

ESSAY

BREVITY IS THE SOUL OF WIT: NGUYEN IS DEAD

by
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Flores-Villar v. United States signals a significant shift in the Supreme Court's mid-level equal protection treatment. Because the Court affirmed the lower court by a 4-4 decision, the Court gave only opaque clues to the current status of the gender discrimination standard expressed by Nguyen v. INS. Both cases are remarkably similar and only ten years apart. Yet, despite all odds, the Court granted certiorari. Even though the Court affirmed the Ninth Circuit opinion following Nguyen, the nine-word opinion is enough to show that four justices disagree with Nguyen and a fifth justice is likely to join them. If Justice Kagan had not needed to recuse herself, Nguyen would likely be overruled. This Essay predicts that the equally divided court of Flores-Villar signals the silent death of Nguyen v. INS and a return to the Court's stronger commitment to gender equality as reflected in United States v. Virginia.

The judgment is affirmed by an equally divided Court.¹

This deceptively simple opinion may well have signaled a significant change in the Supreme Court's Equal Protection jurisprudence. The nominal nine word opinion (a non-entity at first appearance) constitutes the Supreme Court's entire per curiam² decision last term in *Flores-Villar*

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¹ *Flores-Villar v. United States*, 131 S. Ct. 2312, 2313 (2011) (per curiam).

² Per curiam (“by the court” in Latin) is used to announce an Opinion and Judgment for the Court as a whole, rather than one signed by named Justice(s).

v. United States,³ a case unjustly overlooked by commentators. The Court could have achieved perfect symmetry—one solitary word for each Justice—except that “Justice Kagan took no part in the consideration or decision of this case.”⁴ Justice Kagan’s recusal paved the way for the Court’s 4–4 split decision/non-decision.⁵ It is my contention that *Flores-Villar*, tied for the shortest of the Supreme Court’s opinions last term,⁶ and technically of no substance, was paradoxically also one of its more important decisions.⁷ This Essay argues that *Flores-Villar* signals, *sub silentio*, the stealth overruling⁸ of *Nguyen v. INS*,⁹ and the welcome expansion of Equal Protection rights for a significant class of individuals.

Although often used to announce results in non-controversial or unimportant cases, there are many examples of important per curiam Supreme Court decisions. *See, e.g.*, *Presley v. Georgia*, 130 S.Ct. 721 (2010) (requiring trial courts to consider all reasonable alternatives before ordering the closure of a public trial under the Sixth Amendment); *Bush v. Gore*, 531 U.S. 98 (2000) (effectively deciding the 2000 Presidential election); *Buckley v. Valeo*, 424 U.S. 1 (1976) (campaign finance reform); *Furman v. Georgia*, 408 U.S. 238 (1972) (striking down all then extant capital punishment statutes in the United States); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (The Pentagon Papers Case); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (establishing the stringent incitement test for prosecuting violent speech); *Cooper v. Aaron*, 358 U.S. 1 (1958) (condemning and ruling unconstitutional Governor Orville Faubus’s blatant refusal to comply with the principles of *Brown v. Board of Education*, 347 U.S. 483 (1954)).

³ 131 S. Ct. 2312.

⁴ *Id.* at 2313.

⁵ Of course technically when the Supreme Court affirms the lower court by an equally divided vote, the *decision* lacks all precedential value, hence my earlier comment that the Court’s words are nominally non-entities.

⁶ *Costco Wholesale Corp. v. Omega, S.A.*, 131 S. Ct. 565 (2010), was decided in the identical way by the same nine words, but it only involved a rather narrow question of statutory interpretation of the scope of copyright’s first-sale doctrine.

⁷ There are many other cases where the Supreme Court has decided important principles of law with short opinions. *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (First Amendment protects offensive parody of public figure); *Rabeck v. New York*, 391 U.S. 462 (1968) (declaring obscenity statute unconstitutional in summary fashion that came to be known as “redrupping” after *Redrup v. New York*, 386 U.S. 767 (1967)); *Gayle v. Browder*, 352 U.S. 903 (1956) (extending the desegregation equality principles of *Brown v. Board of Education*, 347 U.S. 483 (1954), to public buses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (ordering the desegregation of public beaches and bathhouses); *Missouri v. Holland*, 252 U.S. 416 (1920) (affirming expansive federal treaty power vis-à-vis States); *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829) (early Marshall court decision helping to define the scope of the Commerce Clause). These and other short decisions of significance are the inspiration for the pre-colon portion of my title.

⁸ For a classic article discussing the Supreme Court’s practice and techniques for overruling prior decisions, see Jerold H. Israel, *Gideon v. Wainwright: The “Art” of Overruling*, 1963 SUP. CT. REV. 211 (1963). For a more explicit discussion of *sub silentio*, stealth, and implicit overruling by the Supreme Court, see, for example, *id.* at 260 (arguing that “the *Chewing* decision . . . overruled [*Betts*] *sub silentio*” before *Gideon* reached the Court for the express overruling of *Betts*); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1430–34, app. B (giving numerous examples where the author contends that the Supreme Court “implicitly” overruled

I. *NGUYEN V. INS*: TURNING BACK THE CLOCK TO 2001

On June 11, 2001, the United States Supreme Court issued its opinion in *Nguyen v. INS*.¹⁰ Tuan Nguyen was born in Vietnam in 1969 to an unwed couple. His father, Joseph Boulais, was an American citizen working at that time for a corporation in Vietnam, and his mother was a Vietnamese citizen. Boulais brought the young boy to the United States in 1975, where Nguyen “became a lawful permanent resident.”¹¹ Boulais then raised his son in Texas. When Nguyen reached his late twenties he was found to be deportable as an alien guilty of crimes of moral turpitude based upon his earlier pleas to two felony counts of sexual assault in 1992 when he was 22 years old.¹²

Nguyen’s deportation status turned on whether he was an alien or a citizen. The immigration and naturalization statute covered Nguyen’s specific situation of a person born outside of the United States to unmarried biological parents when one of the parents was a U.S. citizen and the other was not. The statute provided quite different standards depending upon whether the citizen parent was the mother or the father.¹³ Nguyen would have been a U.S. citizen under the terms of the statute if the citizenship of his biological mother and father had been exactly reversed, but he could not satisfy the much more stringent statutory requirements for citizenship when it was his father, rather than his mother, who was the U.S. citizen. A sharply divided Supreme Court acknowledged this significant gender-based difference and described the circumstances as “unfortunate, even tragic,”¹⁴ but held 5–4 that the statute did not violate Equal Protection.¹⁵

Nguyen, on its holding alone, is a serious impediment to overseas citizen fathers and their biological children. One might at least have hoped that the Court would confine its impact by relying on Congress’s plenary power to regulate immigration and naturalization.¹⁶

statutory precedents); Barry Friedman, *Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010); Christopher J. Peters, *Under-the-Table Overruling*, 54 WAYNE L. REV. 1067 (2008).

⁹ 533 U.S. 53 (2001).

¹⁰ *Id.*

¹¹ *Id.* at 57.

¹² *Id.*

¹³ *Id.* at 56–60; see 8 U.S.C. §§ 1409, 1401(g) (2006).

¹⁴ *Nguyen*, 533 U.S. at 71.

¹⁵ *Id.* at 73. Although there is no express Equal Protection Clause limiting discrimination by the federal government, the Supreme Court properly has long held that fundamental fairness required by the Fifth Amendment Due Process Clause implicitly holds the federal government to the same standards of equality that the Fourteenth Amendment demands of the States through the Fourteenth Amendment Equal Protection Clause. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁶ See, e.g., *Fiallo v. Bell*, 430 U.S. 787 (1977); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

Unfortunately, Justice Kennedy's opinion for the Court¹⁷ upped the ante when it ruled out cabining *Nguyen* along these or other lines by concluding that the "gender-based classification" between citizen fathers and citizen mothers "satisfies . . . 'the heightened scrutiny that normally governs gender discrimination claims.'"¹⁸ *Nguyen* therefore has to be taken seriously as the view of a majority of the Court, at least in 2001, on the appropriate gender discrimination standard, and its proper application in all manner of cases. What was the *Nguyen* Court's gender discrimination standard and how did the majority believe that it should be applied?

The majority encouragingly began its discussion of the proper level of scrutiny for gender classifications by citing¹⁹ *United States v. Virginia*, where the Court struck down the male-only admissions policy of the Virginia Military Institute (VMI).²⁰ In describing the VMI test in the early pages of its opinion, the *Nguyen* majority mentioned the need for "important governmental objectives" and a "substantial[]" relation between the governmental "means employed" and "the achievement of those objectives."²¹ The majority conspicuously left out Justice Ginsburg's rigorous requirements for "skeptical scrutiny" and "an exceedingly persuasive" justification before gender distinctions are allowed.²² True, the majority did arrive belatedly at the "exceedingly persuasive" and most important part of the VMI test, but only after it had applied a much less rigorous standard, and then only to assert perforce that the inferred justifications for the distinction between biological citizen fathers and

¹⁷ *Nguyen*, 533 U.S. at 56. Justice Kennedy delivered the opinion of the Court for the majority of five in which Chief Justice Rehnquist and Justices Stevens, Scalia, and Thomas joined.

¹⁸ *Id.* at 60–61 (quoting *Miller v. Albright*, 523 U.S. 420, 435 n.11 (1998)); see also *id.* at 61 ("Given that determination [that the gender-based distinction in the instant case satisfies normal equal protection heightened scrutiny of gender classifications], we need not decide whether some lesser degree of scrutiny pertains because the statute implicates Congress' immigration and naturalization power."). Despite this express disclaimer, however, one would be naïve to discount the common occurrence that factors beyond the mechanistic application of the Court's stated jurisprudential tests influence at least subtly the application of a particular test and outcome of the Court's decisions.

¹⁹ *Id.* at 60–61.

²⁰ *United States v. Virginia*, 518 U.S. 515 (1996). Justice Ginsburg's majority opinion requiring an "exceedingly persuasive justification" for gender distinctions is the most rigorous formulation of the level of scrutiny for sex discrimination, heightened or rigorous mid-level scrutiny, ever subscribed to by a majority of the Court. *Id.* at 524 (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)) (internal quotation marks omitted).

²¹ *Nguyen*, 533 U.S. at 60 (quoting *Virginia*, 518 U.S. at 533) (internal quotation marks omitted).

²² *Id.* In this regard, it is noteworthy that the "exceedingly persuasive" portion of the *Virginia* test appears on the same page and in the same passage of *Virginia*, 518 U.S. at 533, as the rest of the test, and the very page that the *Nguyen* majority cites.

mothers and their offspring were sufficient as a merely conclusory matter.²³

The *Nguyen* majority's treatment of the asserted reasons for the substantial gender distinctions allowed in the case illustrate the weakness in its opinion. First, the Court noted the irrefutable importance of assuring that the citizen is in fact the biological parent of the child.²⁴ While an administratively convenient policy of favoring women on this ground would meet a low-level rational relationship test, or perhaps even a weak version of mid-level scrutiny, it cannot withstand the rigors of "exceedingly persuasive" testing. The father here demonstrated his biological paternity with a reliable DNA test, and the Supreme Court acknowledged that he was, in fact, the biological father.²⁵ More telling still is the Court's statement that "[t]he Constitution, moreover, does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity, even if that mechanism arguably might be the most scientifically advanced method."²⁶ Perhaps Congress's statute need not require such a method, but surely it cannot claim to satisfy an "exceedingly persuasive" justification standard if it prohibits a citizen father from making a conclusive showing by the most scientific method at his own expense, as was done here. As I have already noted, rough-cut administrative convenience and cost-conscious penny-pinching are the stuff of the low-level rational relationship test and certainly not of *VMF*'s enhanced mid-level scrutiny afforded to those suffering from disadvantaging gender classification.²⁷ Similarly, with respect to the second judicially-inferred possible interest of ensuring that the parent and the child have the opportunity to develop a real and meaningful relationship with each other, the majority settled for another "Congress[ionally] enacted . . . easily administered scheme."²⁸ The statutory scheme approved here of course is without regard to whether the father actually had a deep, meaningful, and long-standing relationship with his child, as Joseph Boulais did with his son Tuan Nguyen.

More significant than my own conclusion that the majority's sex-discrimination test is less rigorous than the *VMF* version of the test is the

²³ *Nguyen*, 533 U.S. at 70.

²⁴ *Id.* at 62.

²⁵ *Id.* at 57.

²⁶ *Id.* at 63.

²⁷ A case for a weaker standard might well be made if the gender classification was done for true affirmative-action reasons, but no such claim was made or was possible in the instant case. For indications that the Court applies more relaxed versions of the relevant level of scrutiny in affirmative action cases, see, for example, *Califano v. Webster*, 430 U.S. 313 (1977); *Kahn v. Shevin*, 416 U.S. 351 (1974); *cf. Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Morton v. Mancari*, 417 U.S. 535 (1974). *But see Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980).

²⁸ *Nguyen*, 533 U.S. at 69.

fact that *Nguyen's* four dissenters,²⁹ including Justice Ginsburg who authored *VMI*, emphatically complained that the majority was seriously diluting *VMI*:

While the Court invokes heightened scrutiny, the manner in which it explains and applies this standard is a stranger to our precedents.

....

Today's decision . . . represents a deviation from a line of cases in which we have vigilantly applied heightened scrutiny to [sex-based] classifications I trust that the depth and vitality of these precedents will ensure that today's error remains an aberration.³⁰

The *Nguyen* majority's articulation and application of the level of scrutiny applied to gender discrimination is critically different from the version espoused by the dissent. While the majority's lone reference to "exceedingly persuasive" was almost an embarrassed afterthought, the dissent used the term early and often,³¹ and would have rejected the government's transparently superficial justifications by rigorously applying *Virginia's* "skeptical scrutiny."

II. THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME, OR DO THEY?

Ruben Flores-Villar was born in Mexico in 1974. Like *Nguyen*, Flores-Villar was born to unmarried parents. His biological father was an American citizen but his mother was not. He was brought to the United States as an infant, and he grew up in California with his father and grandmother, also an American citizen. As an adult, Flores-Villar was convicted of importation of marijuana and illegal entry into the United States. He was removed from the United States several times as an alien. Flores-Villar was arrested in California in 2006 and convicted of being a deported alien improperly in the United States.³² His defense that he was an American citizen was rejected by the District Court and the Ninth Circuit Court of Appeals.³³ The derivative citizenship statute required a citizen father to have ten years of U.S. residency, at least five of which were after attaining the age of 14, to confer citizenship on his child.³⁴

²⁹ Justice O'Connor wrote the dissenting opinion. She was joined by Justices Souter, Ginsburg, and Breyer. *Id.* at 74.

³⁰ *Id.* at 74, 97 (O'Connor, J., dissenting).

³¹ The dissent used the term "exceedingly persuasive" five times in its opinion. *Id.* at 74, 76, 79, 89.

³² *United States v. Flores-Villar*, 536 F.3d 990, 994 (9th Cir. 2008).

³³ *Id.* at 994, 999.

³⁴ 8 U.S.C. § 1401(a)(7) (1970) (later redesignated as 8 U.S.C. § 1401(g)). The statute was amended in 1986 to only require that the father be physically present in the United States for five years, at least two of which were after the parent reached age fourteen. Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 12, 100 Stat. 3655, 3657.

Since the father was only 16 at the time of Flores-Villar's birth, it was logically impossible for the father to meet the statutory requirement prior to his son's birth in order to confer citizenship on Flores-Villar.³⁵ If the citizenship of Flores-Villar's mother and father had been reversed, Ruben would have acquired United States citizenship at birth as long as his mother had resided in the United States for one year.³⁶

Flores-Villar argued that the gender difference in the length and nature of residency requirements for citizen mothers and fathers to transmit citizenship violated his equal protection rights.³⁷ The district court judge and the three judge panel for the Ninth Circuit were bound by *Nguyen*. Although the facts and the application of the statutory distinctions are different in *Nguyen* and *Flores-Villar*, it is no surprise that all four judges rejected the defendant's equal protection claim on the basis of the majority's gender discrimination standard in *Nguyen*.³⁸ Flores-Villar's criminal conviction was affirmed.³⁹ That, one might very well have thought, was that.

Instead, Flores-Villar's federal public defender filed a petition for a writ of certiorari with the United States Supreme Court on August 3, 2009.⁴⁰ The Solicitor General (now Supreme Court Justice Elena Kagan) responded on behalf of the Government with a brief in opposition to certiorari.⁴¹ Many certiorari petitions are filed; few are granted. The chances that the Court would take Flores-Villar's case seemed even weaker than usual given the position that the Solicitor General took in her brief: "Further review of [the Ninth Circuit] decision is not warranted . . . because it does not conflict with any decision of this Court or of any other court of appeals, because it is correct, and because it concerns a statute that has been materially amended."⁴²

In response, the federal public defender submitted a reply brief on January 21, 2010.⁴³ There is a subtle but potentially important difference in emphasis between the original filing, the petition for certiorari, and the reply brief in support of the petition. The initial petition essentially fully accepted *Nguyen* and attempted to categorically distinguish *Flores-Villar* on the ground that there is no biological basis for the differential

³⁵ *Flores-Villar*, 536 F.3d at 994.

³⁶ *Id.* at 995; 8 U.S.C. § 1409(a), (c) (1970).

³⁷ *Flores-Villar*, 536 F.3d at 993, 995.

³⁸ In this regard, the Ninth Circuit panel said: "This precise question has not been addressed before, but the answer follows from the Supreme Court's opinion in *Nguyen*." *Id.* at 993.

³⁹ *Id.*

⁴⁰ Petition for Writ of Certiorari, *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (No. 09-5801).

⁴¹ Brief for the United States in Opposition, *Flores-Villar*, 131 S. Ct. 2312 (No. 09-5801).

⁴² *Id.* at 9.

⁴³ Reply Brief in Support of Petition for Writ of Certiorari, *Flores-Villar*, 131 S. Ct. 2312 (No. 09-5801).

treatment of fathers and mothers, even if there might have been a biological basis in *Nguyen*.⁴⁴ The core of the reply brief, in contrast, focused on the level of scrutiny for gender discrimination and the rigor of application, especially with respect to the necessary tightness of the means–ends fit.⁴⁵ Here, petitioner relied on the classic rigorous gender-discrimination cases, including *Craig v. Boren*,⁴⁶ *Mississippi University for Women v. Hogan*,⁴⁷ *United States v. Virginia*,⁴⁸ and notably a quotation from Justice O'Connor's dissenting opinion (rather than the majority) in *Nguyen*.⁴⁹ Now the matter was in the pile of certiorari petitions awaiting Supreme Court action.

III. THE DENOUEMENT

One thing that had changed between *Nguyen* and the filing of the petition for certiorari in *Flores-Villar* was the composition of the Supreme Court. Chief Justice John Roberts had replaced Chief Justice Rehnquist from the *Nguyen* majority. The author of the dissenting opinion, Justice O'Connor, was replaced by Justice Samuel Alito, and another of the dissenters, Justice Souter, was replaced by Justice Sonia Sotomayor.⁵⁰ These changes did not suggest that the new Court would be more receptive to claims of gender discrimination. Against the odds, the Supreme Court nonetheless granted Mr. Flores-Villar's petition for certiorari on March 22, 2010.⁵¹ I am confident that almost all of those who were aware of the case were rather surprised by the Court's decision to take the case. Unless Chief Justice Roberts and Justice Alito wanted to have a fresh look at the principles announced in *Nguyen*, and followed or extended by the lower court judges in *Flores-Villar* (a highly unlikely

⁴⁴ See, e.g., Petition for Writ of Certiorari, *supra* note 40, at 9–16. The sole question presented by petitioner for review was: “Whether the Court’s Decision in *Nguyen v. INS Permits Gender Discrimination That Has No Biological Basis?*” *Id.* at i. Most of petitioner’s argument focused on this question and the asserted distinction between the instant case and *Nguyen*. For example, “In short, unlike the distinctions upheld in *Nguyen*, the residency differential is not based on any innate biological differences between men and women.” *Id.* at 16.

⁴⁵ See Reply Brief in Support of Petition for Writ of Certiorari, *supra* note 43, at 6–12. The Reply Brief also responded to the Solicitor General’s positions that petitioner lacked standing, *id.* at 3–6, that the courts lacked remedial power, *id.* at 12–14, and that the Supreme Court should deny certiorari because the statutory provisions affecting Flores-Villar had been amended in a more lenient direction, *id.* at 14–15.

⁴⁶ 429 U.S. 190 (1976).

⁴⁷ 458 U.S. 718 (1982).

⁴⁸ 518 U.S. 515 (1996).

⁴⁹ Justice O'Connor’s quote calling for a “much tighter fit between means and ends,” *Nguyen*, 533 U.S. at 78, appears in the Reply Brief in Support of Petition for Writ of Certiorari, *supra* note 43, at 10–11.

⁵⁰ ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 290–91 (Sanford Levinson rev., 5th ed. 2010).

⁵¹ 130 S. Ct. 1878 (2010).

occurrence), it seems evident that either Justice Stevens or Justice Kennedy (*Nguyen's* author) or both must have developed second thoughts about *Nguyen*.⁵² On April 9, 2010, just a few weeks after certiorari was granted in *Flores-Villar*, Justice Stevens announced his intention to retire from the Court.⁵³ Former Solicitor General Elena Kagan was appointed to replace him, and Justice Kagan was sworn in on August 7, 2010.⁵⁴

Merits briefs were filed by the parties and amici. The Supreme Court heard oral argument in *Flores-Villar* on November 10, 2010.⁵⁵ Deputy Solicitor General Edwin Kneedler presented oral argument for the government as he had in *Nguyen*, one more common thread binding *Nguyen* and *Flores-Villar*.⁵⁶ Ten years on, it justifiably may have seemed to Mr. Kneedler to be “*déjà vu* all over again.”⁵⁷ While the argument dealt with a number of different issues,⁵⁸ there was express discussion of the level of scrutiny that should be applied in the instant case.⁵⁹ We already know how things turned out. With only eight active Justices participating, the Court divided 4–4 and perforce affirmed Mr. Flores-Villar’s conviction from the lower courts without expressing any further clarifying views on the scope or continued vitality of *Nguyen*. But I argue that there are a number of inferences that should be drawn from behind the veil of the Court’s opacity.

⁵² In truth it is virtually impossible to imagine the necessary four votes for certiorari without at least one of them coming from either Justice Stevens or Justice Kennedy, presumably joining Justices Ginsburg, Breyer, and Sotomayor.

⁵³ Sheryl Gay Stolberg & Charlie Savage, *Stevens’s Retirement Is Political Test for Obama*, N.Y. TIMES (Apr. 9, 2010), <http://www.nytimes.com/2010/04/10/us/politics/10stevens.html?pagewanted=all>.

⁵⁴ Peter Baker, *Kagan Is Sworn In as the Fourth Woman, and 112th Justice, on the Supreme Court*, N.Y. TIMES, Aug. 8, 2010, at A13.

⁵⁵ Transcript of Oral Argument, *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (No. 09-5801).

⁵⁶ *Flores-Villar*, 131 S. Ct. at 2313; *Nguyen v. INS*, 533 U.S. 53, 56 (2001).

⁵⁷ YOGI BERRA, *THE YOGI BOOK 30* (1998).

⁵⁸ The issues discussed included, *inter alia*, biological differences between mothers and fathers in the *Nguyen* and *Flores-Villar* circumstances; stereotype and reality-based gender distinctions; the government’s putative concern with the problem of statelessness; statutory construction, severability and remedy issues; and the plenary power doctrine in immigration and naturalization law. Transcript of Oral Argument, *supra* note 55.

⁵⁹ *E.g.*, *id.* at 24, 27–32, 34–36. Justice Sotomayor asked Mr. Kneedler if the government was arguing for “the rational basis plus test,” *id.* at 29, and Justice Breyer followed up by directly telling Mr. Kneedler that “what you are doing is applying a lesser standard to gender discrimination than is ordinarily applied to gender discrimination.” *Id.* at 30–31. Justice Ginsburg highlighted the gender discrimination contained in the statutory classification by inquiring what would happen if the residency requirements were reversed and the more stringent one applied to citizen-mothers. Her hypothetical got Mr. Kneedler to concede that this might present a difficult constitutional Equal Protection question. *Id.* at 34–36.

First, there were four votes to reverse the Ninth Circuit. Justice Kagan's decision to recuse herself from the *Flores-Villar* case was an easy one since she had been counsel of record on the government's brief in opposition to Mr. Flores-Villar's petition. With Justice Stevens retired and Justice Kagan not participating, the most logical conclusion is that Justice Kennedy provided the fourth vote to reverse Mr. Flores-Villar's conviction despite having authored *Nguyen*.

Second, although the Court heard oral argument barely a month into its 2010–2011 term on November 10, 2010, it did not issue its decision in *Flores-Villar* until June 13, 2011, within two weeks of the end of the term. That suggests strongly that more was going on within the Court than meets the eye. If the Justices were split evenly and irrevocably on the outcome from the beginning, there would have been no need or reason to delay issuing the simple affirmance without a merits opinion to the end of the term. Quite probably the four Justices who ultimately voted to affirm were trying to get a majority opinion relying on the weakened version of mid-level scrutiny (or less) endorsed in *Nguyen*, and they lost Justice Kennedy somewhere along the way. Or, the four Justices who voted to reverse were prepared to apply the more rigorous (and post-*Virginia* standard) version of mid-level scrutiny espoused in Justice O'Connor's *Nguyen* dissent but could not attract a fifth Justice. Either way, the critical question of whether the analytical framework of *Nguyen* will be reaffirmed and expanded to other classes of gender-discrimination claims, or narrowly restricted to the facts and statutory clauses at issue in *Nguyen*, or abandoned altogether in a future overruling of *Nguyen*, seems to depend upon the views of Justice Kagan in future cases.

Third, I will be so bold as to venture that when those cases come before the Court, Justice Kagan will align herself with the philosophy of Justices Ginsburg and O'Connor that gender-discrimination claims deserve the rigorous, skeptical, heightened version of mid-level scrutiny of *Virginia*.

I freely confess that the previous three paragraphs are based to some extent on inference.⁶⁰ I am filling in between the lines, but I take comfort from the fact that one of the greatest Supreme Court Justices, Robert Jackson, in a different context extolled the "great silences of the Constitution."⁶¹ My inferences are also from silences, those of the Court. If I am right, the inherent tension between the analytical approaches of *Nguyen* and *United States v. Virginia* will be resolved in favor of *Virginia*. This is because *Flores-Villar* and its context demonstrate that a majority of

⁶⁰ The lack of footnotes in these paragraphs is intended as a small homage to legendary former Yale Law Professor Fred Rodell, who long ago argued against the course that law review literature has taken and made his point in a short article without a single footnote. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1937). Well, at least my Essay is short.

⁶¹ *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949).

the current Supreme Court will not water down or renege on its commitment to gender equality, as reflected most prominently in *Virginia. Nguyen* is dead for all practical purposes, or at the very least confined to extremely cramped quarters.