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DISCRIMINATION BASED ON SEX AND ILLEGITIMACY IS PERMISSIBLE IN THE IMMIGRATION AREA—FIALLO V. BELL

In a recent decision, *Fiallo v. Bell*, the Supreme Court has implied that equal protection, guaranteed to every citizen by the Constitution, may be denied to fathers and illegitimate children who are citizens if the discriminatory classification is made in the context of the immigration laws. Noting the broad power Congress has over aliens and the political nature of this area, the Court declined the opportunity to distinguish this case from prior immigration cases even though this was not the ordinary instance of preferring one type of alien over another. In *Fiallo* a relationship with particular citizens determined the class, and the discrimination that occurred was not between aliens, but between citizens.

Plaintiffs were three sets of unwed biological fathers and their illegitimate children who challenged the constitutionality of sections

3. 430 U.S. at 800.
4. "'Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.'" *Id.* at 792, quoting *Oceanic Navigation Co. v. Strananhan*, 214 U.S. 320, 339 (1909).
5. "'[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.'" *Id.*, quoting *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976). The political aspect of the immigration area is derived from the concept of sovereign power of the federal government. Because of its sovereign power, the federal government has an enormous amount of control in the area of immigration law. However, the courts have found immigration issues to be justiciable and thus not precluded from judicial review. Immigration disputes are not primarily a function of the legislature and therefore are not immune from judicial review under the separation of powers principle. Likewise, such disputes are not immune from review under the political question doctrine. See generally *Scharpf, Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).
7. The hopelessness of the plaintiffs' situation is exemplified by the Wilson family. Arthur Wilson acknowledged Trevor and Earl as his illegitimate sons. He lived with them and supported them until 1968, at which time they moved to New York City with their mother. From 1968 until 1974, Mr. Wilson maintained his relationship with his sons by visits and correspondence. He also continued to support them financially. After their mother died in 1974, the two boys asked their father to come to live with them in the United States, but Mr. Wilson was only able to stay for as long as an emergency visa allowed. Since his children were illegitimate, Mr. Wilson was unable to settle in this country without a labor certificate. However, if a mother were in Mr. Wilson's position or if the children were legitimate, the parent would have been able to enter the country without a labor certificate. 406 F. Supp. at 169-70. Substantial
101(b)(1)(D)\textsuperscript{8} and (b)(2)\textsuperscript{9} of the Immigration and Nationality Act.\textsuperscript{10} These sections define "child" and "parent" for the purpose of determining immediate relative status. The importance of this status is that it allows an alien to circumvent the quota on admissions\textsuperscript{11} and the labor certification.\textsuperscript{12} Aliens seeking entry are subject to annual nu-

evidence exists to prove that Arthur Wilson is the natural father of the children. Since the mother died, the children can never be legitimized. Therefore, either the children will become wards of the state or they will be forced to give up their citizenship. Congress never intended such a harsh result, especially in light of the purpose in enacting the amendment: to reunite the family and alleviate hardships imposed upon the American citizen. \textsuperscript{103} CONC. REC. 14659 (1957). For information on the other plaintiffs, see 406 F. Supp. at 169-70.

8. Section 101(b)(1)(D) of the Immigration and Nationality Act states:

(i) The term "child" means an unmarried person under twenty-one years of age who is—

(D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;


9. Section 101(b)(2) of the Immigration and Nationality Act states:

The terms "parent," "father," or "mother" mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection.


11. Aside from exceptions for "special immigrants," § 1101(a)(27), and "immediate relatives," § 1151(b), the quota on admissions is set at not more than 45,000 persons for each of the first three quarters of any fiscal year and not more than 170,000 persons for the full fiscal year. 8 U.S.C. § 1151(a) (1970).

1921 marked the origin of quota laws in the United States. After World War I, poverty, distress, hunger, and disease was widespread in Europe. It was estimated that between two million and eight million persons in Germany alone wanted to come to the United States. The Congress at the time was concerned with housing, disease, unemployment, and the adverse effect on business conditions that would result if they did not restrict the influx of immigrants into the United States. H.R. REP. No. 1365, 82d Cong., 2d Sess. 2, reprinted in [1952] U.S. CODE CONG. & AD. NEWS 1666-67. See Note, Immigrants, Aliens, and the Constitution, 49 NOTRE DAME LAW. 1075, 1076-78 (1974). See also Symposium, The Immigration System: Need to Eliminate Discrimination and Delay, 8 U. CALIF. D. L. REV. 191, 195-210 (1970).

12. Section 212(a)(14) of the Act states the following requirement for labor certification:

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

8 U.S.C. § 1182(a)(14) (1970). Effective January 1, 1977, the immediate relative status will no longer exempt an alien from the requirement of obtaining a labor certificate. Pub. L. No. 94-571 (1976). This amendment, however, has a savings clause which says that it will not operate to affect the entitlement of an alien who has applied for the preference prior to the effective date. Therefore, this law would not affect the plaintiffs if the Court had ruled in their favor.
merical limitations and, if their objective is to perform skilled or unskilled labor, must be certified by the Secretary of Labor. An immediate relative is exempt from both requirements. Under the challenged sections, special preference is granted to an illegitimate child by virtue of its relationship with its natural mother but is denied if the relationship is with its natural father.

The statutory provisions were attacked on the grounds that they violated equal protection by discrimination against the plaintiffs as natural fathers and illegitimate children. The plaintiffs also alleged that the statute denied them due process of law and infringed upon their fundamental right to privacy and mutual association. The three-judge district court, with one judge dissenting, rejected the plaintiffs' contentions. Emphasizing the exclusive power of Congress in the immigration area, the lower court held that the provisions were neither "wholly devoid of any conceivable rational purpose" nor "fundamentally aimed at achieving a goal unrelated to the regulation of immigration." 

See Rodino, The Impact of Immigrants on the American Labor Market, 27 RUTGERS L. REV. 245 (1974). The purpose of requiring a labor certificate was to protect the United States laborers from competition with alien workers.

13. "Immediate relatives" mean the children, spouses, and parents of a citizen of the United States. They are admitted without regard to the numerical limitations imposed on all other aliens. 8 U.S.C. § 1151(b) (1970).


15. The fathers claimed discrimination on the grounds of gender and marital status. 430 U.S. at 791.

16. The plaintiffs claimed that there was established "an unwarranted conclusive presumption of the absence of strong psychological and economic ties between natural fathers and their children born out of wedlock and not legitimated." Id. However, the Court did not direct itself to this issue. If it had, the Court would have had to have dealt with the decisions that have held irrebuttable presumptions to be unconstitutional. In Vlandis v. Kline, 412 U.S. 441, 446-54 (1973), the Court found that the due process clause of the Fourteenth Amendment does not permit a state to deny an individual the opportunity to present evidence that he is a bona fide resident entitled to in-state tuition rates, on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination. Similarly, the Court in Stanley v. Illinois, 405 U.S. 645, 649, 657-58 (1972) found that the presumption under Illinois law that unmarried fathers are unsuitable and neglectful parents is violative of due process, and that an unwed father must be granted a hearing on his fitness as a parent before his children could be taken from him in a dependency proceeding after death of the children's natural mother.


18. Id. at 168 (Weinstein, J., dissenting). Judge Weinstein argued that the classification created by Congress pertained to citizens and permanent residents and, therefore, should be subjected to more meaningful scrutiny. Id. at 170.

19. Id. at 166.

20. Id.
The Supreme Court refused to accept the Government's position that a "substantive policy regulating the admission of aliens in the United States [is] not an appropriate subject for judicial review," 21 but nevertheless upheld the validity of the statute. The decision to exclude aliens, the Court stated, involved fundamental principles of sovereignty, 22 was subject to limited judicial scrutiny, and did not violate the equal protection rights of plaintiffs. The majority would not acknowledge that the rights of citizens were involved. 23 Justice Marshall, joined by Justice Brennan, strongly dissented, 24 characterizing the scrutiny employed by the majority as "abdication." 25

This Note will examine the constitutional basis of congressional authority to regulate immigration and the judicial authority to review legislation in this area. After demonstrating that the fact of citizenship of the plaintiffs distinguishes this case from the precedent relied upon by the majority, it will argue that the Court should have employed traditional equal protection analysis. Finally, the impact of this decision will be considered.

**EVOLUTION OF IMMIGRATION LAW**

Congress received its authority to control immigration from the Constitution under the delegated power of Congress to regulate commerce with foreign nations. 26 For the first one hundred years of


22. 430 U.S. at 792. Justice Field writing for the majority in The Chinese Exclusion Case, 130 U.S. 581 (1889), stated that the power to exclude was one of "those sovereign powers delegated by the Constitution." Id. at 609. His juxtaposition of these two words, "sovereign" and "delegated," has led to the development of the "plenary power" doctrine in the area of immigration and has also caused much confusion. Plenary power refers to the expansiveness of Congress' power to legislate in the immigration area. Yet, the use of sovereignty and delegation to describe this power is contradictory. A sovereign power is one inherent in an independent nation. See Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892). On the other hand, if the source of a delegated power is the Constitution, then the power must be exercised within constitutional limits. See generally Helbush, Aliens, Deportation and the Equal Protection Clause: A Critical Reappraisal, 6 GOLDEN GATE L. REV. 23 (1975); Quarles, The Federal Government: As To Foreign Affairs, Are Its Powers Inherent As Distinguished From Delegated?, 32 GEO. L.J. 375 (1944).

23. 430 U.S. at 795-96 n.6.

24. 430 U.S. at 800 (Marshall, J., dissenting).

25. Id. at 805 (Marshall, J., dissenting).

this nation's existence, immigration was essentially unrestricted. Thereafter, the legislation that evolved either prohibited the entry of certain types of aliens or limited the number of any nationality entering the United States.

In 1952 Congress made substantial changes in the existing immigration and naturalization laws by introducing a system of selective immigration by giving special preferences to relatives of United States citizens. The sections challenged in Fiallo were part of certain 1957 amendments to this 1952 Act. These sections granting preferences were substantially different from the rest of the immigration legislation that was passed, because only these sections were directed to citizens.

The Fiallo Court assumed that the citizen had no right in the admission of the alien, only an interest in that admission. However, the statutory language and articulated purpose of the challenged sections of the Act clearly demonstrate that preferences were established for the benefit of the citizen. According to the legislative history, the purpose of the preferential status was to alleviate the hardships of American citizens caused by separation of families. The history mentioned several times that "Congress intended to provide for a liberal treatment of children and was concerned with the problems of keeping families of United States citizens and immigrants united." With this objective, section 1154(a) sets forth a procedure by which an alien may receive a preference. The section begins by stating that "any citizen of the United States claiming that an alien is entitled to a preference status by reason of the relationship . . . may file a petition with the Attorney General." It appears clear from the language that


28. In 1921, Congress passed the first quota law limiting the number of any nationality entering the United States to 3% of foreign-born persons of that nationality who lived in the United States in 1910. Act of May 19, 1921 ch. 8, 42 Stat. 5. See note 11 supra.

29. A child born to an American outside the United States may come into the country under the preferential status of an immediate relative. However, he is not automatically a citizen. Rather, he is a "derivative citizen," who must satisfy certain statutory conditions in order to become an American citizen. See Symposium, The Conditional Nature of Derivative Citizenship, 8 U. CALIF. D. L. REV. 345 (1975).


31. See note 38 infra.

32. 430 U.S. at 795-76 n.6.

33. 103 CONG. REC. 14659 (1957).


36. Id. (emphasis added).
Congress specifically granted the privilege of petitioning for a preferential status to the citizen. Aliens cannot petition directly.\textsuperscript{37} The citizen is the person who has the right to request the preference, and it is this statutory right that is affected.\textsuperscript{38} Therefore, when a right is given to everyone except a small designated group of citizens, the Court should review the classification as it would any other discrimination since it is citizens’ not aliens’ rights that are affected.

\textbf{PRIOR CASE LAW}

In reaching its decision in \textit{Fiallo} the Supreme Court relied upon prior immigration cases which involved disputes between aliens and the government.\textsuperscript{39} That situation presented little conflict and required minimal analysis because the alien had no constitutional right to enter this country.\textsuperscript{40} However, \textit{Fiallo} involved citizens, aliens and the government, and therefore presented a more complex problem: an apparent conflict between Congress’ exclusive right to regulate immigration and citizens’ constitutionally protected rights to equal protection and due process.

\textsuperscript{37} If a citizen does not file, an alien will not qualify as an “immediate relative” no matter how he might otherwise fit the statutory definition.

\textsuperscript{38} It is significant to note that § 1154(a) is the only section in the Immigration and Nationality Act directly affecting the admission or entry (or reentry) of aliens in which application is to be filed by the citizen. In all other sections, application is to be filed by the alien. See § 1202(a) (application for visa); § 1203(a) (reentry permit); § 1254 (suspension of deportation); § 1302 (registration of aliens); § 1326(2) (reentry of deported aliens); § 1445(a) (requirements of naturalization).

\textsuperscript{39} See Galvan v. Press, 347 U.S. 522 (1954) (alien challenged sufficiency of evidence to sustain his deportation and attacked the constitutionality of the Internal Security Act); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (Greek national challenged the validity of his deportation proceeding and attacked the constitutionality of the Alien Registration Act); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (Chinese laborer filed a petition for a writ of habeas corpus challenging his deportation proceeding).

Although Congress has the exclusive power to make policy concerning the entry of aliens,\(^4\) neither early precedent\(^2\) nor constitutional authority\(^3\) vested in Congress an unfettered discretion. The Constitution is an instrument of checks and balances, and the concept of unrestrained power is "manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights . . . ."\(^4\) The powers enumerated in the Constitution are limited by the restraints incorporated in that instrument, and the Court cannot interpret a constitutional power granted to Congress in a way that would conflict with or violate another section of the Constitution, namely the Bill of Rights.\(^5\)

The Court itself recognized a restraint on congressional power in a recent immigration case, *United States v. Brignoni-Ponce*.\(^6\) In

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41. In *Galvan v. Press*, 347 U.S. 522 (1954), a Mexican-alien alleged that he had joined the Communist party without knowledge of its advocacy of violence and challenged the constitutionality of the Internal Security Act. The Court held that "[t]he power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty." *Id.* at 530. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), an alien was excluded from the United States for security reasons. He was stranded on Ellis Island because other countries would not take him back. The Court held that continued exclusion, without a hearing, did not deprive the plaintiff of any constitutional right because the "[j]udicial power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Id.* at 210. In *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), a Greek national filed a petition for habeas corpus because he was challenging the validity of his deportation. He claimed that although he was a member of the Communist party, his membership terminated before the enactment of the Alien Registration Act of 1940. The Court sustained the constitutionality of the Act which made membership in the Communist party grounds for deportation because the authority to restrict aliens arises under international law as a power inherent in every sovereign state. *Id.* at 587-89. *See also* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); *Boutilier v. INS*, 387 U.S. 118 (1967); *The Chinese Exclusion Case*, 130 U.S. 581 (1899).


43. U.S. CONST. art. I, § 8, cl. 3, 4, 11. Congressional power over aliens is found in the delegated powers of foreign commerce, naturalization, and war.

44. Reid v. Covert, 354 U.S. 1, 17 (1957). At issue in this case was the supremacy of the Constitution over Congress' treaty power. Justice Black argues that the Constitution is a model of power and restraint. *See also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-80 (1803).

45. In *Geofroy v. Riggs*, 133 U.S. 258 (1890), the Court stated that "[t]he treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government . . . ." *Id.* at 267. *See Kleindienst v. Mandel*, 408 U.S. 753, 783 (1972) (Marshall, J., dissenting); *United States v. Rebel*, 389 U.S. 258, 264 (1967); and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

46. 422 U.S. 873 (1975).
Brignoni-Ponce, the government had infringed upon the Fourth Amendment rights of citizens while acting pursuant to a provision of the Act which was directed to aliens. Responding to this violation, the Court stated:

Although we may assume for purposes of this case that the broad congressional power over immigration . . . authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in this country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens.  

The majority in Fiallo rejected the plaintiffs' argument that Congress' power could not diminish Fifth Amendment rights of citizens and distinguished the Brignoni-Ponce decision by saying that "at issue [in Brignoni-Ponce] . . . was the nature of the protections mandated by the Fourth Amendment with respect to government procedures designed to stem the illegal entry of aliens." The Court further reasoned that since an "exercise of the Nation's sovereign power to admit or exclude foreigners" was involved, the statutory discrimination would be subject only to limited judicial review. However, the Court failed to notice that the same "sovereign power" was involved in Brignoni-Ponce and that they neither limited their review nor hesitated in restricting Congress' power in that decision.

The Fiallo Court also placed great reliance upon a 1973 immigration decision, Kleindienst v. Mandel, for its position that an alleged infringement of a citizen's fundamental right does not require a stricter standard of review. In Kleindienst, a Belgian alien and American citizens brought an action to compel the Attorney General to issue a

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47. U.S. CONST. amend. IV: "The right of the People to be secure in their persons, houses, papers and effects against unreasonable search and seizures . . ."
48. 422 U.S. at 883-84. In an earlier case, Almeida-Sanchez v. United States, 413 U.S. 266 (1973), a Mexican citizen was arrested for illegally importing marijuana when a warrantless search of his automobile was made without probable cause by a roving patrol of the United States Border Patrol. The Court held that the search was not a border search, was not justified by the Immigration and Nationality Act, and violated the alien's rights under the Fourth Amendment. Justice Powell in a concurring opinion stressed that the government's need to enforce immigration laws must be consistent with the requirements of the Fourth Amendment. Id. at 284 (Powell, J., concurring). In United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the Court made its most recent statement on the issue of Fourth Amendment rights and the government's interest in stopping the illegal entry of aliens. The Court held that the stopping and questioning of occupants of automobiles may be "made in the absence of any individualized suspicion at reasonably located checkpoints." Id. at 562. See generally Symposium, Border Searches: Beyond Almeida-Sanchez., 8 U. CALIF. D. L. REV. 163 (1975).
49. 430 U.S. at 794.
50. Id. at 795-96 n.6.
51. 408 U.S. 753 (1972).
waiver to the alien-journalist so that he might enter the country on a temporary basis to participate in academic conferences and discussions. The citizens claimed that failure to allow his entry would be a violation of their First Amendment right of freedom of speech and the right to receive information. The Kleindienst Court rejected this argument and applied only a limited review.

Kleindienst, however, is distinguishable from Fiallo in several important respects. First, the stated purpose of section 212(a)(28)(D), which was used to exclude the alien-journalist in Kleindienst, was to assure "that undesirable aliens will not gain admission to the United States." The section excluded aliens who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship. Throughout the section the emphasis is directed towards aliens. Any effect which this provision might have upon the rights of citizens is "merely an incidental and unavoidable consequence of that political judgment." On the other hand, the stated purpose in Fiallo was to alleviate hardships of the American citizens by reuniting their families. For this reason, only citizens are allowed to petition.

Another point of distinction between Kleindienst and Fiallo involves the nature of the complaint in the cases. In Kleindienst the plaintiffs conceded that Congress had the authority to exclude the

53. 408 U.S. at 760. The citizens also contended that § 212(a)(28) denied them equal protection by permitting entry of "rightists" but not "leftists" and that same section deprived them of procedural due process. Id.
54. Id. at 770. The Court accepted the Attorney General's facially legitimate reason for denying the waiver and refused to look behind the exercise of the discretion. Id. at 769-70.
57. 8 U.S.C. § 1182(a)(28)(D) (1970). The statutory provision involved in Kleindienst is part of the Immigration and Nationality Act's section entitled "Excludable aliens." 8 U.S.C. § 1182 (1970). Subsection 28, the subsection involved in Kleindienst contains nine provisions (A through I), all of which refer specifically to aliens. Citizens are not mentioned. Furthermore, § 1182(d)(3), the provision which permits waiver of ineligibility, makes it clear that it is the alien who is filing the application when it states "[e]xcept as provided in this subsection, an alien (A) who is applying for a nonimmigrant visa [may be granted a waiver]." Id.
58. 430 U.S. at 808 (Marshall, J., dissenting).
59. See text accompanying notes 33 & 34 supra.
aliens who held beliefs similar to the alien-journalist Mandel and challenged only the exercise of discretion by the Attorney General in denying a waiver. The plaintiffs asked the Court to weigh the Attorney General’s discretion against their First Amendment right to be informed. The Court reviewed the facts and found no abuse of the discretion because the denial was based on a “legitimate and bona fide reason.” The Court hesitated in finding an abuse, because it feared the possibility of reviewing every instance where the Attorney General denies an ineligible alien’s entry into the country. In Fiallo, however, the plaintiffs were challenging a statutory provision which they considered to be unconstitutional on its face, and the threat of a case-by-case review was not present. Consequently, the Fiallo Court’s reliance upon the Kleindienst decision seems inappropriate.

APPROPRIATE METHOD OF ANALYSIS

Since citizens’ rights were affected and since the Court was asked to determine the constitutionality of an act of Congress, the Fiallo Court should have employed the same judicial review that any other equal protection case would have required. The standard of review previously employed in equal protection analysis has been articulated as a two-tier model. If the government discriminates against a “suspect” class or if a fundamental right is involved the Court will apply rigid scrutiny. This level of review requires the government to carry the burden of proof by showing that their action furthers a compelling state interest and is the least restrictive alternative capable of accomplishing the state interest in order to justify the discrimi-

61. 408 U.S. at 767.
62. Id. at 754.
63. Id. at 770. The Court found that past abuses of the privilege by Mandel was a legitimate and bona fide reason for denying the waiver. Id. at 769.
64. Id. at 768-69.
65. 430 U.S. at 791.
nation. If, on the other hand, no suspect class or fundamental right is involved, the rational basis test is applied. The legislation is presumed to be reasonable, and all that the government must show is a rational relationship between the purpose of the law and the classification.

This two-tier theory, however, does not adequately explain the level of scrutiny the Court has applied in all areas of equal protection. In *Fiallo* the classes discriminated against were natural

68. In Shapiro v. Thompson, 394 U.S. 618 (1969), the Court found a one year residency requirement for receiving welfare assistance to be unconstitutional because the effect of the requirement was to inhibit the exercise of the fundamental right to interstate travel. The Court held that the government failed to justify the one year requirement with assertions that it facilitates planning of the welfare budget, minimizes fraudulent claims, provides an objective test for residency and encourages new residents to work. Some examples of cases where the Court has found a legitimate compelling state interest are Roe v. Wade, 410 U.S. 113 (1973) (protecting potential life in the last trimester of pregnancy) and Korematsu v. United States, 323 U.S. 214 (1944) (national security in time of war). See generally Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clause*, 50 S. CALIF. L. REV. 689, 689-718 (1977).


70. Members of the Court have acknowledged that the Court uses other levels of scrutiny besides the traditional two levels. Justice Powell, in Craig v. Boren, 429 U.S. 190 (1976), recognized a middle-tier that is used in scrutinizing gender-based classifications. *Id.* at 464 n.* (Powell, J., concurring). Justice Marshall, in San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), found that the Court took a "reasoned approach" which he described as a function of three variables: characterization of the classification, the importance of the right being infringed upon, and the asserted state interest. *Id.* at 98-99 (Marshall, J., dissenting).

Legal commentators have also noted the inherent weakness of the present two tier system. One authority proposed a three tier approach to equal protection in which the alleged discrimination is classified into one of three groups:

1. prohibited, which is similar to the present suspect classification,
2. permissive, which is similar to the present rational basis classification, or
3. neutral, in which the state must show the means used bears a factually demonstrable relationship to the stated objective.

fathers and illegitimate children. Classifications based on gender or legitimacy have received more than minimal review. The Court requires that the government show that the method employed bears a "fair and substantial relation to the object of the legislation."\textsuperscript{71} When the Court reviews sex or illegitimacy cases it looks at the stated purpose of the statute and will not substitute another purpose. In neither situation is administrative or economic efficiency a sufficient justification.\textsuperscript{72}

The courts which have dealt with the classification in \textit{Fiallo}, therefore, should have asked whether it bore a "fair and substantial relation to the object of the legislation." However, the lower court rejected the purpose found in the legislative history\textsuperscript{73} of reuniting families and substituted instead the objective of minimizing the potential for spurious claims and facilitating administrative convenience.\textsuperscript{74} A majority of the Supreme Court accepted this theory.\textsuperscript{75}

Administrative efficiency has not been accepted as a sufficient justification under prior holdings, and does not bear a "fair and substantial" relation to the section excluding natural fathers and illegitimates.\textsuperscript{76} As Justice Marshall pointed out in his dissent,\textsuperscript{77} a stepmother who petitions for her husband's illegitimate child must prove


\textsuperscript{72} The Court refused to uphold the constitutionality of gender-based classifications when the asserted purpose was administrative efficiency. Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). Neither would it uphold the constitutionality of legislation that discriminated against illegitimates for that reason. Jimenez v. Weinberger, 417 U.S. 628 (1974); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972). However, in Mathews v. Lucas, 427 U.S. 495 (1976), a provision of the Social Security Act conditioned the eligibility of illegitimate children for surviving child's insurance benefits upon a showing that the deceased wage earner was the claimant's parent. The Court acknowledged that the purpose of the provision was "obviously to serve administrative convenience," and it held that such a purpose was permissible under the Fifth Amendment, so long as it did not "exceed the bounds of substantiality tolerated by the applicable level of scrutiny." \textit{Id.} at 509.

\textsuperscript{73} "In a number of other instances, the statutory language makes it clear that the underlying intent of the legislation was to preserve the family unit upon immigration to the United States." H.R. REP. NO. 1199, 85th Cong., 1st Sess., \textit{reprinted in} [1971] U.S. CODE CONG. & AD. NEWS 2021.


\textsuperscript{75} 430 U.S. at 795-96.

\textsuperscript{76} See note 72 supra.

\textsuperscript{77} 430 U.S. at 814 (Marshall, J., dissenting).
not only his paternity but also their marriage. More is required of the stepmother and, consequently, the justification of undue costs involving proof of paternity is invalid.

Another possibility is that the actual purpose of the statute was to reunite families. However, such an argument could not even pass a minimal scrutiny analysis, let alone a stricter one. In *Trimble v. Gordon*, which was decided the same day as *Fiallo*, the issue was the constitutionality of section 12 of the Illinois Probate Act which allowed illegitimate children to inherit by intestate succession from their natural mothers, but not from their natural fathers. The Court stated that "when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises stricter scrutiny" and held that the discriminatory classification was unconstitutional. Given the similarity of the classification in *Trimble* and *Fiallo*, the Court in *Fiallo* clearly would have found the challenged classification to be unconstitutional if it had been outside the area of immigration.

Another aspect of the equal protection issue in *Fiallo* involved the fundamental right of privacy and mutual association. Statutes which directly intrude upon a fundamental right are presumed to be unconstitutional unless they can be justified by showing the furtherance of a compelling state interest. The Constitution guarantees each individual the freedom to decide whether to enter into or alter his

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80. See text accompanying note 68 supra.

81. The Court has found privacy to be guaranteed under the penumbra of the First Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965), under the Fourth and Fifth Amendments as protection against government intrusions "of the sanctity of a man's home and the privacies of life," *id.* at 484-85, and under the Ninth Amendment as a fundamental right that is not expressly enumerated in the first eight amendments. *Id.* at 488 (Goldberg, J., concurring).

Justice Black in his dissent in *Griswold*, however, could not agree that a general right of privacy was implicit in the various amendments. He stated that "[o]ne of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term 'right of privacy.' ..." *Id.* at 509 (Black, J., dissenting).

82. In *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), suit was brought by two pregnant school teachers challenging the school board's mandatory leave rule. The Court, in finding that the mandatory rule violated the due process clause of the Fourteenth Amendment, stated that it had long recognized "that freedom of personal choice in matters of marriage and family life is one of the liberties protected." *Id.* at 639. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Planned Parenthood League were convicted of violating the Connecticut Birth Control Laws when they gave out information, instruction and medical advice to married persons about contraceptives. The Court found the law to be unconstitutional and intruded upon the right of marital privacy. This privacy is the right to choose whether or not to have children.
family associations\textsuperscript{83} and how to rear and educate his child.\textsuperscript{84} This freedom of choice applies to the "individual, married or single."\textsuperscript{85} The right of privacy has been held to be so broad as to include a woman's decision to terminate her pregnancy\textsuperscript{86} and a patient's decision to decline medical treatment.\textsuperscript{87} By comparison, the right of a natural father and an illegitimate child to form a family relationship does not appear to be as extreme, and thus ought to have been afforded the full constitutional protection by the Fiallo Court.

Lower courts have not evaded equal protection questions when presented with such issues, even though they were in the context of the immigration laws. In Faustino v. Immigration & Naturalization Service\textsuperscript{88} and a series of similar cases\textsuperscript{89} a child challenged a provision of the Act which allowed a citizen over 21 years of age to secure an immediate relative status for his alien parents but denied that privilege if the citizen was under 21 years of age. Applying minimal scrutiny, the courts have not found this classification to be unconstitutional. The majority in Fiallo alluded to these cases\textsuperscript{90} to support their

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\item \textsuperscript{83} In Roe v. Wade, 410 U.S. 113 (1973), a pregnant single woman brought a class action challenging the constitutionality of a Texas criminal law which proscribed procuring or attempting an abortion except on medical advice for purposes of saving a mother's life. The Court held that the abortion acts violated the due process clause of the Fourteenth Amendment which protects the right to privacy, including a woman's qualified right to terminate her pregnancy. \textit{Id.} at 156-62. In Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976), the Court upheld provisions of an abortion statute which required a woman's prior written consent, and recordkeeping and reporting procedures. It found unconstitutional those provisions which required the spouse's consent or the parent's consent in the situation of a minor. It also found unconstitutional a provision which prohibited the most commonly used abortion procedure, saline amniocentesis.
\item \textsuperscript{84} In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court found that a compulsory education act which required attendance at a public school violated the Constitution in that it interfered with the liberty of parents to direct the upbringing and education of their children. In Meyer v. Nebraska, 262 U.S. 390 (1923), the Court stated that the liberty guaranteed by the due process clause includes the right "to acquire useful knowledge, to marry, establish a home and bring up children . . ." \textit{Id.} at 399.
\item \textsuperscript{85} Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). The Court held that a Massachusetts statute permitting married persons to obtain contraceptives, but prohibiting distribution of contraceptives to single persons violated the equal protection clause. \textit{Id.} at 454-55.
\item \textsuperscript{86} See note 83 \textit{supra}.
\item \textsuperscript{87} The court in In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), even extended the right to third parties to exercise the right to refuse medical treatment on behalf of an individual who is unable to do so. \textit{Id.} at 53-54, 355 A.2d at 670-71. See Symposium, In Re Quinlan, 30 \textit{Rutgers L. Rev.} 243-328 (1977).
\item \textsuperscript{88} 432 F.2d 429 (2d Cir. 1970), \textit{cert. denied}, 401 U.S. 921 (1971).
\item \textsuperscript{89} The facts in the following cases are essentially the same: a minor citizen-child tried to stay deportation proceedings of his alien-parents. Gonzalez-Cuevas v. INS, 515 F.2d 1222 (5th Cir. 1975); Perdido v. INS, 420 F.2d 1179 (5th Cir. 1969); Acosta v. Gaffney, 413 F. Supp. 827 (D.N.J. 1976); and Application of Amoury, 307 F. Supp. 213 (S.D.N.Y. 1969).
\item \textsuperscript{90} 430 U.S. at 797-99.
\end{itemize}
contention that the classification in Fiallo was another example of the distinctions Congress must make in deciding which aliens may enter the country. However, this reliance is misplaced because the two classifications are different. Discrimination based on age, as in Faustino, has not received more than minimal scrutiny and has been presumed to be reasonable. In contrast, numerous decisions have held that classifications based on sex or illegitimacy are unconstitutional. The lower court of Faustino said that if “a purpose is properly within the plenary power of Congress an attack upon that classification must fail as not presenting a substantial constitutional question, unless the classification can be shown to constitute ‘invidious discrimination.’” The classification was found to be constitutional, not because it was within the immigration laws, but because it was reasonable.

**TREND IN THE LAW**

There is a strong indication in today’s society that an increasing number of children, legitimate and illegitimate, are living with their fathers. Some courts have recognized that unwed fathers, like unwed mothers, have close ties to their illegitimate children. Dr. Lee Salk, a noted child psychologist, is of the opinion that the gender of the parent is irrelevant, and the mother is no longer indispensable in the rearing of the child. Even Congress has realized that an unmarried male is capable of rearing and caring for a child, and it has followed the trend set by state adoption laws in allowing adoption of children by unmarried individuals, male or female.

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91. See notes 71-72, 78 supra.
93. See generally Herzog, Some Notes About Unmarried Fathers, 45 CHILD WELFARE 194 (April 1966); Sauber, The Role of the Unmarried Father, 4 WELFARE IN REVIEW 15 (1966); Comment, The Emerging Constitutional Protection of the Putative Father’s Parental Rights, 70 MICH. L. REV. 1581 (1972).
94. In Stanley v. Illinois, 405 U.S. 645 (1972), the Court stated that “[t]he private interest . . . of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.” Id. at 651. See also In re Mark T., 8 Mich. App. 122, 154 N.W.2d 27 (1967) (court awarded custody of an illegitimate child to the father after mother’s release of child for adoption); Conley v. Johnson, 24 N.C. App. 122, 210 S.E.2d 88 (1974) (court held it may order visitation rights for a father of an illegitimate despite mother’s objection); Hammad v. Wise, 211 S.E.2d 118 (W. Va. 1975) (court awarded the father custody of his illegitimate child); State ex rel. Lewis v. Lutheran Social Services, 59 Wis.2d 1, 207 N.W.2d 826 (1973).
On December 16, 1975, Congress approved an amendment to section 101(b)(1)(F) which permitted the adoption of an alien child by an unmarried United States citizen, either male or female. Yet the Fiallo Court inferred that even though Congress intended to allow an unwed male to secure a preferential status for his adopted alien child, Congress also intended to prohibit the unwed male from securing a preference for his natural alien child.

Since the legislative history does not mention specifically why Congress excluded the relationship between a natural father and an illegitimate child, a reasonable inference is that in 1957 when Congress passed the amendment permitting a natural mother and an illegitimate child to receive a preference it had not anticipated the situation in which a father and an illegitimate child would be close or choose to be together. Justice Stevens suggested that this is the result of "habit rather than analysis or actual reflection." Prior to 1963 sex was commonly used as a basis for legislative classifications, often without regard to the purpose of the legislation. However, there has been a significant change in the social awareness of equality between males and females. The present state of the law seldom recognizes sex as a valid basis for discrimination. Since the amendment was passed prior to the time the courts found gender classifications to be unconstitutional, and since Congress has not yet amended the provision to coincide with the law, the Court in Fiallo should have scrutinized closely the challenged legislation, rather than exercising limited review.

CONCLUSION

The holding in Fiallo v. Bell is questionable. When constitutionally protected rights of citizens were infringed upon, the Court chose to scrutinize the government action with great restraint because they were dealing with "an exercise of the Nation's sovereign power."

100. Id. at 222.
102. Id. at 137.
104. 430 U.S. at 795-96 n.6.
In addition to the misapplication of equal protection principles, consideration of societal factors suggests that the Court’s decision in *Fiallo* was improper. The Court’s holding was particularly insensitive to the political and social changes that have occurred in the country. The assumption that it is dealing with sovereign power manifested itself in a way that is beyond the limitations of the Constitution. This decision establishes the outer limits of Congress’ power to enact immigration legislation that affects citizens.105

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