

PROTECTING SEX: SEXUAL DISINCENTIVES AND SEX-BASED DISCRIMINATION IN NGUYEN V. INS

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“Male and female are created through the eroticisation of dominance and submission. The man/woman difference and the dominance/submission dynamic define each other.... The feminist theory of knowledge is inextricable from the feminist critique of power because the male point of view forces itself upon the world as its way of apprehending it.”¹

— Catharine MacKinnon

Catharine MacKinnon’s famous formulation of the social and political struggle between men and women as a manifestation of men’s sexual subordination of women has informed feminist debate for the past two decades. The fundamental project of radical feminism was to demonstrate that sex discrimination and sexual domination are one and the same. Against this backdrop, recent developments in feminist and queer theory have turned the equivalence of sex and sexuality inside out—a dissociation that has played out prominently in the context of legal scholarship, particularly with respect to rape, pornography, and sexual harassment. This effort to rehabilitate “deviant” sexuality entails rescuing the fight against sex discrimination from the vilification of sex.

Whatever one’s feelings on the relationship between sex and sex-based discrimination, they are likely to be reserved for academic debate. The successful application of equal protection doctrine to such sex-laden topics as birth status, contraception, and abortion has had the unfortunate side-effect of submerging judicial discussion of sexual subordination and sexual freedoms in favor of less contentious issues of biological equality and difference. The blanket omission of sexuality from sex discrimination decisions—despite the sustained theoretical frenzy surrounding the issue—is striking.

This Article considers a recent United States Supreme Court decision to explore the tension between sexuality and equal protection doctrine and to explain the practical ramifications of the erasure of the

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¹ Catharine MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 Signs: J. Women in Culture and Society 635, 635-636 (1983).

former from the latter. It identifies a sex-regulatory element of immigration law that could, in theory, be incorporated into a sex discrimination claim. But it suggests that such a claim, even if it were to succeed (an unlikely prospect) within the current doctrinal framework, would achieve only as much as any discrimination claim can—it would compel the government to treat everyone equally well or equally badly. This Article, then, is chiefly a descriptive undertaking. Its objective is to point out the omission of sexuality from current doctrine and to identify the ramifications of that omission.

In 2001, the Supreme Court decided *Nguyen v. INS*,² a case that challenged one of the last facially discriminatory statutes that remains on the books.³ Title 8 U.S.C. § 1409⁴ specifies the naturalization procedures for the foreign-born children of unmarried United States citizens. The child of an unmarried citizen-mother is considered to have acquired United States citizenship at birth as long as her mother has at some point prior to childbirth lived in the United States or its territories for a continuous period of one year.⁵ For the child of an unmarried citizen-father, however, the naturalization requirements are far more burdensome.⁶

Those additional burdens weighed heavily on Tuan Anh Nguyen. Born in Saigon to a Vietnamese mother and an American father,⁷ Nguyen arrived in the United States at the age of five and lived with his father in Texas throughout his minority. At the age of twenty-two, Nguyen pled guilty to two counts of sexual assault on a child, and the INS initiated deportation proceedings.⁸ In 1998, in *Miller v. Albright*,⁹ Justices Stevens

² 533 U.S. 53 (2001).

³ Brief for Petitioners at 9, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071).

⁴ Immigration and Nationality Act, ch. 477, § 309, 66 Stat. 238, as amended and presently in force, 8 U.S.C. § 1409 (1994).

⁵ 8 U.S.C. § 1409(c).

⁶ See discussion *infra* Part II.B. The requirements are set out in 8 U.S.C. §§ 1409(a)(1), (3), and (4).

⁷ It is unclear from the court documents whether Joseph Boulais, a former member of the United States Army, traveled to Vietnam for reasons related to his military service. The petition for certiorari relates that “Boulais stayed in Vietnam after his honorable discharge from the military.” *Nguyen v. INS*, 533 U.S. 53 (2001), *petition for cert. filed*, 2000 WL 1706737 (U.S. Nov. 13, 2000) (No. 99-2071). It seems likely, however, that Boulais in fact arrived in Vietnam after his discharge. The Petitioners’ brief states, “[Boulais] served in Germany, receiving an honorable discharge in January 1963. Following his discharge from the army, Boulais relocated to Vietnam. In 1969, while he was working for Pacific Architect Engineer, a military contractor, he began a relationship with a Vietnamese citizen, Hung Thi Nguyen. As a result of that relationship, Boulais’s son, Tuan Anh Nguyen (“Nguyen”), was born in Vietnam on September 11, 1969.” Brief for Petitioners at 4, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071) (citations omitted).

⁸ *Nguyen*, 533 U.S. at 57.

and Rehnquist failed to assemble a majority willing to decide whether § 1409(a) discriminated on the basis of sex in violation of the Equal Protection Clause. Justices O'Connor and Kennedy concurred in the judgment on the basis that the plaintiff in that case, the daughter of a citizen-father, lacked standing.¹⁰ In Nguyen, the petitioners therefore pursued the equal protection claim of Nguyen's father, Michael Boulais. Section 1409(a), they argued, impermissibly discriminated against fathers.

The five-justice majority rejected Boulais's equal protection claim, holding that § 1409(a) serves at least two important governmental objectives: it facilitates the identification of a biological parent-child relationship, and it ensures the opportunity for "everyday ties that provide a connection between child and citizen parent and, in turn, the United States."¹¹ The Court further found that § 1409(a) accomplished these objectives through substantially related means. The dissent criticized the majority for its reliance on sex-based stereotypes about childbearing and rejected both of the purported governmental interests. Because the majority was unable to identify an "exceedingly persuasive justification" for the sex-based classification created by § 1409(a), the dissent would have found an equal protection violation.

To date, there have been markedly few academic defenses of the Court's decision in Nguyen and of the similar arguments in Miller. Rather, camps that agree on little else have come together to criticize the majority opinion as sexist, narrow-minded, and patently conservative.¹² The critiques seem to betoken a partial victory for the feminist ideals of an earlier generation: critics and the dissenting justices are practically unanimous in their willingness to accept that preferential treatment of mothers amounts to entrenching gender norms. While I agree that § 1409(a) carries many undesirable consequences, it is not clear to me that symbolic indicia of subordination and stereotyping are chief among them, nor that equal

⁹ 523 U.S. 420 (1998). For a description of the various opinions in Miller, see discussion *infra* Part I.B.

¹⁰ Justices Scalia and Thomas concurred on the basis that the claim was not justiciable at all. *Id.* at 453 (Scalia, J., concurring). Since the Constitution imbues Congress with the plenary authority to "establish an uniform Rule of Naturalization," U.S. Const. art. I, § 8, cl. 4, Miller would remain an alien barring a "congressional enactment granting [her] citizenship." Miller, 523 U.S. at 453 (Scalia, J., concurring). Simply put, "[t]he complaint must be dismissed because the Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress." *Id.*

¹¹ Nguyen, 533 U.S. at 63.

¹² *But see* Katharine B. Silbaugh, Miller v. Albright: Problems of Constitutionalization in Family Law, 79 B.U. L. Rev. 1139, 1141, & n.9 (1999) (noting that the pervasive criticism of Miller v. Albright overlooks the crucial family law ramifications of the case, which lend some support to the majority opinion).

protection analysis of the kind propounded by the dissent is the best means of redressing them.¹³

Nguyen is about more than formal inequality—it is about writing sexual subordination out of the narrative in order to prevent it down the road. Childbirth, unlike employment discrimination or educational barriers, is uniquely sexual in its origin. So long as children are born predominantly through sex, sexual relationships deserve consideration. Radical feminism, whatever its failings, facilitates an important intervention. If sex discrimination is premised on the possibility of sexual abuse, then the desirability of confining women to the home, as married mothers, originates in sex—and the exclusion of children produced through non-normative sexual acts, unless they are redeemed by their fathers, makes all the sense in the world.

Part I of this Article sketches the legal backdrop against which Nguyen was decided. Nguyen is situated at the intersection of several distinct bodies of developing law. As a sex-based equal protection claim, Nguyen challenges a statute that facially discriminates against men, a class that is neither traditionally suspect nor anything close to a discrete and insular minority. It is reflective of the pervasive success of feminist legal reform efforts of the past decades that even the majority was more interested in examining the implications of § 1409(a) for stereotyping women as traditional caregivers than in the barriers to citizenship imposed uniquely on the children of *men*, which the Court dismissed as administrative inconveniences. Nevertheless, the majority ultimately rested its validation of the policy on biological essentialism. “The difference between men and women in relation to the birth process is a real one,” the majority emphasized, “and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.”¹⁴

Although Nguyen came to the Supreme Court as a sex discrimination case, it is first and foremost an immigration case. The majority declined to dismiss the case on the grounds of Congress’s plenary immigration power (though neither did they take the opportunity to overrule the doctrine). The ramifications of Nguyen’s status as a case about naturalization and citizenship are nevertheless indispensable to the Court’s analysis of Nguyen’s equal protection claim. More broadly, citizenship and sex are closely related, both historically and symbolically.

¹³ The most obvious critique of the dissent pertains to family law concerns. Those who decry Nguyen are willing to undermine one of women’s only legal advantages—parenthood privileges—in order to level the playing field over the long run. This strategy has received a good deal of attention in the broader context of parental rights (specifically, child custody and putative father registries), and though it is conspicuously missing from the equal protection analysis of Nguyen, it is not the subject of this Article.

¹⁴ Nguyen, 533 U.S. at 73.

Part II reviews the majority and dissenting opinions in Nguyen and highlights the tensions between those opinions and the precedent outlined in Part I. Part III begins with a critique of Nguyen with respect to the inadequacies of equal protection doctrine. It then examines sex and sexuality and their omission from the legal and academic discussions of Nguyen in particular and sex discrimination in general. The question, for the purposes of this Article, is not on what alternative basis Nguyen might have been decided that would have avoided encountering these shortcomings of equal protection analysis.¹⁵ Rather, I ask, what is the cost of omitting sex from the discussion? Nguyen is not just about men and women. It is, fundamentally, a case about sex. Limiting the discussion to equal protection analysis has occluded the inherently sexual dimension of Nguyen's saga—from the sex that produced Nguyen to the sex that got him deported. Is there a role, then, for reading the regulation of sexuality into purportedly unsexualized laws? What are the costs of not doing so? And even if there is a descriptive benefit to such an undertaking, is it relevant to the project of normative legal reform?

¹⁵ Conceivably, substantive due process, following Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Roe v. Wade, 410 U.S. 113 (1973), might provide such a basis. Despite the fall from favor of the privacy/decisional autonomy cases in the last decade, the right to decide whether to bear or beget a child seems fairly secure, at least for the time being. The Supreme Court has not yet decided whether fornication laws are constitutional. Nevertheless, one might argue on the basis of Eisenstadt that it is impermissible to discourage fornication by regulations incidental to fornication. Unlike Eisenstadt, however, there is no more closely tailored option available to the government—after all, the U.S. government cannot regulate sex outside U.S. borders. Moreover, there is no parallel intrusion on the rights of married people. The retreat from privacy rights in Bowers v. Hardwick, 478 U.S. 186 (1986), and the current configuration of the Court suggest that premising this case on the right to engage in non-marital sex outside U.S. borders would have been a legal mistake, even if sex is what the case was really about. However, a due process claim, if tenable, would have facilitated the recognition that women's sex is uniquely targeted by the statute. See discussion *infra* Part III.A.

It should be noted, in this context, that the Court will reconsider the question of whether restrictions on private sexual activity impinge on liberty and privacy, in violation of due process, in Lawrence v. Texas. The petition for certiorari in Lawrence has convincingly put forward an argument for insulating gay sex from state intervention on the basis that, "To Americans, nothing is more personal and private than sexual relations between consenting adults behind closed doors." Lawrence v. Texas, 41 S.W.3d 349 (Tex. App. 2001), *petition for cert. filed*, 71 U.S.L.W. 3387 (U.S. July 16, 2002) (No. 02-102). The petition quotes from the Georgia Supreme Court's opinion in Powell v. State, 510 S.E.2d 18, 24 (Ga. 1998), which struck down on state law grounds the very statute at stake in Bowers: "We cannot think of any other activity that reasonable persons would rank as more private than unforced, private, adult sexual activity." *Id.* at 25. However, the Petitioners' argument is fundamentally based on a privacy rationale that, even if successful, would not lend itself to use in invalidating incidental burdens on sexual freedom. While it might preclude the United States from explicitly regulating the sexual practices of US citizens abroad, it seems highly unlikely that any holding in Lawrence would prohibit the United States from discouraging such sex through adverse citizenship requirements for potential offspring.

I. THE LEGAL LANDSCAPE

The narrative disjunction of Nguyen's legal course complements the complexity of his constitutional challenge. Although the purpose of this Article is to explore what is *missing* in the Court's analysis of Nguyen v. INS—and in equal protection precedent in general—that task cannot be accomplished without first assessing what is present. Given the many parallels and inconsistencies between Nguyen and recent equal protection decisions, it will be useful to review the relevant developments in sex-based equal protection doctrine as it applies to citizens, and particularly those cases that discriminate against fathers. The subsequent section sketches the historical backdrop for equal protection claims in the immigration context.

A. Sex Discrimination

As a general matter, the Supreme Court has been steadily more comprehensive in its invalidation of sex-based discriminatory laws and policies. Particularly in light of the landmark anti-discriminatory outcome of United States v. Virginia,¹⁶ decided in 1996, the apparent retreat in Nguyen came to many as an unpleasant surprise. Much of the litigation strategy surrounding sex discrimination cases has centered on the standard of review, which after three decades remains conspicuously ambiguous.¹⁷ The Court first applied the Equal Protection Clause to sex-based classifications in 1971, in Reed v. Reed.¹⁸ Shortly thereafter, in Frontiero v. Richardson,¹⁹ four Justices deemed sex a suspect classification subject to strict scrutiny, but they were unable to persuade the remainder of the Court. In 1976, with something approaching unanimity, the Court arrived at a compromise and introduced the category of intermediate scrutiny for sex discrimination,²⁰ reasoning that “previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”²¹

Intermediate scrutiny took on somewhat more bite in the early 1980s. In Mississippi University for Women v. Hogan,²² the Court called

¹⁶ 518 U.S. 515 (1996).

¹⁷ See, e.g., J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) (noting ambiguity of heightened scrutiny in sex-discrimination cases).

¹⁸ 404 U.S. 71 (1971) (holding that an Idaho statute that favored men in designating administrators of estates violated equal protection).

¹⁹ 411 U.S. 677 (1973).

²⁰ See Craig v. Boren, 429 U.S. 190, 197-98 (1976).

²¹ *Id.* at 197.

²² 458 U.S. 718 (1982).

for, but was unable to find, an “exceedingly persuasive justification” for excluding men from a women’s nursing school. Though not the first case to invalidate discrimination against men,²³ Hogan was influential in differentiating preferential treatment of women as a traditionally disadvantaged sex from impermissibly burdening men’s rights. The Court’s reasoning was premised substantially on the notion of stereotype—“traditional, often inaccurate, assumptions about the proper roles of men and women”²⁴—which figures prominently in the sex-based equal protection challenges of the 1990s and became decisive in the Nguyen dissent.

Subsequent application of Hogan has been inconsistent at best. Nevertheless, the “exceedingly persuasive justification” standard achieved full force, despite the vocal disapproval of Justice Scalia, in United States v. Virginia, the celebrated 1996 case ordering the admission of women to the Virginia Military Institute.²⁵ Although physical differences between men and women endure, the majority concluded, sex-based classifications cannot be used to create or perpetuate the legal, social, and economic inferiority of women.²⁶ Virginia is further notable for introducing the notion of reasonable accommodation of physical differences between women and men,²⁷ suggesting such innovations as women’s barracks and adjusted physical qualifications and training.²⁸ The Court, it seemed, had abandoned formal equality,²⁹ simultaneously recognizing physical difference and denying it normative power.

Given the rhetoric in Virginia, Nguyen’s retreat to biological difference may at first glance seem surprising. Closer examination of cases dealing with parenthood, however, reveals that the Court has on several prominent occasions upheld facial discrimination against fathers on the basis of “physical differences.”³⁰ The Court’s willingness to tolerate

²³ Earlier cases include Craig v. Boren, 429 U.S. 190 (1976), Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981), and Orr v. Orr, 440 U.S. 268 (1979).

²⁴ Hogan, 458 U.S. at 725-26.

²⁵ 518 U.S. 515 (1996).

²⁶ Many scholars, as well as Justice Scalia in his dissent, have noted that Virginia effectively applies strict scrutiny under the guise of intermediate scrutiny. *Id.* at 571-576.

²⁷ The Court required the state to use what amounted to the “least restrictive means” to accomplish its purpose, a condition previously reserved for strict scrutiny. *Id.* at 573 (Scalia, J., dissenting).

²⁸ *Id.* at 550-51 n. 19.

²⁹ Previously, the Court had required either equal treatment or abandonment of the statute at issue. See Heckler v. Mathews, 465 U.S. 728, 738 (1984).

³⁰ Courts have typically upheld differential treatment in cases of biological difference and as remedy for past discrimination. See Candace Saari Kovacic-Fleischer,

differential treatment is especially evident in the context of pregnancy-related classifications. The first notable equal protection case to uphold pregnancy-based differentiation between men and women was Geduldig v. Aiello,³¹ decided in 1974, in which the Court premised its holding that the state of California need not cover normal pregnancy under its state disability insurance program largely on the fact that not all women become pregnant.³² Similarly, in Michael M. v. Superior Court of Sonoma County,³³ the Court held that sex-based distinctions were permissible as long as they “realistically reflect[ed] the fact that the sexes are not similarly situated in certain circumstances.”³⁴ A statutory rape law penalizing only men did not violate equal protection, because women are adequately deterred by the risk of pregnancy.

The intuitive appeal of the notion that pregnancy “really is different” has repercussions beyond pregnancy itself. Courts have been overwhelmingly willing to uphold statutes, especially in the context of family law, that discriminate against fathers. Particularly relevant is a line of cases beginning with Stanley v. Illinois³⁵ that reflects a proposition known as “biology plus”—that the Constitution protects the parental rights of unmarried fathers who have taken on parental responsibility.³⁶ Lehr v.

United States v. Virginia’s New Gender Equal Protection Analysis with Ramifications For Pregnancy, Parenting, and Title VII, 50 Vand. L. Rev. 845, 868-69 (1997).

³¹ 417 U.S. 484, 494-95 (1974).

³² *Id.* at 497. The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2000), protects pregnant women from employment discrimination, but it does not apply to family law or criminal law. Nan Hunter notes that the Pregnancy Discrimination Act has been somewhat ineffectual in ending discrimination. The Sex Discrimination Argument in Gay Rights Cases, 9 J.L. & Pol’y 397, 403 n.26.

³³ 450 U.S. 464, 469 (1981).

³⁴ *Id.* at 469.

³⁵ 405 U.S. 645 (1972). In Stanley, the Court struck down an Illinois statute making non-marital children wards of the state upon the death of their mothers because it impermissibly distinguished between married and unmarried fathers. Caban v. Mohammed, 441 U.S. 380 (1979), in which the Court invalidated on equal protection grounds a New York law permitting adoption of a non-marital child without the consent of the father, is also relevant.

³⁶ Quilloin v. Walcott, 434 U.S. 246 (1978), is a notable example. A Georgia law prohibited a biological father who had not “legitimated” his children from interfering in their adoption. In Quilloin, the child’s father sought to preclude the adoption of his son, for whom he had provided only intermittent financial support, by the mother’s husband. He did not seek custody or object to the child living with his mother and her husband. The trial court determined that adoption would be in the child’s best interest. The Supreme Court affirmed, suggesting that while an effort to disband a family over the objection of the parents and children with no showing of unfitness might violate due process, “the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned” *Id.* at 255.

Robinson,³⁷ decided by the Supreme Court in 1983, introduced the notion of fatherhood as a biological opportunity that, *when grasped*, confers parental rights.³⁸ In Nguyen, the language of “opportunity” resurfaces. This time, however, mere opportunity is sufficient—and opportunity is afforded women naturally.³⁹ Conversely, even a close father-child relationship of the kind described in Lehr is apparently inadequate to justify equal protection of the law.

Perhaps the greater judicial deference in the context of childrearing reflects that parenting is the last stronghold of permissible stereotyping. One must be careful, however, not to conclude too hastily that laws burdening fathers must uniformly be stamped out in the interest of equality. There is indeed a set of real differences between fathers and mothers for the purposes of pregnancy law in particular and for family law more generally. Even if the law were to retreat to formal equality, the representation of a relationship—whether one must treat all parents the same, regardless of sex, or whether one may differentiate between pregnant and non-pregnant would-be parents⁴⁰—can make all the difference.⁴¹

³⁷ 463 U.S. 248 (1983).

³⁸ *Id.* at 262 (“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. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development.”). In Lehr, the Court upheld a statute that permitted the adoption of a child without notification to her father in cases where the father had not demonstrated a “full commitment to the responsibilities of parenthood.” *Id.* at 248. Where a father had not legally formalized his paternity, he needed to demonstrate a “significant custodial, personal, or financial relationship,” *id.* at 262, in order to claim equal protection and due process rights; “because appellant, like the father in Quilloin, has never established a substantial relationship with his daughter, ... the New York statutes at issue in this case did not operate to deny appellant equal protection....” *Id.* at 267. The Court held that unmarried fathers were “similarly situated” to mothers only if they satisfied at least one of the statutory requirements. *Id.* at 267.

³⁹ See discussion *infra* Part II.B.

⁴⁰ One obvious potential repercussion of absolute equality on the basis of parentage would be allowing the father equal rights to the abortion of a fetus; with bodies out of the equation entirely, it is difficult to make a principled distinction purely by virtue of the “accident” that women bear children. The response, of course, is that fathers attain equal rights only once their children are born; until that point, there is no child with whom to forge a father-child relationship. One might also argue that pregnant “people” have unique rights. The dangers of this approach are palpable in both Geduldig v. Aiello, 417 U.S. 484, 494-95 (1974), *supra* note 31, and in Nguyen itself. Ultimately, the better course seems to be a weighing of burdens and benefits; women’s bodies and autonomy are simply threatened by pregnancy in a manner that men’s are not. The ramifications of the fact that biology can make a difference are discussed at length in Part III. *Cf.* Silbaugh, *supra* note 12, at 1154 (“Given the pervasiveness of certain ‘stereotypes,’ such as initial maternal custody of, and responsibility for, a newborn baby, laws that pretend that fathers and mothers of newborns are similarly situated can do real harm in some cases. State laws, for example, seek to facilitate the placement of newborns for adoption as quickly as possible. Because mothers

B. Immigration

In order to appreciate the relationship among § 1409(a), sex discrimination, and sexuality, one must be familiar with the history of immigration law in this country as an outcrop of government regulation of sex, marriage, and citizenship. Title 8 U.S.C. § 1409(c) of the Immigration and Nationality Act⁴² provides that a child born abroad to an unmarried mother who is a United States citizen may claim United States citizenship so long as the mother has been physically present in the United States, at some time before the child's birth, for one continuous year. Under § 1409(a), however, the foreign-born child of a United States citizen-father becomes a citizen, retroactive to her date of birth, only if there is clear and convincing evidence of paternity; the father consents in writing to provide financial support until the child attains majority; and there is formal acknowledgment of paternity during the child's minority, either by legitimation, adjudication, or the father's written acknowledgment of paternity, signed under oath. Moreover, the father must satisfy a residency requirement significantly more onerous than that imposed on mothers.

Section 1409(a), the statute at issue in Nguyen, facially discriminates against men by imposing additional burdens on unmarried citizen-fathers who wish to transmit their citizenship to their foreign-born

are easier to find than fathers and are usually in the position of physical responsibility for a newborn, most states distinguish mothers from fathers in conferring decision-making authority over adoptions. In opposing such laws, formal equality advocates before the Supreme Court have generally minimized their context by assuming that parental roles are simply one more instantiation of oppressive gender stereotypes, the relief of which would tend to the general good. Family law practices that have afforded unwed mothers of newborns more decision-making authority in adoptions than unwed fathers have done so in response to the very practical situations surrounding routine newborn adoptions. In almost every newborn adoption case, the mother is the immediate custodial parent under circumstances that have forced her, willingly or not, to take responsibility for thinking about the newborn's future. The father may in fact also be thinking about the newborn's future, but nothing in biology, culture or law requires his participation.”)

⁴¹ The pitfalls of both biological essentialism and overhasty formalism are discussed in Part III.B. Nevertheless, following Miller, scholars were nearly unanimous in their opinion that § 1409(a) violated equal protection and that the Court would so decide were they to apply heightened scrutiny. *See, e.g.*, Cornelia T. L. Pillard & Alexander Aleinikoff, Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright, 1998 Sup. Ct. Rev. 1, 18 (1998) (“Five Justices in *Miller* apparently believed that § 309(a) would not survive heightened scrutiny. Under modern equal protection doctrine, those five Justices plainly had the better view. Section 309(a) impermissibly uses sex as an inexact proxy for other attributes of unwed parents, fosters stereotypes that ‘reflect and reinforce historical patterns of discrimination,’ and eschews sex-neutral standards that could serve the government’s purposes as well or better. The statute is a virtual issue-spotter of equal protection defects.”).

⁴² 8 U.S.C. 1409(c), § 309(c).

children. The provision is at first blush an ironic inversion of tradition in this country and many others; historically, citizenship generally passed through the father. The dissent in *Nguyen* implicitly acknowledges that given the allocation of power, political and social, in the United States, no congressionally enacted law is likely to truly disadvantage men.⁴³ An explanation for how § 1409(a) came to be passed is therefore crucial to understanding the powerful gender stereotypes at play in *Nguyen*.

In the United States, citizenship is premised on the feudal concept of *jus soli*;⁴⁴ any child born on United States soil is a citizen, irrespective of the citizenship of her parents. *Jus soli* is to be distinguished from the conferral of citizenship through birth to a citizen-parent, known as *jus sanguinis*,⁴⁵ common in civil law countries. The adoption of *jus soli* in the United States reflects a notable departure from a tradition that confers most privileges on the basis of blood, and particularly of the blood of the father.⁴⁶ The indiscriminate conferral of citizenship on all persons born in the United States neatly avoids the problem of sex.⁴⁷

However, the Fourteenth Amendment, the only constitutional provision to elaborate rules of citizenship,⁴⁸ does not stop at *jus soli*. Rather, it encompasses “[a]ll persons born or naturalized in the United States”⁴⁹—and with respect to naturalization, the Constitution vests the power “[to] establish an uniform Rule of Naturalization” in Congress.⁵⁰ The

⁴³ Justice O'Connor never actually represents the statute as an instance of discrimination against men. Rather, she would invalidate § 1409(a) on the basis that it perpetuates stereotypes concerning natural parenting roles. Interestingly, she addresses discrimination against men only in so far as they, too, are stereotyped: “Indeed, the majority’s discussion may itself simply reflect the stereotype of male irresponsibility that is no more a basis for the validity of the classification than are stereotypes about the ‘traditional’ behavior patterns of women.” *Nguyen v. INS*, 533 U.S. 53, 94 (2001) (O’Connor, J. dissenting).

⁴⁴ Meaning, “right of the soil.”

⁴⁵ Meaning, “right of blood.”

⁴⁶ In this respect, citizenship through *jus soli* offers an interesting counterpoint to laws surrounding birth status, discussed below, which informs citizenship only in the context of naturalization. See discussion *infra* part III.A.

⁴⁷ Arguably, this is not entirely accurate. In so far as a mother, barring physical and economic restraint, may choose to leave (or, if she is a United States citizen, enter) the country to give birth, she is uniquely privileged to determine the citizenship of her child.

⁴⁸ See *United States v. Wong Kim Ark*, 169 U.S. 649, 702-04 (1898). The Constitution does not mention immigration. Louis Henkin, *The Constitution As Compact and As Conscience: Individual Rights Abroad and at Our Gates*, 27 Wm. & Mary L. Rev. 11, 12 (1985).

⁴⁹ U.S. Const. amend. XIV, § 1.

⁵⁰ U.S. Const. art. I, § 8, cl. 4. This provision is the origin of the plenary power doctrine, a problematic body of law that several scholars expected the Court to overrule in

naturalization of children born abroad entailed consideration of the citizenship of the parents, and Congress, relying on traditional principles of *jus sanguinis*, characteristically channeled citizenship through the father.⁵¹

In 1934, Congress promulgated an immigration act that allowed citizen-mothers, for the first time, to confer citizenship on their children.⁵² Six years later, Congress made what appears to be a radical change of course with respect to parental privileges. The Nationality Act of 1940⁵³ distinguished between foreign-born children born to a married United States

Nguyen. The Court has repeatedly held that the Constitution authorizes broad congressional discretion with respect to creating laws of citizenship and naturalization. In the infamous Chinese Exclusion Case, Chae Chan Ping v. United States, 130 U.S. 581, 603-04 (1889), the Supreme Court upheld the denial of re-entry to a Chinese laborer, despite his possession of authorizing documents, who had temporarily left the United States. Congress's unfettered discretion to alter immigration policy at will was "too clearly within the essential attributes of sovereignty to be seriously contested." *Id.* at 607. The Court has been straightforward regarding its authorization of congressional discrimination, most prominently quotas, in the immigration context. See Mathews v. Diaz, 426 U.S. 67 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* at 79-80). Justices Scalia and Thomas concurred in both Miller and Nguyen on the basis that Congress's plenary immigration power rendered the case non-justiciable. In their dissent to Miller, Justices Souter, Ginsburg, and Breyer argued that *jus sanguinis* citizenship exceeds the boundaries of the plenary power doctrine. In Nguyen, the plenary power issue was relegated to a one paragraph concurring opinion. The doctrine may nevertheless have influenced the majority's willingness to sanction facial discrimination. It should be noted that the phrase "any person" in the Fourteenth Amendment does extend to aliens. See Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

⁵¹ Act of Mar. 26, 1790, ch. 3, 1 Stat. 104 ("And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States.") See also 7 Charles Gordon et al., Immigration Law and Procedure § 93.04(2)(b) (1998). The conveyance of citizenship *jus sanguinis* through the father is a natural outcrop of coverture, the common law doctrine governing parental rights and responsibilities. Coverture imparted to fathers full legal rights and responsibilities for marital children; nonmarital children, conversely, had no claim on their fathers' property or support. Legislators and courts imported these principles of coverture wholesale to the citizenship context. See generally Kristin Collins, Note, When Fathers' Rights are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright, 109 Yale L.J. 1669 (2000).

⁵² Act of May 24, 1934, ch. 344, 48 Stat. 797. The Act amended § 1993 of the Revised Statutes to read: "Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States ... ; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother ... has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America...."

⁵³ Nationality Act of 1940, ch. 876, 54 Stat. 1137.

citizen and those born outside of wedlock.⁵⁴ Children born abroad to unmarried citizen-mothers were automatically entitled to citizenship. They acquired the United States citizenship of their unmarried fathers, however, only “provided the paternity is established during minority, by legitimation, or adjudication of a competent court.”⁵⁵

The 1940 Act, in an unprecedented celebration of maternal rights, espouses a preference for mothers over fathers. There was, however, a more sinister tendency at work in immigration law. Foreign-born children of married parents had long taken on the citizenship of their fathers. Neither the 1791 statute nor the common law differentiated between marital and non-marital children. Cynically speaking, there was no compelling reason to do so. Given that men bore no legal responsibility for the care of their non-marital children, imparting citizenship to such children would not have adversely affected their fathers’ financial interests;⁵⁶ a father who conceived an unwanted child abroad ran no real danger of being saddled with her care, even if she were to be admitted to the United States. At the same time, unmarried citizen-mothers had insufficient political power to secure citizenship for their children, and married mothers accepted the citizenship and domicile of their husbands for themselves as well as their children. Against a backdrop of coverture and the preservation of the autonomy of “unwilling” fathers, the apparent burdening of a father’s rights vis-à-vis the enactment of the 1940 Act becomes less anomalous. Mothers have always borne responsibility for the care of their non-marital children. The purpose of differential treatment in early immigration legislation was not to reward mothers for their biological and social labors. Rather, like coverture, the 1940 Act served to protect men from unwanted burdens of childcare and support for their non-marital offspring.⁵⁷

⁵⁴ The 1940 Act is the first to distinguish between marital and non-marital children in the context of citizenship. See *Miller v. Albright*, 523 U.S. 420, 465 (1998).

⁵⁵ Nationality Act of 1940 § 205, 54 Stat. at 1139. In 1953, Congress replaced the 1940 Act with the Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163, but the relevant law was essentially unaffected (children of citizen-mothers were henceforth assured citizenship even in cases where paternity had been established). See *Miller v. Albright*, 523 U.S. 420, 467-78 (1998).

⁵⁶ Arguably, the government had an interest in excluding illegitimate children, who were in some cases entitled to state support. Nevertheless, such concerns were apparently insufficient to warrant amendment of the immigration laws.

⁵⁷ Kristin Collins neatly sums up the argument: “The history of coverture and the transmission of American citizenship brings an elementary point into focus: The allocation of parental rights is always correlated with the allocation of parental responsibility. This basic legal truism, and its numerous implications for citizenship law, suggests that the principal gender injustice caused by § 1409 is not its truncation of fathers’ rights, but its creation and perpetuation of a legal regime in which mothers assume full responsibility for foreign-born nonmarital children. Once we recognize this gendered operation of § 1409, broader failures of equal protection analysis come into relief.” Collins, *supra* note 51, at 1672-1673.

Prior to Nguyen, two prominent Supreme Court cases dealt explicitly with the constitutionality of differentiating between foreign-born children for the purposes of citizenship on the basis of the sex of a child's citizen-parent. In 1977, in Fiallo v. Bell,⁵⁸ the Court upheld an immigration statute that prohibited unmarried fathers from petitioning for their foreign-born children to become lawful permanent residents,⁵⁹ validating the congressional perception of an "absence of close family ties"⁶⁰ between fathers and their children.⁶¹ Apparently rethinking the severity of the rule, Congress subsequently enacted legislation allowing fathers to petition for their children's permanent resident status—as long as they can demonstrate a "bona fide parent-child relationship."⁶² Unsurprisingly, no similar restrictions apply to mothers.

More recently, the Court considered the very statute at issue in Nguyen. Its 1998 decision in Miller v. Albright generated more confusion and disagreement than resolution.⁶³ With respect to the question of whether § 1409(a) violates equal protection as applied to the federal government through the Due Process Clause of the Fifth Amendment, Miller failed to produce a majority. Two Justices deemed the statute constitutional with respect to both parent and child.⁶⁴ Two Justices deemed the statute constitutional with respect to children, but did not consider potential discrimination against citizen-fathers.⁶⁵ Another two declined to consider either claim, on the basis that the Court would in any case be unable to confer citizenship as a remedy.⁶⁶ Finally, three Justices concluded that the

⁵⁸ 430 U.S. 787 (1987).

⁵⁹ INA §§ 101(b)(1)(D), 101(b)(2) (1952).

⁶⁰ Fiallo, 430 U.S. at 799.

⁶¹ Fiallo was the first Supreme Court case involving sex-based discrimination in immigration. Although the Court generally applies heightened scrutiny to sex-based equal protection claims, the Court in Fiallo declined to do so. Nevertheless, it introduced a new standard, according to which the government must offer a "facially legitimate and bona fide reason" for sex-based classifications in immigration. *Id.* at 794-95. This standard, though minimal, is higher than the complete deference the Court had shown in previous discrimination cases in the immigration context. Lower courts have applied the standard with varying degrees of rigor. See Debra L. Satinoff, Sex-Based Discrimination in U.S. Immigration Law: The High Court's Lost Opportunity to Bridge the Gap Between What We Say and What We Do, 47 Am. U. L. Rev. 1353, 1359-60 & nn. 31 & 32 (1998).

⁶² 8 U.S.C. § 1101(b)(1)(D) (1999).

⁶³ 523 U.S. 420 (1998).

⁶⁴ See *id.* at 432-445.

⁶⁵ *Id.* at 451-452 (O'Connor, J., concurring). Miller's father had abandoned his equal protection challenge and was no longer a party, and Justices O'Connor and Kennedy felt that Miller did not have third-party standing to raise her father's claims. *Id.* at 445-451.

⁶⁶ *Id.* at 452-459 (Scalia, J., concurring).

statute is unconstitutional.⁶⁷ In Miller, the Court passed up the opportunity to prohibit sex discrimination in immigration law. Neither, however, did it expressly validate the statutory discrimination against citizen-fathers.⁶⁸ The *coup de grâce* would come two years later, in Nguyen v. INS.

II. NGUYEN V. INS

Nguyen v. INS upholds one of the last remaining facially discriminatory federal policies. And yet, as the foregoing overview of similar equal protection cases suggests, the decision was in many ways a predictable one. The reasonings of the various opinions in Nguyen have implications for both sex-based discrimination and representations of sexuality and sexual power. This section seeks to explicate the majority and dissenting opinions and suggests several potential lines of critique.

A. Nguyen's Story

Tuan Anh Nguyen was born in South Vietnam on September 11, 1969 to a Vietnamese mother, who abandoned him at birth. His father, Joseph Boulais, was a United States citizen. After spending his early childhood with his father's Vietnamese girlfriend, Nguyen arrived in the United States as a refugee in 1975 at the age of five. He was raised in Texas by his father, as a lawful permanent resident. In 1992, Nguyen pleaded guilty to two felony charges of sexual assault on a child. The Immigration and Naturalization Service (INS) initiated deportation proceedings against him on the grounds that he had committed two crimes of moral turpitude and an aggravated felony and was therefore, as an alien, deportable under 8 U.S.C. 1251(a)(2)(A)(ii)-(iii). The immigration judge held that Nguyen was deportable.

Nguyen then filed an appeal with the Board of Immigration Appeals. Meanwhile, Boulais obtained an "Order of Parentage," based on positive DNA test results, in a Texas state court. Nevertheless, the Board of Immigration Appeals found that the paternity order did not satisfy § 1409(a) and dismissed the appeal. Nguyen and Boulais appealed the case to the Fifth Circuit, which dismissed for lack of jurisdiction in light of a statute precluding appeal for an alien convicted of sexual assault.⁶⁹ In Nguyen v.

⁶⁷ *Id.* at 461-471 (Ginsburg, J., dissenting); *id.* at 471-490 (Breyer, J., dissenting).

⁶⁸ Immigration scholars perceived in Miller the unique opportunity to apply equal protection to an alien plaintiff; were Miller successful, she would have attained retroactive citizenship to birth and would therefore have been entitled to constitutional protections, including heightened scrutiny of her sex-based discrimination claim. See Silbaugh, *supra* note 12, at 1144-1145.

⁶⁹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) § 309(c)(4)(G), Pub. L. No. 104-208, 110 Stat. 3009-626 to 3009-627, precludes appeal "in

INS,⁷⁰ the Fifth Circuit considered Nguyen's citizenship as a "threshold question" in deciding their jurisdiction. Although it understood the Order of Parentage to definitively establish Boulais's paternity, it held that Boulais had failed to comply with the procedural requirements of 8 U.S.C. § 1409 prior to Nguyen's eighteenth birthday and that Nguyen was therefore ineligible for citizenship. With respect to the equal protection challenge of § 1409(a), the court applied heightened scrutiny but nevertheless found that the statute was "well tailored to meet the important governmental objectives of encouraging healthy parent-child relationships while the child is a minor, and fostering ties between the foreign born child [and] the United States,"⁷¹ and was therefore constitutional. The Supreme Court granted certiorari.

B. Majority Opinion

Justice Kennedy, writing for a 5-4 majority, held that § 1409(a)⁷² served important governmental objectives through means substantially

the case of an alien who is inadmissible or deportable by reason of having committed" specified criminal offenses.

⁷⁰ 208 F.3d 528 (5th Cir. 2000).

⁷¹ *Id.* at 535.

⁷² Section 1409(a) specifies that in order to assume the United States citizenship of her father, a non-marital child must demonstrate that:

- (1) a blood relationship between the person and the father is established by clear and convincing evidence,
- (2) the father had the nationality of the United States at the time of the person's birth,
- (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
- (4) while the person is under the age of 18 years --
 - (A) the person is legitimated under the law of the person's residence or domicile,
 - (B) the father acknowledges paternity of the person in writing under oath, or
 - (C) the paternity of the person is established by adjudication of a competent court.

Title 8 U.S.C. § 1409(a). Moreover, the citizen-parent must meet the residency requirement of § 1401(g). The Court noted that § 1409(a)(3), which was added in 1986, after Nguyen's birth, was inapplicable to Nguyen. However, that provision is among the most problematic, since the imposition of support obligations are more likely to deter use of § 1409(a) than encourage it. *See* Pillard & Aleinikoff, *supra* note 41, at 23-24. Conversely, pursuant to § 1409 (c), the child of a citizen-mother bears a significantly lighter burden:

- (c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out

related to achievement of those objectives and was therefore consistent with equal protection.⁷³ In particular, he concluded, § 1409(a) furthers two primary government objectives: “assuring that a biological parent-child relationship exists,”⁷⁴ and

ensur[ing] that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.⁷⁵

With respect to the first objective, the measures of § 1409(a) are unnecessary in the case of mothers, for whom maternity is verifiable at the moment of birth and is generally documented in a birth certificate or hospital records.⁷⁶ No similar mechanism is available for fathers, however;

of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person’s birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

Title 8 U.S.C. § 1409(c).

⁷³ *Nguyen v. INS*, 533 U.S. 53, 58 (2001). Although the Court applied heightened scrutiny, it did not foreclose the possibility that Congress’s plenary powers obviated elevated scrutiny in the case. *See id.* at 61 (“Given that determination [that § 1409(a) survives heightened scrutiny], we need not decide whether some lesser degree of scrutiny pertains because the statute implicates Congress’s immigration and naturalization power.”). The opinion suggests that equal protection analysis may in fact compel the statute in that citizen-mothers have the right to reenter the United States for childbirth, whereas citizen-fathers cannot determine the place of birth; precluding citizen-mothers from conferring citizenship on their children would penalize those mothers who chose not to or were unable to return to the United States for delivery. The majority also noted that a facially neutral rule premised on establishing parentage within a specified time period would face the same challenges as the present policy, which simply uses “gender specific terms” that “mark a permissible distinction.” *Id.* at 64.

⁷⁴ *Id.* at 62.

⁷⁵ *Id.* at 64. The Court admits that Boulais may not have been aware of the requirements of § 1409(a). The result is that those fathers and children who have the least access to legal resources will be denied the very father-child relationship that Congress is purportedly so eager to facilitate. The majority also stresses that were it not for his crime Nguyen could have applied for citizenship on a substantial ties theory, and as a practical matter probably would have succeeded. Following her defeat in *Miller v. Albright*, Miller pursued precisely that course and was awarded United States citizenship.

⁷⁶ *Id.* at 82. The dissent noted the ease with which such documents can be forged. *See discussion infra* Part II.C. Kif Augustine-Adams comments: “[T]he degree to which hospital records and birth certificates ‘typically establish’ the blood relationship between a mother and a child is culturally dependent and may not be as reliable for establishing the required blood relationship as Stevens suggests, even in the United States. Birth certificates

a father need not be present at birth, and even his presence does not prove paternity.⁷⁷ Fathers and mothers are therefore not “similarly situated” to prove biological parenthood. The majority acknowledged that DNA testing is an accurate method of establishing paternity, but noted that § 1409(a) does not and need not require genetic testing.⁷⁸ Congress’s failure to require similar verification of parentage for mothers, for whom such “proof ... is inherent in birth itself,”⁷⁹ is “unremarkable.”⁸⁰ In any case, the burden of complying with § 1409(a) is minimal.⁸¹

If the majority appears strained in its justification of harsher requirements for demonstrating biological paternity, its rationalization of the second objective—ensuring a “real, everyday” parent-child relationship—essentializes parent-child relationships in a manner that has astounded many commentators. For a citizen-mother, the majority reasoned, “the opportunity for a meaningful relationship between citizen-parent and child inheres in the very event of birth, an event so often critical to our constitutional and statutory understandings of citizenship.”⁸² Given a line of sex-based equal protection cases making stereotype an impermissible basis for discrimination, the Court was precluded from simply validating the classification as rewarding naturally nurturing mothers.⁸³ The majority

are notoriously easy to forge or obtain fraudulently. My own anecdotal experience with birth registrations in Mexico suggests that (1) parents may delay a child’s official registration until they can travel to a home village to effectuate the registration there, (2) children may be officially registered as having been born to relatives, where the relatives are in a better financial position with access to health care for dependents, and (3) the inefficiencies of a system where relatively large numbers of women give birth outside of hospitals allow for multiple registrations of the same child. Whether a mother is a U.S. citizen or not, registering a child’s birth in many parts of the world is a tentative rather than conclusive venture.” *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 Va. J. Int’l L. 93, 107-08 (2000). See also Pillard & Aleinikoff, *supra* note 41, at 27 (“Recent studies show that one-third of all births abroad occur without birth certificates. That reality, especially when coupled with the increased incidence of adoptions from abroad, suggests a need for proof of maternity by U.S.-citizen putative mothers before the children they assert they bore overseas are recognized as *jus sanguinis* U.S. citizens.”).

⁷⁷ *Nguyen*, 533 U.S. at 62.

⁷⁸ *Id.* at 63.

⁷⁹ *Id.* at 64.

⁸⁰ *Id.* at 64.

⁸¹ *Id.* at 70. The dissent noted: “Even assuming that the burden is minimal (and the question whether the hurdle is ‘unnecessary’ is quite different in kind from the question whether it is burdensome), it is well settled that ‘the ‘absence of an insurmountable barrier’ will not redeem an otherwise unconstitutionally discriminatory law.” *Id.* at 93-94.

⁸² *Id.* at 65.

⁸³ The majority specifically addressed the allegation of stereotyping: “There is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother’s

therefore turned to the notion of opportunity. Since a mother is inherently present at birth, she inevitably enjoys the physical opportunity of forging a maternal relationship with her child (whether or not she avails herself of this opportunity is apparently irrelevant). A father, on the other hand, does not naturally share that opportunity—he may not even know he is a father⁸⁴—and he must therefore demonstrate that he has sought some opportunity for a meaningful relationship with his child. The majority stressed, with a note of urgency, that:

Congress is well within its authority in refusing, absent proof of at least the opportunity for the development of a relationship between citizen parent and child, to commit this country to embracing a child as a citizen entitled as of birth to the full protection of the United States, to the absolute right to enter its borders, and to full participation in the political process.⁸⁵

Practically speaking, of course, § 1409(a) requires more than an opportunity for a relationship. By requiring the father to formalize paternity, the statute is likely to affect primarily those fathers who have participated actively in their children's lives.

Ultimately, the majority premised its validation of § 1409(a) on the notion of biological difference. To Justice Kennedy, § 1409(a) does not embody a “gender-based stereotype,” because it “addresses an undeniable difference in the circumstance of the parents at the time a child is born.”⁸⁶ The Court went so far as to celebrate its own recognition of difference as promoting equal protection by separating the “real” differences from the “real” stereotypes:

To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at

knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype.” *Id.* at 68.

⁸⁴ *Id.* at 66-67 (“Indeed, especially in light of the number of Americans who take short sojourns abroad, the prospect that a father might not even know of the conception is a realistic possibility Without an initial point of contact with the child by a father who knows the child is his own, there is no opportunity for father and child to begin a relationship. Section 1409 takes the unremarkable step of ensuring that such an opportunity, inherent in the event of birth as to the mother-child relationship, exists between father and child before citizenship is conferred upon the latter.”). Moreover, the mother herself may not know who the father is. In this context, Justice Kennedy devoted substantial attention to the children of United States military personnel, citing Department of Defense Statistics indicating that a disproportionate number of active military personnel are men. *Id.* at 66-67. Additionally, he cites the high numbers of American visitors to foreign countries, particularly Canada and Mexico. *Id.* at 67.

⁸⁵ *Nguyen*, 533 U.S. at 67.

⁸⁶ *Id.* at 68.

birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real.⁸⁷

For the majority, biological difference justifies different results.

C. Dissent

In her dissent, Justice O'Connor, writing for Justices Souter, Ginsburg, and Breyer, rejected the notion that sex-based stereotypes premised on childbearing are innocuous and necessary. She did not disavow physical differences altogether. Rather, she argued that “[s]ex-based statutes, even when accurately reflecting the way most men or women behave, deny individuals *opportunity*”⁸⁸—the very buzzword on which the majority relied. Sex-based generalizations entrench “fixed notions concerning the roles and abilities of males and females,”⁸⁹ and they are therefore impermissible.

Unlike the majority, which required only that the government demonstrate that § 1409(a) was substantially related to the achievement of an important governmental interest, the dissent would have imposed the higher intermediate scrutiny applied in Virginia.⁹⁰ Under that standard, the government would have needed to offer an “exceedingly persuasive justification” for the sex-based classification in § 1409(a).⁹¹ On this basis, the dissent rejected both of the government’s purported justifications for the discriminatory policy. With respect to biological proof, the dissent criticized the ill fit between the means and end,⁹² noting that genetic testing

⁸⁷ *Id.* at 73.

⁸⁸ *Id.* at 74 (O'Connor, J., dissenting) (emphasis added).

⁸⁹ *Id.* at 74 (O'Connor, J., dissenting) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).

⁹⁰ The dissent criticizes the majority for its departure from its prior application of heightened scrutiny: “In all, the majority opinion represents far less than the rigorous application of heightened scrutiny that our precedents require.” *Id.* at 79.

⁹¹ *Id.* In all likelihood, however, at least three Justices would have found that § 1409(a) violated even the lesser standard applied by the majority.

⁹² The dissent criticized the majority for its dismissal of sex-neutral alternatives on the mere basis that they, too, would result in disparate impact. “In our prior cases, the existence of comparable or superior sex-neutral alternatives has been a powerful reason to reject a sex-based classification.... The majority, however, turns this principle on its head by denigrating as ‘hollow’ the very neutrality that the law requires.... While the majority trumpets the availability of superior sex-neutral alternatives as confirmation of § 1409(a)(4)’s validity, our precedents demonstrate that this fact is a decided strike *against* the law. Far from being ‘hollow,’ the avoidance of gratuitous sex-based distinctions is the hallmark of equal protection.” *Id.* at 82. While the majority was right to note that mothers would more easily satisfy a sex-neutral proof of parentage requirement, facially neutral laws

and other non-discriminatory means would in any case be more effective.⁹³ As for creating an opportunity for a meaningful relationship, the dissent concluded that the majority had failed to demonstrate that Congress had any such intent, and stressed that hypothesized rationales are insufficient under heightened scrutiny.⁹⁴

The dissent considered both of the majority's stated "important governmental objectives" at length.⁹⁵ The basic criticism of the dissent, however, transcends either argument taken individually; simply put, the majority has failed to apply its ordinary scrutiny and instead exhibited excessive deference in upholding facially discriminatory and dangerous distinctions on the basis of sex. For example, Justice O'Connor noted the superfluous nature of the Court's primary justification: the importance of assuring that a biological parent-child relationship exists.⁹⁶ In light of DNA testing and other accurate means of ensuring a biological relationship, the procedural hurdles imposed on fathers by virtue of gender are far from narrowly tailored.⁹⁷ The poor fit of the government's stated purpose is further exemplified by the statutory option of establishing a "biological relationship" through an oath of paternity—a telling departure from

do not trigger heightened scrutiny and are different in kind from facially discriminatory ones. *Id.*

⁹³ *Id.* at 80. *See also id.* at 81 ("Because § 1409(a)(4) adds little to the work that § 1409(a)(1) does on its own, it is difficult to say that § 1409(a)(4) 'substantially furthers' an important governmental interest." (citation omitted)).

⁹⁴ *Id.* at 84.

⁹⁵ *Id.* at 79-91.

⁹⁶ The dissent noted that the requirements of § 1409(a)(1) are largely superfluous in light of § 1409(a)(1)'s requirement that a father demonstrate a blood relationship with his child: "The gravest defect in the Court's reliance on this interest, however, is the insufficiency of the fit between § 1409(a)(4)'s discriminatory means and the asserted end [Section] 1409(a)(1), which petitioners do not challenge before this Court, requires that 'a blood relationship between the person and the father [be] established by clear and convincing evidence.' ... It is difficult to see what § 1409(a)(4) accomplishes in furtherance of 'assuring that a biological parent-child relationship exists' that § 1409(a)(1) does not achieve on its own. The virtual certainty of a biological link that modern DNA testing affords reinforces the sufficiency of § 1409(a)(1)." *Id.* at 80 (citation omitted). *See also id.* ("It is also difficult to see how § 1409(a)(4)'s limitation of the time allowed for obtaining proof of paternity substantially furthers the assurance of a blood relationship. Modern DNA testing, in addition to providing accuracy unmatched by other methods of establishing a biological link, essentially negates the evidentiary significance of the passage of time. Moreover, the application of § 1409(a)(1)'s 'clear and convincing evidence' requirement can account for any effect that the passage of time has on the quality of the evidence.").

⁹⁷ The dissent criticized the majority for dismissing alternative means of establishing a biological relationship. *See id.* at 81-82 ("The majority concedes that Congress could achieve the goal of assuring a biological parent-child relationship in a sex-neutral fashion, but then, in a surprising turn, dismisses the availability of sex-neutral alternatives as irrelevant.") (internal citations omitted).

biology, given the Court's subsequent insistence that a purported father may himself not know who the actual father is.⁹⁸

Similarly, the dissent criticized the majority's emphasis on a mother's "opportunity" to form a meaningful relationship with her child. Had the Court pointed to *actual* relationships between mothers and children, they would have invoked cultural stereotypes and generalizations. By relying on opportunity, they were able to couch their decision in biological difference, thereby avoiding a debate over means-ends fit. While perhaps effective for those purposes, the tactic served to denigrate the importance of fostering parent-child bonds: "[i]t is difficult to see how, in this citizenship-conferral context, anyone profits from a 'demonstrated opportunity' for a relationship in the absence of the fruition of an actual tie."⁹⁹ Moreover, the facts of *Nguyen* confirmed the possibility that a father and child would have the opportunity to develop a relationship and would in fact do so without formalizing their relationship pursuant to § 1409(a).¹⁰⁰

In the end, according to the dissent's reading of *Nguyen*, the government and the majority both fall back on impermissible sex stereotyping. The majority's attempt to disclaim that impulse fails, the dissent argued, because it "articulate[s] a misshapen notion of 'stereotype' and its significance in ... equal protection jurisprudence."¹⁰¹ The majority defined "stereotype" as "a frame of mind resulting from irrational or uncritical analysis."¹⁰² Such a narrow definition, according to the dissent, ignores the long line of cases holding that stereotypes may be empirically

⁹⁸ See *id.* at 81 ("Satisfaction of § 1409(a)(4) by a written acknowledgment of paternity under oath ... would seem to do little, if anything, to advance the assurance of a blood relationship, further stretching the means-end fit in this context.").

⁹⁹ *Id.* at 84 ("If a child grows up in a foreign country without any postbirth contact with the citizen parent, then the child's never-realized 'opportunity' for a relationship with the citizen seems singularly irrelevant to the appropriateness of granting citizenship to that child. Likewise, where there is an actual relationship, it is the actual relationship that does all the work in rendering appropriate a grant of citizenship, regardless of when and how the opportunity for that relationship arose."). The dissent noted that the majority never sufficiently responded to this critique, stating only that "[i]t is almost axiomatic that a policy which seeks to foster the opportunity for meaningful parent-child bonds to develop has a close and substantial bearing on the governmental interest in the actual formation of that bond." *Id.* at 55. In the minds of the dissenting Justices, "[a] bare assertion of what is allegedly 'almost axiomatic' ... is no substitute for the 'demanding' burden of justification borne by the defender of the classification." *Id.* at 87.

¹⁰⁰ *Id.* at 85. The facts of *Nguyen* are not uncommon. The petitioners' brief reported, "according to 1998 Census data, in the United States more than 700,000 never-married fathers are raising more than a million children." Brief for Petitioners at 16 n.6, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071) (citing Lynne M. Casper & Ken Bryson, U.S. Census Bureau, *Household and Family Characteristics* 108 (1998); Terry A. Lugaila, U.S. Census Bureau, *Marital Status and Living Arrangements* iii (1998)).

¹⁰¹ *Nguyen*, 533 U.S. at 89.

¹⁰² *Id.* at 68.

grounded and thus in some sense “rational.” The Court rejects even arguably rational generalizations when they “classify unnecessarily and overbroadly by gender when more accurate and impartial functional lines can be drawn.”¹⁰³

The dissenting opinion concludes with a historical account of the discriminatory intent of the legislation at issue in *Nguyen*. Section 1409(a) was first enacted as § 205 of the Nationality Act of 1940, upon the recommendation of a Committee of Advisors. Their recommendations unabashedly rely on mothers’ natural roles as caretaker and guardian:

[T]he Department of State has, at least since 1912, uniformly held that an illegitimate child born abroad of an American mother acquires at birth the nationality of the mother, in the absence of legitimation or adjudication establishing the paternity of the child. This ruling is based ... on the ground that the mother in such case stands in the place of the father.... [U]nder American law the mother has a right to custody and control of such child as against the putative father, and *is bound* to maintain it as its *natural guardian*. This rule seems to be in accord with the old Roman law and with the laws of Spain and France.¹⁰⁴

Section 1409(a) is the product of a long history of relegating women to the home, as caregivers. As early as 1932, the call for sex-neutral citizenship law was premised on the notion that “when it comes to the illegitimate child, which is a great burden, then the mother is the only recognized parent, and the father is put safely in the background.”¹⁰⁵ In upholding § 1409(a), the dissent suggests, the Court lent its authority to a policy premised on a history of stereotype and subordination.

The dissent’s analysis is fairly persuasive as a matter of precedent. As noted above, discriminatory classifications in the context of employment or schooling, even where premised on biological difference, are regularly invalidated.¹⁰⁶ Moreover, several family law statutes closely related to § 1409(a) with respect to the rights of non-marital children to paternal privileges have been held to violate equal protection. And, of course, the

¹⁰³ *Miller v. Albright*, 523 U.S. 420, 460 (1998) (Ginsburg, J. dissenting).

¹⁰⁴ *Nguyen*, 533 U.S. at 91-92 (quoting *To Revise and Codify the Nationality Laws of the United States*, Hearings on H.R. 6127 Before the House Committee on Immigration and Naturalization, 76th Cong., 1st Sess., 431 (1945) (reprinting Message from the President, *Nationality Laws of the United States* (1938)) (emphasis added and internal quotation marks and citations omitted)).

¹⁰⁵ *Id.* at 92 (quoting *Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States*, Hearing on H.R. 5489 before the House Committee on Immigration and Naturalization, 72nd Cong., 1st Sess., 3 (testimony of Burnita Shelton Matthews)).

¹⁰⁶ See discussion *supra* part I.A.

standard constitutional critiques apply. The rule is both overinclusive and underinclusive, in so far as children who are abandoned by their citizen-mothers at birth are entitled to seek citizenship decades later, whereas those who are raised from birth by citizen-fathers who never formalize their caregiving relationships may be subject to deportation once they reach adulthood.

D. Some Comments on the Decision

What is particularly striking about the majority's opinion is the ideological inconsistency that drives it. The Court succumbed to precisely the conflation of "real" biological difference (whatever that entails) and the social programming that it cautioned against. By couching its validation of Congress's advancement of the nurturing mother in the language of "opportunity," the majority purported to abandon stereotype. It claimed to have done no more than recognize a biological reality: women are inevitably present at birth, men are not. It is the coloring of this distinction, however, that relegates a recognition of difference to the entrenchment of an outmoded ideal of the mothering role. While it is no doubt true, as the dissent pointed out, that more biological mothers than fathers are present at the birth of their children,¹⁰⁷ that fact carries no *physical* significance for subsequent parent-child relationships. And while it may be the case that empirically more mothers do forge such relationships¹⁰⁸—an assumption

¹⁰⁷ Of course, innovations in *in vitro* fertilization, surrogacy, and other new techniques may mean that the egg donor is not present at birth. A case challenging the statute on these grounds is unlikely to arise. Nevertheless, it seems that the Court would be analytically bound to exclude such mothers, and their children, from the coverage of §1409(c)—even if they were in fact present at birth.

¹⁰⁸ See, e.g., Silbaugh, *supra* note 12, at 1152-53 ("With various degrees of comfort or reluctance, many in the family law field have come to the conclusion that the intensity of maternal commitment is, on average, greater than paternal commitment, and more significantly, that variation is far less common among mothers than among fathers. Thus, although it is difficult to speak broadly about the role of a father, in candid moments it is far easier to generalize about certain aspects of motherhood, particularly default responsibility for childrearing should shared parenting fail, and intense emotional involvement with children."). Cf. Collins, *supra* note 51, at 1704 ("The legal default rule that mothers assume parental responsibility for non-marital children generally serves as the 'reasonable' or 'substantial' justification for a concomitant allocation of parental rights: One sex-based legal rule is used to justify another. The result of such circular reasoning in *Miller*, as in other equal protection cases involving the regulation of parenting and reproduction, is that parenting-related statutes are insulated from the searching judicial scrutiny that the modern equal protection doctrine purports to offer. As a consequence, equal protection analysis itself obfuscates the gender-based harms that result from such laws. A second, related problem is that by promoting a search for sex-based stereotypes (for example, that women tend to assume responsibility for nonmarital children), the current approach fails to detect the coercive nature of the default allocation of parental responsibility.").

that must have been the true, if unstated, basis for the Court's decision—that relationship is far from inevitable, as the facts of Nguyen illustrate.¹⁰⁹

Nevertheless, as several family law scholars have emphasized in the wake of Miller and Nguyen, the alternative approach of ignoring the reality that mothers are likely to be burdened with the responsibilities of childrearing is by no means immune from criticism. In some sense, Justice Kennedy's concluding statements on stereotype are true: a legal espousal of formal equality cannot write away such patent physical differences as which sex bears a child. On the contrary, the failure to recognize such differences as sex-based leads to decisions, like Geduldig,¹¹⁰ that systematically overlook women's needs and interests, as well as to skepticism (among leftists and conservatives in equal measure, if for different reasons) that sex-based equal protection is working. In the context of family law, a statute conferring equal privileges on a biological father who had assumed no responsibility for his children years after their birth would be received with outrage by feminists and traditionalists alike. And while formalized legal status would remain a problematic proxy for parental involvement, the imprecision would likely be accepted in the interest of administrative convenience.

Katharine Silbaugh criticizes the dissent, as well as the organizations advocating invalidation of § 1409(a)—most prominently the NOW Legal Defense and Education Fund, which represented Nguyen, and the American Civil Liberties Union, which filed an amicus brief in Miller—for their simplification of the discrimination engendered by the statute. By reducing a policy premised on family relationships to one about gender roles, Silbaugh argues, practitioners and scholars have characteristically ignored family law concerns.¹¹¹ She cites the prevalence of putative father registries and other practical measures that facilitate adoption at the expense

¹⁰⁹ The petitioner's brief noted: "Ironically, though Boulais supported his child, because he undertook that obligation freely as a parent and without any formal written promise, he fails to meet the requirements of Section 1409(a)(3). A citizen mother is not formally required to provide such support; if Nguyen's mother had been the U.S. citizen instead of his father, then Nguyen would be a citizen, even though his mother took no part in his upbringing. The reason for the distinction lies in stereotype: the stereotype that a connection is automatically established between mothers and their children but not fathers and their children, and the stereotype that men, not women, are sole providers for their families." Brief of Petitioners at 19-20, Nguyen v. INS, 533 U.S. 53 (2001) (No. 99-2071).

¹¹⁰ 417 U.S. 484 (1974). See *supra* note 31 and accompanying text.

¹¹¹ Silbaugh, *supra* note 12, at 1154-55. She writes of the ACLU brief that it "speaks of the roles of mothers and fathers in an almost cartoonish way. The picture painted is of a very modern world in which gendered parenting roles are no longer the norm, in which all that can be said of parenting is that it is too heterogeneous to make any gendered claims. The ACLU cites data on women's increased participation in the workforce, apparently expecting the Court to assume that this increased participation must have brought with it role reversals in the home. This may accurately reflect parenting in the popular imagination, but it is not supported by empirical evidence." *Id.*

of fathers' rights¹¹² as evidence that "family law scholars and policymakers usually have preferred reforms that facilitate speedy adoptions and reflect gender fairness ... to reforms that put fathers and mothers on an identical footing but may slow the process of newborn adoptions."¹¹³

There is, however, a central difference between putative father registries and the statute at issue in Nguyen; namely, the invalidation of § 1409(a) would have benefited not only absentee fathers, but also the children of those fathers¹¹⁴ and their struggling single mothers.¹¹⁵ The

¹¹² While the Court has not addressed these questions in depth, it is not unaware of the family law precedent. In Miller, the majority reasoned, "Our conclusion that Congress may require an affirmative act by unmarried fathers and their children, but not mothers and their children, is directly supported by our decision in Lehr v. Robertson.... Whereas the putative father in Lehr was deprived of certain rights because he failed to take some affirmative step within about two years of the child's birth (when the adoption proceeding took place), here the unfavorable gender-based treatment was attributable to Mr. Miller's failure to take appropriate action within 21 years of petitioner's birth and petitioner's own failure to obtain a paternity adjudication by a 'competent court' before she turned 18." Miller v. Albright, 523 U.S. 420, 441 (1998).

¹¹³ Silbaugh, *supra* note 12, at 1156. There may ultimately be a need for a middle ground between Silbaugh's acceptance of the legitimacy of practical considerations and the equal protection notion that administrative convenience is never a permissible justification for state discrimination. The reality, in any case, is that cases like Miller and Nguyen simply do not pose the same administrative concerns that putative father registries do, because the interests at stake in the latter are not children's interests, but rather state interests in restricting citizenship and therefore economic investment in alien children, and more immediately fathers' interests in assuming responsibility only for those children for whom they elect to care.

¹¹⁴ Another irony of the decision, though it may be necessitated by the Court's decision on standing in Miller, is that the Court focuses on the rights of the parent to the exclusion of the interest of the child. This is a blatant departure from the best interests of the child standard that characterizes family law within this country. By presupposing that these children are not U.S. citizens, the Court is able to dispense with a consideration of their interests altogether. A district court deemed the Nationality Act of 1940 invalid in LeBrun v. Thornburgh, on the basis that the Act "served to make the citizenship of children born out of wedlock to American fathers, particularly those serving in the armed forces, subject to the personal vagaries and consciences of their fathers." 777 F. Supp. 1204, 1206 (1991). Judge Sarokin commented: "Those who have no choice in the marital state of their parents should not be so penalized or stigmatized, and their rights to citizenship should not be dependent on the moral fortitude (or lack thereof) of one of their parents. The unfairness is exacerbated by placing such power solely in the hands of the male parent. The law was thus discriminatory in its impact upon children born out of wedlock and sexist in making citizenship dependent upon the acquiescence of the male parent only." *Id.*

¹¹⁵ Cornelia Pillard and Alexander Aleinikoff note that although § 1409(a)(4)(c) (section 309(a)(4)(c) of the Immigration and Nationality Act) formally permits a non-citizen child to initiate a paternity action during her minority, whereby she would be entitled to citizenship, the provision is essentially hollow: "As a practical matter, [a father's] decision will virtually always be definitive. In order to override his preference, a child overseas (or her foreign mother on her behalf) would have to know about the statute, and specifically about her opportunity under § 309(a)(4)(C), to get a court adjudication, locate the correct state court in the United States, hire a lawyer, and file and win an involuntary paternity

children of unmarried citizen-fathers are twice penalized by the irresponsibility the Court is so eager to tout.¹¹⁶ The sting of § 1409(a)'s exclusion is particularly harsh for those children born in developing countries, who grow up in poverty, without the financial or emotional support of their fathers.

Why was *Nguyen* decided as it was? The most palpable difference between this case and other equal protection decisions, including those involving non-marital children, is that *Nguyen* is about immigration and citizenship. The majority appeared convinced of the legitimacy of its appeal to biological difference. There is no doubt, however, that the Court's decision was largely a practical one as well. Although Justice Kennedy purported to decide this case on the basis of heightened scrutiny, the plenary powers doctrine loomed in the background.¹¹⁷ Moreover, at least two Justices were concerned that the Court could not proscribe a remedy even were they to find § 1409(a) unconstitutional,¹¹⁸ since they cannot confer citizenship on terms other than those specified by Congress.¹¹⁹

The decision is practical in another sense as well. Whatever one's feelings on United States immigration policy and this country's responsibility with respect to international poverty, it must be admitted that

action. If she managed to get that far, she would still have to satisfy Section 309(a)(3)'s financial-support prong. It is not at all clear that a child-support order would count as 'agree[ing] in writing to provide financial support' under the statute, but even if it did, the child would face similar logistical obstacles to obtaining such an order. And the nonmarital child abroad might have no substantive right to support from a U.S. father if, for example, the law of the place of birth applied and conferred no such right, and if the relevant U.S. domestic law did not apply extraterritorially." Cornelia T. L. Pillard & Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 Sup. Ct. Rev. 1, 23 (1998).

¹¹⁶ Arguably, in the case of children born to mothers raped by U.S. military personnel in developing countries, the United States is responsible for yet broader social and political injustice.

¹¹⁷ The dissent distinguished *Fiallo*, which rejected a constitutional challenge to a sex-based immigration classification, on the basis that "[t]he instant case is not about the admission of aliens but instead concerns the logically prior question whether an individual is a citizen in the first place. A predicate for application of the deference commanded by *Fiallo* is that the individuals concerned be aliens. But whether that predicate obtains is the very matter at issue in this case." *Nguyen v. INS*, 533 U.S. 53, 96 (2001).

¹¹⁸ Justices Scalia and Thomas felt that the case was non-justiciable on this basis.

¹¹⁹ The dissent argued that severance of § 1409(a)(4) would have been an appropriate remedy, given that the INA contains a general severability clause, § 406, 66 Stat. 281 ("If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby."). While the dissent rightly attacked the majority for subordinating equality to practical considerations of administrative expediency (in a way that precedent had explicitly proscribed), their high ground is unsteady. The petitioners, as we shall see, have made their own sacrifices to expediency and practicality.

the national welfare coffers, at the current level of funding, cannot accommodate a flood of immigrant children.¹²⁰ Given that the dissent quarreled with the narrow tailoring element of heightened equal protection scrutiny more than the compelling governmental interest prong, the majority devoted the bulk of its discussion to biological difference. That tactical decision is unfortunate in so far as it sidetracks a potentially revealing discussion of the distributive effects of § 1409(a).

Taken together, the majority and dissenting opinions in *Nguyen* bring to mind three potential statutory schemes, with very different distributive ramifications. The first, § 1409(a) itself, has the obvious “advantage” of excluding thousands of children who might otherwise have access to United States resources. The second, espoused by neither the majority nor the dissent, would ensure citizenship to all children, wherever born, of at least one United States citizen. Realistically speaking, it is unclear whether even such a generous statute would have a pronounced effect, given that many potentially eligible children would be unable to identify or locate their fathers¹²¹—it seems likely that fewer of the affected mothers would have thought to take down the names (properly spelled) and social security numbers of their lovers, or would in any case have the will or resources to locate them. Nevertheless, the dissent understandably shied away from such a broad rewriting of the statute. Instead, the dissent offered what is ironically the most restrictive proposal of the three: procedural requirements regarding proof of parentage and/or a real social relationship, prior to a child’s attaining majority, *regardless* of the sex of the citizen-parent. While this option would eliminate sex stereotyping, it would in fact increase the number of children vulnerable, like *Nguyen*, to a denial of citizenship on technical grounds despite close ties with their citizen-parents as well as to the United States. Before hastily adopting one of these options in order to mitigate the effects of harmful symbolism, it is important to recognize the economic and social costs of following any of these paths.

¹²⁰ Section 1409(a)(3), enacted in 1986 and therefore inapplicable to *Nguyen*, addresses this issue directly. In *Miller*, the Government explained that the purpose of the clause is “to facilitate the enforcement of a child support order and, thus, lessen the chance that the child could become a financial burden to the states.” Brief for Respondent at 25-26, n.13, *Nguyen v. INS*, 533 U.S. 53 (2001) (No. 99-2071) (quoting *Hearings on H.R. 4823 et al. before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary*, 99th Cong., 2d Sess., 150 (1986) (statement of Joan M. Clark, Assistant Secretary of State for Consular Affairs)). Justice Stevens expressed concern in *Miller* that allowing a man to claim citizenship for an adult child would encourage fraudulent claims, since he would not be responsible for child support. A genetic testing requirement would obviate this concern. Nevertheless, this critique applies theoretically even to those children not covered by § 1409(a)(3), including Lorelyn Miller (as well as *Nguyen*), since a citizen-father will be responsible for supporting his citizen-child regardless of whether he has agreed to do so.

¹²¹ Presumably, even such a relaxed statute would require proof of parentage.

Ultimately, however, the purpose of this Article is not to engage in the debate between majority and dissent over symbolism and stereotype, nor to solve the distributive dilemma outlined above. Rather, the pages that follow explore what is entirely missing from the majority, the dissent, and academic criticism: the sex that underlies the statute and Nguyen's story alike.

III. SEX, SEXUALITY: WHAT'S THE DIFFERENCE?

There appears to be something approaching consensus among scholars that as an equal protection decision, *Nguyen* is wrongly decided. At the same time, however, it is clear that § 1409(a) is more than a garden-variety sex-based classification. The INA, in regulating when a non-marital child is entitled to United States citizenship, is saying something powerful about marriage itself. Non-marital children are the products of non-marital sex, and non-marital sex is the wrong kind of sex. The state has an interest in dictating what kind of sex produces citizens. To date, equal protection doctrine has had nothing to say whatsoever about sexual desire and sexual freedoms. In the many family law cases debating the constitutionality of abortion, birth control, putative father registries, child support obligations, and countless other issues intertwined with sexuality, no judge has touched upon what is really at stake in those decisions—the freedom to engage in sexual acts without bearing the consequences. No one is eager to make the argument that disproportionately burdening women's sex subordinates women.

The notion that the state creates and regulates sexuality is by no means a new one. In 1976, when Foucault criticized a generation of sex liberationists for their conviction in "the sexual cause—the demand for sexual freedom[,] the knowledge to be gained from sex and the right to speak about it,"¹²² he took for granted that the assumption of governmental sexual repression was a widely held one. At the same time, there is a prevalent sentiment that the modern state, despite a pretense of liberalization, is if anything more pervasive in its regulation of sexuality: "Although the movement toward self-conscious sexuality has been hailed by modernists as liberatory, it is important to remember that sexuality in contemporary times is not simply released or free-floating.... States now organize many of the reproductive relations that were once embedded in smaller scale contexts."¹²³ This Article takes no position in that debate except to assume—problematically but without knowing where or how else

¹²² Michel Foucault, *The History of Sexuality: Volume 1: An Introduction* 6 (Robert Hurley trans., Vintage Books ed., 1990) (1976).

¹²³ Ellen Ross & Rayna Rapp, *Sex and Society: A Research Note from Social History and Anthropology*, in *Powers of Desire: The Politics of Sexuality* 51, 68 (Ann Snitow et al. eds., 1985).

to ground a legal critique—that laws do in fact instantiate governmental power by influencing people’s behavior.

This Part begins by examining the consequences of regulating sex, domestically and abroad. It then inquires into the inadequacy of equal protection doctrine to accommodate discussion of sexual difference and sexuality more generally. Finally, it asks whether the limitations of equal protection doctrine account for the absence of sexuality from the Court’s decision, or whether there are more pervasive, normative, political, or jurisprudential forces at work. It should be noted at the outset that the following discussion assumes that most unmarried non-citizen mothers, and particularly those who live in developing countries, lack the knowledge, law, skills, and resources of the United States to effectively bring paternity actions and thereby force paternal responsibility.¹²⁴

A. What’s Sex Got to Do With It?

The suggestion that sex is conspicuously missing from the equal protection discussion of *Nguyen* and § 1409(a) presumes that the statute does indeed regulate sex, whether explicitly and intentionally or as a byproduct of other concerns. The preceding section noted that § 1409(a), despite its ideological shortcomings, has practical advantages, from the perspective of administrative efficiency, in restricting access to social resources. However, the statute has a distinct set of costs unrelated to economic considerations. This section demonstrates the ways in which § 1409(a) influences sexual freedom, with markedly different results for women than men.¹²⁵

Should sex be rich, personal, and deeply relational? Or is “casual sex” an element of adult play that should be liberated and celebrated? Although I do not purport to answer those questions here, they are bound up with the regulation of sex under § 1409(a). For reasons that are elaborated in the following pages, § 1409(a) encourages women to have sex with their husbands and men to have sex however and with whomever they please. In fact, the implicit sexual incentive scheme built into § 1409(a) may be why feminists who share little else share an intuitive distaste for the statute. From a family law relational perspective, § 1409(a) is reprehensible because it sanctions men’s sexual irresponsibility and allows men to objectify women by compelling them to bear the costs of sex. From the

¹²⁴ See *supra* note 115.

¹²⁵ While my approach is not explicitly constructivist, the following discussion presupposes that by imposing different (harsher) consequences on women’s sex than men’s sex, § 1409(a) at least contributes to the representation of women’s sexuality as intrinsically different from men’s. The equal protection question at stake in *Nguyen* is therefore more pervasive than “gender” roles regarding parenting; it penetrates to the core of sex identity. It is also interesting to note that only sex that produces children is at issue—ironically, gay and lesbian sex appears to be entirely free of regulation by this provision.

“sex-positive” perspective of those who seek to redeem sex for its own sake, § 1409(a) is destructive of sexual freedom in so far as, by burdening women disproportionately with the consequences of non-marital sex, it dissuades women from having sex and entrenches a power disparity that precludes truly casual sex. In short, § 1409(a) unabashedly, if perhaps unintentionally, establishes a scheme of sex-discriminatory sexual incentives and regulations.

However anomalous the sexual repercussions of § 1409(a) may seem, they are well-precedented. State regulation of sexuality in the nineteenth century manifested itself early on in laws prohibiting fornication, adultery, sodomy, incest, seduction, and rape; later additions included prohibitions on obscenity and lewdness, interracial sex, cohabitation and marriage, prostitution, and eventually homosexuality.¹²⁶ Although each of these traditional means of explicitly regulating sexuality bears some significance with respect to the legislative scheme at stake in *Nguyen*, the most relevant is that classic device of regulating sexual relationships by regulating their products (children): regulation of birth status.¹²⁷ In fact, *Nguyen* bears a striking resemblance to a line of equal protection cases prohibiting discrimination against non-marital children. Like § 1409(a), state laws releasing fathers from financial obligations with respect to their non-marital children may have been tailored more to the protection of financial resources than to the regulation of sexuality. But for those laws, as for § 1409(a), the effects on sexuality were palpable and power-laden.

1. Social Underpinnings

The second half of this section traces the unsteady progress of litigation aimed at ending birth status discrimination and seeks to understand § 1409(a) as a manifestation, if not a straightforward appropriation and exportation, of many of the principles underlying birth status laws. However, the social norms underlying both § 1409(a) and birth status regulation are as important as their legal history and are the subject of this subsection.

At first blush, Justice O'Connor's assessment that the precursor to § 1409(a) was designed to protect men's wealth, names, and family pedigrees¹²⁸ seems plausible. But there is more to the story than simply the protection of fathers. To begin with, whatever the historical origins of § 1409(a), it may be disingenuous to ascribe to Congress that kind of

¹²⁶ See generally William N. Eskridge & Nan D. Hunter, *Sexuality, Gender and the Law* 1-2 (1997).

¹²⁷ Given the distasteful and weighted connotations of the term “illegitimate,” I will generally use the term “non-marital” rather than “illegitimate” and “birth status” rather than “legitimacy” or “illegitimacy.”

¹²⁸ See *supra* note 104 and accompanying text.

conscious manipulation of immigration law to protect paternal autonomy. Justice Kennedy convincingly set forward a number of sex-neutral justifications for the policy.¹²⁹ Moreover, if shielding fathers from unwanted responsibility were the only purpose of § 1409(a), Boulais should have been permitted to petition for his son's citizenship whenever he chose to do so. Rather than establish a set of tedious administrative procedures and a statute of limitations, Congress could just as easily have permitted fathers to confer citizenship on their children, at their discretion, whenever they chose to do so.

Part of the equation, no doubt, is a brand of class discrimination endemic to the U.S. immigration scheme. The fathers least likely to avail themselves of § 1409(a) during their children's minority are those who have the fewest resources and are inattentive to legal "technicalities."¹³⁰ Similarly, national financial incentives to exclude as many children as possible must have been central.¹³¹ But the normative power of § 1409(a) penetrates deeper into social consciousness, channeling a history of state-sponsored sexual activity. Birth status laws enable the state to regulate sexual relationships and pressure women into heterosexual marriages. If they are to protect their children—an expectation that is of course already socially conditioned—women are forced to accede to the sexual relationships that the state and their fathers have authorized. Moreover, sexual subordination theory would tell us that the government has an interest in sanctioning the sexual vagaries of its male as well as its female citizens; a "mothering" father is just as subversive as a failed mother. A man is not a father until he seeks the legitimization of the state.

Ellen Ross and Rayna Rapp have noted that the Bastardy Clauses of England's 1834 Poor Law Amendment Act in England, which assigned sole financial responsibility for non-marital children to mothers and their

¹²⁹ See discussion *supra* Part II.B.

¹³⁰ There is an element of racial discrimination in the immigration scheme as well. As Kif Augustine-Adams explains, "The exclusion of U.S. servicemen's children born abroad and out-of-wedlock results in a distinct physical embodiment of the nation. Under the current citizenship rule, the U.S. citizen population is whiter than it would be under a rule that granted U.S. citizenship at birth to both the children of unmarried U.S. citizen women and unmarried U.S. citizen men. As Justice Stevens notes, the overwhelming majority of U.S. service people abroad are and have been men. Over the past few decades, these U.S. servicemen have left behind children in countries with populations of color: Vietnam, the Philippines, Japan, Korea, and other Southeast Asian countries. Moreover, minorities of color are represented in the U.S. military at a greater percentage than in the U.S. population generally. Thus, the children excluded under the current rule are most often children of color, through their mother, their father, or both. The practical impact of the rule excluding from the United States children born abroad to unmarried U.S. men is a raced citizenry, a nation without the children of color that belong to its unmarried fathers abroad." Augustine-Adams, *supra* note 76, at 112-113.

¹³¹ See discussion *supra* Part II.D.

parishes, provided men a “new license to avoid marriage.”¹³² As a result, “an earlier tradition of lively female sexual assertiveness ... gave way to a more prudish, cautious image of womanhood by the 1860s.”¹³³ In keeping with a historical tendency to preserve men’s assets and freedom, § 1409(a) releases men from responsibility for child support in the international setting, thereby facilitating men’s sexual freedom and constraining women’s sexual choices.

But § 1409(a) is in some sense far more effective and less contentious than its predecessors. As notions of social welfare and community responsibility for the poor gained sway in this country, the costs of preserving the autonomy of unwitting fathers fell increasingly on the state. Many unmarried mothers were simply unable to provide for their children, and state institutions increasingly intervened. Cynically speaking, the recognition of the high social costs of birth status laws may have been more influential than sympathy for mothers and children in changing the discriminatory regime. Unlike its predecessors, § 1409(a) neatly avoids the costs associated with domestic birth status law—by exporting them. To be sure, the state remains responsible for supporting indigent children of citizen-mothers, a duty to which everyone has become accustomed.¹³⁴ The truly innovative and unique advantage of § 1409(a) is that citizen-fathers can protect their assets without threatening domestic coffers. Women, whether American or foreign, would do well to refrain from non-marital, possibly procreative sex with American men unless they are willing to risk the burdens of parenthood.¹³⁵ Men’s sex, on the other hand, is entirely free of consequences in almost all cases.

The proposition that § 1409(a) implicates sexual norms has ample support in the statute. Regulation of sexual activity is not foreign to the Immigration and Nationality Act of 1940, even if the particular breed of sexual regulation at stake in *Nguyen* was an unintended consequence. Section 316(a) of the Act makes naturalization contingent on “good moral character” for five years prior to an application for citizenship.¹³⁶ Section 101(f)(3) excludes from that definition people engaged in prostitution, polygamy, and moral turpitude, among other factors. Explicit prohibition of sexual practices such as fornication, adultery, and private homosexual

¹³² Ross & Rapp, *supra* note 123, at 51.

¹³³ *Id.*

¹³⁴ The burden of supporting the children of unmarried mothers is still unlikely to fall entirely on the state, since culture charges mothers with the care of their children to the extent possible.

¹³⁵ This argument obviously presupposes a lack of access to reliable birth control and abortion. While this is likely to be the case for women in developing countries, the argument may be more vulnerable in the context of citizen-mothers.

¹³⁶ 8 U.S.C § 1427(a).

conduct were specifically disallowed in a number of jurisdictions,¹³⁷ and by the 1970s, the INS had retreated from its earlier moral hard line. A provision prohibiting adultery was repealed in 1981.¹³⁸ Unsurprisingly, the less palpable regulation of sexuality vis-à-vis birth status managed to survive.

2. Litigating Legitimacy

Although 8 U.S.C. § 1401 provides that children of *married* citizen-fathers are automatically entitled to United States citizenship, the Court in Nguyen did not consider the equal protection claim that § 1409(a) discriminated impermissibly on the basis of birth status.¹³⁹ In many ways, the decision to abandon the birth status claim was an unfortunate one. A Supreme Court holding on the basis of birth status would have obviated the biological reasoning that rationalized the sex-based classification. Even had it considered birth status, however, the Court would not have reached the issue of sexuality for the reasons set out below.

a. Birth Status and Equal Protection Doctrine

Today, birth-status claims receive a level of judicial scrutiny somewhere between rational basis review¹⁴⁰ and the intermediate scrutiny traditionally afforded sex-based discrimination claims.¹⁴¹ To survive equal protection scrutiny, a birth status classification must be “substantially related to an important governmental objective.”¹⁴² The Court’s central motivation for heightened scrutiny appears to be that birth status is

¹³⁷ See, e.g., Marie Posusta v. United States, 285 F.2d 533 (2nd Cir. 1961).

¹³⁸ U.S.C. § 1101[f][2], repealed by Public Law No. 97-116, § 2(c)(1), 95 Stat. 1611 (1981).

¹³⁹ The petitioners did not in fact make such a claim, probably owing to the standing problem in Miller. In Miller, the Court did not grant certiorari on the claim of birth status discrimination. Miller v. Albright, 523 U.S. 420, 422 (1998).

¹⁴⁰ Recall that in Fiallo v. Bell, the Court declined to apply intermediate scrutiny to a provision of the Immigration and Naturalization Act that discriminated against the illegitimate children of citizen-fathers on the basis of the plenary power doctrine. The Court also cited the “perceived absence in most cases of close family ties” between unmarried fathers and their children, as well as obstacles to proving paternity. Fiallo v. Bell, 430 U.S. 787 (1987).

¹⁴¹ See Karen A. Hauser, Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny Add Up to the Need for Change, 65 U. Cin. L. Rev. 891 (1997).

¹⁴² Clark v. Jeter, 486 U.S. 456, 461 (1988). The “important governmental interest” standard replaced the earlier standard, which required substantial relation to “permissible state interests.” Lalli v. Lalli, 439 U.S. 259, 264 (1978).

immutable and accidental;¹⁴³ children should not be disadvantaged because of their parents' actions. Intrusion of such classifications on family privacy rights has been an additional, albeit lesser, consideration.

There is a long history in this country of discriminating against children born to unmarried parents. At common law, a non-marital child was *nullius filius* (nobody's child). The father had no legal duty to support children born outside of marriage, and such children, at least formally, were barred from inheriting from either parent.¹⁴⁴ The harshest of these rules were gradually mitigated by legislation in many states.¹⁴⁵ However, the principle of coverture, which dictated that only marital children acquired status patrilineally, lasted well into the twentieth century. Fathers of non-marital children had neither rights nor responsibilities.¹⁴⁶

The Court first considered an equal protection challenge to birth-status classification in 1968, in *Levy v. Louisiana*.¹⁴⁷ Noting that the Court had been "extremely sensitive when it comes to basic civil rights and ha[d] not hesitated to strike down an invidious classification even though it had history and tradition on its side,"¹⁴⁸ the majority invalidated a wrongful death statute that denied recovery to non-marital children after their mother's death. Since then, the Court has generally been hostile to birth-status classifications,¹⁴⁹ though the outcome and the standard of review to

¹⁴³ See Hauser, *supra* note 141, at 899.

¹⁴⁴ Collins, *supra* note 51, at n. 64

¹⁴⁵ Linda Kelly notes that the award of custody to mothers, beginning in the early nineteenth century, was also a result of the protection of male interests through coverture. Linda Kelly, Essay, *The Alienation of Fathers*, 6 Mich. J. Race & L. 181, 185 (2000) ("While social demands and the transformed image of women allowed women to be viewed as the primary caretakers and awarded women custody as the number of custody disputes grew with the growing number of cases of separation and divorce, illegitimate children were also affected. In keeping with the changing gender roles, women could now also be recognized as the 'natural' caretakers of illegitimate children.... Fathers, on the other hand, would be charged with the financial expectation of keeping their illegitimate children off the public dole.").

¹⁴⁶ The father could, however, choose to adopt his non-marital children. See Collins, *supra* note 51, at n.64

¹⁴⁷ 391 U.S. 68, 72 (1968).

¹⁴⁸ *Id.* at 71.

¹⁴⁹ See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977) (applying heightened scrutiny to strike down an intestate succession law precluding illegitimate children from inheriting from their fathers); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (holding that adoption laws could not unequivocally dispense with paternal consent to the adoption of illegitimate children). But see *Parham v. Hughes*, 441 U.S. 347, 357 (1979) (applying rational basis scrutiny to uphold wrongful death statute that precluded fathers from suing for the wrongful death of their illegitimate children). Arguably, Parham disadvantages only the father of an illegitimate child, not the child herself.

be applied in any given case are far from predictable.¹⁵⁰ However, as with discrimination against fathers, many distinctions remain in state family law.

In 1988, the Court decided Clark v. Jeter,¹⁵¹ which struck down as violative of the Equal Protection Clause a statute that is similar in many ways to § 1409(a). Clark, on behalf of her daughter, challenged a Pennsylvania statute that foreclosed a non-marital child from seeking paternal support unless paternity was established within six years of her birth. The Court reasoned that marital children were not subject to similar time limitations, and the statute therefore impermissibly discriminated on the basis of birth status. The parallels to Nguyen are striking. Whereas the child of a married citizen-father is automatically entitled to citizenship, a non-marital child may not acquire the citizenship of her father barring the fulfillment of certain proscribed requirements within the child's minority.¹⁵² There is, however, a notable distinction between the two cases. In light of the Court's refusal to entertain the equal protection claim of the would-be citizen-child in Miller v. Albright, Nguyen was, of necessity, framed as a case of *paternal* rights. Whereas the government must offer rigorous justification for discriminating against a non-marital child, the father's irresponsibility apparently singles him out for special treatment.¹⁵³

b. Birth Status Unsexed

What is notable for the purposes of this Article is that none of the rights recognized by the courts in the birth status context—neither child's rights nor father's rights, nor, by implication, mother's "right" to not be stereotyped—implicates sexuality. The sexual undercurrent of the birth status laws has largely been lost as a result of the equal protection strategy that sought to abolish them. The limitations of equal protection doctrine with respect to violations of sexual freedoms are the subject of the next section. For now, it is enough to note that in so far as equal protection is about suspect exercises of governmental power (a promising beginning), it is about suspect classifications, not suspect ideologies and normative goals.¹⁵⁴ Non-marital children, like women, may be entitled to constitutional

¹⁵⁰ See, e.g., Homer Clark, The Law of Domestic Relations in the United States 860 (2nd ed. 1988) ("It is difficult if not impossible to arrive at an accurate or useful assessment of the Supreme Court's decisions.").

¹⁵¹ 486 U.S. 456 (1988).

¹⁵² The difference in allotted time for fulfilling those requirements—six years in Clark v. Jeter versus eighteen years in Nguyen v. INS—is arguably a compelling distinction between the two cases. However, the fact that no similar limitations attend to married fathers remains.

¹⁵³ See *supra* note 139 and accompanying text.

¹⁵⁴ The production of suspect classifications is in any case already corrupted. See Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation

protection, but sexual regulation has no place in equal protection jurisprudence.¹⁵⁵

The Court's analysis in the birth status cases has never recognized a mother's choice to have sex out of wedlock, nor in fact has it ever touched upon sexuality at all except to emphasize that a child should not be punished for the sexual impropriety of her parents. In Levy, the first birth status case decided by the Supreme Court, there is little room left for a sex-based claim; after all, "[t]he rights asserted here involve the intimate, familial relationship between a child and his own mother."¹⁵⁶ Even as recently as 1988, in Clark v. Jeter, the Court reasoned within the context of two principles of birth status cases: the practical concession that "it might be appropriate to treat illegitimate children differently in the support context because of 'lurking problems with respect to proof of paternity,'"¹⁵⁷ and the more philosophical notion that "visiting ... condemnation on the head of an infant is illogical and unjust."¹⁵⁸ Whatever the moral deficiencies of the parents' choices, their children should not be penalized for those failings.

To be fair, there are many good reasons for the Court's failure to consider the ramifications of the birth status cases on women's (set against men's) sexual rights. First and foremost, there is little incentive to do so—the heightened scrutiny (often) applied to birth status cases, while premised on resistance to outmoded moralistic notions, is the same standard that (usually) applies in sex discrimination cases. Moreover, arguing on behalf of wronged children who played no role in the violation of laws and social norms is intuitively and analytically more compelling. The Court's summation in Trimble v. Gordon¹⁵⁹ rings true: "The parents have the ability to conform their conduct to societal norms, but their illegitimate children

of Sex from Gender, 144 U. Pa. L. Rev. 1 (1995). Franke suggests that the process of classification reflects social allocation of power rather than natural characteristics. In particular, she argues that "every sexual biological fact is meaningful only within a gendered frame of reference." *Id.* at 98.

¹⁵⁵ By this rationale, perhaps Nguyen might have been decided as a privacy/sexual autonomy case. However, the Court has made clear that the government is not required to *facilitate* choices about sexuality and procreation. It is simply constrained with respect to its power to proscribe certain decisions and activities.

¹⁵⁶ Levy v. Louisiana, 391 U.S. 68, 71 (1962). In the same case, the Court is so sweeping in its liberalism to quote from King Lear: "We can say with Shakespeare: 'Why bastard, wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue? Why brand they us With base? with baseness? bastardy? base, base?'" King Lear, Act I, Scene 2." *Id.* at 72. Although I do not here endeavor to provide a textual exegesis of the passage, the classical American notion of self-determination and autonomy sound loudly.

¹⁵⁷ Clark v. Jeter, 486 U.S. 456, 461 (1988).

¹⁵⁸ *Id.*

¹⁵⁹ 430 U.S. 762 (1977).

can affect neither their parents' conduct nor their own status."¹⁶⁰ Thirdly, if these cases were to be decided on the basis of parents' rather than children's rights, courts would want a broader basis than sex discrimination. Otherwise, states could permissibly penalize both parents. Given the declining success of due process claims in recent years, departing from generally accepted principles of equal protection in order to create a new and sweeping due process right to fornication is an unlikely alternative.

Nevertheless, it should be recognized that these measures were unnecessary precisely because citizen-children do have legal rights. Given the increasing prevalence and tolerance of single parent families in all communities, it seems likely that neither popular sentiment nor, by extension, the Court would today tolerate invidious discrimination against the children of unmarried parents, even if such discrimination were constitutionally permissible. A number of commentators have noted that the Court would have come under substantial attack had it upheld a domestic statute of the sort at stake in *Nguyen*.¹⁶¹ Implicit assumptions about sexual freedom surely play some role in scholarly aversion to this statute and others like it.

B. Unequally Protected Sex

The previous section demonstrates the importance of the sex-regulative undertones of § 1409(a). Whatever the implications of the statute with respect to stereotyping and gender roles—and it is at least arguable that the symbolic costs of sex-based differences with an administrative loophole, while real, may be overcome by practical considerations—it is clear that another set of costs has been overlooked. The following section attempts to explain why. It first explores the doctrinal inadequacies of equal protection with respect to sex-based, and more specifically, sexually based differences. It then looks beyond equal protection law to the broader social, political, and jurisprudential norms that prevent consideration of sexual costs in legal analysis.

Over the past decades, feminist legal scholars have been struggling to formulate a strategy for targeting sex-based discrimination that both dispels gender stereotypes and is sensitive to women's unique concerns, particularly those surrounding pregnancy and childbirth, which the law has consistently undervalued. In practice, the competing goals have created a bifurcation of feminist legal camps: one promoting what has come to be known as "formal equality," the other urging "anti-subordination theory," defined as the recognition of women's differences through different legal

¹⁶⁰ *Id.* at 770.

¹⁶¹ *But see Parham v. Hughes*, 441 U.S. 347 (1979), *supra* note 149.

treatment.¹⁶² Today, even as reductionist notions of *sexual* subordination have lost their grip on feminist scholarship, anti-subordination theory seems to hold the favored place among legal academics. Advocates of formal equality are rightly criticized for their inattentiveness to power disparities and social conditions that would preclude women from taking advantage of purportedly equal opportunities.¹⁶³ Anti-subordination theory, however, is difficult to implement pursuant to equal protection doctrine, and the courts continue to rely largely on formal equality.¹⁶⁴

Strictly speaking, there is little room in equal protection doctrine for accommodation of difference. In some sense, anti-subordination theory tortures a doctrine that was never meant to equalize results and is ill-equipped to do so. And while it allows for more flexibility than does formal equality,¹⁶⁵ it has its own attendant problems. Most patently, it allows discrimination against men,¹⁶⁶ which is problematic from an anti-subordination perspective because men, as a class, do not comprise a historical target of subordination. Although it is possible to reach a result that targets discrimination against men on the basis that it indirectly subordinates women,¹⁶⁷ doing so inevitably entails unpopular and often attenuated modes of reasoning.

Moreover, the specter of “real” difference is always in the backdrop, particularly with respect to discrimination involving sexuality or its repercussions, and neither theory offers much in the way of a solution.¹⁶⁸

¹⁶² See, e.g., Clay M. West, *Nguyen v. INS: Case Note: Is Sex Really More Important Now?* 19 Yale. L. & Pol’y Rev. 525, 526 (2001).

¹⁶³ See, e.g., Hunter, *supra* note 32, at 406 (“The second problem with the formal equality model is that it ignores power. Discrimination against men really is not the same evil as discrimination against women, and one would say the same as to ‘reverse discrimination’ against whites, for example. In both examples, the core of the problem is not the absence of abstract equality but the presence of subordinating systems of power. Anti-subordination theory speaks to this: sex discrimination not only classifies, it subordinates a class.”).

¹⁶⁴ But see Mary Anne Case, *The Very Stereotype the Law Condemns: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 Cornell L. Rev. 1447 (2000) (arguing that despite its fall from favor, formal equality has the advantage of avoiding the separate-but-equal approach engendered by anti-subordination theory).

¹⁶⁵ See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (mandating proactive accommodation on the part of the government).

¹⁶⁶ Discrimination against men is of course at stake, at least superficially, in *Nguyen*.

¹⁶⁷ See *supra* note 23 and accompanying text. Additionally, gays and lesbians are entirely unprotected by sex-based equal protection—despite efforts to cast gay marriage as discrimination against men, as opposed to women, who wish to marry men, and vice versa.

¹⁶⁸ There is of course some overlap between the two categories. The most obvious cases are same-sex education, the military, prison guards, and other fora in which institutions claim that sexuality per se must be a consideration—which are often argued on that basis that men will be unable to contain their sexual aggression and impulses.

Formal equality is of no help whatsoever with respect to purely sexual differences (of either category), where men and women are simply not "equal." A court is always entitled to find that a given law subordinates a subset of women, like pregnant women or mothers, rather than women as a class.¹⁶⁹ For instance, it makes no sense to speak of abortion law as discrimination against women in formal equality terms, since neither women nor men are entitled to abortions. Anti-subordination theory fares slightly better—conceptually, at least, it demands equal results, meaning that women's unique sexual concerns cannot be wholly neglected. Moreover, since anti-subordination theory looks to the underlying social forces and messages at work in a law, it precludes legislation that ostensibly advantages women but reinforces negative cultural associations.

As the law stands, however, a statute that limits women's sexual choices by targeting the consequences (pregnancy, childrearing) borne by a subset of women as a consequence of those choices is unlikely to trigger heightened scrutiny. One potential solution, defining sexual autonomy as an equal protection fundamental right, is unlikely to materialize, if the courts' decisions on gay rights are any indication. The only alternative, from an advocacy standpoint, is to argue on the basis of subordination vis-à-vis sex stereotyping. Even so, it remains quite a stretch to claim that legislation disadvantaging only mothers, or even potential mothers, triggers sex-based equal protection scrutiny at all—and discrimination against a subset of women would be subject only to rational basis review.

This is precisely the problem encountered in Nguyen. Though the dissent argues that § 1409(a), in so far as it perpetuates stereotypes about motherhood and outmoded notions of matrilineage of illegitimate children, violates equal protection, it is easy for the majority to fall back on biological difference. The Court's similar biological reasoning in Miller v. Albright prompted a number of excellent critiques of that decision that

¹⁶⁹ There are two principal areas where the notion of real difference is routinely applied: (1) physical disparities with respect to traits shared by both sexes, such as height, weight, or strength, and (2) sexual characteristics that typically affect only one sex, including menstruation, pregnancy, childbirth, and sexual organs and their diseases. The latter category can be further subdivided into traits shared by almost all members of a given sex (namely, sexual organs, chromosomal configuration, and hormonal balances) as opposed to those shared only by a subset—most frequently, fertile women, pregnant women, or mothers.

Presently available doctrine applies with varying degrees of acuity to the different categories. The easiest case surrounds physical differences, such as height and strength, that rarely implicate sexuality. Formal equality would allow an employer or educational institution to discriminate on the basis of such traits without distinguishing between sexes: a woman would be permitted to serve as a soldier, bouncer, or professional basketball player alongside a man of equivalent size and strength. The limitations of formal equality are self-evident, given the distribution of such traits across the sexes. Anti-subordination theory does better, however, providing that reasonable accommodations should be made in areas in which such characteristics can be supplemented by skill, intelligence, and other compensatory factors.

apply equally to Nguyen, and I do not wish to reproduce those discussions here.¹⁷⁰ Nevertheless, highlighting the pitfalls of biological stereotyping will facilitate an understanding of how the Court subordinated sexuality to a representation of sex-based traits. By pointing to those “real” differences between men and women like the fact that women sometimes become pregnant and men never do, the majority neatly avoids the antecedent question of how mothers become pregnant in the first place.

For Justice Kennedy, the case is settled on the basis of biological necessity¹⁷¹—unwed mothers cannot very well escape the opportunity of forming the mother-child bond. Kif Augustine-Adams represents Justice Stevens’ similar differentiation in Miller of unmarried fathers and mothers with respect to § 1409(a) as a distinction between “legal” fathers and “natural” mothers.¹⁷² Whereas motherhood is understood as a natural, biological, and inescapable relationship, fatherhood is merely a legal status. This analysis applies with equal acuity to the Court’s decisions in the “biology plus” cases.¹⁷³ Even where biology explicitly favors the non-marital partner of the mother, the mother’s husband is the legal father. In some sense, then, Nguyen v. INS embraces the very biologism that the “biology plus” decisions have sought to overcome. By hinging the presumption of a close parent-child relationship—which replaces mere genetic heritage as the prerequisite of citizenship—on the sex of the citizen-parent, the Court’s decision privileges biology rather than actual social ties.

Building on Augustine-Adams’s analysis, it becomes clear that the “naturalization” of the mother and the legal reification of the father go hand in hand. The formalistic tendency in constructing fatherhood reinscribes the father as the locus of law. A married man has positively assumed legal authority as the patriarch and therefore establishes himself as father of any child born to his wife—as long as a woman remains married, she cannot

¹⁷⁰ These studies include Collins, *supra* note 51; Pillard & Aleinikoff, *supra* note 41; and Kelly, *supra* note 145.

¹⁷¹ See discussion *supra* Part II.B.

¹⁷² Kif Augustine-Adams, Gendered States: A Comparative Construction of Citizenship and Nation, 41 Va. J. Int’l L. 93, 104 (2000) (“Thus, under the law upheld by Stevens, the biological and natural process of siring a child does not make a man a father; rather, fatherhood exists as a legally created construct. Men do not—indeed cannot—become fathers until they comply with the legal indicators of fatherhood, despite their biological connection with a child. Unmarried men choose to become fathers, in the legally relevant sense, after siring a child by fulfilling the formal requirements of U.S. citizenship law. The biological tie of fatherhood is not sufficient; what creates a father is a man’s choice to economically support a child and confer legitimacy. In contrast, an unmarried mother’s biological connection to her child is legally determinative. Under the law, she transmits citizenship to her child at birth and thus embodies the nation. Under this reasoning, fatherhood is legal and a matter of choice, whereas motherhood is natural and a matter of biology.”).

¹⁷³ See discussion *supra* Part I.A.

choose the father of her child. Her sexual acts are inseparable from her legal status in so far as she will “mother” any child who is born to her. For her husband, conversely, sexuality is largely divorced from law. Should he choose to impregnate an unmarried woman, he may often walk away.

The father does not entrench himself as such until he takes an affirmative legal action.¹⁷⁴ Mothers, conversely, are denied this formal relationship to their children by virtue of their natural roles. The distinction applies to unmarried women as well. A mother can change her status through law only by choosing to *rescind* her motherhood—termination of parental rights means becoming a not-mother. For unmarried men, on the other hand, law surfaces only in the context of the conferral of father status. That a woman can initiate a paternity action, at least in theory, does not mitigate the identification of the father with the law. However, it does create an ironic inversion. A woman who forces a man to become a father against his will becomes a subject and object of law simultaneously. She has chosen to bring the law down upon herself.¹⁷⁵

Struggling against this legal framework, the dissent suggests that we should be looking beyond biology altogether, by introducing facially sex-neutral citizenship requirements premised on actual parent-child ties rather than opportunity.¹⁷⁶ However, premising citizenship on actual social bonds, as the dissent seemingly advocates, would perpetuate the stereotype of the nurturing mother and preserve men’s autonomy—fathers could continue to exclude their children from their lives and their country; whereas mothers would continue to be culturally (though not legally) compelled to assume the caregiving role.¹⁷⁷ Moreover, one’s ability to make affirmative social choices is circumscribed by sex, wealth, race, and countless other choices. It is naïve to suggest that a non-citizen unmarried mother living in a developing country has an opportunity commensurate with that of the child’s citizen-father to decide whether to form a social

¹⁷⁴ The notable exception to this premise in United States law is the paternity action, whereby a mother may obtain a court order declaring a man the legal father of her child. On that basis, the court will proceed to impose child support obligations.

¹⁷⁵ The concept becomes even more weighted in the context of immigration, where father and fatherland jointly exercise their power.

¹⁷⁶ Because even the dissent is apparently unwilling (to be fair, likely unable) to prohibit Congress from excluding foreign-born children with no actual ties to the United States, Justice O’Connor proposed that § 1409(a) might have permissibly been applied to mothers as well as fathers. Alternatively, Congress could have employed one of “a number of sex-neutral arrangements”—presumably such substitute criteria as DNA testing, presence at birth, or, most likely, demonstration of a parent-child relationship. *Nguyen v. INS*, 533 U.S. 53, 80 (2001). Basing citizenship on the sex-neutral factors advocated by the dissent would indeed have achieved formal equality, but at the price of shirking responsibility for children of United States citizens who are irresponsibly left behind.

¹⁷⁷ The dissent responded to this criticism, as raised by the majority, that the resulting discrimination would pose only disparate impact concerns and would therefore not trigger heightened scrutiny. *Id.* at 82.

relationship with the child. On the one hand, she may be socially bound to care for the child; on the other, she may be forced to surrender her child for any variety of social, economic, familial, or religious reasons.

Ultimately, any decision premised on the notion of biological difference or stereotyping of social roles faces the criticism that legal rules are unlikely to impact cultural biases. In this case, even if the state were to confer citizenship on all children born to one citizen-parent, cultural conceptions of parenting roles would remain intact. Though such a rule would have the practical advantage of preventing administrative oversights like *Nguyen*'s, mothers would continue to bear a disproportionate burden with respect to parental duties. Would a direct confrontation with sexuality do any better? In terms of real results, perhaps not. Nevertheless, the latter strategy expressly acknowledges that children are a result of sex. To the extent that it emphasizes sexual choices over parenting choices, it combats cultural stereotypes of the nurturing mother. Both partners, in an ideal case, have chosen freely to engage in a sexual relationship;¹⁷⁸ they are equally

¹⁷⁸ The premise that § 1409 creates incentives for women to refrain from sex abroad assumed a backdrop of voluntary, consensual sex for pleasure. Unfortunately, in the context of sex between U.S. citizen men and non-citizen women—and particularly of military sex in developing countries, with which the Court is so concerned—that assumption is unwarranted. See *Nguyen*, 533 U.S. at 65 (“Given the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father’s identity.... One concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries. See Department of Defense, Selected Manpower Statistics 48, 74 (1999) (reporting that in 1969, the year in which *Nguyen* was born, there were 3,458,072 active duty military personnel, 39,506 of whom were female); Department of Defense, Selected Manpower Statistics 29 (1970) (noting that 1,041,094 military personnel were stationed in foreign countries in 1969); Department of Defense, Selected Manpower Statistics 49, 76 (1999) (reporting that in 1999 there were 1,385,703 active duty military personnel, 200,287 of whom were female); *id.*, at 33 (noting that 252,763 military personnel were stationed in foreign countries in 1999).”).

A number of studies have documented the prevalence of rape, coercive sex, and commercial sex between American servicemen and foreign women. Each of the three categories, of course, poses unique concerns from the standpoint of sexual power imbalances. For instance, while it is clear that the victims of rape are deprived of sexual autonomy, a number of scholars have suggested that commercial sex may in fact empower women. As a contract-skeptic, I am somewhat resistant to the latter notion. Regardless, § 1409(a) encourages coercive sexual practices, however defined, by casting men as sexually dominant. If a child is produced, the father will be free to decide whether to take responsibility and whether the child will have the right to become a citizen. Women, on the other hand, will almost invariably be burdened with childcare. In the case of lengthier relationships, a woman who has conceived a child, whether willingly or not, will feel pressured to ingratiate herself with the child’s father. As is so common in the case of domestic abuse, pleasing her partner is likely to take a sexual form. What is particularly ironic about *Nguyen*’s story is that the deportation hearings that single him out as the product of rogue sex were sparked by his own foray into sexual assault. It is perhaps poetic justice that the very sexual abuse that caused *Nguyen*’s predicament was tied up with the social norms and resulting legal rules that excluded him from citizenship.

responsible for the consequences of that choice, whether or not they actually discharge their parental responsibilities.

The foregoing discussion of the pitfalls of sex-based equal protection in the face of biological difference begs the question whether there is a principled basis for striking down § 1409(a) on the basis of sex. Arguably, one could buttress the equal protection argument with the very “sexuality” arguments that equal protection doctrine has consistently excluded—after all, unlike discrimination against actual mothers (who are given no choice as to their children’s citizenship) or actual fathers (who face unique administrative obstacles to conferring citizenship on their children), disproportionately targeting sex by *potential* mothers encompasses an overwhelming segment of the category “woman.” Because I am more interested in why related sexual arguments have not been made and the consequences of that omission than in the details of their construction, I leave such doctrinal proposals to one side.

C. The Bigger Picture (Two Tales of a Would-be Citizen)

The last section sought to address the question of why sex is missing from a jurisprudential standpoint: equal protection doctrine simply does not extend to implicit regulation of sexual choices. Nevertheless, the limitations of existing legal doctrine, while relevant, seem inadequate to explain the complete elision of sexuality from all legal challenges to birth status laws. After all, given sufficiently compelling reasons, the Court might have expanded equal protection doctrine or crafted alternative legal bases for sexual rights—whether premised on the once-promising due process right to procreate or on a novel theory. Doctrinal boundaries ultimately seem too simple an answer.

This section asks whether there is something more at stake by examining the regulatory interest of the state in downplaying sexuality and sexual violence, as well as the incentive for legal reformists to advance women’s practical standing at the expense of ideological consistency. In Nguyen’s story, there are two acts of silencing that warrant consideration: the erasure of Nguyen’s sexual assault, and the erasure of sexuality from legal and scholarly consideration of § 1409(a) in particular and sex discrimination doctrine in general. In each case, there are two silences: the silence of the state and dominant social forces (represented by the respondent and the majority), and that of the forces purporting to challenge and subvert government regulation (represented by the petitioners and the dissent).

1. *What Crime?*

Given the United States’s many incentives to exclude children of non-citizen fathers, the underlying sexual politics of § 1409(a) may appear

somewhat academic. Arguably, the Court has shied away from discussions of sexuality because an examination of sexual disincentives from a sex-discrimination perspective might jeopardize valuable governmental programs and traditional spheres of governmental power. This subsection therefore examines the Court's silence with respect to an inescapably sexual act that the government, by all intuitive accounts, should seek to exploit.

In the context of § 1409(a), the events that led up to Nguyen v. INS are probably somewhat anomalous. Lorelyn Miller's story is likely to be more common; she had spent her childhood abroad with her mother and wished to enter the United States and claim citizenship after she had attained majority.¹⁷⁹ And yet the fact that Tuan Anh Nguyen is by most measures (including upbringing, schooling, and acculturation) an American was central to the petitioners' strategy. Given the seemingly palpable injustice of excluding a man who had spent the vast majority of his life in this country, it is notable that the government did not explain its motivation for excluding him in more detail. Nguyen, as it turns out, was a convicted sex offender. He had pled guilty to two separate counts of sexual assault on a child.

There are many other cases that might have come to the Court, and one cannot rest too much on the fortuity that Nguyen's crime was sexual assault. Nevertheless, I believe that the intersection of sexual assault and the implicit regulation of sexuality bear strong descriptive power. Are the two chapters of Nguyen's story incongruous? Both are stories of pain, alienation, and helplessness. The hero of one is the villain of the other. Analysis of the relationship between sex and sexuality in Nguyen v. INS applies with equal force to cases in which sexual domination apparently figures less prominently.

This subsection therefore explores whether the erasure of Nguyen's crime has broader ramifications with respect to the silencing of sexuality. In the interest of rhetorical impact, I would have liked to have begun this endeavor with a narrative account of Nguyen's assault on a young child, broken into an equally poignant story of a Vietnamese-American forced to leave his home and father, and proceeded to highlight and explicate the tensions between the two as manifestations of sexual and sex discrimination in United States society. Unfortunately, that option was foreclosed to me; the erasure of Nguyen's crime was so thorough that the details of his conviction were completely omitted from all of the media, law review, and judicial accounts of the proceedings. The joint appendix to the Supreme Court case contains elaborate records of Boulais's birth and military service and extensive documentation of Nguyen's paternity, but no description of the assault.¹⁸⁰ The petitioners' brief elides Nguyen's sexual transgressions,

¹⁷⁹ Miller v. Albright, 523 U.S. 420, 425 (1998).

¹⁸⁰ The omission bears an ironic resemblance to rape shield laws.

referring to his crimes only as “felonies.” So too do the newspaper accounts of Nguyen’s heroic battle.¹⁸¹

Why was the assault erased from the Court’s narrative?¹⁸² From all news accounts? Where is the victim of the abuse, her story? Would she want Nguyen to be deported?¹⁸³

One may at first imagine that the omission was intentional, a strategy to represent the plaintiff as sympathetically as possible by the women’s rights organizations, most prominently NOW Legal Defense, that represented and supported him—and it seems likely that such considerations led those groups in their briefs to represent Nguyen’s crime merely as an unelaborated felony.¹⁸⁴

¹⁸¹ The joint appendix at the Fifth Circuit contains a copy of Nguyen’s guilty plea, but no details of the crime.

¹⁸² Nguyen’s story raises interesting parallels to the rape sentencing context. There is a tension in the context of criminal law between the feminist condemnation of power-laden sexual crimes, particularly those against girls, and the rehabilitative liberal instinct—feminists often feel instinctually that murderers should be rehabilitated and rapists should be punished far more harshly than they currently are. It is interesting that feminists do not seem to have a similar instinct here, perhaps because the details of the sexual assault are unknown.

¹⁸³ In *Advancing Luna—and Ida B. Wells*, Alice Walker complicates the telling of a rape. The narrator, a black civil rights activist, is overcome with anger when her close white friend reveals that she was raped by a black man. Alice Walker, *Advancing Luna—and Ida B. Wells*, in *You Can’t Keep a Good Woman Down* 93 (1981). She struggles between the impulse to recount her friend’s story and the competing pressure—informed by a history of lynching and the representation of black men as “creatures of uncontrollable lust,” to “[w]rite nothing. Nothing at all.” *Id.* at 93-94. One might suppose that sexual assault is missing from Nguyen’s story for precisely the same reason. Yet Vietnamese men are not like black men, in that they were never perceived as rapists and never lynched for it. Rather, it was the Vietnamese (Vietnamese women, country, and culture) who are represented as victims, and more cogently as rape victims, throughout the popular literature.

¹⁸⁴ NOW Legal Defense is generally unequivocal in its condemnation of sexual abuse, and it is well known for its legal advocacy of the Violence Against Women Act and its defense of “women’s right to live free from violence.” National Organization for Women Legal Defense and Education Fund Issues—Ending Violence Against Women at <http://www.nowldef.org/html/issues/vio>. (There is no basis, it should be noted, for assuming that Nguyen’s victim was female.) In fact, “NOW Legal Defense is determined that violence against women be punished, not rewarded.” NOW Legal Defense and Education Fund—Preface to Legal Docket at <http://www.nowldef.org/html/courts/preface.shtml>. What accounts for the disjunction between the organization’s vehement denunciation of abuse and abusers and its simultaneous commitment to securing citizenship for Nguyen? Ultimately, their elision of the sexual assault probably does boil down to a practical decision, a legal strategy to make the petitioner more attractive, a product of administrative convenience in the furtherance of a struggle that affects far more people than any one case of abuse. Nguyen had already served his prison term; and perhaps, as they prepared to appeal a far less compelling case decided in California several months earlier, they felt that there was no better option. After all, Boulais was a sympathetic father, Nguyen’s mother had abandoned him, and Nguyen was persuasively American. As an advocate of women’s rights, NOW Legal Defense should be commended for its willingness to look beyond the facts of a particular case. The decision acknowledges that making just laws must come before punishment. If law indeed structures social relationships and behavior, deporting one sex

Yet the crime receives barely more attention from the respondents, who, though they refer elliptically to Nguyen's having "pleaded guilty to two counts of sexual assault on a child," elaborate no further. The potential reasons for the elision are manifold. It is possible that Nguyen did no more than engage in consensual sexual relations, at the age of twenty-two, with a minor. It is equally possible that Nguyen did not engage in sexual assault at all; he might have been falsely accused, and he might have pled to avoid a more "serious" charge. Or perhaps the crime was violent and reprehensible. Ultimately, the factual resolution is largely irrelevant. Whatever rhetorical power a fuller narrative might convey, and whatever the rhetorical impact of a demonstration that the erasure was in fact intentional, the absent assault pervades and undergirds Nguyen's proceedings.

It is my contention that the erasure of Nguyen's assault—the silencing of his victim and of the rapes that regularly produce non-citizen children—is a necessary component of the legal system that continues to exclude him. At the same time, there remains a trace of the assault in the disapprobation of the respondent's brief and the majority's opinion. Nguyen is not a stainless specimen of American values. He pleaded guilty, they remind us, to two counts of sexual assault. He has committed a nearly unnamable crime; deportation is his just desert.

The "nearly" in nearly unnamable is of significance. Sexual assault is a serious charge, and sexual assault on a child is that much worse. But even the latter does not carry the stigmatization of those crimes, like sodomy (that infamous crime "not to be named among Christians"¹⁸⁵), most threatening to the sexual order. In *Sexy Dressing*, Duncan Kennedy proposes that the legal system that regulates sexual abuse channels the practices of abuse into designated forms—a "tolerated residuum" that is "plausibly attributed to contestable social decisions about what is abuse and how important it is to prevent it."¹⁸⁶ In a related move, the law of sexual abuse marginalizes the abuser, labels him perverse, only to obscure the reality that such abuse is habitual and is in fact an inevitable product of the governmental scheme.¹⁸⁷

offender without changing the legal scheme that created him would be unproductive. The defense of Nguyen reflects a hope that changing the framework will lead to overall changes in behavior.

¹⁸⁵ See, e.g., 4 Sir William Blackstone, *Commentaries on the Laws of England* 242 (William D. Lewis ed., Reas Welch & Co. 1897) (1769) (referring to sodomy as "peccatum illud horribile, inter christianos non nominandum," translated as "that horrible sin not to be named among Christians.").

¹⁸⁶ Duncan Kennedy, *Sexual Abuse, Sexy Dressing, and the Eroticisation of Domination*, in *Sexy Dressing Etc.* 123, 137 (1993). For instance, "[t]he system generates the conditions for the abuses that it tolerates by criminalizing prostitution without trying to abolish it." *Id.*

¹⁸⁷ *Id.* at 138-39 ("A common popular assessment of sexual abuse is that it is 'pathological' behavior The basic idea is that men by nature are either normal or

Kennedy's insight sheds valuable light on the story of Nguyen's deportation hearings and the subsequent legal battle over his citizenship. By *almost* eliding the assault, the government and the Court make it clear that sexual transgressions are subject to state control. A complete omission of Nguyen's felony might suggest an inability on the part of the government to pin it down and provide an adequate remedy, to regulate it. Instead, we encounter a casual insinuation of a crime that the government has not bothered to explain. The reference is utterly sterile and unexceptional, and it lends the crime a sense of the mundane. Sexual assault happens, it seems to say, and the law takes care of it.¹⁸⁸

However compelling the above explanation, there may be any number of practical and practically innocuous reasons to underplay Nguyen's convictions. But what is omitted in *Nguyen* is not just the incident of assault. Rather, sex is absent altogether. Sex and sexual assault are twice absent from the account: Nguyen's manifestation of sexual power, and that of his father. There is no mention of the sexual act that forced Nguyen from this country, nor is there any trace of the sexual act that brought him into this world.

2. Censored Sex

As we have seen, there are myriad practical and political explanations for the Court's inattention to sex in *Nguyen*, whether in the form of sexual assault or sexual regulation. What is more surprising is the inattentiveness to sexuality among reform groups and scholars devoted to ending sex discrimination.

abnormal, with the latter group perhaps subject to 'cure' through therapy or religious experience. Sexual abuse is deviance.... Although clear cases of abuse are wrong and pathological, it is also important to the conventional view that they are exceptional, indeed much rarer than one would think from the limited empirical evidence...."). Catharine MacKinnon reached a similar conclusion a decade prior: "Attempts to reform and enforce rape laws, for example, have tended to build on the model of the deviant perpetrator and the violent act, as if the fact that rape is a crime means that society is against it, so law enforcement would reduce or delegitimize it.... Even if [this] were effective in jailing men who do little difference from what nondeviant men do regularly, how would such an approach alter women's rapability? Unconfronted are *why* women are raped and the role of the state in that." Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory, Feminism, Marxism, Method, and the State*, 7 Signs: J. Women in Culture and Society 515, 643 (1983).

¹⁸⁸ Silence is particularly problematic when it descends from the state in order to preserve the social order. The elliptical reference to Nguyen's assault erases not only the crime itself, but also the legal structure and process that has inscribed it as a crime.

a. Willful Silence

If it is an objective of this Article to explain *why* scholars and practitioners have chosen to *ignore* the sexual implications of laws that affect sex, we must first establish that they have in fact done so consciously. There is therefore an additional possibility that must be considered, particularly with respect to the neglected sexual repercussions of § 1409(a) as a general matter: simple oversight.

Although there is ample evidence that controlling immoral and deviant sexual practices was a contributing rationale for domestic birth status law, it is unlikely that sexual considerations played a prominent role in the enactment of § 1409(a). Of course, lack of congressional intent cannot explain why legal challenges to birth status statutes have ignored the sexual ramifications of regulating “legitimacy” (though perhaps the doctrinal limitations at issue in the previous section do enough). However, it is unsurprising that in a legal regime critical only of discriminatory *intent*,¹⁸⁹ a regulatory byproduct affecting a behavioral category already subject to overt state control would go unnoticed. Similarly, given the many laws explicitly prohibiting categories of sexual conduct, neither the media nor advocacy groups were likely to devote substantial resources to investigating the sexual repercussions of immigration law.

Still, simple omission seems too glib an explanation. After all, many of the same practical impediments apply to stereotyping, a cultural culprit that has received extensive attention from feminists and legal practitioners alike. Although assumptions about likely and proper parenting responsibilities may have implicitly affected the drafting of § 1409(a), it is very unlikely that Congress enacted the provision in order to entrench discriminatory gender roles. Why is it that feminist organizations have nevertheless undertaken to root out stereotype in relatively innocuous state policies, many of which ostensibly penalize men? Though enticing, the answer cannot be that laws like § 1409(a) are not really very likely to influence sexual choices. After all, obscure provisions of naturalization law are unlikely to really imbue women with a sense of subordination.

b. The Politics of Sexuality

It is tempting, at first blush, to think the under-coverage of the sex at stake in birth status and related laws is anomalous—which may be why the simple oversight rationale has so much intuitive appeal. In recent years,

¹⁸⁹ Section 1409(a) facially discriminates against men. It is nevertheless relevant in this context that equal protection doctrine applies only to cases of intentional discrimination. While disparate impact may provide evidence of intent, mere unequal results will be inadequate to invalidate a statute.

cultural feminists have come under attack precisely because they have *overemphasized* sexuality. In the context of sexual harassment, for instance, recent criticism has suggested that targeting sex-based rather than sexual harassment would be far more advantageous to securing equal employment opportunities and equal treatment for women. There is an important difference between the two modes of sexual regulation, however. Sexual harassment law is about women's right to be free from unwanted sexual attention, a position that is consistent with both feminist sex-negativism and popular, idealized images of women resisting lewd, impure, and tainted sexual advances. It is a negative choice to be unsexed. The choice at stake in § 1409(a), on the other hand, is the positive choice to engage in sex without undue repercussions. Women's sexual desires and freedoms are not yet a legitimate subject of reform.

The latter point raises the question of whether feminist lawyers and scholars have failed to recognize the sexual repercussions of § 1409(a) or have rather chosen not to act for political reasons. It is true, as a descriptive matter, that many potential advocates have simply not been trained to look for this kind of "sex discrimination." But even those who are aware of the problem have a real incentive to focus on more pressing and perhaps more winnable battles.

For example, many women's groups active in family law have been going to great lengths to represent pregnancy and childbirth as special burdens that warrant special rights. There are real reasons to preclude a father from intruding on a mother-child relationship years after the child's birth. And, of course, when it comes to bodily autonomy, most feminists agree that women deserve greater decisionmaking authority than their partners in determining whether to have a child. Finally, women are biologically bound to bear the consequences of unprotected sex that results in pregnancy; whereas men, whatever the law may say, are not. Casting childbirth as a consequence of mutual and autonomous decisions of equal importance on the part of two sexual partners jeopardizes women's authority as mothers. Allowing men to claim U.S. citizenship for their children even without demonstrating a social relationship would give them an additional, very powerful bargaining chip, further skewing both social and sexual relationships.

In addition to these politically practical rationales for sidestepping sexuality, there is an important jurisprudential factor unrelated to equal protection doctrine. In short, litigating sexuality may appear to be a losing battle. Governments routinely prohibit certain categories of sexual behavior, including fornication, sodomy, and prostitution. Although it is conceivable that the Supreme Court would recognize a constitutional right to non-marital sex, the stark denial of a constitutional basis for sexual autonomy in Bowers v. Hardwick¹⁹⁰ makes it very unlikely. The marital bedroom may be

¹⁹⁰ 478 U.S. 186 (1986).

sacrosanct, but it is not because of what goes on in bed. Given an increasingly conservative political landscape and the enormous repercussions a pro-sex decision would carry, the current Court is not likely to quarrel with the government's right to regulate the citizenship of children produced through constitutionally unprotected sex.

CONCLUSION: WHY SPEAK?

This Article has sought to examine the consequences on women's autonomy and power of state regulation of sex. In conclusion, I examine the consequences of *silence*, of omitting the regulation of sex from legal and academic discussion.

I began writing this article with the intent of identifying a doctrinal formula by which discriminatory sexual incentive systems might be remedied. It was clear from the outset that existing equal protection jurisprudence, as manifest in the Court's family law decisions, does not encompass unequal sexual incentive schemes. It nevertheless seemed certain not only that the doctrine could be stretched to accommodate sexuality, but also that the benefits of such an endeavor for women's rights would be plain.

Ultimately, I was unable to locate a legal basis on which such a doctrinal expansion might be grounded. It should by now be clear that discussion and openness are unlikely to make a substantive difference, in the sense of changing the law, at least in the near future. Existing legal doctrine does not provide a remedy for infringements on sexual autonomy. Simply put, there is no right to sex, and the current Court is not about to create one.¹⁹¹ Until it does, sexual inequalities can be redressed only by means of equal protection challenges—and equal protection, for the reasons described above, is unlikely to accommodate sexual disincentives.

More importantly, it has become evident that the practical advantages of such an endeavor are far from unequivocal. The effort to expand sexual equality, at least in the context of § 1409(a), entails a necessary curtailment of women's autonomy as mothers. In order to liberate women from the disproportionate burdens of parenthood, we must empower men as fathers. In fighting for *women's* sexual autonomy—for women's ability, at home and abroad, to engage in sexual activity without assuming undue legal accountability for their decisions—we deprive *mothers* of a foothold for arguing that biological difference demands legal recognition. The reality is that many unmarried women, after bringing their children to term, feel entitled to participate in raising them.

¹⁹¹ The Supreme Court will reconsider the due process "right to sex" this term, in Lawrence v. Texas. However, even a favorable holding in that case would not feasibly provide a basis for reexamining § 1409(a). If there is a right to sex, it is based on privacy rather than autonomy. See *supra* note 15.

This analysis therefore brings us full circle. The consequence of reform would be that American men could claim citizenship for their children based solely on DNA evidence of paternity, without demonstrated commitment to their care. With the ability to confer citizenship comes tremendous coercive power; while the child may be entitled to citizenship, the non-citizen mother will still be excluded. And if a non-citizen mother might lose her child to an American stranger, a non-citizen woman may refrain from having sex with an American man.

Against that backdrop, it is difficult to identify a practical advantage of drawing attention to the way § 1409(a) curtails sexual freedom. Given the futility of speaking out, why is it important to challenge the regulation of sexuality? Or, framed differently, does silence really matter? In the end, we are left with little more than the truism that the failure of our legal system to provide a means for redressing sexual inequality is of unquestionable importance, and whatever the practical repercussions of breaking the silence, doing so remains the better course.¹⁹² Just as silence is indispensable to creating and regulating sexual *transgression*, it is a powerful means of curtailing sexual *expression*. Whatever one's feeling on the possibility of good sex—whether one believes that all sex is power-laden and coercive or instead hopes to encourage it and break it away from traditional (“conservative”) values—the inevitable “liberal” conclusion is that excising sex from democratic dialogue is constrictive and destructive. Acknowledging that the state is influencing and regulating people's sexual choices, and examining the ways in which such regulations impact women, is critical to understanding why the government would want to regulate marriage and childrearing in the first place. It is only through open discussion that boundaries are broken and redrawn.

¹⁹² It would seem inappropriate and shortsighted, in discussing a statutory framework that implicitly regulates sexuality and a body of legal and academic criticism that fails to notice or mention that regulation, not to at least acknowledge the influential contributions of Michel Foucault to the theory of sexual juridical discourses. Foucault famously propounded that “silence itself—the things one declines to say, or is forbidden to name, the discretion that is required between different speakers—is less the absolute limit of discourse, the other side from which it is separated by a strict boundary, than an element that functions alongside the things said, with them and in relation to them within over-all strategies.” Michel Foucault, *The History of Sexuality: Volume 1: An Introduction* 11 (Robert Hurley, trans., 1990) (1978).

