THE NEW MATERNITY

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Abstract

Constitutional law has long assumed that mothers and fathers are fundamentally different. Maternity, that law posits, is certain, obvious, and monolithic—consolidated in an easily identifiable person who is at once a biological, social, and legal parent. Paternity, in contrast, is construed as uncertain, nonobvious, relative, and often unclear. Over time, constitutional law has grown more insistent about the obviousness of motherhood. It also has cemented its idea of maternity into a fundamental principle of sex equality law that applies in settings—like transgender rights—that have nothing to do with certain mothers and uncertain fathers.

Constitutional law's logic of maternal certainty and paternal uncertainty invites criticism for many reasons. It channels the notion that pregnant women are presumptive mothers. It perpetuates questionable stereotypes about mothers and fathers. It determines who can be a parent and how he, she, or they ought to parent. It is in serious tension with constitutional law's disestablishment idea. For all of these reasons, constitutional maternity warrants reform, and one promising pathway of reform is family law's less regressive and more multidimensional vision of motherhood.

Never as uncomplicated as the Supreme Court has assumed, maternity has become considerably more complex in light of the new forms of kinship enabled by alternative reproduction and its legal accommodation. During the exact time that the Supreme Court has insisted that women and men are inherently different because of maternal certainty and paternal uncertainty, state family law has painted a more complicated picture. Maternity, that picture suggests, often is uncertain and nonobvious. It often is relative. Like paternity, it often is a matter of opinion—judicial opinion. Most remarkably, state family law has shown that maternity is all of these things by relying on the same body of federal constitutional doctrine that insists that mothers and fathers are fundamentally different—and fundamentally different because mothers, unlike fathers, are basic, singular, and monolithic.

This Article argues that progressive advances surrounding the new maternity ought to unsettle regressive tendencies surrounding constitutional maternity. These regressive tendencies touch and burden many:

from unmarried fathers and transgender individuals to nonbiological and biological mothers. This Article imagines what the new maternity emerging from family law would mean for constitutional law. The idea that the new maternity could unsettle constitutional maternity is not necessarily radical—that project has been unfolding in state courts for years. The consolidation of the new maternity in constitutional law, however, could have meaningful consequences both within and beyond the law of parenthood, destabilizing everything from parentage regimes that rest on the notion of essential biological difference to the argument that transgender discrimination is not illegal because "sex" is not "a stereotype."

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Table of Contents

> [P]ater semper incertus est. [M]ater certissima est. *([T]he father is always uncertain. [The] mother is very certain.)*
> —Roman law of parentage[1]
>
> *Maternity is a matter of fact. Paternity is a matter of opinion.*
> —American proverb[2]
>
> *[M]aternity is never uncertain.*
> —*Gossett v. Ullendorff*[3]
>
> *We really have no definition of "mother" in our lawbooks . . . . "Mother" was believed to have been so basic that no definition was deemed necessary.*
> —Judge Marianne O. Battani[4]

Introduction

The Supreme Court of Utah upholds the termination of a biological father's parental rights[5] on the ground that paternity is "inherently different"[6] from maternity given that maternity, unlike paternity, is "objectively apparent" through birth.[7] The Supreme Court of the Unit-

1. Nara B. Milanich, Paternity: The Elusive Quest for the Father 12 (2019).
2. *E.g.*, Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 Yale L.J. 187, 198 n.42 (1986).
3. 154 So. 177, 181 (Fla. 1934) (declaring that "a wife is not permitted to deny the parentage of children born during wedlock" because "maternity is never uncertain").
4. *Surrogate Has Baby Conceived in Laboratory*, N.Y. Times, Apr. 17, 1986, at A26 (quoting a Michigan judge's order upholding a surrogacy agreement in 1986).
5. Bolden v. Doe (*In re* Adoption of J.S.), 358 P.3d 1009, 1011–13 (Utah 2014) (rejecting an unwed biological father's federal and state due process and equal protection challenges to a lower court's decision to approve the adoption of the father's child by a married couple over the father's veto).
6. *Id.* at 1031; *see also* Miller v. Albright, 523 U.S. 420, 436 (1998) (stating that "[t]he blood relationship to the birth mother is immediately obvious," whereas the relationship to the father "may often be undisclosed and unrecorded in any contemporary public record").
7. *Adoption of J.S.*, 358 P.3d at 1030; *see id.* at 1030–31.

ed States credits one form of sex discrimination in federal citizenship law (the sex-specific proof-of-parentage requirement),[8] even as it jettisons another (the sex-specific duration-of-residence requirement),[9] on the ground that maternity, unlike paternity, is "establishe[d]" by the act of "giving birth."[10] And a funeral home supports its argument that transgender discrimination is not actionable sex discrimination under federal law—in a case that is now before the Supreme Court—by citing to the section of a Court decision saying that an "undeniable difference" distinguishes mothers and fathers upon the birth of their children: the fact that "the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the . . . father."[11] A common thread unites these three recent examples drawn from different areas of the law: the assumption that paternity is complicated, contingent, and unknowable whereas maternity is obvious, "basic,"[12] and epistemologically simple.

Under the Napoleonic Code, "maternity and paternity were ontologically different."[13] The civil law tended to view maternity as provable through birth, a "material fact, visible, subject to the domination of anyone's senses."[14] Paternity, by contrast, was a "mystery of nature," "an act for which it [was] impossible to give clear proof of any kind."[15]

The same holds true today in American constitutional law. For decades, that law has assumed that mothers and fathers are fundamentally different because maternity is certain, obvious, monolithic, and rarely in doubt, whereas paternity is uncertain, nonobvious, relative, and often unclear.[16] Over time, the logic of constitutional law has grown more insistent about the obviousness of motherhood. It has also grown more

8. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1694 (2017) (citing Nguyen v. INS, 533 U.S. 53, 62 (2001)). The end is here. The end is here.

9. *See id.* at 1686 (striking down as unconstitutional sex discrimination under the equal protection component of the Fifth Amendment's Due Process Clause a provision of federal law imposing more burdensome requirements on unwed citizen fathers than on unwed citizen mothers in order to transmit U.S. citizenship to a child born overseas).

10. *Id.* at 1694.

11. *Nguyen*, 533 U.S. at 68; *see* Brief for the Petitioner at 14, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18–107 (U.S. Aug. 16, 2019) (citing the same paragraph of *Nguyen*, 533 U.S. at 68, for the proposition that "'[p]hysical differences between men and women' relating to reproduction—the very factors that determine sex—are not 'gender-based stereotype[s]'" (alterations in original)); Reply Brief for Petitioner at 5, *R.G. & G.R. Harris Funeral Homes*, No. 18–107 (U.S. Nov. 6, 2018) (same).

12. *Surrogate Has Baby Conceived in Laboratory*, *supra* note 4, at A26.

13. Milanich, *supra* note 1, at 14.

14. Nara B. Milanich, Children of Fate: Childhood, Class, and the State in Chile, 1850–1930, at 54 (2009).

15. *Id.*

16. *See infra* Subpart A, pp. 19–29.

expansive, reverberating in settings—like transgender rights—that have nothing to do with certain mothers and uncertain fathers.[17] The constitutional law of sex and gender discrimination, it seems, *begins* with the idea that "maternity is a matter of fact," whereas "paternity is a matter of opinion."[18]

Constitutional law's assumptions about obvious maternity and complicated paternity invite criticism. Those assumptions blur into stereotypical views of women and men. They are deployed to withhold rights from nontraditional parents. The law relies on them in other contexts to validate discrimination on the basis of sex, gender identity, and sexual orientation. For these and other reasons, this Article argues that constitutional maternity is in need of reform, and that one promising pathway of reform is the vision of maternity unfolding today on the ground under state family law. Family law's maternity, or what this Article calls "the new maternity," looks very different from constitutional maternity and its paradigmatic mother: a singular and obvious woman in whom biological, social, and legal motherhood converge. In addition, family law's new maternity offers a richer and more normatively satisfying account of motherhood than the one that dominates constitutional law, which remains grounded in regressive understandings of sex, gender, parenthood, and the family.

Contrary to what the Supreme Court and countless other courts have said about the obviousness of maternity relative to the nonobviousness of paternity, "proof of motherhood" is not necessarily "inherent in birth itself."[19] The "paternity is uncertain but maternity is obvious" shib-

17. *See infra* Subpart 3, pp. 44–47.

18. *Stumpf, supra* note 2, at 198 n.42.

19. Nguyen v. INS, 533 U.S. 53, 64 (2001). Some commentators have briefly observed (mainly in footnotes) that the Court's assertions and assumptions about obvious motherhood are in tension with maternity in an era of alternative reproduction. *See, e.g.*, Albertina Antognini, *From Citizenship to Custody: Unwed Fathers Abroad and at Home*, 36 Harv. J.L. & Gender 405, 440 n.224 (2013) ("Cases involving in vitro fertilization or surrogacy have proved challenging to the government given the [Supreme] Court's emphasis on the event of birth [in the citizenship transmission cases]."); Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 Am. U. J. Gender Soc. Pol'y & L. 347, 358 n.58 (2012) ("Contemporary practices such as egg donation and gestational surrogacy challenge the assumption that maternity is always obvious."); David B. Cruz, *Disestablishing Sex and Gender*, 90 Calif. L. Rev. 997, 1002 n.24 (2002) (observing that the Supreme Court's belief that maternity "inheres" in birth "fails to address the situation of women serving as gestational surrogates carrying to term a conceptus formed from another woman's egg and a man's sperm"); Jennifer S. Hendricks, *Essentially a Mother*, 13 Wm. & Mary J. Women & L. 429, 431 (2007) ("The unwed father cases took the identity of the mother as given, but science has since split biological motherhood into two parts: begetting by the 'genetic mother' and bearing by the 'gestational mother.'"); Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in* Nguyen v. INS, 12 Colum. J. Gender & L. 222, 238, 245 n.107 (2003) (observing that "innovations in *in vitro* fertilization, surrogacy, and other new techniques may mean that the egg donor is not present at birth," *id.* at 245 n.107,

boleth first surfaced in Supreme Court jurisprudence[20] in the 1960s and 1970s through a series of decisions involving state law's treatment of nonmarital children and unwed fathers.[21] These decisions rationalized states' different treatment of mothers and fathers because of what pregnancy ostensibly guaranteed: the "inherent" certainty of maternity relative to paternity.[22] According to this logic, maternity was clear through pregnancy and birth as well as a unified biological, social, and legal status. The woman who gave birth was the clear genetic mother.[23] She also was presumed to naturally perform the social functions of motherhood,[24] and was designated by law as an automatic legal parent.[25]

Throughout the next three decades, this logic gained steadily in justificatory power, shaping the Supreme Court's jurisprudence dealing with the rights of unwed fathers.[26] In time, constitutional law's idea of maternity as inherent in pregnancy and birth and as a unified biological, social, and legal status was cemented into a fundamental principle of sex equality law that applied both within and well outside the context of unwed fathers.[27]

During much of this period, however, the practice of alternative reproduction *did* render maternity more complicated than Supreme Court doctrine had suggested. Starting in the 1980s, alternative reproductive

contrary to the *Nguyen* Court's confidence that motherhood is inherent in birth, *id.* at 238); Ashley Moore, Note, *The Child Citizenship Act: Too Little, Too Late for Tuan Nguyen*, 9 Wm. & Mary J. Women & L. 279, 282 (2003) ("The process of IVF has raised issues as to who the parent is in regard to the child's birth."); Stumpf, *supra* note 2, at 198 n.42 (observing even in 1986 that "[d]espite the adage that 'maternity is a matter of fact, and paternity is a matter of opinion,' the dichotomy is less valid and more transparent today than ever").

20. This idea, of course, has a lineage that far predates these cases—indeed, far predates the Supreme Court itself. *See* Milanich, *supra* note 1, at 3 ("Whereas a mother's identity can be known by the fact of birth, the father has always been maddeningly uncertain. The quest to identify him animated medical experts at least since Hippocrates and preoccupied jurists of Roman, Islamic, and Jewish law.").

21. *See infra* pp. 19–26.

22. *Nguyen*, 533 U.S. at 64 (stating that "proof of motherhood . . . is inherent in birth itself"); Bolden v. Doe (*In re* Adoption of J.S.), 358 P.3d 1009, 1031 (Utah 2014) (discussing the "inherent[]" differences between mothers and fathers with respect to proof of parenthood); *see also infra* Subpart A, pp. 19–29.

23. *See* Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting) (stating that because "[t]he mother carries and bears the child . . . her parental relationship is clear"); *In re* Estate of Ortiz, 303 N.Y.S.2d 806, 812 (Sur. Ct. 1969) ("That the child is the child of a particular woman is rarely difficult to prove.").

24. *See Estate of Ortiz*, 303 N.Y.S.2d at 812 ("In most cases the child remains with the mother and for a time is necessarily reared by her.").

25. *See* Gossett v. Ullendorff, 154 So. 177, 181 (Fla. 1934).

26. *See infra* Subpart A, pp. 19–29.

27. *See, e.g.*, Brief for the Petitioner, *supra* note 11, at 14 (arguing that transgender discrimination is not impermissible sex discrimination under Title VII because of the differences between motherhood and fatherhood discussed in *Nguyen* (citing *Nguyen*, 533 U.S. at 68)).

technologies (ART), like artificial insemination and surrogacy, started to unsettle constitutional law's vision of maternity as a simple biological, social, and legal category, and courts around the country were forced to grapple with the question of maternity as a matter of state family law. In 1983, the United States Supreme Court denied a petition for certiorari in a Michigan surrogacy case.[28] In 1988, the New Jersey Supreme Court decided *In re Baby M*,[29] a landmark surrogacy decision that required the court to determine whether a surrogate was a legal mother.[30] Five years later, the California Supreme Court decided *Johnson v. Calvert*,[31] another landmark decision requiring a court to settle *dueling* claims to maternity under state parentage law.[32] These and other cases showed that, contrary to the Supreme Court's suggestion otherwise, pregnancy and birth were not inherent proof of motherhood. They also showed that legal maternity might exist not in one biological mother, but in two, and that sometimes, legal maternity did not require biology at all.

Today, family law offers no shortage of contested maternity cases,[33] especially at a time when more people are turning to alternative reproduction to have children[34] (and pressing state courts to resolve the parentage disputes that often ensue[35]), and when the technology of procreation permits the division of reproductive labor between or among multiple players.[36] Nevertheless, constitutional law remains wedded to "the once monolithic and still pervasive legal principle that the mother of the child is the woman who bears the child."[37] That assumption might have made some sense during a time when procreation was exclusively sexual. It makes decreasing sense, however, in the modern reproductive

28. *See* Doe v. Kelley, 459 U.S. 1183, 1183 (1983), *denying cert. to* 307 N.W.2d 438 (Mich. Ct. App. 1981); *Doe*, 307 N.W.2d at 441 (upholding as constitutional a Michigan statute that prohibited the making of a surrogacy contract). For a history of surrogacy, see Gaia Bernstein, *The Socio-legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 Wash. L. Rev. 1035, 1107–18 (2002).

29. 537 A.2d 1227 (N.J. 1988).

30. *Id.* at 1234.

31. 851 P.2d 776 (Cal. 1993).

32. *Id.* at 778.

33. *See infra* Subpart A, pp. 66–82.

34. *See* Douglas NeJaime, *The Nature of Parenthood*, 126 Yale L.J. 2260, 2286–87, 2286 n.140, 2287 nn.141–42 (2017) (citing statistics indicating that ART use has "soared in the . . . twenty-first century," *id.* at 2286).

35. *See infra* Subpart A, pp. 66–82.

36. *See* Michael J. Higdon, *Constitutional Parenthood*, 103 Iowa L. Rev. 1483, 1486–87 (2018) (observing that in some "far from uncommon" scenarios, a child created through ART could "owe its existence to the coordinated efforts of five individuals," *id.* at 1487).

37. John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. Rev. 353, 370 (1991); *see also* Kevin Maillard, *Other Mothers*, 85 Fordham L. Rev. 2629, 2632 (2017) ("Despite significant transformations in family structure and diversity, the contemporary legal conception of parenthood, and particularly maternity, reflects the core principles of the 1970s.").

era, which is currently in the midst of a "second reproductive revolution"[38] that has already witnessed the birth of children with two "genetic mothers" as a result of mitochondrial transfer,[39] and which could soon see "two mom" (and "two dad") reproduction through in vitro gametogenesis.[40]

Other scholars have explored some of the issues raised by alternative reproduction, novel family structures, and evolving gender norms. Professor Darren Rosenblum, for instance, envisions what the separation of biology, gender, and parenting, and the "[u]nwinding [of] parenting from biosex roles,"[41] would mean for law, culture, and the family.[42] Like this Article, Rosenblum's work destabilizes the legal and social category of mother (and mothering), arguing that "[t]he various ways in which one can become a mother" under contemporary reproduction "complicate the usage of the term in ways that expose language's inadequacy."[43]

Similarly, recent scholarship by Professors Naomi Schoenbaum, David Fontana, and Jessica Clarke considers what various bodies of law might look like if certain aspects of pregnancy, or even pregnancy itself, were decoupled from sex. Schoenbaum and Fontana argue that many aspects of the care work associated with pregnancy can, and should, be unbundled from sex, even though the law effectively bundles sex and pregnancy for most purposes.[44] Clarke pushes this idea even further, asking whether the law should decouple sex and pregnancy as a formal

38. I. Glenn Cohen, *Chair Lecture, The Second Reproductive Revolution: From Gene Editing, to Uterus Transplants, to Embryos Derived from Our Skin—How Technology Is Changing Reproduction*, Petrie-Flom Ctr. for Health L. Pol'y, Biotechnology & Bioethics at Harv. L. Sch. (Apr. 29, 2019, 5:15 PM), https://petrieflom.law.harvard.edu/events/details/i-glenn-cohen-chair-lecture [https://perma.cc/9F7A-W9NY].

39. *See, e.g.,* Sara Reardon, *Genetic Details of Controversial "Three-Parent Baby" Revealed*, Nature (Apr. 3, 2017), https://www.nature.com/news/genetic-details-of-controversial-three-parent-baby-revealed-1.21761 [https://perma.cc/KP4P-ZHU8]; Rob Stein, *Her Son Is One of the Few Children to Have 3 Parents' DNA*, NPR (June 6, 2018, 5:47 PM), https://www.npr.org/sections/health-shots/2018/06/06/616334508/her-son-is-one-of-the-few-children-to-have-3-parents [https://perma.cc/2829-GVSE].

40. In vitro gametogenesis involves the creation of sex cells (eggs and sperm) from skin cells "in vitro." For a more complete explanation of in vitro gametogenesis and its implications for same-sex couples, see Henry T. Greely, The End of Sex and the Future of Human Reproduction 121–36, 232 (2016); and Courtney Megan Cahill, *After Sex*, 97 Neb. L. Rev. 1, 11–12, 16 (2018).

41. Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 Harv. J.L. & Gender 57, 61 (2012).

42. *See id.* at 80–81; *see also* Darren Rosenblum et al., Essay, *Pregnant Man?: A Conversation*, 22 Yale J.L. & Feminism 207, 208–17 (2010).

43. Rosenblum, *supra* note 41, at 70.

44. *See* David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 Colum. L. Rev. 309, 311–13 (2019). For instance, Fontana and Schoenbaum show that federal family law provides coverage for newborn-care classes and smoking-cessation programs to pregnant women only, even though none of that prebirth pregnancy work is inextricably tied to a "real" sex-based difference. *Id.* at 342 & n.202.

matter for all purposes, particularly in a world where more nonbinary people and transgender men are having children.[45]

Finally, Professors Douglas NeJaime and Michael Higdon consider the relationship between constitutional law and the body of state family law that has evolved in response to alternative procreation and novel family formation. NeJaime argues that state regulation of alternative reproduction, and of the "new parenthood" facilitated by alternative reproduction, is in tension with existing and emerging constitutional norms favoring sex, gender, and sexual orientation equality.[46] At the same time, NeJaime contends that constitutional law itself is "out of step" with state family law developments around nonbiological parenthood.[47] Higdon urges the Court to take up the issue of constitutional parenthood—last addressed by the Court more than three decades ago—in light of alternative reproduction and same-sex marriage.[48]

While benefitting from many of the insights offered by these scholars, this Article centers its attention on an issue unexplored by them: the relationship between constitutional maternity and the maternity made possible by alternative reproduction and new forms of family and parenthood. Specifically, this Article looks to progressive advances in family law surrounding the new maternity to destabilize constitutional maternity's factual assumptions and regressive tendencies. These regressive tendencies touch and burden many: from unmarried fathers and transgender individuals to nonbiological and biological mothers. This Article shows that family law has facilitated new kinds of maternity beyond the monolithic idea of motherhood construed by constitutional law. Family law has done so by often relying on unwed-father doctrine—the same doctrine that simultaneously extended some legal rights to unwed biological fathers *and* reinforced the idea of a singular and unchanging mother.[49] This Article reverses the arrow in that relationship of influ-

45. *See* Jessica Clarke, *Pregnant People?*, 119 Colum. L. Rev. F. 173, 176–80 (2019); Jessica A. Clarke, *They, Them, and Theirs*, 132 Harv. L. Rev. 894, 954–57 (2019).

46. *See* NeJaime, *supra* note 34, at 2268.

47. *See* Douglas NeJaime, *The Constitution of Parenthood*, 72 Stan. L. Rev. 261, 268 (2020).

48. *See* Higdon, *supra* note 36, at 1486–87.

49. *See infra* notes 331–33 and accompanying text. NeJaime has demonstrated how some advocates have relied on constitutional unwed-father law to secure parental rights for nontraditional parents, including unmarried, nonbiological fathers and unmarried same-sex couples. *See* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 Harv. L. Rev. 1185, 1216–17 (2016) (noting that lawyers for an unwed, nonbiological father seeking parental rights in the early 2000s successfully "recast cases on unmarried fathers, including the Supreme Court's cases from the 1970s and 1980s, as functional, rather than biological, parentage cases," thereby "transform[ing] biology (for unmarried parents) from a necessary starting point to an increasingly immaterial feature," *id.* at 1217); *id.* at 1227–28, 1228 n.263 (discussing a California co-maternity case from the 2000s and advocates' use of unwed-father law in that case to argue for parental rights); *see also* Serena Mayeri, *Foundling Fathers: (Non-)*

ence, considering how family law's idea of multidimensional maternity might be leveraged to unsettle constitutional law's monolithic maternity.

Importantly, even as family law has deployed the law of unwed fatherhood to renovate the law of parenthood, that modernizing project remains incomplete—in large part *because of* the constitutional law of unwed fatherhood.

For instance, many courts continue to appeal to constitutional law's logic of maternal certainty (and paternal uncertainty) in ways that perpetuate stereotypes about mothers and fathers.[50] Others have invoked the logic embodied in constitutional law to justify transgender discrimination,[51] and still others have cited it to curtail parental rights for nontraditional families.[52] Indeed, even as the law in some jurisdictions has relied on the Supreme Court's unwed-father decisions to *expand* parental rights for nontraditional families,[53] the law in others has turned to them to *stymie* novel forms of kinship.[54] In other words, the constitutional law of unwed fatherhood has enabled a more multidimensional maternity in some jurisdictions—but remains a stumbling block for contemporary kinship and nonnormative gender identity in others.[55]

By unsettling constitutional law's belief in the certainty of maternity relative to the uncertainty of paternity, this Article furthers the project of modernizing not just the law of motherhood, but also the constitutional law of sex and gender. It does not claim that the alternative reproductive technologies that compose the new maternity are new—some of those technologies are now decades, even centuries, old.[56] Rather, this Article contends that the rich body of doctrinal and statutory law that has arisen around those technologies ought to cast constitutional law's

Marriage and Parental Rights in the Age of Equality, 125 Yale L.J. 2292, 2389–90 (2016) ("The unmarried fathers cases, with their emphasis on parental conduct rather than mere biology, unexpectedly aided nonbiological LGBT parents [in the 2000s] who lacked access to marriage but who clearly had demonstrated their commitment to parenthood.").

50. *See infra* p. 115.

51. *See infra* Subpart 3, pp. 44–47.

52. *See infra* pp. 41–44.

53. *See infra* pp. 65–67, 78–82.

54. *See infra* pp. 84–85.

55. As NeJaime observes in a related context, "family-law authorities" do not always "[speak] with one voice." NeJaime, *supra* note 47, at 321.

56. Alternative insemination was first performed on humans in the late eighteenth century. *See* Bernstein, *supra* note 28, at 1049 ("Most accounts point to the performance of human [artificial insemination] by the English physician, Dr. John Hunter, some time between 1776–1799."). The first recorded traditional surrogacy contract—where the surrogate was artificially inseminated with the intended father's sperm—occurred in 1976. *See* Lawrence Van Gelder, Obituary, *Noel Keane, 58, Lawyer in Surrogate Mother Cases, Is Dead*, N.Y. Times, Jan. 28, 1997, at B8. The first baby conceived through in vitro fertilization was born two years later, in 1978. *See* Peter Gwynne et al., *All About that Baby*, Newsweek, Aug. 7, 1978, at 66.

jurisprudence of motherhood, sex, and gender in a new light. Constitutional law's "maternity is obvious" refrain gives the false impression that maternity and paternity remain locked in an age-old binary that sees paternity as eternally fraught and difficult and maternity as eternally obvious and simple. The law of maternity in an age of alternative reproduction and novel family formation belies this facile conception of motherhood and fatherhood (and of women and men), prompting this Article's interest in unsettling constitutional maternity and the often-repressive legal regimes to which it has given rise.[57]

This Article proceeds in four Parts. Part I makes visible the origin, evolution, and reach of the constitutional notion that maternity, unlike paternity, is certain and uncomplicated. This Part charts the trajectory and transmission of constitutional law's logic of maternal certainty and paternal uncertainty: from its emergence in the Supreme Court's illegitimacy cases in the 1960s,[58] to its consolidation in the Supreme Court's unwed-father cases,[59] to its recent appearance in lower and state court decisions addressing parenthood rights and transgender discrimination.[60]

Part II makes the case for why constitutional maternity warrants reform. Here, this Article argues that constitutional maternity perpetuates outdated ideas about pregnant women and questionable stereotypes about mothers and fathers. It also maintains that constitutional maternity is in tension with the "disestablishment" idea in constitutional law.[61] Through key constitutional precedents like *Griswold v. Connecticut*,[62] *Lawrence v. Texas*,[63] and *Obergefell v. Hodges*,[64] understandings of the Fourteenth Amendment have evolved to prohibit an official vision and version of the family, much as the First Amendment prohibits an official

57. This Article uses the term "unsettle" in the sense of complicate, not replace and supersede. This Article does not suggest that pregnancy—the principal indicator of constitutional maternity—should have no place in constitutional motherhood. Rather, this Article advocates an expansion of constitutional motherhood to better align it with the maternity of contemporary life and law—maternity that includes, but is not limited to, pregnancy.

58. *E.g.*, Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968).

59. *E.g.*, Nguyen v. INS, 533 U.S. 53 (2001); Lehr v. Robertson, 463 U.S. 248 (1983).

60. *E.g.*, Carcaño v. McCrory, 203 F. Supp. 3d 615 (M.D.N.C. 2016); Elizabeth D. v. San Diego Cty. Health & Human Servs. Agency (*In re* D.S.), 143 Cal. Rptr. 3d 918 (Ct. App. 2012); C.F. v. D.D. (*In re* Adoption of B.B.D.), 984 P.2d 967 (Utah 1999).

61. *See, e.g.*, Courtney Megan Cahill, *The Oedipus Hex: Regulating Family After Marriage Equality*, 49 U.C. Davis L. Rev. 183, 246–49 (2015) (describing this theory); Cruz, *supra* note 19, *passim* (applying First Amendment principles of disestablishment and free exercise to sex and gender); Alice Ristroph & Melissa Murray, Feature, *Disestablishing the Family*, 119 Yale L.J. 1236, 1241 (2010) ("In several ways, the recognition of rights of free exercise of the family has already led toward disestablishment.").

62. 381 U.S. 479 (1965).

63. 539 U.S. 558 (2003).

64. 135 S. Ct. 2584 (2015).

vision and version of religion.[65] Constitutional maternity resists this disestablishment idea by allowing the state to favor traditional forms of procreation, parenthood, and the family. For these and other reasons, constitutional maternity demands reform.

Part III begins that reform project by offering a thicker, alternative account of maternity, one that challenges some of the most regressive aspects of constitutional maternity. This account turns largely to family law—specifically, to the body of statutory and decisional law that has addressed maternal parentage in an era of alternative reproduction, novel family formation, and even gestational fatherhood and gender-neutral pregnancy.

Part III's thicker account of maternity under state family law is significant for two reasons. First, that account shows that many of the factual assumptions on which constitutional maternity is based are inaccurate. Where constitutional law assumes that motherhood exists in a singular and easily identifiable woman, state family law shows that motherhood might exist in two women. Where constitutional law assumes that maternity is certain and obvious, state family law shows that maternity can be uncertain and contested. Where constitutional law assumes that maternity is different from paternity, state family law shows that maternity can be as indeterminate, fractured, and multidimensional as paternity. Second, Part III's thicker account of maternity shows that a more progressive alternative to constitutional maternity already exists in family law, which has produced an image of motherhood that is more in line with contemporary constitutional commitments to sex, gender, and sexual orientation equality.

Based on the cases surveyed and the insights offered in Parts I to III, Part IV envisions what it would mean for constitutional law to accommodate and incorporate the new maternity. Part IV first argues that unsettling constitutional maternity with the new maternity is not necessarily radical. In some sense, that disruption has already happened through family law's reliance on constitutional unwed-father doctrine to expand motherhood and contract differences between mothers and fathers. Moreover, the unsettling of constitutional law by family law accurately reflects how constitutional law is made. As recent scholarship shows, family law is as much a generator of federal constitutional

65. *See* Cahill, *supra* note 61, at 246–48.

meaning as it is responsive to it,[66] and "exceptional" family law institutions can over time become "mainstream[ed]" in constitutional law.[67]

Importantly, that is precisely what happened with the logic of maternal certainty. That logic surfaced in the 1960s and 1970s in a relatively exceptional context (for the time)—nonmarital parenthood—but has become an integral feature of constitutional sex equality doctrine.[68] In the 1960s and 1970s, five to seventeen percent of all U.S. births were to unmarried women.[69] In 2018, that number was around forty percent.[70] Even so, the law deploys the idea of maternal certainty to constrain the rights not just of unmarried fathers, but also of same-sex couples, nonbiological mothers, transgender individuals, and even biological mothers.

What is significant, though, is the impact that the new maternity could have on constitutional law. Part IV considers what that impact might be, suggesting that the new maternity could not only render constitutional maternity more inclusive, but also challenge constitutional sex equality law's logic of reproductive difference. Constitutional law has long reasoned that biological justifications are constitutional whereas sex-role stereotypes are not and that the most significant biological

66. *See* Susan Frelich Appleton, Obergefell*'s Liberties: All in the Family*, 77 Ohio St. L.J. 919, 922 (2016) (challenging "[t]he usual approach [which] emphasizes the impact of constitutional doctrine on family law" by examining "how family law principles, assumptions, and values have infiltrated and shaped constitutional doctrine"); Douglas NeJaime, *The Family's Constitution*, 32 Const. Comment. 413, 415–16 (2017) (critiquing the "conventional account" of the "relationship between family law and constitutional law," *id.* at 415, for "fail[ing] to appreciate the ways in which family law exerts influence over constitutional law," and arguing that "family law shapes the terrain on which constitutional adjudication occurs, structures constitutional conflict, and orients constitutional reasoning," *id.* at 416); *id.* at 417 (exploring how constitutional marriage equality was the result, rather than the cause, of "family law work" dealing with same-sex couples' relational and parenthood rights); *id.* at 432 (arguing that scholars "have largely failed to notice [the] dynamic [between family law and constitutional law], continuing to view family law outside the lens of national, constitutional, civil rights law"); *id.* at 437–46 (contemplating the ways in which "family law reform of parental recognition may one day reshape constitutional approaches to parenthood," *id.* at 437); NeJaime, *supra* note 47, at 343–61 (discussing this dynamic in the context of marriage equality specifically and suggesting its application to the law of parenthood).

67. Douglas NeJaime, *Differentiating Assimilation*, 75 Stud. L. Pol. & Soc'y 1, 35 (2018) (providing an example of the dialogic relationship between exceptionality and the mainstream). On the relationship between the margins and the mainstream in the regulation of kinship, see Courtney Megan Cahill, *Regulating at the Margins: Non-traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 Ariz. L. Rev. 43, 52–65 (2012).

68. *See supra* pp. 7–8 for a fuller explanation of this jurisprudence.

69. Carmen Solomon-Fears, Cong. Research Serv., RL34756, Nonmarital Childbearing: Trends, Reasons, and Public Policy Interventions 9 tbl.1 (2008).

70. *Percentage of Births to Unmarried Mothers by State*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/nchs/pressroom/sosmap/unmarried/unmarried.htm [https://perma.cc/83E8-BB4V].

difference between women and men pertains to maternal certainty: the fact that birth ostensibly renders mothers more knowable than fathers. Part IV uses the new maternity to suggest that this particular formulation of biology—biological reasoning *seemingly at its most biological*—is in fact a sex-role stereotype. Finally, recognizing that some readers might object to the vision of maternity offered here, Part IV responds to anticipated criticisms.

I. Constitutional Law's Logic of Maternal Certainty

The logic of maternal certainty and paternal uncertainty has evolved in Supreme Court doctrine and has persisted in legal reasoning about unwed fathers, parentage law, and transgender discrimination. This Part charts the evolution of that logic and showcases its enduring power. It unites under a common theme—maternal certainty and paternal uncertainty—diverse bodies of law and doctrine that, with notable exceptions, many scholars tend to evaluate separately.[71]

A. *Maternal Certainty and Paternal Uncertainty in the Supreme Court*

Maternal certainty first emerged in the Supreme Court's review of illegitimacy laws under the equal protection guarantees of the Fifth and Fourteenth Amendments. These laws punished nonmarital children and the parents of nonmarital children in a variety of areas because the parents engaged in sex and procreation outside of marriage. Some illegitimacy laws prohibited nonmarital children and unmarried parents from bringing wrongful death actions for the death of their kin. Others prohibited unmarried parents from being eligible heirs of their deceased children's estates. Starting in the 1960s and 1970s, the Court struck down many—though not all—of these laws as violative of the Constitution's Equal Protection Clause.

The Court's first two illegitimacy decisions, *Levy v. Louisiana*[72] and *Glona v. American Guarantee & Liability Insurance Co.*,[73] addressed Louisiana's illegitimacy laws as applied to nonmarital children and their mothers. In *Levy*, the Court struck down a Louisiana statute that denied nonmarital children a right to recover for the wrongful death of their

71. *See, e.g.*, Antognini, *supra* note 19, at 409 (challenging the "conventional understanding of the citizenship transmission cases" as "examples of immigration law exceptionalism" and urging commentators to view those cases instead as an extension of the Court's "treatment of unwed American fathers and mothers in its equal protection doctrine domestically"); Mayeri, *supra* note 49, *passim* (arguing that the Supreme Court's resolution of unwed fathers' constitutional claims has remained consistent across multiple doctrinal domains); NeJaime, *supra* note 34, at 2279–85 (discussing the Supreme Court's illegitimacy cases, domestic unwed-father cases, and citizenship transmission cases as a constitutional collective that relies on the idea of "gender differentiation," *id.* at 2285).

72. 391 U.S. 68 (1968).

73. 391 U.S. 73 (1968).

mother.[74] In *Glona*, a companion case decided the same day as *Levy*, the Court struck down a Louisiana law that denied an unmarried mother the right to recover for the wrongful death of her nonmarital children.[75] Both decisions expressed discomfort with the state's refusal to protect a relationship that was "plainly"[76] maternal, even if "illegitimate."[77] "These children, though illegitimate, were dependent on [their mother]; she cared for them and nurtured them; they were indeed *hers* in the biological and in the spiritual sense," reasoned *Levy*.[78] To be sure, *Levy* and *Glona* criticized all illegitimacy classifications for their tenuous connection to the law's overriding objective: punishing nonmarital sex.[79] However, *Levy* and *Glona* signaled that it was particularly unsavory for the law to punish a biological mother-child relationship, which, unlike paternity, was not beset by problems of "proof."[80]

74. *Levy*, 391 U.S. at 69–72.
75. *Glona*, 391 U.S. at 73–76.
76. *Id.* at 76.
77. *Levy*, 391 U.S. at 72.
78. *Id.* (emphasis added).
79. *See id.* ("[I]t is invidious to discriminate against [the children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother." (footnotes omitted)); *Glona*, 391 U.S. at 75 (reasoning that Louisiana's illegitimacy classification "hardly has a causal connection with the 'sin'" of nonmarital sex). Professor Melissa Murray understands these illegitimacy cases as reflecting the Court's discomfort with the idea that the state would punish morally and fiscally responsible nonmarital families, like those in *Levy* and *Glona*. Melissa Murray, *What's So New About the New Illegitimacy?*, 20 Am. U. J. Gender Soc. Pol'y & L. 387, 397–98 (2012).
80. *See Glona*, 391 U.S. at 76. In the immediate wake of those decisions, some, though by no means all, lower courts limited the scope of *Levy* and *Glona* to maternal illegitimacy, and experts of illegitimacy classifications questioned whether *Levy* and *Glona* could seamlessly apply to paternal illegitimacy, which raised more serious questions of proof. *See, e.g.*, *In re* Estate of Ortiz, 303 N.Y.S.2d 806, 812–13 (Sur. Ct. 1969) (holding that a state law denying nonmarital children the right to share in the proceeds of their putative father's wrongful death action violated the Fourteenth Amendment's Equal Protection Clause, but acknowledging that "some difference does exist in [paternal] relationships at least with respect to the greater difficulty in ascertaining paternity," and observing that whether "the child is the child of a particular woman is rarely difficult to prove," whereas "[p]roof of paternity . . . as experience has shown is a much more difficult problem," *id.* at 812); Baston v. Sears, 239 N.E.2d 62, 63 & n.* (Ohio 1968) (denying a nonmarital child paternal support and distinguishing *Levy* on the ground that *Levy* "[was] based on the intimate, familial relationship which exists between a mother and her child"). *But see* Levy v. State, 216 So.2d 818, 820 (La. 1968) (interpreting the Supreme Court's holding in *Levy* as prohibiting laws that prevent nonmarital children from recovering from *either* parent); Schmoll v. Creecy, 254 A.2d 525, 529 (N.J. 1969) (rejecting the contention that the holding in *Levy* "deals only with the relation of the mother and child"). For commentary discussing whether *Levy* and *Glona* apply (or should apply) to paternal illegitimacy classifications, see John C. Gray, Jr. & David Rudovsky, *The Court Acknowledges the Illegitimate:* Levy v. Louisiana *and* Glona v. American Guarantee & Liability Insurance Co., 118 U. Pa. L. Rev. 1, 19–20 (1969) (observing that paternal relationships raise "more difficult," *id.* at 19, and

Levy and *Glona*'s rhetoric of maternal certainty over time grew more pronounced in the Court's illegitimacy doctrine, particularly in its decisions dealing with paternal illegitimacy.[81] Admittedly, in several important illegitimacy decisions after *Levy* and *Glona*, the Court struck down federal and state illegitimacy laws under the Fifth and Fourteenth Amendments' equal protection guarantees, even though the government defended those laws by adverting to questions of proof and often to questions of proof surrounding paternity.[82] However, in other key illegitimacy cases decided after *Levy* and *Glona*, the Court embraced the sex-specific logic of maternal certainty and paternal uncertainty when upholding illegitimacy classifications that targeted paternal relationships.[83]

"more serious" questions "of proof," *id.* at 20, than maternal relationships"); Harry D. Krause, *Legitimate and Illegitimate Offspring of* Levy v. Louisiana*—First Decisions on Equal Protection and Paternity*, 36 U. Chi. L. Rev. 338, 341, 349 (1969) (observing that "[t]he carelessness of the reasoning in the *Levy* case invites an attempt to delineate the direction further cases [involving fathers and nonmarital children] should take," *id.* at 341, and rejecting differential treatment of unwed mothers and unwed fathers where "proof" of paternity exists, *id.* at 349).

81. *See, e.g.*, Appleton, *supra* note 19, at 358 (arguing that the illegitimacy cases might be understood to reflect "the challenge of identifying the father" in nonmarital relationships).

82. In those cases, the Court rejected paternal uncertainty, among other asserted rationales, as a permissible basis for illegitimacy classifications, most of which automatically disqualified nonmarital children from recovering benefits based on a paternal relationship. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 764–65, 776 (1977) (striking down as unconstitutional an Illinois law prohibiting a nonmarital child from inheriting from his or her father if the father failed to legitimate the child through marriage to the biological mother); Jimenez v. Weinberger, 417 U.S. 628, 634, 637–38 (1974) (striking down a provision of the Social Security Act that discriminated against a subset of nonmarital children notwithstanding the government's asserted concern about "open[ing] the door to spurious claims," *id.* at 634); Gomez v. Perez, 409 U.S. 535, 536–38 (1973) (per curiam) (striking down a Texas law denying nonmarital children a judicially enforceable right to child support from their "natural fathers," despite "the lurking problems with respect to proof of paternity," *id.* at 538); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165, 174–75 (1972) (declaring unconstitutional Louisiana's denial of workmen's compensation benefits to nonmarital children who were never formally acknowledged by their father and explicitly discounting the state's professed concern for curtailing "potentially difficult problems of proof," *id.* at 174); *see also* Beaty v. Weinberger, 478 F.2d 300, 307 (5th Cir. 1973), *aff'd*, 418 U.S. 901 (1974) (rejecting the distinction between paternal uncertainty and maternal certainty as a legitimate basis for disadvantageous treatment of nonmarital children under federal law and citing *Weber* for the proposition that illegitimacy classifications were impermissible under the Equal Protection Clause regardless of whether they targeted a maternal or a paternal relationship (citing *Weber*, 406 U.S. at 175)). The *Trimble* Court acknowledged the truth behind much of the logic of maternal certainty and paternal uncertainty, even though it ultimately rejected it as a constitutionally insufficient basis for maintaining an illegitimacy classification. *See Trimble*, 430 U.S. at 770–71.

83. The earliest decision upholding a paternal illegitimacy classification, *Labine v. Vincent*, 401 U.S. 532, 537–40 (1971), was relatively silent on the issue of paternal proof, basing its holding instead on the state's prerogative to draw distinctions between "legitimate[s]" and "illegitimate[s]" and between "wives" and "concubines" in

For instance, in *Fiallo v. Bell*,[84] the Court upheld a provision of federal immigration law that gave special preference to the children of unwed U.S. mothers but not to the children of unwed U.S. fathers.[85] Rejecting the federal equal protection challenge of three unwed fathers and their nonmarital children,[86] the Court reasoned that "paternity determinations" typically involve "serious problems of proof."[87] Unlike maternity determinations, the *Fiallo* Court wrote, "determining the paternity of an illegitimate child" is marked by "inherent difficulty."[88]

Similarly, in *Lalli v. Lalli*,[89] the Court upheld a New York law requiring that an unwed father (but not an unwed mother) judicially prove his paternity to his children while alive in order for those children to recover a share of his estate under state intestacy law.[90] Justifying New York's imposition of procedural demands on unwed fathers but not on unwed mothers, the Court reasoned that "[e]stablishing maternity is seldom difficult," whereas establishing paternity involves "peculiar problems of proof."[91]

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the property domain, *id.* at 538. The law at issue prohibited even acknowledged nonmarital children from inheriting from an intestate father if he left any other surviving relative. *Id.* at 537. The possibility that this law rested on concerns about paternal proof was raised by Justice Brennan, who, in dissent, suggested that "Louisiana might be thought to have an interest in requiring people to go through certain formalities in order to eliminate complicated questions of proof and the opportunity for both error and fraud in determining paternity after the death of the father." *Id.* at 552 (Brennan, J., dissenting). Dismissing this conjectural concern, Justice Brennan maintained that paternal fraud anxiety "offer[ed] no justification for distinguishing between a formally acknowledged illegitimate child [as in that case] and a legitimate one." *Id.*

84. 430 U.S. 787 (1977).

85. *Id.* at 797, 799–800. For scholarship that explores how concerns over paternal proof weave their way throughout—and in the process tie together—the Court's illegitimacy jurisprudence and immigration jurisprudence, see Antognini, *supra* note 19, at 410. Professor Albertina Antognini explains that "a close reading of the Court's equal protection cases addressing unwed parents across borders, both geographical and doctrinal, shows that its decisions consistently reflect an assumption that the unwed father is absent and the unwed mother is present—not just at birth but in the child's life thereafter." *Id.*

86. *Fiallo*, 430 U.S. at 790.

87. *Id.* at 799.

88. *Id.* at 799 n.8. Moreover, in response to the challengers' contention that "existing administrative procedures . . . could easily handle the problems of proof involved in determining the paternity of an illegitimate child," the Court simply responded that such a possibility "should be addressed to the Congress rather than the courts." *Id.* at 799 n.9. Dissenting, Justice Marshall reminded the Court that in *Trimble*, a case decided the same day as *Fiallo*, the Court explicitly rejected "lurking problems with respect to proof of paternity" as a reason "to shield otherwise invidious discrimination." *Id.* at 813 (Marshall, J., dissenting) (quoting Trimble v. Gordon, 430 U.S. 762, 771 (1977)).

89. 439 U.S. 259 (1978).

90. *Id.* at 261–62, 264 (plurality opinion).

91. *Id.* at 268.

Finally, in *Parham v. Hughes*,[92] the Court invoked the logic of maternal certainty when upholding a Georgia law that prohibited certain unwed fathers (but not unwed mothers) from maintaining a wrongful death action for the death of their children.[93] "Unlike the mother . . . whose identity will rarely be in doubt, the identity of the father will frequently be unknown," *Parham* reasoned.[94]

The Court's later illegitimacy cases justified different treatment of unwed mothers and unwed fathers principally on account of maternal and paternal biology—the fact that paternity involved "peculiar problems of proof," whereas "maternity [was] seldom difficult."[95] Even so, ideas about maternal and paternal *biology* blurred quickly into ideas about maternal and paternal *behavior*.[96] For instance, *Lalli* assumed that fathers, unlike mothers, were not invested in their children *because* their identity was always uncertain.[97] "'That the child is the child of a particular woman is rarely difficult to prove[]' . . . [whereas p]roof of paternity . . . frequently is difficult," *Lalli* reasoned.[98] "The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother."[99] Importantly, then, the biologically grounded "fact" of maternal certainty and paternal uncertainty reflected and reproduced stereotypes about mothers, fathers, and their respective social roles.[100]

92. 441 U.S. 347 (1979).

93. *Id.* at 348–49, 358–59.

94. *Id.* at 355 (citing *Lalli*, 439 U.S. at 268–69 (plurality opinion)).

95. *Lalli*, 439 U.S. at 268 (plurality opinion).

96. Antognini makes a similar point when arguing that, in the context of unwed fathers and federal immigration law, "[t]he fact of birth quickly assumes legal relevance for both the government and the Court, to the exclusion of any other reality, including the father's potential presence at that moment." Antognini, *supra* note 19, at 432. For an analysis of a similar phenomenon (the discounting of unwed fathers' actual parenting work) in Supreme Court decisions addressing the rights of unwed fathers in the adoption context, see Allison Anna Tait, *A Tale of Three Families: Historical Households, Earned Belonging, and Natural Connections*, 63 Hastings L.J. 1345, 1386–88 (2012).

97. *See Lalli*, 439 U.S. at 269 (plurality opinion).

98. *Id.* at 268–69 (quoting *In re* Estate of Ortiz, 303 N.Y.S.2d 806, 812 (Sur. Ct. 1969)).

99. *Id.* at 269 (quoting *Estate of Ortiz*, 303 N.Y.S.2d at 812).

100. For a more complete discussion of the stereotypes that flow from the logic of maternal certainty, see *infra* Subpart A, pp. 48–52. *See also* Antognini, *supra* note 19, at 461–64. On the law's use of biological reasoning to justify different (and often disadvantageous) legal treatment of women generally, see Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261 (1992). On the law's use of biologism to justify different (and often disadvantageous) legal treatment of sexual minorities, see Douglas NeJaime, *Marriage, Biology, and Gender*, 98 Iowa L. Rev. Bull. 83 (2013); and NeJaime, *supra* note 34.

The logic and language of maternal certainty that influenced the Court's reasoning in later illegitimacy decisions, like *Parham*, eventually emerged in a more robust way in a line of Supreme Court decisions addressing the constitutional rights of unwed fathers, first in the context of state adoption law and later in the context of federal citizenship transmission law. The laws in these cases did not (and still do not) treat unmarried fathers as automatic legal fathers, even though they treated (and still treat) biological mothers as automatic legal mothers. Rather, the laws imposed more procedural burdens on fathers than on mothers in order for fathers to prove and enjoy a legally protected parental relationship. If unwed fathers failed to satisfy those burdens, then they risked losing their parental rights, as sex-differentiated adoption law made it easier for a biological mother to place her child for adoption without the biological father's consent. Unwed fathers also risked rendering their children non–U.S. citizens, as sex-differentiated citizen-transmission law made it more difficult for biological fathers to transmit U.S. citizenship to their children.

In the adoption law setting specifically, the logic of maternal certainty originally occupied a minority position in important dissents in *Caban v. Mohammed*.[101] There, disagreeing with the majority's holding striking down a sex-specific adoption law, Justice Stewart remarked that different treatment of mothers and fathers was permissible under the Fourteenth Amendment because "[t]he mother carries and bears the child, and in this sense her parental relationship is clear."[102] He also noted that the "mother is *always* an identifiable parent"[103] and that "only the mother carries and gives birth to the child."[104] Justice Stevens noted that "the mother's identity is known *with certainty*" at birth, whereas "[t]he father . . . may not be present."[105]

By 1983, however, when the Court revisited the question of whether gender-specific adoption laws passed constitutional muster in *Lehr v. Robertson*,[106] maternity (and paternity) logic moved from dissent to

101. 441 U.S. 380 (1979).

102. *Id.* at 397 (Stewart, J., dissenting). A majority in *Caban* struck down as unconstitutional sex discrimination a provision of New York's adoption law that gave unwed mothers but not unwed fathers veto power over a third-party adoption of their child on the ground that unwed mothers and unwed fathers were sometimes similarly situated. *Id.* at 391–94 (majority opinion). Justice Stewart dissented on the grounds that, in his view, mothers and fathers were never similarly situated with respect to parental identity in cases of infant adoption, *id.* at 398–99 (Stewart, J., dissenting), and that the state had a strong interest in "promoting the welfare of illegitimate children" by facilitating their adoptions, *id.* at 395.

103. *Id.* at 399 (Stewart, J., dissenting) (emphasis added).

104. *Id.*; *see also id.* at 404 (Stevens, J., dissenting) ("Only the mother carries the child . . . .").

105. *Id.* at 405 (Stevens, J., dissenting) (emphasis added).

106. 463 U.S. 248 (1983).

majority. *Lehr* upheld as constitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment a provision of state adoption law that extended unwed fathers fewer procedural protections, such as notice and veto power, than unwed mothers before termination of parental rights through adoption.[107] Writing for the majority, Justice Stevens emphasized the clarity and certainty of motherhood relative to fatherhood, reasoning that because "[t]he mother carries and bears the child . . . her parental relationship is clear," whereas "the father's parental claims must be gauged by other measures."[108] While an unwed father's biological connection to his child was significant, Justice Stevens observed, the father needed to prove social and legal paternity through "other measures"—like an established father-child bond—in order to enjoy full constitutional protection akin to that of the mother.[109] On this view, social and legal parenthood followed inevitably from biological maternity but not from biological paternity.

The maternal certainty that surfaced in the Court's early illegitimacy decisions blossomed fifteen years later into a fixed feature of its constitutional doctrine relating to the nonmarital family, and particularly to unwed fathers.[110] Unwilling during this time to uphold laws embodying sex stereotypes under the Equal Protection Clause,[111] the Court tolerated laws reflecting "real" reproductive differences[112]—and the

107. *Id.* at 250, 264–65, 266–67.

108. *Id.* at 260 n.16 (quoting *Caban*, 441 U.S. at 397 (Stewart, J., dissenting)).

109. *See id.* at 261–62.

110. Indeed, the Court's invocation of the logic of maternal certainty and paternal uncertainty in response to unwed fatherhood was so habitual that its absence in a key unwed-father case from around this time—*Michael H. v. Gerald D.*, 491 U.S. 110 (1989)—was conspicuous. *See id.* at 113, 120–30 (upholding as constitutional under the federal Due Process Clause a state marital presumption that could be rebutted by biological mothers and marital fathers, but not by nonmarital presumed biological fathers).

111. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) (striking down under the Fourteenth Amendment's Equal Protection Clause a public nursing school policy prohibiting admission to males); Craig v. Boren, 429 U.S. 190, 191–92, 204–05 (1976) (striking down under the Fourteenth Amendment's Equal Protection Clause a state law that set the age for consuming low-alcohol beer at twenty-one for males but at eighteen for females); Weinberger v. Wiesenfeld, 420 U.S. 636, 637–39 (1975) (striking down under the Fifth Amendment's equal protection guarantee a provision of the Social Security Act allowing widows but not widowers to claim survivor benefits); Frontiero v. Richardson, 411 U.S. 677, 678–79 (1973) (striking down under the Fifth Amendment's Due Process Clause a military policy that required dependents of female but not male service members to prove dependency in fact before receiving supplemental benefits); Reed v. Reed, 404 U.S. 71, 74 (1971) (striking down under the Fourteenth Amendment's Equal Protection Clause a state statute that automatically preferred males over females as estate administrators).

112. *See, e.g.*, Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. Rev. 1187, 1219–21 (2016) (discussing judicial reliance on biological difference to justify laws that treat unwed fathers "as legally inferior," *id.* at 1220, to unwed mothers); Cary Franklin, *The Anti-stereotyping Principle in Constitutional Sex Discrimination Law*, 85

real reproductive difference that often mattered most to the Court concerned maternal certainty relative to paternal uncertainty. In addition, as the logic of maternal certainty became more firmly settled in constitutional sex discrimination law, that law became more *adamant* about the constitutional mother's presumed obviousness. In *Lalli* and *Parham*, "[e]stablishing maternity [was] *seldom* difficult,"[113] and maternal "identity" was "*rarely* . . . in doubt."[114] By the time the Court decided *Lehr* just a few years later, the mother's maternal relationship was "clear."[115]

For this reason, it was little surprise that, starting in the late 1990s, the Court once again deployed the logic of maternal certainty in its confrontation with discrimination against unwed fathers—this time in the context of federal citizenship transmission laws. While maternal certainty played a role in the plurality's decision in one of those cases, *Miller v. Albright*,[116] it commanded a majority of the Court in the 2001 decision *Nguyen v. INS*,[117] which upheld as constitutional a federal law imposing

N.Y.U. L. Rev. 83, 125–72 (2010) (discussing cases rejecting sex stereotypes on constitutional equality grounds as well as cases upholding biological difference as a limit on this antistereotyping principle); Mayeri, *supra* note 49, at 2391 (discussing how the Court rejected different treatment of husbands and wives but permitted different treatment of unwed fathers and unwed mothers by resorting to biological difference); NeJaime, *supra* note 34, at 2280 (remarking that "as the Court forged constitutional sex-equality doctrine in the 1970s and 1980s, it generally resisted claims that the differential treatment of unmarried mothers and fathers constituted impermissible sex discrimination"); *id.* at 2352–55 (discussing the role of biological difference in immigration law and in the law of unwed fathers and adoption).

113. Lalli v. Lalli, 439 U.S. 259, 268 (1978) (plurality opinion) (emphasis added).

114. Parham v. Hughes, 441 U.S. 347, 355 (1979) (plurality opinion) (emphasis added). Indeed, it is worth noting here that in *Glona*, Justice Douglas raised the possibility that *Glona*'s holding "[could] conceivably be a temptation to some to assert *motherhood* fraudulently." Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 76 (1968) (emphasis added).

115. Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)).

116. 523 U.S. 420 (1998). Writing for the plurality in an opinion joined only by Chief Justice Rehnquist, Justice Stevens explained that mothers and fathers of illegitimate children differ in at least two ways relevant to the claimant's equal protection claim. *Id.* at 427. First, "[t]he blood relationship to the birth mother is immediately obvious," whereas "the relationship to the . . . father may often be undisclosed and unrecorded in any contemporary public record." *Id.* at 436. Second, a child is likely to establish a relationship with the mother, who "certainly knows of her child's existence," whereas the child might not even know the identity of the father, let alone have cultivated a relationship with him. *Id.* at 438. Drawing an explicit doctrinal connection between the Court's existing unwed-father jurisprudence and its constitutional understanding of citizenship transmission, Justice Stevens reasoned that the plurality's *Miller* holding was "directly supported by [the Court's] decision in *Lehr v. Robertson*." *Id.* at 441.

117. 533 U.S. 53 (2001).

more burdensome requirements on unwed fathers than on unwed mothers in order to transmit citizenship to a child born overseas.[118]

More than any other decision addressing the equality rights of unwed fathers, Justice Kennedy's majority decision in *Nguyen* was insistent about the obviousness of maternity and motherhood. (Notably, even Justice O'Connor's condemnatory *Nguyen* dissent agreed that a "mother . . . is *by nature* present at birth," whereas a father is present "by choice."[119]) Importing the reasoning of maternal certainty used to justify sex-specific adoption statutes in *Lehr* and in Justice Stewart's *Caban* dissent,[120] the *Nguyen* majority reasoned that "the mother is always present at birth"[121] as well as that "proof of motherhood . . . is inherent in birth itself."[122] Furthermore, *Nguyen* maintained that mothers' obvious and uncomplicated biological relationship to their children guaranteed the opportunity for a social "relationship between [the] citizen parent and child."[123] Paternity, by contrast, presented "serious problems of pro[of]"[124] with respect to biological and social connection alike. For these reasons, *Nguyen* concluded, Congress did not engage in unconstitutional sex discrimination under the Fifth Amendment by requiring more of unwed fathers than of unwed mothers.[125]

Remarkably, the *Nguyen* Court's conception of maternity under the Federal Constitution was in tension with federal law itself. When *Nguyen* was decided, the State Department determined maternity for certain classes of women citizens—including unmarried women—who had children overseas on the basis of gametes (or genetics), not gestation and birth.[126] Congress sets the rules for how mothers transmit citizenship to children born overseas and outside of wedlock (the issue in *Nguyen*).[127] The State Department, however, is charged with determining who qualifies as a "mother" in the first place.[128] Indeed, before the

118. *Id.* at 58–60.

119. *Id.* at 86 (O'Connor, J., dissenting) (emphasis added).

120. *Id.* at 62 (majority opinion).

121. *Id.* at 64.

122. *Id.*

123. *Id.* at 67.

124. *Id.* at 63 (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)).

125. *Id.* at 73.

126. *See, e.g.*, Kristine S. Knaplund, *Baby Without a Country: Determining Citizenship for Assisted Reproduction Children Born Overseas*, 91 Denv. U. L. Rev. 335, 352 (2014).

127. *See* 8 U.S.C. § 1409(c) (2018).

128. *See* Joanna L. Grossman, *Flag-Waving Gametes: Biology, Not Gestation or Parenting, Determines Whether Children Born Abroad Acquire Citizenship from U.S. Citizen Parents*, Verdict (Apr. 3, 2012), https://verdict.justia.com/2012/04/03/flag-waving-gametes [https://perma.cc/9UBL-43NA] (discussing the case of an unmarried American woman who had children in Israel through in vitro fertilization with donor eggs and donor sperm, and the United States's denial of citizenship to her children). For the policy, see Bureau of Consular Affairs, U.S. Dep't of State, Acquisition of

State Department changed its rules in 2013,[129] the federal government refused to recognize an unmarried American woman who had twins in Israel through in vitro fertilization with donor eggs as a "mother" capable of transmitting American citizenship,[130] even though *Nguyen* confidently asserted that gestation and birth were "inherent" and irrefutable proof of maternity.[131] When *Nguyen* was decided, then, federal law was at odds with itself on this question of who was a mother, suggesting that maternity was more socially and legally constructed than *Nguyen*'s biologism and maternal naturalism made it appear.

Today, *Nguyen*'s notion that maternity is certain, uncomplicated, basic, and obvious, whereas paternity is the obverse of all of those things, remains a foundational aspect of constitutional sex equality law. As mentioned, that law has rejected much official sex discrimination on antistereotyping grounds, but it has preserved some official sex discrimination by adverting specifically to the logic of maternal certainty.[132] In fact, the idea that the government may treat mothers and fathers differently because mothers, unlike fathers, are obvious even emerged in the Court's most recent constitutional sex discrimination decision—one in which the Court *rejected* a provision of federal citizenship transmission law as an unconstitutional sex stereotype.[133]

That decision, *Sessions v. Morales-Santana*,[134] struck down federal law's requirement that unwed American fathers reside in the United States for a longer time than unwed American mothers must in order to transmit their citizenship to a child born overseas.[135] The government justified that requirement by invoking the same logic of maternal certainty at play in *Nguyen*, arguing that differential treatment of unwed mothers and fathers passed constitutional muster because mothers, unlike fathers, were obvious at birth.[136] This time, however, the Court rejected mater-

U.S. Citizenship at Birth by a Child Born Abroad, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Acquisition-US-Citizenship-Child-Born-Abroad.html [https://perma.cc/B934–3YGW].

129. *See* Knaplund, *supra* note 126, at 352 ("In late 2013, the State Department quietly amended its website to recognize giving birth as a means to prove maternity.").

130. *See* Grossman, *supra* note 128.

131. Nguyen v. INS, 533 U.S. 53, 64 (2001) (stating that "proof of motherhood . . . is inherent in birth itself").

132. *See supra* pp. 24–25. Indeed, even the *Nguyen* majority made clear that sex stereotypes were unconstitutional. *See Nguyen*, 533 U.S. at 73 (distinguishing between laws based on "real" biological difference, which are permitted under the Constitution, and those based on a "stereotype[]," which are not).

133. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017).

134. 137 S. Ct. 1678.

135. *Id.* at 1686.

136. *See* Brief for the Petitioner at 30–31, *Morales-Santana*, 137 S. Ct. 1678 (No. 15–1191); *see also* Cary Franklin, *Biological Warfare: Constitutional Conflict over "Inherent Differences" Between the Sexes*, 2017 Sup. Ct. Rev. 169, 200 (observing that, as in *Nguyen*, "the government focused again on the moment of birth, noting that because

nal certainty as a constitutionally adequate rationale, contending that it reflected not a biological truth but rather "stunningly anachronistic" beliefs about men and women and their relative caretaking roles.[137]

The Court's repudiation of biological reasoning in *Morales-Santana* means that "[a]fter *Morales-Santana*, courts and litigants cannot as easily assert or assume that the reach of heightened scrutiny for sex-based state action runs out early, either at the water's edge of citizenship law or when it comes to the rights of unmarried parents."[138] Even so, *Morales-Santana* preserved space for biological reasoning in sex equality doctrine when it distinguished the residency requirement at issue there from the proof-of-parentage law at issue in *Nguyen*. *Nguyen* was still good law, *Morales-Santana* reasoned, because the law in *Nguyen*, unlike the law in *Morales-Santana*, reflected a biological truth: maternity, unlike paternity, is obvious by a woman's act of "giving birth."[139] In other words, the same decision that exposed the stereotypic logic that lay behind maternal certainty in one context (duration of residency) upheld that logic as constitutionally adequate in another (proof of parenthood).

In preserving a distinction between the biological reality of the proof-of-parentage requirement and the stereotypic logic of the duration-of-residence requirement, *Morales-Santana* implicitly certified the *Nguyen* Court's confidence that "proof of motherhood . . . is inherent in birth itself."[140] To be sure, federal law's proof-of-parentage requirement was not at issue in *Morales-Santana*, and so the majority might have approached the question of its constitutionality differently given the opportunity.[141] In addition, as Professor Cary Franklin notes, "[t]he nexus between biological differences and the sex distinction in *Nguyen* was

unmarried mothers are invariably present at a child's birth, and because their parentage is thereby assured, they are recognized at that moment as the child's only legal parent").

137. *Morales-Santana*, 137 S. Ct. at 1693.

138. Franklin, *supra* note 136, at 202.

139. *Morales-Santana*, 137 S. Ct. at 1694.

140. Nguyen v. INS, 533 U.S. 53, 64 (2001). In this regard, the *Morales-Santana* majority bears some similarities to the *Nguyen* dissent, which Justice Ginsburg—who authored the majority opinion in *Morales-Santana*—joined. In *Nguyen*, Justice O'Connor asserted that "it is *doubtless true* that a mother's blood relation to a child is *uniquely* 'verifiable from the birth itself' to those present at birth." *Id.* at 81–82 (O'Connor, J., dissenting) (emphases added) (quoting *id.* at 62 (majority opinion)). Similarly, in the appellate court decision in *Miller v. Albright*, Judge Wald, although condemning the requirement that fathers—but not mothers—take additional steps beyond proving a biological connection to transmit citizenship to their children, remarked that a requirement that fathers specifically prove a biological connection might be acceptable. *See* Miller v. Christopher, 96 F.3d 1467, 1474 (D.C. Cir. 1996) (Wald, J., concurring in the judgment).

141. The *Morales-Santana* Court recognized as much itself. *See* 137 S. Ct. at 1694 (noting that "Morales-Santana's challenge does not renew the contest over" the law at issue in *Nguyen*).

arguably closer than the nexus between biological differences and the sex distinction in *Morales-Santana*," given that *Nguyen* involved proof of parenthood (more biological in nature) whereas *Morales-Santana* involved duration of residency (more social in nature).[142]

Nevertheless, *Morales-Santana*'s unquestioning belief in maternal certainty—in the proof-of-parentage context—is worthy of note for at least two reasons. First, it shows that maternal certainty can escape meaningful constitutional review even when the Court is acutely aware of the sex stereotypes that lie behind it.[143] In addition, and as later Parts will elaborate in greater detail, it shows that the Court has inherited a way of thinking about maternity, pregnancy, biology, and birth that is simply inaccurate—especially in 2017, the year when *Morales-Santana* was decided and a time by which alternative reproductive technologies had created a situation where "giving birth" was far from conclusive evidence of maternity.

B. *Maternal Certainty and Paternal Uncertainty Outside the Supreme Court*

The Supreme Court's logic of maternity and paternity has influenced lower courts' dispositions of issues relating to a variety of groups, including biological fathers, nonbiological mothers, same-sex parents, and transgender individuals. In this sense, the biologically grounded justification of maternal certainty has traveled widely in the law. Emerging first as a response to domestic family-related issues in cases like *Lalli v. Lalli*[144] and *Lehr v. Robertson*,[145] maternal certainty eventually expanded to apply to federal immigration issues in cases like *Miller v. Albright*[146] and *Nguyen v. INS*.[147] In turn, lower courts have absorbed *Nguyen*'s discourse on maternal certainty when addressing everything from nontraditional parentage[148] to transgender rights.

142. Franklin, *supra* note 136, at 202. Franklin also argues that the sex classification at issue in *Nguyen*—unlike the sex classification at issue in *Morales*—"passed constitutional muster only because the Court did not actually scrutinize it with much rigor." *Id.* "If the Court had actually applied the same level of scrutiny in *Nguyen* that it applied in *Morales-Santana* . . . , it would have detected the fairly substantial gaps between the government's stated ends and its use of a sex discriminatory rule." *Id.*

143. On this point, see Kristin A. Collins, *The Supreme Court, 2016 Term—Comment: Equality, Sovereignty, and the Family in* Morales-Santana, 131 Harv. L. Rev. 170, 203 (2017) ("[L]aws that regard biological mothers as a child's 'natural guardian,' with rights and responsibilities that dwarf those of . . . biological nonmarital fathers (as in *Nguyen*) . . . are in significant tension with *Morales-Santana*'s deep skepticism of gender-based allocations of parental rights and status.").

144. 439 U.S. 259 (1978).

145. 463 U.S. 248 (1983).

146. 523 U.S. 420 (1998).

147. 533 U.S. 53 (2001).

148. *See* Collins, *supra* note 143, at 195 (observing that "*Nguyen* became a resource for lawyers defending the gender-based regulation of parentage and, more

1. Unwed Biological Fathers

Constitutional law's logic of maternal certainty has influenced courts' approaches to the rights of unwed biological fathers in at least three different settings: adoption law, the marital presumption, and custody law. Following *Lehr*, adoption law in many states accords unwed fathers fewer procedural protections than it does unwed mothers prior to releasing their biological children for adoption by third parties—procedural protections like notice of the adoption proceeding and a veto power over it.[149] When such laws are challenged on due process or equal protection grounds (or both), courts routinely uphold them by invoking the binary of maternal certainty and paternal uncertainty.

One court, for instance, reasoned that it was constitutional for a state to *accord* different protections to unwed fathers and unwed mothers in the adoption process since "identification of a child's mother is automatic because of her role in the birth process, while identification of the father is not."[150] Others have cited to *Lehr*, *Nguyen*, and Justice Stewart's *Caban* dissent for the proposition that "[t]he mother carries and bears the child, and in this sense her parental relationship is clear," whereas "[t]he validity of the father's parental claims must be gauged by other measures."[151]

On this last point, consider *In re Adoption of J.S.*,[152] a recent Utah Supreme Court case that illustrates the continuing resonance of maternal certainty in constitutional challenges to sex-specific adoption statutes. After discovering that a woman with whom he was sexually involved was pregnant, and shortly before the birth of his son, Bolden filed a petition in court seeking to establish paternity, custody, and child support; he

generally, the family," and that "state courts adjudicating constitutional challenges to such regulations tended to interpret *Nguyen* along similar lines").

149. *See, e.g.*, Children's Bureau, U.S. Dep't of Health & Human Servs., Consent to Adoption (2017), https://www.childwelfare.gov/pubPDFs/consent.pdf [https://perma.cc/ HS3K-7ET3] (listing consent-to-adoption statutes as of March 2017); Mary Beck, *Toward a National Putative Father Registry Database*, 25 Harv. J.L. & Pub. Pol'y 1031, 1039–42 (2002) (describing how putative father registries "place[] increasing responsibility on the man to protect his own paternal rights," *id.* at 1042).

150. C.F. v. D.D. (*In re* Adoption of B.B.D.), 984 P.2d 967, 972 (Utah 1999) (quoting Swayne v. L.D.S. Soc. Servs., 795 P.2d 637, 641 (Utah 1990)).

151. *E.g.*, Helen G. v. Mark J.H. (*In re* Adoption Petition of Bobby Antonio R.), 175 P.3d 914, 924 (N.M. 2007) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)); *see, e.g.*, Bolden v. Doe (*In re* Adoption of J.S.), 358 P.3d 1009, 1027–28 (Utah 2014). In several of these cases, courts have relied on maternal certainty when upholding parental terminations of unwed fathers, even when the fathers were deceived by birth mothers who gave up infants for adoption upon birth. *See, e.g.*, *In re* Adoption of A.A.T., 196 P.3d 1180, 1184–85, 1195 (Kan. 2008) (mother lied about having an abortion); *In re* Baby Girl S., 407 S.W.3d 904, 906–07, 914–15 (Tex. App. 2013) (mother never informed father of the pregnancy).

152. Bolden v. Doe (*In re* Adoption of J.S.), 358 P.3d 1009.

also registered under Utah's putative father registry.[153] What he failed to do prior to his son's birth was file a separate affidavit promising that he would be his son's physical custodian and support him financially.[154] When the child's mother initiated adoption proceedings shortly after the child's birth, the prospective adoptive parents argued that Bolden's consent to the adoption was unnecessary because he failed to comply with Utah's affidavit requirement.[155] Bolden challenged that requirement—unsuccessfully—in the state trial court before appealing his case to the Utah Supreme Court, where he argued that Utah's law violated state and federal due process and equal protection guarantees because it imposed burdens on unwed fathers from which unwed mothers were exempt.[156]

Rejecting Bolden's constitutional claims, a divided Utah Supreme Court explained that "mothers are identified . . . as parents by virtue of their biological connection," whereas "fathers require something more (both biologically and legally)." F[157] An unwed mother's biological relationship to her child is "objectively apparent" at birth, the majority reasoned, and her social relationship to her child is "objective[ly]" established by her decision "to carry the child to term (and not end[the pregnancy] by abortion or emergency contraception)."[158] "An unwed father's role," by contrast, "is inherently different."[159] Like his biological connection to the child, which is "indeterminate" at birth,[160] the unwed father's social connection is also unclear at that time and must be gauged by other measures—like the timely filing of an affidavit.[161] Where a mother's "decision" not to terminate her pregnancy through abortion "express[es] [her] commitment to [her] offspring," the court continued, fathers must "express" their commitment in a different way.[162] For all of these reasons, *Bolden* concluded, Utah's different treatment of mothers and fathers passed constitutional muster.[163]

Just as courts have invoked maternal certainty to justify sex-specific adoption laws, they also have invoked it to justify sex-specific marital presumption laws, as *Grimes v. Van Hook-Williams*[164] illustrates. There, a Michigan court rejected the equal protection claim of a biological father who, under state law, lacked standing to rebut the marital presumption and thereby prove his legal paternity of a child who was born into an

153. *See id.* at 1012–13.
154. *Id.* at 1013.
155. *Id.*
156. *See id.* at 1012.
157. *Id.* at 1030 n.32.
158. *Id.* at 1030.
159. *Id.* at 1031.
160. *Id.*
161. *See id.* at 1031–32.
162. *Id.* at 1032.
163. *See id.*
164. 839 N.W.2d 237 (Mich. Ct. App. 2013).

extant marriage—wherein he was not the husband.[165] Where Michigan law gives all birth mothers standing to rebut the presumption, it gives only certain alleged fathers that ability.[166] The plaintiff in *Grimes* did not qualify as one of those alleged fathers.[167]

Holding that it was constitutional for the state to treat men and women differently by allowing all biological mothers but only certain nonmarital fathers to rebut the presumption, *Grimes* favorably cited *Nguyen* for the proposition that mothers and fathers are not similarly situated for constitutional purposes.[168] "[T]he identity of the mother is rarely, *if ever*, in question," it observed, whereas "the identity of the child's biological father may well be uncertain."[169] In addition, *Grimes* reasoned that "[t]he mother is *the* only necessary actor at all stages of the process, from conception through pregnancy and delivery, including all the physical and medical implications of each stage."[170] The court noted further that "the mother is usually the child's primary caregiver during the infant's first weeks of life."[171] "These are genuinely differentiating characteristics,"[172] *Grimes* concluded.

Finally, some courts have invoked constitutional law's logic of maternal certainty to justify custody laws that assign legal and physical custody of nonmarital children to mothers upon birth.[173] When unwed fathers have challenged those regimes on equality grounds, courts have upheld them by relying on *Nguyen* and its language of maternal certainty. As a Minnesota court stated in *In re Custody of J.J.S.*,[174] the state does not violate constitutional equality guarantees by investing mothers with exclusive custody of their nonmarital children because birth renders mothers, but not fathers, identifiable.[175]

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165. *Id.* at 239–40.

166. *See* Mich. Comp. Laws Ann. § 722.1441(3)(a)(i) (West 2020) (imposing an additional requirement on alleged fathers, in cases of children born into a married household, that they show they "did not know or have reason to know that the mother was married at the time of conception").

167. *Grimes*, 839 N.W.2d at 242.

168. *Id.* at 245.

169. *Id.* (emphasis added).

170. *Id.* (quoting Rose v. Stokely, 673 N.W.2d 413, 421 (Mich. Ct. App. 2003)).

171. *Id.* (quoting *Rose*, 673 N.W.2d at 421).

172. *Id.* (quoting *Rose*, 673 N.W.2d at 421).

173. For a list and critique of state statutes that invest biological mothers with sole physical and legal custody of their children at birth, but require fathers to affirmatively seek custodial responsibility through legal action, see Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 Stan. L. Rev. 167, 204 n.204 (2015). *See also id.* at 227 ("The fifteen states that currently grant sole custody to an unmarried mother should repeal these laws and replace them with a legal rule that grants custody to both parents." (footnote omitted)).

174. Hassinger v. Seeley (*In re* Custody of J.J.S.), 707 N.W.2d 706 (Minn. Ct. App. 2006).

175. *Id.* at 710.

2. Nonbiological Mothers

Constitutional law's logic of maternal certainty also has played a role in curtailing the rights of nonbiological mothers. Take, for instance, the "presumption of maternity" for same-sex married female couples. States initially refused to extend the presumption to that class, and courts justified those refusals by relying on *Nguyen*, reasoning that the marital presumption existed as a way of "determining whether a man is a child's biological father," not whether a woman is a biological mother.[176] Invoking the language of *Nguyen*, one court noted that "fathers and mothers are not similarly situated with regard to proof of biological parenthood."[177] Whereas "it is generally not difficult to determine the biological mother of a child,"[178] the court continued, "birth reveals nothing about the identity of the child's biological father."[179] Another court remarked in a related context that "[i]t does not violate equal protection to acknowledge basic biological truths,"[180] quoting *Nguyen* for the proposition that failing to do so "risks making the guarantee of equal protection superficial, and so disserving it."[181]

Today, most jurisdictions that have considered this issue have extended the marital presumption to the wives of birth mothers,[182] often citing to *Obergefell v. Hodges*[183] and its mandate of sexual orientation equality in matters relating to marriage and parenthood.[184] Even so, some significant holdouts remain. A Texas court, for instance, recently refused to apply the presumption to the wife of a birth mother.[185] Similarly, the

176. *E.g.*, Turner v. Steiner, 398 P.3d 110, 114 (Ariz. Ct. App. 2017) (citing Hall v. Lalli, 977 P.2d 776, 780–81 (Ariz. 1999) (en banc)), *abrogated by* McLaughlin v. Jones, 401 P.3d 492 (Ariz. 2017).

177. *Id.* at 115 (quoting Nguyen v. INS, 533 U.S. 53, 63 (2001)).

178. *Id.* (quoting Adoptive Parents of M.L.V. v. Wilkens, 598 N.E.2d 1054, 1059 (Ind. 1992)).

179. *Id.* (citing *Nguyen*, 533 U.S. at 63).

180. Smith v. Pavan, 505 S.W.3d 169, 181 (Ark. 2016), *rev'd*, 137 S. Ct. 2075, 2076–77 (2017) (per curiam) (holding that Arkansas's refusal to record the wife of a birth mother on a birth certificate, even as the state required a hospital to record the husband of a birth mother on a birth certificate, violated *Obergefell v. Hodges*'s holding that the Constitution requires the state to extend same-sex marriage as well as its attendant benefits to same-sex couples).

181. *Id.* (quoting *Nguyen*, 533 U.S. at 73).

182. For a list of these states, see NeJaime, *supra* note 34, at 2363 app. A.

183. 135 S. Ct. 2584, 2599 (2015) (holding that the Federal Constitution protects a right to marry that includes same-sex couples).

184. *See, e.g.*, McLaughlin v. Jones, 401 P.3d 492, 498 (Ariz. 2017). Courts (like in *McLaughlin*) also have cited to *Pavan v. Smith*, 137 S. Ct. 2075, *see, e.g.*, *McLaughlin*, 401 P.3d at 498, which itself cited to *Obergefell* for the proposition that the Constitution requires that the state afford same-sex couples the entire "constellation of benefits" afforded to married opposite-sex couples, including the right to be listed on a marital child's birth certificate, *Pavan*, 137 S. Ct. at 2077 (quoting *Obergefell*, 135 S. Ct. at 2601).

185. *See In re* A.E., No. 09–16–00019, 2017 WL 1535101, at *1, *8 (Tex. App. Apr.

State Department has refused to extend the presumption to married same-sex couples—indeed, has refused to recognize married same-sex couples as even married—for the purpose of recognizing their children born overseas as children born "in wedlock."[186] In addition, the maternal presumption today remains unavailable for nonbiological mothers in opposite-sex marriages—mothers for whom the maternal presumption has proven unavailing because of the logic of maternal certainty.

Cases from California further illustrate this point. In one, *Amy G. v. M.W.*, F[187] a court refused to extend a maternal presumption to the wife of a man who became a father with another woman, even though state law extended a paternal presumption to the husband of a woman who became a mother with another man.[188] Citing *Nguyen*, the court remarked that different treatment of the wives of biological fathers and the husbands of biological mothers passed constitutional scrutiny since

27, 2017).

186. Currently, the State Department considers children born overseas to a married, opposite-sex couple, at least one member of which is a United States citizen, to be born "in wedlock," but treats children born overseas to a married, same-sex couple as born "out of wedlock." *See* Dvash-Banks v. Pompeo, No. CV 18–523, 2019 WL 911799, at *4 (C.D. Cal. Feb. 21, 2019); *see also id.* at *7–8 (rejecting the State Department's argument and holding that a child born overseas to a married, same-sex couple, one member of which is a United States citizen, was a child born in wedlock for federal immigration purposes). In other words, the State Department applies the parental presumption to married, opposite-sex couples but not to married, same-sex couples. The State Department's "in wedlock/out of wedlock" distinction has made it difficult, if not impossible, for certain children born overseas to married, same-sex couples to get United States citizenship, given that the eligibility requirements for children born abroad to married parents are easier to satisfy than the eligibility requirements for children born abroad to unmarried parents. *See, e.g.*, Sarah Mervosh, *Gay U.S. Couple Sues State Dept. for Denying Their Baby Citizenship*, N.Y. Times (July 23, 2019), https://nyti.ms/2SyxS7U [https://perma.cc/8NY7-LLNT] (noting that three same-sex couples were suing the State Department for denying citizenship to their children born abroad, and that "gay couples argue that they are far more likely to be questioned about their conception methods when applying for citizenship"). The State Department contends that for children born overseas to be considered born "in wedlock," they must be born to two biological parents, *see* 8 U.S. Dep't of State, Foreign Affairs Manual § 304.1–2 (2018), https://fam.state.gov/FAM/08FAM/08FAM030401.html [https://perma.cc/C9MW-5GCM], even though the Department does not genetically test the children born overseas to a married, opposite-sex couple to determine a biological connection to both parents, *see id.* § 304.1–1. If the traditional parental presumption assumed biological connection because of marriage, then the State Department's current interpretation of the presumption assumes marriage because of (presumed) biological connection. Put differently, the appearance of biological relatedness here creates marriage, whereas traditionally marriage created the appearance of biology. In this sense, married, same-sex couples are triply punished: first, because their children are denied a legal relationship to both parents; second, because their children are denied United States citizenship; and third, because the couples are denied a legal marriage under federal law.

187. 47 Cal. Rptr. 3d 297 (Ct. App. 2006).

188. *Id.* at 299, 304.

"[t]he difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid [the Legislature] to address the problem at hand in a manner specific to each gender."[189]

In another, *In re D.S.*,[190] a nonbiological mother who had raised her husband's biological child for several years, while the biological mother was absent, argued that California law ought to allow her to bring a maternity action against the biological mother, just as it allows third parties to bring a paternity claim against a biological father.[191] Rejecting her claim, the *In re D.S.* court recognized that California law allowed certain women to contest the maternity of birth mothers, but reasoned that such a situation did not apply outside the "rare" case, like surrogacy or two mothers in a same-sex relationship.[192] Notably, *In re D.S.* also rejected the biological mother's claim that California law ought to recognize conclusive acknowledgments of maternity (by birth mothers), just as it recognizes conclusive acknowledgments of paternity.[193] In support of its rejection of *both* maternal claims, *In re D.S.* cited to *Nguyen*, declaring that mothers and fathers are inherently different and reasoning that "proof of motherhood . . . is inherent in birth itself,"[194] whereas "[i]dentifying a child's father is not as obvious."[195]

Finally, while subtle, the logic of maternal certainty could also animate another form of discrimination against nonbiological mothers: the law's refusal to uphold surrogacy agreements when intended mothers lack a genetic relationship to the children that surrogates bear.[196] NeJaime argues that this genetic-relatedness requirement for intended mothers suggests that modern law continues to "organize the legal family around a biological mother,"[197] and that biological maternity, unlike biological paternity, continues to anchor the legal family, even amidst advances in alternative reproduction that facilitate nonbiological maternity.[198] Surrogacy law's continuing obsession with genetic maternity (but not genetic paternity)[199] in the modern era hearkens back to the logic of maternal

189. *Id.* at 308 (second alteration in original) (quoting Nguyen v. INS, 533 U.S. 53, 73 (2001)).

190. Elizabeth D. v. San Diego Cty. Health & Human Servs. Agency (*In re* D.S.), 143 Cal. Rptr. 3d 918 (Ct. App. 2012).

191. *Id.* at 919–20, 922–23.

192. *Id.* at 924.

193. *Id.* at 923, 927.

194. *Id.* at 924 (omission in original) (quoting *Nguyen*, 533 U.S. at 64).

195. *Id.* (citing *Nguyen*, 533 U.S. at 65).

196. *See infra* Subpart 1, pp. 68–78; *see also* NeJaime, *supra* note 34, at 2326.

197. NeJaime, *supra* note 34, at 2316.

198. *Id.* at 2314–16.

199. To clarify: genetic maternity states require intended mothers that are parties to a surrogacy agreement, but not intended fathers, to have a genetic connection to the child in order for the agreement to be valid. For a discussion of this issue, see *id.* at 2309–16.

certainty because it suggests that the law is unable to envision the family without a certain and obvious mother. Put differently, the law has grown so habituated to the idea of maternal certainty that it struggles to envision the family in its absence.

3. Transgender Discrimination

Constitutional law's logic of maternal certainty has recently influenced a setting that is unrelated to parenthood and parental rights: transgender discrimination. In a Title VII transgender discrimination case that is now before the Supreme Court, for example, an employer has cited to the section in *Nguyen* addressing maternal certainty and paternal uncertainty to support the employer's refusal to recognize an employee's sex and gender identity.[200] A school district in Jacksonville, Florida, also appealed to *Nguyen* to justify the school's decision to prohibit a transgender male high school student from using the male restroom.[201] In the school's view, *Nguyen* supported the school's argument that essential biological differences between the sexes justified a policy under which a student's sex assigned at birth determined which bathroom he could use.[202]

In some of these cases, defendants' invocation of *Nguyen* and its maternal (and paternal) logic has been unsuccessful. The court in Florida's transgender bathroom case, for instance, reasoned that *Nguyen* and similar cases were inapposite because "[t]he school bathroom policy does not depend on something innately different between the bodies of boys and girls or what they do in the bathroom."[203] In other cases, however, courts have credited such arguments, reasoning that the unwed-father cases and their notions of maternal certainty and paternal uncertainty are relevant to the constitutional question of bathroom choice for transgender people.

Representative here is *Carcaño v. McCrory*,[204] a federal district court decision addressing the legality of a (now partially defunct)[205] North Carolina law, which, among other things, required individuals throughout the

200. *See* Brief for the Petitioner, *supra* note 11, at 14, 35 (citing *Nguyen*, 533 U.S. at 68); Reply Brief for Petitioner, *supra* note 11, at 5 (citing *Nguyen*, 533 U.S. at 68).

201. Adams *ex rel.* Kasper v. Sch. Bd., 318 F. Supp. 3d 1293, 1318, 1320, 1325 (M.D. Fla. 2018) (finding that a public school's refusal to allow a transgender male student to use the male restroom violated Title IX's proscription against sex and gender discrimination as well as the Fourteenth Amendment's Equal Protection Clause).

202. *Id.* at 1317–18 (summarizing these arguments).

203. *Id.*

204. 203 F. Supp. 3d 615 (M.D.N.C. 2016).

205. The provision of the law at issue in *Carcaño*—the mandatory bathroom provision for transgender individuals—was repealed in 2017. *See* Camila Domonoske & James Doubek, *North Carolina Repeals Portions of Controversial "Bathroom Bill,"* NPR: The Two-Way (Mar. 30, 2017, 3:11 AM), https://www.npr.org/sections/thetwoway/2017/03/30/522009335/north-carolina-lawmakers-governor-announce-compromise-to-repeal-bathroom-bill [https://perma.cc/5JRX-E8R9].

state to use public bathrooms corresponding to their "biological sex."[206] While *Carcaño* found that the law likely violated Title IX's proscription against sex discrimination,[207] it did not hold that the law violated the Equal Protection Clause.[208] Finding that physiological differences (rather than unconstitutional sex stereotypes) justified the law, *Carcaño* cited to and quoted *Nguyen* at length,[209] favorably channeling *Nguyen*'s recognition that "[t]here is nothing irrational or improper in the recognition that at the moment of birth . . . the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father."[210]

Judicial reliance on *Nguyen—and specifically on* Nguyen*'s idea that maternal identity is always obvious and certain*—to justify transgender discrimination shows just how far the logic of maternal certainty and paternal uncertainty has traveled in the law, from the illegitimacy and unwed-fathers' rights cases to more recent decisions dealing with nonbiological mothers and transgender discrimination. It also shows that this logic has seeped into nonconstitutional settings, even though it originally emerged as a constraint on the constitutional rights of unwed fathers.

Consider in this regard the role that maternal certainty has played and, indeed, is playing in *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*,[211] the transgender discrimination case mentioned above currently before the Supreme Court. *R.G. & G.R. Harris Funeral Homes* addresses the question whether transgender discrimination constitutes impermissible sex discrimination under Title VII, not the Constitution.[212] Nevertheless, just as other bodies of constitutional doctrine have influenced interpretations of Title VII,[213] constitutional law's logic of maternal

206. 2016 N.C. Sess. Laws 3, §§ 1.2–1.3, *repealed by* 2017 N.C. Sess. Laws 4, § 1.

207. *See Carcaño*, 203 F. Supp. 3d at 639. When *Carcaño* was decided, the Department of Education interpreted Title IX to include transgender discrimination within that law's definition of proscribed sex discrimination. *See* Dear Colleague Letter on Transgender Students from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., & Vanita Gupta, Principal Deputy Assistant Att'y Gen. for Civil Rights, U.S. Dep't of Justice 2 (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/X9B6–3WZ8]. However, in 2017, the Department of Education rejected this interpretation. *See* Jeremy W. Peters, Jo Becker & Julie Hirschfeld Davis, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. Times (Feb. 22, 2017), https://nyti.ms/2lvgnF0 [https://perma.cc/DT4Z-9LQ6].

208. *See Carcaño*, 203 F. Supp. 3d at 645.

209. *Id.* at 642–43.

210. *Id.* (omission in original) (citing Nguyen v. INS, 533 U.S. 53, 68 (2001)).

211. No. 18–107 (U.S. argued Oct. 8, 2019).

212. *See* Brief for the Petitioner, *supra* note 11, at i.

213. *See, e.g.*, Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 349–52 (7th Cir. 2017) (stating, in holding that sexual orientation discrimination is impermissible sex discrimination under Title VII, that "[t]oday's decision must be understood against the backdrop of the Supreme Court's decisions, not only in the field of employment discrimination, but also in the area of broader discrimination on the basis of sexual orientation,"

certainty has emerged in the arguments made by *R.G. & G.R. Harris Funeral Homes*'s defendant-employer, who has contended that maternal certainty supports a reading of Title VII that limits that statute to prohibiting sex, but not gender identity, discrimination.[214] In a brief, the defendant-employer cited *Nguyen* for the proposition that "'[p]hysical differences between men and women' relating to reproduction—the very features that determine sex—are *not* 'gender-based stereotype[s].'"[215] The defendant-employer did so to support its argument that refusing to recognize an employee's sex and gender identity is not a Title VII violation, since "sex itself . . . is not a stereotype."[216] The defendant-employer's argument suggests that maternal certainty is not just a reproductive difference *associated with* sex, but the reproductive difference that *defines* sex. On this view, maternal certainty and paternal uncertainty lie at the heart of sex itself.

The deficiencies of the defendant-employer's argument are beyond the scope of this Article, but suffice it to say here that a constitutional idea *relating to unwed mothers, fathers, and sexual reproduction* is being deployed to support discrimination against a transgender employee for her gender identity. Somehow, the logic of maternal certainty has become the justificatory backdrop for discrimination against employees for their sex and gender presentation. Constitutional law's logic of maternal certainty has leached not only into nonconstitutional terrain, such as Title VII, but also into territory that bears little resemblance to the one in which that logic originally took root.

II. The Case for Constitutional Reform

Constitutional law's image of maternity warrants reform for several reasons. Constitutional maternity perpetuates stereotypes about men and women, generalizes about pregnant women, and is in tension with constitutional law's disestablishment idea. This Part considers each deficiency in turn.

A. *Constitutional Maternity Perpetuates Sex Stereotypes*

Constitutional maternity reflects and reproduces harmful stereotypes about mothers and fathers because it assumes that mothers have special relationships with their children that fathers lack, in large part

id. at 349, and citing cases like *Obergefell v. Hodges* in support of that idea, *see id.* at 349–50). *But see id.* at 372 (Sykes, J., dissenting) (faulting the *Hively* majority for "conflat[ing] the distinction between state action, which is subject to constitutional limits, and private action, which is regulated by statute," and for importing the "Due Process and Equal Protection Clauses" into its Title VII analysis).

214. *See* Reply Brief for Petitioner, *supra* note 11, at 5.

215. *Id.* (alterations in original) (quoting *Nguyen*, 533 U.S. at 68).

216. *Id.*

because of mothers' "certain" biological relationship to their children.[217] "An unwed mother's connection to her child is objectively apparent" through pregnancy and birth, the Utah Supreme Court reasoned in *In re Adoption of J.S.*, and her social relationship to her child is objectively established by her decision "to carry the child to term (and not ending [the pregnancy] by abortion or emergency contraception)."[218] "An unwed father's role," it continued, "is inherently different."[219]

Pregnancy alone, however, is insufficient "proof" of commitment,[220] as not all women bond with the genetically related child that they bear in the same way, notwithstanding their genetic and gestational attachments to that child; some women might never form a maternal bond at all.[221] Moreover, many fathers create significant attachments to their children,

217. Of course, not all women (or mothers) are presumed to be naturally maternal, as this assumption is itself dependent on racial and class priors. A rich body of scholarship explores and exposes how the law, including constitutional law, privileges, protects, and idealizes white and affluent mothers but disciplines, controls, and punishes mothers of color and economically disadvantaged mothers. *See, e.g.*, Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty 10 (Vintage Books 1999) (1997) (observing that "[c]ontrary to the ideal white mother, Black mothers had their own repertory of images that portrayed them as immoral, careless, domineering, and devious"); Khiara M. Bridges, *Privacy Rights and Public Families*, 34 Harv. J.L. & Gender 113, 116–17 (2011) (arguing that a Medicaid program designed to subsidize prenatal healthcare functions as a "gross and substantial intrusion by the government into poor, pregnant women's private lives," *id.* at 116); Michele Goodwin, *Prosecuting the Womb*, 76 Geo. Wash. L. Rev. 1657, 1664 (2008) (arguing that the law "polic[es] reproduction" through the uneven application of fetal drug laws to "the less sophisticated, less powerful members of society," and particularly "poor women of color"); Dara E. Purvis, *The Rules of Maternity*, 84 Tenn. L. Rev. 367, 431 (2017) (stating that "[m]any women . . . are seen as undesirable mothers," and that "any discussion of the rules of maternity must acknowledge that large numbers of women are told not to be mothers at all").

218. Bolden v. Doe (*In re* Adoption of J.S.), 358 P.3d 1009, 1030 (Utah 2014).

219. *Id.* at 1031; *see also In re* S.D., 250 So. 3d 1097, 1098–99 (La. Ct. App. 2018) (favorably citing *Adoption of J.S.* and *Lehr* for the proposition that state laws requiring unwed fathers to take affirmative steps to preserve their rights to biological children did not violate the Fourteenth Amendment and reasoning that "[a]n unwed mother's connection to her child is objectively apparent," *id.* at 1099, whereas an unwed father's connection is "inherently different," *id.*).

220. Future work by the author will explore this relationship between pregnancy and "proof" in the context of parentage disputes, the criminal law, and even employment law, where women's pregnancies often function as "proof" of behavior to which the employer might object on religious grounds (for example, premarital sex, artificial reproduction, surrogacy). On this latter point, see generally Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. Rev. 2083, 2135–40 (2017).

221. *See* Orna Donath, Regretting Motherhood: A Study (2017) (documenting the personal experiences of women who regret having children); Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. Cal. Rev. L. & Women's Stud. 133, 143 (1992) ("Not all women feel so passionately about their babies, and not all women feel immediately such intense emotions.").

sometimes after birth and sometimes in utero.[222] Witness the father in *Nguyen v. INS*, who raised his son in the United States from the time his son was six years old,[223] or the father in *In re Adoption of J.S.*, who tried to develop a relationship with his son but whose efforts were frustrated by the Utah Supreme Court on the barest of technical grounds.[224]

In addition, even assuming that maternal nonbonding and paternal bonding were exceptional circumstances—neither of which likely is, given the definition of "exceptional" as "unusual," "special," and "out of the ordinary"[225]—the Supreme Court has on numerous occasions suggested that the government engages in unconstitutional sex stereotyping when it treats men and women as types rather than as individuals.[226] This idea did much of the work in *United States v. Virginia*,[227] which suggested that the government violated the Constitution's antistereotyping principle by failing to recognize the exceptional woman (that is, the woman who could satisfy Virginia Military Institute's rigorous requirements) as well as the exceptional man (that is, the man who could not).[228] Sex discrimination decisions predating *Virginia* also support the notion that the government violates constitutional equality guarantees when it constrains individual men and women by treating them on the basis of generalities.[229] Professor Mary Anne Case refers to this principle as constitutional law's "sex-respecting rule," writing: "[T]he assumption at the root of the sex-respecting rule must be true of either all women or no

222. *See* Fontana & Schoenbaum, *supra* note 44, at 311 n.5 (listing authorities that discuss "prenatal attachment from both maternal and paternal perspectives").

223. *See* Nguyen v. INS, 533 U.S. 53, 57 (2001).

224. *See Adoption of J.S.*, 358 P.3d at 1011–12 (noting that the putative father failed to file a paternity affidavit within the time prescribed by state law).

225. *Exceptional*, Oxford English Dictionary (2d ed. 1989).

226. *See, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1692–93 (2017); United States v. Virginia, 518 U.S. 515, 550 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–25, 729–30 (1982); Craig v. Boren, 429 U.S. 190, 213 n.5 (1976) (Stevens, J., concurring).

227. 518 U.S. 515.

228. *Id.* at 550 (observing that a gender-inclusive "remedy must be crafted" for the fraction of women who "would want to attend [VMI] if they had the opportunity" and who "are capable of all of the individual activities required of VMI cadets" and "can meet the physical standards [VMI] now impose[s] on men" (alterations in original) (internal quotation marks omitted) (first quoting United States v. Virginia, 766 F. Supp. 1407, 1414 (W.D. Va. 1991); then quoting *id.* at 1412; and then quoting United States v. Virginia, 976 F.2d 890, 896 (4th Cir. 1992))). For Justice Scalia's criticism of this reasoning, see *id.* at 574 (Scalia, J., dissenting) ("There is simply no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance.").

229. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 139 n.11 (1994) ("[G]ender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization."); *Hogan*, 458 U.S. at 725; *Craig*, 429 U.S. at 198–99. For a case decided after *Virginia* that also stands for this idea, see *Morales-Santana*, 137 S. Ct. at 1692–93.

women or all men or no men; there must be a zero or a hundred on one side of the sex equation or the other."[230] On this view, the state engages in unconstitutional sex stereotyping when it fails to protect the exceptional case.[231]

To be sure, constitutional law's "antistereotyping principle" draws a distinction between unconstitutional sex stereotyping and "real" biological difference, the latter of which operates as a constitutionally adequate justification for sex discrimination.[232] Even here, though, the Court has cautioned against using presumed biological differences—even presumed

230. Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 Cornell L. Rev. 1447, 1449–50 (2000).

231. The idea that the Constitution protects the individual or exceptional case has shaped the Court's doctrine in other areas. For instance, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), exceptionality informed the Court's understanding of what the Constitution requires as a matter of due process. *See id.* at 887, 895 (plurality opinion) (striking down as an undue burden Pennsylvania's law requiring that a married woman notify her husband prior to procuring an abortion). There, the joint opinion rejected the state's contention that the spousal-notification law would have at most a de minimis effect since most married women would notify their husbands anyway, observing that constitutional "analysis does not end with the one percent of women upon whom the statute operates; it begins there," as well as that "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects." *Id.* at 894. *But see* Gonzales v. Carhart, 550 U.S. 124, 141–43, 167–68 (2007) (rejecting a facial constitutional challenge to a federal law criminalizing a certain method of abortion despite the lack of a health exception as required under *Casey* on the ground that most women would not need to use the abortion method prohibited by the law). For a critique of *Carhart*'s logic, see *id.* at 188–89 (Ginsburg, J., dissenting) (remarking that "[i]t makes no sense to conclude that this facial challenge fails because respondents have not shown that a health exception is necessary for a large fraction of second-trimester abortions, including those for which a health exception is unnecessary," since "[t]he very purpose of a health *exception* is to protect women in *exceptional* cases"). Exceptionalism has cut in less progressive directions in the Court's jurisprudence on race under the Equal Protection Clause, operating as a reason to condone discriminatory state action that is neutral on its face and to constrain official attempts to foster race equality through affirmative measures. For an example, see *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 730, 733–35 (2007) (striking down official programs designed to foster racial equality in public schools for failing to satisfy strict scrutiny's narrow tailoring requirement, *id.* at 733–35, and stating that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens *as individuals*, not as simply components of a racial, religious, sexual or national class," *id.* at 730 (alteration in original) (emphasis added) (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995))).

232. *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464, 471–73 (1981) (upholding a sex-specific statutory rape law by adverting to the uniqueness of pregnancy); Franklin, *supra* note 136, at 90 ("The Burger Court declined to apply the anti-stereotyping principle in domains where it had identified 'real' differences between the sexes, so in practical terms, the doctrine was limited. It failed to reach pregnancy, abortion, rape, and sexuality—areas where sex-role stereotyping was often strongest."); Siegel, *supra* note 100.

biological differences relating to pregnancy—as a pretext for laws grounded in sex stereotypes.[233] The "'[i]nherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on *an individual's* opportunity."[234] Maternal certainty is one such seemingly "inherent" pregnancy-based difference that shades quickly into a stereotype—that is, into an overbroad generalization that fails to see individuals as individuals.[235] While "it is a biological reality that a father need not be present at birth," the *In re Adoption of J.S.* dissent observed, "[i]t is not a biological reality that a woman is committed to the best interest of her child."[236]

On this latter point, return to *Grimes v. Van Hook-Williams*, which upheld as constitutional a state law that gave all birth mothers, but only certain alleged fathers, standing to rebut the marital presumption.[237] Moving seamlessly from an "at birth" situation (maternal certainty) to a "post-birth" situation (maternal caregiving), *Grimes* deployed the biological logic of maternal certainty ultimately to justify uneven parenting demands on mothers. That is, *Grimes* cited to *Nguyen* for the proposition that mothers and fathers were differently situated in terms of biology,[238] but in the next breath reasoned that maternal biology naturalized primary responsibility for children, even referring to the mother's singular caregiving role after birth as a "genuinely differentiating characteristic[]."[239] In so doing, *Grimes* obscured the fact that a mother's role as the

233. *See, e.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730–31 (2003) (observing that state regulation of pregnancy might reflect and perpetuate unconstitutional sex-role stereotypes reachable by Congress under section 5 of the Fourteenth Amendment); Franklin, *supra* note 136, at 160 (observing that cases like *Virginia* and *Hibbs* "suggest that the biological nature of pregnancy no longer immunizes reproductive regulation from skeptical scrutiny and that this form of regulation should arouse constitutional equality concerns when it reinforces stereotyped conceptions of motherhood and women's role in the family").

234. United States v. Virginia, 518 U.S. 515, 533 (1996) (emphasis added).

235. Part IV will argue that maternal certainty in an era of alternative reproduction and nontraditional family formation is *always* a stereotype, at least according to the Court's definition of an unconstitutional stereotype. *See infra* Subpart 2, pp. 110–11.

236. Bolden v. Doe (*In re* Adoption of J.S.), 358 P.3d 1009, 1043 (Utah 2014) (Nehring, J., dissenting).

237. 839 N.W.2d 237, 244 (Mich. Ct. App. 2013); *see supra* pp. 39–40.

238. *See Grimes*, 839 N.W.2d at 245 (citing Nguyen v. INS, 533 U.S. 53, 63 (2001)).

239. *Id.* (quoting Rose v. Stokely, 673 N.W.2d 413, 421 (Mich. Ct. App. 2003)). For another example of this slip from maternal biology to maternal caregiving, see *Caban v. Mohammed*, 441 U.S. 380, 405–06 (1979) (Stevens, J., dissenting). Justice Stevens stated that maternal certainty at birth means that after birth "the mother and child are together" whereas "[t]he father . . . may or may not be present," *id.* at 405, and that "it is virtually *inevitable* that from conception through infancy the mother will constantly be faced with decisions about how best *to care for* the child," *id.* at 406 (emphases added).

"primary caregiver" of her children, far from a "genuinely differentiating characteristic[]"[240] of women relative to men, is often a product of social conventions and sex stereotypes—the very conventions and stereotypes long shored up by the rhetoric and reasoning of maternal certainty.[241]

B. *Constitutional Maternity Generalizes About Pregnant Women (and Pregnant Persons)*

Constitutional maternity generalizes about pregnant women by assuming that pregnancy (as conduct) is inherent proof of motherhood (as status).[242] In this sense, constitutional maternity coincides with—indeed, may have given rise to—other legal discourses that "homologiz[e]"[243] pregnancy and motherhood in ways that do not fully capture the reality of pregnancy for all women.[244] One such discourse is abortion jurisprudence;[245] another is recent breastfeeding legislation and the reasoning that sustains it.[246] The automatic conflation of pregnancy and moth-

240. *Grimes*, 839 N.W.2d at 245.

241. Examples of that social convention abound. *See, e.g.*, Fontana & Schoenbaum, *supra* note 44, at 332–42 (discussing the various bodies of law, including constitutional law, that assume that "carework during pregnancy . . . whether biological or not" is women's work *before* birth, *id.* at 332–33). One prime example is just the kind of law upheld as constitutional in *Hassinger v. Seeley (In re Custody of J.J.S.)*, 707 N.W.2d 706 (Minn. Ct. App. 2006): a mother-specific custody statute, *see id.* at 709–10. That case, too, relied on *Nguyen* for constitutional support. *See id.* at 710 (citing *Nguyen*, 533 U.S. at 73). To be sure, many unwed mothers might very well desire primary custody of their children. The problem, however, is that the law automatically assigns all unwed mothers that responsibility regardless of whether they want it or not. Contrary to *Grimes*'s intuition, then, "the mother is usually the child's primary caregiver," *Grimes*, 839 N.W.2d at 245 (quoting *Rose*, 673 N.W.2d at 421), not because of nature, but because of law—the very law that is authorized and naturalized by the Constitution. *See, e.g.*, Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1204 n.124 (1992); Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 Yale L.J. 1669, 1704 (2000). Related to this point, Professor Serena Mayeri observes that a brief filed in *Fiallo v. Bell*, 430 U.S. 787 (1977), which upheld a paternal illegitimacy classification in immigration law on the basis of paternal uncertainty and maternal certainty, *see id.* at 797–99, argued that "eliminating the sex-based discrimination in the challenged [immigration] laws would actually benefit nonmarital mothers," who were effectively saddled with sole parental responsibility under those laws. Mayeri, *supra* note 49, at 2328 (citing Brief for Appellants at 24 n.17, *Fiallo*, 430 U.S. 787 (No. 75–6297)). Finally, for an analysis of this dynamic in the context of citizenship transmission laws, see Collins, *supra*, at 1704. There, the author explains that "[t]he legal default rule that mothers assume parental responsibility for nonmarital children generally serves as the 'reasonable' or 'substantial' justification for a concomitant allocation of parental rights: [o]ne sex-based legal rule is used to justify another." *Id.* (footnote omitted).

242. *See* Julia E. Hanigsberg, Essay, *Homologizing Pregnancy and Motherhood: A Consideration of Abortion*, 94 Mich. L. Rev. 371, 374, 394 (1995).

243. *Id.* at 374.

244. *See id.* at 374–79.

245. *See id.* at 391–97.

246. *See infra* pp. 59–60. *But see* Saru M. Matambanadzo, *Reconstructing*

erhood that occurs in these settings is harmful because it ascribes the responsibilities of parenthood to a person who may lack the intention to adopt that role. It also treats the pregnant person in reductive terms—as a synecdoche for motherhood rather than as a full person.

Consider *Roe v. Wade*,[247] which first established the constitutional abortion right,[248] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[249] which reaffirmed that right nearly twenty years later.[250] Both of those decisions repeatedly refer to women who seek to avoid motherhood through abortion as "mothers"[251] and conceptualize women's potential health needs in the abortion setting as needs relating to "maternal health."[252] Similarly, *Gonzales v. Carhart*,[253] a 2007 Supreme Court decision upholding the constitutionality of a federal law that criminalized an abortion method popularly known as "partial-birth abortion," referred to women who underwent this method of abortion as "mothers."[254] The Court's most recent abortion decision, *Whole Woman's Health v. Hellerstedt*,[255] is unusual in *not* referring to the pregnant woman seeking an abortion in a maternal lexicon. Rather, *Whole Woman's Health* refers to the woman who exercises her right to choose as a "woman."[256]

Pregnancy, 69 SMU L. Rev. 187, 226–27 (2016). Professor Saru Matambanadzo cites *Ames v. Nationwide Mutual Insurance Co.*, No. 11-cv-00359, 2012 WL 12861597 (S.D. Iowa Oct. 16, 2012), as a case that distinguished between lactation and breastfeeding. *See* Matambanadzo, *supra*, at 226–27. Matambanadzo explains that in denying the plaintiff's claim of nursing discrimination, "Judge Pratt noted that . . . a lactating mother[] may not even be a member of the class of persons protected under Title VII's prohibition against sex discrimination and pregnancy discrimination," since lactation is a "medical condition" that does not inherently involve breastfeeding. *Id.* at 227.

247. 410 U.S. 113 (1973).

248. *See id.* at 153.

249. 505 U.S. 833 (1992).

250. *Id.* at 846 (plurality opinion).

251. Hanigsberg, *supra* note 242, at 394 & n.101 (remarking that "[c]ourts frequently refer to the pregnant woman as a mother," *id.* at 394, and observing "this legerdemain in action" in *Roe* and *Casey*, *id.* at 394 n.101, as well as in "the context of so-called 'fetal protection' cases, in which a court is called upon to restrict a woman's behavior during pregnancy or to intervene forcibly on behalf of the intrauterine life," *id.* at 394). Hanigsberg notes that *Roe* referred to pregnant women in maternal terms "[forty-two] times" and *Casey* did so "[twenty-one] times." *Id.* at 394 n.101.

252. *See, e.g.*, *Casey*, 505 U.S. at 860 (plurality opinion); *Roe*, 410 U.S. at 163.

253. 550 U.S. 124 (2007).

254. *Id. at 160, 168. Carhart* also credited the statute with recognizing the fact that "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child." *Id.* at 159. For an analysis of the law's characterization of pregnant women seeking abortions as "mothers," see Khiara M. Bridges, *Capturing the Judiciary:* Carhart *and the Undue Burden Standard*, 67 Wash. & Lee L. Rev. 915, 930 n.55 (2010). Professor Khiara Bridges argues that "within the worldview" cultivated by *Carhart*, a woman seeking an abortion "is already a 'mother' by virtue of her pregnancy." *Id.*

255. 136 S. Ct. 2292 (2016).

256. *E.g.*, *id.* at 2311. The word "mother" does not appear pertinently in the

Of course, motherhood and abortion are not inherently incompatible, as women who seek abortions might very well consider themselves to be mothers for any number of reasons.[257] The problem, however, is that the law—including abortion rights landmarks—often affixes the label of "mother" on all pregnant women contemplating abortion, regardless of how they see themselves.

Consider also contemporary lactation law, which treats pregnancy and motherhood interchangeably.[258] In recent work, Professor Meghan Boone shows that lactation law sometimes prohibits nonmothers from publicly breastfeeding or expressing breast milk in the workplace.[259] In so doing, lactation law perpetuates the idea that previously pregnant women are presumptive mothers—but in reverse, by suggesting that only previously pregnant people who *are* mothers are entitled to the panoply of benefits associated with pregnancy. If under abortion logic all pregnant women are (and must be) mothers, then Boone's work shows that under lactation logic all previously pregnant people who are breastfeeding are (and must be) mothers, and not simply milk providers.[260]

Other examples exist of the law's treatment of pregnant women as presumptive mothers, and of its assumption that pregnancy as conduct and motherhood as a status are interchangeable.[261] The bigger point here

opinion.

257. For instance, in one study of the reasons why women seek abortions, twenty-nine percent of women reported a "need to focus on other children." *See* M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the U.S.*, 13 BMC Women's Health, no. 29, 2013, at 6. Additionally, a woman might seek an abortion in order to preserve her own health or because of either perceived or actual fetal issues. Surveys suggest, however, that most women obtain abortions for reasons other than either their own health or the health of the fetus. *See* Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Persp. on Sexual & Reprod. Health 110, 110 (2005); *see also* Biggs et al., *supra*, at 4–8.

258. *See* Meghan Boone, *Lactation Law*, 106 Calif. L. Rev. 1827, 1845–48 (2018).

259. *See id.* at 1850–51.

260. Such logic has often percolated through the Supreme Court's reasoning. For instance, in a dissent in *Stanley v. Illinois*, 405 U.S. 645 (1972), a landmark case extending parental rights to an unwed biological father, *id.* at 658, Chief Justice Burger remarked that the state did not violate equal protection by recognizing unwed biological maternity but not unwed biological paternity since "the biological role of the mother in carrying *and nursing* an infant creates stronger bonds . . . than the bonds resulting from the male's often casual encounter," *id.* at 665 (Burger, C.J., dissenting) (emphasis added). There, maternal certainty worked in conjunction with value-laden beliefs about breastfeeding, including the beliefs that all mothers breastfeed and that breastfeeding will necessarily create a bond that is different in kind from the other types of bonds that might exist between children and parents.

261. For an examination of the pregnancy/motherhood homology—and its disruption—in the criminal law, for example, see Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 Stan. L. Rev. 457, 485–91 (2013). Bridges explores the disconnect between the criminal law, which sometimes sees pregnancy as an injury in the context of rape, and cultural conceptions of pregnancy that regard it in monolithically positive terms. *See id.*

is that constitutional maternity—and its insistence that "*mater est quam gestation demonstrat* (by gestation the mother is demonstrated)"[262]—reflects and reinforces that assumption. That assumption has never held true in all circumstances—see, for example, the case of abortion—and is especially problematic in a world where the pregnant, or previously pregnant, person might not be a mother, but rather a surrogate or even a gestational father, as later Parts will address in greater detail.[263] Most important here, that assumption harms pregnant women and pregnant persons by treating them in partial terms and by assigning a role to them that they might reject.

C. *Constitutional Maternity Reflects and Reinforces the Traditional Family*

Constitutional maternity reflects and reinforces traditional ideas about sex (as an act), sexuality, and the family, and therefore is in tension with constitutional principles disfavoring sexual exceptionalism and heterosexism in familial and intimate life. For more than fifty years, federal constitutional law has witnessed the decline of different forms of sexual and heterosexual supremacy. This story begins with *Griswold v. Connecticut*,[264] *Eisenstadt v. Baird*,[265] *Roe v. Wade*,[266] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[267] all of which protected a right not to procreate. It continues with *Lawrence v. Texas*,[268] which held that sex does not need to be procreative—nor penetrative in a traditional heterosexual sense—to warrant constitutional shelter.[269] It culminates (so far) with the successful movement for marriage equality and its key

262. Hill, *supra* note 37, at 370.

263. The problematic nature of this assumption manifests in jurisdictions where intended mothers obtain prebirth orders declaring them, and not the surrogate, to be legal mothers *before* a child is even born. *See* Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 Fam. L.Q. 633, 634 (2005).

264. 381 U.S. 479, 481–82, 485–86 (1965) (holding that the Fourteenth Amendment's Due Process Clause protects a right to marital privacy that prohibits the government from criminalizing married persons' use of contraception).

265. 405 U.S. 438, 443, 453 (1972) (holding that the Fourteenth Amendment's Equal Protection Clause prohibits the government from treating single persons and married persons differently with respect to their decisions to use contraception).

266. 410 U.S. 113, 153–54 (1973) (holding that the Fourteenth Amendment's Due Process Clause limits the government's ability to infringe on a woman's right to decide whether or not to terminate a pregnancy).

267. 505 U.S. 833, 869 (1992) (opinion of O'Connor, Kennedy & Souter, JJ.) (upholding the right to abortion under the Fourteenth Amendment's Due Process Clause but permitting greater regulation of abortion by the state during the entire pregnancy).

268. 539 U.S. 558 (2003).

269. *Id.* at 563, 578 (striking down Texas's criminal sodomy law for violating the right to sexual autonomy under the Fourteenth Amendment's Due Process Clause).

decisional precedents, including *United States v. Windsor*[270] and *Obergefell v. Hodges*,[271] which rejected the idea that formal marriage requires heterosexual procreation in order to qualify as a fundamental right.[272]

These precedents collectively stand for the related propositions that neither sex nor marriage needs to be procreative (let alone sexually procreative) to receive constitutional protection. Some of them—particularly *Obergefell* but even earlier decisions like *Roe*—also support the argument that the Constitution protects procreation regardless of whether it occurs through sexual or alternative means.[273] Viewed together, they reject the idea that the Constitution establishes a singular vision of sex, marriage, and the family grounded in heterosexual, procreative sex.[274] They also suggest that constitutional liberty and equality guarantees work in synergistic ways to promote more egalitarian and pluralistic formulations of kinship.[275]

Constitutional maternity is in tension with constitutional law's "anti-establishment" principle in at least two ways.[276] First, constitutional maternity *reflects* sexual and heterosexual norms by assuming that only "[t]he mother carries and bears the child"[277] and that maternity is "rarely . . . in doubt"[278]—statements that channel a vision of procreation that is in equal parts sexual and heterosexual. Second, constitutional maternity *reinforces* sexual and heterosexual norms by working to curtail nonsexual, nonheterosexual parenthood. For instance, courts have invoked the constitutional mother to deny parental rights to nontraditional parents like same-sex couples.[279] In so doing, they establish traditional kinship even in a context where sexual reproduction is absent.

270. 570 U.S. 744, 752, 774 (2013) (striking down the provision of the Defense of Marriage Act that prohibited the federal government from recognizing same-sex marriage).

271. 135 S. Ct. 2584, 2604 (2015) (holding that same-sex marriage exclusions violate the Fourteenth Amendment's Due Process and Equal Protection Clauses).

272. *Id.* at 2601.

273. For a discussion of this possibility, see Courtney Megan Cahill, Obergefell *and the "New" Reproduction*, 100 Minn. L. Rev. Headnotes 1, 8–11 (2016); Courtney Megan Cahill, *Reproduction Reconceived*, 101 Minn. L. Rev. 617, 666 & n.248, 673–76 (2016); and Courtney Cahill, *Disestablishing the Mother*, Take Care (May 20, 2019), https://takecareblog.com/blog/disestablishing-the-mother [https://perma.cc/NQ6U-F8WU].

274. *See* Cahill, *Reproduction Reconceived*, *supra* note 273, at 681.

275. For analysis of the synergies between equality and liberty in Fourteenth Amendment jurisprudence, see Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1902–07, 1902 n.32 (2004).

276. For an explanation of the constitutional disestablishment idea, see sources cited *supra* note 61.

277. Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)).

278. Parham v. Hughes, 441 U.S. 347, 355 (1979) (plurality opinion).

279. *See, e.g.*, Turner v. Steiner, 398 P.3d 110, 115 (Ariz. Ct. App. 2017) (justifying

Even more, the law has deployed constitutional motherhood to sustain conventional gender identity. Recall the role that maternal certainty has played in the transgender discrimination context. There, advocates and courts have reasoned that transgender discrimination does not amount to impermissible sex discrimination because like the sex-specific proof-of-parentage requirement in *Nguyen*, laws that require people to use bathrooms associated with the sex they were assigned at birth simply "'take[] into account a biological difference' between men and women."[280] In concluding that a trans-discriminatory law was not based on improper stereotypes, one court emphasized the *Nguyen* Court's conclusion that "[t]here is nothing irrational or improper in the recognition that at the moment of birth . . . the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father."[281]

The fact that the unwed-father doctrine—stating that men and women are fundamentally different with respect to the obviousness of maternal identity relative to that of paternal identity—is now surfacing to justify transgender discrimination suggests that constitutional maternity habitually appears to establish not just the sexual and heterosexual family, but also the normative gender roles that render it possible. Because mothers and fathers are inherently different with respect to parenthood, the argument goes, it is legal to discriminate against someone for their perceived sex and gender nonconformity. The law of sex and gender discrimination begins with the family, notwithstanding the rich body of constitutional law that requires the family's disestablishment.

III. An Alternative Maternal Model

Constitutional law's idea of maternal certainty has grown stronger and more expansive over time, evolving from a "bloodless" justification for illegitimacy classifications[282] into a freestanding and independent justification for constitutionally challenged sex and gender discrimination both in and outside of parenthood. Constitutional law's idea of maternal certainty also warrants reform, tethered as it is to outmoded conceptions and stereotypes about sex, gender, parenthood, and the family.

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the state's refusal to extend a marital presumption to the wife of a birth mother by citing to *Nguyen* and its disquisition on maternal certainty), *abrogated by* McLaughlin v. Jones, 401 P.3d 492 (Ariz. 2017).

280. Carcaño v. McCrory, 203 F. Supp. 3d 615, 642 (M.D.N.C. 2016) (quoting Nguyen v. INS, 533 U.S. 53, 64 (2001)).

281. *Id.* at 642–43 (omission in original) (quoting *Nguyen*, 533 U.S. at 68).

282. Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 Calif. L. Rev. 1277, 1333 (2015) (referring to the illegitimacy cases that upheld illegitimacy classifications because of concerns relating to paternal proof as "relatively bloodless decisions").

This Part offers a model for reform: the vision of maternity unfolding today on the ground under state family law, which has had to grapple with maternity disputes arising from alternative reproduction and new forms of kinship. That maternity, referred to as "the new maternity," descriptively departs from constitutional law's paradigmatic mother: a singular and obvious woman in whom biological, social, and legal motherhood converge. It also offers a richer and more normatively satisfying account of motherhood than the one that dominates constitutional law, which remains grounded in regressive understandings of sex, gender, parenthood, and the family.

Of course, motherhood has always been less tidy and more complicated than constitutional law assumes, even before the advent of alternative reproductive technologies and novel family formation. Paternal uncertainty has been a cultural obsession at least since *Oedipus Rex*, but it bears remembering that Oedipus was just as mistaken about his mother, Jocasta, as he was about his father, Laius.[283] Uncertain maternity also concerned the writers of the first Book of Kings, which recounts the story of King Solomon and his solution to contested maternity,[284] and was a familiar literary device for eighteenth- and nineteenth-century writers captured by the idea of babies switched at birth, particularly during a time when the Industrial Revolution was destabilizing the traditional family.[285]

Furthermore, contested, disputed, complicated, or unknown maternity is not just the stuff of religion, myth, and fiction. In early twentieth-century America, contested maternity became a real phenomenon—and a litigated issue—as women increasingly opted for hospital rather than home births.[286] In her recent book on the history of paternity testing in the United States, Europe, and Latin America, Professor Nara Milanich recounts these American "baby swap" cases in fascinating detail, observing that the advent of hospital birthing destabilized the assumption that the woman who gave birth was a child's legal mother.[287]

283. *See* Sophocles, The Oedipus Cycle 65–75 (Dudley Fitts & Robert Fitzgerald trans., 1949). In the first play of Sophocles's trilogy, *Oedipus Rex*, Oedipus learns that he has married his mother (Jocasta) after killing his father (Laius). *Id.* at 62–63.

284. 1 *Kings* 3:16–28. Kings 3:16–28 relates the story of King Solomon's decision to divide a contested baby in half in order to determine the baby's true mother. The King determined that the real mother was the woman who begged him to spare her son by giving him to the other woman. *Id.* 3:26–27.

285. *See, e.g.*, Lori Merish, *Melodrama and American Fiction*, *in* A Companion to American Fiction 1780–1865, at 191, 192 (Shirley Samuels ed., 2004) (surveying this device in American fiction); *cf.* Ruth Perry, *Incest as the Meaning of the Gothic Novel*, 39 Eighteenth Century 261, 261–62, 264 (1998) (arguing that the prevalence of incest themes in numerous eighteenth-century texts is a reflection of the transformation of the family and rise of the middle class that were taking place at the time).

286. *See* Milanich, *supra* note 1, at 79–87.

287. *See id.*

"In law and culture, maternity was supposedly certain, empirically verifiable at the moment of birth," Milanich writes.[288] "Yet in the modern hospital nursery, this most intimate and indelible of ties could be severed forever by a moment of banal carelessness."[289]

As a more general matter, sexually produced children placed in adoptive families at birth might consider their biological mothers to be nonobvious, especially if the identities of their birth mothers are sealed upon adoption. Moreover, maternal fraud is technically possible by women; the majority opinion in *Glona v. American Guarantee & Liability Insurance Co.* in 1968 acknowledged as much when raising the possibility that its holding "[could] conceivably be a temptation to some to assert motherhood fraudulently."[290] Such a statement is hardly imaginable today in unwed-father doctrine, which assumes without reflection that maternity is "inherent[ly]" obvious and uncomplicated.[291]

Complicated even in a world of sexual reproduction, however, maternity has become especially complex in light of alternative reproduction and the new forms of kinship it enables.[292] Under the "new reproduction,"[293] maternal identity is complicated in many of the ways associated with paternity in constitutional law. For instance, under the new reproduction, maternity is sometimes "in doubt"[294] and sometimes

288. *Id.* at 82.

289. *Id.*

290. Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 76 (1968).

291. Nguyen v. INS, 533 U.S. 53, 64 (2001) (stating that "proof of motherhood . . . is inherent in birth itself").

292. While not the subject of this Article, the emerging alternative reproductive technologies that comprise the "new ART," or "second reproductive revolution," will render maternity even more contested and less obvious than it was under the old ART. *See* Cohen, *supra* note 38 (discussing the "second reproductive revolution"). One such technology, mitochondrial transfer, splits not genetic and gestational maternity, like surrogacy, but rather genetic maternity itself by allowing two women to combine different DNA from their eggs to form an embryo. *See* Reardon, *supra* note 39. Another technology is in vitro gametogenesis, which involves the creation of eggs and sperm through human stem cells known as "induced pluripotent stem cells," or "human iPSCs"; this process could allow a man to create an egg cell, and therefore to be a "mother" himself. *See* Greely, *supra* note 40, at 131–35; Sonia M. Suter, In Vitro *Gametogenesis: Just Another Way to Have a Baby?*, 3 J.L. & Biosciences 87, 88 (2016); Rachel Lehmann-Haupt, *Get Ready for Same-Sex Reproduction*, Medium: NEO.LIFE (Feb. 28, 2018), https://medium.com/neodotlife/same-sex-reproduction-artificial-gametes-2739206aa4c0 [https://perma.cc/6UB7–35KV] (stating that with in vitro gametogenesis a "mind-bending trick is . . . possible: that cells from a man could be turned into egg cells and cells from a woman could be turned into sperm cells").

293. *See, e.g.*, Dorothy E. Roberts, *Race and the New Reproduction*, 47 Hastings L.J. 935, 935 (1996) (referring to alternative reproduction as "the new reproduction"); *see also* Naomi Cahn, *The New Kinship*, 100 Geo. L.J. 367, 369 (2012) (describing the "new families" created by alternative reproduction).

294. Parham v. Hughes, 441 U.S. 347, 355 (1979) (plurality opinion) (implying that paternal identity is often "in doubt").

"difficult" to determine;[295] often, maternity is something that must be "gauged" by "measures"[296] other than pregnancy and birth—measures that include, but are not limited to, intent and conduct. Moreover, under the new reproduction, biological, social, and legal maternity might coalesce not in one woman, but in two.[297] Finally, under the new reproduction, statements like "[o]nly the mother carries the child,"[298] "a mother must be present at birth but the father need not be,"[299] and "[t]he mother is *the* only necessary actor at all stages of the process, from conception through pregnancy and delivery,"[300] are simply wrong.

This Part challenges constitutional law's assumption that maternity is obvious and uncomplicated because it exists in an easily ascertainable woman who is at once a biological, social, and legal mother. It does so by turning to family law—specifically, to parentage disputes that have arisen under state law as a result of alternative reproductive technologies and the "new kinship."[301] Subpart A looks at cases that have adjudicated the question of maternity in the surrogacy and co-maternity contexts, resolving it by looking alternatively at gestational labor, genetics, conduct, and intent. Subpart B turns to more recent statutory reform efforts, particularly the 2017 Uniform Parentage Act,[302] which at times dissociates gender, pregnancy, and birth entirely by referring to the person who gives birth as a gender-neutral "individual."[303] Subpart C considers state law addressing situations where the pregnant person is not a woman, as in the case of gestational fatherhood. Collectively, these Subparts challenge the factual assumptions that underlie constitutional maternity. They also offer a maternal model that—when compared to constitutional law's maternal paradigm—depends less on biology and is less saddled by sex and gender stereotypes.

This Part does not provide an exhaustive overview of the new maternity in every state; other scholars have already undertaken that valuable project.[304] Rather, this Part captures trends surrounding maternity and charts the broad contours of its evolution as a result of

295. Lalli v. Lalli, 439 U.S. 259, 269 (1978) (plurality opinion).

296. Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)); Helen G. v. Mark J.H. (*In re* Adoption Petition of Bobby Antonio R.), 175 P.3d 914, 924 (N.M. 2007) (quoting *Caban*, 441 U.S. at 397 (Stewart, J., dissenting)).

297. *See supra* note 292.

298. *Caban*, 441 U.S. at 404 (Stevens, J., dissenting).

299. Nguyen v. INS, 533 U.S. 53, 73 (2001).

300. Rose v. Stokely, 673 N.W.2d 413, 421 (Mich. Ct. App. 2003).

301. *See* Cahn, *supra* note 293, at 369 (using the phrase "the new kinship" to refer to the "new communities" and families made possible by alternative reproductive technologies like artificial insemination, gamete donation, and embryo donation).

302. Unif. Parentage Act (Unif. Law Comm'n 2017).

303. *See id.* § 201.

304. *See, e.g.,* NeJaime, *supra* note 34, at 2337–47.

alternative reproduction. Its principal objective in so doing is to unsettle constitutional law's insistence that maternity, unlike paternity, is "rarely, if ever, in question."[305]

A. *Decisional Law on Dual (or Dueling) Mothers*

Collaborative reproduction takes many shapes and has generated a number of legal disputes that have preoccupied courts for nearly five decades. The decisions featured here involve surrogacy and co-maternity disputes. Many of them involve women who have competing legal claims to the children who result from collaborative reproduction. All of them involve individuals pressing courts to recognize new forms of maternity through a variety of common law, statutory, and constitutional mechanisms. These decisions are as notable for their expansion of maternity as they are for their deployment of constitutional unwed-father doctrine to support that expansion.

1. Surrogacy

Surrogacy goes at least as far back as the Bible,[306] but became popular in the United States with the advent and eventual increased use of two first-wave alternative reproductive technologies: artificial insemination and in vitro fertilization.[307] In 1976, the renowned surrogacy lawyer and "undisputed father of surrogate motherhood"[308] Noel Keane negotiated the first recorded, uncompensated surrogacy contract.[309] While the practice of surrogacy during this early phase was not widespread,[310] it was very much in the public eye—as well as on legislators' minds.[311] Keane

305. Grimes v. Van Hook-Williams, 839 N.W.2d 237, 245 (Mich. Ct. App. 2013).

306. Bernstein, *supra* note 28, at 1107–08 (observing that "[s]urrogacy by natural means . . . was practiced since biblical times," *id.* at 1107, and that "[t]he [B]ible tells the story of three slaves . . . who gave birth and handed their children over to their mistresses," *id.* at 1107–08).

307. *See* Greely, *supra* note 40, at 46–53.

308. *See* Carol Sanger, *Developing Markets in Baby-Making:* In the Matter of Baby M, 30 Harv. J.L. & Gender 67, 83 (2007) (quoting James S. Kunen, *Childless Couples Seeking Surrogate Mothers Call Michigan Lawyer Noel Keane—He Delivers*, Time, Mar. 30, 1987, at 93).

309. *See* Van Gelder, *supra* note 56. A "typical" surrogacy agreement involved intended married parents and a woman who became pregnant through artificial insemination, *see id.*, and therefore the surrogate was genetically related to the child or children that resulted. This is known as "traditional surrogacy." *See* Bernstein, *supra* note 28, at 1114.

310. *See* Elisabeth Bumiller, *Mothers for Others*, Wash. Post (Mar. 9, 1983), https://www.washingtonpost.com/archive/lifestyle/1983/03/09/mothers-for-others/e6944450-f0ff-4174-a5c4–9e5ce916fbb4 [https://perma.cc/ZTC2–9TP6] (noting in 1983 that "[f]ewer than 100 babies have been born to American surrogate mothers in the last few years"). That said, surrogacy was certainly not negligible, either. *See id.* (describing the surrogacy industry that had taken hold in the United States by the early 1980s); *see also* Sanger, *supra* note 308, at 83–84 (same).

311. *See* Bumiller, *supra* note 310.

promoted surrogacy in national media outlets as well as in his 1981 book, *The Surrogate Mother*,[312] as did Elizabeth Kane—one of the first surrogate mothers[313]—who publicized her surrogacy in *People* magazine and on the enormously popular *Donahue* show.[314] Kane was not alone—other women also appeared on the *Donahue* show during the early 1980s to discuss their experiences with surrogacy.[315]

In addition, in 1983, journalist Elisabeth Bumiller published a lengthy lifestyle piece on surrogacy in *The Washington Post*.[316] In that article, Bumiller wrote, among other things, of the "[ten] surrogate-mothering agencies [then in existence] across the country,"[317] and of the "bills [that had] already . . . been introduced in Michigan and other states to either regulate [surrogacy] or ban it entirely."[318] She also provided intimate details about the experiences of three surrogates, one of whom remarked that she and the intended parent "talk about [the baby] as being [the intended mother's] baby, not my baby or our baby."[319]

As early as 1983, then, surrogacy had already started to complicate motherhood as a social, cultural, and legal category—notwithstanding the Supreme Court's statement *that same year* in *Lehr v. Robertson* that motherhood, unlike fatherhood, was an altogether easy matter.[320] Indeed, the Supreme Court itself was no stranger to surrogacy in 1983. Early that year, the Court denied a petition for certiorari in a Michigan surrogacy case,[321] one in which intended parents argued that Michigan's effective surrogacy ban violated the Federal Constitution's right to privacy as embodied in decisions like *Griswold v. Connecticut* and *Roe v. Wade*.[322] Invoking *Roe* to support a right to parenthood through surrogacy made some sense, as *Roe* not only reaffirmed an individual right to

312. Noel P. Keane & Dennis L. Breo, The Surrogate Mother (1981).

313. *See* Sarah Mortazavi, Note, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 Geo. L.J. 2249, 2250 (2012); Elizabeth Kane, *Surrogate Mother Elizabeth Kane Delivers Her "Gift of Love"—Then Kisses Her Baby Goodbye*, People (Dec. 8, 1980), http://www.people.com/people/archive/article/0,,20078051,00.html [https://perma.cc/V4AG-6UE6].

314. *See* Elizabeth Kane, Birth Mother: The Story of America's First Legal Surrogate Mother 75–80, 109–16 (1988). Following her experience as a surrogate and her public promotion of surrogacy, Kane published a book condemning it. *See id.*

315. *See, e.g.*, William Raspberry, *"Layaway Baby,"* Wash. Post (Feb. 4, 1983), https://www.washingtonpost.com/archive/politics/1983/02/04/layaway-baby/b1726515-a4c6–4a50–80b4–069ca3450643 [https://perma.cc/U593-BQRA].

316. Bumiller, *supra* note 310.

317. *Id.*

318. *Id.*

319. *Id.*

320. Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)).

321. Doe v. Kelley, 459 U.S. 1183, 1183 (1983), *denying cert. to* 307 N.W.2d 438 (Mich. Ct. App. 1981); *Doe*, 307 N.W.2d at 441 (upholding as constitutional a Michigan law applying sections of its adoption law to surrogacy).

322. *See Doe*, 307 N.W.2d at 440–41.

privacy but also explicitly suggested that alternative reproductive technologies—including "implantation of embryos, artificial insemination, and even artificial wombs"[323]—were relevant to certain constitutional questions, including the question of "what is life?" as well as, perhaps, the question of "who is a mother?"[324]

By the mid-to-late 1980s, surrogacy was no longer a completely novel social, cultural, or legal issue. In 1988, the New Jersey Supreme Court decided the nation's first high-profile surrogacy case, *In re Baby M*, in which the court unanimously held that a traditional surrogacy contract between intended married parents and a surrogate was void.[325] Just five years later, in 1993, the California Supreme Court upheld a surrogacy agreement in *Johnson v. Calvert*.[326]

Unlike *Baby M*, *Johnson* directly confronted the question of "who is a child's mother?,"[327] as the contract at issue therein involved gestational rather than traditional surrogacy,[328] as well as an intended mother who was genetically related to the child.[329] Upholding the contract under California's Uniform Parentage Act, the *Johnson* court reasoned that procreative intent was the tiebreaker between the competing maternal claims of two women who could equally establish parentage under the Act, one by virtue of giving birth and the other by virtue of her genetic connection to the child.[330]

Notably, *Johnson* invoked *Lehr v. Robertson* and other unwed-father decisions not to support the surrogate, but rather to support the genetic mother. This is contrary to what one might expect, given those decisions' emphasis on pregnancy and birth as the central meaning of motherhood.[331] *Johnson* reasoned that "certain language" in *Lehr* and

323. Roe v. Wade, 410 U.S. 113, 161 (1973). The *Roe* Court cited these alternative reproductive technologies to justify why it refrained from extending independent due process protection to potential life, lest the Court undermine the abortion right entirely. *See id.* at 159–62 (rejecting Texas's argument that life begins at conception in part because of technological advances that render the questions of "what is life" and "when does it begin" resistant to judicial resolution).

324. *See id.* at 159–61.

325. *In re* Baby M, 537 A.2d 1227, 1234 (N.J. 1988).

326. 851 P.2d 776, 777–78 (Cal. 1993).

327. That is, *Baby M* was a dispute between the child's biological father and the surrogate. *See Baby M*, 537 A.2d at 1237. *Johnson v. Calvert*, by contrast, was a dispute between two women who had equal claims to maternity under state law. *See Johnson*, 851 P.2d at 788 (Kennard, J., dissenting) (framing the issue in *Johnson* as "who . . . [a] child's legal mother" is when "a woman who wants to have a child provides her fertilized ovum to another woman who carries it through pregnancy and gives birth to a child").

328. Whereas traditional surrogacy uses artificial insemination, gestational surrogacy uses in vitro fertilization, and thus "both the ovum and the sperm . . . belong[] to the intended couple." Bernstein, *supra* note 28, at 1114.

329. *Johnson*, 851 P.2d at 778.

330. *Id.* at 781–82.

331. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983) (quoting Justice

other unwed-father cases "reinforces the importance of genetic parents' rights."[332] In so doing, *Johnson* drew at least an implicit analogy between *Johnson*'s genetic mother and *Lehr*'s unwed father, given that the "certain language" from unwed-father doctrine to which *Johnson* was referring applied to the importance of genetics for unwed fathers, not mothers.[333]

To be sure, *Johnson* was not an altogether radical decision. The court, for instance, rejected the possibility that a child could have two mothers under California law.[334] It also reasoned that procreative intent was a tiebreaker in that case only because the two women could both claim a biological connection to the child, one through birth and the other through genetics.[335] Had the intended mother used an egg donor, in other words, the surrogate might have prevailed—despite the lack of procreative intent.

Nevertheless, *Johnson* recognized something that the Supreme Court had rejected during this time (as it had for decades): that motherhood, like fatherhood, could sometimes be "difficult"[336] and open to question. *Johnson* went so far as to suggest that the very acts that had long constituted incontrovertible proof of motherhood for the Supreme Court—pregnancy and birth—had *never* been essential features of motherhood, even *before* alternative reproductive technologies had complicated maternity:

> It may be that the language of [California's] Uniform Parentage Act [which recognizes genetic as well as gestational maternity] merely reflects "the ancient dictum *mater est quam [gestation] demonstrat* (by gestation the mother is demonstrated). This phrase, by its use of the word 'demonstrated,' *has always reflected an ambiguity in the meaning of the presumption*. It is arguable that, while gestation may demonstrate maternal status, *it is not the sine qua non of motherhood*. Rather, *it is possible* that the common law viewed genetic consanguinity as the basis for maternal rights. Under this latter

Stewart's dissent in *Caban*, which discussed maternity in terms of pregnancy and birth).

332. *Johnson*, 851 P.2d at 786.

333. *See id.* That is, *Johnson* elaborated on the "certain language" from *Lehr* supporting the rights of genetic parents by quoting the section of *Lehr* that states: "The significance of the biological connection is that it offers *the natural father* an opportunity that no other male possesses to develop a relationship with his offspring." *Id.* (emphasis added) (quoting *Lehr*, 463 U.S. at 262).

334. *Id.* at 781 ("[F]or any child California law recognizes only one natural mother . . . .").

335. *See id.* at 782.

336. Lalli v. Lalli, 439 U.S. 259, 268–69 (1978) (plurality opinion) ("Proof of paternity . . . frequently is difficult," *id.* at 269, whereas "[e]stablishing maternity is seldom difficult," *id.* at 268.).

> interpretation, gestation simply would be irrefutable evidence of the more fundamental genetic relationship."[337]

While arguably replacing one form of maternal certainty (gestation) with another (genetics), the *Johnson* majority nevertheless reasoned about legal maternity in language that suggested that maternal status, *much like paternal status*, was open to legal question—something that had to be "demonstrated" just as paternity had to be "gauged."[338] The *Johnson* majority also rendered sex less relevant in parenthood by implicitly associating fathers and mothers through genetics, which is "itself not a sex-based reproductive difference."[339] In *Johnson*'s telling, the logic of maternity consolidated in Supreme Court doctrine on unwed fathers "[had] *always* reflected an ambiguity,"[340] and the self-evident indicators of motherhood from those decisions—pregnancy and birth—were not, in fact, the "sine qua non of motherhood."[341] "[T]he use of artificial reproductive techniques," *Johnson* concluded, merely "highlighted" an "ambiguity"[342] surrounding motherhood *that had always existed*.[343]

Since *Baby M* in 1988 and *Johnson* in 1993, surrogacy has surged in popularity and use,[344] leading to numerous cases across the country where courts have had to resolve the legal question of "who is a moth-

337. *Johnson*, 851 P.2d at 781–82 (third alteration in original) (emphases added) (quoting Hill, *supra* note 37, at 370 (footnotes omitted)).

338. *Lehr*, 463 U.S. at 260 n.16 (observing that a mother's relationship to her child was clear through gestation and birth whereas a father's relationship "must be *gauged* by other measures" (emphasis added) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting))). For analysis on how surrogacy during this time rendered maternity a "contested" and "contingent" legal category, see NeJaime, *supra* note 34, at 2302–03. NeJaime uses *Johnson* and other early surrogacy cases to conclude that "the emerging legal regulation of gestational surrogacy and egg donation made motherhood a *contested* biological, social, and legal status," *id.* at 2303 (emphasis added), and that "[w]ith the expansion of women's reproductive and parental options, motherhood became *contingent* on social factors," *id.* (emphasis added).

339. NeJaime, *supra* note 34, at 2326 (discussing jurisdictions where "[g]enetics—itself not a sex-based reproductive difference—can ground legal motherhood"). *Johnson* also pushed motherhood and fatherhood closer together as legal categories by suggesting that California's parentage act should be read in a gender-neutral way. *See Johnson*, 851 P.2d at 779 (stating that California parentage law "applies to *any* parentage determination, including the rare case in which a child's maternity is in issue").

340. *Johnson*, 851 P.2d at 781 (emphasis added) (quoting Hill, *supra* note 37, at 370).

341. *Id.*

342. *Id.* at 782.

343. *Id.* at 781.

344. Morgan Holcomb & Mary Patricia Byrn, *When Your Body Is Your Business*, 85 Wash. L. Rev. 647, 651 (2010) ("Surrogacy statistics are difficult to obtain, but the U.S. government conservatively estimates that more than 1000 births from surrogacy occur every year."). Moreover, "[i]n 2000, the CDC reported 1210 attempted gestational surrogacy arrangements, twice the number attempted just three years earlier." *Id.* at 651 n.14 (citing David P. Hamilton, *She's Having Our Baby: Surrogacy Is on the Rise as In-Vitro Improves*, Wall St. J., Feb. 4, 2003, at D1).

er?" In some jurisdictions, courts have favorably cited to *Baby M* and its exclusive focus on gestation as the legal determinant for motherhood, even in instances where the surrogate carried a child created with donor eggs.[345] At the other extreme is a jurisdiction like California, where courts after *Johnson* have conferred maternity on intended nonbiological mothers who were parties to gestational surrogacy agreements on the basis of procreative intent. Representative here is *In re Marriage of Buzzanca*,[346] a 1998 California Court of Appeal decision that held that a child conceived with donor gametes and a gestational surrogate was the legal child of the nonbiological intended parents who "initiated" the surrogacy contract.[347]

Increasingly, courts have steered a middle path by settling maternity in surrogacy cases on the basis of genetics, or on some combination of genetics and intent.[348] Intended genetic mothers have fared well in these jurisdictions, some of which have found that federal sex equality guarantees require the state to issue "declarations of maternity" on par with "declarations of paternity" in cases where intended mothers share a genetic relationship to a child born through gestational surrogacy. A New York court, for instance, recently rejected the State's reliance on *Nguyen v. INS* to justify the State's decision to place an intended genetic father, but not an intended genetic mother, on the birth certificate of a child carried by a gestational surrogate.[349] The State's gender discrimination, the

345. *See, e.g.*, A.G.R. v. D.R.H., No. FD-09–001838–07, 2009 N.J. Super. Unpub. LEXIS 3250, at *9–10 (Super. Ct. Ch. Div. Dec. 23, 2009) ("The lack of [a gestational surrogate's] genetic link to the twins is . . . a distinction without a difference significant enough to take the instant matter out of *Baby M*.").

346. Buzzanca v. Buzzanca (*In re* Marriage of Buzzanca), 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

347. *Id.* at 282. *Buzzanca* located maternity in the intended mother even though she lacked both a gestational and a genetic relationship to the child. *Id.* The court reasoned that California law must confer maternity on a married woman who consents to in vitro fertilization using donor gametes and gestational surrogacy with a third party, just as California law confers paternity on a husband who intends to conceive with his wife through alternative insemination with donor sperm. *Id.* In both cases, intent and consent, rather than biology, were the bases for legal parenthood. *Id.* at 286. Importantly, marriage also did considerable work in *Buzzanca* to shore up parental intent. *See* NeJaime, *supra* note 49, at 1211 (observing that "[m]arriage served as a way to understand and legally recognize the intent to parent" for the *Buzzanca* court).

348. For a survey and discussion of these jurisdictions, see NeJaime, *supra* note 34, at 2309. NeJaime observes that in most states, "[t]he gestational surrogate, who is not the legal mother when the intended mother is the genetic mother, is the legal mother when the intended mother uses a donor egg." *Id.* at 2309. He also notes that it is only "in a minority of states" that "surrogacy statutes and appellate decisions expressly recognize nonbiological mothers engaging in egg-donor gestational surrogacy as parents without requiring them to adopt their children." *Id.*

349. T.V. v. N.Y. State Dep't of Health, 929 N.Y.S.2d 139, 142, 152 (App. Div. 2011). The State there cited *Nguyen* for the proposition that "the biological differences between men and women in relation to the birth process cannot be disputed." *Id.*

court reasoned, amounted to "an impermissible gender-based classification between [mothers and fathers] *after* the birth of the child."[350]

Intended parents who fare less well in these genetic maternity-required surrogacy states include single men, same-sex male couples, and nonbiological intended mothers—none of whom can claim a genetic (or a gestational) connection to the child who results from third-party surrogacy. As NeJaime has shown, these jurisdictions continue to ground the legal family in biological mothers, replacing maternal gestation with maternal genetics.[351] Courts here struggle with the idea of biologically "motherless" families, as did a Texas court when declaring a gestational surrogate, rather than an intended biological father who was unmarried but partnered, to be the legal parent of twins born out of a surrogacy agreement.[352] "In essence," the court stated, "[the intended father] seeks a declaration that he is the sole parent and the children have no mother."[353]

In one sense, courts adjudicating maternity in genetic maternity-required surrogacy states are perpetuating the idea of maternal certainty even though the traditional indicators of that certainty—gestation and birth—have been replaced with a different indicator: genetics. As this Article has earlier argued, the biologically certain mother is so deeply rooted in the law's conception of motherhood that even in an alternative reproductive era, some courts struggle to envision the family in her absence.[354] The law has adapted to paternal uncertainty—and to the possibility of nongenetic paternity—through a number of mechanisms. For instance, the common law's paternal presumption has long recognized the social rather than biological aspects of fatherhood.[355] Similarly, vol-

at 142.

350. *Id.* at 152.

351. *See* NeJaime, *supra* note 34, at 2315 ("Same-sex couples, who are not similarly situated to different-sex couples with respect to biological parenthood, remain particularly vulnerable in a nonmarital parentage regime organized around biological connection.").

352. *In re* M.M.M., 428 S.W.3d 389, 392, 396 (Tex. App. 2014).

353. *Id.* at 392.

354. *See supra* pp. 24–29.

355. *See* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. Rev. 227, 229 (2006) (providing an example of a court applying the presumption that the person married to a child's mother is the father despite evidence that this person was not the genetic parent); Leslie Joan Harris, *A New Paternity Law for the Twenty-First Century: Of Biology, Social Function, Children's Interests, and Betrayal*, 44 Willamette L. Rev. 297, 297 (2007) (stating that historically "the legal father of most children was also the social father, the man who functioned as their father—their mother's husband," and that while "[t]his man was usually also their biological father, . . . even when he was not, few people were likely to know for sure"); NeJaime, *supra* note 34, at 2289 ("The marital presumption historically facilitated the parental recognition of men who were not in fact biological fathers.").

untary acknowledgments of paternity, recognized in all states,[356] might blossom into legal fatherhood notwithstanding DNA evidence indicating a mismatch between biological and legal paternity.[357] In many jurisdictions, however, the law continues to reach for a biologically obvious and certain mother to render kinship legible and complete.

In another sense, though, decisional law in genetic maternity-required surrogacy states challenges the notion of a basic and unchanging mother. Since its appearance in the illegitimacy and unwed-father cases, maternal certainty has never been an altogether lucid or stable concept. When the Supreme Court first invoked maternal certainty in the 1960s and 1970s, it was difficult to tell whether that logic captured the genetic certainty of the maternal relationship or the relational bond between mother and child made possible by pregnancy and birth (or both).[358] As the California Supreme Court noted in *Johnson v. Calvert*, the "ancient dictum . . . [that] by gestation the mother is demonstrated"[359] has always been ambiguous, appearing to refer to one thing—gestation—when it might easily have been capturing another: genetics.[360] This tension was also evident in *Nguyen v. INS*, which insisted that birth was the constitutionally relevant basis for maternity when federal law *at that exact time* indicated that maternity was produced through genetics.[361]

By choosing genetics over gestation as the defining feature of maternity, courts in genetic maternity-required surrogacy states are sharpening

356. *See* Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 Am. U. J. Gender Soc. Pol'y & L. 467, 469 (2012) (observing that "in all states, opposite-sex couples who cannot or do not wish to marry can establish the man as a child's legal father by signing a voluntary acknowledgment of paternity (VAP) and filing it with the state vital statistics office" and that such VAPs "have become the most common way to establish the legal paternity of children born outside marriage").

357. *See id.* at 480–82 (observing that "eight states have held that a VAP should not be vacated, despite evidence that the man was not the biological father," *id.* at 480–81, and that "a man who is not the biological father can still sign a VAP, since genetic testing cannot be required," *id.* at 482).

358. For instance, when Justice Stewart stated in *Caban v. Mohammed* that "[t]he mother carries and bears the child, and in this sense her parental relationship is clear," 441 U.S. 380, 397 (1979) (Stewart, J., dissenting), it was unclear whether by "parental relationship" he was referring to a mother's genetic connection to her children or to her gestational relationship to her children—or both. Justice Stevens later endorsed this language in *Lehr v. Robertson*, without clarifying what was meant by "parental relationship." *See* Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983) (quoting *Caban*, 441 U.S. at 397). The collapse of genetic maternity and gestational maternity into each other continued in *Nguyen v. INS*, where the majority appeared to suggest that women have social bonds with their children not necessarily because of gestation per se, but rather because of the genetic connection that gestation ostensibly guarantees. *See* Nguyen v. INS, 533 U.S. 53, 62 (2001).

359. Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993) (quoting Hill, *supra* note 37, at 370).

360. *Id.* at 781–82.

361. *See supra* pp. 26–27.

the contours of what maternity means. These states preserve the certain mother from the past, but at the same time clarify her in ways that disrupt one of the bases that initially rendered her distinctive: pregnancy. This alone is significant, as it shows that maternal meaning has shifted and evolved over time—even in those places where the law clings to the idea of a monolithic and unequivocal mother.

A 2018 surrogacy decision from the Iowa Supreme Court shows that surrogacy continues to shape and clarify the boundaries of motherhood, even decades after law's and culture's initial exposure to collaborative reproduction. Decided nearly thirty years to the day after *In re Baby M*, *P.M. v. T.B.*[362] upheld as statutorily and constitutionally valid a surrogacy agreement between a gestational surrogate and an intended father who used his sperm (and a donor's eggs) to conceive.[363] Unlike some of the other surrogacy decisions discussed so far, *P.M.* did not arbitrate between conflicting mothers and did not directly confront the question of "who" is a mother. Rather, *P.M.* was a parentage dispute between the intended genetic father and the gestational surrogate, the former of whom successfully asserted exclusive legal parentage of a baby born by the latter.[364]

Nevertheless, *P.M.* contributes to the question of "what makes a mother?" through negation when it lists the reasons why the surrogate in that case was *not* a legal mother. Unlike the surrogate in *Baby M*,[365] *P.M.* reasoned, the surrogate in *P.M.* was not "choosing to give up her own genetically related child."[366] In addition, the court then immediately noted that the surrogate's pregnancy and birth were the result of the "acted-on intention" of the intended parents, not that of the surrogate.[367] "But for the acted-on intention of the [intended parents]," the court stated, "[the baby] would not exist."[368]

Furthermore, the *P.M.* court rejected the surrogate's argument that enforcement of the agreement violated her federal due process and equal protection rights.[369] In an attempt to align herself with the paradigmatic mother from unwed-father doctrine, the surrogate cited to

362. P.M. v. T.B., 907 N.W.2d 522 (Iowa 2018).

363. *See id.* at 524–25, 540, 544.

364. *See id.* at 525. Though this issue was not before the court, *P.M.* suggested that Iowa, like other genetic maternity-required surrogacy states, did not consider the wife of the intended genetic father to be the mother of the child at birth because she lacked a genetic relationship to the child; as a nonbiological parent, the wife's sole route to legal parentage was through adoption. *See id.* at 536 ("When the intended mother is not the egg donor, she may replace the birth mother on a new certificate of live birth through a formal adoption.").

365. *See id.* at 534.

366. *Id.* at 537.

367. *Id.*

368. *Id.* Similar to *Johnson v. Calvert*, *P.M.* moved seamlessly between genetics and intention as indicators of parenthood—so seamlessly, in fact, that *P.M.* at least implicitly gestured toward a theory of parenthood by pure intention.

369. *See id.* at 542–43.

Lehr v. Robertson and *Nguyen v. INS*, contending that those decisions supported a finding of legal maternity in her favor given their emphasis on pregnancy and birth as inherent indicators of motherhood.[370] As the court explained: "[The surrogate] relies on *Lehr v. Robertson*, in which the United States Supreme Court stated, 'The mother carries and bears the child, and in this sense her parental relationship is clear.'"[371]

Rejecting the surrogate's analogy, *P.M.* reasoned that "*Lehr* dealt not with a surrogate mother but, rather, with a 'traditional' mother—the child's genetic parent. *Lehr* is distinguishable for that reason. The same is true for *Tuan Anh Nguyen v. I.N.S.*"[372] Rather than center motherhood on pregnancy and birth—as *Lehr* and *Nguyen* had done—*P.M.* centered it instead on genetic connection, observing that unwed-father doctrine "based . . . constitutional rights on the father's biological connection to the child, which here is superior to any parental interest claimed by the gestational surrogate."[373] In so doing, *P.M.* unbundled what unwed-father doctrine appeared to put together: genetics and gestation.

The surrogate in *P.M.* appealed the Iowa Supreme Court's decision to the U.S. Supreme Court, and in her petition for certiorari, she asked the Court for a "resolution" on the question of *Lehr*'s and *Nguyen*'s meaning.[374] Specifically, the surrogate asked: "Is a pregnant mother's interest in her actual relationship with the child she carries during pregnancy and after birth protected as a substantive due process liberty under the Fourteenth Amendment whether or not she is genetically related to the child?"[375] In October 2018, the Court denied her petition.[376]

Nevertheless, *P.M.* shows that fifty years after the law and culture were first introduced to surrogacy, and thirty years after the New Jersey Supreme Court confronted the question of who is a mother in *Baby M*, the question of motherhood remains a "difficult"[377] and complicated issue—despite constitutional doctrine's insistence that "the identity of the mother is rarely, if ever, in question."[378] Although the Supreme Court denied certiorari in *P.M.*, the fact that the Court was even asked in 2018 for a "resolution" on something that some Justices believed was "known with certainty"[379] is significant. It shows that constitutional motherhood

370. *See id.*

371. *See id.* at 542 (quoting Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting))).

372. *Id.* at 543.

373. *Id.*

374. Petition for a Writ of Certiorari at 26, T.B. v. P.M., 139 S. Ct. 125 (2018) (No. 17–1631).

375. *Id.* at i.

376. T.B. v. P.M., 139 S. Ct. 125.

377. Lalli v. Lalli, 439 U.S. 259, 265 (1978) (plurality opinion) (describing the question of paternity as "difficult").

378. Grimes v. Van Hook-Williams, 839 N.W.2d 237, 245 (Mich. Ct. App. 2013).

379. Caban v. Mohammed, 441 U.S. 380, 405 (1979) (Stevens, J., dissenting).

has never been self-evident, even before the practice of surrogacy threw its complexity into relief.

2. Co-maternity

Maternity also has evolved and taken new shape in alternative reproductive settings that involve two women having children within a preexisting relationship. Here, courts have pushed the boundaries of motherhood even more than in the surrogacy space by recognizing the concept of dual maternity under state parentage law—a concept considered, and rejected, by earlier decisions like *Johnson v. Calvert*.[380] Courts have done so not just by invoking a combination of factors relating to intent, conduct, and biology, but also by interpreting the unwed-father cases—which *consolidated* maternity in one monolithic and epistemologically certain mother—to support the *expansion* and *distribution* of maternity over more than one person.

Over the last two decades, courts have been considering co-maternity petitions on behalf of two women who, as part of a relationship, bear children together. In 1999, a San Francisco court granted a judgment of parentage recognizing as the legal parents of a child two women who jointly and intentionally participated in the child's creation, one as the egg donor and the other as the gestational carrier.[381] Since then, state courts have increasingly recognized legal parentage claims made by two women—even in the absence of biological connection—as a matter of state parentage law, state and federal constitutional law, or both.

For instance, in 2005, the California Supreme Court decided on the same day a series of cases that found that two women were the legal mothers of children born to them during an intact, marriage-like relationship. In one of them, *K.M. v. E.G.*,[382] the court extended legal parentage under California's parentage law to two women on the basis of biology,[383] limiting *Johnson v. Calvert*'s declaration that "for any child California law recognizes only one natural mother" to its facts.[384] In another, *Elisa B. v. Superior Court*,[385] the court found that a woman was the legal parent of twins born to her former partner even though she lacked a

380. *See* Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993) (rejecting the possibility of dual motherhood).

381. *See* NeJaime, *supra* note 49, at 1214 (describing this case as "the first of its kind").

382. K.M. v. E.G., 117 P.3d 673 (Cal. 2005).

383. In that case, one of the women carried and gave birth to twins created with the eggs of her partner. *Id.* at 680 (stating that one mother's "relationship with [children born to her partner] constitutes evidence of a mother and child relationship under" California's Uniform Parentage Act because she donated the eggs); *id.* (recognizing that the other mother was also a legal parent under California's Uniform Parentage Act through "birth").

384. *See id.* at 681 (quoting *Johnson*, 851 P.2d at 781).

385. 117 P.3d 660 (Cal. 2005).

biological connection to them.[386] Grounding maternity in intent and conduct, *Elisa B.* reasoned that the nonbiological mother was a legal parent because she demonstrated an intent to parent the twins (prior to conception)[387] and functioned as a parent prior to the dissolution of the couple's relationship.[388]

More recently, the Supreme Court of Florida held that state and federal due process and equal protection guarantees required the state to recognize two women as the legal mothers of a child born to them through collaborative reproduction.[389] That case, *D.M.T. v. T.M.H.*,[390] considered whether the former partner of a birth mother qualified as a legal parent under Florida law,[391] which at the time did not recognize dual maternity.[392] Opening the decision of a divided court by quoting *Lehr v. Robertson* and giving the nod to its recognition of the "constitutional protection" afforded the parent-child relationship,[393] the court held that the former partner qualified as a legal mother because she intended to become a parent with the birth mother,[394] functioned in a parental capacity before the relationship dissolved,[395] and, as the egg provider, was genetically related to the child.[396]

The *D.M.T.* majority squarely placed the genetic mother in the same position as the unwed father from *Lehr*, reasoning that she was a genetic parent who more than fulfilled a parental role "until her contact with her child was suddenly cut off."[397] It also implicitly rejected the dissent's invocation of the exclusive and obvious mother from the common law.[398] That is, reaching for the maternal certitude of a former era, the *D.M.T.* dissent cited a 1934 case that declared that "maternity is never

386. *Id.* at 662.

387. *See id.* at 670 (stating that the nonbiological mother "actively assisted [the biological mother] in becoming pregnant, with the understanding that they would raise the resulting children together").

388. *See id.* ("Having helped cause the children to be born, and having raised them as her own, [the nonbiological mother] should not be permitted to later abandon the twins simply because her relationship with [the biological mother] dissolved.").

389. D.M.T. v. T.M.H., 129 So. 3d 320, 327–28 (Fla. 2013).

390. 129 So. 3d 320.

391. *See id.* at 327.

392. *See id.* at 356 (Polston, C.J., dissenting).

393. *Id.* at 327 (majority opinion) (quoting Lehr v. Robertson, 463 U.S. 248, 256 (1983)).

394. *Id.* at 338 ("T.M.H. and her former partner D.M.T. demonstrated an intent to jointly raise the child . . . .").

395. *Id.* ("T.M.H. actively participated as a parent for the first several years of the child's life.").

396. *Id.* at 327, 338 ("In this case, the biological connection between mother and daughter is not in dispute." *Id.* at 338.).

397. *Id.* at 338.

398. *See id.* at 337 (crediting the genetic mother's invocation of the unwed-father cases to support her federal constitutional due process claim).

uncertain";[399] the dissent also rejected the possibility of "multiple motherhood."[400] By contrast, the *D.M.T.* majority recognized that maternal status—under both statutory *and* constitutional law—had evolved and shifted with "advancements in reproductive technology . . . that were not contemplated by society centuries or even decades ago."[401]

Courts in other jurisdictions also have extended legal maternity to women who have engaged in collaborative reproduction as a method of family formation based on a combination of intent, function, biology, and even contract.[402] For instance, recognizing that maternity determinations in an alternative reproductive age "can be more complicated than [they were] in the past,"[403] the Nevada Supreme Court recently elaborated on "[t]he *multiple* ways to prove maternity"[404] under state law—ways that line up with the "variety of ways" in which "[p]aternity may be established."[405]

Courts in other states have established dual maternity even in the absence of genetic maternity. They have done so by interpreting the marital presumption to apply to the wives of birth mothers,[406] by recognizing nonbiological, nonadoptive mothers as second mothers through the de facto parent doctrine[407] or "hold out" provisions in state law,[408] or

399. *See id.* at 355 (Polston, C.J., dissenting) (citing Gossett v. Ullendorff, 154 So. 177, 181 (Fla. 1934)).

400. *Id.* at 356 (alteration omitted) (quoting Michael H. v. Gerald D., 491 U.S. 110, 131 (1989) (plurality opinion)).

401. *See id.* at 338 (majority opinion).

402. *See, e.g.*, St. Mary v. Damon, 309 P.3d 1027 (Nev. 2013).

403. *Id.* at 1032.

404. *Id.* (emphasis added). In *Damon*, co-maternity was established through genetics, *see id.* at 1034, as well as through intent and contract, *see id.* at 1035–36 (accepting the argument that two mothers' "co-parenting agreement demonstrates the parties' intent regarding parentage and custody of the child," *id.* at 1035).

405. *Id.* at 1032.

406. *See, e.g.*, McLaughlin v. Jones, 401 P.3d 492, 498 (Ariz. 2017) (finding that federal equal protection guarantees required the state to extend the marital presumption to the wife of a birth mother); Wendy G-M. v. Erin G-M., 45 Misc. 3d 574, 593, 595–96 (N.Y. Sup. Ct. 2014) (applying New York's common law marital presumption to the wife of a birth mother).

407. *See, e.g.*, Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 491, 501 (N.Y. 2016) (finding that New York recognizes some rights attendant to legal parentage for nonbiological parents—like the nonbiological mother in that case—who "prove[] by clear and convincing evidence that [they] . . . agreed with the biological parent of the child to conceive and raise the child as co-parents," *id.* at 501); Rubano v. DiCenzo, 759 A.2d 959, 961, 968 (R.I. 2000) (permitting lower court to recognize de facto parental relationship for nonbiological mother in a same-sex relationship); *see also, e.g.*, V.C. v. M.J.B., 748 A.2d 539, 541–42, 555 (N.J. 2000) (recognizing a nonbiological mother in a same-sex relationship as a de facto mother); Carvin v. Britain (*In re* Parentage of L.B.), 122 P.3d 161, 163 (Wash. 2005) (same).

408. *See, e.g.*, Chatterjee v. King, 280 P.3d 283, 284, 286 (N.M. 2012) (finding that an adoptive mother's former same-sex partner qualified as a legal mother under the "hold out" provision of New Mexico's Uniform Parentage Act); *see also id.* (describing

by extending full legal maternity to second mothers through maternity proceedings analogous to paternity proceedings.[409] As one court stated, "paternity proceedings . . . should be made available to lesbian . . . mothers"[410] who intentionally engage in alternative reproduction to form a family, regardless of whether they are biologically connected to their children.[411]

Decisional law on co-maternity shows that the pathways to motherhood are "multiple"[412] and manifold, extending beyond gestation and birth and approximating many of the pathways traditionally reserved for fatherhood. Decisional law on co-maternity also shows that maternity, by some courts' own admission, "can be [as] complicated" as paternity.[413] In this sense, co-maternity law blurs the boundaries between mothers and fathers, renders sex or gender less relevant in the law of parenthood,[414] and challenges the idea—deeply embedded in constitutional jurisprudence—of a naturally given, "basic," and epistemologically unproblematic mother.

On this latter point, consider the way in which co-maternity law has simultaneously *relied on* the unwed-father doctrine surveyed in Part I and *unsettled* that doctrine—and to an even greater degree than has surrogacy law. Like surrogacy law, co-maternity law places genetic intended mothers in the same position as *Lehr*'s and *Nguyen*'s unwed genetic fathers in order to justify why genetic mothers are entitled to legal maternity as a matter of federal constitutional law. Unlike surrogacy law, however, co-maternity law invokes unwed-father doctrine not to replace one mother (the gestational mother) with another mother (the genetic mother), but rather to disperse and distribute maternity over multiple mothers. In so doing, co-maternity law disrupts a foundational premise of the very jurisprudence on which it relies: that maternity and paternity are not just different, but different because maternity, unlike paternity, is located in one obvious, certain, and easily identifiable woman.

Furthermore, co-maternity law demonstrates the flexibility of unwed-father doctrine in expanding the concept of motherhood. In the

New Mexico's hold out provision).

409. *See* A.F. v. K.H., 57 N.Y.S.3d 352, 357–58 (Fam. Ct. 2009) (finding that a nonbiological former partner of a birth mother qualified as a "parent" under New York law for all purposes because she intended to parent a child).

410. *Id.* at 358 (omissions in original) (quoting *In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 690 (Sur. Ct. 2009)).

411. *See id.* at 357.

412. St. Mary v. Damon, 309 P.3d 1027, 1032 (Nev. 2013).

413. *See id.* at 1032.

414. NeJaime makes a similar point when observing that courts that recognized gestational surrogacy agreements when intended mothers were genetically related to their children (as in *Johnson v. Calvert*) "cleaved the biological process of reproduction from the legal status of motherhood, thus weakening the justification for differences between motherhood and fatherhood." NeJaime, *supra* note 34, at 2305.

surrogacy context, courts have turned to unwed-father doctrine to *supplant* the gestational mother with a genetic mother.[415] By contrast, in the co-maternity context, courts have turned to unwed-father doctrine to *supplement* the gestational mother with the genetic mother. Judicial reliance on the same doctrine to achieve different varieties of maternity—heterosexual maternity (*Johnson*) and same-sex maternity (*D.M.T.*)—shows just how malleable that doctrine has become, shifting and evolving to adapt to the changing realities of parenthood generally and of maternity specifically—the very maternity assumed by unwed-father doctrine to be naturally given and incontestable.

To be sure, it is important not to overstate unwed-father doctrine's progressivism in state decisional law on either surrogacy or co-maternity. In both contexts, many courts have deployed that doctrine to reinforce the traditional biological family grounded in genetic motherhood.[416] Consider in this regard co-maternity cases that do not involve two biological mothers, where courts have invoked unwed-father doctrine to *deny* nonbiological mothers parental rights. For instance, *Russell v. Pasik*,[417] a recent Florida district court of appeal decision, relied on unwed-father doctrine to deny two children's nonbiological mother—and former partner of the children's biological mother—parental recognition on a de facto parent theory of parenthood.[418] In response to the nonbiological mother's claim that "her due process rights as a parent [were] being infringed upon by the [biological mother's] refusal of visitation,"[419] the *Russell* court cited *D.M.T.* for the proposition that "it is the *biological connection between parent and child*" that matters for federal constitutional purposes.[420]

At the same time, not all courts invoke *Lehr* to reinforce the traditional biological family. Some courts, in fact, have appeared to rely on *Lehr* to *support* nonbiological maternity.[421] Moreover, even when courts

415. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (deciding between two mothers). The Iowa Supreme Court in *P.M.* would also have been deciding between two mothers had the genetic father's wife in that case been genetically related to the child carried by the surrogate. *See* P.M. v. T.B., 907 N.W.2d 522, 525 (Iowa 2018).

416. *See supra* p. 79.

417. 178 So. 3d 55 (Fla. Dist. Ct. App. 2015).

418. *See id.* at 59–61.

419. *Id.* at 60.

420. *Id.* (citing D.M.T. v. T.M.H., 129 So. 3d 320, 338 (Fla. 2013)). *Russell* recognized that "parents who are involved in the process of raising a child most certainly have a protected and fundamental due process right in being a parent," even citing *Lehr* to support that idea. *Id.* (citing Lehr v. Robertson, 463 U.S. 248, 261 (1983)). Nevertheless, it ultimately fell back on genetic connection as a necessary condition of constitutional parenthood. *Id.*; *see also* Amy G. v. M.W., 47 Cal. Rptr. 3d 297, 308 (Ct. App. 2006) (invoking *Nguyen v. INS* to justify the state's refusal to extend a marital presumption to a nonbiological parent who was the wife of the biological father).

421. Take, for instance, *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000). There, the Rhode Island Supreme Court extended de facto parent recognition to a nonbiological

do rely on the more conservative aspects of unwed-father jurisprudence when extending parental rights to genetic mothers, they simultaneously weaken other aspects.

For instance, in relying on *Lehr* to recognize two mothers, *D.M.T.* disturbed *Lehr*'s idea of a single and monolithic mother. It also at least implicitly unsettled a different aspect of later unwed-father doctrine: its insistence that the Constitution does not recognize constitutional parenthood for two members of the same sex simultaneously.[422] In addition, in relying on *Lehr* to supplant the surrogate with a genetic mother (akin to *Lehr*'s genetic father), *Johnson* disturbed *Lehr*'s idea that mothers and fathers (and therefore women and men) are fundamentally different with respect to parenthood.

While not always viewed as paradigms of progressive family law, the Court's unwed-father decisions are being reworked on the ground in progressive ways to challenge unwed-father doctrine's foundational assumptions—and particularly its assumption that paternity and maternity are inherently different. Often, as these co-maternity and surrogacy decisions show, mothers and fathers are more similarly situated with respect to parenthood than the law assumes, *both because of and in spite of the constitutional jurisprudence that says otherwise*. Put differently, the body of family law addressing the new maternity uses the same constitutional doctrine that *creates space* between women and men to *narrow* the daylight between them.

B. *Proposed Statutory Reform: The 2017 Uniform Parentage Act*

Statutory developments in some states have kept pace with the changing meaning of motherhood enabled by alternative reproduction, with many states now recognizing as a matter of law the different

mother who was the former partner of the biological mother. *See id.* at 961, 968. *Rubano* did not directly confront the constitutional rights of the nonbiological mother. *See id.* at 961. Rather, it limited its constitutional analysis to whether the biological mother had a "constitutional liberty interest in exercising freedom of personal choice to prevent unwanted third parties from exercising parental rights with respect to her natural child," citing cases like *Lehr* for the proposition that "a biological parent who has never shouldered any responsibility for the rearing of that parent's biological child does not have a[n exclusive] constitutional right" over that child. *See id.* at 973. But in an intriguing recent analysis of *Rubano*, NeJaime suggests that "the court read constitutional dimensions into" the unwed-father decisions' protections "of parents who lack biological ties and are not married to the child's mother." NeJaime, *supra* note 47, at 330. On NeJaime's reading, *Rubano* deployed *Lehr* to reinforce not the traditional biological family, but an alternative nonbiological one. *See id.* at 330–31. If he is right, then unwed-father law has the capacity to facilitate not just nontraditional, genetic maternity (of the sort featured in *Johnson* and *D.M.T.*) but also nontraditional, nonbiological maternity (of the sort featured in the de facto parenthood cases).

422. *See* Michael H. v. Gerald D., 491 U.S. 110, 118–24 (1989) (plurality opinion) (choosing a married, de facto father over a biological, de facto father as the legal father of a child and observing that the Constitution does not recognize dual fatherhood).

varieties of maternity discussed so far by this Article.[423] Exemplary also is the 2017 Uniform Parentage Act (UPA), which could have significant effects on statutory definitions of maternity in the near future in at least three ways.[424]

First, the 2017 UPA expands *how* someone might become a mother under the law beyond pregnancy, birth, and genetics. It does so by "expressly" applying "most methods of determining parentage [recognized under prior Acts] . . . without regard to gender," and by "consolidat[ing] those methods into a single, gender-neutral list."[425] In so doing, the UPA recognizes that men *as well as* women can become parents by "[holding]" themselves "out" as legal parents even in the absence of a marital relationship to the birth parent or of a biological relationship to the child[426]—a route to legal parentage previously reserved for only men under the former UPA.[427] Similarly, the 2017 UPA recognizes that men *as well as* women can become parents through "voluntary acknowledgments of parentage"[428]—another route to legal parentage previously reserved for only men under the former UPA.[429] In addition, the 2017 UPA supplements birth as the sole route to legal maternity by recognizing that some women might become mothers through orders or judgments,

423. For an overview of states that now recognize de facto parentage, see Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 U. Colo. L. Rev. 941, 986–1011 (2019). For an overview of state surrogacy laws, see Alex Finkelstein et al., Columbia Law Sch. Sexuality & Gender Law Clinic, Surrogacy Law and Policy in the U.S. 8–11, 55 app. A (2016); and NeJaime, *supra* note 34, at 2376 app. E. It is important to note that scholars have also been integral to the flourishing of new forms of legal parentage, including new forms of legal maternity. *See, e.g.*, Am. Law Inst., Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.03(1)(c) (2002) (recognizing de facto parentage).

424. The 2017 UPA has already been adopted in full in two states. *See* Vt. Stat. Ann. tit. 15(c) (2017); Wash. Rev. Code § 26.26A (2019).

425. Courtney G. Joslin, Am. Bar Ass'n Section of Family Law, Uniform Parentage Act (2017): What You Need to Know 2 (2018); *see also* Unif. Parentage Act § 201 cmt. (Unif. Law Comm'n 2017) ("Most of the mechanisms for establishing parentage apply equally without regard to gender."); *id.* ("UPA (2017) merges into a single list what had been separate subsections for establishing the parentage of women and men.").

426. Unif. Parentage Act § 204(a)(2) (gender-neutral "holding out" provision).

427. *See, e.g.*, *id.* § 204(a)(5) (Unif. Law Comm'n 2002) ("A man is presumed to be the father of a child if[,] . . . for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.").

428. *Id.* § 301 (Unif. Law Comm'n 2017) ("A woman who gave birth to a child and an alleged genetic father of the child, intended parent under [Article] 7, or presumed parent may sign an acknowledgment of parentage to establish the parentage of the child." (alteration in original)).

429. *Id.* art. 3 cmt. (stating that "Article 3 of UPA (2002) referred only to the establishment of paternity through this administrative process," whereas "UPA (2017) makes Article 3 gender neutral and refers to the establishment of parentage through the acknowledgment process for an alleged genetic father, an intended parent, and a presumed parent, allowing Article 3 to apply to both men and women").

as when an intended mother receives "an order or judgment . . . declaring [her to be the mother of a child born by a gestational surrogate] . . . on the birth of the child."[430] All of these provisions show that birth is not a necessary condition of maternity, challenging the notion that having given birth is essential to maternity.[431] They also suggest that maternity can be "demonstrated"[432] through formal law and process (orders, judgments, acknowledgments) as well as through biology, just as paternity has long been "gauged" by nonbiological "measures."[433]

Second, the UPA expands *who* might qualify as a mother beyond the monolithic mother envisioned in constitutional jurisprudence, and even beyond the dualistic mothers discussed above. The UPA does so by recognizing that a child could have more than two legal parents—and therefore more than two mothers—in "rare circumstances."[434] Poly-parentage—and, by implication, poly-maternity—"is consistent with an emerging trend permitting courts to recognize more than two people as a child's parents,"[435] the comment to the UPA states.

Third, the UPA at times unsettles the link between pregnancy and maternity by referring to the person who gives birth as a gender-neutral "individual" or "person" rather than as a "mother" or even a "woman."[436] For instance, under its "gender-neutral list" addressing the "establishment"of a parent-child relationship,"[437] the UPA first lists "the *individual* [who] gives birth to the child."[438] To be sure, the UPA does not eliminate gender entirely, as other key provisions refer to the person who gives birth as a "woman."[439] Nevertheless, by using gender-neutral language at some points when discussing pregnancy, the UPA disaggregates sex from constitutional law's most relevant sex-based difference.

C. *Gestational Fathers*

Another on-the-ground development that complicates traditional maternity is the rise of transgender gestational fathers and nonbinary

430. *Id.* § 811(a)(1).

431. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 64 (2001) ("[P]roof of motherhood . . . is inherent in birth itself . . . .").

432. Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993) (quoting Hill, *supra* note 37, at 370).

433. Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)).

434. Unif. Parentage Act § 613 cmt. (Unif. Law Comm'n 2017).

435. *Id.*

436. *Id.* § 201(1) (referring to the "individual [who] gives birth to the child").

437. *Id.* § 201.

438. *Id.* § 201(1) (emphasis added).

439. *Id.* § 204(a)(1)(A) ("An individual is presumed to be a parent of a child if . . . the individual and the *woman* who gave birth to the child are married to each other and the child is born during the marriage." (emphasis added)). Use of the word "woman" rather than "individual" to refer to the individual who gives birth predominates throughout the statute.

pregnant persons, both of whom decouple sex, gender, and gestation. If alternative reproduction and the new parenthood destabilize the constitutional mother by showing that sometimes the woman who gives birth is not the mother, then gestational fatherhood and nonbinary pregnancy destabilize the constitutional mother by showing that sometimes the person who gives birth is not a woman.

Statistical data on the actual numbers of transgender and nonbinary pregnancies in the United States do not exist. That said, numerous unofficial sources, including "news reports, documentaries, social media list-serves and video-sharing sites," suggest that the "numbers of transgender individuals . . . seeking family planning, fertility, and pregnancy services could certainly be quite large."[440] That this might be so should come as no surprise. The numbers of self-identified transgender and nonbinary individuals have increased significantly in recent years,[441] likely as a result of growing cultural acceptance of transgender and gender-nonbinary people[442] and of the passage of more robust state[443] and federal[444] legal protections for them. In addition, young people make up the largest share of those who self-identify as trans or nonbinary,[445] and fewer trans

440. Juno Obedin-Maliver & Harvey J. Makadon, *Transgender Men and Pregnancy*, 9 Obstetric Med. 4, 4 (2016) (footnotes omitted). For one such unofficial social media source, see *Birthing and Breast or Chestfeeding Trans People and Allies*, Facebook, https://www.facebook.com/groups/TransReproductiveSupport [https://perma.cc/GPX9-NAP9]. *See also* Clarke, *Pregnant People?*, *supra* note 45, at 179 ("Media coverage characterizes the 'pregnant man' as a rare phenomenon, but a number of indicators suggest pregnant transgender men are not so unusual.").

441. The out adult trans population in the United States has more than doubled in the last ten years to 1.4 million. *See* Andrew R. Flores et al., The Williams Inst., How Many Adults Identify as Transgender in the United States? 2 (2016), https://williamsinstitute. law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf [https://perma.cc/KD9B-549D].

442. For a discussion of the increased visibility of nonbinary and gender-queer identities in culture, see Clarke, *They, Them, and Theirs*, *supra* note 45, at 898–99 ("Nonbinary gender identities are not new, but media attention to nonbinary people in the United States has increased significantly since 2015." *Id.* at 898 (footnote omitted).).

443. For a recent overview of state protections for gender identity in employment and public accommodations, see Karen Moulding & Nat'l Lawyers Guild, 1 Sexual Orientation and the Law § 10:7 (2019).

444. More federal courts are recognizing transgender discrimination as impermissible sex discrimination under both Title VII and Title IX. *See, e.g., EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 574–75 (6th Cir. 2018) (holding that transgender discrimination amounts to illegal sex discrimination under Title VII), cert. granted, 139 S. Ct. 1599 (2019); Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049–50 (7th Cir. 2017) (holding that gender-identity discrimination is impermissible sex discrimination under Title IX); see also Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding that discrimination on the basis of transgender identity is illegal sex stereotyping under the Fourteenth Amendment's Equal Protection Clause).*

445. *See* Clarke, *They, Them, and Theirs*, *supra* note 45, at 909.

and nonbinary people are opting for hormonal and surgical interventions, like hysterectomies, that would render them incapable of pregnancy.[446]

It is important not to overstate legal and cultural gains in the area of transgender and nonbinary gender rights. Transgender and nonbinary people continue to be targets of discrimination in all areas, including in sports,[447] medicine,[448] education,[449] the armed forces,[450] the family,[451] and employment.[452] As the transgender community becomes more pub-

446. *See* Clarke, *Pregnant People?*, *supra* note 45, at 179 ("In the 2015 U.S. Transgender Survey, only fourteen percent of transgender men and two percent of nonbinary individuals reported having had a hysterectomy." (citing Sandy E. James et al., Nat'l Ctr. for Transgender Equal., The Report of the 2015 U.S. Transgender Survey 101 figs.7.12 & 7.13 (2016), https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF [https://perma.cc/YDN4–2L6T])). This shift is likely due in part to the fact that states no longer require surgical interventions before recognizing legal changes on birth certificates and other formal documents. *See, e.g.*, Sonia K. Katyal & Ilona M. Turner, *Transparenthood*, 117 Mich. L. Rev. 1593, 1596 (2019) ("State legislatures and courts across the country have lowered barriers to obtaining legal recognition by, for example, removing the requirement that a person undergo surgery before they can change the gender marker on a driver's license.").

447. *See, e.g.*, Julie Moreau, *Dozens of Anti-LGBTQ State Bills Already Proposed in 2020, Advocates Warn*, NBC News (Jan. 23, 2020, 1:26 PM), https://www.nbcnews.com/feature/nbc-out/dozens-anti-lgbtq-state-bills-already-proposed-2020-advocates-warn-n1121256 [https://perma.cc/7PV3-F5DC] (discussing state bills that would prohibit transgender athletes from competing in their self-identified gender category by basing athletes' competition category on their sex assigned at birth).

448. *See, e.g.*, Julie Bosman & Mitch Smith, *Doctors Could Face Criminal Charges for Treating Transgender Teens*, N.Y. Times (Jan. 27, 2020), https://nyti.ms/2t4YBko [https://perma.cc/N5QC-9UBV] (reviewing bills proposed in South Dakota and elsewhere that impose criminal liability on doctors providing healthcare services such as puberty-blocking medication or transgender surgery to young transgender patients). Following the publication of this *New York Times* article, the bill passed in South Dakota's House of Representatives, but it ultimately failed in the Senate. *See* Devan Cole, *Bill Banning Gender Reassignment Treatments for Transgender Youth Fails in South Dakota*, CNN (Feb. 10, 2020, 7:31 PM), https://www.cnn.com/2020/02/10/politics/transgender-health-bill-fails-south-dakota/index.html [https://perma.cc/7XJJ-TWWH].

449. *See, e.g.*, Dear Colleague Letter from Sandra Battle, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., & T.E. Wheeler II, Acting Assistant Attorney Gen. for Civil Rights, U.S. Dep't of Justice (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf [https://perma.cc/68M3-QJLE] (withdrawing Obama-era protections extended to transgender students in public schools under Title IX).

450. Several federal courts enjoined the implementation of Trump's transgender service ban, al-though the ban went into effect last year when the Supreme Court lifted those courts' preliminary injunctions. *See* Trump v. Karnoski, 139 S. Ct. 950 (2019) (mem.); Trump v. Stockman, 139 S. Ct. 950 (2019) (mem.).

451. *See, e.g.*, Katyal & Turner, *supra* note 446, *passim* (reviewing and critiquing custodial decisions that discriminate on the basis of a transgender parent's gender identity and gender transition).

452. The Department of Justice has argued that sex discrimination laws like Titles VII and IX do not protect transgender individuals from discrimination, though courts, including circuit courts, have increasingly held otherwise. *Id.* at 1596–97. Most

lic and wins legal victories in one domain, it suffers devastating defeats in others.[453] In addition, transgender and nonbinary people are frequent victims of disgust,[454] alienation, and homicidal violence,[455] and are much more likely to commit suicide than the average person is.[456] Gestational fathers in particular experience significant amounts of revulsion and ridicule, as did Thomas Beatie, the first public "pregnant man,"[457] and Wyley Simpson, a transgender man who said he experienced some "abuse" when he decided in 2018 to carry through with an unintended pregnancy.[458]

Nevertheless, states are starting to grapple with gestational fatherhood in ways that suggest a willingness to think about pregnancy as a status decoupled from sex or gender. For instance, in 2014, an Arizona appeals court reversed a lower court decision that refused to find that a transgender man—Thomas Beatie—was legally male under Arizona law.[459] Even though Beatie had changed his birth certificate in Hawaii to male following a "sex change operation,"[460] and even though he had

states do not list gender identity as a protected status in their employment discrimination statutes. *See State Maps of Laws & Policies*, Hum. Rts. Campaign, https://www.hrc.org/state-maps/employment [https://perma.cc/N6L3-XK5T].

453. *See, e.g.*, Jennifer Finney Boylan, Opinion, *The First Time I Said, "I'm Trans*," N.Y. Times (Jan. 22, 2020), https://nyti.ms/3aHIaeS [https://perma.cc/3WNK-A3F3] (observing that while "[i]t is awesome to think of how far" transgender people like Boylan "have come," "it's also scary . . . [b]ecause now that we're on the radar, conservatives (and others) have developed a new language with which to demonize us").

454. Patrick R. Miller et al., *Transgender Politics as Body Politics: Effects of Disgust Sensitivity and Authoritarianism on Transgender Rights Attitudes*, 5 Pol. Groups & Identities 4, 7–8 (2017); *LGBT Politics and the Impact of Disgust*, U. Mich. Inst. for Soc. Res., https://isr.umich.edu/news-events/insights-newsletter/article/lgbt-politics-impact-disgust [https://perma.cc/EBH7-N5H8] (featuring empirical research investigating the relationship between disgust and transgender-discriminatory policies).

455. Transgender women of color are especially vulnerable. *See* Rick Rojas & Vanessa Swales, *18 Transgender Killings This Year Raise Fears of an "Epidemic*," N.Y. Times (Sept. 30, 2019), https://nyti.ms/2mdsCuR [https://perma.cc/YCV5-VTCY].

456. *See* James et al., *supra* note 446, at 114 (reporting that the lifetime attempted suicide rate for surveyed transgender individuals is nearly nine times that of the general population).

457. *See* Amel Alghrani, Regulating Assisted Reproductive Technologies 229 (2018) (recounting the media's "pejorative responses" to Beatie when he went public, including David Letterman's description of Beatie as an "androgynous freak show" and other public figures' comments that Beatie was "disgusting" and "useless" (quoting Alex Blaze, *Hate Starts Rolling In for Thomas Beatie*, Bilerico Project (Apr. 5, 2008, 3:36 PM), http://bilerico.lgbtqnation.com/2008/04/hate_starts_rolling_in_for_thomas_beatie.php [https://perma.cc/74ZY-S3MR])).

458. Char Adams, *Transgender Man Opens Up About Being Pregnant, Giving Birth: "I Had to Deal with a Lot of Stigma*," People (Mar. 7, 2019, 1:59 PM), https://people.com/human-interest/wyley-simpson-pregnant-man-baby-boy-texas [https://perma.cc/Y7QM-CX3T].

459. Beatie v. Beatie, 333 P.3d 754, 757, 760 (Ariz. Ct. App. 2014).

460. *Id.* at 758.

married a woman in Hawaii,[461] the lower court held that Beatie was still legally female and thus in an invalid same-sex marriage (in Arizona in 2014) because he carried and gave birth to the couple's children.[462] Reversing that decision, the Arizona appeals court found that Beatie's marriage was valid in Arizona because it was "'valid by the law of the place where contracted,' as reflected by the issuance of the marriage license by the State of Hawaii."[463]

Although the appeals court decision in *Beatie v. Beatie*[464] turned principally on full faith and credit, it also addressed some of the broader issues related to sex and pregnancy that are implicated by gestational fatherhood. For instance, the court observed that as a matter of fact, "there is no apparent basis . . . for the proposition that in the event Thomas gave birth after having modified his gender designation, it would have abrogated his 'maleness,' as reflected upon the amended birth certificate."[465] In addition, the court suggested that as a matter of constitutional law, the state likely could not condition a birth certificate amendment on an individual's agreement to forgo the right to procreate. "Arizona's statute [addressing sex amendments] does not require specific surgical procedures be undertaken or obligate the applicant to forego procreation," the court observed.[466] In a footnote, the court suggested that if Arizona did the latter—"obligate the applicant to forego procreation"—Arizona would likely violate the applicant's right to have children, "a liberty interest afforded special constitutional protection."[467]

Where *Beatie* considered whether gestational fatherhood changes the father's sex designation on his own birth certificate, other states have considered whether gestational fatherhood affects the father's status on his children's birth certificates. Representative here is California, which now uses the gender-neutral term "parent" on all birth certificates, and which gives parents the choice to identify as "mother," "father," or "parent" on those certificates.[468] Similarly, Illinois today allows parents to identify in the gender of their choosing on their children's birth certificates.[469] A few months ago, the state refused to recognize a gestational

461. *Id.* at 756.

462. *Id.* at 756–57.

463. *Id.* at 760 (quoting Ariz. Rev. Stat. Ann. § 25–112(A) (2020)).

464. 333 P.3d 754.

465. *Id.* at 759.

466. *Id.*

467. *Id.* at 759 n.10 (citing Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942)).

468. Rich Vaughn, *New CA Birth Certificate Law Allows LGBT Parents to Identify as Mother, Father, Parent*, Int'l Fertility L. Group (Sept. 25, 2014, 4:07 PM), https://www.iflg.net/new-ca-birth-certificate-law-allows-lgbt-parents-to-identify-as-mother-father-parent [https://perma.cc/E5JN-FLUC].

469. *See* Nara Schoenberg, *In a First for Illinois, Transgender Man Who Gave Birth Will Be Listed as the Father on His Baby's Birth Certificate*, Chi. Trib. (Jan. 14,

father as a father on his child's birth certificate, informing him prior to the child's birth that Illinois would identify him as the child's mother because he was the gestational parent.[470] The state also informed the mother, a transgender woman, that Illinois would identify her as the child's father.[471] After Lambda Legal challenged the misgendering of the parents in an advocacy letter to the state, the state reversed course, identifying the mother and father in their correct sex categories on their daughter's birth certificate shortly after she was born.[472] Illinois has signaled a commitment to respecting parents' self-identification on their children's birth certificates moving forward.[473]

IV. The New Maternity

Family law's conception of maternity in an alternative reproductive era—what this Article calls the new maternity—is not perfect. It sometimes reenacts the most traditional aspects of constitutional maternity, like its obsession with maternal biology.[474] It also reinforces—even while simultaneously pushing back on—some of the sex and gender differentiation associated with constitutional maternity.[475]

Nevertheless, the new maternity is a good starting point for reforming constitutional law's paradigm of motherhood. The new maternity better captures today's maternal pluralism. It also has the potential to counteract some of the most regressive features of constitutional maternity, like its automatic conflation of pregnant women and mothers[476] and its stereotypic assumptions about male and female parenting.[477] In addition, the new maternity shows that men and women are more similar with respect to certain aspects of parenthood than constitutional maternity presumes. In so doing, the new maternity casts doubt on legal regimes that justify sex, sexual orientation, and gender-identity discrimination by adverting to constitutional law's certain and monolithic mother and distinguishing her from constitutional law's uncertain and fragmented father.

For all of these reasons, this Part contemplates how the new maternity might trickle up from the family law domain where it has largely

2020, 11:02 AM), https://www.chicagotribune.com/lifestyles/ct-life-first-transgender-birth-certificate-tt-01132020–20200114-qfbbf3dvufhppid5shjru6l5xu-story.html [https://perma.cc/49YZ-FKAN].

470. *See id.*

471. *See id.*

472. *See id.*

473. *See id.*

474. *See supra* p. 44 (discussing the law in many states that requires intended mothers who are parties to gestational surrogacy agreements to have a genetic relationship to the child in order for the agreement to be upheld).

475. *See* NeJaime, *supra* note 34, at 2330 (discussing how the genetic maternity–surrogacy requirement reenacts gender differentiation in parenthood law).

476. *See supra* Subpart B, pp. 54–56.

477. *See supra* Subpart A, pp. 47–51.

resided and unsettle constitutional maternity, with its hidebound ideas about motherhood, parenthood, sex, and gender.

Trickle-up maternity is not a radical idea. In some ways, trickle-up maternity has already happened, and is an accurate depiction of how constitutional law is made. What is significant, though, is the impact that trickle-up maternity could have on the law writ large. Trickle-up maternity could *expand* the constitutional status of motherhood to make it more inclusive of the new maternity. It could also *contract* the presumed differences between mothers and fathers (and women and men) that currently exist under constitutional maternity and its sex-based logic of reproductive difference.

A. *Trickle-Up Maternity*

Trickle-up maternity—or the notion that family law's more pluralistic and inclusive maternity might unsettle constitutional law's more monolithic and exclusive maternity—is not a radical idea. To some degree, it has already happened. Even more, trickle-up maternity accurately reflects the way in which constitutional law is made.

Part III has shown that state family law on the new maternity has already altered the federal constitutional mother. Unwed-father jurisprudence establishes a singular and monolithic mother whose meaning is self-evident through pregnancy and birth, and in whom biological, social, and legal parenthood converges. Courts addressing the new maternity, however, have relied on that jurisprudence to locate maternity in something other than pregnancy and birth, and to disperse biological, social, and legal maternity over more than one mother. In addition, unwed-father jurisprudence assumes that mothers and fathers are inherently different with respect to all aspects of maternity and paternity. Courts addressing the new maternity, however, have relied on that jurisprudence to *narrow* the differences between mothers and fathers—in a way that the unwed-father doctrine's logic of biological and reproductive difference would appear to resist.

The fact that the new maternity evolved from doctrine on the old maternity suggests that there is space for thinking about how unwed-father doctrine might help to generate, rather than stymie, a progressive vision of sex and the family. The Court's unwed-father decisions were progressive in the sense that they eliminated formal marriage as the sole constitutional basis of fathers' parental rights,[478] established that sometimes the constitutional rights of men and women were equal,[479] and

478. Importantly, in later unwed-father decisions, the Court reestablished marital fatherhood as the constitutionally superior form of legal parenthood for men. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 128–29 (1989) (plurality opinion) (ranking the constitutional rights of married, nonbiological fathers above those of unmarried, biological fathers).

479. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 382 (1979).

prompted states to "reform[] their family law systems" to extend legal protection to nonmarital children and unmarried parents.[480] Nevertheless, scholars more commonly remember those decisions for their marital supremacy,[481] their molding of nonmarital parenthood in the image of ideal marriage[482] and ideal parenthood,[483] and their logic of "real" biological sex difference[484]—none of which is especially progressive. This Article's look at the retrofitting of unwed-father doctrine with the doctrine of the new maternity suggests that even the most regressive features of constitutional law contain the seeds of progressive reformation.

To be sure, by their own admission, courts addressing the new maternity turn to unwed-father law to *clarify* constitutional motherhood, not necessarily to transform it. Return here to *P.M. v. T.B.* There, the Iowa Supreme Court cited to *Lehr v. Robertson* and *Nguyen v. INS* not to upend their vision of constitutional motherhood, but rather to locate it in genetics rather than gestation.[485] Moreover, as did the California Supreme Court in *Johnson v. Calvert*, the *P.M.* court appealed to unwed-father law to suggest that *all along*, the Supreme Court's unwed-father decisions meant to protect genetic, rather than gestational, motherhood.[486]

But the problem with this reading is that it conflicts with what *Lehr* and *Nguyen* actually said. *Nguyen* unambiguously stated that birth, not genetics, is "inherent" "proof of motherhood."[487] The point here is not to argue what the Court really meant to say in the unwed-father cases when it addressed constitutional motherhood, but rather to suggest that state courts have already reinvented the mother from unwed-father law by unsettling that law's deeply rooted notions of maternal certainty, inherent reproductive difference, and unified biological, social, and legal motherhood.

If it is true that state family law on the new maternity has already altered constitutional maternity, then this process accurately reflects how constitutional law is made. The conventional narrative of that process sees "family law and constitutional law . . . [as] occupy[ing] relatively

480. NeJaime, *supra* note 34, at 2276.

481. *See* Mayeri, *supra* note 49, at 2334–72 (viewing the evolution of the Court's unwed-father decisions through the lens of marital supremacy).

482. *See* Murray, *supra* note 79, at 409 (arguing that the Court fashioned the constitutional rights of unwed fathers in the image of marital fatherhood).

483. *See* Clare Huntington, *Staging the Family*, 88 N.Y.U. L. Rev. 589, 620–21 (2013) (arguing that the Court's unwed-father decisions required unmarried fathers to satisfy an idealized image of male parenting that emphasized economic well-being).

484. *See* NeJaime, *supra* note 34, at 2275–76 ("[E]ven as the Court eradicated longstanding in-equalities [in the unwed-father decisions], it preserved gender differentiation in parentage, appealing to differences in reproductive biology to justify legal differences between mothers and fathers.").

485. *See* P.M. v. T.B., 907 N.W.2d 522, 542–43 (Iowa 2018) (interpreting *Lehr* and *Nguyen* as cases that protected genetic, not gestational, motherhood).

486. *See id.* at 543 (citing Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993)).

487. Nguyen v. INS, 533 U.S. 53, 64 (2001).

separate spheres,"[488] only "occasionally meet[ing] when constitutional law, exercising power in a top-down way, dictates new directions for family regulation."[489] On this view, constitutional law tends to happen from above in a process of trickle-down constitutionalism that starts with the Supreme Court and ends with state law.

Important recent scholarship reveals the deficiencies of this conventional account. For example, NeJaime argues that the conventional reading "fails to capture the dialogic relationship between family law and constitutional law,"[490] underappreciating "the ways in which family law exerts influence over constitutional law" by "shap[ing] the terrain on which constitutional adjudication occurs, structur[ing] constitutional conflict, and orient[ing] constitutional reasoning."[491]

Using the specific example of marriage equality, NeJaime explains that constitutional marriage equality originated as a family law matter long before state and federal courts began to credit constitutional objections to restrictive marriage laws in 2003.[492] Starting in the 1980s, and continuing into the early 2000s, LGBT advocates successfully obtained relationship recognition[493] and parental rights[494] for their clients by analogizing same-sex couples to married couples, "mapping same-sex couples onto *marital* norms,"[495] and "appeal[ing] to the marriage-like relationships of unmarried couples."[496] In the process, LGBT claimants not only gained relational and parental protection, but also altered the meaning of marriage and parenthood, loosening both of those institutions from their traditional grounding in "heterosexuality, gender differentiation, and sexual procreation," and locating them instead in function and intent.[497] Those altered understandings in turn paved the way for national marriage equality in *Obergefell v. Hodges*, which incorporated family law's rejection of sexual and heterosexual supremacy in marriage,[498] and constitutionalized an image of marriage and parenthood that could

488. NeJaime, *supra* note 47, at 273.

489. NeJaime, *supra* note 66, at 415.

490. *Id.*

491. *Id.* at 416.

492. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (striking down Massachusetts's marriage exclusion on state constitutional grounds). National marriage equality was not achieved until twelve years later in *Obergefell v. Hodges*. *See* 135 S. Ct. 2584, 2608 (2015).

493. *See* Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 Calif. L. Rev. 87, 112–54 (2014).

494. NeJaime, *supra* note 49, at 1188.

495. NeJaime, *supra* note 47, at 346.

496. NeJaime, *supra* note 49, at 1188.

497. NeJaime, *supra* note 47, at 346.

498. *See id.* at 351–54.

touch—indeed, has already touched—a far greater swath of people than the minority actors for whom it was most immediately relevant.[499]

NeJaime's alternative reading of the dynamic between family law and constitutional law suggests that there is no longer any such thing as family law exceptionalism and "exceptional cases" within it.[500] It might also be an analogue for what is happening today with the new maternity, as well as a prediction of what the new maternity could hold for the future. Some courts have reasoned that maternity disputes today constitute "rare" cases. For instance, in refusing to allow a nonbiological (and functional) mother to contest the maternity of a traditional mother, *In re D.S.* reasoned that contested maternity disputes were reserved under California law for the "rare" situation like surrogacy and co-maternity—neither of which applied in that case.[501] On this view, co-maternity and surrogacy were exceptional situations that had no bearing on the court's approach to mainstream motherhood.

But if NeJaime is correct, then those "rare" or "exceptional" cases unfolding in state court under state law might, over time, transform constitutional maternity and its mainstream mother.[502] Even to call those cases "rare" is to obscure their frequency in contemporary family law. In 1993, *Johnson v. Calvert* described contested maternity as a legal rarity.[503] But that was over a quarter century ago, when surrogacy was less common. Today, the mother described by the new maternity is decreasingly rare, and her influence on the law of motherhood is increasingly manifest.[504]

In addition, it is important to remember that the law of unwed fatherhood has shaped doctrine in universal ways even though it emerged in a minority area. The logic of maternal certainty (and paternal uncertainty) surfaced in a set of cases dealing with nonmarital parenthood, which at the time was far less prevalent than it is today. In the 1960s and 1970s, five to seventeen percent of all U.S. births were to unmarried women.[505] Today, that number is around forty percent.[506] But, as this Article has shown, the

499. For *Obergefell*'s application to nonmarriage, an increasingly common relationship in the twenty-first century, see Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. Rev. 425, 430, 432–33 (2017).

500. *See* NeJaime, *supra* note 67, at 35 (discussing the dialogic relationship between exceptionality and the mainstream); *see also* Cahill, *supra* note 40, at 51 n.258 (discussing the dialogic relationship between central and marginal forms of kinship in American law).

501. Elizabeth D. v. San Diego Cty. Health & Human Servs. Agency (*In re* D.S.), 143 Cal. Rptr. 3d 918, 919, 924 (Ct. App. 2012).

502. *See* NeJaime, *supra* note 67, at 7 (discussing how "[s]ame-sex couples leveraged . . . exceptional cases in ways that dramatically broadened their reach—transforming exceptions into rules").

503. Johnson v. Calvert, 851 P.2d 776, 779 (Cal. 1993) (referring to the "rare case in which a child's maternity is in issue").

504. *See supra* Part III, pp. 63–88.

505. Solomon-Fears, *supra* note 69, at 48 app. tbl.A-1.

506. *Percentage of Births to Unmarried Mothers by State*, *supra* note 70.

law deploys that logic to constrain the rights not just of unmarried fathers, but also of same-sex couples, nonbiological mothers, transgender individuals, and even biological mothers. The constitutional doctrine relating to maternal certainty took shape around a relatively exceptional case that was eventually mainstreamed.[507] There is no reason to doubt that a similar process will play out with family law's new maternity.

B. *Legal Implications*

Trickle-up maternity could impact the law in at least three interrelated ways: by expanding (or even eliminating) constitutional maternity; by exposing as a stereotype the biological basis for maternal certainty; and by pushing the law in more egalitarian directions that better align with legal and cultural commitments to sex, gender, and sexual orientation equality.

1. Expanding (or Eliminating) Constitutional Maternity

Trickle-up maternity could expand the constitutional mother to accommodate mothers other than the monolithic and epistemologically obvious one derived from unwed-father law. Those mothers might include intentional mothers, nonbiological mothers, nongestational functional mothers, and marital mothers. This Article does not define the exact parameters of this constitutional category;[508] nor does it rank these mothers in order of importance,[509] or suggest that constitutional law ought to extend special protection to only one of them.[510] Its argument, rather, is

507. For example, the defendant-employer in *R.G. & G.R. Harris Funeral Homes* cited the page of *Nguyen* that espouses maternal certainty when discussing whether "treating a person whose sex is male as a man" constitutes sex stereotyping. *See* Reply Brief for Petitioner, *supra* note 11, at 5 (citing Nguyen v. INS, 533 U.S. 53, 68 (2001)). In this way, the logic of maternal certainty has expanded far beyond the unwed-father cases.

508. Scholars recently have begun to outline the contours of constitutional parenthood in an era of alternative reproduction and constitutional equality for same-sex families. For some examples, see Higdon, *supra* note 36, at 1524–40 (advocating a "twenty-first century" definition of constitutional parenthood, *id.* at 1524, that is grounded in a combination of biology, intent, and function, but rejecting federal constitutional protection for de facto or functional parents "absent biology and intent," *id.* at 1538); NeJaime, *supra* note 47, at 275 (explaining the article's project as "building the case for a liberty interest that includes nonbiological parent-child bonds"). I have previously advocated an intent-based model for reproductive regulation. *See* Cahill, *Reproduction Reconceived*, *supra* note 273, at 686 (arguing that the regulation of alternative and sexual reproduction ought to "turn[] on intent rather than on procreative mechanics and on unreliable (and constitutionally questionable) criteria like sex and intimacy").

509. Some scholars have rejected the expansion of constitutional maternity beyond gestation and birth, even in an era of alternative reproduction. *See, e.g.*, Hendricks, *supra* note 19, at 473–75 (arguing that constitutional motherhood ought to flow from gestation regardless of genetic connection rather than from genetics alone).

510. Quite the contrary. As Part III demonstrated, the new maternity unfolding in the family law domain draws from constitutional unwed-father doctrine to establish

that trickle-up maternity could expand the boundaries of constitutional motherhood in a way that approximates family law's more capacious maternity. A more capacious conception of constitutional maternity could in turn benefit not just nontraditional mothers, including those who establish maternal relationships through means other than biology and birth, but also children, who have interests in maintaining bonds with established caregivers regardless of how those caregivers become parents.[511]

Of course, trickle-up maternity could push constitutional law to eliminate remaining distinctions between maternity and paternity entirely, and to embrace instead a sex-neutral concept of constitutional "parenthood."[512] As this Article has argued, family law's new maternity has already moved in this direction by bringing men and women closer together in the law of parenthood. Family law shows that proof of maternity, like paternity, is often complicated, "difficult,"[513] and nonobvious. In addition, family law shows that women, like men, can become parents without becoming pregnant, and that women, like men, can be related to their children not through gestation but rather through genetics, function, and intent. Finally, family law shows that sometimes the person who bears and births a child is not a woman at all. In all of these ways, family law already provides a sex-neutral vision of constitutional parenthood that might trickle up to unsettle many of the distinctions between

simultaneous legal rights in two mothers. In so doing, the new maternity is reforming unwed-father doctrine's insistence that constitutional parenthood cannot extend to two people of the same sex simultaneously. *See* Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) (plurality opinion) (rejecting the possibility of dual constitutional fatherhood).

511. Recent scholarship argues that children have interests in maintaining relationships with established caregivers regardless of whether those caregivers are parents. *See* Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1487 (2018) (imagining and proposing a "new law of the child" which, among other things, takes "children's broader interests seriously" by "giving children greater access to important adults in their lives," regardless of whether those adults are parents).

512. The idea that constitutional parenthood would be completely sex neutral is not so radical in light of the fact that the Court has already struck down most gender classifications in the family law domain as unconstitutional sex stereotypes. *See, e.g.*, Naomi Mezey & Cornelia T.L. Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229, 230 (2012) (remarking that today's "legal parent is . . . sex-neutral" because of "[t]he official de-linking of presumptive parenting roles from a parent's sex . . . in modern equal protection doctrine, statutory law, and common law"). This Article agrees with Professor Naomi Mezey and Judge Pillard that many aspects of parenting law are today sex neutral. Nevertheless, it argues that significant bodies of constitutional, statutory, and common law remain wedded to the idea of inherent sex difference when it comes to pregnancy. Moreover, those bodies of law insist on using ostensible pregnancy-based differences, like maternal certainty, to justify differential treatment of men and women, fathers and mothers, biological and nonbiological parents, and same-sex and opposite-sex families.

513. Lalli v. Lalli, 439 U.S. 259, 269 (1978) (plurality opinion).

motherhood and fatherhood that constitutional sex equality law takes for granted.

2. Exposing Biology as a Stereotype

Trickle-up maternity could expose constitutional law's doctrine of "real" biological difference as a stereotype. Part II of this Article argued that maternal certainty is a biological rationale that often *blurs into* stereotypes about mothers, fathers, and their relative caretaking capacities.[514] This Subpart argues that maternal certainty is *itself* a stereotype because it rests on erroneous factual assumptions about who is a mother (or pregnant person) in the first place. On this reading, the new maternity shows that biological rationales, even at their most biological, can be sex stereotypes.

The government engages in unconstitutional sex stereotyping when it treats individual women and men on the basis of generalities. The logic of maternal certainty does just that by assuming that all legal mothers are present at birth—and that all mothers are the people who give birth—because most mothers might be. Those statements have never been an accurate reflection of reality, even when procreation was exclusively sexual,[515] but they are especially problematic today, now that biological, social, and legal maternity can be unbundled in ways that render some mothers more like some fathers. As with some fathers, some mothers are not present at birth, and like paternal identity, maternal identity is sometimes in question.

Whether factual assumptions are unconstitutional sex stereotypes depends on whether those assumptions are correct today—not on whether they were right fifty years ago. As the *Morales-Santana* Court stated, sex classifications "must substantially serve an important governmental interest *today*, for 'in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.'"[516] In *Morales-Santana*, the relevant "new insight" included the fact that more fathers were involved in the raising and caretaking of their children in 2017, when *Morales-Santana* was decided,[517] than in 1940, when Congress passed a sex-specific federal immigration law that reflected the "once habitual, but now untenable,"[518] assumption that the "unwed mother is the natural and sole guardian of a nonmarital child."[519]

514. *See supra,* Part II, pp. 47–57.

515. For examples of contested maternity in an era of exclusive sexual procreation, see *supra* pp. 62–63.

516. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1690 (2017) (alterations and omission in original) (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015)).

517. *See id.* at 1693 n.13.

518. *Id.* at 1690–91.

519. *Id.* at 1691.

The relevant "new insight" unearthed by this Article is the fact that maternity is today not as certain, obvious, and self-evident as constitutional law assumes. Maternal certainty might have been true (or at least more true) in the 1960s and 1970s, when maternal certainty first surfaced in constitutional law to justify sex discrimination. But maternal certainty's factual assumptions increasingly border on "untenable"—and unconstitutional—sex stereotypes in a world where maternity can be as uncertain as paternity.

3. Pushing the Law in More Egalitarian Directions

After trickling up to dislodge constitutional law's paradigmatic mother, the new maternity could trickle back down to destabilize the various bodies of law that rely on maternal certainty to justify discrimination against a range of actors, from transgender individuals to nonbiological mothers to unwed fathers. In so doing, trickle-up maternity could have the effect of channeling the law writ large to better conform to contemporary legal and social commitments to sex, gender, and sexual orientation equality.

As for transgender discrimination, the new maternity ought to make it harder for state and private actors to invoke constitutional law's certain and obvious mother to justify the legality of gender-identity discrimination. Recall that opponents of transgender equality have argued that transgender discrimination is not illegal sex discrimination because transgender discrimination is based on sex, and sex, defined as maternal certainty, is not a stereotype.[520] Insofar as the new maternity shows that maternal certainty is incorrect, it exposes one of the dominant arguments in favor of transgender discrimination to be an unconstitutional sex stereotype, defined by the Court as a refusal to respect exceptional cases. Relatedly, the new maternity could also challenge other forms of transgender and gender-identity discrimination that rely on the notion of real biological difference between the sexes, including birth-certificate misgendering and discrimination in sports.

As for family law, the new maternity could challenge the argument that it is legal to discriminate on the basis of sex, sexual orientation, and nonbiological parenthood in the application of the parental presumption because of maternal certainty.[521] It could also make it harder for the law to automatically assume that mothers will shoulder more parenting burdens than fathers because the mother is always present at birth.[522]

520. *See supra* pp. 46–47 (discussing this argument's emergence in litigation over transgender discrimination).

521. *See supra* p. 62 (discussing the role that maternal certainty has played in cabining the application of the parental presumption to traditional, heterosexual families).

522. *See* Grimes v. Van Hook-Williams, 839 N.W.2d 237, 245 (Mich. Ct. App. 2013) (making this argument).

In addition, the new maternity could unsettle laws that regulate alternative reproductive technologies in ways that reflect and reinscribe constitutional law's paradigmatic mother, including laws that require genetic maternity, but not genetic paternity, for surrogacy contracts to be legal.[523] Such laws appear willing to tolerate paternal uncertainty (in the form of genetic nonrelatedness) but not a similar form of maternal uncertainty, perhaps because they unthinkingly apply the presumed norms of sexual reproduction, like maternal certainty (in a genetic sense), to nonsexual reproduction.

Finally, trickle-up maternity could unsettle sex classifications in immigration law—including the biologically grounded classifications that remain intact even after *Morales-Santana*.[524] It could also decouple sex and pregnancy in ways that resonate in other constitutional settings, including in abortion law, which, as argued earlier, conflates pregnancy and motherhood.[525]

C. *Anticipated Objections*

One anticipated objection to the vision of maternity endorsed here is that constitutional maternity is right most of the time, since legal, social, and biological maternity exist in one woman in most cases. Another objection is that reforming constitutional maternity will devalue women's reproductive labor. Yet a third objection (related in part to the second) is that reforming constitutional maternity will threaten constitutional protections for pregnancy by decoupling sex and pregnancy.

The first objection—that constitutional maternity is right most of the time—underappreciates constitutional law's insistence that equality guarantees protect the exceptional case, not the state of affairs that exists most of the time. Part II discussed the numerous cases that stand for that proposition,[526] reaffirmed most recently in *Morales-Santana*, which recognized that "[o]verbroad generalizations . . . have a constraining impact, *descriptive though they may be of the way many people still order their lives*."[527] In this sense, *Morales-Santana* reversed the logic of the late nineteenth-century sex discrimination case *Bradwell v. Illinois*,[528] which

523. *See supra* pp. 75–76 (discussing the requirement in most states that intended mothers, but not intended fathers, have a genetic connection to a child born through surrogacy for the surrogacy contract to be legal).

524. *See supra* notes 140–43 and accompanying text (discussing the continuing appeal of maternal certainty even in *Morales-Santana*, which rejected the logic of maternal certainty as applied to federal law's sex-specific duration-of-residency requirement).

525. *See supra* pp. 55–56 (discussing abortion law's conflation of motherhood and pregnancy and why that conflation is problematic).

526. *See supra* notes 225–36 and accompanying text.

527. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1692–93 (2017) (emphasis added).

528. 83 U.S. (16 Wall.) 130 (1872).

rejected Myra Bradwell's claim that Illinois's refusal to admit her to the state bar because she was a woman violated the Constitution.[529] Concurring in the judgment, Justice Bradley, applying the separate-spheres ideology in vogue at the time, intoned that "the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases"[530]—exceptional cases like Myra Bradwell,[531] who wanted to be a lawyer rather than simply "fulfil [sic] the noble and benign offices of wife and mother."[532] Read through the lens of *Bradwell*, the web of laws and doctrines that has taken shape around maternal certainty rests secure since maternal certainty descriptively reflects "the general constitution of things"[533] and "the way [that] many people still"[534] become parents. But read through the lens of *Morales-Santana*, that web is constitutionally vulnerable since maternity is less monolithic—and less certain—than the logic of maternal certainty presumes.

The second objection—that reforming constitutional maternity could devalue women's reproductive labor—assumes that constitutional maternity today values women's reproductive labor. Whether that is so is unclear. Constitutional maternity is less about valuing reproductive labor per se and more about valuing the maternal certainty that pregnancy supposedly guarantees. When the Court says that mothers are inherently different from fathers because women birth children and men do not, the Court is ultimately privileging the fact that birth means that we know who the mother is, not necessarily the fact that birth means the woman invested valuable reproductive labor.[535] Put differently, constitu-

529. *Id.* at 130, 138–39.

530. *Id.* at 141–42 (Bradley, J., concurring in the judgment).

531. This Article is not conceding that Myra Bradwell was an exceptional case in desiring to become a member of the bar, but rather that the Court regarded her as being such a case.

532. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring in the judgment).

533. *Id.* at 142.

534. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1693 (2017).

535. For instance, the *Nguyen* Court upheld the provision of immigration law at issue there for two reasons: first, because birth meant that the mother could be accurately identified; and second, because birth gave the mother an *opportunity* to create a meaningful connection with her child—meaningful enough to confer United States citizenship upon that child. *See* Nguyen v. INS, 533 U.S. 53, 62–65 (2001). On this view, women are rewarded (to the extent that we view that provision as benefitting rather than burdening women) not for their gestational labor but rather for a post-birth relationship that maternal certainty ostensibly makes possible. *See* Hendricks, *supra* note 19, at 469 (observing that the *Nguyen* majority upheld the law because it "ensured an 'opportunity' for a meaningful relationship, which the mother satisfied by her necessary 'presence at the birth,' as opposed to the certainty of her relationship with the child through gestation and birth" (citing *Nguyen*, 533 U.S. at 64–68)). Even in earlier unwed-father decisions, it was not always clear whether the Court valued pregnancy because of gestation or because of the maternal identification ostensibly made possible by birth. *See supra* note 358 (arguing that *Lehr v. Robertson*, which justifies sex-specific parental rules on the ground that a mother's "parental relationship

tional maternity's paramount concern has always been about identifying who the mother is, not about rewarding her for gestation. If that is right, then it is hard to see how reforming constitutional maternity by opening that category up to different kinds of mothers will take something away from women that the Constitution currently gives them.

The third objection—that constitutional maternity will threaten constitutional protections for pregnancy by decoupling sex and pregnancy[536]—assumes that constitutional law currently views pregnancy as a formal matter as a form of sex inequality. But in 1974, the Court in *Geduldig v. Aiello*[537] held that pregnancy classifications were not reviewable sex classifications under the Equal Protection Clause unless an invidious intent to discriminate on the basis of sex could be shown.[538] Despite *Geduldig*'s tortured logic,[539] and despite the fact that later Supreme Court decisions—and federal statutory developments—have chipped away at that logic,[540] *Geduldig* technically remains good law.

In addition, even when the Court *has* associated pregnancy with women specifically, it has done so to justify sex discrimination, as Part I's review of the Court's illegitimacy and unwed-father decisions demonstrates.[541] Indeed, while resisting seeing pregnancy discrimination as a kind of sex discrimination, the Court has invoked pregnancy as a reason

is clear," 463 U.S. 248, 260 n.16 (1983) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)), is itself unclear as to the precise meaning of "parental relationship").

536. This objection might also be framed as a fear about "neutralizing" or "degendering" pregnancy. *See, e.g.*, Martha Albertson Fineman, *The Neutered Mother*, 46 U. Miami L. Rev. 653, 655 (1992) (criticizing "the liberal legal feminist notion that Mother is an institution which must be reformed—that is, contained and neutralized").

537. 417 U.S. 484 (1974).

538. *Id.* at 496–97, 496 n.20.

539. The *Geduldig* Court held that pregnancy discrimination did not constitute facial sex discrimination because pregnancy classifications distinguished between pregnant and nonpregnant people, not between men and women. *See id.* at 496 n.20. In 1976, the Court extended *Geduldig*'s logic to Title VII in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which held that pregnancy discrimination was not impermissible sex discrimination under federal law. *See id.* at 133–40.

540. Congress overruled *Geduldig* with the Pregnancy Discrimination Act of 1978, Pub. L. No. 95–555, § 1, 92 Stat. 2076, 2076 (codified at 42 U.S.C. § 2000e(k) (2012)), which provides that discrimination "'because of sex' or 'on the basis of sex'" under Title VII includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." *Id.* As for *Geduldig*'s view of pregnancy classifications under the Constitution, some scholars argue that the Court recognized in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), that pregnancy classifications constitute impermissible sex discrimination under the Fourteenth Amendment when they reflect and reproduce sex stereotypes about men and women and their relative caretaking responsibilities. *See* Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 Stan. L. Rev. 1871, 1892 (2006) (reading *Hibbs* as alternatively "limiting *Geduldig* sub silentio" or clarifying it).

541. *See supra* pp. 19–24.

to uphold sex classifications that reflect and reproduce sex-role stereotypes.[542] As Professor Katharine Bartlett argued shortly after *Geduldig* was decided, "[t]hat women may and do become pregnant is the most significant single factor used to justify the countless laws and practices that have disadvantaged women for centuries."[543] On this view, the tethering of sex to pregnancy has not always helped women; in fact, it might actually have harmed them by making it easier for the state to justify a range of sex stereotypes—and asymmetrical caretaking responsibilities[544]—on the purported logic of biological difference and reproductive uniqueness.[545]

Furthermore, decoupling sex and pregnancy as a formal matter—something that the 2017 UPA gestures toward[546] and that a few states have already done by legally recognizing gestational fathers as males[547]—does not foreclose "more substantive arguments linking pregnancy discrimination to sex."[548] As Professor Reva Siegel has argued, in *Nevada*

542. In addition to the illegitimacy and unwed-father decisions reviewed in Part I, *see also Michael M. v. Superior Court*, 450 U.S. 464 (1981), which cited to pregnancy as an inherent biological difference between men and women when upholding California's sex-specific statutory rape law as constitutional under the Equal Protection Clause. *See id.* at 469–73 (plurality opinion). For scholarly recognition of this phenomenon—the Court's reading of pregnancy as sex neutral in one context (pregnancy classifications) and as sex relevant in another (sex classifications)—see Franklin, *supra* note 136, at 180, where the author observes that after *Geduldig*, "when the government turned around and defended *sex classifications* by reference to pregnancy, the Court . . . concluded that pregnancy was an 'inherent difference' between men and women that could justify their differential treatment." Franklin notes that "[d]espite the apparent tension between these approaches, they are consistent in one respect: in both circumstances, the Court steps back and allows the state greater leeway to regulate because pregnancy is involved." *Id.*

543. Katharine T. Bartlett, Comment, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 Calif. L. Rev. 1532, 1532 (1974).

544. *See, e.g.*, Grimes v. Van Hook-Williams, 839 N.W.2d 237, 245 (Mich. Ct. App. 2013) (justifying different rules for determining mothers versus fathers on the "genuinely differentiating characteristic[]" of the mother "usually [being] the child's primary caregiver during the infant's first weeks of life" and the fact that "the identity of the mother is rarely, if ever, in question" (first quoting Rose v. Stokely, 673 N.W.2d 413, 421 (Mich. Ct. App. 2003); and then citing LAF v. BJF (*In re* RFF), 617 N.W.2d 745, 756 (Mich. Ct. App. 2000))).

545. *See, e.g.*, Bartlett, *supra* note 543, at 1536 (observing that *Geduldig* found that "because pregnancy is 'an objectively identifiable physical condition with unique characteristics,' a classification based on pregnancy is not sex-based" (quoting Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974))); Clarke, *They, Them, and Theirs, supra* note 45, at 956 (pushing back on the argument that severing sex and pregnancy will frustrate constitutional protection for women by observing that "[i]f the law defines women as a class by their capacity to become pregnant, then this capacity appears to be a legitimate basis for discrimination against women").

546. *See supra* Subpart B, pp. 82–84.

547. *See supra* pp. 96–98.

548. Clarke, *They, Them, and Theirs*, *supra* note 45, at 956. One such substantive argument is "that in practice, discrimination based on pregnancy drives women's inequality." *Id.* Others are "that [pregnancy discrimination] is based on the assumption

Department of Human Resources v. Hibbs,[549] the Court linked pregnancy and sex inequality by focusing not on the formal association between sex and pregnancy, but rather on the way in which pregnancy regulation perpetuates unconstitutional stereotypes.[550] On this reading, it is possible to decouple sex and pregnancy as a formal matter and still preserve space for arguing that pregnancy regulation is unconstitutional sex discrimination when it enforces grossly simplistic assumptions about men and women and their relative positions in domestic and public life.

Conclusion

Real differences in parenthood are fading, yet constitutional law continues to give them effect in ways that burden many: unwed biological fathers, same-sex couples, nonbiological mothers, biological mothers, and transgender individuals. All of these constituencies are touched by constitutional law's long-standing assumption that mothers and fathers are inherently different in a variety of ways relating to reproduction, sex, gender, and the family. That assumption limits their ability to become parents. It determines how they ought to parent. At its most extreme, it frustrates their expression of sex and gender identity.

Considerable attention has been paid in the law—and in culture more generally—to the "elusive" and uncertain father.[551] For decades, Sophocles's myth of uncertain paternity and its tragic consequences has inspired legal debates over the practices of alternative reproduction and the kind of family that they facilitate.[552] The notion of a similarly "elu-

that all workers meet a traditionally male norm," and that pregnancy discrimination "is a thinly veiled attempt to exclude women from the workplace." *Id.*

549. 538 U.S. 721 (2003); *see id.* at 735–37 (upholding the Family and Medical Leave Act as applied to government actors as a valid exercise of Congress's enforcement power under section 5 of the Fourteenth Amendment).

550. *See* Siegel, *supra* note 540, at 1892 (observing that *Hibbs* established that "legislative classification concerning pregnancy is sex-based state action within the meaning of the Equal Protection Clause" when it "reflect[s] sex-role typing and [is] not attributable to reproductive physiology alone"); *see also id.* at 1893 ("*Hibbs* treats classifications concerning pregnancy that reflect sex stereotypes as sex-based state action within the meaning of the exception reserved in *Geduldig*.").

551. *See generally* Milanich, supra note 1; Carl Zimmer, *Fathered by the Mailman? It's Mostly an Urban Legend*, N.Y. Times (Apr. 8, 2016), https://nyti.ms/1qc6mxr [https://perma.cc/2BK2-C6V9] (observing that "[u]ncertainty over paternity" is a cultural obsession that "goes back a long way in literature[, as e]ven Shakespeare and Chaucer cracked wise about cuckolds, who were often depicted wearing horns"). For an overview of the role that the trope of uncertain fatherhood, in the context of the incest taboo, has played in literature, culture, psychoanalysis, and the law, see Cahill, *supra* note 61, at 214–26.

552. In the relatively early days of alternative insemination, commentators stoked Oedipal fears by warning that anonymous sperm donation would lead to accidental incest. *See* Martin Curie-Cohen, *The Frequency of Consanguineous Matings Due to Multiple Use of Donors in Artificial Insemination*, 32 Am. J. Hum. Genetics 589, 590 (1980). More recently, the incest taboo has emerged as a reason to ban human

sive" and uncertain mother seems by comparison impossible to imagine, wedded as law and culture are to the idea that maternity, unlike paternity, is a matter of incontestable fact.[553] Ours is a law of the uncertain father, not a law of the uncertain mother.

Constitutional law both reflects and reproduces this idea. Historically, complicated "[q]uestions of motherhood never arose"[554] in the law—including in constitutional law—and that tradition continues to resonate today in constitutional motherhood. Indeed, to the extent that the Court "has offered any guidance on the broader topic of *constitutional* parenthood," it has only occurred "within the nonmarital, biological father context."[555] Constitutional law's understanding of maternity looks more like maternity as described by the Tennessee Supreme Court, which observed that Tennessee law "employ[s] the term 'mother' in a way that assumes we already know who the 'mother' is."[556] Motherhood, on this view, bears no explanation.[557]

This Article has made visible a law of the multidimensional mother, one obscured by constitutional maternity's insistence on singular and monolithic motherhood. It has also imagined what the implications of the new maternity would be for constitutional law. The idea that the new maternity could trickle up to unsettle constitutional maternity is not necessarily radical—that project has been unfolding in state courts for years. Its consolidation in constitutional law, however, would have meaningful consequences, both within and far beyond the law of parenthood.

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reproductive cloning and to require non-anonymity in gamete donation. *See* Leon R. Kass & James Q. Wilson, The Ethics of Human Cloning 17–19 (1998) (comparing cloning and incest); Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, 21 J.L. & Health 1, 3 (2008) (advocating donor non-anonymity to prevent accidental incest between related individuals). Oedipal fears have also emerged in discussions about women raising children either alone or together in a same-sex relationship. *See* Cahill, *supra* note 61, at 226–37. In either case, commentators anxious about fatherless families have raised the specter of incest specifically and of the familial dysfunction associated with violations of the incest taboo more generally. *See id.* Given the power of the Oedipus myth (in literature, psychoanalysis, and law) as the paradigmatic case of paternal uncertainty, it is important to keep in mind that Sophocles's tale is *equally* one of paternal and maternal uncertainty.

553. *See* Milanich, *supra* note 1, at 3, 12, 14.

554. Higdon, *supra* note 36, at 1493.

555. *Id.* at 1486.

556. *In re* C.K.G., 173 S.W.3d 714, 723 (Tenn. 2005). In that case, the Tennessee Supreme Court held that a woman who gave birth to triplets was their legal mother even though she lacked a genetic relationship to them. *See id.* at 716–17.

557. In this sense, constitutional maternity is reminiscent of the Supreme Court's approach to obscenity before *Miller v. California*, 413 U.S. 15 (1973), clarified its definition. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (describing pornography as something "I know . . . when I see it").