CONFLATING WOMEN'S BIOLOGICAL AND SOCIOLOGICAL ROLES: THE IDEAL OF MOTHERHOOD, EQUAL PROTECTION, AND THE IMPLICATIONS OF THE NGUYEN V. INS OPINION

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INTRODUCTION

The role of women in our society is shaped in significant part by our legal system, and the legal rights recognized by our courts. When the government creates laws based on traditional notions of what women's roles should be, and the Supreme Court upholds such laws, such stereotypes are legitimized, making it more difficult for women to act in non-traditional roles. One of the most firmly-rooted gender stereotypes in our society is that of the ideal mother. Not surprisingly, this stereotype can most seriously impede women's advancement in society.1 Recently, the Supreme Court addressed concepts of motherhood in the context of a citizenship case, Nguyen v. INS.2 In that case, it was argued that the statute governing the process for naturalized citizenship of children born to a citizen father and non-citizen mother violated the guarantees of the Equal Protection Clause.

In this paper, I will examine the Nguyen decision; specifically, I will look at the language used in the opinion to demonstrate that the traditional ideas of women's proper roles have continued to subtly and not so subtly influence our legal system's highest court. I will then discuss the possible implications of "motherhood" language such as that used by the Nguyen Court. In particular, I will explore the potentially adverse effects of presuming that, because a woman is a mother in the biological sense, she is also a mother in the sociological sense.

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1 Linda Kelly, Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images, 51 Hastings L.J. 557, 564 (2000) ("[T]he good mother stereotype impedes the progress of women. Despite the growing necessity and desire of women to work outside the home, women continue to be regarded as the primary caretakers.") (citations omitted).

I will also address the concept of the "ideal mother" and the arguments put forth by several feminist theorists that images of the ideal mother can harm women because they can be used to justify denying women reproductive freedoms and childrearing support. Because women who are biological mothers are presumed to be sociological mothers, they are expected to strive to meet society's ideological standards of motherhood; those who do not or cannot attain such goals are left to internalize their failure, or worse. Finally, I will argue that a woman could claim that Section 1409(a)(4), the statute at issue in *Nguyen*, violates her "rights" because the statute is based on "archaic and stereotypic notions" of gender roles and not on biological classification alone.

It is important to establish what I mean when I refer to the sociological role of mother, as opposed to the biological role of mother. I rely in part on the distinction Adrienne Rich makes in her book *Of Woman Born*. The biological role of mother is a function of a woman's body and her ability to give birth. Rich views the sociological role of motherhood as a restrictive institution established to perpetuate a social system designed by men. For the purposes of this paper, however, the sociological role of mother is meant to refer to the idea that caregiving and childrearing are not necessarily instinctual, but are learned cultural experiences separate from the experience of pregnancy and birth. The details of this distinction are further outlined in Part III.

I. *NGUYEN v. INS*

The facts leading up to *Nguyen* are as follows. Tuan Anh Nguyen, the son of an American citizen father and a non-citizen mother, was found guilty on criminal charges. The United States Immigration and Naturalization Service ("INS") then initiated deportation proceedings against Nguyen, claiming that he was an alien; an immigration judge found him deportable. On appeal to the Board of Immig-

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4 ADRIENNE RICH, OF WOMAN BORN 13 (1976) (distinguishing the two meanings of motherhood).
5 Id.
6 See id. at 12 (theorizing that there are two parts to motherhood: the first being the experience of pregnancy and birth; the second, learning to nurture). But see Katharine K. Baker, Biology for Feminists, 75 CHI.-KENT L. REV. 805, 808-09 (2000) (suggesting that because, biologically speaking, women invest more resources in the creation of offspring, and because there will always be some uncertainty for a man as to whether the child is his own, women are more likely to invest in caretaking than men).
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gration of Appeals, the Board rejected Nguyen's claim that he was a United States citizen because he had failed to comply with 8 U.S.C. § 1409(a), a statute establishing citizenship requirements for individuals born abroad out of wedlock to a citizen father and noncitizen mother. Together with his citizen father Joseph Boulais, Nguyen appealed to the Court of Appeals for the Fifth Circuit, arguing that Section 1409 violated the Equal Protection Clause of the Constitution because it provided different rules for citizenship depending upon the gender of the parent with American citizenship. Specifically, Section 1409(a) requires more affirmative steps to be taken to obtain citizenship when the citizen parent is the father than when the citizen parent is the mother. The Fifth Circuit rejected the constitutional claims of Nguyen and Boulais, and the case went before the Supreme Court.

The Supreme Court, in a 5-4 decision, held that Section 1409(a) does not violate the equal protection provisions of the Constitution. While acknowledging that the gender classifications of Section 1409 require heightened scrutiny, the Court concluded that the federal government had met this standard. In its discussion of important governmental interests furthered by Section 1409(a)(4), the majority noted that one such interest was ensuring that "the child and the citizen parent have some demonstrated opportunity or potential to develop... a relationship... that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States." The Court noted that in the case of the citizen mother and child born overseas, "the opportunity for a meaningful relationship inheres in the very event of birth, an event so often critical to our constitutional and statutory understandings of citizen-

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7 Nguyen, 533 U.S. at 58.
8 8 U.S.C. § 1409(a) states that, for children born out of wedlock, citizenship will be conferred to such a person born to a citizen father and a noncitizen mother if: (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. 8 U.S.C. § 1409(a)(4) (2002).
9 Nguyen, 533 U.S. at 60 ("For a gender-based classification to withstand equal protection scrutiny, it must be established 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."") (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)) (further citations omitted).
10 Id., 533 U.S. at 64-65.
It is true that with respect to Section 1409, the "event of birth" is the basis for transmitting citizenship from a citizen mother to her child. However, due to what the Court labels "biological inevitability," unwed fathers do not have the same opportunity: the nine months that lapse between conception and birth mean that it is not always certain a father will know a child was conceived or that a mother will know the father's identity.

Essential to the majority's contention that there was no equal protection violation in *Nguyen* is the principle that differential treatment based on gender is not inherently discriminatory. The majority relies on language in *United States v. Virginia* stating that "[p]hysical differences between men and women... are enduring" to support its conclusion that the government can base its differential treatment of citizen fathers and citizen mothers upon the unique biological role of women in childbearing. The Court states that:

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 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.*

Reliance on gender stereotypes as the actual justification for discrimination is impermissible, but reliance on physical or biological differences between men and women does not in itself elicit heightened equal protection scrutiny in the Court's view. It is not clear, however, that the majority, and indeed the government, were not in fact relying on gender stereotypes in enacting Section 1409. In her dissent in *Nguyen*, Justice O'Connor argues persuasively that the majority (and the government) illogically premises its

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11 *Id.* at 65.
12 See 8 U.S.C. § 1409(c) ("[A] person born outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had nationality of the United States at the time of such person's birth . . . .")
13 *Nguyen*, 553 U.S. at 65.
15 *Nguyen*, 553 U.S. at 68 (emphasis added).
16 *Hogan*, 458 U.S. at 725 (noting that tests for gender-based classifications must be "applied free of fixed notions concerning the roles and abilities of males and females").
17 See *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that a state insurance program that excludes the physical condition of pregnancy from its list of compensable disabilities does not necessarily mean that it is an invalid sex-based classification). As *Geduldig* states, 
Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition. *Id.* at 496-497, n.20.
opinion upholding the statute on the biological differences between the sexes, and fails to consider whether the sex-based classification within the statute is merely an impermissible proxy for a more germane basis for classification. Examining the history of the citizenship and custody laws for nonmarital children born overseas, O'Connor concludes that the gender classification in Section 1409 goes beyond biological differences; its differential treatment is unnecessary given the purported governmental goals for the statute, such as the goal of allowing for an "opportunity for a relationship" between the citizen parent and child. In disputing this justification for the statute's differential treatment, she states:

[T]he idea that a mother's presence at birth supplies adequate assurance of an opportunity to develop a relationship while a father's presence at birth does not would appear to rest only on an overbroad sex-based generalization. A mother may not have an opportunity for a relationship if the child is removed from his or her mother on account of alleged abuse or neglect, or if the child and mother are separated by tragedy, such as disaster or war, of the sort apparently present in this case. There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms. The "[p]hysical differences between men and women"...do not justify § 1409(a)(4)'s discrimination.

O'Connor concludes that using the goal of a parental relationship for upholding Section 1409(a)(4) "finds support not in biological differences but instead in a stereotype—i.e., 'the generalization that mothers are significantly more likely than fathers...to develop caring relationships with their children.'" Because, as previously noted, sex-based classifications based on "archaic and stereotypic notions of women" are impermissible, O'Connor reasons that it is impermissible for the majority to use such a classification as a justification for upholding the statute.

Although Nguyen concerns the equal protection rights of a citizen father, its reasoning has negative implications for women as well. O'Connor notes that the Court's decision could have a lasting impact on preconceived ideas of gender roles: "Sex-based generalizations both reflect and reinforce 'fixed notions concerning the roles and

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18 Nguyen, 533 U.S. at 79 (O'Connor, J., dissenting) (referring to the standard as laid out in Craig v. Boren, 429 U.S. 190, 198 (1976)).
19 Id. at 86-87.
20 Id. at 86-87 (quoting Virginia, 518 U.S. at 533) (emphasis added).
21 Id. at 88-89 (quoting Miller v. Albright, 523 U.S. 420, 482-83 (1998) (Breyer, J., dissenting)) (emphasis added).
22 Hogan, 458 U.S. at 725.
abilities of males and females."

Thus, according to O'Connor, in upholding the use of a sex-based generalization to justify the differential treatment outlined in Section 1409, the majority's opinion not only perpetuates the myth that men are not as available to establish relationships with their children as women are, but also does a disservice to women and societal perception of their roles as well. Following Congress' lead in enacting Section 1409, the majority reasons that knowledge of one's own pregnancy and the event of birth itself is enough to establish "an opportunity" for a mother-child relationship. That Congress requires additional affirmative steps to be taken by a citizen father (via Section 1409(a)(4)) is proof that the legislature did not believe that knowledge of pregnancy and presence at birth was enough in itself to establish an opportunity for a father-child relationship. This disparate reasoning should immediately sound a warning, and one must examine why such factors are enough to establish an opportunity to bond with a child for a citizen mother but not a citizen father.

Furthermore, the necessity of having such a law on the books is questionable. O'Connor takes the majority to task for not seriously considering the option of a gender-neutral citizenship requirement. She notes that instead of the gender-biased requirements outlined in Section 1409(a)(4), Congress could have used a gender-neutral requirement for presence at or knowledge of the birth of the child in question to fulfill its interest in allowing for an "opportunity for a relationship" between citizen parent and child. Indeed, the majority's justification for not requiring a gender-neutral statute is arguably insufficient; the Court notes that although Congress could have excused compliance with the formal requirements of Section 1409(a)(4) when an actual father-child relationship existed, thus nearing gender-neutrality in the implementation of the statute, the intrusiveness of the inquiry and difficulties of proof were perhaps too much of a burden on the government. O'Connor states that this

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23 533 U.S. at 74 (quoting Hogan, 458 U.S. at 725.
24 Id. at 89. Indeed, Justice O'Connor, in her dissent, implies that a disturbing stereotype of men may also have been used to justify the differential treatment of Section 1409. Referring to the majority's recitation of statistics of the number of (predominantly male) military personnel situated overseas and the frequency of overseas travel by (presumably male) Americans as proof that, in many cases, a man may not be aware of the existence of his child nor may have an opportunity to bond with that child, O'Connor states: "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 in women." Id. at 94.
25 Id. at 65.
26 Id. at 86 (O'Connor, J., dissenting).
27 Id. at 69.
explanation is essentially based on administrative convenience. Not only has administrative convenience been repeatedly rejected as grounds for allowing sex-based discrimination, O'Connor claims, but it is questionable whether there would be any inconvenience in requiring the government to use a gender-neutral statute.

Because the majority believes that a biological event—birth—is a significant factor in establishing an opportunity for parent-child relationships, any claims of gender discrimination can be readily dismissed. As mentioned earlier, disparate treatment correlating to physical differences between men and women has not been held suspect under the Equal Protection Clause. However, as the Nguyen dissent and Nguyen's own arguments imply, it is my contention that the majority of the Court and Congress do not rely on the event of birth as a physiological occurrence. They instead rely on gender stereotypes that are implicit in American society's perceptions of birth and parenting. Namely, I believe that the Supreme Court in Nguyen and in earlier family law cases subtly but effectively reinforces the stereotype that a woman becomes a mother in both the legal and socialized sense upon the event of birth whereas a man does not become a father until he elects to do so. As with any stereotype, these assumptions that motherhood—in the sense of caregiving—is a biological fact and not a sociological construction harm women and impede their ability to fully participate as citizens in this country. Additionally, as I will address later, because it is men who control the image of motherhood, the assumption that caregiving and nurturing are biological (and thus natural) is particularly damaging to women.

Nguyen is not the first time that preconceived notions of motherhood and mothering have infiltrated a Supreme Court opinion, nor is it an isolated example from recent decisions of the Court, as evidenced by language in the next Part of my paper. Instead, the majority opinion in Nguyen illustrates the pervasiveness of gender stereotypes and their continual presence in our legal system.

II. GENDER STEREOTYPING IN OTHER SUPREME COURT CASES

Language in several Supreme Court cases illustrates that the Court and its Justices are not impervious to the gender stereotypes

28 Id. at 88 (O'Connor, J., dissenting).
29 See Brief for Petitioners at 16, INS v. Nguyen, 533 U.S. 53 (2001) (No. 99-2071) ("As a matter of biology, a mother may be presumed to know of a child's existence at the time of birth. But knowledge that one is a parent, no matter how it is acquired, does not guarantee a relationship with one's child.")
that pervade our society. In *Stanley v. Illinois*, for instance, an unmarried father argued that he was entitled under the Due Process Clause to a hearing to determine his fitness as a parent before the state took his children away from him. The Supreme Court agreed with the father's claim, noting that "[t]he Court has frequently emphasized the importance of the family." However, comments made by Chief Justice Burger in a dissent revealed what law professor June Carbone later labeled the Chief Justice's "biological determinism:

I believe that a State is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers.

From this statement, one may conclude that Burger believed motherhood was not a function of socialization but rather one solely of biology. He was not alone in this belief; Justice Blackmun, known for his opinions advocating the rights of women, signed onto Chief Justice Burger's dissent in *Stanley*. That Blackmun joined Burger may be evidence that it was generally accepted that such a theory of motherhood appeared to have no harmful effect upon women's rights. But the theory is riddled with faults; for instance, the "proof" that Burger puts forth to support the "biological determinism" theory—namely, the "observable fact" that unwed mothers express more concern for their children than fathers, as well as "centuries of human experience" reinforcing such facts—is not necessarily conclusory. In fact, this theory can be seen as a self-fulfilling prophecy; because women are socialized to be mothers, they are expected to take on the responsibilities assigned to this role, and thus exhibit behavior consistent with this expectation. This alternative view of Burger's "proof" is supported by an understanding of custody history in America. In *Nguyen*, Justice O'Connor notes in her dissent that traditionally, laws

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30 405 U.S. 645 (1972).
31 Id. at 651.
were established recognizing mothers as the “natural guardians” of nonmarital children, thus leaving women with the responsibility of caring for these children and, more significantly, relieving men of that same responsibility.\footnote{533 U.S. at 92 (O'Connor, J., dissenting).}

Furthermore, in \textit{Caban v. Mohammed},\footnote{441 U.S. 380 (1979).} a father who had had joint custody of his two children from the time of their birth challenged the validity of an order allowing the children’s mother’s new husband to adopt the children. The Supreme Court upheld the father’s claim that his equal protection rights were violated. The majority, however, did not go so far as to extract socialized parental roles from biological functions, commenting that even if unwed mothers as a class were in fact closer to their children at birth than unwed fathers, such a generalization about parent-child relations became “less acceptable as a basis for legislative distinctions as the age of the child increased.”\footnote{Id. at 389.}

The Court thus accepted the possibility that women exhibited stronger social ties to their children at birth due to their biological function, but that over the passage of time such ties could also develop between fathers and their children. Even when striking down impermissible gender-based generalizations in statutes, the Court reinforced the stereotype that women are natural caretakers and therefore assume the role of mother when they give birth.

In his dissent in \textit{Caban}, Justice Stewart noted an element of discord between parental rights and biology, stating that “Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.”\footnote{Id. at 397 (Stewart, J., dissenting).} He then went on to say that “[t]he mother carries and bears the child, and in this sense her parental relationship is clear.”\footnote{Id.} Even though Stewart observed a problem with establishing parental rights solely on biological ties, his latter statement seems to imply that a woman’s biological ties give clear support to her parental ties to the child, thus agreeing in this sense with the majority’s view of biology and parenting with respect to women.

\textit{Lehr v. Robertson}\footnote{463 U.S. 248 (1983).} was yet another case dealing with the rights of unwed fathers. There, the Supreme Court upheld a New York state statute establishing a “putative father registry,” with which a man registers to demonstrate his intent to claim paternity of a nonmarital
child and thereafter is entitled to receive notice of any adoption proceedings concerning the child. The Court reasoned that if the natural father of a nonmarital child fails to take the opportunity to develop a relationship with his child, the Constitution will not compel the state to listen to the father's opinion on what is best for the child. Writing for the majority, Justice Stevens remarked on the significance of familial ties in our society: "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility." But, he stated, "the mere existence of biological link [between parent and child] does not merit equivalent constitutional protection." This would seem to imply that Stevens distinguished between the socialized roles of parents and the biological roles of men and women. However, in *Miller v. Albright*, a later case that perhaps foreshadowed the outcome of *Nguyen*, Stevens echoed the sentiment of previous Justices that motherhood, in the sociological sense, is inherent in pregnancy and birth.

The facts of *Miller* were similar to those of *Nguyen*; petitioners claimed that Section 1409(a)(4)'s requirement that children born abroad and out of wedlock to citizen fathers but not to citizen mothers obtain formal proof of paternity by age eighteen violated the Fifth Amendment. In upholding the statute against claims of sex-based discrimination, Stevens, writing for the majority, stated that the sex of the citizen parent alone did not determine whether the child was a citizen under the statute. Instead, an "event" created the legal relationship between the parent and child, the event being "the birth itself for citizen mothers, but post-birth conduct for citizen fathers and their offspring." While this statement can perhaps be seen as a reiteration by Stevens of the government's use of birth as a basis for transmitting citizenship, and not an example of how the Court itself has been influenced by stereotypes of motherhood, it is clear that the majority perceives the sex-based differential treatment of Section 1409 as a biological classification. As mentioned earlier in my discussion of *Nguyen*, once the Court can structure its argument on an existing physical difference, such as birth, then it is almost inevitable that any equal protection sex discrimination claims will fail. The *Miller*
opinion provides further proof that the statute is not insinuating women are natural caretakers; the statute, the Court writes, does not “assume that all mothers of illegitimate children will necessarily have a closer relationship with their children than will fathers.” However,

[The statute] does assume that all of them will be present at the event that transmits their citizenship to the child, that hospital records and birth certificates will normally make a further acknowledgment and formal proof of parentage unnecessary, and that their initial custody will at least give them the opportunity to develop a caring relationship with the child.

At first glance, the Court’s emphasis on the link between citizenship and biological function seems logical and even reasonable. However, as Justice Ginsburg notes in her dissent in *Miller*, historical treatment of children born abroad to American citizens “counsels skeptical examination” of the government’s justification for differential treatment based on sex; namely, the “close connection of mother to child, in contrast to the distant or fleeting father-child link.”

Analyzing this “biological” justification for differential treatment in light of the treatment of parenthood in American history, Ginsburg remarks that “[f]or most of our Nation’s past, Congress demonstrated no high regard or respect for the mother-child affiliation,” implying that the governmental interest cited is not the true purpose behind Section 1409. Ginsburg makes it clear in her dissent that she believes Section 1409 rests on the generalization that mothers are responsible for children born out of wedlock, whereas fathers ordinarily are not. Her dissent demands further inquiry into whether the biological classification explained in the majority opinion is not itself tangled in stereotypical views of men and women.

The influence of gender stereotypes is not limited to cases concerning citizenship. Justice O’Connor, who points out the impact of relying on gender stereotypes in her dissent in *Nguyen*, takes a different view in her opinion in *Planned Parenthood v. Casey*. There, O’Connor describes the physical and emotional pain that accompanies childbirth and motherhood, and the fact that “these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the

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6 Id. at 444.
7 Id. at 468 (Ginsburg, J., dissenting).
9 *Miller*, 523 U.S. at 468 (Ginsburg, J., dissenting).
10 Id. at 460.
infant a bond of love."^{51} O'Connor concludes, however, that this is
not enough to allow the state to require that women become moth-
erers, no matter how popular the vision of what a woman's role is.
O'Connor's insistence that women be allowed to decide their own fu-
ture^{52} is diluted somewhat by her reference to the "bonds of love" that
presumably form between women and the children they bear. Like
the other Supreme Court references to women as mothers, this
statement associates a biological event with certain required emotions
on the part of the woman, thereby fusing together a physical event
with societal expectations of women.

These cases, while differing in their outcomes, all demonstrate the
subtle ways in which gender stereotypes can influence the Court and
Congress and, by extrapolation, our legal system as a whole. Most of
the cases cited herein involve male plaintiffs challenging custody or
citizenship statutes, many of whom argue that the statutes are based
on stereotypes of fathers. But as I will explain in the next section,
seemingly harmless gender stereotypes that are so prevalent in our
society, succeeded in infiltrating the opinions (and dissents) of the
Supreme Court whether the cases upheld or denied plaintiffs' equal
protection claims. The Court has invariably conflated the ideal of
motherhood with the idea of birth. Such confusion of sociology and
biology, while at times appearing to benefit women via better treat-
ment under custody or citizenship statutes,^{54} in the end succeeds only
in perpetuating "fixed notions" of "the roles and abilities" of
women.^{55}

In order to relieve women of such stereotypes, we must address
both the forces behind such stereotypes and their impact. In the
next Part, I make use of different feminist theorists' arguments in or-
der to accomplish this.

III. FEMINIST THEORY AND MOTHERHOOD

Feminist theory provides analytical tools with which to identify
and dissect biases within law and society; it is therefore an effective

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opinion).
^{52} Id.
^{53} Id. ("The destiny of the woman must be shaped to a large extent on her own conception
of her spiritual imperatives and her place in society.").
^{54} See, e.g., Miller, 523 U.S. at 460 (Ginsburg, J., dissenting) ("On the surface, § 1409 treats
females favorably.").
^{55} United States v. Virginia, 518 U.S. 515, 541 (1996) (quoting Miss. Univ. for Women v. Ho-
gan, 458 U.S. 718, 725 (1982)).
way in which to explore the implications of the Supreme Court's language on mothering in \textit{Nguyen}. While I am aware that feminism is not a monolith, one of its main themes—that men and women ought to be given the same opportunities to fully exercise their citizenship—is a pertinent part of my argument concerning women's perceived roles in our society. While the theorists I use in my discussion do not all share similar viewpoints within feminist theory, this theme of opportunity for and recognition of women's citizenship is present in their works. I believe that this is a strong enough connection to justify grouping their theories under the general heading of "feminist theory."

Nancy Chodorow has noted that the terms "mothering" and "fathering" mean different things in our society, and that while a man can possibly "mother" a child, it is unheard of for a woman to "father" a child. She concludes that being a mother in our culture means something more than the physical act of bearing a child; it also means socializing and nurturing that child.\footnote{NANCY CHODOROW, THE REPRODUCTION OF MOTHERING 11 (1978).} In this section I will examine what I believe to be a confusion of these two roles of women, an assumption that a biological mother is automatically and necessarily a mother in the sociological sense—nurturing. Because there exists an ideal form of motherhood, and because this ideal imagines the nurturing and caregiving we associate with motherhood to be instinctual among women, women who give birth are automatically compared to the ideal mother. Furthermore, because this ideal is unattainable for most women, women are set up to constantly attempt and consistently fail at modeling themselves after this ideal. The ideal mother is also used to justify restrictions on women's liberties and citizenship. Thus, the presumption that the biological event of birth results in motherhood imposes society's rigid construction of ideal motherhood on women. A woman who gives birth is expected to adhere to the ideals of motherhood or face the consequences (and penalties), leaving women with children (and those without) little room to express their citizenship as individuals. Finally, when the Supreme Court and Congress use language that equates biological motherhood with society's concept of motherhood—but do not do the same for men—they are perpetuating gender stereotypes that can harm women.
A. Biology and Motherhood

If the tendency to nurture and care for children is instinctual within women—a "natural" phenomenon—then it would seem to be a short jump to the conclusion that women's bodies have been wired for motherhood, and so all women should accept their biological destiny and assume the role of nurturing mother. Because women are biologically programmed to be mothers, men, who have no such instinct, are free to choose whether or not to engage in childrearing and nurturing since the responsibility is not theirs to bear. This theory in turn supports the traditional nuclear family model. 57

It is debatable whether there is any biological evidence that the nurturing and mothering women often perform in society is instinctual. 58 Those who would interpret biological data carry certain biases into the endeavor, potentially coloring their conclusions with their own social views. 59 Even the link between a woman's "biological destiny" and her physiology may not be so obvious. Mary Becker points out that while there is concern that, if biology is destiny, "many people will regard any subordination associated with women's traditional roles as natural and inevitable," we do not regard other natural occurrences such as poor eyesight as inevitable simply because they are natural. 60

Many feminist theorists thus distinguish the sociological role of mothering from its biological role not only because of the problematic interpretation of scientific data but also because focusing solely on biology ignores the social construction of biological factors. 61 Al-

57 See Richard Epstein, Gender is for Nouns, 41 DePaul L. Rev. 981, 990 (1992). Epstein claimed that the "nurturing instincts" of women reduce the cost of doing activities that help promote the survival of both her and her offspring.... If nurturing brings greater pleasure or requires lower cost for women than for men, then we should expect to see women devote a greater percentage of their resources to it than men. This specialization... should be accepted for what it is: a healthy adaptation that works for the benefit of all concerned....

58 See Chodorow, supra note 56, at 16, 21-22 (noting the difficulty in substantiating claims about biological bases for sex differences in behavior, and also the difficulty in finding proof of an instinctual or biological basis for parenting).


61 See, e.g., Chodorow, supra note 56, at 14 (rejecting the bioevolutionary theory that women are primary now because they always have been because it ignores the "social malleability of biological factors"); Abrams, supra note 59, at 1026 (concluding that the theory that women's caregiving and nurturing are biologically-based ignores social structures that "grew up
though some theorists would give more weight to the possibility that the biological body influences, at least in part, the bond between women and their children, even they would not necessarily conclude that society and the law should confine women to such roles. In fact, some, like Kathryn Baker, would argue that the law is supposed to control and rectify such inequalities present in nature.

It is readily apparent in popular culture and law that there is strong cultural support for the idea that biology has made motherhood a woman's destiny—and thus the biological and sociological concepts of motherhood are one and the same. Why support exists for such a theory is not as clear. Some have theorized that mothering has taken on the meaning of both childbearing and childrearing because women usually perform both duties, so the two distinct acts are collapsed into one term despite the fact that there is little or no evidence that nature requires women to mother. Others theorists would argue that a more invidious reason lies behind the fact that the term "mother" tends to mean both the biological event of birth and the social role of care-taking; men, who have the power to shape such roles, do not want to participate in raising children and thus assign that responsibility to women.

to reinforce women's restriction to these tasks," such as the belief that childcare is women's work.

62 See Sara Ruddick, Maternal Thinking, in FEMINIST SOCIAL THOUGHT 584, 587 (Diana Tietjens Meyers ed., 1997) ("I do not wish to deny any more than I wish to affirm some biological bases of maternal thinking. The 'biological body' (in part a cultural artifact) may foster certain features of maternal practice, sensibility, and thought") (emphasis in original).

63 See Baker, supra note 6, at 805-6.

64 See Abrams, supra note 59, at 1022 (noting that arguments "tracing socially observable differences to, or basing social and familial roles on, accounts of biological differentiation" are prevalent in our society); Mary Joe Frug, A Postmodern Feminist Legal Manifesto, 105 HARV. L. REV. 1045, 1049 (1992) ("[T]here remains a common residue of meaning that seems affixed, as if by nature, to the female body. Law participates in creating that meaning."); Lisa C. Ikemoto, The In/fertile, the Too Fertile, and the Dysfertile, 47 HASTINGS L.J. 1007, 1024 (1996) ("We rarely think about the legal basis for motherhood. The fact that a woman gives birth to a child makes the woman’s status as mother seem obvious.").

65 See generally M.M. Slaughter, The Legal Construction of “Mother,” in MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 73 (Martha Albertson Fine- man & Isabel Karpin eds., 1995) (discussing the role of childrearing inherent in the concept of "mother").


[M]en (as a group) don’t rear children because they don’t want to rear children. (This implies, of course, that they are in a position to enforce their preferences.) It is to men’s advantage that women are assigned childrearing responsibility, and it is in men’s interest to keep things that way.
This latter reasoning for the confusion of biological fact and sociological norm is supported by society's construction of the "ideal" mother. This ideal, analyzed in the next section, perpetuates traditional parenting and gender roles of mother and father. It also has the effect of alienating and marginalizing many women, both with and without children, because of its rigid definition of what a mother should (and should not) be.

B. The Ideal Mother

The notion of the "ideal" mother is rooted in the aforementioned idea of biological destiny and is prevalent in our society. Patrice DiQuinzio refers to this ideal as "essential motherhood":

According to essential motherhood, mothering is a function of women's essentially female nature, women's biological reproductive capacities . . . . It requires women's exclusive and selfless attention to and care of children based on women's psychological and emotional capacities for empathy, awareness of the needs of others, and self-sacrifice. According to essential motherhood . . . women's desires are oriented to mothering and women's psychological development and emotional satisfaction require mothering. 67

According to this ideal, the mother should feel an immediate and intense emotional bond with her child, despite the reality that not all women feel passionate about their babies and indeed may not feel any intense emotions immediately. 68 Besides self-sacrifice and devotion, the ideal mother standard requires the impossible from some women; in popular culture, the best mothers are white, heterosexual, financially secure, and married. 69 Thus, poor women, single women, lesbians and women of color are further marginalized by society; while some women are permitted to model themselves after the ideal, these women are never allowed to be viewed as ideal mother material. The consequences of this restrictive and racist ideology are discussed later.

See also Becker, supra note 60, at 159 ("[I]f biology is destiny, many people will regard any subordination associated with women's traditional roles as natural and inevitable.").


68 Becker, supra note 60, at 143. See also DiQuinzio, supra note 67, at 89 (stating that women are expected "to have a certain bond with or connection to the children to whom they give birth").

The ideology of motherhood places an inordinate amount of pressure on women to have and care for children. This ideology posits not only that all women should want to be mothers (because it is their biological destiny), but that perhaps females do not even become women until they experience the physical event of childbirth. DiQuinzio maintains that "the fact that women play a specific role in the physical reproduction of the species means that to be a woman is to fulfill this role." This assumption that all women should want to bear children and that childbearing is an essential part of a woman's identity has even permeated the medical world, potentially impacting women's medical decisions. Paula Nicholson, who has analyzed postnatal depression, explains that motherhood becomes a public experience through a woman’s interaction with experts such as doctors, social workers, and psychologists during pregnancy, labor, childbirth and childrearing. Within these interactions, such experts “prescribe the motherhood role with impunity and apparently without question,” the consequence being that "discourses surrounding childbirth and motherhood position the role of ‘mother’ as biological and immutable. Childbirth and motherhood, exclusively the function of the female body, in both a physical and social sense, are seen to be natural for women."

The influence of science upon the imposition of the role of motherhood, and vice versa, is not merely coincidental. American society is pronatalist in that it encourages childbearing. Thus, having professionals in the medical and social sciences reinforce the notion that women should want to be mothers furthers this goal of childbearing and rearing. This unflinching support for childrearing, coupled with the aforementioned idea that women should be responsible for that childbearing, maintains our western industrial capitalist society. When the traditional model of family life is followed, the man (or husband) is free to pursue economically productive activi-

70 DiQuinzio, supra note 67, at 89.
71 But see Cherry, supra note 69, at 98 n.63 (noting that some black feminist critiques of motherhood suggest that, for some women in the African-American community, having a child is considered a symbol of adulthood).
72 DiQuinzio, supra note 67, at 89.
75 However, American society only encourages certain kinds of childbearing and rearing: ideally, white children born to married couples who are economically self-sufficient. See infra Part III (discussing the contours of ideal motherhood).
76 DiQuinzio, supra note 67, at viii.
ties, such as a full-time job, while the woman (or wife) is relegated to the home to care for the children. Indeed, Elizabeth Iglesias contends that a mother who attempts economic autonomy or any other kind of independence is perceived as selfishly neglecting her children, while no such stigma is attached to a father’s quest for similar ends. The ideals of motherhood are thus deeply rooted in the structure of our society. It is no wonder that these ideals, as previously noted, seep into the opinions of our nation’s highest court.

Even the act of giving birth can be perceived as symbolic of womanhood. In modern society, more women have more choices before them in terms of career development and economic advancement. Women who are fortunate enough to have these choices may still opt to create a family. Due to external pressures, though, such women often lack the time to undertake the duties of the perfect mother, such as round-the-clock childcare. Some argue that because more women are diversifying their time and energies into more activities than full-time childcare alone, the event of birth itself has become “the socially and biologically quintessential womanly act;” it embodies who and what a woman is. The result is that a purely biological event—childbirth—is cloaked in notions of femininity and is portrayed as a goal for which American women should strive. Childbirth becomes shorthand for the fulfillment of a woman’s role in society.

While it is beyond the scope of this paper to examine when the ideology of motherhood came into existence, it is critical to understand how our society—including our legal system—has readily adopted and perpetuated this concept. The reality of the situation is that women’s ability to influence the concept of motherhood and its duties is extremely limited; men have traditionally held the power to define the roles of both women and children. According to Adrien

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78 See generally ARLIE HOCHSCHILD, THE SECOND SHIFT (1989) (surveying case studies on women who, because of societal presumptions of who should perform the housework and childcare, must deal with the friction created when women choose to both work and have a family); ARLIE HOCHSCHILD, THE TIME BIND (1997) (analyzing the creation of time for both work and family in modern American society).
81 NICHOLSON, supra note 73, at 8.
Katherine Wing and Laura Weselmann in their analysis of images of mothers, motherhood is not only presented as the natural destiny for all women, but definitions of motherhood "are further shaped by public and private expectations, which are socially and culturally enforced." Furthermore, as April Cherry argues, because motherhood is shaped by men and patriarchal norms, women do not own the institution of motherhood. Instead, "[t]he meaning of motherhood for women has been created largely in response to having the institution forced upon them." Indeed, assumptions about motherhood are continually reinforced by our legal system. Martha Fineman argues that this is because motherhood is a "colonized category" in law, one "initially defined, controlled, and given legal content by men." The very structure of our legal system legitimizes the male-defined category of motherhood. Fineman notes that law as an institution "was constructed at a time when women were systematically excluded from participation." Thus, for the "colonized categor[y]" of motherhood, "[m]ale norms and male understandings fashioned legal definitions of what constituted a family, of what was good mothering, who had claims and access to children as well as to jobs and education, and, ultimately, how legal institutions functioned to give or deny redress for alleged (and defined) harms." Thus, the imagery and expectations of motherhood, controlled by those in power, perpetuate gender inequalities in our legal system and maintain the "social, economic, and political power in the hands of White men."

Any discussion of an ideal mother raises the question of who is the non-ideal mother. As mentioned earlier, I believe that the ideal mother is an impossible standard for any woman to reach. However, certain groups of women are further disadvantaged because society labels them "bad mothers" from the start. Those who do not (or cannot) conform to the ideal image of motherhood are categorized as "deviant" mothers by Martha Fineman; such mothers include women who work, poor women, and unmarried women. Non-white women are also branded as bad mothers. April Cherry contends that

\[\text{\textsuperscript{83} Wing & Weselmann, supra note 80, at 257.}\]
\[\text{\textsuperscript{85} Fineman, supra note 84, at 101.}\]
\[\text{\textsuperscript{87} Fineman, supra note 84, at 101.}\]
\[\text{\textsuperscript{90} Id.}\]
\[\text{\textsuperscript{92} Id.}\]
\[\text{\textsuperscript{94} Cherry, supra note 69, at 91.}\]
\[\text{\textsuperscript{96} Id.}\]
\[\text{\textsuperscript{97} Id.}\]
that motherhood requires chastity and sexual modesty, traits that white hegemonic culture have not traditionally offered to African-American women. Along these same lines of marginalization, single women are characterized as being selfish for wanting children and are also blamed for such societal ills as crime and poverty. Unmarried African-American women with children are often viewed as flawed individuals with "inherent character weaknesses" for having children in situations contradictory to that prescribed by society. As a group, however, white single women with children are generally not demeaned or blamed in the same way.

From this characterization of certain groups of women, it is evident that the ideology of motherhood sets up a hierarchy, casting women who do not conform to the ideal into lower, less-respected roles, in effect punishing them for their inability or refusal to meet the demands of society. In fact, Patrice DiQuinzio maintains that such deviant women, along with women who refuse to mother, are considered "deficient as women."

The legal implications for stereotypes of motherhood, then, are grave indeed; the construct of legal rights depends upon lawmakers' ideas of individuals' societal roles, and so rights and remedies available to women can depend on lawmakers' views of who is an ideal mother. The impact that societal norms can have on administrators and judges is also critical, since such norms may influence their decisions in particular cases. For instance, an unmarried woman seeking citizenship for her nonmarital children in a situation similar to Nguyen might face her own uphill battle against preconceived notions of what a mother is because she does not have the husband and traditional familial structure that society expects and rewards.

Those who do not fit into society's "norm" of who should be a mother are thereby deprived of the benefits and protections that laws can provide. When a legislature—local, state or federal—conflates a woman's biological function—such as birth—with the expectation of motherhood, this can only heighten the potential harm for women, because such assumptions confuse social expectations with physiological events. By incorporating such assumptions into our laws, the

90 Id. at 108.
91 Ikemoto, supra note 64, at 1050-52.
92 Cherry, supra note 69, at 103-04.
93 Ikemoto, supra note 64, at 1047.
94 Id.
95 DIQUINZIO, supra note 67, at xiii.
legal system succeeds in perpetuating "conventional gender ideology." 96

In the next section, I will explore the possible implications of this conflation of biology with societal norms, and the impact that the language in the Nguyen might have.

C. Implications of Ideal Motherhood and the Nguyen Decision

The implications of comparing women to the ideal mother (or the standard of the bad mother) are far-reaching. Generally, the ideals of motherhood are used to punish women or, more accurately, to use them as scapegoats. For instance, the presumption is that the maternal instinct is inherent in all women or, more accurately, in women who should be mothers. According to Paula Nicholson, the absence of this maternal instinct can then be used to explain "women's maternal failures, such as not protecting children from or perpetuating child abuse or neglect." 97 This is the other side of the proverbial coin; not only does the construction of an ideal mother relieve men of the responsibilities of caring for children by correlating motherhood with childbirth, but this ideal can be wielded against women as well as punishment for their perceived shortcomings in the prescribed role of mother.

In the area of criminal law, prosecutors and defense attorneys rely on the dichotomy of good/bad mother (or, even more telling, "monster/mother") in their portrayals of female defendants who have abused or killed their children. 98 Such a dichotomy establishes heightened standards of appropriate conduct for women who have children that might be used by the jury and public in their judgment of such defendants, standards that society would not hold to men with children. 99 Even attorneys representing women accused of child abuse can be affected by the concept of the "bad mother," 100 which

96 Wing & Weselmann, supra note 80, at 266.
97 Nicholson, supra note 73, at 14. See also Carol Sanger, Separating from Children, 96 COLUM. L. REV. 375, 377 (1996) (discussing the significance of mother-child bonds and the fact that mothers who unnecessarily break that bond—via separation from the child—"are regarded as misguided, selfish, unnatural").
98 See Chimene I. Keitner, Victim or Vamp? Images of Violent Women in the Criminal Justice System, 11 COLUM. J. GENDER & L. 38, 47 (2002) (stating that the district attorney in a particular case said that the defendant mother "was going to be held up to our community as a monster.") (quoting Patrick May, Florida Woman Sentenced to Die for Torture-Murder of Son, BALT. SUN, Apr. 2, 1992, at 3A).
99 Id. at 47.
100 See Marie Ashe, The "Bad Mother" in Law and Literature: A Problem of Representation, 43 HASTINGS L.J. 1017, 1017-18 (1992) (describing how other practitioners and law students find
can have potential adverse effects on their ability to adequately and 
competently represent such clients.

In the context of child custody disputes, the effect of this ideology 
is again to hold women more responsible for the welfare of their 
children than fathers. Because judges continue to impose or approve 
child custody and support plans in which women have more physical 
responsibility for child care than men, Mary Joe Frug concludes that 
"the administration of domestic relations law is implicated in helping 
or making women 'mother' their children."\textsuperscript{101} The ideal mother 
functions in the ideal family: a nuclear family, headed by married 
parents. In reality, however, many African-American and Latina 
women, who are often unmarried, raise their children with the sup-
port of extended "matrifocal" families.\textsuperscript{102} Because such families do 
not conform to the ideal, the women who head them are penalized 
by the state; for instance, welfare eligibility rules do not fully recog-
nize such family units, making it difficult for such women to receive 
economic aid.\textsuperscript{103}

So pervasive is this ideal image of mother that, even if a woman 
does not experience direct blame for her mothering, she may still be 
susceptible to experiencing a sense of failure. Women who are not 
mothers can be viewed by society as unfeminine, and their achieve-
ments made outside of motherhood "are condemned within patriar-
chy as substitutes for normal femininity."\textsuperscript{104} The proper sphere for 
women to exercise any influence, according to the popular view, is 
exclusively motherhood.\textsuperscript{105} The stigma attached to bad mothering 
thus can extend to women who are not mothers because they have 
failed to use their bodies for their expected role.

With respect to the event of childbirth, researchers have found 
that a significant number of women have negative reactions immedi-
ately after giving birth;\textsuperscript{106} this may be due to the fact that such women 
were led to believe that childbirth would be easier than it was in real-

\begin{itemize}
\item women accused of abuse or neglect "morally abject," and how the author has attempted to use 
literature to "facilitate a more sympathetic approach to these clients").
\item Frug, supra note 64, at 1060. \textit{But see} Baker, supra note 6, at 822 (claiming that because 
women must expend more of physiological resources in order to have children, the law should 
reflect the larger investment of women, and should not presume that both parents are equally 
fit to take care of the child).
\item Iglesias, supra note 77, at 929.
\item Id.
\item NICOLSON, supra note 73, at 7.
\item Cherry, supra note 69, at 99.
\item SHEHAN & KAMMEYER, supra note 74, at 193 (referring to a study done by Entwistle and 
Doering in 1981).
\end{itemize}
The perpetually positive spin placed on motherhood and the reluctance to disclose the truth of many women’s situations—the physical pain, the emotional challenges, the lack of support—does an injustice to women who do elect to have children because, at the very least, such high expectations unnecessarily set such women up for disappointment. In stronger terms, the ideals of motherhood can deceive women into believing that not only should they become mothers (because it a biological imperative), but that such a role will be supported by society. Often times, as noted earlier, this is far from reality; many women with children are marginalized or even ignored by the state and society.

Reproductive freedoms and privacy may be the most affected by this ideology. When motherhood is perceived as the societal norm, as I have discussed above, the expectation is that all women should embrace the role of mother. This expectation, in turn, can be used to justify restrictions on abortion. Reva Siegel has argued that one of the objectives, if not the objective, of abortion regulation “is to force women to assume the role and perform the work that has traditionally defined their secondary social status,” namely, motherhood. She later elaborates on this possible ulterior motive of lawmakers:

[L]egislators enacting restrictions on abortion may act from judgments about the sexual and maternal conduct of the women they are regulating; and not merely from a concern about the welfare of the unborn. Legislators may condemn abortion because they assume that any pregnant woman who does not wish to be pregnant has committed some sexual indiscretion properly punishable by compelling pregnancy itself.

This tendency to punish pregnant women for not adhering to society’s standards can invade all aspects of a woman’s privacy. Dorothy Roberts contends that government requirements for administering and reporting drug tests of pregnant women is a way for the government to criminalize the mother “as a consequence of her decision to bear a child.” This is especially problematic because of the racial bias of the reporting; such policies in effect target poor women of color, who are most likely to be under government supervision in the first place, and thus are more likely to be reported. Even the decision to become a mother can be adversely affected. Because child-

\footnotesize

107 Id. at 191, 193.
109 Id. at 361.
111 Id.
lessness is so often equated with failure, it is difficult to say that women are freely exercising their reproductive freedom when they choose to become mothers.\footnote{Cherry, supra note 69, at 94.}

When the government makes policy decisions or legal judgments based on stereotypes of women as inevitable mothers, it does a disservice to its female citizens because it circumscribes what constitutes appropriate conduct by women. In contrast, any governmental reliance on stereotypes of men as fathers does not have the equivalent adverse effect on men's citizenship because these stereotypes do not assume that all men are inherently fathers.\footnote{In fact, it would seem that the government presumes that men are not fathers, as evidenced by the stringent requirements of Section 1409 for children born abroad to citizen fathers, thus initially freeing a man from the gendered role of father until further evidence establishes him as such. And although men who do challenge society's relatively low expectations of fathers can experience the same negative economic consequences as mothers, a father's duties to his children, his presence (or absence) in a household, and his decision to have children do not draw the same attention nor impose the same kind of expectations that burden a similarly situated woman. For a discussion of how fathers may experience the same negative economic consequences as mothers, see Martha Albertson Fineman, \textit{Commentary: Why Marriage?}, 9 VA. J. SOC. POL'Y & L. 239, 256 (2001) (noting that although "the assumption of responsibilities for children and other dependents continues to be gender-skewed" and that "[t]he implications of motherhood are very different from those of fatherhood," studies show that when men attempt to redefine "society's expectations for fathers" they can "suffer some of the same disadvantages and negative economic consequences as mothers").}

When a court, such as the \textit{Nguyen} court, expects women to be nurturing and "maternal" upon the birth of a child, such presumptions are based on traits assigned to women by a patriarchal society and not necessarily on any instinct or biological predisposition. These characterizations of women as nurturers perpetuate gender stereotypes and traditional familial roles to the detriment of women. Having established, at least in part, the broad scope of women's rights affected by stereotypes of motherhood, in the next Part I address the possibility of a woman challenging Section 1409 on equal protection grounds.

IV. POTENTIAL EQUAL PROTECTION VIOLATION UNDER SECTION 1409(A) FOR WOMEN

As mentioned earlier in discussing Ginsburg's dissent in \textit{Miller}, Section 1409 seems on its face to benefit women;\footnote{Miller v. Albright, 523 U.S. 420, 460 (1998) (Ginsburg, J., dissenting).} there are far fewer obstacles for a citizen mother to surmount in order to establish the citizenship of her non-marital child born outside the United States than there are for a citizen father in the same situation.\footnote{See 8 U.S.C. § 1409(c) (2002).} The citizen
mother does not have to establish a maternal link to the child in the way that a citizen father must under Section 1409(a)(4). So long as the mother has United States citizenship at the time her child is born and has lived in this country continuously for at least one year, her child will also receive United States citizenship. Contrast this with the burdensome provisions of Section 1409(a), which require a father seeking similar citizenship for his child to show proof of a blood relationship between himself and the child, to agree in writing to provide financial support for the child until he or she is eighteen years old, and, at issue in *Nguyen*, to legitimate the child under local law, acknowledge paternity in writing under oath, or establish paternity by adjudication in court. Clearly, the requirements for a citizen mother are less burdensome, and thus the statute seems to benefit women more than men.

However, both Congress and the Supreme Court implicitly (and, at times, explicitly) rely on the aforementioned stereotypical notions of motherhood to achieve this supposed “benefit” for women under Section 1409. As mentioned above, a statute containing a sex-based classification is subjected to heightened scrutiny, meaning that the statute must serve important governmental objectives and the means used must be "substantially related to the achievement of those objectives." According to the *Hogan* Court, the real governmental purpose behind the unequal treatment cannot rest upon stereotypes; the heightened standard “must be applied free of fixed notions concerning the roles and abilities of males and females.”

The majority in *Nguyen* bypassed this discussion of stereotypes because they found that the government’s interest in ensuring that the child and citizen parent have an opportunity to develop both a legal relationship and everyday ties was indeed important and that the differential treatment supported that objective. Because a man is not biologically required to be present at birth as a woman is, the Court found that the extra burden the government imposed on fathers was substantially related to the government’s interest in seeing a real rela-

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116 8 U.S.C. § 1409(a) (2).
117 8 U.S.C. § 1409(c). Note that a citizen mother may also meet the requirement by living for at least one continuous year in one of the outlying possessions of the United States. *Id.*
119 See *Nguyen*, 533 U.S at 59-60.
122 8 U.S.C. § 1409(a) (2).
123 533 U.S. at 65.
tionship develop between father and child. Once the Court substituted the event of birth for an opportunity for a woman and child to bond, upholding the statute was almost inevitable since legislation that differentiates its treatment on biological or physical differences is not subject to heightened scrutiny.

The dissent also made note of the majority's approach, as discussed in the first section of this paper, and concluded that using the woman's inevitable presence at the birth as justification for differential treatment was based on an overbroad generalization about gender roles. While the dissent was concerned with examining how a generalization that mothers are more likely than fathers to develop relationships with their children would negatively affect men, I am arguing that this generalization has an equally negative impact on women. I would extend the dissent's arguments to incorporate the statute's potentially adverse effects on women's equal protection rights. Presuming that women will bond with their children simply because there is a biological tie between them places an enormous pressure on women to become mothers and conform to societal expectations; there is no such pressure on men to become fathers despite their own biological ties to children. The majority's analysis in Nguyen thus selectively relies on biology to justify upholding Section 1409.

The biggest criticism of such an argument is that its basis is too attenuated; the language of the case and of the statute does not on its face presume that all women are mothers, or should be mothers. However, when applying heightened scrutiny in equal protection cases, a court examines the actual purpose of the legislature, not merely its stated purpose. The Nguyen dissent details the history of child custody and immigration laws in America and concludes that the present laws were founded on laws that discriminated heavily against women and that this history should counsel the Court in its analysis of the actual legislative purpose in the present case. This examination of legal history sheds light on burdens that the law has imposed on women; women were viewed as the "natural guardian" of

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124 See id.
125 See Virginia, 518 U.S. at 533 ("[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.") (quoting Ballard v. United States, 329 U.S. 187, 193 (1946) (alteration in original)).
126 See Nguyen, 533 U.S. at 86 (O'Connor, J., dissenting).
127 Id. at 89.
128 See id. at 75 ("[A] justification that sustains a sex-based classification must be genuine, not hypothesized or invented post hoc in response to litigation.") (quoting Virginia, 518 U.S. at 533).
129 Id. at 91-92.
children and consequently men were freed from the duty to care for children since the duty was naturally the mother's.\textsuperscript{130} The assumption that birth invokes the ideals of motherhood within women rests on similar discriminatory notions. Additionally, the mere fact that discrimination seems to benefit women does not mean that an equal protection challenge brought by a woman will fail. As mentioned in the \textit{Nguyen} dissent, it does not matter whether the generalizations for the sex-based classification shows disrespect for one class; all that matters is whether it uses gender as a "proxy for other, more germane bases of classification."\textsuperscript{131} Thus, a challenge brought by a woman against Section 1409 could stand because the classification in the statute arguably relies on stereotypes of parental roles. Even if it is debatable whether a woman citizen would actually raise such a claim against this seemingly beneficial statute, from a theoretical standpoint there is no question that the effects of such gender stereotyping are potentially harmful to any woman. It is therefore important to examine the legal arguments available to women who wish to challenge the differential treatment of Section 1409.

\textbf{CONCLUSION}

It is important to stress that the point of this analysis is not to deprive women of the rights and privileges they do have under the law; it certainly would seem that attacking a statute that gives women an advantage in establishing citizenship for their children would be contrary to that principle. However, the underlying presumptions that have given women beneficial treatment under that law must be examined. Here, these presumptions seem to only harm women in the long run. By expecting women to become mothers in a sociological sense, merely because they have become mothers, in a biological sense, at the time of birth, the government is compelling women to fulfill the sociological role of motherhood. Reva Siegel writes that "[w]hen the state deprives women of choice in matters of motherhood, it deprives women of the ability to lead their lives with some rudimentary control over the sex-role constraints this society imposes on those who bear and rear children."\textsuperscript{132} Thus, Section 1409's unequal treatment and its presupposition that women will bond with

\textsuperscript{130} Id.

\textsuperscript{131} Id. at 90 (referring to language in \textit{Hogan}, 458 U.S. at 726) (quoting \textit{Craig v. Boren}, 429 U.S. 190, 198 (1976)).

\textsuperscript{132} Siegel, \textit{supra} note 108, at 378.
children at birth perpetuates the antiquated idea that women, exclusively, should be the primary caretakers.

Neglecting to combat these stereotypes and to legally distinguish between women's biological functions and society's expectations of women can result in more policies and legislation that limit women's full participation as citizens in this country; the adverse implications of motherhood stereotypes range from restrictive abortion regulations to condemning women of color and poor women for having children at all. The argument that was ultimately accepted in *Nguyen*—that a real opportunity exists at birth for a woman to bond with her child—seems to be driven by an insistence that women should readily bond with their children, and will be categorized, both in the law and in society at large, as unfit or deviant if they do not.

While it is true that women seemingly benefit from the provisions of Section 1409 (at least in contrast to their male counterparts), the price that women must pay for such advantageous treatment is too high. When we as a society presume that women who become biological mothers will immediately transform into nurturers and caretakers, we give women little choice but to function within society's gender-biased paradigm of parenthood. Such women are destined to continually strive to meet society's standards of what a mother ought to be (lest they be faced with the consequences of nonconformity), and to most likely fail, in one way or another, in their attempts to become the ideal mother.

Motherhood can be empowering and fulfilling, but it can also be isolating, especially for women who do not or cannot conform to what society views as the model mother. While I believe the law should reflect the vast contributions women make by raising children, I also believe that in deciding to participate in the cultural institution of motherhood, women must be allowed to exercise their choice free from the constraints and impossible expectations of society.

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133 See Ruddick, supra note 62, at 585 (discussing the power a woman has in deciding to have children and in deciding how to raise them).

134 See, e.g., Becker, supra note 60, at 139 (advocating a "maternal deference standard" in child custody cases, which would have judges "defer to fit the mother's judgment of the custodial arrangement that would be best") (emphasis in original).