It's Time to Root Out Sex-Based Stereotypes in Immigration Law

By Jennifer M. Chaucin

A nyone who has studied both constitutional law and immigration law knows that many of the constitutional rights given to citizens are protected by the courts when claims are made that some citizens are being treated differently in certain contexts — rights such as freedom of association and equal protection — receive relatively different results from courts in cases where a non-citizen alleges that an immigration law amounts to a violation of such rights. There have been several recent cases where the courts have held that Congress's plenary power to regulate immigration allows for limitations on rights that would be unconstitutionally restricted in other contexts. On Nov. 12, 2010, the Supreme Court heard oral arguments in the case of Flores-Viloria v. United States, a case that illustrates — and challenges — some longstanding limits on the equal protection doctrine as the context in immigration law.

Flores-Viloria resolves around a statutory provision in the Immigration and Nationality Act (INA) that, on its face, discriminates on the basis of sex. The kind of sex-based classification at issue in Flores-Viloria has been rejected outside of the immigration context on equal protection grounds. Yet the Supreme Court has upheld this type of discriminatory provision in immigration law. The time has come for the Court to reconsider its approach, and to strike down a statute that is premises upon unsound and problematic assumptions about gender roles in parenting.

Rufina Flores-Viloria was born in Mexico in 1934, but came to the United States when he was two months old with his U.S. citizen father. This father remarried when Rufina was seven, and the family moved to California. Rufina was raise by his mother, who was an U.S. citizen, until she was 16. Rufina moved to the United States and became a legal permanent resident. Rufina's mother told the Court that she was the only person who had trouble with the law, and his criminal convictions rendered him deportable. As a defense to deportation, Rufina argued that he was a U.S. citizen.

The Board of Immigration Appeals, however, rejected Rufina's claim of citizenship, finding that he failed to comply with the terms of the INA. For a child born out of wedlock to acquire citizenship through a citizen father, Section 309(j)(8) of the INA requires that while the person is under the age of 18 years, the parents are married or living together in the same household of the person's residence or domicile; the father acknowledges paternity of the person in writing或其他 than by the performance of marriage; or the paternity of the person is established by adjudication of a competent court. All parties to the litigation conceded that the requirement of a written acknowledgment of the father's paternity was not satisfied.

In what is now referred to as the Flores-Viloria case, the Supreme Court agreed that the “new” requirement was a departure from previous law. The Court noted that the 1980 amendment of the INA was implemented under the Due Process Clause of the Fifth Amendment. The INA’s Circuit Court of Appeals affirmed, but the district court reversed the Circuit Court’s conclusion on the Supreme Court's 2001 decision in Nguyen v. INS, 533 U.S. 28, 36 (2001). It held that the 1980 amendment to the INA was a reasonable exercise of Congress’s statutory discretion.

The Immigration and Nationality Act (INA) allows enter to the United States, and his father and co-citizens, Joseph B. Gilbert, was an American citizen. Rufina married Rufina's mother in 1967. Rufina moved to the United States and became a legal permanent resident. Rufina's mother told the Court that she was the only person who had trouble with the law, and his criminal convictions rendered him deportable. As a defense to deportation, Rufina argued that he was a U.S. citizen.

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