

AMERICAN CONSTITUTIONALISM  
VOLUME II: RIGHTS AND LIBERTIES  
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Supplementary Material

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

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**Bell v. Low Income Women of Texas, 95 S.W.3d 253 (TX 2002)**

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*Charles Bell, the Texas commissioner of health, administered the Texas Medical Assistance Program (TMAP). That program provided medically necessary services for poor women only when the state received matching funds from the federal government. When the federal government in 1976 stopped providing matching funds to pay for most abortions, Texas stopped funding abortion services unless the pregnant woman might die or the pregnancy resulted from rape or incest. Low Income Women of Texas, an advocacy group, filed a lawsuit claiming that policy violated the equal rights amendment of the Texas Constitution. A lower state court rejected the lawsuit, but that decision was reversed by the Austin (Texas) Court of Appeals. Texas appealed to the Supreme Court of Texas.*

*Texas Governor Rick Perry, several pro-life organizations, and an association of pro-life politicians filed amicus briefs urging the state court to sustain the Texas policy of not funding abortions. Governor Perry's brief asserted,*

*This proceeding seeks to judicially end-run Governor Perry's powers and duties – and thereby subvert the People's will as expressed through Texas' democratic processes – by compelling use of Texas' tax dollars to subsidize abortions, which Texas heretofore has refused to do. This effort would also subvert Texas' longstanding policy choice to limit its Medicaid spending solely to procedures for which federal "matching" funds are available. [T]he Texas Constitution places all of these choices with the Governor and Legislature, rather than with the Judiciary.*

*The Women's Health Care Providers filed an amicus brief urging the state court to require elected officials to fund abortions under the state constitution. That brief stated,*

*Restrictions on Medicaid coverage render abortion services unobtainable for many Texas women. Studies consistently show that a substantial number of low-income women lose access to abortion altogether when Medicaid does not fund the procedure. However diligent and resourceful these women are in seeking out the money to pay for a legal abortion procedure, their extreme poverty prevents between one-quarter and one-third of them from gathering the sum they need, even when they have tapped every available resource and literally gone without food and shelter. Those who manage to acquire the hundreds or thousands of dollars for the procedure do so only after dangerous delays and at great cost to their families, their health, and their safety.*

*The supreme court of Texas unanimously ruled that the Texas Constitution did not require state officials to fund abortions for poor women. Judge O'Neill's unanimous opinion held that restrictions on funding for abortion did not discriminate against women. How did he reach that conclusion? Was that conclusion correct? How do you explain the differences between the New Mexico court in New Mexico Right to Choose and the Texas court in Low Income Women of Texas?*

JUSTICE O'NEILL delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE HECHT, JUSTICE ENOCH, JUSTICE OWEN, JUSTICE JEFFERSON, JUSTICE SCHNEIDER and JUSTICE SMITH joined.

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Texas passed the Equal Rights Amendment to the Texas Constitution in 1972. The Equal Rights Amendment was “designed expressly to provide protection which supplements the federal guarantees of equal treatment.” It provides that “[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.” Plaintiffs contend that the abortion funding restrictions discriminate on the basis of sex because the State funds virtually all medically necessary services for men, while refusing to fund abortions that are medically necessary. They further maintain that the restrictions serve no compelling State interest and thus are constitutionally infirm.

In *In re McLean* (TX 1987), a plurality of this Court described a three-step process for evaluating alleged Equal Rights Amendment violations. . . . In doing so, we first decide whether equality under the law has been denied. If it has, the Equal Rights Amendment’s language compels us to determine “whether equality was denied because of a person’s membership in a protected class of sex, race, color, creed, or national origin.” If we conclude that equality was denied because of a person’s membership in a protected class, the challenged action cannot stand unless it is narrowly tailored to serve a compelling governmental interest.

In the present case, it is undisputed that the State provides virtually all medically necessary services to indigent men, yet it denies funding for abortions that are determined to be medically necessary. Because the State treats indigent women seeking abortions differently from all others, the plaintiffs have established the first prong of the *McLean* analysis, that is, that equality under the law has been denied. The question we must decide is whether equality has been denied “because of” sex. The State contends that this disparity is not sex based because the funding restriction is facially neutral and merely prohibits funding any services that are not federally reimbursable. Plaintiffs, on the other hand, look solely to the Hyde Amendment’s terms and argue that, because only women can become pregnant, funding is necessarily denied “because of” sex. We believe the question is not as straightforward as either party suggests. In *McLean*, we considered a statutory scheme that treated unmarried fathers differently from unmarried mothers. There, a biological father challenged, under the Equal Rights Amendment, a statute that required an unmarried father who wished to exercise his parental rights over a child to either obtain the mother’s consent, or to establish that legitimation was in the child’s best interest. Unmarried mothers, on the other hand, could exercise their parental rights automatically and were never subjected to such a requirement. Because only men were required to obtain consent or satisfy the best-interest test to establish parental rights, the statute expressly created a gender-based distinction, that is, it treated fathers differently because they are male.

In the present case, it is true that the funding restrictions affect only women, but that is because only women can become pregnant. If the State were to deny funding of all medically necessary pregnancy-related services, the classification might be comparable to the overt gender-based distinction in *McLean*. But while the TMAP, through the Hyde Amendment, denies funding for medically necessary abortions unless certain conditions are met, it does fund all other medically necessary pregnancy-related services. Thus, to say that the State’s funding restriction discriminates on the basis of pregnancy, which in turn is gender based, misses the mark. The classification here is not so much directed at women as a class as it is abortion as a medical treatment, which, because it involves a potential life, has no parallel as a treatment method. We simply cannot say that the classification is, by its terms, “because of sex” as it was in *McLean*. But that does not end our inquiry. If the TMAP funding scheme is merely a pretext designed to prefer males over females in the provision of health care, then discrimination “because of sex” is established and the funding restrictions must withstand strict scrutiny to pass constitutional muster.

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Under federal law, unless an action challenged on equal protection grounds explicitly creates a suspect classification, a litigant must establish that the action stems from a discriminatory purpose in order to subject the action to strict scrutiny. When a federal equal protection challenge rests upon disparate impact, rather than explicit classification, the federal courts apply the analytical framework the United States Supreme Court first described in *Village of Arlington Heights v. Metropolitan Housing Development Corporation* (1977). We recognize that the funding restrictions in this case impact only

women, and for that reason, this is not strictly a disparate impact case. But we find the analysis provided in those cases helpful in determining whether TMAP discriminates because of sex.

In *Arlington Heights*, (t)he Court stated that . . . “Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” According to *Arlington Heights*, determining whether the requisite discriminatory purpose exists “demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” Disproportionate impact is one piece of evidence. Other factors the Court identified include the historical background providing the context for the challenged action, the specific sequence of events leading up to it, departures from the normal procedural and substantive course, and legislative or administrative history. Our consideration of these factors in the present case leads us to conclude that the TMAP funding restrictions are not based on sex.

[T]he State funds virtually all medically necessary procedures for men. Likewise, except for medically necessary abortions, the State funds all medically necessary procedures for women, including those that are pregnancy-related. Obviously, the denial of funding for medically necessary abortions affects only women, at least directly. But, as the Pennsylvania Supreme Court noted in considering a challenge to similar abortion funding restrictions,

[t]he mere fact that only women are affected by [the restriction] does not necessarily mean that women are being discriminated against on the basis of sex. In this world there are certain immutable facts of life which no amount of legislation may change. As a consequence there are certain laws which necessarily will only affect one sex. *Fischer v. Dep't of Pub. Welfare* (1985).

[T]he history of TMAP reveals that the Texas Legislature intended to create a program that conformed to the federal program's contours. . . . Consistent with that purpose, the Act further provided that “no medical services may be included for which Federal matching funds are not available. Furthermore, our constitution has long reflected a strong interest in maximizing federal matching funds for medical assistance to the needy.

Section 5 of the Act . . . expressly prohibits the Department from authorizing any services “unless federal matching funds are available.” This provision was plainly not directed at abortion funding, as abortion was illegal in Texas at the time it was enacted. The record contains no evidence that the State has ever deviated from adhering to the matching-funds requirement in administering its Medicaid program. Furthermore, it is undisputed that Texas has consistently funded abortions through TMAP to the extent that federal matching funds have been available. From the time that the Supreme Court struck down Texas's abortion law in *Roe v. Wade* (1973), until Congress passed the Hyde Amendment, TMAP funded all medically necessary abortions. The historical background of the State's creation and administration of TMAP supports the conclusion that the funding restrictions do not discriminate “because of” sex.

[T]he Texas Equal Rights Amendment, under which plaintiffs bring their challenge, has no federal constitutional counterpart. Our Equal Rights Amendment was passed many years after the equal protection and due process clauses of both the United States and Texas Constitutions, and it expressly prohibits gender discrimination. Rules of constitutional interpretation dictate that all clauses must be given effect. Unless the Equal Rights Amendment grants additional protection against gender-based classifications than had been found in the federal and state constitutions at the time it was passed, the amendment was futile. As we have noted, the amendment's legislative history indicates that it was intended to enlarge upon the federal equal protection guarantees. It does so by elevating sex to a suspect class and subjecting sex-based classifications to heightened strict-scrutiny review.

Plaintiffs claim that Texas's abortion funding restriction should be considered suspect because “states have historically used women's childbearing capacity as a basis for denying women equality.” We don't question that women's ability to become pregnant has historically been “at the root of the discriminatory practices which keep women in low-paying and dead-end jobs.” Clearly, the Equal Rights Amendment is directed at just such purposeful gender-based discrimination. But we do not believe the discouragement of abortion through funding restrictions can, by itself, be considered purposeful

discrimination against women as a class. . . . The biological truism that abortions can only be performed on women does not necessarily mean that governmental action restricting abortion funding discriminates on the basis of gender. As we have said, that might be true if the State refused to fund medically necessary pregnancy-related services. But, other than abortion, the TMAP does fund all medically necessary pregnancy-related care.

The State contends that, even if we ignore section 32.024(e)'s facial neutrality and look only at the Hyde Amendment's abortion funding restrictions, those restrictions implement a legitimate governmental purpose to favor childbirth over abortion. We agree. While the federal constitution prevents the State from placing undue burdens upon a woman's freedom to terminate a pregnancy, the State retains the authority to "make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." In the absence of any other evidence of discriminatory intent, we believe that the Hyde Amendment was intended to implement such a value judgment.

We acknowledge that the adverse consequences of TMAP's abortion funding restrictions upon women could give rise to an inference of discriminatory purpose. But "an inference is a working tool, not a synonym for proof." "When . . . the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when . . . the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof." Whatever one might think of the legislative policy choice that the TMAP funding scheme embodies, plaintiffs have simply failed to demonstrate that it reflects a purpose to discriminate because of sex.

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