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Alimony Awards under Middle-Tier Equal Protection Scrutiny: *Orr v. Orr*, 440 U.S. 268 (1979)

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Note

Alimony Awards Under Middle-Tier Equal Protection Scrutiny

Orr v. Orr, 440 U.S. 268 (1979).

I. INTRODUCTION

Prior to the United States Supreme Court's decision in *Reed v. Reed*,[1] lawmakers were generally free to draw legislative classifications based upon gender and did so frequently.[2] Even the suffrage movement, which secured women the right to vote,[3] had little impact upon gender-based statutory distinctions.[4] With the *Reed* decision the Supreme Court brought gender-based legislative classifications within the scrutiny of the equal protection clause.[5] Nevertheless, *Reed* became uncertain precedent in the area of equal protection. Although it was obvious that gender-based classifications were to be scrutinized, commentators and lower courts alike were uncertain as to which of the two traditional degrees of scrutiny was being applied.[6] Language in *Reed* indicated that the lower, traditional rational relationship test should be employed; however, the opinion of the Court in a later case implied that the upper-tier of strict scrutiny would be more proper.[7] In 1976, the Court established a third level of scrutiny for gender-based classifications,[8] a middle-tier analysis which required that gender-based classifications be substantially related to important governmental interests.[9]

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1. 404 U.S. 71 (1971).
2. *See* Muller v. Oregon, 208 U.S. 412 (1908); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).
3. U.S. CONST. amend. XIX, § 1.
4. *See* Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 355 U.S. 464 (1948).
5. U.S. CONST. amend. XIV, § 1.
6. Orr v. Orr, 351 So. 2d 904 (Ala. Civ. App. 1977); Frontiero v. Richardson, 411 U.S. 677 (1973); Ginsburg, *Gender and the Constitution*, 44 U. CINN. L. REV. 1, 10 (1975).
7. Frontiero v. Richardson, 411 U.S. 677 (1973).
8. Craig v. Boren, 429 U.S. 190 (1976).
9. "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197.

In *Orr v. Orr*,[10] the Supreme Court ex .nined Alabama's alimony statutes under this middle-tier scrutiny. The statutes[11] allowed alimony awards only to females.[12] The Court held that the statutory provisions were an unconstitutional denial of equal protection.[13]

The application of this substantial relationship test concerns not only parties who may be seeking divorces and the legislatures in eight states whose alimony statutes do not appear to pass its scrutiny,[14] but it also concerns those involved with other areas of law employing gender-based classifications. Equal protection scrutiny of gender-based classifications becomes even more significant in light of the uncertain status of the Equal Rights Amendment.[15]

II. HISTORICAL APPLICATION OF EQUAL PROTECTION TO GENDER-BASED CLASSIFICATIONS

The fourteenth amendment prohibits states from denying persons equal protection of the law.[16] Prior to this decade, equal protection analysis of the relationship between legislative objectives and legislative classifications generally involved two tiers of judicial scrutiny. Under the lower or traditional level, legislation is upheld if the court can find any rational relationship between the

10. 440 U.S. 268 (1979).
11. ALA. CODE §§ 30-2-51 to -53 (1975); note 117 *infra*.
12. "In the absence of a statute so providing there is no authority in this state for awarding alimony against the wife in favor of the husband." Baggett v. Baggett, 47 Ala. App. 539, 258 So. 2d 735 (1972); Davis v. Davis, 279 Ala. 643, 644, 189 So. 2d 158, 160 (1966).
13. Orr v. Orr, 440 U.S. 268, 283 (1979).
14. ALA. CODE §§ 30-2-51 to -53 (1975); ARK. STAT. ANN. § 34-1211 (Repl. 1962); GA. CODE ANN. § 30-201 (Supp. 1978) (This statute is referred to in text; however, in 1979 the Georgia Legislature amended the statute to provide alimony to either party. GA. CODE ANN. § 30-201 (Supp. 1979)); IDAHO CODE § 32-706 (1974); LA. CIV. CODE ANN. art. 160 (West Supp. 1979); N.H. REV. STAT. ANN. § 458:19 (1968); N.Y. DOM. REL. LAW § 236 (McKinney 1977); S.C. CODE §§ 20-3-120, -130 (1976); WYO. STAT. § 20-2-114 (1977).
15. H.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972). The House approved the amendment by a vote of 354-23. 117 CONG. REC. H. 9392 (Oct. 12, 1971). Senate approval came on an 84-8 vote. 118 CONG. REC. S. 4612 (Mar. 22, 1972). Congress passed the amendment on March 23, 1972. 118 CONG. REC. H. 2423 (Mar. 23, 1972). Thirty-five states have ratified, fifteen have not. There have been *attempted* rescissions by four states, including Nebraska. U.S. NEWS & WORLD REPORT, Nov. 28, 1977, at 32.

    H.J. Res. 638 proposed to extend the time for ratification until 1982. H.J. Res. 638, 95th Cong., 2d Sess., 124 CONG. REC. 17283 (1978).
16. U.S. CONST. amend. XIV, § 1 provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

classification and its permissible governmental objective.[17] However, when a legislative classification is based upon a suspect classification such as race,[18] alienage,[19] or national origin,[20] or upon a fundamental right,[21] it is subject to the strict judicial scrutiny of upper-tier analysis. The use of a suspect classification will be upheld only if it serves a compelling governmental interest, is drawn as narrowly as possible, and employs the least drastic means available to achieve the statutory objective.[22]

Reed v. Reed[23] was the first case in which the Supreme Court placed a gender-based classification under equal protection scrutiny.[24] Prior to this landmark decision, the Court had frequently upheld gender-based classifications in a variety of situations.[25]

In *Reed*, the plaintiff challenged an Idaho probate code provision which required that preference be given to males over females in instances where both applicants for letters of administration were from the same entitlement class.[26] The Court referred to a 1920 tax discrimination case for a phrase expressing the test applicable in order to invalidate the statute: "A 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.' "[27] Although the Court identified the issue as whether or not the statutory preference of males over females bore a rational relationship to the state objective,[28] it did not apply the traditional rational relationship analysis.[29] The statute was held unconstitutional even though its objective of reducing the probate court work load was "not without some legitimacy."[30] Such legitimacy would probably have been sufficient to sustain a classification under a traditional rational relationship test.

17. Frontiero v. Richardson, 411 U.S. 677, 683 (1973); Reed v. Reed, 404 U.S. 71, 76 (1971).
18. Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964).
19. Graham v. Richardson, 403 U.S. 365, 372 (1971).
20. Oyama v. California, 332 U.S. 633, 644-46 (1948); Korematsu v. United States, 323 U.S. 214 (1944).
21. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 51 (1973).
22. Kahn v. Shevin, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting).
23. 404 U.S. 71 (1971).
24. Ginsburg, *supra* note 6, at 10.
25. *See* note 2 *supra*.
26. The code provision was effectively repealed when the Idaho Legislature adopted the Uniform Probate Code in 1972.
27. 404 U.S. at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).
28. *Id.*
29. Craig v. Boren, 429 U.S. 190, 210 (1976) (Powell, J., concurring) (material noted with astrisk).
30. 404 U.S. at 76.

Frontiero v. Richardson[31] involved a challenge to a federal statutory provision which required servicewomen, but not servicemen, to prove, before they became eligible for increased housing and medical benefits, that they provided over one-half of their spouse's support. The application of the rational relationship test in *Reed* was the springboard for an argument by four of the justices in *Frontiero* that gender should be recognized as a suspect classification.[32]

Justice Brennan delivered a plurality opinion (joined by Justices Douglas, White, and Marshall), expressing the view that gender should be considered a suspect classification.[33] Justice Powell, Chief Justice Burger and Justice Blackman stated in a concurring opinion that it was unnecessary to classify gender as suspect,[34] reasoning that *Reed* was sufficient authority to overrule the provision before them and that the court should await the ratification of the Equal Rights Amendment before taking too much action in the area of gender-based classifications.[35]

Although *Reed* indicated that gender would be reviewed under some type of rational relationship test, the plurality opinion in *Frontiero* specifically expressed the view that gender ought to be a suspect classification. The justices, however, were not in agreement as to how much scrutiny gender-based classifications should receive. This indecisiveness understandably caused confusion among lower courts and commentators as to which level of analysis was appropriate for gender-based classifications.[36]

In *Kahn v. Shevin*,[37] the Court upheld a Florida property tax exemption allowed to widows but denied widowers. In upholding such differential treatment of similarly situated males and females, the court reasoned that:

> This is not a case like Frontiero v. Richardson . . . where the Government denied its female employees both substantive and procedural benefits granted males "*solely* . . . for administrative convenience." . . . . We deal here with a state tax law reasonably designed 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.[38]

Kahn has been interpreted as holding that the substantial relationship test will allow statutory classifications discriminating upon gender if the statute is intended to compensate women for

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31. 411 U.S. 677 (1973).
32. *Id.* at 682.
33. *Id.*
34. *Id.* at 691-92 (Powell, J., concurring).
35. *Id.* at 692 (Powell, J., concurring).
36. *See* notes 55-57 & accompanying text *infra*.
37. 416 U.S. 351 (1974).
38. *Id.* at 355 (citations omitted) (emphasis in original).

past discrimination.[39] It is difficult, however, to determine to what extent the *Kahn* ruling reflected the compensatory purpose of the statute, or whether the decision can be attributed to the high degree of deference afforded states in the area of taxation.[40] The language above indicates that the deference issue was a major factor.

The Court shed more light on this area when a slightly different test was enunciated in *Craig v. Boren*.[41] That case provided the first indication of a third level of equal protection scrutiny. Following a summary of decisions involving gender-based equal protection analysis prior to 1976, the Court reviewed an Oklahoma statute prohibiting the sale of 3.2% beer to males under age twenty-one and females under age eighteen. The test utilized was similar to the one subsequently employed by the Court in *Orr*: "[T]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[42]

The two phases of this substantial relationship test evolved from decisions which followed the *Reed* analysis. The first group of opinions followed *Reed* more closely than the second and held that administrative convenience[43] or "old notions of role typing"[44] could not sustain statutory classifications based upon gender; hence, the important governmental interest requirement was created. The second group of decisions relied less directly upon *Reed*. These cases attempted to use *gender* where other, more narrowly drawn classifications, would have been more closely related to the governmental objective.[45] Thus, the requirement that classifications "be substantially related to achievement of those objectives"[46] became solidified.

Although the Court agreed with the state that traffic safety was an important governmental function, the statute in *Craig v. Boren* did not withstand the second phase of the substantial relationship

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39. *See* note 55 *infra*.
40. "Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973) (footnote omitted). *See also* Austin v. New Hampshire, 420 U.S. 656, 661-62 (1975); Allied Stores v. Bowers, 358 U.S. 522, 528 (1959).
41. 429 U.S. 190 (1976).
42. *Id.* at 197.
43. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 690 (1973); Stanley v. Illinois, 405 U.S. 645, 656 (1972).
44. Stanton v. Stanton, 421 U.S. 7 (1975).
45. *See* Stanton v. Stanton, 421 U.S. 7 (1975); Schlesinger v. Ballard, 419 U.S. 498, 508 (1975); Taylor v. Louisiana, 419 U.S. 522, 535 n.17 (1975).
46. Craig v. Boren, 429 U.S. 190, 197 (1976).

analysis because the gender-based distinction was not related closely enough to traffic safety.[47] The difference between males and females with respect to the drinking of 3.2% beer and driving did not warrant the difference in their treatment. The court has summarized this middle-tier test as simply a question of whether the difference between males and females with respect to the object of the legislation warrants a difference in treatment.[48]

III. THE FACTS OF *ORR*

In February of 1974, the Circuit Court of Lee County Alabama issued a divorce decree dissolving the marriage of William and Lilian Orr.[49] The decree incorporated a stipulation by the parties whereby Mr. Orr agreed to pay $1,240 per month alimony.[50] In 1976, Mrs. Orr began contempt proceedings to collect $5,524 of unpaid alimony as well as attorneys' fees. Mr. Orr submitted a motion requesting that Alabama's alimony statutes be declared unconstitutional because they provided that alimony may be awarded to wives upon divorce but not to husbands. This constitutional challenge was his only defense, and he did not claim alimony for himself.[51]

Without referring to authority or stating its reasons for upholding the constitutionality of the statutes, the circuit court denied Mr. Orr's motion and entered a judgment against him for the accrued alimony.[52]

The Alabama Court of Civil Appeals affirmed the circuit court and upheld the constitutionality of the statute.[53] The appellate court relied heavily upon a Georgia case which reasoned that alimony statutes providing awards to women only were constitutionally valid as legislation aimed at "cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionally heavy burden."[54] This compensatory rationale paralleled that which had been endorsed in *Kahn*. The court felt that the same reasoning which upheld the Florida tax exemption for widows applied equally to wives after divorce. "It is the wife of a broken marriage who needs financial assistance for whom the alimony statutes of Alabama were designed."[55]

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47. *Id.* at 204.
48. *Id.* at 199.
49. Orr v. Orr, 351 So. 2d 906, 906 (Ala. 1977) (personal opinion).
50. *Id.* at 907; Brief for Appellant at 3-4, Orr v. Orr, 440 U.S. 268 (1979).
51. Orr v. Orr, 440 U.S. 268, 271 (1979).
52. Brief of Appellant at 3.
53. Orr v. Orr, 351 So. 2d 904 (Ala. Civ. App. 1977).
54. *Id.* at 905 (quoting Murphy v. Murphy, 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 421 U.S. 929 (1975) (quoting Kahn v. Shevin, 416 U.S. 351 (1974)).
55. Orr v. Orr, 351 So. 2d at 905.

The Alabama Supreme Court granted a writ of certiorari to review the judgment but later quashed the writ as improvidently granted, without issuing a majority opinion.[56] Two justices noted that the statutes were "designed to foster and preserve the family unit, a constitutionally permissible area for legislation."[57] However, one justice dissented because he felt the statute lacked the necessary relationship to its purposes and that the objective of protecting only the lone female was improper.[58]

IV. THE *ORR* DECISION

After granting certiorari and dismissing several preliminary issues,[59] the Supreme Court began analysis of the case by setting forth the appropriate standard of judicial scrutiny for gender-based legislative classifications. As set out in *Craig v. Boren*,[60] the standard requires that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[61] The first step of the Court's substantial relationship analysis was an examination of three governmental objectives which Alabama's alimony statutes might possibly have served.[62]

Reinforcement of the State's preference for a family role model in which the wife was dependent upon the husband for her support is arguably a valid statutory objective.[63] Because this purpose was based upon stereotypes of traditional family roles, it would have failed to sustain the Alabama statute even if the statute had

56. 351 So. 2d 906 (Ala. 1977).
57. *Id.*
58. *Id.* at 909.
59. Before reaching the equal protection question, the Court addressed three issues which were not raised by either of the parties, or by the Alabama courts. 440 U.S. at 271. Presumably, these issues were dealt with in response to Justice Rehnquist's dissent. *Id.* at 290. The preliminary issue was standing. Mr. Orr was granted standing despite the fact that he may have had to pay the alimony judgment even if his equal protection challenge was successful. The second issue was the timeliness of his challenge. Since both of the Alabama courts had decided the constitutional issue upon the merits, the Court could not regard those decisions as resting upon adequate state grounds and accordingly could decide the issue. The last issue was whether the alimony obligation was a matter of state contract law since it arose from a stipulation of the parties which was later incorporated in the divorce decree. Again, because the lower courts had clearly based their decisions upon the constitutional issue, the Supreme Court was allowed to address it. *See, e.g.*, Stern v. Stern, 165 Conn. 190, 332 A.2d 78 (1973).
60. 429 U.S. 190 (1976).
61. *Id.* at 197.
62. Orr v. Orr, 440 U.S. at 278.
63. *Id.* at 279.

been substantially related to the achievement of that objective.[64] This was illustrated when the United States Supreme Court invalidated a Utah statute providing different ages of majority for males and females because it was based upon stereotypes.[65]

The Court readily accepted two objectives arguably served under the Alabama statutory scheme.[66] The state court had adopted the reasoning of the Georgia Supreme Court[67] that statutes providing alimony to women only were closely akin to the tax assistance given women in *Kahn v. Shevin*[68] and were thus constitutionally acceptable.[69] The Alabama court said that the *Kahn* reasoning was "equally applicable in the instance of a wife involved in seeking alimony pursuant to a divorce. It is the wife of a

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64. *Id.* at 279-80.

65. Stanton v. Stanton, 421 U.S. 7 (1975). The statute allowed a court to award child support for males up to age twenty-one but for females only until they reached age eighteen. The Utah court attempted to justify this difference in treatment with

> "old notions," namely, "that generally it is the man's primary responsibility to provide a home and its essentials," . . . that "it is a salutary thing for him to get a good education and/or training before he undertakes those responsibilities," . . . that "girls tend generally to mature physically, emotionally and mentally before boys"; and that "they generally tend to marry earlier."

Id. at 10 (quoting Stanton v. Stanton, 30 Utah 2d 315, 318, 517 P.2d 1010, 1012 (1974)). The Court accepted the assumption that generally it is a man's primary responsibility to provide a home, making it important for him to get adequate education and training before he assumes that responsibility, and that females may tend to marry earlier than males. *Id.* at 14. However, as in *Orr*, traditional ideas regarding family roles failed to support gender-based discrimination because they imposed criteria unrelated to the statutory objective of child support. *Id.*

> A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the market-place and the world of ideas. Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for the girl. To distinguish between the two on educational grounds 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.

Id. at 14-15 (citations omitted).

66. Orr v. Orr, 440 U.S. at 280.

67. Murphy v. Murphy, 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 421 U.S. 929 (1975).

68. 416 U.S. 351 (1974).

69. Orr v. Orr, 351 So. 2d at 905 (Ala. Civ. App. 1977).

broken marriage who needs financial assistance for whom the alimony statutes of Alabama were designed."[70]

The Supreme Court found that two objectives could be gleaned from this reasoning. The first of these was "provid[ing] help for needy spouses, using sex as a proxy for need."[71] The second was "compensating women for past discrimination during marriage, which assertedly has left them unprepared to fend for themselves in the working world following divorce."[72]

As to the second objective, the Court held "that assisting needy spouses is a legitimate and important governmental objective."[73] The Court's explanation was limited to a quote from a previous case which held that "[r]eduction of the disparity in economic condition between men and women . . . [was] an important governmental objective."[74]

Having satisfied the first phase of the substantial relationship test, the equal protection analysis would normally have progressed to the second phase. Gender would have been examined to determine if it was "a sufficiently 'accurate proxy' . . . for dependency to establish that the gender classification rests 'upon some ground of difference having a fair and substantial relation to the object of the legislation.' "[75] The other objective would have been examined to determine "whether women had in fact been significantly discriminated against in the sphere to which the statute applied a sex based classification, leaving the sexes '*not* similarly situated with respect to opportunities' in that sphere."[76]

Orr does not indicate whether a gender-based classification is substantially related to either objective, since the second phase of equal protection analysis for both objectives was precluded by the procedure specified in the Alabama alimony statutes. Individualized hearings as to the parties' financial situations were already a requisite formality in the process of awarding alimony.[77] Accordingly, even if sex were an accurate proxy for dependency resulting in need after divorce, automatically awarding alimony only to females would not be justified, as actual dependency could be ascertained in each case at these hearings. For the same reason, the statute is defective with respect to the purpose of compensating

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70. *Id.* at 905.
71. Orr v. Orr, 440 U.S. at 280.
72. *Id.*
73. *Id.*
74. *Id.* (quoting Califano v. Webster, 430 U.S. 313, 317 (1977)).
75. *Id.* at 280-81 (quoting Craig v. Boren, 429 U.S. at 204, and Reed v. Reed, 404 U.S. at 76).
76. *Id.* at 281 (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)) (emphasis in original).
77. *Id. See* ALA. CODE § 30-2-51 to -53 (1975); note 115 *infra*.

women for discrimination during marriage. Any marriage-based discrimination which may have left the wife "*not* similarly situated with respect to opportunities in that sphere"[78] may also be determined at hearings on the financial position of the parties in each individual case.

Alabama's alimony statutes were overinclusive because they extended the benefit of alimony to some females who did not need it. At the same time, they were underinclusive in that they were not allowing alimony to needy males.[79] In some situations these flaws may produce results contrary to the objectives of the statute. The situation in which a financially secure wife who has been a major source of income for the couple is awarded alimony from the needy husband under the Alabama alimony statutes, is one example.[80] Clearly in this situation the male is the needy spouse and just as clearly the wife has not been discriminated against or left in a position where she is unable to support herself because of her role in the marriage, yet she is not obligated to pay alimony and may even receive it. Under a gender-neutral statute, the wife would undoubtedly have to bear the burden of alimony given this situation.

V. ANALYSIS

Orr should not have a great impact upon the equal protection doctrine in the area of gender-based classifications. The Court applied the substantial relationship test first set out in *Craig v. Boren*[81] and used in gender-based classification cases since.[82] But because it did not reach the second phase of the substantial relationship analysis, the *Orr* opinion does not reveal whether or not a classification drawn upon gender is substantially related to the important governmental objectives of assisting needy spouses and compensating women for past discrimination.[83]

The Alabama Court of Civil Appeals felt the statutes were a constitutional application of gender-based classifications because they provided assistance to women.[84] In light of the somewhat confusing messages embodied in the opinions of the Court on the

78. *See* note 71 *supra*.
79. Orr v. Orr, Civ. 1006, slip op. at 3 (Ala. Civ. App. May 30, 1979).
80. ALA. CODE § 30-2-52 (1975) allows an alimony award to the wife without consideration of her resources. *See* note 115 *infra*.
81. 429 U.S. 190 (1976).
82. *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977).
83. The opinion did, however, incorporate the concept of "tailoring" in the substantial relationship analysis which had previously been associated with the strict scrutiny of suspect classifications and fundamental interests. *See* Kahn v. Shevin, 416 U.S. at 357 (Brennan, J., dissenting).
84. *See* notes 52-54 *supra*.

issue of gender-based classifications, the Alabama court was probably justified in believing that a statute designed to provide economic assistance to females was constitutionally acceptable.[85]

The opinion of the Alabama Court of Civil Appeals relied heavily upon *Murphy v. Murphy*,[86] the case in which the Georgia Supreme Court upheld the constitutionality of the state's alimony statute[87] upon the authority of *Kahn*.[88] That law was similar to the Alabama statutes in that it provided awards only to women. In *Murphy*, the Georgia Supreme Court outlined the compensatory rationale upheld by the Court in *Kahn* and said:

> These reasons are equally applicable and cogent in the case of a dependent wife involved in the demise of a marriage who is seeking a divorce and alimony or only alimony. It is the dependent wife of a broken marriage for whom the alimony statutes of Georgia were designed to provide financial support.[89]

Accordingly, the Georgia alimony statute was upheld over an equal protection challenge, even though it provided alimony only to women.[90]

In his dissent in *Kahn*, Justice Brennan stated that even though the Florida objective of assisting widows through a $500 property tax exemption rose to the level of a compelling state in-

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85. *See* text accompanying notes 28-34 *supra*.
86. 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 421 U.S. 929 (1975).
87. As revised, GA. CODE ANN. § 30-201 (Supp. 1978) provides:

> [Alimony is an allowance out of the husband's estate, made for the support of the wife when living separate from him. It is either temporary or permanent.] The wife shall not be entitled to alimony if it is established by a preponderance of the evidence that the separation between the parties was caused by the wife's adultery or desertion. In all cases in which alimony is sought by the wife, the court shall receive evidence of the factual cause of the separation even though one or both of the parties may also seek a divorce, regardless of the grounds upon which a divorce is sought or granted by the court. In all other cases in which alimony is sought by the wife, alimony is authorized, but not required, to be awarded to the wife in accordance with her needs and the husband's ability to pay. In determining whether or not to grant alimony to the wife, the court shall also consider evidence of the husband's conduct toward the wife. Should the husband die prior to the court's order on the issues of alimony, the rights of the wife shall survive and be a lien upon the estate of the deceased. Pending final determination by the court of the wife's right to alimony, the husband shall not make any substantial change in the assets of his estate except in the course of ordinary business affairs and bona fide transfers for value.

The bracketed material indicates the former statute, encountered by the court. GA. CODE ANN. § 30-201 (Supp. 1974). Subsequent revisions reflect the *Orr* decision. The former statute was interpreted to provide awards to women only. Lowry v. Lowry, 283 Ga. 593, 234 S.E.2d 509 (1977).

88. 416 U.S. 351 (1974).
89. 232 Ga. at 353, 206 S.E.2d at 459.
90. *See, e.g.*, Whitt v. Vathier, 316 So. 2d 202 (La. App. 1975).

terest, it denied equal protection because the statutory objective could be met more efficiently through the use of a more carefully tailored legislative classification.[91]

Although the Florida tax statute and the Alabama alimony provision were both economic benefits awarded only to females in an overly broad manner upon the demise of a marital relationship, one reason for upholding the property tax exemption and invalidating the alimony provision is the strength of the state interest involved. The Alabama Court of Civil Appeals thought the statutes were a constitutional application of gender-based classifications because they provided assistance to women. This reasoning was based upon *Kahn*, which upheld an overly broad tax exemption. As a result, *Orr* implies that a state statute discriminating solely upon the basis of gender will not be upheld even if it compensates women for past discrimination unless the state has a sufficiently strong interest in the area of legislation.

A. The Strength of the State Interest

As mentioned previously, the interest of the State of Florida in its taxation policy was quite strong. Traditionally state taxation powers have been afforded great respect.[92] The strength of that interest was a large factor in sustaining different treatment of similarly situated individuals according only to their gender.[93]

The right to regulate and control the conditions surrounding divorce is generally recognized as an exclusive state right.[94] Notwithstanding this, *Orr* indicates that when individualized hearings already exist, this interest is not strong enough to justify the different treatment of persons who are similarly situated with respect to the statutory objective of compensating needy spouses. Florida's interest in taxation sustained a statutory classification which could have been more narrowly drawn; however, Alabama's interest in controlling the financial relations of private parties to provide for needy spouses was not strong enough to sustain an overly-broad statute to that effect.

In other decisions involving equal protection the Court has specifically recognized the strength of the legislative interest in the area where gender-based classification is employed. While this state interest component is not the basis for these decisions, it does appear to be one of the factors considered. These decisions

91. 416 U.S. at 358 (Brennan, J., dissenting).
92. *See* note 41 *supra*.
93. Kahn v. Shevin, 416 U.S. at 355.
94. Whitehead v. Whitehead, 53 Hawaii 302, 492 P.2d 939 (1972); Collins v. Oklahoma Tax Comm'n, 446 P.2d 290 (Okla. 1968); Smitheal v. Smitheal, 518 S.W.2d 842 (Tex. Civ. App. 1975).

have indicated that the interest of the state in controlling divorce is not as strong as the interest of a state in running a self-sufficient disability insurance program[95] or the interest of Congress in administering the promotion of Naval officers.[96] Statutes in these areas have employed a strong legislative interest to sustain different treatment of persons who were similarly situated solely upon the basis of their sex.

A federal statute which gave female officers a longer period of tenured service than males before mandatory retirement was upheld in *Schlesinger v. Ballard*.[97] In that statutory scheme, officers were in competition for promotion only with other officers similarly situated, yet female officers were given more time for promotion.[98] The Court upheld the provision because it felt Congress could have rationally presumed female officers did not have the same opportunity as males for advancement before mandatory retirement and therefore attempted to compensate women for this lack of opportunity.[99] The *Ballard* opinion specifically noted that Congress was responsible for deciding how the armed forces should go about being prepared for battle and achieve "a flow of promotions commensurate with the Navy's current needs and . . . motivate qualified commissioned officers to so conduct themselves that they may realistically look forward to higher levels of command."[100] Respect for this legislative interest appears to have been an important factor in allowing dissimilar treatment of males and females.

Even the authority of a state to control alcoholic beverages under the twenty-first amendment was insufficient to sustain different treatment of males and females with respect to the purchase of 3.2% beer.[101] After examining statistics presented by the state, the Court decided that "if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit' "[102] and went on to "hold, that the Twenty-first Amendment does not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment."[103]

The interest of the State of California in maintaining a self-supporting disability insurance program was sufficient to allow the

95. Geduldig v. Aiello, 417 U.S. 484 (1974).
96. Schlesinger v. Ballard, 419 U.S. 498 (1975).
97. 419 U.S. 498 (1975).
98. *Id.* at 518-19 (Brennan, J., dissenting).
99. *Id.* at 508.
100. *Id.* at 510.
101. Craig v. Boren, 429 U.S. 190, 209-10 (1976).
102. *Id.* at 201-02.
103. *Id.* at 204-05.

state to exclude disabilities affecting only females.[104] The constitutionality of the program was upheld even though it covered male, sex-related disabilities while excluding disabilities from normal pregnancy and childbirth.[105] The state objective could have been achieved through less drastic, gender neutral means.[106]

> The State has a legitimate interest in maintaining the self-supporting nature of its insurance program. Similarly, it has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately. Finally, California has a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance.
>
> These policies provide an objective and wholly non-invidious basis for the State's decision not to create a more comprehensive insurance program than it has.[107]

It appears then, that a state may draw statutory classifications upon gender only if the state interest in the important governmental objective is sufficiently strong whether or not the statute's purpose is to compensate women for past discrimination.

In light of past decisions, a state interest is more likely to be viewed as strong enough to sustain a compensatory statute if it concerns the economics of the state. In both *Kahn*[108] and *Geduldig v. Aiello*[109] the state was directly involved financially with persons within the classification. In *Geduldig* the state's disability insurance program would have been thoroughly disrupted had the equal protection challenge been successful. In *Kahn* the state would have had to modify their system of taxation.

B. Statutes From Other States

Alimony statutes in other jurisdictions fall basically into four categories: those providing awards to females only,[110] those awarding to either spouse at the court's discretion,[111] those provid-

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104. Geduldig v. Aiello, 417 U.S. 484 (1974).
105. *Id.* at 501 (Brennan, J., dissenting).
106. *Id.* at 505 (Brennan, J., dissenting).
107. *Id.* at 496.
108. 416 U.S. 351.
109. 417 U.S. 484.
110. *See* note 14 *supra*.
111. *See* ALASKA STAT. § 09.55.210 (Supp. 1979); D.C. CODE ENCYCL. §§ 16-912 to -13 (West Supp. 1978); IOWA CODE § 598.11 (Supp. 1979); KAN. STAT. ANN. § 60-1610 (Supp. 1978); ME. REV. STAT. ANN. tit. 19., 721 (Supp. 1978); MD. ANN. CODE art. 16, § 3 (Supp. 1979); MICH. COMP. LAWS § 552.23 (Supp. 1979); N.J. REV. STAT. § 2A: 34-23 (Supp. 1979); N.M. STATS. ANN. § 40-4-7 (1978); N.C. GEN. STAT. §§ 50-11 to -16.1 (1976); N.D. CENT. CODE § 14-05-24 (1971); OKLA. STAT. tit. 12, § 1278 (Supp. 1978); R.I. GEN. LAWS §§ 15-5-6, -7 (1978); S.D. COMP. LAWS ANN.

ing awards to either spouse after considering specific factors,[112] and those adopting or patterned after the Uniform Marriage and Divorce Act, which allows an award to either spouse in light of specific need factors.[113] Examination of these statutes will be limited to those in the first category, as they are similar to those invalidated in *Orr*.[114] The other categories present no equal protection issue since they do not employ gender-based classifications.

Alabama's alimony statutes provided support to the wife when her estate was insufficient to support her or when divorce was granted due to the misconduct of either party.[115] In each case, the

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§ 25-4-41 (Supp. 1979); UTAH CODE ANN. § 30-3-5 (Supp. 1979); VT. STAT. ANN. tit. 15, § 754 (Supp. 1979); W.VA. CODE § 48-2-15 (1976).

112. *See* CAL. CIV. CODE § 4801 (West Supp. 1979); CONN. GEN. STAT. § 46b-82 (Supp. 1979); FLA. STAT. ANN. § 61.08 (Supp. 1979); HAW. REV. STAT. § 580-47 (Supp. 1978); MASS. GEN. LAWS ANN. ch. 208, § 34 (Supp. 1979); OHIO REV. CODE ANN. § 3105.18 (Page Supp. 1978); OR. REV. STAT. § 107.105 (1977); VA. CODE § 20-107 (Supp. 1979); WASH. REV. CODE § 26.09.090 (Supp. 1978); WIS. STAT. § 247.26 (Cum. Supp. 1979).

113. UNIFORM MARRIAGE AND DIVORCE ACT § 308 (amended 1973). *See* ARIZ. REV. STAT. ANN. § 25-319 (1976); COLO. REV. STAT. § 14-10-114 (1973); ILL. REV. STAT. ch. 40, § 504 (Supp. 1979) (P.A. 80-923, § 504); KY. REV. STAT. § 403.200 (Supp. 1978); MO. ANN. STAT. § 452.335 (Vernon 1977); MONT. REV. CODES ANN. § 48-322 (Supp. 1977); MINN. STAT. ANN. LAWS § 518.552 (Supp. 1978).

114. Nebraska's alimony provision directs the trial court to consider certain factors in making the award to either spouse. The language would appear to be neutral. NEB. REV. STAT. § 42-365 (Reissue 1978) provides:

> payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

The legislative history to this provision reveals that:

> what we've tried to do here was put in some clauses as to what the court should consider in awarding alimony because right now there is a question as to whether or not the interruption of education and personal careers is cause for awarding more alimony and we've tried to say this shall be one of the things that the court shall consider . . . .

Comm. on Judiciary, Comm. Statement on L.B. 1015 Before Interim Study Comm., Neb. Leg., 83d Sess. 34 (Feb. 11, 1974) (remarks of Walt Radcliff). *But see* Essex v. Essex, 195 Neb. 385, 238 N.W.2d 235 (1976); Magruder v. Magruder, 190 Neb. 573, 209 N.W.2d 585 (1973) (ultimate criteria is reasonableness). NEB. REV. STAT. § 42-367 (Reissue 1978) gives the divorce court the authority to require a husband to pay a wife any amount necessary to enable her to bring the divorce action.

115. ALA. CODE § 30-2-51 (1975) provides: "If the wife has no separate estate or if 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 the condition of his family." Section 30-2-52 provides: "If the divorce is in favor of the wife for the

trial court was directed to consider the financial circumstances of the husband.

Other state statutes which provide alimony to wives only generally direct the trial court to consider several factors. The husband's ability to provide support, the wife's need and the conduct of the parties are usually examined before the award and its size are determined.[116] The phrasing of these statutes indicates that their basic purpose is to provide private support for females who would presumably be candidates for state support in the absence of income from their husbands. While this certainly is an important objective, *Orr* implies that this does not create a state interest strong enough to sustain a gender specific classification when that objective could be met just as readily through a gender-neutral classification.

Aid to needy spouses has been accepted as an important governmental objective and satisfies the first phase of the substantial relationship test.[117] Since each of these gender specific statutes directs the trial court to consider the financial cirucumstances of at least the husband before making the alimony award to the female, they are subject to the same flaw which proved to be the downfall of the Alabama statutes. The statutes would fail an equal protection test because the purpose of assisting needy spouses could be met without any additional administrative inconvenience while the financial circumstances of the parties are being considered under the current statute. Thus, just as in *Orr*, the objective can be satisfied without placing the burden solely upon husbands through a gender-neutral statute.

The possible objective of compensating women for past discrimination in marriage may be read into these statutes as it was in *Orr*.[118] But again as in *Orr*, this purpose may be achieved

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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." Section 30-2-53 provides: "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."

116. *See* Calderwood v. Calderwood, 114 N.H. 651, 327 A.2d 704 (1974); Leigh v. Leigh, 66 A.D.2d 735, 411 N.Y.S.2d 320 (1978); Finder v. Finder, 65 A.D.2d 536, 409 N.Y.S.2d 406 (1978); Beasley v. Beasley, 264 S.C. 611, 216 S.E.2d 535 (1975); McNaughton v. McNaughton, 258 S.C. 554, 189 S.E.2d 820 (1972); Gramme v. Gramme, 587 P.2d 144 (Utah 1978); note 117 *infra*.

117. Orr v. Orr, 440 U.S. at 280.

118. *Id.*

through a gender-neutral statute at the individual hearings which already take place under the existing statute.

Accordingly, it would appear that each of the statutes in this group would fall subject to the same claim of unconstitutionality which befell the Alabama statutes. The apparent objectives of these underinclusive statutes could be met with no increased burden upon the state and without requiring that males support spouses who are not in need or not the victims of past discrimination.

C. Alternatives Upon Remand

After *Orr* the State of Alabama had two courses of action upon remand. Alimony benefits could either be extended to persons of either gender or denied to both.[119] Upon remand, the Alabama Court of Civil Appeals selected the former alternative and reluctantly extended alimony to males.[120] After determining the legislative purpose underlying the alimony statute, the Court of Civil Appeals decided that awards could not be withheld from females.

> It is clear to this court that the statues, notwithstanding the deficiency which the Supreme Court found to exist, were at the time of their promulgation substantially related to the appropriate legislative objective of providing monetary assistance to the financially needy wife and that this objective continues, as a pragmatic matter in appropriate circumstances, in its viability today. Furthermore, it occurs to us that the legislature is quite cognizant of the fact that the female in appropriate cases who has virtually contributed her adult life to the maintenance of the marital relationship is arguably not destined for "the market place . . . ." Put another way, a female who has virtually never been employed outside the home, but has been a mother, wife, and/or homemaker for a number of years is not in a favored position to obtain gainful employment.
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> As a matter of predominant legislative purpose then, we are not prepared to eliminate the current statutory benefits available to needy females inasmuch as we are of the opinion that the legislature would not do so.[121]

Several other states have chosen this alternative. They have removed their statutes from the gender specific category by ascertaining the legislative purpose and deciding that it could be met equally as well by extending the opportunity for alimony to both sexes.

Beal v. Beal[122] illustrates this alternative. *Beal* was a decision in which the Alabama Court of Civil Appeals followed on remand of *Orr*. In *Beal*, the Supreme Judicial Court of Maine held that the state's original alimony statute failed even the lower rational rela-

119. *Id.* at 272.
120. Orr v. Orr, No. 1006 (Ala. Civ. App., filed May 30, 1979).
121. *Id.* at 5.
122. 388 A.2d 72 (Me. 1978).

tionship test because it was not based upon a legitimate state interest.

> By its repeal and replacement of the alimony statute in 1977 the legislature has made it clear that as between abolishing alimony and making it available to husbands in appropriate cases, it would choose the latter. We conclude that the dominant legislative purpose of the alimony statute, as it stood when this action was brought, is correctly served by treating it as extending eligibility to men as well as women.[123]

Although the Maine legislature repealed and replaced its provision for alimony to women only, the state of New York has corrected this flaw in their statute entirely by judicial interpretation. In *Thaler v. Thaler*,[124] a New York Supreme Court found that the state's alimony statute denied equal protection because it allowed awards only to women. Declining to invalidate the provision, the court extended the benefit to both males and females.[125]

XI. CONCLUSION

Whether these statutes, which provide awards only to females, are changed by the legislature of the state or by a judicial interpretation allowing alimony to males as well, the impact upon alimony law may not be great. Like Alabama, courts which are reluctant to allow alimony to men may still be very penurious with such awards. Only in situations where the female is self-sufficient and has means of support relatively equal to that of the male will any impact be felt. States are still free to impose other criteria which tend to weigh heavier upon males because of social structure and role tendencies. States may direct the divorce court to consider the length of the marriage, the number of children needing support, the behavior of the parties toward each other, and the ability of the dependent spouse to support him or herself.[126] Such considerations provide ample opportunity for trial courts to rest the burden of support upon the male.

However, where the wife does not have the extra burden of children to support and is capable of providing for herself at a level near that which she was accustomed during marriage, *Orr* may have a great impact. Awarding alimony to a party who needs it regardless of sex is a just result, not only for the husbands who may have been unduly burdened under a statute similar to Alabama's, but for society and divorced wives as well.

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123. *Id.* at 76.
124. 89 Misc. 2d 315, 391 N.Y.S.2d 331 (Sup. Ct. 1977).
125. *Id.* at 339-40.
126. *See* notes 114-15 *supra*.