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# Caban v. Mohammed

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NB Nancy - discuss this with me - especially in light of Ill. case I wrote last Term.

N.Y. statute gives an unwed mother a veto of any adoption of the illegitimate child, but no comparable right is given unwed father.

We left this Q open in Quilloin - but we DFWSFQ in Orsini involving this same N.Y. statute.

The E/P issue seems substantial.

Discuss

PRELIMINARY MEMORANDUM

May 11, 1978 Conference
List 2, Sheet 1

No. 77-6431 — Appeal from N.Y. Ct. App. (mem. dismissing appeal)

CABAN (illegitimate father)

v.

MOHAMMED (mother & stepfather)

State/Civil — Timely

1. SUMMARY: Appellant raises two issues not resolved in Quilloin v. Walcott [Ga case], 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

Q

Discuss. See back.

Nancy

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

2. FACTS: 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, another woman, with whom he had had two children. While living together, appellant and the mother had the two 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

Unwed mother given right to veto adoption



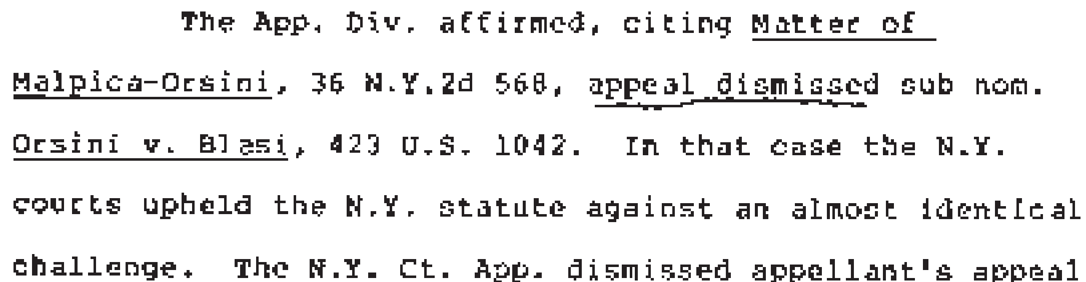
children when there is a dispute over custody. In constrast, New York's adoption law gives either parent of a child born in wedlock the right to veto adoption by a third party and gives an unwed mother the same veto power, while it denies the same right to an unwed father like appellant. N.Y. Domestic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

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. Stanley v. Illinois, 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 temporary 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 petn 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 Matter of Malpica-Orsini, 36 N.Y.2d 568, appeal dismissed sub nom. Orsini v. Blasi, 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 Orsini. After Quilloin was decided, appellant twice sought reargument, unsuccessfully.

3. CONTENTIONS: (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 Stanley v. Illinois, supra. (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 custody proceedings which began before and pended throughout the adoption proceedings, 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. DISCUSSION: It is hard to recommend what to do with this appeal because the Court's precedents go in opposite directions. The DFWSFQ in Orsini 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 Orsini was not as substantial as the relationship here, but the pool memo in Orsini seems to belie that contention. The indicia of closeness or substantiality of the relationship differ in the two cases, but it does not look like the Court's assessment of the strength of the parent/child relationship was what led to the DFWSFQ.

This is irrelevant to E/P issue

Pointing in the other direction is Quilloin. There the substantiality 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 children 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 petn was filed. (It certainly would be helpful if appellant had provided some support for this assertion.) 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 Quilloin. 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 Orsini, 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 parent.)

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 Stanley, 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.

Bregstein Opns in petn

MAY 11 1978

Court ..................... Voted on.................., 19...

Argued ................., 19... Assigned .............., 19... No. 77-6431

Submitted ..............., 19... Announced ..............., 19...

CABAN

vs.

MOHAMMED

Also motion to dismiss or affirm

Standard procedural D/P involved. Here there was a hearing. TM says we apparently left this open.

Voted.

| | HOLD FOR | CERT. G | CERT. D | JURISDICTIONAL STATEMENT N | POST | DIS | AFF | MERITS REV | MERITS AFF | MOTION G | MOTION D | ABSENT | NOT VOTING |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Burger, Ch. J. | | | | | | ✓ | | | | | | | |
| Brennan, J. | | | | ✓ | | | | | | | | | |
| Stewart, J. | | | | | | | ✓ | | | | | | |
| White, J. | | | | | Join 3 | | | | | | | | |
| Marshall, J. | | | | ✓ | | | | | | | | | |
| Blackmun, J. | | | | | Join 3 | | | | | | | | |
| Powell, J. | | | | ✓ | | | | | | | | | |
| Rehnquist, J. | | | | | | ✓ | | | | | | | |
| Stevens, J. | | | | ✓ | | | | | | | | | |

DW 11/6/78

D/P Issue. Appellant asserts a substantive D/P right not to be deprived of ~~custody~~ child by adoption absent a finding of unfitness of the natural parent — whether wed or unwed.

In Quilloin, a sub. D/P case (p7), we held that the state could allow adoption when found to be in best interest of child. The father there had been given a hearing.

I would not agree to any absolute right. Best interest of child should control, tho presumption — a strong one — favors natural parent unless found unfit.

E/P Issues (N.Y. statute classifications) (p. 10)

1. Gender discrimination — accords right to veto (consent required) in unwed mother but not father. (Issue reserved in Quilloin)

2. Unwed father dif. from wed fathers who ~~are divorced~~.

Fundamental right — strict scrutiny. A natural parent who has not abandoned child has a fundamental right as a parent. A statute ~~[illegible]~~ authorizing adoption must be strictly construed.

BOBTAIL BENCH MEMORANDUM

To: Justice Powell

Re: Caban v. Mohammed--No. 77-6431 (App. from N.Y.Ct.App.)(order)

This case presents the question left open by the Court's decision last Term in Quilloin v. Walcott, __ U.S. __, 46 U.S.L.W. 4055 (January 10, 1978): To what extent must an unwed father participate in the raising of his children in order to gain a ... say concerning the adoption of the children equal to that of the mother? The appellant (Abdiel) and appellee (Maria) lived together as husband and wife from 1968 to 1973, when Maria left Abdiel to take up residence with

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.

Soon after Maria left Abdiel, she married Kazim, with whom she and the children lived. During this time, David and Denise would visit Maria's mother periodically; as Abdiel lived 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 temporary custody under a court order and Maria and Kazim 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

cross 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 ruling.

## I. THIS COURT'S DECISIONS

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

### A. Stanley v. Illinois

In Stanley 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 holding a hearing to determine his fitness to be a parent; such a hearing would be afforded

married, surviving spouses and unmarried mothers under Illinois law.

The Court upheld the father's right to a fitness hearing on two grounds. First, 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.

Stanley

Second, the Court in Stanley 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 Stanley 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 Stanley. 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 "[c]enturies 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. at 666.

True

B. Quilloin v. Walcott

Quilloin involved a Georgia statute essentially the same as the New York statute at issue in the case at hand; 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 affirmed, 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 breakup of a natural family over the 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 Quilloin the 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 Quilloin 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.

## II. 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 Stanley. 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

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 Quilloin had been given adequate notice and had been given a full opportunity to appear and participate in the adoption proceedings. Indeed, in both Quilloin and here the natural father did participate in the proceedings.

The only due process question presented here, 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 questions, this calls upon the decision-maker to look to his own sensibilities concerning fairness; perhaps 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 Quilloin 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 Quilloin 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 Quilloin exception, because he lived with the two children for several years as their

father and has displayed consistent interest in their well-being.

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 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 Court could rule 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

Not impossible

Probably Not

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 leeway if it is preserving some remnant of the original natural family. 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.

Yes adoption - is drastic remedy

As you can see, the considerations I believe pertinent to the question do not all point in one direction. In fact, I 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 off 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 spouse 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.

Yes

Sound thoughts

B. Equal Protection

There are at least two quite different equal protection arguments lurking in this case. (1) On the one hand, the appellant claims that the New York statute improperly is distinguishing 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 Quilloin that the gender-discrimination claim was not properly before it.) On the other hand, (2) 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 Stanley and Quilloin, 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 prima facie right to block adoption of his child by witholding consent.

Yes

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

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 disqualified from giving consent under §111. The unmarried father, however, has no such prerogative, and therefore is more vulnerable to the termination of his parental rights than are other parents. Put another way, all 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 N.Y.2d 383 (1978).

Finally, the Surrogate in the case at bar plainly perceived the rights of Abdiel to be quite different from those 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, I find it difficult to justify such a difference. The New York Court of Appeals in Matter of Malpica-Orsini, 36 N.Y.2d 568 (1975) attempted to justify §111 on two grounds: First, 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.

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 Stanley 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 Surrogate, 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

Not sure father should be given veto power

could eliminate veto power of both parents

constitutional problem with the New York statute is the difference 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

As I've said in the memo, I do not see how these questions can be viewed as insubstantial, especially after Quilloin. But the Court 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 only if you think there would be 5 votes to reverse, probably on the equal protection issues. Otherwise I see no point in going beyond the DFWSFQ in Orsini. But, as I've said, I think the questions are substantial.

R.

Yes

Appeal - N.Y. Ct/Apps

77-6431 CABAN v. MOHAMMED Argued 11/6/78
(Unwed father) (natural mother) (+ her new husband, who will become step-father if this adoption is sustained

N.Y. Adoption law:

As to child born in wed-lock, either parent may veto adoption by 3rd party. Even a father divorced has veto.

As to child born out of wed lock, mother has veto right over adoption - but father has none

Under N.Y. decisions, a stranger (here the proposed step-father) may adopt even if unwed father is fit.

Facts: Appellant is unwed father of two children, and lived with - & helped support - unwed mother & children for 4 yrs. Mother has now married another man (Mohammed), who wishes to adopt children.

Contentions:

Denial of E/P: (1) denial of veto right to unwed father is gender based classification, and (2) allowing veto to married father even after divorce, but not to unwed father, is irrational classification

N.Y. law as to custody is different from adoption. In former each unwed parent is given equal rights - no presumption in favor of mother.

Cases: By summary affirmance in Orsini v. Blasi 423 U.S. 1042, we sustain statute here challenged

In Quilloin v. Walcott (last Term, T.M.) the E/P issue was not presented

Stanley v. Ill left E/P Q open.

x x x

Appellant raises substantive D/P issue also, but critical Q is E/P.

Silk (for appellant)

No finding of unfitness of father.

Both of unwed parents had married (9 think). P.S. made point that if both natural parents marry, & either step-parent ~~[illegible]~~ is allowed to adopt the child, one of natural parents will be deprived of all legal relationship with the child.

Must not confuse custody with adoption — provisions of law differ.

Father was supporting child

Argues that "relationship" with child is basis of Const. right. (I thought the argument was denial of E/P).

x x x

Relies primarily on D/P argument that a natural parent may not be deprived of her or his child w/out showing of unfitness

Schuelsaper (appellee)

~~[illegible]~~ Incoherent argument!

Strum (asst A G of N. Y.)

State may favor unwed mother over unwed father — though welfare of child controls.

Reverse 6-3

77-6431 Caban v. Mohammed Conf. 11/8/78

The Chief Justice Affirm

There are differences in rights of mother + father

Mr. Justice Brennan Reverse

Denial of E/P

Talk about best interest of child is relevant to custody - not to court. issue -

Statute is invalid.

Mr. Justice Stewart Reverse - tentatively

E/P attack on two grounds:

(1) Gender

(2) Unmarried fathers + divorced fathers

We do have a dismissal for WANT in case involving same statute. We can decline to follow.

P.S. passed on First Vote

x x x x x

Tentatively, P.S. voted to Reverse on E/P

"Briefs + arguments were dreadful."

Mr. Justice White *Reverse*

*Stanley is irrelevant. It was a procedural D/P case.*

*This is an E/P case & would reverse on either or both claims.*

---

Mr. Justice Marshall *Reverse*

*Quilloin doesn't control.*

---

Mr. Justice Blackmun *Affirm*

*Father here is against mother, step-father and state.*

*~~[illegible]~~ Agrees Quilloin not controlling.*

*State has some interest in adoption.*

*Interest of children outweigh father's.*

*No denial of E/P or D/P.*

Mr. Justice Powell Reverse

On E/P grounds

Mr. Justice Rehnquist Affirm

There are thousands of years of experience in favor of mother.
If this were claim raised by children, there might be something to the claim as to dif. bet. unwed father & divorced father. But we have only unwed father complaining.

No denial of procedural D/P

Mr. Justice Stevens

Not at rest.
On E/P claim, the vast number of adoptions are when child is new born infant. Mother should be favored at that age. Thus, for young children – the state interest is substantial. But here the unwed father had lived with children ~~& children~~ & they were not infants. Hard to draw line.
(See back)

As to the father v. father E/P issue, agrees with WHR

John Stevens (cont.)

As to D/P, this is not a Stanley case, & the interest of father is substantial. There was hearing here, but father is cut off entirely by adoption

Not at rest, but probably will Reverse on substantive D/P issue — but would confine to where there is ev. of a substantial rel. ~~to~~ bet. father & child as in this case

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

CHAMBERS OF
THE CHIEF 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.

I 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

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

> [a]fter the making of an order of adoption the 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.

what are these?

2. As the appellant was given ~~adequate~~ due notice ~~of the hearing before the Law Officer~~ and was permitted to participate ~~fully~~ as a party in the adoption proceedings, he does not contend that he was denied the procedural due process ~~we ruled natural fathers are entitled to~~ held to be requisite 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 guardian 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 insane 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 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 manner as the judge or surrogate may direct and an opportunity to be heard 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 child. 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.
>
> 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. Blasi, supra, the Court dismissed an appeal from the New York Court of Appeals challenging the

FN-3

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

5. In his brief as amicus curiae, the New York Attorney General echoes the New York Court of Appeals' exposition in Matter of Malpica-Orsini 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 Trimble v. Gordon, 430 U.S. 762, 768 & n.13 (1977), we alluded to the importance of the State's interest in "the promotion of [legitimate] family relationships" in rejecting it as a justification for an Illinois intestacy law excluding illegitimate children. That rejection was based in part on our

marry: the unwed father.

Even though §111 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 family 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 §111 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-Orsini, 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 unwed fathers who sought to preserve their

lfp/ss 12/14/78

MEMORANDUM

TO: David DATE: Dec. 12, 1978

FROM: 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 rest 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 Rodriguez, 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 Reed v. Reed, Boren, and my concurring opinion in Frontiero.

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 ~~@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 any of these cases, and wonder whether any of them describe 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

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 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 §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.

4. I am not concerned about Zablocki, as I agree with you that the interests regulated there are quite 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 Quillion 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 Quillion.

* * *

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.

ss

* I'm not sure I have Quillion fully in mind. I believe the father had ~~not~~ commenced legitimatization proceedings.

DW 12/12/78

<u>Memorandum</u>

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 easily be cut down to a single paragraph, if you wish.

*Lets see how this looks*

There are <u>four things</u> 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 rely on both grounds? If so, which should come first? If not, which should be chos*

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 Zablocki v. Redhail, 434 U.S. 374, 391 (1978)(Stewart, J., concurring in the judgment).

4. Finally, I am somewhat uneasy concerning the position you set forth in your concurring opinion in Zablocki, supra. Although I believe that that case is distinguishable from 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

How do our cases describe or state the interest of a parent in custody of his child?

Are there cases holding that a parent's right (however described) is fundamental?

If so, strict scrutiny applies to the classification (or "heightened scrutiny")

If we rely only on the gender based classification, we could decide ~~a~~ case on the irrationality of such a classification. Reed, Boren

We would not have to rely on ~~the~~ father's fundamental right.

DW 12/12/78

add full names of parties

No. 77-6431 Caban v. Mohammed--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. We rule that the New York statute as applied in this 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.

I think not

David, I would omit "mother" here.

I. ~~Facts~~

Abdiel Caban and appellee Maria Mohammed lived

married to another woman, from whom he was separated. While living with the appellant, Maria 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.

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.

Maria's

Abdiel periodically ~~heard of~~ the children's activities through his parents, who also resided in Puerto Rico. In November of 1975, ~~appellant went to visit David and Denise,~~ 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, ~~leaving the grandmother a telephone number where Abdiel's attorney could be reached.~~ When Maria learned that the children were in the custody of Abdiel, 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, Nina, visiting rights.

In January, 1976, appellees filed a petition to adopt David and Denise ~~as their own~~. In March, the Cabans cross-petitioned 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-

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 ~~set forth~~ the ~~role played~~ under New York law ~~by~~ unwed fathers in adoption proceedings~~, where the natural mother is one of the petitioning parties.~~ "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 appellants ~~had no prospect of~~ adopting David and Denise, as the natural mother had witheld 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 ~~concluded that the Mohammeds~~' petition for adoption ~~should be granted, as they would provide David and Denise with a solid and permanent home and would care for the children.~~

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 Matter of Malpica-Orsini, supra. Matter of David A.C., 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 Quilloin v. Walcott, 434 U.S. 246 (1978), recognized the substantive due process right of natural fathers to maintain a parental relationship with their children absent a finding 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 Amendment.

II ~~Differential 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 ~~exquing~~ circumstances, an unwed mother ~~and~~ as well as 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 cannot accept the~~ Appellees' interpretation of §111~~, as we can~~ finds no support in New York caselaw~~, for appellees' claim that New York courts do not vigorously enforce the consent requirement of the statute~~. On the contrary, the

decision in the case ~~at hand~~ present, affirmed by the New York Court of Appeals, was based upon the assumption that there was a ~~considerable~~ 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 ~~ruled~~ held ~~out of the question~~ 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 would not be fit parents.

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 benign on their face may be justified by their "rational relationship to legitimate state purposes." <u>San 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, 388 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); Roe v. Wade, 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

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. Redhail, 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 U.S. 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 question 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 Quilloin v. Walcott, 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 he 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 <u>Quilloin</u>, 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 <u>Quilloin</u>, by the unmarried father's lack of interest in

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 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 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 offspring." 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 ~~powerful~~ important 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 Matter of Malpica-Orsini, 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 here 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 protected ~~fully~~ adequately by means of a statute that trenches less drastically upon the fundamental right of all parents to rear 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., Craig v. Boren, 429 U.S. 190 (1977); Reed v. Reed, 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 drawing a gender-based distinction that this Court has ~~come to view with suspicion~~ disapproved in a number of cases.

The New York Court of Appeals in Matter of Malpica-Orsini, supra, presented the same justification for the distinction in §111 between men and women as it did for that between ~~those~~ men who are married and ~~those who are~~ unmarried: the impediment to adoption that would result if 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

curtailed cannot justify the difference in treatment between unmarried fathers 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.

Appellees advanced ~~put forward~~ another justification for the different treatment of fathers and mothers under §111. ~~Thus,~~ They 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 otherwise ~~othersie~~ show toward a legislature'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.

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 family. 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 parents 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 process by the New York court's decision terminating his parental rights without first finding him to be unfit to be a parent. See Stanley v. Illinois, 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.

Reversed.

lfp/ss 12/14/78

MEMORANDUM

TO: David DATE: Dec. 12, 1978

FROM: 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 rest 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 Rodriguez, 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 Reed v. Reed, Boren, and my concurring opinion in Frontiero.

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 ~~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 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

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 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 §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.

4. I am not concerned about Zablocki, as I agree with you that the interests regulated there are quite 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 Quillion 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 Quillion.

* * *

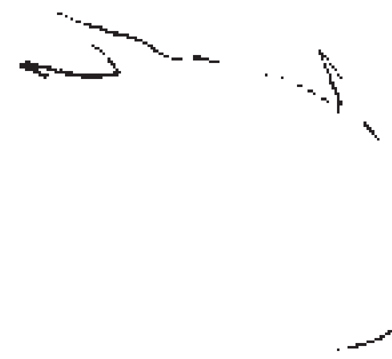
In sum, we should decide some of the foregoing questions, and perhaps you should make revisions in light of our answers to these questions, before I undertake editing.

L.F.P., Jr.

ss

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

As we repeated in Reed v. Reed, supra, 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.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)."



Caban 9

lfp/ss 12/18/78 Rider A, 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.

Caban 12

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 Stanton, supra, at 14-15.

Nor may we accept uncritically the generalization - underlying much of the argument in support of § 111 - 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 childhood, 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 parental 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 qualified 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.

L. F. P.

Revised

2nd CHAMBERS DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant,
v.
Kazim 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, 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 mother 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 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 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.

In December of 1973, Mohammed took the two children 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 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. Caban, 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 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, Nina, visiting rights.

In January 1976, appellees filed a petition under § 110 of the New York Domestic Relations Law to adopt David and Denise.[3] In March, the Cabans cross-petitioned for adoption.

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[3] Section 110 of the New York Domestic Relations Law provides in part that:

"An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an

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 foreclosed from adopting David and Denise, as

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adult or minor husband or an adult or minor wife may adopt such a child of the other spouse."

Although a natural mother in New York has many parental rights without adopting her child, New York courts have held that § 110 provides for the adoption of an illegitimate child by his mother. See *In re Anonymous Adoption*, 177 Misc. 683, 31 N. Y. S. 2d 595 (App. Div. 1941).

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

"[a]fter the making of an order of adoption the 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."

As an exception to this general rule, § 117 provides that:

"[w]hen a natural or adoptive parent, having lawful custody of a child, marries or remarries and consents that the stepfather or stepmother may adopt such child, such consent shall not relieve the parent so consenting of any parental duty toward such child nor shall such consent or the order of adoption affect the rights of such consenting spouse and such adoptive child to inherit from and through each other and the natural and adopted kindred of such consenting spouse."

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

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-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 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 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 natural fathers to maintain a parental relationship with their children absent a finding that they are unfit as parents.[5]

II

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

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[5] As the appellant was given due notice and was permitted to participate as a party in the adoption proceedings, he does not contend that he was denied the procedural due process held to be requisite in *Stanley* v. *Illinois*, 405 U. S. 645 (1972).

> 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 incompetent to care for the child.[4] Absent one of

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[4] 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:

"1. Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

"2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

"3. Of the mother, whether adult or infant, of a child born out of wedlock;

"4. Of any person or authorized agency having lawful custody of the adoptive child.

"The consent shall not be required of a parent who has abandoned the child or who has 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 guardian 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 insane 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 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 manner as the judge or surrogate may direct and an opportunity to be heard 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 the 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 child. 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.

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

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 § 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 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

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sents specified in subdivisions two and three of this section shall not be required, and the judge 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."

interests of the child.[6] 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 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 their best interests. Accordingly, it is clear that § 111 treats unmarried parents differently according to their sex.

III

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. *Boren*, 429 U. S. 190, 197 (1976). 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 unmarried fathers bears a substantial relation to some important state interest. Appellees assert that the distinction is justified

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[6] See *In re Corey L* v. *Martin L*, 45 N. Y. 2d 383, 391, 380 N. E. 2d 266, 270 (1978):

"Absent consent, the first focus here is on the issue of abandonment since neither decisional rule nor statute can bring the relationship to an end because someone else might rear the child in a more satisfactory fashion. . . . Abandonment, as it pertains to adoption, refers to such conduct on the part of a parent as evinces a purposeful rejection of parental obligations and the foregoing of parental rights—a withholding of interest, presence, affection, care and support. The best interests of the child, as such, is not an ingredient of the conduct and is not involved in the threshold question. While protection of the best interests of the child is essential to ultimate approval of the adoption application, such interests cannot act as a substitute for a finding of abandonment." (Citations omitted.)

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. This claimed difference is difficult to assess in the abstract without reference to the very different situations in which adoption of illegitimate children is sought. In some circumstances, unwed mothers stand in a relationship to their children very different from that enjoyed by an unwed father. 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[6] may justify some statutory distinction between mothers and fathers of newborn infants.

Contrary to the apparent presumption of § 111, maternal and paternal roles are not invariably different in importance. As children grow older, generalizations concerning parent-child relations and parental responsibility become less acceptable as bases for legislative distinctions according to the sex of the parent. The present case demonstrates that an unwed father may 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 participated in the care and support of their children.[7] There is no reason to believe that the Caban

[6] See infra, at —.

[7] In rejecting an unmarried father's constitutional claim in *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), we emphasized the importance of the appellant's failure to act as a father toward his children, noting that he

> ". . . 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." *Id.*, at 256.

In *Quilloin* we expressly reserved the question whether the Georgia statute

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 illegitimate children. Although the legislative history of § 111 is sparse,[9] in *In re Malpica-Orsini*, *supra*, 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.[10] The court concluded that

"[t]o require the consent of fathers of children born out

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similar to § 111 of the New York Domestic Relations Law unconstitutionally distinguished among parents according to their gender, as the claim was not properly presented. See 434 U. S., at 253 n. 13.

[9] Consent of the unmarried father has never been required for adoption under New York law, although parental consent otherwise has been required at least since the late 19th century. See, *e. g.*, Laws of the State of New York, 120th Session, L. 1896, ch. 272. There are no legislative reports setting forth the reasons why the New York Legislature exempted unmarried fathers from the general requirement of parental consent for adoption.

[10] In *Orsini* v. *Blasi*, *supra*, the Court dismissed an appeal from the New York Court of Appeals challenging the constitutionality of § 111 as applied to an unmarried father whose child had been ordered adopted by a New York Surrogate. In dismissing the appeal, we indicated that a substantial federal question was lacking. This was a ruling on the merits, and therefore is entitled to precedential weight. See *Hicks* v. *Miranda*, 422 U. S. 332, 344 (1975). At the same time, however, our decision not to review fully the questions presented in *Orsini* v. *Blasi* is not entitled to the same deference given a ruling after briefing, argument, and a written opinion. See *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). Insofar as our decision today is inconsistent with our dismissal in *Orsini*, we overrule our prior decision.

> 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 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 natural father.[13]

The State's interest in providing for the well-being of illegitimate children is an important one. Furthermore, we ~~may assume~~ 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 scrutiny under the Equal Protection Clause unless it is shown that the gender-based distinction of the statute is ~~tailored~~ [structured] reasonably to meet this concern. As we repeated in *Reed* v. *Reed*, *supra*, at 76, a statutory "classification 'must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and

[13] In his brief in this Court, the New York Attorney General adopts the New York Court of Appeals' exposition in *In re Malpica-Orsini* of the interests promoted by § 111's different treatment of unmarried fathers. See Appellee's Brief of New York Attorney General, at [illegible].

do not question

structured

David – "tailored" is one of the Court's over-used words

substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415 (1920)."

We find that application of the distinction in § 111 between unmarried mothers and unmarried fathers in this case does not bear 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 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. Neither the State nor the appellees have argued that unwed 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 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 unwed fathers when adoption proceedings are brought, whereas mothers are more likely to remain with their children. In assessing this claim it is necessary once again to distinguish among the various situations in which illegitimate children are adopted. The problem of identifying an unwed father of a new-born infant is different in significant degree from the identification of an unwed father who has established a substantial relationship 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 strong interest in repose by appropriate measures which foreclose post-adoption claims of paternity.

But these considerations do not continue to apply 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 in § 111.[10] In 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 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 abandoned the child.[11] See *e. g.*, *In re Orlando F.*, 40 N. Y. 2d 103 (1976). This provision of § 111 applies to fathers and mothers alike, with respect to children born in wedlock. Thus, no showing has been made

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[10] See Comment, The Emerging Constitutional Protection of the Putative Father's Parental Rights, 70 Mich. L. Rev. 1581, 1590 (1972).

[11] If the New York Court of Appeals is correct that unmarried fathers often desert their families, then allowing those fathers a right to object to the termination of their parental rights will pose little threat to the State's ability to order adoptions of their children. But we do not question a State's right to do what New York has done in this portion of § 111: to withhold from fathers who have abandoned their children any right to block adoption of those children.

We do not suggest, of course, that the provision of § 111 making parental consent unnecessary in cases of abandonment is the only constitutional mechanism available to New York for the protection of its interest in allowing the adoption of illegitimate children when their natural fathers are not available to be consulted. In reviewing the constitutionality of statutory classifications, "it is not the function of a court 'to hypothesize independently on the desirability or feasibility of any possible alternative[s]' to the statutory scheme formulated by the State." *Lalli v. Lalli*, — U. S. —, — (1978) (quoting *Mathews v. Lucas*, 427 U. S. 495, 515 (1976)). We note some alternatives to the gender-based distinction of § 111 only to emphasize that the state interests asserted in support of the statutory classification could be protected through numerous other mechanisms more closely attuned to those interests.

David — what does this note say?

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 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 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 entitled than mothers to exercise a concerned judgment as to the fate 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, 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 where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests.[15]

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[15] Appellant also challenges the constitutionality of the distinction made in § 111 between married and unmarried fathers. Appellant urges that the custody of a child is an activity constitutionally protected from intrusion by government interference. See *Quilloin* v. *Walcott*, 434 U. S. 246, 255 (1978); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 652 (1975); *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944). In drawing statutory distinctions with respect to who will be permitted to raise a child, therefore, the State must act only [illegible] interests [illegible] of a compelling interest, as it deals with fundamental rights. See, e. g., *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 253–254 (1974); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). As we have resolved that the sex-based distinction of § 111 violates the Equal Protection Clause, we express no view concerning the constitutionality of the distinction under New York law between married fathers and unmarried fathers.

Finally, appellant argues that he was denied substantive due process

The judgment of the New York Court of Appeals is

*Reversed.*

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when the New York courts terminated his parental rights without first finding him to be unfit to be a parent. See *Stanley* v. *Illinois*, 405 U. S. 645 (1972) (*Stanley*). Because we have ruled that the New York statute is unconstitutional under the Equal Protection Clause, we express no view on whether a State is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit.

26 DEC 1978

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# SUPREME COURT OF THE UNITED STATES

No. 77-6431

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| Abdiel Caban, Appellant, v. Kazim 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, 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 mother and stepfather without his consent. We find the statute to be unconstitutional, as the distinction it 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 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.

In December of 1973, Mohammed took the two children 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 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 Gonzales willingly surrendered 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. 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 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, Nina, visiting rights.

In January 1976, appellees filed a petition under § 110 of the New York Domestic Relations Law to adopt David and Denise.[2] In March, the Cabans cross-petitioned for adoption.

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[2] Section 110 of the New York Domestic Relations Law provides in pertinent part:

"An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an

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.[5] 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 foreclosed from adopting David and Denise, as

adult or minor husband or an adult or minor wife may adopt such a child of the other spouse."

Although [illegible] position in New York [illegible] adopting his child, New York courts have held [illegible] § 110 [illegible] adoption of an illegitimate child by its mother. See *In re Anonymous Adoption*, 177 Misc. 683, 31 N. Y. S. 2d 595 (Surr. Ct. 1941).

[5] Section 117 of the New York Domestic Relations Law provides, in part, that:

"After the making of an order of adoption the 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."

As an exception to the general rule, § 117 provides that:

"Where a natural or adoptive parent, having lawful custody of a child, marries or remarries and consents that the stepfather or stepmother may adopt such child, such consent shall not relieve the parent so consenting of any parental duty toward such child nor shall such consent or the order of adoption affect the rights of such consenting spouse and such adoptive child to inherit from and through each other and the natural and adopted kindred of such consenting spouse."

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

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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-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 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 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 natural fathers to maintain a parental relationship with their children absent a finding that they are unfit as parents.[4]

II

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

[4] As the appellant was given due notice and was permitted to participate as a party in the adoption proceedings, he does not contend that he was denied the procedural due process held to be required in *Stanley* v. *Illinois*, 405 U. S. 645 (1972).

> 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 relinquished his or her rights in the child or has been adjudicated incompetent to care for the child.[7] Absent one of these cir-

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[6] At the time of the proceedings below, the statute, § 111, provided:

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

"1. Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

"2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

"3. Of the mother, whether adult or infant, of a child born out of wedlock;

"4. Of any person or authorized agency having lawful custody of the adoptive child.

"The consent shall not be required of a parent or of any other person having custody of the child who has abandoned the child or who has surrendered the child to an authorized agency for the purpose of adoption under the provisions of the social services law or of a guardian of a child who has been surrendered 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 insane or who has been judicially declared to be incompetent or who is a mentally retarded person 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 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 manner as the judge or surrogate may direct and an opportunity to be heard 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 the 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 child. 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.

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

cumstances, an unwed mother has the authority under New York law to block the adoption of her child simply by withholding consent. The unwed father, on the other hand, has no similar control over the fate of his child. He may prevent the termination of his parental rights only by showing that the petitioning couple would not be fit parents.

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 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 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 interests of the child. Indeed, the Surrogate's decision in the

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[illegible]

[illegible]

Matter of Corey L. v. Martin L., 45 N. Y. 2d [illegible], [illegible] N. E. 2d 266, 270 (1978).

[illegible]

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 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 would not be fit parents. We conclude, therefore, that § 111 treats unmarried New York parents differently according to their sex.[7]

III

Gender-based distinctions "must serve important 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. *Boren*, 429 U. S. 190, 197 (1976). See also *Reed* v. *Reed*, 404 U. S. 71 (1971). Although the legislative history of § 111 is sparse, in *In re Malpica-Orsini*, *supra*, the New York Court

[illegible] "Abandonment, as it pertains to adoption, [illegible] any conduct on the part of a parent which evinces a settled purpose to forego all parental obligations and the foregoing of parental rights—a withholding of interest, presence, affection, care and support. The best interests of the child as such is not an ingredient of that inquiry and is not involved in this threshold question. While consideration of the best interests of the child is essential to ultimate approval of the adoption application, such interests cannot act as a substitute for a finding of abandonment." [illegible] (citations omitted.)

In *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), we considered the constitutionality of a Georgia statute similar to § 111 of the New York Domestic Relations Law. In upholding the Georgia law as applied in that case, we specifically noted that the appellant had not presented properly [illegible] that the Georgia statute's gender-based distinction [illegible] violated the Equal Protection Clause. See 434 U. S., at 253 n. 13. Our upholding of the statute in *Quilloin*, therefore, does not foreclose review of the gender-based distinctions of § 111.

[7] Contrary to the [illegible] under New York law, although a parent's consent otherwise has been

of Appeals set forth in detail the state interests it believed to be promoted by § 111 of the New York Domestic Relations Law.[9] The court recognized New York's substantial interest in providing for the interests of illegitimate children, for whom adoption often is the best course. The court concluded that:

> "To 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 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 merely withholding 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

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[illegible] of New York [illegible] (1965) [illegible] p. 272. [illegible] New York [illegible]

[9] In *Orsini* v. *Blasi*, 423 U. S. 1042 (1976), the Court dismissed an appeal from the New York Court of Appeals challenging the constitutionality of § 111 [illegible] New York [illegible] a ruling on the merits and therefore is entitled to precedential weight. See *Hicks* v. *Miranda*, 422 U. S. 332, 344 (1975). At the same time, however, our [illegible] the issues presented in *Orsini* v. *Blasi* is not entitled to the same deference given a ruling after briefing, argument, and a written opinion. See *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). [illegible] today's decision [illegible] *Orsini* [illegible] our recent decision.

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.[12]

The State's interest in providing for the well-being of illegitimate children is an important one. Furthermore, we do not doubt 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 scrutiny under the Equal Protection Clause unless it is shown that the gender-based distinction of the statute is tailored reasonably to meet this concern. As we repeated in *Reed* v. *Reed*, *supra*, 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 circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920).

We find that the distinction in § 111 between unmarried mothers and unmarried fathers does not bear 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 prevent the adoption of their illegitimate children. [illegible] This impediment to adoption, however, is likely to be 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

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[12] The [illegible] the New York Attorney [illegible] the New York Court of Appeals' opinion in *In re Malpica-Orsini* [illegible] the interests purportedly served by § 111 [illegible]. See [illegible] Brief of New York Attorney General [illegible] 26-29.

mothers and fathers for their children. Neither the State nor the appellees have argued that unwed 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 *Matter of Malpica-Orsini*, *supra*, suggested that requiring unmarried fathers' consent would pose a peculiarly strong impediment to 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 fathers usually are more difficult to locate and identify than unwed mothers, 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. 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 has abandoned the child. See, *e. g.*, *In re Orlando F.*, 40 N. Y. 2d 103 (1976). This abandonment provision of § 111 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 home. In sum, no showing has been made that the different treatment afforded unmarried fathers and unmarried mothers under § 111 bears a substantial relationship to the proclaimed interests of the State in promoting the adoption of illegitimate children.

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See Comment, The Emerging Constitutional Protection of the Putative Father's Parental Rights, 70 Mich. L. Rev. 1581, 1590 (1972).

If the New York Court of Appeals is correct that unmarried fathers often desert their families, then allowing such fathers a right to object to the termination of their parental rights will pose little threat to the State's

Beyond the State's interest in promoting 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 does." Tr. of Oral Arg. at 41. Accord, *Stanley* v. *Illinois*, 405 U. S. 645, 665-666 (1972) (Burger, C. J., dissenting). Thus appellees appear to argue that the distinction of § 111 between unmarried mothers and unmarried fathers merely reflects that mothers and fathers are not "similarly situated" for purposes of the Equal Protection Clause, and therefore that their different treatment does not violate the Constitution.

Whatever may be said about the differences between maternal and paternal relations, it is plain that the New York Legislature did not rely upon any such differences in drafting § 111. Section 111 draws no gender-based distinction between parents of children born in wedlock, giving each the right to prevent the adoption of the child merely by withholding con-

[illegible]

We do not suggest that the present version of § 111 [illegible] available to New York for [illegible] allowing the adoption of illegitimate children [illegible]. In reviewing the constitutionality of statutory classifications, [illegible] to the statutory scheme formulated by [the State]." *Lalli* v. *Lalli*, — U. S. —, — (1978) (quoting *Mathews* v. *Lucas*, 427 U. S. 495, 515 (1976)). We note some alternatives to the gender-based distinction of § 111 only to emphasize [illegible] could be protected through other means [illegible].

sent. Thus, the legislature did not view a purported difference between mothers and fathers to be sufficiently great to require recognition with respect to children born in wedlock, as well as those born without. At the same time the statute provides for those cases where married parents have not taken an active interest in their children, by eliminating the consent requirement under certain circumstances enumerated in the statute. Neither the State nor the appellees have suggested to us any 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 maternal and paternal relations were the basis for the gender-based distinction of § 111, the statute would not meet the requirements of equal protection as its classification is grounded on "archaic and overbroad generalizations" concerning the family. See *Califano v. Goldfarb*, 430 U. S. 199, 211 (1977); *Stanton v. Stanton*, 421 U. S. 7, 14-15 (1975). The traditional role of the mother centering in the home and the rearing of children is an honored and respected one. Yet we may no longer presume

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[11] There is a difference between unmarried mothers and fathers, of course, which does not exist between parents of children born in wedlock. As most States presume that a child born in wedlock is fathered by the husband of the mother, see, e.g., [illegible] v. [illegible], 253 N. Y. 205, 170 N. E. 537 (1930), it is the statute which identifies the mother as the bearer of such a child. The identity of the mother of a child born out of wedlock almost invariably is certain, but the father's identity often presents a difficult question. See *Lalli v. Lalli*, — U. S. — (1978); *Trimble v. Gordon*, 430 U. S. 762, 770 (1977). States have a legitimate interest, therefore, in providing that an unmarried father's right to object to the adoption of a child will be conditioned upon his showing that he is in fact the child's father. Here, however, the paternity of the appellant was not in dispute. Although New York provides for a procedure in the Family Court to establish paternity, see §§ 511-?? of the New York Judiciary Court Act, there is no provision allowing men who have been determined by the court to be the father of a child born out of wedlock to object to the adoption of their children under § 111.

that by custom or under the constitutional guarantee of equal protection women are destined exclusively for homemaking rather than other careers in our society. At least, legislative classifications cannot be predicated on such a prescription. See *Stanton* v. *Stanton*, *supra*, at 14-15.

Nor may we accept uncritically the generalization underlying much of the argument in support of § 111—that mothers are closer to their children than are fathers. During infancy, the mother's role is unique, although even then one cannot invariably assume that the father's role in his child's life is less than that of the mother. As children grow older, generalizations concerning child-parent relations and parental responsibility become less accurate. The present case demonstrates that an unwed father may take a continuing and devoted interest in his children's well-being. There is no reason to believe that the Caban children, aged 4 and 6 at the time of 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 qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children. Section 111 at the same time both excludes some loving fathers from full participation in the decision whether their children will be adopted and enables some alienated mothers arbitrarily to cut off the parental rights of fathers.[10]

We conclude that this gender-based statutory distinction does not bear a substantial relationship to the State's asserted interests.[11]

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[10] We certainly do not suggest that state legislatures may draw no distinctions between maternal and paternal roles in our society. Our holding is confined to classifications like the one before us, where the only [illegible] to the State's [illegible] reasons [illegible] annunciated in the decisions of this Court.

[11] Appellant also challenges the constitutionality of the distinction made in § 111 between married and unmarried fathers. Appellant [illegible]

The judgment of the New York Court of Appeals is

*Reversed.*

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the rearing of a child is a private activity constitutionally protected from unreasonable governmental interference. See *Quilloin* v. *Walcott*, 434 U. S. 246, 255 (1978); *Wisconsin* v. *Yoder*, 406 U. S. 205, 232 (1972); *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944). It is argued that in drawing statutory distinctions with respect to who will be parents of and raise a child, the State must act only from a necessity born of a compelling interest, as it deals with fundamental rights. See, e. g., *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 258–261 (1974); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). As we have concluded that the sex-based distinction of § 111 violates the Equal Protection Clause, we express no view concerning the constitutionality of the distinction made by New York law between married fathers and unmarried fathers.

Appellant also argues that he was denied substantive due process when the New York courts terminated his parental rights without first finding him to be unfit to be a parent. See *Stanley* v. *Illinois*, 405 U. S. 645 (1972) (dictum). Again, because we have ruled that the New York statute is unconstitutional under the Equal Protection Clause, we similarly express no view as to whether a State is constitutionally barred from ordering adoptions in the absence of a determination that the parent whose rights are being terminated is unfit.

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

DEC 29 1978

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

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 troubled 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.

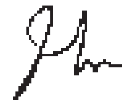
Even in those cases in which consent of the father is obtained, how will the adopting parents be protected against the risk that some other person will subsequently make a claim that he was the father and did not give his consent? Even when an evidentiary hearing would demonstrate that the concern was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

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 unborn 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 cut 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 I 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

File

Caban    12/31/78 (last day!)

Read Stanley. I think it referred to father's rt. as "fundamental" but did not say test was strict scrutiny.

[Margin: N.Y. has now amended its law to accord with Ga. Does Ga require marriage as pre-condition]

Quilloin - Ga statute similar to N.Y. but one major difference: the unwed father could petition a court to be declared the legal father & thereby gain right to give consent to adoption in same way as mother. [We noted Quilloin had not done this. Nor did he seek to adopt.]
N.Y. statute before us affords no ~~[illegible]~~ right. I think this could be a controlling distinction, i.e. Ga. statute may be valid.

But where does this leave father if adoption - without his knowledge - occurs at birth or infancy?

I could decide this case on the facts: hold that N.Y. statute as applied to father who has acknowledged ~~[illegible]~~ publicly his paternity, lived with & supported child, ~~[illegible]~~ deprives him of D/P. This ~~[illegible]~~ would leave ~~[illegible]~~ cases to be decided on facts. ~~[illegible]~~ [illegible] could

[Margin: Quilloin ~~[illegible]~~ was decided on its facts - the issue]

D/P

J.P.S. - Voted to Reverse on substantive D/P grounds where a substantial rel. exists bet. father & child (Burr has appeal). Stanley's holding not relevant as that was procedural D/P case & here - as in Quilloin - father had a hearing. (Check discussion in both of these cases for language supporting sub. D/P analysis. Quilloin was a sub D/P case.

David's Bench memo (8) suggests it would be difficult to write this case on sub D/P grounds as ev. is conflicting as to father's relationship (e.g. amount of support). But statement of facts in my opinion convinces me that father's relationship was substantial enough not to be severed except by a determination based on best interest of child - not on mother's veto.

David thinks (14, 15) as I do, that a proper state statute would give neither parent veto power & predicate adoption decision on child's best interest. Natural parents, where known should have a presumptive right to retain child (same for each). Parents relation to child

David of their right?

The fatal defect in N.Y. statute is that it allows mother to veto adoption by unwed father under all circumstances - even if ~~[illegible]~~ mother does not want child. (Or would such a mother be deemed to have "abandoned" child? A mother might not be physically or financially able to rear child & would simply prefer - say - that her best friend or sister have the child. Would this be abandonment? (See Corey, p.6, N.S. my op.)

An absolute veto right for either is too inflexible

January 2, 1979

No. 77-6431 Caban 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.F.P., Jr.

ss

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 (1) 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 (2) requiring the consent of the natural father will undermine the substantial interest in repose; adoptive parents will be reluctant 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, (3) 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

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 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 Mohammed tried to raise questions concerning Abdiel Caban's status as the father of David and Denise by testifying that she had had sexual relations with another man sometime prior to each of the children's births.

Yes

?!

Because of the uncertainty surrounding the identity of all 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.

State law case should foreclose this

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 discern 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

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.

I agree

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

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 seems 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 Law §111. Once deemed ineligible, the unmarried father's rights could be statutorily terminated entirely, thereby foreclosing subsequent challenges to adoption. Though

Yes

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

How much older

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 simple 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 dissipates--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 relationship to their children after infancy is illustrated by the facts here, where Caban has acted as the de facto father 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.

yes

3. Substantive Due Process

The third alternative you should consider is rewriting the opinion to recognize in unwed fathers a substantive due process right to veto the adoption of their children. The groundwork for such a ruling was (apparently) laid by the Court in Stanley v. Illinois, 405 U.S. 645 (1972), where the Court ruled that an unwed 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--Stanley was entitled to a hearing, 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 ruled 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 further indicated that parental rights are entitled to substantive due process protection in Quilloin, where Mr. Justice Marshall in dictum said that "[w]e have little doubt that the Due Process Clause would be offended '[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 unfitness and for the sole reason that to do so was 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

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. First, I am not persuaded of the strength of the precedent cited. Although Stanley 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 Stanley 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 hearing to protect its interest in fitness.

So do I

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 **

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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 David

[c. JAN. 2, 1979]

David -

These notes are illegible & illiterate — but they may guide you to right power.

[C JAN 2, 1979]

77-6431 Caban

Quilloin 434 U.S. 246 {Ga statute "attacked 'as applied'"

Facts emphasized:

Child had been in "custody & control of mother -- for entire life" - 247, 255

Unwed parents never had a home together - 247. Q never a "de facto" father - 253

Q sought to block adoption by ~~[illegible]~~ husband ~~but~~ & belatedly sought order of legitimation. But did not seek to adopt & assume custody or resp. himself. 247, 255, 256

~~[illegible]~~ Ga statute

Like N.Y.'s except for provision for father to legitimate.

Notes 2 & 3 (p. 248)

Due Process

~~[illegible]~~

Natural parent has a constitutionally protected ~~[illegible]~~ interest.

Smith v Org of Foster Parents, 431 U.S. 862 (Stewart)

Yoder, Meyer, Stanley (see Op. p. 255)

But no such interest here because father had never "had or sought actual or legal custody of child" - 255. In these circumstances, ~~[illegible]~~ father's interest could be

w/o showing unfitness of father

E/P - It's op very thin.

Even tho the disparity bet rights (to veto) of mother + father was ~~[illegible]~~ advanced in S/CT of Ga (p. 252) it was ignored by J. Marshall's opinion

The op. merely said that where unmarried father had never had or sought custody, the ~~[illegible]~~ application of statute did not deny D/P. The difference bet. the mother's "commitment to welfare of child" + that of Quilloin justified the denial of veto right to father.

No discussion of sex disc.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 2, 1979

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

Dear Lewis,

Please join me.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

Lewis,

I had thought that adoptions could be defeated without necessarily showing the "unfitness" of the adopting parents. But perhaps because Maria was the mother, that is the correct standard. My question relates to line 8 on 17 and line 6 on p6.

BRW

DW 1/2/79

Caban v. Mohammed

Rider A, page 10

The New York Court of Appeals in Matter of Malpica-Orsini, 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. We may agree that Even if unwed fathers often if not usually are more difficult to locate and identify than unwed mothers. But this fact lends little support to the denial of 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., <u>In the Matter of Orlando F.</u>, 40 N.Y.2d 103 (1976). This provision of §111 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 home. To be sure, in the case of adoption of newborn infants it may be impossible to say that an 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 §111~~, however,~~ 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 unmarried father's constitutional claim in Quilloin v. Walcott, 434 U.S. 246 (1978), we emphasized the importance of the appellant's failure to act as a father toward his children, noting that he,

> ...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. 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.

Appellant's relationship to his children in the present case contrasts sharply with the relationship we found present in Quilloin. Caban 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 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

This need not be repeated

Caban 9

Keep in File

Substantially revised & improved by David's draft of 1/4/79

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

We consider, therefore, whether the distinction in §111 between unmarried mothers and 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 fathers may be quite different at times and in some circumstances. 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 fathers of newborn infants.

As children grow older, however, generalizations concerning child-parent relations and parental responsibility become less acceptable as a

Caban and appellee Maria 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 children. 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

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

The state's interest in proceeding with adoptions in 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 §111[11]. 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.2d 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

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

Caban 9

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

File Substantially Revised

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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

Gender-based distinctions "must serve important 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. *Boren*, 429 U. S. 190, 197 (1977). See also *Reed* v. *Reed*, 404 U. S. 71 (1971). Although the legislative history of § 111 is sparse,[7] in *In re Malpica-Orsini*, *supra*, the New York Court

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[illegible] Abandonment . . . as it pertains to adoption, relates to such conduct on the part of a parent as evinces a purposeful relinquishing of parental obligations and the foregoing of parental rights—a withholding of interest, presence, affection, care and support. The best interests of the child as such is not an ingredient of that conduct and is not involved in the threshold question. While promotion of the best interests of the child is essential to ultimate approval of the adoption application, such interests cannot act as a substitute for a finding of abandonment." (Citations omitted.)

[6] In *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), we considered the constitutionality of a Georgia statute similar to § 111 of the New York Domestic Relations Law. In upholding the statute as applied in that case, we specifically noted that the appellant had not presented properly a claim that the Georgia statute's gender-based distinction among unmarried parents violated the Equal Protection Clause. See 434 U. S., at 253 n. 13. Our upholding of the statute in *Quilloin*, therefore, has no bearing upon our review of the gender-based distinction of § 111.

[7] Consent of the unmarried father has never been required for adoption under New York law, although parental consent otherwise has been

of Appeals set forth in detail the state interests it believed to be promoted by § 111 of the New York Domestic Relations Law.[5] The court recognized New York's substantial interest in protecting the interests of illegitimate children, for whom adoption often is the best course. 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 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 merely withholding 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

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[5] [illegible] of New York (1961) [illegible] New York [illegible] adoption.

[6] In *Orsini* v. *Blasi*, 423 U. S. 1042 (1976), the Court dismissed an appeal from the New York Court of Appeals' decision upholding the constitutionality of § 111 against [illegible] New York [illegible] this case. This [illegible] therefore is entitled to precedential weight. See *Hicks* v. *Miranda*, 422 U. S. 332, 344 (1975). At the same time, however, it does [illegible] fully the questions presented in *Orsini* v. *Blasi* is not entitled to the same deference given a ruling after briefing, argument, and a written opinion. See *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). Insofar as our decision today is inconsistent with the dismissal in *Orsini*, we overrule our prior decision.

not adopt the mother's offspring." *Id.*, at 378. 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. Furthermore, we do not doubt 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 [legitimacy as well] prompted by a concern for the best interests of illegitimate children, ~~however,~~ [though] § 111 cannot withstand federal scrutiny under the Equal Protection Clause unless it is shown that the gender-based distinction of the statute is tailored reasonably to meet this concern. As we repeated in *Reed* v. *Reed*, *supra*, 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 circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920).

[Rider A]

We find that the [application of the] distinction in § 111 between unmarried mothers and unmarried fathers [is unconstitutional in this case, as it] does not bear 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 prevent the adoption of their illegitimate children. ~~This impediment to adoption, [illegible]~~. This impediment to adoption, however, is likely to be 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

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This [illegible] the New York Attorney General [illegible] the New York Court of Appeals' [illegible] in *In re Malpica-Orsini*, [illegible] § 111's disparate treatment of unmarried fathers. See Amicus Brief of New York Attorney General, at 16-20.

~~We emphasize, therefore, whether~~

mothers and fathers for their children. Neither the State nor the appellees have argued that unwed 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.

Rider A

The New York Court of Appeals in *Matter of Malpica-Orsini*, *supra*, suggested that requiring unmarried fathers' consent would pose a peculiarly strong impediment to 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 fathers usually are more difficult to locate and identify than unwed mothers, 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 (3).[10] 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 has abandoned the child. *See, e. g., In re Orlando F.*, 40 N. Y. 2d 103 (1976). This abandonment provision of § 111 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 home. In sum, no showing has been made that the different treatment afforded unmarried fathers and unmarried mothers under § 111 bears a substantial relationship to the proclaimed interests of the State in promoting the adoption of illegitimate children.[11]

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[10] See Comment, The Emerging Constitutional Protection of the Putative Father's Parental Rights, 70 Mich. L. Rev. 1581, 1590 (1972).

[11] ~~The New York Court of Appeals [illegible]~~

B/ Beyond the State's interest in promoting the adoption of illegitimates, appellees [further] 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 does." Tr. of Oral Arg., at 41. Accord, *Stanley* v. *Illinois*, 405 U. S. 645, 665–666 (1972) (Burger, C. J., dissenting). Thus, appellees appear to argue that the distinction of § 111 between unmarried mothers and unmarried fathers merely reflects that mothers and fathers are not "similarly situated" for purposes of the Equal Protection Clause and therefore that their different treatment does not violate the Constitution.

Whatever may be said about the differences between maternal and paternal relations, it is plain that the New York Legislature did not rely upon any such differences in drafting § 111. Section 111 draws no gender-based distinction between parents of children born in wedlock, giving each the right to prevent the adoption of the child merely by withholding consent. [illegible]

We do not suggest [illegible] § 111 [illegible] New York [illegible] adoption of [illegible] § 111 [illegible]

We do not question a state's right to do what New York has done here: provide that fathers who have abandoned their children are without any right to block adoption of those children.

and indeed encouraging,

substantial

"fathers" or "natural parents or one of them"

sent. Thus, the legislature did not view a purported difference between mothers and fathers to be sufficiently great to require recognition with respect to children born in wedlock, as well as those born without. ~~At the same time the statute provides for those cases where married parents have not taken an active interest in their children by eliminating the consent requirement under certain circumstances enumerated in the statute.~~ Neither the State nor the appellees have suggested to us any 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.[13]

Even if perceived differences between maternal and paternal relations were the basis for the gender-based distinction of § 111, the statute would not meet the requirements of equal protection, as its classification is grounded on "archaic and overbroad generalizations" concerning the family. See *Califano v. Goldfarb*, 430 U. S. 199, 211 (1977); *Stanton v. Stanton*, 421 U. S. 7, 14-15 (1975). The traditional role of the mother, centering in the home and the rearing of children, is an honored and respected one. Yet we may no longer presume

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[13] There is a difference between unmarried mothers and fathers, [illegible] paternity of children born out of wedlock. In most States, [illegible] of a child born out of wedlock is [illegible] by the [illegible] of the mother; see, e. g., *Commissioner of Public Welfare v. Koehler*, 284 N. Y. 260, 30 N. E. 2d 587 (1940); [illegible] the identity of either [illegible] or the father of such a child. The identity of the mother of a child born out of wedlock [illegible] readily ascertainable, [illegible] the father's identity often presents a difficult question. See *Lalli v. Lalli*, — U. S. —, — (1978); *Trimble v. Gordon*, 430 U. S. 762, 770 (1977). States have a legitimate interest, therefore, in providing that [illegible] must be [illegible] to the adoption of a child only [illegible] establishing that he is the father. Such is not, however, the case in the New York statutes. Although New York provides for actions in the Family Court to establish paternity, see §§ 511-571 of the New York Family Court Act, there is no [illegible] that fathers be determined by the court to be the father of a child born out of wedlock to object to the adoption of their children under § 111.

that by custom or under the constitutional guarantee of equal protection women are destined exclusively for homemaking rather than other careers in our society. ~~At least legislative classifications cannot be predicated on such a presumption.~~ See *Stanton* v. *Stanton*, *supra*, at 14–15.

Nor may we accept uncritically the generalization—underlying much of the argument in support of § 111—that mothers are closer to their children than are fathers. During infancy the mother's role is unique ~~although even then one cannot invariably assume that the father's role in the child's life is less than that of the mother~~. As children grow older generalizations concerning child-parent relations and parental responsibility become less accurate. The present case demonstrates that an unwed father may take a continuing and devoted interest in his children's well-being. There is no reason to believe that the Caban children, aged 4 and 6 at the time of their adoption, continued to have a relationship with their mother unrivaled by the affection and esteem of their father. The facts of this case illustrate the harshness of classifying fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children. Section 111 at the same time both excludes some loving fathers from full participation in the decision whether their children will be adopted and enables some alienated mothers arbitrarily to cut off the paternal rights of fathers.[15]

We conclude that this gender-based statutory distinction does not bear a substantial relationship to the State's asserted interests.[16]

[Handwritten insertion in the right margin: "Indeed, this unique relationship, combined with the difficulties attendant to identifying and locating fathers at birth, may justify some statutory distinctions between mothers and fathers of newborn infants.[19]"]

[Handwritten in the left margin: "however,"]

[Handwritten note: "14. See supra, at 10."]

[15] We certainly do not suggest that [illegible] distinctions between [illegible] [illegible] [illegible] the decisions of this Court.

[16] Appellant also challenges the constitutionality of the distinction made by § 111 between married and unmarried fathers. Appellant argues that

The judgment of the New York Court of Appeals is

*Reversed.*

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the rearing of a child is constitutionally protected from unreasonable governmental interference. See *Quilloin* v. *Walcott*, 434 U. S. 246, 255 (1978); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 652 (1975); *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944). It is argued that in drawing a statutory distinction with respect to who will be permitted to raise a child, the State must act only from the necessity born of a compelling interest, as it deals with fundamental rights. See, *e. g.*, *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 253-254 (1974); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). As we have resolved that the sex-based distinction of § 111 violates the Equal Protection Clause, we express no view concerning the constitutionality of the distinction under New York law between married fathers and unmarried fathers.

Appellant also argues that he was denied substantive due process when the New York courts terminated his parental rights without first finding him to be unfit to be a parent. See *Stanley* v. *Illinois*, 405 U. S. 645 (1972) (*semble*). Again, because we have ruled that the New York statute is unconstitutional under the Equal Protection Clause, we express no view on whether a State is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit.

Cabannote 2

lfp/ss 1/4/79 <u>Footnote (Caban)</u>

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 does". 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.

Caban 3

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

Add at some appropriate place a note substantially as follows:

I would add this

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 JAN. 12, 1979, p. 8]

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.

Dad – may I see you.

File copy
do not remove

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

1,5-13

From: Mr. Justice Powell

Circulated: ____________

Recirculated: 12 JAN 1979

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant, v. Kazim 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, 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 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 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 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.

In December of 1973, Mohammed took the two children 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 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. Caban, 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 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, Nina, 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 Cabans cross-petitioned for adoption.

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[1] Section 110 of the New York Domestic Relations Law, provides in part that:

"[A]n adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an

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.[4] 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 foreclosed from adopting David and Denise, as

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adult or minor husband or an adult or minor wife may adopt such a child of the other spouse."

Although a natural mother in New York has many parental rights without adopting her child, New York courts have held that § 110 provides for the adoption of an illegitimate child by his mother. See *In re Anonymous Adoption*, 177 Misc. 683, 31 N. Y. S. 2d 595 (App. Div. 1941).

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

"[a]fter the making of an order of adoption the 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."

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

"[w]hen a natural or adoptive parent, having lawful custody of a child, marries or remarries and consents that the stepfather or stepmother may adopt such child, such consent shall not relieve the parent so consenting of any parental duty toward such child nor shall such consent or the order of adoption affect the rights of such consenting spouse and such adoptive child to inherit from and through each other and the natural and adopted kindred of such consenting spouse."

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

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-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 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 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.[3]

## II

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

> "consent to adoption shall be required as follows: . . . (3) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock; [and] (4) Of the

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[3] As the appellant was given due notice and was permitted to participate as a party in the adoption proceedings, he does not contend that he was denied the procedural due process held to be requisite in *Stanley* v. *Illinois*, 405 U. S. 645 (1972).

> 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 incompetent to care for the child.[4] Absent one of

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[4] 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:

"1. Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

"2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

"3. Of the mother, whether adult or infant, of a child born out of wedlock;

"4. Of any person or authorized agency having lawful custody of the adoptive child.

"The consent shall not be required of a parent who has abandoned the child or who has 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 guardian 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 insane 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 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 manner as the judge or surrogate may direct and an opportunity to be heard 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 child. 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.

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

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 § 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 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

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sents specified in subdivisions two and three of this section shall not be required, and the judge 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."

interests of the child.[7] 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 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 their best interests. Accordingly, it is clear that § 111 treats unmarried parents differently according to their sex.

III

Gender-based distinctions "must serve important 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. *Boren*, 429 U. S. 190, 197 (1976). 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 unmarried fathers bears a substantial relation to some important state interest. Appellees assert that the distinction is justified

[7] See *In re Corey L.* v. *Martin L.*, 45 N. Y. 2d 383, 391, 380 N. E. 2d 266, 270 (1978):

"Absent consent, the first focus here was on the issue of abandonment since neither decisional rule nor statute can bring the relationship to an end because someone else might rear the child in a more satisfactory fashion. . . . Abandonment, as it pertains to adoption, relates to such conduct on the part of a parent as evinces a purposeful ridding of parental obligations and the foregoing of parental rights—a withholding of interest, presence, affection, care and support. The best interests of the child, as such, is not an ingredient of that conduct and is not involved in the threshold question. While promotion of the best interests of the child is essential to ultimate approval of the adoption application, such interests cannot act as a substitute for a finding of abandonment." (Authorities omitted.)

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 underlying § 111, maternal and paternal roles are not invariably different in importance. Although unwed mothers as a class undoubtedly are closer to their newborn infants than are unwed fathers, as children grow older, this generalization concerning parent-child relations becomes less acceptable as a basis for legislative distinctions. The present case demonstrates that an unwed father may 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 participated in the care and support of their children.[7] 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 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.

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[7] In rejecting an unmarried father's constitutional claim in *Quilloin v. Walcott*, 434 U. S. 246 (1978), we emphasized the importance of the appellant's failure to act as a father toward his children, noting that he

"... 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." *Id.*, at 256.

In *Quilloin* we expressly reserved the question whether the Georgia statute similar to § 111 of the New York Domestic Relations Law unconstitutionally distinguished between parents according to their gender, as the claim was not properly presented. See 434 U. S., at 253 n. 13.

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,[9] in *In re Malpica-Orsini*, *supra*, 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.[10] 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 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

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[9] Consent of the unmarried father has never been required for adoption under New York law, although parental consent otherwise has been required at least since the late 19th century. *See, e. g.*, Laws of the State of New York, 119th Session, 1896, ch. 272. There are no legislative reports setting forth the reasons why the New York legislature excepted unmarried fathers from the general requirement of parental consent for adoption.

[10] In *Orsini v. Blasi*, *supra*, the Court dismissed an appeal from the New York Court of Appeals challenging the constitutionality of § 111 as applied to an unmarried father whose child had been ordered adopted by a New York Surrogate. In dismissing the appeal, we indicated that a substantial federal question was lacking. This was a ruling on the merits, and therefore is entitled to precedential weight. *See Hicks v. Miranda*, 422 U. S. 332, 344 (1975). At the same time, however, our decision not to review fully the questions presented in *Orsini v. Blasi* is not entitled to the same deference given a ruling after briefing, argument, and a written opinion. *See Edelman v. Jordan*, 415 U. S. 651, 671 (1974). Insofar as our decision today is inconsistent with our dismissal in *Orsini*, we overrule our prior decision.

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.*, 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.[7]

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 scrutiny under the Equal Protection Clause unless it is shown that the gender-based distinction of the statute is structured reasonably to meet this concern. As we repeated in *Reed* v. *Reed*, *supra*, at 76, a statutory "classification 'must be reasonable, not arbitrary, and must rest upon 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 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 homes for its illegitimate children. It may be that, given the opportunity, some unwed fathers would

[7] In his brief as amicus curiae, the New York Attorney General relies on the New York Court of Appeals' exposition in *In re Malpica-Orsini* of the interests promoted by § 111's different treatment of unmarried fathers. See *Amicus* Brief of New York Attorney General, at 16-20.

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. Neither the State nor the appellees have argued that unwed 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 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 unwed 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 unwed fathers at birth would justify a legislative distinction between mothers and fathers of new borns.[10] 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 cases can be protected by means that do not draw such an inflexible gender-based distinction as that made in § 111.[11] 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

[10] Because the question is not before us, we express no view whether the special relationship between mothers and their newborn children, and the singular difficulties in locating unwed fathers at birth, would justify a statute drawn more narrowly than § 111 addressed particularly to newborn adoptions.

[11] See Comment, The Emerging Constitutional Protection of the Putative Father's Parental Rights, 70 Mich. L. Rev. 1581, 1590 (1972).

parent whose consent otherwise would be required never has come forward or has abandoned 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,[15] there should be no difficulty in the State's identifying the father even of children born out of wedlock.[16] Thus, no showing has been made that the different treatment afforded

[14] If the New York Court of Appeals is correct that unmarried fathers often desert their families (a view we need not question), then allowing those fathers who remain with their families a right to object to the termination of their parental rights will pose little threat to the State's ability to order adoption in most cases. For we do not question a State's right to do what New York has done in this portion of § 111: provide that fathers who have abandoned their children have no right to block adoption of those children.

We do not suggest, of course, that the provision of § 111 making parental consent unnecessary in cases of abandonment is the only constitutional mechanism available to New York for the protection of its interest in allowing the adoption of illegitimate children when their natural fathers are not available to be consulted. In reviewing the constitutionality of statutory classifications, "it is not the function of a court 'to hypothesize independently on the desirability or feasibility of any possible alternative[s]' to the statutory scheme formulated by [the State]." *Lalli* v. *Lalli*, — U. S. —, — (1978) (quoting *Mathews* v. *Lucas*, 427 U. S. 495, 515 (1976)). We note some alternatives to the gender-based distinction of § 111 only to emphasize that the state interests asserted in support of the statutory classification could be protected through numerous other mechanisms more closely attuned to those interests.

[15] In *Quilloin* v. *Walcott*, *supra*, we noted the importance in cases of this kind of the relationship that in fact exists between the parent and child.

[16] States have a legitimate interest, of course, in providing that an unmarried father's right to object to the adoption of a child will be conditioned upon his showing that it is in fact his child. Cf. *Lalli* v. *Lalli*, — U. S. —, — (1978). Such is not, however, the import of the New York statute here. Although New York provides for actions in its Family Courts to establish paternity, see §§ 511 to 571 of the New York Judiciary Court Acts, there is no provision allowing men who have been determined by the court to be the father of a child born out of wedlock to object to the adoption of their children under § 111.

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 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 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 entitled than mothers to exercise a concerned judgment as to the fate 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, 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 where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests.[15]

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[15] Appellant also challenges the constitutionality of the distinction made in § 111 between married and unmarried fathers. Appellant urges that the raising of a child is an activity constitutionally protected from unreasonable governmental interference. See *Quilloin* v. *Walcott*, 434 U. S. 246, 255 (1978); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 652 (1975); *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944). In drawing statutory distinctions with respect to who will be permitted to raise a child, therefore, the State must act only from a necessity born of a compelling interest, as it must do with fundamental rights. See, *e. g.*, *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 253–254 (1974); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). As we have resolved that the sex-based distinction of § 111 violates the Equal Protection Clause, we express no view concerning the constitutionality of the distinction under New York law between married fathers and unmarried fathers.

Finally, appellant argues that he was denied substantive due process when the New York courts terminated his parental rights without first

The judgment of the New York Court of Appeals is

*Reversed.*

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finding him to be unfit to be a parent. See *Stanley* v. *Illinois*, 405 U. S. 645 (1972) (unwed father). 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.

David - I think this is ready to go. Unless you have some substantial changes to suggest, I'd circulate this & make minor editing changes later.

L.F.P. Reviewed

1, 4, 7-14

Minor editing changes to be made in 3rd Draft

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12

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant,
v.
Kazim 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, 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 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 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 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.

In December of 1973, Mohammed took the two children 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 when they came to visit their grandmother.

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

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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 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.[7]

II

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

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[7] As the appellant was given due notice and was permitted to participate as a party in the adoption proceedings, he does not contend that he was denied the procedural due process held to be requisite in *Stanley* v. *Illinois*, 405 U. S. 645 (1972).

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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.[4] Absent one of

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[4] 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:

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"4. Of any person or authorized agency having lawful custody of the adoptive child.

"The consent shall not be required of a parent who has abandoned the child or who has 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 guardian 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 insane 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 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 manner as the judge or surrogate may direct and an opportunity to be heard 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 child. 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.

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

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 § 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 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

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sents specified in subdivisions two and three of this section shall not be required, and the judge 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."

interests of the child.[6] 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 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 their best interests. Accordingly, it is clear that § 111 treats unmarried parents differently according to their sex.

III

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. *Boren*, 429 U. S. 190, 197 (1976). 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 unmarried fathers bears a substantial relation to some important state interest. Appellees assert that the distinction is justified

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[6] See *In re Corey L.* v. *Martin L.*, 45 N. Y. 2d 383, 391, 380 N. E. 2d 266, 270 (1978):

"Absent consent, the first focus here was on the issue of abandonment since neither decisional rule nor statute can bring the relationship to an end because someone else might rear the child in a more satisfactory fashion. . . . Abandonment, as it pertains to adoption, refers to such conduct on the part of a parent as evinces a purposeful ridding of parental obligations and the foregoing of parental rights—a withholding of interest, presence, affection, care and support. The best interests of the child, as such, is not an ingredient of that conduct and is not involved in this threshold question. While promotion of the best interests of the child is essential to ultimate approval of the adoption application, such interests cannot act as a substitute for a finding of abandonment." (Authorities omitted.)

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 underlying § 111, maternal and paternal roles are not invariably different in importance. Although unwed mothers as a class undoubtedly are closer to their newborn infants than are unwed fathers, as children grow older, this generalization concerning parent-child relations becomes less acceptable as a basis for legislative distinctions. The present case demonstrates that an unwed father may 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 participated in the care and support of their children.[7] 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 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.

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[7] In rejecting an unmarried father's constitutional claim in *Quilloin v. Walcott*, 434 U. S. 246 (1978), we emphasized the importance of the appellant's failure to act as a father toward his children, noting that he

"... 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." *Id.*, at 256.

In *Quilloin* we expressly reserved the question whether the Georgia statute similar to § 111 of the New York Domestic Relations Law unconstitutionally distinguished unwed parents according to their gender, as the claim was not properly presented. See 434 U. S., at 253 n. 13.

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 Malpica-Orsini*, *supra*, 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.[7] 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 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

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[7] Consent of the unmarried father has never been required for adoption under New York law, although parental consent otherwise has been required at least since the late 19th century. See, *e. g.*, Laws of the State of New York, 110th Session 1, 1896, ch. 272. There are no legislative reports setting forth the reasons why the New York Legislature excepted unmarried fathers from the general requirement of parental consent for adoption.

[8] In *Orsini* v. *Blasi*, *supra*, the Court dismissed an appeal from the New York Court of Appeals challenging the constitutionality of § 111 as applied to an unmarried father whose child had been ordered adopted by a New York Surrogate. In dismissing the appeal, we indicated that a substantial federal question was lacking. This was a ruling on the merits, and therefore is entitled to precedential weight. See *Hicks* v. *Miranda*, 422 U. S. 332, 344 (1975). At the same time, however, our decision not to review fully the questions presented in *Orsini* v. *Blasi* is not entitled to the same deference given a ruling after briefing, argument, and a written opinion. See *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). Insofar as our decision today is inconsistent with our dismissal in *Orsini*, we overrule our prior decision.

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.*, 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.[4]

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 scrutiny under the Equal Protection Clause unless it is shown that the gender-based distinction of the statute is structured reasonably to meet this concern. As we repeated in *Reed* v. *Reed*, *supra*, 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 circumstanced shall be treated alike.' *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 homes for its illegitimate children. It may be that, given the opportunity, some unwed fathers would

[4] In his brief as *amicus curiae*, the New York Attorney General echoes the New York Court of Appeals' exposition *In re Malpica-Orsini* of the interests promoted by § 111's different treatment of unmarried fathers. See *Amicus* Brief of New York Attorney General, at 19–20.

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. Neither the State nor the appellees have argued that unwed 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 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 unwed 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 unwed fathers at birth would justify a legislative distinction between mothers and fathers of new borns.[11] 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 cases can be protected by means that do not draw such an inflexible gender-based distinction as that made 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

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[11] Because the question is not before us, we express no view whether the special relationship between mothers and their newborn children, and the singular difficulties in locating unwed fathers at birth, would justify a statute drawn more narrowly than § 111, addressed particularly to newborn adoptions.

[12] See Comment, The Emerging Constitutional Protection of the Putative Father's Parental Rights, 70 Mich. L. Rev. 1581, 1590 (1972).

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parent whose consent otherwise would be required never has come forward or has abandoned the child.[13] 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 has ~~is willing to~~ admitted his paternity,[14] ~~there should be no difficulty in the State's~~ identifying the father even of children born out of wedlock.[15] Thus, no showing has been made that the different treatment afforded

[13] If the New York Court of Appeals is correct that unmarried fathers often desert their families (a view we need not question), then allowing those fathers who remain with their families a right to object to the termination of their parental rights will pose little threat to the State's ability to order adoption in most cases. For we do not question a State's right to do what New York has done in this portion of § 111: provide that fathers who have abandoned their children have no right to block adoption of those children.

We do not suggest, of course, that the provision of § 111 making parental consent unnecessary in cases of abandonment is the only constitutional mechanism available to New York for the protection of its interest in allowing the adoption of illegitimate children when their natural fathers are not available to be consulted. In reviewing the constitutionality of statutory classifications, "it is not the function of a court 'to hypothesize independently on the desirability or feasibility of any possible alternative[s]' to the statutory scheme formulated by [the State]." *Lalli v. Lalli*, — U. S. —, — (1978), quoting *Mathews v. Lucas*, 427 U. S. 495, 515 (1976). We note some alternatives to the gender-based distinction of § 111 only to emphasize that the state interests asserted in support of the statutory classification could be protected through numerous other mechanisms more closely attuned to those interests.

[14] In *Quilloin v. Walcott*, *supra*, we noted the importance in cases of this kind of the relationship that in fact exists between the parent and child.

[15] States have a legitimate interest, of course, in providing that an unmarried father's right to object to the adoption of a child will be conditioned upon his showing that it is in fact his child. *Cf. Lalli v. Lalli*, — U. S. —, — (1978). Such is not, however, the import of the New York statute here. Although New York provides for actions in its Family Courts to establish paternity, see §§ 511 to 571 of the New York Judiciary Court Acts, there is no provision allowing men who have been determined by the court to be the father of a child born out of wedlock to object to the adoption of their children under § 111.

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 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 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 entitled than mothers to exercise a concerned judgment as to the fate 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, 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 where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests.[15]

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[15] Appellant also challenges the constitutionality of the distinction made in § 111 between married and unmarried fathers. Appellant urges that the raising of a child is an activity constitutionally protected from unreasonable governmental interference. *See Quilloin* v. *Walcott*, 434 U. S. 246, 255 (1978); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 652 (1975); *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944). In drawing statutory distinctions with respect to who will be permitted to raise a child, therefore, the State must act only from a necessary basis of a compelling interest, as it deals with fundamental rights. *See, e. g., Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 253–254 (1974); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). As we have resolved that the sex-based distinction of § 111 violates the Equal Protection Clause, we express no view concerning the constitutionality of the distinction under New York law between married fathers and unmarried fathers.

Finally, appellant argues that he was denied substantive due process when the New York courts terminated his parental rights without first

The judgment of the New York Court of Appeals is

*Reversed.*

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finding him to be unfit to be a parent. See *Stanley* v. *Illinois*, 405 U. S. 645 (1972) (dictum). 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.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

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No. 77-6431

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"4. Of any person or authorized agency having lawful custody of the adoptive child.

"The consent shall not be required of a parent who has abandoned the child or who has 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 guardian 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 insane 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 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 manner as the judge or surrogate may direct and an opportunity to be heard 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 child. 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.

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

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 § 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 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

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sents specified in subdivisions two and three of this section shall not be required, and the judge 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."

interests of the child.[5] 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 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 their best interests. Accordingly, it is clear that § 111 treats unmarried parents differently according to their sex.

III

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. *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 unmarried fathers bears a substantial relation to some important state interest. Appellees assert that the distinction is justified

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[5] See *In re Corey L.* v. *Martin L.*, 45 N. Y. 2d 383, 391, 380 N. E. 2d 266, 270 (1978).

[6] "Absent consent, the first focus here was on the issue of abandonment since neither decisional rule nor statute can bring the relationship to an end because someone else might rear the child in a more satisfactory fashion. . . . Abandonment, as it pertains to adoption, relates to such conduct on the part of a parent as evinces a purposeful relinquishment of parental obligations and the foregoing of parental rights—a withholding of interest, presence, affection, care and support. The best interests of the child as such is not an ingredient of that conduct and is not involved in the threshold question. While promotion of the best interests of the child is essential to ultimate approval of the adoption application, such interests cannot act as a substitute for a finding of abandonment." (Authorities omitted.)

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 underlying § 111, maternal and paternal roles are not invariably different in importance. Even if unwed mothers as a class were closer than unwed fathers to their newborn 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 unwed father may 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 participated in the care and support of their children.[7] 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 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.

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[7] In rejecting an unmarried father's constitutional claim in *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), we emphasized the importance of the appellant's failure to act as a father toward his children, noting that he

"... 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." *Id.*, at 256.

In *Quilloin* we expressly reserved the question whether the Georgia statute similar to § 111 of the New York Domestic Relations Law unconstitutionally distinguished unwed parents according to their gender, as the claim was not properly presented. See 434 U. S., at 253 n. 13.

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,[7] in *In re Malpica-Orsini*, *supra*, 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.[8] 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 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

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[7] Consent of the unmarried father has never been required for adoption under New York law, although parental consent otherwise has been required at least since the late 19th century. *See, e. g.*, Laws of the State of New York, 119th Session, 1, 1896, ch. 272. There are no legislative reports setting forth the reasons why the New York Legislature excepted unmarried fathers from the general requirement of parental consent for adoption.

[8] In *Orsini* v. *Blasi*, *supra*, the Court dismissed an appeal from the New York Court of Appeals challenging the constitutionality of § 111 as applied to an unmarried father whose child had been ordered adopted by a New York Surrogate. In dismissing the appeal, we indicated that a substantial federal question was lacking. This was a ruling on the merits, and therefore is entitled to precedential weight. *See Hicks* v. *Miranda*, 422 U. S. 332, 344 (1975). At the same time, however, our decision not to review fully the questions presented in *Orsini* v. *Blasi* is not entitled to the same deference given a ruling after briefing, argument, and a written opinion. *See Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). Insofar as our decision today is inconsistent with our dismissal in *Orsini*, we overrule our prior decision.

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.*, 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.[9]

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 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 it must be shown that the distinction is structured reasonably to further these ends. As we repeated in *Reed* v. *Reed*, *supra*, at 76, such a statutory "classification 'must be reasonable, not arbitrary, and must rest upon 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 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 homes for its illegitimate children. It may

[9] In his brief as *amicus curiae*, the New York Attorney General echoes the New York Court of Appeals' exposition in *In re Malpica-Orsini* of the interests promoted by § 111's different treatment of unmarried fathers. *See* Amicus Brief of New York Attorney General, at 16–20.

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. Neither the State nor the appellees have argued that unwed 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 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 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 fathers at birth would justify a legislative distinction between mothers and fathers of newborns,[10] these 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 in § 111.[11] 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 abandoned

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[10] Because the question is not before us, we express no view whether such difficulties would justify a statute addressed particularly to newborn adoptions, setting forth more stringent requirements concerning the acknowledgment of paternity or a stricter definition of abandonment.

[11] See Comment, The Emerging Constitutional Protection of the Putative Father's Parental Rights, 70 Mich. L. Rev. 1581, 1590 (1972).

the child.[22] 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,[23] there should be no difficulty in the State's identifying the father even of children born out of wedlock.[24] Thus, no showing has been made that the different treatment afforded unmarried fathers and unmarried mothers under § 111 bears a substantial relationship to the

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[22] If the New York Court of Appeals is correct that unmarried fathers often desert their families (a view we need not question), then allowing those fathers who remain with their families a right to object to the termination of their parental rights will pose little threat to the State's ability to order adoption in most cases. For we do not question a State's right to do what New York has done in this portion of § 111: provide that fathers who have abandoned their children have no right to block adoption of those children.

We do not suggest, of course, that the provision of § 111 making parental consent unnecessary in cases of abandonment is the only constitutional mechanism available to New York for the protection of its interest in allowing the adoption of illegitimate children when their natural fathers are not available to be consulted. In reviewing the constitutionality of statutory classifications, "it is not the function of a court 'to hypothesize independently on the desirability or feasibility of any possible alternative[s]' to the statutory scheme formulated by [the State].'" *Lalli* v. *Lalli*, — U. S. —, — (1978) (quoting *Mathews* v. *Lucas*, 427 U. S. 495, 515 (1976)). We note some alternatives to the gender-based distinction of § 111 only to emphasize that the state interests asserted in support of the statutory classification could be protected through numerous other mechanisms more closely attuned to those interests.

[23] In *Quilloin* v. *Walcott*, *supra*, we noted the importance in cases of this kind of the relationship that in fact exists between the parent and child.

[24] States have a legitimate interest, of course, in providing that an unmarried father's right to object to the adoption of a child will be conditioned upon his showing that it is in fact his child. Cf. *Lalli* v. *Lalli*, — U. S. —, — (1978). Such is not, however, the import of the New York statute here. Although New York provides for actions in its Family Courts to establish paternity, see §§ 511 to 571 of the New York Family Court Act, there is no provision allowing men who have been determined by the court to be the father of a child born out of wedlock to object to the adoption of their children under § 111.

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 *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 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 entitled than mothers to exercise a concerned judgment as to the fate 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, 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 where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests.[12]

The judgment of the New York Court of Appeals is

*Reversed.*

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[12] Appellant also challenges the constitutionality of the distinction made in § 111 between married and unmarried fathers. As we have concluded that the sex-based distinction of § 111 violates the Equal Protection Clause, we need express no view as to the validity of this additional classification.

Finally, appellant argues that he was denied substantive due process when the New York courts terminated his parental rights without first finding him to be unfit to be a parent. See *Stanley* v. *Illinois*, 405 U. S. 645 (1972) (*dicta*). Because we have ruled that the New York statute is unconstitutional under the Equal Protection Clause, we similarly express no view as to whether a State is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit.

OMISSION

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

CHAMBERS OF
THE CHIEF JUSTICE

January 18, 1979

Re: 77-6431 - Caban v. Mohammed

Dear Potter:

I take it John's memo will bear on Caban 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.

Regards,

Mr. Justice Stewart

Copies to the Conference

Outcome depends on Harry's vote. He says he is undecided.

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 18, 1979

Memorandum to the Conference

Re: 77-6431 - Caban v. Mohammed

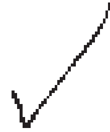
78-3 - Parham v. Hughes

As indicated at our conference yesterday, I have vacillated a great deal in the Caban 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
Washington, D. C. 20543



CHAMBERS OF
JUSTICE THURGOOD MARSHALL

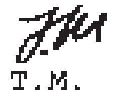
January 22, 1979

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

Dear Lewis:

Please join me.

Sincerely,


T.M.

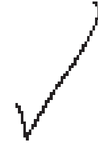
Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR

January 22, 1979



RE: No. 77-6431 Caban v. Mohammed

Dear Lewis:

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

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 29, 1979

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

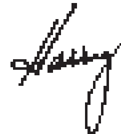
Dear Lewis:

Please join me.

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 Quilloin "manifested a paternal interest," albeit a tardy one.

Sincerely,



Mr. Justice Powell

cc: The Conference

1/2/79

4th DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 77-6431

| | |
|---|---|
| Abdiel Caban, Appellant, v. Kazim 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, 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 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 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 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.

In December of 1973, Mohammed took the two children 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 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. Caban, 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 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, Nina, 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 Cabans cross-petitioned for adoption.

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[1] Section 110 of the New York Domestic Relations Law provides in part that,

"[a]n adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an

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.[3] 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 foreclosed from adopting David and Denise, as

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adult or minor husband or an adult or minor wife may adopt such a child of the other spouse."

Although a natural mother in New York has many parental rights without adopting her child, New York courts have held that § 110 provides for the adoption of an illegitimate child by his mother. See *In re Anonymous Adoption*, 177 Misc. 683, 31 N. Y. S. 2d 595 (App. Div. 1941).

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

"[a]fter the making of an order of adoption the 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."

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

"[w]hen a natural or adoptive parent, having lawful custody of a child, marries or remarries and consents that the stepfather or stepmother may adopt such child, such consent shall not relieve the parent so consenting of any parental duty toward such child nor shall such consent or the order of adoption affect the rights of such consenting spouse and such adoptive child to inherit from and through each other and the natural and adopted kindred of such consenting spouse."

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

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-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 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 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.[3]

## II

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

[3] As the appellant was given due notice and was permitted to participate as a party in the adoption proceedings, he does not contend that he was denied the procedural due process held to be requisite in *Stanley* v. *Illinois*, 405 U. S. 645 (1972).

> 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 incompetent to care for the child.[4] Absent one of

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[4] 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:

"1. Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

"2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

"3. Of the mother, whether adult or infant, of a child born out of wedlock;

"4. Of any person or authorized agency having lawful custody of the adoptive child.

"The consent shall not be required of a parent who has abandoned the child or who has 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 guardian 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 insane 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 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 manner as the judge or surrogate may direct and an opportunity to be heard 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 child. 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.

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

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 § 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 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

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sents specified in subdivisions two and three of this section shall not be required, and the judge 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."

interests of the child.[9] 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 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 unmarried parents differently according to their sex.

## III

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. *Boren*, 429 U. S. 190, 197 (1976). 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 unmarried fathers bears a substantial relation to some important state interest. Appellees assert that the distinction is justified

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[9] *See In re Corey L.* v. *Martin L.*, 45 N. Y. 2d 383, 391, 380 N. E. 2d 266, 270 (1978):

"Absent consent, the first focus here was on the issue of abandonment since neither decisional rule nor statute can bring the relationship to an end because someone else might rear the child in a more satisfactory fashion. . . . Abandonment, as it pertains to adoption, relates to such conduct on the part of a parent as evinces a purposeful relinquishing of parental obligations and the foregoing of parental rights—a withholding of interest, presence, affection, care and support. The best interests of the child, as such, is not an ingredient of that conduct and is not involved in this threshold question. While promotion of the best interests of the child is essential to ultimate approval of the adoption application, such interests cannot act as a substitute for a finding of abandonment." (Authorities omitted.)

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 underlying § 111, maternal and paternal roles are not invariably different in importance. Even if unwed mothers as a class were closer than unwed fathers to their newborn 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 unwed father may 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 participated in the care and support of their children.[7] 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 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.

[7] In rejecting an unmarried father's constitutional claim in *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), we emphasized the importance of the appellant's failure to act as a father toward his children, noting that he,

"... 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." *Id.*, at 256.

In *Quilloin* we expressly reserved the question whether the Georgia statute similar to § 111 of the New York Domestic Relations Law unconstitutionally distinguished unwed parents according to their gender, as the claim was not properly presented. See 434 U. S., at 253 n. 13.

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,[7] in *In re Malpica-Orsini*, *supra*, 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.[8] 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 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

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[7] Consent of the unmarried father has never been required for adoption under New York law, although parental consent otherwise has been required at least since the late 19th century. See, *e. g.*, Laws of the State of New York, 119th Session I, 1896, ch. 272. There are no legislative reports setting forth the reasons why the New York Legislature excepted unmarried fathers from the general requirement of parental consent for adoption.

[8] In *Orsini* v. *Blasi*, *supra*, the Court dismissed an appeal from the New York Court of Appeals challenging the constitutionality of § 111 as applied to an unmarried father whose child had been ordered adopted by a New York Surrogate. In dismissing the appeal, we indicated that a substantial federal question was lacking. This was a ruling on the merits, and therefore is entitled to precedential weight. See *Hicks* v. *Miranda*, 422 U. S. 332, 344 (1975). At the same time, however, our decision not to review fully the questions presented in *Orsini* v. *Blasi* is not entitled to the same deference given a ruling after briefing, argument, and a written opinion. See *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). Insofar as our decision today is inconsistent with our dismissal in *Orsini*, we overrule our prior decision.

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.*, 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.[9]

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 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 it must be shown that the distinction is structured reasonably to further these ends. As we repeated in *Reed* v. *Reed*, *supra*, at 76, 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 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 homes for its illegitimate children. It may

[9] In his brief as amicus curiae, the New York Attorney General echoes the New York Court of Appeals' exposition *In re Malpica-Orsini* of the interests promoted by § 111's different treatment of unmarried fathers. See Amicus Brief of New York Attorney General, at 16-20.

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. Neither the State nor the appellees have argued that unwed 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 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 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 fathers at birth would justify a legislative distinction between mothers and fathers of newborns,[10] these 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 in § 111.[11] 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 abandoned

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[10] Because the question is not before us, we express no view whether such difficulties would justify a statute addressed particularly to newborn adoptions, setting forth more stringent requirements concerning the acknowledgment of paternity or a stricter definition of abandonment.

[11] See Comment, The Emerging Constitutional Protection of the Putative Father's Parental Rights, 70 Mich. L. Rev. 1581, 1590 (1972).

the child.[13] 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 has admitted his paternity,[14] a State should have no difficulty in identifying the father even of children born out of wedlock.[15] Thus, no showing has been made that the different treatment afforded unmarried fathers and unmarried

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[13] If the New York Court of Appeals is correct that unmarried fathers often desert their families (a view we need not question), then allowing those fathers who remain with their families a right to object to the termination of their parental rights will pose little threat to the State's ability to order adoption in most cases. For we do not question a State's right to do what New York has done in this portion of § 111: provide that fathers who have abandoned their children have no right to block adoption of those children.

We do not suggest, of course, that the provision of § 111 making parental consent unnecessary in cases of abandonment is the only constitutional mechanism available to New York for the protection of its interest in allowing the adoption of illegitimate children when their natural fathers are not available to be consulted. In reviewing the constitutionality of statutory classifications, "it is not the function of a court 'to hypothesize independently on the desirability or feasibility of any possible alternative[s]' to the statutory scheme formulated by [the State]." *Lalli* v. *Lalli*, — U. S. —, — (1978) (quoting *Mathews* v. *Lucas*, 427 U. S. 495, 515 (1976)). We note some alternatives to the gender-based distinction of § 111 only to emphasize that the state interests asserted in support of the statutory classification could be protected through numerous other mechanisms more closely attuned to those interests.

[14] In *Quilloin* v. *Walcott*, *supra*, we noted the importance in cases of this kind of the relationship that in fact exists between the parent and child. See n. 8, *supra*.

[15] States have a legitimate interest, of course, in providing that an unmarried father's right to object to the adoption of a child will be conditioned upon his showing that it is in fact his child. Cf. *Lalli* v. *Lalli*, — U. S. —, — (1978). Such is not, however, the import of the New York statute here. Although New York provides for actions in its Family Courts to establish paternity, see §§ 511 to 571 of the New York Judiciary Court Act, there is no provision allowing men who have been determined by the court to be the father of a child born out of wedlock to object to the adoption of their children under § 111.

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 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 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 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 111 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 where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests.[13]

The judgment of the New York Court of Appeals is

*Reversed.*

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[13] Appellant also challenges the constitutionality of the distinction made in § 111 between married and unmarried fathers. As we have resolved that the sex-based distinction of § 111 violates the Equal Protection Clause, we need express no view as to the validity of this additional classification.

Finally, appellant argues that he was denied substantive due process when the New York courts terminated his parental rights without first finding him to be unfit to be a parent. See *Stanley* v. *Illinois*, 405 U. S. 645 (1972) (*Stanley*). Because we have ruled that the New York statute is unconstitutional under the Equal Protection Clause, we similarly express no view as to whether a State is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

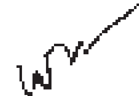
March 2, 1979

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

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

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Pp. 1, 4, 9

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant,
v.
Kazim Mohammed and
Maria Mohammed.

On Appeal from the Court of Appeals of New York.

[March —, 1979]

MR. JUSTICE STEVENS, with whom MR. JUSTICE REHNQUIST joins, dissenting.

Under § 111 (1)(c) of the New York Domestic Relations Law, the adoption of a child born out of wedlock usually requires the consent of the natural mother; it never requires that of the natural father. Appellant, the natural father of two school-aged children born out of wedlock,[1] challenges that provision insofar as it allows the adoption of his natural children by the husband of the natural mother without his consent. Appellant's primary objection is that this nonconsensual 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. Secondarily, he attacks § 111 (1)(c)'s disparate treatment of natural mothers and natural fathers as a violation of the Equal Protection Clause of the same Amendment. In view of the Court's disposition, I shall discuss the equal protection question before commenting on appellant's primary contention. I shall then indicate why I think the holding of the Court, although erroneous, is of limited effect.

I

This case concerns the validity of rules affecting the status of the thousands of children who are born out of wedlock

[1] The children are presently aged seven and eight years old. At the time of the hearing before the Surrogate Court, they were five and six.

every day.[1] All of these children have an interest in acquiring the status of legitimacy; a great many of them have an interest in being adopted by parents who can give them opportunities that would otherwise be denied; for some the basic necessities of life are at stake. The state interest in facilitating adoption in appropriate cases is strong—perhaps even "compelling."[2]

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

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[1] Illegitimate births accounted for an estimated 14.2% and 15.5% of all births in the United States during the years 1976 and 1977, respectively. See National Center for Health Statistics of the Department of Health, Education, and Welfare, Monthly Vital Statistics Report, February 5, 1979, at 19; *id.*, March 29, 1978, at 17. In total births, this represents 468,100 and 515,700 illegitimate births, respectively. Although statistics for New York State are not available, the problem of illegitimacy appears to be especially severe in urban areas. For example, in 1975, over 50% of all births in the District of Columbia were out of wedlock. National Center for Health Statistics of the Department of Health, Education and Welfare, 1 Vital Statistics of the United States (Natality), 1975, at 50.

Adoption is an important solution to the problem of illegitimacy. Thus, about 70% of the adoptions in the 34 States reporting to HEW in 1975 were of children born out of wedlock. The figure for New York State was 78%. National Center for Social Statistics of the Department of Health, Education, and Welfare, Adoptions in 1975, at 11 (hereinafter Adoptions in 1975).

[2] The reason I say "perhaps" is that the word "compelling" can be understood in different ways. If it describes an interest that "compels" a conclusion that any statute intended to foster that interest is automatically constitutional, few if any interests would fit that description. On the other hand, if it merely describes an interest that compels a court, before holding a law unconstitutional, to give thoughtful attention to a legislative judgment that the law will serve that interest, then the State's interest in facilitating adoption in appropriate cases is unquestionably compelling. See *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 844 and n. 51; *id.*, at 862-863 (Stewart, J., concurring in judgment); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175; *Stanley* v. *Illinois*, 405 U. S. 645, 652; *Matter of Malpica-Orsini*, 36 N. Y. 2d 568, 571-574.

Because it draws this gender-based[4] distinction between two classes of citizens 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.[5] That determination requires more than merely recognizing that society has traditionally treated the two classes differently.[6] But it also requires analysis that goes beyond a merely reflexive rejection of gender-based distinctions.

Men and women are different, and the difference is relevant to the question whether the mother may be given the exclusive right to consent to the adoption of a child born out of wedlock. Because most adoptions involve newborn infants or very young children[7] it is appropriate at the outset to focus on the significance of the difference in such cases.

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[4] Although not all men are included in the disadvantaged class, since under § 111 (1)(c) married fathers are given consent rights, it is nonetheless true that but for their gender the members of that class would not be disadvantaged. Hence it is not possible to avoid the conclusion that the classification here is one based on gender. See *City of Los Angeles* v. *Manhart*, — U. S. —, — n. —.

[5] Section 111 treats illegitimate children somewhat differently from legitimate ones insofar as the former, but not the latter, may be removed from one or both of their natural parents and placed in an adoptive home without the consent of *both* parents. Nonetheless, appellant has not challenged the statute on this basis either on his or his children's behalf, and the difficult questions that might be raised by such a challenge, compare *Lalli* v. *Lalli*, — U. S. —, with *Trimble* v. *Gordon*, 430 U. S. 762, are not now before us.

[6] "For a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made." *Mathews* v. *Lucas*, 427 U. S. 495, 520-521 (STEVENS, J., dissenting).

[7] The relevant statistics in New York are not complete. The most

Both parents are equally responsible for the conception of the child out of wedlock.[7] 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 constitutional right to decide whether to bear it or not.[8] In many cases, only the mother knows who sired the child, and it 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 marry a different partner, the child will be legitimate when born, and the natural father may never even know that his "rights" have been affected. 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 impact on the status of the child; if he instead should marry a

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comprehensive ones that we have found are for the years 1974 and 1975. Even for those years, however, we could find none that includes a breakdown by age of the adoptive children where one of the adoptive parents is in some way related to the child. (New York adoptions by related parents—including ones by relatives other than a natural parent and stepparent—accounted for just over half of all adoptions in 1974 and just under half in 1975.) Nonetheless, of the children adopted by nonrelated parents in New York in 1974 and 1975, respectively, 66% and 62% were under one year old, and 90% and 88% were under six years old. In 1974, moreover, the median age of the child at the time of adoption was five months; no similar figure is available for 1975. New York's figures appear to be fairly close to those obtaining nationally. Adoptions in 1974, *supra*, at 15-16; Adoptions in 1975, *supra*, at 15.

[7] Of course, this is not true in every individual case, or perhaps in most cases. Nevertheless, for purposes of equal protection analysis, it probably should be assumed that in the class of cases in which the parties are not equally responsible, the woman has been the aggressor about as often as the man. If this assumption is doubted on the ground that the adverse consequences of conception out of wedlock typically make the woman more cautious because those consequences are more serious for her, that simply reinforces the basic analysis set forth in the text.

[8] See *Planned Parenthood* v. *Danforth*, 428 U. S. 52, 67-75.

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 birth and immediately thereafter. During that period, the mother and child are together;[10] 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.[11] These natural differences between unmarried fathers and mothers make it probable that the mother, and not the father or both parents, will have custody of the newborn infant.[12]

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[10] In fact, there is some sociological and anthropological research indicating that by virtue of the symbiotic relationship between mother and child during pregnancy and the initial contact between mother and child directly after birth a physical and psychological bond immediately develops between the two that is not then present between the infant and the father or any other person. *E. g.*, J. Bowlby, Attachment and Loss, Vols. I, II (19[illegible]); M. Mahler, The Psychological Development of the Human Infant (1968).

[11] The Court has frequently noted the difficulty of proving paternity in cases involving illegitimate children. *E. g.*, *Trimble* v. *Gordon*, 430 U. S. 762, 770–771; *Gomez* v. *Perez*, 409 U. S. 535, 538. Indeed, these proof problems have been relied upon to justify differential treatment not only of unwed mothers and fathers but also of legitimate and illegitimate children. *Parham* v. *Hughes*, — U. S. —, —; *Lalli* v. *Lalli*, — U. S. —, — (plurality opinion).

[12] Although statistics are hard to find in this area, those I have found bear out the proposition that is developed in text as a logical matter. Thus, in "relinquishment adoptions" in California in 1975, natural mothers signed the "relinquishment" document—papers that release custody of the child to an adoption agency and that must be signed by the parent(s) with custody or by a judge in cases involving neglect or abandonment by the parent(s) who previously had custody—in 70% of the cases, while natural fathers did so in only 30% of the cases. On the other hand, fathers took no part in over 27% of the relinquishment adoptions, apparently because they never had custody, while the comparable figure for mothers was 3.5%. California Health and Welfare Agency, Relinquish-

In short, it is virtually inevitable that from conception through infancy the mother will constantly be faced 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,

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ment, Adoptions in California, January-December 1975, at Tables 12 and 13.

[11] Cf. Part II, *supra*. Indeed, New York does give unwed fathers ample opportunity to participate in adoption proceedings. In this case, for example, appellant appeared at the adoption hearing with counsel, presented testimony, and was allowed to cross-examine the witnesses offered by appellees. See N. Y. Dom. Rel. L. § 111-a; App., at 27; *supra*, at 2-3. As a substantive matter, the natural father is free to demonstrate, as appellant unsuccessfully tried to do in this case, that the best interests of the child favor the preservation of existing parental rights and forestall cutting off those rights by way of adoption. Had appellant been able to make that demonstration, the result would have been the same as that mandated by the Court's insistence upon paternal as well as maternal consent in these circumstances: neither parent could adopt the child into a new family with a stepparent, both would have parental rights (*e. g.*, visitation), and custody would be determined by the child's best interests.

In this case, although the New York courts made no finding of unfitness on appellant's part, there was ample evidence in the record from which they could draw the conclusion that his relationship with the children had been somewhat intermittent, that it fell far short of the relationship existing between the mother and the children (whether measured by the amount of time spent with the children, the responsibility taken for their care and education, or the amount of resources expended on them), and that, judging from appellant's treatment of his first wife and his children by that marriage, there was a real possibility that he could not be counted on for the continued support of the two children and might well be a source of friction between them, the mother, and her new husband. *E. g.*, App., at 22-25; Transcript of Proceedings in Record on Appeal before the New York Court of Appeals, at 75-77, 82-90, 106, 120, 189, 388-393, 414-415, 430-431.

That conclusion, coupled with the Surrogate's finding that the mother's

it is perfectly obvious that at the time and immediately after a child is born 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 mother of the newborn infant 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 loving father an incentive to marry the mother,[16] and has no adverse impact on the disinterested father. Finally, it facilitates the interests of the adoptive parents, the child, and the public at large by streamlining the often traumatic adoption process and allowing the prompt, complete and reliable integration of the child into a satisfactory new home at as young an age as is feasible.[17] Put most simply, it

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as marriage to the adoptive father was "solid and permanent" and that the children were "well cared for and healthy" in the new family, App. at 30, surely justify the Surrogate's ultimate conclusion that the legitimacy and stability to be gained by the children from the adoption far outweighed [illegible] loss (and even appellant's) due to the termination of appellant's parental rights. See App. at 28.

"Whatever the motive for [appellant's] opposition to the adoption, the consequences are the same—harassment of the natural mother in her new relationship and embarrassment to [the children] who though living with and being supported in the new family may not in school and elsewhere bear the family name."

[16] Marrying the mother would not only legitimate the child but would also assure the father the right to consent to any adoption. See N. Y. Dom. Rel. L. § 111 (1)(b).

[17] These are not idle interests. A survey of adoptive parents registered on the New York State Adoption Exchange as of January 1975 showed that over 75% preferred to adopt children under three years old; over half preferred children under one year old. New York Department of Social Services, Adoption in New York State (Program Analysis Report No. 59, July 1975) at 20. Moreover, adoption proceedings, even when judicial in nature, have traditionally been expeditious in order to accommodate the needs of all concerned. Thus, 61% of all Family Court adoption pro-

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 borne 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,[16] 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 unshakable responsibility for the care of the child. Furthermore, questions relating to the adequacy of notice to absent fathers could invade the mother's privacy,[17] 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.[18] While it might not be irrational for a State to

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ceedings in New York during the fiscal year 1972-1973 were disposed of within 30 days. Nineteenth Annual Report of the Judicial Conference to the Governor of the State of New York and the Legislature, at 352.

[16] Although the Court is careful to leave the States free to develop alternative approaches, it nonetheless endorses the procedure described in text for adoptions of older children against the wishes of natural fathers who have established substantial relationships with the children. *Ante*, at 11-12, and n. 12.

[17] To be effective, any such notice would probably have to name the mother and perhaps even identify her further, for example by address. Moreover, the terms and placement of the notice in, for example, a newspaper, no matter how discreet and tastefully chosen, would inevitably be taken by the public as an announcement of illegitimate maternity. To avoid the embarrassment of such announcements, the mother might well be forced to identify the father (or potential fathers)—despite her desire to keep that fact a secret.

[18] In the opinion upon which it relied in dismissing the appeal in this case, the New York Court of Appeals concluded that the "trauma" that would be added to the adoption process by a parental consent rule is "unpleasant to envision." *In re Malpica-Orsini, supra*, 36 N. Y. 2d, at 571. See n. 20, *infra*.

conclude that these costs should be incurred to protect 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 treatment of the two sexes 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 § 111 (1)(c) makes differential treatment so suspect that the State has the burden 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 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 insofar as it 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 fathers of children born out of wedlock, the mere fact that the statute draws a "gender-based distinction," see *id.*, at 7, should not, in my opinion, give rise to any presumption that the impartiality principle embodied in the Equal Protection Clause has been violated.[11] Indeed, if we make the further undisputed assumption that the discrimination is justified in those cases in which the rule has its most frequent application—cases involving newborn infants and very young children in the custody of their natural mothers, see nn. 7 and 11, *supra*—

[11] E. g., *Califano* v. *Webster*, 430 U. S. 313; *Schlesinger* v. *Ballard*, 419 U. S. 498.

we should presume that the law is entirely valid and require the challenger to demonstrate that its unjust applications are sufficiently numerous and serious to render it invalid.

In this case, appellant 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 § 111 (1)(c), 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.

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"To 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 least, the marital process of adoption would be seriously impeded.

"Great difficulty and expense would be encountered, in many instances, in locating the putative father to ascertain his willingness to consent. Frequently, he is undesirable or even unknown. Paternity is denied more often than admitted. Some birth certificates set forth the names of the reputed fathers, others do not.

"Couples considering adoption will be dissuaded for fear of subsequent harassment and entanglements. A 1975 study in Florida of 500 independent adoptions showed that 26% of the couples who had direct contact with the natural parents reported subsequent harassment, compared with only 2% of couples who had no contact (Clarke, Adopting a Child Today, [illegible]). The burden on charitable agencies will be oppressive. In independent placements, the infant is usually placed in the adoptive home at four or five days of age, while the majority of agencies do not place children for several months after birth (p. 88). Early private placements are made for a variety of reasons, such as a desire to decrease the trauma of separation and an attempt to conceal the out-of-wedlock birth. It is unlikely that the consent of the natural father could be obtained at such an early time after birth, and prospective couples, if well advised, would not accept a child if the father's consent was a legal requisite and not then available. Institutions and foster-boarding homes [illegible] the children [illegible] to continue their

The mere fact that an otherwise valid general classification appears arbitrary in an isolated case is not a sufficient reason

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unnecessary, in itself, for the most desirable of foster parents are unobtainable and the wards therefore unplaceable. These philanthropic agencies would be reluctant to take infants for no one wants to bargain for trouble in an already tense situation. The drain on the public treasury would also be immeasurably greater in regard to infants placed in foster homes and institutions by public agencies.

"Some of the ugliest disclosures of our time involve black marketing of children for adoption. One need not be a clairvoyant to predict that the grant to unwed fathers of the right to veto adoptions will provide a very fertile field for extortion. The vast majority of instances where paternity has been established arise out of filiation proceedings, compulsory in nature, and persons experienced in the field indicate that these legal steps are instituted for the most part by public authorities, anxious to protect the public purse (see *Schaschlo v. Taishoff*, 2 N. Y. 2d 408, 411). While it may appear at first blush, that a father might wish to free himself of the burden of support, there will be many who will interpret it as a chance for revenge or an opportunity to recoup their losses.

"Marriages 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.

"We should be mindful of the jeopardy to which existing adoptions would be subjected and the resulting chaos by an unobliterated declaration of unconstitutionality here. Unless there be a finding of constitutionality, the welfare of children placed in homes months ago or longer, and awaiting the institution or completion of legal proceedings, would be seriously jeopardized. The attendant trauma is unpleasant to envision." *In re Malpica-Orsini*, *supra*, 36 N. Y. 2d, at 572–574.

To the limited extent that the Court takes cognizance of these findings and conclusions, it does not dispute them. *Ante*, at 11, 12 n. 12. Instead, the Court merely states that many of these findings do not reflect appellant's situation and "need not" reflect the situation of any natural father who is seeking to prevent the adoption of his older children. *Id.*, at 11.[9]

Although I agree that the findings of the New York Court of Appeals are more likely to be true of the strong majority of adoptions that involve infants than they are in the present situation—a conviction that should be sufficient to justify the classification drawn by § 111 (1)(c) in all situations—I am compelled to point out that the Court marshals not one bit of evidence to bolster its contrary judgment that most natural fathers

for invalidating the entire rule.[24] 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.[25] 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 § 111 (1)(c) 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 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 custody 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 natural 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," *ante*, at 12, but

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facing the adoption of their older children will have appellant's relatively exemplary record with respect to admitting paternity and establishing a relationship with his children. In my mind it is far more likely that what is true at its inception will be true thereafter: the mother will probably retain custody as well as the primary responsibility for the care and upbringing of the child.

[24] *Parham* v. *Hughes*, — U. S. — , —; *Califano* v. *Jobst*, 434 U. S. 47, 55-56; *Dandridge* v. *Williams*, 397 U. S. 471, 485.

[25] Even if the exclusive consent requirement were limited to newborn infants, there would still be an occasional case in which the interests of the child would be better served by a responsible paternal veto than by an irresponsible maternal veto.

has previously been unwilling to take steps to legitimate his relationship. I am inclined to believe that such cases are relatively rare. But whether or not this assumption is valid, the far safer assumption is that in the more common adoption situations, the mother 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 unfairness in a significant 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 unquestionably, but in this case justifiably, a gender-based distinction.

## II

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* v. *Illinois*, 405 U. S. 645, 651.[15] Although the Court has not decided whether the Due Process Clause provides any greater substantive protection for this relationship than simply against official caprice,[16] it has indicated that an adoption

[14] Cf. *Quilloin* v. *Walcott*, 434 U. S. 246. See also *Smith* v. *Organization of Foster Families*, *supra*, 431 U. S., at 845.

[15] See also *Smith* v. *Organization of Foster Families*, *supra*, 431 U. S., at 842-847; *Armstrong* v. *Manzo*, 380 U. S. 545; *Meyer* v. *Nebraska*, 262 U. S. 390, 399-401.

[16] Although some Members of the Court have concluded that greater protection is due the "private realm of family life," *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (emphasis added); see, e.g., *Moore* v. *East Cleveland*, 431 U. S. 494 (plurality opinion), this appeal does not fall within that realm because whatever family life once surrounded appellant and his children.

decree that terminates the relationship is constitutionally justified by a finding 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 best interests of the child, at least in a situation such as this in which the natural family unit has already been destroyed, the father has previously taken no steps to legitimate 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.[illegible] 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 reason surely avoids the conclusion that the order is arbitrary, and is also sufficient to overcome any further protection of those bonds that may exist in the recesses of the Due Process Clause. Although the constitutional principle at least requires a legitimate 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.

III

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 embarking on a new course that threatens to interfere with social arrangements that have come into use over long periods of time. Because I consider the course on

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and appellee Maria Mohammed has long since dissolved through no fault of the children. In fact, it is the State rather than appellant that now relies in this case on the importance of the family insofar as it is the State that is attempting to foster the establishment and privacy of new and legitimate adoptive families.

[illegible] See *Parham* v. *Hughes*, — U. S. —, —. Cf. *Quilloin* v. *Walcott*, *supra*, 434 U. S., at 255, quoting *Smith* v. *Organization of Foster Families*, *supra*, 431 U. S., at 862–863 (STEWART, J., concurring in judgment).

which the Court is currently embarked to be potentially most serious, I shall explain why I regard its holding in this case as quite narrow.

The adoption decrees that have been entered without the consent of the natural father must number in the millions. An untold number of family and financial decisions have been made in reliance on the validity of those decrees. Because the Court has crossed a new constitutional frontier with today's decision, those reliance interests unquestionably foreclose retroactive application of this ruling. See *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107. Families that include adopted children need have no concern about the probable impact of this case on their familial security.

Nor is there any reason why the decision should affect the processing of most future adoptions. The fact that an unusual application of a state statute has been held unconstitutional on equal protection grounds does not necessarily eliminate the entire statute as a basis for future legitimate state action. The procedure to be followed in cases involving infants 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 holding or by its reasoning. In fact, as I read the Court's opinion, the statutes now in effect may be enforced as usual unless "the adoption of older children is sought," *ante*, at 11, and "the father has established a substantial relationship with the child and is willing to admit his paternity." *Id.*, at 12. State legislatures will no doubt promptly revise their adoption laws to comply with the rule of this case, but as long as state courts are prepared to construe their existing statutes to contain a requirement of paternal consent "in cases such as this," *ibid.*, I see no reason why they may not continue to enter valid adoption decrees in the countless routine cases that will arise before the statutes can be amended.[4]

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[4] Cf. *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, 739; [illegible]

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.

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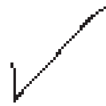
v. *Sincock*, 377 U. S. 695, 711-712; *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, 655; *Reynolds* v. *Sims*, 377 U. S. 533, 585 (valid elections may go forward pursuant to statutes that have been held unconstitutional as violating the one-person, one-vote rule, when an impending election is imminent and the election machinery is already in progress).

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

CHAMBERS OF
THE CHIEF JUSTICE



March 13, 1979

Re: 77-6431 - Caban v. Mohammed

Dear John:

I join your dissent.

Regards,

WEB

Mr. Justice Stevens

Copies to the Conference

pp. 1, 12-14
new nn. 27+2[illegible]

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

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# SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant,
v.
Kazim Mohammed 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 REHNQUIST join, dissenting.

Under § 111 (1)(c) of the New York Domestic Relations Law, the adoption of a child born out of wedlock usually requires the consent of the natural mother; it does not require that of the natural father unless he has "lawful custody." See ante, at 3 n. 4. Appellant, the natural but noncustodial father of two school-aged children born out of wedlock,[1] challenges that provision insofar as it allows the adoption of his natural children by the husband of the natural mother without his consent. Appellant's primary objection is that this unconsented-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. Secondarily, he attacks § 111 (1)(c)'s disparate treatment of natural mothers and natural fathers as a violation of the Equal Protection Clause of the same Amendment. In view of the Court's disposition, I shall discuss the equal protection question before commenting on appellant's primary contention. I shall then indicate why I think the holding of the Court, although erroneous, is of limited effect.

## I

This case concerns the validity of rules affecting the status

[1] The children are presently aged seven and eight years old. At the time of the hearing before the Surrogate Court, they were five and six.

of the thousands of children who are born out of wedlock every day.[2] All of these children have an interest in acquiring the status of legitimacy; a great many of them have an interest in being adopted by parents who can give them opportunities that would otherwise be denied; for some the basic necessities of life are at stake. The state interest in facilitating adoption in appropriate cases is strong—perhaps even "compelling."[3]

Nevertheless, it is also true that § 111 (1)(c) gives rights to natural mothers that it withholds from natural fathers

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[2] Illegitimate births accounted for an estimated 14.7% and 15.5% of all births in the United States during the years 1976 and 1977, respectively. See National Center for Health Statistics of the Department of Health, Education, and Welfare, Monthly Vital Statistics Report, February 5, 1979, at 19; *id.*, March 29, 1978, at 17. In total births, this represents 468,100 and 515,700 illegitimate births, respectively. Although statistics on New York State are not available, the problem of illegitimacy appears to be especially severe in urban areas. For example, in 1975, over 50% of all births in the District of Columbia were out of wedlock. National Center for Health Statistics of the Department of Health, Education, and Welfare, 1 Vital Statistics of the United States (Natality), 1975, at 60.

Adoption is an important solution to the problem of illegitimacy. Thus, about 70% of the adoptions in the 43 States reporting to HEW in 1975 were of children born out of wedlock. The figure for New York State was 78%. National Center for Social Statistics of the Department of Health, Education, and Welfare, Adoptions in 1975, at 11 (hereinafter Adoptions in 1975).

[3] The reason I say "perhaps" is that the word "compelling" can be understood in different ways. If it describes an interest that "compels" a conclusion that any statute intended to foster that interest is automatically constitutional, few if any interests would fit that description. On the other hand, if it merely describes an interest that compels a court, before holding a law unconstitutional, to give thoughtful attention to a legislative judgment that the law will serve that interest, then the State's interest in facilitating adoption in appropriate cases is unquestionably compelling. See *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 844, and n. 52; *id.*, at 862–863 (Stewart, J., concurring in judgment); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175; *Stanley* v. *Illinois*, 405 U. S. 645; *Matter of Malpica-Orsini*, 36 N. Y. 2d 568, 571–574.

Because it draws this gender-based[4] distinction between two classes of citizens 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.[5] That determination requires more than merely recognizing that society has traditionally treated the two classes differently.[6] But it also requires analysis that goes beyond a merely reflexive rejection of gender-based distinctions.

Men and women are different, and the difference is relevant to the question whether the mother may be given the exclusive right to consent to the adoption of a child born out of wedlock. Because most adoptions involve newborn infants or very young children,[7] it is appropriate at the outset to focus on the significance of the difference in such cases.

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[4] Although not all men are included in the disadvantaged class, since under § 111 (1)(b) married fathers are given consent rights, it is nonetheless true that but for their gender the members of that class would not be disadvantaged. Hence, it is not possible to avoid the conclusion that the classification here is one based on gender. See *City of Los Angeles* v. *Manhart*, — U. S. —, — - —.

[5] Section 111 treats illegitimate children somewhat differently from legitimate ones insofar as the former, but not the latter, may be removed from one or both of their natural parents and placed in an adoptive home without the consent of *both* parents. Nonetheless, appellant has not challenged the statute on this basis either on his or his children's behalf, and the difficult questions that might be raised by such a challenge, compare *Lalli* v. *Lalli*, — U. S. —, with *Trimble* v. *Gordon*, 430 U. S. 762, are not now before us.

[6] "For a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made." *Mathews* v. *Lucas*, 427 U. S. 495, 520-521 (STEVENS, J., dissenting).

[7] The relevant statistics for New York are not complete. The most

Both parents are equally responsible for the conception of the child out of wedlock.[6] 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 constitutional right to decide whether to bear it or not.[7] In many cases, only the mother knows who sired the child, and it 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 marry a different partner, the child will be legitimate when born, and the natural father may never even know that his "rights" have been affected. 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 impact on the status of the child; if he instead should marry a

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comprehensive ones that we have found are for the years 1974 and 1975. Even for those years, however, we could find none that includes a breakdown by age of the adoptive children where one of the adoptive parents is in some way related to the child. (New York adoptions by related parents—including ones by relatives other than a natural parent and stepparents—accounted for just over half of all adoptions in 1974 and just under half in 1975.) Nonetheless, of the children adopted by unrelated parents in New York in 1974 and 1975, respectively, 60% and 62% were under one year old, and 90% and 88% were under six years old. In 1974, moreover, the median age of the child at the time of adoption was 5.0 months; no similar figure is available for 1975. New York's figures appear to be fairly close to those obtaining nationally. Adoptions in 1974, supra, at 15-16; Adoptions in 1975, supra, at 15.

[6] Of course, this is not true in every individual case or perhaps in most cases. Nevertheless, for purposes of equal protection analysis, it probably should be assumed that in the class of cases in which the parties are not equally responsible, the woman has been the aggressor about as often as the man. If this assumption is doubted on the ground that the adverse consequences of conception out of wedlock typically make the woman more cautious because those consequences are more serious for her, that doubt merely reinforces the basic analysis set forth in the text.

[7] See *Planned Parenthood* v. *Danforth*, 428 U. S. 52 (1976).

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 birth and immediately thereafter. During that period, the mother and child are together;[12] 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.[13] These natural differences between unmarried fathers and mothers make it probable that the mother, and not the father or both parents, will have custody of the newborn infant.[14]

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[12] In fact, there is some sociological and anthropological research indicating that by virtue of the symbiotic relationship between mother and child during pregnancy and the initial contact between mother and child directly after birth a physical and psychological bond immediately develops between the two that is not then present between the infant and the father or any other person. *E. g.*, J. Bowlby, Attachment and Loss, Vols. I, II (1969—1973); M. Mahler, The Psychological Development of the Human Infant (1975).

[13] The Court has frequently noted the difficulty of proving paternity in cases involving illegitimate children. *E. g.*, *Trimble* v. *Gordon*, 430 U. S. 762, 770–771; *Gomez* v. *Perez*, 409 U. S. 535, 538. Indeed, these proof problems have been relied upon to justify differential treatment not only of unwed mothers and fathers but also of legitimate and illegitimate children. *Parham* v. *Hughes*, — U. S. —, —; *Lalli* v. *Lalli*, — U. S. —, — (plurality opinion).

[14] Although statistics are hard to find in this area, those I have found bear out the proposition that is developed in text as a logical matter. Thus, in "relinquishment adoptions" in California in 1975, natural mothers signed the "relinquishment" documents—papers that release custody of the child to an adoption agency and that must be signed by the parent(s) with custody, or by a judge in cases involving neglect or abandonment by the parent(s) who previously had custody—in 70% of the cases, while natural fathers did so in only 30% of the cases. On the other hand, fathers took no part in over 27% of the relinquishment adoptions, apparently because they never had custody, while the comparable figure for mothers was 0.5%. California Health and Welfare Agency, Relinquish-

In short, it is virtually inevitable that from conception through infancy the mother will constantly be faced 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,

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ment Adoptions in California, January-December 1975, at Tables 12 and 13.

[11] Cf. Part II, *infra*. Indeed, New York does give unwed fathers ample opportunity to participate in adoption proceedings. In this case, for example, appellant appeared at the adoption hearing with counsel, presented testimony, and was allowed to cross-examine the witnesses offered by appellees. See N. Y. Dom. Rel. Law § 111-a; App., at 27; *supra*, at 2-3. As a substantive matter, the natural father is free to demonstrate, as appellant unsuccessfully tried to do in this case, that the best interests of the child favor the preservation of existing parental rights and forestall cutting off those rights by way of adoption. Had appellant been able to make that demonstration, the result would have been the same as that mandated by the Court's insistence upon paternal as well as maternal consent in these circumstances: neither parent could adopt the child into a new family with a stepparent. Both would have parental rights (e. g., visitation); and custody would be determined by the child's best interests.

In this case, although the New York courts made no finding of unfitness on appellant's part, there was ample evidence in the record from which they could draw the conclusion that his relationship with the children had been marked by intermittency, that it fell far short of the relationship existing between the mother and the children (whether measured by the amount of time spent with the children, the responsibility taken for their care and education, or the amount of resources expended on them), and that judging from appellant's treatment of his first wife and his children by that marriage, there was a real possibility that he could not be counted on for the continued support of the two children and might well be a source of friction between them, the mother, and her new husband. *E. g.*, App., at 22, 26; Transcript of Proceedings in Record on Appeal before the New York Court of Appeals, at 74-77, 82-84, 106, 120, 140, 288-317, 414-425, 426-427.

This conclusion, coupled with the Surrogate's finding that the mother's

it is perfectly obvious that at the time and immediately after a child is born 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 mother of the newborn infant 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 loving father an incentive to marry the mother,[10] and has no adverse impact on the disinterested father. Finally, it facilitates the interests of the adoptive parents, the child, and the public at large by streamlining the often traumatic adoption process and allowing the prompt, complete, and reliable integration of the child into a satisfactory new home at as young an age as is feasible.[11] Put most

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[illegible] as to the adoptive father was "solid and permanent," and that the children were "well cared for and healthy" in the new family, App., at 30, surely justify the Surrogate's ultimate conclusion that the legitimacy and stability to be gained by the children from the adoption far outweighed [illegible] due to the termination of appellant's parental rights. See App. at 28:

"Whatever the motive for [appellant's] opposition to the adoption, the consequences are the same—harassment of the natural mother in her new relationship, and embarrassment to [the children] who though living with and being supported in the new family may not in school and elsewhere bear the family's name."

[10] Marrying the mother would not only legitimate the child but would also assure the father the right to consent to any adoption. See N. Y. Dom. Rel. L. § 111 (1)(b).

[11] These are not idle interests. A survey of adoptive parents registered on the New York State Adoption Exchange as of January 1975 showed that over 75% preferred to adopt children under three years old; over half preferred children under one year old. New York Department of Social Services, Adoption in New York State (Program Analysis Report No. 59, July 1975), at 20. Moreover, adoption proceedings, even when parental

simply. It 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 borne 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,[17] 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 unshakable responsibility for the care of the child. Furthermore, questions relating to the adequacy of notice to absent fathers could invade the mother's privacy,[18] 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.[19] While it might not be irrational for a State to

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in nature, have traditionally been expeditious in order to accommodate the needs of all concerned. Thus, 61% of all Family Court adoption proceedings in New York during the fiscal year 1972–1973 were disposed of within 90 days. Nineteenth Annual Report of the Judicial Conference to the Governor of the State of New York and the Legislature, at 352.

[17] Although the Court is careful to leave the States free to develop alternative approaches, it nonetheless endorses the procedure described in text for adoptions of older children against the wishes of natural fathers who have established substantial relationships with the children. *Ante*, at 11–12, and n. 22.

[18] To be effective, any such notice would probably have to name the mother and perhaps even identify her further, for example, by address. Moreover, the terms and placement of the notice in, for example, a newspaper, no matter how discreet and tastefully chosen, would inevitably be taken by the public as an announcement of illegitimate maternity. To avoid the embarrassment of such announcements, the mother might well be forced to identify the father (or potential fathers)—despite her desire to keep that fact a secret.

[19] In the opinion upon which it relied in dismissing the appeal in this case, the New York Court of Appeals concluded that the "balance" that

conclude that these costs should be incurred to protect 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 treatment of the two sexes 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 § 111 (1)(c) makes differential treatment so suspect that the State has the burden 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 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 insofar as it 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 fathers of children born out of wedlock, the mere fact that the statute draws a "gender-based distinction," see *id.*, at 7, should not, in my opinion, give rise to any presumption that the impartiality principle embodied in the Equal Protection Clause has been violated.[19] Indeed, if we make the further undisputed assumption that the discrimination is justified in those

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would be added to the adoption process by a paternal consent rule is "unpleasant to envision." *In re Malpica-Orsini*, supra, 36 N. Y. 2d, at 574. See n. 20, *infra*.

[19] *E. g.*, *Califano* v. *Webster*, 430 U. S. 313; *Schlesinger* v. *Ballard*, 419 U. S. 498.

cases in which the rule has its most frequent application—cases involving newborn infants and very young children in the custody of their natural mothers, see nn. 7 and 11, *supra*—we should presume that the law is entirely valid and require the challenger to demonstrate that its unjust applications are sufficiently numerous and serious to render it invalid.

In this case, appellant 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 § 111 (1)(c), 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.[21]

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[21] "To 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 least, the worthy process of adoption would be severely impeded.

"Great difficulty and expense would be encountered, in many instances, in locating the putative father to ascertain his willingness to consent. Frequently, he is unknowable or even unknown. Paternity is denied more often than admitted. Some birth certificates set forth the names of the reputed fathers, others do not.

"Couples considering adoptions will be dissuaded out of fear of subsequent annoyance and embarrassments. A 1961 study in Florida of 500 independent adoptions showed that 10% of the couples who had direct contact with the natural parents reported subsequent harassment, compared with only 2% of couples who had no contact (Isaac, Adopting a Child Today, pp. 88, 129). The burden on charitable agencies will be oppressive. In independent placements, the baby is usually placed in his adoptive home at four or five days of age, while the majority of agencies never place children for several months after birth (p. 89). Early private placements are made for a variety of reasons, such as a desire to decrease the trauma of separation and an attempt to conceal the out-of-wedlock birth. It is unlikely that the consent of the natural father could be

The mere fact that an otherwise valid general classification appears arbitrary in an isolated case is not a sufficient reason

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obtained at such an early time after birth, and married couples, if well advised, would not accept a child if the father's consent was a legal requisite and yet not then available. Institutions such as foundling homes which nurture the children for months could not afford to continue their maintenance, in itself not the most desirable, if fathers' consents are unobtainable and the wards therefore unplaceable. Those philanthropic agencies would be reluctant to take infants for no one wants to bargain for trouble in an already tense situation. The drain on the public treasury would also be immeasurably greater in regard to infants placed in foster homes and institutions by public agencies.

"Some of the ugliest disclosures of our time involve black marketing of children for adoption. One need not be a clairvoyant to predict that the grant to unwed fathers of the right to veto adoptions will provide a very fertile field for extortion. The vast majority of instances where paternity has been established arise out of filiation proceedings, compulsory in nature, and persons experienced in the field indicate that these legal steps are instigated for the most part by public authorities, anxious to protect the public purse (see *Schaschlo v. Taishoff*, 2 N. Y. 2d 408, 411). While it may appear, at first blush, that a father might wish to free himself of the burden of support, there will be no few who will interpret it as a cheaper form of revenge or an opportunity to recoup their losses.'

"Marriages 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.

"We should be mindful of the jeopardy to which existing adoptions would be subjected and the resulting chaos by an unadulterated declaration of unconstitutionality. Even if there be a holding of nonretroactivity, the welfare of children, placed in homes months ago, or longer, and awaiting the institution or completion of legal proceedings, would be seriously affected. The attendant trauma is unpleasant to envision." *In re Malpica-Orsini*, *supra*, 36 N. Y. 2d, at 572-574.

To the limited extent that the Court takes cognizance of these findings and conclusions, it does not dispute them. *Ante*, at 11, 12 n. 12. Instead, the Court merely states that many of these findings do not reflect appellant's situation and "need not" reflect the situation of any natural father who is seeking to prevent the adoption of his older children. *Id.*, at 11.

Although I agree that the findings of the New York Court of Appeals are more likely to be true of the strong majority of adoptions that involve

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 § 111 (1)(c) 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 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 custody of the child, the mother would prevail just as she did in the state court.[23]

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infants than they are in the present situation. In concluding that should be sufficient to justify the classification drawn by § 111 (1)(c) in all situations, I am compelled to point out that the Court needs no more evidence to bolster its empirical judgment that most natural fathers facing the adoption of their older children will have appellant's relatively exemplary record with respect to admitting paternity and establishing a relationship with his children. To my mind, it is far more likely that what is true at infancy will be true thereafter—the mother will probably retain custody as well as the primary responsibility for the care and upbringing of the child.

[21] *Vance* v. *Bradley*, — U. S. —, —; *Califano* v. *Jobst*, 434 U. S. 47, 53-54; *Dandridge* v. *Williams*, 397 U. S. 471, 485.

[22] Even if the exclusive consent requirement were limited to newborn infants, there would still be an occasional case in which the interests of the child would be better served by a responsible paternal veto than by an irresponsible maternal veto.

[23] In fact, although the Court understands it differently, the New York statute apparently does [illegible] on custody. Thus § 111 (1)(d) gives consent rights to "any person . . . having lawful custody of the adoptive child." The New York courts have not had occasion to interpret this section in a situation in which a custodial father is seeking consent rights adverse to the wishes of the mother. Nonetheless, the courts have interpreted "legal custody" in a flexible and practical manner dependent on who actually is acting as the guardian of the child, *e. g.*, *In re Erhardt*

Whether or not it is wise to devise a special rule to protect the natural 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," *ante*, at 12, but has previously been unwilling to take steps to legitimate his relationship. I am inclined 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 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 unfairness in a significant 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 unquestionably, but in this case justifiably, a gender-based distinction.

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25 App. Div. 2d 894, 277 N. Y. S. 2d 754 (1967). Moreover, the Uniform Adoption Act, after which the New York statute appears to be patterned, has a similar section that is drafted [illegible] to [illegible] a father having custody of his illegitimate minor child. Uniform Adoption Act, § 5 (a)(3) Commissioners' Note. In this light, the allegedly improper impact of the gender-based classification in § 111 (1)(c) as challenged by appellant is even more attenuated than I have suggested because it only disqualifies those few natural fathers of older children who have established a substantial relationship with the child, have admitted paternity, and who nonetheless do not have custody of the children.

## II

Although the substantive due process issue is more troublesome,[21] I can briefly state the reason why I reject it.

I assume that, if and when one develops,[22] 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* v. *Illinois*, 405 U. S. 645, 651.[23] Although the Court has not decided whether the Due Process Clause provides any greater substantive protection for this relationship than simply against official caprice,[24] it has indicated that an adoption decree that terminates the relationship is constitutionally justified by a finding 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 best interests of the child, at least in a situation such as this in which the natural family unit has already been destroyed, the father has previously taken no steps to legitimate the child and a further requirement such as a showing

[21] Insofar as the New York statute allows natural fathers with actual custody of their illegitimate children to consent to the adoption of those children, see n. 2?, *supra*, this issue is far less troublesome. Cf. *Stanley* v. *Illinois*, 405 U. S. 645.

[22] Cf. *Quilloin* v. *Walcott*, 434 U. S. 246. See also *Smith* v. *Organization of Foster Families*, *supra*, 431 U. S., at 844.

[23] See also *Smith* v. *Organization of Foster Families*, *supra*, 431 U. S., at 842–847; *Armstrong* v. *Manzo*, 380 U. S. 545; *Meyer* v. *Nebraska*, 262 U. S. 390, 399–401.

[24] Although some Members of the Court have concluded that greater protection is due the "private realm of *family* life," *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (emphasis added); e. g., *Moore* v. *East Cleveland*, 431 U. S. 494 (plurality opinion), this appeal does not fall within that realm because whatever family life once surrounded appellant, his children, and appellee Maria Mohammed has long since dissolved through no fault of the State. In fact, it is the State, rather than appellant, that may rely in this case on the importance of the family insofar as it is the State that is attempting to foster the establishment and privacy of new and legitimate adoptive families.

of unfitness would entirely deprive the child—and the State—of the benefits of adoption and legitimation.[*] 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 reason surely avoids the conclusion that the order is arbitrary, and is also sufficient to overcome any further protection of those bonds that may exist in the recesses of the Due Process Clause. Although the constitutional principle at least requires a legitimate 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.

III

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 embarking on a new course that threatens to interfere with social arrangements that have come into use over long periods of time. Because I consider the course on which the Court is currently embarked to be potentially most serious, I shall explain why I regard its holding in this case as quite narrow.

The adoption decrees that have been entered without the consent of the natural father must number in the millions. An untold number of family and financial decisions have been made in reliance on the validity of those decrees. Because the Court has crossed a new constitutional frontier with today's decision, those reliance interests unquestionably foreclose retroactive application of this ruling. See *Chevron Oil Co. v. Huson*, 404 U. S. 97, 106–107. Families that include

[*] See *Parham v. Hughes*, — U. S. —, —. Cf. *Quilloin v. Walcott*, supra, 434 U. S., at 255, quoting *Smith v. Organization of Foster Families*, supra, 431 U. S., at 862 (Stewart, J., concurring in judgment).

adopted children need have no concern about the probable impact of this case on their familial security.

Nor is there any reason why the decision should affect the processing of most future adoptions. The fact that an unusual application of a state statute has been held unconstitutional on equal protection grounds does not necessarily eliminate the entire statute as a basis for future legitimate state action. The procedure to be followed in cases involving infants 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 holding or by its reasoning. In fact, as I read the Court's opinion, the statutes now in effect may be enforced as usual unless "the adoption of older children is sought," *ante*, at 11, and "the father has established a substantial relationship with the child and is willing to admit his paternity." *Id.*, at 12. State legislatures will no doubt promptly revise their adoption laws to comply with the rule of this case, but as long as state courts are prepared to construe their existing statutes to contain a requirement of paternal consent "in cases such as this," *ibid.*, I see no reason why they may not continue to enter valid adoption decrees in the countless routine cases that will arise before the statutes can be amended.[illegible]

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.

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[illegible] Cf. *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, 739; *Roman* v. *Sincock*, 377 U. S. 695, 711–712; *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, 655; *Reynolds* v. *Sims*, 377 U. S. 533, 585 (public elections may go forward pursuant to statutes that have been held unconstitutional as violating the one-person, one-vote rule, when an impending election is imminent and the election machinery is already in progress).

DW 3/26/79

David – This response looks OK to me – as edited.

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:

6/ The dissent ~~suggests~~ speculates that the sex-based distinction of §111 might not apply to those unwed fathers who obtain legal custody of their children. See post, at __ n. 23. ~~MR. JUSTICE STEVENS admits, however, that~~ But no New York courts has so ~~have not~~ ruled ~~that an unwed father can obtain legal custody of his child and thereby resist adoption by the mother~~. ~~Id.~~ Indeed, one ~~New York~~ court has indicated that, at least with respect to legitimate children, §111(4) applies only if the natural parents are

David – Should we identify what §111(4) provides?

See In re Mendelsohn's Adoption, 39 N.Y.S.2d 384, 386 (Surrogate'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 ~~position~~ legal rights would have been different under New York law.

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 Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

New Final

From: Mr. Justice Powell

Circulated: ______________

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5th DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant,
v.
Kazim 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, 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 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 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 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.

In December of 1973, Mohammed took the two children 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 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 Gonzales willingly surrendered 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. 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 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, Nina, 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 Cabans cross-petitioned for adoption.

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[1] Section 110 of the New York Domestic Relations Law provides in part that,

"[a]n adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an

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.[3] 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 foreclosed from adopting David and Denise, as

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adult or minor husband or an adult or minor wife may adopt such a child of the other spouse."

Although a natural mother in New York has many parental rights without adopting her child, New York courts have held that § 110 provides for the adoption of an illegitimate child by his mother. *See In re Anonymous Adoption*, 177 Misc. 683, 31 N. Y. S. 2d 595 (App. Div. 1941).

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

"[a]fter the making of an order of adoption the 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."

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

"[w]hen a natural or adoptive parent, having lawful custody of a child, marries or remarries and consents that the stepfather or stepmother may adopt such child, such consent shall not relieve the parent so consenting of any parental duty toward such child nor shall such consent or the order of adoption affect the rights of such consenting spouse and such adoptive child to inherit from and through each other and the natural and adopted kindred of such consenting spouse."

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

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-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 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 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.[3]

## II

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

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[3] As the appellant was given due notice and was permitted to participate as a party in the adoption proceedings, he does not contend that he was denied the procedural due process held to be requisite in *Stanley* v. *Illinois*, 405 U. S. 645 (1972).

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 incompetent to care for the child.[4] Absent one of

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[4] 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:

"1. Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

"2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

"3. Of the mother, whether adult or infant, of a child born out of wedlock.

"4. Of any person or authorized agency having lawful custody of the adoptive child.

"The consent shall not be required of a parent who has abandoned the child or who has 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 guardian 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 insane 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 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 manner as the judge or surrogate may direct and an opportunity to be heard 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 child. 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.

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

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 § 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 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

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sents specified in subdivisions two and three of this section shall not be required, and the judge 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."

interests of the child.[5] 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 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 unmarried parents differently according to their sex.[6]

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[5] See *In re Corey L.* v. *Martin L.*, 45 N. Y. 2d 383, 391, 380 N. E. 2d 266, 270 (1978):

"Absent consent, the first focus here was on the issue of abandonment since neither decisional rule nor statute can bring the relationship to an end because someone else might rear the child in a more satisfactory fashion. . . . Abandonment, as it pertains to adoption, relates to such conduct on the part of a parent as evinces a purposeful ridding of parental obligations and the foregoing of parental rights—a withholding of interest, presence, affection, care and support. The best interests of the child, as such, is not an ingredient of that conduct and is not involved in this threshold question. While promotion of the best interests of the child is essential to ultimate approval of the adoption application, such interests cannot act as a substitute for a finding of abandonment." (Authorities omitted.)

[6] The dissent speculates that the sex-based distinction of § 111 might not apply to those unwed fathers who obtain legal custody of their children. See *post*, at — n. 23. But no New York court has so ruled. Indeed, one court has indicated that, at least with respect to legitimate children, the provision in § 111 (4) giving legal guardians a veto over the adoption of their wards applies only if the natural parents are dead. See *In re Mendelsohn's Adoption*, 180 Misc. 147, 149, 39 N. Y. S. 2d 881, 883 (Surrogate's Ct. 1943). 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 rights would have been different under New York law.

III

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. *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 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 appellees' argument and to the apparent presumption underlying § 111, maternal and paternal roles are not invariably different in importance. Even if unwed mothers as a class were closer than unwed fathers to their newborn 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 unwed father may 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 participated in the care and support of their children.[7] There is no

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[7] In rejecting an unwed father's constitutional claim in *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), we emphasized the importance of the appellant's failure to act as a father toward his children, noting that he,

". . . 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." *Id.*, 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 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 illegitimate children. Although the legislative history of § 111 is sparse, in *In re Malpica-Orsini*, *supra*, 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:

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similar to § 111 of the New York Domestic Relations Law unconstitutionally distinguished unwed parents according to their gender, as the claim was not properly presented. See 434 U. S., at 253 n. 13.

Consent of the unmarried father has never been required for adoption under New York law, although parental consent otherwise has been required at least since the late 19th century. *See, e. g.*, Laws of the State of New York, 119th Session L. 1896, ch. 272. There are no legislative reports setting forth the reasons why the New York Legislature excepted unmarried fathers from the general requirement of parental consent for adoption.

In *Orsini* v. *Blasi*, *supra*, the Court dismissed an appeal from the New York Court of Appeals challenging the constitutionality of § 111 as applied to an unmarried father whose child had been ordered adopted by a New York Surrogate. In dismissing the appeal, we indicated that a substantial federal question was lacking. This was a ruling on the merits, and therefore is entitled to precedential weight. *See Hicks* v. *Miranda*, 422 U. S. 332, 344 (1975). At the same time, however, our decision not to review fully the questions presented in *Orsini* v. *Blasi* is not entitled to the same deference given a ruling after briefing, argument, and a written opinion. See *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). Insofar as our

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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 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 natural father.[illegible]

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 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 it

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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 homes for its illegitimate children. It may 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. Neither the State nor the appellees have argued that unwed 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 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 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 fathers at birth would justify a legislative distinction between mothers and fathers of newborns,[11] these difficulties need not persist past infancy. When the adoption of an older child is

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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 gender-based distinction as that made 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 abandoned the child.[13] 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 has admitted his paternity,[14] a State should have no dif-

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[12] See Comment, The Emerging Constitutional Protection of the Putative Father's Parental Rights, 70 Mich. L. Rev. 1581, 1590 (1972).

[13] If the New York Court of Appeals is correct that unmarried fathers often desert their families (a view we need not question), then allowing those fathers who remain with their families a right to object to the termination of their parental rights will pose little threat to the State's ability to order adoption in most cases. For we do not question a State's right to do what New York has done in this portion of § 111: provide that fathers who have abandoned their children have no right to block adoption of those children.

We do not suggest, of course, that the provision of § 111 making parental consent unnecessary in cases of abandonment is the only constitutional mechanism available to New York for the protection of its interest in allowing the adoption of illegitimate children when their natural fathers are not available to be consulted. In reviewing the constitutionality of statutory classifications, "it is not the function of a court 'to hypothesize independently on the desirability or feasibility of any possible alternative[s]' to the statutory scheme formulated by [the State].'" *Lalli* v. *Lalli*, — U. S. —, — (1978) (quoting *Mathews* v. *Lucas*, 427 U. S. 495, 515 (1976)). We note some alternatives to the gender-based distinction of § 111 only to emphasize that the state interests asserted in support of the statutory classification could be protected through numerous other mechanisms more closely attuned to those interests.

[14] In *Quilloin* v. *Walcott*, *supra*, we noted the importance in cases of this

ficulty in identifying the father even of children born out of wedlock.[10] 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 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 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 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 111 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 where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests.[11]

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kind of the relationship that in fact exists between the parent and child. See n. 8, *supra*.

[10] States have a legitimate interest, of course, in providing that an unmarried father's right to object to the adoption of a child will be conditioned upon his showing that it is in fact his child. Cf. *Lalli* v. *Lalli*, — U. S. —, — (1978). Such is not, however, the import of the New York statute here. Although New York provides for actions in its Family Courts to establish paternity, see §§ 511 to 571 of the New York Judiciary Court Acts, there is no provision allowing men who have been determined by the court to be the father of a child born out of wedlock to object to the adoption of their children under § 111.

[11] Appellant also challenges the constitutionality of the distinction made in § 111 between married and unmarried fathers. As we have resolved

The judgment of the New York Court of Appeals is

*Reversed.*

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that the sex-based distinction of § 111 violates the Equal Protection Clause, we need express no view as to the validity of this additional classification.

Finally, appellant argues that he was denied substantive due process when the New York courts terminated his parental rights without first finding him to be unfit to be a parent. See *Stanley* v. *Illinois*, 405 U. S. 645 (1972) (semble). Because we have ruled that the New York statute is unconstitutional under the Equal Protection Clause, we similarly express no view as to whether a State is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: ________

Recirculated: 12 APR 1979

6th DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 77-6431

Abdiel Caban, Appellant,
v.
Kazim 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, 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 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 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 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.

In December of 1973, Mohammed took the two children 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 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. Caban, 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 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, Nina, 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 Cabans cross-petitioned for adoption.

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[1] Section 110 of the New York Domestic Relations Law provides in part that:

"[a]n adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an

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.[3] 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 foreclosed from adopting David and Denise, as

adult or minor husband or an adult or minor wife may adopt such a child of the other spouse."

Although a natural mother in New York has many parental rights without adopting her child, New York courts have held that § 110 provides for the adoption of an illegitimate child by its mother. See *In re Anonymous Adoption*, 177 Misc. 683, 31 N. Y. S. 2d 595 (App. Div. 1941).

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

"[A]fter the making of an order of adoption the 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."

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

"[W]hen a natural or adoptive parent, having lawful custody of a child marries or remarries and consents that the stepfather or stepmother may adopt such child, such consent shall not relieve the parent so consenting of any parental duty toward such child nor shall such consent or the order of adoption affect the rights of such consenting spouse and such adoptive child to inherit from and through each other and the natural and adopted kindred of such consenting spouse."

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

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-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 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 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.[3]

II

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

[3] As the appellant was given due notice and was permitted to participate as a party in the adoption proceedings, he does not contend that he was denied the procedural due process held to be requisite in *Stanley* v. *Illinois*, 405 U. S. 645 (1972).

> 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 incompetent to care for the child.[4] Absent one of

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[4] 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:

"1. Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

"2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

"3. Of the mother, whether adult or infant, of a child born out of wedlock;

"4. Of any person or authorized agency having lawful custody of the adoptive child.

"The consent shall not be required of a parent who has abandoned the child or who has 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 guardian 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 insane 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 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 manner as the judge or surrogate may direct and an opportunity to be heard 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 the 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 child. 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.

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

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 § 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 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

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sents specified in subdivisions two and three of this section shall not be required, and the judge 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."

interests of the child.[5] 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 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 unmarried parents differently according to their sex.[6]

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[5] See *In re Corey L. v. Martin L.*, 45 N. Y. 2d 383, 391, 380 N. E. 2d 266, 270 (1978):

"Absent consent, the first focus here was on the issue of abandonment since neither decisional rule nor statute can bring the relationship to an end because someone else might rear the child in a more satisfactory fashion. . . . Abandonment, as it pertains to adoption, relates to such conduct on the part of a parent as evinces a purposeful ridding of parental obligations and the foregoing of parental rights—a withholding of interest, presence, affection, care and support. The best interests of the child, as such, is not an ingredient of that conduct and is not involved in this threshold question. While promotion of the best interests of the child is essential to ultimate approval of the adoption application, such interests cannot act as a substitute for a finding of abandonment." (Authorities omitted.)

[6] The dissent speculates that the sex-based distinction of § 111 might not apply to those unwed fathers who obtain legal custody of their children. See *post*, at —, and — n. 25. But no New York court has so held. Indeed, one court has indicated that, at least with respect to legitimate children, the provision in § 111 (1) giving legal guardians a veto over the adoption of their wards applies only if the natural parents are dead. See *In re* [illegible] *Adoption*, 186 Misc. 147, 149, 59 N. Y. S. 2d 164, 166 (Surrog. Ct. 1945). We should not overlook, moreover, the New York courts' exclusive reliance upon § 111 (1) and [illegible] whether, if Caban had sought and obtained legal custody of his children, his legal rights would have been different under New York law.

III

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. *Boren*, 429 U. S. 190, 197 (1976). 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 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 appellees' argument and to the apparent presumption underlying § 111, maternal and paternal roles are not invariably different in importance. Even if unwed mothers as a class were closer than unwed fathers to their newborn 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 unwed father may 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 participated in the care and support of their children.[7] There is no

[7] In rejecting an unmarried father's constitutional claim in *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), we emphasized the importance of the appellant's failure to act as a father toward his children, noting that he,

"... 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." *Id.*, at 256.

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similar to § 111 of the New York Domestic Relations Law unconstitutionally distinguished unwed parents according to their gender, as the claim was not properly presented. See 434 U. S., at 253 n. 13.

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decision today is inconsistent with our dismissal in *Orsini*, we overrule our prior decision.

[10] In his brief as amicus curiae, the New York Attorney General echoes the New York Court of Appeals' expression in *In re Malpica-Orsini* of the interests promoted by § 111's different treatment of unmarried fathers. See *Amicus* Brief of New York Attorney General, at 16–20.

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The New York Court of Appeals in *In 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 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 fathers at birth would justify a legislative distinction between mothers and fathers of newborns,[11] these difficulties need not persist past infancy. When the adoption of an older child is

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[13] See Comment, The Emerging Constitutional Protection of the Putative Father's Parental Rights, 70 Mich. L. Rev. 1581, 1590 (1972).

[14] If the New York Court of Appeals is correct that unmarried fathers often desert their families (a view we need not question), then allowing those fathers who remain with their families a right to object to the termination of their parental rights will pose little threat to the State's ability to order adoption in most cases. For we do not question a State's right to do what New York has done in this portion of § 111: provide that fathers who have abandoned their children have no right to block adoption of those children.

We do not suggest, of course, that the provision of § 111 making parental consent unnecessary in cases of abandonment is the only constitutional mechanism available to New York for the protection of its interest in allowing the adoption of illegitimate children when their natural fathers are not available to be consulted. In reviewing the constitutionality of statutory classifications, "it is not the function of a court 'to hypothesize independently on the desirability or feasibility of any possible alternative[s]' to the statutory scheme formulated by [the State]." *Lalli* v. *Lalli*, — U. S. —, — (1978) (quoting *Mathews* v. *Lucas*, 427 U. S. 495, 515 (1976)). We mention some alternatives to the gender-based distinction of § 111 only to emphasize that the state interests asserted in support of the statutory classification could be protected through numerous other mechanisms more closely attuned to those interests.

[15] In *Quilloin* v. *Walcott*, *supra*, we noted the importance in cases of this

ficulty in identifying the father even of children born out of wedlock.[13] 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 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 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 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 111 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 where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests.[14]

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kind of the relationship that in fact exists between the parent and child. See n. 8, *supra*.

[13] States have a legitimate interest, of course, in providing that an unmarried father's right to object to the adoption of a child will be conditioned upon his showing that it is in fact his child. Cf. *Lalli* v. *Lalli*, — U. S. —, — (1978). Such is not, however, the import of the New York statute here. Although New York provides for actions in its Family Courts to establish paternity, see §§ 511 to 571 of the New York Judiciary Court Acts, there is no provision allowing men who have been determined by the court to be the father of a child born out of wedlock to object to the adoption of their children under § 111.

[14] Appellant also challenges the constitutionality of the distinction made in § 111 between married and unmarried fathers. As we have resolved

The judgment of the New York Court of Appeals is

*Reversed.*

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that the sex-based distinction of § 111 violates the Equal Protection Clause, we need express no view as to the validity of the additional classification.

Finally, appellant argues that he was denied substantive due process when the New York courts terminated his parental rights without first finding him to be unfit to be a parent. See *Stanley* v. *Illinois*, 405 U. S. 645 (1972) [illegible]. Because we have ruled that the New York statute is unconstitutional under the Equal Protection Clause, we similarly express no view as to whether a 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 4/23/79 77-6431 Caban v. Mohammed

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 and mothers of illegitimate children ~~depending solely on whether the child is legitimate~~.

The parties to this case, appellant Caban and appellee Mohammed, 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 Fourteenth 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.

2 copies to Mr. Putzel 4/31/79

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