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Inequality in Marital Liabilities: The Need for Equal Protection When Modifying the Necessaries Doctrine

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INEQUALITY IN MARITAL LIABILITIES: THE NEED FOR EQUAL PROTECTION WHEN MODIFYING THE NECESSARIES DOCTRINE

Under the common law doctrine of necessaries, if a husband neglects to furnish necessaries[1] to his wife, she may purchase them herself on his credit.[2] This doctrine was once widely accepted[3] as necessary to

1. Although the common law originally narrowly defined necessaries to mean only such basic items as food, drink, clothing, and shelter, this definition has been expanded to include all things necessary and suitable, given the spouses' status and condition in life. *See, e.g.*, Anderson v. W.T. Grant Co., 45 Ala. App. 105, 226 So. 2d 166 (1969); Chipp v. Murray, 191 Kan. 73, 379 P.2d 297 (1963); Smith v. Smith, 255 N.C. 152, 120 S.E.2d 575 (1961); *see also* 2 R. LEE, NORTH CAROLINA FAMILY LAW § 132 (3d ed. 1963) (factors to be considered in each case include: the status, earning capacity and wealth of the husband; the customs and fashions of the time; and the general standard of living). For examples of what have been held to be necessaries other than the basic items of food, drink, clothing, and shelter, see McCormick v. Sexton, 239 Ark. 29, 386 S.W.2d 930 (1965) (funeral expenses); Fenters v. Fenters, 238 Ga. 131, 231 S.E.2d 741 (1977) (legal expenses incurred in divorce proceeding); Rubin v. Rubin, 233 Md. 118, 195 A.2d 696 (1963) (fees wife paid to private detective hired to obtain evidence to use against her husband in divorce case); Jordan Marsh Co. v. Cohen, 242 Mass. 245, 136 N.E. 350 (1922) (furniture and other household goods); Bowes v. Bowes, 43 N.C. App. 586, 259 S.E.2d 389 (1979) (medical expenses); State v. Clark, 88 Wash. 2d 533, 563 P.2d 1253 (1977) (legal expenses incurred to defend against a criminal charge that could result in incarceration). *But see* Chipp v. Murray, 191 Kan. 73, 379 P.2d 297 (1963) (fees wife paid to detective hired to discover evidence against her husband on which to base a separation action are not necessaries); Johnson & Maxwell, Ltd. v. Lind, 288 N.W.2d 763 (N.D. 1980) (legal costs incurred during divorce are not necessaries).

2. *See* Ewell v. State, 207 Md. 288, 114 A.2d 66 (1955); Sillery v. Fagan, 120 N.J. Super. 416, 294 A.2d 624 (1972); New York Tel. Co. v. Teichner, 69 Misc. 2d 135, 329 N.Y.S.2d 689 (Dist. Ct. 1972); Jenkins v. Jenkins, 246 Pa. Super. 455, 371 A.2d 925 (1977); H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 6.3 (1968).

3. *See, e.g.*, A. & W. Hughes v. Chadwick, 6 Ala. 651 (1844); Schlothan v. Schlothan, 5 Alaska 162 (1914); Beverly v. Nance, 145 Ark. 589, 224 S.W. 956 (1920); Davis v. Fyfe, 107 Cal. App. 281, 290 P. 468 (1930); Stokes v. Dollard, 94 Colo. 206, 29 P.2d 706 (1934); Cohn v. Snyder, 102 Conn. 703, 130 A. 100 (1925); Parkinson v. Hammond, 35 Del. 145, 159 A. 846 (1932); Phillips v. Sanchez, 35 Fla. 187, 17 So. 363 (1895); Morrison v. Evans, 31 Ga. App. 256, 120 S.E. 430 (1923); Ing v. Chung, 34 Hawaii 709 (1938); Edminston v. Smith, 13 Idaho 645, 92 P. 842 (1907); Abrams v. Traster, 244 Ill. App. 533 (1927); Litson v. Brown, 26 Ind. 489 (1866); Descelles v. Kadmus, 8 Iowa 51 (1859); Frisby v. Hladky, 139 Kan. 517, 31 P.2d 1001 (1934); Billing v. Pilcher & Hauser, 46 Ky. 458 (1847); Schaeffer v. Trascher, 165 La. 315, 115 So. 575 (1928); Furlong v. Hysom, 35 Me. 332 (1853); Stonesifer v. Shriver, 100 Md. 24, 59 A. 139 (1904); Shaw v. Thompson, 33 Mass. 198 (1834); Annis v. Manthey, 234 Mich. 347, 208 N.W. 453 (1926); Carr v. Anderson, 154 Minn. 162, 191 N.W. 407 (1923); Galtney v. Wood, 149 Miss. 56, 115 So. 117 (1928); County of Audrain v. Muir, 297 Mo. 499, 249 S.W. 383 (1923); McQuay v. McQuay, 86 Mont. 535, 284 P. 532 (1930); Acton v. Schoenauer, 121 Neb. 62, 236 N.W. 140 (1931); Jewell v. Jewell, 53 Nev. 97, 292 P. 616 (1930); Ott v. Hentall, 70 N.H. 231, 47 A. 80 (1899); Asche v. Wakely, 112 N.J. Eq. 60, 163 A. 278 (1932); Chevallier

protect dependent wives and is based on the husband's general duty to support his wife and family.[4] Recent economic and legal developments, however, have required a reconsideration of the necessaries doctrine; the increasing independence of women and the Supreme Court's insistence that men and women be treated equally[5] have led many courts and legislatures to modify this doctrine.[6] Most of the modifications implemented are gender neutral and comply with the Supreme Court's decisions on gender discrimination.[7] One modification, however, continues to treat husbands and wives unequally by holding the husband primarily liable and the wife secondarily liable for all debts incurred by the couple for necessaries.[8] Despite the ob-

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v. Connors, 33 N.M. 93, 262 P. 173 (1927); Wanamaker v. Weaver, 176 N.Y. 75, 68 N.E. 135 (1903); Bowen v. Daugherty, 168 N.C. 242, 84 S.E. 265 (1915); Badger v. Orr, 1 Ohio App. 293 (1913); Schiefer v. Wilson, 171 Okla. 119, 42 P.2d 263 (1935); Taylor v. Taylor, 54 Or. 560, 103 P. 524 (1909); Moore v. Copley, 165 Pa. 294, 30 A. 829 (1895); Marshall v. Perkins, 20 R.I. 34, 37 A. 301 (1897); Scates v. Canvas Decoy Co., 5 Tenn. App. 695 (1927); Crosby v. A. Harris & Co., 234 S.W. 127 (Tex. Civ. App. 1921); Joseph Frost & Co. v. Willis, 13 Vt. 202 (1841); Mihalcoe v. Holub, 130 Va. 425, 107 S.E. 704 (1921); Hinton Dep't Co. v. Lilly, 105 W. Va. 126, 141 S.E. 629 (1928); Lichtenberger v. Central Wis. Trust Co., 197 Wis. 336, 222 N.W. 218 (1928). The majority of these cases are no longer followed, having been either expressly or implicitly overruled by statute or case law. For those states that still adhere to the common law doctrine, see *infra* note 17.

4. The common law doctrine provided a means of enforcing the husband's support obligation. *See generally* H. CLARK, *supra* note 2, § 6.1 (1968). This obligation arose out of the marital relationship, *see, e.g.*, Bennett v. Bennett, 27 Ill. App. 2d 24, 169 N.E.2d 172 (1960); Gorco Constr. v. Stein, 256 Minn. 476, 479 n.7, 99 N.W.2d 69, 73 n.7 (1959), and was based on the view that performance of the wife's marital duties was consideration for the obligation, *see, e.g.*, Graham v. Graham, 33 F. Supp. 936 (E.D. Mich. 1940); *In re* Sonnicksen's Estate, 23 Cal. App. 2d 475, 73 P.2d 643 (1937).

The common law did not, however, impose a duty of support on the wife. As a result, she could not be held liable for necessaries furnished to her family. *See, e.g.*, Mergenthaler v. Mergenthaler, 69 Cal. App. 2d 525, 160 P.2d 121 (1945); Parkinson v. Hammond, 35 Del. 145, 159 A. 846 (1932); Truax v. Ellett, 234 Iowa 1217, 15 N.W.2d 361 (1944).

5. Historically the Supreme Court has shown great deference to the legislature's decision to adopt a gender-based classification. In recent years, however, the Court has begun to scrutinize closely such classifications to determine their constitutionality under the equal protection clause. *See infra* notes 25-43 and accompanying text; *see also* Loewy, *Returned to the Pedestal — The Supreme Court and Gender Classification Cases: 1980 Term*, 60 N.C.L. REV. 87 (1981); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 177-88 (1977). The Court's demand for equal treatment applies even where the laws are designed to benefit women if, by according differential treatment to women, the law is reinforcing traditional stereotypes that tend to place women in a subordinate position. *See infra* notes 58-61 and accompanying text. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-24 to -26 (1978).

6. *See, e.g.*, Manatee Convalescent Center, Inc. v. McDonald, 392 So. 2d 1356, 1357, 1359 (Fla. Dist. Ct. App. 1980) (holding that the support obligation of the wife is coequal with that of the husband); Memorial Hosp. v. Hahaj, ___ Ind. App. ___, 430 N.E.2d 412, 416 (1982) (holding the wife primarily liable for her own expenses); Condore v. Prince George's County, Md., 289 Md. 516, 530-32, 425 A.2d 1011, 1018 (1981) (holding the common law doctrine of necessaries invalid after passage of the Maryland Equal Rights Amendment).

7. *See infra* notes 19-23 and accompanying text.

8. *See, e.g.*, Page v. Welfare Comm'r, 170 Conn. 258, 365 A.2d 1118 (1976); Klump v. Klump, 96 Ohio App. 93, 121 N.E.2d 273 (1954); Marshfield Clinic v. Discher, 105 Wis. 2d 506, 314 N.W.2d 326 (1982).

vious inequality of this "primary/secondary" modification, no court has struck it down.[9]

This Note contends that the "primary/secondary" modification is unconstitutional[10] because it ignores the husband's equal protection rights while unlawfully stigmatizing women as dependent. Part I discusses how the growing independence of women has led courts to modify the common law doctrine. Part II develops the test that the Supreme Court would apply in judging the constitutionality of any modification of the doctrine. Part III applies this test to the "primary/secondary" modification and concludes that the modification is unconstitutional and, therefore, not a legitimate reformation of the common law necessaries doctrine.

I. THE CONDITIONS DEMANDING REFORM OF THE COMMON LAW RULE AND THE RESULTING MODIFICATIONS

Implicit in the common law doctrine is the assumption that the wife depended upon her husband to provide for her financial needs. This dependency was unavoidable due to the legal and economic disabilities imposed on wives by the common law. Typically, at common law the husband acquired rights to all of his wife's property immediately upon marriage.[11] Consequently, the wife was entirely without personal assets

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9. *See* Marshfield Clinic v. Discher, 105 Wis. 2d 506, 314 N.W.2d 326 (1982). Although it appears that only the Wisconsin courts have acknowledged the constitutional problem, it unquestionably exists because "statutory classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause.'" Craig v. Boren, 429 U.S. 190, 197 (1976) (quoting Reed v. Reed, 404 U.S. 71, 75 (1971)). Furthermore, although *Craig* and *Reed* involved statutory classifications, the required scrutiny applies equally to judicial action. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 14 (1948); Civil Rights Cases, 109 U.S. 3, 11 (1883); Virginia v. Rives, 100 U.S. 313, 318 (1880).

10. This Note does not specifically address the constitutionality of the common law doctrine. Nevertheless, the arguments regarding the constitutionality of the modification also can be applied to the common law doctrine. Indeed, at least five states have rejected the common law doctrine as unconstitutional under the equal protection clause. *See* Condore v. Prince George's County, Md., 289 Md. 516, 530, 425 A.2d 1011, 1018 (1981); Jersey Shore Medical Center-Fitkin Hosp. v. Estate of Baum, 84 N.J. 137, 147-48, 417 A.2d 1003, 1008-09 (1980); Kilbourne v. Hanzelik, 648 S.W.2d 932 (Tenn. 1983); Schilling v. Bedford County Memorial Hosp., ___ Va. ___, 303 S.E.2d 905 (1983). Similarly, the Georgia legislature repealed Georgia's codified necessaries doctrine, GA. CODE ANN. § 53-510 (1974), in order to "comply with those standards of equal protection under the law announced in . . . Orr v. Orr[, 440 U.S. 268 (1979)]." Act of April 4, 1979, 1979 Ga. Laws 466, 469.

11. H. CLARK, *supra* note 2, § 7.1. Although the passage of the Married Woman's Property Acts removed many of the common law disabilities by allowing married women to have their own separate estates, bring suits, and enter contracts, *id.* § 7.2, as a practical matter, some dependency remained, *see* Amsler, *The New Married Woman's Statutes: Meaning and Effect*, 15 BAYLOR L. REV. 145, 149-53 (1963) (under Texas law, although a wife may unilaterally sell her separate property and contract for goods in her own name, the purchaser or creditor may continue to require her husband's joinder); Comment, *Marital Property: A New Look at Old Inequalities*, 39 ALB. L. REV. 52, 54-56, 61-62, 70-73 (1974) (as a practical matter, most wives

and unable even to provide the consideration necessary to enter contracts.[12]

Today, however, many wives are not dependent upon their husbands[13] and courts can no longer presume a need to provide them with financial protection. Not only do a significant number of married women work outside the home[14] and contribute jointly with their husbands to the family resources,[15] in some marriages the wife is the sole provider.[16] This change in marital roles, along with the growing awareness that the law requires equal treatment of men and women, has led most courts and legislatures to view the common law necessaries doctrine as an anachronism demanding reform.[17]

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are in no better position as a result of the Property Acts than they were under the common law). Moreover, the passage of the Acts typically did not relieve the husband of his duty of support. *See, e.g., In re* Tunison's Estate, 75 F. Supp. 573 (D.D.C. 1948); Loveman, Joseph & Loeb, Inc. v. Rogers, 39 Ala. App. 162, 96 So. 2d 691 (1957); Stein v. Woodward & Lothrop, 77 A.2d 564 (D.C. 1950). Rather, liability continued to be imposed on the husband for all goods purchased by the wife unless she evidenced a clear intention to bind her separate estate. *See, e.g.*, Herring v. Holden, 88 Ga. App. 212, 76 S.E.2d 515 (1953); New York Tel. Co. v. Teichner, 69 Misc. 2d 135, 329 N.Y.S.2d 689 (Dist. Ct. 1972).

12. *See* H. CLARK, *supra* note 2, § 7.1.

13. In March 1981, both husband and wife worked in 52% of all married-couple families. *See* Hayghe, *Marital and family patterns of workers: an update*, MONTHLY LAB. REV., May 1982, at 53, 55 table 4; *see also* Kamerman, *Child care and family benefits: policies of six industrialized countries*, MONTHLY LAB. REV., Nov. 1980, at 23. ("Our country's most prevalent family type is now the two-parent, two-wage-earner family."). The increasing number of working wives is likely to continue. It has been projected that two-thirds of the labor force growth between 1980-1995 will be generated by women. *See* Fullerton, *The 1995 labor force: a first look*, MONTHLY LAB. REV., Dec. 1980, at 11.

14. Fifty-one percent of all married women with husbands present were part of the labor force in March 1981. *See* Hayghe, *supra* note 13, at 54 table 1.

15. In 1978, the average amount of the family income attributed to the wife's earnings was 26%. *See* Johnson, *Marital and family characteristics of the labor force, March 1979*, MONTHLY LAB. REV., Apr. 1980, at 48.

16. In 1981, the wife was the only wage earner in almost three and one-half percent of married-couple families. *See* Hayghe, *supra* note 13.

17. *See, e.g.*, Jersey Shore Medical Center-Fitkin Hosp. v. Estate of Baum, 84 N.J. 137, 147-49, 417 A.2d 1003, 1008-09 (1980) ("The common law rule imposing liability on husbands, but not wives, is an anachronism that no longer fits contemporary society. . . . The common law must adapt to the progress of women in achieving economic equality and to the mutual sharing of all obligations by husbands and wives."); *see also* Manatee Convalescent Center, Inc. v. McDonald, 392 So. 2d 1356, 1357-58 (Fla. Dist. Ct. App. 1980); Memorial Hosp. v. Hahaj, ___ Ind. App. ___, 430 N.E.2d 412, 413 (1982); Condore v. Prince George's County, Md., 289 Md. 516, 530-32, 425 A.2d 1011, 1018-19 (1981).

A few states continue to explicitly follow the common law doctrine. *See, e.g.*, Automobile Club Ins. Co. v. Lainhart, 609 S.W.2d 692 (Ky. Ct. App. 1980) (relying on the statutory codification of the common law embodied in KY. REV. STAT. § 404.040 (1972)); *In re* Dupont, 19 Bankr. 605 (E.D.N.Y. 1982); Bowes v. Bowes, 43 N.C. App. 586, 259 S.E.2d 389 (1979). Some states have not addressed the issue recently, but appear to adhere to the common law. *See, e.g.*, Green v. First Nat'l Bank, 49 Ala. App. 426, 272 So. 2d 895 (1971), *rev'd on other grounds*, 290 Ala. 14, 272 So. 2d 901 (1972); Parkinson v. Hammond, 35 Del. 145, 159 A. 846 (1932) (*cited with apparent approval in* Hyland v. Southwell, 320 A.2d 767 (Del. Super. Ct. 1974)); Banker v. Dodge, 126 Vt. 534, 237 A.2d 121 (1967). In still other states it appears that the common law rule, while not explicitly overruled, may no longer be followed given the courts' treatment of

Four basic modifications of this doctrine have resulted.[18] The most common modification holds both spouses jointly and severally liable for all necessary expenses. This modification has generally been imposed by statute and appears primarily in states that have adopted an Equal Rights Amendment.[19] At the other extreme, Maryland courts hold neither spouse liable for necessaries furnished to the other in the absence of an express or implied contract.[20] A third modification holds each spouse primarily liable for the debts he or she incurs for necessaries and holds the other spouse secondarily liable.[21] These modifications are, on their face, gender neutral,[22] and no question arises as to their constitutionality in this regard under the equal protection clause.[23]

The fourth modification provides that a husband is always primarily liable and a wife always secondarily liable for all debts incurred

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analogous situations. *Compare* Trotter v. Minnis, 199 Ark. 924, 136 S.W.2d 463 (1940) *and* Brown v. Durepo, 121 Me. 226, 116 A. 451 (1922) (both recognizing the common law rule) *with* Paulson v. Paulson, 8 Ark. App. 306, 652 S.W.2d 46 (1983) (awarding of attorney's fees in divorce proceeding is discretionary with the court and dependent upon financial abilities of the parties) *and* Beal v. Beal, 388 A.2d 72 (Me. 1978) (alimony statute allowing for support of wives only is an unconstitutional denial of men's equal protection rights).

18. There are a few minor exceptions to these basic patterns. The principle variation is found in some community property states where necessaries are considered to be debts of the marital community and are first satisfied with community property. In the absence of sufficient community property, however, one of the four modifications will be applied. *See* ARIZ. REV. STAT. ANN. § 25-215 (1956); NEV. REV. STAT. § 123.090 (1979); N.M. STAT. ANN. § 40-3-11 (1978). Another variation is found in Massachusetts, where the wife is liable for necessaries up to the amount of $100 but only if she has property worth at least $2000. *See* MASS. ANN. LAWS ch. 209, § 7 (Law. Co-op. 1981). If the wife does not own $2000 of property, the common law will be applied.

19. These statutes have generally been of two types: Family Expense Acts held to include necessaries, *see* COLO. REV. STAT. § 14-6-110 (1973) (ERA); ILL. REV. STAT. ch. 40, § 1015 (1979) (ERA); IOWA CODE ANN. § 597.14 (West 1981) (no ERA); WASH. REV. CODE § 26-16-205 (1981) (ERA), and statutes which were enacted to deal specifically with the question of necessaries, *see* HAWAII REV. STAT. § 573-7 (Supp. 1982) (ERA); MONT. CODE ANN. § 40-2-102 (1981) (ERA). In addition, Mississippi has adopted this modification judicially. *See* Cooke v. Adams, 183 So. 2d 925 (Miss. 1966) (no ERA).

20. *See* Condore v. Prince George's County, Md., 289 Md. 516, 425 A.2d 1011 (1981).

21. *See* Memorial Hosp. v. Hahaj, ____ Ind. App. ____, 430 N.E.2d 412 (1982); Busch v. Busch Constr., 262 N.W.2d 377 (Minn. 1977); Jersey Shore Medical Center-Fitkin Hosp. v. Estate of Baum, 84 N.J. 137, 417 A.2d 1003 (1980); *see also* Manatee Convalescent Center, Inc. v. McDonald, 392 So. 2d 1356 (Fla. Dist. Ct. App. 1980) (holding that a legislatively mandated gender-neutral duty of support requires that both spouses be responsible for the other's necessaries but expressly leaving open the question of whether the spouse not incurring the debt is liable only if the spouse incurring the debt is unable to pay).

22. In other words, these classifications do not provide for different treatment of males and females on the basis of their gender.

23. This does not preclude the possibility that these modifications may violate the equal protection clause because of some discriminatory effect unrelated to gender. Without actual gender discrimination, however, these modifications would be scrutinized under the more lenient rational basis test, thereby virtually guaranteeing their constitutionality under the equal protection clause. *See infra* note 28 and accompanying text.

by either spouse for necessaries.[24] This modification differs from the others because it continues the common law practice of imposing an unequal share of financial responsibility upon the husband. Consequently, this modification fails to promote the equal treatment of men and women demanded by modern social and legal conditions.

II. EQUAL PROTECTION ANALYSIS OF GENDER-BASED CLASSIFICATIONS

Traditionally, the Supreme Court applied a rational basis test[25] to determine the constitutionality of any law[26] providing for different treatment of men and women. Under this test, which continues to be used in cases of economic and social welfare legislation, the Court upholds all laws reasonably related to a legitimate government purpose.[27] Because broad deference is usually given to the legislative determination of whether a law is reasonably related to a government purpose, most laws challenged under this test are upheld.[28]

Early application of this test to laws basing treatment on gender was in accord with prevailing legal and social views of women.[29] By nature,

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24. At least six states have adopted this view either by statute or judicial decree: Page v. Welfare Comm'r, 170 Conn. 258, 365 A.2d 1118 (1976) (interpreting CONN. GEN. STAT. § 46b-37 (1981)); NEB. REV. STAT. § 42-201 (1978); Klump v. Klump, 96 Ohio App. 93, 121 N.E.2d 273 (1954) (interpreting OHIO REV. CODE ANN. § 3103.03 (Baldwin 1982)); OKLA. STAT. tit. 32, § 3 (1981); W. VA. CODE § 48-3-22 (1980); Marshfield Clinic v. Discher, 105 Wis. 2d 506, 314 N.W.2d 326 (1982).

25. L. TRIBE, *supra* note 5, § 16-24, at 1060 (until the 1970's, gender classifications were upheld whenever they were reasonably related to a governmental purpose).

26. Whether the claim is brought against a state or federal law is insignificant. Although the equal protection clause of the fourteenth amendment applies only to states, the Supreme Court has held that there is an implicit federal equal protection component in the due process clause of the fifth amendment. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Moreover, the equal protection analysis under either amendment is identical. *See* Buckley v. Valeo, 424 U.S. 1, 93 (1976) (per curiam); *see also* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 518 (1978) [hereinafter cited as NOWAK].

27. *See* L. TRIBE, *supra* note 5, §§ 16-2 to -5.

28. This test assumes the validity of the legislature's judgment in creating the classification. *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1960). The Court grants this deference because judges have no greater capability than legislators to assess the reasonableness of social and economic legislation. NOWAK, *supra* note 26, at 524. In exercising this deference, the Court may even consider possible legislative purposes other than those articulated. *See, e.g.*, Fleming v. Nestor, 363 U.S. 603, 611-12 (1960). *But see* McGinnis v. Royster, 410 U.S. 263, 270 (1973) (the Court's only inquiry is whether the "challenged distinction rationally furthers some legitimate, articulated state purpose"). Consequently the Court will uphold a classification if there is any conceivable set of facts supporting it. *See, e.g.*, McGowan v. Maryland, 366 U.S. at 426; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). Because of this deference, the rational basis test has been described as requiring "minimal scrutiny in theory and virtually none in fact." Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

29. *See* L. TRIBE, *supra* note 5, § 16-24.

women were considered too delicate for many occupations in civil life. In addition, most members of society felt that a woman's obligation was to the home and family.[30] To fulfill this obligation, many lawmakers believed that women needed special legal protections.[31] Application of the rational basis test allowed legislatures to pass such protections freely[32] and reflected the general societal consensus that they were appropriate.

During the 1970's, however, the Court began to recognize that the changing role of women demanded application of a more stringent test.[33] Socially, women were gaining an equal footing with men, and laws discriminating against them or stereotyping them as domestic were no longer considered appropriate.[34] Yet because gender-based discrimination had strong roots in social conventions and lacked the invidiousness of other forms of discrimination, such as racial discrimination,[35] the Court was reluctant to overturn these laws under the same strict scrutiny[36] analysis used in these other cases. Rather, the Court sought

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30. *Id.*; *see also* Bradwell v. State:

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.

83 U.S. 130, 141 (1872).

31. *See, e.g.*, West Coast Hotel v. Parrish:

> [A] woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence . . . [H]er physical well-being becomes an object of public interest and care in order to preserve the strength and vigor of the race . . . . Hence she [is] properly placed in a class by herself, and legislation designed for her protection may be sustained even when like legislation is not necessary for men and could not be sustained.

300 U.S. 379, 394-95 (1937) (citation omitted).

Even as late as the 1960's, the Court held that a woman's central role in raising a family permitted discriminatory legislation encouraging women to remain in the home. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57, 61-62 (1961) (upholding a state law excluding women from jury service absent an indication that they desired to serve).

32. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (allowing jury selection that automatically excluded women absent an indication from them that they wanted to serve); Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding statute forbidding any female from working as a bartender unless she were the wife or daughter of a male owner of the establishment); West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (allowing establishment of minimum wages for women but not for men); Muller v. Oregon, 208 U.S. 412 (1908) (upholding limitation on number of hours women were allowed to work); Minor v. Happersett, 88 U.S. 162 (1874) (holding that women were not guaranteed the right to vote by the fourteenth amendment).

33. *See* Loewy, *supra* note 5, at 87-95.

34. *See, e.g.*, Stanton v. Stanton, 421 U.S. 7, 14-15 (1975) ("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.").

35. "Traditionally, [gender-based] discrimination was rationalized by an attitude of 'romantic paternalism' . . . firmly rooted in our national consciousness . . . ." Frontiero v. Richardson, 411 U.S. 677, 684 (1972) (plurality opinion). Such "romantic paternalism," while injurious, lacks the overt hostility commonly characteristic of other forms of discrimination.

36. The strict scrutiny test is applied in cases involving fundamental rights or a suspect class. Under this test, discriminatory legislation will be struck down "unless shown to be necessary to promote a *compelling* governmental interest," Shapiro v. Thompson, 394 U.S. 618, 634 (1969)

to develop a middle-tier test commensurate with the unique aspects of gender discrimination.[37]

The Supreme Court initially developed this middle-tier analysis in *Reed v. Reed*.[38] There, the Court held that to withstand scrutiny, a gender-based 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."[39] Although the Court did not expressly state that it was applying a new standard,[40] both the language and outcome[41] of this opinion clearly indicated that the Court was developing a new test.

This new test was not fully refined or officially recognized until the Supreme Court decided *Craig v. Boren*[42] in 1976. Applying what has become known as the "middle-tier" approach, the Court in *Craig* held that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[43] This test demands

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(emphasis in original), and is the least drastic means of achieving that objective, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). For a thorough treatment of the strict scrutiny test, see L. TRIBE, *supra* note 5, §§ 16-6 to -18.

37. With only a temporary detour, *see infra*, the evolvement toward a level of scrutiny somewhere between rational basis and strict scrutiny has been constant. *See infra* notes 38-43 and accompanying text. The single exception was a brief flirtation with the strict scrutiny test in Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion). In that case, a plurality of the Court found classifications based on gender to be inherently suspect and applied the strict scrutiny test to invalidate a statute presuming that wives of male members of the uniformed services were dependent but requiring husbands of female members to prove their dependence.

38. 404 U.S. 71 (1971).

39. *Id.* at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

40. The Court actually purported to apply the rational basis test, holding that the classification had to bear "a rational relationship to a state objective." 404 U.S. at 76.

41. Professor Gunther suggests that had the rational basis test been used, the classification would have been upheld. The Court recognized the legitimacy of the state's objective to reduce administrative disputes in appointing estate administrators, and since "clear priority classifications" were relevant to this objective, the classification should have been upheld. By striking down the classification, the Court demonstrated a "special sensitivity to sex as a classifying factor." Gunther, *supra* note 28, at 34.

42. 429 U.S. 190, 210 & n.* (1976) (Powell, J., concurring).

43. *Id.* at 197. The Court explicitly stated that *Reed* and subsequent cases required the application of this test. Not all of the justices agreed, however. *See id.* at 220 (Rehnquist, J., dissenting) ("The Court's conclusion that a law which treats males less favorably than females 'must serve important governmental objectives and must be substantially related to achievement of those objectives' apparently comes out of thin air.").

Since *Craig*, the Court has consistently applied this test. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331, 3339 (1982); Michael M. v. Superior Court, 450 U.S. 464, 469 (1981) (plurality opinion); Kirchberg v. Feenstra, 450 U.S. 455, 460 (1981); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980); Califano v. Westcott, 443 U.S. 76, 85-86 (1979); Caban v. Mohammed, 441 U.S. 380, 388 (1979); Orr v. Orr, 440 U.S. 268, 279 (1979); Califano v. Webster, 430 U.S. 313, 316-17 (1977) (per curiam); Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977) (plurality opinion); *see also* Rotsker v. Goldberg, 453 U.S. 57, 70-72 (1981) (recognizing the test in *Craig*, but giving extraordinary deference to Congress's determination of the best alternative because of the military context).

more than the rational basis test in two respects. First, the law must relate to an *important* government purpose; a higher standard than the legitimate purpose required by the rational basis test. Second, the test requires that the law have a *substantial* rather than merely reasonable relation to this objective.

III. APPLICATION OF THE MIDDLE-TIER TEST TO THE PRIMARY/SECONDARY MODIFICATION OF THE COMMON LAW DOCTRINE OF NECESSARIES

A. Important State Objective

The first step in applying the middle-tier approach is determining whether the law examined serves an important state objective.[44] Historically, the purpose of the doctrine of necessaries has been to provide for needy wives by allowing them to obtain necessary goods and services where they are personally unable to pay for them.[45] This purpose has survived in the primary/secondary modification of the doctrine which continues to protect wives by holding them only secondarily liable for necessaries they purchase. Because the Supreme Court has determined that providing support for needy spouses is an important governmental objective,[46] the primary/secondary test survives the

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44. In determining the purpose of legislation scrutinized under this test, the Court need not accept legislative assertions of purpose at face value when an examination of the legislative scheme and its history demonstrates that the asserted purpose was not the goal of the legislation. *See* Weinburger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1974); Eisenstat v. Baird, 405 U.S. 438, 448-49 (1972).

45. *See supra* notes 1-4 and accompanying text; *see also* Marshfield Clinic v. Discher, 105 Wis. 2d 506, 510-11, 314 N.W.2d 326, 328-29 (1982) ("The heart of the common law rule is a concern for the support and the sustenance of the family and the individual members thereof. . . . The necessaries rule encourages the extension of credit to those who in an individual capacity may not have the ability to make these basic purchases."). Another possible, though unarticulated, purpose is the protection of creditors. For a discussion of the effectiveness of the necessaries doctrine in achieveing either of these objectives, see Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. (forthcoming 1984).

46. Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980); Orr v. Orr, 440 U.S. 268, 280 (1979). The Court has never explained exactly why support of needy spouses is an important governmental objective. One possibility is that the Court is concerned about the sanctity of marriage and the family. The institution of marriage would be undercut if individuals, although capable of providing for their spouses, were allowed to keep them in financial need. *Cf.* Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 83-90 (1980) (arguing that the Court's decisions involving a constitutional right of privacy were concerned not with an individual's right to use contraceptives or procure an abortion, but rather were, "like the general run of the Court's decisions in this area, dedicated to the cause of social stability through the reinforcement of traditional institutions").

For other important objectives underlying the Court's decisions, see, e.g., Michael M. v. Superior Court, 450 U.S. 464 (1981) (prevention of illegitimate pregnancies); Califano v. Westcott, 443 U.S. 76 (1979) (providing benefits to children deprived of basic sustenance because of a parent's

first step of the middle-tier analysis.

B. Substantial Relation to the Objective

The second step of the middle-tier test requires that the primary/secondary modification be substantially related to achieving the objective of protecting needy spouses. The modification fails to meet this part of the test in three ways. First, even under the lax rational basis test, the modification is not sufficiently inclusive to meet the constitutional mandate of fairly benefiting and burdening all persons similarly situated. Second, even if the modification did meet the requirements of the rational basis test, it would nonetheless fail the stricter fit requirements of the substantial relation test.[47] Finally, even assuming it could meet these stricter fit requirements, it still could not be justified given that there is a gender-neutral rule available that would be equally effective in achieving the objective.

1. Underinclusion — classification fails to achieve objective— Leading commentators have suggested that, to meet the reasonable relation requirement of the rational basis test, a classification must include "all persons who are similarly situated with respect to the purpose of the law."[48] Insofar as the purpose of the rule holding husbands primarily liable is to help needy spouses, it is evident that the classification is "underinclusive" because it fails to include needy husbands.[49]

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unemployment); Califano v. Webster, 430 U.S. 313 (1977) (compensation for past economic discrimination against females); Craig v. Boren, 429 U.S. 190 (1976) (protection of public health and safety); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (providing children deprived of one parent the opportunity for the personal attention of the other parent); Schlesinger v. Ballard, 419 U.S. 498 (1975) (fair and equitable advancement programs in the armed forces).

47. Because the equal protection clause does not require that all persons be treated alike, but only that similarly situated persons be treated alike, *see* Tigner v. Texas, 310 U.S. 141, 147 (1940), gender classifications have been upheld where it was shown that the classification "realistically reflects the fact that the sexes are not similarly situated in certain circumstances," Michael M. v. Superior Court, 450 U.S. 464, 469 (1981) (plurality opinion). Thus, for example, the Court has upheld gender classifications designed to rectify the effects of past discrimination against women since men and women are not similarly situated with respect to this discrimination. *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977) (per curiam); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974). The Court has refused, however, to uphold classifications not grounded in any dissimilarity but rather based on "archaic and overbroad generalizations" that assume a wife's dependency on her husband and therefore do not reflect contemporary society. *See, e.g.*, Califano v. Westcott, 443 U.S. 76 (1979). This refusal is based on the Court's heightened concern that gender-based classifications be closely related to their objective.

48. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949).

49. The classification is also "overinclusive" because it benefits some non-needy wives. Although commentators have suggested that "overinclusiveness" is a greater evil than "underinclusiveness," *see Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1086-87 (1969) [hereinafter cited as *Equal Protection*]; Tussman & tenBroek, *supra* note 48, at 351, the Supreme Court has held that "overinclusiveness" does not render a classification un-

Although "underinclusiveness" is said to be prima facie evidence that the classification is not reasonable,[50] the Court occasionally has upheld such classifications.[51] The Court's rationale in these instances is generally that practical considerations prevent requiring legislatures to attack all aspects of a problem at once.[52] For example, if a problem is too large to be remedied all at once, the legislature may be allowed discretion to choose which aspects of the problem are most serious.[53] Such is not the case with helping needy spouses, however. The only practical consideration involved in holding husbands primarily liable is the administrative convenience of assuming wives are dependent rather than requiring a determination in each case as to which, if either, spouse is actually dependent. The Court, however, has held that the administrative inconvenience of having to hold hearings is not sufficient justification to support a gender-based classification.[54] Consequently, the Court is unlikely to uphold any classification that fails to include needy husbands.

2. *Statistics insufficient to justify gender as proxy*— Even assuming that the primary/secondary modification is sufficiently inclusive to satisfy the rational basis test, it nonetheless fails to meet the stricter fit requirements used in evaluating gender-based classifications. Under the middle-tier test, where gender is used as a proxy for some other basis of classification, it must *accurately* reflect this other basis.[55] The reason is clear: use of gender as an inaccurate proxy unfairly stereotypes all females with a characteristic regardless of how many actually possess

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constitutional, *see* Kahn v. Shevin, 416 U.S. 351 (1974). Therefore, the benefit afforded some non-needy wives is irrelevant for equal protection purposes.

50. *See* Tussman & tenBroek, *supra* note 48, at 348; *see also* Dandridge v. Williams, 397 U.S. 471, 519 (1970) (Marshall, J., dissenting) ("Such underinclusiveness manifests 'a prima facie violation of the equal protection requirement of reasonable classification' . . . .") (quoting Tussman & tenBroek, *supra* note 48).

51. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (sellers of ready-to-wear glasses need not be subjected to regulations imposed on opticians); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (vehicles advertising products of the vehicle's owner may be exempted from regulation forbidding use of advertising vehicles on city streets); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935) (regulations forbidding dentists to advertise need not extend to other classes of professionals).

52. *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484, 495 (1974) ("'[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.'") (quoting Dandridge v. Williams, 397 U.S. 471, 486-87 (1970)); Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 610 (1935); L. TRIBE, *supra* note 5, § 16-4, at 997; Tussman & tenBroek, *supra* note 48, at 348-49; *Equal Protection*, *supra* note 49, at 1084-85.

53. *See* L. TRIBE, *supra* note 5, § 16-4, at 997; Tussman & tenBroek, *supra* note 48, at 349; *Equal Protection*, *supra* note 49, at 1084-85.

54. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 688- 89 (1973); Reed v. Reed, 404 U.S. 71, 76 (1971) ("To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . .").

55. *See* Orr v. Orr, 440 U.S. 268, 280-81 (1979); Craig v. Boren, 429 U.S. 190, 204 (1976).

it.[56] Thus, by using gender as a proxy for need, the primary/secondary modification labels all wives as "dependent," and thereby unconstitutionally demeans the efforts of those wives who do work.[57]

In addition, this process of stigmatization often has the negative effect of perpetuating traditional stereotypic views of women.[58] By assuming wives are dependent and treating them as dependent, a classification reinforces the view that females need special protection. Moreover, using classifications designed to give this protection makes it difficult for women to break out of their stereotypic roles.[59] Protective classifications have the effect of denying females the opportunity to become fully responsible persons,[60] and reaffirm the commonly held belief that they need special protection. The entire process becomes a vicious circle working to insure that women never attain truly equal status.[61]

These potentially adverse effects must be minimized by requiring that gender be used as a proxy only where it accurately reflects the underlying classification. In the case of the primary/secondary modification, however, statistics do not show a close enough correlation between gender and dependence to justify the use of a gender classification.

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56. *Cf.* Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973) (plurality opinion) ("statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individuals members").

57. The Court has repeatedly held that gender-based classifications may not operate to denigrate the female wage earner. *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 148 (1980); Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975).

58. *See* Mississippi Univ. for Women v. Hogan, 102 S. Ct. 3331, 3333 (1982) (policy of excluding males from nursing program "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job"); Orr v. Orr, 440 U.S. 268, 283 (1979) ("Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection."); Stanton v. Stanton, 421 U.S. 7, 15 (1975) (To argue that female children do not need child support as long as male children because they do not go to school as long "is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed."). *See generally* L. TRIBE, *supra* note 5, § 16-25; Harzenski & Weckesser, *The Case for Strictly Scrutinizing Gender-Based Separate But Equal Classification Schemes,* 52 TEMP. L.Q. 439, 472-78 (1979); *The Supreme Court, 1974 Term,* 89 HARV. L. REV. 49, 100-03 (1975).

59. *See* Harzenski & Weckesser, *supra* note 58, at 469-71.

60. *Id.* at 469.

61. *Cf.* Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment,* 91 HARV. L. REV. 1, 55 (1977):

> The law . . . has long been one of the chief instruments for assuring the dependency of women. . . . If a woman is, for some legal purposes, a thing, if the law treats her in some contexts as incapable of behaving as an adult, if the law reminds her at every turn that she is a dependent — then is it any wonder that she internalizes the stigma of inferiority and assumes herself to be less than fully human? . . . A woman who has been brought to think that she is incapable of filling a particular social role *is* incapable.

(emphasis in original) (footnotes omitted).

Although, on the average, women tend to earn less than men,[62] it does not necessarily follow that the wife is always, or even usually, dependent on her husband and thus needy. On the contrary, recent statistics indicate that in fifty-two percent of all married-couple families, both the husband and wife work.[63] Consequently, in fifty-two percent of all families, the wife is at most only partially dependent upon her husband. Moreover, in almost three and one-half percent of married-couple families, the wife is the only wage earner.[64] Although this seems to be a small percentage, it means that potentially 1,707,000 husbands are totally dependent upon their wives.[65]

Based on these statistics, it appears that using gender as a proxy for need may be accurate only slightly more than forty-four percent of the time. In the other fifty-six percent of cases, however, where the wife is at least a joint wage earner and in some cases the sole wage earner, she is being unfairly branded with the label "dependent," complete with its stereotypic and degrading effects.[66] Given these effects in such a potentially large percentage of cases, gender is hardly a sufficiently accurate proxy for need to meet the substantial relation requirement.

3. *Availability of a gender-neutral alternative*— Even assuming that gender is an accurate proxy for need and that holding husbands primarily liable does achieve the desired result, the classification still cannot be upheld. Where a gender-neutral rule is available that would achieve the desired objective, a gender-based rule cannot be employed.[67]

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62. *See* Rytina, *Occupational segregation and earnings differences by sex*, MONTHLY LAB. REV., Jan. 1981, at 49, 49 & n.1.

63. *See supra* note 13.

64. *See supra* note 16.

65. *Id.* Some account must be taken here of those husbands who do not work but who are independently wealthy and thus not dependent on their working wives. Account must also be taken of working husbands who may be partially dependent.

66. This is not to say that wives who are, in fact, dependent should feel any degradation because of their status. The degradation occurs when those wives who are *not* dependent are labeled dependent, thus insinuating that the work they do is insignificant.

67. Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980); Orr v. Orr, 440 U.S. 268, 283 (1979). This rule was apparently contradicted in Michael M. v. Superior Court, 450 U.S. 464, 473 (1981), where a plurality stated that it is not necessary to prefer a gender-neutral rule if a non-neutral rule — drawn within constitutional limits — is available. Obviously, the plurality in *Michael M.* did not feel that the existence of a gender-neutral rule is relevant in determining whether a classification is sufficiently precise to be constitutional. This contradicts the majority decisions of *Orr* and *Wengler*.

To reach the conclusion that a gender-neutral rule need not be preferred, the plurality relied on a footnote in the majority opinion of *Kahn v. Shevin*. This footnote states that it is insufficient to argue that the "[l]egislature could have drafted the statute differently, so that its purpose would have been accomplished more precisely. . . . [T]he issue . . . is not whether the statute could have been drafted more wisely, but whether the lines chosen . . . are within constitutional limitations." 416 U.S. 351, 356 n.10 (1974). It is apparent that this footnote was improperly relied upon because it was not meant to apply to the question of preferring a gender-neutral rule over a gender-based one. Rather, the footnote in *Kahn* was in response to the argument

At least three gender-neutral alternatives are available that would achieve the objective of helping needy spouses.[68] First, the husband and wife could be held jointly and severally liable. Second, courts might hold the spouse who incurred the debt primarily liable and the other spouse secondarily liable.[69] Finally, liability could be imposed on whichever spouse was better able to handle the financial burden.[70] Which of these alternatives is preferable is irrelevant to the question of the constitutionality of the gender-based classification. The mere existence of a viable gender-neutral rule indicates that the gender-based rule of holding husbands primarily liable cannot be substantially related to the objective of helping needy spouses.

CONCLUSION

The common law doctrine of necessaries undoubtedly had a legitimate basis at one time. No longer, however, can the assumption of a wife's dependency constitutionally sustain a gender-based classification such as the primary/secondary modification. Not only does this modification ignore dependent husbands, it also demeans the efforts of working wives by perpetuating the stereotypic view that the wife is the dependent spouse. In addition, there are several gender-neutral alternatives available that would achieve the desired objective of assisting needy spouses. These considerations indicate that the primary/secondary modification unconstitutionally denies the equal protection rights of men and women. Insofar as the modification is unconstitutional, it is not a legitimate means of reforming the common law doctrine of necessaries. Any such reformation must be gender neutral to be constitutional.

—Debra S. Betteridge

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that the statute was not substantially related to the achievement of the state's objective because it was overinclusive — it benefited some who did not need the benefit and it could have been drawn to exclude these people. *Id.* at 360 (Brennan, J., dissenting). Thus, the footnote should not be read as saying that it is not necessary to use a gender-neutral rule if one is available.

68. A fourth alternative, that of holding neither spouse liable for necessary debts incurred by the other, while gender neutral, would not advance the objective of helping needy spouses obtain what they need because there would be no one to hold liable if they were unable to pay.

69. For those states that apply these two alternatives, see *supra* notes 19 & 21 and accompanying text.

70. At the present time, no state has adopted this alternative. Use of this alternative would require a case-by-case determination of which spouse could better afford the cost. Because of its administrative inconvenience, this rule has been rejected in favor of the gender-based rule requiring no such determination. *See* Marshfield Clinic v. Discher, 105 Wis. 2d 506, 525, 314 N.W.2d 326, 335-36 (1982) (Abrahamson, J., concurring in part, dissenting in part). Yet because the Court has held that administrative inconvenience is not a sufficient reason to prefer one gender over another, *see supra* note 54 and accompanying text, the rule remains a viable alternative available for use in achieving the state's objective of helping needy spouses.