

QUESTIONS & ANSWERS: Moderated by Louise Derevlany

1. In November, New Yorker's will have an opportunity to flip their ballots and vote on Prop 1 – an amendment to the NY state constitution. How did we get here?

KB

- Conversation about legal protections for women has spanned decades/centuries, 5 years ago Senator Krueger began a conversation about equality protection in NY state constitution – spurred deep research and conversations with academics and legal experts
- *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ____ (2022), specific impetus for 2022 legislative passage; second passage 2023
- Opponents mounting unsuccessful legal challenges against process

2. What is Prop 1 and why do we need it?

○ KB:

- Prop 1 amends NY const. sect. 11, EPC and CRC to add explicit protections for classes;
- Background on sect. 11:
 - courts have found it needs additional legislation to apply to private actors, legislature made clear that the ERA applies directly to prohibit government discrimination
 - courts have matched sect 11's meaning to rights under the federal constitution

- DC: Federal landscape post Dobbs rolling back rights; sex discrimination has always been viewed narrowly on federal level, eg. *Geduldig v. Aiello*, 417 U.S. 484 (1974); clarifying these protections within the state constitution.

3. What is the language of the amendment?

○ KB – read language of the amendment

- New Yorkers will see something similar on their ballot, not all voters are clear that this language protects LGBTQ people and abortion; the BOE did not follow the plain language statute when promulgating the ballot language; there is a campaign to educate voters

4. Let's get into the meaning. What rights does the amendment protect? Aren't these rights already protected under NY law?

- KB:
 - Adds a variety of protections that are meaningful for many communities in NY; really critical to include and clarify parameters of sex discrimination: 1) corrects caselaw like *Geduldig*, 2) reproductive health care and autonomy is a matter of equality
- DC: Some of these rights are protected by statute and already in the constitution, however not strong enough if political winds shift, we are cementing our rights

5. How will this protect abortion rights that are not mentioned in the amendment?

- KB: Post *Dobbs*, state advocates protecting access in state constitutions, some naming just abortion, NY has taken a different route, ie abortion is a symptom of sex discrimination. This will prohibit the state from singling out abortion and creating barriers to access. This also reflects the ways that pregnant people are being punished across the country for other outcomes such as stillbirth and miscarriage.

6. What is the purpose of adding these groups as protected classes to the NYS Constitution?

DC:

Why existing laws and rights are not sufficient. Leveling the playing field.
Clarifying the standard of review.

Flip the ballot: The State of the ERA (Proposition 1)

Presented by WBASNY's ERA/Civil Rights Committee

Thursday, October 10, 2024

What is the purpose of adding these groups as protected classes to the NYS Constitution?

Why aren't existing laws sufficient?

N.Y. Exec. Law §296 (a)

N.Y. Exec. Law § 297

N.Y. Civ. Rts. Law §§ 40-c(2), 40-d

Will help level the playing field when considering legislation and/or policies impacting various groups. i.e. What are the protections needed and the burdens imposed?

Will help clarify the standard of review the courts should use (strict scrutiny, heightened scrutiny, rational basis) when deciding cases involving these laws and/or policies and their application

Neutral, generally applicable law = rational basis test

Not generally applicable = strict scrutiny

Doesn't the U.S. Constitution already provide protections, e.g. same sex marriage (Obergefell v. Hodges), LGBTQ+ rights (Bostock v. Clayton)

Depends on how U.S. Supreme Court interprets and/or applies them

e.g. Dobbs overturned Roe

Returned abortion rights to the States

State laws widely vary

Challenges to state laws vary in level of scrutiny the courts apply

Planned Parenthood of Southwest and Central Florida v. State of Florida, 384 So.3d 67 (2024)

Florida Amendment 4, Right to Abortion Initiative (2024) to amend the state constitution

Before *Obergefell*, same-sex couples challenging constitutionality of New York Domestic Relations Law that did not permit same-sex marriage were reviewed by the New York Court of Appeals under a rational basis test.

Hernandez v. Robles, 7 N.Y.3d 338 (2006), abrogated by *Obergefell v. Hodges* (2015)

What happens if *Obergefell* is reversed by the U.S. Supreme Court?

Will the amendment result in the infringement of existing rights?

Parental rights

Minor's access to gender affirming care U.S. Supreme Court granted cert. regarding such bans in Tennessee and Kentucky.

Proposed laws creating statutory bans on treating gender dysphoria impact parental rights of transgender students.

L.W., et al. v. Skrametti, et al., 83 F.4th 460 (6th Cir. 2023)

U.S. v. Skrametti, 2023 WL 7327440 (2023) (Petition for Writ of Certiorari)

Existing “best practices” in New York State regarding school policies regarding handling students’ gender identity try to balance student welfare with parental rights and responsibilities.

Creating a Safe, Supportive, and Affirming School Environment For Transgender and Gender Expansive Students – 2023 Legal Update and Best Practices, The State Education Dep’t/The University of the State of New York

<https://www.nysed.gov/sites/default/files/programs/student-support-services/creating-a-safe-supportive-and-affirming-school-environment-for-transgender-and-gender-expansive-students.pdf>

Title IX / school sports rights

Fact Sheet: U.S. Department of Education's Proposed Change to its Title IX Regulation on Students' Eligibility for Athletic Teams amending 34 CFR Part 106.41 (b) (Separate Teams)

Religious rights

Religion is and continues to be protected under the U.S. and State Constitutions

Will the amendment create irresolvable constitutional conflicts?

Our legal system is set up to balance and resolve such conflicts

Relationship of constitutional protections and public accommodation laws

Fact intensive inquiry

Emilee Carpenter LLC, et. al. v. James, 107 F. 4th 92 (2d Cir. 2024)

By Debra S. Cohen, Esq., co-chair, WBASNY's ERA/Women's Civil Rights Committee

Debra S. Cohen is the co-chair of the Civil Rights Practice Group of Newman Ferrara LLP. Ms. Cohen practices in both federal and state courts in New York, at both the trial and appellate level, focusing on a wide variety of civil rights issues including police misconduct, sex and gender identity discrimination, child abuse and open government violations. For over twenty years Ms. Cohen has been an adjunct professor at Pace University's Haub School of Law teaching courses in civil rights law and civil rights litigation.

Text of Proposal Number One, An Amendment

Concurrent Resolution of the Senate and Assembly proposing an amendment to section 11 of article 1 of the constitution, in relation to equal protection

Section 1. Resolved (if the Assembly concur), That section 11 of article 1 of the constitution be amended to read as follows:

§ 11. **a.** No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, **ethnicity, national origin, age, disability,** creed [or], religion, **or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy,** be subjected to any discrimination in [his or her] **their** civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state, **pursuant to law.**

b. Nothing in this section shall invalidate or prevent the adoption of any law, regulation, program, or practice that is designed to prevent or dismantle discrimination on the basis of a characteristic listed in this section, nor shall any characteristic listed in this section be interpreted to interfere with, limit, or deny the civil rights of any person based upon any other characteristic identified in this section.

§ 2. Resolved (if the Assembly concur), That the foregoing amendment be submitted to the people for approval at the general election to be held in the year 2024 in accordance with the provisions of the election law.

Explanation – Matter in underscored is new; matter in brackets [] is old law to be omitted.

[2024 Statewide Ballot Proposal | New York State Board of Elections \(ny.gov\)](#)

**NEW
YORK'S**

EQUAL RIGHTS AMENDMENT

An Amendment to Guarantee Protections for All New Yorkers

WHAT TO KNOW:

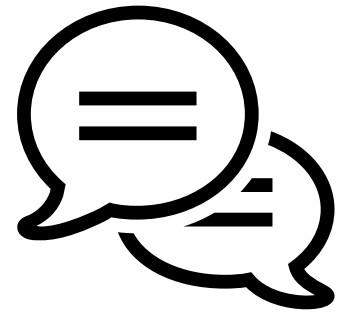
Right now, New York's State Constitution does not protect all New Yorkers – for example, pregnant New Yorkers, women, LGBTQIA+ people, those with disabilities, older adults, and people from different countries and cultures.

We need a constitutional amendment so our rights and freedoms are protected – no matter who is in office.

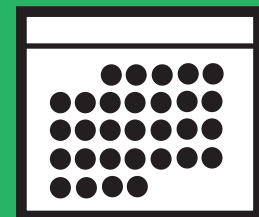
The New York ERA would:

- * explicitly prohibit discrimination by the government based on a person's ethnicity, national origin, age, disability, and sex – including their sexual orientation, gender identity, and gender expression – in addition to pregnancy, pregnancy outcomes.
- * add to existing protections against discrimination based on race and religion.
- * ensure New York's Constitution includes the strongest legal protections for all New Yorkers.

New Yorkers will have the opportunity to vote on the Amendment in November, 2024. If voters approve it, the ERA will be added to New York's State Constitution.

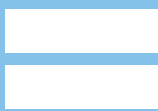


**STAY
INFORMED
+
SPREAD
THE WORD**



**APPEARING ON
THE BALLOT
NOVEMBER
2024**

NY



**NEW YORKERS
FOR EQUAL RIGHTS**