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THE CHILD CITIZENSHIP ACT: TOO LITTLE, TOO LATE FOR TUAN NGUYEN

ASHLEY MOORE

In *Tuan Nguyen v. INS*,¹ the Court held that 8 U.S.C. § 1409² did not violate the Equal Protection Clause. In reaching this conclusion, the Court held that the classification serves to establish legitimate government interests: (1) the existence of a biological parent-child relationship;³ and (2) parent-child relationships consisting of "real, everyday ties."⁴ Further, because Congress' means substantially relate to its interest in facilitating a parent-child relationship⁵ and impose a minimal obligation,⁶ the statute withstands equal protection scrutiny.

Nguyen was born in Vietnam in 1969 to Joseph Boulais and a Vietnamese citizen.⁷ Boulais and Nguyen's mother were not married.⁸ Boulais has always been a citizen of the United States and was employed in Vietnam.⁹ In 1975, at the age of 6, Nguyen came to the United States.¹⁰ Since that time, he has been a lawful permanent resident and has lived with his father in Texas.¹¹ In 1992, Nguyen pled guilty to sexually assaulting a child.¹² Although sentenced to eight years in prison, the Immigration and Naturalization Service (INS) began deportation proceedings against Nguyen.¹³ An immigration judge found Nguyen deportable.¹⁴ While appealing this decision, Nguyen's father obtained the requisite paternal materials, including order of parentage from a state court and a DNA test.¹⁵ The appeals board rejected Nguyen's citizenship claim

1. *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001) (O'Connor, J., dissenting).

2. 8 U.S.C. § 1409 (2002) (establishing the requirements for a child to gain United States citizenship rights according to the sex and marital status of the citizen parent).

3. *Nguyen*, 533 U.S. at 62.

4. *Id.* at 65.

5. *Id.* at 69.

6. *Id.* at 72.

7. *Id.* at 57.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* Deportation is allowed if an alien is convicted of crimes involving moral turpitude. See 8 U.S.C. § 1227 (2002).

14. *Nguyen*, 533 U.S. at 57.

15. *Id.*

because he did not comply with 8 U.S.C. § 1409.¹⁶ Nguyen was denied citizenship status by the Fifth Circuit and, ultimately, by the Supreme Court.¹⁷

The Court relied on erroneous factors and ignored a new amendment to the Citizenship Child Act that more accurately reflects Congress' intent for immigration matters involving children.¹⁸ The dissent emphasized that "the majority hypothesizes about the interests serviced by the statute and fails adequately to inquire into the actual purposes"¹⁹ This Note will examine the Court's erroneous assumptions used to demonstrate the government's legitimate interests and discuss the statutory improvements that Congress enacted in order to ensure the real legislative interests were protected.

Part I of this Note addresses the view that a biological parent-child relationship inherently exists between a woman and the child she bears. The Court identified statutory provisions that grant a child citizenship status based on the sex of the parent.²⁰ The Court stated that "[i]n the case of the mother, the relation is verifiable from the birth itself."²¹ However, the recent rise in surrogate motherhood challenges the presumption that a woman is in fact the biological, genetic, and legal mother of a child automatically at the birth of the child. The dissent noted that the biological relationship is not an actual interest of the INS.²² Additionally, the laws in many states are not conducive to finding suitable surrogate mothers, so some couples are forced to look outside of the United States for women who are willing to become "gestational carriers." In those instances, it would be improper to assume that the baby is not a citizen of the United States because of the nationality of the birth mother.²³

16. *Id.*

17. *Id.* at 58.

18. 8 U.S.C. § 1431 (2002) (conferring automatic citizenship on children born to citizens of the United States on foreign soil). The amendment was signed into law on October 30, 2000. The Child Citizenship Act of 2000: Fact Sheet (Dec. 2000), at <http://www.ins.gov/graphics/publicaffairs/factsheets/adopted.htm>.

19. *Nguyen*, 533 U.S. at 78.

20. See 8 U.S.C. § 1409(c) (2002) (recognizing that "a person born . . . outside of the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother").

21. *Nguyen*, 533 U.S. at 62.

22. *Id.* at 79.

23. See 8 U.S.C. § 1401 (c) (2001) (establishing citizenship in "a person born outside of the United States . . . of parents both of whom are citizens of the United States"). In this type of surrogacy agreement, the child would meet the statutory requirements for being a citizen because of its genetic parents, but would be denied citizenship due to the nationality of the woman who gave birth.

Part II analyzes the assumption that all mothers want a lasting relationship with their child and that fathers lack that same desire. With the changing composition of American families and a detour from the traditional nuclear family, more men are accepting the challenge of being active caregivers to children. This concept, combined with women continuing to exercise their right to put a child up for adoption, demonstrates the flaw in the Court's reasoning that women have greater "opportunity or potential to develop . . . a relationship . . . that consists of the real, everyday ties that provide a connection between child and citizen parent."²⁴ The dissent again argued that the majority failed to "demonstrate that this was Congress' actual purpose in enacting § 1409(a)(4)."²⁵

Part III examines statutory revisions and public policy notions. Recent statutory changes created a conflict between the statute the Court relied on in its decision and the approved amendment to another statute. Resolving the discrepancy will provide groundwork for similar cases in establishing citizenship rights in children born outside the United States. The dissent also suggested possible changes to § 1401 to make it gender neutral, while providing the means-end fit the majority failed to accomplish.²⁶ The policy contentions will suggest ways of increasing notice to all United States citizens about the requirements for establishing citizenship for children born in a foreign country. The notice and statutory amendments would remove the burdensome expectation the Court places on the children themselves to ensure their own citizenship status.²⁷

There is little argument to be made against Congress' interest in denying non-citizens access to United States' liberties without meeting certain obligations. However, a child who is a citizen by blood or adoption should not be punished to protect these interests. As technology continues to advance and stereotypical walls crumble, the Court needs to recognize these changes and reevaluate methods for protecting legitimate government interests.

I. ENSURING A BLOOD RELATIONSHIP

The Court identified that the "first government interest to be served is the importance of assuring that a biological parent-child

24. *Nguyen*, 533 U.S. at 64-65.

25. *Id.* at 84.

26. *See generally id.* at 74.

27. *Id.* at 71.

relationship exists."²⁸ However, the dissent recognized that the Court "does not elaborate on the importance of this interest."²⁹ There is an assumption that the important interest is to prevent "fraudulent conveyances of citizenship."³⁰

As the success rate of pregnancy through in vitro fertilization (IVF) rises,³¹ the question emerges as to the true genetic identity of these children. An increasing number of couples adopt gestational surrogacy as an option to conceive when they are unable to do so on their own.³²

In gestational surrogacy, the biological parents provide the sperm and egg. The egg is fertilized either in the mother's womb or through IVF.³³ The fertilized embryo is implanted into a gestational surrogate who delivers the baby at the end of the term. The gestational surrogate has no genetic link to the embryo or the baby; she provides only the womb and umbilical cord for the development of the child.³⁴

The process of IVF has raised issues as to who the parent is in regard to the child's birth. The Supreme Judicial Court of Massachusetts held in *Culliton v. Beth Israel Deacones Medical Center* that the legal parents are the ones who provide the genetic composition of the child.³⁵ In order to protect the future legal rights of the parents and the child, the biological parents' names should be used on the child's birth certificate, not the name of the surrogate mother.³⁶

Only a few other states recognize that the gestational carrier is not the legal mother.³⁷ Inevitably, this leads couples to seek surrogate mothers and gestational carriers for their babies outside the United States. Israel and the United Kingdom are the only

28. *Id.* at 62.

29. *Id.* at 79 (recognizing that it is neither a purpose of the statute nor an interest the INS relied upon in its brief).

30. *Id.*

31. Pamela Ferdinand, *Mass. Case Tests Legal Standing of Surrogate, Genetic Mothers: Procedure for Placing Name on Birth Certificate Is at Issue*, WASH. POST, Sept. 6, 2001, at A06.

32. *Id.*

33. MARTHA A. FIELD, *SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES* 36 (expanded ed. 1990).

34. *Id.*

35. See generally *Culliton v. Beth Israel Deacones Med. Ctr.*, 756 N.E.2d 1133 (Mass. 2001).

36. See generally *id.*

37. Kathleen Burge, *Ruling Backs Genetic Parents*, BOSTON GLOBE, Oct. 13, 2001, at B1. See also *Belsito v. Clark*, 67 Ohio Misc. 2d 54, 56-58 (Court of Common Pleas 1994) (recognizing the genetic parents as the legal parents in Ohio).

countries “to allow state-controlled surrogacy” to take place.³⁸ American citizens’ ability to obtain more accessible surrogacy options in other countries will lead to a rise in the number of children who are citizens by blood but were not born in the United States. Recently, a California couple encountered problems when their gestational carrier, a woman from England, breached the surrogacy contract by refusing to abort one of two fetuses that resulted from the IVF.³⁹

The dissent relied on the same presumption as the majority that a mother’s relationship to the child is “verifiable from the birth itself,”⁴⁰ but clarified that the relationship is only apparent to those present and not to the INS.⁴¹ The means will not suffice to meet the objective of ensuring the relationship because the statute does not require mothers to prove their relationship to their children.⁴²

As the ability for women “to have their own biological children in much the same way that men always have”⁴³ increases, the Court must look beyond the assumption that by bearing a child the woman is the genetic and legal mother. As fathers and mothers become more similarly situated in proving that a biological relationship exists, the Court must consider gender-neutral alternatives to alleviate the discrimination.

II. FORMING THE EVERYDAY TIES

Since the beginning of the nineteenth century, women have been viewed as “model[s] of virtue and care” for their children.⁴⁴ The Industrial Revolution started the transition from considering a man’s wife and children as his property, to recognizing women as capable caregivers and the primary source of instilling “civic duty

38. Judy Siegal-Itzkovich, *Surrogacy: Bearing the Greatest Gift of All*, JERUSALEM POST, May 27, 2001, at 17.

39. Greg Moran, *One-or-None Edict Complicates Surrogate Pregnancy*, SAN DIEGO UNION-TRIB., Aug. 11, 2001, at A1.

40. *Nguyen*, 533 U.S. at 82.

41. *Id.*

42. 8 U.S.C. § 1409(c) (2002) reads:

Notwithstanding the provision of subsection (a) of this section, a person born . . . outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality status of the United States at the time of such person’s birth.

Id.

43. FIELD, *supra* note 33, at 61.

44. Linda Kelly, *Republican Mothers, Bastards’ Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 562 (2000).

and commitment" in her children.⁴⁵ Gradually, women began to gain custody and control over their children as the role of mother developed as nurturer and the role of father became merely one of financial support to the product of his misdeeds.⁴⁶ Today, the Court continues to see mothers and fathers in these stereotypical roles.⁴⁷

In an attempt to protect the government's interest in creating everyday ties between fathers and children, "[t]he Court again fails to demonstrate that this was Congress' actual purpose in enacting § 1409(a)(4)."⁴⁸ The problem with the Court's standard is that it only requires proof of an "opportunity" for ties to be established with the parent; it does not require that an actual relationship does or will exist.

The Court assumes "that a mother's presence at birth supplies adequate assurance of an opportunity to develop a relationship."⁴⁹ The fallacy comes from not recognizing that some women do not have or want that opportunity. Women voluntarily give up their children for adoption or, in the case of surrogacy, to the biological parents. Additionally, some children are involuntarily separated from their mothers if there is evidence of neglect, abuse, or through a disaster such as war.⁵⁰

In traditional surrogacy, a surrogate mother is selected for a couple unable to have a child because the female's infertility.⁵¹ The surrogate mother either has sexual intercourse with, or is artificially inseminated by, the husband. She carries the child and allows the couple to adopt the baby once it is born.⁵² This allows the couple to be the child's legal parents.

In traditional and gestational surrogacy, the carrier understands from the onset of pregnancy that the child is not hers.⁵³ This knowledge deters the formation of a bond between the mother and the child she carries.

Whether the mother relinquishes her child voluntarily or involuntarily, the opportunity to have a relationship with the child is not inherent in the mother's presence at the birth.

45. See generally *id.*

46. See *id.* at 563 (quoting MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA (1985)) ("bastardly law now portrayed mothers as 'victims of male lust and irresponsibility' while fathers were cast as the 'debtors and criminals'").

47. Kelly, *supra* note 44, at 564.

48. Nguyen, 533 U.S. at 84.

49. *Id.* at 86.

50. *Id.*

51. FIELD, *supra* note 33, at 5.

52. *Id.* at 6.

53. *Id.*

Congress' Action to Make Fathers More Involved – The Subcommittee Report on Children and Families

The 2000 United States Census revealed that one of the fastest growing categories is that of households headed by unmarried men with children.⁵⁴ The 2.2 million families organized in this manner increased 62 percent from 1990 and 172 percent from 1980.⁵⁵ One reason for the increase is the number of fathers receiving sole custody of their children after divorce. This number “has grown to 15 [percent] from 10 [percent] a decade ago.”⁵⁶ An additional reason for the increase is that more homosexual men have gained custody of their children or started to adopt.⁵⁷ The actual number of children adopted by homosexual men is not exact because “many people choose not to reveal their sexual orientation when they adopt, and some agencies don’t keep track of such data.”⁵⁸ Some homosexual men face the added challenge of overcoming statutory provisions that do not allow them to adopt.⁵⁹ Despite these obstacles, more unwed men are accepting the duties of fatherhood and proving to be reliable figures in their children’s lives.

Additionally, since 1972, the Supreme Court has recognized that biological fathers have a right to the custody of their non-marital children if the mother dies.⁶⁰ In *Stanley v. Illinois*, the Court held that Illinois law could no longer assume that an unwed father was automatically unfit to have custody of his children.⁶¹ In making its determination, the Court agreed that the state had legitimate interests, but acknowledged that “the Constitution recognizes higher values than speed and efficiency.”⁶² Further, the Court noted the need “to protect the fragile values of a vulnerable citizenry from overbearing concern for efficiency and efficacy.”⁶³

54. *Id.* at 61.

55. Margot Roosevelt, *Father Makes Two: Unmarried Men Who Raise Their Children Are One of the Fastest Growing Groups in America*, TIME, Nov. 19, 2001, at F1.

56. *Id.*

57. *Id.*

58. Nahal Toosi, *For Two Dads, A Dream Realized: Adopting a Son Brings Joy to Gay Milwaukee Couple, Amid Increasing Acceptance*, MILWAUKEE J. SENTINEL, Nov. 4, 2001, at 1L.

59. See generally FLA. STAT. ANN. § 63.042 (2000); N.H. REV. STAT. ANN. § 170-B:4 (1990) (explicitly precluding homosexuals from adopting); *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001) (upholding statute which prohibits homosexuals from adopting).

60. See generally *Stanley v. Illinois*, 405 U.S. 645 (1972).

61. *Id.* at 658.

62. *Id.* at 656.

63. *Id.*

Nguyen's father was another example of a man defying the stereotype and raising a child without a mother.⁶⁴ Even though the DNA tests occurred after Nguyen turned eighteen,⁶⁵ the existence of a real relationship should have been enough for the Court to see that a real, everyday tie existed.⁶⁶

Despite the method employed to play an active role in their children's lives, these types of men demonstrate that women are not the only sex who can offer a nurturing, attentive environment for children's development. Indeed, children of these fathers should not be "denied the right[s] of other children because familial bonds in [these] cases [are] often as warm, enduring, and important as those arising within a more formally organized family unit."⁶⁷

III. RECONCILING THE REQUIREMENTS

In reaching its decision about Tuan Nguyen, the Court relied on Title 8 of the United States Code, Section 1409, which requires a male citizen parent to verify paternity before his child may acquire United States citizenship rights.⁶⁸ While the statute withstands equal protection scrutiny, its provisions cause greater harm to the child that enters the United States under the belief that she is a citizen than to the parents whom the equal protection scrutiny applies.⁶⁹ Potential statutory revisions and policy considerations would provide the needed relief for these children.

Statutory Revisions for Establishing a Blood Relationship

Establishing a blood relationship between a citizen parent and their alien child appears to be a legitimate interest. However, in identifying it the Court does not address the changing statutes for adoption and citizenship.⁷⁰ In cases of adoption, a blood relationship does not exist, yet Congress has expressed its desire to protect the

64. *Nguyen*, 533 U.S. at 86.

65. *Id.* at 57.

66. *See Stanley*, 405 U.S. at 657 ("But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.").

67. *Id.* at 652 (citing *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968)).

68. 8 U.S.C. § 1409(a) (2002).

69. *See generally Miller v. Albright*, 523 U.S. 420 (1998) (noting that the daughter did not have standing to bring an equal protection claim against the 8 U.S.C. § 1409 because the terms applied to her father).

70. *See generally* 8 U.S.C. § 1431 (2002) (this provision is discussed in greater detail below).

families that are created when parents adopt a child who was born in a foreign country.⁷¹

Assuming a government interest exists in assuring a biological relationship between a citizen father and his child, placing a time restriction on declaring the child's right to United States citizenship does not substantially further that assurance.⁷² If a child is a citizen by blood, modern technology will always be able to verify that fact, not just during the first eighteen years of the child's life.⁷³ If a child relies on the reasonable assumption that he is a citizen of the United States and later discovers that he has not followed the proper procedural measures to gain citizenship status, he should still be able to retroactively attain citizenship by blood. In *Nguyen*'s case, once he realized he was not protected as a citizen of the United States, the father underwent DNA testing and received a court order stating he was the biological father.⁷⁴

Although the Court recognizes a blood relationship as a legitimate interest, Congress has stated otherwise and the dissent in *Nguyen* found some reasonable alternatives that would protect both the interest and the child.⁷⁵

Statutory Revisions for Everyday Ties

It has already been observed that the opportunity for a relationship to exist between the parent and child does not mean that an actual relationship consisting of "real, everyday ties" will result. A gender-neutral classification in the statute could easily be applied to ensure that a relationship is created. "Congress could require some degree of regular contact between the child and the citizen parent over a period of time."⁷⁶

The Court raised concerns over a father's notice about the birth of his child. The Court was hesitant to allow any child to assert citizenship rights automatically based on a biological relationship to the father because some fathers are unaware that they have children. Congress could easily remedy this problem by "substitut[ing] a requirement that the parent be present at birth or

71. 146 CONG. REC. H7774, H7776 (Sept. 19, 2000) (conferring equal status and rights on adopted children as given to children born to citizen parents).

72. *Nguyen*, 533 U.S. at 80.

73. *Id.*

74. *Id.* at 57.

75. *Id.* at 70.

76. *Id.* at 88 (paraphrasing *Miller v. Albright*, 523 U.S. 420, 470 (1998) (Ginsberg, J., dissenting)).

have knowledge of birth."⁷⁷ Making the requirement gender-neutral gives the father who chooses to be present at the birth the same power as the mother who is required to be present.

The question of time limitations becomes irrelevant again. By allowing parents to prove a relationship retroactively, a child who actually forms a bond with her father is not punished for failing to show "opportunity" before she turns eighteen. For example, "where there is an actual relationship, it is the actual relationship that does all the work in rendering appropriate a grant of citizenship, regardless of when and how the opportunity for that relationship arose."⁷⁸

Previous statutory changes strengthen the argument that Congress should rewrite 8 U.S.C. § 1409. Statutes change as societal ideals and expectations change. When society considered children and wives as property of the father or husband, statutes regarding citizenship reflected this ideal by granting automatic citizenship to children born to citizen fathers and alien mothers;⁷⁹ citizenship was not given to children born to citizen mothers and alien fathers. As societal images evolved the statute was found to violate the Equal Protection Clause.⁸⁰ Despite finding the converse in violation of the Equal Protection Clause, the current provision still withstands equal protection scrutiny.⁸¹ Additionally, the Court has held that immigration statutes that discriminate against non-marital children and their natural fathers are unconstitutional.⁸²

Gender Neutral Terminology

The dissent in *Nguyen* offers a suggestion for gender-neutral provisions: "Congress could have required both mothers and fathers to prove parenthood within thirty days or, for that matter, 18 years,

77. *Id.* at 86 (paraphrasing *Miller*, 523 U.S. at 487 (Breyer J., dissenting)).

78. *Id.* at 85. In a trilogy of cases concerning adoption by an unmarried father, the Court only provided for the right of paternal consent in adoptions to a father who had already demonstrated his dedication to his children. See generally *Lehr v. Robertson*, 463 U.S. 248 (1983) (denying the father's rights to adoption consent when the father does not seek legal recognition of his relationship with the child); *Caban v. Mohammed*, 441 U.S. 380 (1979) (holding that a statute giving more adoption rights to unwed mothers than unwed fathers violated the Equal Protection Clause when the father established a substantial relationship with the child and has admitted his paternity); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (upholding a statute requiring only maternal consent for adoption when the father makes sporadic child support payments and rarely visits his child).

79. *Breyer v. Meissner*, 214 F.3d 416, 427 (3d Cir. 2000).

80. *Id.* at 429.

81. See generally *Nguyen*, 533 U.S. at 53.

82. See generally *Fiallo v. Bell*, 430 U.S. 787 (1977).

of the child's birth."⁸³ Even though "it would be easier for mothers to satisfy a sex-neutral proof of parentage requirement . . . facially neutral laws that have disparate impact are a different animal for purposes of constitutional analysis than laws that specifically provide for disparate treatment."⁸⁴

By changing the statutory language to gender-neutral requirements, Congress would continue the trend they have been practicing for many years. The Sexual Abuse Act of 1986 was amended to "eliminate gender-based distinctions."⁸⁵ That same year, Congress amended the Veteran's Benefits Improvement and Health-Care Authorization Act to remove the gender distinctions in Federal programs that provide benefits to veterans.⁸⁶ Revision of the Father's Count Act of 1999 to include gender-neutral terminology made specific parenting programs available to women that were initially designed to get fathers involved in their children's lives.⁸⁷ In almost every area of the law, Congress is making the change to gender-neutral provisions in existing statutes even if the Court has not mandated the changes through the Equal Protection Clause.⁸⁸

The Child Citizenship Act of 2000

Congress amended 8 U.S.C. § 1431 in order to prevent unsuspecting children from being deported because they reasonably believed they were citizens of the United States.⁸⁹ The prior draft of 8 U.S.C. § 1431 required the alien parent to become naturalized in order for the child to gain automatic citizenship rights.⁹⁰ The amended version changed substantially to provide that:

- (a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:

83. *Nguyen*, 533 U.S. at 81 (paraphrasing *Miller*, 523 U.S. at 436 (Stevens, J.)).

84. *Id.* at 82.

85. 86 CIS Leg. Hist. Pub. L. 99-654.

86. 99 CIS Leg. Hist. Pub. L. 576.

87. 145 CONG. REC. H11870, H11880 (1999) (the amendment would change the title to the Parents Count Act).

88. See generally Servicemembers and Military Families Financial Protection Act of 2001, H.R. 3173, 107th Cong. (2001); Juvenile Justice and Delinquency Prevention Act of 2001, H.R. 1900, 107th Cong. (2001); Commonsense Product Liability Legal Reform Act of 1996, 142 CONG. REC. S2553 (1996).

89. See Child Citizenship Act of 2000, H.R. 2883 (2000). Representative Delahunt from Massachusetts acknowledged the "terrible price [alien children] and their families have paid" when the children are deported because the parents failed to file the proper paperwork to obtain citizenship for them. 146 CONG. REC. H7777 (Sept. 19, 2000).

90. 8 U.S.C. § 1431(a) (2000).

- (1) At least one parent of the child is a citizen of the United States whether by birth or naturalization.
- (2) The child is under the age of eighteen years.
- (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.⁹¹

This change, the Child Citizenship Act of 2000 (CCA), while effective on February 27, 2001,⁹² does not apply retroactively, so Tuan Nguyen could not have sought relief under it.⁹³ The CCA only grants automatic citizenship to children who were under the age of eighteen on February 27, 2001.⁹⁴

The CCA was designed, in part, to clarify citizenship for children adopted from foreign countries by United States citizens. United States citizens adopted 14,867 immigrant orphans in 1998.⁹⁵ Up from 12,596 in 1997,⁹⁶ the trend of adopting children born outside of the United States continues to rise. Congress sought to protect these children and their adoptive parents by removing the statutory provisions that restrict the parents' ability to secure timely citizenship rights for their children.⁹⁷ Under the CCA, adopted children attain citizenship automatically because of the status of their adoptive parents, while children who are related to a United States citizen by blood are not afforded the same protection.⁹⁸

91. *Id.*

92. *Id.*

93. Currently the courts have not been able to consider the implications of § 1409 and § 1431 with a person who was under the age of 18 at the time § 1431's amendment became effective. There have been a few cases dealing with applying the statute retroactively, but these all affirm Congress' intent to not apply it retroactively. See, e.g., *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001); *Barton v. Ashcroft*, 2001 U.S. Dist. Lexis 17955 (2001).

94. See generally *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001).

95. *Immigrant Orphans Adopted by U.S. Citizens By Sex, Age, and Region and Selected Country of Birth: Fiscal Year 1998*, 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 65, tab. 15 (2000), available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/1998yb.pdf> (last visited Jan. 25, 2003).

96. *Immigrant Orphans Adopted by U.S. Citizens By Sex, Age, and Region and Selected Country of Birth: Fiscal Year 1997*, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 57, tab. 15 (1999), available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/1997YB.pdf> (last visited Jan. 25, 2003).

97. 146 CONG. REC. H7774, 7776 (Sept. 19, 2000) (recognizing that naturalizing the children under the previous statute "[could] take years because of the naturalization backlog at the Immigration and Naturalization Service").

98. 8 U.S.C. § 1409 still applies to children born out of wedlock despite the changes in 8 U.S.C. § 1431.

The apparent discrepancies between 8 U.S.C. § 1409 and the CCA possibly come from the definitions of “child”⁹⁹ and “parent.”¹⁰⁰ A child is defined as “an unmarried person under twenty-one years of age who is a child born in wedlock”¹⁰¹ or “a child born out of wedlock . . . on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person.”¹⁰² A parent is:

a parent, father, or mother . . . except that . . . in the case of a child born out of wedlock . . . the term “parent” does not include the natural father of the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.”¹⁰³

The specific requirement that a child be born in wedlock to receive automatic citizenship, punishes a child for something the child could not control. By adopting only the CCA and repealing 8 U.S.C. § 1409, the child would be protected without fear that the conflicting laws could lead to his deportation because his father failed to file the proper paperwork for citizenship.

Notice Requirements

With military stations overseas and increased travel to foreign countries, American men have the opportunity to father foreign-born children. A problem arises if these men attempt to return to the United States with their children. Without notice requirements, men are not aware of the prerequisites for establishing the citizenship of their children born overseas. The solution is simple: require notice as part of the procedure to obtain a United States Passport.

One problem imposed by the *Nguyen* decision was the notion that *Nguyen* could have applied for citizenship in his own right, without reliance on his father's status.¹⁰⁴ The difficulty in many cases is the good faith reliance on United States citizenship by the parents and the child.¹⁰⁵

99. 8 U.S.C. § 1101(b)(1) (2002).

100. *Id.* at (b)(2).

101. *Id.* at (b)(1)(A).

102. *Id.* at (b)(1)(D).

103. *Id.* at (b)(2).

104. *Nguyen*, 533 U.S. at 71.

105. *Id.* at 57 (indicating that *Nguyen* had lived in the United States as a lawful permanent resident since the age of six).

According to the Selective Service System, all males in the United States must register between the ages of 18 and 25.¹⁰⁶ All citizens, nationals, aliens, and other non-citizens are required to register, with few exceptions. Not registering for the draft would not give an alien notice that he was not a citizen of the United States. Some aliens, under the reasonable belief that they are citizens, have even voted in elections.¹⁰⁷ While it has previously been a criminal offense to vote in an election without being a citizen, Congress has realized that there are a large number of non-citizens voting because of their reasonable belief that they are citizens; Congress has implemented changes in the law to protect these people from deportation.¹⁰⁸

Deportation

Congress recognized another problem in requiring children to bear the responsibility of determining their own citizenship status. Representative Gejdenson, in his statement before the House of Representatives, noted "there are tragic cases where children of U.S. parents, never naturalized because of inadvertence, are facing deportation because of a crime they have committed. While these children must face their punishment, to deport them to countries with which they have no contact . . . is needlessly cruel."¹⁰⁹

The Court ignored this reasoning when deciding to uphold the decision to deport Tuan Nguyen. Instead they explicitly placed the burden of acquiring citizenship on his shoulders,¹¹⁰ but then continued to say that it was too late for him to acquire his rights.¹¹¹ While the Court may have been unable to grant the relief sought, declaration of Nguyen's United States citizenship, they could have prevented his deportation.¹¹² In *Barton v. Ashcroft*,¹¹³ the District Court of Connecticut allowed a stay of deportation pending a constitutional analysis of INA § 212(h)(1)(B), which grants the right of waiver to felons who have not been admitted to the United States

106. Selective Service System, *Who Must Register*, at <http://www.sss.gov/Fswho.htm>.

107. 146 CONG. REC. H7774, H7777 (Sept. 19, 2000).

108. *Id.* (referring to the Child Citizenship Act of 2000).

109. 146 CONG. REC. H7774, H7778 (Sept. 19, 2000).

110. *Nguyen*, 533 U.S. at 61-62 ("A person born to a citizen parent of either gender may assert citizenship, assuming compliance with statutory preconditions, regardless of his or her age.").

111. *Id.* at 71 (stating that the option to acquire citizenship on his own "may be foreclosed to Nguyen . . . due to the serious nature of his criminal offenses").

112. 8 U.S.C. § 1252(d)(1) (1999) (providing that a court may review final orders of removal if "the alien has exhausted all administrative remedies available to the alien as of right").

113. 2001 U.S. Dist. LEXIS 17955 (2001).

for permanent residence while a "felon who is a lawful permanent resident is not given the same opportunity."¹¹⁴

Citizenship Jus Soli

The United States Constitution provides that "[a]ll persons born . . . in the United States . . . are citizens of the United States."¹¹⁵ As a citizen, a person receives all the protections provided by the Constitution and the laws of the state in which they reside.¹¹⁶ If a non-citizen or alien couple enters the United States and a child is born to them while they are on United States soil, that child becomes a citizen *jus soli*.¹¹⁷ At this point, the child's ability to receive assistance such as welfare benefits would not depend on the status of the child's alien parents.¹¹⁸ Additionally, the state's questioning of the parent's status "unlawfully penalize[d] the children for the alien status of their parents."¹¹⁹ Through the citizen child, alien parents receive the benefit of citizenship – protection through the Constitution. To deny them the protection would deny those protections to the child.¹²⁰

Protecting a child born on United States soil is an essential interest that should not be impeded in any way, but the discrepancies in the rights given to those who are citizens by place of birth to those who are citizens by blood deny a class of citizens the rights that should be granted to them by their birth alone.

IV. CONCLUSION

When the founders of the United States ratified the Constitution, they realized that as times and people change, the laws of the country might need to change as well.¹²¹ Indeed, previous changes in science and society have led to many changes in the laws. Now there is a new need for statutory change as many notions of family

114. *Id.* at 17.

115. U.S. CONST. amend. XIV, § 1.

116. *Id.*

117. See Kelly, *supra* note 44, at 565.

118. Stacey Hardin, *State Forays into Immigration Law, "SOS": Can California 'Save Our State'*, 34 U. LOUISVILLE J. FAM. L. 195, 205 (1996) (citing *Doe v. Miller*, 573 F. Supp. 461, 467-68 (N.D. Ill. 1983)).

119. *Id.*

120. *Id.* (recognizing the alien parent's right to privacy through their child in order to ensure the child receives proper education and welfare benefits).

121. U.S. CONST. art. V.

and society have become outdated and the expectation of protecting our citizens has increased.

Women and men are taking the power to have children and raise families into their own hands. Through surrogacy, IVF, and adoption, it is becoming easier to have a child without a traditional blood relationship. Individuals and families are punished every day because the Court does not want to recognize this trend. Congress should change the statutes to protect these non-traditional families instead of allowing an outdated standard of "blood relationship" dictate who gains protection under the law.

The role of women in society has changed throughout history.¹²² Statutes changed as the stereotypes changed. The Court and Congress' efforts to reduce sexual discrimination have continued to offer women the same opportunities as men; however the opposite is true for men. Despite previous power granted to them through societal and legal shifts, men are now facing discrimination in regard to their ability and desire to raise a family without a female presence. Statutory changes need to occur again as more men willingly choose to fill the role of provider and nurturer for a child.

In light of recent tragedies in the United States, the government's interest in protecting the country's borders and citizens has increased drastically.¹²³ The government can still protect this interest by extending the current statutory regulations to apply to all United States citizens who have a child on foreign soil. Requirements that have already been found not burdensome to the father,¹²⁴ should meet the same standard for a mother. By establishing uniform requirements for all citizen parents who have children outside of the United States, it will be easier to provide notice of the requirements for gaining citizenship for those children when they return to the United States and will protect them from the evils that would result if proper procedure is not followed.

122. Kelly, *supra* note 44.

123. Karen Hosler & Gail Gibson, *Senate Easily Approves Bill to Bolster Security: Measure, Which Bush Plans to Sign Today, Eases Wiretaps, Data Exchange*, BALT. SUN, Oct. 26, 2001, at 5A.

124. *Nguyen*, 533 U.S. at 70.