Women and the Constitution: The Asymmetries of Citizenship

The Constitution’s language of equality is wholesomely generic. The Fourteenth Amendment declares, “All persons, born or naturalized in the United States, are

citizens." But the practices of equality have been problematic. *Nguyen v. INS*, decided by the U.S. Supreme Court in June 2001, captures the state of judicial thought about one important dimension of the contested meaning of citizenship.

American legal tradition and practice has long been shaped by the assumption that married women's domestic obligations to their husbands trump their civic obligations to the state. The corollary, of course, is that married men and married women are not equal. In theory, the civic infirmities of married women should not affect single women—the never married, divorced, or widowed who at any moment make up a substantial proportion of the population. In practice, however, all women were generally treated as if they were married.


CONSTITUTIONS
DES
TREIZE ÉTATS-UNIS
DE L'AMÉRIQUE.
A PHILADELPHIE;
Et se trouve A PARIS,
1783.

Fig. 1. Constitutions des treize Etats-Unis de l'Amerique, 1783. The Gilder Lehrman Collection, courtesy of the Gilder Lehrman Institute of American History, New York.

As a result the rights and obligations of citizenship have been invoked differently for men and for women. The differences in rights are easier to see. We know that the right to vote has varied greatly by gender and race, across time and place. Despite the nation's founding principle of "no taxation without representation," most of the vast numbers of people excluded from the suffrage (most African Americans for most of American history, most white women until 1920, and until deep into the twentieth century, Asian immigrants ineligible for citizenship) paid taxes.

Inequality can be traced not only in the well-known history of unequal rights but quite as deeply in the history of unequal obligations to the state. Women have not been excused from civic obligation, but rather civic obligation has burdened them in different forms than it has burdened men. These asymmetries have occurred in the various categories of specific rights and obligations, including not only voting and taxation, but inclusion in the pool of jurors,

the obligation to avoid vagrancy, and entitlement to birthright citizenship.

Which babies born outside the U.S. count as Americans from birth? And which men and women can bestow U.S. citizenship, automatically, upon their children? For centuries, with minor variations, the practices that define which children born abroad are to be considered American citizens and which must be naturalized have treated the status of the mother and the status of the father asymmetrically. And in June 2001, just in time for Father's Day, the U.S. Supreme Court handed down its decision in *Tuan Anh Nguyen et al. v. Immigration and Naturalization Service*, a case that sustains traditional ideas about fathers and the meaning of their citizenship.

As is often true of significant cases, *Nguyen* was full of ironies: a challenge to sex discrimination brought by a man jailed for sexual assault; a claim to the rights of citizenship brought by a convicted felon. Tanh Anh Nguyen was born in 1969. His father, Joseph Boulais, was an American veteran who, after his discharge from service in Germany, went to Vietnam as a civilian employee of a construction company. He had a son with a Vietnamese woman who abandoned them both after Nguyen's birth. Boulais remained in Vietnam, cared for his son, and developed a new relationship with a Vietnamese woman—not Nguyen's mother—whom he would later marry. When Saigon fell in April 1975, Boulais was out of Vietnam; the child was being cared for by his wife's mother. She managed to flee the city, taking the boy with her. They reached the United States as refugees and the family was reunited. Nguyen grew up in Houston in his father's home.

Had his birth parents been married to each other, U.S. law would have embraced Nguyen as a citizen from birth. Children of American citizens are automatically citizens, so long as one parent had lived in the United States for ten years, at least five of which were after age fourteen. (The number of years has since been reduced to five and two.) Joseph Boulais clearly met this requirement, which seeks to ensure that we do not develop a class of citizens who from one generation to the next have never lived in the United States. But he had not married Nguyen's mother.

If Nguyen's *mother,* although unmarried, had been a citizen, U.S. law would also have defined Nguyen as a citizen from birth so long as she had lived in the United States for twelve months before her baby was born. But it was Joseph Boulais who was the citizen, and in order to secure Nguyen's status as a citizen, Boulais was legally required to do three things on his son's behalf: to establish by "clear and convincing evidence" the blood relationship between them; to provide financial support until his son reached age eighteen; and to acknowledge his paternity formally before the child reached legal adulthood.

So long as life moved along quietly, so long as Boulais supported his son, what did formal paperwork matter? But in 1992 Nguyen, then age twenty-three and still, in legal terms, a resident alien, was convicted of sexually assaulting a minor, and sentenced to an eight-year prison term. Four years into Nguyen's

sentence, Congress, responding to a rising tide of anti-immigrant sentiment, tightened the rules controlling legal aliens like Nguyen: conviction of a felony now meant deportation. And so, as Nguyen's prison time neared its end, the INS moved to deport him. Released from prison, Nguyen remained in confinement at the INS detention center in Houston.

Had his parents been married, Nguyen would have been counted a citizen at birth. Flip the coin: had his unmarried citizen-parent been his mother, he would also have been a citizen at birth and invulnerable to deportation. Not illogical, Justice John Paul Stevens had declared in the last similar case to reach the Supreme Court, *Miller v. Albright*, decided in the spring of 1998. Parenthood, the Court effectively found, *was*asymmetrical. Motherhood counted for more. Everyone knows who the mother is; there are witnesses to the birth. (Such reasoning has a long history; a member of the medieval Guild of Fishwives had the right to be in the birthing room of Marie Antoinette, charged with the responsibility to witness that the heir to the French throne had actually emerged from the body of his mother.) Not illogical, wrote Justice Stevens, but rather "entirely reasonable for Congress to require special evidence of [ties to this country] . . . between an illegitimate child and its father. A mother is far less likely to ignore the child she has carried in her womb than is the natural father, who may not even be aware of its existence . . . [T]he time limitation . . . deters fraud."

Justice Ruth Bader Ginsburg disagreed. In a vigorous dissent joined by Justices Souter and Breyer, she assailed the law as "one of the few provisions remaining in the United States Code that uses sex as a criterion in delineating citizens' rights." Ginsburg's dissent argued that opposing arguments were soaked with stereotypes about the parental roles of men and women. The three dissenting justices waited impatiently for another chance to consider this principle in a case without some of the technicalities raised by *Miller*.

Nguyen gave them one. His suit challenged the threat to deport him on the grounds that he should have been a citizen from the moment of his birth. Boulais argued that he, an American man, should have the same right American women have to transmit citizenship to nonmarital children. He arranged for DNA testing that demonstrated his paternity. He might well have imagined he would prevail. Indeed, court decisions in Canada underline how fluid stereotypes can be. Until very recently, it was the child born abroad to a Canadian woman, fathered by a U.S. man, who required a security check in order to take up Canadian citizenship; the child born abroad to a Canadian citizen-father was automatically a citizen.

In *Miller* four years ago, and then again, in *Nguyen*, much of the discussion focused on stereotypes. The treatment is unequal because fathers are burdened; they have to go through more hoops to establish paternity than women do to establish maternity. But there is another, ugly history lurking in the subtext to these arguments. In the Anglo-American legal tradition—the body of law that Americans received as colonists and retained despite the Revolution—the father

was the head of the household, and his wife's citizenship largely depended on his. In American family law, husbands traditionally controlled children as well as wives. Fathers made the final decision, for example, on where a child should be apprenticed. In the event of divorce fathers usually got custody. A father had responsibility for financial support of the children born during his marriage.

But a long tradition also held that a man became accountable for the children he fathered *outside* of marriage only if he wished to claim them. If legitimate heirs were the responsibility of their fathers, illegitimate children were the responsibilities of their mothers. To make doubly sure, American colonists passed laws that specified that children of free fathers and enslaved mothers "followed the condition of the mother." (That is why Thomas Jefferson's father-in-law, John Wayles, could use his own daughter as a slave; that is how Sally Hemings—Jefferson's own sister-in-law—ended up a slave in Jefferson's household.) In 2001, Nguyen's "condition"—as citizen or noncitizen—was governed by the status of his mother.

Last June, barely thirty years after the Court in *Reed v. Reed* ruled for the first time that discrimination on the basis of sex may be a denial of equal protection of the law, the Supreme Court ruled against Nguyen. The decision was five to four. The majority opinion, written by Justice Anthony Kennedy, emphasized—as the Justice Department had done in oral argument—the reasonableness, even generosity of the rules. Citizen-fathers have an extended period of time—eighteen years—to satisfy the requirements of the statute. "Fathers and mothers are not similarly situated with regard to the proof of biological parenthood," and gender-neutral language—language like that of the Fourteenth Amendment, say—would have been "a hollow neutrality." Kennedy observed, "Given the nine-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 . . ."

During oral argument, when this point was made, Justice Ruth Bader Ginsburg remarked that it implied that the Court approved of military men fathering children out of wedlock and abandoning them. "I expect very few of these are the children of female service personnel," Ginsburg observed to the amusement of the audience. "There are these men out there who are being Johnny Appleseed."

But the majority of justices remained unpersuaded. To the contrary, Kennedy's opinion continued, "[Considering] the conditions which prevail today . . . the ease of travel and the willingness of Americans to visit foreign countries have resulted in numbers of trips abroad that must be of real concern when we contemplate the prospect of accepting petitioners' argument, which would mandate . . . citizenship by male parentage subject to no condition save the father's previous length of residence in this country . . . " To insist that

citizenship must be consciously claimed, rather than "unwitting," was not, Kennedy insisted, a stereotype. As the Court had previously established, "Physical differences between men and women . . . are enduring."

Kennedy's opinion came as a disappointment to observers who had trusted that, given facts different from those in *Miller*, he could be persuaded to focus on the similar situation of the newborn rather than the different situation of the mother and father. Still, as Gerald Neuman of Columbia University School of Law pointed out, the opinion could also count as strengthening another important American tradition of citizenship: that descent alone should not be enough, that citizenship should be claimed. "U.S. citizenship isn't racial," Neuman observed. "We are not a descent group. We are tied together by something else. I think it may be useful not to lose sight of this positive aspect of the decision."

The other vote that Nguyen's supporters had hoped to swing swung. Justice Sandra Day O'Connor, who had voted with the majority in *Miller*, wrote an extensive dissent joined by Justices Ginsburg, Souter, and Breyer. She rejected the idea that the case was about immigration and naturalization; it actually concerned birthright citizenship. Quoting an observation made in *J.E.B. v. Alabama ex rel. T.B.,* a 1994 case that had addressed gender-based peremptory challenges in jury selection, she situated *Nguyen* squarely "in the context of our Nation's long and unfortunate history of sex discrimination," a history that required "the application of heightened scrutiny" and the showing of "an exceedingly persuasive justification of the sex-based classification substantially relate[d] to the achievement of important governmental objectives." In *Ngyuen,* she maintained, "The different statutory treatment is solely on account of the sex of the similarly situated individuals. This type of treatment is patently inconsistent with the promise of equal protection of the laws." She challenged the arguments made by the Department of Justice: if the Court were truly interested in establishing that the citizen-parent had a substantial relationship to the child, she thought, it would logically have placed burdens of proof of parenthood on mothers as well as fathers. Were it interested primarily in biological connection, it would not have shrugged off DNA testing so cavalierly. And so the decision fell back on stereotypes: "the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children." The facts in this case contradicted the stereotype: Boulais, not the child's birth mother, had raised Nguyen.

Nguyen, the dissent continued, belonged in the "historic regime that left women with responsibility, and freed men from responsibility, for non-marital children." O'Connor ended by castigating the majority for deviating from "a line of cases in which we have vigilantly applied heightened scrutiny"; she ended with the hope "that today's error remains an aberration."

And so Tuan Anh Nguyen and Joseph Boulais—and the lawyers who threw their hearts into helping them make their arguments—lost their battle. At this

writing, Nguyen is no longer in confinement but he continues to face deportation. But in the long run the law is also shaped by valiant dissents. The dissenters here make clear that the deep-rooted belief that women are likely to be tricksters, and that men should be able to pick and choose for which of their children they will be responsible, still infects the integrity of American law.

Further Reading: See Kristin Collins, "When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in *Miller v. Albright*," *Yale Law Journal* 109 (2000): 1669-1708; Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York, 1998); Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (Princeton, N.J., 1996); Cornelia T. L. Pillard and T. Alexander Aleinikoff, "Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in *Miller v. Albright*," *Supreme Court Review* (1998): 1-70.

This article originally appeared in issue 2.4 (July, 2002).

Linda K. Kerber is May Brodbeck Professor in the Liberal Arts and professor of history at the University of Iowa. Her most recent book is *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York, 1998), which won the Littleton-Griswold and Joan Kelley prizes. She serves as chair of the executive committee of the Omohundro Institute of Early American History and Culture.