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# State Responsibility for Gender Stereotyping

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# State Responsibility for Gender Stereotyping

Barbara Stark\*

“Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t.”

– Justice Antonin Scalia<sup>1</sup>

## I. INTRODUCTION

Scholars have recently re-discovered Justice Ruth Bader Ginsburg’s early anti-stereotyping work.<sup>2</sup> As Cary Franklin notes, Justice Ginsburg’s approach “was grounded not in a commitment to eradicating sex classifications from the law, but in a far richer theory of equal protection involving constitutional limitations on the state’s power to enforce sex-role stereotypes.”<sup>3</sup> Some of these scholars believe that this approach holds great promise for issues at the “frontiers of equal protection law” such as same-sex marriage and the work-family conflict.<sup>4</sup> As Ginsburg herself has come to

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1. Amanda Terkel, *Scalia: Women Don’t Have Constitutional Protection Against Discrimination*, HUFF POST POL. (May 25, 2011), [www.huffingtonpost.com/2011/01/03/scalia-women-discrimination-constitution\\_n\\_803813.html](http://www.huffingtonpost.com/2011/01/03/scalia-women-discrimination-constitution_n_803813.html).

2. Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010) (citing Ginsburg’s brief on behalf of a pregnant service woman in a case that was settled); *see also* Ruth Bader Ginsburg, *A Postscript to Struck by Stereotype*, 59 DUKE L.J. 799, 800 (2010) (noting that “[t]he authors have captured just what was on my mind and in my heart”); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

3. Franklin, *supra* note 2, at 83.

4. *Id.* at 91. Others are less sanguine. *See, e.g.*, Julie Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 39

realize, however, anti-stereotyping is only the beginning.<sup>5</sup> This Article explains why anti-stereotyping is insufficient, what else is needed, and why the Constitution cannot be relied upon to provide it.

Part I explains how gender stereotypes originate and are perpetuated; that is, how gender is reproduced. It also sets out the consequences—for men, for women, and for the societies in which they live. Part II explains why barring the state from enforcing sex-role stereotypes is inadequate; it allows the most pernicious stereotypes to flourish. It also explains why this is not surprising.

Part III explains why the Convention on the Elimination of All Forms of Discrimination Against Women<sup>6</sup> (CEDAW or Women's Convention) is far more promising. The Article concludes that CEDAW's bar on stereotyping is not only better for women than the Constitution's grant of equal protection, but better for men as well.

For the first time in United States history, there are more women than men in the labor force.<sup>7</sup> Roughly twenty percent of men of prime working age are unemployed, the highest rate ever recorded.<sup>8</sup> These demographics are part of a larger "economic and cultural power shift from men to women" documented in a recent influential article, *The End of Men*.<sup>9</sup> This shift makes gender equality an increasingly clear imperative—especially, as Ginsburg

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(2010) (arguing that generous family leave policies in Europe result in a weaker labor force attachment for European women).

5. See *infra* Part II.C.; David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 764 (2012) (quoting Ginsburg: "I would not look to the U.S. Constitution if I were drafting a constitution in the year 2012."). Ginsburg suggests that the South African Constitution, Canadian Charter, or the European Convention on Human Rights might be more useful as models. *Id.* Adam Liptak, *'We the People' Loses Appeal With People Around the World*, N.Y. TIMES (Feb. 6, 2012), [http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html?\\_r=0](http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html?_r=0). All three instruments expressly assure gender equality and positive rights. JEANNE M. WOODS & HOPE LEWIS, HUMAN RIGHTS AND THE GLOBAL MARKETPLACE: ECONOMIC, SOCIAL, AND CULTURAL DIMENSIONS 726–80 (2005) (South African Constitution); *id.* at 781–840 (European Convention); *id.* at 254–62 (Canadian Charter). See *infra* text accompanying note 46 (explaining how the lack of these two features, among others, makes the U.S. Constitution an outlier).

6. G.A. Res. 34/180, Part I, art. 2, U.N. Doc. A/RES, 34/180 [hereinafter CEDAW] (entered into force Sept. 3, 1981). President Jimmy Carter signed CEDAW in 1978. As a signatory, under Article 18 of the Vienna Convention on the Law of Treaties, the United States must refrain from any action that would "defeat the object and purpose of a treaty." 1946–1980, 1155 U.N.T.S. 331, 336, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

7. Catherine Rampell, *Women Now a Majority in American Workplaces*, N.Y. TIMES (Feb. 6, 2010), [www.nytimes.com/2010/02/06/business/economy/06women.html](http://www.nytimes.com/2010/02/06/business/economy/06women.html); Hanna Rosin, *The End of Men*, ATLANTIC, July/Aug. 2010, [www.theatlantic.com/magazine/archive/2010/07/the-end-of-men/308135/](http://www.theatlantic.com/magazine/archive/2010/07/the-end-of-men/308135/).

8. Rosin, *supra* note 7.

9. *Id.*

insisted forty years ago, for American men.

## II. THE REPRODUCTION OF GENDER

This Part explains how gender is reproduced and why it matters. Section A explains where gender stereotypes come from and how they are replicated. Section B describes how this dynamic plays out in the global economy. Section C focuses on its effects in the United States.

### A. *The Sexual Division of Labor*

Historian Gerda Lerner, among others, identifies the “sexual division of labor based on biological differences”<sup>10</sup> as the bedrock for women’s subordination.<sup>11</sup> As anthropologist Gayle Rubin notes, the sexual division of labor based on biological differences appears in “endless variety and monotonous similarity, cross-culturally and throughout history.”<sup>12</sup> As she explains:

Although every society has some sort of division of tasks by sex, the assignment of any particular task to one sex or the other varies enormously . . . [the purpose] is to insure the union of men and women by making the smallest viable economic unit contain at least one man and one woman. The division of labor by sex can therefore be seen as a “taboo”: a taboo against the sameness of men and women, a taboo dividing the sexes into two mutually exclusive categories, a taboo which exacerbates the biological differences between the sexes and thereby *creates* gender.<sup>13</sup>

The innumerable iterations of the sexual division of labor are grounded in stereotypes of women as *reproductive* workers and men as *productive*

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10. GERDA LERNER, *THE CREATION OF PATRIARCHY* 16–17 (1986).

11. See, e.g., Alison M. Jaggar, *Globalizing Feminist Ethics*, in *DECENTERING THE CENTER: PHILOSOPHY FOR A MULTICULTURAL, POSTCOLONIAL AND FEMINIST WORLD* 1, 13 (Uma Narayan & Sandra Harding eds., 2000) (noting consensus among feminists in the developing world that “the abolition of the sexual division of labor” is necessary to overcome women’s subordination); Gayle Rubin, *The Traffic in Women: Notes on the “Political Economy” of Sex*, in *FEMINIST ANTHROPOLOGY: A READER* 87, 90 (Ellen Lewin ed., 2006) (drawing on Claude Lévi-Strauss, Sigmund Freud, and Jacques Lacan to develop a theory of “a sex/gender system,” found in every society, consisting of “a set of arrangements by which the biological raw material of human sex and procreation is shaped by human, social intervention”). But see Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women’s Human Rights*, 21 *HUM. RTS. Q.* 853, 899 (1999) (noting different views regarding the “roots of [gender] inequality” among the less developed countries, the western industrialized states, and the Soviet bloc).

12. Rubin, *supra* note 11, at 88.

13. *Id.* at 94.

workers.<sup>14</sup> This includes the “female-as-caregiver” and “male-as-rightsholder” stereotypes described by Aristotle.<sup>15</sup> In his *polis*, men alone were citizens, and therefore rightsholders. Women’s job was to reproduce male citizens, by raising them as well as quite literally giving birth to them. “Raising citizens” involves a range of caregiving tasks, including feeding, bathing, clothing, and protecting children, which may be understood as reproductive work. Although these tasks are not necessarily linked to reproduction, Aristotle considered women’s responsibility for this work to be “natural.”<sup>16</sup> “Rightsholders” were male—never pregnant, never breastfeeding—and “caregivers” were female—always subject to the endless demands of caregiving, even if not actually pregnant or breastfeeding.

The reproduction of gender extends beyond the sexual division of labor to stereotypes unrelated to it, but which nevertheless signal gender in a particular culture. In the United States, dressing babies in pink, for example, signals that they are girls.<sup>17</sup> The reproduction of gender is both internalized

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14. Other theories for the origins of gender roles include economist Ester Boserup’s notion that gender roles can be traced back to early farming practices. A recent paper, for example, suggests that gender roles originated in a “fundamental” technological change in food production; i.e., the adoption of the plough, which demanded greater upper body strength than hoes. Once ploughs were used, men had an advantage. See Alberto Alesina et al., *On the Origins of Gender Roles: Women and the Plough*, 128 Q.J. ECON. 469 (2013); *The Plough and The Now*, ECONOMIST, July 23, 2011, at 74, available at <http://www.economist.com/node/18986073>.

15. See generally D. BRENDAN NAGLE, *THE HOUSEHOLD AS THE FOUNDATION OF ARISTOTLE’S POLIS* (2006); *THE SEXISM OF SOCIAL AND POLITICAL THEORY: WOMEN AND REPRODUCTION FROM PLATO TO NIETZSCHE vi-ix* (Lorenne M.G. Clarke & Lynda Lange eds., 1979). Jack Balkin puts this in a contemporary context:

[T]he lower status of women in society has largely been achieved through role differentiation, which has been justified by paternalism and appeals to nature and biological differences. The inequality of women in our society has been maintained by ensuring that they are remitted to traditional occupations of home and family and by denying them opportunities beyond those activities socially marked as “women’s work.”

Jack M. Balkin, *Roe v. Wade: An Engine of Controversy*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 45 (Jack M. Balkin ed., 2005).

16. NAGLE, *supra* note 15, at 85. Recent studies question this link. See, e.g., Pam Belluck, *Fatherhood Cuts Testosterone, Study Finds, For Good of the Family*, N.Y. TIMES, Sept. 13, 2011, at A1 (citing “the first large study measuring testosterone in men when they were single and childless and several years after they had children” which found that “[t]estosterone, that most male of hormones, takes a dive after a man becomes a parent. And the more he gets involved in caring for his children—changing diapers, jiggling the boy or girl on his knee, reading ‘Goodnight Moon’ for the umpteenth time—the lower his testosterone drops.”); see also Alex Williams, *Fathers and the XX-Factor*, N.Y. TIMES, Sept. 18, 2011, at ST1 (describing fathers’ reactions to this news).

17. See, e.g., Jeanne Maglaty, *When Did Girls Start Wearing Pink?* SMITHSONIAN (Apr. 8, 2011), <http://www.smithsonianmag.com/arts-culture/when-did-girls-start-wearing-pink-1370097/> (observing that “today’s color dictate wasn’t established until the 1940s”). JO B. PAOLETTI, *PINK AND BLUE: TELLING THE GIRLS FROM THE BOYS IN AMERICA* (2012) (describing historical trends, including the relatively recent fashion of indicating an infant’s sex with pink or blue).

and overdetermined.<sup>18</sup> It is reflected in, and reinforced by, redundant social,<sup>19</sup> economic,<sup>20</sup> cultural,<sup>21</sup> religious,<sup>22</sup> and legal norms.<sup>23</sup> The reproduction of gender shapes the U.S. economy, in part simply by determining what counts as “work,” as explained below. In the process of doing so, it perpetuates itself, reproducing gender in ever-shifting forms.

Carolyn Heilbrun explained to a class on Women & the Law at Columbia Law School in 1989 that baby girls can wear blue, but baby boys can't wear pink because it would be degrading. But times may be changing. *See, e.g.,* Andrea Canning & Maureen White, *For Young Boys, Is Pink the New Blue?* (ABC News television broadcast July 18, 2011) (noting that “pink is in”).

18. There is a vast literature on the internalization and overdetermination of gender. Noteworthy examples include: IRIS MARION YOUNG, *THROWING LIKE A GIRL* (2005); NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* (1989); DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR* (1976); *See also* Katherine Bartlett, *Pregnancy and The Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532, 1564 (1974) (noting that “sex roles today are more deeply entrenched than race roles; it is still acceptable, after all, to teach sex roles at home and in school, long after instruction in racial bias has gone underground”). The author, of course, was writing in 1974.

19. Social norms include the expectation that mothers, more than fathers, will take care of small children. *See, e.g.,* MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 309 (2003) (noting “the ‘gender codes’ that put pressure on women to become mothers, to keep and raise their children, and to subordinate their professional and personal interests for family have not disappeared”); Keith Cunningham, Note, *Father Time: Flexible Work Arrangements and the Law Firm's Failure of the Family*, 53 STAN. L. REV. 967 (2001); Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1048 (1994) (explaining social barriers restricting paternal participation in caregiving, including stereotypes of men as “breadwinners”); Christen Linke Young, Note, *Childbearing, Childrearing, and Title VII: Parental Leave Policies at Large American Law Firms*, 118 YALE L.J. 1182 (2009).

20. *See* JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000) (explaining how the structure of market work disadvantages caregivers); Felice Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV., Jan–Feb. 1989, at 65 (arguing in favor of a “mommy track” to enable women to combine motherhood and careers).

21. *See, e.g.,* Katha Politt, *Whose Culture?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 27 (Susan Moller Okin et al. eds., 1999) (“In its demand for equality for women, feminism sets itself in opposition to virtually every culture on earth. You could say that multiculturalism demands respect for all cultural traditions, while feminism interrogates and challenges all cultural traditions.”). This includes legal culture. *See* LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL AND INSTITUTIONAL CHANGE* (1997) (explaining how gender is reproduced in law schools).

22. *See, e.g.,* Cass R. Sunstein, *Should Sex Equality Law Apply to Religious Institutions?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 85 (Susan Moller Okin et al. eds., 1999); Sherry F. Colb, *To Whom Do We Refer When We Speak of Obligations to “Future Generations”?* *Reproductive Rights and the Intergenerational Community*, 77 GEO. WASH. L. REV. 1582, 1587 (2009) (noting religious restrictions on birth control).

23. *See, e.g.,* HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW* 233–44 (2000) (explaining why “human rights” are “men’s rights”); Joan Williams & Nancy Siegal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77 (2003) (describing varying forms of workplace discrimination).

### B. How This Plays Out

As the CEDAW Committee observes, “[p]ublic and private spheres of human activity have always been considered distinct, and have been regulated accordingly. Invariably, women have been assigned to the private or domestic sphere, associated with reproduction and the raising of children, and in all societies these activities have been treated as inferior.”<sup>24</sup> These activities, moreover, have been ignored—as Marilyn Waring and others show, women’s work has historically been economically invisible; it has not appeared in national statistics.<sup>25</sup>

A 2011 study based on detailed time-use surveys for 26 Organization for Economic Cooperation and Development (OECD) member countries and three emerging economies reveals that, “between one-third and half of all valuable economic activity . . . is not accounted for in the traditional measures of well-being, such as GDP per capita. In all countries, women do more of such work than men.”<sup>26</sup> Women everywhere do all or most of the childcare;<sup>27</sup> they clean and maintain the family home;<sup>28</sup> they prepare the family’s food;<sup>29</sup> and they nurse family members when they become sick.<sup>30</sup> Even when women work outside the home, they continue to perform far more of this work than men.<sup>31</sup>

24. U.N. Comm. on the Elimination of All Forms of Discrimination Against Women (CEDAW), *Gen. Recommendation No. 23: Political & Public Life*, ¶ 8, U.N. Doc. A/52/38 (1997), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>. The Committee concludes, “[b]y contrast, public life, which is respected and honoured, extends to a broad range of activity outside the private and domestic sphere. Men historically have both dominated public life and exercised the power to confine and subordinate women within the private sphere.” *Id.*

25. MARILYN WARING, *IF WOMEN COUNTED* 74–91 (1988). See also MARILYN WARING, *THREE MASQUERADES: ESSAYS ON EQUALITY, WORK AND HU(MAN) RIGHTS* 58 (1996). For a detailed description of women’s global economic subordination, see CHARLESWORTH & CHINKIN, *supra* note 23, at 4–14.

26. Veerle Miranda, *Cooking, Caring and Volunteering: Unpaid Work Around the World*, OECD SOC., EMP. & MIGRATION WORKING PAPERS 4 (Mar. 3, 2011), available at <http://www.oecd.org/berlin/47258230.pdf>.

27. *Id.* at 16–20 (noting that not only do women spend substantially more time on childcare than men, but that, “non-working fathers still devote less time to childcare than working mothers in nearly all surveyed countries (except in Hungary and the United States)”). In the United States, the non-working fathers spend 95 minutes per day on childcare, while working women spend 94 minutes per day on childcare. *Id.* at 19.

28. “In all countries the main component of unpaid work is routine housework” averaging 2 hours and 8 minutes per day. *Id.* at 15.

29. “82% of women prepare meals on an average day, while only 44% of men do. Also, the average time spent by women on cooking is four times the time spent by men.” *Id.* at 25.

30. *Id.* at 20–21.

31. *Id.* at 13–14 (noting that, “[w]hile women have traditionally been responsible for

Because of the demands of their unpaid work, in part, most women who work outside of the home work in lower-paid “female” occupations.<sup>32</sup> Like the sexual division of labor within the family, the association of particular occupations with one sex or the other varies among countries and over time. The constant is that women are paid less. While women’s participation in the paid workforce has increased, according to the U.N. Division of Statistics, “[h]orizontal and vertical job segregation has resulted in a persistent gender pay gap everywhere.”<sup>33</sup> In the United States, “[t]he typical woman who worked full-time, year-round in 2010 still made only 77 cents for each dollar earned by her male counterpart—a figure that has barely moved in more than a decade.”<sup>34</sup> The poverty rate among women rose to 14.5 percent in 2010, the highest rate in 17 years.<sup>35</sup> Women living in “extreme poverty”—i.e., women whose income was less than half of the federal poverty line—rose to 6.3 percent, or 7.5 million women, in 2010, the highest ever recorded.<sup>36</sup>

By impoverishing women, the sexual division of labor impoverishes the families and communities in which they live. As set out in a recent World Bank report, women are less likely to spend money on alcohol or other forms of entertainment for themselves and more likely to spend it in ways that benefit their families and communities.<sup>37</sup> As a recent OECD study measuring the economic and political power of women in 162 countries concluded, “the greater the power of women, the greater the country’s

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housework and caring, they have become increasingly active in the paid labour market over the past few decades and have decreased their unpaid working time. . . . Yet, even in the country with the highest average unpaid working time among men—Denmark—men still devote less time to unpaid work than women in Norway, the country with the lowest female unpaid working time.” (citations omitted)). See also U.N. Dep’t of Econ & Soc. Affairs, *The World’s Women 2010: Trends and Statistics*, U.N. Doc. ST/ESA/STAT/SER.K/19 (2010) [hereinafter *World’s Women*], available at [http://unstats.un.org/unsd/demographic/products/Worldswomen/WW\\_full%20report\\_color.pdf](http://unstats.un.org/unsd/demographic/products/Worldswomen/WW_full%20report_color.pdf) (noting tables of time spent on paid and unpaid work, indicating that women everywhere perform more of the latter than men).

32. CHARLESWORTH & CHINKIN, *supra* note 23, at 6.

33. *World’s Women*, *supra* note 31, at ix.

34. *Analysis of New 2010 Census Poverty Data*, NAT’L WOMEN’S L. CTR., <http://www.nwlc.org/analysis-new-2010-census-poverty-data-%E2%80%93-september-2011> [hereinafter NWLC] (last updated Sept. 22, 2011).

35. *Id.* (showing that the men’s poverty rate was lower, rising to only 11.2%).

36. Leslie Bennetts, *Women: The Invisible Poor*, DAILY BEAST (Sept. 14, 2011, 12:11 PM), <http://www.thedailybeast.com/articles/2011/09/14/u-s-women-hit-hardest-by-poverty-says-census-report.html>.

37. World Bank, *The World Bank and Gender Equality: At a Glance* (Nov. 11, 2011), <http://www.worldbank.org/en/news/feature/2011/04/11/the-world-bank-and-gender-equality-at-a-glance> [hereinafter World Bank, *Gender Equality*] (noting further that, “[t]his could be one reason why countries with greater gender equality tend to have lower poverty rates”).



economic success.”<sup>38</sup>

### C. In the United States

While gender is reproduced in the United States, as it is everywhere else, it looks different here.<sup>39</sup> These differences are grounded in the peculiar American antipathy to economic rights. The United States is the only industrialized state that does not recognize basic economic rights,<sup>40</sup> including the right to “special protection [for] mothers during a reasonable period before and after childbirth”<sup>41</sup> and the right to health.<sup>42</sup> As David Law and Mila Versteeg note in the *N.Y.U. Law Review*, the failure of the United States Constitution to assure economic rights, along with its failure to explicitly assure women’s rights, make it a global outlier.<sup>43</sup>

#### 1. Pregnancy and Childcare

Like women everywhere, women in the United States do most of the childcare, housework, and general caregiving work.<sup>44</sup> Twenty years ago, Arlie Hochschild and Anne Machung described “the second shift” worked by employed women in the home, amounting to an extra month’s work each year compared to their husbands.<sup>45</sup> As sociologist Suzanne Bianchi and her colleagues have recently shown, the second shift persists, albeit in altered forms—“[f]athers’ increased child care seems to have accelerated particularly in the 1990s . . . [but] [m]others still shoulder twice as much child care and housework.”<sup>46</sup>

38. Rosin, *supra* note 7, at 4.

39. These differences also support the argument, set out above, that gender stereotypes and the sexual division of labor are constructed, rather than innate. See *supra* Part II.A.

40. See generally Barbara Stark, *At Last? Ratification of the Economic Covenant as a Congressional-Executive Agreement*, 20 TRANSNAT’L L. & CONTEMP. PROBS. 107 (2011) [hereinafter *Economic Covenant*] (arguing that the United States should ratify the International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 4).

41. *Economic Covenant*, *supra* note 40, at art. 10.

42. *Id.* at art. 12.

43. Law & Versteeg, *supra* note 5, at 806–07 (noting that “[t]he U.S. Constitution is, instead, rooted in a libertarian constitutional tradition that is inherently antithetical to the notion of positive rights”).

44. See Nadine Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381 (1985).

45. ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 3 (1989).

46. SUZANNE M. BIANCHI ET AL., *CHANGING RHYTHMS OF AMERICAN FAMILY LIFE* 177

Unlike women in the other industrialized states, however, most American women lack support for maternity leave and childcare.<sup>47</sup> The Family and Medical Leave Act assures certain employees maternity leave, without pay, for up to twelve weeks.<sup>48</sup> Every other industrialized state assures women paid maternity leave, often for extended periods of time.<sup>49</sup> This is linked to generous family leave policies, which allow parents to care for babies and young children at the state's expense.<sup>50</sup>

Although such programs are usually gender-neutral, women are much more likely to take advantage of them than men.<sup>51</sup> This results in weaker labor force attachments, in general, for women in Europe compared with women in the United States. As Julie Suk notes, this is problematic for American feminists, who have long argued in favor of such generous family leave.<sup>52</sup> To the extent that such policies exacerbate the sexual division of labor, Suk suggests, they are at best a mixed blessing. Rather, the *absence* of such policies contributes to the shrinking wage gap between American women and men.<sup>53</sup>

Over time, however, American women earn far less than men. According to the Institute for Women's Policy Research,

taking into account women's lower work hours and their years with zero earnings due to family care . . . women workers in their prime earning years earned 62% less than men, or only \$0.38 for

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(2006); see also Melissa A. Milkie et al., *The Time Squeeze: Parental Statuses and Feelings About Time With Children*, 66 J. MARRIAGE & FAM. 739 (2004).

47. California and New Jersey are the only two states with public paid leave family insurance programs. HUMAN RIGHTS WATCH, *FAILING ITS FAMILIES: LACK OF PAID LEAVE AND WORK-FAMILY SUPPORTS IN THE US* 22–23 (2011), available at <http://www.hrw.org/sites/default/files/reports/us0211webwcover.pdf> (noting that California, New Jersey, New York, Rhode Island, Hawaii, and Puerto Rico additionally provide Temporary Disability Insurance (TDI) for "disabilities" caused by pregnancy-related complications, childbirth, and recovery from childbirth). See Paid Family Care Leave Act, CAL. UNEMP. INS. CODE § 3301(a) (1) (West 2011) ("Family temporary disability insurance shall provide up to six weeks of wage replacement benefits to workers who take time off work to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a minor child within one year of the birth or placement of the child in connection with foster care or adoption."); Temporary Disability Benefits Law, N.J. STAT. ANN. § 43:21–39.3 (West 2011), available at [http://lwd.dol.state.nj.us/labor/forms\\_pdfs/tdi/Law.pdf](http://lwd.dol.state.nj.us/labor/forms_pdfs/tdi/Law.pdf) (entitling an employee to six weeks of paid leave to care for a newborn child).

48. Family and Medical Leave Act, 29 U.S.C. § 2601 (2006).

49. *World's Women*, *supra* note 31, at 213–17. The United Kingdom, for example, covers 90% of wages for 52 weeks. *Id.* at 217. Sweden covers 480 days at 80% of wages. *Id.* at 216.

50. *Id.*

51. Miranda, *supra* note 26, at 4.

52. Suk, *supra* note 4, at 4.

53. CATALYST, *WOMEN'S EARNINGS AND INCOME* 3 (2011) (reporting based on median income for full-time, year round workers). In 2009, women earned 77% as much as men. Women's earnings increased 44% from 1970 to 2007, compared with 6% growth for men. *Id.* at 4.

every dollar men earned. During that 15-year period, the average woman earned only \$273,592 (in 1999 dollars) while the average man earned \$722,693 (in 1999 dollars).<sup>54</sup>

Thus, although the lack of paid maternity and family leave corresponds to greater parity regarding wages for American women and men in some age groups, this apparent parity vanishes over time. This correlates directly with women's assumption of family responsibilities: "[d]uring [a] 15-year period, the more likely women are to be married and have children under 18, the more likely it is that they will be low earners and have fewer hours in the labor market."<sup>55</sup> When American women have children—and most American women do<sup>56</sup>—their average earnings plummet.<sup>57</sup>

## 2. Healthcare

Unlike women in the other industrialized states, moreover, many American women do not have health insurance.<sup>58</sup> According to the census, the rate of women under 65 without health insurance rose to 19.7 percent in 2010, or 19 million women, the highest rate in more than a decade.<sup>59</sup> This leaves American women especially vulnerable to reproductive health problems. Even women with employer-based health insurance are often left exposed.<sup>60</sup> As Sylvia Law points out, "[m]ore U.S. women confront unintended pregnancy than women in nearly every other developed country. One reason is that most employment-based health insurance programs in the United States exclude payment for contraceptives from otherwise comprehensive coverage for prescription drugs and medical services."<sup>61</sup> Nor

54. *Id.* at 5.

55. *Id.* ("The opposite is true for men: Men who are married and have dependent children are more likely to have higher earnings and work longer hours.").

56. See JANE LAWLER DYE, U.S. CENSUS BUREAU, FERTILITY OF AMERICAN WOMEN: JUNE 2008, at 3 tbl.1 (Nov. 2008), <http://www.census.gov/prod/2010pubs/p20-563.pdf> (showing that 54.3% of women between the ages of 15 and 44 had raised at least one child during or before 2008); see generally DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 10 (1997) (noting that, "[b]eing a mother is considered a woman's major social role. Society defines all women as mothers or potential mothers").

57. See CATALYST, *supra* note 53. See also Joan Williams, *Want Gender Equality? Die Childless at Thirty*, WOMEN'S L. REP. 3 (2006) (keynote address).

58. INST. MED. NAT'L ACAD. OF SCI., INSURING AMERICA'S HEALTH: PRINCIPLES AND RECOMMENDATIONS (2004), available at [www.iom.edu/~media/Files/Report%20Files/2004/Insuring-Americas-Health-Principles-and-Recomendations/uninsured6EnglishFINAL.pdf](http://www.iom.edu/~media/Files/Report%20Files/2004/Insuring-Americas-Health-Principles-and-Recomendations/uninsured6EnglishFINAL.pdf).

59. NWLC, *supra* note 34.

60. *Id.* The percentage of women with employer-sponsored health insurance declined to 60.6% in 2010, a decrease of over 0.6 million women from the prior year.

61. Sylvia Law, *Sex Discrimination and Insurance for Contraception*, WASH. L. REV. 363

can women depend on Medicaid or the states to pay for abortion. The Supreme Court upheld the refusal to pay for poor women's abortions in *Maher v. Roe*<sup>62</sup> and *Harris v. McCrae*.<sup>63</sup>

In March 2010, President Obama signed the Patient Protection and Affordable Care Act,<sup>64</sup> requiring almost all Americans (ninety-four percent) to obtain health insurance and providing subsidies enabling them to do so.<sup>65</sup> The price for Republican support, however, was the explicit exclusion of coverage for abortion.<sup>66</sup> In addition, as noted above, the United States, unlike other industrialized states, still does not recognize health care as a human right.<sup>67</sup> The failure to explicitly acknowledge that it is in fact a right,<sup>68</sup> rather than a transitory policy preference, leaves the right to health vulnerable to the attacks and erosion already underway.<sup>69</sup>

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(1998). According to a recent study by the Independent Institute of Medicine, commissioned by the Obama administration, as recently as 2008, roughly half of all pregnancies in the United States were unplanned; 42% of these unintended pregnancies ended in abortion. *Excerpts from a Health Report*, N.Y. TIMES, Jan. 30, 2012, at A3.

62. *Maher v. Roe*, 432 U.S. 464, 465–68 (1977) (holding that neither the state nor the federal government must pay for a poor woman's abortion, even if childbirth is covered).

63. *Harris v. McCrae*, 448 U.S. 297, 316 (1980) (holding that “[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency”). *But see* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1320 (1991):

Only women can be disadvantaged, for a reason specific to sex, through state-mandated restrictions on abortion. The denial of funding for Medicaid abortions obviously violates this right. The Medicaid issue connects the maternity historically forced on African American women integral to their exploitation under slavery with the motherhood effectively forced on poor women, many of whom are Black, by deprivation of government funding for abortions. For those who have not noticed, the abortion right has already been lost: this was when.

64. JOINT CTR. FOR POLITICAL & ECON. STUDIES, PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010: ADVANCING HEALTH EQUITY FOR RACIALLY AND ETHNICALLY DIVERSE POPULATIONS 1 (Dennis P. Andrulis et al. eds., 2010), available at <http://www.jointcenter.org/research/patient-protection-and-affordable-care-act-of-2010-advancing-health-equity-for-racially-and>.

65. *How The Health Care Law Benefits You*, U.S. DEP'T HEALTH & HUM. SERVS., <http://www.hhs.gov/healthcare/facts/bystate/Making-a-Difference-National.html> (last updated Dec. 31, 2013).

66. Stupak Amendment to H.R. 3962, 111th Cong. (2010) Rev. 108 (barring abortion coverage in “public option” portion of plan as well as barring inclusion of such coverage from any plan purchased by anyone receiving federal subsidy).

67. *Human Right to Health*, NAT'L ECON. & SOC. RIGHTS INITIATIVE, <http://www.nesri.org/programs/health> (last visited Feb. 13, 2014).

68. *See* Law & Versteeg, *supra* note 5; *Health Care is a Human Right*, AMNESTY INT'L USA, <http://www.amnestyusa.org/our-work/issues/poverty-and-human-rights/health-care-in-the-us?id=1021216> (last visited Feb. 13, 2014).

69. *See* Dorothy Samuels, *Where Abortion Rights are Disappearing*, N.Y. TIMES, Sept. 25,

### III. THE CONSTITUTION

Civil and political rights are enshrined in our Constitution. The Bill of Rights was drafted to protect the rights of male citizens to participate in civic and political life. They are worth most to those women who seek “formal” equality—who demand the same rights as men. When women seek freedom of speech, for example, they can rely on well-developed first amendment jurisprudence.<sup>70</sup>

When women demand reproductive rights or seek support for reproductive work, in contrast, they are on their own. These rights, and this work, focus on women’s experiences of conception, pregnancy, childbirth, and child-rearing. They are rarely encountered in traditional rights discourse.<sup>71</sup> The Supreme Court, however, has held in a long line of cases that “our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>72</sup> The parameters of that constitutional protection are discussed in the next section.

#### A. Reproductive Rights

The plaintiff in *Griswold v. Connecticut*<sup>73</sup> challenged a Connecticut statute criminalizing the provision of contraceptives and medical advice regarding their use. Citing earlier cases in which the Court had held that parents had a constitutionally-protected interest in deciding how their children were to be educated, the Court situated the right to privacy in the penumbra of the Ninth Amendment. But *Griswold* only protected married couples.<sup>74</sup> As Justice Douglas explained,

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2011, at SR14 (noting “newly intensified drive by anti-abortion forces”). See also JOINT CTR. FOR POLITICAL & ECON. STUDIES, *supra* note 64; see *infra* Part III.B.

70. See, e.g., Mary Becker, *Patriarchy and Inequality: Toward a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 24–25 (suggesting that, if women simply seek “a bigger piece of the pie” . . . the women who succeed will be those who are male-centered and male-identified”). See also Franklin, *supra* note 2, at 141 (noting that in the 1980s feminists criticized Ginsburg’s early work with male plaintiffs as “status-quo-affirming”).

71. As Brenda Cossman argues, “citizenship has always been sexed.” Brenda Cossman, *Sexual Citizens: Freedom, Vibrators, and Belonging*, in GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP 289 (Linda C. McClain & Joanna L. Grossman eds., 2009) (hereinafter GENDER EQUALITY); Men, too, have reproductive rights and these, too, may be denied. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1972) (holding unmarried father had custodial rights to his children after their mother died). The ways in which the denial—and the assurance—of men’s reproductive rights reproduce gender are beyond the scope of this Article.

72. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

73. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

74. *Id.* at 485.

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.<sup>75</sup>

As a practical matter, the availability of birth control pills gave married women unprecedented control over their own fertility, but the husband was still the decision maker in the traditional couple.<sup>76</sup> Reproductive rights were not extended to individuals, including unmarried women, until *Eisenstadt v. Baird* in 1972, in which the court struck a Massachusetts law allowing doctors and pharmacists to provide contraceptives only to married persons.<sup>77</sup>

Scholars have criticized the privacy rationale for reproductive rights since its first articulation.<sup>78</sup> Feminists have noted the downsides of “privacy” for women.<sup>79</sup> First, as Linda McClain observes: “privacy connotes female seclusion and subordination, leading to women’s underparticipation in society and vulnerability to violence in the home.”<sup>80</sup> Domestic violence is a well-known risk for women seeking abortions. As Justice Sandra Day O’Connor noted in striking Pennsylvania’s spousal notification law in *Casey*:

75. *Id.* at 485–86.

76. WILLIAM BLACKSTONE, COMMENTARIES \*442 (“By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything . . . .”) (footnote omitted). *See also* NORMA BASCH, IN THE EYES OF THE LAW 19–20 (1982) (noting that, “[t]he wife’s inferior status [in the common law] had a religious and metaphysical foundation in Western culture”); LERNER, *supra* note 10.

77. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). As Janet Dolgin notes, by applying the notion of individual autonomy to the family, the *Eisenstadt* court ignored the historic understanding of “family”. Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1545–46 (2004). For an insightful exploration, see Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women’s Movement*, 61 N.Y.U. L. REV. 589, 634–42 (1986) (explaining how the struggle for reproductive rights shaped, and was shaped by, the women’s movement).

78. As Justice Stewart observed, dissenting in *Griswold*, “[T]he Connecticut statute [is] an uncommonly silly law.” *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting); *see also* John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1979) (arguing that privacy lacks a coherent conceptual basis).

79. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93–102 (1987) (arguing that the public/private distinction has been detrimental to women).

80. Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759, 762 (1999).

[T]here are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. Many may have justifiable fears of physical abuse . . . Many may fear devastating forms of psychological abuse . . .<sup>81</sup>

Second, “privacy” is negative—it requires the state to refrain from interfering in our lives rather than imposing any affirmative duty to make them better. As Frances Olsen and others point out, grounding reproductive rights in privacy, accordingly, undercuts claims for public funding.<sup>82</sup> Until the passage of the Affordable Care Act, requiring health insurance to include contraception,<sup>83</sup> the United States generally failed to recognize affirmative reproductive rights.<sup>84</sup> This meant that American women, enjoyed only the reproductive rights they can afford.<sup>85</sup>

United States proponents of reproductive rights have long argued that these rights should be grounded in “equality.”<sup>86</sup> As Neil Siegel and Reva Siegel recently discovered, Justice Ginsburg relied on equality while representing a pregnant service woman in 1972.<sup>87</sup> As Anita Allen explains, the equality argument includes two propositions. First, “prohibiting abortion is a form of *prima facie* or *de jure* sex discrimination . . . [second] it results from constitutionally unacceptable stereotypes . . .”<sup>88</sup>

81. Planned Parenthood v. Casey, 505 U.S. 833, 893 (1992).

82. Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 134 (1990).

83. Health Res. & Serv. Admin. (HRSA), *Women's Preventive Services Guidelines*, U.S. DEP'T HEALTH & HUM. SERVS., <http://www.hrsa.gov/womensguidelines/> [hereinafter HRSA] (last visited Apr. 2, 2014) (providing an exception for religious employers).

84. See *supra* Part II.C.2.

85. See, e.g., Stupak Amendment to H.R. 3962, *supra* note 66 (describing effects of Stupak amendment).

86. CHAMALLAS, *supra* note 19, at 304; Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 419 (1995) [hereinafter Allen, *Reflections*].

87. Siegel & Siegel, *supra* note 2, at 773. Katharine Bartlett, then a law student, made a similar argument. Bartlett, *supra* note 18. See also Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 893–94 (1971); Law & Versteeg, *supra* note 5, at 779 (noting that the failure of the Constitution to assure women's rights is one of the features that makes it a global outlier).

88. Allen, *Reflections*, *supra* note 86, at 437 (emphasis added). As Ginsburg noted, “[t]hus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.” *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

But, there are problems with equality under constitutional doctrine. As Law notes: “[T]he development of modern constitutional sex equality doctrine has suffered from a lack of focus on biological reproductive differences between men and women.”<sup>89</sup> In addition, the Supreme Court only views sex-based classifications as “quasi-suspect.”<sup>90</sup> Unlike race, they do not trigger strict scrutiny. As Suzanne Goldberg has shown, this produced a hopelessly convoluted jurisprudence.<sup>91</sup> Like privacy doctrine, moreover, equal protection imposes no affirmative obligations on the state.

Third, as Martha Fineman, Robin West, and Ruth Colker have argued, “equality” doesn’t go far enough. As Fineman explains, “an impoverished sense of equality is embedded in our current legal doctrine. We understand equality in terms that are formal, focused on discrimination, and inattentive to underlying societal inequities.”<sup>92</sup> West, similarly, faults the legalistic safeguards of *Roe* and *Casey* for neglecting the social and economic circumstances in which reproductive choices are made.<sup>93</sup> Colker is the most concrete: “[a] woman, in my view, has the right to seek an abortion to protect the value of her life in a society that disproportionately imposes the burdens of pregnancy and child care on women and does not sufficiently

89. Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); see also Elizabeth M. Schneider, *The Synergy of Equality and Privacy in Women’s Rights*, 2002 U. CHI. LEGAL. F. 137, 147–50 (discussing intersection between privacy and equality in the context of reproductive rights).

90. *Craig v. Boren*, 429 U.S. 190, 220 (1976) (striking Oklahoma law setting a higher age limit for males than for females to purchase 3.2% beer because the sex-based classification was not “substantially related” to “important governmental objectives”).

91. Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481–85 (2004). Goldberg argues for a single standard for equal protection analysis. See generally Symposium, *Two Decades of Intermediate Scrutiny: Evaluating Equal Protection for Women*, 6 AM. U. J. GENDER SOC. POL’Y & L. 1 (1997). Law argues that the burden should be on the state in cases of sex discrimination: “[g]iven how central state regulation of biology has been to the subjugation of women, the normal presumption of constitutionality is inappropriate and the state should bear the burden of justifying its rule . . .” Law, *supra* note 89, at 1009.

Ratification of CEDAW would not necessarily subject gender-based regulations to the same standard as race-based regulations, however. As Charlesworth and Chinkin pointed out, the obligations imposed on states parties under the Women’s Convention require them to take “all appropriate measures without delay” in contrast to the “immediately binding” obligations imposed under the Race Convention. CHARLESWORTH & CHINKIN, *supra* note 23, at 45.

92. Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 2 (2008).

93. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009). West argues elsewhere that, “[m]othering children, as we presently socially construct that work . . . is incompatible with the basic rights and responsibilities of citizenship . . . .” Balkin, *supra* note 15, at 20. Assuring reproductive rights, for West, is “pathetically inadequate.” *Id.* at 21. But see Reva B. Siegel, *Introduction: The Constitutional Law and Politics of Reproductive Rights*, 118 YALE L.J. 1312, 1314–15 (criticizing West’s Yale symposium article for slighting the accomplishments of reproductive rights advocates).



sponsor the development and use of safe, effective contraceptives.”<sup>94</sup>

In addition, Ninth Amendment privacy analysis in the abortion cases also recognizes the State’s interest in “potential life.”<sup>95</sup> The woman’s right of privacy does not outweigh this interest as long as the state statute or regulation does not place “a substantial obstacle” in the path of a woman seeking an abortion.<sup>96</sup> This odd formulation begs the question at the core of the privacy analysis, i.e., whether a fetus is considered a “person.”<sup>97</sup> As Balkin and others have pointed out, if a fetus is a person from the moment of conception, allowing abortion in the case of incest or rape makes no more sense than excusing murder because the victim was produced from a coerced or incestuous union.<sup>98</sup> Siegel suggests that statutes permitting abortion in cases of rape or incest implicitly concede the point.<sup>99</sup>

### B. Reproductive Work

The U.S. Supreme Court has long held that reproductive work—bearing, caring for, raising and educating children—is protected from state interference under the Constitution. States cannot require parents to send their children to public school.<sup>100</sup> Nor can they prevent parents from having

94. Ruth Colker, *Feminism, Theology and Abortion: Toward Love, Compassion, and Wisdom*, 77 CAL. L. REV. 1011, 1050 (1989); see also RUTH COLKER, *ABORTION AND DIALOGUE: PRO-CHOICE AND AMERICAN LAW* (1992).

95. *Roe v. Wade*, 410 U.S. 113, 150 (1973).

96. *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). As Johnsen notes, “*Casey* allowed the government substantially greater authority to interfere with women’s reproductive choices. The Court overruled protective rulings from the 1980s and upheld the very types of restrictions it previously had held to be unconstitutional.” Dawn E. Johnsen, *A Progressive Reproductive Rights Agenda for 2020*, in *THE CONSTITUTION IN 2020*, at 255, 257 (Jack M. Balkin & Reva B. Siegel eds., 2009). But see Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 996 (2003) (arguing that *Casey* “implicates the human existence of millions of lives a year” referring to “human unborn child[ren]”).

97. Philip Alston, *The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child*, 12 HUM. RTS. Q. 156, 173 (1990).

98. Balkin, *supra* note 15, at 46–47. Mark Tushnet, *Revised Opinions in Roe v. Wade and Doe v. Bolton: TUSHNET, J., concurring*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 89 (Jack M. Balkin ed., 2005) (noting that, “[n]o prosecutor has ever returned a murder indictment charging the taking of the life of a fetus. This would not be the case if the fetus constituted human life”) (quoting Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOY. L.A. L. REV. 1, 9–10 (1969)).

99. “The statutory exception allowing women to have abortions if they conceive by rape indicates that the state’s decision to prohibit abortion rests on unarticulated assumptions about how women are to comport themselves sexually—a code the state enforces by selectively allowing women access to abortion.” Reva B. Siegel, *Revised Opinions in Roe v. Wade and Doe v. Bolton: SIEGEL, J., concurring*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 77 (Jack M. Balkin ed., 2005).

100. See generally *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

their children taught a foreign language in school.<sup>101</sup> While the precise scope of this protection is contested, especially with respect to abortion,<sup>102</sup> the basic right is well-established.

What is *not* contested— what is rarely even discussed— is that almost none of this protection receives state support. With the exception of public education, a few struggling federal programs,<sup>103</sup> and the recent ACA initiative,<sup>104</sup> reproductive work receives no support in the United States. While the “decision” whether to bear a child is protected as a fundamental liberty interest, paid leave to care for the newborn is not assured.<sup>105</sup> Parental choices regarding education are given considerable deference,<sup>106</sup> but if a

101. Meyer v. Nebraska, 262 U.S. 390 (1923).

102. Sixty-one state laws restricting access to abortion, including mandatory waiting periods and “demeaning ‘counseling’ sessions lacking a real medical justification,” were enacted during the first eight months of 2011. See Samuels, *supra* note 69, at SR14. Only twelve states have no such onerous restrictions. *Id.*

The scope of protection for pregnant workers, similarly is disputed. See, e.g., Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567 (2010); Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act’s Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15 (2009); Dina Bakst, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES (Jan. 30, 2012), <http://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html> (noting that, while “three-quarters of women now entering the work force will become pregnant on the job,” because of a gap between discrimination and disability laws, employers are not required to “accommodate most pregnant workers in any way”).

103. See Binyamin Appelbaum & Robert Gebeloff, *Even Critics of Safety Net Increasingly Depend on It*, N.Y. TIMES (Feb. 12, 2012), <http://www.nytimes.com/2012/02/12/us/even-critics-of-safety-net-increasingly-depend-on-it.html?pagewanted=all> (noting that the share of federal benefits to the poorest 20% has declined from 54% in 1979 to 36% in 2007). These programs include: The Children’s Health Insurance Program (“CHIP”), Head Start, Special Supplemental and Nutrition Program for Women, Infants and Children (“WIC”), and Vaccines for Children Program (“VFC”). *What is CHIP?*, INSUREKIDSNOW.GOV, <http://www.insurekidsnow.gov/chip/index.html> (last visited Feb. 14, 2014) (explaining the program that provides free or low-cost health insurance for eligible children up to age nineteen); *About Head Start*, HEAD START, <http://eclkc.ohs.acf.hhs.gov/hslc/hs/about> (last visited Mar. 27, 2014) (promoting “the school readiness of children ages birth to five from low-income families by enhancing their cognitive, social, and emotional development”); *Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)*, NUTRITION.GOV, <http://www.nutrition.gov/food-assistance-programs/wic-women-infants-and-children> (last visited Feb. 14, 2014) (safeguarding the nutritional health of low-income women and children age five and below); *Vaccines for Children Program*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vaccines/programs/vfc/index.html> (Feb. 14, 2014) (offering free vaccinations for children who otherwise would not receive them because they cannot afford them).

104. See HRSA, *supra* note 83.

105. See Family and Medical Leave Act, 29 U.S.C. § 2601 (2006). Even the two states that do provide paid leave do not ground the leave in their constitutions. *Id.*

106. See, e.g., Pierce v. Soc’y of Sisters, 268 U.S. 510, 535 (1925) (striking state statute requiring children to attend public school noting that “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations”); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that

state chooses to reduce funding in a non-discriminatory manner, the Constitution poses no obstacle. In fact, it is well settled that economic rights in general are *not* protected under the United States Constitution,<sup>107</sup> although several eminent scholars have argued that they should be.<sup>108</sup> The United States provides virtually no material support for reproductive work. What it does provide takes the form of policy preferences, which can be revoked.<sup>109</sup>

The Constitution is silent about the social importance of reproduction, that is, its importance to the larger community. As Sylvia Law pointed out twenty-five years ago, "Silence, absolute and deafening, is the central theme of the original founders' discussions of women and families."<sup>110</sup> The Constitution does not contemplate pregnant or nursing workers, and their children. Rather, it allows ongoing and widespread discrimination against them.<sup>111</sup> It ignores what Joan Williams calls "[o]ur [f]amily-[h]ostile [p]ublic [p]olicy,"<sup>112</sup> i.e., the dearth of support, from the lack of affordable, quality daycare to the inflexibility which distinguishes American workplaces

state cannot prevent parents from having their children learn a foreign language); see generally Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992) (criticizing cases for neglecting children's perspectives).

107. See, e.g., Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (no right to sleep in public places); Harris v. McRae, 448 U.S. 297 (1980) (holding no right to Medicaid funding for abortion); Lindsey v. Normet, 405 U.S. 56, 73–74 (1972) (holding no right to housing). See also Law & Versteeg, *supra* note 5 (noting that the failure of the Constitution to assure economic rights is one of the major features making it a global outlier).

108. See, e.g., Charles L. Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1105 (1986) (discussing the derivation of a "constitutional right to a decent material basis for life"); Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1628 (1988) ("[M]inimum protections' for the necessities of life . . . are preconditions for civic republican citizenship."); Frank I. Michelman, *The Supreme Court, 1968 Term, Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). See also Goodwin Lui, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203 (2008). Some economic rights are assured under state constitutions. See Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy"*, 44 HASTINGS L.J. 79 (1992).

109. See Samuels, *supra* note 69, at SR 14.

110. Sylvia Law, *The Founders on Families*, 39 U. FLA. L. REV. 583, 586 (1987). For a rich and evocative depiction of the tensions between the needs of the family and the demands of the state in the American colonies, see MARY BETH NORTON, *FOUNDING MOTHERS & FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY* (1996).

111. See, e.g., Grossman, *supra* note 102, at 575–78; Grossman & Thomas, *supra* note 102, at 23.

112. JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 33 (2010). See also David Leonhardt, *A Market Punishing to Mothers*, N.Y. TIMES (Aug. 4, 2010), <http://www.nytimes.com/2010/08/04/business/economy/04leonhardt.html> (noting that "[t]he main barrier [to gender equality] is the harsh price most workers pay for pursuing anything other than the old-fashioned career path. 'Women do almost as well as men today,' Ms. Waldfogel said, 'as long as they don't have children'").

from their European counterparts.<sup>113</sup>

#### IV. CEDAW

Cary Franklin provides a rich account of the development of gender equality in Sweden and its impact on Ginsburg.<sup>114</sup> Long after Ginsburg came home however, women in Europe, and indeed women throughout the world continued to work toward gender equality. Their efforts produced CEDAW, as well as a series of global conferences, and UN initiatives for women.<sup>115</sup>

CEDAW addresses the major American complaints regarding the support for reproductive work. Equality under CEDAW is more muscular than equality under American equal protection doctrine. First, CEDAW bars *all* forms of legal discrimination against women, public as well as private, intentional or inadvertent.<sup>116</sup> Second, it requires states to focus on the “underlying societal inequities” that concern Fineman<sup>117</sup> and, as West urges, to proactively address the social and economic circumstances in which reproductive choices are made.<sup>118</sup> Third, CEDAW imposes affirmative obligations on the state to support women’s rights, including but not limited to their reproductive rights. Finally, CEDAW explicitly focuses on reproductive work and the responsibilities of individual men, as well as the state, to support it.

##### A. Women’s Human Rights

CEDAW requires states to assure women’s human rights, including their rights to participate in social, economic, cultural, and political life on equal terms with men. These rights include the civil and political rights familiar to Americans from our own Constitution, such as the right to vote<sup>119</sup> and freedom of movement.<sup>120</sup> These rights also include less familiar

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113. WILLIAMS, *supra* note 112, at 34–35.

114. Franklin, *supra* note 2, at 97–105.

115. For a general introduction, see Barbara Stark, *Women’s Rights*, in 5 *ENCYCLOPEDIA OF HUMAN RIGHTS* 341 (David P. Forsythe ed., 2009).

116. See *infra* Part IV.A; Judith Resnik, *What’s Federalism For?*, in *THE CONSTITUTION IN 2020*, at 269, 275 (Jack M. Belkin & Reva B. Siegel eds., 2009).

117. See *supra* text accompanying note 92.

118. See *supra* text accompanying note 93.

119. CEDAW, *supra* note 6, at 194–95.

120. *Id.* at 196.

economic and social rights, such as the right to work<sup>121</sup> and the right to health.<sup>122</sup>

Thus, CEDAW assures positive as well as negative rights, imposing affirmative obligations on the state. Under CEDAW, moreover, rights are to be assured in actual, daily life. That is, CEDAW not only requires *formal* equality (equality of opportunity); it requires *result* equality.<sup>123</sup>

CEDAW's bar against "discrimination" is more robust than that set out in the 14<sup>th</sup> Amendment:

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>124</sup>

Under Article 2, furthermore, "States Parties condemn discrimination against women in all its forms [and] agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women . . . ."<sup>125</sup> Article 4 specifically provides for affirmative action "aimed at accelerating *de facto* equality . . . ."<sup>126</sup> CEDAW, in short, requires the state to assure actual equality between women and men, sooner rather than later.

121. *Id.* at 195–96.

122. *Id.* at 196.

123. CHARLESWORTH & CHINKIN, *supra* note 23, at 217; *see generally* MARTHA FINEMAN, *THE ILLUSION OF EQUALITY* (1990) (exploring the effect of family law, both instrumental and symbolic, on gender equality).

124. CEDAW, *supra* note 6, at 194.

125. *Id.* at 194–95.

126. *Id.* at 195. There is an enormous amount of literature on CEDAW. Some sources especially pertinent here include: Andrew Byrnes, *Human Rights Instruments Relating Specifically to Women with Particular Emphasis on Convention to Eliminate All Forms of Discrimination Against Women*, in *ADVANCING THE HUMAN RIGHTS OF WOMEN: USING INTERNATIONAL HUMAN RIGHTS STANDARDS IN DOMESTIC LITIGATION* 39 (Andrew Byrnes et al. eds., 1997); Rebecca J. Cook, *State Accountability for Violations of Women's Human Rights*, in *HUMAN RIGHTS OF WOMEN* 228 (Rebecca J. Cook ed., 1994); LARS ADAM REHOF, *GUIDE TO THE TRAVAUX PREPARATOIRES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN* (1993); Alda Facio & Martha I. Morgan, *Equity or Equality for Women? Understanding CEDAW's Equality Principles*, 60 ALA. L. REV. 1133 (2009).

### B. Reproduction and the Reproduction of Gender

CEDAW crucially, explicitly addresses reproduction and reproductive work.<sup>127</sup> Under Article 5, reproduction is both supported by the state and disaggregated from women's traditional roles. First, Article 5(a) requires states to "take all appropriate measures:"

To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women[.]<sup>128</sup>

CEDAW recognizes that the reproduction of gender is socially constructed, that it is neither immutable nor "natural," and that it violates women's rights. The "stereotyped roles" that Article 5 bars include that particular culture's "division of tasks by sex."<sup>129</sup> This is more ambitious than the bar on stereotyping envisioned in Ginsburg's early work, reflecting almost four decades of work by the international women's movement that first inspired her.<sup>130</sup>

In its responses to the reports filed by states parties, the Committee has clarified the scope of this provision, drawing on concrete examples from the Reports themselves. In Slovakia, for example, the Committee has noted "the persistence of traditional stereotypes regarding the roles and tasks of women and men in the family and in society at large."<sup>131</sup> Nigeria, similarly, reported on six programs undertaken to eliminate stereotypes pursuant to Article 5,

127. Article 10 of the Economic Covenant requires states to afford some protections to mothers, but CEDAW is the first human rights instrument to comprehensively address reproduction. See, e.g., CEDAW, *supra* note 6, Arts. 5, 11, 12, 14, and 16.

128. CEDAW, *supra* note 6, Art. 5. The effects, if any, of this prohibition on beauty pageants, drag queens, and what Robin West has called "women's hedonic lives" or pornography is beyond the scope of this Article. Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149 (2000); see generally Franklin, *supra* note 2, at 163–72 (describing implications of a bar on sex-role stereotyping on LGBT rights); Barbara Stark, *The Women's Convention, Reproductive Rights, and the Reproduction of Gender*, 18 DUKE J. GENDER & L. 223, 274–78 (2011) [hereinafter Stark, *Reproductive Rights*] (explaining why CEDAW requires the recognition of same-sex relationships).

129. See *supra* text accompanying note 14. The U.S. delegate repeatedly stressed that the father's responsibility for childcare be explicit in Article 5. REHOF, *supra* note 126, at 86–87.

130. See Franklin, *supra* note 2.

131. U.N. Comm. on the Elimination of All Forms of Discrimination Against Women (CEDAW), Concluding Observations of the Comm. on the Elimination of Discrimination Against Women: Slovakia, 41<sup>st</sup> Sess., June 30–July 2008, U.N. Doc. CEDAW/C/SVK/CO/4, at 4, available at [http://www.iwraw-ap.org/committee/pdf/41\\_concluding\\_observations/slovakia.pdf](http://www.iwraw-ap.org/committee/pdf/41_concluding_observations/slovakia.pdf) (recommending "that policies be developed and programmes implemented to ensure the eradication of traditional sex role stereotypes in the family, labor market, the health sector, academia, politics and society at large").

including a new “National Policy on Education . . . aimed at encouraging increased participation of the girl child in science and technology” and data indicating that women are “beginning to undertake those vocations which were previously considered masculine such as motor mechanic, welding, commercial drivers and motor-cyclists.”<sup>132</sup> In its *Concluding Observations*, the Committee: “welcome[d] the adoption by 18 states of the Child Rights Act, which sets the minimum age of marriage at 18 years” but noted with concern section 29 of the Constitution, which states that “a woman is deemed to be of full age upon marriage” and urged the repeal of the offending section without delay.<sup>133</sup>

The division of labor by sex may seem universal, such as the ubiquity of female nurses,<sup>134</sup> or it may not, such as the cultural ban in Saudi Arabia against female cashiers in supermarkets.<sup>135</sup> Article 5 bars all of these stereotypes, even as it recognizes men’s responsibility for reproductive work. Women, like men, have rights under CEDAW; and men, like women, are expected to take care of their children.<sup>136</sup>

As noted above, because reproductive rights focus on experiences—conception, pregnancy, childbirth—that affect women more directly than they affect men, these experiences are not reflected in traditional rights

132. U.N. Comm. on the Elimination of All Forms of Discrimination Against Women (CEDAW), Consideration of Reports Submitted by States Parties Under Article 18 of CEDAW: Sixth Periodic Report of States Parties: Nigeria, U.N. Doc. CEDAW/C/NGA/6, at 53 (Oct. 5, 2006), available at [http://www.iwraw-ap.org/resources/pdf/41\\_official\\_documents/nigeriaNGA6.pdf](http://www.iwraw-ap.org/resources/pdf/41_official_documents/nigeriaNGA6.pdf).

133. U.N. Comm. on the Elimination of All Forms of Discrimination Against Women (CEDAW), Concluding Observations of the Comm. On the Elimination of Discrimination Against Women: Nigeria, 41<sup>st</sup> Sess., June 30–July 2008, U.N. Doc. CEDAW/C/NGA/CO/6, at 5, available at <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-NGA-CO-6.pdf>. In addition, “[t]he Committee noted[d] the continued high incidence of female genital mutilation in some areas of the country . . . [and] the absence of national legislation prohibiting this harmful traditional practice[.]” and also went beyond the subjects addressed by Nigeria to focus on “the persistence of patriarchal attitudes and deep-rooted stereotypes concerning women’s roles and responsibilities that discriminate against women and perpetuate their subordination within the family and society . . . [and] the persistence of entrenched harmful traditional and cultural norms and practices, including widowhood rites and practices.” *Id.* at 4–5.

134. See, e.g., WORLD BANK, GENDER ISSUES IN AGRICULTURAL LABOR (2007); *Some Occupations Becoming More Gender-Neutral*, OCCUPATIONAL OUTLOOK Q. 48 (Winter 2004–05), available at <http://www.bls.gov/opub/ooq/2004/winter/oochart.pdf> (noting that men in United States increased their share of employment in nursing between 1983 and 2002, although the field remains dominated by women).

135. See, e.g., Fatima Sidiya, *Debate Rages Over Saudi Women Working as Cashiers*, ARAB NEWS (Aug. 18, 2010), <http://arabnews.com/saudiarabia/article106238.ece?>. See generally Margarita Estevez-Abe, *Gendering the Varieties of Capitalism: A Study of Occupational Segregation by Sex in Advanced Industrial Societies*, 59 WORLD POL. 142, 143 (2006) (noting “genuine puzzles” in cross-national patterns).

136. See NAGLE, *supra* note 15 (explaining “rightsholder” and “caregiver” stereotypes in Aristotles’s *polis*).

discourse.<sup>137</sup> CEDAW recognizes this omission and requires states parties to rectify it. Reproductive work must be recognized and respected by the state; protected from infringement by non-state third parties, and affirmatively supported. While CEDAW does not explicitly assure the right to abortion, reflecting the lack of consensus among states,<sup>138</sup> CEDAW bars the denial of women's reproductive rights.<sup>139</sup>

Second, Article 5(b) requires the state to recognize maternity as a "social function" and to educate men to share in reproductive work:

(b) To ensure that family education includes a proper understanding of maternity as a social function and the *recognition of the common responsibility of men and women in the upbringing*

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137. See *supra* Part II.A.

138. See, e.g., Law No. 239 of 24 Mar. 1970 on the Interruption of Pregnancy, *amended by*, Law No. 564 of 19 July 1978 and Law No. 572 of 12 July 1985 (Finland), *available at* <http://cyber.law.harvard.edu/population/abortion/Finland.abo.htm> (last visited Feb. 27, 2014). See generally David Bradley, *Convergence in Family Law: Mirrors, Transplants and Political Economy*, 6 MAASTRICHT J. EUR. & COMP. L. 127 (1999); Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 605 (1978); Florian Miedel, *Is West Germany's 1975 Abortion Decision a Solution to the American Abortion Debate? A Critique of Mary Ann Glendon and Donald Kommers*, 20 N.Y.U. REV. L. & SOC. CHANGE 471, 475 (1993–94).

The CEDAW Committee, moreover, has criticized states for prohibiting abortion. See, e.g., LUISA BLANCHFIELD, CONG. RESEARCH SERV., THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW): ISSUES IN THE U.S. RATIFICATION DEBATE 13 (2009), *available at* [http://www.hrcnc.org/Human\\_Rights\\_Documents\\_files/UN\\_CEDAW\\_issues.pdf](http://www.hrcnc.org/Human_Rights_Documents_files/UN_CEDAW_issues.pdf) (recommending that Mexico, "review their legislation so that, where necessary, women are granted access to rapid and easy abortion." More recently, in 2007, the Committee urged Poland "to ensure that women seeking legal abortion have access to it, and that their access is not limited by the use of the conscientious objection clause.") *Id.* (citations omitted). The Committee has also pointed out that, "[i]t is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women." U.N. Comm. on the Elimination of Discrimination Against Women (CEDAW), 20th Sess., Jan. 19–Feb. 5, 1999 & 21st Sess., Jun. 7–25, 1999, U.N. Doc. A/54/38/Rev. 1; GAOR, 54th Sess., Supp. No. 38 (1999) at ¶ 11. *But see id.* at 13 (noting that CEDAW has been ratified without RUDs by several states limiting abortion). "Currently, over 60% of the world's people live in countries where induced abortion is permitted either for a wide range of reasons or without restriction as to reason. In contrast, about 26% of all people reside in countries where abortion is generally prohibited." CTR. FOR REPRODUCTIVE RIGHTS, THE WORLD'S ABORTION LAWS MAP 2013 UPDATE (June 2013), *available at* [http://www.reproductiverights.org/pdf/pub\\_fac\\_abortionlaws.pdf](http://www.reproductiverights.org/pdf/pub_fac_abortionlaws.pdf) (listing countries).

139. CEDAW, *supra* note 6, at art. 5. As Reva B. Siegel notes, this is crucial:

Perhaps the most prominent feature of the sexual equality approach to reproductive rights is its attention to the social as well as physical aspects of reproductive relations. A sex equality analysis is characteristically skeptical of the traditions, conventions, and customs that shape the sex and family roles of men and women.

Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 817 (2007); See, e.g., Berta E. Hernandez, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309 (1991).



*and development of their children . . . (emphasis added)*<sup>140</sup>

As noted in a leading human rights text, “[t]he breadth and aspiration of [Article 5] can be described only as striking.”<sup>141</sup> Article 5 is “striking” in at least two ways. First, and crucially, like Ginsburg’s early reliance on male plaintiffs, it explicitly recognizes that gender stereotypes limit men as well as women and that any meaningful notion of “equality” must address both.<sup>142</sup> Second, as American critics of equal protection have long urged, CEDAW recognizes and requires the state to support “maternity as a social function.”<sup>143</sup>

Later articles explicitly protect women’s reproductive rights and situate reproduction in a social and cultural context. Article 11.2, for example, sets out the measures to be taken by states to “prevent discrimination . . . on the grounds of marriage or maternity and to ensure [women’s] effective right to work . . . .”<sup>144</sup> These measures include the prohibition of dismissal for pregnancy or maternity leave,<sup>145</sup> maternity leave with pay or “comparable social benefits,”<sup>146</sup> and the “necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment . . . of child-care facilities.”<sup>147</sup> Article 12 requires the state to “ensure access to healthcare services, including those related to family planning” and, more specifically, to “ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”<sup>148</sup> Article 14 reiterates the right to family planning

140. CEDAW, *supra* note 6, at art. 5.

141. HENRY STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 184 (2008).

142. See Franklin, *supra* note 2, at 86–87 (noting that “when it became clear that the [Women’s Rights Project] was serious about establishing the right of men to be free from sex discrimination, the laughter turned to confusion and disbelief, and, in some cases, to anger and disgust”).

143. See, e.g., Law, *supra* note 89; Fineman, *supra* note 92; West, *supra* note 93; Colker, *supra* note 94.

144. CEDAW, *supra* note 6, at Art. 11.2.

145. *Id.* at Art. 11.2(b).

146. *Id.*

147. *Id.* at Art. 11.2(c).

148. The Committee’s General Recommendation No. 24 elaborates on Article 12.2, addressing women’s access to health care, including family planning services. For a more detailed formulation of these rights, see the AFRICAN COMM’N ON HUMAN & PEOPLES’ RIGHTS, *PROTOCOL TO THE AFRICAN CHARTER ON HUMAN & PEOPLES’ RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA* (Nov. 25, 2005), available at [http://www.achpr.org/files/instruments/women-protocol/achpr\\_instr\\_proto\\_women\\_eng.pdf](http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf). See generally CTR. FOR REPRODUCTIVE RIGHTS BRIEFING PAPER, *THE PROTOCOL ON THE RIGHT OF WOMEN IN AFRICA: AN INSTRUMENT FOR ADVANCING REPRODUCTIVE AND*

services for rural women in particular. Finally, Article 16 requires states to “take all appropriate measure to eliminate discrimination against women in all matters relating to marriage and family relations . . . .”<sup>149</sup>

It is undisputed that actual compliance with CEDAW varies enormously. While reports from Sweden, for example, demonstrate ongoing progress,<sup>150</sup> other states persistently violate the treaty.<sup>151</sup> Where those seeking gender equality have access to the law, however, CEDAW has become a mainstay of the legal culture.<sup>152</sup> As explained in the next section, it could play a similar role in the United States.<sup>153</sup>

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SEXUAL RIGHTS (Feb. 2006), available at [http://reproductiverights.org/sites/default/files/documents/pub\\_bp\\_africa.pdf](http://reproductiverights.org/sites/default/files/documents/pub_bp_africa.pdf).

149. CEDAW, *supra* note 6, Art. 16. Article 16 has received an unprecedented number of reservations. Rebecca Cook, *Reservations to the Convention on the Elimination of All forms of Discrimination Against Women*, 30 VA. J. INT’L L. 643 (1990). Two States Parties to the Convention—Malta and Monaco—“stated in their reservations to CEDAW that they do not interpret Article 16(1) (e) as imposing or forcing the legalization of abortion in their respective countries.” BLANCHFIELD, *supra* note 138, at 14.

150. U.N. Comm. on the Elimination of Discrimination Against Women (CEDAW), Consideration of Reports Submitted by States Parties Under Article 18 of CEDAW: Combined Sixth & Seventh Periodic Report of States Parties: Sweden, U.N. Doc CEDAW/C/SWE/7 (Sept. 14, 2006), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/3697f82210b82fc3c125729c0040c6b6/\\$FILE/N0655987.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/3697f82210b82fc3c125729c0040c6b6/$FILE/N0655987.pdf).

151. See *Reporting Status by Country: Afghanistan: CEDAW*, OFF. HIGH COMM’R FOR HUM. RIGHTS, <http://www.unhchr.ch/tbs/doc.nsf/5038ebdcb712174dc1256a2a002796da/80256404004ff315c125638c005c007e?OpenDocument> (last visited Feb. 19, 2014) (Afghanistan has ratified CEDAW); see *Reporting Status by Country: Yemen: CEDAW*, OFF. HIGH COMM’R FOR HUM. RIGHTS, <http://www.unhchr.ch/tbs/doc.nsf/5038ebdcb712174dc1256a2a002796da/760d1bf29696deb8025674e003bf948?OpenDocument> (last visited Feb. 19, 2014) (Yemen has ratified CEDAW and has filed several Reports).

See *Country Reports on Human Rights Practices 2010*, U.S. DEPT. STATE (Apr. 4, 2011), <http://www.state.gov/j/drl/rls/hrrpt/2010/> (noting that several LDCs, including “Afghanistan, Bangladesh and Yemen, have persistent human rights problems including . . . violence and societal discrimination against women”).

152. See, e.g., *World’s Women*, *supra* note 31; Rachel A. Cichowski, *Women’s Rights, the European Court, and Supranational Constitutionalism*, 38 LAW. & SOC’Y REV. 489 (2004) (focusing on the role of the European Court of Justice in the creation of women’s rights); A, B & C v. Ireland, [2010] Eur. Ct. H.R. 2032 (Dec. 16 2010) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102332> (holding that Ireland had failed to implement the constitutional right to a legal abortion in violation of Article 8’s guarantee of the right to respect for private and family life); Carson Osberg, *Inter-American Court Holds that Mexico Violated the Human Rights of Two Women Raped by Mexican Military Personnel*, HUMAN RIGHTS BRIEF (Nov. 16, 2010) <http://hrbrief.org/2010/11/inter-american-court-holds-that-mexico-violated-the-human-rights-of-two-women-raped-by-mexican-military-personnel/>; But see Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’L L. 171 (2003) (noting problems in ascertaining causality).

153. See Law & Versteeg, *supra* note 5, at 69 n.203 (describing a “substitution effect” in which treaty rights substitute for constitutional rights). This is particularly useful where, like here, the Constitution is rarely amended.

### C. In the United States

Despite our dismal record with respect to human rights treaties, Section 1 below assumes that the United States not only ratifies, but actually *complies* with CEDAW. Section 2 explains how this would affect reproductive rights and reproductive work in this country. Section 3 describes how this builds on broader changes in the labor force already underway.

#### 1. Assuming Good Faith

Ratification of CEDAW will transform the legal landscape in the United States, for men as well as for women, if it is ratified in good faith. This is a big “if.” All of the major human rights treaties ratified by the United States have been accompanied by a package of reservations, understanding, and declarations (“RUDs”) intended to limit their impact.<sup>154</sup> This both results from the United States’ long and troubled history with respect to international human rights and perpetuates that history.<sup>155</sup>

The Obama administration has promised to do better. It has directed the Senate Foreign Relations Committee to move forward on CEDAW.<sup>156</sup> Harold Koh, then Legal Advisor to the President, confirmed the President’s intent to ratify CEDAW as recently as October 2011, when he also reaffirmed the Administration’s commitment to human rights.<sup>157</sup> Taking the Administration at its word, the rest of this section assumes that the United States ratifies CEDAW in good faith and analyses CEDAW’s effects on United States law.

154. See, e.g., S. EXEC. DOC. NO. 102-23, at 19 (1992) (“[T]he [Civil] Covenant will not create a private cause of action in U.S. courts.”).

155. In 1953, Senator Bricker of Ohio proposed an amendment to the United States Constitution which would require an act of Congress before any human rights treaty could become law in the United States. The Eisenhower Administration was able to defeat the Bricker Amendment, but only by promising not to ratify any human rights treaties. LOUIS B. SOHN & THOMAS BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 964–65 (1973). See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 349 (1995) (suggesting that, as a practical matter, Bricker has prevailed).

156. Letter from Richard R. Verma, Assistant Sec’y of Legislative Affairs, to the Hon. John F. Kerry, Chairman, Comm. on Foreign Relations. See Press Release, Nat’l. Org. for Women, CEDAW Hearing Encouraging, U.S. Ratification Long Overdue (Nov. 19, 2010), available at <http://www.now.org/press/11-10/11-19.html?printable> (applauding Senator Dick Durbin “for chairing a first-ever Judiciary Committee hearing . . . on ratification of the [CEDAW]”). Ratification of CEDAW has been on the agenda for a long time. See, e.g., MALVINA HALBERSTAM & ELIZABETH DEFEIS, *INTERNATIONAL CONVENTIONS: AN ALTERNATIVE TO THE ERA?* (1987).

157. Harold Koh, Sterling Professor of Int’l Law, Yale Law, Address of Fordham Law School International Law Weekend (Oct. 23, 2011); see also Harold Hongju Koh, *America and the World, 2020*, in *THE CONSTITUTION IN 2020*, at 313 (Jack M. Balkin & Reva B. Siegel eds., 2009).

## 2. Reproductive Rights and Reproductive Work

CEDAW would supersede, rather than overrule, the line of cases beginning with *Griswold*,<sup>158</sup> and including *Eisenstadt*,<sup>159</sup> *Roe v. Wade*,<sup>160</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>161</sup> and *Gonzales v. Carhart*.<sup>162</sup> That is, reproductive rights, including the right to contraception and abortion, would no longer be grounded exclusively in Ninth Amendment privacy. Rather, these rights would also be assured by CEDAW's affirmative guarantees and protected by its bar on the reproduction of gender.<sup>163</sup> As discussed above,<sup>164</sup> CEDAW recognizes the obligation of the larger community to provide material support for maternity—before, during, and after birth. As Law explains, this is crucial to women's equality, which requires nothing less than the “transformation of the family, child rearing arrangements, the economy, the wage labor market, and human consciousness.”<sup>165</sup>

Under Article 12, all American women would have access to contraception, which would probably limit the need for abortion.<sup>166</sup> The recent development of an after-sex pill that can prevent pregnancy if taken within five days of intercourse<sup>167</sup> may further reduce the number of

158. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965).

159. See generally *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

160. *Roe v. Wade*, 410 U.S. 113 (1973) (holding that under the Ninth Amendment, women have a right to abortion subject to the state's interest in protecting the developing fetus).

161. *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) (affirming the “essential holding” of *Roe*, while allowing the state to promote its “profound interest in potential life, throughout pregnancy” so long as the measures adopted by the state do not constitute an “undue burden”).

162. *Gonzales v. Carhart*, 550 U.S. 124, 127 (2007).

163. For an in-depth analysis of abortion under CEDAW, see Stark, *Reproductive Rights*, *supra* note 128, at 290–94.

164. See *supra* Part III.B.

165. Law, *supra* note 89, at 956; see Leonhardt, *supra* note 112 (noting that, “[w]ith Australia's recent passage of paid [parental] leave, the United States has become the only rich country without such a policy”).

166. Some data indicate that the majority of American women who have had abortions said that they were using contraceptives when they became pregnant. Balkin, *supra* note 15, at 5. But see Gardiner Harris, *Panel Recommends Approval of After-Sex Pill to Prevent Pregnancy*, N.Y. TIMES (June 17, 2010), <http://www.nytimes.com/2010/06/18/health/policy/18pill.html> (noting that “more than one million women who do not want to get pregnant are estimated to have unprotected sex every night in the United States”).

167. Harris, *supra* note 166 (noting “dispute [as to] whether the [new] drug works by delaying ovulation . . . or by preventing a fertilized egg from implanting itself in the uterus”); Nicholas D. Kristof, *Another Pill That Could Cause a Revolution* (July 31, 2010), <http://www.nytimes.com/2010/08/01/opinion/01kristof.html> (describing misoprostol, which is a single drug that may make abortion safer and easier around the world); Emily Bazelon, *The New Abortion Providers*, N.Y.

abortions sought.<sup>168</sup> The use of teleconferencing to enable women in the first nine weeks of pregnancy to obtain prescriptions for abortion pills,<sup>169</sup> moreover, is likely to reduce the number of surgical, as opposed to medical abortions.<sup>170</sup> American abortion law, however, would also be affected.

CEDAW would establish a federal floor, situating abortion firmly in the context of women's reproductive health. This has been obscured in this country by the complicated politics of abortion. Ginsburg viewed *Roe v. Wade* as a political mistake, for example, which "prolonged divisiveness and deferred stable settlement of the issue."<sup>171</sup> Justice William Brennan also thought it would have been wiser to wait and see what the legislatures might do, rather than set out *Roe's* trimester framework.<sup>172</sup> More recently, Neal Devins has argued that public opinion drives the law in this context, so public opinion should be addressed before legal reform is attempted.<sup>173</sup> Reva Siegel has carefully documented the ways in which "constitutional culture channels social movement conflict"<sup>174</sup> and how the right has tailored

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TIMES, July 14, 2010, (Magazine), at 30, 44, available at <http://www.nytimes.com/2010/07/18/magazine/18abortion-t.html?pagewanted=all> (noting that, "almost 90 percent of the abortions in the U.S. are performed before 12 weeks; in addition, four years ago, the proportion of procedures performed before 9 weeks reached 62 percent").

The morning-after pill, which is not a form of abortion, has been available for many years. See, e.g., Editorial, *Respect for Women in Uniform*, N.Y. TIMES (Feb. 14, 2010), <http://www.nytimes.com/2010/02/15/opinion/15mon3.html> (commending Pentagon's decision to make morning-after emergency contraception available to women in the military, and criticizing remaining rules making abortions available only in cases of rape, incest, or when women's lives are endangered, and requiring women to pay for such abortions).

168. Harris, *supra* note 166 (citing the Office of Population Research at Princeton University: "more than one million women who do not want to get pregnant are estimated to have unprotected sex every night in the United States, and more than 25,000 become pregnant every year after being sexually assaulted. Half of all pregnancies in the United States are unintended. . .").

169. Monica Davey, *Abortion Drugs Given in Iowa via Video Link*, N.Y. TIMES (June 8, 2010), <http://www.nytimes.com/2010/06/09/health/policy/09video.html?gwh=7DA4C1F87C61AF041981EB938B695E69> (noting that 1,500 abortions have been performed in Iowa using teleconferencing equipment at sixteen Iowa clinics since June 2008).

170. Bazelon, *supra* note 167, at 46 (noting that, "[a]bortion remains the most common surgical procedure for American women; one-third of them will have one by the age of 45. The number performed annually in the U.S. has largely held steady: 1.3 million in 1977 and 1.2 million three decades later").

171. Balkin, *supra* note 15, at 11.

172. *Id.* at 10.

173. See generally Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318 (2009).

174. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1323 (2006) (explaining how "equal protection doctrine prohibiting sex discrimination was forged in the Equal Rights Amendment's defeat").

its arguments to reflect cultural change.<sup>175</sup> But as Jeffrey Toobin notes, the efforts of pro-choice centrists to be respectful of their opponents comes at a high cost to women's health.<sup>176</sup>

The Roberts Court is apparently willing to leave reproductive rights to the states.<sup>177</sup> As Dawn Johnsen notes, "[s]ince *Casey*, states have adopted literally hundreds of abortion restrictions, reflecting an incremental, multitiered strategy to create "abortion-free" states and to deter women from having abortions, often through deception."<sup>178</sup> These restrictions, even if upheld under the Constitution, could certainly be challenged under CEDAW's explicit protections.<sup>179</sup> As international law, moreover, under the Supremacy Clause CEDAW would trump inconsistent state law regarding reproductive rights.<sup>180</sup>

It would also trump inconsistent state law regarding reproductive work. As noted earlier, the United States provides less support for reproductive work than any other industrialized state.<sup>181</sup> This results in greater parity

175. See generally Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008) (explaining how the right has tailored its arguments).

176. Jeffrey Toobin, *Not Covered*, NEW YORKER (Nov. 23, 2009), [http://www.newyorker.com/talk/comment/2009/11/23/091123taco\\_talk\\_toobin](http://www.newyorker.com/talk/comment/2009/11/23/091123taco_talk_toobin).

177. Charles M. Blow, *Abortion's New Battle Lines*, N.Y. TIMES (Apr. 30, 2010), <http://www.nytimes.com/2010/05/01/opinion/01blow.html?gwh=1276FC18B804AED2B5AB101F40EA923C> (describing the "rash of states [that have] rushed to restrict access to abortion . . . . It is a striking series of laws, enacted mostly by men, that seek legal control over women's bodies. I happen to agree with Representative Janet Long of Florida, who said on Friday that you should 'stand down if you don't have ovaries.'").

178. Johnsen, *supra* note 96, at 261; see Erik Eckholm, *New Laws in 6 States Ban Abortions After 20 Weeks*, N.Y. TIMES, June 27, 2011, at A10 (citing "fetal pain," despite the lack of scientific support); see also Samuels, *supra* note 69.

179. See *supra* Part IV.B (describing scope of articles 11 through 14). As noted above, while CEDAW does not explicitly assure the right to abortion, the Committee has criticized states for prohibiting it. But see Johnsen, *supra* note 96, at 258 (noting that while "litigation has served as the primary and most effective weapon against dangerous abortion restrictions . . . [a] Court-centered strategy for the coming decades would be dangerously inadequate").

180. See, e.g., *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (striking down Massachusetts's law on Burma as incompatible with federal law). As noted earlier, this assumes the ratification of the treaty in good faith. See *supra* Part IV.C.1. Since the *Medellin* fiasco in 2008, *Medellin v. Texas*, 552 U.S. 491 (2008), in which Texas refused to accede to then-President George W. Bush's request to stay an execution, leaving the United States in violation of international law, "good faith" requires either language in the transmittal letter indicating that the treaty is "self-executing;" see Carlos Manuel Vázquez, *Treaties As Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008) (explaining why the presumption that treaties are self-executing endures after *Medellin*); ratification as a congressional-executive agreement, see Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008); or federal legislation having the same effect. *Id.*

181. See *supra* Part I.C.

between male and female wage earners here *until* women have children.<sup>182</sup> Historically, American women have paid the price in the form of weakened labor force attachment. Women are now the majority in the workforce, however, and they are also better educated than men.<sup>183</sup> Patterns are changing.

Researchers describe two distinct trends. Women without a four-year college degree are not waiting to marry before having children. As a recent front-page headline announced, *Unwed Mothers Now a Majority Before Age of 30*.<sup>184</sup> These women see little advantages to marriage, which may well make them ineligible for the few benefits, such as food stamps and child care credit, otherwise available to mothers.<sup>185</sup>

Women with four-year college degrees, in contrast, “overwhelmingly marry before having children.”<sup>186</sup> However, even among educated young couples, who can afford services like nannies and high quality pre-school, someone has to find and coordinate a patchwork of private options. Their counterparts in Germany and France do not.<sup>187</sup> This puts young Americans at a competitive disadvantage in an increasingly global marketplace.

CEDAW requires state support for reproductive rights and reproductive work, for men as well as women. As Ginsburg pointed out forty years ago, this matters for men as well as for women. As explained in the next section, it has never mattered more for American men.

### 3. The End of Men?<sup>188</sup>

Rosin argues that “thinking and communicating have come to eclipse physical strength and stamina as the keys to economic success.”<sup>189</sup> As she notes, “three-quarters of the 8 million jobs lost were lost [during the Great Recession] by men. The worst-hit industries were overwhelmingly male and deeply identified with macho: construction, manufacturing, high finance.”<sup>190</sup>

182. *Id.*

183. Rosin, *supra* note 7, at 3.

184. Jason DeParle & Sabrina Tavernise, *For Women Under 30, Most Births Occur Outside Marriage*, N.Y. TIMES (Feb. 17, 2012), <http://www.nytimes.com/2012/02/18/us/for-women-under-30-most-births-occur-outside-marriage.html?pagewanted=all> (“The fastest growth in the last two decades has occurred among white women in their 20s. . .”).

185. *Id.*

186. *Id.*

187. See Miranda, *supra* note 26 (describing state support of infant and early childcare).

188. Rosin, *supra* note 7.

189. *Id.*

190. *Id.*

Like Ginsburg's plaintiffs, these men are the casualties of an outmoded sex/gender system.<sup>191</sup> Like them, these men need support. Their employment prospects are dim: "[m]en dominate just two of the 15 job categories projected to grow the most over the next decade: janitor and computer engineer. Women have everything else—nursing, home health assistance, child care, food preparation."<sup>192</sup> While women eagerly take jobs once reserved for men,<sup>193</sup> men remain reluctant to take jobs traditionally held by women. Like many gender issues, this is overdetermined.<sup>194</sup> Some of these jobs require social intelligence that they lack.<sup>195</sup> Others require bachelor's degrees, almost 60 percent of which are now awarded to women.<sup>196</sup> The most intractable factor may be that they are perceived as "female" jobs. Men view them as "unmanly."<sup>197</sup>

CEDAW confronts these perceptions head-on by barring the reproduction of gender.<sup>198</sup> For men like Ginsburg's plaintiffs,<sup>199</sup> CEDAW affirms caregiving work.<sup>200</sup> For men who have shied away from such work because of its perceived stigma, CEDAW might encourage them to take advantage of state-supported family leave, for example, or flex-time.<sup>201</sup>

191. See Rubin, *supra* note 11.

192. Rosin, *supra* note 7.

193. Women now hold 51.4% of managerial and professional jobs, and 45% of the associate positions in law firms. *Id.* Even sixty-five years ago, American women went to work in the factories when American men went off to fight in World War II. See RUTH MILKMAN, *GENDER AT WORK: THE DYNAMICS OF JOB SEGREGATION BY SEX DURING WORLD WAR II* (1987) (explaining how women were encouraged to work in factories during World War II to replace the men in the military).

194. See *supra* Part II.A.

195. Rosin, *supra* note 7.

196. *Id.*

197. See *supra* text accompanying note 18.

198. As Franklin notes, the benefits for men of the eradication of gender stereotypes have long been recognized in Sweden. See Franklin, *supra* note 2, at 97. American feminists, including Justice Ginsburg, quickly grasped the significance of this argument. See *id.*

199. See, e.g., Franklin *supra* note 2, at 104–05. This would include the growing numbers of single fathers in this country, see NANCY E. DOWD, *REDEFINING FATHERHOOD* (2000), as well as the growing numbers of married fathers assuming caregiving responsibilities. See also James Poniewozik, *Up All Night, Modern Family and TV's Feminism for Men*, TIME (Nov. 17, 2011), [entertainment.time.com/2011/11/17/up-all-night-modern-family-and-tvs-feminism-for-men/](http://entertainment.time.com/2011/11/17/up-all-night-modern-family-and-tvs-feminism-for-men/) (noting the show's efforts to convey "the complexity of [the new father's] position: He made the decision to stay at home while his wife worked willingly and without drama, and he knows that there can still be stigma and awkwardness around stay-at-home dads—yet he can't help carrying some of that same baggage").

200. See *supra* Part III.B.

201. See Katrin Bennhold, *Working Part-Time in the 21st Century*, N.Y. TIMES (Dec. 30, 2010), <http://www.nytimes.com/2010/12/30/world/europe/30iht-dutch30.html?pagewanted=all>



CEDAW, over time, might allow even the diehards to tackle pink collar jobs.<sup>202</sup> It might encourage children, including the majority of American children who are now being raised in “non-traditional families,”<sup>203</sup> to take a more relaxed approach to gender in general.<sup>204</sup> CEDAW, in sum, would build on developments already well underway.<sup>205</sup>

## V. CONCLUSION

As I have explained elsewhere, Justice Ginsburg’s early anti-stereotyping work has been rediscovered by a new generation of scholars. This Article has explained why, as Ginsburg herself has recognized, anti-stereotyping is only the beginning.<sup>206</sup>

Part I explained how gender stereotypes are perpetuated, and the consequences for men, women, and the societies in which they live. Part II analyzed the limitations of the Constitution in this context, specifically in its failure to recognize women’s rights, including their reproductive rights, as well as its failure to recognize economic rights of women. Because of these lacunae, the Constitution cannot effectively be used to address and combat gender stereotypes. Part III showed how CEDAW can be used to address and combat gender stereotypes, and further demonstrated why CEDAW is as necessary for American men as it is for American women.

Finally, this Article has drawn on *The End of Men* to explain the

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(quoting Remco Vermaire, the youngest partner at his high-powered law firm, “[w]orking four days a week is now the rule rather than the exception among my friends,” said Mr. Vermaire, the [firm’s] first [lawyer] to take a ‘daddy day’ in 2006. Within a year, all the other male lawyers with small children in his firm had followed suit.”); Rosin, *supra* note 7 (noting that, “[f]or recent college graduates of both sexes, flexible arrangements are at the top of the list of workplace demands, according to a study published last year in the *Harvard Business Review*.”).

202. See *supra* text accompanying notes 188–95.

203. JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE 1, 9 (1996).

204. See Canning & White, *supra* note 17 (noting that “pink is in” for young boys); Jennifer Conlin, *The Freedom to Choose Your Pronoun*, N.Y. TIMES (Sept. 30, 2011), [http://www.nytimes.com/2011/10/02/fashion/choosing-a-pronoun-he-she-or-other-after-curfew.html?\\_r=1&](http://www.nytimes.com/2011/10/02/fashion/choosing-a-pronoun-he-she-or-other-after-curfew.html?_r=1&) (describing American teenagers who view gender as a choice).

205. See Franklin, *supra* note 2 (describing feminist activism in the 1970s). More recently, American scholars such as Nancy Levit and Nancy Dowd have set out the benefits of “feminism for men.” Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037 (1996) (discussing how gender stereotypes harm men); see, e.g., DOWD, *supra* note 199 (explaining how men have been excluded or marginalized in connection with nurturing work); Kyle Spencer, *What’s New at the PTA, Dad?*, N.Y. TIMES (Feb. 17, 2012), [http://www.nytimes.com/2012/02/19/fashion/fathers-Shift-the-Dynamics-of-the-PTA.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/02/19/fashion/fathers-Shift-the-Dynamics-of-the-PTA.html?pagewanted=all&_r=0) (noting burgeoning participation of fathers in PTAs nationwide).

206. See Law & Versteeg, *supra* note 5.

“economic and cultural power shift from men to women.”<sup>207</sup> The sexual division of labor,<sup>208</sup> widely viewed as “natural” only forty years ago,<sup>209</sup> is increasingly recognized as an anachronism, for men as well as for women, as Ginsburg insisted even then.

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207. See Rosin, *supra* note 7.

208. See *supra* text accompanying note 8.

209. See, e.g., Bartlett, *supra* note 18.

