

# The Burger Court Opinion Writing Database

*Orr v. Orr*

440 U.S. 268 (1979)

Paul J. Wahlbeck, George Washington University

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 16, 1978



RE: No. 77-1119 Orr v. Orr

Dear John:

Please join me in the dissenting opinion you  
have prepared in the above.

Sincerely,

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 16, 1978

Re: 77-1119 - Orr v. Orr

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Dear John,

Please join me.

Sincerely yours,



Mr. Justice Stevens

Copies to the Conference

10. The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

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## SUPREME COURT OF THE UNITED STATES

WILLIAM HERBERT ORR v. LILLIAN M. ORR

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

No. 77-1119. Decided May —, 1978

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

In summarily deciding the merits of this appeal, the Court either misconceives its own jurisdiction or fails to perceive that the case raises an important constitutional question.

Appellant was held in contempt for failing to comply with an order requiring him to pay alimony to his divorced wife. On appeal from the contempt order, he challenged the constitutionality of the Alabama statutes providing that women, but not men, may be granted alimony in a divorce decree.<sup>1</sup>

Our power to reach the federal question would be clouded if the Alabama courts had held that the constitutionality of the statute could not be raised in a contempt proceeding. Cf. *United States v. United Mine Workers*, 330 U. S. 258, 289-295. But the courts did not even hint at such a ruling. The Alabama Court of Civil Appeals squarely faced and decided the constitutional question.<sup>2</sup> Our jurisdiction is not in doubt.

Nor is there any doubt about appellant's standing. The Alabama statutes impose a burden on men without imposing a like burden on women, and appellant is one of the men burdened by the statutes. If the distinction is unconstitutional, two remedies are possible. The burden may be lifted from men or imposed on women. The choice is not self-evident. See *Skinner v. Oklahoma*, 316 U. S. 535, 542-543;

<sup>1</sup> Ala. Code 1975 §§ 30-2-51 through 30-2-53. See *Davis v. Davis*, 278 Ala. 643, 189 So. 2d 158 (1966).

<sup>2</sup> "The sole issue before this Court is whether Alabama's alimony statutes are unconstitutional. We find they are not unconstitutional and affirm." *Orr v. Orr*, 351 So. 2d 904 (1977).

*Ala Ct addressed the Court issue*

*state*

*P. 905*

*Stanton v. Stanton*, 421 U. S. 7, 17-18. But the possibility that appellant will prevail on his constitutional claim and then lose on remand to the Alabama courts does not foreclose his right to raise the constitutional question.

This case is not controlled by *Kahn v. Shevin*, 416 U. S. 351, in which the difficulty of determining which taxpayers needed a tax exemption arguably justified the gender distinction. Because divorce cases are individual in nature, the need for alimony cannot be determined by a comparable crude rule of thumb. If the federal question in this case is insubstantial, only *Bailey v. Patterson*, 369 U. S. 31, makes it so.

I would note probable jurisdiction and set the case for argument.