



Updating New York's Constitution and Protecting Women's Equality in the 21st Century

New York has long shaped the contours of American jurisprudence and is repeatedly touted as a global leader in progressive policies and initiatives.¹

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Seneca Falls, New York served as the birthplace of the women's movement in 1848, where Elizabeth Cady Stanton proclaimed, "All men and woman are created equal."² International Women's Day traces its roots to a 15,000-woman march through New York City in 1908,³ seemingly solidifying New York's reign as a champion of women's rights. And, modern-day politicians gush that New York is the country's "progressive beacon."⁴ Yet, New York State has yet to pass and adopt an Equal Rights Amendment ("ERA") that prohibits discrimination on the basis of sex, trailing woefully behind the majority of states that have already done so.⁵ In 2022, women are still unequal under New York's Constitution. As Columbia Law Professor Katherine Franke said during a recent webinar on this issue hosted by the Legislative Affairs Committee of the Women's Law Section of the New York State Bar Association (NYSBA),⁶ "New York has basically a 19th century Constitution, particularly when it comes to equality."⁷

New York's failure has not been for lack of trying. In 1938, New York passed an equal rights amendment that prohibited discrimination on the basis of race, color, creed, or religion. While including women in equal rights amendments was a national discussion by this point, most ERAs addressing women's equal rights were not enacted until Congress passed the federal ERA in 1972.⁸ Unsurprisingly, New York sought to be chief among them. The New York Assembly and Senate passed an amendment closely tracking the Federal Equal Rights Amendment: "Equality of rights under the law shall not be denied or abridged on account of sex." As required by New York's Constitution, the amendment was put to a popular vote in 1975, but was defeated by nearly 400,000 votes. Proponents and opponents of the amendment agreed it was largely rejected by women voters, who — based on opposition propaganda that warned the amendment would lead to unisex toilets, gay marriage, and women paying alimony — feared the amendment's

impact on their lives.⁹ The effects of the defeat reverberated far beyond New York State, striking a “psychological blow” to the women’s movement and severely stalling the momentum necessary to ratify the Federal ERA.¹⁰ State activists at the time decided that there would be “little point” in trying to push the state Equal Rights Amendment through the Legislature again, choosing instead to focus their efforts on getting the Federal ERA ratified. This too, of course, proved futile.

After the 1975 amendment’s defeat, New York’s Legislature put any plans for a state ERA into hibernation while the fight for women’s equality persisted at the federal level. It was not until 2018, when Senator Liz Krueger and Assemblywoman Rebecca Seawright disrupted a four-decade slumber by sponsoring concurrent bills to amend New York’s Constitution, that New York re-entered the battle, this time not only to prohibit sex discrimination, but discrimination based on several additional identities and characteristics.¹¹ Subsequent iterative drafts have been presented to the Legislature each year since, fine-tuning specific language, but remaining ideologically committed to increasing inclusivity coverage, dragging New York’s Constitution into the 21st Century. ERA advocates hope that 2022 is the year that the New York State Legislature begins to bring this vision to fruition. In fact, the timing is critical.

According to New York’s Constitution, the Legislature must pass a constitutional amendment in two consecutive sessions before the amendment can be put to a popular vote. This year is the second year of the current two-year legislative session. Passing an equality amendment this year would allow the amendment to receive second passage in the 2023-2024 legislative session, and then be put to a popular vote. Stated differently, if the New York Legislature does not pass an equality amendment this year — in 2022 — then women will continue to be unprotected under New York State’s Constitution for at least another four years.

This means that, rather than being able to point to an explicit statement in New York State’s governing document to demand equal protection under the law, women and other marginalized groups have to rely on a patchwork of statutes and local ordinances. Lourdes Rosado, President and General Counsel of the LatinoJustice PRLDEF, has described the limited protections these statutes offer as “a safety net that has some major holes in it — depending on where you land, you may or may not be protected from discrimination”. Namely, these statutes remain subject to judicial interpretation, which, at least at the federal level, have been increasingly hostile to civil rights.

Two equality amendment proposals are currently pending before the New York State Legislature.¹² Both propose prohibiting discrimination on the basis of race, color, ethnicity, national origin, disability, and sex, including

pregnancy, sexual orientation, gender identity, or gender expression. The Senate bill would also prohibit discrimination based up on pregnancy outcomes. Professor Franke notes, “Thinking sex equality independent of those other vectors of identity doesn’t make any sense and is absolutely unworkable... We no longer live in a time when we can’t think and work intersectionally.” The current proposals offer an intrinsically New York approach by amending the Constitution to expand equal protections beyond sex and incorporate a progressively broad approach to equality.

NYSBA’s Women in Law Section, upon recommendation of the Legislative Affairs Committee, endorsed the Senate bill, which includes language that would not only prohibit intentional discrimination, but also discrimination that disparately impacts the amendment’s protected categories. This is important because, as a result of the U.S. Supreme Court’s 1976 holding in *Washington v. Davis*, even New York’s current Equal Rights Amendment that prohibits discrimination based on race, color, creed and religion is limited to intentional discrimination.¹³ Ms. Rosado notes, “We are perpetuating the discrimination by continuing to ignore the impact of what we see as race-neutral policies today, because those policies — even though they are race neutral — they do stem from past discrimination and they disproportionately impact people on the basis of color or race or gender.”

Thus, ideologically, New York politicians and advocates are committed to enshrining more expansive equality in the State’s Constitution. But, as Senator Liz Krueger recently noted, changing the New York Constitution is “damn hard”. She explained that “when trying to make sure that you are providing for the protections for everyone, you really have to think through who those ‘everyones’ are and what the impact can be because you’re not going to change [the Constitution] very often.” She noted that legal counsel for each chamber are weighing the specific location of the amendment’s language in the Constitution, explaining that the decision affects the amendment’s relationship to the existing protections for religious rights. Professor Franke noted that while the state Constitution already protects religious liberty robustly — in some cases privileging religious over secular values — some advocates feel it does not make sense to bundle religion with same kinds of protections of other groups because of the unique character of religious liberty. In addition, counsel for the two chambers continue to discuss whether the amendment needs to clearly state that it is self-executing. Overall, however, New York’s politicians agree that the State is overdue for a comprehensive, modern, and inclusive amendment to the Constitution’s equal rights provision. Senator Krueger said that other states are looking to New York as a leader in this regard, adding, “I would love us to be able to get this done the right way as soon as possible and be a model for the other states”.