

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

By Jennifer M. Chacón

Anyone who has studied both constitutional law and immigration law knows that many of the constitutional rights given fairly robust protection by the courts in some contexts — rights such as freedom of association and equal protection — receive relatively less protection from courts in cases where a non-citizen alleges that an immigration law amounts to a violation of such rights. For over a century, the courts have held that Congress' plenary power to regulate immigration allows for limitations on rights and liberties that would be impermissible in other contexts. On Nov. 12, 2010, the Supreme Court heard oral arguments in the case of *Flores-Villar v. United States*, a case that illustrates — and challenges — some longstanding limits on the equal protection doctrine in the context of immigration law.

Flores-Villar revolves 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-Villar* has been rejected outside of the immigration contexts on equal protection grounds. Yet the Supreme Court has upheld this type of discriminatory provisions in immigration law. The time has come for the Court to reevaluate its approach, and to strike down a statute that is premised upon outmoded and problematic assumptions about gender roles in parenting.

Ruben Flores-Villar was born in Mexico in 1974, but came to the United States when he was two months old with his U.S. citizen father. His father raised him as a single parent in the United States. Flores-Villar sought citizenship through his father. Because he was born abroad, establishing citizenship through his father required Flores-Villar to comply with the provisions of the INA specifying that if a U.S. citizen father had a child out of wedlock abroad with a non-U.S. citizen mother, the father must have resided in the United States for at least 10 years, five of which were after his 14th birthday, to confer citizenship on his child. His father had resided in the United States for over a decade at the time of Flores-Villar's birth, but because his father was only 16 years old at the time of his birth, his father had not met the statutory requirement of having lived at least five of those years in the United States after his 14th birthday. Flores-Villar's father was therefore statutorily ineligible to confer citizenship on his son.

The law in question facially discriminates on the basis of sex. Unlike unwed U.S. citizen fathers, unwed U.S. citizen mothers need only have lived in the United States for a single year prior to the birth of the child, and that year could have occurred when the mother was any age. In other words, if it had been Flores-Villar's mother, rather than his father, who was the unwed U.S. citizen parent, Flores-Villar would be statutorily eligible for citizenship.

In spite of the statute's obvious discrimination on the basis of sex, the district court rejected the Equal Protection claim Flores-Villar raised under the Due Process Clause of the Fifth Amendment. The 9th U.S. Circuit Court of Appeals affirmed the district court's conclusion, relying heavily on the Supreme Court's 2001 decision in *Nguyen v. INS*, 533 U.S. 53 (2001). The facts of that case reveal the depth of the discrimination in the INA's citizenship provisions.

Like Flores-Villar, Tuan Anh Nguyen was born outside of the United States, and his father and co-petitioner, Joseph Boulais, was an American citizen. Boulais was not married to Nguyen's mother. In June 1975, Nguyen moved to the United States and became a lawful permanent resident. Boulais raised Nguyen in Texas. Like Flores-Villar, Nguyen later ran into trouble with the law, and his criminal convictions rendered him deportable. As a defense to deportation, Nguyen argued that he was a U.S. citizen.

The Board of Immigration Appeals, however, rejected Nguyen'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(a)(4) of the INA requires that while the person is under the age of 18 years: the person is legitimated under the law of the person's residence or domicile; the father acknowledges paternity of the person in writing under oath; or the paternity of the person is established by adjudication of a competent court. All parties to the litigation conceded that the requirements of 309(a)(4) had not been met.

As in Flores-Villar's case, had Nguyen's mother — rather than his father — been the U.S. citizen, the transmittal of citizenship would have been governed by INA Section 309(c), which contained none of the requirements of Section 309(a)(4). Because of the differential requirements based on the sex of the citizen parent, Nguyen (and Boulais) argued that the INA violated the Constitution's Equal Protection Clause.

In a decision authored by Justice Anthony M. Kennedy, the Court acknowledged that the statutory scheme created sex-based distinctions. The Court therefore applied a heightened scrutiny standard to the statute, requiring that the statute serve an important governmental



objective and that the discriminatory means employed were substantially related to the achievement of that objective. The Court in *Nguyen* found that the governmental interests served by the statutory requirements were "assuring that a biological parent-child relationship exists" and "ensur[ing] that the child and the citizen parent have some demonstrated opportunity or potential to develop...a relationship...that consists of real, everyday ties that provide a connection between the child and the citizen parent and, in turn, the United States." The Court rejected the argument that Section 309 embodied a sex-based stereotype, concluding that "there is nothing irrational or improper in the recognition that at the moment of birth...the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of unwed fathers."

The Court then reasoned that the means chosen by Congress was substantially related to the governmental ends, finding it "unsurprising" that Congress decided to require that the opportunity for a parent-child relationship occur before the child reached the age of 18. In an opinion that relied on sex-based stereotypes to provide a rationale for the law, Justice Kennedy thus affirmed the law on heightened scrutiny review. He also suggested that it was possible that rational basis review might be more appropriate in light of Congress' plenary power to regulate immigration and naturalization. This would have been consistent with the Court's approach in cases such as *MacKenzie v. Hare*, 239 U.S. 299 (1915), in which the Court upheld a law requiring the expatriation of women who married non-citizen men, and *Fiallo v. Bell*, 430 U.S. 787 (1977), in which the Court upheld an INA provision excluding the relationship between an illegitimate child and his natural father, as opposed to his natural mother, from the special preference immigration status accorded a "child" or "parent" of a U.S. citizen or lawful permanent resident.

The 9th Circuit opinion in the *Flores-Villar* case follows the lead of *Nguyen* in applying heightened scrutiny to the sex-based distinctions of the statute. Like the *Nguyen* majority, however, the 9th Circuit opinion suggests that rational basis review might be more appropriate. The appropriate standard of review is one of the critical questions now facing the Supreme Court, and the government continues to argue that rational basis scrutiny should apply.

Applying heightened scrutiny, the 9th Circuit found that the statute serves an important governmental interest, insofar as the relaxed standard that it applies to the children of unwed U.S. citizen women protects many children against statelessness. But as Flores-Villar has argued, the problem of statelessness is one that also confronts the children of

unwed U.S. citizen fathers. It is not clear that this interest is rational, much less important, and it could be served better if fathers and mothers were subject to the same standard that now applies only to mothers.

At oral argument, one of the persistent questions was what remedy should apply if the court does find an equal protection violation. Interestingly, the deputy solicitor general argued that in the event the statute was found to violate equal protection, the residency requirement for mothers should be raised to match those of fathers rather than lowering the requirement for fathers. This would be an odd result since it would compound further the statelessness problem that the government is advancing as the "important" interest served by the statute.

In the *Nguyen* case, Justice Sandra Day O'Connor wrote a dissenting opinion, joined by Justices David Souter and Ruth Bader Ginsberg, urging that available sex-neutral alternatives could "at least replicate, and could easily exceed, whatever fit there is between [Section] 309(a)(4)'s discriminatory means and the majority's asserted ends." The dissent also noted that any claim that the discriminatory statutory provision relates to the achievement of a "real, practical relationship" found support not in biological differences between women and men, but in stereotypes that mothers are more likely than fathers to develop caring relationships with their children. The *Flores-Villar* case presents the Court with the opportunity to begin to root out the sex-based stereotypes that pervade many aspects of the citizenship statute. The Court should seize this opportunity to do so.

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