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Enactment of the Women's Equality Agenda: A Fitting Bicentennial Birthday Gift for Elizabeth Cady Stanton

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Verdict

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JOANNA L. GROSSMAN

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At the end of October, New York's Governor, Andrew Cuomo, signed into law the Women's Equality Act (WEA), a broad-based bill he proposed more than two years ago. The bill was designed, in his words, to "break down barriers that perpetuate discrimination and inequality based on gender" and to restore New York to "its role as a progressive leader on women's rights."



One might point to different historical eras to make the claim that New York has been a progressive leader on women's rights, but the clearest support for that claim is found in

the year 1848. That was the year in which Elizabeth Cady Stanton, together with other feminist activists, convened the Seneca Falls convention, which launched the women's rights movement in this country.

November 12, 2015, marks Stanton's 200th birthday, an occasion for which there is no conventional gift or symbol—unless the birthday is celebrated by the U.S.A., in which case (recall the red-white-and-blue blur that was 1976) the country is literally covered with American flags. But Stanton would not have been satisfied with flags or symbols; what she wanted, what she fought for, was real change in the way women were treated. And while much work remains to be done, this law represents a serious effort to equalize the playing field for women in New York. Our foremother would be pleased.

The Women's Equality Act and the History It Invokes

The Women's Equality Act, as first proposed in 2013, was a list of ten reforms, covering a wide range of issues affecting women from sexual harassment to equal pay to family status discrimination to abortion. This likely resonated with women's history buffs, who might have recalled the Declaration of Sentiments that came out of the Seneca Falls Convention in 1848. That document, written in the rhythm and words of the Declaration of Independence, condemned a wide range of "injuries and usurpations on the part of man toward woman"—everything from withholding the right to vote to applying different codes of moral conduct—and demanded "immediate admission to all the rights and privileges which belong to them as citizens of the United States." (The Declaration of Sentiments, coincidentally, is apparently missing. Story [here](http://lawprofessors.typepad.com/gender_law/2015/10/the-search-for-the-womens-declaration-of-sentiments.html)

http://lawprofessors.typepad.com/gender_law/2015/10/the-search-for-the-womens-declaration-of-sentiments.html.) The allusions to the Declaration of Independence were not coincidental; the basis for the claim to equality was women's equal citizenship. Women were citizens and therefore were entitled to the substantive rights enjoyed by other citizens—a broad spectrum of political, personal, and civil rights from suffrage to child custody to property ownership. The Declaration framed decades of women's rights advocacy that led to revolutionary changes, including the married women's property acts that put an end to the system of coverture and the widespread civil disabilities it imposed on married women.

The Continued Fight for Equality

At a certain level of generality, women's rights advocates still seek the rights laid out in that 1848 document. Women have won the right to vote, but lag far behind men in political participation at every level. Men no longer have exclusive access to higher education or the professions, but occupational segregation is entrenched, as are the pay gap and problems like sexual harassment and pregnancy discrimination. Women gained

equal custody rights, but assume a disproportionate share of caretaking of children and are routinely penalized for employers based on stereotypes about the inadequate labor force attachment of mothers.

The Women's Equality Act takes as its starting point that the work Stanton began so long ago is unfinished. When he announced the bill in 2013, Governor Cuomo invoked this history and the spirit of Seneca Falls. "From that moment in time and continuing through today," he wrote, "the state has been the home of female leaders and visionaries . . . [who] served as role models for not only their generation but for every generation to come." He noted that despite a long tradition of advocacy, much of it successful, study after study concludes that gender inequality persists.

The New Law's Provisions

Like the Declaration, the WEA attacks gender inequality in a variety of different contexts simultaneously. Only one of the original ten proposals did not make it into the final bill—a provision that would have solidified and marginally expanded women's abortion rights. But the controversy over that provision threatened to sink the bill, so it was dropped. The remaining nine, listed and explained below, have become law.

The WEA embodies the notion of substantive equality, which dictates that we measure equality by outcomes—whether men and women able to capitalize equally well on their natural talents and capacities—rather than simply by whether men and women have been subjected to formally equal rules. By comparing these two babies who start out on equal footing, and yet end up in drastically different places as adults, the Cuomo agenda argues for a shift in the way we think about women's equality. It works backwards from the unequal adult outcomes to determine what along the way might have caused their paths to diverge so dramatically.

Consider the new provisions (available [here](https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-protect-and-further-women-s-equality-new-york-state) (<https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-protect-and-further-women-s-equality-new-york-state>)) in context:

- **Pay Equity:** The law amends the state's equal pay law in four ways calculated to reduce the existing gender wage gap. First, it narrows the scope of an affirmative defense that allows employers to justify pay differentials based on any factor other than sex, an exception that is so broad as to defeat the requirement of equal pay in many cases. Second, it expands the pool of comparators for purposes of proving equal pay violations to include those working for the same employer, but at a different physical location, as long as they were in the same geographical region "no larger than a county." Third, the law forbids employers from insisting on pay

secrecy—a practice that is disallowed by the National Labor Relations Act, but widely practiced nonetheless, and which makes it difficult for women to learn they are the victims of pay discrimination. Fourth, the law provides for greater damages for willful equal pay violations. These proposed changes are necessitated by the entrenched wage gap and the difficulty that women have in learning about, challenging, and receiving recompense for pay discrimination. (The pay equity problem is detailed [here \(http://verdict.justia.com/2012/04/17/the-lady-in-red\)](http://verdict.justia.com/2012/04/17/the-lady-in-red).) The significance of this bill is largely in its passage of provisions that have stalled in Congress. Significant efforts, still underway, have been made to pass the Paycheck Fairness Act at the federal level. California just passed a similar fair pay law, discussed [here \(https://verdict.justia.com/2015/10/13/for-the-love-of-batgirl-california-passes-much-needed-fair-pay-law\)](https://verdict.justia.com/2015/10/13/for-the-love-of-batgirl-california-passes-much-needed-fair-pay-law), and states are wise to pick up the slack from Congress's failures.

- **Sexual Harassment:** This provision applies existing sexual harassment prohibitions (embodied in the general ban on sex discrimination) to all employers, not just those with five or more employees as provided under current law. While much of the problem in remediating sexual harassment lies in the weak regime of employer liability, this law tackles a different, but still important problem—that a majority of the state's private employers are too small to be covered by anti-discrimination laws at the state or federal level.
- **Lending Discrimination:** The law provides for attorneys' fees in cases where plaintiffs prove employment or credit discrimination (including those brought before the Department of Financial Services rather than in court) on the basis of sex and would retain the possibility of such fees in housing and housing credit cases. This change is motivated by the concern that victims of discrimination have a hard time finding lawyers to represent them because of the uncertain pay off, and that plaintiffs fare poorly when they hire lawyers to work on contingency (rather than for hourly fees).
- **Family Status Discrimination:** This law adds "familial status" to the list of protected characteristics upon which employers cannot discriminate. Because New York law already prohibited marital status discrimination, this provision is focused on protecting against discrimination because of parenting responsibilities. With this change, New York joins a small but growing number of states who understand that wives and mothers face unique types of discrimination in the workplace based on stereotypes about their unreliability, competence, or labor force commitment. Studies document that mothers suffer significant wage penalties and unfair employment decisions as a result of the application of such stereotypes. This is particularly troubling given the number of single mothers who live in poverty and cannot afford to lose their jobs or be paid less than they are worth. (An analysis of

federal law and policy regarding caregivers is available [here](http://writ.news.findlaw.com/grossman/20090512.html) (<http://writ.news.findlaw.com/grossman/20090512.html>.)

- **Domestic Violence Discrimination:** This provision prohibits landlords from discrimination against potential tenants or current tenants either because of domestic violence victim status or because their source of income comes from government vouchers rather than wages or some other private source. This change is designed to decrease the likelihood that a victim of domestic violence will stay in a dangerous situation because she lacks access to other housing.
- **Protection from Domestic Violence:** This provision authorizes a pilot program to allow a petition for a temporary order of protection to be filed by electronic means for victims of abuse who do not have ready access to a court. This law enhances accessibility to the law's protection, a minor but important change.
- **Sex Trafficking:** The law makes several changes to the criminal code to provide greater protection against sex trafficking, including an expansion of the definition of trafficking to encompass more offenders, an increase in the severity of penalties for trafficking convictions, and the establishment of an affirmative defense to prostitution prosecutions when the defendant was a victim of sex trafficking. New York already has one of the strongest anti-trafficking laws in the country, but these changes will make it stronger still.
- **Pregnancy Discrimination:** This provision is something of a buried treasure on a long list of gender equality mandates. It mandates that employers provide reasonable accommodation to employees with pregnancy-related disability unless doing so would result in undue hardship to the employer. This change is incredibly important, given the number of pregnant women who seek (indeed, need) to continue working throughout pregnancy, but require often minor accommodations because of the physical effects of pregnancy. Although the federal Pregnancy Discrimination Act purports to provide some protection, at least when employers offer accommodations to other temporarily disabled workers, federal courts in recent years have narrowed and weakened its protection, leaving many pregnant women vulnerable to job loss during the time when they can least afford it. A handful of states have passed reasonable accommodation laws such as this one, and New York would be dramatically increasing women's access to equality by passing it. As with the equal pay problem, a good bill to enhance the availability of pregnancy accommodation in the workplace has been proposed, but stalled, in Congress. The Supreme Court improved accommodations law under the Pregnancy Discrimination Act with its April 2013 ruling in *Young v. UPS*. But that law remains insufficient, and the Pregnant Workers Fairness Act, which would do much of what this New York law does, has stalled in Congress. (*Young* is discussed [here](https://verdict.justia.com/2015/03/31/forceps-delivery-the-supreme-court-) (<https://verdict.justia.com/2015/03/31/forceps-delivery-the-supreme-court->

[narrowly-saves-the-pregnancy-discrimination-act-in-young-v-ups](#)), and the federal bill is discussed [here \(http://verdict.justia.com/2012/05/11/the-pregnant-workers-fairness-act\)](http://verdict.justia.com/2012/05/11/the-pregnant-workers-fairness-act).)

Conclusion

In some ways, Elizabeth Cady Stanton led a traditional life. She was married to a lawyer and gave birth to and raised seven children while he practiced law. But she deliberately omitted “obey” from her marriage vows, a sign perhaps of what her future held. A writer, thinker, and activist, as well as a wife and mother, Stanton left an unforgettable legacy. And she would be pleased to see what the world looks like on her 200th birthday: a strong female candidate for the U.S. presidency, three women on the Supreme Court, and the fight for women’s suffrage in Britain depicted beautifully on the big screen in *Suffragette*. But perhaps New York’s renewed commitment to women’s equality, and the Governor’s invocation of her legacy, is the best gift of all. Happy Birthday, Liz.



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