10-1978

Parham v. Hughes

Lewis F. Powell Jr.

Note
(Q in a substantial one)

Ga. statute allows mother of illegitimate child to sue for wrongful death but not the father - same as in this case where the father had acknowledged paternity from birth.

Case is close on principle to Trimble v Gordon - but here the father could have obtained the right he claims by legitimating the child under Ga. statute.

PRELIMINARY MEMORANDUM

Summer List 13, Sheet 1

No. 78-3-ASX

PARHAM (father of illegitimate)

v.

HUGHES (wrongful death defendant) State/Civil Timely

(Appeal from Ga. Sup. Ct. (Nichols, for the ct.; Hill dissenting)

SUMMARY: This case presents the question whether the Georgia Wrongful Death Act, by permitting a mother to bring an action for the death of her illegitimate child, but not permitting a father to bring such an action, violates equal protection.

FACTS AND DECISIONS BELOW: The facts, as adopted in the order of the trial court, are not in dispute. Appellant was the father of Lemuel Parham, a minor, who was killed in an automobile accident. The child's natural mother, Cassandra

For the reasons stated in the memorandum, I recommend noting jurisdiction

Moreen, was also killed in the accident. The deceased child was illegitimate, appellant and Moreen never having married.

Appellant had nevertheless signed Lemuel's birth certificate, acknowledging paternity, and he continued to acknowledge Lemuel as his son at all times afterwards. In addition, appellant had provided regular support payments for Lemuel, from his birth until his death, and had maintained charge accounts at grocery stores to insure that the child had adequate food and other necessities. Appellant had visited Lemuel virtually every day, and the child had spent many weekends with him.

On February 7, 1977, appellant filed suit in the Superior Court of Richmond County, Georgia, charging appellee with negligence in the death of his son and seeking damages under the Georgia Wrongful Death Statute. Lemuel's maternal grandmother, as administrix of the estate, filed a similar action.

Appellee moved for summary judgment as to appellant, contending that his action was conclusively barred by the statute. Georgia Code Ann. § 105-1307 reads:

> A mother, or, if no mother, a father, may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the life of such child. In suits by the mother the illegitimacy of the child shall be no bar to a recovery. (Emphasis added.)

The trial court denied the motion for summary judgment. It held that the statute, by conditioning the right of either parent to sue for wrongful death upon the legitimacy of the child, violated equal protection and due process. It also held that the statute, by allowing the mother of an illegitimate child to bring an action for wrongful death, but not the father, violated equal protection and due process.

The trial court granted a certificate of immediate review, and the Georgia Supreme Court agreed to hear the case on an interlocutory basis. In an opinion by Chief Justice Nichols rendered April 14, 1978, the high court reversed.

The supreme court stated that although a "superficial consideration" of this Court's decisions might lead to the conclusion that the trial court was correct, "a close and detailed examination of the constitutional analysis in those decisions yields a different result." The court first addressed the appropriate level of scrutiny. It read Mathews v. Lucas, 427 U.S. 495 (1976),as establishing that the standard used in reviewing classifications burdening illegitimate children is something less than "strict scrutiny." Here, the classification burdened the parents of illegitimate children. The court stated that it could find no Supreme Court decision holding that in such cases a "stronger than ordinary level of scrutiny" should apply. Quillon v. Walcott, 98 S.Ct. 549 (1978) and Stanley v. Illinois, 405 U.S. 645 (1972) were distinguished as decisions dealing not with discrimination against fathers of illegitimate children, but with potential state infringement, without a proper hearing, on the right of an individual to raise a family.

Applying the "normal level of scrutiny," the court conceded that the ends served by the classification were not "readily discernable." Nonetheless, it found four state objectives possibly served by the statute. First, by providing an action for the fathers of legitimate children, but not for the fathers of illegitimate children, the statute might act as an inducement promoting the institution of the legitimate family. Second,

the statute could forestall potential problems of proof of paternity in wrongful death actions. Third, the classification might reflect the judgment of the legislature that the father of an illegitimate child is less likely to suffer any real loss from the child's wrongful death. And finally, by depriving the father of an illegitimate of the opportunity to share in a wrongful death action, the statute might serve the state's interest in setting a standard of morality.

The court recognized that Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73 (1968), holding that it violates equal protection to deprive a mother of an action for the wrongful death of an illegitimate child, "stands as a physical precedent for the propositions proferred by [appellant.]" But it thought that case was distinguishable. Given that in most circumstances it is the mother, not the father, who raises and cares for an illegitimate child, and given that the father of an illegitimate child is usually the parent with the most control over whether a legitimate family unit will exist, the court found the distinction between mothers and fathers "arguably" served the state's interests in promoting the family as an institution and setting standards of morality.

The court did not clearly delineate the argument that the statute discriminated against parents of illegitimate children from the argument that the statute discriminated between parents on the basis of sex. Moreover, it is unclear from the opinion whether the court relied on all four conceivable state interests, or only the interests in promoting the legitimate family unit and setting a standard of morality.

Justice Hill dissented. He found that, "regardless of

the level of scrutiny employed," the majority had failed to explain how the state's purported interest in promoting the legitimate family unit was furthered by the statutory classification. In his view, moreover, the attempted distinction of Glona "based on the difference in proving paternity vs. maternity" had been expressly rejected by this Court in Trimble v. Gordon, 430 U.S. 762 (1977). There, the Court stated that although the state might adopt a more demanding standard of proof for fathers of illegitimate children than for mothers of illegitimate children, it could not adopt the more extreme measure of excluding recovery altogether where fathers of illegitimate children are involved.

CONTENTIONS: Appellant submits that the four interests mentioned by the Georgia Supreme Court have either been rejected by this Court as insufficient, or can be shown to bear no rational relationship to the statutory classification. Appellant maintains that Quillon, supra, holding that a state need not accord the father of an illegitimate child the same veto power over an adoption accorded to a divorced father, is readily distinguishable from the present case. There, the natural father had never exercised actual custody of the child nor had he provided any support. Here, in contrast, the trial court found that appellant had maintained a meaningful relationship with Lemuel from his birth until his death.

Appellant contends that this case is controlled by Glona, supra, which appellant sees as not confined merely to the mothers of illegitimate children. According to appellant, Glona establishes that "parents of illegitimate children may not be treated differently from parents of legitimate children consistent with [equal protection]." Finally,

appellant argues that the Georgia court gave inadequate attention to his contention that the statute represented impermissible sex discrimination, although the issue was raised and argued below.

Appellee generally rests on the reasoning of the Georgia Supreme Court. Appellee stresses the problems of proof of paternity presented by actions for wrongful death of illegitimate children, and notes that permitting such claims might lead to spurious and nuisance suits and could make it more difficult to settle wrongful death claims because of the possibility of double recovery presented by a natural father who could not be located. Appellee also points out that if appellant is barred from bringing this action, the estate will still have a claim for wrongful death. Ga. Code Ann. § 105-1309. Appellee suggests that, if the estate recovers, appellant might then be able to claim a share of the assets disbursed from the estate of the minor child.

DISCUSSION: Appellant has particularly strong facts in support of his constitutional claim. There is no problem here with proof of paternity, or with showing that appellant and his son had a close and affectionate relationship. Moreover, appellant fulfilled his support obligation, as required by Georgia law. Ga. Code Ann. § 74-202. Given the facts, the only state interests in support of the statutory classification are the interests in promoting the legitimate family unit and deterring immorality. With these interests, however, appellee is caught on the horns of a dilemma. On the one hand, appellee cannot argue that these interests are sufficient to bar actions by all parents of illegitimate children, since the same interests were rejected, with respect to mothers, in Glona. On the

other hand, if appellee argues that these interests justify barring actions by fathers of illegitimates, but not mothers, he is open to the charge of sex discrimination.

The supreme court's argument that it is less invidious to prohibit wrongful death actions by parents of illegitimates, than it is to bar such actions by illegitimate children, has merit. While illegitimate children have no way of changing their status, and thus constitute a "discrete and insular minority," parents of illegitimate children have much more control over their status. This case might therefore provide an appropriate occasion to reconsider the implications of Glona.

Appellant's claim falls within a definite lacuna in this Court's decided cases dealing with equal protection and illegitimacy. Moreover, given the Court's prior decisions, it seems clear that the claim raises a substantial federal question.

Note. There is a motion to dismiss.

8/15/78 Merrill Ops. in Jur. State.

Hold for

SUPPLEMENTAL MEMORANDUM

Summer List 13, Sheet 1

No. 78-3-ASX

PARHAM (father of illegitimate)

v.

HUGHES (wrongful death defendant) State/Civil Timely

Appeal from Ga. Sup. Ct. (Nichols; Hill dissenting)

It has come to my attention that one of the issues to be argued in Caban v. Mohammed, No. 77-6431, prob. jur. noted May 15, 1978, is whether it constitutes impermissible sex discrimination to afford the mother of an illegitimate child a veto over its adoption, but not to afford such a veto to the father. One of the issues in the present case is whether it constitutes impermissible sex discrimination to afford the mother of an illegitimate child an action for its wrongful death, but not to afford such an action to the father. Although I think Marcus's suggestion is a good one, hold for Caban v. Mohammed. LFP

the interests invoked in support of these two classifications are different, the Court may want to consider holding Parham for Caban. For example, if the Court decides that the gender-based classification in Caban violates equal protection, it might then want to NVR Parham for consideration not inconsistent with Caban.

8/17/78 Merrill

September 25, 1978

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

Argued ....., *19*... *Assigned* ....., *19*... No. 78-3

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

PARHAM

vs.

HUGHES

Also motion to dismiss.

Noted Held for Calabresi

	HOLD FOR	CERT. a	CERT. b	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION A	MOTION D	CIRCUIT	NOT VOTING
Burger, Ch. J.	✓	for			Calabresi								
Brennan, J.				✓									
Stewart, J.				✓									
White, J.				✓									
Marshall, J.				✓									
Blackmun, J.	✓	for			Calabresi								
Powell, J.	✓					"							
Rehnquist, J.	✓					"							
Stevens, J.				✓									

DW 1/11/79 David Henke Hircase ~~[illegible]~~ turns on Lalli - rather than Trimble - analysis.

Ga has provided a reasonable means for unwed fathers to qualify to sue.

The impact of the statute at issue (2) is upon the unwed ~~[illegible]~~ father - not upon the child as in Weber & in Trimble - and Ga law enables the father to remove the alleged discrimination by requesting a court for legitimation of a child (4)

In Trimble ~~[illegible]~~ an illegitimate child sought to share in father's estate. Only way under Ill. law was ~~[illegible]~~ for father to have married.

In Lalli we sustained N.Y. statute denying a child right ~~[illegible]~~ share in estate of unwed father. Father could have legitimated simply by court order.

Bobtail Bench Memorandum

To: Justice Powell

Re: Parham v. Hughes, No. 78-3

In Caban, issue was sex discrimination w/respect to adoption

This case presents the question whether a state constitutionally may deny only the fathers of illegitimate children the right to sue for the wrongful death of those children. As in Caban, the state statute is challenged on two equal protection grounds: (1) that it unconstitutionally distinguishes between fathers of illegitimate children and fathers of legitimate children (that is, according to legitimacy); and (2) that it unconstitutionally distinguishes

between fathers of illegitimate children and mothers of illegitimate children (that is, according to sex).

I. Facts

Appellant was the natural father of Lemuel Parham, a child born out of wedlock. Appellant was named as the father on Lemuel's birth certificate, paid for the birth of the child, paid child support for Lemuel throughout the latter's life, and visited the child virtually every day. (It appears, however, that appellant never had custody of the child; nor did he live with the child and his mother.)

While Lemuel was still a minor (we are not told how old he was), he was killed in an automobile accident which claimed the life of his mother as well. Appellant filed the present action against appellee in Georgia state court, seeking damages for his son's wrongful death. Appellee charged that appellee's negligence had been the cause of the accident in which Lemuel had died. Appellee moved for summary judgment on the basis of §105-1307 Ga. Code Ann., which provides that,

> [a] mother, or if no mother, a father, may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the life of such child. In suits by the mother, the illegitimacy of the child shall be no bar to a recovery.

It appears to be undisputed that the last sentence of the statute entails its converse: The illegitimacy of a child bars

recovery in suits by the father.

The trial court, finding §105-1307's exclusion of fathers of illegitimates unconstitutional, denied appellee's motion to dismiss the suit. An interlocutory appeal was allowed to the Georgia Supreme Court, which reversed. The court recognized that there were substantial questions concerning the validity of the statute under the equal protection clause. Nonetheless, it ruled that there were four important state interests which supported the exclusion of unwed fathers from recovering for wrongful death: (1) the avoidance of difficult questions concerning proof of paternity; (2) the encouragement of legitimate family relations; (3) the recognition of substantial differences between maternal and paternal relations; and (4) the encouragement of certain moral standards.

In upholding the Georgia statute, the court thought it important that the rights of the parents of an illegitimate were in question, and not the rights of the illegitimate himself. Thus, the court thought that the rights of unwed parents are weaker than those of illegitimate children and, accordingly, that the State has more leeway in denying unwed parents various privileges with respect to their children. Applying an "ordinary level of scrutiny," the court ruled that the Georgia statute's exclusion of unwed fathers is sufficiently related to the four enumerated state interests to withstand scrutiny under the equal protection clause.

II. Discussion

A. Legitimates vs. Illegitimates

There is no question but that the Georgia statute draws a distinction between parents according to the legitimacy of their children. As you know, under the equal protection clause legislative distinctions of this sort must survive scrutiny that, although less than "strict," is nonetheless not "toothless." See, Trimble v. Gordon, 430 U.S. 762, 767 (1977). Moreover, it appears that the Court exercises the same powers of review irrespective of whether the parent of an illegitimate child is aggrieved or the child himself is aggrieved. See Glona v. American Guarantee Co., 391 U.S. 73 (1968)(unwed mother's right to sue for wrongful death of her child). The question therefore is whether the Georgia statute challenged here is substantially related to any of the four state interests asserted by the Georgia Supreme Court (and, of course, whether those interests are legitimate).

1. Prior Cases

Before considering the relation between the statute and the asserted interests, you should note the Court's past actions with respect to similar statutes. In three cases, the Court has dealt with every wrongful death/illegitimacy permutation, save the present one. Thus, in Levy v. Louisiana, 391 U.S. 68 (1968), the Court struck down under the equal protection clause Louisiana's statute which did not allow illegitimate children to recover for the death of their mother,

Prior wrongful death cases

although legitimate children otherwise identically situated were given such a right. In so doing, the Court noted that "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother."

The second case dealing with this issue is Glona v. American Guarantee Co., 391 U.S. 73 (1968), decided together with Levy v. Louisiana. In Glona, the Court extended its ruling in Levy to strike down Louisiana's statute insofar as it precluded a mother from suing for the wrongful death of her illegitimate child, where she would have been permitted to sue had her child been legitimate. The Court in Glona took some pains to argue that the Louisiana statute did not in any way serve the State's interest in encouraging legitimacy, as parents are not likely to enter into illicit relationships merely to gain the possibility of collecting for their issue's wrongful death. Justice Harlan, dissenting in both Glona and Levy noted, inter alia, that the Louisiana statute might well encourage parents to legitimize their children after they were born.

The third and final case directly pertinent here is your opinion in Weber v. Aetna Causalty & Surety Co., 406 U.S. 164 (1972), in which the Court struck down Louisiana's workmen's compensation law insofar as it gave illegitimate children a lower priority than legitimate children in the distribution of benefits following their father's death. The Court found that Levy governed its decision, and noted that the

State's interest in promoting legitimate relations was not substantially related to the statute, as illegitimate children have no ability to legitimate themselves. Moreover, the Court relied in part on its observation in Glona that it was unlikely that parents would consider the question of their potential offspring's recovery under workmen's compensation in deciding whether to have extramarital sexual relations. The Court explicitly noted, however, that states would remain free to prescribe reasonable methods for determining paternity.

2. Justification for Statute

Turning to the State's asserted justifications for the Georgia statute at issue here, I believe that the purported difference between maternal and paternal relations, and the promulgation of morality must be discarded out of hand. I think that the Court's observations in Glona and Weber are correct: It is too implausible to suppose that partners considering illicit relations will be significantly deterred by the prospect of being disqualified from bringing a tort action with respect to the possible death of a possible child. One might argue that, quite apart from deterrent effect, the State has an interest in not appearing to condone immoral acts. Though this is not a frivolous point, I question the extent to which allowance of wrongful death actions would be perceived as condonation of illegitimacy.

Similarly, I see no weight for purposes of the distinction between legitimate and illegitimate fathers to the

purported difference between maternal and paternal relations. If this difference is real and is material, it justifies the distinction between unmarried mothers and unmarried fathers--not the difference between married fathers and unmarried fathers.

The two interests the Court must focus upon, then, are the interests in encouraging legitimate relations and in avoiding difficult questions concerning proof of paternity. You should note that the former interest is not the same as promulgating a particular standard of morality, although the two are closely connected. Thus, irrespective of the effect upon potential unwed parents, the State argues (through its Supreme Court) that the Georgia statute encourages those who have begotten illegitimate children to legitimate them. In Georgia, there are two separate ways in which a father may legitimate his child. First, he may marry the child's mother. Second, he may institute a proceeding under §74-103 Ga. Code Ann., which provides that,

> [a] father of an illegitimate child may render the same legitimate by petitioning the Superior Court of the county of his residence, setting forth the name, age, and sex of such child, and also the name of the mother; and if he desires the name changed, stating the new name, and praying the legitimation of such child.

According to appellee, the Georgia statute under attack here treats a father who has legitimated his child under this

provision the same as a father of a child born in wedlock. The interest in encouraging legitimation of children seems to me a substantial one. Moreover, the relationship between this interest and the statute in issue seems to me to be closer than that involved in Weber or Trimble v. Gordon, as the immediate impact of the statute falls upon the person within whose power it is to act. In both Weber and Trimble, unlike the present case, the statutes had their direct effect upon the illegitimate children, who were without power to cause legitimation.

There is one reason why the Court should hesitate before accepting as the justification for Georgia's statute the encouragement of legitimation. In Glona the Court struck down a statute quite similar to the one in issue here, rejecting the argument that it would encourage legitimation. One is tempted to say that Glona is distinguishable, as it involved the mother of an illegitimate, who is powerless under Georgia law to legitimate. This distinction does not wash, however, because Justice Harlan notes in his dissent that under the Louisiana law operative in Glona either mother or father could legitimate their child. Accordingly, if the Court were to rule that the Georgia statute here is justified as a reasonable inducement for legitimation, it would have to overrule, or significantly undercut, Glona.

There is a second possible justification for the Georgia statute, however: Unwed fathers are excluded as a class from

bringing wrongful death actions on behalf of their children because of the special difficulties attendant upon identifying unwed fathers. We know this argument well, of course, from our protracted struggle with Caban v. Mohammed, where we recognize that there may be special problems with such identification. I see two difficulties with relying upon identification problems in justifying the Georgia statute. First, in Trimble v. Gordon, you stated that, even when identification problems are substantial, the state cannot resort to the drastic remedy of excluding all unwed fathers. Rather, the Court required the state to devise some less drastic means, which satisfies the state's substantial interest in identifying the proper party while at the same time not unnecessarily excluded fathers irrespective of whether there is any substantial question concerning his paternity.

Although there is some broad language in Trimble indicating to the contrary, I believe that this case falls on the Lalli side of the Trimble/Lalli distinction. Georgia in the present case has adopted a reasonable method of establishing the identity of unwed fathers for purposes of wrongful death actions: Fathers must identify themselves as such to a court and give the child's mother an opportunity to object to legitimation order. This method is in stark contrast to that used by Illinois in Trimble, where the father had to marry the mother in order to avoid disqualification. Moreover, to me it makes no difference that here the identification mechanism chosen by the State is

labeled "legitimation." Finally, it is not unfair to require that, in order to benefit from the wrongful death provisions of state law, an unwed father must come forward before his child's death to identify himself.

There is a second difficulty with the identification justification, however. In Trimble you reemphasized what you had said in ~~Trimble~~ Weber: The State's interest in orderly disposition of property at death is much stronger than its interest in identifying the true father for purposes of an action in tort. Accordingly, it may be that the State must make a stronger showing of justification for distinctions in wrongful death statutes than it does in intestate succession statutes. This is a difficult question, to which I have no ready answer. It depends solely upon your evaluation of the strength of the state's interest in assuring that only actual fathers collect for the wrongful death of their purported children. My own preference, I think, would be to uphold the statute, as the alternative would be to set forth in detail exactly how the state may provide for the identification of natural fathers who wish to sue for the wrongful death of their children.

B. Mothers vs. Fathers

After what we said in Caban concerning differences between maternal and paternal relations, I would be extremely reluctant to use such a difference as the justification for the Georgia statute. If Caban says anything, it says that the

state cannot assume that mothers are invariably closer to their children than are fathers, irrespective of the age of the child.

On the other hand, it strikes me that both of the state interests discussed above may provide fertile ground for upholding the statute against a sex-discrimination challenge. Thus, under Georgia law only fathers can legitimate their children, and so it makes sense that the statute would seek to induce only fathers to do so. Furthermore, as we saw in Caban, there often are special difficulties attendant upon discovering the identity of an unwed father that do not exist with respect to the mother. To be sure, in Caban we required the State to act carefully in recognizing this difference. But the stakes for the unwed father in that case were incomparably greater than in this: In Caban the unwed father stands to be cut off from his child; here, the worst that can happen to the father is that he will not be allowed to collect from a tortfeasor who killed his child.

****

In sum, I would be inclined to uphold the statute on the grounds that it is substantially related to the State's interest in providing for the orderly identification of unwed fathers. As an alternative, the Court could look to the State's interest in promoting legitimation of children, but to do so would require substantial revision of the Court's opinion in Glona.

1/11/79

David

78-3 PARHAM v. HUGHES Argued 1/15/79

Ga statute allows unwed mother may bring wrongful death claim but unwed father may not.

Green (appellant)

making facial & applied attack.

Would not have sued if father had not been supporting child.

Child was 7 yrs old - no effort to legitimate under Ga. statute.

Miller (appellee)

~~It~~ Same measure of damages in wrongful death action whether TT is mother, father or administrator of deceased child.

Supports Ga statute. Problem of locating unwed fathers is serious.

Record here very sparse. No ev. Only the affidavit of father is in ev.

~~[illegible]~~ Legitimation procedure "very simple".

~~It~~ Their statute has been in effect for 92 yrs. Amended 1887 & 1952.

Relies on Lalli & Quilloin

A father obtains right to veto adoption by legitimating child. This is stronger interest of speculating on right to bring wrongful death suit.

DW 1/17/79

Memorandum

To: Justice Powell

Re: Parham v. Hughes, No. 78-3

At your suggestion, I have reexamined seven cases dealing with illegitimate children and the equal protection clause: Levy v. Louisiana, Glona, Weber, Gomez v. Perez, Trimble, Lalli, and Caban v. Mohammed. In going back through these cases, it strikes me that, as you suggested yesterday, the principle most consistent with these cases that would lead to upholding the statute in the present case is the following: The State may adopt means to identify unwed fathers for purposes of descent, tort actions, and adoption proceedings that impose some extra burden on illegitimate fathers, provided that the burden is not severe. The following table, I hope, will illustrate why this principle is relatively consistent with prior cases.

1.	Levy v. Louisiana	In this wrongful death action, a child attempted to collect for the loss of his mother. Plainly there are no special identification problems with respect to mothers.
2.	Glona	A mother sought to recover for the wrongful death of her child. As in Levy, there are no special

identification problems with mothers.

3. Weber — A child sought to recover under workmen's compensation for the death of his father. Although the Court recognized the need to impose a greater identification burden on illegitimate fathers, it ruled that Louisiana's statute did not protect this interest. Only those who actually were dependent upon the deceased could collect, which minimized identification problems. Moreover, it is not apparent that La. provided any simple method by which father's could identify themselves as such and thereby avoid the disability of the statute.

La provided no regularized means by which father could identify themselves.

4. Gomez v. Perez — The Court required illegitimate fathers to pay support the same as legitimate fathers. It recognized, however, "the lurking problems with respect to proof of paternity." It appears that the ruling, therefore, is based on the fact that no ready means was available by which children could identify their fathers and thereby avoid the disability of the statute.

5. Trimble — In striking down a descent statute, the Court rejected the claim that it served the interest of identification. It appears that there were two reasons for this. First, the State required not only a judicial determination of paternity, but also that the father marry the mother. Second, there had been a judicial declaration of paternity, and so there was no real question of identity. Thus, the mechanism asserted by the State was both overly severe, and unnecessary.

6. Lalli — The Court upheld a statute

requiring only a judicial declaration of paternity. This was a reasonable, minimal imposition that furthered the interest in identification.

7. Caban — Our opinion strikes down the statute, noting that it appears that New York has provided no way for an illegitimate father to identify himself officially as such and thereby avoid the disability of the statute. We leave open the possiblity that some such reasonable requirements could be imposed.

The trend of my analysis is, of course, toward upholding the statute in the present case. This case strikes me as being closer to Lalli than any of the other cases. Indeed, in one sense it is stronger than Lalli because here the one most able to initiate the identification procedure (the father) is the one who will lose if he fails to do so.

I must note one caveat, however. After rereading your opinion in Weber, I think it is difficult to construe wrongful death tort actions as being more like descent than like workmen's compensation provisions. You emphasized in Weber the traditional rights of the states concerning intestacy, and indeed in a footnote you distinguished Levy from descent cases.

1/17/79 David

Reverse 4
Affirm 3

78-3 PARHAM v. HUGHES Part 2 Conf. 1/17/79

The Chief Justice Affirm,

Mr. Justice Brennan Reverse
Differs from most cases involving illegitimates
There is nothing more than gender based discrimination

Mr. Justice Stewart Part - until Lalli Caban is decided.
Hope to identify what is not involved.
Involves no contest bet. children & illegitimate -- as to inheritance
Case here is like Caban. It will control.
If Court agrees with me, then this case should be decided same way.

Mr. Justice White *Reverse*

Gender discrimination
Can't stand analysis under
our cases

Mr. Justice Marshall *Reverse*

Gender discrimination

Mr. Justice Blackmun *Reverse*

Not fully at rest.
Have supported state laws
with respect to inheritance. But
Court has treated wrongful
death differently
Levy & Glona - can't decide
on their statute.
Could go on sex discrimination

Mr. Justice Powell -

9'd await outcome of Caban before coming to rest.
(9 unanimized Dandridge memo of 1/17)

Mr. Justice Rehnquist Affirm

No right at common law.

Claim of paternity before child dies is declaration vs interest. Claim after death is declaration in one's interest (he uses to

Mr. Justice Stevens Affirm

Not a case of discrimination vs an illegimate child.

There is a significant diff. bet. mother & father of illegimate child - in relationship as well as in identification.

No guarantee vs the spurious claim.

Ga statute is reasonable.

Even if unwed father could not

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

CHAMBERS OF
THE CHIEF JUSTICE

January 18, 1978

Re: 78-3 - Parham v. Hughes

Dear Potter:

My vote sheet shows you as "Pass"on 78-3. If your "present" vote to affirm remains, you make a fifth vote to affirm.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

I may well join Judgment. Altho I agree with much of the opinion, I am not happy with the E/P language

also I've spoken to P.S. about her reference to "indigents" on p 4

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

From: Mr. Justice Stewart

9 FEb 1979

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SUPREME COURT OF THE UNITED STATES

No. 78-3

Curtis Parham, Appellant, v. Ellis Franklin Hughes. | On Appeal from the Supreme Court of Georgia.

[February —, 1979]

MR. JUSTICE STEWART delivered the opinion of the Court.

Under § 105-1307 of the Georgia Code (hereinafter the "Georgia statute"),[1] the mother of an illegitimate child can sue for the wrongful death of that child. A father who has legitimated a child can also sue for the wrongful death of the child if there is no mother.[2] A father who has not legitimated a child, however, is precluded from maintaining a wrongful death action. The question presented in this case is whether this statutory scheme violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment by denying the father of an illegitimate child who has not legitimated the child the right to sue for the child's wrongful death.

I

The appellant was the biological father of Lemeul Parham, a minor child who was killed in an automobile collision. The child's mother, Cassandra Moreen, was killed in the same collision. The appellant and Moreen were never married to each other, and the appellant did not legitimate the child as

[1] Section 105-1307 provides:

[2] "A mother, or, if no mother, a father may recover for the homicide of a child, minor or sui juris, unless such child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the life of such child. *In suits by the mother the illegitimacy of the child shall be no bar to a recovery.*" (Emphasis added.)

he could have done under Georgia law.[1] The appellant did, however, sign the child's birth certificate and contribute to his support.[2] The child took the appellant's name and was visited by the appellant on a regular basis.

After the child was killed in the automobile collision, the appellant brought an action seeking to recover for the allegedly wrongful death. The complaint named the appellee (the driver of the other automobile involved in the collision) as the defendant and charged that negligence on the part of the appellee had caused the death of the child. The child's maternal grandmother, acting as administratrix of his estate, also brought a lawsuit against the appellee to recover for the child's wrongful death.[3]

The appellee filed a motion for summary judgment in the present case, asserting that under the Georgia statute the appellant was precluded from recovering for his illegitimate child's wrongful death. The trial court held that the Georgia

[1] Under § 74-103 of the Georgia Code, a natural father can have his child legitimated by court order. Section 74-103 provides:

"A father of an illegitimate child may render the same legitimate by petitioning the Superior Court of the county of his residence, setting forth the name, age, and sex of such child, and also the name of the mother; and if he desires the name changed, stating the new name; and praying the legitimation of such child. If the application the mother, if alive, shall have notice. Upon such application, proved and filed, the court may pass an order declaring said child to be legitimate, and capable of inheriting from the father in the same manner as if born in lawful wedlock, and the name by which he or she shall be known."

[2] Under § 74-202 of the Georgia Code, a father is required to support an illegitimate child until the child reaches 18, marries, or becomes self-supporting, whichever occurs first.

[3] Section 105-2001 of the Georgia Code provides:

"In every action there is no person entitled to sue under the foregoing provisions of this Chapter ('the Georgia Wrongful Death Chapter'), the administrator or executor of the deceased may sue for and recover and hold the amount recovered for the benefit of the next of kin. In any such case, the amount of the recovery shall be the full value at the time of the death."

statute violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment and, accordingly denied a summary judgment in favor of the appellee. On appeal, the Georgia Supreme Court reversed the ruling of the trial court. The appellate court found that the statutory classification was rationally related to three legitimate state interests: (1) the interest in avoiding difficult problems of proving paternity in wrongful death actions; (2) the interest in promoting a legitimate family unit; and (3) the interest in setting a standard of morality by not according to the father of an illegitimate child the statutory right to sue for the child's death. Accordingly, the court held that the statute did not violate either the Equal Protection or Due Process Clauses of the Fourteenth Amendment. We noted probable jurisdiction of this appeal from the judgment of the Georgia Supreme Court. — U. S. —.

I

A

State laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause. *Lockport v. Citizens for Community Action*, 430 U. S. 259, 272. Legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others, and legislative classifications are valid unless they bear no rational relationship to a permissible state objective. *New York City Transit Authority v. Beazer*, — U. S. —; *Vance v. Bradley*, — U. S. —; *Massachusetts Bd. of Retirement v. Murgia*, 427 U. S. 307, 314; *Dandridge v. Williams*, 397 U. S. 471, 485. As Mr. Chief Justice Warren stated for the Court in *McGowan v. Maryland*, 366 U. S. 420, 425–426:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than

others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Not all legislation, however, is entitled to this presumption of validity. The presumption is not present when a State has enacted legislation whose purpose or effect is to create classes based upon criteria such as race that, in a constitutional sense, are inherently "suspect." *McLaughlin v. Florida*, 379 U. S. 184; *Brown v. Board of Education*, 347 U. S. 483. If a statutory classification reflects invidious discrimination—if it "immediately burdens a class of persons characterized by some unpopular trait or affiliation." *New York City Transit Authority* v. *Beazer*, *supra*, at ——. —the presumption of validity disappears. In addition to racially discriminatory classifications, there are other classifications that, at least in some settings, the Court has found "suspect"—for example, those based upon national origin, alienage, indigency, illegitimacy or gender. See, *e. g.*, *Oyama* v. *California*, 332 U. S. 633 (national origin); *Graham v. Richardson*, 403 U. S. 365 (alienage); *Griffin v. Illinois*, 351 U. S. 12 (indigency); *Gomez* v. *Perez*, 409 U. S. 535 (illegitimacy); *Reed v. Reed*, 404 U. S. 71 (gender).

In the absence of such invidious discrimination, a court is not free under the aegis of the Equal Protection Clause to substitute its judgment for the will of the people of a State as expressed in the laws passed by their popularly elected legislatures. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the political process and that judicial intervention is generally unwarranted no matter how

unwisely we may think a political branch has acted." *Vance v. Bradley*, — U. S. —, — (footnote omitted). The threshold question, therefore, is whether the Georgia statute is invidiously discriminatory. If it is not, it is entitled to a presumption of validity and will be upheld "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legislative purposes that we can only conclude that the legislature's actions were irrational." *Id.*, at —.

III

The appellant relies on decisions of the Court that have invalidated statutory classifications based upon illegitimacy and upon gender to support his claim that the Georgia statute is unconstitutional. Both of these lines of cases have involved laws reflecting invidious discrimination against a particular class. We conclude, however, that neither line of decisions is applicable in the present case.

A

The Court has held on several occasions that state legislative classifications based upon illegitimacy—*i. e.*, that differentiate between illegitimate children and legitimate children—violate the Equal Protection Clause. *E. g., Trimble v. Gordon*, 430 U. S. 762; *Weber v. Aetna Casualty & Surety Co.*, 406 U. S. 164.[2] The basic rationale of these decisions is that it is unjust and ineffective for society to express its condemnation of procreation outside the marital relationship by punishing the illegitimate child who is in no way responsible for his situation and is unable to change it. As Mr. Justice Powell stated for the Court in the *Weber* case:

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[2] In cases where statutory classifications affecting illegitimates are so provide-wide-ranging as to further a sufficiently substantial state interest, however, the Court has upheld the validity of the statutes. *Labine v. Labine*, — U. S. —; *Matthews v. Lucas*, 427 U. S. 495; *Lalli v. Lalli*, 431 U. S. 762.

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual as well as an unjust way of deterring the parent." 406 U. S., at 175.

It is apparent that this rationale is in no way applicable to the Georgia statute now before us. The statute does not impose differing burdens or award differing benefits to legitimate and illegitimate children. It simply denies a natural father the right to sue for his illegitimate child's wrongful death. The appellant, as the natural father, was responsible for conceiving an illegitimate child and had the opportunity to legitimate the child but failed to do so. Legitimation would have removed the stigma of bastardy and allowed the child to inherit from the father in the same manner as if born in lawful wedlock. Ga. Stat. Ann. § 74-103. Unlike the illegitimate child for whom the status of illegitimacy is involuntary and immutable, the appellant here was responsible for fostering an illegitimate child and for failing to change its status. It is thus neither illogical nor unjust for society to express its "condemnation of irresponsible liaisons beyond the bonds of marriage" by not conferring upon a biological father the statutory right to sue for the wrongful death of his illegitimate child. The justifications for judicial sensitivity to the constitutionality of differing legislative treatment of legitimate and illegitimate children are simply absent when a classification affects only the fathers of deceased illegitimate children.

B

The Court has also held that certain classifications based upon sex are invalid under the Equal Protection Clause, *e. g.*, *Reed* v. *Reed*, *supra*; *Stanton* v. *Stanton*, 421 U. S. 7; *Frontiero* v. *Richardson*, 411 U. S. 677; *Craig* v. *Boren*, 429 U. S. 190. Underlying those decisions is the principle that a State is not free to make overbroad generalizations based on sex which demean the ability or social status of the affected class. Thus in *Reed* v. *Reed*, *supra*, the Court was faced with the question of the constitutionality of an Idaho probate code provision that gave men a mandatory preference over women, in the same degree of relationship to the decedent, in the administration of the decedent's estate. The Court held that "[b]y providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause." 404 U. S., at 77. Similarly, in *Frontiero* v. *Richardson*, *supra*, the Court invalidated the Federal Armed Services benefit statutes that were based on the assumption that female spouses of servicemen were financially dependent while similarly situated male spouses of servicewomen were not. 411 U. S., at 690-691. And in the *Stanton* case, the Court held constitutionally invalid a Utah statute which provided that males had to reach a greater age than females to attain majority status. In reaching this result, the Court rejected the "old notion" that the female is "designed solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." 421 U. S., at 14-15. See also *Orr* v. *Orr*, — U. S. —.

In cases where men and women are not similarly situated, however, and a statutory classification is realistically based upon the differences in their situations, this Court has upheld its validity. In *Schlesinger* v. *Ballard*, 419 U. S. 498, for example, the Court upheld the constitutionality of a federal statute which provided that male naval officers who were not promoted within a certain length of time were subject to

mandatory discharge while female naval officers who were not promoted within the same length of time could continue as officers. Because of restrictions on women officers' seagoing service, their opportunities to compile records entitling them to promotion were more restricted than were those of their male counterparts. Thus, unlike the *Reed* and *Frontiero* cases where the gender-based classifications were based solely on administrative convenience and outworn cliches, the different treatment in the *Schlesinger* case reflected "not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service." 419 U. S., at 508 (emphasis supplied).

With these principles in mind, it is clear that the Georgia statute does not invidiously discriminate against the appellant simply because he is of the male sex. The fact is that mothers and fathers of illegitimate children are not similarly situated. Under Georgia law only a father can by voluntary unilateral action make an illegitimate child legitimate.[3] Unlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown. *Lalli* v. *Lalli*, — U. S. —,[4] By resting forward

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[3] The constitutionality of the legitimation provision of the Georgia statute has not been challenged and is not at issue in this case.

[4] As Mr. Justice Powell stated for the plurality in the *Lalli* case:

"That the child is the child of a particular woman is rarely difficult to prove. Proof of paternity, by contrast, frequently is difficult when the father is not part of a normal family unit. The putative father often goes to great lengths to conceal the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any tie to the mother. Indeed the mother may not know who is responsible for her pregnancy." — U. S. —. (Citations omitted.)

In *Schweiker* v. *American Civil Liberties Union*, 450 U. S. 785, the Court held that a law restricting state aid did not violate a natural mother of an illegitimate child's rights under the Equal Protection Clause. That case was quite different from this one. The invidious discrimination perceived in that case was between married

with a motion under § 74–103 of the Georgia Code, however, a father can both establish his identity and make his illegitimate child legitimate.[7]

Thus the conferral of the right of a natural father to sue for the wrongful death of his child only if he has previously acted to identify himself, undertake his paternal responsibilities, and make his child legitimate, does not reflect any overbroad generalizations about men as a class, but rather the reality that in Georgia only a father can by unilateral action legitimate an illegitimate child. Since fathers who do legitimate their children can sue for wrongful death in precisely the same circumstances as married fathers whose children were legitimate *ab initio*, the statutory classification does not discriminate against fathers as a class but instead distinguishes between fathers who have legitimated their children and those who have not.[8] Such a classification is quite unlike those condemned in the *Reed*, *Frontiero*, and *Stanton* cases which

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and unmarried mothers. There thus existed no real problem of identification of fraudulent claims. See Part IV, *infra*. Moreover, the statute in *Gibson* excluded every mother of an illegitimate child from bringing a wrongful death action while the Georgia statute at issue here excludes only those fathers who have not legitimated their children. Thus the Georgia statute has in effect adopted a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. *Trimble v. Gordon*, 430 U. S. 762, 771. Cf. *Lalli v. Lalli*, — U. S. —. We need not decide whether a statute which completely precluded fathers, as opposed to mothers, of illegitimate children from maintaining a wrongful death action would violate the Equal Protection Clause.

[7] See p. 2, *supra*.

[8] The ability of a father to make his child legitimate under Georgia law distinguishes this case from *Gibson v. Mohammed*, decided today. The Georgia legislature chooses to let the father by change his child's status, and thereby be seen for purposes of the wrongful death statute, put at the same time a rational method for the State and C with the problem of proving paternity. *Lalli v. Lalli*, *supra*, see Part IV, *infra*. In the *Gibson* case, by contrast, the father could neither change his children's status nor be seen for purposes of the New York statute.

were premised upon overbroad generalizations and excluded all members of one sex even though they were similarly situated with members of the other sex.

IV

Having concluded that the Georgia statute does not invidiously discriminate against any class, we still must determine whether the statutory classification is rationally related to a permissible state objective.

This Court has frequently recognized that a State has a legitimate interest in the maintenance of an accurate and efficient system for the disposition of property at death. *E. g., Lalli* v. *Lalli*, *supra*; *Trimble* v. *Gordon*, 430 U. S. 762; *Labine* v. *Vincent*, 401 U. S. 532. Of particular concern to the State is the existence of some mechanism for dealing with "the often difficult problem of proving the paternity of illegitimate children and the related danger of spurious claims against intestate estates." *Lalli* v. *Lalli*, *supra*, at — . *See also Gomez* v. *Perez*, 409 U. S. 535, 538.

This same state interest in avoiding fraudulent claims of paternity in order to maintain a fair and orderly system of decedent's property disposition is also present in the context of actions for wrongful death. If paternity has not been established before the commencement of a wrongful death action, a defendant may be faced with the possibility of multiple lawsuits by individuals all claiming to be the father of the deceased child. Such uncertainty would make it difficult if not impossible for a defendant to settle a wrongful death action in many cases, since there would always exist the risk of a subsequent suit by another person claiming to be the father.[10] The State of Georgia has chosen to deal with this problem by allowing only fathers who have established their

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[10] Indeed, this sort of uncertainty is evident in the present case. The appellee has been sued by both the administrators of the estate and the appellee on behalf of the child.

paternity by legitimating their children to sue for wrongful death, and we cannot say that this solution is an irrational one. Cf. *Lalli* v. *Lalli*, *supra*.[9]

The appellant argues, however, that whatever may be the problem with establishing paternity generally, there is no question in this case that he is the father. This argument misconceives the basic principle of the Equal Protection Clause. Unlike the personal rights and liberties created by other provisions of the Constitution, notably the Bill of Rights, the Equal Protection Clause of the Fourteenth Amendment confers no substantive rights and creates no substantive liberties.[10] The function of the Equal Protection Clause, rather, is simply to measure the validity of classifications created by state laws. Since we have concluded that the classification created by the Georgia statute is a rational means for dealing with the problem of proving paternity, it is constitutionally irrelevant that the appellant may be able to prove paternity in another manner.

V

The appellant also alleges that the Georgia statute violates the Due Process Clause of the Fourteenth Amendment. Nowhere in the appellant's brief or oral argument however, is there any explanation of how the Due Process Clause is implicated in this case. The only decision of this Court cited by the appellant that is even remotely related to his due process claim is *Stanley* v. *Illinois*, 405 U. S. 645. In the *Stanley* case, the Court held that a father of illegitimate children who had raised these children was entitled to a hearing on his fitness as a parent before they could be taken

[9] We thus need not decide whether the classification created by the Georgia statute is one rationally related to the State's interests in promoting the traditional family unit or in preventing a certain kind of morality.

[10] It cannot seriously be argued that a person may not choose to sue for the wrongful death of another in order to exercise a "fundamental" or constitutional right.

from him by the State of Illinois. The interests which the Court found controlling in *Stanley* were the integrity of the family against state interference and the freedom of a father to raise his own children. The present case is quite a different one, involving as it does only an asserted right to sue for money damages.

For these reasons, the judgment of the Supreme Court of Georgia is affirmed.

It is so ordered.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 10, 1979

Re: No. 78-3 - Parham v. Hughes

Dear Potter,

In due course I shall circulate a dissent in this case.

Sincerely yours,

Byron

Mr. Justice Stewart

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 12, 1979

Re: 78-3 - Parham v. Hughes

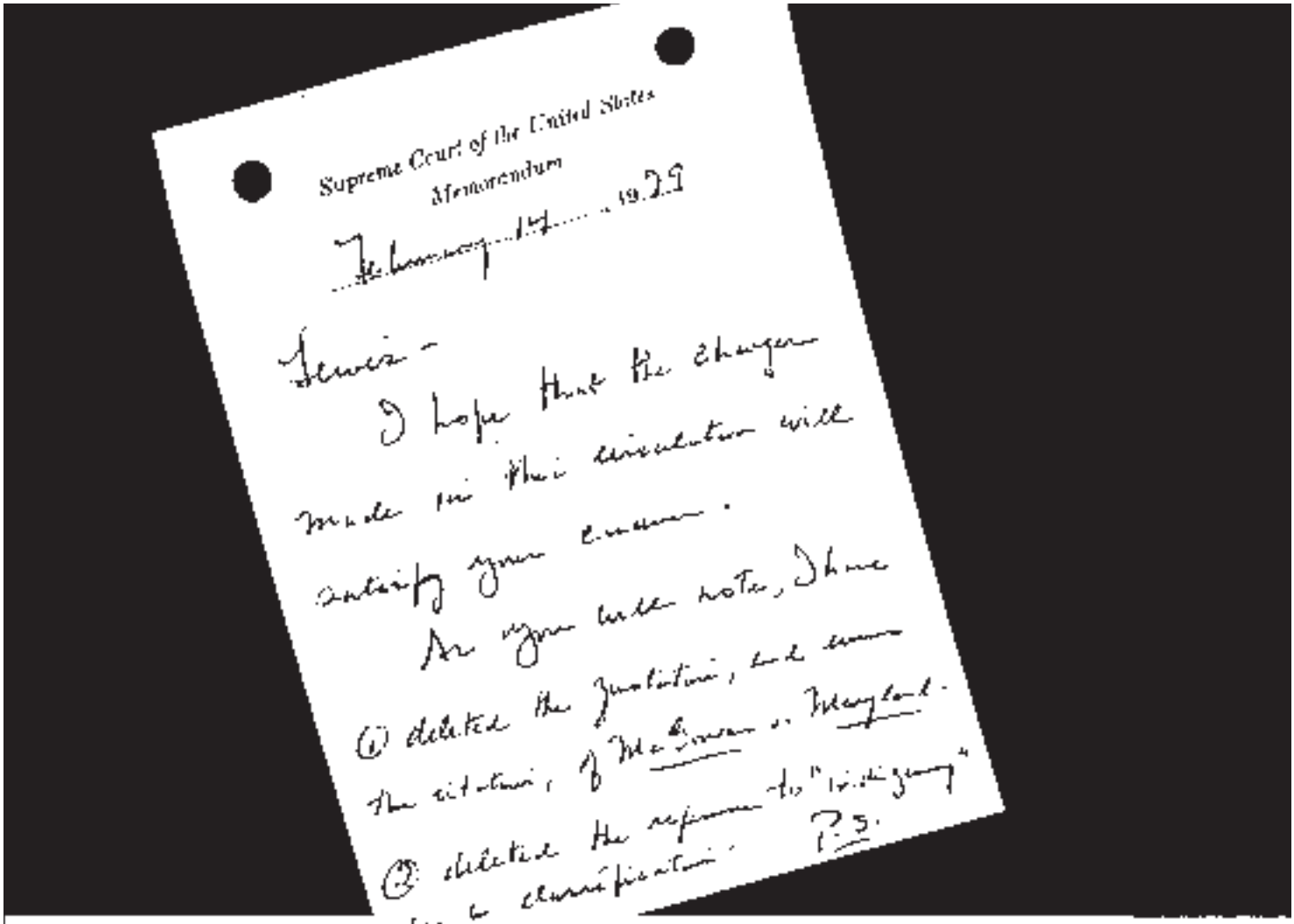
Dear Potter:

Please join me.

Respectfully,

Mr. Justice Stewart

Copies to the Conference


Supreme Court of the United States
Memorandum

February 17, 1979

Lewis -

I hope that the changes made in this circulation will satisfy your concern.

As you will note, I have

① deleted the quotation, and the citation, of McGowan v. Maryland.

② deleted the reference to "privileges" in a classification.

P.S.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 14, 1979

Re: No. 78-3 Parham v. Hughes

Dear Potter:

Please join me.

Sincerely,

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 15, 1979

Re: No. 78-3 - Parham v. Hughes

Dear Potter:

I await the dissent.

Sincerely,

T.M.

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 26, 1979

Re: No. 78-3 - Parham v. Hughes

Dear Potter:

I, too, shall await the dissent in this case.

Sincerely,

Harry

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 27, 1979

RE: No. 78-3 Parham v. Hughes

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 6, 1979

Re: No. 78-3 - Patham v. Hughes

Dear Byron:

Please join me in your dissent.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

March 9, 1979

No. 78-3 Parham v. Hughes

Dear Potter:

As you will see from the concurring opinion I am today circulating, I concluded that it was best for me to write separately.

I appreciate the changes you made to accommodate my suggestions, but the difficulty is that you and I have not been together in most of the "illegitimate" equal protection cases. I think it best to adhere to the type of analysis I have consistently applied in the past.

In any event, you have a Court and I think our opinions will afford adequate guidance.

Sincerely,

Mr. Justice Stewart

LFP/lab

March 9, 1979

No. 78-3 Parham v. Hughes

Dear Potter:

As you will see from the concurring opinion I am today circulating, I concluded that it was best for me to write separately.

I appreciate the changes you made to accommodate my suggestions, but the difficulty is that you and I have not been together in most of the "illegitimate" equal protection cases. I think it best to adhere to the type of analysis I have consistently applied in the past.

In any event, you have a Court and I think our opinions will afford adequate guidance.

Sincerely,

Mr. Justice Stewart

LFP/lab

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–3

Curtis Parham, Appellant, v. Ellis Franklin Hughes. | On Appeal from the Supreme Court of Georgia.

[March —, 1979]

MR. JUSTICE POWELL, concurring in the judgment.

I agree that the gender-based distinction of Georgia Code § 105–1307 does not violate equal protection.* I write separately, however, because I arrive at this conclusion by a route somewhat different from that taken by the Court.

To withstand judicial scrutiny under the Equal Protection Clause, gender-based distinctions must "serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U. S. 190, 197 (1977). See *Stanton v. Stanton*, 421 U. S. 7, 14 (1975); *Reed v. Reed*, 404 U. S. 71 (1971). We have recognized in various contexts the importance of a State's interest in minimizing potential problems in identifying the natural father of an illegitimate child. See, e. g., *Caban v. Mohammed*, — U. S. —, — n. 14 (1979) (adoption); *Lalli v. Lalli*, — U. S. —, — (1978) (inheritance); *Gomez v. Perez*, 409 U. S. 535, 538 (1973) (child support). Indeed, we have explicitly sought to avoid "impos[ing] on state court systems a greater burden" in determining paternity for purposes of wrongful death actions. *Weber v. Aetna Casualty & Surety Co.*, 406 U. S. 164, 174 (1972).

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*I do agree with the Court that the classification of § 105–1307 affects only fathers of illegitimate children, not the illegitimates themselves, and therefore that the case differs substantially from those in which we have found classifications based upon illegitimacy to be unconstitutional. See, e. g., *Trimble v. Gordon*, 430 U. S. 762 (1977).

The question, therefore, is whether the gender-based distinction at issue in the present case is substantially related to achievement of the important state objective of avoiding difficult problems in proving paternity after the death of an illegitimate child. In § 74-103 of the Georgia Code, the State has provided a simple, convenient mechanism by which the father of an illegitimate child can eliminate all questions concerning the child's parentage. Under that statute a father can legitimate his child simply by filing a petition in state court identifying the child and its mother and requesting an order of legitimation. After notice has been served on the mother, the state court can enter an order declaring the child legitimate for all purposes of Georgia law.

It is clear that the Georgia statute is substantially related to the State's objective. It lies entirely within a father's power to remove himself from the disability that only he will suffer. The father is required to declare his intentions at a time when both the child and its mother are likely to be available to give evidence. The mother, on the other hand, is given the opportunity to oppose and rebut or rebut the father's claim of paternity. The marginally greater burden placed upon fathers is no more severe than is required by the marked difference between proving paternity and proving maternity—a difference we have recognized repeatedly. See, *e. g., Lalli* v. *Lalli*, — U. S. —, — (1978).

I find the present case to be quite different from others in which the Court has found unjustified a State's reliance upon a gender-based classification. In several cases the Court has confronted a state law under which the burdened individual (whether a child born out of wedlock or the father of such a child) has been powerless to remove himself from the statutory burden—regardless of the proof of paternity. See, *e. g., Cabán* v. *Mohammed*, *supra*; *Trimble* v. *Gordon*, *supra*. The requisite marriage between the father and mother often is tantamount to a total exclusion of fathers, as marriage is pos-

sible only with the consent of the mother. In the present case, however, no such onerous requirement is imposed upon fathers under Georgia law. It seem, therefore, I conclude that the Georgia statute challenged in this case, unlike the statutes reviewed in our prior decisions, is substantially related to the State's objective of avoiding difficult problems of proof of paternity.

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

CHAMBERS OF
THE CHIEF JUSTICE

March 15, 1979

Dear Potter:

Re: 78-3 Curtis Parham v. Ellis Franklin Hughes

I join your latest draft.

Regards,

WEB

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE WM J BRENNAN JR

March 15, 1979

RE: No. 78-3 Parham v. Hughes

Dear Potter:

I have joined Byron's dissent in the above and am withdrawing my separate dissent which Thurgood had joined.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 15, 1979

Re: 78-3 - Parham v. Hughes

Dear Byron:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

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: 10 MAR ___

1-3

2nd DRAFT

Brought down 4/24

SUPREME COURT OF THE UNITED STATES

No. 78-3

Curtis Parham, Appellant,
v.
Ellis Franklin Hughes.

On Appeal from the Supreme Court of Georgia.

[March —, 1979]

MR. JUSTICE POWELL, concurring in the judgment.

I agree that the gender-based distinction of Georgia Code § 105-1307 does not violate equal protection.* I write separately, however, because I arrive at this conclusion by a route somewhat different from that taken by MR. JUSTICE STEWART.

To withstand judicial scrutiny under the Equal Protection Clause, gender-based distinctions must "serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U. S. 190, 197 (1976). See *Orr v. Orr*, — U. S. —, — (1979); *Stanton v. Stanton*, 421 U. S. 7, 14 (1975); *Reed v. Reed*, 404 U. S. 71 (1971). We have recognized in various contexts the importance of a State's interest in minimizing potential problems in identifying the natural father of an illegitimate child. See, e.g., *Caban v. Mohammed*, — U. S. —, —, n. 14 (1979) (adoption); *Lalli v. Lalli*, — U. S. —, — (1978) (inheritance); *Gomez v. Perez*, 409 U. S. 535, 538 (1973) (child support). Indeed, we have sought to avoid "impos[ing] on state court systems a greater burden" in determining paternity for purposes of wrongful death actions. *Weber v. Aetna Casualty & Surety Co.*, 406 U. S. 164, 174 (1972);

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* I also agree with MR. JUSTICE STEWART that the classification of § 105-1307 [illegible] 762 (1977).

The question, therefore, is whether the gender-based distinction at issue in the present case is substantially related to achievement of the important state objective of avoiding difficult problems in proving paternity after the death of an illegitimate child. In § 74–103 of the Georgia Code the State has provided a simple, convenient mechanism by which the father of an illegitimate child can eliminate all questions concerning the child's parentage. Under that statute a father may legitimate his child simply by filing a petition in state court identifying the child and its mother and requesting an order of legitimation. After notice has been served on the mother, the state court can enter an order declaring the child legitimate for all purposes of Georgia law.

It is clear that the Georgia statute is substantially related to the State's objective. It lies entirely within a father's power to remove himself from the disability that only he will suffer. The father is required to declare his intentions at a time when both the child and its mother are likely to be available to provide evidence. The mother, on the other hand, is given the opportunity to appear and either support or rebut the father's claim of paternity. The marginally greater burden placed upon fathers is no more severe than is required by the natural difference between proving paternity and proving maternity—a difference we have recognized repeatedly. See, *e. g., Lalli* v. *Lalli*, — U. S. —, — (1978).

I find the present case to be quite different from others in which the Court has found unjustified a State's reliance upon a gender-based classification. In several cases the Court has confronted a state law under which the burdened individual (whether a child born out of wedlock or the father of such a child) has been powerless to remove himself from the statutory burden—regardless of the proof of paternity. See, *e. g., Caban* v. *Mohammed*, *supra*; *Trimble* v. *Gordon*, *supra*. To require marriage between the father and mother often is tantamount to a total exclusion of fathers, as marriage is pos-

side only with the consent of the mother. In the present case, however, no such requirement is imposed upon father under Georgia law. In sum, therefore, I conclude that the Georgia statute challenged in this case unlike the statutes reviewed in our prior decisions, is substantially related to the State's objective of avoiding difficult problems of proof of paternity.

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

From: Mr. Justice Powell

Circulated: 16 MAR 1979

1st DRAFT Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-3

Curtis Parham, Appellant, v. Ellis Franklin Hughes. | On Appeal from the Supreme Court of Georgia.

[March —, 1979]

MR. JUSTICE POWELL, concurring in the judgment.

I agree that the gender-based distinction of Georgia Code § 105-1907 does not violate equal protection.* I write separately, however, because I arrive at this conclusion by a route somewhat different from that taken by the ~~Court~~ Mr Justice Stewart.

To withstand judicial scrutiny under the Equal Protection Clause, gender-based distinctions must "serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig* v. *Boren*, 429 U. S. 190, 197 (1977). *See Stanton* v. *Stanton*, 421 U. S. 7, 14 (1975); *Reed* v. *Reed*, 404 U. S. 71 (1971). We have recognized in various contexts the importance of a State's interest in maintaining procedures for identifying the natural father of an illegitimate child. *See, e. g., Caban* v. *Mohammed*, ___ U. S. ___, ___ n. 14 (1979) (adoptions); *Lalli* v. *Lalli*, ___ U. S. ___, ___ (1978) (inheritance); *Gomez* v. *Perez*, 409 U. S. 535, 538 (1973) (child support). Indeed we have ~~explicitly~~ sought to avoid "imposing on state court systems a greater burden" in determining paternity for purposes of wrongful death actions. *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 174 (1972).

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*I disagree with the Court that the classification of § 105-1907 affects only matters of illegitimacy, not the illegitimates themselves, and therefore that it is substantially different from those in which we have found discrimination based upon illegitimacy to be unconstitutional. *See, e. g., Trimble* v. *Gordon*, 430 U. S. 762 (1977).

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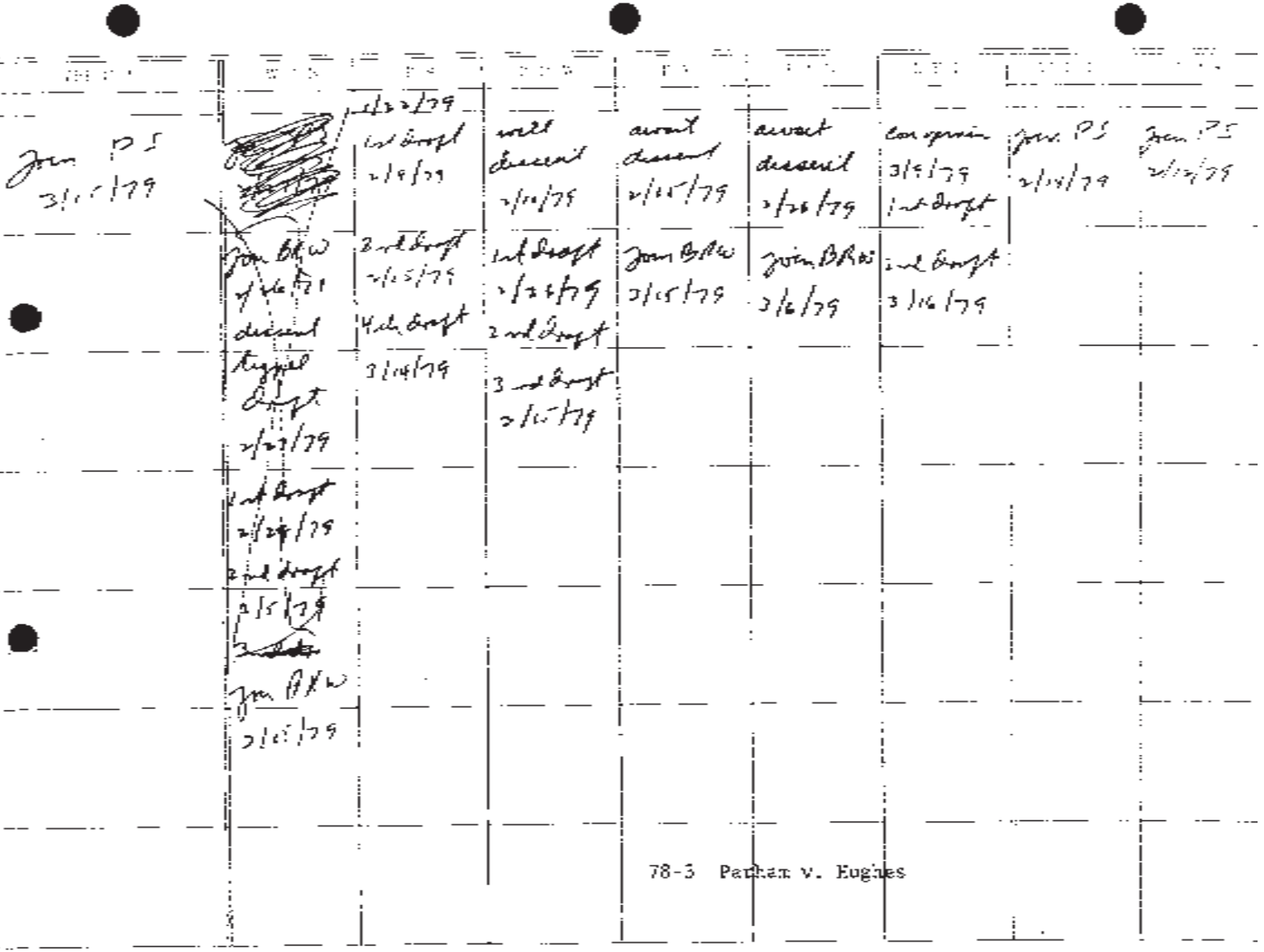
The question, therefore, is whether the gender-based distinction at issue in the present case is substantially related to achievement of the important state objective of avoiding difficult problems in proving paternity after the death of an illegitimate child. In § 74-103 of the Georgia Code the State has provided a simple, convenient mechanism by which the father of an illegitimate child can eliminate all questions concerning the child's parentage. Under that statute, a father can legitimate his child simply by filing a petition in state court identifying the child and its mother and requesting an order of legitimation. After notice has been served on the mother, the state court can enter an order declaring the child legitimate for all purposes of Georgia law.

It is clear that the Georgia statute is substantially related to the State's objectives. It lies entirely within a father's power to remove himself from the disability that only he will suffer. The father is required to declare his intentions at a time when both the child and its mother are likely to be available to give evidence. The mother on the other hand, is given the opportunity to appear and either support or rebut the father's claim of paternity. The marginally greater burden placed upon fathers is no more severe than is required by the marked difference between proving paternity and proving maternity—a difference we have recognized repeatedly. See, e. g., *Lalli* v. *Lalli*, — U. S. —, — (1978).

I find the present case to be quite different from others in which the Court has found unjustified a State's reliance upon a gender-based classification. In several cases the Court has overturned a state law under which the legitimized individual (whether a child born out of wedlock or the father of such a child) has been powerless to remove himself from the statutory burden—regardless of the proof of paternity. See, e. g., *Gomez* v. *Perez*, *Weinberger* v. *Wiesenfeld*, *supra*, *Trimble* v. *Gordon*, *supra*. To require marriage between the father and mother often is tantamount to a total exclusion of fathers, as marriage is pos-

sible only with the consent of the mother. In the present case, however, no such [redacted] requirement is imposed upon fathers under Georgia law. In sum, therefore, I conclude that the Georgia statute challenged in this case, unlike the statutes reviewed in our prior decisions, is substantially related to the State's objective of avoiding difficult problems of proof of paternity.


Jon PS
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Jon BKW
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