The Burger Court Opinion Writing Database

Orr v. Orr

440 U.S. 268 (1979)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

November 30, 1978

Re: 77-1119 - Orr v. Orr

MEMORANDUM TO THE CONFERENCE:

If a majority vote that the constitutional issue is before us so as to reach the merits, the Conference discussion indicated we were all of a mind on the merits.

In light of Bill's and Potter's memos, that may be the disposition.

Regards,

WEB

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
THE CHIEF JUSTICE

March 1, 1979

Dear Bill:

Re: 77-1119 Orr v. Orr

Please join me in your dissent.

Regards,

Mr. Justice Rehnquist

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 30, 1978

MEMORANDUM TO THE CONFERENCE

RE: No. 77-1119 Orr v. Orr

Upon further reflection I have come around to agree with Byron, Harry and John that the constitutional question is properly before us. Reaching the merits I conclude that the statute is unconstitutional and therefore vote to reverse.

W.J.B. Jr.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 4, 1978

RE: No. 77-1119 Orr v. Orr

Dear Chief:

I shall try my hand at a Court opinion in the above.

Sincerely,

The Chief Justice

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

Mr. Justice Brennan

Circulated: 1-16-79

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–1119

William Herbert Orr, Appellant, v. Lillian M. Orr. | On Appeal from the Supreme Court of Alabama.

[January —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether Alabama alimony statutes, which provide that husbands but not wives may be required to pay alimony upon divorce, are constitutional.[1]

On February 26, 1974, a final decree of divorce was entered, dissolving the marriage of William and Lillian Orr. That

[1] The statutes, Ala. Code, Tit. 30, provide that:

"§ 30–2–51. 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 conditions of his family.

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

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

The Alabama Supreme Court has held that "there is no authority in this state for awarding alimony against the wife in favor of the husband. . . . The statutory scheme is to provide alimony only in favor of the wife." *Davis v. Davis*, 279 Ala. 643, 644, 189 So. 2d 158, 160 (1966).

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

From: Mr. Justice Brennan

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1119

William Herbert Orr, Appellant, *v.* Lillian M. Orr.	On Appeal from the Court of Civil Appeals of Alabama.

[January —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is the constitutionality of Alabama alimony statutes which provide that husbands, but not wives, may be required to pay alimony upon divorce.[1]

On February 26, 1974, a final decree of divorce was entered, dissolving the marriage of William and Lillian Orr. That

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The Alabama Supreme Court has held that "there is no authority in this state for awarding alimony against the wife in favor of the husband. . . . The statutory scheme is to provide alimony only in favor of the wife." *Davis* v. *Davis*, 279 Ala. 643, 644, 189 So. 2d 158, 160 (1966).

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pp. 10, 12

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Po
Mr. Justice R
Mr. Justice St

From: Mr. Justice

Circulated: _____

Recirculated: 2 6 J

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1119

William Herbert Orr, Appellant, v. Lillian M. Orr. | On Appeal from the Court of Civil Appeals of Alabama.

[January —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is the constitutionality of Alabama alimony statutes which provide that husbands, but not wives, may be required to pay alimony upon divorce.[1]

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

Feburary 9, 1979

Re: Orr v. Orr, No. 77-1119
Memorandum to the Conference

In response to Bill Rehnquist's dissent, I would add the following footnote at the appropriate place in the Court opinion:

The dissent argues that Doremus v. Board of Education, 342 U.S. 429 (1952), requires dismissal of Mr. Orr's appeal. The quotation from Doremus cited by the dissent, post, at 10, merely confirms the obvious proposition that a state court cannot confer standing before this Court on a party who would otherwise lack it. But that proposition is wholly irrelevant to this case. The dissent argues that a matter of state contract law, albeit unsettled, denies Orr his otherwise clear standing. But that could only be the case if the Alabama courts had construed the stipulation as continuing to bind Mr. Orr -- something which the Alabama courts did not do. Although a state court cannot confer standing in this Court, it can decline to place purely state-law obstacles in the way of an appellant's right to have this Court decide his federal claim. By addressing and deciding the merits of Mr. Orr's constitutional argument, the Alabama courts have declined to interpose such obstacles.

WJB, Jr.

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

pp. 8, 9.

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1119

William Herbert Orr, Appellant, v. Lillian M. Orr | On Appeal from the Court of Civil Appeals of Alabama.

[January —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is the constitutionality of Alabama alimony statutes which provide that husbands, but not wives, may be required to pay alimony upon divorce.[1]

On February 26, 1974, a final decree of divorce was entered, dissolving the marriage of William and Lillian Orr. That

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The Alabama Supreme Court has held that "there is no authority in this state for awarding alimony against the wife in favor of the husband. . . . The statutory scheme is to provide alimony only in favor of the wife." *Davis* v. *Davis*, 279 Ala. 643, 644, 189 So. 2d 158, 160 (1966).

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 26, 1979

Memorandum to the Conference
Re: Orr v. Orr, No. 77-1119

I contemplate adding the following footnote at page 8 of the Court opinion in response to Mr. Justice Powell's dissent:

__/ My brother Powell's dissent makes two objections to our reaching the merits of this case. The first is that this Court should abstain from deciding the constitutional issue until the cause is remanded to affor the Alabama Supreme Court a second opportunity to conside the case. For authority he cites opinions applying the so-called "Pullman abstention" doctrine. See Railroad Comm'n v. Pullman, 312 U.S. 496 (1941). But that doctrin is applicable only where the state court to be deferred to has not previously examined the case. Not one of the long string of opinions cited by my Brother Powell, post, at 1-2, approved abstention in a case like this one, where the court to which the cause would be remanded already considered the case.

The more surprising, indeed disturbing, objection made by my Brother Powell is the suggestion that the parties may have colluded to bring the constitutional issue befo this Court. Post, at 4 & n.3. No evidence whatever, within or outside the record, supports that accusation. And my Brother Powell suggests none. Indeed, it is difficult to imagine what possible interest Mrs. Orr coul have in helping her ex-husband resist her demand for $5,524 in back alimony.

W.J.B. Jr.

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pp 6, 9
& footnote
renumbered

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1119

William Herbert Orr, Appellant, v. Lillian M. Orr. | On Appeal from the Court of Civil Appeals of Alabama.

[January —, 1979]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is the constitutionality of Alabama alimony statutes which provide that husbands, but not wives, may be required to pay alimony upon divorce.[1]

On February 26, 1974, a final decree of divorce was entered, dissolving the marriage of William and Lillian Orr That

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The Alabama Supreme Court has held that "there is no authority in this state for awarding alimony against the wife in favor of the husband. . . . The statutory scheme is to provide alimony only in favor of the wife." *Davis* v. *Davis*, 279 Ala. 643, 644, 189 So. 2d 158, 160 (1966).

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

March 7, 1979

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

From: Mr. Justice Brennan

Circulated: 7 MAR 1979

Recirculated: _____

Memorandum to the Conference
Re: Cases held for Orr v. Orr, 77-1119

Childs v. Childs, 77-1653; Recommendation: GVR

In this appropriately entitled child custody suit, Petitioner argues that §237 of the New York Domestic Relations Law violates the Equal Protection Clause because it provides that a court may direct a father to pay the mother's attorney's fees, but does not make a similar provision for payment of the father's fees by the mother. Petitioner, who did get custody of his child, was ordered to pay part of his wife's fees. The substantive constitutional question appears clearly to be governed by Orr. Thus, unless there is some adequate state ground barring our review, we should GVR.

Petitioner did not seek counsel fees for himself, but as in Orr simply objected to having to pay. In addition, he apparently did not raise his constitutional objection at the trial level. He did, however, raise it on appeal to the Appellate Division. That court refused to reach the issue, not because of a timeliness problem, but because petitioner, "having failed to request a counsel fee, lacks the requisite standing to challenge the constitutionality of the statute." Petitioner's appeal to the New York Court of Appeals was dismissed by that court on the ground that "no substantial constitutional question is directly involved."

The procedural posture is not precisely the same as that in Orr, as the state court did not decide the equal

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 30, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 77-1119, Orr v. Orr

With Bill Brennan now voting to reverse the judgment in this case, my notes indicate that there are now four votes to reverse and four to dismiss, with me passing. It is thus now clearly incumbent upon me to take a position.

Not without continuing misgivings, I tentatively agree with the views expressed yesterday by Byron, Harry and John. As I understand their position, the Alabama Appellate Court upon remand would not only be free, but would almost be invited, again to decide this case in favor of the respondent -- but this time on a nonconstitutional basis.

P.S.

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 18, 1979

Re: No. 77-1119 - Orr v. Orr

Dear Bill:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.
1.

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

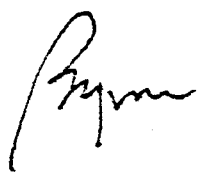
January 17, 1979

Re: 77-1119 - Orr v. Orr

Dear Bill,

I agree.

Sincerely yours,



Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 17, 1979

Re: No. 77-1119 - Orr v. Orr

Dear Bill:

Please join me.

Sincerely,

T.M.

T.M.

Mr. Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

From: Mr. Justice Blackmun

Circulated: 22 JAN 1978

Recirculated: _____

No. 77-1119 - Orr v. Orr

MR. JUSTICE BLACKMUN, concurring.

On the assumption that the Court's language concerning discrimination "in the sphere" of the relevant preference statute, ante, at 11, does not imply that society-wide discrimination is always irrelevant, and on the further assumption that that language in no way cuts back on the Court's decision in Kahn v. Shevin, 416 U.S. 351 (1974), I join the opinion and judgment of the Court.

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

From: Mr. Justice Blackmu

Circulated: _____

Recirculated: 23 JAN 19

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1119

William Herbert Orr, Appellant, *v.* Lillian M. Orr.	On Appeal from the Court of Civil Appeals of Alabama.

[February —, 1979]

MR. JUSTICE BLACKMUN, concurring.

On the assumption that the Court's language concerning discrimination "in the sphere" of the relevant preference statute, *ante*, at 11, does not imply that society-wide discrimination is always irrelevant, and on the further assumption that that language in no way cuts back on the Court's decision in *Kahn* v. *Shevin*, 416 U. S. 351 (1974), I join the opinion and judgment of the Court.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 16, 1979

No. 77-1119 Orr v. Orr

Dear Bill:

I will await Bill Rehnquist's dissent before deciding what to do in this case.

Sincerely,

L. Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

From: Mr. Justice Powell

Circulated: 22 FEB 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–1119

William Herbert Orr, Appellant, v. Lillian M. Orr.	On Appeal from the Court of Civil Appeals of Alabama.

[February —, 1979]

MR. JUSTICE POWELL, dissenting.

I agree with my Brother REHNQUIST that the Court, in its desire to reach the equal protection issue in this case, has dealt too casually with the difficult Art. III problems which confront us. Rather than assume the answer to questions of state law on which the resolution of the Art. III issue should depend, and which well may moot the equal protection question in this case, I would abstain from reaching either of the constitutional questions at the present time.

This Court repeatedly has observed that:

> "[W]hen a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question." *Harris County Comm'rs Court* v. *Moore*, 420 U. S. 77, 83 (1975).

See *Elkins* v. *Moreno*, 435 U. S. 647 (1978); *Boehning* v. *Indiana State Employees Assn., Inc.*, 423 U. S. 6 (1975); *Askew* v. *Hargrave*, 401 U. S. 476 (1971); *Reetz* v. *Bozanich*, 397 U. S. 82 (1970); *Aldrich* v. *Aldrich*, 378 U. S. 540 (1964); *Dresner* v. *City of Tallahassee*, 378 U. S. 539 (1964); *Clay* v. *Sun Ins. Office, Ltd.*, 363 U. S. 207 (1960); *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639 (1959); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101 (1944);

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

From: Mr. Justice Powell

Circulated: _____

Recirculated: 28 FEB 1979

1-5

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1119

William Herbert Orr, Appellant, v. Lillian M. Orr. | On Appeal from the Court of Civil Appeals of Alabama.

[February —, 1979]

MR. JUSTICE POWELL, dissenting.

I agree with MR. JUSTICE REHNQUIST that the Court, in its desire to reach the equal protection issue in this case, has dealt too casually with the difficult Art. III problems which confront us. Rather than assume the answer to questions of state law on which the resolution of the Art. III issue should depend, and which well may moot the equal protection question in this case, I would abstain from reaching either of the constitutional questions at the present time.

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See *Elkins* v. *Moreno*, 435 U. S. 647 (1978); *Boehning* v. *Indiana State Employees Assn., Inc.*, 423 U. S. 6 (1975); *Askew* v. *Hargrave*, 401 U. S. 476 (1971); *Reetz* v. *Bozanich*, 397 U. S. 82 (1970); *Aldrich* v. *Aldrich*, 378 U. S. 540 (1964); *Dresner* v. *City of Tallahassee*, 378 U. S. 539 (1964); *Clay* v. *Sun Ins. Office, Ltd.*, 363 U. S. 207 (1960); *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639 (1959); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101 (1944);

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 30, 1978

Re: No. 77-1119 Orr v. Orr

Dear Chief:

I may not have made my views on the merits of the constitutional issue in this case clear at Conference, but I am quite certain that I am not in agreement with a majority of the Court on that issue. I remain firmly convinced that the Court should not reach the constitutional issue, however, and if nobody else volunteers or is assigned the task I will write a dissent to that effect.

Sincerely,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 16, 1979

Re: No. 77-1119 Orr v. Orr

Dear Bill:

In due course I anticipate circulating a dissent addressed to the "case and controversy" and similar issues addressed in Part I of your opinion in this case.

Sincerely,

Mr. Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

From: Mr. Justice Rehnquist

Circulated: 8 FEB 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1119

William Herbert Orr, Appellant, v. Lillian M. Orr. | On Appeal from the Supreme Court of Alabama.

[February —, 1979]

MR. JUSTICE REHNQUIST, dissenting.

In Alabama, only wives may be awarded alimony upon divorce. In Part I of its opinion, the Court holds that Alabama's alimony statutes may be challenged in this Court by a divorced male who has never sought alimony, who is demonstrably not entitled to alimony even if he had, and who contractually bound himself to pay alimony to his former wife and did so without objection for over two years. I think the Court's eagerness to invalidate Alabama's statutes has led it to deal too casually with the "case and controversy" requirement of Art. III of the Constitution.

I

The Architects of our constitutional form of government, to assure that courts exercising the "judicial power of the United States" would not trench upon the authority committed to the other branches of government, consciously limited the Judicial Branch's "right of expounding the Constitution" to "cases of a Judiciary nature"[1]—that is, to actual

[1] 2 M. Farrand, The Records of the Federal Convention of 1787, at 430 (rev. ed. 1937). Indeed, on four different occasions the Constitutional Convention rejected a proposal, contained in the "Virginia Plan," to associate Justices of the Supreme Court in a counsel of revision designed to render advise on pending legislation. 1 *id.*, at 21. Suggestions that the Chief Justice be member of the Privy Council to assist the President and that the President or either House of Congress be able to request advisory

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice [illegible]
Mr. Justice [illegible]
Mr. Justice [illegible]
Mr. [illegible]

From: Mr. Justice [illegible]

Circulated: 9 FEB

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1119

William Herbert Orr, Appellant, v. Lillian M. Orr. | On Appeal from the Supreme Court of Alabama.

[February —, 1979]

MR. JUSTICE REHNQUIST, dissenting.

In Alabama, only wives may be awarded alimony upon divorce. In Part I of its opinion, the Court holds that Alabama's alimony statutes may be challenged in this Court by a divorced male who has never sought alimony, who is demonstrably not entitled to alimony even if he had, and who contractually bound himself to pay alimony to his former wife and did so without objection for over two years. I think the Court's eagerness to invalidate Alabama's statutes has led it to deal too casually with the "case and controversy" requirement of Art. III of the Constitution.

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The Architects of our constitutional form of government, to assure that courts exercising the "judicial power of the United States" would not trench upon the authority committed to the other branches of government, consciously limited the Judicial Branch's "right of expounding the Constitution" to "cases of a Judiciary nature"[1]—that is, to actual

[1] 2 M. Farrand, The Records of the Federal Convention of 1787, at 430 (rev. ed. 1937). Indeed, on four different occasions the Constitutional Convention rejected a proposal, contained in the "Virginia Plan," to associate Justices of the Supreme Court in a counsel of revision designed to render advise on pending legislation. 1 *id.*, at 21. Suggestions that the Chief Justice be member of the Privy Council to assist the President and that the President or either House of Congress be able to request advisory

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

From: Mr. Justice Rehnqui

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SUPREME COURT OF THE UNITED STATES

No. 77-1119

William Herbert Orr, Appellant, v. Lillian M. Orr. | On Appeal from the Supreme Court of Alabama.

[February —, 1979]

MR. JUSTICE REHNQUIST, dissenting.

In Alabama only wives may be awarded alimony upon divorce. In Part I of its opinion, the Court holds that Alabama's alimony statutes may be challenged in this Court by a divorced male who has never sought alimony, who is demonstrably not entitled to alimony even if he had, and who contractually bound himself to pay alimony to his former wife and did so without objection for over two years. I think the Court's eagerness to invalidate Alabama's statutes has led it to deal too casually with the "case and controversy" requirement of Art. III of the Constitution.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 17, 1979

RE: No. 77-1119 - Orr v. Orr

Dear Bill:

Please join me.

Respectfully,

John

Mr. Justice Brennan

Copies to the Conference

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Mr. 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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77-1119 - Orr v. Orr

MR. JUSTICE STEVENS, concurring.

Whether Mr. Orr has a continuing contractual obligation to pay alimony to Mrs. Orr is a question of Alabama law that the Alabama courts have not yet decided. In Part IB of his opinion, Mr. Justice Rehnquist seems to be making one of two alternative suggestions:

(1) that we should decide the state law issue; or

(2) that we should direct the Supreme Court of Alabama to decide that issue before deciding the federal constitutional issue.

In my judgment the Court has correctly rejected both of these alternatives. To accept either--or a rather confused blend of the two--would violate principles of federalism that transcend the significance of this case.*/ I therefore join the Court's opinion.

*/Even if I could agree with Mr. Justice Rehnquist's view that Mr. Orr's probability of success on the state law issue is so remote that we should deny him standing to argue the federal question decided by the Alabama Supreme Court, I still would not understand how he reached the conclusion that the litigation between Mr. and Mrs. Orr is not a "case or controversy" within the meaning of Article III.

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