New York State Equal Rights Amendment

On January 24, 2023, the New York State Assembly passed the Equal Rights Amendment to the state constitution. Proposed amendments must be approved by the state senate and the state assembly in two successive state legislative sessions before they can be presented to the voters. The assembly's January vote was the final legislative step in the amendment process, as required by New York State law. Having reached that milestone, the amendment will be on the ballot in the November 2024 general election, and voters will have the final say as to whether to add the ERA to the state constitution.

The NY ERA prohibits discrimination based on a person's ethnicity, national origin, age, disability or sex, including gender identity, sexual orientation, gender expression, pregnancy and pregnancy outcomes. The League of Women Voters New York State and our state local leagues support this proposed constitutional amendment. Its passage will protect and ensure equal rights for all New Yorkers – all 20 million of us.

It would not be the first time New York has added an equal protection clause. In 1938, the state constitution was amended to guarantee protection from discrimination based on a person's race, religion or creed. The problem with the amendment, which the NY ERA will correct, is that it is too narrow, applying only to discriminatory behavior as it relates to race, religion or creed. The ERA's expansive language will guarantee that all New Yorkers have the right to be free from discrimination.

Despite this, some will argue that the NY ERA is unnecessary. After all, New York's 2019 Reproductive Health Act (RHA) added new protections for women to make their own healthcare decisions, including expanding and clarifying abortion rights, and ensuring that any federal decisions to limit abortion rights would not impact New Yorkers' rights.

Yet, the RHA is narrow, affecting only a particular set of people. Passage of the ERA will bring the RHA's provisions into the state constitution, as part of the amendment's language securing equal rights for all New Yorkers.

More than 50 years ago, Congress passed a federal ERA, which sought to enshrine similar rights in the US Constitution. The proposed 27th Amendment stated simply: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." The amendment was sent to the states for ratification. For the amendment to be added to the US Constitution, three-quarters of the states must vote in the affirmative.

Some 10 years later, the debate continued. In 1983, Dr. Mary Frances Berry, historian, activist, law professor and then-commissioner on the US Commission for Civil Rights, appeared before the House Committee on the Judiciary's hearings on the Equal Rights Amendment. In her testimony, she argued that passage of a federal amendment was necessary because laws such as Title IX, which prohibits sex discrimination in any education program or activity that receives federal funding or assistance, were "not being enforced vigorously," citing "continuous efforts to narrow the scope of what the language means . . . until it means practically nothing."

The issue, she said, comes down to this: “we lack a firm constitutional basis for equal rights on the basis of gender.”

In answer to the argument that the 14th Amendment already ensures equal rights, Dr. Berry pointed out that US Supreme Court did not agree. The Justices were not applying 14th Amendment’s “standards to sex discrimination that they do to race discrimination.” Justice Lewis Powell had noted that ‘sex’ was not considered a suspect class under the 14th Amendment; therefore, it was not entitled to that amendment’s protections. “Ratification [of the ERA] would,” in Justice Powell’s words, “‘resolve the substance of this precise question.’”

In other words, without the ERA, ‘sex’ cannot be considered a suspect class. “The result,” said Dr. Berry, “is a ‘catch-22.’”

Dr. Berry further observed that “in the absence of a formal constitutional foundation for gender equality, a hostile legislature . . . could wipe off all the antidiscrimination laws that are now on the books.” In the past year we have seen this in real time.

The 2022 US Supreme Court decision in Dobbs v. Jackson Women’s Health Organization, which sent the question of abortion back to the states, made clear that lack of “a firm constitutional basis for equal rights” made abortion rights vulnerable. Meaning, an inferred right is not a right – it is a potential loophole.

The federal ERA was not ratified, falling three votes short of the 38 states required. The time for ratification has long expired. There is a movement in Congress to declare the amendment ratified, because in recent years several states reversed their ‘no’ votes to ‘yes.’ However, five states have in that time decided to rescind their ‘yes’ votes on the ERA.

While a federal amendment is preferable, the tool we have available to ensure equal protections for all New Yorkers is amending our state constitution, so our rights will not be subject to the whims of politics.

In February, I joined members of the Albany County League on a visit to Assembly member Phil Steck, whose district includes parts of Albany and Schenectady. When it came my turn to speak, I thanked him for his vote in favor of NY ERA.

Assembly member Steck smiled and said, “It was a no-brainer.” I concur, yet also understand that is not so for everyone.

The NY ERA passed with two-thirds of state legislators voting ‘yes.’ A very comfortable margin. Yet, we do well to note the reverse: one-third of state legislators voted against the amendment. The ‘no’ votes were disproportionately cast by men, but a half-dozen women voted ‘no’ as well.

For many of us, it is a ‘no-brainer’; for others, it is not; and some may be either undecided about or unaware of NY ERA. Passage of the amendment may not be easy and likely will take more effort than we have anticipated. Our commitment and our work are needed. The rights of 20 million New Yorkers are worth it.

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