CONSTITUTIONAL LAW

Equal Protection Clause • State Alimony Statutes • Sex Discrimination

Orr v. Orr, 99 S. Ct. 1102 (1979)

IN *Orr v. Orr*[1] the United States Supreme Court held unconstitutional the Alabama alimony statutes which provided that husbands, but not wives, may be required to pay alimony upon divorce. The Court's principal reason for so holding was the statutes' violation of the Equal Protection Clause of the fourteenth amendment on the basis of sex discrimination.

The case began its journey to the United States Supreme Court in the Circuit Court of Lee County. Lillian Orr filed a petition in the Circuit Court seeking to have William Orr adjudged in contempt for failing to make his alimony payments.[2] William Orr as a defense filed a motion challenging the constitutionality of the Alabama alimony statutes.[3] The Circuit Court denied William Orr's motion and he appealed to the Court of Civil Appeals of Alabama.[4]

The Court of Civil Appeals affirmed the findings of the Circuit Court. Mr. Orr appealed to the Supreme Court of Alabama which initially granted the Writ of Certiorari on May 24, 1977, but then quashed it as improvidently granted on November 10, 1977.[5]

After the Writ of Certiorari was quashed by the Alabama Supreme Court, Mr. Orr appealed to the United States Supreme Court which noted probable jurisdiction.[6]

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[1] 440 U.S. 268, 99 S. Ct. 1102 (1979).

[2] *Id.* at 1107.

[3] The statutes, ALA. CODE tit. 30, provide that:

"§ 30-2-51. If the wife has no separate estate or it be insufficient for her maintenance, the judge, upon granting a divorce, at his discretion, may order to the wife an allowance out of the estate of the husband, taking into consideration the value thereof and conditions of his family.

§ 30-2-52. If the divorce is in favor of the wife for the misconduct of the husband, the judge trying the case shall have the right to make an allowance to the wife out of the husband's estate, or not make her an allowance as the circumstances of the case may justify, and if an allowance is made, it must be as liberal as the estate of the husband will permit, regard being had to the condition of his family and to all the circumstances of the case.

§ 30-2-53. If the divorce is in favor of the husband for the misconduct of the wife and if the judge in his discretion deems the wife entitled to an allowance, the allowance must be regulated by the ability of the husband and the nature of the misconduct of the wife."

The Alabama Supreme Court has held that "there is no authority in this state for awarding alimony against the wife in favor of the husband . . . The statutory scheme is to provide alimony only in favor of the wife." Davis v. Davis, 279 Ala. 643, 189 So.2d 158, 160 (1966).

See, also Orr v. Orr, 351 So.2d 906, 907 (1977).

[4] Orr v. Orr, 351 So.2d 904 (Ala. Civ. App. 1977).

[5] 351 So.2d 906.

[6] 430 U.S. 924 (1978).

In its opinion, the Supreme Court discussed three possible state objectives which might have been served by the statutes. The first objective, as argued by Mr. Orr, was that the statutes effectively announced the "State's preference for allocation of family responsibilities under which the wife plays a dependent role." The second objective the statutes may have served was to "provide help for needy spouses, using sex as a proxy for need." Thirdly, the State may have sought to compensate "women for past discrimination during marriage, which assertedly has left them unprepared to fend for themselves in the working world following divorce."[7]

When the Court examined the statutes in light of the State's possible objectives, it decided that here " 'the gender-based distinction [was] gratuitous; without it the statutory scheme would only provide benefits to those men who [were] in fact similarly situated to the women the statute aids, and the effort to help those women would not in any way be compromised'."[8]

HISTORY OF GENDER-BASED EQUAL PROTECTION CASES

Until 1971 the Supreme Court followed a deferential policy in regards to legislation with a non-neutral gender basis.[9] Until the 70's it seems that the Supreme Court was satisfied to follow Justice Bradley's view in *Bradwell v. Illinois*[10] regarding legislation that affected the roles of men and women. In *Bradwell,* Justice Bradley wrote:

> . . . the family institution is repugnant to the idea of a women adopting a distinct and independent career from that of her husband . . . . .
>
> The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator and the rules of civil society must be adapted to the general constitution of things and cannot be based upon exceptional cases.[11]

This type of judicial attitude was not the only hurdle that had to be overcome by the early gender discrimination cases. Until the 1960's, the Supreme Court followed the view established by the *Slaughter - House Cases*[12], that the equal protection clause was a provision to protect against racial discrimination, and therefore, was rarely applicable to any other case.[13]

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[7] 440 U.S. at 279-280, 99 S. Ct. at 1104, 1111-1112.

[8] *Id.* at 282, 99 S. Ct. at 1113 (citing Weinberger v. Wisenfeld, 420 U.S. at 653).

[9] *See,* Ginsburg, *Gender and the Constitution.* 44 U. CIN. L. REV. (1975).

[10] 83 U.S. (16 Wall.) 36 (1872).

[11] *Id.* at 141, as cited in Ginsburg, *supra,* note 9 at 4.

[12] 83 U.S. (16 Wall.) 36 (1872).

[13] *See,* Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1,8 (1972); and Ginsburg, *supra* note 9 at 5.

With the Warren Court came "(t)he emergence of the 'new' equal protection" clause.[14] When deciding if there was a violation of equal protection, the Warren Court resorted to a "rigid two-tier" test.[15] This "two-tier" test encompassed (1) A "strict scrutiny standard" used when cases involved what the court considered (a) "fundamental rights" or "suspect classes", and (2) a deferential "rational relationship standard" used in all other cases.[16] The "strict scrutiny standard" proved almost always fatal to the state action or legislation involved, while the "rational relationship standard" proved to be a standard very easily overcome.[17]

The Burger Court continued to allow the Equal Protection Clause to remain a viable, independent stepping stone to the doors of the Supreme Court.[18] Professor Gunther noted three trends emerging from the Burger Court's first encounters with the Equal Protection Clause:

> (1) The Burger Court is reluctant to expand the scope of the new equal protection, although its best established ingredients retain vitality.
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> (2) There is a mounting discontent with the rigid two-tier formulations of the Warren Court's equal protection doctrine.
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> (3) The court is prepared to use the clause as an interventionist tool without resorting to the strict scrutiny language of the new equal protection.[19]

The question now becomes — How does this judicial approach to equal protection in general pertain to the more specific problems of gender-based discrimination? The cornerstone case in the sex discrimination arena is *Reed v. Reed*.[20] *Reed* dealt with certain Idaho statutes that gave males preference over females when two equally qualified persons petitioned for letters of administration in an estate. The Court began with the general proposition that the fourteenth amendment does not in all cases deny States the right to give preference to certain classes in certain situations.[21] However, the Court went on to say that the fourteenth amendment does "deny to States the power to legislate that different treatment be accorded to . . . classes on the basis of criteria wholly unrelated to the objective of that statute."[22] However, the relationship between the legislation and the objective that the Court sought was not deferential, minimal scrutiny type of relationship

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[14] *Id.*

[15] *See,* Gunther, *supra* note 13 at 8, 9, and Ginsburg, *supra* note 9 at 16, 17.

[16] *Id.*

[17] *Id.*

[18] *See,* Gunther, *supra* note 13 at 12.

[19] *Id.*

[20] 404 U.S. 71 (1971).

[21] *Id.* at 75.

[22] *Id.* at 75, 76.

followed by the Warren Court. In *Reed,* the Burger Court held that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.[23]

What the Burger Court succeeded in doing in *Reed* was to put "new bite" into the Warren court's equal protection analysis. The Court today is much "less willing to supply [the] justifying rationales" that would sustain the legitimacy of the legislation in question.[24] It seems the *Reed* court was trying to walk on middle ground. That is, on one hand, it did not want to declare "gender" a "suspect class" and subject it to the almost insurmountable "strict scrutiny" test. On the other, the Court recognized that this was too important of an area to merely subject it to the minimal scrutiny of the old deferential "rational relationship" test used by the Warren Court.

The Court then proceeded in *Frontiero v. Richardson*[25] to increase the confusion caused by the *Reed* decision. *Frontiero* concerned the right of servicewomen to receive the same housing and medical fringe benefits as servicemen. Justice Brennan, writing for a plurality[26] of Justices, held that "classifications based upon sex . . . are inherently suspect and must therefore be subjected to close scrutiny."[27] Justice Brennan reasoned that there has been a "long and unfortunate history of sex discrimination,"[28] and that sex is merely an "accident of birth"[29] and therefore subject to a "stricter standard of review."[30]

The remaining members of the court covered the remaining spectrum of possible positions. Mr. Justice Powell, Mr. Chief Justice Burger, and Mr. Justice Blackmun concurred in judgment but added that "(i)t is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding."[31] Mr. Justice Stewart concurred holding that the statutes were invidiously discriminating, contrary to the mandate of *Reed.*[32] Mr. Justice Rehnquist dissented simply by stating that he agreed with the majority opinion of the District Court.[33]

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[23] *Id.*

[24] *See,* Gunther, *supra,* note 13 at 21.

[25] 411 U.S. 677 (1973).

[26] Justice Brennan was joined by Mr. Justice Douglas, Mr. Justice White and Mr. Justice Marshall.

[27] 411 U.S. at 682.

[28] *Id.*

[29] *Id.* at 686.

[30] *Id.* at 688.

[31] *Id.* at 691, 692.

[32] *Id.* at 691, *also see,* Reed v. Reed, 404 U.S. 71 (1971).

[33] *Id.* at 691, *also see,* Frontiero v. Laird, 341 F. Supp. 201 (1972), opinion and judgment by Circuit Judge Rives and District Judge McFadden.

Although *Reed* and *Frontiero* caused confusion over which test should be applied in gender discrimination cases, there remained a common thread running between the two. The common rationale being that if two people, similarly situated, are classified and treated differently by legislation, then the basis of such legislation would have to be substantially more than archaic notions about the differences between men and women.[34]

The next case that presented the Court with an opportunity to clarify its position in this area added a new twist to the problem. In *Kahn v. Shevin*,[35] it was not a member of the female gender that was seeking equal protection, but instead a male was seeking benefits denied to him but granted to females. *Kahn* involved a Florida statute that granted to "widows an annual $500 property tax exemption" without providing for an "analogous benefit for widowers."[36] Mr. Kahn "questioned the reasonableness of treating men and women who do not match the gross generalization as if they did, and using a gender pigeon hole in lieu of a functional description."[37] Mr. Kahn further argued, that such pigeonholing reinforced "the role-typing that so often placed women 'not on a pedestal but in a cage.' "[38]

Justice Douglas, writing for the majority in Kahn, began with the premise that "(t)here can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man."[39] The Court then analyzed certain statistical data and came to the conclusion that the median income for women in the labor force is substantially lower than that of men.[40] Relying on these two premises the Court went on to state that "[t]here can be no doubt, therefore, that Florida's differing treatment of widows and widowers 'rest[s] upon some ground of difference having a fair and substantial relation to the object of legislation'."[41] The "objective" of the statute was to "further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."[42] Anticipating the possible confusion that might emerge from a comparison of *Frontiero* with *Kahn*, the Court made an effort to distinguish *Frontiero* from the latter case by stating that the legislation in *Frontiero* had as its sole objective "administrative con-

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[34] *See*, Ginsburg, *Some Thoughts on Benign Classification in The Context of Sex*, 10 CONN. L. REV. 813, 816 (1978), *also see* Gunther, *supra* note 13 at 34.

[35] 416 U.S. 351 (1974).

[36] *Id.* at 351 (Syllabus).

[37] Ginsburg, *supra* note 9 at 13. Ruth Bader Ginsburg, author of this article and also the article footnoted at 36, argued the case on behalf of Mr. Kahn before the Supreme Court.

[38] Ginsburg, *supra* note 34 at 817. *See also* note 41 *supra*.

[39] 416 U.S. at 353.

[40] *Id.* at 353, 354.

[41] *Id.* at 355. (quoting Reed v. Reed, 404 U.S. 71, 76, quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415).

[42] *Id.*

venience"[43] while the Florida statute was more "reasonably designed to achieve a substantial state objective.[44]

Three Justices dissented in *Kahn*. Mr. Justice Brennan and Mr. Justice Marshall took the view that legislative classification predicated on gender "must be subjected to close scrutiny," and must serve a "compelling governmental interest."[45] While Mr. Justice Brennan and Mr. Justice Marshall believed that the Florida statute served a "compelling governmental interest," they thought the statute "invalid because the State's interest can be served equally well by a more narrowly drafted statute."[46] Mr. Justice White dissented because he believed that "all widows" were not "financially more needy and less trained or less ready for the job market than men" and that "there are many widowers who are needy . . . and have less access to the job market than many widows."[47]

After *Kahn*, there was a feeling among some legal scholars that what the Court was granting women was not an equal but superior position to that of men.[48] It seemed that the Court was "ready to strike down classifications that discriminated against females, yet vigilant to preserve laws that favor them."[49]

In 1975, the Supreme Court had four sex discrimination cases[50] argued before it, and therefore, had ample chance to finally reach a consensus on what standard of scrutiny would be applied in sex discrimination cases. While much of the uncertainty concerning the earlier decisions still remained, certain judicial trends did seem to appear.

In *Schlesinger*, the emerging trend was that statutes that sought to remedy situations of sex discrimination would be held valid, but if, and only if, the discrimination existed in reality and was not merely presumed from old stereo-type notions.[51]

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[43] The Court in *Kahn* also noted that in *Frontiero* the statute was "not in any sense designed to rectify the effects of past discrimination against women." 416 U.S. at 355 n.8 *citing* 411 U.S. at 689 n.22.

[44] 416 U.S. at 355.

[45] *Id.* at 357, 358.

[46] *Id.* at 358. The Warren Court held that to pass the strict scrutiny standard the statute must serve a compelling state interest and that there must be no less burdensome method of achieving the asserted state purpose. *See,* Gunther, *supra* note 13 at 21.

[47] *Id.* at 360, 361.

[48] Ginsburg, *supra* note 38, at 818.

[49] *Id. Also see,* Ginsburg, *supra* note 32 at 818 n.32 *citing* HARV. L. SCH. REC., Mar. 23, 1973, at 15 (quoting Justice Potter Stewart's comment in an informal talk with Harvard students: "(T)he female of the species has the best of both worlds. She can attack laws that unreasonably discriminate against her while preserving those that favor her.").

[50] Schlesinger v. Ballard, 419 U.S. 498 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Stanton v. Stanton, 421 U.S. 7 (1975).

[51] 419 U.S. 498, 508. "[t]he different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, the demonstrable fact that male and

In *Stanton* and in *Taylor,* the Court, using a mass of statistical data, came to the conclusion that the notion that a woman's role is in the home is no longer a valid presumption today.[52] In part, the statistical data relied on indicated that "54.2% of all women between 18 and 64 years of age were in the labor force; and 67.3% of mothers who were widowed, divorced or separated were in the work force . . ."[53]

More importantly, *Wiesenfeld, Stanton,* and *Taylor* demonstrated that the Court was less willing to decide "whether a classification based on sex is inherently suspect."[54] The Court felt that the "substantial rational relation" test of *Reed* was a sufficient basis for judicial analysis. However, it is important to keep in mind that these cases also evidence the Court's unwillingness to take a deferential approach to the supposed objective of the legislature. Unlike the Warren Court, the Burger Court is more willing to do some "searching for the actual governmental motivation or purpose.[55]

With the last three major decisions[56] by the Court, one can now discern certain benchmarks that will be the underlying basis of the Court's review. First, any classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[57] That is, "the mere recitation of benign compensatory purpose is not an automatic shield which protects against inquiry into the actual purposes underlying a statutory scheme."[58] No longer will the Court uphold statutes which have as their basis " 'archaic and overbroad generalizations' about women'."[59]

Notwithstanding the above-mentioned benchmarks, the only safe general statement concerning the Court's view of legislation which establishes classifications based on gender is that it is still uncertain. However, even with this general uncertainty, it is clear that "with respect to the equal protection standard" to be used in cases involving gender-based classifications, *"Reed v. Reed* is the most relevant precedent."[60] Further, it is clear

female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service . . . Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts . . . therefore, . . . the goal [was] to provide women officers with 'fair and equitable career advancement programs'."

[52] 419 U.S. at 535; 421 U.S. at 14, 15.

[53] 419 U.S. at 535 n.17.

[54] 421 U.S. 13. *Also see,* Johnston, *Sex Discrimination and Supreme Court - - - 1975,* 23 U.C.L.A. L. REV. 235 (1975).

[55] *See.* Johnston, *Id.* at 261.

[56] Craig v. Boren, 429 U.S. 190 (1976), Califano v. Goldfarb, 450 U.S. 199 (1977); Califano v. Webster, 430 U.S. 313 (1977).

[57] 429 U.S. at 197; 430 U.S. 316, 317.

[58] 430 U.S. 317; 430 U.S. 224 (both citing Weinberger v. Weinberger, 420 U.S. 636 (1975)).

[59] 430 U.S. 317; 430 U.S. 224; 429 U.S. 198 (all citing Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

[60] 429 U.S. at 210 (Justice Powell, concurring).

that when "legislation directly addresses discrimination and serves to remedy it, disparate treatment of the sexes, at least as an interim measure is constitutional."[61] On the other hand, if the legislation "is rooted in traditional role-typing and is not deliberately and specifically aimed at redressing past injustice, disparate treatment based on sex is unconstitutional."[62]

GENDER-BASED ALIMONY STATUTES

Alimony is an allowance which a court typically "compels the husband to pay to his wife for her support and maintenance" during and/or following a legal separation or divorce.[63] There are generally two types of alimony: temporary and permanent.[64]

"Temporary alimony, or alimony pendente lite, sometimes designated as interim alimony, is an allowance made by the court to be paid by the husband," typically "for the maintenance" and support of the wife "during the ongoing of the matrimonial action either by or against her." The theoretical basis for temporary alimony "is that the wife is entitled to support while she is engaged in litigation which will determine her rights arising out of her marriage with the adverse party and that the husband ought to support her during such period, unless she has sufficient means of her own."[65]

Permanent alimony is a stated sum of money which a court compels the husband to pay the wife following the legal separation or divorce. It is called "permanent" to distinguish it from the allowance made for support during the pendency of the suit. The majority of jurisdictions view the function of permanent alimony as support for the wife; some jurisdictions, however, treat permanent alimony as compensation for the wrong and injury a wife has suffered by reason of her husband's misconduct. In the more technical sense, permanent alimony is not based on the obligation for the support, since this obligation is terminated by the decree of divorce. Rather, it is a substitute for the right of support.[66]

Usually, alimony awards to husbands must be based on statutory authority, since the husband had no common-law right to support on which an award could be based.[67] However, the modern trend, as evidenced by the Uniform Marriage and Divorce Act § 308, provides that maintenance may be ordered for either spouse.

The fourteenth amendment to the United States Constitution provides in part, that no State shall "deny to any person within its jurisdiction the

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[61] Ginsburg, *supra* note 34 at 823.

[62] *Id.*

[63] 24 Am. Jur.2d, *Divorce and Separation* § 600.

[64] Annot., 85 A.L.R.3d 940 (1977).

[65] 24 Am. Jur.2d, *Divorce and Separation* § 548.

[66] 24 Am. Jur.2d, *Divorce and Separation* § 600.

[67] 24 Am. Jur.2d, *Divorce and Separation* § 527.

equal protection of the laws." Where alimony statutes continue to speak in terms of an allowance to the "wife" rather than to the "spouse", constitutional challenges have been brought on the grounds that such statutes impermissibly discriminate against husbands on the basis of sex. In the reported cases in which the merits of such a challenge have been determined, the specific constitutional grounds invoked have either been due process and equal protection of the laws, or state constitutional provisions expressly prohibiting discrimination on the basis of sex.[68]

THE FACTUAL SETTING

This particular case commenced its long journey through the judicial system when William Orr and Lillian Orr signed a written agreement which in part stipulated that William Orr would pay Lillian Orr the sum of $1,240 per month as alimony.[69] On February 26, 1974, the final decree of divorce incorporated said agreement and the marriage of William Orr and Lillian Orr was dissolved.[70]

However, Mr. Orr failed to make the alimony payments as stipulated in the agreement. As a result, Mrs. Orr filed a petition on July 28, 1976, seeking to have Mr. Orr adjudged in contempt, alleging him to be in arrears in his alimony payments.[71] On August 19, 1976, at the hearing on Mrs. Orr's petition, Mr. Orr claimed as a defense that the divorce decree of February 26, 1974, was illegal because the statutes it relied on[72] were unconstitutional.[73] The trial court denied Mr. Orr's motion and granted judgment against him in the amount of $5,524 for back alimony, attorney fees and court cost.[74] Claiming that "statutes which provide alimony for women without providing for such a corresponding award for males" are unconstitutional in that they violate the fourteenth amendment to the United States Constitution, Mr. Orr appealed to the Court of Civil Appeals of Alabama.[75]

The Court of Appeals determined that the sole issue before it was a constitutional issue.[76] The Court then determined that this same issue was argued in the case of *Murphy v. Murphy*[77] decided by the Supreme Court of Georgia.[78] The Court held that the language of *Murphy* was controlling.[79]

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[68] Annot., 85 A.L.R.3d 940 (1977).

[69] *See,* Orr v. Orr, 351 So.2d 906,906-907 (1977). (Justice Jones, dissenting)

[70] *See,* Orr v. Orr, 440 U.S. at 270, 99 S. Ct. at 1102, 1107.

[71] *Id.* at 271, 99 S. Ct. at 1107. *Also see, Id.,* (Syllabus).

[72] *See* note 3, *supra.*

[73] *See,* 351 So.2d at 907.

[74] *See,* 440 U.S. at 271, 99 S. Ct. at 1107; and 351 So.2d. at 907.

[75] Orr v. Orr, 351 So.2d 904 (Ala. Civ. App. 1977).

[76] 351 So.2d at 905.

[77] 232 Ga. 352, 206 S.E.2d. 458 (1974), *cert. denied,* 421 U.S. 929 (1975).

[78] 351 So.2d 905.

[79] *Id.*

In the case of *Murphy v. Murphy*,[80] the Georgia Supreme Court held that a statute providing that alimony could be awarded to a wife but not to a husband was not violative of either due process or equal protection guaranties. The *Murphy* court relied heavily on the United States Supreme Court case of *Kahn v. Shevin*[81] in reaching its decision. The *Murphy* court reasoned that the *Kahn* rationale was equally applicable to the statute in question. Thus, the court declared that the financial difficulties facing a dependent wife upon the demise of a marriage exceed those facing a husband, and it is the dependent wife of a broken marriage whom the statute in question was designed to protect. Upholding the constitutionality of the statute, the court said that it was for the legislature to modify or repeal it.[82]

Thus, relying on the rationale of *Murphy v. Murphy*[83] and *Kahn v. Shevin*[84] the Court of Civil Appeals on March 16, 1977 sustained the constitutionality of the Alabama alimony statutes.[85] Mr. Orr appealed to the Supreme Court of Alabama which granted Mr. Orr's writ of certiorari on May 24, 1977, but then quashed the writ, without court opinion, as improvidently granted on November 10, 1977.[86] Mr. Orr then appealed to the United States Supreme Court which noted probable jurisdiction.[87]

ANALYSIS BY THE COURT

I. *Jurisdictional issues not raised below*

Mr. Justice Brennan, in his opinion for the Court, before turning to the merits of the case, first dealt with three preliminary questions "not raised by the parties or the courts below, but which nevertheless may be jurisdictional and therefore are considered of our motion."[88]

The first preliminary question dealt with Mr. Orr's standing to assert in his defense the constitutionality of the Alabama statutes. Mr. Orr made no claim that he was entitled to alimony from Mrs. Orr, but only that he should not be required to pay alimony if similarly situated wives could not be ordered to pay. Therefore, as Justice Brennan pointed out, Mr. Orr's success in this case may not ultimately bring him relief from the judgment outstanding against him. The respondent argued that the only "proper plaintiff" to the action would be a husband who requested alimony for himself, and not one who merely objected to paying alimony.[89]

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[80] 232 Ga. 352. 206 S.E.2d. 458, *cert. denied*, 421 U.S. 929 (1974).
[81] 416 U.S. 351 (1974).
[82] *Id.*
[83] 232 Ga. 352, 206 S.E.2d. 458 (1974), cert. denied, 421 U.S. 929 (1975).
[84] 416 U.S. 351 (1974).
[85] Orr, *supra* note 5 at 905.
[86] Orr v. Orr, 351 So.2d 906 (1977).
[87] 430 U.S. 924 (1978).
[88] 440 U.S. at 271, 99 S. Ct. at 1107.
[89] *Id.* at 1108.

In dealing with this question, Justice Brennan cited the case of *Stanton v. Stanton* as precedent on the problem of challenges to underinclusive statutes. Justice Brennan wrote that there is "no question but that Mr. Orr bears a burden he would not bear if he were female . . . the burden alone is sufficient to establish standing."[90] "Our resolution alone of a statute's constitutionality often does not finally resolve the controversy between the appellant and the appellee."[91]

Thus, "if (these statutes are) held unconstitutional, Alabama could either (1) permit awards to husbands as well as wives, or (2) deny alimony to both parties."[92]

If Alabama chooses the second option then Mr. Orr would in fact have standing since he would no longer be required to pay alimony. Therefore, the court reasoned that it would not deny standing simply because the " 'appellant, although prevailing here on federal constitutional issue, may or may not ultimately win [his] lawsuit'."[93] The Court found that the holdings of the Alabama courts stand as a total bar to appellant's relief; his constitutional attack holds the only "promise of escape from the burden that derives from the challenged statute."[94] Therefore, the Court found Mr. Orr to indeed have the standing to be a "proper plaintiff" here.

A second preliminary question concerned the timeliness of appellant's challenge to the constitutionality of the statutes at the time of the original divorce decree.[95] He did not assert the constitutional attack until his ex-wife sought a contempt judgment against him.

However, neither Mrs. Orr nor the Alabama courts at any time objected to the timeliness of the presentation of the constitutional issue. Instead, the Alabama Circuit and Civil Appeals courts both considered the issue to be properly presented and decided it on its merits.[96] In deciding that appellant's challenge to the constitutionality of the statutes was indeed timely, Justice Brennan quoted from *Manhattan Life Insurance Company v. Cohen*.[97] This case was considered to be an application of the "elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided."[98]

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[90] *Id.*
[91] Stanton v. Stanton, 421 U.S. 7, 17 (1975).
[92] 440 U.S. at 272, 99 S. Ct. at 1108.
[93] *Id., citing* Stanton v. Stanton, 421 U.S. at 17.
[94] *Id.*
[95] *Id.* at 1109.
[96] 351 So.2d at 905.
[97] 234 U.S. 123 (1914).
[98] 234 U.S. 123, 134 (1914).

The third preliminary question arose from the fact that Mr. Orr's alimony obligation was part of a stipulation entered into by the parties, which was then incorporated into a divorce decree by the Lee County Circuit Court. Thus, as brought out by the Court, even though the alimony statutes may be unconstitutional, Mr. Orr may have a continuing obligation to Mrs. Orr based on a matter of state contract law. Therefore, if the Alabama courts had held that the case was decided on state contract law, not on a federal question, the U.S. Supreme Court would be without power to hear the case. The reason for the lack of power would be the existence of an independent and adequate state ground.[99]

However, Mr. Justice Brennan wrote that there was no doubt here that the lower courts based their decisions upon the federal question. Citing the case of *Indiana ex. re. Anderson v. Brand*,[100] Justice Brennan quoted, "Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgement if, as here, it is a final judgement."[101]

Thus, with these three preliminary questions analyzed, it was decided that the Court had jurisdiction to entertain Mr. Orr's case. Since an Article III[102] "case or controversy" was presented, the Court then turned to the merits of the case.

II. *Equal Protection Analysis*

It was Mr. Orr's position that the statutes involved and the State Court's "holdings deprived him of a fair forum, decreased his initial bargaining power in the settlement agreement negotiations, and harmed Mrs. Orr and society as well because of the stereotyping that resulted. Mr. Orr argued that there was no other basis for the statutes other than traditional generalizations about women."[103]

Mrs. Orr argued that the statutes were constitutional because they were enacted to compensate the wife for past discrimination.[104] She further asserted that the United States Supreme Court has in the past upheld all statutes that economically favored females, while it disapproved all statutes *economically* favoring males.[105] (emphasis added)

Possibly the most influential brief filed before the Court in this case

[99] 440 U.S. at 276, 99 S. Ct. at 1110.
[100] 303 U.S. 95 (1938).
[101] 303 U.S. 95, 98 (1938).
[102] U.S. CONST. art. III.
[103] Brief for Appellant 5.
[104] Brief of Appellee 11-12.
[105] *Id.* at 5.

was the Amicus Curiae Brief.[106] The authors of this brief argued that the Alabama statutes were based on a "rigid gender classification."[107] They further argued that this classification was a product of "archaic and overbroad generalizations" of traditional thinking which no longer has any substantial relationship to present reality."[108] They disputed the claim that Alabama statutes compensated for past discrimination.[109] They argued that such a claim is valid only when:

> (1) The history of the challenged provision reveals genuine intention to remedy past discrimination against women and;
>
> (2) The challenged scheme actually operated "directly to compensate women for past economic discrimination" without denigrating the status of gainfully employed women.[110]

The Amicus Curiae Brief provided further that the Alabama statutes met neither of the above provisions.

Mr. Justice Brennan, delivering the opinion of the Court, began with the proposition that when legislation "provides that different treatment be accorded . . . on the basis . . . sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.[111] Equal protection scrutiny requires that such classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives."[112] The Court then reiterated its view that it will no longer sustain statutes that build their basis from "old," "archaic," stereotype views of women.[113]

The Court interpreted the Alabama Court of Civil Appeals as suggesting two legislative objectives for the statutes in question. The first was regarded as a "legislative purpose to provide help for needy spouses, using sex as a proxy for need."[114] The second legislative purpose was to compensate "women for past discrimination during marriage, which assertedly has left them unprepared to fend for themselves in the working world following divorce."[115]

The Court, having ascertained the legislative objectives of the Alabama

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[106] Ruth Baden Ginsburg, Margaret Moses Young and Kathleen Willert Denatis for the American Civil Liberties Union and Hans Smith for Columbia University School of Law.

[107] Amicus Curiae Brief 11-13.

[108] *Id. Also see,* Stanton v. Stanton, 421 U.S. 7, 15 (1975); Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, Concurring); Taylor v. Louisiana, 419 U.S. 522 n.17 (1975); Weinberger v. Wiesenfeld 420 U.S. 636, 643 (1975).

[109] Amicus Curiae Brief 15-16.

[110] *Id. Also see,* Califano v. Webster, 430 U.S. 313, 317-318 (1977).

[111] 440 U.S. at 279, 99 S. Ct. at 1111 (quoting Reed v. Reed, 404 U.S. 71, 75 (1971)).

[112] 440 U.S. at 279, 99 S. Ct. at 1111 (quoting Califano v. Webster, 430 U.S. 313, 316-317 (1977)).

[113] *Id.* at 279, 99 S. Ct. at 1112.

[114] *Id.*

[115] *Id.*

statutes, reviewed them in light of the *Califano v. Webster* standard[116] of "*important* government" objectives (emphasis added). The Court acknowledged that "assisting needy spouses"[117] and reducing the economic disparity between men and women "caused by . . . discrimination against women"[118] are "legitimate and important governmental objective(s)."[119]

With the legislative objectives having been ascertained and conceded to be "legitimate and important," the Court reasoned that the only issue remaining was whether the gender classification was " 'substantially related to achievement of those objectives'."[120] It is here that the Court, which to this point was following a somewhat predictable analysis, decided to switch "scrutinies" in midstream. Up to now, the Court seemed to be following the "middle-tier"[121] approach of *Reed*. However, at this point it seems that the Court is shifting to what may be termed "quasi-strict scrutiny" analysis.

The Court states that there is no need to determine if this gender classification had some "fair and substantial relation to the objective of the legislation."[122]

> (E)ven if sex were a reliable proxy for need, and even if the institution of marriage did discriminate against women, these factors still would "not adequately justify the salient features of" Alabama's statutory scheme, ...[123]

The Court noted that the Alabama statutory scheme provided for individualized hearings in each case to determine the relative financial status of each party.[124] Thus, there was no need to use sex as a proxy. At little or no cost to the State, "needy males could be helped along with needy females."[125] More importantly the "alleged compensatory purpose (of the statutes) may be effectuated without placing burdens solely on husbands."[126] The Court comes to the conclusion that "even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination *must be carefully tailored.*"[127] All of which suggested that not only must a statute

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[116] *See* note 110.

[117] 440 U.S. at 280, 99 S. Ct. at 1112.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 1111 (citing Califano v. Webster, 430 U.S. 313, 317 (1977)).

[121] I use the term "middle-tier" for lack of a better one, even though the Court chooses not to "endorse that characterization." *See,* Craig v. Boren, 492 U.S. 190, 210* (1975) (Justice Powell, concurring).

[122] Reed v. Reed, 404 U.S. at 76.

[123] 440 U.S. at 281, 99 S. Ct. at 1112, 1113.

[124] *Id.* This same point was argued in the Amicus Curiae Brief at 25,26.

[125] *Id.*

[126] *Id.*

[127] *Id.* at 283, 99 S. Ct. at 1112.

serve a "legitimate and important" state objective, but it must also use the least burdensome method of achieving that objective.

Now, if one substitutes the word "compelling" for "legitimate and important" one finds that the Court today comes very close to applying a "strict scrutiny" analysis if not in fact doing so. Justice Brennan's majority opinion today comes exceedingly close to his dissenting opinion in *Kahn v. Shevin*.[128] In his dissenting opinion in *Kahn*, Justice Brennan argued that:

> While, in my view, the statute serves a compelling governmental interest by "cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden," I think that the statute is invalid because the State's interest can be served equally well by a more narrowly drafted statute.[129]

Further on his dissenting opinion he writes:

> The statute nevertheless fails to satisfy the requirements of equal protection, since the State has not borne its burden of proving that its compelling interest would not be achieved by a *more precisely tailored statute* . . .[130] (emphasis added).

Could it not be argued that the Court today comes as close as possible to a "strict scrutiny" analysis without declaring sex a "suspect class."

> The Court concluded its equal protection analysis by stating that: Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies . . . the state cannot be permitted to classify on the basis of sex.[131]

III. *The Dissenting Opinions*

Mr. Justice Rehnquist and Chief Justice Burger joined in one dissent. Mr. Justice Powell wrote a separate dissent.

In the Rehnquist-Burger dissent, the Justices asserted that they strongly believed that the Court's eagerness to invalidate Alabama's statutes has led it to deal too casually with the "case or controversy" requirement of Article III of the Constitution. They pointed out the long line of precedent in which the Court has held that in order to satisfy the "injury in fact" requirement for standing, a party claiming that a statute unconstitutionally withholds a particular benefit must be in line to receive a benefit if the suit is successful.[132]

Mr. Justice Powell agreed with the first dissent, and added a principle from the case of *Harris County Commissioners v. Moore*.[133] The principle

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[128] 116 U.S. 351, 357-360.

[129] *Id.* at 358.

[130] *Id.* at 360. Note the similarity between this argument in *Kahn* and the holding in *Orr* noted in 107. (Thus, even statutes designed to compensate for . . . past discrimination *must be carefully tailored.* (emphasis added).

[131] 440 U.S. at 283, 99 S. Ct. at 1113.

[132] *Id.* at 293, 99 S. Ct. at 1118, 1119.

[133] 420 U.S. 77 (1975).

states in effect that where a federal constitutional claim is premised on an unsettled question of state law, the federal court should "stay its hand" in order to provide the state courts an opportunity to settle the underlying state law question and thus avoid the possibility of unnecessarily deciding a constitutional question.[134]

Here exist two questions of state law, in the opinion of Mr. Justice Powell. The first concerns the timeliness of the challenge; Alabama might regard the constitutionality attack as untimely. The second question of state law concerns the formal settlement agreement entered into between Mr. and Mrs. Orr. The agreement may continue to bind the parties as a matter of state contract law, quite apart from the divorce decree. Thus, Justice Powell would have the Court abstain from reaching the federal constitutional claim that is premised on unsettled questions of state law without first affording the state courts an opportunity to resolve such questions. Therefore, Justice Powell argued for a remand to the Supreme Court of Alabama.[135]

ANALYSIS AND CONCLUSIONS

If the case of *Orr v. Orr* is any indication of the Court's further trends, a four-part test is developing. First, the Court itself will discern what it believes to be the objectives of the gender-based statute. Second, the Court will then determine if this objective is a legitimate and important one. Thirdly, the Court will examine the gender classification to see if it is substantially related to the achievement of those important governmental objectives. And finally there seems to be a fourth requirement emerging. That is, when a gender classification is involved, then the State legislature must choose the least burdensome method to achieve its objective. This is especially true if there is a method available to reach the objective that does not involve gender discrimination.

Perhaps this holding will aid in the erosion of other parts of the divorce process. For instance, already fading is the tradition that women automatically receive custody of the children. This decision may help in the attack on other facets of the divorce proceedings which have traditionally been one-sided.

This decision may also be a help to the Equal Rights Amendment. Anti-ERA members have long said that the ERA will mean that women will have to pay alimony. This holding makes such a matter the law, rendering such anti-ERA arguments moot.

Finally, no longer can "the female of the species . . . attack laws that unreasonably discriminate against her while preserving those that favor her."[136]

DAVID A. DETEC JANE L. THOMAS-MOORE

[134] 420 U.S. 77, 83 (1975).

[135] 440 U.S. at 289, 99 S. Ct. at 1117.

[136] *See* note 49, *supra.*