The Burger Court Opinion Writing Database

Parham v. Hughes

441 U.S. 347 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

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

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.

February 27, 1979

RE: No. 78-3 Parham v. Hughes

Dear Byron:

Please join me.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

To: The Chief Justice
Mr. Justice Stewar
Mr. Justice White
Mr. Justice Marsha
Mr. Justice Black
Mr. Justice Powell
Mr. Justice Rehn
Mr. Justice Steven

27 February 1979

From: Mr. Justice Bren

No. 78-3, Parham v. Hughes

Circulated: 27 FEB 9

Recirculated: _____

MR. JUSTICE BRENNAN, dissenting.

I join my Brother White's opinion dissenting from the judgment of the Court. I write separately only to express my concern at the somewhat loose language of the Court:

> "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. The function of the Equal Protection Clause, rather, is simply to measure the validity of classifications created by state laws." Maj. op. at 10.

If the Court means by this passage only what is necessary in the context of its opinion -- that in the absence of a suspect classification or of a fundamental interest, a reasonable statutory classification does not become irrational and therefore impermissible under the Equal Protection Clause merely because in some circumstances it is overbroad-- the passage is of course unobjectionable. But if the Court means by this passage that statutes or regulations cannot, while acceptable on

Circulated 1-2 2-28-79

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 BRENNAN, dissenting.

I join my Brother WHITE's opinion dissenting from the judgment of the Court. I write separately only to express my concern at the somewhat loose language of the Court:

> "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. The function of the Equal Protection Clause, rather, is simply to measure the validity of classifications created by state laws." Maj. op., at 10.

If the Court means by this passage only what is necessary in the context of its opinion—that in the absence of a suspect classification or of a fundamental interest, a reasonable statutory classification does not become irrational and therefore impermissible under the Equal Protection Clause merely because in some circumstances it is overbroad—the passage is of course unobjectionable. But if the Court means by this passage that statutes or regulations cannot, while acceptable on their face, be found impermissible as applied under the Equal Protection Clause, then the Court violates the common understanding of the Clause dating back at least as far as *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373 (1886).* And surely

* "For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a

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

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 5 MAR 79

1-2

2nd 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. JUSTCE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I join my Brother WHITE's opinion dissenting from the judgment of the Court. I write separately only to express my concern at the somewhat loose language of the Court:

> "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. The function of the Equal Protection Clause, rather, is simply to measure the validity of classifications created by state laws." Maj. op., at 10.

I interpret the Court to mean by this passage only what is necessary in the context of its opinion: In the absence of a suspect classification or of a fundamental interest, a reasonable statutory classification does not become irrational and therefore impermissible under the Equal Protection Clause merely because in some circumstances it is overbroad. For if the Court meant by this passage that statutes or regulations cannot, while acceptable on their face, be found impermissible as applied under the Equal Protection Clause, the Court would violate the common understanding of the Clause dating back at least as far as *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373 (1886).* And surely the Court could not be implying by its

*"For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a

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

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

Circulated: 9 FEB 1979

Recirculated: _____

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.

[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. 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, Cassandria 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:

"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.)

Supreme Court of the United States

Memorandum

February 14, 1979

Lewis - 78-3

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

As you will note, I have ① deleted the quotation, and even the citation, of McCulloch v. Maryland. ② deleted the reference to "indigency" in a clarification.

P.S.

3,4

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

Circulated: _____

Recirculated: 14 FEB 1979

2nd 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.

[February —, 1979]

MR. JUSTICE STEWART delivered the opinion of the Court.

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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

Circulated: _____

Recirculated: 15 FEB 1979

3rd 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.

[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. 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, Cassandria 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

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"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.)

10

The Chief J...
Mr. Justice B...
Mr. Justice Whit...
Mr. Justice Marsh...
Mr. Justice Blackm...
Mr. Justice Powell
Mr. Justice Rehnqui...
Mr. Justice Stevens

From: Mr. Justice Stewa...

Circulated: 14 MAR 197-

Recirculated: _____

4th 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.

[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. 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, Cassandria 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

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 26, 1979

MEMORANDUM FOR THE CONFERENCE

Case held for 78-3, Parham v. Hughes.

The only hold is 78-5441, Robinson v. Kolstad.

This is the only case that has been held for Parham. However, it probably should have been held for 77-1115, Lalli v. Lalli instead. The issue in Kolstad is under what circumstances an illegitimate child can sue for the wrongful death of his father. The Wisconsin Supreme Court upheld a Wisconsin statute that denied an unacknowledged illegitimate child the right to sue for the wrongful death of his father. The statute provided that an illegitimate child could be acknowledged by a father's admission in open court, an adjudication in paternity proceedings, a subsequent marriage of the parents, or a signed document by the father. The Kolstad case is thus similar to Lalli (that case dealt with when an illegitimate child can inherit from his father).

The issue in Parham, by contrast, was whether a father of an illegitimate child can be denied the right to sue for the wrongful death of his child. We specifically stated in Parham that the case did not present the same issues as the Court's illegitimacy cases where the rights of an illegitimate child were at stake. I would vacate and remand for reconsideration in light of Lalli v. Lalli.

PS

PS

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

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

From: Mr. Justice White

Circulated: 26 FEB 1979

Recirculated: _____

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 WHITE, dissenting.

Petitioner is the father, rather than the mother, of a deceased illegitimate child. It is conceded that for this reason alone he may not bring an action for the wrongful death of his child. Yet the Court concludes that petitioner is not discriminated against "simply" because of his sex, *ante*, at 7, because Georgia provides a means by which fathers can legitimate their children. The dispositive point for the Court is that only a father may avail himself of this process. Therefore, we are told, "[t]he fact is that mothers and fathers of illegitimate children are not similarly situated," *ibid.*

There is a startling circularity in this argument. The issue before the Court is whether Georgia may require unmarried fathers, but not unmarried mothers, to have pursued the statutory legitimization procedure in order to bring suit for the wrongful death of their children. Seemingly, it is irrelevant that as a matter of state law mothers may not legitimate their children,[1] for they are not required to do so in order to maintain a wrongful death action. That only fathers *may* resort to the legitimization process cannot dissolve the sex discrimination in *requiring* them to.[2] Under the Court's boot-

[1] Although Ga. Code § 74-103 (1973) provides that a father may petition, with notice to the mother, to legitimate his child, mothers are not given a similar right. At least one State provides that either parent, or both, may legitimate a child. La. Civ. Code Ann. Art. 203 (West 1976).

[2] The Court not only fails to examine whether required resort by fathers to the legitimization procedure bears more than a rational rela-

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

From: Mr. Justice White

Circulated: _____

Recirculated: 28 FEB 1979

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1

2nd 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 WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

Appellant is the father, rather than the mother, of a deceased illegitimate child. It is conceded that for this reason alone he may not bring an action for the wrongful death of his child. Yet the Court concludes that appellant is not discriminated against "simply" because of his sex, *ante*, at 7, because Georgia provides a means by which fathers can legitimate their children. The dispositive point for the Court is that only a father may avail himself of this process. Therefore, we are told, "[t]he fact is that mothers and fathers of illegitimate children are not similarly situated," *ibid.*

There is a startling circularity in this argument. The issue before the Court is whether Georgia may require unmarried fathers, but not unmarried mothers, to have pursued the statutory legitimization procedure in order to bring suit for the wrongful death of their children. Seemingly, it is irrelevant that as a matter of state law mothers may not legitimate their children,[1] for they are not required to do so in order to maintain a wrongful death action. That only fathers *may* resort to the legitimization process cannot dissolve the sex discrimination in *requiring* them to.[2] Under the Court's boot-

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

From: Mr. Justice White

Circulated: _____

Recirculated: 15 MAR 1979

BRN
Please join me
in your dissent
JM

1, 2, 4

3rd 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 Marshall

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, dissenting.

Appellant is the father, rather than the mother, of a deceased illegitimate child. It is conceded that for this reason alone he may not bring an action for the wrongful death of his child. Yet four Members of the Court conclude that appellant is not discriminated against "simply" because of his sex, *ante,* at 7, because Georgia provides a means by which fathers can legitimate their children. The dispositive point is that only a father may avail himself of this process. Therefore, we are told, "[t]he fact is that mothers and fathers of illegitimate children are not similarly situated," *ibid.*

There is a startling circularity in this argument. The issue before the Court is whether Georgia may require unmarried fathers, but not unmarried mothers, to have pursued the statutory legitimization procedure in order to bring suit for the wrongful death of their children. Seemingly, it is irrelevant that as a matter of state law mothers may not legitimate their children,[1] for they are not required to do so in order to maintain a wrongful death action. That only fathers *may* resort to the legitimization process cannot dissolve the sex discrimination in *requiring* them to.[2] Under the plurality's

[1] Although Ga. Code § 74–103 (1973) provides that a father may petition, with notice to the mother, to legitimate his child, mothers are not given a similar right. At least one State provides that either parent, or both, may legitimate a child. La. Civ. Code Ann. Art. 203 (West 1976).

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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,

TM

T.M.

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

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 HARRY A. BLACKMUN

March 6, 1979

Re: No. 78-3 - Parham 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

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: 16 MAR 1979

Recirculated: _____

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.~~ 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 minimizing potential problems in 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 "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).

*I also agree with the Court that the classification of § 105–1307 affects only fathers of illegitimates—not the illegitimates themselves—and therefore that this 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).

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

2nd DRAFT

From: Mr. Justice Powell

Circulated: 16 MAR 1979

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.

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*I also agree with MR. JUSTICE STEWART that the classification of § 105–1307 affects only fathers of illegitimates—not the illegitimates themselves—and therefore that this 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).

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,

Mr. Justice Stewart

Copies to the Conference

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