

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 11: The Contemporary Era – Equality/Gender/State ERAs

New Mexico Right to Choose/NARAL v. Johnson, 126 N.M. 788 (1998)

William Johnson, the Secretary of the New Mexico Human Services Department, in 1995 determined that New Mexico would fund abortions only if the procedure was necessary to save the life of the pregnant woman, if the abortion would end an ectopic pregnancy, or if the pregnancy resulted from rape or incest. Before that rule took effect, New Mexico Right to Choose and the National Abortion and Reproductive Rights Action League filed a lawsuit. They claimed the new rule violated the equal rights amendment of the New Mexico Constitution. A state district court agreed and issued an injunction, prohibiting New Mexico officials from denying funding to poor women seeking abortions. New Mexico officials appealed to the Supreme Court of the New Mexico. All parties agreed that, under Harris v. McRae (1980), poor women had no federal constitutional right to funding for abortions. The issue was whether the New Mexico Constitution protected more rights than the federal Constitution.¹

The supreme court of New Mexico unanimously decided that poor women in New Mexico had a state constitutional right to funding for abortions. Justice Minzner's opinion ruled that the state prohibition on funding discriminated against women and that the equal rights amendment of the state constitution required that gender discriminations be strictly scrutinized. How did Justice Minzner distinguish federal constitutional protections from state constitutional protections? Is his analysis correct? Suppose New Mexico did not have a state ERA. Would the justices nevertheless have reached the same result?

JUSTICE MINZNER delivered the opinion of the Court.

. . . New Mexico's Equal Rights Amendment requires a searching judicial inquiry to determine whether the Department's rule prohibiting state funding for certain medically necessary abortions denies Medicaid-eligible women equality of rights under law. We conclude from this inquiry that the Department's rule violates New Mexico's Equal Rights Amendment because it results in a program that does not apply the same standard of medical necessity to both men and women, and there is no compelling justification for treating men and women differently with respect to their medical needs in this instance. The district court did not exceed its authority in providing a remedy for this constitutional violation by enjoining the Department from enforcing its rule and requiring the Department to apply the standard of medical necessity in a nondiscriminatory manner in this case.

. . .
Except in cases of rape or incest, or when necessary to save the life of the mother, abortions are among the medical services for which federal funding is unavailable under a provision of federal law known as "the Hyde Amendment." However, "[a] participating State is free, if it so chooses, to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable."

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. . . Plaintiffs concede that the United States Constitution does not require the State to provide funding to Medicaid-eligible women for medically necessary abortions that fall outside the restrictions of the Hyde Amendment. See [*Harris v. McRae* (1980)]. Plaintiffs' arguments in the district court and on

¹ Remember that state constitutions may protect rights unprotected by the federal constitution, but they may not deny rights protected by the federal constitution.

appeal are directed to the issue of whether the New Mexico Constitution affords greater protection than federal law. . . .

At least twelve other state courts have published opinions addressing the question of whether state law requires funding for abortions for indigent women in situations where federal reimbursement is unavailable. In six of these states, the courts have determined that such funding is required under their state constitutions [California, Connecticut, Massachusetts, Minnesota, New Jersey, West Virginia] One court [Oregon] found that a state agency exceeded its statutory authority in restricting state funding for abortions. Another court [Idaho] expressed disapproval of an agency rule restricting state funding for abortions in an opinion holding that a trial court abused its discretion in denying an award of attorney fees to plaintiffs who prevailed in their challenge to such restrictions. In four of the twelve states that have published opinions on the issue, however, the courts have not found provisions in their state constitutions that require state funding for abortions in situations where federal reimbursement is unavailable [Michigan, New York, North Carolina, Pennsylvania].

Our analysis focuses on the protection afforded by the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution in the situation where the Department has elected to provide medical assistance to needy persons. We first examine whether this provision of our state constitution establishes a basis for affording Medicaid-eligible women greater protection against gender discrimination than they receive under federal law. We conclude that it does. Next, we address the Department's claim that Rule 766 does not warrant heightened judicial scrutiny because it is based on a physical characteristic unique to one sex, namely the ability to become pregnant and bear children. We conclude that this unique physical characteristic does not exempt Rule 766 from a searching judicial inquiry under New Mexico's Equal Rights Amendment. We then examine whether Rule 766 operates to the disadvantage of women in the context of the State's Medicaid program, and we determine that Rule 766 is presumptively unconstitutional because it results in a program that does not apply the same standard of medical necessity to both men and women. Finally, we examine whether there is a compelling justification for treating men and women differently with respect to their eligibility for medical assistance in this instance. Because such a compelling justification is lacking in this case, we conclude that Rule 766 violates the New Mexico Constitution.

Article II, Section 18 of the New Mexico Constitution guarantees that "[e]quality of rights under law shall not be denied on account of the sex of any person." This guarantee became part of our state constitution in 1973, after the people of New Mexico passed the Equal Rights Amendment by an overwhelming margin. There is no counterpart to New Mexico's Equal Rights Amendment in the United States Constitution. Indeed, the absence of such an amendment to the United States Constitution appears to have been a significant factor in the development of federal law applying the Equal Protection Clause to gender discrimination claims. . . .

Based on our review of the text and history of our state constitution, we conclude that New Mexico's Equal Rights Amendment is a specific prohibition that provides a legal remedy for the invidious consequences of the gender-based discrimination that prevailed under the common law and civil law traditions that preceded it. As such, the Equal Rights Amendment requires a searching judicial inquiry concerning state laws that employ gender-based classifications. This inquiry must begin from the premise that such classifications are presumptively unconstitutional, and it is the State's burden to rebut this presumption.

Although we recognize that federal courts currently apply an intermediate level of scrutiny to gender-based classifications, our rationale for conducting a searching judicial inquiry regarding such classifications under the New Mexico Constitution may accord with the criteria for invoking more stringent judicial scrutiny under federal law. . . .

[T]o determine whether a classification based on a physical characteristic unique to one sex results in the denial of "equality of rights under law" within the meaning of New Mexico's Equal Rights

Amendment, we must ascertain whether the classification “operates to the disadvantage of persons so classified.”

In making these determinations, we cannot ignore the fact that “[s]ince time immemorial, women’s biology and ability to bear children have been used as a basis for discrimination against them.” Further, history teaches that lawmakers often have attempted to justify gender-based discrimination on the grounds that it is “benign” or “protective” of women. . . .

We also note that some physical characteristics, such as the ability to become pregnant, may have profound health consequences. For example, there is undisputed evidence in the record that carrying a pregnancy to term may aggravate pre-existing conditions such as heart disease, epilepsy, diabetes, hypertension, anemia, cancer, and various psychiatric disorders. . . .

In light of these factors, we conclude that classifications based on the unique ability of women to become pregnant and bear children are not exempt from a searching judicial inquiry under the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution. New Mexico’s state constitution requires the State to provide a compelling justification for using such classifications to the disadvantage of the persons they classify.

Looking “beyond the classification to the purpose of the law,” it is apparent that men and women who meet the Department’s general criteria regarding financial and medical need are similarly situated with respect to their eligibility for medical assistance in this case. . . .

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Except in the cases of rape or incest, or when necessary to save the life of the mother, Rule 766 denies state funding for abortions even when they are medically necessary. Under the Department’s regulations, there is no comparable restriction on medically necessary services relating to physical characteristics or conditions that are unique to men. Indeed, we can find no provision in the Department’s regulations that disfavors any comparable, medically necessary procedure unique to the male anatomy. . . .

Thus, Rule 766 undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women. . . . We determine that Rule 766 employs a gender-based classification that operates to the disadvantage of women and is therefore presumptively unconstitutional. In order to survive the heightened scrutiny that we apply to such classifications, the State must meet its burden of showing that Rule 766 is supported by a compelling justification.

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The Department fails to offer a sufficiently compelling justification for such discrimination in this case. To be sure, Rule 766 may prevent the State from incurring the cost of funding medically necessary abortions not covered by the Hyde Amendment. But the Department’s assertion “that it saves money when it declines to pay the cost of a [Medicaid-eligible woman’s medically necessary] abortion is simply contrary to undisputed facts.”

...

. . . It is undisputed that the State’s expenses associated with bringing a pregnancy to term generally are much greater than its expenses associated with providing a medically necessary abortion. For these reasons, we cannot conclude that Rule 766 serves as the least restrictive means of reducing the State’s costs of providing medical assistance.

We next consider whether, apart from its financial impact, Rule 766 serves as the least restrictive means of advancing the State’s interest in the potential life of the unborn. Under federal law, the State’s interest in the potential life of the unborn is never compelling enough to outweigh the interest in the life and health of the mother. Assuming, however, that at some late stage of a woman’s pregnancy the State’s interest becomes sufficiently compelling to support the denial of public funding, Rule 766 is not the least restrictive means of advancing this interest because it prohibits state funding for most medically necessary abortions at all stages of a woman’s pregnancy and without regard to her health except in life-threatening situations. Further, according to the parties’ stipulated facts, Rule 766 also may deny coverage for an abortion even when it is determined that the fetus will not be viable because it suffers from a fatal physical or mental impairment.

For these reasons, we conclude that Rule 766 is not the least restrictive means to advance the State's interest in the potential life of the unborn at a point when that interest may become compelling. Further, because the State fails to provide a compelling justification for treating men and women differently with respect to their medical needs in this instance, we conclude that Rule 766 violates the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution.

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