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nancy diam N8. tour then with me - especially in light of fill, care 9 wrole last Term. n. y. statute gives an unwed mother a veto of any adoption of the ellegeneate child, but no comparable right is queen unwed father . We left this of upon in Quillion -but we DEWSEQ in Oxeni modering ther same N. y. statute The E/P none seener substanted.

PRELIMINARY MEMORANDUM

May 11, 1978 Conference List 2, Sheet 1 No. 77-6431 (mem. dismissing appeal)

CABAN (illegitimate father)

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MOHAMMED (mother & ... stepfather)

1. <u>SUMMARY</u>: Appellant raises two issues not resolved in <u>Quilloin v. Walcott</u>, No. 76-6372 (decided January 10, 1978). The first is whether a father of an illegitimate child is denied due process when a state court orders adoption of the child by another without finding that the father is unfit. The second is whether the N.Y. statute violates the equal protection clause, either

State/Civil

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Domas. See back.

because it treats unwed fathers differently from previously married fathers or because it treats unwed mothers differently from unwed fathers.

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2. PACTS: Appellant is the father of two illegitimate children, age 5 and 7. Appellees are the mother of the children and her new husband (the stepfather of the children). Appellant and the mother never were married but lived together for 5 years, from 1968 to 1973. At that time appellant was married to, but separated from, Westeanother woman, with whom he had had two children. While living living together, appellant and the mother had the two for for for the children and raised them together. It appears that both parents contributed to the children's support.

The mother left appellant to marry her new husband; she took the children with her. Appellant continued to visit his children regularly. In late 1974 or early 1975, the mother took the children to Puerto Rico to live with the maternal grandmother. Appellant was allowed visitation rights in Puerto Rico. After one of his visits, he spirited the children away and concealed their whereabouts in New York. After finding the children, the mother was awarded temporary custody of them. Recently, appellant obtained a divorce from his first wife and remarried.

New York law gives equal rights to each parent in custody proceedings. That is, neither the mother nor the father is presumed to be more fit to have custody of

guin night; to the adaption children when there is a dispute over custody. In constrast, New York's adoption law gives either parent of a child born in wedlock the right to veto adoption by a third party and gives an unwed mother the same veto power, while U it denies the same right to an unwed Eather like appellant. N.Y. Domestic Relations Law § 111 (2), (3).

Unnex mother

When the stepfather sought to adopt the children, appellant objected. He contended that the children could not be adopted--which would take away all his rights as their natural father--without a finding that he was unfit. <u>Stanley v. Illinois</u>, 405 U.S. 645. He also contended that the N.Y. statute denied him equal protection because it withholds from him the veto power which is available to unwed mothers and previously married fathers. The former is an impermissible classification on the basis of gender; the latter is an irrational classification when applied to fathers who had and continue to have a close and substantial relationship with their children.

The surrogate's court did not discuss these points. It remarked that although appellant did not have the right to withhold consent to the adoption, his opposition to the adoption would be heard. The court noted that "[a] putative father opposing such an adoption without the consent of the natural mother has himself no prospect of adopting the child" when the mother has custody. [I am not sure I understand this remark. The mother had only <u>temporary</u> custody, and appellant contends in his J.S. that he was seeking permanent custody of the child at the same time that the stepfather's adoption peth was filed. J.S. 21. I am not sure, therefore, why the court said appellant would have no prospect of adopting his own children, or why the court made the fact of temporary custody in the mother determinative if permanent custody proceedings in fact were pending.]

The court then explained that the reason for allowing the father to be heard is "not to determine the degree of his continued interest in the child but rather to determine the best interests of the child. Any evidence the putative father may offer concerning the solidity of the marriage and the concern and treatment of the child in the new family is particularly relevant." The court then found that there was no evidence that appellees would not take good care of the children or that there was anything wrong with the mother's new marriage. The court concluded: "Nothing therefore justifies a denial of the [adoption] petition other than that the putative father professes that he loves the children and fervently desires that they continue to bear his name. This is not enough however sincerely motivated."

The App. Div. affirmed, citing <u>Matter of</u> <u>Malpica-Orsini</u>, 36 N.Y.2d 568, <u>appeal dismissed</u> sub nom. <u>Orsini v. Blasi</u>, 423 U.S. 1042. In that case the N.Y. courts upheld the N.Y. statute against an almost identical challenge. The N.Y. Ct. App. dismissed appellant's appeal

for want of a substantial constitutional question, citing <u>Orsini</u>. After <u>Quilloin</u> was decided, appellant twice sought reargument, unsuccessfully.

3. <u>CONTENTION</u>S: (1) The law violates the due process clause by allowing adoption of a child by a third party without a finding that the natural father is unfit, contrary to <u>Stanley v. Illinois</u>, <u>supra</u>. (2) The law violates the equal protection clause in two respects: (a) by giving previously married fathers a veto right but denying it to an unwed father whose connection with the children is substantial and always has been; (b) by giving the unwed mother of the children a veto power but denying it to the unwed father. The latter is a classification based on nothing but gender.

In making his equal protection contention, petr mentions that the N.Y. Law on custody (N.Y. Domestic Relations Law § 70) gives equal rights to both parents. It provides that "there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child" (And appellant says that this provision applies to children born out of wedlock.) Thus, according to appellant, "there was a distinct possibility that appellant may have been awarded legal custody in the children's best interest if the <u>custody proceedings which began before and</u> <u>pended throughout the adoption proceedings</u>, had instead gone to conclusion on the merits." J.S. 21. Appellant

does not provide any further explanation of the asserted pendency of custody proceedings.

Appellees claim that this case does not present a substantial federal question in view of the dismissal of the appeal in Orsini. They also state their version of the facts, which consist mainly of disparagement of appellant (claiming that he beat the mother and drank too much while they were living together), his relationship with the children, and his contribution to their support while living with the mother; and asserting that he did not protest or demand the return of the children when the newly constituted family went to Puerto Rico. Appellees provide no citations to the record in their motion to dismiss the appeal, so it is impossible to tell whether these assertions are founded. The assertions in any event are not related to appellant's contentions but are offered in support of appellees' conclusion that "[i]f it were necessary . . . for the Surrogate to find (appellant) to be unfit for custody of the children . . . , the record of hearing would amply support the finding." Motion to Dismiss 9.

4. <u>DISCUSSION</u>: It is hard to recommend what to do with this appeal because the Court's precedents go in opposite directions. The DFWSFQ in <u>Orsini</u> points in the direction of similar action here; the cases are virtually indistinguishable. The same N.Y. law is at issue, and the facts--while different--do not seem to be distinguishable

as a constitutional matter. Appellant contends that the relationship between the father and child in <u>Orsini</u> was not as substantial as the relationship here, but the pool memo in <u>Orsini</u> seems to belie that contention. The indicia of Thir closeness or substantiality of the relationship differ in the two cases, but it does not look like the Court's the father the strength of the parent/child relationship the was what led to the DYWSFQ.

Pointing in the other direction is Quilloin. There the substantiallty of the relationship was considered material. The father in Quilloin hardly had attempted to preserve his relationship with his child and seemed to be doing no more than attempting to block an adoption that would be good for the child. Here, on the other hand, appellant not only had shared custody and support of the chi)dren for several years, but was left by the mother, continuously visited the children, and--according to the J.S.--was attempting to obtain legal custody of the children when the stepfather's adoption peth was filed. (It certainly would be helpful if appellant had provided some support for this ascertion.) In short, this sounds like exactly the kind of case about which the Quilloin Court was concerned, where there would not be a significant difference between the unwed father and the divorced father.

In addition, this case raises the gender-based equal protection issue that was left open (because it had

not been raised) in <u>Quilloin</u>. It hardly seems to satisfy the requirement of equal protection to give the mother a veto but not the father. If appellant and his new wife had been the ones who had temporary custody of the children, and the new wife had sought to adopt the children, the natural mother would have been able to veto the adoption. (It was noted in the pool memo in <u>Orsini</u>, however, that it would not be in the child's best interests for both parents to have this veto power, which could forever prevent the child from having a normal family relationship. But this is a policy question with which the legislature would have to deal if this Court struck down the gender-based discrimination--whether to disallow a veto for either perent.)

In sum, I think the equal protection question is substantial in both of its aspects. Appellant's due process argument is less persuasive because this factual situation is different from <u>Stanley</u>, where the State was trying to take children away from an unwed father, after the mother died, without proving that the father was unfit. Requiring a showing of the father's unfitness in that context is more compelling than requiring a showing of the father's unfitness when the mother's new husband wants to adopt the child. The issue of unfitness would seem to be more relevant when the father seeks custody of the child than when he seeks to prevent an adoption.

There is a response.

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B/P I me . appellent asserts a substantive D/P right not to be deprived of antiting child by adoption advent a funding of unfitness of the natural parent - whether wid or unwed In quellon, a sut. O/P con (p1), we head that the state could allow adaption when former to be in best where I of child. The fatters there had been given a hearing I would not agave to any absolute right Best interest of child should contral, the presimption " a strong one - found national poweret unless found unfit. E/A lower (224 statute classification) (p. 19) T. Gender disamuration - accorder nght to veto (consent required) in unwed mother but not father. (Prome sesand in Quellon) 2. Unwed father dif. from wed father who Freelowental next - street renching. a realized an diversed parent who has not abuildouch child has a BOBTAIL BENCH MEMORANDUM fruidemented right a statute definition sullion hung To: Justice Powell Caban v. Mohammed--No. 77-6431 (App. from adoption minst N.Y.Ct. App.) (order) be shretly coustneed. Re :

Kazim Mohammed (also an appellee here). During their time together, Abdiel and Maria gave birth to two children born out of wedlock: David, born in 1969, and Denise, born in 1971. The record is in turmoil concerning the circumstances of Abdiel and Maria's life together. It is uncontested, however, that Abdiel lived together with the children and Maria until December of 1973 and that Abdiel's name appears as the father on each of the children's birth certificates. During this time, Abdiel apparently held himself out as the father of David and Denise, although he never acted to acknowledge as much legally. Moreover, the Surrogate (acting as the finder of fact) found that both Abdiel and Maria contributed to the support of the children while they were living together.

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Soon after Maria left Abdiel, she married Kazim, with whom she and the oblidern lived. During this time, David and Denise would visit Maria's mother periodically; as Abdiel Bived just below the mother, he saw the children regularly. In September of 1974, the Mohammeds sent the two children to Puerto Rico with their grandmother. Thirteen months later, Abdiel went to Puerto Rico, "snatched" the children from the grandmother, and took them back to live with him in New York. Maria then obtained Lemporary custody under a court order and Maria and Kazım filed a petition for to adopt the two children. Abdiel and his new wife cross petitioned for adoption.

After an evidentiary hearing, the Surrogate granted Maria and and Kazim's adoption petition and denied Abdiel's

eross petition. The court noted that under New York law, "!a]lthough a putative father's consent to...an adoption is not a legal necessity, he is entitled to an opportunity to be heard in opposition to the proposed stepfather adoption." At the same time, "[a] putative father...without the consent of the natural mother, has himself no prospect of adopting the child." The court went on to review in summary fashion the nature of the Cabans' household when they were living together, the nature of the Mohammed's family life, and Abdiel's present Status as a parent. Drawing upon all these factors, the Surrogate concluded that it was in the best interests of the children for them to be adopted by Kazim. In orders, the Appellate Division and the New York Court of Appeals affirmed the Surrogate's roling.

I. THIS COURT'S DECISIONS

There are two decisions of this Court that pertain directly to the resolution of the case at bar: <u>Stanley v.</u> <u>Illinois</u>, 405 U.S. 645 (1972); and <u>Quilloin v. Walcott</u>, <u>U.S.</u> , 46 U.S.L.W. 4055 (January 10, 1978).

A. Stanley v. Illinois

In <u>Stanley</u> three children born out of wedlock became wards of the State of Illinois when their mother died. The children had lived intermittently with the father since their birth. The father challenged the State's authority to take his children from him without first bolding a hearing to determine bis fitness to be a parent; such a hearing would be afforded

married, surviving spouses and unmarried mothers under Illinois law.

Stonley

The Court upheld the father's right to a fitness hearing on two grounds. Pirst, the Court opined that a father's parental interest was so substantial and fundamental that it deserved the protection of the due process clause. In this case, the protection took the form of notice and a hearing to determine the father's fitness as a parent before depriving him of the right to raise his children.

Second, the Court in <u>Stanley</u> ruled that the father's right to equal protection of the laws had been denied because married parents and unmarried mothers were given a fitness hearing, whereas unmarried fathers such as <u>Stanley</u> were denied such a hearing. The Court did not discuss whether it was subjecting the Illinois statute to "strict scrutiny" or to some less rigorous form of equal protection analysis.

Chief Justice Burger dissented in <u>Stanley</u>. Beyond objecting to the procedural posture of the case, he argued that there were valid reasons for distinguishing between an unwed father and other biological parents. Unlike a married father, an unmarried father has not formally undertaken to care for the children. Unlike the unmarried mother, the unmarried father is not easily identifiable. Moreover, the Chief Justice opined that "!clenturies of human experience"...suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed Fathers." 405 U.S. **± 666**.

B. Quilloin v. Walcott

Quilloin involved a Georgia statute essentially the same as the New York statute at issue in the case at band; One important difference is that under the Georgia statute an unwed father could petition in the courts to be declared the legal father of the child, and thereby gain the same right to give consent to an adoption that the mother enjoyed." The father and mother of the child whose adoption was at issue in Quilloin never had lived together as husband and wife; neither had the child lived with the father for any length of time. Rather, the father's sole contact with the child had been occasional visits and the giving of a few gifts. When the mother remarried, she gave her permission for her new husband to adopt the child as his own. The natural father objected and, for the first time, filed a petition for legitimation. After a hearing on the adoption petition and the cross petition for legitimation, the Georgia court found it to be in the child's best interests that he be adopted by the stepfather and that the natural father be given no visiting rights.

On appeal, this Court offirmed, finding nothing in the Georgia statute violating the equal protection or due process clauses. Although the Court noted that under some circumstances the due process clause would forbid a State's attempt "to force the breadup of a natural family over 0.5 the objections of the parents and their children," 46 U.S.L.W. at

*/ Since the adoption of the Caban children, New York law Has been amended to provide for a similar filiation proceeding.

4058, it found that in <u>Ouilloin</u> unwed father did not at any time have or seek actual or legal custody of his child. The Court concluded that "[w]hatever might be required in other Situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, was in the "best interests of the child." Id.

The Court found the father's equal protection claim to be similarly without substance. The Court noted that the question of discrimination on the basis of sex had not been raised below and therefore was not properly before it on appeal. The Court found ample grounds to distinguish the father in <u>Quilloin</u> from a divorced father (who under Georgia law would have veto power over an adoption): An unwed father at no time had legal custody of or responsibility for the child; a divorced father had such custody and responsibility at least for the duration of the marriage.

There was no dissent in Quilloin.

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11. DISCUSSION

A. Due Process

There are two very different due process claims that become muddled in this case: procedural due process and substantive due process. The former is the only form of due process addressed in <u>Stanley</u>. Thus, the Court's ruling in that case was that Stanley was entitled to notice and a hearing before his children could be taken away. In Quilloin, on the

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other hand, the Court noted that there was no claim of a procedural deficiency in the way Georgia had proceeded with the adoption. As in the case at bar, the father in <u>Quilloun</u> had been given adequate notice and had been given a full opportunity to appear and participate in the adoption proceedings. Indeed, in both <u>Quilloin</u> and here the natural father did participate in the proceedings.

winer did participate in the proceedings. The only due process guestion presented here, The only due process guestion presented here, allow therefore, is one of substance: Is it fundamentally unfair to allow the State to take a child away from an unwed father merely because the courts have determined that adoption by another is in the child's best interests? As with all substantive due process guestions, this calls upon the decisionmaker to look to his own sensibilities concerning fairness; perbaps this is why I am so uncomfortable saying that anything violates substantive due process.

> Because Quilloin was a substantive due process case, the starting place here must be the Court's opinion there. In <u>Ouilloin</u> the Court was careful to note that in some cases the due process clause would prohibit the State from interfering with parental relations. At the same time, however, the Court found that the clause did not prohibit the Georgia courts in <u>Quilloin</u> from granting adoption, as the father had not had a close relation with his children. In the case at hand, the appellant argues that he comes within the <u>Quilloin</u> exception, because he lived with the two children for years as their

father and has displayed consistent interest in their wellbeing.

If the Court wishes to fashion a due process rule that looks to the extent of a father's contact with his children. born out of wedlock, it will be difficult to do so in this impossible case. As you can see from the briefs and oral arguments, the Surrogate did not resolve many of the factual disputes concerning the extent of Abdiel's participation in the raising of the two children. Such important questions as the extent of financial support he provided the children and the extent to which he helped to discipline and teach the children remain, therefore, in sharp dispute. Thus, unless the Court wishes to adopt a per se rule that unwed fathers who have lived with their children for some substantial period of time are entitled to veto the adoption of their children by others, the Court will have difficulties with this record. (The usual devices of dismissing as improvidently granted and remanding for reconsideration in light of Quilloin are unavailable here: This is an appeal, and according to the jurisdictional statement the appellant presented Quilloin to the New York Court of Appeals on the second petition for rehearing.)

On the other hand, the <u>Court could rule</u> that the due process clause does not prohibit a State from allowing adoption over the objection of the unwed father, irrespective of the father's closeness to his children. In choosing which path to follow, I suggest the following considerations. First, to

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eliminate all overtones of equal protection analysis, the question should be considered as if the State had passed a law allowing adoption of any child (without regard to the circumstances of his birth or parentage) by another upon a finding that such an adoption would be in the child's best interests. Second, unlike the situation in Stanley, here the competition is between two natural parents--if either is allowed to adopt, then the child will be with a biological parent. It may be that the State is entitled to more looway if it is preserving some remnant of the original natural Eamily. Third, even if it is unfair to allow adoption over the protestations of the natural father, the State must be allowed some leeway to infer a waiver of the right to protest. Thus, if the father cannot be found or has abused the child, the State must be allowed to ignore the father's lack of consent. Finally, the Court must bear in mind the great difference between adoption and custody. Under the latter, the custodian is given primary responsibility for the child, but the other parent typically is given some parental rights and duties--such as visitation and support. Under the former, as I understand it, the non-adopting parent is cut off entirely from his child-a drastic remedy.

As you can see, the considerations I believe pertinent to the question do not all point in one direction. In fact, 1 believe that my first two points support the fairness of allowing adoption over parental objection, whereas the second

two points indicate that such adoption would be unfair.

My own prejudice would be to allow the State substantial room to do what it perceives to be best for the child, even if it means cutting of[some parents from their children. Often parents who have separated already have problems that too easily are passed on to the children. Children who have suffered the trauma of a broken home will need the security that may only come with being finally placed in a single home with a single set of parents. Furthermore, I fear it is too often that bitter parents use their children as the battleground to wage war against their former sponse or lover. In sum, then, I would rule that the due process clause does not require that parents be given the right to veto adoption of their children, at least where the adopting person is a natural parent or the spouse of a natural parent.

8. Equal Protection

There are at least two quite different equal protection arguments lurking in this case. On the one hand, statute the appellant claims that the New York improperly is distinguishes between unmarried men and unmarried women--that is, that there is present here an unconstitutional gender based distinction. (You should note that the Court explicitly stated in <u>Ouilloin</u> that the gender-discrimination claim was not properly before it.) On the other hand, the appellant is claiming that New York improperly is distinguishing between married and unmarried men. Although the Court has been none

too explicit concerning the equal protection standard it has applied in cases such as <u>Stanley</u> and <u>Quilloin</u>. It seems most reasonable that strict scrutiny is called for, as parental rights are fundamental constitutional rights. If this is true, it would make little difference whether one analyzed this as a gender distinction or a married/unmarried distinction.

The initial question confronting the Court is whether the New York law of adoption treats unmarried fathers differently from married fathers and unmarried mothers. §111 of the New York Domestic Relations Law provides that consent to an adoption is required: (1) of the parents or surviving parent of a child born in wedlock; and (2) of the mother of a child born out of wedlock. §111 also provides that the requirement of consent shall be excused if the parent has abandoned the child to be adopted, if a guardian has been appointed for the child, if the parent is incarcerated, or if the parent otherwise is found to be unfit (e.g., has been adjudged to be a drunkard). Thus, the unwed father is the only parent who does not have at least a prime facie right to block adoption of his child by witholding consent.

The appellee argues that, the appearance of the §111 to the contrary notwithstanding, unwed fathers have the same parental rights in New York as any other parent. Thus, appellee points out that, even if consent is given, the "best interests of the child" is determinative of whether anyone can adopt a child. Moreover, appellee argues that consent is

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excused for virtually any sort of misdeed of a parent, and so the consent requirement of §111 is merely a "paper tiger."

I find it difficult to accept appellee's arguments with respect to the effect of \$111. Although an adoption must be in "the best interests of the child" irrespective of objections from parents, unwed fathers nonetheless have fewer rights than do other parents. Thus, even if the best interests of the child favor adoption, a married mother and father and an unmarried mother all may block the adoption by mere objection, provided they are not disgualified from giving consent under \$111. The unmarried father, however, has no such prerogative, and therefore is more vulnerable to the termination of his porental rights than are other parents. Put another way, <u>all</u> parents save the unmarried father have the prima facie right to block adoption of their children without showing that the adoption is contrary to the best interests of the child.

Moreover, I doubt that this Court can accept appellee's claim that "experience of the courts at adoption hearings establishes that the 'dispensing conditions' are invariably present." In the first place, appellee merely asserts that this is so without referring to any authority. In the absence of any authority indicating to the contrary, this Court must assume that the New York statute means what it says. Furthermore, the appellant refers to a case in which the New York courts have found that a married father's refusal to consent is an absolute bar to adoption, even though the

father's relationship with his child was less than exemplary. See Matter of Corey L., 45 K.Y.2d 383 (1978).

Finally, the Surrogate in the case at bar plainly perceived the rights of Abdiel to be quite different from those \mathcal{Y} of Maria. Thus, although each was petitioning for adoption, the court noted that adoption by Abdiel was out of the question, as Maria had not given her consent. At the same time, however, the court said that Abdiel's consent was not needed and that his participation in the adoption proceedings pertained only to whether the adoption by the stepfather would be in the children's best interests. I conclude, therefore, that unmarried fathers are treated substantially differently from married fathers and from unmarried mothers under the New York law of adoption.

If there is a real difference in New York between the rights of unmarried fathers and other parents concerning adoption of their children, 1 find it difficult to justify such a difference. The New York Court of Appeals in <u>Matter of Matter of Stalpica-Orsini</u>, 36 N.Y.2d 568 (1975) attempted to justify §111 on two grounds: Pirst, the court argued that it would be expensive and burdensome to attempt to locate unwed fathers in order to ask their permission to order adoption; second, the court suggested that unwed fathers, if given a veto power over adoption of their children, would use their new power to extort concessions from the mother. A further possible justification is found in Chief Justice Burger's dissent in Stanley:

Traditionally unwed mothers have been closer to their children than have unwed fathers.

If i find none of these justifications to be adequate. Thus, as I have noted, even if the State constitutionally must provide some protection for the interests of the unwed father. I can see no constitutional prohibition on the State's providing that consent shall be deemed waived if the father cannot be found. Moreover, I cannot see why unwed fathers are any more likely than are unwed mothers to use a veto power for improper ends. Finally, as the Court in Starley ruled, even if generally unwed mothers are more interested in the well-being of their offspring, the State is not justified in adopting a conclusive presumption to that effect. Since under Stanley some hearing probably must be held in any event, I see no reason why the State cannot inquire on a case-by-case basis into the extent of the father's interest in the child. Thus, I Would conclude that the New York statute violates equal protection, as it treats unwed fathers substantially differently from all other parents for no good reason.

The question remains what remedy should be ordered. If I am correct in my analysis, then the case must be remanded for reconsideration by the Surroqate, as Abdiel was not given an even chance at adopting his children. I am not certain, however, that the Court must (or should) order that unwed fathers be given a veto power similar to that now afforded unwed mothers and married parents. Thus, if the only

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constitutional problem with the New York statute is the <u>difference</u> in its treatment, the difficulty may be eliminated by striking down the veto power given any parent. As you can tell, I would prefer such a remedy, as I believe that the State is in a better position to discern the best interests of the children than are the separated parents. The question for me, therefore, is whether the Court has the discretion to order such relief or whether we must leave it to the New York legislature to correct the problem.

11/6/78

David

I've south in the memo, I do not see As how these questions can be viewed as insubstantial, especially after <u>Qvilloin</u>. But the cruit DFWSFQ'd in Orsini, which is almost directly on point. (BRW and WJB dissented; they would have noted in Orsini.) I would Note in this case <u>only if</u> you think there avoiled be 5 votes to reverse, probably on the equal protection issues. Otherwise I see no point in going beyond the DFWSFR in Orsini. But, as I've said, I think the questions are subtantial. π. Yer

appeal - NY. Ct/appe 77-6431 CABAN V. MOHAMMED Argued 11/6/78 (Univer father) (+ ber new husband who one become step-father

U. y. adoption law : as to child born in wed-lock, either parent may alto adaption by 3rd party. Even a father divorced has veto. as to child born out of wed lock, mother has we to regul over adoption -but father has none Under N. Y. decessorer, a stranger (here the proposed she father) way about even if unsuch follow in Facts: appellant is unwed father of two children, but. and level with - & helped support - univer mother & chelpow for 4 yrs. Theother has nor redrived consther man (Mohaweved), who washer to adopt chilfin

Contention: Denial of E/P: (1) denial of veto right to unwed father in geneer based classification, and (2) allowing veto to married father even after devorce, but not to unwed father, in invational classification 2.4. law as to custofy in different from adaption. Se former each unwed present in given equal rights - no presentation in term of nother. Cases: By summary affirmance in Origini v. Blass 423 45.1042, we suction statute her chall he Guidlorin Walcott (last Term, T.M.) the E/P issue was not presented

Stanley . ? le left E/P 9 open. Coppellant reiser substantion D/P isoul also, but contral Q in E/P. Kolon providen by confirment

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Schulalaper (appeller) Incoherent argument !

Strum (ant AG of N. 4.) State may favor uneved mother over unwell father - though welfare of dield contrala .









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77-6431 Caban v. Mohammed Conf. 11/8/78 The Chief Justice affirm There are differenses in rights of mollan + father

Mr. Justice Bronnan Reven Denal of E/P Talk about best interest of child is nelevent to custorely met to coust. usul. Statule in uncoust.

Mr. Justica Stewart The Revone - tentolively E/P attack on two grounds: (1) Genda (2) Humanned father & divoral We do have a dismissel for WANT a in care sourcervey same statule. Tule P.S. panel on First Vate Tentaturely, P.S. voted to Revence m ETP

1. 2 2 Mr. Justice White Ramane Stanley in inclusiont. It was a procedural D/Peace. This is an E/P case & would verse mather or bath claims

Mr. Justice Marshall Revence

Quellion day int contral.

Mr. Justice Blackmun affirm Fother have a use against mother, stop-father and state. The agree Quelon not carballing State has some interest in adaption Superest of children outrough father's. no semal of 5/p n D/p .

Mr. Justice Powell Revence an E/A ground

Mr. Justice Rehnquist Cofferme There are thousands of years of experience in favor of mother. If this were claim mined by cheldren, these night be soulthing to The melane as to det. bet. unwed father & diversed father. But where my precised bother is complaining no land of morehund D/P Mr. Justice Stevens not at wat. on E/P, claim, the vast mumber of adoptions are whenchild in new born infant, mother to should be favored that this age, Thur, for young children - the state where the substantial. But have the + Kund father had leved with children + allerion + they wave not infante. Hand to the draw line " / See back

golin Stevens (cont.) as to D/P, this is not a 5 taulay care, * me interest of father is substantial There was bearing here, but father in cut app entirely lig adaption Not at vert, but probably will Revene in substantive D/P mue - but would confine to where there wer of a substantial vel. to bet. father & child as in this care

Supreme Court of the Aniled States Washington, D. C. 2054.2

CHANGERS OF THE CHIFF JUSTICE

November 13, 1978

Re: 77-6431 - Caban v. Mohammed

Dear Bill:

This will confirm our telephone discussion of the above and your assignment to Lewis.

1 may well wind up in your position. But I have enough reservations so that I think it appropriate for you to assign.

The impasse that will result from our contemplated holding will reduce this to a custody and visitation case, and the state courts can handle that in due course.

Regards,

Mr. Justice Brennan

Copies to the Conference

FN-1

DW 12/9/78

FOOTNOTES

 Section 117 of the New York Domestic Relations Law provides, in part, that,

 [a]fter the making of an order of adoption the estural parents of the adoptive child shall be

natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession, except as hereinafter stated.

Fr what are these?

2. As the appellant was given adequate notice of the hearing before the law officer and was permitted to participate fully of as a party in the adoption proceedings, he does not contend that he was denied the procedural due processive valed natural fathers are entitled to in Stanley v. Illinois, 405 U.S. 645

(1972).

3. At the time of the proceedings before the Surrogate, \$111 provided:

Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

surrendered the child to an authorized agency for the purpose of adoption under the provisions of the social services law or of a parent for whose child a quardian has been appointed under the provisions. of section three hundred eighty-four of the social services law or who has been deprived of civil rights or who is insame or who has been adjudged to be an habitual drunkard or who has been judicially deprived of the custody of the child on account of cruelty or neglect, or pursuant to a judicial finding that the child is a permanently neglected child as defined in section six bundred eleven of the family court act of the state of New York; except that notice, of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an opportunity to be beard thereon may be afforded to a parent who has been deprived. of civil rights and to a parent if the judge or Surrogate so orders. Notwithstanding any other provision of law, neither notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the obild. For the Purposes of this section, evidence of insubstantial and infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a finding that such parent has abandoned such child.

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Where the adoptive child is over the age of eighteen years the consents specified in subdivisions two and three of this setion shall not be required, and the jduge or surrogate in his discretion may direct that the consent specified in subdivision four of this section shall not be required if in his opinion the moral and temporal interests of the adoptive child will be promoted by the adoption and such consent cannot for any reason be obtained.

An adoptive child who has once been lawfully adopted may be readopted directly from such child's adoptive parents in the same manner as from its natural parents. In such case the consent of such natural parent shall not be required but the judge or surrogate in his discretion may require that notice be given to the natural parents in such manner as he may prescribe.

4. In Orsini v. Blaci, supra, the Court dismissed an appeal

from the New York Court of Appeals challenging the

FN-43

on the merits, and therefore is entitled to some precedential weight. See <u>Hicks v. Miranda</u>, 422 U.S. 332, 344 (1975). At the same time, however, our decision not to review fully the questions presented <u>Orsini v. Blass</u> is not be given the same deference shown to a ruling <u>sizen</u> after briefing, argument, and a written opinion. See <u>Edelman v. Jordan</u>, 415 U.S. 651, 671 (1974). Insofar as our decision today is inconsistent with our dismissal in <u>Orsini</u>, we overrule our prior decision.

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5. In his brief as amicus curiae, the New York Attorney General echoes the New York Court of Appeals' exposition in <u>Matter of Malpica-Orsini</u> concerning the interests promoted by §111 different treatment of unmarried fathers.

In addition to these interests, \$111 may be intended to promote the state's interest in marriage. In <u>Trimble V.</u> <u>Gordon</u>, 430 U.S. 762, 768 § a.13 (1977), we alloded to the importance of the State's interest in "the promotion of [legitimate] family relationships" in rejecting it as a justification for an I]linois intestacy]aw excluding illegitimate children. That rejection was based in part on our marry: the unwed father.

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Even though \$11) is more rationally related to the promotion of marriage than was the intestacy statute Struck down in Trimble, we do not find that the statute is necessary. to promote a compelling state interest. We have not yet ruled that the important state interest in encouraging legitimate fami)y relationships is compelling for purposes of the Equal Protection Clause. Even if it were a compelling purpose, however, we would reject its assertion as a justification for the distinction in SIII between married and unmarried fathers. There is no indication that the promotion of marriage was in any way considered by the New York Legislature when it enacted \$111. Similarly, neither the New York Court of Appeals, see Matter of Malpica-Drsini, supra, at 571-74, nor the Attorney General of the State has claimed that the differential treatment of unmarried fathers is justified by the effect it has on marriage. Finally, it would be strange indeed if the State sought to promote solid family relationships by penalizing those anwed fathers who sought to preserve their

1fp/ss 12/14/78

MEMORANDUM

M: David				ወስጥ	ወስጥግቱ	Dec.	32.	1978
FROM:	Lewis	г.	Powell,	Jr.				

Caban v. Mohammed

I have read your draft opinion 12/12, without undertaking any editing beyond Part I.

Pefore going further it may be well for us to talk. Your memo accompanying the AraEt raises guestions that require some careful thinking through.

1. Your first question is whether we nest the onlnion on both arounds. I think I have a slight preference for the needer-based discrimination (the "sex around"). We could rely on this ground without metting into the "thicket" of "strict scrutiny" and "combelling state interest". I have always been uneasy with this type of analysis. It had been established before I came to the Court. At the time I wrote <u>Sodriguez</u>, I considered abandoning it, but the precedents - as well as the votes of my Brothers - counseled against that course.

I therefore would feel more comfortable with a fairly simplicitic analysis addressed to cender-based classifications. Our cases have recognized a sort of "middle-tier" type of scrutiny without so characterizing

it. See <u>Reed v. Reed</u>, <u>Boren</u>, and my concurring opinion in Prontlero.

If we have our opinion, in whole or in part, upon the classification of unwed fathers differently from wed fathers (the "marital status" hasis). T subcose Suppose we would commence as you have with a holding that a natural parent - whether father or mother and regardless of marital status - has a fundamental right of some kind with respect to his or her child. You have described this in terms of an "interest" of a parent in taking part in the "raising" of his or her child.

On page 9 of the draft, you cite several cases as holding or supporting the view that "the rearing of a child is an activity constitutionally protected from unreasonable government interference". I have not reread of Mana any of these cases, and wonder whether any describes this "right" or "interest" as fundamental. If fundamental, before government interference is justified [suppose there would have to be a compelling state interest = not merely an interest that would support reasonable classification. In short, I am not familiar enough with our authorities to know whether in fact we can find, on

the basis of precedent, that there is a fundamental right protected by the Constitution in a parent with respect to the rearing of a child. If so, exactly what is it? Moreover, is it not a substantive Aue process right - as I recognized with respect to the family in Moore?

In view of these questions, I wonder whether we should not rely solely on the sex-based classification, stating in a note or the text that we need not decide the other issue.

2. Your second numbered paragraph refers to the legislative history of Slll. I had rather not delay circulation of the opinion until that is in band. Often, we never succeed in obtaining history of state statutes.

3. You are quite right that Justice Stewart is unlikely to join any opinion we write on equal protection grounds. We must try to put a Court together without him.

4. I am not concerned about <u>%ablocki</u>, as I agree with you that the interests regulated there are guite different from those now before us.

* * *

Whether we elect to limit our opinion to one

ground or retain both, I would reduce Part III to a brief conclusory discussion of equal protection analysis. There are no five Justices who come close to agreeing on terminology unless it is expressed somewhat ambiguously. If we rely on the sex ground, I think you can find appropriate language in our sex discrimination cases, using Reed V. Reed as the basic benchmark.

I had shought that the best way to distinguish <u>Quillion</u> was to draw the distinction between custody^X Finvolved there) and adoption. The former can be quite temmorary; the latter usually is final. I would be inclined to edwance this ground first; then rely on the Eactual distinction as to the absence of relationship between father and child; and then emphasize that the issue before us now was not present in Quillion.

* * *

In sum, we should decide some of the foregoing questions, and merbaps you should make revisions in light of our answers to these questions, before I undertake editing.

L.F.P., Jr.

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* I'm not sure 9 have Quillin fully in mind. I believe The father had percommenced legitimation morechings.

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DW 12/12/78

Memorandum

To: Justice Powell

Re: First Draft of Caban v. Mohammed--No. 77-6431

Enclosed you will Find my first attempt at an opinion for the Court. As you suggested, I have tried to keep the opinion short and straight-forward on the theory that this case does not present an occasion for a complete rethinking of the Equal Protection Clause. Nonetheless, Section "III" could have me easily be cut down to a single paragraph, if you wish.

There are four things you should consider in reviewing the opinion:

1. I have written the opinion to rest upon two alternative grounds: the distinction according to sex, and the distinction according to marital status. Beyond a sense of thoroughness, I thought that this might aid in our getting a majority of the Court to concur at least in some part of the opinion. Thus, as I understand it, Justice Stewart is most troubled by the sex discrimination of the New York statute, whereas the Chief Justice and Justice Blackmun find the sex distinction the most justified. Along this line, you should consider whether, if we are to keep both grounds of decision, the sex-based point should come before the marital status

Do we vely on both goowed

point.

2. At two points in the opinion I have referred to what the New York Legislature relied upon in passing §111. I have called for the legislative history of the statute, but there has been some delay in getting it from New York. Of course, we cannot circulate until I have had a chance to go over these materials, which should be in this week.

3. In the course of my research I have become more acquainted with Justice Stewart's views on the Equal Protection Clause. Those views seem to me at odds with his joining this opinion, although Conference Notes indicate that he would reverse on Equal Protection grounds. For a good discussion of his preference for substantive due process as a mechanism for striking down statutes such as this, see <u>2ablocki v. Redhail</u>, 434 U.S. 374, 391 {1978](Stewart, J., concurring in the judgment).

4. Finally, 1 am somewhat uneasy concerning the position you set forth in your concurring opinion in <u>Zablocki</u>, supra. Although I believe that that case is distinguishable (rom the instant one (as the interests being regulated are quite different), I think you should review that opinion and make sure that you wish to apply a "strict scrutiny" standard in the case at hand.

12/12/78

David

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How do our cour describe or states are there cares holding that a parent's right & however described) in fun Ramestal? If so, strict sanding applea to The clashpeation (or "heightined security") If we selly only on the gander based classification, we could becade a care on the instructuly of such a clampsation. Read, Borens the would not have to very on to father's fundamental right.

DW 12/12/78

and full rearrier

No. 77-6431 Caban v. Hohammed--First Draft

MR. JUSTICE POWELL delivered the opinion of the Court.

The appellant, Abdiel Caban, challenges the constitutionality of \$111 of the New York Domestic Relations Law, insofar as it permitted the adoption of his natural children by their natural mother and step-father without his consent. Two rule that the New York statute as applied in this measured case violates the Equal Protection Clause of the Fourteenth Amendment, as without compelling justification it affords unwed fathers a substantially lesser right to prevent the adoption of their children than is enjoyed by unwed mothers and by married fathers.

Ι.

Abdiel Caban and appellee Maria Mohammed lived

married to another woman, from whom he was separated. While living with the appellant, Marsa gave birth to two children: David Andrew Caban, born July 16, 1969, and Denise Caban, born March 12, 1971. Abdiel Caban was identified as the father on each child's birth certificate, and lived with the children as their father through 1973. Together with Maria, he contributed to the support of the family, paying the monthly rent and occasionally purchasing food.

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In December of 1973, Maria took the two children and abruptly left the appellant to take up residence with appellee Kazim Mohammed, whom she married on January 30, 1974. For the next nine months, Maria took David and Denise each weekend to visit Maria's mother, who lived one floor above Caban. Because he maintained close relations with Maria's mother, Abdiel saw the children each week when they came to visit their grandmother.

In September of 1974, Maria's mother left New York to take up residence in her native Puerto Rico. At Maria's request, the grandmother took David and Denise with her.

kept in force in the Abdiel periodically heard of the children's activities through his parents, who also resided in Puerto Rico. In November of he want to Presto Rice, where 1975, appollant went to visit David and Doniss. Maria's mother willingly surrendered the children to their father with the understanding that they would be returned after a few days. Abdiel, however, returned to New York with the children. Peaving the grandmother a celepitone number where wodie A stiorney could be ceached. When Maria learned that the children were in the custody of Abdicl, she attempted to retrieve them with the aid of a police officer. After this attempt failed, the appellees sought the aid of the New York Family Court, which placed the children in the temporary custody of the Mohammeds and gave Abdiel and his new wife, Nana, visiting rights.

3.

Haved -9+ server odd met a wother

In January, 1976, appellees filed a petition to adopt David and Denise as their own. In March, the Cabans crosspetitioned for adoption. After the Family Court stayed the custody proceedings pending the outcome of the adoption proceedings, a hearing was held on the petition and cross-Sec man addition

The Surrogate granted the Mohammeds' petition to adopt the children, thereby cutting off all Abdiel's parental rights and obligations.¹ In his opinion, the Surrogate ect forth the limited right A sector of a start of and here's production deriver and production moduler moduler production produ proceedings; where the natural mother is one-of-the-patitioning (🖓 partness "Although a putative father's consent to such an adoption is not a legal necessity, he is entitled to an opportunity to be heard in opposition to the proposed stepfather adoption." Moreover, the court noted that the appeliants had not prospect of adopting David and Denise, as the natural mother bad witheld ber consent. Thus, the court considered the evidence presented by the Cabans only insofar as it reflected upon the Mohammeds' gualifications as prospective The Surrogate concluded that the Mohammeds' petition their parents. Popiso with a set it and permanent home and would care for the children.

4.

The New York Supreme Court, Appellate Division,

affirmed, the granting of appellees! petition for adoption.

N.Y.S.2d 846 [1976]. The New York Court of Appeals similarly affirmed in a memorandum decision based on <u>Matter of Malpica-</u> <u>Orsini</u>, supra. <u>Matter of David A.C.</u>, 43 N.Y.2d 708, 401 N.Y.S.2d 208 (1977).

On appeal to this Court, the appellant presses two claims. First, he contends that this Court's decision in <u>Quilloin v. Walcott</u>, 434 U.S. 246 (1978), recognized the substantive due process right of natural fathers to maintain a parental relationship with their children absent a funding that they are unfit as parents.² Second, appellant argues that the distinction drawn under New York Law between the adoption rights of an unwed father and those of other parents violates the Equal Protection Clause of the Fourteenth Akondment. 1...

I Differentiat Treatment

§111 of the New York Domestic Relations Law provides in part that:

> consent to adoption shall be required as follows: ...(b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock; [and] (c) Of the mother, whether adult or infant, of a child born out of wedlock....

these execting circumstances, an unwed mother and either married parent has the authority under New York law to block the adoption of their child simply by withholding their consent. It is only the unwed father who is not given this veto over the fate of his child.

Despite the plain wording of the statute, the appellees argue that unwed fathers are not treated differently from other parents under \$111. Thus, According to appellees, the consent requirement of \$111 is merely a formal requirement, wholly lacking in substance, as New York courts consistently find an excuse for consent whenever the best interests of the child support the adoption. Because the best interests of the child always determine whether an adoption petition is granted in New York, appellees contend that all parents, including unwed fathers, are subject to the same standard.

We connot accept the appellees' interpretation of §111, as we can find no support in New York caselaw for appellees' claim that New York courts do not vigorously enforces the concent requirement of the statute. On the contrary, the

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decision in the case at here, affirmed by the New York Court of Appeals, was based upon the assumption that there was a *distinction* considerable difference between the rights of Abdiel Caban, as the unwed father of David and Denise, and Maria Mohammed, as the unwed mother of the children: Adoption by Abdiel was ruled to be impermission in the absence of Maria's consent, whereas adoption by Maria could be prevented by Abdiel only if he could show that the Mohammeds would not be fit parents.

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III. Standard

Having concluded that under New York law unwed fathers have substantially less authority to block the adoption of their children than do unwed mothers or married fathers, we must consider whether there is some justification for this disparate treatment. The strength of the supporting justification required by the Equal Protection Clause depends upon the nature of the classification under scrutiny. Thus, classifications beingn on their face may be justified by their "rational relationship to legitimate state purposes." <u>San</u> <u>Antonio,School District v. Rodriguez</u>, 411 U.S. 1, 40 (1973);

interest. See San Antonio Schol District v. Rodriguez, supra, at 16; In re Griffiths, 413 U.S. 717 (1973)(alienage); Loving v. Virginia, 398 U.S. 1 (1967)(race). Moreover, since Shapiro v. Thompson, 394 U.S. 618 (1969), classifications that bear upon some "fundamental interest" of those being classified must be supported by a compelling state concern. See, e.g., Memorial Hospital v. Maricopa County, 415 U.S. 250, 253-54 (1974)(right of interstate travel); <u>Roe v. Wade</u>, 410 U.S. 113, 154-55 (1973)(right of personal privacy).

In the instant case, the New York statute does not treat people differently according to their race or national origin. Nonetheless, we must give strict scrutiny to §111 of the New York Domestic Relations Law, as it impinges upon an interest that is fundamental: The interest of parents in taking part in the raising of their children.

The right of a parent to rear his child is one of the most important and basic aspects of human existence. For a classification to trigger strict scrutiny under the Equal Protection Clause, however, it is not enough that it bear upon

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contexts we have ruled that various intimate, critical aspects of family life are protected by a constitutional cloak of privacy from unwarranted government intrusion. See Zablocki V. Rednail, 434 U.S. 374, 384-85 (1978){right to marry): Carey v. Population Services International, 431 U.S. 678, 684-85 (1977); Roe v. Wade, supra (right to make abortion decision); Eisenstadt v. Baird, 405 0.5. 438, 453 (1972)(contraception); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942)(procreation). Certainly the right to have a continuing relationship with one's offspring can be no less protected by the Constitution than one's right to decide whether or not those offspring will be conceived. Indeed, we have stated that the rearing of a child is an activity constitutionally protected from unreasonable government interference. See Quilloin V. Walcott, 434 U.S. 246, 255 (1978); Weinberger v. Wiesenfeld, 420 U.S. 636, 652 (1975); Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972); Stanley v. Illinois, 405 U.S. 645, 649 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Meyer v. Nebraska, .. 262 U.S. 390, 399~401 (1923).

relationship with their children will be ended. As we have determined already that §111 of the New York Domestic Relations Law treats married fathers and unwed mothers more favorably in considering adoption petitions than it does unwed fathers, the only guestion remaining is whether the State of New York has demonstrated that §111 is a device necessary for the achievement of some compelling state purpose.

IV. Justifications

A. Unmarried vs. Married Fathers.

In <u>Quilloin v. Walcott</u>, 434 U.S. 246 (1978), we considered the constitutionality of a Georgia Statute which. like §111 of the New York Domestic Relations Law, denied unmarried fathers the power to veto the adoption of their children, while providing such a veto power to married fathers. In upholding the Georgia statute as applied in that case, we noted that the appellant,

> has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities, and, indeed, he does not even now seek custody of his child. In contrast, legal custody of children is, of course, a central aspect of the marital relationship, and

of Georgia constitutionally could distinguish between Quilloin and married fathers was based on the fact that at no time had he taken substantial responsibility for the welfare of the child whose adoption he sought to preclude. In the case at bar, on the other hand, the appellant is in a very different position. He lived with his children for a substantial period of time: four years with David Caban, and just under two years with Denise Caban. According to the Surrogate's decision, during this time he helped provide for the children's needs. and the testimony given at the hearing before the Law Assistant indicates that be acted as any married father would toward the two children. After the children were taken from him, the appellant continued to see them regularly, thereby demonstrating his continued parental interest. Finally, in stark contrast to the unwed father in Quilloin, the appellant here seeks not only custody but adoptive rights to his children. The difference in treatment between married and unmarried fathers, therefore, cannot be justified here, as it was in Quilloin, by the unmatried Cather's lack of interest in

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State interests it believed to be promoted by \$111 of the New York Domestic Relations Law.⁴ The court recounted the substantial interest that New York has in promoting the best interests of the children whose fate the State is called upon to determine. Finding that adoption often is in the best interests of illegitimate children, the court concluded that,

> "[t]o require the consent of fathers of children born out of wedlock...,or even some of them, would have the overall effect of denying homes to the homeless and of depriving innocent children of the other blessings of adoption: The cruel and undeserved out-of-wedlock stigna would continue its visitations. At the very least, the worthy process of adoption would be severely impeded."

Id., at 572. The court reasoned that people wishing to adopt a child born out of wedlock would be discouraged, if the natural father could prevent the adoption by the meru withholding of his consent. Indeed, the court suggested that "[m]arriages would be discouraged because of the reluctance of prospective husbands to involve themselves in a family situation where they might only be a foster parent and could not adopt the mother's of[spring." Id., at 573. Finally, the court noted that often unwed fathers cannot be located. Thus, the court speculated

The State's interest in providing for illegitimate children's well-being is unquestionably an important one. Furthermore, such children's best interests often may require their adoption into new families who will give them the stability and love that will foster their growth into responsible members of the adult community. It is not enough, however, that the denial to unwed fathers of a substantial voice in the adoption of their children may further some mayor Tant powerEnd state interest. In addition, the Equal Protection Clause requires that the means selected to promote a compelling state interest be carefully tailored to do so without infringing unnecessarily upon the fundamental interests involved. See Memorial Hospital v. Maricopa County, 415 U.S. 250, 267 (1974). . .

We find that \$111 is not necessary to promote the interests set forth in <u>Matter of Malpica-Orsini</u>, supra. Neither the State nor the appellees have presented any argument that the veto given married fathers is any less of An impediment to adoption than would be a similar veto given to and families. More important, the State is not entitled to treat all unmarried fathers alike merely on the basis of the irresponsibility of some. The instant case demonstrates that some unwed fathers take an ongoing, active interest in their children's well-being. Certainly there was no difficulty bero in discerning the appellant's views concerning the adoption of his children. Thus, the State could protect its adoption proceedings from unnecessary delay and impediment by excusing the consent of the natural father in cases where he could not be reached. Indeed, §111 may achieve this result as presently drafted, as consent is excused in cases where the father has abandoned the child. See In the Matter of Orlando F., 40 N.Y.2d 103 (1976).

In sum, we conclude that New York's interest in providing stable homes for its illegitimate children could be *advantable* protected fully by means of a statute that trenches less drastically upon the fundamental right of all parents to sear their children. Accordingly, \$111 violates the Equal Protection Clause insofar as it is applied in this case to

according to their marital status. This Court has required that in giving different treatment according to sex, a statutory classification must bear some "fair and substantial relation" to an important governmental purpose. See, e.g., <u>Craig v. Boren</u>, 429 U.S. 190 (1977); <u>Reed v. Recd</u>, 404 U.S. 71 [1971]. Thus, the distinction drawn in \$111 between mothers and fathers is particularly troublesome, as it impinges upon the fundamental right to rear one's children, and does so by <u>genles. based</u> drawing a distinction that this Court has come to view with a member of courts.

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The New York Court of Appeals in <u>Matter of Malpica-</u> <u>Orsini</u>, supra, presented the same justification for the distinction in \$111 between men and women as it did for that between those who are married and these who are unmarried: the impediment to adoption that would result it unmarried fathers were given a veto power over the adoption of their children. We see no reason why unmarried mothers would pose any less obstruction to adoptions than would unmarried fathers. Indeed, insofar as the New York Court of Appeals is correct in its

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curtailed cannot justify the difference in treatment between umarried (athers and mothers. Moreover, as we have noted. those unmarried fathers not available to participate in the adoption proceedings may be deprived of their veto right the same way that unmarried mothers are: through the abandonment proviso of §111. See discussion, supra, at 14.

Converse another justification for the Appellees § different treatment of fathers and mothers under \$111. Thusthey suggest that the common "experience of mankind" indicates that "A natural mother, absent special circumstances, bears a closer relationship with her child...than a father does." Tr. of Oral Argument at 41. And see Stanley v. Illinois, 405 U.S. 645, 665-66 (1972)(Burger, C.J., dissenting). We have not accepted as a compelling justification for differential treatment the assumed difference between a mother's relationship with her chid and a father's relationship with the same child. See id. Moreover, any deference we might othersie show toward a logislature's evaluation of the material relationship is wholly inappropriate here, as we have no

with respect to unmarried couples is some indication that this difference was not uppermost in the legislators' minds when they enacted the statute.

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Even if the nature of a mother's relation to her infant justifies some special deference to the maternal interest, §111 is an irrational and imprecise way to protect. this interest. Thus, the statute draws the distinction irrespective of the situation of the children or the parents, without regard to the prior relationship that has been had among the members of the natural Eamily. Plainly there will be cases, however, where a child has grown closer to his father than to his mother. Furthermore, the uniqueness of an newborn's closeness with his mother cannot be equated with the relationship between an older child and his parents. The same experience of mankind that indicates the special nature of the maternal relationship during the first months of life, surely shows that, as children grow older, they develop close relations with both of their purents that defy any quantitative comparison. Indeed in the case at hand it is difficult to

after a close review of the circumstances of that relationship. When fundamental rights are impinged upon, the state cannot assume away such individual treatment by making broad assumptions concerning human nature.

We conclude, therefore, that \$111 is unconstitutional as applied in this case, as it is not the sort of carefully tailored remedy that is required when a State regulates conduct protected by the Constitution.

V. Due Process

Appellant also argues that he was denied substantive due procees by the New York court's decision terminating his parental rights without first finding him to be unfit to be a parent. See <u>Stanley v. Illinois</u>, 405 U.S. 645 (1972)(semble). Because we have ruled that the New York statute is unconstitutional under the Equal Protection Clause, we express no view on whether every state is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit.

lfp/ss 12/14/78

MEMORANDUM

TO:	Davið	DATE:	Dec.	12,	1978
SROM:	Lewis F. Powell, Jr	-			

Caban v. Mohammed

I have read your draft opinion 12/12, without undertaking any editing beyond Part I.

Before going further it may be well for us to talk. Your memo accompanying the draft raises questions that require some careful thinking through.

1. Your first question is whether we test the opinion on both grounds. I think I have a slight preference for the gender-based discrimination (the "sex ground"). We could rely on this ground without getting into the "thicket" of "strict scrutiny" and "compelling state interest". I have always been uneasy with this type of analysis. It had been established before I came to the Court. At the time I wrote <u>Rodriguez</u>, I considered abandoning it, but the precedents - as well as the votes of my Brothers - counseled against that course.

I therefore would feel more comfortable with a fairly simplistic analysis addressed to gender-based classifications. Our cases have recognized a sort of "middle-tier" type of scrutiny without so characterizing it. See <u>Read v. Read</u>, <u>Boren</u>, and my concurring opinion in <u>Frontiero</u>.

If we base our opinion, in whole or in part, upon the classification of unwed fathers differently from wed fathers (the "marital status" basis), I suppose **Beoperse** we would commence as you have with a holding that a natural parent - whether father or mother and regardless of marital status - has a fundamental right of some kind with respect to his or her child. You have described this in terms of an "interest" of a parent in taking part in the "raising" of his or her child.

On page 9 of the draft, you cite several cases as holding or supporting the view that "the rearing of a child is an activity constitutionally protected from unreasonable government interference". I have not reread any of these cases, and wonder whether any describes this "right" or "interest" as fundamental. If fundamental, before government interference is justified I suppose there would have to be a compelling state interest - not merely an interest that would support reasonable "classification. In short, I am not familiar enough with our authorities to know whether in fact we can find, on

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the basis of precedent, that there is a fundamental right protected by the Constitution in a parent with respect to the rearing of a child. If so, exactly what is it? Moreover, is it not a substantive due process right - as I recognized with respect to the family in <u>Moore</u>?

In view of these questions, I wonder whether we should not rely solely on the sex-based classification, stating in a note or the text that we need not decide the other issue.

2. Your second numbered paragraph refers to the legislative history of \$111. I had rather not delay circulation of the opinion until that is in hand. Often, we never succeed in obtaining history of state statutes.

3. You are quite right that Justice Stewart is unlikely to join any opinion we write on equal protection grounds. We must try to put a Court together without him.

I am not concerned about <u>Xablocki</u>, as I agree with you that the interests regulated there are guite different from those now before us.

* * *

Whether we elect to limit our opinion to one

ground or retain both, I would reduce Part III to a brief conclusory discussion of equal protection analysis. There are no five Justices who come close to agreeing on terminology unless it is expressed somewhat ambiguously. If we rely on the sex ground, I think you can find appropriate language in our sex discrimination cases, using Reed v. Reed as the basic benchmark.

I had thought that the best way to distinguish <u>Quillion</u> was to draw the distinction between custody (involved there) and adoption. The former can be quite temporary; the latter usually is final. I would be inclined to advance this ground first; then rely on the factual distinction as to the absence of relationship between father and child; and then emphasize that the issue before us now was not present in <u>Quillion</u>.

* * *

In sum, we should decide some of the foregoing questions, and perhaps you should make revisions in light of our answers to these questions, before I undertake editing.

L.F.P., Jr.

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lfp/ss 12/18/78 Rider A, p. 8 (Caban)

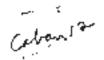
As we repeated in <u>Reed V. Reed, supra</u>, at 76, a statutory "classification 'must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstances shall be treated alike.' <u>Royster Guano</u> Co._v._Virginia, 253 B.S. 412, 415 (1920)."

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lfp/ss 12/18/78 Rider Λ, p. 9 (Caban)

We may assume as a generalization that it is correct to say that unwed fathers usually are more difficult to locate and identify than unwed mothers. But recognition of this fact lends little support to the judgment below. The state's interest in proceeding with adoptions where one parent cannot be found or identified may be protected adequately by means that do not draw such an inflexible gender-based distinction as that made in § 111.



lfp/ss 12/18/78 Rider A, p. 12 (Caban)

The traditional role of the mother centering in the home and the rearing of children is an honored and respected one. Yet, no longer may we presume that by custom or under the constitutional guarantee of equal protection women are destined primarily for homemaking rather than other careers in our society. At least, legislative classifications cannot be predicated on such a presumption. See <u>Stanton, supra</u>, at 14-15.

Nor may we accept uncritically the generalization - underlying much of the argument in support of § ill - that mothers are closer to and have a greater concern for the welfare of their children than fathers. At infancy and during the early months and even years of childbood, the mother's role is unique, although even then one cannot invairably assume that the father's interest and concern is less than that of the mother. As children grow older, generalizations as to child-parent relations and oarental responsibility become even less dependable. their adoption, continued to have a relationship with their mother unrivaled by the affection and concern of their father. The facts of this case illustrate the harshness of classifying fathers as being invariably less gualified to exercise a concerned judgment as to the custody of his child than its mother. The effect of the statute also enables an alienated mother artibrarily to prevent a qualified father ever from obtaining custody. We conclude that the statute does not bear a substantial relationship to the state's asserted interests.

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Revised

2nd CHAMBURS DRAFT.

SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellaut.)

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 Da Appeal from the Court of Kazim Mohammed and Appeals of New York.
 Moria Mohammed.

[January --, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

The appellant, Abdiel Caban, challenges the constitutionality of \$ 111 of the New York Domestic Relations Law, under which two of his natural children were adopted by their natural nother and stepfather without his consent. We find the statute to be unconstitutional as applied in this case as the distinction it invariably makes between the rights of uncarried mothers and the rights of nonzaried fathers has not been shown to be substantially related to an important state interest.

Abdiel Coban and appelles Maria Mohammed lived together in New York City from September of 1968 until the end of 1973. During this time Caban and Mohammed represented theoselves as being husband and wife, although they rever legally married. Todeed, until 1974 Caban was marned to abother woman from whom he was separated. While living with the appellant, Mohammed gave birth to two children: David Andrew Caban, been July 16, 1969, and Decase Caban, hera March 12, 1971. Abdiel Caban was identified as the father on each child's forth certificate, and lived with the children as their father through 1973. Together with Mohammed, he contributed to the support of the family.

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In December of 1973, Mohammed took the two children and left the appellant to take up residence with appellee Kazim Mohammed, when she married on January 30 1974. For the next nine months, she took David and Denise each weekend to visit her mother. Delenes Gonzales, who lived one floor above Calair. Because of his friendship with Genzales Cabar was able to see the children each week obecthey came to visit their grandmother.

In September of 1974, Gougales left New York to take up residence in his native Paerto Rico. At the Mohammeds' remest, the graphinother took David and Denise with her, According to appellees, they obtained to ion the children in Puerto Rico as soon as they had saved enough money to start a business there. During the children's stay with the r grandmother, Mrs. Mohammed kept in touch with David and Denise by naully Ceban communicated with the children through his parents, who also resided in Peerto Rice. In November of 1975, he want to Poerto Rico, where Gauzalez willingly somendered the children to Cabab with the orderstanding that they would be returned after a few days. Caban, however, returned to New York with the children. When Mrs. Molucomed logicityd that the children were in Cabax's restory, she attempted to retrieve them with the aid of a police officer. After this attempt failed, the appolleds instituted custorly proceedings in the New York Family Court. which placed the children in the temporary custedy of the Mohammeds and gave Caban and his new wife, Nina, visiting rights,

In January 1975, aphellors filed a petition moder \$110 of the New York Donorstic Relations Law to adopt David and Denise? In March, the Calants cross-petitioned for adoption.

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Sector: 10 of the New York Domestic Relations Law provides in part that.

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CARAN v. MOHAMMED

After the Family Court stayed the custody sait pending the outcome of the adoption proceedings, a hearing was held on the petition and cross-perition before a Law Assistant to a New York Surrogate in Kregs County N. Y. At this bearing, both the Mohammeds and the Calams were represented by coursed and were permitted to present and cross-example witnesses.

The Surrorate granted the Mohammods' petition to adopt the children thereby entring off all of appellant's parental rights and obligations.¹ In his opinion, the Surrogate auted the limited tight under New York law of sawed fathers in adoption proceedings: "Although a patientive father's consent to such an adoption is out a legal necessity, be is cotilled to an opportunity to be heard in opposition to the proposed stepfather adoption." Moreover, the court stated that the oppellant was foreclosed from adopting David and Denise, as

adels or mean buckund on an adult or mixer wile may adopt such a child of the other sponse."

Mebowich a natural mather is New York bits many provided rights without adopting her child. New York courts have bed that § 210 seconds are the adoptions of an electricate child by the mother. For D we decomposed disperses 177 Miss 583, 31 N, Y S, 2d 505 (App. Div. 1942).

²Section 117 of the New York Domestic Relations Lyw provoles, in part, that,

"Tableter the matching of an order of , deption the external parallel of the subscripter definition of the relevant of the parallel datase coward and of -10 responsibilities for order shall be used an anglets over so biodoptive definition as her projectly by descent action of our exception data datased."

As an exception to this general sale, § 117 provides that,

"In the a number of subspace the prior theory is which extends of a child, mention of constraints and expression that the supporter of a reproductive year theory with this is a dimensional dual that at least the manual or conserving of any parent is duty few and such child our shall such a conserving order with obspaces allow the residue of such a constant process of such unique of the test of such residue of such a constant spectra of such unique of the test of such respects a least of such a constant of a material and the pair kind set of such are such a such as for any disconstant of such as

In addition § 107 (2) provides that adoption shall in the field a diddly sight to distribut on of protocols with

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CABAN & MOHAMMED

the natural mother had withheld har consent. Thus, the court considered the evidence presented by the Cabaus only insofar as it reflected upon the Mohammeds' qualifications as prospective parents. The Surrogate found them well qualified and granted their adoption partition.

The New York Supreme Court, Appellate Division, differed, It stated that appellant's constitutional challenge to 8–111 was forcelosed by the New York Court of Appeals' decision in In re-Mulpice-Orshol, 36 N. Y. 2d 568, app. Gaussied for ward of a substantial federal question sub-mail. Orshol V. Blasi, 423 U. S. 1042 (1977). In re-David Andrew C., 56 A. D. 2d 627, 301 N. Y. S. 2d 846 (1976). The New York Court of Appeals similarly affermed in a memorandum decision based rea In re-Mulpice-Orshol, suprate David A. C. 43 N. Y. 2d 708, 401 N. Y. S. 2d 208 (1977).

On appeal to this Coort appellant presses two rlains. First he argues that the distinction drawn under New York, law between the adoption rights of an nowed father and those of other parents violates the Equal Protoction Clause of the Fourteenth Amendment. Second, appellant contends that this Court's decision in Quilloin v. Walcott, 434 U. S. 246 (1978), recognized the substantive due process right of notural fathers to maintain a parental relationship with their children absent a finding that they are unfit as parents.'

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Section 111 of the New York Donastic Relations Law provides in part that:

"current to adoption shall be required as follows; . . . (b) Of the parents or surviving parent, whether adult or infant, of a child born in wellock; [and] (c) Of the

Not the step diant was given the definer and was predicted to participate as a party of the adjustic proceedings, i.e. does not reduced that he was densel the procedural due process held to be requisite as Stephen's Thinkis, 465(11/8) (645) (1052).

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mother, whether adult or infant, of a child born out of wedlock, $\dots^{n} = N$, Y, Dorn, Ref. Law § 111 (McKinney's 1977).

The statute makes parental consent unnecessary, however, in certain cases, including those where the parent has abandoned or referquished his or her rights in the thild or has been adjudicated incompetent to care for the child.⁴ Absent one of

24 Of any person or appharized up acy having lateful cost of the adoptive child.

""The encount dial' not be required of a parent which is closed-and the child of why has suffered one? On shill to an authorized energy for the purpose of a lighting ender the provision of the sound services incomestic point for when clubba generic the best approxised under the previous of vectors three bundred childly-four of the social services law or whether beet decreed of vicit rights or when size as or whenlas been significant to be an hiddent drockard or whether been addicate deprived of the case hole of the chief so assembly females or negled, or parents they (place) finding that the abilities of superconducts preved which as defined as sectors six buildred eleven of the fighty court act of the state of New Yerks except that contine of the proposed indeption which be given in each manner. as the judge of suffree to may described and the opportunity to be been thereon may be afforded to a powert which chose detrived of each rightand to a parent of the hadge or surgery so encoders. Notworkstanding any when provided by mathematics of a preposal adapting nor and press in such prevedue shall be separate to contractly name of the person or persons socking to adopt the child. For the purpose of this so tion avidence of social costs is of principants outputs by a parent with his of her sheld shall rate of theft, be sufficient as a matter of pay its presidents and og thet sin hoperent has abardened side skild.

"Where the adoptive child is over the age of eighteen years the long-

At the time of the proceedings is fore the Surrogate § 111 provided:

PSafiged to the heritations hereizafter set forth consent to adoption shill be required as follows:

⁽¹⁾ Of the asian invested in a contrast on years of ages unless the pudge or sample, to go his discretions directly ended with stark ends of:

⁽²⁾ Of the periods of surveying period, whether points or infinite of a shift formula wellock:

 $^{^{+}}$ G the mother, whether adds ar added, of a cloid boxs out of well-ext

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these electronstances an inwed mether has the outfunity under New York law to block the adoption of her child simply by withholding consent. The may 4 father has no similar control over the fate of his child, even when his parental relationship is substantial as in this case. He may prevent the termination of his parental rights only by showing that the best interests of the shild would not permit the shild's adoption by the petitioning roughe.

Despite the plain wording of the statute, appellers argue that inwed fathers are not treated differently index § 111 from other parents. According to appellees, the consent requirement of § 111 is merely a formal requirement lacking its substance, as New York courts find consent to be inneressary whenever the best interests of the child support the adoption. Because the best interests of the child support the adoption. Because the best interests of the child always determine whether an adoption petition is granted in New York, appellees contend that all parents, including unwed fathers, are subject to the same standard

Appellers' interpretation of \$ UU finds to support in New York caselaw. On the croticary, the New York Court of Appeals has stated anoquivocally that the question whether consent is required is cutively separate from that of the best

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sents specified in sublicitions two and three of this section shall not be required, and the judge or actors do in his discretion any direct that the convent specified in subdicision for t of this section shall not be required if in his optimum the most band tong and interests of the adoption child will be predicted by the adoption and such convent expect for any reason be abtained.

[&]quot;An eleption child who has only bring having ordered may be readepted directly from such child's adoptive parents in the same reasons as from its natural parents. In so h, as the consent of such matrical parent shill not be required but the index or survey to in his discretion any require that notice be given to the trained parents of such manner as he may presented."

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interests of the child." Fudred, the Surrogate's decision in the present case, affirmed by the New York Court of Appeals, was based upon the assumption that there was a distinctive difference between the rights of Abdiel Cabao, as the towed father of David and Decise, and Maria Mohammed, as the unwed nother of the children: Adoption by Abdiel was held to be impermissible in the absence of Maria's consent, whereas adoption by Maria could be prevented by Abdiel only if he could show that the Mohammeds' adoption of the children would con be in their best interests. Accordingly, it is clear that § 111 trents momaried parents differently according to their sex.

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Gender-based distinctions "initial serve governmental objectives and must be substantially related to achievement of those objectives" in order to withstand judicial scriptiny under the Equal Protection Clause. Craig v. Borov, 404 U. S. 199–197 (1977). See also Reed v. Reed, 404–11. S. 71 (1971). The question before us therefore, is whether the distruction in § 111 between academical mothers and unmatried fathers being a substantial relation to some emportant state interest. Appelleus assert that the distinction is judified

⁴ See Let & Corry Let V Mathie L. 45 N. Y. (20083) 391, 380 N. E. 21 256, 270 (1978);

[&]quot;Absent consent, the first forms here was not the issue of the advection since method decisional data non-statute can bring the relationship to an end because some one else might over the circle in a mate sub-factory fashion, i.e. Absentionment, i.e. it performs to a logition relates to such conduct on the part of a particle as comes a propose full indication process oblightions and the formeric of prototal rights—, will had an a formered process, affection, core and support. The data interacts of the data is a study, is not on represent of the treaches and corrects of the data in this study, is not on represent of the treaches and corrects of the data in the four-half question. While prototal of the base interacts of the data in the four-half question. While prototation of the base interacts of the data is exacted for the adjusted of the relation applied in the field is consistent of a prototation of the base interacts of the data is consistent on a substitute for a field of the relation applied in the relations consistent of the substitute for a field of the relation of the logith of the data consistent of the relation of the relation of the logith of the data is consistent.

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by a fundamental difference between material and parenal relations that "a capital norther, absent special circumstances, bears a closer relationship with her child . . . than a father does." Tr. of Oral Arg., at 41. This claimed difference is difficult to assess in the abstract without reference to the very different situations in which indeption of illegitimate chaldren is sought. To some circumstances, newed mothers stand in a relationship to their children very different from that enloyed by an inwed father. During infancy, the mother's role—biologically and otherwise—is unique. This uniqueness combined with the special difficulties attendant upon identifying and legating moved fathers at highly may justify some statutory distance in between mothers and fathers of newhorn infants.

Contrary to the apparent presumption 46,8111, indexeal and potential roles are not invariably different in innertance. As elected grow other, generalizations concerning parent-child relations and parental responsibility because less acceptable as bases for legislative distinctions according to the sex of the parent. The present case demonstrates that ar unwed father may have a relationship with loss children fully comparable to that of the number. Appellant Calara, appelles Maria Molammed, and their two children fixed together as a natural family for several years. As members of this family, both mother and father participated in the case and support of their childrent. There is un reason to believe that the Cabara

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In Qiallols we expressly reserved the question whether the Georgia statute

[&]quot;See prior, at ----

⁷ for new tag on numerical factors construction below in Quality, $Walkary = 4.04 \pm 0.85$, $2.02 \pm (1078)$, we say be readed the supertaneous of the appell 0.05 follows relative to a factor toward bis oblighted by the line

[&]quot;. . . for over exercised neurol or legal entration or his child, not thus has report should and any significant responsibility with respect to the field supervision, obtained, procession of care of the child. Appellatitions to be only " in of "esters any care these responsibilities and, indeed, he does not even new sectors take of fact dold " $[M_{\rm eff}]$ if $[M_{\rm eff}]$

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CABAN V. MOHAMMED

children—aged 4 and 6 at the time of the adoption proceedings—duct a solutionship with their nother unrivated by the affection and concern of their father. We reject, Correfore, the claim that the briefd, gorder-based distinction of \$111 is required by any universal difference between material and patential relations at every place of a child's development.

As an alternative justification for § 111, appellers argue that the distinction between moved fathers and unwed mothers is substantially related to the State's interest in promoting the adoption of illegitimate children. Although the legislative history of § 111 is sparse," in *In to Malpien-Orsino, septen,* the New York Court of Appeals identified as the legislature's purpose in adopting § 111 the furthering of the interests of illegitimate children, for whom adoption often is the best course.⁴ The court concluded that,

"[1]o require the consent of fathers of children bora out-

similar to § 101 of the New York Damester Relations Lew automstragmenally distocounsless marked potents or configure their period, as the charaway not preperty present distributed U.S., at 253 (6)13.

[&]quot;Constant of the non-arrival factor has cover been required for a lapton such a New York law advange gategrable operational responsibility has simple the lapton of the second for Second Secon

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of wedlock . . . , or even some of them, would have the overall effect of denving bours to the honorless and of depriving innocent children of the other blessings of adoption. The cruck and undescreed out-of-wedlock stigma would continue its visitations. At the very least the worthly process of adoption would be severely junpeded." *Id.*, at 572.

The court reasonal that people wishing to adopt a child born out of wedlock would be discorraged, if the natural father could prevent the adoption by the more withholding of his consect. Indeed, the court wout so far as to suggest that "[m]arriages would be discouraged because of the reluctance of prospective husbands to involve themselves in a family situation where they might only be a foster parent and could not adopt the muther's offspring." Id_{c} at 573. Finally the court noted that if pawed fathers' consect were required before adoption could take place, in many instances the adoption would have to be delayed or eliminated altogether because of the constantial father.¹⁶

The State's interest in providing for the well-being of illegitimate children is an important one. Furthermore, we may assume that the last interests of such children often may require their adoption into new families who will give them the stability of a normal, two-parent hores. Even if prompted by a common for the best interests of illegitimate children, however, § 111 cannot withstand judicial scratter under the Equal Protoction Clause unless it is shown that the grader based distinction of the statute is **tailoued** protoched to meet this concern. As we repeated in *Road v. Reed. sofern* at 76, a statutory "classification franct be reasonable not arbitrary, and must test on some ground of difference baying a fair and

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CABAN V. MOILAMMED

substantial relation to the object of the logislation, so that all persons similarly circumstanced shall be treated alike.⁴ Royster Gauno Co. v. Virginia, 253 U. S. 412, 415 (1920).⁴

We find that application of the distinction in & 111 between manarrial mothers and monarrial fathers in this case does not bear a substantial relation to the State's interest in proyang adaptive homes for its illepitience children. In may be that, given the opportunity, some movied fathers would prevent the adaption of their illepitience children. This impedament to adaption usually is the result of a natural parental interest shared by both geoders aller; it is out a boarifestation of any profound difference between the affection and concern of mathers and fathers for their children. Neither the State numbers and fathers for their children. Neither the State num the appellers have argued that growed fathers are more likely to object to the adoption of their children than are moved mothers; our is there any self-condect reason why as a class they would be.

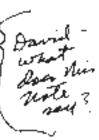
The New York Court of Appeals in In re-Malpha-Orsian, source, suggested that the requiring of asymptical fathers' consect for adoption would price a strong impediment for adoption because often it is impossible to forme proved fathers when adoption proceedings are brought, whereas mothers are more lakely to remain with their children. In assessing this claim it is precissary core again to distinguish memory the various situations to which illegitimate children are adopted. The problem of identifying an unwed father of a new-born ictaut is different to significant degree from the identification of an unwed father who has established a substantial rela-Conship with an older child. Where the identity of the father of a newborn is not known or, if known to the mother. has not been revealed, the State may protect its should interest in repose by appropriate infustaces which forcelose post-adoption claims of paternity,

But these considerations do not continue to apply past infancy. When the adoption of an other child is sought, the

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State's interest in proceeding with adaption rases for he protrated by means that do not draw such an inflexible genderbased distinction as that made in § 111.⁹ To this and similar cases where the father has established a substantial relationship with the child and has admitted his paternity, he may be identified as readily as the married father. Where the father never has come forward to participate in the rearise of Lischild, nothing in the Equal Protection Clause produces the State from withholding from lite the privilege of vetong the adaption of that ebild, the leader diverstatute as it now stands the Sum gate may proceed in the absource of consent when the parent whose ensent otherwise would be rispiped never has some forward or has alreaded of the child of See. c. g., In returbanda F., 40 N. Y. 24 103 (1976) This provision of \$400 applies to failurs and mothers alike, with respect to children buru in wellock. Thus, no showing has been rashe

We do not suggest of non-staticity provides of \S (1) in king particle bottom transmosters in a case of the efforment is the organization to call the bottom transmosters in a case of the effort in protection of the (intervational free bottom) are shiftly to New York for the protection of the (intervational free bottom) is a structure bolic the restriction of the (intervational free bottom) is a structure bolic the restruction of the (intervational free bottom) is a structure of the fractions of the constitution of the structure bottom of the interval flux fractions of the structure free bottom and productive on the docated free on fractions of the structure free bottom two [s]? To the structure of structure fractions of the structure free bottom two [s]? To the structure of structure gradient bottom, the fraction two [s]? To the structure of structure gradient bottom, the structure fraction two [s]? To the structure of structure gradient bottom (fractions), the function of \$ (113) only to emphasize the fraction of the structure fraction etion of \$ (113) only to emphasize that the structure fractions are structure of \$ (113) only to emphasize the fraction of the rough more present bet resched emission to check the track the protocol of fraction structure present bet to structure of structure of the structure of the structure present bet



¹⁹ See Condens, The Charteling Constitute and Proceeding of the Polytike Futber's Proceed Ref. S. 70 Math. J. Rev. 1581, (500) 198701.

If the New York Courses Aspects is correct that connected for his office description of a description of the product $2\pi d$ is well you with the description description of the product $2\pi d$ is well you with the description of the State's description. For we denote the state $2\pi d$ is the State's definition of the View York 1 is described on the product of ξ but we denote the state of ξ but the state of the New York 1 is described on the product of ξ but the state of the State's description of the state of the st

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that the different treatment afforded nemarried fathers and contarried methers under \$111 bears a substantial relationship to the proclaimed interest of the State to promoting the adoption of disguimate children.

In sum, we believe that § 111 is mother example of "overbroad generalizations" in geoder-based classifications. See Californi v. Gabiliath, 430 V. S. 199, 211 (1977); Stanton v. Structure 401/U/S, 7, 04-15 (1975). The effect of New York's classification is to discriminate against woord fathers even when their identity is known and they have manufested a paternal interest of the cliffe. The farts of this gase diustrate the hardness of classifying amound fathers as being invariably less qualified and entitled than unthers to exercise a concerned judgment as to the fate of their children. Section 11 both excludes some loving fathers from full participation in the derivon whether their children will be adopted and, at the same time, enables some alignated mothers subiratily to cut of the paternal rights of fathers. We conclude that this undifferentiated distinction between unwed a others and growed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not been a substantial relationship to the State's asserted juranesis,"

Facely, application gues that he was denied onlying the due process

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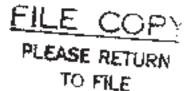
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CABAN & MOILAMMED

The judgment of the New York Court of Appeals is Reversed.

when the New York courts termine and his parental rights we have first finding from to be oright to be a pressure. See Station is Planes 405 U.S. 645 (1972) (so able). Prepare we have at his framine New York station is encourse to form the Eq.(4) Protocol (C. as a we express to show any wheth it courts the Eq.(4) Protocol (C. as a we express to show any wheth it courts State is constitutionally be training as rights are being to managed in the planet of a decomplex large that the planet whose rights are being to managed is unliked.

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Calam, Appellant-

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v. Nazlar Mohamzaid and

Maria Mohammed.

On Append from the Court of Appends of New York.

[January -, 1979]

Mr. JUSTICE POWERS delivered the opinion of the Courts.

The appellant Abdiel Calum challenges the constitutionality of § 111 of the New York Domestic Relations have under which two of his natural chaldren were adopted by their natural mother and stepfather without his consect. We first the statute to be corrected attrial, as the distriction it toakes between the rights of memarical mothers and the rights of nannaried fathers has not been shown to be substantially related to an important state interest.

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Abdid Calam and appellee Maria Mohammed livel together in New York City from September of 1958 mill duend of 1953. During fins time Calam and Mohammed hypersented themselves as being husband and wile, although they never legally married. Indeed until 1974 Cabao was staryied to another women from whom he was separated. While living with the appellant, Mohammed gave birth to two children: David Androw Caban, from July 16, 1960, and Denise Calam, hore March 12, 1972. Abdiel Caban was identified as the father on each child's buth certificate, and lived with the children as finer father through 1973. Together with Mohammed, he contributed to the support of the facily.

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UABANA, MORANNED,

In December of 1973, Mohammed took the two children and left the appellant to take up residences with appellee Naziri Mohammed, whom she related on Jarouary 30, 1974. For the next tim manths she took David and Decise each veckered to visit ner norther. Delores Goroades, who hved mee flow above Cabaco. Because of his friendship with Genzales, Caban was able to see the children each week when they game to visit their gravito other.

Li September of 1974, Gonzales left New York to take up residence in her native Pherto Rice. At the Mubanning's request, the grandmother rook David and Denise with her-According to appellees, they planted to join the children in Points Biro as som as they had saved success more to start a bushess there. During the children's stay with their grandupd'um Mrs. Mohammed kept in tonch with David and Derive by much Unhan communicated with the children through his parents, who also resided as Puerro Riss. In November of 1975, he went to Pherry Russ, where Genzalez willingly sympodered the clubban to Caism with the qudeestudieg that they would be returned after a few days Column proveyor, returned to New York with the children, When Mrs. Mohananad Journey that the elddree were in Cobacis costedy, she attempted to retrieve them with the aid of a collectoffice. After this attempt felled, the gradies Instituted rustody proceedings in the New York Facaily Court. which alword the children γ_{*} the temporary sustaine of the Molonomods and gave Calant and his new wife, Ning, e-siting rights

In January 1976, accorders filed a petition under \$110 of the New York Demestic Relations Law to adopt David a d Dentse, — In March, the Cabaco successpirational for gdoption

⁽¹⁾ Sectors (1) Boot the New York Damests, Bell (see 5) we provide respect that:

⁽i) all cadulation without bracklands and the callability of tensors with weight a much makes the efficient efficiency of them come in the of weight weight as

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CABANA, MORAMMED.

Mer the Family Court stayed the rusterly see pending the outcome of the adeption proceedings, a hearing was held on the petitice and cross-petition before a Law Assistant to a New York Surregate in Kings Courty, N. Y. At this hearing both the Mohagmards and the Calams were represented by coursel and were permitted to present and cross-examinawitnesses.

The Surveyant granted the Mohammucki preficter to adopt the children, thereby entrong off all of gapellant's potential tights and obligations.⁴ The histophetic the Surveyant rooted the limited right under New York law of unweet tathers in adoption proceedings: "Although a putative father's consent to such an adoption is not a legal necessary he is outfield to an importunity to be heard in consistent to the proposed stepfather adoption.¹¹ Moreover, the court stated that the appeliant was forcelosed from adopting David and Dense as

adult of the third state in a middly on a proportion with the velocity of the field of the third sectors."

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(Section 30) on the New York Domestic Relations 1 to provided in note that.

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CARAN & MORAMMED

After the Family Court stayed the custody soft pending the outcome of the adoptice, proceedings, a heating was held on the potition and cross-perition before a Law Assistant to a New York Surrogate in Krags County, N, Y. , At this heating, both the Molenumeds and the Cabins were represented by consel, and wore permitted to present and consistential with uses.

The Suprogate grants I the Mohammeds' petitors to adopt the children, thereby entring off all of appellant's parental rights and obligations. In this optimen, the Surrogate coted the branted right under New York has of around fathers in indeption proceedings: "Although a parative father's consent to such as adoption is not a legal mensity, he is outlifted to an opportunity to be heard, in opposition to the proposed stepfather adoption ". Moreover, the contribution that the appellant was functioned from adopting David and Dense, as

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Constanting § 117 (17) as welds the todoption should not off successful to distribution of sympersymmetry for a track property with

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⁽a) the statistical hashand as a product of proceeding the interval opposition and c) the offset of set spectra."

77 GIB JOPINION

CARANA AND AND AND A

the catural mortice had withhold for consent. Thus, the contractional function processes and by the Cabanis only insofaction as a reflected upon the Mohammeds' qualifications as prospertive parents. The Surgegate found there well qualified and graded their polaptice partition.

The New York Suprome Court, Appellate Division affirmed. It stated that appellatids constantional challenge to § 114 was forcelosed by the New York Court of Appeals' decision in there Malpha-thesis, 36 N, Y, 20 568, app. discussed for want of a sub-diminal federal question sub-mon. Order v. Blass, 423– 11, S, 1042 (1977). To be David Andrew C., 56 A, D, 24 627, 201 N, Y S, 2d 846 (1976). The New York Court of Vapeals similarly adjunct on a trensmandage decision based on In re-Malpha-theory, supration in David A., C., 43 N, Y, 2d 708– 401 N, Y, S, 2d 208 (1977).

On apped in this Court appellant presses two clapps. First, he argues that the distinction drawn under New Yorklaw between the adoption rights of a smooth father and these of other parents violates the Equal Protection Clause of the Fourierich Academic Second appellant contends that this Court's decision in *Qualitaticy*. Walkett, 434 U. S. 246 (1978), recognized the cubstantive due process right of patteral fathers to constrain granized polaticoships with pseucioldron grants to including that they are useful apparents.

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Section 111 of the New York Demestic Relations Law mosvides in part that:

"consent to adoption shall be required as follows: ... (b) 02 the parents or surcivity parent, whether adds or (infact) of a shall have an wedlack; [and] (c) Of the

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We the quotient waveground constrained wave effected to participate the respective distribution proceedings, by do show respectively as wave above the procedure to a process held to be respectively wavefunction and 0 is a 0.5×0.072 .

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CARANA, MORALMUD.

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mother whether adult or inform of a child born out of weillock, $z \in \mathbb{C}^{n}$, N_{z} V. Doey Ref. Law § 111 (McKintevis 1977).

The statute neckes pwordal consent in neerssay, however, in certain cases, including above where the parent i as reliacolored his or log rights in the child or has been adeulo ated incompetent to egre for the child.¹¹ Magnitions of these dis-

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(1) COUPS provide second value on the whether odds or other or all stations in which is written.

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The external data is the product operator when we determine the chill or who has surjudently the study to be applicably bygons. An the y maximization add the station as he could spray law ends. rateat (et elses). E al a graph print des ring in ost under else provisi ris of second three landship rights (our of the sub-it seconds 1 who the feet destrict of end rights of when a near standard azies and adapt to the tailed of the standard many tests in the data of the case table of the difference and of crucicy or negative or pursuant solution. Figure that the dustrial period worth predocted statistical processing swiftendred depended the family contrast of the state of New York event the moment the proposal geopherical in the general submaniform is the rade of starting to serve atmentiated in a polynomial patholic field. there in the literated that parent which substantigraves have sightand there suffict in the judge of some sub-specifiers. Abroade confinguous other provided of the britler preformer of a press of the provide gradient process to stable presenting shell be respond to contain the name of the period of persons welcong to other the child of the partness of the ention, evolution of insulation in and just spin to outputs two quark with he or him child shall not not used. Ne with put we computer of law to Survivas a landing that work promotiles abreaking benchment

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CARANA, MODAMADED

runstances, an inwed mother has the autoority under New York law to block the adoption of her child shoply by withholding encount. The unived father, on the other hand, has no similar control over the fate of his child. He may prevent the technologies of his parental rights only by showing text the performs grouple would not be St parents.

Despite the plane wording of the statute appakees and that mered fathers are not treated differently toder § 101 hour other parents. According to appelles, the consect supprement of § 113 is merely a formal regularized, briking in substance, as New York courts find consent to be unnecessitive whenever the best interests of the child support the adaptive. Because the best interests of the child support the adaptive. Because the best interests of the child support the adaptive whether ac adaptive persists of the child aboves determine whether ac adaptive persists including moved for superscription that all recents including moved for bothes, are suffect to the scale stational.

Appelled interpretation of \$111 fields to support is New York caselaw. On the contrary, the New York Court of Appeals has stated uncontivorally that the one-sticn whether consert is required is noticely second count that of the best interests of the child γ . Indical, the Subogate's decision in the

Note I_0 is Const. 1, $N = H_0$ (n/T = 05 N (Y = 23.58) and (500×10^{-2}) (20) (270) (1978)

(About consent, the first torus there was not demonstrated burner) in a constitution demonstrates or states or a large thread torus lep-to a and be user conjugates, magnification of filling a more sate prior.

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access operated in subdivisions the could be such the sectors of the the required and the judge or surrogate in the sector of maximized to all the sector states provide a solution for the first sector is hill not be concrete. This for content the rest hand complete states of the index to exclude with the promoted by the propulsion of such concrete such to such the site besides not be rest.

An article of the scheduler for the loss of γ . Note how the theorem in the depth formally open wells build a community point to the scheduler of the formation of the format

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CARANA, MOMANDI D.

present case affermed by the New York Coord of Appeals was based upon the assumption that there was a distinctive difference between the rights of Alchel Caban, as the unwelfather of Bavid and Denise and Maria Muhaermod as the newed mether of the cirklena: Adoption by Abdiel was held to be impermissible in the absorce of Marga's consent, whereas adoption by Maria ready he prevented by Abdiel only if he could show that the Muhammuds would not be fit payents. We conclude, therefore, that § 111 treats incommod New York payonts differently according to their set."

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Gender-Ansel distinctions "constructive important 20000 normal objectives and noise be substantially related to achievement of those objectives" is order to withstand othend scritting under the Equal Protection Chaose. Comp. y, Ramo 429 U. 8 (190) 197 (1977). See also Read y Read, 404 U. S. 71 (1971). Although the legislative history of \$410 is sparse toy In a Malgoria-tradict supra the New York Const.

I down a sub-backgrout, we threat us to dopt in a 2-bit star such configuration the probability products consists a proposal direction is a power to sharp mass and the foregoing or present directory with holdbar of interstrations affection, in rescaling probability and in the free parameters of the child mesized as even as imprediced of the source and a most investory of the child mesized all questions. When provide the distance to the of the child meessature affective. When provide the distance to the distance of the child meessature action metric product of the index for a system of the child mematic astronometers approach of the index for a system on set of the child mematic astronometers approach of the index product of a system on set of the child returned astronometers are a modeling as all or distances in a torth of a symmet 1.

In Quillies in Rev. 6, 101 1018 (2010) 10780, we conclude the order throughty of a Gaussian elements and the SUB or the New York Frances (2010) and 1, which is provided by the state of applied through the constant should be Ghorgin state of pre-illust the data proves of properly including the the Ghorgin state of the state of the Constant State of the Subest conduct the Equal Proceeding Constant State $U = S_{\rm eff} = 253$ at 13 Our upbedding of the state to an Quile state of state is state to reach on the track of the state to an Quile state of state is state to reach on the track of the state to an Quile state of state is state to reach on the track of the gender broad of the state of state (2010).

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CANANA MOLLOGMED

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of Appends set forther, detail the state interests it believed to be promoted by X411 of the New York Dimestic Relations Law? The energy promited New York's substantial reference in promoting the interests of dieget rente children, for wheth adoption of the is the best reduce. The centre core field that

Fit for require the consect of fateers of children but not of weellock (-, -) on some some of them, would have the overall effect of denving booses to the broadess and of denving incommutable on set the other blowings of adoption. The end and mediserved out of-weellocs stipula would continue its visitations. As the very least the worffly process of policities would be secondly to speed 17 $-Id_{\infty}$ at 572.

The constant region of that purple wishing to bring a clubbour out of workness worklichs choosing of the natural father readd prevent the solution by metric withhedding hiconsent. To had, the rough were so far as to suggest that "furfaminges would be discouraged because of the refuctive of prospective bushands to involve thereafters in a family situation where they might only be a faster parent so head).

The $\delta \phi_{n,m,N}/\delta \phi_{n,m}$ (C. S. (112) 0.077 roles Court berry-order over the same Court No. New York: Court of Appendix is the length physical end of the model of the model of the same field of the model of the model of the model of the same field of the same field of the model of the model of the same field of t

to control at least since the later twinted rate of $S_{\rm eff}$ and $T_{\rm eff}$ is the State of New York (1996) Second 7, 1897, an 272. Then the state of rate of the state of the York later of optical states at the New York later of optical states at the state of the York later of optical states at the state of the

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CABANA, MORIANAU DO

For adopt the particula of spring, 1 - bt, at 573 . For ally, the court model, that if the word fathers' reasons were respectively before adoption could take sizes in many instances the adoption would have to be delayed or eliminated altogethet, because of the maxiphibility of the actual father.)

The State's interest is providing for the well brind of ill-25theat elibiraries ar indestination of Furthermore, we do not Joint Par the best rater sty of such whildren of the tory require their adaptive into new families who will give them the stability of a control two-general horar. Here, if precipited by a concern for the best interests of illigibilitate defidient however, \$111 a smort withstand judicial services in to the Educt Protector. Chase unless it is shown that the non-terslowed distriction of the statistic is tailored reasonably to most this owners. As we repeated to Reed v. Reed source, of 76 postatutory folossification must be reasonal location fits. they, god must requot some ground of diffuse richsving a fair and selectaritid relation to the object of the legislation. so that #3 persons and/exty emergestationed shall be treated while I Remain Granue Univ. Witnesser, 253 41; S. 412, 415 (1)200.0

We find that the distortion in § 111 between intential prefers not non-second interval as not been a substantial relation to the State's interval a providing adoutive between for as illegation which have the new between the opentunity some waved fathers would prevent the adoption of their illegation to children. We are dominate conjugation their illegation to children. This impeditor the adoption howone is likely to be the result of a natural agrental interest shared by both graders added it is not a transferration of any probability difference for wave the affertion and currents of

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^{12.5} for which is gravitational the New York Alterney Control is motion. New York Pleter on Appendix operator in the $r \in Mn'_{r}$ backwork for $r \in N_{r}$ with the product of M_{r} with the product of the product

77-6405 OPENION

CABANAS MORTAMMED

contines and fathers for their children. Norther the State northe appellers have argued that never fathers are more likely to object to the geoptice of their children than are served mothers; nor is there any self-evident tensors why as a class they would be:

The New York Court of Appeals in Matter of Malpha Orgini, super, suggested that requiring numerrised fathers' consent would pose a populiarly strong impediment to adopthen because often it is inconsible to locate turned fathers when advotice proceedings are brought, whereas nothers are more likely to remain with then children. Even if movel fathers usually are more difficult to locate and identify than thread mothers, this fact hours fittle support to the indement below. The State's (clerest 's proceeding with adoptions where use parent curves he found or identified may be protorted adoptately for means that do not draw such an in-Resilds gender-based distinction as that made is §111-030.11 hadord, order the statute as it now stands the Surragate new proceed it. the absence of consent when the practic whose consect otherwise would be required has abandoned the child Soc. e. a., In re-Orlando F., 40 N, Y, 24 103 (1996). This aluminational provision of 3-141 applies to fighters and mothers able, with respect to challen hors in wellack Thus, New York already has browided for situations where, but for the absence of a parent, a child, would be placed in a new propring home. To sum, no standing has been neglethat the different treatment arthraid new maind in Section unnerried mothers while 3 112 beers a substantial relationsituate the toorlained interests of the State in proceeding the adoption of illegitingta effective 25

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^{3.} G. the New York Construct Application optics that uncommode software effort from their functions that allowing such dath as a right to aligner to the termination of the measure of the Messwill provide the threat to Date and a

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CARANAC MOLEGARDO

Beyond for State's interest in proporting the adoption of illegiturates, appellers assert that the contrain "experience of markind" indicates that "a natural mother, absord special vircumstances hears a closer relationship with her child that a father dors." To of Oral Arg. at 41. Accord, Stanker v. Rivous 405 U. S. 645, 685–666 (1972) (Bradin, C. J. dissorting). Thus, appellers appear to argue that the distinction of § 111 between unmaried evolvers and nutconviral fathers merely reflects that mothers and fathers are not "conductly simpled" for purposes of the Equal Protection Classe, and therefore that their different treatment does not vielled the Constitution.

Whatever new by said ghost the differences between maternal and particul relations, it is plain that the New York Legislature did not rely mean any such differences in diafting \$113 - Section 111 draws no gender-based distinction between provide of children barg in weather's giving each the right to prevent the adoption of the child merely by withhedding con-

realizes the set r we cannot be the realizer size known whether the formation r is a set of pulsible mean we also set for the back task is known. Consumer, the value of pulsible mean track set known defines a function of the set of the s

We define a growth with the property of $\xi = 1.3$ stacks there are also seen as a masses with the set of the balance is the order constrained of the balance is the order of the set of the balance is the order of the set of the set

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CARANA, MODAVINED.

soit. Tous, the legislature did not view a purported differeace between mothers and fathers to be sufficiently great to require renogation with respect to children horn is wellock, as well as those horn with respect to children horn is wellock, as well as those horn with respect to children horn is wellock, as well as those horn with respect to children provides for those cases where married potents have not taken on active interest to their children, by effect acting the coosed requirement under actiant circumstances enumerated in the statute. Neither the State nor the appellers have suggested to us now reason why the carefully drawn provisions of § 111 with respect to married parents would not work as well in the case of parents who are not married.¹¹

Even if perceived differences between material and paterial relations were the basis for the genelectored distortion of ξ 111, the statute would not meet the requirements of equal protection as its classification is geometed on "gradian and overbried generalizations" concerning the facely. See Collique v. Coldfride 400 11, S. 199, 211 (1977); Stanton v. Station, 421, U. S. 7, 14, 15, (1977). The traditional role of the mother contering in the house and the recting of children its an house of and respected ones. Yet we may recting relation

There is a difference between concerned on these and dathers of so the schedules are construction of a hidrer barrier in K. As the CSC on president later of such as an wolflack in Softer direction but band on the booth of some some Commission and Papers Wellingers, Kanley, 201 N. Y. LON 30, N. F. 13, 587 (1980), in a second distance of s about ty of our end the production the Alther of such a bind of The identity - Operatorher of a relative to the set state of sets also prove during out on the but the tuber's iterative often presents and hards one-show look both y Ld = -10.8[11978] A. Telesberger, Gravitational Astrophys. 7 (2), 770. 1977). Surve have a legitative interval therefore in prevides that communication and the providence of the second state of the second second second second second second second se or strong up or the strengt that it is a prior as algebra when sight, consymptic imports, the New York static field, Affic all New York provides for a more in all Parally Coeff, the enterplant trends over \$8.511 3) 5(1) 6 the New Nork dedictory Contr. Acts, there is no precision adoreing tory why have been determined for the neuronal beats, ratio of of 06 homeouthy, we fork to do state the description of their electron under § 111.

D. Hol-CONDA

UMMAN & MORAMMED

that by easton; or under the constitutional guarantee of equal protection women are destined exclusively for bomeniak, g rather three other carriers in our society. At least, legislative classifications (a) but he predicated on such a presumption. See Stanfore v. Stanton, super at 14–15.

Not may we acceld uncritically the generalization product lying much of the argument in support of \$111-that moders. are closer to their daldree that are fathers. During informs, the mother's role is untime, although even then one can alo variably assume that the father's relation his child's lafe is less than that of the norther. As children grow added, genendizations concerning child parent relations and paternal responsibility become less accurate. The present case domainstates that an arowed father may rake a continuing and devated interest in his clidden's well being. There is an report to behave that the Calum shildren aged 4 and 6 at the title of their adoption contrained to have a relationship with their pother perivaled by the affect on and someone of their father. The facts of this case dissuate the farshness of plassifying fathers as bong invariably loss qualified and cutilled than mothers to exercise a concerned judgment as to the fate of their children. Soutien 111 at the same time both excludes some laying fathers from full participation in the decision whether their elaboration will be adopted and enobles some algorithm mothers addreadly to get off the patetad rights of fathers."

We can choic that this genetic based statistory distinction does not been a substantial relationship to the State's asserted interests?

¹¹ Appellant size that togets the constitution day of the distance on prode as § 111 hereword in true is not need in the size. Appellant region for it

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^{4.} We set to With not suggest the distribution of datases now in where destinations between an exact of pattern directly all correspondence that data argues could be based using the distribution influences, where the other data argues to determine the data argues.

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CABAN V. MOHAMMED

The judgment of the New York Court of Appeals is

Reversed.

The matrix of a child is a notivity constitutionally protocted from corresponded governes at a tech convert Six Q where V Biology, $\lambda + 1 - S$ (25), 253 (1968). Workshows V Biological (1976), 263 (1976), 264 (1976), 265 (1976), 275, 166 (1966) - 16 is argued thermal with respect to where we have to a derive in a derive of state of st

Application is to be a set that the acts densed solution the process when the New York sources correct to define a metric region with each first fairling form to be under to be a present. See Sourchark of the global N > S > 645 + 12.6 for K = 1000. Again, because one have raded that the New York structures into a the theorem is source on the presention. Charles are correspondences on whether a State to source or the formula form we correspond to the line absciss of a determination () of the parent winger rights are being terminated is traffic.

Onpreuse Court of the Anited States Mushington, B. G. 20543

DEC 2 9 1978

SUMMERS OF JUSTICE JOIN PAUL STEVENC

December 29, 1978

RE: 77-6431 - Caban v. Mohammed and Mohammed

Dear Lewis:

As you will recall from the Conference, I am on the other side of the Equal Protection issue in this case. It is therefore presumptuous of me to raise any question about your opinion. Nevertheless, because I am profoundly croubled by its potential impact on the typical adoption of the newborn infant, I would like to identify some of my concerns informally, rather than in any sort of formal Writing.

It is my understanding that the most respected adoption agencies throughout the country generally make the adoption arrangements well before the child is born. In many cases involving teenage mothers, the identity of the father is either undisclosed, unknown, or even ambiguous. In a significant number of cases the father may even be unaware of the pregnancy. As a practical matter I wonder how the new constitutional { requirement of either consent or a finding of unfitness } of the father will work.

Even in those cases in which consent of the father is obtained, how will the adopting parents be protected against the risk that some other person will subsequently make a claim that he was the father and did not give his consent? Even when an evidentiary hearing would demonstrate that the concern was not justified, the adopting parents may nevertheless be genuinely fearful of unknown contingencies. There Mr. Justice Powell Page two

are no title companies guaranteeing the fatherhood of unborn illegitimate children.

If the father's consent cannot be obtained, perhaps because the mother is unwilling to reveal his identity, how can the unfitness of the father of an unbern child be demonstrated? If the failure to marry the mother is considered adequate proof, then the whole requirement of a father's consent becomes meaningless. Your opinion suggests that notice by publication would out off subsequent challenges by unconsenting fathers or possible fathers, but what would such a notice say? It would be useless if it did not identify the mother, and if it does identify her, it would offend her privacy interests in a most outrageous fashion.

I will not burden you with further writing, but I wonder if you would give consideration to trying to develop some limitation in the opinion to minimize its impact on the adoption of infants. I realize that this may not be possible under an Equal Protection rationale--and, indeed, that is why 7 cannot join the analysis--but my respect for your practical wisdom prompts me at least to raise the question with you.

Respectfully,

Mr. Justice Powell

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January 2, 1979

No. 77-6431 Cahan v. Mohammed

MEMORANDUM TO THE CONFERENCE:

I am contemplating making some changes in the first draft of the opinion I circulated on December 28.

I hope to recirculate within the next few days.

L.P.P., Jr.

DW 1/1/79

Memorandum

To: Justice Powell

Re: Mr. Justice Stevens' letter in Caban

You have asked me to review our opinion in Caban v. Mohammed, No. 77-6431, in the light of Mr. Justice Stevens' letter to you of December 29, 1978. Justice Stevens raises several thoughtful points concerning the difficulties our opinion will pose for the adoption of newborn infants. I believe that his concerns fairly may be grouped into three categories. First, he suggests that often it will be impracticable to obtain the consent of the unmarried father, as his identity will be "undisclosed, unknown, or even ambiguous." Second, Justice Stevens argues that requiring the consent of the natural father will undermine the substantial interest in repose; adoptive parents will be rejuctant to adopt a child knowing that in the future some man may come forward to claim. that he--not the man who consented to the adoption--is the true father. Finally, Justice Stevens takes issue with our suggestion that the state may set up mechanisms (such as publication) to foreclose natural fathers' rights in some circumstances. He notes that requiring publication of an illegitimate child's birth "would offend [the mother's: privacy

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interests in a most outrageous fashion."

Although Justice Stevens' expressed concern is with the adoption (arranged generally before birth) of newborns, you should notice that his criticisms apply in some degree to all you adoptions. Thus, there often will be questions concerning the identity of the father with respect to children several years old. Indeed, the record in the present case indicates that at the hearing before the Law Officer Maria Mohammod tried to raise questions concerning Abdiel Caban's status as the father of David and Denise by testifying that she had had sexual

Because of the uncertainty surrounding the identity of <u>all</u> unmarried fathers (irrespective of the age of their children), problems of finality will arise whenever unwed fathers are given the right to have some control over the fate of their children. Thus, for example, in the present case even if Abdiel Caban were to consent to the adoption of his children, it is impossible to assure the adoptive parents with certainty that five years hence no other man will come forward and seek to prove that he--not Caban--is the real father.

Finally, if the unwed mother wishing the adoption of her child refuses to identify the father of that child, then the problem of how to discorn the father's identity arises whatever the age of the child. Publication often will have no less intrusive an effect when the children are five than when

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they are newly born.

To be sure, there are important distinctions between the newborn adoption and other adoptions--distinctions that may make Justice Stevens' concerns less compelling when applied to older children. Thus, it may be that the state constitutionally may distinguish between parents who have developed some substantial relationship with their children and those who have not. If this is the case, then only those natural fathers who have been living with their children as de facto fathers for some period of time must be accounted for by the state, and such fathers often may be more readily identifiable without resort to such things as publication. Similarly, if the state constitutionally may limit the veto to parents with a substantial relationship to their illegitimate children, then parents without such a relationship may be precluded from subsequent challenges to an adoption, whether or not they are the "real parents." My point, then, is not to take issue with Justice Stevens' emphasis upon newborn adoptions, but rather to indicate that, to my mind, the concerns he poses apply in some degree to all adoptions.

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As I see it, there are three alternative ways we could alter the opinion to accomodate the difficulties posed by Justice Stevens: (1) we could indicate that states remain free, in cases where the unwed father's identity is unknown, to fashion some mechanism for giving minimal protection to the father and maximum protection to the mother's interest in

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privacy and the adoptive parents interest in finality; (2) we could emphasize the distinction we suggest at the end of the opinion between parents of newborns and parents of older children (such as are involved in the present case); or (3) we could rewrite the opinion as recognizing a substantive due process right on the part of unwed fathers.

1. Determination of Father's Identity

In the opinion as now written, there are references to the state's interest in giving parental rights only to those who truly are parents. See n. 11 & 12. As we say in note 12, states presume that children born in wedlock are fathered by the man married to their mother. If some similar presumption were constitutionally permissible with respect to children born out of wedlock, then many of the problems concerning the identification of the unmarried father would be eliminated.

It is difficult to find a presumption that Geens fairly applicable to unmarried fathers. One alternative, however, might be that only those fathers who either: {1} are living with the child's mother at the time of birth; or (2) are identified as fathers by the child's mother at birth, are entitled to assert parental rights. All other unmarried fathers would be deemed ineligible to assert parental rights, on a theory analogous to the abandonment provision of N.Y. Domestic Relations taw §111. Once deemed ineligible, the unmarried father's rights could be statutorily terminated entirely. thereby foreclosing subsequent challenges to adoption. Though

this might seem harsh, it strikes me as being little different from other mechanisms that we have found to be acceptable to promote the state's interest in finality and ordered social relationships. See, e.g., Lalli v. Lalli.

Fortunately, this Court need not come up with a suitable mechanism to deal with situations where the identity of the father is in doubt. In this case there is no such substantial doubt, and so the statute as applied to this case is unconstitutional. To meet Justice Stevens' concerns, however, we should consider two things: (1) explicitly leaving the door open to the states to draft a statute designed to deal with the problem of the unknown father (this could be done by expanding either footnote 11 or footnote 12); and (2) inserting language in pertinent places to indicate that we are considering the constitutionality of \$111 as applied to this case, where the identity of the unmarried father is not in question.

2. Distinction Between Newborns and Older Children

A second way we could deal with Justice Stevens' concerns would be to recognize the distinction he seems to urge between newborn and older children. Notes from Conference indicate that he believes that a mother has a unique relationship with her child at birth which does not obtain once the child has grown older. This distinction comports with Justice Stevens' concern in particular with adoptions which take place at birth. Moreover, in the opinion as now written

we recognize that there may be a difference between the quality of maternal and paternal relations with respect to newborn infants. See Opinion at 13.

There are two reasons why a distinction between newborn infants and older children makes sense. First, it is plausible, as we concede in the opinion as now written, that mothers in fact have a special relationship with their children at birth that is not equalled by a father's relations with his new child; this is a result of Ample biology. Thus, mothers and fathers necessarily are not "similarly situated" with respect to newborn infants. With the passage of time, however, this necessary disparity between maternal and paternal relations dissidates--the difference between maternal relations and paternal relations becomes more a matter of the conduct of the parents than of biology. Some fathers become very close to their children; others may not even know their children. Thus, although the state may be entitled to presume a difference between maternal and paternal relations with respect to a newborn, it cannot presume such a difference where, as in the present case, the children are substantially beyond the point of infancy. The fallacy of presuming that fathers continue to have an inferior golationship to their children after infancy is illustrated by the facts here, where Caban has acted as the de facto Eather of his children. This Court recognized the importance of such action in Quilloin, where, in rejecting an Unwed father's attempt to block the adoption of his children,

the Court noted that the father never had lived with or had custody of the children.

Moreover, there is a second reason why the states constitutionally should be allowed to distinguish between the parental rights of unmarried fathers of newborns and fathers of older children. If the right to veto the adoption of one's children depends upon one's having functioned as a de facto father, then the problem of identifying the father will be substantially reduced.

Substantive Due Process.

The third alternative you should consider is rewriting. the opinion to recognize in unwed fathers a substantive due process right to yeto the adoption of their children. The groundwork for such a ruling was (apparently) laid by the Court in Stanley v. Illinois, 405 D.S. 645 (1972), where the Court ruled that an unwood father is entitled to a hearing concerning his fitness as a father before his children are taken from him. Justice White (who wrote Stanley) now contends strongly that the case was merely a procedural due process case--Stabley was entitled to a heating, nothing more. Others have interpreted Stanley as necessarily being based upon substantive due process considerations: By giving Stanley a hearing concerning his fitness, the Court implicitly roled that the Constitution precludes the termination of parental rights absent a finding of unfitness. See, e.g., Note, The Emerging Constitutional Protection of the Putative Father's Parental Rights, 70

Mich.L.Rev. 1581, 1604 (1972). Several law clerks this Term concur in this analysis.

The Court forther indicated that parental rights are entitled to substantive due process protection in <u>Quilloin</u>, where Mr. Justice Marshall in dictum said that "[w]e have little doubt that the Due Process Clause would be offended f(i)f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfiltness and for the sole reason that to do so ws thought to be in the children's best interest."

There is precedent, therefore, for finding substantive due process to be offended by §111. To be sure, in order to meet Mr. Justice Stevens' concerns, the right would have to be stated with utmost care. The formulation he seems to prefer is that unwed fathers "with a substantial relationship to their children" have a due process right to exercise a veto over those children's adoption. By requiring a "substantial relationship," Justice Stevens seeks to do two things: {1} give mothers-but not fathers-the veto with respect to newbornS; and (2) avoid difficulties with determining the identity of the father--fathers who have maintained a substantial relationship with their children should not be hard to find.

The principal advantage I see to a substantive due process approach is that it avoids the thicket of equal protection with which we have been struggling. Thus, it is in the mainstream of some thought, which dictates that much of

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equal protection should be rethought to come under the substantive constitutional protections underlying the challenge.

I see two principal disadvantages to proceeding under a substantive due process rubric. Pirst, I am not persuaded of the strength of the precedent cited. Although <u>Stanley</u> could be read to be a substantive due process case, it is not the only fair reading, in my view. Thus, there was a reason Justice White fastened upon the "fitness" of the unwed father as the subject of the hearing guaranteed by due process: The State in <u>Stanley</u> had asserted as the justification for its statute its interest in awarding children only to fit parents. Thus, the State claimed that most unwed fathers were unfit and therefore properly were denied parental rights. Justice White wrote the opinion, therefore, to say that the State could not make such a blanket assumption-that it would have to use the procedural mechanism of a bearing to protect its interest in fitness.

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Second, and more important, I feel a great deal of unease in ruling that the Constitution requires every state to grant parents with a substantial relation to their children a veto identical to that created under \$111. Thus, by ruling that substantive due process requires that Caban be given a right identical to Maria's, the Court would be finding the statutory mechanism of the New York statute to be constitutionally required. I am not at all sure, however, that I would consider to be unconstitutional a state statute which

provided that, in cases of broken homes, the best interests of the child would govern any adoption proceeding, provided that there would be some presumption that parents who had maintained a substantial relation with their child would not be cut off. Thus, I fear that substantive due process would go too far in / constitutionalizing states' law of adoption.

Recommendation

MARGIN-INDENT OVERLAP **

provided that, in cases of broken homes, the best interests of the child would govern any adoption proceeding, provided that there would be some presumption that parents who had maintained a substantial relation with their child would not be cut off. Thus, I fear that substantive due process would go too far in constitutionalizing states' law of adoption.

Recommendation

As I mentioned to you this morning, I have a preference for the second alternative I discussed above. This seems to me the most intuitively acceptable, and certainly is the easiest to adopt in our opinion. I have taken the liberty, therefore, of modifying a copy of our opinion along the lines I have suggested so that you can see what I have in mind.

1/2/79

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[C. JAN. 2, 1979]

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[C SAN. 2, 1974] 27-6431 Caban ga statete quilloin 43445 246 applied" tacks employed: Child had been in custorby & control of mother -- for entire life - 247,255 Unwed parents never had a home together - 2457 Q never a"de factor fettur 253 Q might to black adapten by tenter hurband test & helatedly sought order of legetimation. But did not seek to adapt & assund custory North. hunselp. 247, 255, 256. Ega statute -beke Ul's except for - prover for father to legetimett. nola 283 (P248) Due Process Ko and the natural persent has a coulded tenully protected a utcout Smith ~ Bry of Forte Pascult, 431 U.S. 862 (Stewart) John, meyer, Stanley (see Oh p 255) - But no such interest have beeren father had never that a rought actual a legal custorly applied - 255 he there Currentance, afather's interest could be

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Supreme Court of the United States Washington, N. C. 20543

CHARGEN OF WHICH

January 2, 1979

Re: No. 77-6431 - Caban v. Mohammed

Dear Lewis,

Please join me.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

Jewis. I had thought that adoptions could be defated without necessarily sharing the unfitian" of the idopting parcents. But perhaps because Harris was The mother, that is the conset stanlard. Hyperton adates to fine 8 or 17 and line 6 on pb. BAU

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Caban v. Mohamued Rider A, page 10

The New York Court of Appeals in Matter of Malbica-Orgini, supra, suggested that requiring unmarried fathers' consent would pose a peculiarly strong impediment for adoption because often it is impossible to locate unwed fathers when adoption proceedings are brought, whereas mothers are more likely to remain with their children, Even if unwed Cathers offer of not usually are more difficult to locate and identify than unwed But mothers, this fact lends little support to the denial of λ appellant's parental rights in this case. Appellant was identified as the father of David and Denise on the children's birth records and by his long-standing role as the children's de facto father.¹⁰ Furthermore, there was no difficulty in locating appellant, as he was a party to the proceedings below from their inception.

The state's interest in proceeding with adoptions in cases, unlike the present one, where one parent cannot be found

whose consent otherwise would be required has abandoned the child. See, e.g., In the Matter of Orlando P., 40 N.Y.2d 103 (1976). This provision of \$11* applies to fathers and mothers alike, with respect to children born in wedlock. Thus, New York already has provided for situations where, but for the absence of a parent, a child would be placed in a new, adoptive bome. To be sure, in the case of adoption of newborn infants it may be impossible to say that in unwed father has "abandoned" his child. In such cases, the father has not been given an opportunity to act as a father toward his child; indeed, often he may not know he has fathered the child. To avoid difficulties of identifying and locating the father in such circumstances, it may be necessary for the State to draw a distinction between mothers and fathers of newborn children. This hardly justifies the broad distinction of Slll_...hewaver, which applies, as in the present case, to children far beyond the point of infancy. In sum, no showing has been made that the different treatment invariably afforded unmarried fathers and unmarried mothers under \$111 bears a substantial relationship to the proclaimed interest of the State in

Footnote

10. In rejecting an unmacried father's constitutional claim in <u>Quilloin v. Walcott</u>, 434 U.S. 246 (1978), we emohasized the importance of the appellant's failure to act as a father foward his children, noting that he,

> ...has never exercised actual or legal custody over bis child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Apellant does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child.

Id., at 256.

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present case contrasts sharply with the relationship we found oresent in <u>Quilloin</u>. Caban lived with his children for a substantial period of time: (our years with David Caban, and just under two years with Denise Caban. According to the Surrogate's decision, during this time he helped provide for the children's needs, and the testimony given at the hearing before the Law Assistant indicates that he acted as any married father would toward the two children. After the children were taken from him by appellees, appellant continued to see them

Appellant's rolationship to his children in the

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lfp/ss 1/3/79 Rider A, p. 9 (Caban)

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We consider, therefore, whether the implement by David's distinction in \$111 between unmarried mothers and drugt of 1/4/79 unmarried fathers bears a substantial relation to the state's interest in providing adoptive homes for its illegitimate children. The question in the abstract is not free from significant difficulty because of the varying circumstances in which the adoption of such children is desired. The situations of unwed mothers and Unwed futhers may be quite different at times and in some dircumstances. But they are not invariably different, as §111 apparently presumes. During infancy, the mother's role - biologically and otherwise is unique. This uniqueness, combined with the special difficulties attendant upon identifying and locating unwed fathers at birth, may justify some statutory distinction between mothers and [athers of newborn infants.

As children grow older, however, generalizations concerning child-parent relations and parental responsibility become less acceptable as a Caban and appellerMaria Mohammed lived together from September 1968 until the end of 1973, during which time they held themselves out as being husband and wife. Their son David was born in July 1969 and their daughter Denise was born in March 1971. Appellant identified himself as the father on each child's birth certificate, and lived with the children as their father through 1973. The Cabans were a natural family, in which both the father and mother participated in the care and support of their childrens. Following the breakup of this family, there is no reason to believe that the Caban children, aged 4 and 6 at the time of their adoption, had a relationship with their mother that was significantly different from that of their father in terms of affection and parental concern.

It is argued, however, that even with respect to older children the identity of an unwed father often is undisclosed, unknown or even ambiguous, and this affords further justification for the gender-based

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substantial relationship with the child and acknowledged paternity, he may be identified as readily us the married father. This also is true where the unwed father comes forward and objects to the terimination of his parental rights.

The state's interest in proceeding with adoptioner cases, unlike the present one, where one parent cannot be found or identified also may be protected reasonably by means that do not draw such an inflexible gender-based distinction as that made in §111¹¹. Indeed, under the statute as it now stands the Surrogate may proceed in the absence of consent where the parent whose consent otherwise would be required is found to have abandoned the child. See, e.g., In the matter of Orlando F, 40 N.Y.20 103 (1976). This abandonment provision in \$111 applies to fathers and mothers alike with respect to children born in wedlock, as well as to unwed mothers. No reason has been suggested why a similar provision should not be applied

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not known - or, if known only to the mother, is not disclosed by her - this interest may be protected by appropriate measures to foreclose post-adoption claims of paternity.

In summary, we think that §111 is another example of "overbroad generalizations" in gender-based classifications. See Califano v. Goldfarb, 430 U.S. 199, 211 (1977); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975). The effect of New York's classification is to discriminate seriously against unwed fathers at least where they are known and have manifested a paternal interest in the child. The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children. Section 11 both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers. We conclude that this undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances

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CARANA, MCGADH D.

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The court recovered that needs we him to adopt a child here out of we dock would be discouraged if the natural father would prevent the adoption by morely withhoolog his consent. United, the court we'll so far as to suggest that if a barriages would be discoursed because of the relations of presentive hashes is to involve themselves in a family situation where they might only be a faster parent and could

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The State's pricest in reoviding for the well-backg of illegitempte children is an inconstruct und ... E with tighter we do cot doubt that the lost interests of such childfine often may mention their adoption is to new fatathes who will give there the stability of a toread two-parent home. – Ever 🚊 prompted by a concern for the base openess of illegitingue rbildness however, § 11) constant with faits! [0.6coal sortions moler the Equal Properties Charse giftees reas show a that the gealer based distriction of the stylene is tailored mesonably to meet this noticeta . As we negligibles Reed v. Reed, supraat 70, a statistic "classificatio fromst he mesonable and arbitrary, red must not on smellgrand of difference baying a fair and substantial relation to the affirst of the legislation so that all presses shall of circumstanced shall be reased [a), key Royster Gumm Rev. v. Forgetia (253) V. S. 412, 415

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4<u>192</u>007 We find that the distinction is 3 110 between recommend undhers and congerrical fations loss out hear a substantial is unconstitutional to clation to the State's concern in provide gradioptive homes. for its directurate of dense. It may be that given the court-Unity some A well fullers would growent the adapticut of their Clerit/nate children This firmaliment to adoption, A statistic and sector was a line in pathway to adoption, howcorn is Kaly to be the mode of a natural ignorial is been slipped for both genders align: it is not a manifestation of any probyfod differences I, tween the affectane and concern of

is the brief to express in the New York Attorney Control of the 6 New York, Const. of Acquals' experimental InstruMediation Quantum. control or property \$3.1 a density tradition of information of others Southeast Broll of New York Automore General, 0, 16-20.

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27.615.4 OPINION.

CARAN & MORAMASTIC

routhers and fathers for their children. Nother the State or the appelless have argued that inwest fathers are more likely to children to the adoption of their children than are dowed nothers: not is there any self-evident reason why as a class they would be

The New York Cours of Appeals in Matter of Malpices Orgini, source suggested that requiring accordinied fathers' consists would poss a peculiarly strong impolation to adoption because often it is impossible to header unwed fathers which adorated proceedings are brought whences mothers are more likely to recente with their children. Even if unwed fathers usually are more difficult to forate and identify than caved earthers, this fact leasts little support to the judgment being. The State's interest in proceeding with adoptions where one provid rappor he found in identified type he motrebal microstely by means that in not down such an in-Sexible gender-based distinctifier as the stands in \$111-035.2 ticleed under the statute as⁶) tick statuts the Surrogate new present in the absence of consent when the private whose consent otherwise wonhighe required has also dened the ability Sec. c. n., In restandor F. 40 N. Y. 23 103 (1976). This chardonnet movision of \$211 anglies to indices and nothers alike with respect to children hore in wedlock Thus, New York diready has provided for situations where but for the observe of a parent, a clubel would be marel in a new adoritiv/facine. It was no showing has been made tion the different mentioes, afforded sevenmed farmes and morenels l'information et l'El boars à substantial colations ship to the proclaimed interests of the State in promoting the adoution for illegitionate chaldren ??

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	B/ - further
	Beyond the State's interest in acounting the adoption of
	illegitimates, appellees, essent that the common "experience of
	mackand" indicates that its narmal mother, absent special
	corrected ers, bears a closer relationship with for shild
	them a father does in Trinof Onal Arg. of 41. Accord.]
	Stude e.s. Bloo <u>b</u> , 405 U. S. 645, 665-666/1972 (Briefler)
	$C_{\rm e}$ dissenting \bigcirc Thus, appellees appear to argue that the
	distinction of \$111 between uncoveried mothers and notmat-
	ned fathers merely reflects that motops and fathers are con-
	"singlarly situated" for purposes of the Equal Pretaction
	Classe and therefore that their different frequenciations (a)
1. 17	Violate the Constitution 💉 🖉
hi 41	ternal and paternal publicos, it is place that the New York.
	Logislature did not rely appropriate such d foremes in drafting
	8.111 Section 111 draws an gender-based distinction between
	parents of children boys in wollock, giving each the right to
	present the adoption of the child merely by withholding roc-
We do not question	
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de what New York	and the second
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sent. Thus, the legislature difficult view a purported difference between mothers and fathens to be syfficiently great to explore trenguition with restorer to children both in weilbek, as well as those both without. At the case must the statute provider for these cases when children by elimination that taken an active interest in their children by elimination that moment equipment under contain accountances connected in the statute. Neither the State car the appellace have suggested to as any reason why the carefully drawn provisions of § 111 with respect to control promise would not work as well at the case of parents who are not covering.

The influence of the basis for the gradient of the state of the basis for the gradient level distinction of \$ 111, the state would not meet the requirements of equal protection as its classification is groupoled in "brokhic and overblock generalizations," concerning the family. See California v. Goldfords, 430 U. S. 200–211 (2017)): Stateou v. Sta

🕞 🖷 🗍 end in a la conferencia de la pla com anche receburar l'acta anche in thera, est contraction in foreign available provide an addition was a controlled in As-(i) A States in respective devices of the new construction of the other dataset band of the models, see prior Construction of Pathy, Wester St. Keelers. [28] N. Y. 101, 40; M.F. 25 [88] (1940), f. p. row to deviation the electric strainfart factories as the father of materia fald. The claimts of the method of gradul to reaction of work as a low to readily the estimated of Cuber & there ight a target of the procenties in data of separate as a Social Social structure. $E_{i}P_{i} = - P_{i} + \rho_{i}$ 🛀 — 1965 - Thirle e thatain 1990 S 762 779 (1877) State have a legran or interest therefore in previdue the an one strugg probability and the support of the adoption was a child will be condition of a new measurement with a measurement and the first state in a sector toward American at a the New York strategies. Although Not York provides for actions in the hands. Course to could lick promitive set \$6.511 (a) 57 for the New York dynamy Court Acts (function oppositional base) regulars who have by a determined for the court of the the other of a right both with a few affark, to object the Greek Seption of Their children Water S 111.

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77.02.1 OPINICS

CARANA AROUAMAPTE

that by coston or order the constitutional gradientee of radial protection, we can are distanced exclusively, for Londonsky rather than other concept μ can sometry. At least 4 joint of classification errors the producted on each μ proceeding for Starton 8, Strutce supercent 14-15.

Nor may we arrest moritraffy the good slightnos-Karder bying much of the accordent in support of 3 G1+sting (nothers are closer to their children than are <u>fathers</u>. Durify infance, the gother's rule is thickness when they conserved arearing assumed in the sector of an in the only of the is we than the of the methes As children grow older factenalizations concerning enalidadiations religions and prefer alresponsibility become less accurate . The present rese demonstates that we unwell father may take a continuing and devoted interest in his conditions well-being. These is no wason to believe that the Calum children, aged 4 and 6 at the time of their adoption, contifiend to have a relation same with their further univolately for affection and concerned their father. The facts of this case diastrate the hardmess of closelying fathers as being novariably lass qualitied and entitled than anothers to exercise a concerned judgment as to the fate of their children. Section 111 at the same time both excludes some loying fathers from full participation m the decision whether/their children will be adopted and enables some abcorted mothers arborarily to end off the paternal rights of fathers, 205

We conclude that this gender-based statutory discretion does not been a substantial relationship to the State's asserted intensits **=**18

19. See super, at 10.

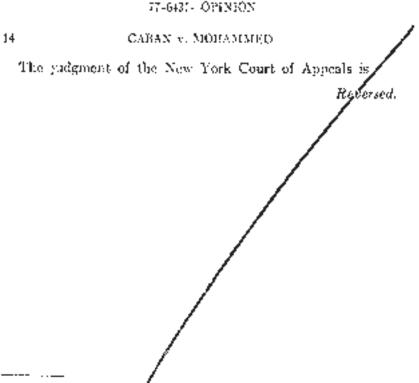
howaver,

1.2. We certainly do not suggest that state any of times a purple to nonzero functions (effectively and state particulation of the complete state of the astronometry does not state particulation of the before any where the active the particulation of the state state of the tempore for interview stated relation of the best of the decision state for the tempore. In interview stated relation of the tempore of the tempore of the state of the tempore. In the state of the tempore of the decision state for the tempore.

III Structure and the shallonges the construction of the distruction in the system is tween that field and many read to the set. Appellation or you due

Indred, this unique relationship, combined with the difficulties attendent to dentifying and locating fathers at birth, may justify some statutory distinctions istween nothers and fathers of newsburn infants

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the resting of a shift is the environmentation for proceeds from the soundle generation is an elements. See Quefficienty Walcolf, 134 U.S. 246, 255 (1578): Weinberger V. Weinenfeld 420 D.S. 659, 352 (1578): Proceeds v. Massachmetts, 321(1) S. 458, 166 (1644). To be angled that in draw inglest staticity distinguistic with respect to other with the permitted for τ is a which the Stategraphic end to spect to other with the permitted for τ is a which the Stategraphic end to spect to other with the permitted for τ is a which the Stategraphic end to spect to other with the permitted for τ is a which the Stategraphic end to spect to other with the permitted for τ is a which the Stategraphic end to be found in the sector form of a compacting reference as at deally with fourther and rights. See, in σ . Monotood Haspital τ , Massaches County, 415 U.S. 250, 255 (251) (1051). Shaping a Theory form 394 U.S. (18 (1952)). As we have restricted the the sectores ing very concerning the representation for of the distinction under New York by between market (athless and and marked lattices.

Appendix the argues that he was drawd satisfactive doe process when the New York courts terminated as presents rights without first finding blue to be upfor to be a parent. See Study v. Riscols, 445 U.S. 653 (1972) (section). Again because are block rules that the New York statute is product to the analysis the Equal Protection Charge we express no elemfor whether a State is constitution by Fortel form ordering adoption of the descare of a department that the protect whose rights are bring terminated is unfit.

lfp/ss 1/4/79 Footnote (Caban)

(s)rounder

Add a footnote, along the following lines:

In addition to the state's interest in facilitating the adoption of illegitimates, appellees assert that the common "experience of mankind" indicates that "a natural mother absent special circumstances, bears a closer relationship with her child . . . than a father docs". Although this well may be true especially, as noted above, during infancy, it is plain that the New York legislature did not rely. upon this difference in drafting §111. That section draws no gender-based distinction between parents of children born in wedlock, giving each the right to prevent the adoption of a child merely by withholding consent.



Add at some appropriate place a note substantially as follows:

In an age when divorce and desertion are all too frequent, the abandonment provision of \$111 applies to a married father who has deserted his wife and children or who, following divorce, no longer contributes to their support or maintains any substantial relation with them. In such a case, the identity of the father is known although often he will have moved away and wholly lost touch with his former family. Where the identity of an unwed father is known, an abandonment provision should be equally effective in foreclosing any claim he may later assert.

RE JAM. 12, 1979; p. 8) But The unquestioned right of the State to purther there desurable ends by legislation is not in itself sufficient to justify the auger based distinction of 5111 Jacol nuory

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To: The Chief Justic Mr. Durst, . Ber man Mr. Julting Steart Mr. Juctice Arity Mr. Just de Coustall Mr. Austine Slackson Was Justice Bohrgelet Mr. Juntine Stevens From: Mr. Justice Powell

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2nd DRAFT

SUPBEME COURT OF THE UNITED STATES

No. 77 6431

Abdiel Caban, Appellant, v. Kaxim Molynomed and Maria Mohammed, Appeals of New York.

[January ~ , 1979]

MR, JUSTICE POWERL delivered the opinion of the Court.

The appellant, Abdid Caban, challenges the constitutionality of \$ 114 of the New York Domestic Relations Law, order which two of his trataral challeen were adopted by their natural mother and stepfather without his consent. We find the statute to be unconstitutional, as the distinction in stourishing I makes between the rights of numerical mothers and the rights of numerical fatters has one been shown to be substantially related to an important state interest,

Ι

Abdiel Caban and appellee Maria Mohammed lived together in New York City from September of 1968 metil the end of 1973. During this time Cahan and Mohammed represented themselves as being husband and wife, although they never legally matried. Indeed, notil 1974 Caban was martied to another touries from whom he was separated. While living with the appellant, Mohatomed gave birth to two children: David Andrew Cabar, born July 16, 1969, and Denise Cahao, born March 12, 1971. Abdiel Caban was identified as the father of each child's forth certificate, and lived with the children as their father through 1973. Together with Mohammed, he contributed to the support of the family.

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In December of 1973, Mohatamed took the two children nucl left the appellant to take up residence with appellee Kazia: Mohammed whom she married on January 30, 1974. For the next who months, she took David and Denise each weekend to visit her mather, Delores Gonzales, who lived one floor above Caban. Because of his friendship with Gonzales, Caban was able to see the children each week where they came to visit their grandmother.

In September of 1974, Gonzales left New York to take up residence in her native Puerto Rico. At the Mohanmark' request, the grandenther took David and Denise with her, According to appellees, they planned to join the children in Puerto Rieo as soon as they had saved enough money to start a basiness there. During the children's stay with their grandroother. Mrs. Mohammed kept in touch with David and Denise by mail: Caban communicated with the children through his parents, who also resolut in Puerto Rico. In November of 1975, he went to Paerto Rico, where Gonzalez willingly surreadered the children to Caban with the understanding that they would be returned after a few days, Caban, however, returned to New York with the children, When Mrs. Molenning learned that the children were in Cabra's custody, she attempted to retrieve them with the aid of a police office). After this attempt failed, the appellees instituted custody proceedings in the New York Family Court, which placed the children in the temporary custody of the Mobannoods and gave Caban and his new wife, Naca, visiting rielits.

In January 1976, appellees filed a petition number § 110 of the New York Domestic Relations Law to inlight David and Decise,¹ In March, the Calapis cross-petitioned for adoption.

⁽Section 110 of the New York Domestic Relations Law, provides is particle).

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After the Family Court stayed the endody sait pending the outcome of the adoption proceedings, a hearing was held on the petition and cross-petition before a Law Assistant to a New York Surrogate in Kings County, N. Y. At this hearing, both the Mohammeds and the Calague were represented by rounsel and were permitted to present and cross-quaninewilnesses.

The Surrogate gravited the Mohammeds' petition to adopt the children, thereby cotting off all of appellant's parental rights and obligations.⁴ In his opacies, the Surrogate noted the limited right under New York hav of unwed fathers is adoption proceedings: "Although a putative father's consent to such an adoption is not a legal necessity, he is entitled to an opportunity to be heard in opposition to the proposed stepfather adoption." Moreover, the court stated that the appellant was forerload from adopting David and Decise, as

adult or minor leishaad or an adolt or ramaa wife engy pitype greb a adalah filmant erisponsa."

Although a material mathem in New York has many parental rights we have adopting the child. New York courts have field that $\frac{3}{2}$ 110 provides for the adopting top of the direction of the distribution of the decomposition of the direction of the direction of the distribution of the distribution decomposition of the distribution of the distribution of the distribution decomposition of the distribution of the distr distribution of the dist

"System 117 of the New York Dimestic Relations Law provides, in part, that,

(z)Per the making of an order of adaption the natural parents of the adaption child shall be achieved of all parents datas restard and of all respectively adaptive child or (a trajectories) by descent an ancession, every a subscingting start "

As an exception to this general rule § 117 provider Gale.

"[w] we a interval or adoptive parent, leaving lawful ensuity of s child, matrixs on transitions and encounts that the stepf ther or dependent may adopt such child such observals that the stepf ther or dependent and only interval we conserve the order of adoption affect the rights of such conserving spaces and such adoption which to cohering the Orrough with achieve the zatural and the matrix of such conservation affect the rights of such conservation such adoption which to cohering the Orrough with achieve and the zatural and adoption kinduction is the discription space."

It addition, § (17.12) provides that adoption shall for affect a solid singlet to distribution of property under his matrix diparents, with

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the natural mother had withheld her consent. Thus, the court considered the evidence presented by the Cabacs only involar as it reflected optic the Mohammeds' qualifications as prospective process. The Surrogate found them well qualified and granted their adoption petition.

The New York Supreme Court, Appellute Division, affirmed, It stated that appellant's constitutional diallenge to 3 111 was forcelosed by the New York Court of Appeals' decision in In re-Malpen-Orsial, 36 N/Y 2d 568 upp dismissed for weat of a substantial federal question sub-non, Disini v. Blasi, 423-U/S, 1042 (1977) – In ce David Andrew C., 56 A, D. 2d 627, 391 N, Y, S. 2d 846 (1976). The New York Court of Appeals similarly affermed in a memorandum decision based on In re-Malpica-Orsial, supra – In re-David A, C., 43 N, Y, 2d 708, 401 N, Y, S. 2d 208 (1977).

On appeal to this Court appellant presses two claims. First, he argues that the distinction drawn under New Yorklaw between the adoption rights of an unwell futher and those of other parents violates the Equal Protection Clause of the Fourteenth Amendment. Second, appellant contends that this Court's decision in *Quillon* v, Walcott, 434 U. S. 246 (1978) recognized the due process right of natural futhers to unitatia a parental relationship with their children absenta finding that they are unfit as parents.⁹

]]

Section 111 of the New York Domestic Relations Law provides in part that:

Fromsent to adoption shall be required as follows: . . . (5) Of the parents or surviving parent, whether adult or infant, of a child horn in wedlock; |aaa| (e) Of the

⁵ As the appellant was given due zon as and was permitted to participate as in party in the solution j co-solutized by does not constant that he was defied the procedural due process held to be requisite in Starley V. *Divide*, 405 (18), 645 (1972).

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CAUAN V. MOHAMMED

another, whether solutions infant, of a child born out of weathers, $z \in \mathbb{N}^{n}$, Y, Donn, Reb, Law § 111 (McKinney's 1977).

The statute makes parental consent unnecessary, however, in certain cases, including those where the parent has abandoned or reliquished his or key rights in the child or has been adia@fauted incompetent to care for the child." Absent one of

 Satisfeet to the literations between det set forth consent to adoption shall be required as follows:

 Of the adoptive clobel Siloven featuren years of age, to less the judge at supragate in his discretion disperses with such consent;

3. Of the parents or surviving parent, whether adult or inform of a class born in wedlock;

 ± 3.3 Of the nonliner, whether which or infant, of a child born next of scatters.

54. Of one person of notherwell agency having laward costudy of the order time child.

"The enders' shall not be required of a purson who has abandened the and as who has entrendered the child to us authorized agenes for the purpose of adoption under the procising of the social services law or of a parent for whose child a particle to has been appointed, inder the processing of section three houdred eighty-frage of the social services law as who has been depended of civil rights on who is available who has been adjudged to be an historic drankard or which is been junically deprived of the ensto build the child on account of country or angles), or parameters judget d facility that the children's permanently as given while as defined in section riv handred charge at the family court act of the state of New York; everyt that notice of the proposed adoption of all be given in such manner. as the indge or surragable may direct and an opportunity to be leard the respirate the afforded to a period, who has been deprived of each rights and to a parent if the judge of softogate so orders. Notwithstanding any other provision of low methor torial of a proposed adoption nor any process in such proceeding shall be required to contain the name of the per-on or persons seeking to adopt the study. For the purposes of this section, or letter of the first ortic and introducing exclusive here parent with his or her claid of all not of itself, be sufficient as a matter of law to preclude a finding that such parent has abandaned such child.

"Where the adoptive child is over the age of eighteen years the con-

At the fine of the proceedings before the Surphysic, § 11; provided.

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CABAN Y. MOHAMMED

these circumstances, an unwed mother has the authority under New York law to block the adoption of her child simply by withhobiling constant. The unwed father has to similar control over the fate of his child, even when his parental relationship is substantial: as in this case. He may prevent the termination of his parental rights only by showing that the best interests of the child would not permit the child's adoption by the petitioning couple.

Despite the plain wording of the statule, appellers argue that inwed fathers are not treated differently under §114 from other pureats. According to appellers, the consent requirement of §111 is merely a formal requirement, lacking in substance, as New York courts find consent to be unnecessary whenever the best interests of the child support the adoption. Because the best interests of the child always distribute whether an adoption petition is granted in New York, appelless routend that all parents, including moved fathers, are subject to the same standard.

Appellecs' interpretation of \$111 finds on support in New York caselaw. On the contrary, the New York Court of Appeals has stated accountedly that the question whether consent is required is entirely separate from that of the best

8.

some specified in subdivisions two and three of this section shall not be required and the judge or surrogate in the distriction may direct that the real-cet specified in subdivision form of this section shall not be required if it los opinion the most and temporal interests of the adoptive child will be preserved by the adoption and style consent cannot for any reasonbe obtained.

At indeption child who has exact been lowfully adopted may be readopted directly from such thinks adoptive parents in the same manner as from its network parents. To such case the constant of such matters per of shall not be required but the judge or subrogate in his discretion takes required but the judge of subrogate in his discretion takes required but notice be given to the natural parents in such manner as be may presented."

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interests of the child.) Indeed, the Surrogate's decision in the present case, affirmed by the New York Court of Appeals, was based upon the assumption that there was a distinctive difference between the rights of Ahdiel Cabaa, as the traved father of David and Denise, and Maria Mohammed, as the traved another of the childrent Adoption by Abdiel was held to be respermissible in the absence of Maria's consert, whereas adoption by Maria could be prevented by Abdiel only if he could show that the Muhammeds' adoption of the children would not be in their best interests. Accordingly, it is clear than § 111 treats uncoarried parents differently according to their sec.

III.

Gendersbased distinctions "must serve governmental obfertives and must be substantially related to achievement of those objectives" is order to withstand judicial serutiary under the Equal Protection Clause. Crug v. Boren, 404– U. S. 190, 197 (1977). See also Reed v. Reed, 404–U. S. 71 (1971). The question before us, therefore, is whether the distinction in § 111 between annearied confirms and unmarried fathers bears a substantial relation to some important state interest. Appellers assert that the distinction is justified

¹See Inter Const. C. Martin L., 55 N. Y. 20 383, 391, 580 N. E. 2d 295 (259) (1978);

"Means constant, the first tools here was on the issue of abandan mean other decisional rule and state was on the issue of abandan mean besters decisional rule and state the child as a topic set of action α_{ij} . We adapted in a state rate where a particular field of a part of a part of a part of a set part the child as a topic set of the total configurations will be totaged as at particular for adoption, relates to such configurations will be totaged as a particular part of the field of a state to such configurations will be totaged as a part of the field of the total of the total obligations will be totaged at the totaged part of the total rule is not involved on the order is not an aggregical of the the conduct and is not involved on the threshold question. While presention of the best interest of the child is essential total under approximation of the widplice application, such instants connection as a structure for a find egaption application, such instants connection as a structure for a find egaption application, such instants connection as a structure for a find egaption application of the find egapt of the find.

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CABAN 5. MOHAMMED:

by a fundamental difference between maternal and paternal relations - that "a natural another, absent special circumstances, hears a cluser relationship with her child . . . than a father does.' - Tr. of Oral Arg., at 41.

Contrary to appellees' argument and to the apparent presumption underlying \$111 material and paterial roles are not invariably different in importance. Although accord mothers as a class undoubtedly are closer to their newborn infants than are innerf fathers, as daildren grow older, this generalization concerning parent-child relations becames less acceptable as a basis for legislative distinctions. The present case demonstrates that an unwed father may have a relationship with his elifdren fully memparable to that of the mother, Appellant Calign, appeller Maria Mohammed, and their two children lived together as a natural family for several years. As members of this family, both mother and father participated in the care and support of their children? There is no reason to believe that the Cabao children | aged 4 and 6 ab the time of the adoption proceedings—had a relationship with their pather univaled by the affection and concern of their father. We reject, flowefore, the claim that the broad, gender-based distinction of \$111 is required by any universal difference between maternal and paternal relations at every phase of a child's development,

In adjecting an unmerried tother's constitutional cities in $Q_{\rm e}/M_{\rm eff}$ we supplied with the K. S. 246 (1978), we emphasized the impartance of the separate bull of the data to set π , tother toward his children, assign that he,

 $^{^{22}}$, the never overcises betal or lead castedy over his dold, and thus have never shouldered any significant responsibility with respect to the Cally supervisor education protection, i.e. are of the clobel. Appellant cases as the amplitude this exemption from these responseducies and, indeed, in

In Quality, we express a reserved the question whether the Gaurgia statute similar to §121 of the New York Domestic Reichards Law repression transity distinguished in was parents according to their gender, as the claim was not properly presented -Sec.474/35, Sec.at.253 (n.43).

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CABAN & MORAMMED.

As an alternative justification for § 111, appellees argue that the distinction between anived fathers and unwed muthers is substantially related to the State's interest in promoting the solution of illegitudate clubbren. Although the legislative history of § 111 is sparse, in *In re Mulpica-Undol, supra*, the New York Court of Appeals identified as the legislature's purpose in adopting § 111 the furthering of the interests of Elegitimate children for achieve adoption often is the best tourse.¹ The court concluded that,

"[1], or require the consect of fathers of children born out of wedlerk . . , or even some of down would have the overall effect of decying homes to the boucless and of depriving bencent children of the other blessings of adoption. The cruel and undeserved out-of-wedleck stigons would continue its visitations. As the very least, the worthy process of adoption would be severely mpeded." $Id_{\rm e}$ at 572.

The court reasoned that people wishing to adopt a child

Where $0 \to 0$ the unmarried table has report been required for adoption and t. New York, law, obtaingly periodid constant otherwises has been required at least since the 5 to (9th evoluty). See, i. we have soft (a. State of New York, (19th Session 1, 1896) do, 272. There are no legislative reports setting forth the reasons why the New York logislative eccepted from arrive fathers in the general requirement of parental source at the adoption.

To Orcheller, Black experience Court distribution an appeal from the New-York Court of Appends challenging the constitutionality of § 111 as applied to an university to the class challenging the constitution object by a New-York Subraction to the distribution of the probability of the operation of the probability of the operation of the distribution of the distribution of the operation of the distribution of distribution of the distret distribution of the distribution of the distr

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bern out of wellock would be discouraged if the natural father could prevent the adoption by the mere withholding of his constant. Indexi, the court went so far as to suggest that "[m]arriages would be discouraged because of the relations of prospective hashands to involve themselves in a family situation where they might only be a faster parent and could not adopt the nother's offspring." Id., at 573. Finally the court noted that if inweal fathers' consent were required before adoptive could take place, in many instances the adoption would have to be delayed or eliminated altogether because of the automability of the natural father."

The State's interest in providing for the well-being of illegitimate enddrem is an important one. For thermore, we do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a normal, two-parent home. Even if prompted by a concern for the best interests of illegitimate children. *Even if prompted* by a concern withstand judicial scrutiny under the Equal Protoction Cause indexs it is shown that the genderbased distinct or of the statute is structured reasonably to meet this concern. As we repeated in *Recel v. Recel*, super, at 76, a statutory "classification, must be reasonable, not arbitrary, and paint rest on some ground of difference having a fair and substantial relation to the object of the logislation, so that all persons stability rinemistanced shall be treated alike," *Rospier Gamme Co. v. Virginia*, 253 U. S. 412, 415 (1020)."

We find that the distinction at § 111 between unmarried mothers and unmarried inthers, as illustrated by this case does not beer a substantial relation to the State's interest in providing adoptive homes for its illegitimate children. It may be that, given the opportunity, some unwed fathers would

⁽²⁾ bis bruch is note as reached the New York Attaction General releasing New York Court of Append-Cospections In its Multiplet Grand of random vis promoted by § 1115 different interfacent of an example Laboration Section 26 and as bineful New York Attaction Openeral, at 16 40.

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prevent the adoption of their illegitionals children. This impediated to adoption usually is the result of a natural parental interest shared by both genders aliket it is not a manifestation of any profound difference between the affection and concett of nonlines and fathers for their children. Neither the State for the appellees have argued that newed fathers are more likely to object to the adoption of their children that are unwed methers) not is there any self-evident reason why as a class they would be.

The New York Court of Appeals in In re-Malphea-trisiol, supral suggested that the requiring of memoried fathers' constant for adoption would pose a strung unperlyment for adoption because often it is impossible to locate moved fathers. when adoption proceedings are brought, whereas mothers are more likely to reusing with their children. It may well be that the special difficulties often attendant upon locating and identifying unwed fathers at birth would justify a legislative distinction between mothers and fathers of new horns." But cress difficulties need not persist past infancy. When the adoption of an older child is sought, the State's interest in proceeding with adoption cases can be protected by means that do not draw such an inflexible gender-based distinction as that made $m \leq 111.9$. In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Chaose precludes the State from withholding from him the privilege of veroing the adoption of that radd. Indeed, order the statute as it now stands the Surrogate may proceed in the absonce of consent when the ۰.

) Resource the spectrum is not before us, an express rankow whether the spectrum dup between mode is and their mechanic children, and the singular difficulties in locating convex to these of burtle, would justify a solution drawn more narrowly than $\frac{1}{2}116$ calibrated particularly by new-bare identically.

¹⁰ See Catataent, The East grap Cross-Autotional Property of the Network Earborn, Physical Registry 71, Mult. J. Rev. 1980 (1986) (1972).

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parent whose consent otherwise would be required never has come forward or has shatuloned the child.¹⁴ See, e. g., In re-Orlando F. 40 N. Y. 2d 103 (1976). But in cases such as this, where the father has established a substantial relationship with the child and is willing to admit his paternity.¹⁶ there should be no difficulty in the State's identifying the father even of children have out of wedlock.¹⁶ Thus, no showing has been made that the different treatment afforded

While the New York Court of Appends is correct that announced fathers often desire their function of view we need not question), then allowing these betters what remain what their familias a right to edged to the termatorial of filest parential rights will gave to be threat to the teriblety to order adoption of monot cases. For we do and question is Statistight to do what New York has done in this parameter of § 111: provide that furthers who have addressed their chastrers have no right to black addption of these charters.

We do not suggest, of course that the provision of § 111 making interval consent uniconstary in cases of abar-longard is the only constitutional mechanism available to New York for the prediction of its interest is allowing the adoption of 65 gebb we clabter owhen their a dural fathers are not available to be consulted. In reversing the constitution interval distributions of a bar of equilibrium of a court to hypothesize independently graphs destrability or ferminist of arguments of statistic productions of a linear the function of a court to hypothesize independently graphs destrability or ferministed by [the Shate] To LaBley $<math>LaBle_{\pm} = 11/8 = -1.5 + (1978)$ (sproting Matthews v. Local 427 U. S. 195, 515 (1976)). We note some alternatives to the generative distribution of § 111 only to output one distribution states asserted as apport of the statistics is used by protected rate assert of an apport of the statistics is used by protected rate assert of an apport of the statistics is assistention if and the state interests asserted in support assistention if and the scattering matterial matterial matterial distributions other as the four two statistics is and the state asterial matterial matterial matterial statistics other as the four interval of the state interval matterial as a state of the state interval matterial matterial

(i) In Quarkow y, United, repressive name the properties, in cases of the kind of the relationship that in 0 research between the patent and child.

¹⁰ States have a legitimate interest, of contrast in providing that an influented interest right to object to the adoption of a chair will be could used upon the showing that it is in fact his child. C.I. Lake a Lake $-10^{-5}S_{-} \rightarrow -10^{-5}S_{-} \rightarrow 50^{-5}S_{-} \rightarrow 50^{-5}S$

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commercied fathers and non-arrivel mothers under 3-111 bears a sub-tannel relationship to the proclamed interest of the State is premoting the adoption of illegitimate children.

by sum, we believe that § 111 is another example of "overbroad generalizations" in gender based classifications. See Califano v. Gald(arb, 430 U. 8, 199, 211 (1977)); Stanton v. Stanton, 421 U. S. 7, 14, 15 (1975). The effect of New York's classification is to discriminate against unweil fathers even where their identity is known and they have multilested a paternal interest in the child - The facts of this case illustrate the bard, asso of classifying unwed fathers as being invariably. less qualified and entitled than mothers to exercise a concerned isolyment as to the fate of their children. Section 111 both excludes some loving fathers from full participation in the derision whether their children will be adopted and, at the some time, enables some inherated mothers arbitrarily to cutoff the paternal rights of fathers. We conclude that this undifferentiated distinction between inwed mutters and unwish fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests "

Finally, appethat argues that he was denied ada-tactive day process, when the New York courts terminared his parental rights without first

¹ A) policies of a chartengly the constitutionality of the distinction reside in § 111 between inserted and contrartical furthers. Appelling arges shut the relating of a child is an activity constitution-dix protected furthinstantial government interference. See Quillain v. Wahatt, 434 U.S. 245, 255 (1978); Workshows et Wieser (dot. 420 U.S. 636, 462 (1975)). Prime v. Massacharactic 321 U.S. 658, 168 (1914). In drawing statisticity detections with respect to who will be permitted to raise a child, therefore, the Sixter most at really trace a necessary both of a compelling interval, as it is is with true around rights. See, e.g., Measure Hospital v. Marzoger Covers, 115 U.S. 258, 253–254 (1974); Sequence Theorem, 314 G.S. (1979). As we have resclered that the scalars of distribution of § 121 violates the Figure Distribute Claractic we express no view concreasing the constitution duty of the distinction under New York law

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The jadgment of the New York Court of Appeals is

Reversed.

Such g bins to be well to be a term of See Studies y Dirack, 0.5 ± 5.5 (1972) could be a because we have taked that the New York statute is successful termination of the Signal Protection Charles, we express no view on obsther every State is constativitionally formal from arbitrary adoption in the discharge of a determination due the parent whose rights are being permitted as units.

LZP David - I Much Penewe Nun n nearly to go. Unless you have nime substantial numor electrics 1.4.7-14 changer to suggest, changer to I'd availate this be make in & make neres 3 ml Quel Editing changer 2nd DRAFT Я SUPREME COURT OF THE UNITED STATES 10 12-No. 77-6431 Abdiel Caban, Appellant, On Appeal from the Court of ŶĴ., Appeals of New York, Kazim Mohammed and

Maria Mohammed.

Appeals in New Tork,

[January ---, 1979]

MR. JUSTICE POWRLE delivered the opinion of the Court.

The appellant, Abdiel Caban, rhallenges the constitutionality of § 111 of the New York Domestic Relations Law, under which two of his natural children were adopted by their natural mother and stepfather without his consent. We find the statute to be unconstitutional, as the distinction it invariably makes between the rights of unmarried mothers and the rights of unmarried fathers has not been shown to be substantially related to an important state interest.

Ι

Abdiel Caban and appellee Maria Mohammed lived together in New York City from September of 1968 until the end of 1973. Huring this time Caban and Mohammed represented themselves as being husband and wife, although they never legally married. Indeed, until 1974 Cahan was married to another woman from whom he was separated. While living with the appellant. Mohammed gave birth to two children: David Andrew Caban, born July 16, 1969, and Denise Caban, born March 12, 1971. Abdiel Caban was identified as the father on each child's birth certificate, and lived with the children as their father through 1973. Together with Mohammed, he contributed to the support of the family.

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In December of 1973, Mohammed took the two children and left the appellant to take up residence with appeller Explicit Mohammed, whom she married on January 30, 1974. For the next since months, she took David and Denise each weekend to visit her mother. Delores Gonzales, who lived the floor above Caban. Because of his friendship with Gonzales, Caban was able to see the children each week when they came to visit their grandmother.

In September of 1974, Gonzales left New York to take up residence in her native Puerto Rico. At the Mohammeds' request, the grandbother took David and Denise with her, According to appellees, they planned to join the children in Puerto Rico as soon as they had saved enough minney to start a business there. During the children's stay with their grandmother. Mrs. Mohammed kept is touch with David and Denise by teail; Cabao communicated with the children through his parents, who also resided in Puerto Rico. In November of 1975, he went to Puerto Rico, where Gauzalez willingly surrendered the children to Caban with the understanding that they world be returned after a few days. Cabao, however, returned to New York with the children. When Mrs. Mohammed learned that the children were in Caban's costody, she attempted to retrieve them with the aid of a police office). After this attempt failed, the appellees instituted custody proceedings in the New York Family Court. which placed the children in the temporary custody of the Mohammeds and gave Caban and his new wife, Ning, visiting rights.

In January 1976, appellers filed a petition under § 110 of the New York Domestic Relations Law to adopt David and Denise.¹ In March, the Cabans cross-petitioned for adoption,

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Section 110 of the New York Domestic Relations have, provides in part that.

[&]quot;Extunated for minor busheast and his while or master wife together stay assupt a child of either of them barn in or out at wellock and an

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After the Family Court stayed the custody sum pending the autcome of the adoption proceedings, a hearing was held on the petition and cross-petition before a Law Assistant to a New York Surrogate in Kings County, N. V. At this hearing, both the Mohammeds and the Cabans were represented by counsel and were permitted to present and cross-examine witnesses.

The Surrogate granted the Mohammeds' petition to adopt the children, thereby cotting uff all of appellant's parental rights and obligations.⁴ In his opmion, the Surrogate noted the limited right under New York law of unwed fathers in adoption proceedings: "Although a pretative father's consent to such an adoption is not a legal necessity, he is entitled to an opportunity to be heard in opposition to the proposed stepfuther adoption." Moreover, the court stated that the appellant was forcelosed from adopting David and Decise, as

As an exception to this general side, § 117 provides that,

"fivelibes a natural or of genore parent, having lewful encode of a child, corrries of remarkies and converts that the steptather or opposition may adopt such child, such concert shall not relieve the parent so consenting of any parental duty reward such child for shall such consent or the order of adoption affect the tights of such encoursing spaces and such other of adoption affect the tights of such encoursing spaces and such other of adoption affect the tights of such encoursing spaces and such other of adoption affect the tights of such encoursing spaces and such other of adoption affect the tights of such encourses and the excitation adoption is kindiged of such conventing spaces."

In addition, § 117 (2) provides that adaption shall not affect a child's right to distribution of property under his assured preparates will.

adult or misson bu-band of an adult or minor wife may adopt such ω , that of the other spaces."

Although a matural axother on New York has many parental rights wathout adopting Let child. New York rounts have hold that § (10) provides for the adoption of na allogithmetic child by his mother. See P_0 or Astrograms Adoption 177 Mass rest, 31 N, Y, S, 2d 305 (App. Div. 1941).

⁻ So tion 117 of the New York Damestic Relations Law provides, in part, that,

Halffor the tasking of an order of adoption the natural parents of the duptive child shall be releved of all parental duties taward and af all responsibilities for and shall have to rights seen such adoptive child or tasking appendix by descent or succession, except as hereinafter stated."

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the natural mother had withheld her consent. Thus, the court considered the evidence presented by the Cabans only insofar as it reflected upon the Mohammeds' qualifications as prospective parents. The Surrogate found them well qualified and granted their adoption petition.

The New York Supreme Court, Appellate Division, affirmed, It stated that appellant's constitutional challenge to § 111 was foreclosed by the New York Court of Appeals' decision in In re-Malpica-Desiri, 36 N. Y. 2d 568, app. dismissed for want of a substantial federal question sub-non. Orsini v. Blasi, 423 V. S. 1042 (1977). In re-David Andrew C., 56 A. D. 2d 627, 391 N. Y. S. 2d 846 (1976). The New York Court of Appeals similarly affirmed in a memorandum decision based on In re-Malpica-Orsini, supra. In re-David A. C., 43 N. Y. 2d 708, 401 N. Y. S. 2d 208 (1977).

On appeal to this Court appellant presses two claims. First, he argues that the distinction drawn under New York law between the adoption rights of an unwed father and those of other parents violates the Equal Protection Clause of the Fourtmonth Amendment. Second, appellant contends that this Court's decision in *Quilloin* v. Walcott, 434–15, S. 246 (1978) recognized the due process right of natural fathers J to maintain a parental relationship with their children absent a finding that they are unit as parents.²

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Section 111 of the New York Damestic Relations Law provides in part that:

"consent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock: [and] (c) Of the

⁸ As the appell of was given due zoriev and was permitted to perturbate $z_{\rm c}$ is party in the adoption proceedings, be down out contend that he was decided the procedural due process heid to be required in Stanley v. Humps, 405 U. S. 665 (1972).

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mother, whether adult or infant, of a child burn out of wellock, $\dots^{n} = N$, Y. Dom, Ref. Law § 111 (McKinney's 1977).

The statute makes parential consent unnecessary, however, in certain cases, including those where the parent has abandoned or relinquished his or her rights in the child or has been adjudicated incompotent to care for the child." Absent one of

At the tipe of the proceedings before the Sutrogate § 111 provided:

"Subject to the limitations hereinafter set forth consent to adoption shall." To required as follows:

*1. Of the adoptive child, if over fourtien years of age, indess the judge consurrogate in his discretion disperses with such consent;

12 Of the parents of surviving parent, whether adult or infent, of a child from in wetlock;

=3. Of the mother, whether while or infant, of a child born out of weakheds:

"4. Of any person or wellorized agency having lowful costody of the subagrive child,

"The cot-cut shall not be required of a patent who has abandoned the whild or who has surroundered the clubb to an authorized agency for the protocol of adoption index the prost-ions of the social services faw or of \mathbf{z} parent for whose child a gaundran has been appointed under the provisions of section three buildred eighty-four of the social services hav or who has been deprived of civil rights or who is usane or who has been objudged to he an haletned diminiarit or which as been judicially dependent the case tody of the child on at outd of crucity or neglect, or parsonnal to a judical fitaling that the child is a permutantly neglected child as defined in section six hundred eleven of the family court act of the state of New York; except that not set of the propaged adoption shall be given in such manager as the policy of surgicule may direct and as opportugity to be heard the term may be afforded to a parent who has been deprived of civil rights and to a purel, if the judge or surregore so orders. Notwirkstanding any other provision of law, related police of a proposed adoption for any process in such proceeding shall be required to even in the name of the censon or persons socking to schopt the child. For the purposes of this section, evidence of insubstantial and infrequent endners by a parent with by or her child shall not, of itself, he sufficient as a justice of law to produce a finding that such parent has abandoned such child

"Where the adaptive child is over the age of eighteen years the con-

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these circumstances, an inwed mother has the authority under-New York law to block the adoption of her child simply by withholding consent. The mowed father has no similar controlover the fate of his child, even when his parental relationship is substantial— as in this case. He may prevent the termination of his parental rights only by showing that the best interests of the child would not permit the child's adoption by the petitioning couple.

Despite the plain working of the statute, appellees argue that unwed fathers are not meabed differently under § 111 from other parents. According to appellees, the consent requirement of § 111 is merely a formal requirement, lacking in substance, as New York courts find consent to be unnecessary whenever the best interests of the child support the adoption. Because the best interests of the child always determine whether an adoption petition is granted in New York, appellees contend that all parents, including unwedfathers, are subject to the same standard.

Appellees' interpretation of \$ 111 finds no support in New-York caselaw. On the contary the New York Court of Appends has stated unequivocally that the question whether consent is required is entirely separate from that of the best

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sents specified in substituions (we and three of this extion shall not be required, and the judge or surrogate in his discretion may dreat that the converse specified in substitution four of this section shall not be required if in his obtains the metal and temperal atterests of the adoptive shill will be promoted by the adoption and such consent cannot for any resonabe obtained.

[&]quot;An adoptive child ochs has once here hypfully adopted may be readopted directly from such child's adoptive parents in the same manner as from its control parents. In such ever the consent of such rational (arent shall not be required but the judge of correspond in the discretion has require that active be given to the normal parents to such manner as he may preserve."

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interests of the child.⁸ Dolived, the Surrogate's decision in the present case, affirmed by the New York Court of Appeals, was based upon the assumption that there was a distinctive difference between the rights of Abdiel Caban, as the inwed father of David and Denise, and Maria Mohammed, as the unwed mother of the children: Adoption by Abdiel was held to be impermissible in the obsence of Maria's consent, whereas adoption by Maria could be prevented by Abdiel only if he could show that the Mohammed's indeption of the children would not be in their best interests. Accordingly, it is clear that § 111 treats unmarried parents differently according to their sex.

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Gender-based distinctions "must serve governmental objectives and must be substantially related to achievement of 0.056 objectives" in order to withstand judicial serutiny under the Equal Protection Crause. Craig v. Boren, 404 17. S. 190, 197 (1977). See also Reed v. Reed, 404 17. S. 71 (1971). The question before us, therefore, is whether the distinction in § 111 between unmarried mothers and unmarried fathers hears a substantial relation to some important state interest. Appeilees assert that the distinction is justified

⁸Soc In the Correy I. A. Marthe, L., 45 N. Y. 2d 383, 301, 380 N. E. 2d 266, 270 (1978).

[&]quot;Absent consent, the first local here was do the issue of abandminiant succe meither deviational rule (or statute can bring the relationship) to an end because someone cise sciple teat the clobe in a more subsidictary fashient . . . Abardisanetic, as it pertains to adoption, relates to such conduction the part of a potent as evidens a pathweeter ridding of parental abigations and the foregoing of partnal right—as withhedding of interest, prevenue, affertion, core and support. The best interests of the clobe jarsuch, as not an ingredient of their conduct and is not involved as this threshold guestion. While production of the best interests of the cliff jaescential to administ approved of the acaption application such interests runned as a substitute for a finding of abandoment " (Authorities runnet as a substitute for a finding of abandoment " (Authorities runnet as a substitute for a finding of abandoment " (Authorities runnet as).)

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by a fundamental difference between maternal and paternal relations —that "a natural mother, absent special circumstances, bears a closer relationship with her child , . . . than a father does." — Tr. of Oral Arg., at 41.

Contrary to appelloes' argument and to the apparent presuboption underlying \$111, assternal and paternal roles are not invariably different in importance. Although unwed mothers as a class uniforbiedly are closer to their newborn infants than are anneed fathers, as children grow olders, this generalization concerning parent-child relations becomes less acceptable as a basis for legislative distinctions. The present ease demonstrates that an unwell father may have a relationship with his children fully comparable to that of the mother. Appellant Cubio, appellee Maria Mahammed, and their two ebildrets livest together as a untural faceby for several years. As members of this family, both mother and father participated in the care and support of their children? There is no reason to believe that the Caban children-ages 4 and 6 at the time of the inligition proceedings-had a relationship with their mother unrivated by the affection and concern of their father. We reject therefore, the claim that the broad, gender-based distinction of §111 is required by any iniversal difference between material and paternal relations at every physe of a chald's development.

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⁴ In rejecting an onmatricel father's constitutional elsion in Quillois et Walcott, 444 U. S. 246 (1978), we emphasized the importance of the appellant's father to act as a father toward his shifteen neuring that he.

 $^{^{10}}$, this never exercised actual or legal ensemptions over his child, and thus has mover should not significant responsibility with respect to the faily supervision, education, (dotection, at care of the child. Appellant dote two complains of his exemption from these tespon-sightness and, indeed, he dote not even now seek ensuring of its child. Id, at 2.6.

in Quality we expressly reserved the question relation the Georges statute similar to \S 111 of the New York Donorstie Relations have quasi-stitutionally distinguished moved parents occurding to their geneier, as the claim was flat property presented. See 434 U. S., 59 253 n. 13,

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As an alternative justification for § 111, appellees argue that the distinction between moved fathers and unwed mothers is substantially related to the State's interest in promoting the adoption of illegitemate clubbres. Although the legislative history of § 111 is sparse, in *In re Malpira-Orsini, sapra*, the New York Court of Appeals obsettified as the legislature's purpose in adopting § 111 the furthering of the interests of illegitimate children, for whom adoption often is the best course.⁴ The court concluded that,

"[t]o require the consent of fathers of children horn out of wedlock or even some of them, would have the overall effect of denying homes to the homeless and of depriving innocut children of the other blessings of adoption. The cruel and undeserved out-of-wedlock stight would continue its visitations. At the very least, the worthy process of adoption would be severely impeded," Id_{c} at 572.

The court reasoned that people wishing to adopt a child

Consists of the numerical factor has sever been required to adoption order. New York has, although periodal essential otherwise has been required at least since the late 10th century. Single p. Laws of the State of New York 216th Session 1, 1806 on 252. There are no legislative reports setting forth the reasons why the New York Legislations excepted once arised forthers, from the general requirement of parental consent for adoption.

To Orzivi v. Blazi, super, the Court dismissed on append from the New York Potent of Appends circlinging the constitutionality of § 411 as applied to an automatical rather whose child had been ordered adopted by a New York Surrogate. In dismissing the append, we indicated that a substantial federal quastion was backing. This was a miling on the metric, and therefore is started to provolential weight. See Hicks v. Mizzanla 422 (1, S. 352, 354, 10075) – At the same time, however, our decision nucles previous fields a Hicks v. Blazin and the same deference given a miling after beliefs, argument, and a written optimum. See Editmon v. Jordan, 425 (1, S. 451, 671, (2014)). Involution, See Editmon v. Jordan, 425 (1, S. 451, 671, (2014)). Involation prior decision today is interpristent with our discussed in *Orginic*, we overrule our prior decision.

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born out of wedhick would be discouraged, if the natural father could prevent the adoption by the mere wathholding of his consent. Indeed, the court went so far as to suggest that "[m]arriages would be discouraged because of the reinctance of prospective husbands to involve themselves in a family situation where they might only be a foster parent and could not adopt the mother's offspring." *Id.*, at 573, Finally, the court noted that if unwed fathers' consent were required before adoption could take place, in many instances the adoption would have to be delayed or eliminated altogethey, because of the annealiability of the natural father."

The State's interest in providing for the well-being of illegitimate children is an important one. Furthermore, we do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a normal, two-parent home. Even if prompted by a concern for the best interests of illegitimate children, however, § 111 cannot withstand judicial solutiny under the Equal Protection Claese tailess it is shown that the genderbased distinction of the statute is structured reasonably to meet this concern. As we repeated in *Ried v. Revil, supra*, at 76, a statutory "classification 'must be reasonable, not arbitrary, and finist rest on some ground of difference baying a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Urginia*, 253 U. S. 412, 415 (1920)."

We find that the distinction in § 111 between unmarried northers and unmarried fathers, as illustrated by this case, does not beer a substantial relation to the State's intérest in providing adoptive homes for its illegitimate children. It may be that, given the opportunity, some unwed fathers would

¹ It his brief as unitar order, the New York Attorney General echasthe New York Court of Appends' expansion in a Malpien-Order of the interests producted by § 1214 difference treatment of moneyrical tathers. See Andrew Brief of New York Attorney General, at 18-20.

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prevent the adoption of their illegitimate children. This impediment to adoption usually is the result of a natural parental interest shared by both genders alike: it is not a manifestation of any protonoid difference between the affection and concern of mothers and fathers for their children. Neither the State nor the appellers have argued that unwed fathers are more likely to object to the adoption of their children than are showed nothers; nor is there any self-evident reason why as a class they would be.

The New York Court of Appeals in In re-Mulping-Oraini, supral suggested that the requiring of unmarried fathers' consent for adaption would pose a strong impediment for adoption because often it is impossible to locate unweil fathers when adoption proceedings are brought, whereas mothers are more likely to remain with their children. It may well be that the special difficulties often attendant upon locating and identifying wowed fathers at birth would justify a legislative distinction between mothers and fathers of new barns." But these difficulties need not persist past infancy. When the adoption of an older child is sought, the State's interest in proceeding with adoption cores can be protected by means that do not draw such as infl-xible gender-based distinction as that made it \$411.9 In those cases where the father never has come forward to participate in the reaming of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child. Indeed, under the statute as it now stands the Surrogate may proceed in the absence of consect when the

In Boolean the question is not before us, we express no view whether the special relationship between mathers with their newborn children, and the chicator data after in boolean parasel, fothers at both, would justify a statute drawn more correctly then §111, addressed particularly to newsborn adoptions.

¹⁹ See Comment, The Energing Constitutional Protection of the Patietive Father's Potential Rights, 70 Mich. L. Rev. 1584, (200 (1972)).

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parent whose consent otherwise would be required never has come forward or less shouldoned the child ¹⁶. See, e. g., In re *Orlando F.* 40 N. Y. 2d 103 (1976). But in cases such as this, where the father has established a substantial relationship with the child and $e^{-\omega}$ willing to admit his paternity.¹⁶ there should be on difficulty in the State's identifying the father even of children born out of wedlock.¹⁰ Thus, no showing has been made that the different treatment afforded

Which New York Court of Appends is correct that approached forhers often shorth their foundation primition we need not question there allowing those to their who remain with their minutes a right to object to the fermentation of their parential rights will pose bitle threat to the States ability to other odeption in most cases. For we do not question a State's right to do what New York has done in this portion of § 111: pravide that further who have algorithmed rither children have no right to block adaption of these children.

We do not suggest of contset that the provision of § 111 making parental consect the cosstary in cases of abundanticut is the only constitutional neckonism cossibile to New York for the protection of its interest in aboving the adoption of illigitance children when their natural tables are neurovabile to be consulted. In reviewing the constitutionality of standard classifications, for its not the function of a court to by pathesize adoption the distribution of a court to by pathesize adoption of the constrainty of function of a court to by pathesize adoption the constraint is not the function of a court to by pathesize adoption of the constrainty of function of a court to by pathesize displayed and the constrainty of functions of a court to by pathesize<math>displayed and the constrainty of functions of a court to by pathesize<math>displayed and the constrainty of functions of a court to by pathesize<math>displayed and the constrainty of functions of a court to by pathesize<math>displayed and the constrainty of functions of a court to by pathesize<math>displayed and the constrainty of functions of a court to by pathesize<math>displayed and the constrainty of functions of a court to by pathesize<math>displayed and the constrainty of functions of a court to be pathesize<math>displayed and the constrainty of functions of a court to be pathesize<math>displayed and the constrainty of functions of a court to be pathesized<math>distingtion of § 111 only to emphasize that the state interests asserted in supportof the station y classification could be pathweight functions to.

• In Quadrance With a derive agency, we noted the importance in cases of these kinds of the telephonetry that in fact exists between the parent and child.

¹¹States have a logitariate interset, of marse, in providing that an ermatrish bottler's right to Open to the adoption of a child will be conditioned open has showing that it is in fact has child. Cf. Laffe v. Laffe \rightarrow U S = 1, s = 119782. Such is not, however, the import of the New York statute here. Although New York provides the armons in the brandy Coatte to establish patch two set §§ 513 to 571 of the New York Database patch that for the new York the coattes is no provider allowing their ways between determined to the coattest be the father of a child one was been determined to the coattest be the father of a child one was based ack to object the object of the vertice of their children matters § 111.

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CADAN & MOHAMMED

annactical fathers and unmarried mothers under § 111 hears a substantial relationship to the proclaimed interest of the State in promoting the adoption of illegitimate children.

In sum, we believe that §111 is another example of "overbroad generalizations" in gender-based classifications. See Califono v. Goldfarb, 430 U. S. 199, 211 (1977); Stanton v. Stanton, 421 U. S. 7, 14 45 (1975). The effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a paternal interest in the child. The facts of this case illustrate the harshness of classifying unwed fathers as being invariably. less qualified and outility than mothers to exercise a concerned judgment as to the fate of their children. Section 111 hoth excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some abenated mothers arbitrarily to our off the paternal rights of fathers. We conclude that this undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the state's asserted interests,"

¹⁵ Appeliant also challenges the constitutionality of the distinction made in § 111 between matrixed and minimization forthers. Appellant urges that the rearray of a club is an activity constitutionally protected from intersectivity government interference. See Quadelin v. Walcott. 434 U. S. 246, 255 (1968). Weinberger v. Biosenfeld, 420 U. S. 636, 652 (1975): Prime v. Maxim basets, 321 U. S. 558, 196 (1944). The decomposition is there are a subset to also will be permitted to raise a club, therelike the State matrix and curl the permitted to raise a club, therelike the State matrix and anith the permitted to raise a club, therelike the State matrix and curl rates. See, e. g., Memorial Haspital v. Matricopa County, 415 (1-S, 250, 253-254 (1974)). Shapiro v. Theorpoot, 494 V. S. 618 (1959). As we have resolved that the september of statement of § 111 values the Equal. Protection (poler New York law endermong the constationality of the distinction (poler New York law between matrixed fathers and manutried tothers,

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Finally, appellant argues that he was denied sub-functive due process when the New York coarts terminated his parental rights without first

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14

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The judgment of the New York Court of Appeals is Reversed.

finding birs to be quffer to be a pertent. See Shawka v. Hinois, 405 11, S. (45) (1972) instabilist. Because we have taked that the New York statute is uncersituational analog the Fiqual Protection Classe, we express no view on whether every state is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is order.

8,10,11,13

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So: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justics White
Mr. Justice Marchall
Mr. Justice Blackson
Mr. Justice Sebrguist
Mr. Justice Stevens
From: Mr. Justice Poweli 1 9 JAN 19/9 Circulated:

Recirculated:

3rd DRAFT

SUPREME COUBT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant, v. | On Appeal from the Court of Kazim Mohammed and | Appeals of New York, Maria Mohammed. |

[January ---, 1979]

Mit. JUSTICE POWELL delivered the opinion of the Court.

The appellant, Abdiel Cabas, challenges the constitutionality of § 111 of the New York Domestic Relations Law, under which two of his natural children were adopted by their natural mother and stepfather without his consent. We find the statute to be unconstitutional, as the distinction it invariably makes between the rights of accessrical numbers and the rights of unconstructed fathers has not been shown to be substantially related to an important state interest.

¥.

Abdiel Cabao, and appellee Maria Mohammed fived together in New York City from September of 1968 until the end of 1973. During this time Cabao and Mohammed represented themselves as being busbaad and wife, although they never legally married. Indeed, until 1974 Cabao was married to another wordan from whom he was separated. While living with the appellant, Mohammed gave birth to two childreat David Andrew Cabao, born July 16, 1969, and Denise Cabao, born March 12, 1971. Abdiel Cabao was identified as the father on each child's birth certificate, and lived with the children as their father through 1973. Together with Mohammed, he contrabuted to the support of the family.

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In December of 1973 Mohammed took the two children and left the appellant to take up resolence with appellae Kazim Mohammed, whom she married on January 30, 1974. For the text time months, she took David and Denise each weekend to visit her mother. Debres Ganzales who fixed one floor above Calum. Because of his friendship with Gonzales Calum was able to see the children each week when they came to visit their grandmother.

In September of 1974, Goozales left New York to take up residence is her online Poerto Rico - At the Moleconneds' request the grandmother took David and Donise with her, According to appellies, they platning to join the children in Paerto Ricous soon as they had saved enough money to start a business there . During the children's stay with their grandmother, Mrs. Mohammed kept in touch with David and Devise by mail: Caban communicated with the children through his purcets, who also revolved in Puerto Rico. In November of 1975, he went to Paerto Rico, where Gonzalez willingly surrendered the children to Cahoo with the understanding that they would be returned after a few days, Caban, however, returned to New York with the children, When Mrs. Mohammod beamed that the children were in Calcar's custody, she ottempted to retrieve them with the aid of a police officer. After this attempt failed, the appellens instituted custody proceedings in the New York Facely Court, which placed the children is the temporary custody of the Mohammeds and gave Caban and his new wife. Ning visiting rights.

In January 1976, appellers filed a perition under \$110 of the New York Domestic Relations Law to adopt David and Denise.¹ In March, the Cabans cross-petitioned for adoption.

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⁴ Section 110 of the New York Dimostic Relations Low, provides in pair that,

[&]quot;Julto adults on minor her-book and his adult or minor wife together may adopt a shill of either of them have in an out of worldock and an

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After the Family Court stayed the custody suit pending the outcome of the adoption proceedings, a hearing was held on the petition and cross-petition helders a Law Assistant to a New York Serrogate in Kings County, N. Y. At this hearing, both the Mohammeds and the Cabans were represented by counsel and were permitted to present and cross-examine witnesses.

The Surrogate granted the Mohammeds' petition to adopt the children, thereby cutting off all of appellaut's parental rights and obligations.^{*} In his opinion, the Surrogate noted the limited right under New York law of unced fathers in adoption proceedings: "Although a putative father's consent to such an adoption is not a legal meressity, he is entitled to an opportunity to be heard in opposition to the proposed stepfather adoption." Moreover, the court stated that the appellant was forcelosed from adopting David and Denise as

- Section 117 of the New York Domostic Relations have provides, in part, that,

"[a)for the tacking of an order of subprior the natural parents of the adoptive child shall be relieves of all parental dattes toward and of s.] are possibilities for and shall have no rights over such adoptive child or to bis property by descent or succession except as hereinafter stand."

As an exerction to this general role [5117] provides that,

 $f_{\rm ev}^{\rm t}$ has a matural or adoptive parent, laying lowfol costody of a cheld, invertes or remarks and consents that the steplather or steplattle recovadopt such shild, such consent shall not relieve the parent so concenting all my pure-tal dark toward on hacked nor glait with consect or the uniter of adoption affect the rights of each consectivity sporse and such infertion cheld to inferit from and threads each other and the matural and adopted kindted of sech conservations."

to amittane § 117 (2) provines that objeton shall not affect a child's right to distribution of property under his natural parents (will,

adult or minor he-band or an adult or minor wife may roleys such a Calif of the other species."

Although s noticed mother in New York has non-y principal right- without adopting her child. New York courts have held that § 110 provides for the adoption of an elleptimate child by his number. See *Devic Anonymens* Adoption 177 Mag. 683–81 N, Y, § 25 595 (App. Div. 1941).

CARAN & MOHAMMED

the national mother had withheld her consent. Thus, the court considered the evidence presented by the Cabans only insofar as it reflected upon the Mohammeds' qualifications as prospective parents. The Surrogate found them well qualified and granted their adoption petition.

The New York Supreter Court, Appellate Division, affittued, It stated that appellant's constitutional challenge to 3–114 was forcelosed by the New, York Court of Appeals' decision in In re-Malpha-Orsial, 36 N. Y. 2d 568, app. dismissed for want of a substantial federal question sub-non-Orsial v. Blass, 423– 49, S. 1042 (1977). In re-David Andrew C., 56 A. D. 23–627, 391 N. Y. S. 2d 846 (1976). The New York Court of Appeals similarly affirmed to a reconcendum decision based on In re-Malpha-Orsial, supret—In re-David A. C., 43 N. Y. 2d 708, 401 N. Y. S. 2d 208 (1977).

On uppeal to this Court appellact presses two claims. First, he argues that the distinction drawn under New Yorklaw between the adoption rights of an unwed father and those of other parents violates the Equal Protection Chase of the Fourteenth Amendment. Second, appellant contends that this Court's decision in Quilloin v. Wabratt, 434–0. S.: 246 (1978), recognized the due process right of natural fathers to maintain a parental relationship with their children absent a finding that they are nofit as parents.⁴

11

Section 111 of the New York Domestic Relations Law provides in part that:

"consent to adoption shall be required as follows: . . .

(b) Of the parents or surviving parent, whether adult or infant, of a child bern in wellock; [and] (c) Of the

² As the appellant was given doe rative and was penalitied to participate as a garts in the adaption proceedings, he deep not contend that he was defied the procedural dos process held to be required in *Stanlary Illinois*, 405 15, 8, 615 (4972).

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mother, whether adult or infant, of a child born out of wedback, $\ldots = N$, Y. Dom, Rel. Law § 111 (McKinaty's 1977).

The statute makes parental consect unnecessary, however, in certain cases, iterining these where the parent has abandoned or relinquished his or her rights in the child or has been adjudicated incompetent to care for the child.⁴ Absent one of

*At the tang of the precedings before the Surragite §411 provided: "Subject to the family-tions hereinisfier set forth consent to adoption shall be required as follows:

"1. Of the adoption shild, if over furthern years of age, unless the judge of sufficient in his discretion disperses with such consent.

- 52 Of the parents or surviving purent which er while or infant, of w infald form in wellock;

 $^{+33}$. Of the mother, whether table or infant, of a child base out of readiant;

"4. Of any person of authorized agency baying kiwfal en-tasly of the poloptive child.

"The interval shall not be required of a partial who has a bondened the which ar who has surrendered the claid to an authorized assure for the purpose of adoption under the provisions of the social services hav or of a potent for whose chillo a guardies, has been appointed under the processes of section three hundred eighty-four of the social services law or who has been deprived of each rights at who is meane or who has been adherged to be an halothal drankard or who has been judi is hiddeproved of the case tody of the dalid on a court of cracky or region, or pursuant to a judenal finding that the claid is a permanantly neglected child as defined in section six handred eleven of the fourth mout act of the state of New York: everyl that dotter of the proposed adoption shall be given in such manner. as the judge or surrogate new direct and an opportunity to be been thereas may be afforded to a parent who has been deprived of a bit rights and this patent if the judge or soming to so orders. Notwithstanding my other provision of law, britler notice of a preposed adoption non-only process is such proceeding shall be respond to contain the name of the person of persons socking to adopt the child. For the purposes of this section, evidence of insubstantial and infrequent contacts by a paper, with Lis or her shild shall not, of itself, he sufficient as a matter of law m prediction dialog the courts parent has about and such a bibl-

"Where the coloptive child is ever the age of eightree years the one-

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these discumstances, an anwed mother has the authority under New York law to block the adoption of her child simply by withhobling consold. The unwed father has no similar control over the fate of his child, even when his parental relationship is substantial—as in this case. He may provent the terminatine of his parental rights only by showing that the best interests of the child would not permit the child's adoption by the petitioning couple.

Despite the plaie wording of the statistic, appellers argue that unwed fathers are not treated differently under § 111 from other parents. According to appellers, the consent requirement of § 111 is merely a formal requirement, backbag in substance, as New York courts find consent to be unnecessary whenever the best interests of the child support the adoption. Because the best interests of the child always determine whether an adoption petition is granted in New York, appellers contend that all purents, including unweal lathers are subject to the same standard.

Appellees' interpretation of \$ 111 finds no support in New York easelaw. On the contrary, the New York Coart of Appeals has stated unequivocally that the question whether consent is required is entirely separate from that of the best

Sants operative in subdivisions two and three of this section shall not be toquited, and the judge or surrogate in his distributions direct that the convent specified in subdivision four of this section should be required it in the optimizer the moral and temporal interests of the adoptive child will be promoted by the adoption and such constant connection any reason be airregized.

[&]quot;An adoptive whild whether once been lowerly adopted may be modepted directly from such diddly adoptive parents in the same manage as from its notated provide. In such case the consent of such matural parent shall not be required but the judge or surrogate in his discretion may require that notice be given to the startal parents in such mature as be may presente."

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interests of the child.³ Indeed, the Sarrogate's decision in the present case allitude by the New York Court of Apprals, was based upon the assumption that there was a distinctive difference between the rights of Abdiel Caban, as the moved father of David and Denise, and Maria Mohammed, as the unweil mather of the childrent Adoption by Abdiel was hold to be impermissible in the absence of Maria's consent whereas adoption by Maria could be prevented by Abdiel only if he could show that the Mohammeds' adoption of the children would ont be in their best interests. Accordingly, it is clear that § 111 treats to married parents differently according to their sex.

111

Gender-based distinctions "must serve governmental objectives and emist be substantially related to achievement of those objectives" in order to withstand judicial scrutiny under the Equal Protection Chasse. Cruig v. Boren, 404 U. S. 190, 197 (1977). See also Reed v. Reed, 404 U. S. 71 (1971). The question before us, therefore is whether the distinction in § 111 between unmarried mothers and unovarried fothers bears a substantial relation to some important state interest. Appellees assert that the distinction is justified

² See In co Coneg L. v. Marthu I., 45 N. Y. 26 383, 394 [380] N. E. 26 206, 270 (1978).

[&]quot;Absent consent, the first facts here was on the issue of abandon since weither devisional rate non-statute can bring the relationship to an and human someone doe profession to adoption, relates to such conduct on the part of a potential cylinder to adoption, relates to such conduct on the part of a potential relation a weitholding of interval athing time, and the foregoing of principal rights—a weitholding of interval prevenue, affection, care this opposit. The fact intervals of the shift asuch as not are ingredient of the condext and is not involved in the threshold quastion. While proposition of the best intervals of the shift is even we as a substitute for a finding of the objection, such increase cuttors we as a substitute for a finding of a boolermore \mathbb{C}^n . Combations emitted.)

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by a fundamental difference between maternal and paternal relations—that "a natural mother absent special drougstances, hears a closer relationship with her child . . . that a father does." Tr. of Oral Azg., at 41.

Contrary to appellees' argament and to the apparent prosumption underlying \$111, outernal and paternal roles are not invariably different is importance. Even if threed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning press-child. relations would become less acceptable as a basis for legislative distinctions as the age of the shild increased. The presentcase demonstrates that an unwell fother may have a relationship with his children fully comparable to that of the mether. Appellant Cuban, appeller Maria Molumaned, and their two children lived together as a tutural fattily for several years. As prombers of this family, both number and father participated in the care and support of their children." There is no reason to believe that the Caban children-aged 4 and 6 at the time of the adoption proceedings-had a relationship with their nother unrivated by the affection and concern of their father. We reject therefore, the chim that the broad, geoder-based distinction of \$111 is required by any universal difference between material and paternal relations at every phase of a child's development,

\$

Now reflecting an exampled forber's constructional claim in $Quillion | v_i = Walkett_i (44) | U_i(S_i/245) (1978), we simplicized the apportance of the appellant's failure to act as a facher toward his children, noting the be,$

⁴. . To show reversion result or legal encody over his child, and thus but more should not any significant responsibility with respect to the duity senses some astronomy rate (ion, or care of the child, "Appellant does not complete at his exception into the environment these and indeed, be does not even proceeds where to be of his chald." Fit, at 256.

In Quillois we expressly reserved the question whether the Georgie statute orbitat to §100 of the New York Damests. Relating Law unconstitutionally distinguished unwest parents are onling to their gender, as the slippe way not projectly presented. See 334 by Su at 253 \approx 13,

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As an alternative justification for \$ 111, appellees argue that the distinction between unwed fathers and unwed mothers is substantially related to the State's interest in promoting the adoption of illegitionate children. Although the legislature bistory of \$ 111 is sparse, in *In ve Mulpica-Ursiei, super*, the New York Coart of Appeads identified as the legislature's purpose in adopting \$ 111 the furthering of the actorests of illegitimate children, for whom adoption often is the best course,². The coart concluded that,

"[1]0 require the consent of fathers of children horn out of wellock ..., or even some of them, would have the overall effect of denying hornes to the homeless and of depriving innocent children of the other blessings of adoption. The cruel and undeserved untsof-wedlock stigues would continue its visitations. At the very least, the worthy process of adoption would be severely impeded." *Id.*, at 572.

The court researce that people wishing to adopt a child-

Consent of the numerical (whe) his super base required for adoption under New York Lew, although parental reasont otherwise has been topicful at least since the isree Path century. See, e.g., Lews of the State of New York, (19th) Session 1, 1996, ch. 272. There are no legislative reports acting forth the mesons why the New York (regislative excepted manuficies) follows from the general conjunctions of patiental consent for adoption.

The Optical St. Bard, support the Court distributed an append from the New-York Court of Appends challenging the constructionality of § 411 as applied to an estimatrial rather whose chain had here addeted adopted by . New York Sorregues. The distributegraphical we facily ded that a substantial federal question was lacking. This was a radiug on the merits and therefore is conticled to predictation aright. See Hacks v. Monoda. 422–17–8. 642, 844 (1975) – A) the same time, *markets*, our denotes not to review hully the questions presented in *Ordel v. Had* is not entitled to the same defectors given a rather vitient vitigat granient, and a written openeous defectors given a rather vitie friendly $\pi 10074$. The same defectors given a rather of $\pi 8, 551, \pi 51, 10074$. Toolar as our devision today is inconsistent with nor distribuility of 90000, we recercily our prior devision

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born out of wedlock would be discouraged, if the natural father could prevent the adaption by the mere withholding of bis consecut. Indeed the court went so for as to suggest that "[infurcinges would be discouraged because of the reluctance of prospective husbands to involve themselves in a family situation where they might only be a foster parent and could not adopt the mother's offspring." Id., at 573. Finally, the court noted that if newed fathers' consent were required before adoption could take place, in many restances the adoption would have to be delayed or eliminated altogetter, because of the unavailability of the natural father."

The State's interest in providing for the well-being of illegitimate children is an important one. We do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a coracil, two-parent home. Moreover, adoption will remove the stigma noder which illegiturate champe softer. But the unquestioned right of the State to further these desirable ends by legislation is not or itself sufficient to justify the gender-based optimetion of \$114. Rather, lader the relevant cases applying the Equal Protection Clause B must be shown that the distinction is structured reasonably to forther these ends. As we repeated in Reed X. Reed, supraat 76 such a statutory "classification transfibe reasonable, not arbitrary, and must cest on some ground of difference having a fair and substantial relation to the object of the legislation isa that all prosons similarly circumstanced shall be treated alike? Royster Guano Co. v. Virginaa, 253 1i, S. 412, 415 (1920) ??

We find that the distinction in §111 between ormagnish mothers and unmarried fathers, as illustrated by this case, does not bear a substantial relation to the State's interest in providing adoptive houses for its illegiturate children. It may

² In Lis brief as maintee control, the New York Automas, General enhancing New York Court of Apperbil expose on *Deco Mandem-Grand* (1) the enteries protocols by \$1118, difference variational of non-introd fathers. See Anothe Brief of New York Automaty General, at 16-20.

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he that, given the opportunity, some anweal fathers would prevent the adoption of their illegatimate children. This imposition it to adoption usually is the result of a actual parental interest shared by both genders addret it is not a manifestation of any profound difference between the affection and concern of mothers and fathers for their children. Neither the State nor the appellees have argued that unwell fathers are more likely to object to the adoption of their children than are moved mothers; nor is there any self-evident reason why as a class they would be.

The New York Court of Appeals in Io re Malpica-Orsini, supra, suggested that the requiring of unmarried fathers' consent for adoption would pose a strong impediment for adoption because often it is impossible to locate unwell fathers when adoption proceedings are brought, whereas nothers are more likely to remain with their children. Even if the special inflicultures attendent, upon locating and identifying unwed fathers at birth would justify a legislative distinction between mothets and tothers of myshortis - these difficulties need not petsist past infuncy. When the adoption of an older child is singht the State's interest in proceeding with adortion cases can be protocted by means that do not draw such an inflexible gender-based distinction as that made in \$111.9 In those cases where the father never has come forward to participate in the rearing of his choid mothing in the Equal Protection Clause produces the state from wrigholding from him the privilege of verteing the adoption of that child. Indeed, amirthe statute as it now stands the Surrogate may proceed in the absence of constrat when the parent whose consent otherwise would be required never has come forward or Las abandons!

¹⁹ Because the question is not before us now expression view whether such difficult is world proper a statute addressed particularly to new local adoptions, softing forth many stringent requirements can obligh the asknowledgment of potential on a structure definition of signification).

¹⁰ See Comment. The Emerging Constitutional Prace ther of the Petative Estimate Present Region, 70 Mat. J. Rev. (281, 1991) 199724.

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the child.²² See, c. g_{ij} for re-tirlando F_{ij} 40 N, Y, 2d 103 (1976) — But in cases such as this, where the father has established a substantial relationship with the child and is willing to advant bis pateronty.²⁴ (here should be no difficulty in the State's identifying the father even of children horn out of wedlack.²⁴ Thus, no showing has been made that the different treatment afforded non-meried fathers and unmarried mothers only § 111 bears a substantial relationship to the

We do not suggest, at course, that the provision of § (1) making parental conservammenessary in cases of abundonment is the only equivational mortantism would be to New York for the procedum of us integers in allocate the objection of illightmatic children when their matural fathers are not available to be consolved. In reviewing the mestion formation of a court to be parketing of a court to be parketing independently on the describility or initiality of any posed in alternative (s)² to the statisticity reliance formulated by table State [2]. Latic v. Latt, \rightarrow U/S, \rightarrow , \rightarrow , (2978) (quasing Matthews v. Latter 427–15, 8– 425, 515 (1976)). We note some abernatives to the gradez-based distinction of § (1) only the implantate that the statistic rests asserted in support of the statistic result by protected through runnerous other mathemistics mate charder to the protected through runnerous other mathemistics mate charder to the protected through runnerous other mathemistics mate charder to the protected through runnerous other mathemistics mate charder to the entry res-

(1) De Quellola v. Widente support memorial the importance in cases of this kind of the relationship that in fact exists forming the privational chebi-

¹⁷States have a legitiente meters), als course, in providing that an account of lather's right to object to the adoption of a child will be combined upon his showing that it is in the his child. Clothali will be $\frac{1}{2} = 1^{\circ}$, $\frac{1}{2} = \frac{1}{2} = \frac$

³⁷ If the New York Court of Appends is correct that management fathers afree description for fatalies to view we used not spectrum) then allowing these fathers who remark with their fatalies a right to abject to the teralization of their periods with their will pose with the threat to the State's ability to state the prior in most cases. For we do not question a State's right to six what New York like done in this perform of §112 provide that fathers who have absorbed their children have no right to block adoption of these children.

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proclaimed interest of the State in promoting the adoption of allogramate children.

In sum, we believe that § 111 is another example of "overbroad generalizations" in gender-based classifications. See Califano v. Gold(mb. 430 U. S. 199, 211 (1977); Stanton v. Stanton, 421 U. S. 7, 14-15 (1975). The effect of New York's elassification is to discriminate against unwed fathers even when their identity is known and thuy have manifested a paternal interest in the child. The facts of this case illustrate the harshness of classifying unweil fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the face of their children. Section 111 both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, reables some alignated mothers arbitrarily to out off the paternal rights of fathers. We conclude that this undifferentiated distinction between unwed mothers and gowed fathers, applicable in all exemistances where adoption of a child of theirs is at issue, does not beer a substantial relationship to the State's asserted inforests.¹⁹

The judgment of the New York Court of Appeals is

Reversed.

DMISSIDO

"Appellant also deduces the constitutionality of the distinction mode in §111 between matrixed and unmatrixed fathers. As we may reasoned that the exclusion distinction of §112 violates the hip of Protector UC use we next express on more as to the validity of the additional classification.

Finally, appellant argues that he was denoted sub-transitive due process when the New York courts terminated his parental agets without firstfinding him to be units to be a parent. See Stanley v. *Phanes* 405 U/8 645 (4052) (combin). Because we have toled that the New York stature is concertation of target the Final Procession (Cause are sub-larly express to know as to whether a School's constrained by harded (can ordering adopt to be the obsched to determinated that the parent also rights are being terminated to unly

Supreme Çouri of the Amited States Washington, P. C. 2054.3

CHANDERS OF THE CHIEF JUSTICE

January 18, 1979

Re: 77-6431 ~ Caban v. Mohammed

Dear Potter:

I take it John's memo will bear on <u>Caban</u> alone. I am with two others to affirm, and if you have moved to affirm and John does the same, that will turn the Conference vote around.

Segards,

Jutcom

and the

NOW

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the Anited States Bashington, H. C. 20343

CHANBERS OF

January 18, 1979

Memorandum to the Conference

Re: 77-6431 - Caban v. Mohammed

78-3 - Parham v. Hughes

As indicated at our conference yesterday, I have vacillated a great deal in the <u>Cahan</u> case. I have talked about it to John Stevens this morning, and he has agreed to undertake a memorandum that would uphold the New York statute.

My present tentative view in the Parham case is that the judgment should be affirmed.

Sincerely,

Supreme Court of the United States Anohington, D. J. 20549

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CHARGERS OF JUSTICE THURGOOD MARSHALL

January 22, 1979

Re: No. 77-6431 - Caban V. Mohammed

Dear Lewis:

Please join me.

Sincerely,

Ju. т.м.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States Mashington, D. C. 20543

.. . .

CHANDLINS OF JUSTICE WA. J. BRENNAN, J.R.

January 22, 1979

RE: No. 77-6431 Caban v. Mohammed

Dear Lowis:

I am happy to join your opinion in the above as recirculated on January 19.

•

Sincerely,

Biel

Mr. Justice Powell cc: The Conference Supreme Court of the United States Washington, P. C. 20943

CHANGERS OF JUSTICE MARRY A, BLACKMUN

January 29, 1979

Re: No. 77-6431 - Caban v. Mohammed

Dear Lewis:

Please join mc.

Your second and third drafts assuaged my concerns about the first draft. I think your proposed opinion does justice in this case and lays down principles that are not too hard to live with. This does not mean, of course, that there will not be further litigation in line drawing in cases of this kind. That, perhaps, will be a consequence of the decision, but it does not detract from the justice that is being done here and in like cases.

I have only one very minor suggestion to offer. Would it be worthwhile, at the end of the eighth line of page 13, to insert the word "significant," or something similar thereto, so that the phrase will read "they have manifested a significant paternal interest in the child?? I suggest this only because, in a sense, the father in <u>Quilloin</u> "manifested a paternal interest," albeit a tardy one.

Sincerely,

Mr. Justice Powell

cc: The Conference

1/2/19

4th DRAFT

SUPBEME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant, v. Nazim Mohammed and Maria Mohammed. On Appeal from the Court of Appeals of New York,

[January -, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

The appellant. Addiel Caban, challenges the constitutionslity of § 111 of the New York Domestic Relations Law, under which two of his natural children; were adopted by their natural mother and stepfather without his consent. We find the statute to be unconstitutional, as the distinction at invariably makes between the rights of unmarried mothers and the rights of unmarried fathers has not been shown to be substantially related to an important state interest.

I

Abdiel Caban and appellee Maria Mohammed lived together in New York City from September of 1968 until the end of 1973. During this time Caban and Mohammed represented themselves as being husband and wife, although they never legally married. Indeed, until 1974 Caban was married to another woman from whom he was separated. While living with the appellant, Mohammed gave hirth to two children: David Andrew Caban, born July 16, 1959, and Denise Caban, bern March 12, 1971. Abdiel Caban was identified as the father on each child's birth certificate, and lived with the children as their father through 1973. Together with Mohammed, he contributed to the support of the family.

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CABAN v. MOHAMMED

In December of 1973, Mohammed took the two ebildren and left the appellant to take up residence with appellee Kazim Mohammed, whom she married on January 30, 1974, For the next nine months, she took David and Denise each weekend to visit her mother, Delores Gonzales, who lived one floor above Caban. Because of his friendship with Gonzales Caban was able to see the children each week whea they came to visit their grandmother.

In September of 1974, Gonzales left New York to take up residence in her native Puerto Rica. At the Mohammeds' request, the grandmother took David and Denise with her. According to aquelless, they planned to join the children in Puerto Rico as soon as they had saved enough money to start. a business there. During the children's stay with their grandmother. Mrs. Mohammed kept in touch with David and Decise by mail; Cabte communicated with the children through his parents, who also resided in Puerto Rico. In November of 1975 he wont to Puerto Rico, where Gonzalez willingly surrendered the children to Caban with the understanding that they would be returned after a lew days. Cabaa, however, returned to New York with the children. When Mrs. Mohammed learned that the children were in-Caban's custody, she attempted to retrieve them with the aid of a police officer. After this attempt failed, the appellers instituted custody proceedings in the New York Family Court, which placed the children in the temporary castedy of the Mohummeds and gave Cahan and his new wife, Ning, visiting rights.

In January 1976, appellees filed a petition under § 110 of the New York Domestic Relations Law to adopt David and Denise.¹ In March, the Cabaos cross-petitioned for adoption.

⁴ Section 110 of the New York Domestic Relations Low provides in part that,

[&]quot;[a]u sdutt or mutor husband and his adult or minor wife together may adopt a child of other of them born in or out of wellock and an

77-6431-OPINION

CABAN V. MOHAMMED

After the Family Court stayed the custody suit pending the outcome of the adoption proceedings, a hearing was held on the petition and cross-petition before a Law Assistant to a New York Surrogete in Kings County, N. Y. At this hearing, both the Mohammeds and the Cabans were represented by counsel and were permitted to present and cross-examine witnesses.

The Surrogate granted the Mohammeds' petition to adopt the children, thereby cutting off all of appellant's parental rights and obligations.⁴ The his opinion, the Surrogate noted the limited right under New York law of unwed fathers in adoption proceedings: "Although a putative father's consent to such an adoption is not a legal occessity, he is entitled to an opportunity to be heard in opposition to the proposed stepfather adoption." Moreover, the court stated that the appellant was forcelosed from adopting David and Denise, as

Although a natural mother in New York has many parental rights without adopting her child, New York caurts have held that § 110 procedes for the adoption of an illegitimate shild by his mother. See In re Analyzon ddoption 177 Mise 684, 31 N, Y, S, 2d 305 (App. Div. 1911).

²Section 117 of the New York Domestic Relations Law provides, in part, that,

"[a]fter the making of an order of adoption the cotoral parents of the adoptive child shill be referred of all parented duries toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descont ar succession, except as bereinafter sected,?

As an exception to this general rate, § 117 provides that,

"[w]http a natural or adoptive parent, having lawful custody of a child, nottice of rematrice and consents that the stepforher or stephenther may adopt such child, such cares at shall not rebeve the potent so consenting of add potential data toward such child not shall such consent or the other of adoption affert the rights of such consenting sponse and such adoptive child to inherit from and through each other and the narmal and adopted kindzed of such consenting sponse."

In addition § 117 (2) provides that adoption shall not affect a shift's right to distribution of property molecular material parents' well.

much of mixed be-band of an while or mixed with may integer archild of the other spon-e."

77-6431 ///PINION /

CABAN Y MOHAMMED

the natural mother had withheld her consent. Thus, the court considered the evidence presented by the Cabans only insofar as it reflected upon the Mohammed's qualifications as prospective parents. The Surrogate found them well qualified and gravied their adoption petition.

The New York Supreme Court, Appellate Division, affirmed It stated that appellant's constitutional challenge to 3 111 was forcelosed by the New York Coart of Appeals' decision in In re-Malpica-Orshei 36 N, Y 2d 568 app, dismissed for want of a substantial (ederal question sub-nois). Orshei V. Blaz, 423 U. S. 1042 (1977). In re-David Andrew C., 56 A, D. 2d 627, 391 N, Y. S. 2d 846 (1976). The New York Court of Appeals similarly affirmed in a memorandum decision based on In re-Malpica-Orshe, supra. In re-David A, C., 43 N, Y, 2d 708, 401 N, Y. S. 2d 208 (1977).

On append to this Court appellant presses two claims. First, he argues that the distinction drawn under New York law between the adoption rights of an arweal father and those of other parents violates the Equal Protection Clause of the Fourteenth Amendment. Second, appellant contends that this Court's decision in *Quillobic* v. Walcott, 434 U. S. 246 (1978), recognized the dee process right of natural fathers to maintain a parental relationship with their children absent a fielding that they are unfit as parents.²

11

Section 111 of the New York Domestic Relations Law provides in part that:

"consent to adoption shall be required as follows: (\cdot, \cdot) (b) Of the parents or surviving parent, whether adult or infant, of a child bern in weillock; [and] (c) Of the

² As the appellant was given due notice and was parameted to participate as a party in the adoption proceedings, he does not control that he was denied the procedure is due process hold to be requisite in *Startey V. Filman*, 405 B, 8, 645 (1972).

77-6431---OPIN108

CABAN V. MOHAMMED

mother, whether adult or infant, of a child born out of wedlock, . , \mathbb{P}^n - N, Y, Dom, Rel, Law § 111 (McKinney's 1977),

The statute makes parental consent unnecessary, however, in certain cases, including those where the parent has abandoned or relinquished his or her rights in the child or has been adjudicated incompetent to care for the child." Absent one of

*2 Of the (wreat) of surviving parent, whether adult or original, of a child born (n wedlock).

(3) Of the mother, whether adult or affect, of a child form out of welleck;

"4. Of any person or outhorized agency bacing lawful custody of the adoptive child

"The crushed shall not be required of a parent who has alwondered the child or who loss settersleted the child to an anthonazed agency for the purpose of adoption under the provisions of the sorial services law or of a parent for whose child a granitum has been appointed under the provisions of section three hundred eighty-form of the social services law or who have been deprived of civic rights or who is resume or who has been adjurged to he on liabitual drapkard or who has been judicially deprived of the enstialy of the shild on account of emolty or neglect, or personal two judgial finding that the child is a permanently neglected shild as defined in section six bundred eleven of the family court act of the state of New Yorkeveryt that nutice of the proposed adoption shall be given in such masteras the judge or surregate may direct and an opportunity to be heard thereon may be afforded to a patent who has been depresed of easil rights ADN to a parent of the judge or zorregate to orders. Netwithstanding any other provision of law, conflet notice of a proposel inteption nor apy process to such proceeding shell be required to contain the name of the percent or persons steking to adopt the child. Her the perposes of this section, is idente of insubstantial and infrequent contacts by a parent with his or her whild shall not, of itself, he sufficient as a matter of law to preclude a finding that such pay at has atomicated such child,

"Where the adoptive child is over the age of righteen years the coa-

^{*}At the time of the proceedings before the Surrogate §111 provided "Subject to the functations hereinafter set for the consent to adoption shall be required as follows:

[&]quot;I. Of the adoptive child, if even forthern years of age, unless the prige recompate in his discretion dispenses with such convert;

77-9431-OPINION

CABAN V. MDHAMMED

these circumstances, an unwed mother has the authority under New York law to block the adoption of her child simply by withholding consent. The unwed father has no similar control over the fate of his child, even when his parental relationship is substantial—as in this case. The may prevent the termination of his parental rights only by showing that the best interests of the child would not permit the child's adoption by the petitioning couple.

Despite the plain wording of the statute, appellees argue that unwed fathers are not treated differently under § 111 from other parents. According to appellees, the consent requirement of § 111 is merely a formal requirement, lacking in substance, as New York roughs find consent to be unnecessary whenever the best interests of the child support the adoption. Because the best interests of the child support the adoption. Because the best interests of the child always determine whether an adoption petition is granted in New York, appellees contend that all parents, including unwedfathers, are subject to the same standard.

Appellees' interpretation of § 111 finds an support in New-York caselaw. On the contrary, the New York Court of Appeals has stated unequivocally that the question whether consent is required is entirely separate from that of the best

sents specified in subdivisions two and three of this section shall not be required, and the judge or surrogate in his discretion new direct that the transmit specified in additionion four of this section shall not be required if in his opinion, the motal and temporal interests of the adoptive child will be primited by the adoption and such consent manual for any revision be obtained.

[&]quot;An orioptive child who has once been deviably adopted may be readopted directly from such dold's adoptive parents in the some manner as from its net real parents. In such case the consent of such parents? parent shall not be required but the judge or surragate in the discretion may require that notice be given to the moure? parents in such tammer as he may presente."

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CABAN V, MOHAMMED

interests of the child.) Indeed, the Surrogate's decision in the present case, affirtued by the New York Court of Appeals, was based upon the assumption that there was a distinctive difference herween the rights of Abdiel Caban, as the unwed father of David and Denise and Marin Mohammell, as the unwed mother of the children: Adoption by Abdiel was held to be impermissible in the disence of Maria's consent, whereas adoption by Maria could be prevented by Abdiel only if he could show that the Mohammel's adoption of the children would out be in the children's best interests. Accordingly, it is clear that ≤ 111 treats archarried parents differently according to their sex.

m

Gender-based distinctions "must serve governmental objectives and must be substantially related to achievement of those objectives" in order to withstand judicial scrutiny under the Equal Protection Chause, Crang v. Boren, 404 U. S. 190, 197 (1977). See also Rood v. Reed, 404 U. S. 71 (1971). The question before us, therefore, is whether the distinction in § 111 between matrixed mothers and unmatried fathers bears a substantial relation to some important state interest. Appellees assert that the distinction is justified

^{*}See In to Corry L. v. Martin L., 45 N. Y. 24 383, 391, 380 N. E. 2d 206, 270 (1978);

[&]quot;Abcout consent, the first force here was on the jests of abardonment since mither decisional rule cost statute can bring the relationship to an end because someone effectingly rear the shift in a more satisfactory fashion. . . . Abardonment, as is pertains to adaption, relates to such coolant in the pure of a present as evalues a purposeful relation of parental obligations and the foregoing of parental rights to withholding of otherset, preserve, affectual, care and support. The best interests of the child, as such is not an ingredient of the conduct and is not involved in this threshold question. While promotion of the best interests of the child is rescaled on the infinite report of the doption application, such interests consist as a substitute to a product of the best interests of the child is rescaled on a substitute to a product of the best interests of the child is rescaled to ultimore report of the adoption application, such interests consist as a substitute to a finding of abardonment." (Authoritus smatted.)

77-6431--OPINION

CABAN V. MORAMMED

by a fundamental difference between maternal and paternal relations—that "a natural mother, absent special circumstances, bears a closer relationship with her child . . , than a father does." Tr of Oral Arg., at 41,

Contrary to appellees' argument and to the apparent presumption according \$411, maternal and optercal roles are not invariably different in importance. Even if unwed mothers as a class were closer than unwed fathers to their newhorn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased. The present case demonstrates that an unweil father only have a relationship with his children fully comparable to that of the mother. Appellant Caban, appellee Maria Mohammed, and their two children lived together as a natural family for several years As members of this family, both mother and father particle pated in the care and support of their children." There is no reason to believe that the Ceban children-aged 4 and 6 at the time of the adoption proceedings-- had a relationship with their mother unrivaled by the affection and concern of their We reject, therefore, the claim that the broad, father. gender-based distinction of \$111 is required by any universal difference between uniternal and paternal relations at every phase of a child's development,

\$

The rejecting an contarried father's constitutional claim is Q_{0} where v_{i} Walcolf, 464 U. S. 246 (1975), we couplessized the importance of the appellant's failure to act as a father toward has children, sating flat he,

 $^{^{2}}$. This never exercised actual or legal costroly over his child, and these has access abundened any significant responsibility with respect to the faily supervision, education, preserving, or more of the child. Appellant does not compleme of his exemption from these responsibilities and, subred, be does not even now seek enstudy of his child." Id., at 256.

In Quidely we expressly reserved the question whether the Georgia statute similar to § 111 of the New York Domestic Relations how monostitutionally distinguished waved parents according to their gender, as the claim was not properly presented. See 434 U, S., a) 253 n. 13.

77-6431-OPIN10N

CABAN v. MOHAMMED

As an alternative justification for \$ 111, appellees argue that the distinction between unwed fathers and unwed mothers is substantially related to the State's interest in promoting the adoption of illegitimate children. Although the legislative history of \$ 111 is sparse,' in *In re Malpuea-Orsini, supro*, the New York Court of Appeals identified as the legislature's purpose in charming \$ 111 the furthering of the interests of illegitimate children, for whom adoption often is the best course.⁴ The court concluded that,

^a[t]o require the consent of fathers of children born out of wedlock ..., or even some of them, would have the overall effect of denying homes to the homeless and of depriving innocent children of the other blessings of adoption. The cruel and undeserved out-of-wedlock stigma would continue its visitations. At the very lesst, the worthy process of adoption would be severely impeded,⁹ $-Id_0$ at 572.

The court reasoned that people wishing to adopt a child

⁴ Convent of the unmarried Lither has never been explired for adoption under New York hav, although parental consent otherwise has been required at least since the late 19th century. See, e. p., Laws of the State of New York 119th Sector 1, 15%, ch. 252. There are no legislative reports sating forth the reasons why the New York Legislature excepted unmarried fathers from the general requirement of parental consent for adoption.

The Origin's Black supratiche Court discussed an append from the New York Court of Appends challenging the constructionality of § 111 as applied to an unmatrial father whose child had been ordered adopted by a New York Stategrate. In discussing the append, we indicated that a substantial federal question was breking. This was a ruling of the america, and therefore is contrast to precedential weight. See Hicks v. Mirgarla, 122 U.S. 332, 344 [1975]. At the same time, however, our decision not to review fully the questions presented in Orabit v. Blast is not entitled to the same deletence given a ruling after briefing, argument, and a written optimize. See Edulation v. Jordan, 415–618 (0.8–65), 671 (1074). Theofar as our decision today is inconsistent with our dismissed in Orabit we avertale our prior decision.

77-6431-OPINION

CABAN & MOILVIMED

born out of wedlock would be discouraged, if the natural father could prevent the adoption by the mere withholding of his consent. Indeed, the court went so far as to suggest that "[m]arriages would be discouraged because of the reluctance of prospective husbands to involve themselves in a family situation where they might only be a foster parent and could not adopt the mother's offspring." Id_{π} at 573. Finally, the court noted that if moved fathers' consent were required before adoption could take place, in many instances the adoption would have to be delayed or eliminated altogether, because of the upavailability of the natural father.'

The State's interest is providing for the well-being of illegitiunte et ildret is an important one. We do not question that the best interests of such children, often may require their adoption into new families who will give them the stubility of a normal, two-parent home. Moreover, adoption will remove the sugma nuder which illegitimate children suffer. But the unquestioned right of the State to further these desirable ends by legislation is not in itself sufficient to justify the gender-based distinction of \$111 Rather, under the relevant cases applying the Equal Protocom Clause it must be shown that the distinction is structured reasonably to further these emis. As we repeated in Read v. Reed, supra. at 76, such a statutory "classification troust he reasonable, out arbitrary and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly ricemstanced shall be treated alike." Royster Guano Co. v. Virginia, 258 U. S. 412, 415 (1920)."

We find that the distinction in § 111 between to mothers and unmarried fathers, as illustrated by this case, does not bear a substantial relation to the State's interest in providion adoptive homes for its dirigiting e children. If may

The his brief is more we cannot the New York Alteria c General velocities. New York Coart of Appende expection in the Maipern-Oralis of the interview York Coart of Appende expection in treatment of monistried (athers, Sp. Ambeut Reief of New York Altering Constal, at 16-20.

77-0431-011N1ON

CABAN V. MOHAMMED

be that, given the opportunity, some unwed fathers would prevent the adoption of their illegitimate children. This impediment to adoption usually is the result of a natural parental interest shared by both genders alike: it is not a manifestation of any profound difference between the affection and concern of mothers and fathers for their children. Nother the State nor the appellers have argued that (moved fathers are more likely to object to the adoption of their children than are unwed mothers; nor is there any self-evident reason why as a class they would be.

The New York Court of Appeals in In re-Malpira-Orsini, supra, suggested that the requiring of unmarried [athers] consent for adoption would pose a strong impediment for adoption because often it is impossible to locate enwed fathers when adoption proceedings are brought, whereas mothers are more likely to remain with their children. Even if the special difficulties attabiant upon beating and identifying unwert fathers at birth would justify a legislative distinction between mothers and fathers of newbores," these difficulties need not persist past infancy. When the adoption of an older child is sought, the State's interest in processling with adoption cases can be protected by means that do not draw such an inflexible gender-based distinction as that made in $\$ 111^{10}$. In these cases where the father never has come forward to participate in the maring of his child, nothing in the Equal Protection Choise precludes the State from withholding from him the privilege of vetoing the adoption of that child - Indeed, under the statute as it now stands the Surrogate may proceed in the absence of consent when the patient whose consent otherwise would be required never has came forward or has abandoned

¹¹ Because the mostion is not before as we express no view whether start difficulties would distant a starture addressed particularly to newborn asbrations is thing forth more stratight waveforments concording the acknowledgment of parenting of a structure debugtor of abardonment.

¹⁰ See Comment, The Emerging Constitutions: Protestane of the Parative Father's Percental Rights, 75 Mach. J. Rev. 1581, 1800 (1972).

77-6631-OPINION

CABAN v. MOHAMMED

the child.¹² Sec. e. g., In re Orlando F., 40 N. Y. 24 103 (1976). But in cases such as this, where the father has established a substantial relationship with the child and has admitted his paternity.¹⁵ a State should have no difficulty in identifying the father even of children born out of werllock.¹⁰ Thus, no showing has been made that the different treatment afforded unmarried fathers and unmarried.

S to Quality v. Weight, source, we noted the importance in cases of this shift of the relationship that in that exists between the percent and child. See $v \in S$, super-

PS1508 Lave a legitimute potents' of course as providing that an autoartised lather's right to object to the adaption of a shift will be conditioned upon his showing that it is in fact his child. UP Laff v. Laff, \rightarrow V, S, \rightarrow , \rightarrow (1978) – Such is not, however, the import of the New York statute here. Although New York provides for actions to its Family Courts to establish patentity, see §§ 511 to 578 of the New York field any Court Acts. Cours is no provision allowing men who have beep determined by the court to be the father of a child here on of wedlock to abject its the adoption of their rhigher moder § (1).

¹⁵ If the New York Court of Appeals is correct that utmatried fathers often described their families of view we need not question), then allowing those furthers who remain with their families a right to object to the fermination of their periodal right- will pase little threat to the State's ability to other adoption in most cases. For we do not question a State's right to do what New York has done in this portion of §1111 provide that fathers who have abandened their studies have an right to block adoption of those children.

We do not sugget of course, that the introvision of § 111 making parental constant undergenery in cases of absindonment is the only constitutional mechanism available to New York for the protection of as interest in allowing the adoption of fleptopate children whon their natural fathers are not available to be excented. In preterior of a court to hypothesize independently on the descalability of function of a court to hypothesize independently on the descalability of function of a court to hypothesize independently on the descalability of function of a rout to hypothesize ($(e^{-1})^{-1}$ to the statisticity scheme formulated by [the State] = Labil v, Le^{-1} , \longrightarrow U S, \longrightarrow , \longrightarrow (1978) (quoting Matthew v. Lorus, 427 D S, 495–515 (1976)). We note some alternatives to the gender-based distingtion of § 111 only to emphasize that the state interests insected in support of the statisticy classification could be protected through numerous other perhansing pore classification could be protected.

77-6431-OPINION

CABAN V. MOHAMMED.

mothers under § 111 hears a substitutial relationship to the proclaimed interest of the State in promoting the adoption of disgitingen children.

In sum, we believe that § 111 is another example of "overbroad generalizations" in gender-based classifications. See Califuna v. Goldiorb, 430 U. S. 198, 211 (1977); Stantan v. Stanton, 421 U. S. 7, 14, 15 (1975). The effect of New York's classification is to discriminate against upwed fathers even when their identity is known and they have manifested a siguffeaut paternal interest in the child. The facts of this case illustrate the barshness of plassifying unwel fathers as being invariably less qualified and outitled thus mothers to exercise a concerned judgment as to the fate of their children. Section 414 both excludes some loving rathers from full participation in the decision whether their children will be adopted and, at the same time, evables some alignated mothers arbitrarily to cut off the paternal rights of fathers. We conclude that this tradifferentiated distinction between unwed mothers and anwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's assertial interests."

The judgment of the New York Court of Appeals is

Reversed.

⁵ App² hout also challenges the constitutionality of the distinction mathin § 101 between that riod and memorized fathers. As we have resolved about the sex-based distinction of § 111 violates the logical Properties Clause, we need express to view as to the validate of this additional classification.

Finally, apprendent argues that he was denied substantive due process when the New York courts terminated his parental rights without first finding him to be outfit to be a parent. See Stanley v. Eleman 405 U.S. 545 (1972) (scalable). Because one have railed that the New York statute is intronstationated and the Equal Protocolou Classe, we similarly expresate view as to obscher a State is constitutionally formed trace ordering adoption in the absence of a determination that the parent whose rights, are being terminated windy.

Supreme Court of the United States Washington, D. C. 20543

DISTICE WILLIAM R. REHNQUIST

March 2, 1979

Re: No. 77-6431 - Caban v. Mohammed

Dear John:

Please join me in the second draft of your dissent in this case.

Sincerely.

Mr. Justice Stevens

Copies to the Conference

Pp. 1,4,9

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To: The Chief Justice Mr. Justice Breanan Mr. Justice Stewart Mr. Justice White Mr. Justice Marshall Mr. Justice Bleakaun Mr. Justice Bleakaun Mr. Justice Behnquist Tr. Justice Stevene
Circulated: 1070

2nd DRAFT

Recirculated: MAR 6 1979

SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdad Caban, Appellant. 9. Kazim Moharsmod and Maria Moharomed.

On Appeal from the Court of Appeals of New York.

[March -, 1979].

MR. JUSTICE STATES, with which MR. JUSTICE RED SQUIST joins, discorting.

Under \$111(F)(c) of the New York Domestic Rulations Law, the adoption of a child born out of wedleck usually requires the consent of the natural mother: it never requires that of the natural father. Appellant, the natural father of two scheol-aged children born out of wedlock,' challenges that provision insufar as it allows the adoption of his natural children by the hijsband of the ignoral mother without his Appellabilis primary objection is that this mannconsent sected to termination of his parental rights without proof of unfitness on his part violates the substantive component of the Due Process Clause of the Fourteenth Amendment – Secundarily, he stracks \$111 (1)(c)'s disparate treatment of optoral mothers and initiaral fathers as a violation of the Equal Protection Choise of the same Amendment. In view of the Court's disposition 4 shall discuss the equal protection question before communiting on appellant's primary contention [1] shall then indicate why I think the bobling of the Court, although erroneous, is of limited effect.

]

This case encourse the validity of sules affecting the status of the thousands of elablicen who are born out of wedlock

[.] The effective are presently aged seven and eight vert-old. At the trace of the heater g veloce the Sectogets from , they were free and set.

77-6401-D188ENT

CABAN & MOHAMMED.

every day? All of these children have an interest in acquiring the status of legitimicy; a great many of them have an interest so being adopted by pacents who can give them opportunities that would otherwise be denied; for some the basic necessities of life are at stake. The state interest in incilitating adoption in appropriate cases is strong—perhaps even "compelling."^{**}

Nevertheless, it is also tree that §111(1)(c) gives rights to natural numbers that it withholds from instaral fathers.

Adaption is an acport of solution to the problem of digital rates. Thus, also (70%) of the adaptions in the 34 states reporting to HEW in 1975, were of children learn out or wollock. The figure for New York State was 78%. Nations (Construct Social Statistics of the Department of Health, Education, and Webtare Adaptions in 2075, et 1) the tensifier adaptions in 1975).

The reason 1 say "pack pell is that the word "competing" can be understood to different ways. If it discress an interset that "competer" a condition that any statute interests would fit that description. On the other hand of a mench describes on atterest that mempes a court, before hand or 't mench describes on atterest that mempes a court, before indiring a law unconstitutional to give description attertion to a legislicity (additional that the loc well serve that interest, then the Son's interest in facilitating along would be explored for attention to a legislicity (additional that the loc well serve that interest, then the Son's interest in facilitating along would be explored for a propagate cases is unpresticably "competing. See South & Construction of Foster Families, 431 11 8, 816, while and in bit $[bl_{1,1,1}]$ solves a give $b_{1,2}$ is the loc $b_{2,3}$ is a solve $b_{3,4}$ of $b_{3,4}$ is $b_{4,1,1,2}$. Studies $v_{1,2}$ does not be a first $v_{2,3}$ before $b_{3,4}$ and $b_{4,1,1,2}$ solves $b_{4,2}$ (see which does being in judgment); if there $v_{2,3}$ date $b_{3,4,3}$ $b_{4,2}$. Matter of Mulping-Orang, 36 N, Y, 24, 568, $b_{3,4}$ and $b_{3,4}$ $b_{4,5}$ $b_{4,5}$. Matter of Mulping-Orang, 36 N, Y, 24, 568, $b_{3,4}$ and $b_{4,4,5}$ $b_{4,5}$ $b_{4,5}$.

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⁽Regularity boths accounted for an isomatrial 14.7%) and 15.5% of all boths in the Roberd States during the years 1976 and 1977, respectively Son National Center (in Regular Statistics in the Department of Headth, Februarion, and Welfrier, Monthley Vatur Statistics Report February 5, 2070, an 19–56, March 29, 1978, at 17. In total bridge, this represent-468,000 and M.5.700 digenerate brittle, respectively. Actionspherioristics for New York State are not as so able, the problem of Regularized appears to be expressible science in orbital access. For example, in 1975, near 50% of all bittles in the District of Cohombia mere out of wellock - National Center for Health Statistics of the Department of Regular, Education and Welfare 4 Vatal Statistics of the United States (Natabiyi), 1975, at 50.

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Because it draws this gender-based ' distinction between two classes of eitizens who have an equal right to fair and impartial treatment by their government, it is necessary to determine whether there are differences between the members of the two classes that provide a justification for treating them differently.' That determination requires more than merely 'recognizing that society has traditionally treated the two classes differently.' But it also requires analysis that goes beyond a merely reflexive rejection of gender-based distinctions.

Alon and winner are deferred, and the difference is relevant to the question whether the number may be given the exclusive right to reason in the adaption of a child born out of wedletk. Because most adoptions involve revolute infants or very young children' it is appropriate at the other to focus on the significance of the difference in such cases.

Scenari 111 strats illegitable collider (serieval) differently from legitimations, instances the terms, but not the latter may be tensored from one or both of door matural potents and placed in an admittine home without the constration both parents. Nonetheless, appellate has not chalbraned the statute on due basis with a one historian chaldmark behalf, and the difficult questions that might be mixed by such a challenge, receptor Latter = Latter = 1, $S \longrightarrow$, with *Transfer y Gradies*, 450 U, S, 762, are not much before us

⁵ "For a traditional clossification is more likely to be used with explosing to consider its particle than the mass a mody streated classification. Habit, within their analysis makes it form interplable and manyal to she the grade between the and formle phononic dimension begins for two much of our history there was the same instant or disputtance. For two much of our history there was the same instant or disputtance for two much of our history there was the same instant or distriguishing between h^2 als and white . But that sort of supported relation may have to fation the characteristic that grade propolated descentary from the the stated purpose for which the classification is bring made " Mathema in Lemma 127–57, 8–405–520, 821–680 (1985). J., discenting)

717by extended on the first of New York are not complete. The most

^{*} Webough not all mentate included as the dead-custaged class, since noder § 111 (1) for accord for betty degiven consent rights of its nodes theless over the but for the eigendet the members of that class would not be discributinged. Hence it is not possible to avoid the conclusion that the classific from here is one based on gender. See City of Los Angeles w, Maxhout \rightarrow () $\beta \rightarrow -\infty - \infty -$.

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Both parents are equally responsible for the correction of the child out of wedlock." But from that point on through pregnately and informy, the differences between the scale and the female have an important impact on the child's destroy. Only the nother carries the child; it is she who has the constitutional right to decide whether to hear it or out." In many cases, only the mother knows who sized the child, and a will often be within her power to withhold that fact, and even the fact of her pregnancy, from that person. If during pregnancy the mother should a arry a different partner, the child will be legitimate when born, and the motion father may never even know that his "rights" have been affected. On the other hand, only if the natural mother agrees to nearry the outer hand, only if the natural mother agrees to nearry the outer all father during that period can the latter's actions have a positive impact on the status of the child; if he instead should nearry a

² See Planne Ultravellouel C. Durdparth, 428 (198), 82, 67-75.

¹¹¹⁰ convex this is not true to every and valued cases or perfaces in an encases. Novertheless, for perposes so can investigation analysis, it performs should be assumed that in the class of easier in added the parties are nerequility requireship, the wave on his loss in the approximation is often as the matrix. If this estimation is should be upper solar that the affective exissuper results of conception solar of worksols typically make the wave or more carbonic beration those conceptions are more series to for her, that simplify theories the data conception are not solar to series are more series to for her, that simplify the other minimum the set of a large for the series of the set.

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different partner during that time, the only effect on the child is negative, for the likelihood of legitimacy will be lessened.

These differences continue at hirth and immediately thereefter. During that period, the nutber and child are together; " the mother's identity is known with certainty. The father, on the other hand, may or may not be present: his identity may be unknown to the world and may even be uncertain to the mother." These natural differences between marined fathers and mothers make it probable that the norther, and not the father or both parents, will have custody of the newborn infact."

⁶ In Sith there is some sociological and authropological research indienting that by varies of the symbolic relationship between mother and child during programs and the matrix routant between mother and child directly after birth a physical and psychological band immediately develops indices the two that is not then present between the might and the farlier or any other person $\mathcal{K}(g)$. J. Bowley, Attachment and Loss, Yols 1 41 (1996) M. Mohler, The Psychological Development of the Harman briant (1966).

¹⁰ The Court has frequently noted the differents of proving paternity in cases involving directions to 0.05 m. E_{c} p., Tranible v. Guadow, 430 [U.S. 762, 770–771]. Genues v. Perez, 409 [U.S. 545, 548]. Indeed, these proof problems have been relied upon to justify differential relationed normally of onwest methers and interval also of legitimate and illegitimate elidedrea. Parkow v. Hawkey, \rightarrow 15 S $\rightarrow -$, \rightarrow ; Eable v. Eable, \rightarrow 4, S. \rightarrow , \rightarrow (pharality option)

^{[7} A90mogh statistics on load to find in this area, three I have found been out the proposition that is developed in text were logical matter. Thus, in the proposition that is developed in text were logical matter. Thus, in the proposition obsprint [1] in California in 1975, natural mathets signed the "relucquishment" document—gapers that release custady of the child to an caloption operation and they must be signed by the parent (s) with custody of by a judge in wrote mealway register or abarticement by the parents] who previously had custody—in 70% of the custody with custody of by a judge in order whole custody—in 70% of the custody with custody of by a previously had custody—in 70% of the custody while matrixed by the order of the device. On the other hand, had as the best in over 27%, of the velocity had the affect approach because they never had enstady, while the comparable figure for mothers was 3.5%. California Health and Welfare Agency, Relinguish-

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In short, it is virtually inevitable that from conception through infancy the number will constantly be faced with devisions about how best to care for the child, whereas it is much less certain that the father will be confronted with comparable problems. There no doubt are eases in which the relationship of the parties at birth makes it appropriate for the State to give the father a voice of some sort in the adoption decision.¹⁰ But as a matter of equal protection analysis.

mean viaprions at California, January-Determber 1975 53 Tables 12 and 13

1017 Pare II, when the limited. New York does give moved forthers ample apportunity to perturbate in adoption proceedings. In this wave, for example, appelling appeared at the adoption barring with connect presented to endow, and was allowed to cross-manner the value-set offered to equalities a Sec N. Y. Done Ref. L. § 111-a. Applied 27: where at [2,3]. As a substantive matter, the natural tables is first to demonstrate, as appelling cost costs of the total to do in this case. that the best interests of the child towar the preservation of existing period rights and tone-table cutting off these rights have of adoption. Rul appelling factor able to broke that domonstration the result would have been the same as that mundated by the Cours's toristence upon paternal as well as indered curver in these ensurestances in other parent could adopt the child integers any family with a step-parent, both would have parented rights for providences inderests would be determined hy the child show more step-

In this case, withough the New York roots and one finding of traffictess are appelletter with their was simple evidence in the record framwhole they could draw the conclusion that his relationship with the reladranch of beam somewhat intermettent, that it field for short of the relationship existing to tween the number and the rindown redacher measured by the amount of time spect with the children, the respectability ratio for their case and education on the amount of resources expended on there(), and that polyage from appellant's treatment of his first wife and his children to that courridge, there was a real possibility that be ended in the dubite to that courridge, there was a real possibility that be ended in the courted on for the continents support of the two children and angle well be a south not induce to tween, them, the mather, and her new broaded of K y. App. at 22–25. Transcript of Proceedings in Record on Append before the New York Court of Appeals, at 74–77, 82–90, 406, 120, (49) (88–805) (14–445) (4.01–91).

That coordision, coupled with the Sorrigato's hiding that the mother's

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it is perfectly obvious that at the time and immediately after a child is iona out of wedlock differences between men and women justify some differential treatment of the mother and father in the adoption process.

Most particularly, these differences justify a rule that gives the moth *e* of the newborn infact the exclusive right to consent to its adoption. Such a rule gives the mother, in whose sole charge the infant is often placed anyway, the maximum flexibility in deciding how best to care for the child. It also gives the hoving father an incentive to marry the outher.¹⁹ and has no adverse impact on the disinterested father. Fiins¹⁰v it facilitates the interests of the adoptive parents, the child, and the public at large by stressolining the often traumativ adoption process and allowing the prompt complete and cellable integration of the child into a satisfactory new home at as young an age as is feasible.²⁰ Put must simply, it

"Whatever the metric lot [repellant's] opposition to the adoption, the convergences are the some—baraesment of the spitiaral spectre in her new relationship and conformationent to [the sliddren] who though fiving with and being supported in the new family may not in school and elsewhere beat the founty many formation school and elsewhere beat the founty many.

). Marrying the number would net only legitimate the child but would denote the father the right to encrypt to mut adoption. See N V Dom. Ref. L, § 111 (1) (1)

37 Theorem outside concretes. A survey of adaptive parents registered on the New York State Adaption Exchange us of January 1975 showed that over 75% preferred to adopt children under three years old; over ball preferred studies are rear old. New York Department of Secal Sections. Adoption in New York State (Program Analysis Report No. 59, July 1975), or 20. Moreover, adaption proceedings, even when judicial in 0.0006, have its difficulty, here experiments in order to conconnelate the nexts of all concentered. These 60% of all Family Court adoption pro-

as strage to the adoptive father was isolid and permanent" and that the children more "well cared for and healthy" to the new family. App, at 50 morely justify the Surregate's ubstrate conclusion that the September and stability to be gained by the children from the adoption far outweighed door loss fand even appellant's time to the termination of appellant's priorital rights. See App., at 28

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permits the maximum participation of interested natural parents without so burdening the adoption process that its attractiveness to potential adoptive parents is destroyed.

This conclusion is borac out by considering the alternative rule proposed by appellant. If the State were to require the consent of both parents, or some kind of hearing to explain why either's consent is unnecessary or unobtainable," it would unquestionably complicate and delay the adoption process. Most importantly, such a rule would remove the mother's freedom of choice in her own and the child's behalf without also releaving her of the unshakable responsibility for the care of the child. Furthermore, questions relating to the adeconcy of notice to absent fathers could invade the mother's provacy," cause the adopting parents to doubt the reliability of the new relationship, and add to the expense and time required to conclude what is now usually a simple and certain process." While it might not be irrational for a State to

¹⁶ To ise effective, any such name would probably have to name the mother and pathage even identify her further, for example by address Moreover the terms and placement of the netice in, for example, a newspaper, to institut how discrete and instefully chosen, would inevitably be taken by the public is an amountement of illegitmente maternity. To avoid the confective-control stath amounterments, the mother might well be forced to identify the father (or potential tathers)—despite for desire to keep that (net a serie).

¹⁵ In the opinious open which is relied in distributing the append an this size. The New York Court of Appends concluded that the "treatment" that odd by added to the adoption process by a percental container code is employed, the environt " In Sec. Malpire Draine, **40**, 26 N. Y. 24 at 5_1^{+1} . Sec. a. 20, infin.

readings in New York during the focal year 1972-1973 were disposed of within 90 days. Non-rearth Annual Report of the Judicial Conference to the Governor of the State of New York and the Logislature, at 352.

¹⁶ Although the Court is coreful to have the States free to develop alternative approaches, it note theless endarses the procedure developed in two for adoptions of older children against the weakes of natural fathers who have established substantial relationships with the children. *Ante, st* 41-12, and to 12.

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ranchole that these costs should be incurred to protect the interest of outpral fathers, it is nevertheless plain that those costs, which are largely the result of differences between the mother and the father, establish an imposing pastification for some differential treatment of the two sexes in this type of situation.

With this much the Court does not disagree, it confires its holding to cases with as the one at hand involving the adoption of an older child against the wides of a natural father who previously has participated in the rearray of the child and who adouts pretermly. There at (1/12). The Court does conducing however, that the geoder basis for the classification drawn by § 111 (O(c)) makes differential treatment so suspect that the State has the funder not only of showing that the rule is generally justified but also that the justification holds equally true for *all* persons disadvantaged by the rule. In its view, since the justification is not as strong for some inject monthly shall part of the disadvantaged class as it is for the class as a whole set *id*, at 11, the rule is invalid under the Equal Prefection. Classe insofar as it applies to that substars. With the courlingion I disagree.

If we assume, as we simply must, that characteristics possessed by all members of one class and by no members of the other class justify some disparate mentioner of mothers and fathers of children bere one of welfack, the mere fact that the statute draws a "ger derobased distinction," see *id.*, at 7, should but, in my open on give rise to any presumption that the incoartiality principle embodied in the Equal Protection Clause has here violated." Indeed, if we make the further undesputed assumption that the discrimination is justified in those cases in which the rule has its must frequent application cases in which the rule has its must frequent application cases in which the rule has its must frequent application the custody of their natural methers, see on, 7 and 11, *supra*—

¹⁴ E. y. Collinson v. Webster, 140 iii, 5 (313) Subbridger C. Ballard, 499 U. S. ass.



17-0413(----DISSUNT)

CARAN & MORAMARD

we should presume that the law is retirely valid and require the challenger to demonstrate that its impast applications are sufficiently impractors and seriors to result; it invalid,

In this case, appellant made no such showing: his demonstration of unfairness, assuming the icos made one, extends only to himself and by implication to the tasknown number of fathers inst like line. Eacther, while appellar) did nothing to inform the New York rotarts about the size of his subclass a of the overall degree of its disadvantage under \$ 111 (1)(e), the New York Court of Appeals has previously concluded that the subclass is small and its disadvantage is significant by comparison to the benefits of the onle as it now stands."

tamples considernat adoptions will be disonally reprint war of subsequere i converto confrectionalements. A 1994 study no Elegida en 500 independent independent scheme definition (2%) of the couples which had also onta charde discontatali para comparis di suborgioni, hara-americanapress with only 25, of a space who had no contact (Datas). Graphing a Child Foliay, yes (8, 110). The bristen on Garmabies grades with he numerous. In independent placement the base is usually placed endos depute four at fact or five days of age while the magnity of agenciedo not place children for soveral months after bitle (p. 88). Furly private planetterior are made for a compression science such as indesiry to decrease the station of organization and encatorized to commit the output-worksig bricks. It is totakely that the consists of the natural datase would be its field at such a model takes from bittly, and arrivants or ploy at well advised, would not be optical dublisticate forther's registric ways a legal topose and not then with block hyperbias shell is topology longer which compressions to define the parameter or following allowed by containing them

[•] To restrict the mass of all for large stabilistic horn net of worlfack..., is even some or the network there the overall effect of denoing nones to the bouckess the or depending measure to black profile where blackings of adoption. The creduated and cards are the mastweather string a weight to the order of viscotic . At the very least, the markly gradess of adoption result to service to posts!

⁽¹⁾ so of difficulty and express would be viscomitteed, in many instances, in doi, (ing the subative of the the scottern bis performance). From the isotale stable of viscomitation of Parametry is dealed mark sitematic in allocated . Some bands regulations are marked by annes of the regulation three, others do not.

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CABAN & MORAMMED

The mere fart that an otherwise value general classification appears arbitrary in an isolated tase is not a sufficient reason

individuated, in Profilmations discussed desirable of forthers' concents are conducited do and the words the tensor anytherable. These globapthropic agencies would be relation to the take infants for an one would be hargapfor would just an already recensive matrix . The dashead the public transmy would also be impressivably go store as arganel to juffants placed in factor (agencies, and instate) store by public agencies.

There is a subscription of the basis of our time involve block marketing of children for clocking. One may not be a characterized to practice that the grant to convest fathers of the right to yets adoptions will provide a very fertile field for exterior. The yest is distributed provides a very fertile field for exterior. The yest is distributed provides where patenticly has been established action on the field indicate that the begal are sets instructed for the maximum distributed indicate that the begal are sets instructed for the maximum distribution indicate that the begal are sets instructed for the maximum distribution indicate that the begal are sets instructed for the maximum distribution of the relative states to protocillar public protocillar protocillar to the basis of the bas

Materizes would be also an error but use of the reflectives of prospective followed to involve their serves in a namely subarbancher of her might only but to to the parent and could not adopt the prother's off-pring.

"We should be indefinition for property to which existing subprious would be enhanced and the total and characterized in a contrast of declaration of the curve matter beam have any there be a following of non-existence using the welface of cloudered placed in frames memory against longer, and moniting the fustion for an completion of log (proceedings, would be seried by deiented. The attendant transmission phenometry of (1 - for er MulgorusCostal super, 36 N, Y) with 372-574

The fire field of even of data the Grant takes requirement these findings and conclusions, it does not dispute them. (Aste, a) 11, 12 m, 22 (Theorem for Court much busices that takes of the to findings do not reflect appelbut solution and the discut for "reflect the situation of any matrixed fielder who is solving to prove the solution of his older chaires) of an 11.9

Although i region that the findings of the New York Caura of Appeals are noted likely to be true of the strong requirity of dileptions that involve fidents there they are in the present structure is corritorial that should be subject to fasting the classifier time drawn by \S [11,11] and in all simptions of Laux compailed the point can that the Coura marshold not are bieffective to fasting the point can that the Coura marshold not are biter evidence to fasting the point can that the Coura marshold not are bi-

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for invalidating the ontire rule.⁹ Nor, indeed, is it a sufficient reason for concluding that the application of a valid rule in a bard case constitutes a violation of equal protection principles, i. We cannot test the conformance of rules to the principle of equality simply by reference to exceptional cases.

Moreover, I can out at all some that § 111 (121c) is arbitrary even if viewed solely in the light of the exceptional circumstances presently before the Court. This case involves a dispute between natural parents over which of the two may adopt the children. If both are given a viso, as the Court requires, wither may adopt and the children will remain illegitimate. If, in-tend of a gender-based distinction, the veto were given to the present having castedly of the child, the mother would prevail just as she did in the state court. Whether or not it is wise to devise a special rule to protect the vatural father who tau has a substantial relationship with his child and (b) wants to veto an adoption that a court has found to be in the best interest of the child, the record in this case does not demonstrate that the Equal Protection Clause requires such a rule.

I have 50 way of knowing how often disputes between neutral parents over adoption of their children arise after the father "has established a substantial relationship with the child and is willing to admit his paternity" *mate,* at 12, but

foring the adaption of their odder children will have appellant's solutions exemptions should with respect to admitting parentics and establishing a relation stap with the disfifteent. In our relation is for more there that what is the of a tensor will be true thereafters, the norther will probably relation stated as well as the primary responsibility for the care and agforinging of the civit,

¹ Function Resulting, — 50 S. — — California & Julist, 434 (6, S. 47, 50) 58; Developing, v. Bolliques, 557 (5) S. 474, 485;

⁽a Execute the evolutive torsend requirements agree (and red to an whorm infante), there would still for an operational in symplectic the measure of the child would be issued to real by a trappole big paternal year than by an integrate-fible maternal year.

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CADAN >: MOILAMMED

has previously been unwilling to take steps to legitimate his relationship. If an inclued to believe that such cases are relatively rate. But whether or not this assumption is valid, the fat same assumption is that in the more common adoption situations, the author will be the more and often the only, responsible parent, and that a paternal consent requirement will constitute a hindrance to the adoption process. Because this general rule is amply justified in its normal application. I would therefore require the party challenging its constitutionality to make some demonstration of infairness in a siguificant number of situations before concluding that it violates the Equal Protection Clause. That the Court has found a violation without requiring such a showing can only be attributed to its own "stereotyped reaction" to what is impuestionably, but in this case justifiably, a gender-based distinction.

ΙI

Although the substantive due process issue is more troublesome. I can briefly state the reason why I reject it.

I assume that if and when one develops: the relationship between a father and his natural child is entitled to protection against arbitrary state action as a matter of due process. See Stanley c. Illinois, 405 U. S. 645, 651.⁴⁴ – Although the Courthas not decided whether the Dae Process Clause provides any greater substantive protection for this relationship than simply against official reprice.⁴⁷ it has indicated that an adoption

¹¹ C. Quillahov, Walends, 434 U. S. 246, Social-a South v. Organization of Fredric Equation, superior 451 15, 81, pp. 844.

¹¹ See a so Smith C. Deparization of Foster Families super, 431–15, S., 5 (S42-847), Acoustromy & Plance, 380 U.S. 545; Mayer & Nebrasia, 262 41, S, 202, 404 404

[&]quot;Although some Membras of the Court have concluded that greater periodics is due the "private reduced brache life," *Private a Maxim has* 8005, 821, 128, 158, 768 temphasis, difell <math>x is a *Maxim Keyl Cherchical* 461, 57, 87, 881 (greenbly) opinions, this appeal does not full with a that reduction and whether it only life order substanded appellant his choleron.

CABAN & MOILAMMED.

dence that terminates the relationship is constitutionally justified by a finding that the father has abandoned or mistreated the child. See M₀ at 652. In my view such a decree may also be justified by a finding that the adoption will serve the best interests of the child, at least in a situation such as this in which the natural family unit has already been destrowed, the father has previously taken no steps to legitinsate the child, and a further requirement such as a showing of unfitness would entirely deprive the child-and the State-of the benefits of adoption and legitimation." As a matter of legislative pulicy, it can be argued that the latter reason standing alone is insufficient to sever the bonds that have developed between father and child. But that reason surely avoids the correlation that the order is arbitrary, and is also sufficient to overcome any further protection of those bouls that may exist in the occusses of the Due Process Clause. Although the constitutional principle at least requires a logity inate and relevant reason and, in these circumstances, perhaps even a substantial reason, it does not require the reason to be one that a judge would accept if he were a legislator,

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There is often the risk that the arguments one advances in dissent may give use to a broader reading of the Coart's opinion than is appropriate. That risk is especially grave when the Court is endarking on a new coarse that threatens to interfete with social arrangements that have come into ase over long periods of trace. Because 1 reasider the coarse on

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and appedent Martin Methodized free long sizes of softweet dimorgli na fault of the state's of the fact, it is the State rather than oppedient, that powers to this case on the importance of the family meafar were is the State that is all coupling to force the establishment and primely of new stat legitorized suboptive tandice.

¹ Ster Parliane N. Hugher — D. S. —, — Cf. Quilling V. Walcoff, superved 35, U. S. at 255, questing Social N. Concentration of Francisc Function, superved 451, U. S. at 862, Sec. 863, 856 wave, J., concurring in prigram 0.

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CABAN & MORAMMED

which the Coart is currently embarked to be patentially most serious, I shall explain why I regard its holding in this case as quite number.

The soloption decrees that have been externed without the consent of the metural father must number to the collines. An autoid number of family and financial decisions have been made in relative on the validity of those decrees. Because the Coart has crossed a new constitutional frontier with turby's decision, these reliance interests implicationably foreclose retructive application of this ruling. See Chevron Od Co. v. Huson, 404–15, S. 97, 106–107. Families that include adopted children need have no concern about the probable implied of this case or their familied security.

Not is there any mason why the domain should affect the processing of most former adoptions. The fact that an consult application of a state statute has been held unconstitutional on equal protection grounds does not accessivily elimitate the entire statute as a basis for future legitimate state action. The procedure to be followed in cases involving infants who are in the castody of their mothers-whether solely or isostly with the father one of agencies with authority to roused to adaption, is entirely anothered by the Court's bobling or by its reasoning. In fact, as I read the Court's upicion. the statutes new in effect may be enforced as usual unless "the adoption of older children is sought," inte, at 11, and "the fother has established a substantial relationship with the child and is willing to admit his paternity." He, at 12, State legislatures will as doubt promptly revise their adoption laws to comply with the rule of this case, but as long as state courts are prepared to construct heir existing statutes to contain a requirement of patiental consent "in cases such as this," doid. I see no reason why they may not continue to enter valid adoption decrees in the courtless routine cases that will arise before the statutes can be accepted.²

⁴ Cl. Lanux v. Colonado General Josenskin, 377 (p. 8, 715, 791) Ranging

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In short, this is an exceptional case that should have no effect on the typical adoption proceeding. Indeed, I suspect that it will affect only a tiny fraction of the cases envered by the statutes that must now he rewritten. Accordingly, although my disagreement with the Coart is as profound as that fraction is small. I am confident that the wisdom of judges will forestull asy widespread harm.

1 respectfully dissent.

v. Sourcest, 277 U. S. 026, 741–712; WARTA Factor Leonargie, 377 U. S. 053, 055; Required ev. Source 377 U. S. 333, 585 (while elections may generated purchant to stations that have lower held manufacturations violating the one-period, one-core rate, when an impending election jackspread that the election machinety is already in progress).

Sapreme Conrt of the United States Washington, D. C. 20543

CHANDLED OF THE CHIFF JUSTICE

March 13, 1979

Re: 77-6431 - Caban v. Mohammed

Dear John:

I join your dissent.

Régards,

Mr. Justice Stevens

Copies to the Conference

PP- 1, 12-14 ACW nn. 27+24 To: Ine Child Lab Mr. Justice Brannin Mr. Justice White Mr. Justice Marshell Mr. Justice Blackwon Mr. Justice Peeell Mr. Justice Behaguist From: Mr. Justice Stevens

364 DRAFT

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SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant,

v. Wazim Mobammed and Maria Mohammed. On Appeal from the Court of Appeals of New York.

(March —, 1979).

MR. JUSTICE STEVENS, with whom THE CHIEF JUSTICE and MR. JUSTICE REILNQUEST jole, disconting.

Under \$111 (1)(c) of the New York Damestie Relations Law, the adoption of a shild burn out of weillock usually researcs the consent of the natural motion; it does not require that of the natural father unless he has "lawful rustody." See note. Appellant, the natural but monostodial father of at 3 n 4 two school-aged children form out of wedlock,' challenges that provision insufar as it allows the adoption of his natural children by the husband of the natural another without his consect. Appellancis primary objection is that this unconsected to termination of his carental rights without proof of unfitness on his part violates the substantive component of the Due Process Gause of the Fourteenth Amendment, S conductly, he attacks \$111 (1)(c)'s disparate mannent of natural mothers and natural fathers as a violation of the Equal Protection Choise of the same Amendment - In view of the Court's disposition, I shall discuss the equal protection question before commenting on appellant's primary centertion. I shall then indicate why I think the holding of the Court, although erronouus, is of limited effect.

This case concerns the validity of rules affecting the status

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Class children, its presently used zeros and eight years old. At the time of the benefag is targene for Surrogane Court, they were live and six.

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of the thousands of children who are born out of wellock every day? Att of these children have an interest in acquiring the status of lepitimacy; a great taking of them have an interest in being adopted by parents who can give them opportunities that would otherwise be dealed; for some the basic mercesities of life are at stake. The state interest in facilitating adoption in appropriate cases is strong- perhaps even "compelling ".⁴

Nevertheless it is also true that \$111(1)(c) gives rights to partical a others that it withholds from natural fathers

Adoption is an inportant solution to the problem of disprimery. Thus, beer 70% of the adoptions in the 64 States reporting to HDW in 1975, and of children bern out of wedfack. The figure for New York State was 78%. National Center for Social Statistics of the Department of Floath, Education, and Weblard, Adoptions in 1975, at 11 thereinafter whisticas in 1975).

The trace F say "perfuges" is that the word "competing" can be state-stand in different ways. If it describes an interest that "compete" is comparised that new statute intrudied to favor that interest is automatis. So constitutional, few of new noticests would fit that description. On the other board, if it mutchs describes are interest that compete a room, be after board, if it mutchs describes are interest that compete a room, be after board, if it mutchs describes are interest that compete a room, be as a policity in the more static marks that interest that compete a tense policity is an of the favor will serve there into rest, then the State's attended to first the adoption in appropriate cases is around state's attended to first the adoption in appropriate cases is aroun-state outpetlage. See Smith 8, Generalization of Favore Fundles, Fit II, S 829, 844, and in 515 of an axis set set is restricted by the fit of a fit II, S 829, 844, and in 515 of an axis set state (i.e., 400 I) (S 104, 105, 80mb) at fit of a 1 (S 104, 452). More all Margarantical for N, Y, 24 568, M(-574).

[&]quot;Bosition is Sirils accounted for on estimated 14.750 and 15.550 at all births in the Vinted States during the years 1966 and 1977, respectively Son National Contes for Health Statistics of the Department of Health, theorem a and Welflow, Monthis Antal Statistics Report, February 5, 1979, at 19, ed., March 29, 1978, at 17. In total births, the represents 168,000 and 525,790 illegiturate births, respectively. Although statistics to New York State we not avaitable, the grabient of illegitures y appears to the specially sevens in orthon areas. For example, in 2075, over 5005 of all births in the Distribution of Galaghia were out of wedlock. National Context for Reach Statistics of the Department of Health Education and Welfare, 5 Vind Statistics of the United States (Nataliy), 5075, at 50.

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Because it draws this gender-based ' distinction between two classes of obtaous who have an equal right to fair and importual treatment by their government, it is necessary to determine whether there are differences between the members of the two classes that provide a justification for treating them differently.' That determination requires more than energy recognizing that society has traditionally treated the two classes differently.' But it also requires analysis that goes beyond a metely reflexive telection of gender-based distinctions

Men and women me different, and the difference is relevant to the question whether the mother may be given the each sive right to consent to the adaption of a child born out of wedlock. Because most adaptions involve mechans infants or very young children.⁷ it is appropriate at the outset to focus on the significance of the difference in such cases.

¹ The relevant statistics for New York can not complete. The next.

[&]quot;Although not all must are uncoded in the disadvantaged class, since nuclea § 111 (11)(h) variable fathers are given consists rights, it is upper theless true that but for their gender the members of that class would not be distributinged. Hence, it is not possible to avoid the conclusion that the classifications here is an lassed on gender. See City of Las Angeles c_i Maniform i = 11/8 $i = 1, \dots, m$.

Section 112 treats illegitimete children schowligt differently freetigitimete curs insofar as the fortner, but not the fortnet, one becominged from one or both of their terminical purples and physical in an obspression without the source of the hash parents. Nonetheless, appellant has not challeoged the statute of this basis either on his or his richtren's behalf, and the difficult questions that rangin be reased by such a challenge, compare Lodd v. Labit, $--1^{+}$ S. --, with Trimble v. therder, 460 U. S. 762, are not now have been us

¹⁴ For a traditional elessification is more likely to be easily different partoup to consult its justification than is a newly createst classification. Hold, tail or then analysis, makes in sent acceptable may house it to distinwhich between male and female, after and sitizen. Explicate semi-flegitimany for two mode of our ki-tory there was the same inertia in derivwhich between black and white the total sector increase generation which us we to retional to see obje-sched the pure projonicid distructions thus to the stated purpose for which the classification is being made." *National v. Larger* 15, 10, 8, 10, 520-521 (Scores, st. discorring)

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Both provids are equally responsible for the conception of the child out of wellock." But from that point on through pregnancy and infancy, the differences between the male and the female have an important impact on the child's destiny. Only the mother carries the child; it is she who has the constitational right to decide whether to hear is or out. In teany cases, only the mother knows who sired the child, and it will often be within her power to withhold that fact, and even the but of her pregnancy, from that person. If during pregnancy the mother should marry a different partner, the child will be legitimate when born, and the natural father may never even know that his "rights ' have been afforted. On the other hand, only if the natural mother agrees to marry the natural father during that period can the latter's actions have a positive expact on the status of the child; if he instead should nearry a

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completions includes that we have found are for the years 1974 and 1975, its in (or these years, however, we could find none that includes a break down by age of the eduptive children whose one of the complete parents at 0 some way to bool to the child. Onew York adoptions by related parents -including ones for relatives other from a fractual parent and steps catent, accounted for just over half of all adoptions in 1974 and just order bill in 1975. Nonetheless, of the chalten adoption by used to parents in New York in 1974 and 1975, respectively, 6657 and 6277 were unifer one year old, and 6985, and 8805, were under so years ald. In 1974, moreover, the unside age of the child of the first of adoption wafee months; no words from the obtaining nationally. Adoptions in 1974, appear to be fairly close to these obtaining nationally. Adoptions in 1974, more, at 15-191; Adoptions in 1975, *mpra*, at 15

Of routize this is not tree in every individual case, or perhaps in most case. Neutribuless, for partness of equal protoction analysis, it probable should be assumed that in the class of most in which the parties are not on Ty responsible, the woman has by a the aggressed about a soften as the norm. If this assumption is conduced on the ground that the adverse consummers of correction out of wollback typically make the woman more cathers because these consequences are more series for her that dealer more dy relations the basic adapties set for the next.

² See Physicael Data (theory) 8, Data[6,10, 428] [i], 8, 52 (1747).

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different partner during that time, the only effect on the child, is negative, for the likelihood of legitimacy will be bescuel.

These differences continue at birth and immediately thereaiter. During that period, the mother and child are together; " the mother's identity is known with certainty. The father, on the other band, may or may not be present; his identity may be unknown to the world and may even be uncertain to the nother." These natural differences between married fathers and mothers make it probable that the mother, and not the father or both parents, will have castedy of the newborn infant.¹⁴

⁵⁵ In cast, there is some social grad and arthropological research indirating that by virtue of the symbolic relationship between mother and shift during pregnotery and the initial contact between mother and shift directly after birds a physical and psychological bond summatically develops between the two that is not then present is (were the infrat and the father or any other person $E_{\rm e}(q_{\rm e})$). Breakby, Arnachment and bass, Vol. 1, 14 (1994) M. Mohler, The Prochological Development of the Bondy 1 plane (1976).

¹³ The Court has inceptently noted the difficulty of provine paternity in cases involving illegitimate children, $E_{\rm c} \mu$, *Priorble v. Gardon*, 430–15, S. 762, 770–771; *Change V. Prove*, 400–47, S. 538, Fielderd, these prior problems have been relied upon to justify differential treatment are only of above anothers and Lübers for also of logitimate and idlegitimate ghildren. *Pathan v. Roubes*, \rightarrow 17, S. \rightarrow , \rightarrow ; *Lalli v. Lulli* i = 0, S. \rightarrow , \rightarrow (plurality optimate).

¹⁵ Millough statistics are hard to find in this area, along 1 have found how out the proportion that is developed in react as a logical tears in Thus, in the important of deprious in Uniformia in (97%, correct gradients) for which is developed in reacting of the child to an adoption agency and that may be signed by the percent of the constant of the presentation of the

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In short, it is virtually inevitable that from conception through infancy the mother will constantly be fared with decisions about how best to care for the child, whereas it is much less certain that the father will be confronted with comparable problems. There no doubt are cases in which the relationship of the parties at birth makes it appropriate for the State to give the father a voice of some sort in the adoption decision.¹¹ But as a matter of equal protection analysis.

mene Adoptions in California, January-Desember 1975, at Tables 22 and 13

Cf. Part II, *initial* (mixed) New York does give around rathers ample apportunity to participate in adoption (proceeding). In this case, for example, appellant appeared at the adoption heating with coursel, presented testimony, and was allowed to error-sectating the witnesseoffered by appellast. See N. Y. Does Ref. U.§ (1)-at Applied 27, only, at 2-3. As a substantive softer, the canoral father is free to demonstrate a appellant cosmoessfully tried to do in this case, that the loss interestof the could faster the preservation of existing parental rights and forwardly outting all these rights by way or adopting. Had appellant been able to make that domastration, the result would have been the same as that an analyted by the Court's desistence upon patential as well as material context in these dimensions, the result would have been the same as that an addeed by the Court's desistence upon patential as well as material context in these dimensions insider parent could adopt the child interest and the well a deep parent both would have parent drights (e.g., voitation); and material by the child's best interests.

In this case, although the New York courty mode an finding of guffones and ppellor is part, there was anaple evidence in the record from which they would show the conclusion that his relation supposed. The chistren had been concard it intervalitient, that it will for short of the relationship existing between the factor and the children (whether intervalied by the analytic of tion spect with the children, the responsibility relation to the analytic of tion spect with the children, the responsibility relation to the analytic of tion spect with the children, the responsibility relation to the analytic of tion spect with the children, the responsibility relation to the analytic of tion spect with the children of the responsibility relation theory and shart index (or the analytic of resources expended on them), and that index (from apped on a treatment of his first wife and his children by that matrice, there was a real possibility that he could not be connected on for the constanted support of the two children and might well be a contex of first the constant of appendent of the mother, and her new further the theory of 22, 25. Transcript of Proceedings in Berowit an Appendic defined New York Court of Appender at 74-77, 82-99, 106, 120, 140, 288-361 (414-32), 420-421

This wonderfor coupled with the Sprograph buding that the motion-

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it is perfectly obvious that at the time and immediately after a child is bora out of wedlock differences between men and women justify some differential treatment of the poother and father in the adoption process.

Most particularly, these differences justify a rule that gives the mether of the newborn infant the exclusive right to consent to its adoption. Such a rule gives the mother, or whose sole charge the infant is often placed anyway, the number flexibility is deciding how best in care for the child It also gives the loving father an incentive to marry the mother," and has no adverse impact on the disinterested father. Finally, it facilitates the interests of the adoptive potents, the child, and the public at large by streageding the other, to annear adoption process and allowing the precisit complete and reliable integration of the child into a satisfictety new home at as young an age as is feasible.¹⁰ Put must

actified to the complete father was should and permutated and that the children were "well cands for and facility" in the new tarnity, App, at 30, encode justify the Sorting do's alterate coordision that the legitimacy goal stability to be gauged to the children from the adoption for surveighed the bactering pellowich due to the remaindance toggethness (strands rights a Six App, at 28;

Whenever the protive for happedicitis) apposition to the adoption the consequences are the same—harassment of the factored mother in her new relationship and embarrassment to [the children] who though hving with and bying supported in the new facally may not in school and elsewhere been the faces y marks?

¹⁰ Morrying the mother would can only legitimate the child but would also assume the latter the right to constant to key adoption. See N. Y. Usan, Ref. 1, § (1) (1) (b).

There are not life interests. A survey of adoptive parents registered or 0.5. New York Since Adoption backwarge us of domary 2075 showed for two 7555 prefetted to adopt children order three years add; meet half prefetted children onder one great old. New York Department of Social Set lines, Vargeta i in New York State (Program Analysis Report No. 50, 1678–1975), at 2011. Moreover, adopting proceedings open other patient

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simply, it periods the maximum participation of interested autoral parents without submidening the adoption process that its attractiveness to potential adoptive parents is distroyed.

This conclusion is home out by considering the alternative rule proposed by appediant. If the State were to require the consent of both parents, or some kind of hearing to explain why other's consent is unnecessary or mobilizable." it would unquestionably complicate and delay the adoption process. Most importantly, such a rule would remove the mother's freedom of choice in her own and the child's behalf without also relieving her of the reschakable responsibility for the cate of the child. Furthermore, questions relating to the adoquary of notice to absent futures roald invade the mother's privacy." entse the adopting parents to doubt the reliability of the new relationship, and add to the expense and time required to conclude what is now usually a simple and certain process." While it might not be irrational for a State to

¹⁵ In the opticing upon which it refind in domissing the appeal in this stor, the New York Court of Appeals concluded that the furnished that

in nature, have traditionally been expeditions in order to overapproduce the cools of all concerned. The cool y, of all Family Court adaption proceebags in New York during the facal year 1972–1973 were disposed of which 90 days. Numbershi America Report of the Judicial Conference to the Governor of the State of New York and the Lagislature, at 952

¹ Although the Court is coreta to be write States from to develop alternative approaches, it monotheless endorses the protochus develops in (a) for adoptions of older widdren against the visites of optimal forherwho have established substantial relationships with the children. Avec, at 11–12, and q. 22,

¹⁶ To be effective, any stell notice would probably have to more the monitor and perimps even thereify her further, for example by address. Moreover, the terms and precover of the notice in for example, a new super, no matter how despect and testeinly chased, would inevitably he taken by the public of an announcement of illegitimate materially. To avoid the embarressness of such parential influence material might well be tote of to identify the failur for parential furthers)—despite increase to keep that fact, sector.

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conclude that these costs should be incurred to proper the interest of natural fathers, it is nevertheless plain that those costs, which are largely the result of differences between the mother and the father, establish an imposing justification for some differential meatment of the two serves in this type of situation.

With this much the Court does not disagree; it confines its holding to cases such as the one at hand involving the adoption of an older child against the wishes of a natural father who previously has participated in the rearing of the child and who admits paternity. *Ante*, at 11-12. The Court does conclude, however, that the gender basis for the classification drawn by χ 111 (4)(c) neakes differential treatment so suspect that the State has the burden but only of showing that the only is generally justified but also that the justification holds equally tree for all persons disadvantaged by the rule. To its view, since the justification is not as strong for some indeterminately small part of the disadvantaged class as it is for the class as a whole, see *id*, at 11, the rule is invalid under the Equal Protection Clause involutes in applies to that subclass. With this conclusion I disagree.

If we assume as we surely must, that characteristics possessed by all members of one class and by no members of the other class justify some disparate treatment of mothers and lathers of cheldren bore out of wellock, the more fact that the statute draws a "gender-based distinction," see al., at 7, should not, in any opinion, give rise to any presumption that the impartiality principle embedded in the Equal Protection Classe has been violated," Indeed, if we make the further unlispated assumption that the discrimination is justified in these

would be reflect to the adoption process by a principal consert rule is the process to envelope T for an Uniprice-Orabid, support 36 N, Y (2d) at 574. See al. 20, m/r_0 .

¹⁶ R. g., Cubleton v. Webster 430 U.S. 313; Scalesinger v. Rolland, 439 15, 8, 408

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In this case, apprilant made no such showing: his demonstration of unfairness assuming he has made one, extends only to himself and by implication to the unknown number of fathers just like him. Further, while appellant did nothing to inform the New York courts about the size of his subclass and the overall degree of its disadvantage under \$ (11,11)(e)the New York Court of Appeals has previously concluded that the subclass is small and its disadvantage insignificant by comparison to the benefits of the rule as it now stands.²⁹

²⁰ "To require the consent of furthers of children both act of wellock and or even some of them, would have the overall effect of deriving books to the hondows and of depriving amount children of the other ble-sings of adoption. The strict and indexerved network weight striggt would contimute its vietnitians. At the very beas, the worthy process of caloption would be given by impedied.

[&]quot;Great fillently and expense would be enconnected, in 2-may instances, in locating the potenties (when to apertain his withightes) to encoder. Frequently, he is unbeen due to even unknown. Potentially is derive mass often than admitted. Some birth certainstee set to the the names of the reported forbers, others in not.

Complex ensistencing cohormons will be diparathed out of few of subsequent control are called to generate. A 1961 study in Florid, or 500 independent cohormon and extragonates. A 1961 study in Florid, or 500 independent cohormon showed that $10g^2$ or the encaptes who had struct control with the natural parents reported sub-sequent for a second structure pared with the natural parents reported sub-sequent for a second parent pared with the natural parents reported sub-sequent for a second parent pared with the natural parents reported sub-sequent for a second parent (hald Today, pp. 38, 126). The harden on charinable against with the oppressive. The independent plass metric, the table is especific place in this singulate house at four or five days at again while the enginetity of against structure place children for a verter months after both $1g^2$ s80. Table private placetter is no to do for a variety of average, while the optic production the internation of a partition and an effective is encoded the order range the internation of a partition and an effective of the order of and are birth. (i) To makely that the encoder of the internation table is when the order of a line

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The pore fact that an otherwise valid general classification appears arbitrary in an isolated case is not a sufficient reason

"Some of the oglest disclosers of our time involve black marketing of children for adoption. One need not be a charvovent to product that the grant to stawed fathers of the tight to veto adoptions will provide a very fatilite field for extention. The vast majority of anstances where patrimity has been established order out of limition proceedings, computanty in trater, and persons experiment in the held influence that these legal steps are justiced for the next pure by parallel antibarries, analoses to protect the public price time schemest by the model, 2 N, Y, 26 408 4141. While it may appear, at less blach, that a tabler might wish to free herself of the batter of suboption, there will be more way only interpret it as a chapter for near the suboption process.

"Mattinges would be discussinged because of the relationse of prospective busheads to involve themselves in a fundy situation where this might only but a factor parent and could tak asiapt the partner's of spring.

"We should be miniful of the jeopoidy to which existing adaptions would be colder tell (of the resolving choose by an unadulterated doct nation of unconstructions?). Even if there be a holding of non-streageneity, the well are of challers, placed in houses months ago, or longer, and awairing the institution or completion of legal proceedings, would be verifying for the distribution of completion of legal proceedings, would be verifying for the distribution of some sample solution envision." The re-Malpania Orabit support 36 N, Y 20, et 372–374.

To the functed extent that the Courrockes complement these findings and conclusions, it does not despise them - dots for [1, 12] in [12]. Instead, the Court function states that many of these fielders in not relief logarture's simulation and these field relief the situation of any uniteral factors who is recking to proceed the adaption of this other challent D_{20} at [1].

Mithough 3 ogree that the facilities of the New York Court at Appeals are more likely to be tracted the strong majority of adoptions that incohe-

obtained at each on each time after birth, and married morphes, is well advised, would not accept a shall if the tather's consect was a legal requisite and not the available. Its further's consect was a legal which compare the childrep for them is each to afford to continue there and accounted in itself not the most desirable, of fathers' consents are unobtainable and the words therefore any received. These platestiments agencies would be a domated to take inforts for an words to kergen ion toucher an already sense constiant. The drain are the public tensors would also be annousceably greater in regard to interest placed in faster bound also be annousceably greater in regard to interest placed in faster bound also be annousceably greater in regard to interest placed in faster

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for invalidating the entire rule.²¹ Nor, indeed, is it a sufficient reason for concluding that the application of a valid rule in a hard case constitutes a violation of equal protection principles.²² We cannot test the conformance of rules to the principle of equality simply by reference to exceptional cases.

Moreover, I am not at all sure that § III (1)(c) is arbitrary even if viewed solely in the light of the exceptional circutastances presently before the Court. This case involves a dispute between patural parents over which of the two may adopt the children. If both are given a veto, as the Court requires, neither may adopt and the children will remain illegitimate. If, instead of a gender-based distinction, the veto were given to the parent having castody of the child, the number would prevail just as she did in the state quiet.⁴

 \cong Vanie v Bradley, — U.S. —, —, \cong Calibrev V Jabet, 434 U.S.47 Jubets, Dirachilye v Bubpars, 207 U.S. 474, 485,

• Even if the evelopice consult requirement were limited to newlych infants, there would still be an occasional oper in which the interests of the child would be better version by a responsible putched with them by an itro-pensible material nets.

(The first although the Court is first calls if differently, the New York statute upper early show many court rights on costady. Thus, § 11, 121, (d) gives consent rights to that person in the wing 1 which custody in the deprive dold ". The New York custoff is a real induced second reaction in which is started at trace second consent rights advected to the wind by the custoff is a large deprive dold ". The New York custoff is a real induced second comparison to morphy differentiation in a situation in which is started at trace second consent rights advected to the wishes of the tracket. New the large domain real system is first only in the trace of the trace

infords that they are in the present's continue for example, during the solution to methy the constitution drives by \S Th (S) the constitution part on the contrary \S Th (S) the constitution of some by \S Th (S) the constraint for part on the contrary \S Th (S) the constraint for the contrary \S the solution of the constraint protection and example is relatively even plus to constraint of the constraint protection and evaluation of the constraint protection and evaluations are being the adoption of the constraint of definition will be even plus to constraint protection and evaluations are being the constraint with respect to constraint protection and evaluations are being the constraint with the protection of the constraint of the constraint protection of the constraint of the constrain

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Whither or not it is vise to devise a special rule to protect the eatural father who (a) has a substantial relationship with his child and (b) wants to veto an adoption that a court has found to be in the best interest of the child, the record in this case does not demonstrate that the Equal Protection Clause requires such a rule.

I have no way of knowing how often disputes between natural parents over adoption of their children arise after the father "has established a substantial relationship with the child and is willing to admit his paternity," nute, at 12, but has previously been unwilling to take steps to legitimate his relationship. I are included to believe that such cases are relatively rare. But whether or not this assumption is valid, the far surer assumption is that in the more common adoption situations, the mother will be the more, and aften the only. responsible parent, and that a paternal consent requirement will constitute a hindrance to the adoption process. Recause this general rule is amply justified in its normal application, I would therefore require the party challenging its constitu-Condity to make some demonstration of unfairness in a sigefficient number of situations before concluding that it violates the Equal Protection Clause. That the Court has found a violation without requiring such a showing can only be attribtited to its own "stereotyped reaction" to what is unquestionably, but in this case justifiably, a gender-based distinction,

²⁷ App: Div. 20 836, 27 N. Y. S. 20 754 (1967). Moreover, the Uniform Adoption Act, after which the New York states appliers in be patterned, has a static section that is strattens introduct to be (N) in 5,000 maying custody of his illegities to animal could be different Adoption ArV, 8.5 custoff Commissioners' Note – In this light, the allegedly impreparampter of the which there distances [2011] Directors strategized by a gradient [2010] which there is the this light, the allegedly impreparampter of the which there is stratical in [2011] Directors strategized by a gradient [2010] which there is terminated there is all the strategized best so (i) only disordifies there for mountly fathers at other could have additional patients, and who pages that relationships with the study of the distrated paternity, and who pages that we do not have custody of the distrate.

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Although the substantive due process issue is more trankles, some?" I can briefly state the reason why I reject it.

I assume that, if and when one develops, ' the relationship between a father and his natural child is entitled to protection against arbitrary state action as a matter of due process. See Studey v. Himois, 405 F. S. 645, 651.4 — Although the Court has not decided whether the Due Process Clause provides any greater substantive protection for this relationship than simply against official captice i is has indicated that an adoption decree that terminates the relationship is constitutionally justified by a finning that the father has abandoned or mistreated the child. See id, at 652. In my view, such a decree may also be justified by a finding that the adoption will serve the bast interests of the child, at least in a situation such as this in which the metaral family unit has already been destroyed, the tather has providually taken no steps to legatimate the child and a further emplitionary such as a showing

-1 Ci. Quillion & Walcott, 434 C. S. 245. See also Smith 8, Organization of Foster Families, super 431 U.S., at 844.

¹⁷See day Smith v. Regendration of Faster Funding, super, 431–6, S., et 842–847, Academy v. Manzo, 500 U. S. 545; Weyes a, Velensin, 262, U. S. 386, 339–601.

³ A'though some Meighers of the Cours have concluded the growthy protection is due the 'primate traduc of function lite.' Prime v. Matsuchawith, 321 U.S. 158, 156 (coupling), added) $x \in u$. Matsuch 431 U.S. 201 (plurality opticion), this appeal does not tail within that realize because whetever family life once sorteounded appellant, his children, and appeller Matin Mohammed has being since devolved through parford of the State. In the next the State, with a family of the trady sety in this even on the negotiation of the build involve the state that is attempting to faster the establishment and privacy of new and legitimate of private tradies.

A have for as the New York sector collows natural fathers with a tradcustody of their dispirate condition to constant to the complete condition with 0, sector (25, supercontactor is the loss tradition of <math>Q'. Stanley conditions (405.17), S_{1} (45).

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of unfitness would entirely deprive the child—and the State--of the benefits of adoption and legitimation.²⁴ As a matter of legislative policy, it can be argued that the latter reason standing alone is insufficient to sever the bonds that have developed between father and child. But that coased study avoids the conclusion that the order is arbitrary, and is also sufficient to overcome any further protection of those bonds that bony exist in the recesses of the Due Process Clause. Although the constitutional principle at teast requees a legitineate and relevant reason and, in these circumstances, perhaps even a substantial reason and, in these circumstances, perhaps one that a judge would accept if he were a legislator.

111

There is often the risk that the arguments one advances in dissent may give rise to a broader reading of the Court's opinion than is appropriate. That risk is especially grave when the Court is erobarking on a new course that threatens to interfere with social arrangements that have come into use over long periods of rune. Because I consider the course on which the Court is currently embacked in he potentially most serious. I shall explain why I regard its holding in this case as quote narrow.

The adoption decrees that have been entered without the consecut of the national father must number in the millions. An include number of family and financial decisions have been made in reliance on the calidity of those decrees. Because the Court has crossed a new constitutional frontier with today's decision, those reliance interests acquestionably forcelose retroactive application of this ruling. See Chepron Off. Co. v. Huma, 404 U. S. 97, 106–107. Families that include

¹ See Parliane & Hankes — 11 S —, —, Cf. Qualitation Walkest super 431 P. S. et 258, quality South & Degradation of Frider Families, super, 431 D. S. at 362 and (Superior), J., concurring an psigment).

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CABAN & MOILAMMED

inlopted children need have no concern about the probable impact of this case on their familial scentity.

Not is there any reason why the decision should affect the processing of most future adoptions. The fact that as unusual application of a state statute has been held anonestitutional on equal protection grounds does not necessarily climinate the entire statute as a basis for future legitineare state action. The procedure to be followed in cases involving iofants who are in the custody of their mothers (whether solely or jointly with the father-or of agencies with authority to consent to adoption, is entirely unaffected by the Court's hobling or by its reasoning. In fact, as I read the Court's opission, the statutes now in effect may be enforced as usual unless "the adoption of older children is sought." aste, at 11. and "the father has established a sub-tantial relationship with the child and is willing to admit his paternity." Id., at 12. State legislatures will no doubt promptly revise their adoption have to comply with the rule of this case, but us long as state totats are prepared to construe their existing statutes to contate a requirement of paternal consent "in cases such as this." ibid., I see no reason why they may not continue to enter valid adoption decreas in the countless routine cases that will atise before the statutes can be an ended.²⁵

In short, this is an exceptional case that should have no effect on the typical adoption proceeding. Indeed, I suspect that it will affect only a tiny fraction of the cases covered by the statutes that must now be rewritten. Accordingly, although my disagreement with the Court is as profound as that fraction is small. I am confident that the wisdom of judges will forestall any widespread harm.

I respectfully dissent,

⁽¹⁰⁰⁾ Locas v. Coloreda General Assembly, 377 (1. S. 763, 760) Hormony, Sherock, 277 (1. S. 605, 711-712). If MCA, for, v. Lorenzo, 377 (1. S. 603) (65). Remodel v. Sheet, 377 (1. S. 333, 585) (v. her elections may generated personal to statute, that have been held more assembling decrement is statute, that have been held more assembling decrement is unable of the charter more respectively.

DW 3/26/79

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David - This response looks ork to me - as excluded.

Memorandum

To: Justice Powell

Re: Change in Caban v. Mohammed

In response to Justice Stevens' new footnote 23, I propose adding a new footnote 6 at the end of the last full sentence before "III" on page 7:

> <u>f</u>/ The dissent **burgests** that the sex-based distinction of \$111 might not apply to those unwed fathers who obtain legal custody of their children. See <u>post</u>, at __ n. 23. <u>MR. JUEFFICE EFFEVENE-admite</u>. <u>But no</u> <u>bewever</u>, <u>that</u> New York courty <u>base not</u> ruled <u>that</u> <u>an unwed father can obtain legal custody of his</u> <u>child and thereby resist adoption by the mother</u>. <u>Id</u> Indeed, one New York court has indicated that, at least with respect to legitimate children. §111(4) applies only if the natural parents are

Should of Should of we identify what 5 111 (4) ponder ?

See In re Meuhelsohn's Adoption, 37 N.N.S.24 389, 386 (Sunople's Ct. 1943).

dead. We should not overlook, therefore, the New York courts' exclusive reliance upon §111(3) in order to speculate whether, if Caban had sought and obtained legal custody of his children, his legal might position would have been different under New York

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> As you know, Justice Stewart also has filed a dissenting opinion, in which he takes a tack somewhat different from that of Justice Stevens. I have read Justice Stewart's opinion several times, and frankly I have no ready response. Basically, I think he just believes that the New York statute is a fair reflection of mothers' special role in society and the need to remove the stigma of illegitimacy. Insofar as we can respond to these views, I think we have done so in the opinion as it now appears.

3/26/79 David

To: The Chief Justice Mr. Justice Brennish Mr. Justice Stewart Mr. Justice White Mr. Justice Marshall Mr. Justice Blackmun Mr. Justice Blackmun Mr. Justice Stevens From: Mr. Justice Powell

Circulated: _

3 0 MAR 1979

5th DRAFT

Recipoulated: _____

SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appel(ant.)

v. On Appeal from the Court of Kazim Mohammed and Appeals of New York.

[January -, 1979]

MR. JUSTICE POWELS delivered the opinion of the Court.

. The appellant, Abdiel Caban, challenges the constitutionality of § 111 of the New York Domestic Relations Law, under which two of his outural children were adopted by their natural mother and stepfather without his consent. We find the statute to be unconstitutional, as the distinction it invariably makes between the rights of unmarried mothers and the rights of unmarried fathers has not been shown to be substantially related to an important state interest.

I

Abdiel Caban and appellee Maria Mohammed lived together in New York City from September of 1968 until the end of 1973. During this time Caban and Mohammed represouted themselves as being husband and wife, although they never legally married. Indeed, until 1974 Caban was married to another woman from whom he was separated. While living with the appellant, Mohammed gave birth to two children: David Andrew Caban, hora July 16, 1069, and Denise Caban, born March 12, 1971. Abdiel Caban was identified as the father on each child's birth certificate, and lived with the children as their father through 1973. Together with Mohammed, he contributed to the support of the family.

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In December of 1973. Mohammed took the two children and left the appellant to take up residence with appeller Kazim Mohammed, whom she married on January 30, 1974. For the next nine months, she took David and Denise each wookend to visit her mother, Delores Gonzales, who lived one floor above Calaus. Because of his friendship with Gonzales, Caban was able to see the children each week when they came to visit their grandmother.

In September of 1974, Gonzales left New York to take up. residence in her native Puerto Rico. At the Mohammeds' request, the grandmother took David and Denise with her. According to appellees, they planned to join the children in Puerto Rico as soon as they had saved enough money to start a business there. During the children's stay with their grandmother Mrs. Mohammed kept in touch with David and Denise by mail; Caban communicated with the children through his parents, who also resided in Puerto Rico. In November of 1975, he went to Puerto Rico, where Gonzalez willingly surrendered the children to Caban with the understanding that they would be returned after a few days. Cabao, however, returned to New York with the children, When Mrs. Mohammed learned that the children were in Caban's custody, she attempted to retrieve them with the aid of a police officer. After this attempt failed, the appellece instituted custody proceedings in the New York Family Court, which placed the children in the temporary custody of the Mohammeds and gave Caban and his new wife. Nina, visiting rights.

In January 1976, appellees filed a potition under \$ 110 of the New York Domestic Relations Law to adopt David and Denise.⁴ In March, the Cabans cross-petitioned for adoption.

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¹ Section 116 of the New York Domestic Relations Law proceeds in part that,

[&]quot;[a]n solution minor husband and his adult or minor wife together may adopt a shild of either of them born in or cut of wedlock and on-

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After the Family Court stayed the custody suit pending the outcome of the adoption proceedings, a hearing was held on the petition and cross-petition before a Law Assistant to a New York Surrogate in Kings County, N. Y. At this hearing, both the Mohammeds and the Cabans were represented by counsel and were permitted to present and cross-examine witnesses.

The Surrogate granted the Mohammeds' petition to adopt the children, thereby cutting off all of appellant's parental rights and obligations.² In his opinion, the Surrogate noted the limited right under New York law of unwed fathers in adoption proceedings: "Although a putative father's consent to such an adoption is not a legal necessity, he is entitled to an opportunity to be heard in opposition to the proposed stepfather adoption." Moreover, the court stated that the appellant was forcelosed from adopting David and Denise, as

Although a natural mether in New York has many parental rights without adapting her child, New York courts have held that § (10 provides for the adaption of an illegitimistic child by his mother. See In re-Anonymous Adaption, 177 Mise, 683, 31 N, Y S (24 595 (App. Fey. 1941).

"Section 137 of the New York Demostic Relations Law provider, in part, that,

"[a]fter the making of an order of adoption the natural parents of the infortive child shall be referred of all parents! duries toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or spacession, except as becausefor stated."

As an exception to this general rule, § 117 provides that,

"Iwillon a national or adoptive parent, having lawful custody of a child, matrixe or remattive and consents that the steplathyr ar steplanther may adopt such child, such consent shall not relieve the parent so crassenting of any parental daty toward such child nor shall such moment or the order of adoptage affect the rights of such consenting spaces and such adoptive child to inherit from and through such other and the natural and adoptive child to inherit from and through such other and the natural and adopted kindred of such consenting spaces."

In addition, § 117 (2) provides that adoption shift hat affect a riskly right to distribution of property under his natural patents' will.

adult or motor bushand or an adult or minor wife may adapt such a child of the other space."

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the natural mother had withheld her consent. Thus, the court considered the evidence presented by the Cabans only insofar as it reflected upon the Mohammeds' qualifications as prospective parents. The Surrogate found them well qualified and granted their adoption petition.

The New York Supreme Court, Appellate Division, affirmed. It stated that appellant's constitutional challenge to § 114 was foreclosed by the New York Court of Appeals' decision in In re-Malpica-Orsini, 36 N. Y. 2d 568, app. dismissed for want of a substantial federal question sub-nom. Orsini V. Blasi, 423 U. S. 1042 (1977). In re-David Andrew C., 56 A. D. 2d 627, 391 N. Y. S. 2d 846 (1976). The New York Court of Appeals similarly affirmed in a memorandum decision hased on In re-Malpica-Orsini, supra. In re-David A. C., 43 N. Y. 2d 708, 401 N. Y. S. 2d 208 (1977).

On appeal to this Court appellant presses two claims. First, he argues that the distinction drawn under New Yorklaw between the adoption rights of an unwed father and those of other parents violates the Equal Protection Clause of the Fourtcenth Amendment. Second, appellant contends that this Court's decision in Quilloin v. Walcott, 434 U. S. 246 (1978), recognized the due process right of natural fathers to maintain a parental relationship with their children absenta finding that they are unfit as parents."

Π.

Section 111 of the New York Domestic Relations Law provides in part that:

"consent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock: [and] (c) Of the

² As the opposition was given due notice and was pertuited to participate as a party in the adoption provocidings, he does not contend that he was denoted by procedural due process held to be requisite in *Stanley V. Illinoir*, 405 U. S. 545 (1972)

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CABAN v. MOHAMMED

mother, whether adult or infant, of a child born out of wedlock, . . ." N. Y. Dom, Rel. Law § 111 (McKinney's 1977).

The statute makes parental consent unnecessary, however, in certain cases, including those where the parent has abandoned or relinquished his or her rights in the child or has been adjudicated incomprisent to care for the child.⁴ Absent one of

"Subject to the limitations betweenfor set forth consent to adoption shaft, be required as follows:

"I. Of the adoptive child, if court fourteen years of any, unless the judge or surrogate in his describion dispenses with such consent;

"2. Of the parents or surviving parent, whether adult or infant, of a child horn in wedlock;

"3. Of the mother, whether adult or infunt, of a child have out of wedback.

"4. Of any person or authorized agency having lawful costody of the adaptive child.

"The consent shall not be required of a potent who has abandoned the child or who has surrendered the child to an authorited agency for the purpose of adoption under the provisions of the social services has or of a patent for whose child a guardiap has been appointed under the provisions. of section three bundled eighty-fear of the social services faw or who has been deprived of civil rights or what is insure or who lus been adjudged to be an habitual damakard or who has been judicially deprived of the costody of the child on account of cruelty or neglect, or persoant to a judicial finding that the child is a permanently neglected child as defined in section ald hundred eleven of the family court act of the state of New York: except that notice of the proposed adoption shall be given in such number as the findge or surragate may direct and an opportunity to be beard there muy be afforded to a parent who loss been degrived of cash rights and to a parent of the judge or correquire so orders. Notworks muching any other provision of law neither notice of a proposed adoption not any process in Each proceeding shall be required to contain the name of the person or persons seeking to adopt the child. For the purposes of this exting, evidence of insubstantial and infrequent contacts by a parent with lits on her child shall not, of itself, he sufficient us a matter of law to proclude a firsting that such potent has abandoned such child

"Where the adoptive child is over the uge of rightness years the con-

At the line of the proceedings before the Surrogate § D1 provided:

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CABAN v. MORAMMED

these circumstances, an unwed mother has the authority under New York law to block the adoption of her child simply by withholding consent. The unwed father has no similar control over the fate of his child, even when his parental relationship is substantial as in this case. He may prevent the termination of his parental rights only by showing that the best interests of the child would not permit the child's adoption by the petitioning couple.

Despite the plain wording of the statute, appellees argue that unwed fathers are not treated differently under § 11] from other parents. According to appellees, the consent requirement of § 111 is merely a formal requirement, lacking in substance. As New York courts field consent to be unnecessary whenever the best interests of the child support the adoption. Because the best interests of the child always determine whether an adoption petition is granted in New York, appellees contend that all parents, including unwed fathers, are subject to the same standard.

Appellees' interpretation of § 111 finds no support in New York caselaw. On the contrary, the New York Court of Appeals has stated unequivocally that the question whether consent is required is entirely separate from that of the best

sents specified at subdivisions two and three of the section shall not be required, and the judge or surragite in his discretion may direct that the consent specified in subdivision four of this section shall not be required it in his equation the moral and temporal interests of the adoptive child will be promised by the adoption and such consent for any reason be obtained.

[&]quot;An adoptive child who has once been lawfully adopted may be readopted directly from such shelds tabiptive parents in the same manner as from its natural parents. In such case the consent of such astural parent shell not be required but the folge or surrogate in his discretion may require that notice he given to the natural parents in acclumanner as " be may presenter."

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CABAN v. MOITAMMED

Interests of the child.⁵ Indeed, the Surrogate's decision in the present rase, affirmed by the New York Coart of Appeals, was based upon the assumption that there was a distinctive difference between the rights of Abdiel Caban, as the unwed father of David and Denise, and Maria Mohammed, as the unwed mother of the children: Adoption by Abdiel was held to be impermissible in the absence of Maria's consent, whereas adoption by Maria could be prevented by Abdiel only if he could show that the Mohammeds' adoption of the children would not be in the children's best interests. Accordingly, it is clear that § 111 treats unmartied parents differently according to their ses.'

³ See In in Corea L. v. Martin L., 45 N. Y. 24 383, 391, 380 N. E. 26 268, 270 (1978);

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Gender-based distinctions "must serve governmental objectives and paust be substantially related to achievement of those objectives" in order to withstand judicial scrutiny under the Equal Protection Clause. Croig v. Boren, 404 U. S. 190, 197 (1977). See also Read v. Reed, 404 U. S. 71 (1973). The question before us, therefore, is whether the distinction in § 111 between unmarried mothers and unmarried fathers bears a substantial relation to some important state interest. Appellees assert that the distinction is justified by a fundamental difference between maternal and paternal relations—that "a natural mother, absent special circumstances, bears a closer relationship with her child . . . , than a father does." Tr. of Oral Arg. at 41.

Contrary to appellers' argument and to the apparent presumption underlying § 111, maternal and paternal roles are not invariably different in importance. Even if unwedmothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning patent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased. The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother. Appellant Caban, appeller Maria Mohammed, and their two children lived together as a natural family for several years. As members of this family, both mother and father participated in the cate and support of their children. There is no

In Quilloin we expressly reserved the question whether the Georgia statute

³ to rejecting on concerned to be constitutional chain in Quillob v. Walcott, 434 U. S. 246 (1978), we emphasized the importance of the appellant's failure to set as a follow toward his children, noting that be.

[&]quot;... for arrive exercised actual or legal cost of our list child, and thus has never should real my significant responsibility with respect to the daily supervision velocation, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child." Id , at 258.

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CABAN v. MOHAMMED

reason to believe that the Caban children—aged 4 and 6 at the time of the adoption proceedings—had a relationship with their mother unrivaled by the affection and concern of their father. We reject, therefore, the claim that the broad, gender-based distinction of § 111 is required by any universal difference between maternal and paternal relations at every phase of a child's development.

As an alternative justification for § 111, appellees argue that the distinction between unwed fathers and unwed mothers is substantially related to the State's interest in promoting the adoption of Elegitimate children. Although the legislative history of § 111 is sparse," in *In or Malpha-Orsini, supm*, the New York Court of Appeals identified as the legislature's purpose in chacting § 111 the furthering of the (etcrests of illegitimate children, for whom adoption often is the best course." The court concluded that.

"[1]o require the consent of fathers of children born out

The Disiries - Biosi, supress, the Court distribution in append from the Nov-York Court of Appeals challenging the constitutionality of § 111 as applied to an initiated father whose chald had been ordered adopted by a New York Surropare. In distributing the appeal, we indicated that is substantial federal question was lacking. This was a ruling on the merits, and therefore is entailed to precedential weight. See Hicks v. Miranda, 422 U.S. 373, 344 (1975). At the same time, however, our decision not to review fully the questions presented in Orzwi v. Blari is not entitled to the same deference given a ruling after briefing, argument, and a written opinion. See Edefman v. Jordan, 415 U.S. 051, 671 (1974). Insplay as pur-

similar to § 121 of the New York Domestic Relations Law unconstitutionally distinguished unwed parents according to their gender, as the chain was not properly pre-ented – See 404 U. S., at 253 n. 43.

Containt of the domainted forher has accur been required for adoption under New York law, although parential consent otherwise has been required at least since the late 19th contary. See, e. g., Laws of the State of New York, 119th Section L. 1896, eh. 272. There are no legislative reports acting forth the reasons why the New York Legislature excepted unmartied fathers from the ground requirement of parental consent for adoption.

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CABAN V. MOHAMMED

of wedlock ..., or even some of them, would have the overall effect of denying hours to the homeless and of depriving innocent children of the other blessings of adoption. The cruri and undeserved out-of-wedlock stigma would continue its visitations. At the very least, the worthy process of adoption would be severely impeded." Id., at 572.

The court reasoned that people wishing to adopt a child horn out of wedlock would be discouraged, if the natural father could prevent the adoption by the mere withholding of his consent. Indeed, the court went so far as to suggest that "[m]arriages would be discouraged because of the reluctance of prospective husbands to involve themselves in a family situation where they might only be a foster parent and could not adopt the mother's offspring." *Id.*, at 573. Finally, the court noted that if unwed fathers' consent were required before adoption could take place, in many instances the adoption would have to be delayed or eliminated altogether, because of the unavailability of the matural father."

The State's interest in providing for the well-being of illegitimate children is an important one. We do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a normal, two-parent home. Moreover, adoption will remove the sugnea under which illegitimate children suffer. But the unquestioned right of the State to further these desirable ends by legislation is not in itself sufficient to justify the gender-based distinction of § 111. Rather, under the relevant cases applying the Equal Protection Clause is

theisen today is menu-otent with our dismissed in Ordal, we overtuin serprior devision.

¹ In Lis later *e-andrew create* the New York Attorney General adjacethe New York Coart of Appends' experition for re-Malpin-Orsini of the immedia promoted by § 101% different treatment of memoried fathers. Set Analogs Brief of New York Attorney General, at 16-20.

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CABAN v. MOIIAMMED

must be shown that the distinction is structured reasonably to further these ends. As we repeated in *Reed v. Reed, supra*, at 70, such a statutory "classification 'must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Gamm Co. v. Virginia*, 253 U. S. 412, 415 (1920)."

We find that the distinction in \$111 between unmarried mothers and monarried fathers, as illustrated by this case, does not hear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children. It may be that, given the opportunity, some unweil fathers would prevent the adoption of their illegitimate children. This impediment to adoption usually is the result of a natural parental interest shared by both genders alike; it is not a manifestation of any profound difference between the affection and concern of mothers and induces for their children. Neither the State nor the appellees have argued that nowed fathers are more likely to object to the adoption of their children than are unweil mothers; nor is there any self-evident reason why as a class they would be.

The New York Court of Appeals in *In re-Malpice-Oraini,* super, suggested that the requiring of unmarried fathers' consent for subption would pose a strong impediment for adoption because often it is impossible to locate anwed fathers when adoption proceedings are brought, whereas mothers are more likely to remain with their children. Even if the special difficulties attendant upon locating and identifying unwed fathers at birth would justify a legislative distinction between mothers and fathers of newbortes," these difficulties need not persist past infancy. When the adoption of an older child is

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¹⁰ Because the quotient is not before us, we express not view whether each difficulties would pointly a statute addressed particularly to new born adopted as a flog. forth, more strangent, requirements, concerning, the acknowledges of of paternety or a significant diffusion of abandon gent.

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CABAN v. MOHAMMED

sought, the Stare's interest in proceeding with adoption cases can be protected by means that do not draw such an inflexible gender-based distinction as that made in § 111.7 In those cases where the father never has come forward to participate in the rearing of his child, bothing in the Equal Protection Clause precludes the State from withholding from bim the previlege of vetoing the adoption of their child. Indeed, under the statute as it now stands the Sucregate may proceed in the absence of consent when the parent whose consent otherwise would be required never has come forward or has abusioned the child.¹¹ Sec. i. g., In re-trilando F., 40 N, Y, 20 103 (1976). But in cases such as this, where the father has established a substartial relationship with the child and has admitted his patersity.¹² a State should have no dif-

"The Querous C. Wayor, separated the inpertance in cross of this

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⁹ See Connaem, The Energing Constitute and Protection of the Patholice Facher's Parsinal Rights, 70 Math. L. Rev. 1581, 1500 (1992).

The the New York Court of Appendix contrast that dominates if there exists description functions (a view we need not question), then allowing those indices with remain with their function is right to object to the fermionation of their parental rights will possible the Orient to the Statebrack to do when New York has done in this portion of §1121 provide that full the who have abendanted their children have no right to block adoption of these children.

We do not suggest, all course, that the provision of §111 making parental consent undercessary in cases of abardiance of its the only constitutional mechanism available to New York for the protection of as interest in allowing the adopties of diagonate children when their patient follows are not available to be consulted. In previowing the constitutionality of status(y classifications, " μ is nor the function of a court to hyperblexice independent v on the distribuility of *basic*bility of any possible alternativel of $S_1 \longrightarrow S_2 \longrightarrow S_2 \longrightarrow S_10751$ (quoting Mattheory v Lacos, 427 C, S, 155,515,(1956)). We note some strengatives to the gender based distinction of §111 order to emphasize that the state interests asserted in support of the statutory closed on the state interests asserted in support of the statutory closed on the state interests asserted in support of the statutory closed on the state interests asserted in support of the statutory closed on the state interests.

77-6431- -0PINION

CABAN & MORAMMED

ficulty is identifying the father even of children horn out of wedlock.⁴ Thus no showing has been made that the different treatment afforded unmarried fathers and unmarried mothers under \$111 bears a substantial relationship to the proclaimed interest of the State in promoting the adoption of illegitimate children.

In sum, we believe that § 111 is another example of "overbroad generalizations" in gender-based elassifications. See Califano v. Goldjarb, 430 U. S. 199, 211 (1977); Staaton v. Stanton, 421 U. S. 7, 14–15 (1975). The offert of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child. The facts of this case illustrate the hurdiness of classifying animal fathers as being invariably less quidified and entitled than mothers to exercise a reported judgment as to the fate of their children. Section) U both excludes same loving fathers from full participation. in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers. We conclude that this uralifferentisted distinction between turned nothers and anwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests,"

"Appellant also challenges the constitutionality of the distantian material §111 between material and inmatical futtiers. As we have realized

kind of the relationship that in fast exists between the parent and child, See a. 8, super-

[&]quot;States have a fegliheater interest, of course, in providing that an uncontrast father's right to object to the adoption of a child will be conditioned open his showing that it is in fact his child. Cf. Lake v. Lake, \rightarrow U/S \rightarrow , \rightarrow (1978) – Such is not, hencever the import of the New York statute here. Although New York provides for actions in 2's Furnly Courts to establish parentity, see §§ 511 to 575 of the New York Jud early Courts to establish parentity, see §§ 511 to 575 of the New York Jud early Courts to be the not provision allouting men who have been determined by the court to be the rather of a shift been out of wells is to object to the deption of their children under § 12].

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CABAN v. MOHAMMED

The judgment of the New York Court of Appeals is

Reversed.

that the sex-based distinction of § 11 transfers the Equal Protection Charge, we need express no view as to the calibry of the additional classification τ

Finally, apprilant argues that he was devied substantive due processwhen the New York courts terminated his parental rights working from failing from to be unfit to be a parent. See Stanley v. *Plinoia*, 465 U.S. 645 (1972) (semble). Because we have rided that the New York statume is unconstitutional under the Eq. of Procession Clonse, we similarly exprestion r_0 which is to whether r_0 . Since is constitutionally horized items codering objects in a the observer of a determination that the parent whose rights are being tensioned is multi-

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To: The Chief is: Mr. Justice Statust Mr. Justice Statust Mr. Justice Marshall Mr. Justice Marshall Mr. Justice Blackson Mr. Justice Stavens

From: Mr. Justice Porell

Circulated: _____ Recirculated: 12 APR 1079

6th DRAFT

SUPREME COURT OF THE UNFTED STATES

No. 77-6431

Abdiel Cabaa, Appellant, j

v. On Appeal from the Court of Kazim Mohammed and Appeals of New York Maria Mohammed.

[January --, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

The appellant, Abdiel Cabab, challenges the constitutionality of § 111 of the New York Domestic Relations Law, under which two of his natural children were adopted by their natural mother and stepfather without his consent. We find the statute to be unconstitutional, as the distinction it invariably makes between the rights of unmarried mothers and the rights of unmarried fathers has not been shown to be substantially related to an important state interest.

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Abdiel Caban and appellee Maria Mohammed fixed together in New York City from September of 1965 until the end of 1973. During this time Caban and Mohammed represonted themselves as being husband and wife, although they never legally married. Indeed, until 1974 Caban was marned to atmither women from whom he was separated. While living with the appellant, Mohammed gave birth to two children: David Andrew Caban, burn July 16, 1969, and Denise Caban, born March 12, 1971. Abdiel Caban was identified as the father on each child's birth certificate, and lived with the children as their father through 1973. Together with Mohammed, he contributed to the support of the family.

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In December of 1973. Mohammed took the two children and left the appellant to take up traidence with appellee Kazim Mohammed, whom she married on January 30, 1974. For the next nine mouths, she took David and Denise each weekend to visit her mother. Delores Conzules, who fived one floor above Cahan. Because of his friendship with Gonzales. Caban was able to see the children each week when they came to visit their grandmother.

In September of 1974, Gouzales left New York to take up residence in her native Puerto Rico. At the Mohananeds' request, the grandmother took David and Dense with her, According to appellees, they planned to join the children in Fuerto Rico as soon as they had saved enough money to starta business there. During the children's stay with their grandmother. Mrs. Mohammed kept in fouch with David and Denise by mail; Caban communicated with the children through his parents, who also resided in Puerto Rico. In November of 1975, he went to Puerto Rico, where Ganzalez willingly surrendered the children to Caban with the anderstanding that they would be returned after a few days. Cahan, however, returned to New York with the children. When Mrs. Mohammed learned that the children were in Caban's custody, she attempted to retrieve them with the sidof a police officer. After this attempt failed, the appellees instituted costody proceedings in the New York Family Court. which placed the children in the tripporary custody of the Mohammeds and gave Caban and his new wife, Nina, visiting rights.

In January 1976, appellees filed a petition under § 110 of the New York Donoestic Relations Law to adopt David and Denise,⁴ In March, the Cabans cross-petitioned for adoption.

"falls adoit of manor busband and his adolt or minor wife together may adopt a child of eather of them bern at or out of weeks and an

⁴ Services 115 of May New York Domestic Relations Law provides as part (ba),

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After the Family Court stayed the custody suit pending the outcome of the adoption proceedings, a hearing was held on the petition and cross-petition before a Law Assistant to a New York Surrogate in Kings County, N. Y. At this hearing, both the Mohammeds and the Cahans were represented by counsel and were permitted to present and cross-examine witnesses.

The Surrogate granted the Mohammeds' petition to adopt the children, thereby cutting off all of appellant's parental rights and obligations.³ In his opinion, the Surrogate nuted the limited right under New York law of unwed fathers is adoption proceedings: "Although a putative father's consent to such an adoption is not a logal necessity, he is entitled to an opportunity to be heard in opposition to the proposed stepfather adoption.³ Moreover, the court stated that the appellant was forcelosed from adopting David and Denise, as

aifalt or notice hosteaud or an adoly of minor wife may adopt such a rhold of the other spaces."

Although a natural mother in New York loss arous parental mehts without adopting her child. New York courts have held that § 110 provides for the adoption of an disglituste child by In-mother. See In re Anonymous Adoption, 177 Miss. 683–31 N. Y. S. 24 505 (App. Div. 1941).

³Section 117 of the New York Demostic Relations have provided in part, that,

"Is first the making of an other of adoption the entural practice of the adoptive shild shall be relieved of all parential datas toward and of all responsibilities for and shall have no rights over such adoption club or to his property by descript or succession, except as hereinafter stated."

As an exception to this general rule, § (17 provotes don-

"In The the network of adoptive parent, leaving lawfoll and only of a child matters of tenartics and consents that the steplather or steparatics may adopt such child, such consents that the steplather or steparatics may adopt such child, such consents that the steplather or steparatics are order of adoption affect the rights of such measuring sphere and such such the adoption affect the rights of such measuring sphere and such such the other from and through each other and the patient and adoption child to adopt from and through each other and the patient and adopted kindext of such consenting sphere."

In addition, § 117 (2) provides that adoption shell but affect a child's right to detailed on af property under los potenti pargets' will

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the natural mother had withheld her consent. Thus, the court considered the evidence presented by the Cahans may insofar as it reflected upon the Mohammeds' qualifications as prospective parents. The Surrogate found them well qualified and granted their adaption petition.

The New York Supreme Court, Appellate Division, affirmed. It stated that appellant's constitutional challenge to § 111 was foreclosed by the New York Court of Appenls' decision an In re-Matpica-Ornini, 36 N. Y. 2d 568, app. dismissed for want of a substantial federal question stdi nom. Ornini v. Blasi, 423 U. S. 1042 (1977). In re-David Andrew C., 56 A. D. 2d 627, 394 N. Y. S. 2d 846 (1976). The New York Court of Appeals similarly affirmed in a memorandum decision based on In re-Malpha-Orsini, sapra. In re-David A. C., 43 N. Y. 2d 708, 401 N. Y. S. 2d 208 (1977).

On appeal to this Court appellant presses two claims. First, he argues that the distinction drawn under New Yorklaw between the adoption rights of an unweil father and those of other purcets violates the Equal Protection Clause of the Fourteenth Amendment. Second, appellant contends that this Court's decision in Quilloin v. Walcott, 434 U. S. 246 (1978), recognized the due process right of natural fathers to maintain a parental relationship with their children absent a finding that they are unfit as parents.⁸

11

Section 111 of the New York Domestic Relations Law provides in part that,

"roosent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult ar infant, of a child horp in wedlock; [and] (c) Of the

² As the appellant was given due notice and was permitted to participate as a party in the adoption proceedings, he does not control that be was "could the procedural due process held to be requiring in *Stanley v. Human*, 957, 17, 8, 605 (1972).

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mother, whether adult or infant, of a child born out of wedlock, ...," N. Y. Dom. Rel. Law § 111 (McKinney's 1977).

The statute makes parental consent underessary, however, in certain cases, including those where the parent has abandoned or reliaquished his or her rights in the child or has been adjudicated incompetent to care for the child." Absent one of

³¹1. Of the subgroup child, if over faurteen years of age, code-s the judge of subrugate in his describes disperses with each convert.

"2 Of the parents of surviving parent, whether lotals of a shild berty in wellack;

13. Of the matter, whether adult of intent, of a child here out of weeks k.

24 Of any person or authorized agency having lawful rustody of the adoptive child.

"The conversi shall not be required of a parent who has abandaned the thial or who has surrousinger the child of an anthorized agenes for the purpose of adaption moler the previsions of the social septence law or of a parent for whose child a genetica heathers appointed under the practicions of section dates hundred eighty-fear of the social services hav or who has term depriced of vivil sights as where descent of whather been adjudged to be an habitual druckard or who less twen judicially deprived of the custooly of the Gibli on seconds of energy of taglest, or personal term judicle? finding that the child is a permanently registed child as defined in section for harofred eleven of the family court net of the state of New York. everyt that notice of the composed adoption shall be got a monotonic manager. 28 the judge or sufficiate new direct and the opportunity to be hereif. Unreal may be afforded to a parent who has been deprived of evel rights and to a potent of the judge or surrogate so orders. Natwithst, rating any other provision of law mether notice of a preposed adoption mar may presty- in such proceeding shall be maginal to contain the name of the prison or persone seeking to adopt the child. For the purposes of this section, as denoted insubstantial and infrequent contacts by a papert with has on her child shall not, of itself, be sufficient as a matter of itselfe predicte a furthing that such pyreat has abandoned such child,

"Where the adoptive child is over the age of eighteen years the cag-

[&]quot;At the time of the proceedings before the Surregate § 11 proceeds: "Subject to the limitations havemafter set forth consect to the phoe shall be required as follows:

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these circumstances, an unwed mother has the authority under New York law to block the adoption of her child simply by withholding consent. The nawed father has no similar control over the fate of his child, even when his parental relationship is substantial—as in this case. He may prevent the termination of his parental rights only by showing that the best interests of the child would not permit the child's adoption by the petitioning couple.

Despite the plain wording of the statute, appellees argue that unwed furthers are not treated differently under § 111 from other parents. According to appellees, the consent requirement of § 111 is merely a formal requirement, lacking in substance, as New York courts and consent to be unnecessary whenever the best interests of the child support the adoption. Because the best interests of the child always determine whether an adoption petition is granted in New York, appellees contend that all parents, including unwed furthers, are subject to the same standard.

Appellees' interpretation of § 111 finds no support in New York caselaw. On the contrary, the New York Court of Appeals has stated unequivocally that the question whether consect is required is entirely separate from that of the best

sents specified in subdivisions two and three of this section shall not be required, and the judge or subrogate in his discretion may denot that the consent specified in subdivision four of this section shall not be required if in his opinion the moral and temporal interests of the adoptive child will be promoted by the adoption and such consent caused for any zerosinhe obtained.

[&]quot;An adaptive child who has ease been lowfully adopted any tecoordepted directly from such child's adoptive parents in the same manner as from its natural parents. In such case the constant of such patents, parent shall not be required long the judge of suffragate in his description may require that notice be given to the pasteral parents in ad-h manner as he fitsy preserve."

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buterests of the child.² Indeed, the Surrogate's decision in the present case, affirmed by the New York Court of Appeals, was based upon the assumption that there was a distinctive difference between the rights of Abdiel Caban, as the unweit father of David and Denise, and Maria Mohammed, as the unwed mother of the children: Adoption by Abdiel was held to be impermissible in the absence of Maria's consent, whereas adoption by Maria could be prevented by Abdiel only if he could show that the Mohammeds' adoption of the children would not be in the children's best interests. Accordingly, it is clear that \$ 111 treats accounted parents differently according to their sex.⁴

The distorts speculation due to schemed distinction of § (1) might rest apply for those mowed (efficient who obtain legal custody of their children See protections, and $\beta \to \alpha$ (2) for no New York court has a reliable distort, the provision at § (1) (1) giving legal guardians in action and d) independent of the independent of a control of a rest or legiting the children, the provision at § (1) (1) giving legal guardians in action and d) is adoption of their writes applies only of the natural function are dongly. So the control dock the provision β , With (1) giving legal guardians in a control dock, the substance their writes applies only of the natural function are dongly. So the control dock the doption, (8) Mine (17, 140), $\beta \in N$, Y (8) μ_{0} (84, 96) (Surrague's C), 10440. We should not overlook, the server, the New York control is do so a theorem given 8 (11) (1) and instead second to whether, (6) C than had sought and obtained legal custody on his scalading, (1) legal regists would have been different making New York law,

⁴ See In re Coreo L. v. Martin L., 45 N. Y. 24 381, 491, 350 N. E. 24 296, 270 (1978);

[&]quot;Abert) constant, the first facts here was on the issue of abardonment since weither decisional rule nor statute can bring the relationship to an end broadse assume else might rear the child in a more satisfactory fashion. . . Attendonment, as it pertains to adoption, relate to such conduct on the part of a parent as evince a purposeful ridding of parental obligations and the foregoing of parental rights - a withholding of interest, presence, affortion, care and support. The heat interests of the child, as with, is not an agreedent of that conduct and is not asolved in this threshold question. While promotion of the best interests of the child is constant to ultimate approval of the adoption application, such interests current act as a substitute for a finding of abardonment." (Authorities orapited)

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[1]

Gender-based distinctions "must serve governmental objectives and must be substantially related to achievement of those objectives" in order to withstand judicial scrutiny under the Equal Protection Clause. Craig v. Baren, 404 U. S. 190, 197 (1977). See also Recel v. Recel, 404 U. S. 71 (1971). The question before as, therefore, is whether the distinction in § 11) between unmarried mothers and unmarried fathers bears a substantial relation to some important state interest. Appellees assert that the distinction is justified by a fundamental difference between maternal and paternal relations—that "a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father dors," Tr, of Oral Arg., at 4)

Contrary to appellecs' argument and to the apparent presumption underlying ξ ID, maternal and paternal roles are not invariably different in importance. Even if anwed mothers as a class were closer than anwed fathers to their newborn infacts, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased. The present rase demonstrates that an inwed father may have a relationship with his children fully comparable to that of the mother. Appellant Caban, appellec Maria Mobannesi, and their two children lived together as a natural family for several years. As members of this family, both mother and father participated in the care and support of their children.⁴ There is no

In Quilloin we expressly reserved the quistion whether the Georgia statute

In receiving an uncontribut tother's constitutional claim α , *Quillable* α , *Walcolt*, 474–15, S. 246 (1978), we emphasized the importance of the specificative failure to act as a father toward his cleicher, noting that he,

 $^{^{6}}$, this invertexercised actual or legal castody over his rhold, and thus have more characterised any significant responsibility with respect to the defitivity experiment, education, protection, or each of the child. Appellant does not complian of this exclusion from these responsibilities and, indeed, be does not even now seek one tody of his child, "I do at 256.

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reason to believe that the Caban children—aged 4 and 6 at the time of the adoption proceedings—had a relationship with their mother nurivaled by the affection and contern of their father. We reject, therefore, the claim that the broad, gender-based distinction of § 111 is required by any universal difference between maternal and paternal relations at every phase of a child's development.

As an alternative justification for § 111, appellers argue that the distinction between towed fathers and unweil mothers is substantially related to the State's interest in promoting the adoption of illegitimate children. Although the legislative history of § 111 is sparse," in *Iw te Malpica-Orsine sapra*, the New York Court of Appeals identified as the legislature's purpose in enacting § 111 the furthering of the interests of illegitimate children, for whom adoption often is the best course." The court concluded that.

"[1]o require the consent of fathers of children born out

³ In Order V. Blasi, supra, the Court discussed on append from the Nore York Court of Appends challenging the constitution diry of § 111 as applied to an orientration further whose child had been endered adopted by a New York Suprogate. In discussing the append, we indicated that a substantial federal question was tacking. This was a rating on the ments, and there fore is resided to precedential weight. See Hicks v. Miranda, 422–11. S 337, 344 (1975). At the same time, however, our decision net to menter fully the questions presented in Orsee v. Riem is not entitled to the same deference kiven a roling after briefling, argument, and a written openion. See Kidelman v. Jordon, 415–11. S. 651, 671 (1974). Impofar by our

similar to § 111 of the New York Decosity Relations Law unconstitutionally distinguished unwed parents according to their gender, as the claim, was not properly presented. See $434 \le 8$, at $253 \le 43$.

[&]quot;Constant of the non-arrived father has cover base respected for adoption under New York hav, although parental consent otherwise has been required at least since the late (9th contery – See, e.g., Laws of the State of New York, 150th Session E. 1596, eb. 272. There are no breislative reports setting forth the reasons why the New York Legislative excepted opported fothers from the general requirement of parental consent for adoption.

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of wedlock . . , , or even some of them, would have the overall effect of denying homes to the homeless and of depriving innocent children of the other blessings of adoption. The cruel and undeserved out-of-wedlock stigma would continue its visitations. At the very least, the worthy process of adoption would be severely impeded." Id., at 572.

The court reasoned that people wishing to adopt a child born out of wedlock would be discouraged, if the natural father could prevent the adoption by the mere withholding of his consent. Indeed, the court went so far as to suggest that "[m]arriages would be discouraged because of the reluctance of prospective husbands to meetive themselves in a family situation where they might only be a foster parent and could not adopt the mother's offspring." *Id.*, at 573. Finally, the court noted that if unwed fathers' consent were required before adoption could take place, in many instances the adoption would have to be delayed or eliminated altogether, because of the unavailability of the natural father."

The State's interest in providing for the well-being of illegitimate children is an important one. We do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a normal, two-parent home. Moreover, adoption will remove the stigma under which illegitimate children suffer. But the inquestioned right of the State to further these desirable ends by legislation is not in itself sufficient to justify the gender-based distinction of \$ 111. Rother, under the relevant races applying the Equal Protection Clause it

decision (oday is increasistent with our dismissal in $O_{22}(\kappa)$, we overthe our prior decision.

¹⁶ In his bird is annew curve, the New York Arraney General school its New York Court of Appends' exposition in *Inco. Margaret Orien* of the interests prenarial by \$111's different tradiment of unsustand fathers, See Andrew Stier of New York Attorney General, at 16-20.

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reast be shown that the distinction is structured reasonably to further these ends. As we repeated in Reed v. Reed, supraat 76, such a statutory "classification 'must be reasonable, not arbitrary, and reast rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alke." Royster Guano Co. v. Virginia, 253 U. S. 412, 415 (1920)."

We find that the distinction in § 111 between unmarried mothers and unmarried fathers, as illustrated by this case, does not bear a substantial relation to the State's interest in providing adoptive bourts for its illegitimate children. It may be that, given the opportunity, some unwed fathers would prevent the adoption of their illegitimate children. This impedament to adoption usually is the result of a natural parental interest shared by both genders alike; it is not a manifestation of any profound difference between the affection and concern of mothers and fathers for their children. Neither the State nor the appellers have argued that unwed fathers are twore likely to object to the adoption of their children than are unwed mothers; nor is there any soff-ovident reason why as a class they would be,

The New York Court of Appeals in In re-Malpen-Orsini, supra, suggested that the requiring of unmarried fathers' consent for adoption would pose a strong impediment for adoption because often it is impossible to locate unwed fathers when adoption proceedings are brought, whereas mothers are more likely to remain with their children. Even if the special difficulties attendant upon locating and identifying unwed lathers at birth would justify a legislative distinction between enothers and fathers of newborns." these difficulties could not persist past infancy. When the adoption of an older child is

¹¹ Because the question is not before on, we express an else wheth *t* such difficulties would justify a statute and each particularly to new both talgebras. Setting forth more string at requirements concorning the acknowledgment of potentity of a string to following of allowing each

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sought, the State's interest in proceeding with adoption cases can be protected by means that do not draw such an inflexible geoder-based distinction as that mode in § 111.¹² In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child. Indeed, under the statute as it now stands the Surrogate may proceed in the absence of consent when the parent whose consent otherwise would be required never has come forward or has abaraioned the child "—Sec. c. g., In re Orlando F., 40 N, Y, 2d 103 (1976). But in cases such as this, where the father has established a substantial relationship with the child and has generited his paternity." a State should have no dif-

¹¹ See Comment, The Emerging Constitutional Protostion on the Parative Eather's Parental Rights, 76 Mich. I. Rev. 1581, 1590 (1972).

"All the New York Court of Appeals is correct the starm tried forfaces often descent their foundes to view we need not question), then allowing these forfaces who reache with their families a right to object to the feralization of their presidul rights will pass little three to the Statels abd to to order adoption in most cases. For we do not question a State's right to do what New York has done in this partien of \$112, provide that furthers over have abandoned their could entries no right to black adoption of these shallows.

We do not suggest, of course, that the provision of § 111 making (attend) consent analysis of all ones of abandomment is the only constitutional to choose a condulate to New York for the proceeding of its interset in allowing the collection of degreenite children when their material follows are not available to be consolited. In measuring the constitutionality of statisticity descriptions of the function of a court the hyperthesize independently on the desirability of function of a court the hyperthesize independently on the desirability of function of a court the hyperthesize independently on the desirability of function of a court the hyperthesize independently on the desirability of function of any possible alternatice [-1] to the statisticity scheme formulated by [106 State] 2. Lat? when the lattice is the desirability of posting Matthews without 427 35 States] (1076)). We note a use alternative to the gender based signification of § 111 only to emphasize that the state interests asserted in support of the statisticity classification with the state interest of through employate and the statisticity classification when the statistics of the statistic process of the statistics

2016 Quality C. Riskow sugar, we noted the importance in cases of the

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ficulty in identifying the father even of colletten horr out of weißerk.¹ Thus, no showing has been under that the different treatment afforded uncertrial fathers and unmarried mothers under § 111 hears a substantial relationship to the proclaimed interest of the State in promoting the adoption of illegitimate children.

In sum, we believe that § 111 is another example of "averbroad generalizations" in gender-based classifications. See Califono v. Goldfarb, 430 U. S. 1989, 211 (1977); Stanton v. Stanton, 421 U. S. 7, 14–15 (1975). The effect of New York's classification is to discriminate against unwell fathers even when then identity is known and they have manifested a significant paternal interest in the child. The facts of this case illustrate the harshness of classifying dowed fathers as being invariably less qualified and entitled then nothers to exercise a concorned judgment as to the face of their elijdren. Section (11) both excludes some loving tathers from full participation. in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers. We conclude that this and forestioned distinction between unwed mothers and unwed lathers, applicable in all circumstances where adoution of a child of theors is at issue, does not bear a substantial relationship to the State's asserted interests.¹⁶

is Appelling also challenges the registribulation of the distancion made in § 0.1 between its drive and unmarried fathers. As we have resulted

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kind with the relationship that in fact exists between the parent and shift Sector S_1 support

¹⁵ States have a negation we interest, or course, in providing the onanimatrial father's right to object to the adoption of a winder will be conditioned upon his sharing that in is in fact his child. Cf Lafe v. Lafe, \rightarrow 10. S \rightarrow , \rightarrow (1958) – Such is tot, however, the inject of the New Yark statute here. Although New York provide for actions in its Furnely Course to stablish priority, see §§ 514 to 571 of the New York diabetary Course to stablish priority, see §§ 514 to 571 of the New York diabetary Course to stablish priority, see §§ 514 to 571 of the New York diabetary Course to stablish priority of a child form out of wellock to object to the subgetion in their children under § 111

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The judgment of the New York Court of Appeals is

Reversed.

then the sev-based distinction of § 112 violates the Dynal Procession Clause, we need express policies to the violativity of the additional disself-cation.

Facely, appellant segmes that he was derived substantive due process when the New York courts terminated has parential rights without first budging him to be unfit to be a patent. See Studied v, *Blacche* 405 U, S 645 (1972) (coulde). Because we have raded that the New York statute is marchitikhen all confer the lipest Protection Clause, we show york statute to view as to reflection a State is constitutionally barred from ordering adoption in the obsence of a detectoritation, that the parent whose rights are bring terminated branch.

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This case is here on appeal from the New York Court of Appeals. At issue is the constitutionality of New York's adoption statute. Under this statute, a child may be adopted only if his parents consent to the adoption. An exception is made, however, with respect to children born out of wedlock.

Only the consent of the mother is required when an illegitimate child is up for adoption. Regardless of the circumstances, the father has no right under New York law to object. Thus, a categorical distinction is made in this respect between fathers, depending colely on whether the child is logitimate.

The parties to this case, appellant Caban and appellee Nohammed, are the parents of two children, born while they were living together for several years. Over those years, they lived together as a family and appellant contributed to the support of the children. After the couple separated, the children continued to see their father regularly, although they lived with their mother. The mother married another man. She and her new husband then sought to adopt the two illegitimate children.

The natural father's objection to the adoption was rejected by the New York courts. His claim that the statute deprived him of equal protection of the laws, also was rejected.

In an opinion filed today with the clerk, we hold that the New York statute is invalid under the Equal Portection Clause of the Pourteenth Amendment. At least with respect to children as old as appellant's, and where an established relationship exists, the New York statute bears no substantial relation to any important interest of the State.

Accordingly, we reverse the Court of Appeals of New York.

Mr. Justice Stewart has filed a dissenting opinion. Mr. Justice Stevens also has filed a dissenting opinion, in which the Chief Justice and Mr. Justice Rehnquist have joined.

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