

## **Gender Bias in Immigration Law**

The New York Times

January 15, 2001 Monday, Late Edition - Final

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**Section:** Section A; Column 1; Editorial Desk; Pg. 14

**Length:** 436 words

### **Body**

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In case after case over the past several decades, the Supreme Court has held that the constitutional guarantee of equal protection is violated when government dispenses opportunities to individuals based on generalizations about the different attributes of men and women. A case argued last week before the court challenges the justices to extend that well-established principle of gender fairness to an overtly discriminatory aspect of federal immigration law.

In this particular instance, the sex-discrimination disadvantages men. The provision at issue -- one of the few gender-based federal laws still on the books -- makes it harder for fathers than for mothers to transmit their United States citizenship to out-of-wedlock children born overseas. If the mother is a United States citizen and the father an alien, the child born abroad is automatically deemed a citizen at birth on the theory that the mother bears the child and is usually the caregiver, so no additional proof of their relationship is needed. But if it is the father who is the citizen, the child has no citizenship rights unless the father formally acknowledges paternity while the child is under 18 and agrees to support the child until that age.

The case was brought by a Vietnamese-born man and the American father who raised him but only acknowledged paternity when his son was in his 20's and facing deportation from the United States after a criminal conviction. He established paternity by DNA testing, but because his son was already past 18, the Board of Immigration Appeals refused to consider the evidence and deemed the son a non-citizen subject to deportation.

When the Supreme Court considered a similar case three years ago, five justices, a majority, indicated their belief that the law reflected gender-based stereotypes that the court had previously condemned. But the court failed to resolve the issue because two of those justices saw procedural problems in the way the issue was posed.

There may be some truth in the rationale behind the law -- that more American mothers of children born abroad out of wedlock actually raise their children than do the American fathers of such children. Moreover, Congress may be within its rights to try to ensure that ties exist between the child, the parent and the United States, and to provide protection against fraudulent claims. But, as Justices Ruth Bader Ginsburg and Stephen Breyer noted when the issue arose in 1998, neither of these observations justifies reliance on overly broad gender distinctions that assume all mothers behave in one way and all fathers in another.

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### **Classification**

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**Language:** ENGLISH

## Gender Bias in Immigration Law

**Document-Type:** Editorial

**Publication-Type:** Newspaper

**Subject:** CITIZENSHIP (90%); EQUAL PROTECTION (90%); LEGAL PATERNITY (90%); SUPREME COURTS (90%); CONSTITUTIONAL LAW (90%); LITIGATION (90%); GENDER EQUALITY (89%); LAW COURTS & TRIBUNALS (89%); IMMIGRATION (89%); CHILD CUSTODY & SUPPORT (89%); CHILDREN (89%); WOMEN (89%); IMMIGRATION LAW (89%); GENDER & SEX DISCRIMINATION (89%); DECISIONS & RULINGS (78%); SUITS & CLAIMS (78%); DISCRIMINATION (77%); DEPORTATION (76%); US FEDERAL GOVERNMENT (76%); CITIZENSHIP LAW (76%); CRIMINAL CONVICTIONS (73%); CRIMINAL OFFENSES (73%); FORENSIC DNA TESTING (69%); DNA (64%); DNA TESTING (50%)

**Organization:** SUPREME COURT (US)

**Person:** RUTH BADER GINSBURG (58%); STEPHEN BREYER (58%)

**Geographic:** UNITED STATES (96%)

**Load-Date:** January 15, 2001

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