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REAL DIFFERENCES AND STEREOTYPES—TWO VISIONS OF GENDER, CITIZENSHIP, AND INTERNATIONAL LAW

*M. Isabel Medina**

Yes Genevieve does not know it. What. That we are seeing
Caesar.
Caesar kisses.
Kisses today.
Caesar kisses every day.
Genevieve does not know that it is only in this country that she
could speak as she does.
She does speak very well doesn't she. She told them that there
was not the slightest intention on the part of her countrymen to
eat the fish that was not caught in their country.
In this she was mistaken.¹

Primary resistance to globalization today has been directed at economic and market forces, but it also has found voice in claims that globalization imposes Western or American cultural, legal, and political values on other cultures. Resistance to globalization, whether through terrorist violence like that directed at the World Trade Center in 2001, or through increasingly oppressive immigration and detention policies directed against noncitizens,² is unlikely to prevent the continuing development of a global order. The United States has a strong interest in facilitating that development and ensuring that a global order incorporates a strong commitment to human rights. Because it is a powerful country—at times too much a Caesar—American efforts to shape globalization

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¹ Gertrude Stein, *Ladies' Voices, Act 3*, in *SELECTED OPERAS AND PLAYS OF GERTRUDE STEIN* 3, 4 (John Malcolm Brinnin, ed., 1970).

² See, e.g., MARK DOW, *AMERICAN GULAG INSIDE U.S. IMMIGRATION PRISONS* (2004); see also American Bar Association, Task Force on Treatment of Enemy Combatants, Report to the House of Delegates, Feb. 10, 2003.

are likely to be accompanied by claims that the United States merely seeks to impose its own values on the world community. It is difficult to distinguish between policies and practices that “impose” values on unwilling cultures, and policies and practices that foster communication, consensus, and adherence to particular values. However, characterizing efforts to develop communication and consensus on national and global adherence to human rights norms as “imposition” of values, serves only to frustrate communication and change.

One value commonly perceived to be at variance between Western and other cultures is gender equality. The extent to which adherence to gender equality represents a variance between cultures is best acknowledged so that emergence of an international world order is accompanied by adequate safeguards to ensure compliance at national and global levels with norms of gender equality. One method of promoting and facilitating greater understanding and consensus on gender equality as part of an international legal world order is continual consideration of international legal norms in constitutional adjudication. The United States may be less like Caesar if in developing national constitutional norms it considers issues that have global dimensions within a global context.

Justice Ruth Bader Ginsburg is one jurist willing to pursue this approach. It is, of course, appropriate to consider Justice Ginsburg’s decisions in the context of gender equality, for her legacy is well known and well regarded.³ For some years now, Justice Ginsburg’s work has illustrated an awareness that our place in the global order requires consideration of international norms and practice in the formulation of our own national norms.⁴ Future discussions of how globalization should or may be shaped must include a guarantee of gender equality that transcends national, religious, and cultural borders. Acknowledging our own missteps in accepting gender equality as a norm, and placing our legal developments in the global context may help build consensus and acceptance of gender equality throughout the world community. I explore three ideas in this article.

First, the United States Supreme Court’s decisions in citizenship cases fail to articulate a clear and coherent concept of citizen-

³ Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978).

⁴ See Ruth Bader Ginsburg & Deborah Jones Merritt, *Fifty-First Cardozo Memorial Lecture Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999).

ship and how citizenship has been informed by gender.⁵ Justice Ginsburg's dissenting opinion in *Miller v. Albright* is an exception.⁶ *Miller* involved a claim by the nonmarital daughter of a U.S. citizen father that the statute that denied her citizenship was unconstitutional because it treated nonmarital children of U.S. citizen fathers differently from nonmarital children of U.S. citizen mothers.⁷ Five justices affirmed the lower court's dismissal of the nonmarital child's claim but no majority opinion emerged.⁸ Justice Ginsburg dissented, along with Justices Breyer and Souter.⁹ Justice Ginsburg's opinion detailed the extent of gender discrimination in prior U.S. citizenship statutes and the efforts of the more modern Congress to eliminate gender bias from citizenship and naturalization statutes.¹⁰ But Justice Ginsburg's *Miller* dissent is atypical of majority decisions in citizenship and immigration cases.

In the view of the Court, citizenship, in the context of gender, means little for the individual; it secures no rights or responsibilities, including the right to vote or to reside in one's country with one's spouse.¹¹ Paradoxically, in other contexts, such as deporta-

⁵ Scholarship on citizenship has flourished in the past few decades. See, e.g., CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES (T. Alexander Aleinikoff & Douglas Klusmeyer, eds., 2001); ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997). The dialogue on citizenship extends not just to questions of membership, but, of course, to questions of equality. See Kenneth L. Karst, *The Supreme Court, 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977); see also, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

In this article, I do not attempt to provide a substantive and comprehensive definition or concept of citizenship. Nor do I explore the question of membership and the extent to which citizenship should matter in the law. For a discussion of human rights and constitutional protections, see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION (1996).

⁶ *Miller v. Albright*, 523 U.S. 420, 460-68 (1998) (Ginsburg, J., dissenting). See also *Nguyen v. INS*, 533 U.S. 53, 74 (2001) (O'Connor, J., dissenting).

⁷ *Miller*, 523 U.S. at 429.

⁸ Justices Stevens and Rehnquist reached the merits of the case and found no Equal Protection violation. *Miller*, 523 U.S. at 423-45. Justices O'Connor and Kennedy reasoned that the daughter lacked standing to assert her U.S. citizen father's claims and, thus, did not consider the merits of the Equal Protection claim. *Miller*, 523 U.S. at 445-52 (O'Connor, J., concurring on the judgment). Justice Scalia believed that citizenship determinations are plenary with Congress, thus, the Court has no power to confer citizenship "on a basis other than that prescribed by Congress." *Miller*, 523 U.S. at 452-59 (Scalia, J., concurring).

⁹ *Miller*, 523 U.S. at 460-71 (Ginsburg, J., dissenting); 523 U.S. at 471-85 (Breyer, J., dissenting).

¹⁰ *Miller*, 523 U.S. at 460-68.

¹¹ See *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Chang Chan v. Nagle*, 268 U.S. 346 (1925); see also *Mackenzie v. Hare*, 239 U.S. 299 (1915); *Low Wah Suey v. Backus*, 255 U.S. 460 (1912) (wife of Chinese-born U.S. citizen could be deported with

tion or detention, citizenship may mean everything, including the right to live in the country where one has been raised, and the right to be close to the only family one has known.¹²

In describing the interplay between the Supreme Court's development of a constitutional norm on gender and citizenship, I explore cases involving acquisition or loss of citizenship, the context in which the Court has most often developed constitutional norms of citizenship.¹³ The Court's concept of citizenship, however, is informed by other factual contexts. Some of those contexts are helpful in coming to an understanding of the Court's vision of citizenship and gender. Thus, I consider cases in which the Court has decided a claim of sex discrimination, whether implicitly or explicitly, and in which some aspect of citizenship is discussed or is material to the resolution of the case.¹⁴ I include cases that deal with gender and with activities that are viewed today as activities available only to citizens, like voting and the ability to reside in one's country, which is another way to describe freedom from deportation.

Second, I explore the idea that American adherence to norms of gender equality is inconsistent and remains in flux. This theme is developed by examining Supreme Court decisions on gender discrimination in the context of citizenship. These decisions reflect the tensions and discordant views of gender equality that continue to dominate global and national views about gender and the proper role of women and men in transmitting or constructing citizenship in national or transnational societies. Notwithstanding a well developed legal structure to combat gender discrimination in

minimal process on the grounds that she had been found in a house of prostitution); *Yeung How v. North*, 223 U.S. 705 (1912).

¹² *Demore v. Kim*, 538 U.S. 510 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Nguyen v. INS*, 533 U.S. 53 (2001); see also *U. S. v. Wong Kim Ark*, 169 U.S. 649 (1898).

¹³ *Nguyen*, 533 U.S. 53; *Rogers v. Bellei*, 401 U.S. 815 (1971); *Mackenzie*, 239 U.S. at 299. Other cases deal directly with acquisition or loss of citizenship. See, e.g., *Afroyim v. Rusk*, 387 U.S. 253 (1967) (holding that Congress lacks power to involuntarily divest a person of her or his United States citizenship); *Schneider v. Rusk*, 377 U.S. 163 (1964) (holding that a statute providing that a naturalized citizen loses her or his citizenship after continuous residence for three years in her or his country of origin violates the Fifth Amendment's Due Process Clause); *Perkins v. Elg*, 307 U.S. 325 (1939) (holding that a child born in the United States of alien parents is a U.S. citizen and is not subject to deportation because her parents had taken her from the United States to Sweden as a child where she resided until reaching the age of majority); *Wong Kim Ark*, 169 U.S. at 649 (holding that the detention of and exclusion from the United States of an adult born in United States of Chinese parents is unwarranted because he is a citizen of the United States).

¹⁴ See *U. S. v. Virginia*, 518 U.S. 515 (1996); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

the United States, the Supreme Court's jurisprudence reflects an inconsistent and tenuous adherence to gender equality as a constitutionally enforceable norm.

This article explores the Court's modern vision of gender and citizenship through two cases, *United States v. Virginia*¹⁵ (VMI), authored by Justice Ginsburg, and *Nguyen v. Immigration and Naturalization Service*,¹⁶ the case in which a majority of the Court upheld the constitutionality of the statute challenged in *Miller*.¹⁷ These cases make clear that in the context of American society, stereotypes about sexual behavior, maternity, paternity, and parenting, in turn influenced by stereotypes about class, race, and ethnicity, remain primary stumbling blocks to substantive gender equality as well as to a comprehensive and consistent view of citizenship.

Third, globalization is defined as the emergence and continued development of an international world order. Globalization in one sense is a tautology. It merely describes the interrelatedness and interdependence of the earth and its organisms. Formal recognition, whether voluntary or involuntary, of this interdependence is inevitable. Globalization, however, does not eliminate difference. Differences are an inherent aspect of humanity. Differences are an inherent part of the American legal system and of American society, which has, since its founding, perceived itself at least in part as a heterogeneous society. At least two constitutional principles support the view that America, since its founding, is a heterogeneous society: the First Amendment, which implicitly acknowledges diversity of thought, speech and religion;¹⁸ and federalism, which implicitly recognizes variance among states and local communities.¹⁹ Tolerance for difference, necessary for a heterogeneous society to thrive, cannot allow differences to subvert basic human rights. Slavery serves as an example of the extent to which tolerance may accommodate differences. Such oppression is inconsistent with a free and just society.

Globalization poses potent challenges to strong and continued adherence to norms of gender equality.²⁰ A substantial number of

¹⁵ 518 U.S. 515 (1996).

¹⁶ 533 U.S. 53 (2001).

¹⁷ *Miller v. Albright*, 523 U.S. 420 (1998).

¹⁸ U.S. CONST. amend. I.

¹⁹ U.S. CONST. amend. X.

²⁰ VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1136-38 (1999). Some authors question the usefulness of culture as a prism through which to view or judge gender bias. See, e.g., Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001); Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573 (1996). As Professor Volpp

the world's societies and cultures formally endorse the subordination of women.²¹ Even in Western societies, consensus on what gender equality means or necessitates is lacking.²² In the United States, for example, sexual harassment and gender discrimination occur frequently in the workplace and labor statistics reveal a substantial wage differential between women and men.²³ Sexual harassment and assault remain a serious problem in educational institutions.²⁴ Although women are a slight majority of the population in the United States, women still continue to be underrepresented in leadership positions in the corporate world, in the professional world and in the political world.²⁵ Minimal representation on enti-

contends, the difficulties inherent in examining cultural differences on gender are substantial; it may be that different approaches to gender bias may be better studied by reference to religion, the nation-state or to a regional community. The differences, whether cultural, legal, political, or religious should be examined, not ignored or excused.

²¹ See Pamela Constable, *Afghan Women Are Still Policed: Special Morals Guard Holds Sway in Herat, Rights Groups Says*, WASH. POST, Dec. 17, 2002, at A24; Seth Mydans, *In Pakistan, Rape Victims Are the "Criminals,"* N.Y. TIMES, May 17, 2002, at A3; Asra Q. Nomani, *She Shouldn't Be Stoned to Death—None of Us Should*, WASH. POST, June 1, 2003, at B1; Norimitsu Onishi, *Mother's Sentence Unsettles a Nigerian Village*, N.Y. TIMES, Sept. 7, 2002, at A3; Charles Trueheart, *Canada Offers Refuge to Persecuted Women*, CHI. SUN-TIMES, Mar. 3, 1993, at 9.

²² See, e.g., Sean Pager, *Strictness vs. Discretion: The European Court of Justice's Variable Vision of Gender Equality*, 51 AM. J. COMP. L. 553 (2003).

²³ "In Fiscal Year 2002, EEOC [U.S. Equal Employment Opportunity Commission] received 14,396 charges of sexual harassment." EEOC, *Sexual Harassment* (Jan. 6, 2004), at http://www.eeoc.gov/types/sexual_harassment.html (on file with the New York City Law Review). Further, in that same year, the EEOC received 25,536 charges of sex-based discrimination. EEOC, *Sex-Based Discrimination* (Jan. 6, 2004) at <http://www.eeoc.gov/types/sex.html> (on file with the New York City Law Review). See also BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES (Jan. 10, 2004), available at <http://www.bls.gov/cps/cpsaat39.pdf>; Stephanie Boraas & William M. Rodgers III, *How Does Gender Play a Role in the Earnings Gap? An Update*, 126 MONTHLY LAB. REV. 90 (2003) available at www.bls.gov/opub/mlr/2003/03/art2full.pdf.

²⁴ See *United States v. Morrison*, 529 U.S. 598, 634 (Souter, J., dissenting) (2000); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992); see also Christine N. Carlson, *Invisible Victims: Holding the Educational System Liable for Teen Dating Violence at School*, 26 HARV. WOMEN'S L. J. 351 (2003); Nan Stein, *Bullying or Sexual Harassment? The Missing Discourse of Rights in an Era of Zero Tolerance*, 45 ARIZ. L. REV. 783 (2003); DONNA EUBEN, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, SEXUAL HARASSMENT IN THE ACADEMY: SOME SUGGESTIONS FOR FACULTY POLICIES AND PROCEDURES (2002), at <http://www.aaup.org/Legal/info%20outlines/legsexha.htm> (on file with the New York City Law Review).

²⁵ See Kirstin Downey, *Survey Finds Few Female Directors: No Women Serve on Boards of 54 Fortune 500 Firms*, WASH. POST, Dec. 4, 2003, at E3; Karen Jacobs, *Women Have Scaled Corporate Ladder, But Climb Continues to Be a Slow One*, WALL ST. J., Nov. 12, 1999, at B4; Judy Mann, *Pay Discrimination Is No Dirty Little Secret*, WASH. POST, June 15, 2001, at C8; Joseph Menn, *First Woman Named to Lead Blue-Chip Firm*, L.A. TIMES, July 20, 1999, at

ties such as the U.S. Supreme Court is accepted as sufficient.²⁶ I further explore this theme by reference to the modern Greek experience and response to gender bias. Stereotypical views of the sexes are changing and events or developments have a way of out-distancing views and attitudes; still, it clearly is a mistake to view the world as wholeheartedly endorsing the idea that the sexes are entitled to equality of treatment and opportunity, and that this equality of treatment is enforceable by law.

One aspect of tracking the growth of an emerging global legal order is the degree to which the Court considers international norms, decisions of international tribunals, or other nations' legal norms. The Supreme Court's reliance on international norms is sporadic and inconsistent. Although international conventions endorse and support gender-equality norms,²⁷ reliance on international norms on the issue of gender is problematic because actual international practice is inconsistent or at least in substantial variance to the values expressed in conventions and treaties. In addition, international conventions contain provisions that allow states to derogate or ignore their obligations in times of emergency or for elusive and flexible concepts such as "morality" or "public order."²⁸ Moreover, in the past, the Supreme Court has looked to

A1. For an international comparison, see also Solange De Santis, *Canada Trails U.S. in Naming Women to Board*, WALL ST. J., Jan. 28, 1999, at B15; Charles Goldsmith, *Norway Plans to Require Gender Equality in Greater Boardrooms*, WALL ST. J., July 19, 2002, at A9. See also Jillian Mincer, *Women Find Politics Still an Uphill Path*, N.Y. TIMES, Dec. 28, 2003, at 14 L1.

²⁶ See Bill Miller, *Saluting History That's Not Man-Made, at Ceremony, Pioneering Female Judges Recall Firsts*, WASH. POST, Mar. 26, 1998, at JO1. See also Mike Allen & Charles Lane, *Bush Set for High Court Battle; Strategy is to Nominate Ideological Conservative*, WASH. POST, Jan. 19, 2003, at A1; Charles Lane & Amy Goldstein, *At High Court, a Retirement Watch: Rehnquist, O'Connor Top List of Possibilities as Speculation on Replacement Grows*, WASH. POST, June 17, 2001, at A4; Robin Toner & Neil A. Lewis, *Lobbying Starts as Groups Foresee Vacancy on Court*, N.Y. TIMES, June 8, 2003, at A1.

²⁷ *Convention on the Elimination of all Forms of Discrimination Against Women* ("CEDAW"), Annex to G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 194, U.N. Doc. A/34/46, Art. 4(1) (1979). But see Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281 (1991) (reporting that CEDAW has attracted more reservations by states than any other human rights convention); William A. Schabas, *Reservations to the Convention on the Elimination of all Forms of Discrimination Against Women and the Convention on the Rights of the Child*, 3 WM. & MARY J. WOMEN & L. 79 (1997). The United States has not yet ratified CEDAW. See *CEDAW: States Parties* (2004) at <http://www.un.org/womenwatch/daw/cedaw/states.html> (on file with the New York City Law Review). See also African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58, Art. 2 (1982) (entered into force Oct. 21, 1986).

²⁸ See Universal Declaration of Human Rights, Art. 29 (2) which provides:
In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose

international norms in developing legal norms that allowed unbri-
 dled governmental actions and discrimination of disfavored classes,
 for example, women or resident aliens.²⁹ At other times, the Court
 has noted other nations' legal norms to more sharply delineate
 them from our own.³⁰ Recently, some Justices have turned to inter-
 national law and international practice in developing American
 constitutional norms.³¹ Justice Ginsburg, in particular, has placed
 what tends to be discussed in the literature as a national subject—
 race discrimination and affirmative action—in the global context.

Formal recognition and discussion of international law and
 the practices of other nations furthers our own ability to compre-
 hend and develop our own legal institutions, processes, and norms.
 International norms and the actual practices of other countries
 serve not just as a barometer of global opinion but may serve also
 as a caution or warning of the tenuousness of that norm in the
 global order. Discussion of issues like citizenship, race and gender
 in their global context, rather than exclusively in their national

of securing due recognition and respect for the rights and freedom of
 others and of meeting the just requirements of morality, public order
 and the general welfare in a democratic society.

Universal Declaration of Human Rights, art. 29 (2), G.A. Res. 217A, U.N. Doc. A/810
 (1948).

See also Article 4 of the International Covenant on Civil and Political Rights:

In time of public emergency which threatens the life of the nation and
 the existence of which is officially proclaimed, the States Parties to the
 present Covenant may take measures derogating from their obligations
 under the present Covenant to the extent strictly required by the exi-
 gencies of the situation, provided that such measures are not inconsis-
 tent with their other obligations under international law and do not
 involve discrimination solely on the ground of race, colour, sex, lan-
 guage, religion or social origin.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 4 (1), Dec. 16, 1966,
 999 U.N.T.S. 171. See also Oren Gross, "Once More Unto the Breach": *The Systemic Failure
 of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J.
 INT'L L. 437 (1998); Joan F. Hartman, *Derogation from Human Rights Treaties in Public
 Emergencies—A Critique of Implementation by the European Commission and Court of Human
 Rights and the Human Rights Committee of the United Nations*, 22 HARV. INT'L L. J. 1
 (1981); Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y. B. INT'L.
 L. 281 (1978).

²⁹ See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 707-11 (1893); *Chae Chan
 Ping v. United States*, 130 U.S. 581 (1889).

³⁰ See *Laird v. Tatum*, 408 U.S. 1, 35-38 (1972) (Douglas, J., dissenting); *Times Film
 Corp. v. Chicago*, 365 U.S. 43, 78 (1961) (Douglas, J., dissenting); *Perez v. Brownell*, 356
 U.S. 44, 79 (1958) (Douglas, J., dissenting).

³¹ See, e.g., *Lawrence v. Texas*, 123 S.Ct. 2472 (2003); *Washington v. Glucksberg*, 521
 U.S. 702, 734 (1997); *Zadvydas v. Davis*, 533 U.S. 678, 707 (2001) (Kennedy, J., dis-
 senting); see also Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers
 Must Learn About Foreign Law*, 45 FED. LAW., Sept. 1998 at 20; Sandra Day O'Connor,
Federalism of Free Nations, 28 N.Y.U. J. INT'L. L. & POL. 35 (1996).

context, may yield a richer font of approaches and solutions; it may also help build consensus. Moreover, issues like citizenship are inherently international and global. Citizenship is important because national and international legal norms make it important. To discuss citizenship and its meaning in isolation from the global context is to ignore its role in the international order. These are functions that have been acknowledged by the Court in the past and which justify continued reference to international norms and the practice of nations.

Citizenship is particularly suited to study in reference to globalization and gender because the relationship established by citizenship is at the heart of the modern nation-state. International and other nations' citizenship norms share the sex bias of the United States.³² Thus, the international construction of citizenship reflected the traditional and stereotypical understanding of the role that men and women were to play in society. Citizenship continues to be central to developing transnational or regional arrangements like the European Union. Thus, it is informed and constructed by reference to international law. Citizenship, moreover, is likely to be affected by globalization in the years to come. The concept of global citizenship does not appear as unattainable as it may have during the twentieth century.³³ Because citizenship continues to be influenced by gender, discussions of global citizenship should explore its role in norms of citizenship.³⁴

In this article, I first discuss the Supreme Court's treatment of gender discrimination in the context of citizenship in the past. Then, I explore two visions of citizenship reflected in the two most recent Court decisions exploring the constitutionality of intentional gender discrimination, one of which was authored by Justice Ginsburg. Finally, I discuss Justice Ginsburg's use of international law in the development of constitutional law norms, and I urge its expansion in application as an appropriate model for continued international dialogue on gender and citizenship, in particular, and in human rights law, in general.

³² See *Nguyen v. INS*, 533 U.S. 53, 91-93 (2001) (O'Connor, J., dissenting).

³³ PETER SINGER, *ONE WORLD* (2002).

³⁴ It is beyond the reach of this article to fully discuss the role gender plays in today's construction of citizenship in international norms. See Kif Augustine-Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 Va. J. of Int'l Law 93 (2000); Karen Knop, *Relational Nationality on Gender and Nationality in International Law in CITIZENSHIP TODAY*, *supra* note 5.

I. THE COURT ON CITIZENSHIP AND GENDER—
MISSED OPPORTUNITIES

One of the earliest cases to challenge governmental discrimination on the basis of sex, citizenship, and suffrage is *Minor v. Happersett*, decided by the Supreme Court in 1874.³⁵ Virginia and Francis Minor sued the state of Missouri because it refused to register Virginia Minor as a voter because she was not a male citizen of the United States.³⁶ Virginia Minor brought her claim approximately a decade after passage of the Fourteenth and Fifteenth Amendments to the Constitution.

Virginia Minor's challenge was based on the Fourteenth Amendment of the U.S. Constitution, which conferred citizenship on all "persons born . . . in the United States."³⁷ Moreover, she argued the amendment prohibited states from making laws that "abridge the privileges or immunities of citizens of the United States."³⁸ As the Court put it,

[t]he argument is, that as a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the State in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the State cannot by its laws or constitution abridge.³⁹

The Court's logic reflected the plain language of the amendment—"[t]here is no doubt that women may be citizens."⁴⁰ The Court reasoned that citizenship as a concept predated adoption of the Fourteenth Amendment. Citizenship, thus, was something possessed by the people who were members of a political community. Women were persons, the Court noted, and, thus, the mere fact that they were women did not preclude them from membership in the political community.⁴¹ In exploring what "citizens" or "citizenship" might mean, the Court saw it grounded squarely on membership in a political community.

There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation

³⁵ 88 U.S. (21 Wall.) 162 (1875).

³⁶ *Minor v. Happersett*, 53 Mo. 58 (1873), *aff'd*, 88 U.S. (21 Wall.) 162 (1874).

³⁷ U.S. CONST. amend. XIV, § 1.

³⁸ *Id.*

³⁹ *Minor*, 88 U.S. at 165.

⁴⁰ *Id.*

⁴¹ *Id.*

formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. . . . [citizen] is understood as conveying the idea of membership of a nation, and nothing more.⁴²

The Court's focus on membership in a political community to define citizenship might have, if developed, led the Court to a meaningful concept of citizenship. As that "and nothing more" indicated, however, the Court's understanding of what membership in a political community might mean or require was crabbed for it did not require that Virginia Minor be allowed to vote. Suffrage, according to this 1875 Court, was not one of the "privileges and immunities of citizenship."⁴³

The Court's decision rested primarily on historical practice and is consistent with other post-Reconstruction cases interpreting the privileges and immunities clause of the Fourteenth Amendment as a nullity.⁴⁴ Suffrage, it noted, had been restricted since the founding of the republic; all states restricted suffrage to white males of certain ages and some states restricted suffrage to only white, male, property owners.⁴⁵ Moreover, the Court reasoned that citizenship was not necessary to suffrage, as a number of states allowed noncitizen males to vote.⁴⁶ Therefore, according to this Court, there seemed to be little link between suffrage and citizenship or membership in a political community. The Court saw itself bound by historical practice despite the grand break with history the nation as a whole had witnessed in the Civil War, during Reconstruction, and passage of the Thirteenth, Fourteenth, and Fifteenth Amendments.

For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.⁴⁷

Plainly, the *Minor* Court did not deal directly with the issue of gender equality. Nor does the opinion discuss in any depth what citizenship might mean or constitute in practice. The opinion con-

⁴² *Id.* at 165-66.

⁴³ *Id.* at 171.

⁴⁴ *Slaughter House Cases*, 83 U.S. 36 (1872).

⁴⁵ *See Minor*, 88 U.S. at 172-74.

⁴⁶ *Id.*

⁴⁷ *Id.* at 177-78.

tains no reference to the Equal Protection clause of the Fourteenth Amendment, nor does it consider or discuss how differences in sex roles typical of the late 1800s might be related to or affect citizenship and the right to vote. Virginia Minor's own family, her role in the family as an educator and primary caretaker of her children, and therefore perhaps responsible for the passing of values to her children, is not considered relevant to her status as citizen.⁴⁸ The Court speaks briefly about allegiance and protection, but leaves these terms undefined. Similarly, the Court fails to explain how Virginia Minor, as a citizen, is to express her allegiance. Allegiance, for this Court, appears to be an attitude rather than a value requiring some recognition of rights and duties or responsibilities.

In the United States, citizens have no obligation under the law to vote. A substantial number of United States citizens never vote, even in national elections.⁴⁹ Thus, perhaps the *Minor* view that citizenship as a practical matter is disconnected from the franchise is an accurate view. Of course, there is a vast difference between a citizen who chooses not to vote, and a citizen who is prohibited from voting. Notwithstanding the Court's view of the relationship between citizenship and suffrage is likely consistent with the understanding of the framers of the Fourteenth Amendment of the Constitution.⁵⁰ That same Congress adopted the Fifteenth Amendment securing the vote to all male citizens.⁵¹ Leaders of the women's movement resisted adoption of the Fourteenth and Fifteenth amendments because the amendments did not prohibit denial of the franchise to women.⁵² The Court's view of history is not inaccurate; but this is simply not a Court willing to look to social or political developments for an understanding of what the Constitution may require. The opinion is reminiscent of the *Dred Scott* decision in its homage to federalism, state powers, and its understanding of citizenship.⁵³ *Minor v. Happersett* places plenary power to prescribe

⁴⁸ See Karen Knop, *Relational Nationality: On Gender and Nationality in International Law*, in *CITIZENSHIP TODAY*, *supra* note 5, at 89-124.

⁴⁹ See U.S. CENSUS BUREAU, *VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000* 2 (2002) available at <http://www.census.gov/prod/2002pubs/p20-542.pdf> (reporting that sixty percent of voting-age citizens voted in the November 2000 presidential election).

⁵⁰ See Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161 (1979).

⁵¹ U.S. CONST. amend. XV.

⁵² See JOAN HOFF, *LAW, GENDER, AND JUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 143-50 (1991).

⁵³ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). This similarity has been noted by others including Joan Hoff. See HOFF, *supra* note 52, at 173.

citizenship in states; if citizenship is to be shared by women, then citizenship will secure few rights, privileges or immunities.

The Court's concept of citizenship in *Minor* is singularly void of substance. To this late nineteenth century court, citizenship means membership in a political community. Membership, however, involves or requires only silent allegiance to the political community from the member, not active participation in the legislative and political processes. As a member, the citizen receives protection, but it is not clear from whom or from what. Neither the concept of allegiance nor protection are delineated or developed by the Court in any depth. The Court's construction of citizenship may have been affected by the need to develop a theory of citizenship that allowed state and federal legislatures to continue to freely discriminate on the basis of sex.

Forty-one years later, the Court remained constrained in its concept of citizenship and of gender equality. In *Mackenzie v. Hare*, the Court upheld a statute that divested American women, but not men, of their United States citizenship upon marriage to foreign nationals without the individual citizen's consent.⁵⁴ *Mackenzie*, like *Minor*, raised the issue of gender equality in the context of voting. The case came to the Court in an interesting posture because it involved divestiture of citizenship from a person who continued to reside in the United States after her marriage.⁵⁵ Ethel Mackenzie was born in California and met and married Gordon Mackenzie, a citizen of Great Britain, in California.⁵⁶ Both Ethel and Gordon Mackenzie resided in California after their marriage.⁵⁷

Upon reaching the age of 21, approximately three years after her marriage, Mackenzie attempted to register as a voter.⁵⁸ However, she was not allowed to register, because, the state argued, upon her marriage to a subject of Great Britain, she had ceased to be a citizen of the United States.⁵⁹

In an opinion less than three pages long, the Court readily dismissed Ethel Mackenzie's contention that Congress lacked power to deprive her of citizenship.⁶⁰ Instead, the Court consid-

⁵⁴ *Mackenzie v. Hare*, 239 U.S. 299 (1915). *Mackenzie* has not been expressly overruled by case law, although its reasoning has been rejected by subsequent cases. See, e.g., *Vance v. Terrazas*, 444 U.S. 252 (1980); *Afroyim v. Rusk*, 387 U.S. 253 (1967). Moreover, the Nineteenth Amendment arguably invalidated the statute.

⁵⁵ 239 U.S. at 306.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 306.

⁵⁹ *Id.*

⁶⁰ *Id.* at 310-11.

ered her expatriation to be “voluntary” because the expatriation occurred as a result of the marriage, “a condition voluntarily entered into, with notice of the consequences.”⁶¹ The statute imposed expatriation as a result of marriage only on American women, not American men.⁶² The Court justified this discrimination, and the brevity of its opinion in denying relief to Ethel Mackenzie, citing an ancient principle, that of male dominance in a marriage:

[i]t would make this opinion very voluminous to consider in detail the argument and the cases urged in support of or in attack upon the opposing conditions. Their foundation principles, we may assume, are known. The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary and worked in many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy. And this was the dictate of the act in controversy. Having this purpose, has it not the sanction of power?⁶³

Citizenship, the Court acknowledged, had “tangible worth,” but the Court did not discuss what this “worth” might constitute and why entering into a marriage might compromise or diminish the value of citizenship to a woman but not to a man, particularly in a case in which the couple resided in the woman’s country of origin.⁶⁴ Moreover, the Court did not explain why one’s entitlement to citizenship is diminished or affected by marriage, except by reference to the need to “give dominance to the husband.”⁶⁵ Perhaps it did not discuss the substance of citizenship in this case because, as in *Minor*, only suffrage was at issue. Since suffrage was not constitutionally necessary for women until passage of the Nineteenth Amendment in 1920, to divest a woman of citizenship due to marriage, without proof of the woman’s actual intent to divest, did not appear as problematic as if the circumstances were changed and Ethel Mackenzie was facing deportation as a nonci-

⁶¹ *Id.* at 310, 312.

⁶² *Id.* at 307.

⁶³ *Id.* at 311.

⁶⁴ *Id.*

⁶⁵ *Id.*

tizen. Notwithstanding this, it is ultimately citizenship that Ethel Mackenzie lost, not simply the vote.

Moreover, the Court notes that “a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen.”⁶⁶ But it is an illusory consent that the Constitution required—Ethel Mackenzie had in effect “voluntarily” relinquished her citizenship by marrying a foreign national.⁶⁷

Despite the Court’s adherence to a concept of marriage grounded in the woman’s loss of personal identity, the Court, like the *Minor v. Happersett* Court, ignores the role that a woman or mother plays in transmitting citizenship values to the children of the marriage. The Court does not discuss or consider the potential children of the Mackenzie marriage, their citizenship, and Ethel Mackenzie’s role as primary caretaker and educator of her children. Any children of this marriage, if born in the United States, would have been American citizens by birth. Because the family resided in California, they would have been embedded in American culture. The Court, however, does not dwell on the strange family dynamic that it and Congress create; two noncitizen parents, one of them originally a native-born American citizen divested of her citizenship because of her decision to marry, raising American citizen children on American soil. The children of this family have more and better rights than either parent. Although the Court neglects these aspects of citizenship and the mother’s role in parenting and educating her children, in the *Mackenzie* Court’s view of the marital union, mothers, although subordinate to the father in the political arena, are primarily responsible for the care of the children. Since the father is relieved of primary responsibility for actual childcare, he is free to be active in public or political affairs, and to exercise political behavior like voting. Mothers, in this archaic view of the world, should have a primary role in instilling and developing citizenship values in children, although legitimately prohibited from living or practicing those values themselves.

Five years after the *Mackenzie v. Hare* decision, in 1920, the Nineteenth Amendment was adopted prohibiting the denial of the franchise on account of sex in the United States.⁶⁸

Although the early cases dealing with gender and citizenship do not explore or focus on the relationship between parent and

⁶⁶ *Id.*

⁶⁷ See *Afroyim v. Rusk*, 387 U.S. 253, 277 n.17 (1966) (Harlan, J., dissenting).

⁶⁸ U.S. CONST. amend. XIX.

child or mother and child, later cases make clear that the Court is conscious of the role that parents play in educating citizens. In fact, the Court resolved at least two of its decisions on gender and citizenship by focusing on the parental relationship. In *Rogers v. Bellei*,⁶⁹ the Court stressed the value of the male parent in transferring citizenship. In *Nguyen v. INS*, on the other hand, little value is accorded the male parent and, theoretically, at least, the mother's role in birthing is glorified to an uncomfortably illusive level.⁷⁰ It may be that the act of giving birth itself may confer certain rights to prohibit government regulation of and interference with that parent-child relationship. The right at issue here, however, the right for a biological parent to transmit citizenship to his or her biological child, is at least as important to parents who raise the child or who exercise responsibility for the child, as to those who do not. *Bellei*, decided in 1971, reflects the *Mackenzie* view of sex and parenting.

Bellei is not a case that, on its facts, posed a sex or gender discrimination issue; it is a case in which the Court injected a note of sex discrimination. The case was brought by a young man, Aldo Bellei, born in Italy to an alien father and a U.S. citizen mother.⁷¹ At the time, citizenship statutes required that a child of a U.S. citizen parent born abroad, whether mother or father, live continuously in the United States for a period of at least five years between the ages of fourteen and twenty-eight.⁷² Failure to comply with the continuous residence requirement resulted in the child's loss of citizenship.⁷³ The United States treated Aldo Bellei as an American citizen from birth until he was twenty-four years of age when the United States Embassy in Italy refused to renew his passport and informed him that he was no longer considered a citizen.⁷⁴ The statute at issue in *Bellei* was a gender neutral statute. Bellei argued that the statute was an unconstitutional violation of the Fifth Amendment Due Process Clause and the Fourteenth Amendment because it deprived him of his citizenship involuntarily.⁷⁵ A three-judge panel on the Circuit Court of Appeals agreed, reasoning that the Due Process Clause restricted Congress' power to divest per-

⁶⁹ 401 U.S. 815 (1971).

⁷⁰ 533 U.S. 53 (2001).

⁷¹ *Rogers v. Bellei*, 401 U.S. 815, 817 (1971).

⁷² Immigration and Nationality Act of 1952, Pub. L. No. 414 § 301(b), 66 Stat. 236 (repealed 1978).

⁷³ *Bellei*, 401 U.S. at 819-820.

⁷⁴ *Id.* at 819.

⁷⁵ *Bellei v. Rusk*, 296 F. Supp. 1247 (D.D.C. 1969), *rev'd sub nom.*, *Rogers v. Bellei*, 401 U.S. 815 (1971).

sons of citizenship absent fraud.⁷⁶

The Court determined that the kind of citizenship that Bellei possessed, derivative citizenship, was not the kind of citizenship protected by the Fourteenth Amendment.⁷⁷ Derivative citizenship by blood, *jus sanguinis*, under United States law was neither birth-right nor naturalized citizenship, the Court reasoned.⁷⁸ Since the Fourteenth Amendment spoke only to birth-right and naturalized citizenship, the Fourteenth Amendment simply did not apply to Bellei and other beneficiaries of derivative citizenship.⁷⁹ Thus, derivative citizenship, until formalized by a naturalization process, the Court indicated, was not protected by the Fourteenth Amendment and impliedly, thus, received lesser protection under the Fifth Amendment Due Process Clause.

The Court went on to hold that Congress had the power to place restrictions or conditions on derivative citizenship including a five-year period of continuous residence in the United States.⁸⁰ The Court applied a 'reasonableness' standard; that is, as long as the conditions on retention of citizenship are not "unreasonable, arbitrary, or unlawful," they withstood constitutional challenge.⁸¹ The Court reasoned that dual citizenship posed a problem because the individual would be torn between two countries to which she or he owed allegiance.⁸² Thus, the Court noted, requiring a period of residence for a nonresident citizen was reasonable and consistent with promoting dedicated attachment to the United States.⁸³

There are many problems with this decision, in particular, the idea that derivative citizenship is not protected by the Constitution to the same extent as birth-right citizenship or naturalized citizen-

⁷⁶ *Id.* at 1252.

⁷⁷ *Bellei*, 401 U.S. at 827-31.

⁷⁸ *Id.*

⁷⁹ *Id.* at 827. The Court stated:

[t]he central fact, in our weighing of the plaintiff's claim to continuing and therefore current United States citizenship, is that he was born abroad. He was not born in the United States. He was not naturalized in the United States. And he has not been subject to the jurisdiction of the United States. All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff Bellei. He simply is not a Fourteenth Amendment-first-sentence citizen.

⁸⁰ *Id.* at 834-36.

⁸¹ *Id.* at 831.

⁸² *Id.* at 832. Of course, the problems raised by dual citizenship are faced by individuals who are born in the United States as well by those who have one or two parents who are foreign nationals. Thus, dual citizenship concerns do not appear to justify the different treatment of naturalized, birthright and derivative citizens.

⁸³ *Id.* at 834-35.

ship.⁸⁴ The Court also ascribes the function of providing “an express constitutional definition of citizenship” to an earlier decision, *United States v. Wong Kim Ark*.⁸⁵ The constitutional definition of citizenship in *Wong Kim Ark*, however, was limited to determining who is a citizen under the Constitution, not what citizenship involved or what citizenship comprehensively meant under the Constitution.⁸⁶ But it is the Court’s injection of gender into a case that did not pose a gender issue on which I focus. The statute here did not differentiate between derivative citizenship passed through mothers and fathers. Regardless of whether the father or mother transferred citizenship, the child had to comply with the five-year continuous residence requirement.⁸⁷ Nevertheless, the Court, in upholding the statute, comes close to resting its decision on the fact that Aldo Bellei had derived his citizenship through his mother, rather than through his father.⁸⁸ The Court noted that prior to 1934, Congress had provided for derivative citizenship only for U.S. citizen fathers of children born abroad—maternal U.S. citizenship provided no benefit until 1934, so the Court ominously warned, had Bellei been born before 1934, he would have had no claim to citizenship at all.⁸⁹

Still, the Court reasoned, the fact that Bellei took his citizenship through his mother justified the continuous residence requirement and justified divesting him of citizenship involuntarily, even though the requirement was imposed by statute on children who derive their citizenship through either their father or their mother.⁹⁰ As the Court noted,

[t]he Congress has an appropriate concern with problems attendant on dual nationality. . . . *These problems are particularly acute when it is the father who is the child’s alien parent and the father chooses to have his family reside in the country of his own nationality.* The child is reared, at best, in an atmosphere of divided loyalty. We cannot say that a concern that the child’s own primary allegiance is to the country of his birth and of his father’s allegiance is either misplaced or arbitrary.⁹¹

⁸⁴ *Id.* at 830-31. *But see id.* at 836-45 (Black, J., dissenting).

⁸⁵ *Id.* at 830 (citing *United States v. Wong Kim Ark*, 169 U.S. 649 (1898)).

⁸⁶ *United States v. Wong Kim Ark*, 169 U.S. 649, 687-694 (1898) (holding that a child born in the United States of Chinese parents is a citizen of the United States under the Fourteenth Amendment).

⁸⁷ *Id.* at 831.

⁸⁸ *Id.* at 831-32.

⁸⁹ *Id.* at 826.

⁹⁰ *Id.* at 831-32.

⁹¹ *Id.* at 831-32 (emphasis added) (citations omitted).

The *Bellei* Court forgets, however, that residence in the United States failed to help Ethel Mackenzie. The *Bellei* Court seems almost hostile to maternal derivative citizenship. However, a complete turn-around comes about on maternal-derivative citizenship with the *Nguyen* Court.

II. THE MODERN COURT ON GENDER AND CITIZENSHIP—REAL DIFFERENCES AND OVERBROAD GENERALIZATIONS ABOUT THE SEXES

Nguyen v. INS was brought by a U.S. citizen father, Joseph Boulais, and his foreign-born son, Tuan Anh Nguyen.⁹² The son, a nonmarital child, was born in Vietnam and was raised by his father almost from birth.⁹³ Joseph Boulais brought his son back to the United States when Nguyen was six years old in 1975, when the government of South Vietnam fell to communist forces.⁹⁴ Nguyen was admitted first as a refugee and then as a permanent resident alien on July 10, 1975.⁹⁵ Boulais raised Nguyen in the United States, but did not go through the formal legal process acknowledging his paternity while Nguyen was a minor.⁹⁶ DNA testing conducted after Nguyen's citizenship was placed in issue, however, established that it was 99.98% certain that Boulais was Nguyen's biological father.⁹⁷ Nguyen did not go through a process of naturalization.⁹⁸

⁹² *Nguyen v. INS*, 533 U.S. 53 (2001). The Court confronted the issue raised in the *Nguyen* case in *Miller v. Albright*, 523 U.S. 420 (1998). In *Miller* a majority of the Court did not consider the merits of the equal protection claim. For a discussion of *Miller* and the role that gender stereotypes play in the case, see Augustine-Adams, *supra* note 34; see also Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1 (1999).

⁹³ *Nguyen*, 533 U.S. at 57.

⁹⁴ *Id.* at 57.

⁹⁵ *Nguyen v. INS*, 208 F.3d 528, 530 (5th Cir. 2000), *aff'd by*, 533 U.S. 53 (2001). Tuan was admitted as a lawful permanent resident alien on July 10, 1975 pursuant to the Indochinese Refugee Act, Title 1 of Pub. L. No. 95-145 (October 28, 1977). Record at 183. [Hereinafter Record.] (Reviewed by the author and on file with the United States Circuit Court of Appeals for the Fifth Circuit.)

⁹⁶ *Nguyen*, 208 F. 3d at 531. When the South Vietnamese fell, Tuan was in the care of Boulais's girlfriend's mother, as Boulais was out of the country. Tuan and his (eventually) step-grandmother fled Saigon with American assistance. His step-grandmother claimed to be Tuan's mother at the time of their evacuation. The facts of Tuan's birth and true parentage were never corrected in official records. Petitioner's Opening Brief at 5, *Tuan Anh Nguyen v. INS*, No. 98-60418 (Jan. 12, 1999).

⁹⁷ *Nguyen*, 208 F. 3d at 530 n.1; see also *Nguyen*, 533 U.S. at 85 (O'Connor, J., dissenting).

⁹⁸ *Nguyen*, 208 F. 3d at 532 (stating that Nguyen claimed to have citizenship by birth and noting that birth and naturalization are the only two sources of citizenship).

In 1992 when Nguyen was twenty-two, he was convicted of two counts of sexual assault on a child and sentenced to eight years in prison on each count.⁹⁹ These offenses render a permanent resident alien deportable.¹⁰⁰ In the American legal system, deportations of noncitizens are civil proceedings.¹⁰¹ These proceedings are entitled to little judicial review and aliens possess diminished constitutional rights in defending themselves against deportation.¹⁰² Thus, for most aliens, deportations are accomplished through an administrative proceeding with little, if any, judicial review.¹⁰³

Three years after his conviction, in 1995, the Immigration and Naturalization Service (INS) initiated deportation proceedings against Nguyen as an alien who had been convicted of two crimes

⁹⁹ *Id.* at 530.

¹⁰⁰ *Id.*

¹⁰¹ *Bugajewitz v. Adams*, 228 U.S. 585, 590 (1913); see *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L. J. 115 (1999).

¹⁰² *Immigration & Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032, 1034 (1984) (holding that the exclusionary rule does not apply in deportation proceedings).

¹⁰³ The procedural history of the Nguyen case is instructive in conveying the labyrinthian, complex and confusing process deportation cases now follow in the American legal system. Only the most fantastic of legal fictions describes this process as due process. Nguyen was not represented by counsel at the hearing in which his deportability and citizenship status were initially determined. Aliens do not enjoy a constitutional right to counsel in a deportation hearing. Moreover, the deportation determination was made by a judge who lacks Article III status and serves directly under the Attorney General. See M. Isabel Medina, *Judicial Review—A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN.L.REV. 1525 (1997). That decision was appealed to the Board of Immigration Appeals (the “BIA”) and the BIA dismissed the appeal. *Nguyen*, 208 F.3d 528, 531 (5th Cir. 2000), *aff’d by*, 533 U.S. 53 (2001). Despite the fact that by the time the BIA decided the case Nguyen had submitted to the BIA the “Order of Parentage” from a Texas district court declaring Joseph Boulais to be Nguyen’s father and declaring that “the parent-child relationship exists between the father and the child for all purposes,” as well as the results of DNA testing, the BIA order dismissing Nguyen’s appeal stated only that: “We note your claim that you are entitled to derivative United States citizenship. We observe that at your deportation hearing you admitted that you are a native of Vietnam. . . . Having admitted your foreign birth, you are presumed to be an alien. However, you failed to provide the Immigration Judge with evidence to support your citizenship claim. You have not sustained your burden of going forward with evidence establishing your claim of citizenship.” Record *supra* note 95, at 62-63.

Nguyen filed a motion to reconsider with the BIA, which apparently has never been decided. *Id.* Concurrently, Nguyen filed a habeas corpus petition in federal district court challenging the deportation order and the denial of relief from deportation and asking for a declaratory judgment on citizenship. *Id.* Nguyen also appealed the BIA’s order of deportation to the United States Court of Appeals for the Fifth Circuit. *Id.* at 531-32.

involving moral turpitude, and as an aggravated felon.¹⁰⁴ Before the immigration judge, Nguyen argued that he was a citizen of the United States because he was the son of a United States citizen.¹⁰⁵ The hearing was adjourned to allow Nguyen time to present evidence of citizenship.¹⁰⁶ At the second hearing, Nguyen's attorney withdrew.¹⁰⁷ The judge proceeded with the hearing with Nguyen unrepresented by counsel.¹⁰⁸ Nguyen testified at that hearing that he was not a citizen of the United States but was a citizen of Vietnam.¹⁰⁹ The immigration judge found him deportable.¹¹⁰ Nguyen appealed to the Board of Immigration Appeals (BIA).¹¹¹ While the appeal to the BIA was pending, his father obtained an order of parentage from a state court, based on DNA testing.¹¹² The immigration appellate court denied Nguyen's appeal on the grounds that he was not a citizen because his father had failed to comply with 8 U.S.C. § 1409(a), which provides for transmission of citizenship by birth to nonmarital children born abroad of U.S. citizen fathers and noncitizen-mothers.¹¹³ Specifically, the BIA reasoned that Boulais had failed to legitimate their father-son relationship through some formal legal process prior to Nguyen's eighteenth birthday, as required by the statute.¹¹⁴ Nguyen appealed his case to the federal courts, which anyone claiming American citizenship

¹⁰⁴ *Nguyen*, 533 U.S. 53, 57 (2001).

¹⁰⁵ *Id.*

¹⁰⁶ *Nguyen*, 208 F.3d at 530.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 531.

¹¹¹ The BIA is the administrative appellate court that in most immigration cases provides the only and final merit review of immigration judges' legal and factual findings. BIA judges and the review process are subject to complete control by the Attorney General of the United States. Recently, the immigration appeals process was streamlined to sharply curtail meaningful review of immigration judges' decisions. 67 Fed. Reg. 54878-54905 (Aug. 26, 2002). See *Dia v. Ashcroft*, F.3d 228 (3d Cir. 2003) (upholding streamlining regulations as consistent with the federal immigration statute and the due process clause of the Fifth Amendment); see also *Soadjede v. Ashcroft*, 324 F.3d 830 (5th Cir. 2003); *Mendoza v. United States Att'y Gen.*, 327 F.3d 1283 (11th Cir. 2003); *Georgis v. Ashcroft*, 328 F.3d 962 (7th Cir. 2003); *Albathani v. INS*, 318 F.3d 365 (1st Cir. 2003); DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR: THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO, RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 20 (2003), available at http://www.dorsey.com/files/upload/DorseyABA_8mg.pdf.

¹¹² *Nguyen*, 208 F. 3d at 531.

¹¹³ *Nguyen*, 533 U.S. at 57.

¹¹⁴ *Nguyen*, 208 F. 3d at 533.

may do,¹¹⁵ on the grounds that he was a United States' citizen, because, to the extent that the statute that granted derivative citizenship distinguished between the children of U.S. citizen mothers and U.S. citizen fathers and placed a more substantial burden on fathers than on mothers, the sex-based distinction violated the Equal Protection Clause of the Fourteenth Amendment.¹¹⁶

Under the statute, nonmarital foreign-born children of U.S. citizen mothers may claim derivative citizenship on the basis of a birth certificate identifying the U.S. citizen as the mother of the nonmarital child, as long as the mother was a U.S. citizen at the time of birth and as long as the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of at least one year.¹¹⁷ The statute does not require that the mother have raised the child or have provided financial or other support to the child at any time after her or his birth.

U.S. citizens who are fathers of nonmarital foreign born children, however, are required, before the child reaches the age of eighteen, to take one of three affirmative steps, all of which require some form of legal process: legitimating, declaration of paternity under oath by the father, or court order of paternity.¹¹⁸ In addi-

¹¹⁵ 8 U.S.C. § 1252(b)(5) (2004); *see also* 8 U.S.C. § 1105(a) (repealed 1996) (preceding 8 U.S.C. § 1252(b)(5)).

¹¹⁶ *Nguyen*, 533 U.S. at 56-58.

¹¹⁷ 8 U.S.C. § 1409 (c) (2004) (providing that:

(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year).

¹¹⁸ *Id.* at §1409(a) (providing that:

§ 1409. Children born out of wedlock

(a) The provisions of paragraphs (c), (d), (e), and (g) of section [1401 of this title], and of paragraph (2) of section [1408 of this title], shall apply as of the date of birth to a person born out of wedlock 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,

tion, the statute requires that “a blood relationship between the person and the father is established by clear and convincing evidence,”¹¹⁹ and that “the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of eighteen years.”¹²⁰

The federal appellate court rejected Nguyen’s appeal and the Supreme Court agreed to hear the case.¹²¹ A five-justice majority upheld the statute’s distinction on the basis of sex finding that the challenged “classification served important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”¹²² The court identified two important governmental objectives: first, the importance of ensuring that a biological parent-child relationship exists between the U.S. citizen parent and the child claiming citizenship;¹²³ and second:

the determination to ensure 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.¹²⁴

Both of these interests were furthered by the sex differential,

(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.

(b) Except as otherwise provided in section 405 [of this Act], the provisions of section [1401(g) of this title] shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, as of the date of birth, if the paternity of such child is established at any time while such child is under the age of twenty-one years by legitimization.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person’s birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year).

¹¹⁹ *Id.* at §1409(a)(1).

¹²⁰ *Id.* at §1409(a)(3).

¹²¹ *Nguyen v. INS*, 208 F.3d 528 (5th Cir. 2000), *aff’d* by 533 U.S. 53 (2001).

¹²² *Nguyen*, 533 U.S. 53, 60 (2001). Justice Kennedy wrote the majority opinion, joined by Chief Justice Rehnquist and Justices Scalia, Thomas, and Stevens. Justice O’Connor, joined by Justices Ginsburg, Souter, and Breyer, wrote a dissenting opinion. *Id.* at 74 (O’Connor, J., dissenting).

¹²³ *Id.* at 61.

¹²⁴ *Id.* at 64-65.

according to the court, because of the biological difference in actual birth between mothers and fathers.¹²⁵ As to the first interest, the Court stated that mothers and fathers are not similarly situated with regard to the proof of biological parenthood because the mother will always be at the birth itself.¹²⁶ As the Court noted, “[t]he mother’s status is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth,” and giving birth is generally incontrovertible proof of the biological tie between mother and child.¹²⁷ The father, on the other hand, does not have to be present at the birth, and even if he is, his presence is “not incontrovertible proof of fatherhood.”¹²⁸ Since they are not similarly situated vis à vis the proof of biological parenthood, there is no constitutional requirement that the government treat them similarly. To be sure, this is not a court looking toward the future of human biology and birth, not even considering the reality of assisted reproductive technology and how alternative human reproduction techniques might affect its concept of derivative citizenship.¹²⁹

Similarly, this Court is not interested in an actual blood-tie or “biological parenthood” whatever that term might mean, nor does it require that Congress be interested in an actual blood-tie between parent and child or actual biological parenthood.¹³⁰ Proof of birth from a nonmarital mother through birth certificates or other evidence of birth will suffice to establish the mother-child relation-

¹²⁵ *Id.* at 65-66.

¹²⁶ *Id.* at 62.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See, e.g., Kathryn Venturatos Lorio, *Symposium: Pushing the Boundaries: An Interdisciplinary Examination of New Reproductive Technology: The Process of Regulating Assisted Reproductive Technologies: What We Can Learn from our Neighbors—What Translates and What Does Not*, 45 *LOY.L.REV.* 247 (1999).

¹³⁰ The difficulties inherent in the concept of an actual blood-tie or “biological parenthood” today are demonstrated by the following fact pattern:

A female French citizen has a partner who is a dual citizen, American and Canadian, also a female. They have two children conceived by artificial insemination with anonymous sperm obtained through a California clinic. Both children were born in Canada and were carried by a dual American-Canadian citizen. Both children have the same biological father, but one of the children is biologically a descendant of the French mother who has provided her eggs for in vitro fertilization. In other words, one child is the biological descendant of two American citizens, the other child is the biological descendant of an American father whose identity is unknown, a biological mother who is French but who was carried by an American citizen up to birth. Can that child claim U.S. citizenship?

The author thanks Professor Stephen Legomsky for providing this fact pattern.

ship at any time the child wishes to claim citizenship; but not so for the child born abroad of a U.S. citizen nonmarital father.

Moreover, in the view of this Court, both mothers and fathers appear to be typified by the worst in human sexual behavior patterns—both males and females apparently are prone to promiscuous and irresponsible sexual behavior, inevitably, apparently, leading to childbirth. Women and mothers, in particular, are prone to lies and deception about their sexual behavior to their sexual partner. The image of an expectant father at a birth event who is not really the father because the mother has tricked him or, worse, does not know the identity of the real father, is a powerful and accurate image in the eyes of this Supreme Court majority.

As to the second interest, ensuring an opportunity for a meaningful relationship between the parent and child that will facilitate transmission of American culture and values, the Court notes that again the biological difference between mothers and fathers of children born overseas justifies the difference in treatment.¹³¹ In the case of the mother, the Court notes:

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. The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship.¹³²

In the case of the unwed father, however, the same opportunity does not result from the birth. The father may not know that a child was conceived; or similarly, the mother may not even know the father's identity.¹³³ After all, the Court implies, most of these children are likely to be the children of military, most of whom are male and young and apparently, in the view of this Court, extremely promiscuous and irresponsible, more so than the average American man and woman.¹³⁴ Moreover, the Court notes:

When we turn to the conditions which prevail today, we find that the passage of time has produced additional and even more substantial grounds to justify the statutory distinction. 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

¹³¹ *Nguyen*, 533 U.S. 53, 64-65 (2001).

¹³² *Id.* at 65.

¹³³ *Id.*

¹³⁴ *Id.* at 65-66.

petitioners' argument, which would mandate, contrary to Congress' wishes, citizenship by male parentage subject to no condition save the father's previous length of residence in this country. In 1999 alone, Americans made almost 25 million trips abroad, excluding trips to Mexico. . . . Visits to Canada and Mexico add to this figure almost 34 million additional visits. . . . And the average American overseas traveler spent 15.1 nights out of the United States in 1999.¹³⁵

The Court does not do the arithmetic, but the implication of these numbers is clear: a potential fifty-nine million U.S. citizen children born abroad each year—and if the traveler is a male, the number may increase by fourteen children per traveler per year! “Principles of equal protection do not require Congress to ignore this reality,” the Court concludes.¹³⁶

The majority opinion emphasizes biological differences, but, as the dissent points out, this case is not about biological differences, but about fairly broad and overdrawn stereotypes that bear almost no similarity or relationship to the case before the Court, or to the actual behavior patterns of most American women or men.¹³⁷ Thus, the statute imposes a gender differential on the basis of gender stereotypes about males and females—men as irresponsible, promiscuous sexual predators and women either as more responsible, nurturing parents whose bonding with the child at birth is likely to ensure a meaningful relationship with the child (whether the mother ever sees the child again or not), or as willing participants in promiscuous and irresponsible sex, so much so that she or he will never be sure who a child's father really is.

The Court's view of the statutory difference between nonmarital mothers and fathers reflects still another stereotype—that anyone who engages in sex outside marriage is promiscuous and irresponsible. But if this is the stereotype behind Congress's statutory requirements for derivative citizenship in the case of nonmarital children, it would justify similar treatment of the sexes, not differential treatment.

Perhaps, as well, the differential reflects the view that U.S. mothers of nonmarital children born abroad are more likely to return with their children to the United States than U.S. fathers, because, as a general matter, mothers are more likely than fathers to retain primary caretaker or custodial status over their marital or

¹³⁵ *Id.* at 66.

¹³⁶ *Id.*

¹³⁷ *Id.* at 74-97 (2001) (O'Connor, J., dissenting). *See also Miller v. Albright*, 523 U.S. 420, 460-471 (1998) (Ginsburg, J., dissenting).

nonmarital children.¹³⁸ This difference in parenting roles, however, that men and women tend to or are expected to play is at the heart of gender stereotypes. It is the difference that the *Minor* Court used to deny Virginia Minor the vote and another woman, Myra Bradwell, a license to practice law.¹³⁹ It is a difference that has been eliminated for the most part in American family law. It is a difference that, at heart, has nothing to do with sex or gender but with the exercise of parental responsibility.¹⁴⁰ The statutory sex-based distinction does not just make it easier for nonmarital children of U.S. citizen mothers to establish derivative citizenship; it also imposes a substantial burden on the U.S. citizen father that if not fulfilled prohibits him from passing on citizenship to his nonmarital children born abroad.

The Court's opinion strains to find a substantial relationship between the difference in treatment between the sexes and the goal it says Congress is trying to achieve—ensuring that an opportunity for a parent-child relationship during a child's formative years exists. Its attempt to do so, however, is unconvincing. The Court appears to be saying that the fact that a woman has carried a child until birth provides an opportunity for a meaningful relationship to form between mother and child that a father will not have because fathers do not physically carry children. Bearing the child, however, does not provide an opportunity to transmit values. It

¹³⁸ See *Nguyen*, 533 U.S. at 88-89 (O'Connor, J., dissenting); see also *Miller*, 523 U.S. at 486-87 (Breyer, J., dissenting).

¹³⁹ *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (holding that state bar exclusion of women from the practice of law does not violate the Fourteenth Amendment); see also *U.S. v. Virginia*, 518 U.S. 515, 543-44 (1996) ("VMI").

¹⁴⁰ Justice Kennedy's opinion attempts to rebut the claim that the difference between nonmarital mothers and nonmarital fathers rests on stereotypes by defining stereotypes "as a frame of mind resulting from irrational or uncritical analysis." *Nguyen*, 533 U.S. at 68. Contrast this understanding of gender stereotypes with the discussion of gender stereotypes in *Craig v. Boren*, 429 U.S. 190 (1976), or *VMI*, 518 U.S. 515. The *Nguyen* opinion goes on to explain:

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.

Nguyen, 533 U.S. at 68. I am reminded of Gertrude Stein's "there is no there there." GERTRUDE STEIN, *EVERYBODY'S AUTOBIOGRAPHY* 289 (Vintage Books 1973) (1937). *Nguyen's* approach to stereotypes is reminiscent of the Court's approach in *Michael M. v. Sonoma County*, 450 U.S. 464 (1981) (upholding a statutory rape statute limited to male perpetrators). See, e.g., David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997 (2002); Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 AM. U. J. GENDER & L. 147 (1996); Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 932 (1983).

may make sense for Congress to require a parent-child relationship that facilitates an education in and appreciation of, American history, culture and values for transmission of citizenship. But to contend that the period of time a fetus spends in the uterus and the period of time spent in actual birth is material to transmission of citizenship strains credulity. It is the period of time *after* birth, during a child's formative years, that is material for transmission of values. With respect to this period of time, the nonmarital father is in a similar position toward forming or developing a relationship with his child, at least in theory, as the nonmarital mother. Further, the amount of time a fetus spends in the uterus is the same for both marital and nonmarital children. Let us assume that because the law presumes that children born in a marriage are fathered by the male spouse of the marriage (regardless of actual blood-tie or biological parentage), it is rational to treat marital and nonmarital children differently. The difference in treatment would be rational because the marital father bears parental responsibility for the child as a matter of law. Both marital fathers and mothers, thus, are similarly situated with respect to their marital children. With regard to nonmarital children, it makes sense, then, to require that a parent transmitting citizenship to a child bear legal responsibility for the child. The statute challenged in *Nguyen* may have reflected an attempt by Congress to ensure that, in the case of nonmarital children, only parents who financially supported and cared for their children received the benefit of transmitting U.S. citizenship. Although such a scheme may be faulted for failing to take into account the interests of the child, if applied to both mothers and fathers, it would be a reasonable way of distinguishing between marital and nonmarital children. But the *Nguyen* statute does not draw that distinction. Instead, it relies on old and tired stereotypes about men and women and their respective relationships to children, requiring responsible parenting by men but not by women.

Moreover, the opinion, taken as a whole, emphasizes the "minimal" nature of the burden the statute places on the father. But requiring an individual to engage in some kind of formal legal process, when such legal process is actually unnecessary to care for a child and enjoy custody over that child, is not a minimal burden. The Court dismisses the fact that the father may not even know of the statutory requirements for derivative citizenship until after deportation proceedings have begun. To describe the statutory requirements imposed on the father as opposed to the mother (upon whom no burdens are imposed other than giving birth to

the child) as posing a minimal burden is facile. At no point in the *Nguyen* opinion does the Court indicate any awareness that the stereotypes on which its reasoning rests are flatly contradicted by the actual facts of the case before it; it is as if Joseph Boulais and Tuan Anh Nguyen are not before the Court at all.¹⁴¹

Missing in this opinion, as in all the other opinions discussed, is a coherent and clear concept of what citizenship is or might be, and how relationships, including family relationships, may affect citizenship. The Court remains unwilling to articulate a vision or concept of citizenship informed by constitutional principles. This unwillingness to articulate a concept of citizenship does not mean that the Court's opinions fail to convey a vision of citizenship, rather, it is simply an undeveloped vision lacking consistency, coherence and meaning for society.

This omission is most glaring in the Court's characterization of the interests that the government seeks to vitiate in the statute. The Court characterizes the government's interests to ensure that there is a blood relationship between the parent and the nonmarital child, and to ensure that there is an opportunity for a meaningful relationship between the U.S. citizen parent and the child born abroad.¹⁴² The first interest, the blood relationship, is the determinative factor in derivative citizenship. Citizenship by blood traditionally furnished the basis for transmission of citizenship. The problem, of course, is that in *both* the case of the nonmarital mother and nonmarital father, the best evidence of the blood relationship may be DNA testing, not a birth certificate or a legitimating process.

It is the second interest, to ensure a meaningful relationship between parent and child, which creates the more substantial problem with the statutory scheme and the Court's treatment of that scheme. The Court stresses the importance of the opportunity to form a meaningful relationship between parent and child and neglects to explore whether the real interest that could or should be pursued is whether there has been a meaningful parent-child rela-

¹⁴¹ Cf. *Stanley v. Illinois*, 405 U.S. 645 (1972). Constitutional adjudication rests on the idea that the Court is in the best posture to decide challenges to governmental action when persons with much to lose have actually had those interests affected. Presumably, the record developed in such a case is to be of use or service to the Court in explaining why the statute is or is not constitutionally problematic. The *Nguyen* Court ignores the facts of the case; its discussion and reasoning is unaffected and completely removed from the actual factual circumstances that have given rise to the claim.

¹⁴² *Nguyen*, 533 U.S. at 62, 64.

tionship between the citizen parent and the biological child at all. The statute at issue in *Nguyen* plainly required that a meaningful relationship exist between a U.S. citizen father and his nonmarital child in order for that child to enjoy U.S. citizenship. The statute, however, merely assumed that a meaningful relationship existed between the U.S. citizen mother and her nonmarital child, as a consequence of birth. It is precisely this type of assumption about stereotypical sex roles that equal protection doctrine prohibits. The Court's unwillingness to explore what actual interest Congress may constitutionally vitiate through naturalization and citizenship statutes similarly frustrates development of an informed concept of citizenship. One could argue that it is not the Court's role to articulate such a vision, but only to decide actual cases before it. Perhaps it is the role of the legislature to give meaning to this concept of citizenship. That is, to an extent, what the *Nguyen* majority seems to be expressing with its deference to Congress's decision to penalize U.S. fathers and their nonmarital children born abroad and to favor U.S. mothers and their nonmarital children born abroad. But it is the Court's role in the American constitutional scheme to interpret the Constitution and enforce its provisions, in particular, its guarantees of basic human rights. The *Nguyen* case embraces a view of gender and citizenship at odds with the Court's own legal norms of gender equality.¹⁴³ That the Court may have abdicated an opportunity to develop a coherent concept of citizenship upon adoption of the Fourteenth Amendment, does not prevent it from embarking upon the task today.

One vision of citizenship in the context of gender that is based on an honest and realistic measure of each individual's potential and abilities is that presented in the case of the *United States v. Virginia*.¹⁴⁴

VMI was decided in 1996. The case does not appear to involve citizenship at all. Thus, I may be accused of injecting citizenship notions into a case having nothing to do with it, in the same way that I have criticized the *Bellei* Court for injecting gender into a case that does not raise the issue at all. Like the *Bellei* Court, I will live with that criticism.

The *VMI* case involved a challenge to the Virginia Military Institute's single-sex admissions policy on the grounds that the school's male-only policy discriminated on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amend-

¹⁴³ See, e.g., *VMI*, 518 U.S. 515.

¹⁴⁴ *Id.*

ment.¹⁴⁵ In perhaps the strongest opinion on gender discrimination issued by the Supreme Court, Justice Ginsburg acknowledged Virginia's aim in its single-sex policy:

VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. VMI pursues this mission through pervasive training of a kind not available anywhere else in Virginia. Assigning prime place to character development, VMI uses an "adversative method" modeled on English public schools and once characteristic of military instruction. VMI constantly endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. The school's graduates leave VMI with heightened comprehension of their capacity to deal with duress and stress, and a large sense of accomplishment for completing the hazardous course.¹⁴⁶

But, as the lower Court had noted, "neither the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women."¹⁴⁷ Therefore, the Court concluded, the single-sex policy violated the Equal Protection Clause of the Fourteenth Amendment.¹⁴⁸ Both the *Nguyen* and *VMI* courts applied the same test to determine whether the gender differential violated norms of equality; the way the two courts applied the test, however, is substantially different. Both opinions state that governmental distinctions on the basis of sex must not be based on overbroad generalizations about men and women, but instead must be based on real differences between the sexes.¹⁴⁹ The *Nguyen* Court's view of a real difference, however, is hard to understand as anything other than gross cultural stereotypes about female and male behavior patterns. For the *Nguyen* Court, the behavior of a few members of either sex will doom every member of the group to be tainted by whatever characteristic the Court deems to be "representative" of the group.

The *Nguyen* Court sought to mask its reliance on overbroad stereotypes about the sexes by its continued insistence that it was biological differences, in its view real differences, that justified the difference in treatment. As explained by Justice Ginsburg, however, "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on

¹⁴⁵ *Id.* at 523.

¹⁴⁶ *Id.* at 520.

¹⁴⁷ *Id.* at 525 (quoting *U.S. v. Virginia*, 976 F.2d 890, 899 (4th Cir. 1992)).

¹⁴⁸ *Id.* at 519.

¹⁴⁹ *Nguyen*, 533 U.S. 53, 76 (2001); *VMI*, 518 U.S. 515, 533 (1996).

overbroad generalizations about the different talents, capacities, or preferences of males and females.”¹⁵⁰ Moreover, Justice Ginsburg continued, “[i]nherent differences between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”¹⁵¹ In contrast to the *Nguyen* majority, the *VMI* majority attempts to deal with potential differences between men as a group and women as a group in a realistic and honest way, while allowing individual members of both groups to compete on the same playing field.

Virginia advanced two interests or justifications in defending the exclusion of women.¹⁵² First, Virginia claimed that VMI’s male-only policy provided educational benefits and diversity in educational approaches.¹⁵³ Second, Virginia argued that the school’s adversative approach, described as VMI’s unique “method of character development and leadership training,” would have to be modified if women were admitted.¹⁵⁴

The Court rejected the first justification because it was not a justification that the State had actually relied on in making the institution male only but had been developed after the litigation commenced.¹⁵⁵ The historical record simply did not support a finding that Virginia had sought to advance diverse educational options in its single sex policy at VMI; rather, the Court noted, VMI’s policy simply afforded “a unique educational benefit only to males.”¹⁵⁶

The Court also rejected the second justification, that admitting women to VMI would destroy VMI’s program because their participation would eliminate the adversative approach.¹⁵⁷ The Court, however, reasoned that although admission of women to the program would require accommodation of some kind (housing and physical training programs), it would not destroy the adversative method.¹⁵⁸

The Court assumed first that many men and women are not interested in pursuing the VMI approach.¹⁵⁹ It also noted the dis-

¹⁵⁰ *Id.* at 533.

¹⁵¹ *Id.*

¹⁵² *Id.* at 535.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 540.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 540-46.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

strict court's findings that some women, like some men, are capable of all of the individual activities required of VMI cadets.¹⁶⁰ Moreover, the Court noted, "the parties agree that some women can meet the physical standards VMI now imposes on men."¹⁶¹ In fact, the Court had evidence before it that indicated that approximately ten percent of women would be able to meet the physical standards VMI imposed on men.¹⁶² Thus, the fact that a particular stereotype or generalization might hold true for "most" women, did not justify exclusion of all women from the program.¹⁶³ Similarly, it was not material that more men than women may pursue and be successful at VMI; rather the question the Court identified is "whether [Virginia] can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords."¹⁶⁴

The Court rejected the argument that exclusion of women is essential to preserving the character and mission of the VMI program. As Justice Ginsburg wrote:

VMI's mission: to produce "citizen-soldiers," individuals imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready to defend their country in time of national peril. . . . Surely that goal is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men.¹⁶⁵

Setting aside for the moment whether the VMI vision of "citizenship" is a particularly good one, it is at least a vision of citizenship that requires actual equality in the sense of affording all the opportunity to participate in the endeavor. It is a vision that does not mask differences; it acknowledges them but does not make more of them than is warranted. The VMI decision upholds a vision of equality that does not guarantee that everyone will have access to the resources, only that one will have the opportunity for access on the strength of one's abilities. The VMI opinion celebrates the individual—what it guarantees is that one is to be treated as an individual and not as a member of the group, particularly when the group stereotype is a negative stereotype used by the state to deny an indi-

¹⁶⁰ *Id.* at 541.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 542.

¹⁶⁵ *Id.* at 545 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1425 (1991)).

vidual a benefit, right, or privilege. It is this guarantee that is missing in the *Nguyen* Court's analysis and holding. Justice Ginsburg's opinion speaks with an honesty and frankness completely missing from the majority opinion in the *Nguyen* case.

A. *Globalization, Gender, and International Law*

Globalization is inevitable. It will not obscure differences. It may be shaped, however, and we should be actively involved in its shaping.

As Peter Singer notes in the preface to his recent book on globalization, *One World*, in the aftermath of September 11, the war against Iraq and, now, the post-Iraq war, exploring the concept of globalization appears strained.¹⁶⁶ Plainly, today, the world appears divided, whether or not it is actually more divided than at any other time in the past.

But as Professor Singer notes in the context of September 11 and America's response to the attack:

confirms rather than denies the idea of a world that is increasingly becoming one, for it shows that no country, however mighty, is invulnerable to deadly force from the far corners of the earth. An American administration that had previously shown little concern for the opinion of the rest of the world found itself in need of the cooperation of other nations in a global campaign against terrorism.¹⁶⁷

It really is one world, and it always has been one world. Environmental science, technology, and travel have made us more aware of our interconnectedness, but few of us, knowingly or not, go through our lives without interacting or being affected by persons, events, or things that are outside our local area of residence. It may perhaps be most obvious in the context of the environment and biology and our own susceptibility to germs, bacteria, and disease, but events that occur in one part of the world have and have always had an effect on other parts of the world. Thus, while differences in cultures, values, religion, language, attitudes, politics and economies remain stark, we will continue to have to deal with each other.

Globalization exposes the tensions inherent in concepts of citizenship, particularly for states that treat citizenship as material to the issue of human rights. Basic human rights, like freedom from

¹⁶⁶ SINGER, *supra* note 33.

¹⁶⁷ *Id.* at ix.

gender discrimination, should not depend on citizenship status.¹⁶⁸

One lesson we have learned from the American experience, from the German experience, from the formation of the European Union, is that for a society or civilization to thrive, each individual member residing in the community has to be guaranteed basic human rights.¹⁶⁹ Whether these rights are inherent in humanity or whether they are derived from some other source is immaterial to the idea that all individuals are entitled to some set of rights. In the context of the United States, the fifty states may provide different legal norms, benefits, and protections to their residents, but the plain language of the Constitution guarantees to all persons in the country the protection of their basic human rights.

Globalization poses a challenge for legal adherence to and enforcement of gender equality norms. Feminist writers and commentators have warned that gender is a problem in the context of globalization, but their admonishment remains unincorporated into mainstream diplomatic and political structures.¹⁷⁰

That approach is dangerous. Gender stereotypes still play too predominant a role in Western societies for silence on the issue of gender equality in a global context. Adherence to norms of gender equality must be as important a part of the discussion on globalization as other human rights, the environment, trade, labor, the economy, and public health.

Presently, in the United States, constitutional limits generally prohibit governmental discrimination on the basis of sex. *Nguyen's* approach is likely to be limited to the immigration and naturalization context, in which the Court traditionally has adopted a highly

¹⁶⁸ See *infra* *Nguyen* discussion; *Demore v. Kim*, 538 U.S. 510 (2003).

¹⁶⁹ See, e.g., Christian Joppke, *The Evolution of Alien Rights in the United States, Germany, and the European Union*, in *CITIZENSHIP TODAY*, *supra* note 5, at 36-62.

¹⁷⁰ See Vicki C. Jackson, *Feminist Justice, At Home and Abroad: Gender and Transnational Legal Discourse*, 14 *YALE J.L. & FEMINISM* 377 (2002); Volpp, *Feminism Versus Multiculturalism*, *supra* note 20; Volpp, *Talking*, *supra* note 20; Barbara Stark, *Women and Globalization: The Failure and Postmodern Possibilities of International Law*, 33 *VAND. J. TRANSNAT'L L.* 503 (2000); Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad*, 11 *AM. U. J. GENDER SOC. POL'Y & L.* 749 (2003). See generally Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States*, 70 *WASH. L. REV.* 589 (1985); Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1 (1999); Natsu Taylor Saito, *Asserting Plenary Power over the "Other": Indians, Immigrations, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 *YALE L. & POL'Y REV.* 427 (2002); Kevin R. Johnson, *The Moral High Ground? The Relevance of International Law to Remedying Racial Discrimination in the U.S. Immigration Laws*, in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* 285 (Berta Esperanza Hernandez-Truyol ed., 2002).

deferential posture to Congressional and executive exercises of powers.¹⁷¹ Notwithstanding, it is a symbol of perhaps more meaningful protections against discrimination on the basis of sex are secured by federal statutes.¹⁷² States and municipalities also extend some protection to persons who have been injured by gender bias.¹⁷³ The federal enforcement scheme, while imperfect, is stronger than perhaps in any other nation. As with labor, environmental, and health concerns, it behooves our legal and governmental institutions to partake in the international dialogue to secure global acceptance and enforcement of gender equality norms.

A recent period of residency in Greece on a Fulbright grant, allowed me to explore normative and enforcement commitment to gender equality in a different setting. Greece is a predominantly homogeneous society with a rich historical and cultural tradition that in modern times merges elements of Western and Middle Eastern civilizations.¹⁷⁴ Like many of its European counterparts, Greece is a small country. Its total population of almost eleven million is spread out over mountainous, dry, rocky, and arid territory consisting, in part, of 1,400 islands.¹⁷⁵

American scholars think of Greece in the context of ancient Greece and what ancient Greek philosophers contributed to the modern world: the development of democracy, a conception of equality,¹⁷⁶ and, more recently, a conception of sex and gender

¹⁷¹ See, e.g., Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

¹⁷² See, e.g., Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000 e-2(a) (2000); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2000); Title IX, Education Amendments of 1972, 20 U.S.C. § 1681 (2000).

¹⁷³ See, e.g., CAL. [CIV.] CODE § 52.4 (West 2002) (creating a cause of action for victims of gender violence); 5 ILL. COMP. STAT. 82/10 (2004) (providing a cause of action for persons who have been subjected to gender violence); MINN. STAT. ANN. § 609.2231 (West 2003) (prohibiting assaults motivated by gender bias); N.J. STAT. ANN. § 2A:53A-21 (West 2003); N.Y.C. ADMIN. CODE § 8-107 (2003) (prohibiting employment discrimination on the basis of gender); N.Y.C. ADMIN. CODE § 8-904 (2000) (providing a cause of action for victims of gender-motivated crimes of violence against perpetrators); S.C. CODE ANN. § 59-1-475 (Law Co-op. 2003) (requiring continuing education for teachers and appropriate staff regarding domestic and family violence).

¹⁷⁴ See generally RICHARD CLOGG, *A CONCISE HISTORY OF GREECE* (CAMBRIDGE 1992); C. M. WOODHOUSE, *A SHORT HISTORY OF MODERN GREECE* (1991).

¹⁷⁵ U.S. Department of State, Bureau of European and Eurasian Affairs, *Background Note: Greece* (Nov. 2004) at <http://www.state.gov/r/pa/ei/bgn/3395.htm> (on file with the New York City Law Review).

¹⁷⁶ Athanassios N. Yiannopoulos, *Historical Development*, in INTRODUCTION TO GREEK LAW 2-4 (2d ed. by Konstantinos D. Kerameus & Phaedon J. Kozyris). Aristotle and ancient Greece appear frequently in modern discussions of equality theory. See, e.g.,

that accommodates human potential for differences in sexual orientation.¹⁷⁷ Greece warrants closer scrutiny, however, in its modern state, which offers a unique opportunity for examination of a culture or society that has accommodated a blending of Western and Eastern values. Its relative political and economic stability facilitate that scrutiny and enable enhanced understanding of the cultural similarities and divergences between Western and Middle Eastern societies. After the fall of the Byzantine Empire, Greece spent four hundred years under Ottoman rule.¹⁷⁸ This Turkish heritage is evident in modern Greek music, food, customs and mores, and influences, in part, attitudes toward gender and norms of gender equality. Many of the issues facing Middle Eastern, Muslim, and African societies have been dealt with or are being dealt with by Greek society, including an issue of particular importance to gender, that of separation of church and state.¹⁷⁹ Like many other societies, the role of the church in Greece is significant; the Greek Orthodox Church is part of the Greek state¹⁸⁰ and plays an active role in state policy and the development of norms.

Greece's current constitution was adopted on June 11, 1975.¹⁸¹ The constitution eliminated facial discrimination on the basis of sex by formally adopting a requirement of equality, but many gender-based distinctions remained until 1982, shortly after Greece's admission to the European Union as its tenth member. Like many countries, Greece has embraced gender equality, but, for the most part, enforcement of gender equality is lacking. Furthermore, gender equality under the Greek constitution is guaranteed only to Greek citizens.¹⁸² Equality norms apply to Greek

Maureen B. Cavanaugh, *Democracy, Equality and Taxes*, 54 ALA. L. REV. 415, 418-19, 443-45 (2003); Sean Pager, *Strictness vs. Discretion: The European Court of Justice's Variable Vision of Gender Equality*, 51 AM. J. COMP. L. 553 (2003); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 527 (1997); Peter Margulies, *Inclusive and Exclusive Virtues: Approaches to Identity, Merit and Responsibility in Recent Legal Thought*, 46 CATH. U. L. REV. 1109 (1997); Linda R. Hirschman, *The Book of "A"*, 70 TEX. L. REV. 971 (1992); Richard A. Posner, *Response: Ms. Aristotle*, 70 TEX. L. REV. 1013 (1992); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989).

¹⁷⁷ See Marilyn Yalom, Symposium, *Marriage Law: Obsolete or Cutting Edge?*, 10 MICH. J. GENDER & L. 21, 39 (2003); see also Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515 (1994).

¹⁷⁸ CLOGG, *supra* note 174, at 1-46; WOODHOUSE, *supra* note 174, at 99-157; Yiannopoulos, *supra* note 176, at 6-7.

¹⁷⁹ Yiannopoulos, *supra* note 176, at 6-7.

¹⁸⁰ CONSTITUTION OF GREECE, art. 3.

¹⁸¹ CONSTITUTION OF GREECE.

¹⁸² CONSTITUTION OF GREECE, art. 4.

citizens under the Greek constitution, but European Union membership may ensure that European Union citizens will be accorded similar treatment under Greek law. Non-European Union citizens, however, and this includes the bulk of immigrants currently residing in Greece, do not enjoy a constitutional entitlement to freedom from state mandated or sponsored gender bias.

Further, Greek law does not reflect a well developed statutory framework of enforcement. For example, although gender employment discrimination is prohibited, enforcement of that norm is left primarily to employers; certain jobs are still reserved for men and there is no specific statutory provision prohibiting sexual harassment in the workplace.¹⁸³ Inadequate resources and an insufficient commitment to gender equality norms continue to undermine efforts to eliminate harassment, gender-motivated violence, employment discrimination and sexual-trafficking.¹⁸⁴ Full integration of women into the economy, the work force and the government is a goal not yet accomplished.¹⁸⁵ Greek laws on gender discrimination changed, however, primarily as a result of Greece's membership in the European Union.¹⁸⁶ Moreover, European Union pressure to enhance enforcement of norms prohibiting gender bias in Greece and throughout the European Union continues. Thus, the European Union is an example of regional norms affecting or influencing national norms.¹⁸⁷ The dialogue between European Union member states and the European Court of Justice serves to develop and foster a grander and more meaningful international legal dialogue.

Justice Ginsburg's opinions and writings reflect an acknowledgment and exploration of this international legal dialogue.¹⁸⁸ In a number of opinions, Justice Ginsburg uses international conventions to explain the reasons why American constitutional norms should be influenced by international norms. In a sense, international customary law, conventions, and judicial opinions may play a parallel role in constitutional adjudication to that of state laws and

¹⁸³ See Mary Ellen Tsekos, *The New European Union Directive on Sexual Harassment and its Implications to Greece*, 10 Hum. Rts. Br. 31 (2003); THEODORE KONIARIS, *LABOUR LAW IN HELLAS* 124-25, 127, 445 (2002).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ KONIARIS, *supra* note at 184, at 53, 79-81, 86.

¹⁸⁷ See Yiannopoulos, *supra* note 176, at 10.

¹⁸⁸ *Gratz v. Bollinger*, 539 U.S. 244, 296-304 (2003) (Ginsburg, J., dissenting); *Grutter v. Bollinger*, 539 U.S. 306, 343-45 (2003) (Ginsburg, J., concurring); *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428-441 (2003) (Ginsburg, J., dissenting); Ginsburg, *Sex Equality and the Constitution*, *supra* note 3.

state practices. Generally, when the Court considers a human rights issue, it will look at state law and practices to determine whether adherence to precedent make sense or whether a break from precedent is necessary.¹⁸⁹ State norms and state court opinions are not necessarily determinative, but the Court, nonetheless, considers them as evidence of consensus or prevailing trends, and considers them as evidence of the need for a national uniform norm.

Justice Ginsburg's jurisprudence establishes that interpretation of American constitutional norms may be appropriately influenced by international conventions and international norms when those norms further and are consistent with American constitutional values and doctrines. Continued reference to international conventions and norms enhances and strengthens international and global norms. Comprehensive discussion of international conventions and norms in the development of American constitutional law engages the international legal, legislative, and judicial community, facilitating the further development of international norms and law enforcement. This dialogue also facilitates and is evidence of a continued membership and participation in the global community. Supreme Court cases from this last term lend themselves to this approach, and I will briefly discuss three of them as examples of how awareness of international norms or conventions may be of use in American constitutional law and serve to contribute, at the same time, to the development of a global order. The cases deal with human rights issues, namely, affirmative action¹⁹⁰ and detention of noncitizens.¹⁹¹ The Court's resolution of these issues for the most part was accomplished with no reference or consideration, in the majority opinion, of the practices of other nations, or of international conventions or norms. The cases would have benefited from formal consideration of international norms, even where those norms are inconsistent, contrary to, or depart from American norms.

In *Gratz v. Bollinger*,¹⁹² the Supreme Court held that a race-conscious undergraduate admissions plan violated the Equal Protection Clause of the Fourteenth Amendment because it was not sufficiently narrowly tailored to the compelling interest of admitting a diverse student body.¹⁹³ In *Grutter v. Bollinger*, a different

¹⁸⁹ See, e.g., *Washington v. Glucksberg*, 521 U.S. 707, 710-16 (1997).

¹⁹⁰ *Gratz*, 539 U.S. 244; *Grutter*, 539 U.S. 306.

¹⁹¹ *Demore v. Kim*, 538 U.S. 510 (2003).

¹⁹² *Gratz*, 539 U.S. 244.

¹⁹³ *Id.* at 275.

majority upheld the state law school's race-conscious admissions policy.¹⁹⁴ The Court held that a law school has a compelling interest in attaining a diverse student body and that law schools are entitled to deference in exercising their judgment that "such diversity is essential in its educational mission."¹⁹⁵ Neither of the majority opinions reference international human rights law; nor do they make any reference to the experience or practices of other countries. In fact, the majority opinions deal with issues of affirmative action and race as if they are American issues—as if racism and equality are problems peculiarly and exclusively American. The majority opinion in *Grutter* notes the "increasingly global marketplace" and the impact on national security of failing to provide exposure to "widely diverse people, cultures and ideas, and viewpoints,"¹⁹⁶ but shies away from taking note of global trends and developments on the issue of diversity itself. Justice Ginsburg's concurrence in *Grutter* by contrast, opens with an acknowledgment of the global nature of the issue and the formal global response to that issue.¹⁹⁷

The Court's observation that race-conscious programs "must have a logical end point" . . . accords with the international understanding of the office of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, . . . endorses "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." . . . But such measures, the Convention instructs, "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."¹⁹⁸

Justice Ginsburg's opinions make clear that the problems caused by racial discrimination and government responsibility for affirmatively responding to its continuing effects is recognized by the global community as a human rights issue. Recognition of international norms and consensus on the issue of remedying or affirmatively responding to the vestiges of past widespread subjugation of races (or persons because of their sex) encourages

¹⁹⁴ *Grutter*, 539 U.S. 306.

¹⁹⁵ *Id.* at 328.

¹⁹⁶ *Id.* at 330.

¹⁹⁷ *Id.* at 344-46 (Ginsburg, J., concurring); see also *Gratz*, 539 U.S. 244 at 298-305 (Ginsburg, J., dissenting).

¹⁹⁸ *Id.* at 344 (Ginsburg, J., concurring).

more careful and serious consideration of legally required governmental abdication of that responsibility.

The last case I wish to discuss briefly, returns, albeit indirectly, to one of the themes I explored earlier in this article: the concept of citizenship. In *Demore v. Kim*,¹⁹⁹ a majority of the Supreme Court found that mandatory detention of permanent legal residents during removal proceedings, without an individualized showing that the alien posed a flight risk or a danger to the community, did not violate the Due Process clause of the Fourteenth Amendment.²⁰⁰ The Court, in part, based its decision on Congress's "broad power over naturalization and immigration," which permits Congress to regulate aliens in a manner "that would be unacceptable if applied to citizens."²⁰¹ In turn, the Court reasoned that Congress's power to distinguish between citizens and noncitizens rested on the premise that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."²⁰²

The majority acknowledges that distinctions between citizens and noncitizens are based in part on the relationship between the United States and other nation-states, including regional arrangements like the European Union. However, the opinion does not explore or in any way consider international legal norms or norms of other nation-states, on the issue of treatment, and specifically, detention of noncitizens. Traditionally, judicial review is most deferential to the executive and legislative branches in the area of foreign affairs. The singular exception, of course, has been in the area of human rights, and detention, like gender discrimination, is a human rights issue. This has not prevented the modern Court from drawing stark lines between what the government will be constitutionally permitted to do to citizens and noncitizens. International norms on detention of noncitizens may, in fact, be much less protective of noncitizens than the norms developed in the United States in the latter half of the twentieth century,²⁰³ but, as in the case of gender discrimination, formal acknowledgement of international practices will clarify the extent to which international practices may influence constitutional adjudication today.

¹⁹⁹ 538 U.S. 510 (2003).

²⁰⁰ *Id.*

²⁰¹ *Id.* (citing *Matthews v. Diaz*, 426 U.S. 67, 79-80 (1976)).

²⁰² *Id.*

²⁰³ See *Landon v. Plasencia*, 459 U.S. 21, 35 (1982).

Like gender bias, international practice regarding detention or seizures of persons, too frequently departs from basic human rights norms. Because the United States has emerged as a country with one of the strongest prohibitions against unlawful use of state seizure or detention of persons, it is critical for our Supreme Court to take note of our international leadership when considering weakening or departing from the strong constitutional protections that have been developed over many decades against overzealous and abusive government practices. Formal consideration of international norms on detention also forces us to confront the ease with which other nations have resorted to unlawful seizures and frequent violations of the most basic human rights in the context of detention. Formally acknowledging that ease and frequency could be useful to justify our own departures from the strong legal disapprobation of unlawful seizures and detentions. That departure, however, would be at odds with established American legal precedents. Formally acknowledging international practices will clarify the extent to which these international practices are already playing a role, albeit a silent one, in constitutional adjudication today. Justice Ginsburg's articulation of what the Equal Protection clause of the Fourteenth Amendment requires from the federal government in the context of gender is clear and unambiguous. Her opinions reflect a consciousness of the importance of recognizing international legal norms and practices in formulating our own, particularly in the context of cases posing basic human rights issues. If we are, in fact, the most powerful culture in the world today, it would behoove the Court to acknowledge our position as a world leader in formulating basic human rights norms on citizenship and gender. Basic human rights should not depend on citizenship; neither here, in the United States, nor anywhere else. The United States cannot, and should not, dictate law to other countries, but it can, and should, work toward the development of a global order that universally recognizes and protects the basic human rights of all persons. Justice Ginsburg's opinions work toward this goal; it is to be hoped that the Court as a whole will follow her lead.