language" of motherhood—i.e., the narratives, themes, and assumptions that are traditionally associated with mothers. My analysis reveals that the Supreme Court tends to reject this language in cases that protect or expand women's rights. My analysis also reveals that the Court's relationship with the inherited language varies across contexts. Since the 1970s, the Court's gender discrimination cases have firmly and consistently rejected the inherited language, holding that broad generalizations and traditional stereotypes about women are constitutionally impermissible. The Court's immigration cases, by contrast, began with endorsement of the inherited language (*Nguyen*) but have more recently moved toward rejection (*Sessions*). And in abortion cases, the Court has moved from

437. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) (plurality opinion), *overruled by Dobbs*, 142 S. Ct. 2228.

438. *Id.* at 853.

439. *Id.* at 898.

emphatic rejection of the inherited language (*Roe* and *Casey*) to complete disengagement (*Dobbs*).

These patterns suggest several avenues for future research. First, future scholars might consider why the Court embraces the inherited language in some contexts, but not in others. For example, it appears that the Court is most accepting of the inherited language in its immigration cases. Future researchers may ask why this is so. It is possible that the levels of scrutiny that govern other areas (intermediate scrutiny for gender classifications; *Casey*'s undue burden standard for pre-*Dobbs* abortion restrictions) constrain justices' ability to engage with the inherited language. Immigration and citizenship rules, by contrast, are often subject to lower scrutiny, which may create space for justices to endorse inherited tropes. Future scholarship could test these hypotheses to consider why the Court endorses the inherited language in some contexts but not in others.

Researchers might also consider why the Court seems to be more friendly to the inherited language in its most recent decisions. In the 1970s (*Frontiero*, *Roe*), 1980s (*Hogan*), and 1990s (*Casey*, *Virginia*), the Court consistently rejected the inherited language of motherhood. But beginning in the 2000s, it shifted toward a more open (*Nguyen*) and/or neutral (*Dobbs*) approach. This shift could simply reflect changes in the Court's membership: it is possible that recent conservative appointees are more traditional in their views of womanhood and motherhood. But the pattern might also suggest that the inherited language has not fallen out of vogue as society has progressed. In the immigration context, at least, even "modern" courts accept inherited assumptions about women. Future scholars could test these possibilities.

Additional researchers might also examine the correlation between the inherited language and case outcomes. Of the nine cases I analyzed, four clearly expand and/or preserve women's rights: *Frontiero* invalidated a statute that denied female servicemembers spousal benefits, *Virginia* struck down an admissions policy that excluded women from an elite military academy, *Roe* established a woman's right to abortion, and *Casey* reaffirmed the existence of the abortion right.[440] Interestingly, these are the same cases that most strongly disavow the inherited language of motherhood. *Nguyen appeared* to favor women (it upheld a statute granting preferential treatment to mothers), but it arguably violated women's equal protection rights by drawing distinctions on the basis

440. In *Casey*, the Court "retained and once again reaffirmed" *Roe*'s "recognition of the right of the woman to choose an abortion before viability." 505 U.S. at 846. At the same time, though, *Casey* abandoned *Roe*'s trimester framework in favor of the more lenient undue burden standard. *Id.* at 873. *Casey* thus preserved the abortion right while simultaneously creating space for more regulation and restriction of abortion.

of stereotypes.[441] Notably, it did so by explicitly embracing inherited assumptions. And *Dobbs* clearly limited women's rights and interests by ignoring the inherited language altogether. These patterns suggest the possibility of a causal relationship. It may be that the Court uses inherited tropes to justify and defend its substantive decisions—that is, its decisions may dictate its rhetoric. But it is also possible that the Court's rhetorical choices reflect an underlying outlook that shapes and guides the way the justices approach substantive legal issues: its rhetoric may shape its decisions. Regardless, the correlation between the Court's rhetoric and its holdings warrants further study by any who are interested in Supreme Court outcomes.

Most importantly, though, future researchers should consider the constitutive implications of the patterns I have identified. As I just observed, the Court often disavows the inherited language of motherhood in cases that expand women's rights. The Court's relationship with the inherited language thus seems to affect its ability (or, perhaps, its willingness) to craft rules and standards that are favorable to women. But these functional effects—the rules and outcomes the Court articulates—are only part of the story. As James Boyd White has argued, judicial rhetoric establishes the "way [a] case and similar cases should be talked about."[442] It articulates rules and holdings, but it also signals that the way the Court speaks "is the proper language of justice in our culture."[443] If this is true, then the Court's rhetoric about women does more than simply shape case outcomes; it also shapes the way our society defines, thinks, and talks about women's roles, contributions, and relationships.

My analysis highlights some of these constitutive possibilities. When the Court rejects the inherited language of motherhood, as it does in its gender discrimination and early abortion cases, its decisions often have the functional effect of expanding or protecting women's rights. But the Court's noninherited language also has constitutive consequences: it recognizes, validates, and normalizes women who have lives and identities separate from motherhood. Conversely, when the Court *endorses* the inherited language of motherhood, its rhetoric perpetuates the understanding that women are or ought to be nurturers, caregivers, and mothers.[444] Arguably, this constitutive consequence flows even

441. *See* Rogus, *supra* note 97, at 826–29 (arguing that the statute challenged in *Nguyen* was "based on an overbroad generalization about gender rules" and therefore violated women's equal protection rights, even though the statute ostensibly benefitted women).

442. White, *Law as Rhetoric*, *supra* note 23, at 690.

443. *Id.*

444. *See* Joanna Grossman, *A Victory for Motherhood and for Sexism: The Supreme Court's Decision in* Nguyen v. INS, FINDLAW (June 18, 2001), https://supreme.findlaw.com/legal-commentary/a-victory-for-motherhood-and-for-sexism.html [https://perma.cc/5Y6E-Y7QW (staff-uploaded archive)] (arguing that *Nguyen* "perpetuat[ed] the notion that women, rather than men, should assume responsibility for children" and "contribute[d] to negative stereotypes that diminish women as workers,

in cases like *Nguyen*, where the Court's decision technically (i.e., functionally) affirms women's privileged legal status.[445] Constitutive consequences also result when the Court is silent about the inherited language. In *Dobbs*, the Court's silence allows it to overturn *Roe* and *Casey* (a functional effect). But that same silence also signals to all Americans that when it comes to abortion, women's lives, interests, and rights are irrelevant (a constitutive effect). In short, each time the Court engages (or disengages) with the inherited language of motherhood, it either creates, reinforces, or dismantles a world where the assumptions of that language govern.

If White is correct that law is both a set of rules *and* a rhetorical process, then the Court's words may have effects that extend far beyond the legal rules and outcomes they communicate. A seemingly benign decision to describe women as "natural mothers" may unintentionally construct a society where women *must* be mothers. And an opinion that ignores women may reinforce the idea that women are not worthy of consideration. If legal scholars are concerned about how the law structures and orders society, they should study these rhetorical effects, because *how* judges write (as opposed to *what* they write) may have broad and unexpected effects on social norms, values, and relationships.

CONCLUSION

The Supreme Court uses language to define legal rules and articulate holdings. But its rhetoric also communicates values, shapes the ways human beings understand each other, and creates (or constrains) possibilities for social engagement. When the Supreme Court issues an opinion, then, it does not simply say how the case should be involved. It also constructs "our perceptions of the universe[,] . . . define[s] . . . our values and motives," "establish[es] expectations," and "construct[s] a social universe."[446]

This Article has explored the constitutive effects that flow from the Court's language about women and mothers, and it has considered the gendered implications of the Court's rhetorical decisions. But my analysis also illustrates why legal scholars should be more attentive to the Court's rhetoric generally. As James Boyd White has argued, legal rhetoric "define[s] roles and actors, . . .

wage earners, and participants in public life"); Jung Kim, Comment, Nguyen v. INS: *The Weakening of Equal Protection in the Face of Plenary Power*, 24 WOMEN'S RTS. L. REP. 43, 43–44 (2002) (arguing that *Nguyen* is "unsatisfactory," "intellectually dishonest," and "entrenche[s] biases of sex and sex roles"). *But see* Laura Weinrib, Note, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in* Nguyen v. INS, 12 COLUM. J. GENDER & L. 222, 224 (2003) (acknowledging critiques of *Nguyen* as "sexist, narrow-minded, and patently conservative" but arguing that "it is not clear . . . that [the] symbolic indicia of subordination and stereotyping are chief among" the decision's effects).

445. Indeed, the constitutive effects of the *Nguyen* decision illustrate Justice Brennan's concern that "attitude[s] of 'romantic paternalism' [might] . . . in practical effect put women, not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

446. White, *Law as Rhetoric*, *supra* note 23, at 692.

establish[es] expectations as to the propriety of speech and conduct, [and] gives us the terms for constructing a social universe."[447] If legal scholars care about these things—and I argue they should—then they should take more seriously the Court's role as a rhetorical actor.

447. *Id.*