Marriage Equality, Gender Equality, and the Women's Convention

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“Want gender equality? Die childless at 30.”
– Joan Williams

* Professor of Law, Hofstra Research Fellow, and Associate Dean of Intellectual Life, Maurice A. Deane School of Law, Hofstra University. I am deeply grateful to Professors Melanie Jacobs and Cynthia Starnes and the Michigan State Law Review, especially Jeffrey B. Same, Senior Symposium Editor, for organizing this symposium; to research librarian Patricia Kasting and research assistant Jennifer Weisser for excellent research assistance; and to Joyce Cox for her skill and patience in preparing the manuscript. I have explored early iterations of some of the ideas developed in this Article in State Responsibility for Gender Stereotypes, IOWA J. RACE & GENDER (forthcoming 2013) and Anti-Stereotyping and “The End of Men,” 92 B.U. L. REV. ANNEX 1 (2012), available at http://www.bu.edu/law/central/jd/organizations/journals/bulr/volume92n4/documents/STARK.pdf, and I appreciate the opportunity to consider the issue of gender equality in the concrete, but rapidly changing, context of marriage.

Professor Williams was probably right. "Marriage equality" remains an elusive goal in this country. About ten years ago I wrote an article suggesting that private ordering would be a good alternative to the rather haphazard and arbitrary state law governing marriage. Instead, I urged couples to draft their own "marriage proposals." As an example, I attached a "Gender Equity Marriage Proposal." The idea was that "gender equity" might be of some interest to some couples, just as others might be more concerned with a child-centered (or wealth- or environment-centered) model.

I meant well. But my premise was deeply flawed for at least two reasons. First, "gender equity" is not a private preference, like chocolate or vanilla. Rather, like racial equality, it is a fundamental right, an irreducible principle, in the private as well as the public sphere. Second, as a corollary, the notion that private parties might contract their way around gendered norms despite the ubiquity of such norms in the workplace, the culture, and the law seems naïve if not delusional in hindsight.

This Article takes a different tack. It argues, as many have, that marriage equality—at least as it refers to equality within heterosexual marriages—requires gender equality. It argues further, however, that United States law cannot assure gender equality because of its pinched, narrow conception of "rights." Those seeking marriage equality in the United States, accordingly, should look to international human rights law, specifically, the Convention on the Elimination of All Forms of Discrimination against Women ((CEDAW) or the (Women’s Convention)).

Part I describes the more recent iterations of the work/family conflict. This refers to the competing demands of work and family for the increasing numbers of American women who work outside of the home, while usually retaining primary responsibility for childcare and housework. Part II describes the ongoing failure of United States law, including the Family and Medical Leave Act (FMLA), the Affordable Care Act, and the Constitu-

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3. Id. at 1546-48.
tion, to effectively address the work/family conflict and explains why this failure is likely to continue.

Part III begins by explaining how CEDAW fills the gap in United States law, making marriage equality possible. It then sets out the costs of our refusal to ratify CEDAW, including the competitive disadvantage in global labor markets; the waste of human capital, present and future; and the perpetuation of unequal marriage, sensibly avoided by growing numbers of heterosexual women.⁷

I. NOT YOUR PARENTS’ WORK/FAMILY CONFLICT

A. Changing Demographics

Women in the United States, like women everywhere, do most of the childcare, housework, and general caregiving work.⁸ 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.⁹ As sociologist Suzanne Bianchi has more recently shown, “[m]others still shoulder twice as much child care and house work,” although fathers spend more time taking care of their children than they used to.¹⁰

In 2010, for the first time in United States history, there were more women than men in the labor force.¹¹ The Great Recession hit the manufacturing and construction sectors hard, leaving roughly 20% of working age men unemployed, the highest rate on record.¹² Hannah Rosin argues that these demographics are part of a larger “[economic and] cultural power shift from men to women.”¹³ While critics quickly noted that many of these women were employed in low-wage service sector jobs, most still have

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⁷ See, e.g., Andrew J. Cherlin, In the Season of Marriage, A Question. Why Both-er?, N.Y. TIMES, Apr. 28, 2013, at SR7 (noting a decline in the percentage of women ages 35-44 who have wed from 1988 until 2010).


¹³ Id. at 64.
caregiving responsibilities. Those in low-wage service jobs are simply less able to hire other women to take on those responsibilities. While some husbands and partners have stepped up, the lack of quality, affordable childcare, for pre-kindergarten as well as older children, and eldercare leaves American women increasingly burdened.

B. Why Women Should Still Care

Most other industrialized states assure women are paid maternity leave, often for extended periods of time. These leaves, along with generous family leave policies, allow both parents to care for babies and young children at the state’s expense. Although such programs are usually gender neutral, women are much more likely to take advantage of them than men. This results in weaker labor force attachments, in general, for women in Europe compared with women in the United States.

Julie Suk has argued that this is problematic for American feminists who support generous family leave. To the extent that such policies encourage women to leave the labor force, Suk suggests, they are at best a mixed blessing. Rather, she notes, the absence of such policies contributes to the shrinking wage gap between American women and men.

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17. Id. at 105 & n.48, 216.
20. Id. at 59.
21. Id.
The Women's Convention

Over time, however, American women earn far less than men.23 According to the Institute for Women’s Policy Research (Women’s Institute), “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 every dollar men earned.”24 Thus, although the lack of paid maternity and family leave results in greater parity regarding wages for American women and men in some age groups, this apparent parity vanishes over time. When American women have children,25 their average earnings plummet.26 As the Women’s Institute shows: “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.”27

II. THE ONGOING FAILURE OF AMERICAN LAW

Despite a rich jurisprudence of reproductive rights, and an even stronger equal protection jurisprudence, American law affords nominal safeguards for working parents, especially mothers and pregnant women. As explained below, this is grounded in our ongoing hostility to basic economic rights,28 including the right to health.29 President Obama, seeking to generate popular support for the Affordable Care Act, has recently insisted, “regular access to a doctor or medicine or preventive care—that’s not some earned privilege; it is a right.”30 But many Americans, including the Republican
governors who have rejected billions of dollars in federal Medicaid funds, still reject this view.31

A. State Law

California and New Jersey are the only two states with public paid leave family insurance programs.32 The California Paid Family Care Leave Act assures 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.33

The New Jersey law entitles an employee to six weeks of paid leave to care for a newborn child.34 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.35

B. Federal Law

1. The Affordable Care Act

The Patient Protection and Affordable Care Act (Affordable Care Act), which President Obama signed in March 2010, represents a major step forward.36 The Affordable Care Act requires almost all Americans (94%) to


33. See CAL. UNEMP. INS. CODE § 3301(a)(1) (West 2013).


35. HUMAN RIGHTS WATCH, supra note 32, at 22-23.

obtain health insurance and provides subsidies enabling them to do so.\(^{37}\) The price for Republican support, however, was the explicit exclusion of coverage for abortion.\(^{38}\)

In addition, the powerful insurance lobby was able to eliminate the single-payor option, which has enabled the other industrialized states to provide universal health coverage at a reasonable cost.\(^{39}\) Finally, the United States still does not recognize health care as a human right.\(^{40}\) The failure to explicitly acknowledge that it is in fact a right, rather than a mere policy preference, leaves the right to health vulnerable to the attacks and erosion already underway.\(^{41}\)

2. The FMLA

The FMLA assures certain employees maternity leave, without pay, for up to twelve weeks.\(^{42}\) While it represents an important breakthrough, its limitations have been well documented.\(^{43}\) First, over 40% of employees are not covered, and fewer than half—47%—in the private sector are both covered and eligible to take leave.\(^{44}\) Even for those who are covered, however, the FMLA does not directly address the deeply entrenched gendered stereotypes of caregiving women and breadwinning men. Rather, it is only after such stereotypes have been imposed that the law affords a remedy.\(^{45}\) Thus, when William Hibbs found that twelve weeks of intermittent leave under the FMLA was not enough to care for his wife, Dianne, who had been seri-

\[\footnotesize{\begin{align*}
37. & \text{The Patient Protection and Affordable Care Act Detailed Summary, Responsible Reform for Middle Class,} \\
& \text{http://www.dpc.senate.gov/healthreformbill/healthbill04.pdf (last visited Oct. 29, 2013).} \\
38. & 155 CONG. REC. 12,921 (2009). The Stupak-Pitts Amendment bars abortion coverage in “public option” portions of plans as well as barring inclusion of such coverage from any plan purchased by anyone receiving federal subsidy. Id.} \\
39. & \text{Robert Pear & Jackie Calmes, Senators Battle over Two Public Insurance Proposals and Reject Both, N.Y. Times, Sept. 30, 2009, at A18 (describing the rejection by the Senate Committee of two proposals for a single-payer option).} \\
41. & \text{See Dorothy Samuels, Where Abortion Rights Are Disappearing, N.Y. Times, Sept. 25, 2011, at SR14 (noting “a newly intensified drive by anti-abortion forces”).} \\
42. & 29 U.S.C. § 2612 (2006).} \\
43. & \text{Stephanie Bornstein, The Law of Gender Stereotyping and the Work-Family Conflicts of Men, 63 Hastings L.J. 1297, 1300 n.9 (2012).} \\
44. & \text{Id.} \\
45. & \text{See id. at 1319, 1324 (describing workplace ridicule and job loss suffered by caregiving men).} \\
\end{align*}}\]
ously injured in a car accident, he was fired. Hibbs had to take his case to the Supreme Court before he was reinstated.

C. The Constitution

The Framers, like most of their contemporaries, left reproductive work to the private sphere and the women who lived there. The Supreme Court, nevertheless, has cobbled together a long line of cases affirming that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." 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 held in *Griswold v. Connecticut* that reproductive rights were protected under a right to privacy, found in the penumbra of the Ninth Amendment.

The idea of grounding reproductive rights in privacy has been criticized since it was articulated. Feminists have pointed out the implications of "privacy" for women. As Linda McClain observes, "privacy connotes female seclusion and subordination, leading to women's underparticipation in society and vulnerability to violence in the home." These concerns are particularly sharp in the context of reproductive rights. As Justice Sandra Day O'Connor noted in striking Pennsylvania's spousal notification law in *Planned Parenthood of Southeastern Pennsylvania v. Casey*: "[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 wom-

47. Id. at 725, 740.
49. See, e.g., Pierce v. Soc'y of the Holy Names of Jesus and Mary, 268 U.S. 510, 535 (1925) (striking down a 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, 403 (1923) (holding that the state cannot prevent parents from having their children learn a foreign language).
50. 381 U.S. 479, 486 (1965) (striking down a Connecticut law barring the provision of contraceptives and medical advice regarding their use).
51. Id. at 484-86.
52. As Justice Stewart observed, dissenting in *Griswold*, the Connecticut statute "is an uncommonly silly law," but nothing in the Constitution bars it. Id. at 527 (Stewart, J., dissenting); see also John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 37-38 (1978) (arguing that privacy lacks a coherent conceptual basis).
53. 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).
en become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion."

"Privacy," moreover, is negative; it requires the state to refrain from taking action rather than imposing any affirmative obligations. As Frances Olsen and others have noted, grounding reproductive rights in privacy undercut claims for public funding. Because the United States does not recognize affirmative reproductive rights, American women enjoy only the reproductive rights they can afford.

American proponents of reproductive rights have long argued that these rights should be grounded in "equality." As Neil Siegel and Reva Siegel show, Justice Ginsburg relied on "equality" while representing a pregnant service woman in 1972.

But gender "equality" is problematic under the Constitution. As Professor Sylvia A. 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." In addition, sex-based clas-

57. See, e.g., supra note 38 (describing the effects of the Stupak-Pitts Amendment).
60. Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 955 (1984); Reva B. Siegel, Revised Opinions in Roe v. Wade and Doe v. Bolton: Siegel, J., (concurring), in WHAT ROE V. WADE SHOULD HAVE SAID, supra note 58, at 63, 72 (noting that "physical differences between the sexes, in particular a women’s unique capacity to gestate life, occasion some of the most persistent and deep-rooted assumptions about the different roles and worth of men and women"); see also Elizabeth M. Schneider, The Synergy of Equality and Privacy in Women’s Rights, 2002 U. Chi. Legal. F. 137, 147-50 (discussing the intersection between privacy and equality in the context of reproductive rights).
sifications are only viewed as "quasi-suspect" by the Supreme Court. Unlike race, they do not trigger strict scrutiny. As Suzanne Goldberg has shown, this has produced a hopelessly convoluted jurisprudence.

Like privacy doctrine, moreover, "equal protection" imposes no affirmative obligations on the state. Because of this, "equality" doesn't go far enough. As Martha Fineman explains, "[A]n 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." Robin West, similarly, faults the legalistic safeguards of Roe and Casey for neglecting the social and economic circumstances in which reproductive choices are made. Ruth Colker puts it plainly: "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

61. Craig v. Boren, 429 U.S. 190, 198, 204 (1976) (striking down an 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 an "important governmental objective").

62. Suzanne B. Goldberg, Equality Without Tiers, 77 S. CAL. L. REV. 481, 481-85 (2004). Goldberg argues for a single standard for equal protection analysis. Id. at 484. See generally Symposium, Centennial Panel: Two Decades of Intermediate Scrutiny: Evaluating Equal Protection for Women, 6 AM. U. J. GENDER & L. 1 (1997). Law argues that the burden should be on the state in cases of sex discrimination: "Given 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 60, at 1009. Ratification of CEDAW would not necessarily subject gender-based regulations to the same standard as race-based regulations, however. As Chinkin and Charlesworth have pointed out, for example, 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. HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 220 (2000).


64. Id. at 2.

65. See generally Robin West, From Choice to Reproductive Justice: Deconstitutionalizing 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." Robin West, Revised Opinions in Roe v. Wade and Doe v. Bolton: West, J., (concurring in the judgment), in WHAT ROE V. WADE SHOULD HAVE SAID, supra note 58, at 121, 141. Assuring reproductive rights, for West, is "pathetically inadequate." Id. at 141. 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 right advocates).
pregnancy and child care on women and does not sufficiently sponsor the development and use of safe, effective contraceptives.66

The same criticism applies to state treatment of reproductive work. Like reproductive rights, reproductive work—bearing, caring for, raising, and educating children—has been recognized by the U.S. Supreme Court as protected from state interference under the Constitution. States cannot prohibit parents from having their children taught a foreign language in school, for example.67 Nor can states require parents to send their children to public school.68 The scope of this protection is fiercely contested, however, especially with respect to pregnancy, the avoidance of pregnancy,69 the termination of pregnancy,70 and discrimination against pregnant workers.71

Whatever the scope of this protection, however, none of it is entitled to material state support under American law. None of it is constitutionally mandated. With the exception of public education, and a few struggling federal programs,72 the United States does not support reproductive work.

69. In 2011, Kathleen Sebelius, the Secretary of Health and Human Services, invoked her authority under the Federal Food, Drug, and Cosmetic Act to ban the purchase of over-the-counter emergency contraception by women under the age of seventeen. Memorandum from Kathleen Sebelius, Sec'y of Health & Human Servs., to Margaret Hamburg, Comm'r of Food & Drugs (Dec. 7, 2011). In a federal court opinion in the District Court of Eastern New York, Judge Edward Korman overturned this action, thereby making the purchase of emergency non-prescription contraception available to all women, with no prescription necessary. Tummino v. Hamburg, No. 12-CV-763 (ERK)(VVP), 2013 U.S. Dist. LEXIS 49666, at *101 (E.D.N.Y. Apr. 4, 2013).
70. See Samuels, supra note 41 (noting that 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). Only twelve states have no such onerous restrictions. Id.
Thus, while the decision whether to bear or beget a child is protected as a fundamental liberty interest,73 neither pregnant women nor new parents are entitled to paid leave.74 Parental choices regarding education are given considerable deference, but if a state chooses to reduce funding in a non-discriminatory manner, the Constitution poses no obstacle.75

Indeed, it is well settled that economic rights in general are not protected under the United States Constitution,76 although several eminent scholars have argued that they should be.77 The rejection of affirmative economic and social rights disproportionately affects American women because of their reproductive work. Because the United States provides far less material support for reproductive work than any other industrialized democracy, the burden falls on American women. Like its support for healthcare,78 the little support the state does provide takes the form of ephemeral policy preferences;79 it is not anchored in rights.

Equal protection, like American constitutional jurisprudence in general, is grounded in negative rights, freedom from government intrusion or control. As set out in the preceding section, American feminists have al-


73. See supra note 48.

74. Even the two states that do provide paid leave do not ground the leave in their constitutions. See supra notes 32-34.

75. See infra note 77.

76. See, e.g., Clark v. Cnty. for Creative Non-Violence, 468 U.S. 288, 289 (1984) (no right to sleep in public places); Harris v. McRae, 448 U.S. 297, 300-02 (1980) (no right to Medicaid funding for abortion); Lindsey v. Normet, 405 U.S. 56, 73-74 (1972) (no right to housing); see also Law & Versteeg, supra note 59, at 806 (noting that the failure of the Constitution to assure economic rights is one of the major features making it a global outlier).


78. See supra notes 30, 38-40 (describing state support for healthcare).

79. See supra note 72 (describing current healthcare programs).
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ready noted the limits of this approach. Equality for women requires affirmative measures.

III. CEDAW

CEDAW was drafted by an international group of experts on women's rights from a broad range of educational and experiential backgrounds. Unlike the Fourteenth Amendment or Title VII, women were not an afterthought, or a bad joke. CEDAW, drafted by women for women, takes women seriously.

Equality under CEDAW is broader in scope than American equal protection doctrine. It bars all forms of discrimination; there is no requirement of intent, state action, or disparate impact. Second, CEDAW goes beyond American constitutional law to assure positive as well as negative rights, imposing affirmative obligations on the state. Third, CEDAW explicitly addresses reproduction and reproductive work. Fourth, CEDAW recognizes that gender stereotypes are detrimental to men as well as to women, and more specifically, requires the state to promote men's caregiving responsibilities. Fifth, Article 16 expressly provides for equality between women and men in all aspects of marriage. CEDAW promises the kind of equality, in short, that supports, promotes, and requires comprehensive marriage equality.

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. These rights also include less familiar economic and social rights, such as the right to work and the right to health. Thus, CEDAW imposes affirma-

81. Jo Freeman, How "Sex" Got into Title VII: Persistent Opportunism As a Maker of Public Policy, 9 LAW & INEQ., 163, 163-65 (1991) (debunking the myth that "sex" was added as a joke).
84. CEDAW, supra note 4, at 20.
85. Id. at 17.
86. Id. at 18.
tive obligations on the state. In addition, rights are to be assured in fact as well as in law. That is, CEDAW goes beyond formal equality (equality of opportunity) to require result equality. 88

CEDAW's bar against "discrimination" is stronger than that set out in the Fourteenth 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. 89

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." 90 Article 4 specifically provides for affirmative action "aimed at accelerating de facto equality." 91

1. Article 5

CEDAW's most ambitious, and most radical, mandate is set out in Article 5, which explicitly addresses gender stereotypes and men's responsibility for reproductive work. 92 As noted in a leading human rights text, "[t]he breadth and aspiration of [Article 5] can be described only as striking." 93 Article 5 is "striking" in at least two ways. First, it recognizes that gender

87. Id. at 19.
89. CEDAW, supra note 4, at 16.
90. Id.
92. For an in-depth analysis of Article 5, see Rikki Holtmaat, Article 5, in THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY 141 (Marsha A. Freeman, Christine Chinkin & Beate Rudolf eds., 2012) [hereinafter CEDAW COMMENTARY].
93. HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 184 (3d ed. 2007).
stereotypes limit men as well as women and that any meaningful notion of “equality” must address the limits on both. Second, it recognizes and requires the state to support “maternity as a social function.”

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.

CEDAW recognizes that “stereotyped roles” are socially constructed and that they are neither immutable nor “natural.” 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 expressed concern about “the persistence of traditional stereotypes regarding the roles and tasks of women and men in the family and in society at large.”

Nigeria, similarly, reported on six ambitions programs undertaken to eliminate stereotypes pursuant to Article 5, 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 voca-

94. Cary Franklin, The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law, 85 N.Y.U. L. Rev. 83, 86-87 (2010) (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”).

95. CEDAW, supra note 4, at 17. 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. International Covenant on Economic, Social and Cultural Rights, supra note 29, at 7.

96. CEDAW, supra note 4, at 17. This is a far-ranging prohibition, and a full discussion of its implications is beyond the scope of this Article. See Franklin, supra note 94, 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. & Pol’y 261, 274-78 (2011) (explaining why CEDAW requires the recognition of same-sex relationships).

tions which were previously considered masculine such as motor mechanic, welding, commercial drivers and motor-cyclists.\textsuperscript{98}

The gendered division of labor may seem “universal” such as the widespread acceptance of female nurses.\textsuperscript{99} Other examples are idiosyncratic, such as the outraged response to female cashiers in Saudi Arabia.\textsuperscript{100} Article 5 bars all such stereotypes, even as it recognizes women’s unique reproductive capacity and men’s responsibility for reproductive work. Under CEDAW, women, like men, have rights, and men, like women, are expected to assume caregiving responsibilities.\textsuperscript{101}

Second, Article 5(b) demands recognition of maternity as a “social function” and requires states to educate men to share in reproductive work “[t]o 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 and development of their children.”\textsuperscript{102}

The Committee has repeatedly stressed that “concrete measures are needed to promote the role of men in unpaid care activities.”\textsuperscript{103} The Committee has also questioned parental leave policies, which “continue to place


\textsuperscript{102} CEDAW, supra note 4, at 17 (emphasis added). 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.


\textsuperscript{103} See Holtmaat, supra note 92, at 164 (citing comments on the reports of Iceland and the Ukraine).
primary responsibility for family work and childcare on women, rather than emphasizing the shared responsibility of men and women." 104

2. Reproductive Rights and Reproductive Work

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 discourse.105 CEDAW corrects this omission by recognizing women's reproductive work and requiring the state—and men—to support it.106 Whether by a state or a non-state third party, whether by an affirmative act (such as coerced sterilization) or by an omission (such as the refusal to fund family planning),107 whether imposed on all women or a discrete group, whether the objective is to disempower women or to promote women's equality,108 CEDAW protects women's reproductive rights.109

Building on Article 5, later articles more specifically 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." 110 These measures include the prohibition of dismissal for pregnancy or maternity leave,111 maternity leave "with pay" or "comparable social benefits,"112 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." 113 Article 12 requires the state to "ensure . . . access to health care services, including those related to

105. See CEDAW, supra note 4, at 17.
106. Id.
107. See, e.g., David D. Kirkpatrick & Robert Pear, A Victory in Health Care Vote for Opponents of Abortion, N.Y. TIMES, Nov. 9, 2009, at A1 (describing the restriction on abortion coverage added to the health care bill passed by the House).
109. For a detailed account of the ways in which the Committee, through its general comments as well as its observations with respect to specific country reports, highlights the states' obligations, see Rebecca J. Cook & Verónica Undurraga, Article 12, in CEDAW COMMENTARY, supra note 92, at 311, 320-23.
110. CEDAW, supra note 4, at 18.
111. Id. at 19.
112. Id.
113. Id.
family planning” and, more specifically, to “ensure to women appropriate services in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.” Article 14 sets out the right to family planning services for rural women in particular. Article 16 requires states to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.”

CEDAW does not explicitly assure a right to abortion, reflecting the lack of consensus among states. But the CEDAW Committee has criticized states for prohibiting abortion and “continually asks States to re-


115. CEDAW, supra note 4, at 18.


118. See, e.g., Blanchfield, supra note 116, at 15 (noting that the Committee recommended to Mexico that “‘all states . . . review their legislation so that, where necessary, women are granted access to rapid and easy abortion,’” and “urg[ing] Poland ‘to ensure that women seeking legal abortion have access to it, and that their access is not limited by the use
move penalties for women undergoing abortion." 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." At the same time, CEDAW has been ratified without reservations by several states limiting abortion. As Professors Cook and Undurraga note, however, "States parties have entered no reservations to Article 12."  

3. Article 16

Article 16 provides in pertinent part:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

   (a) The same right to enter into marriage;

   (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

   (c) The same rights and responsibilities during marriage and at its dissolution;

   (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

   (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

   (f) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

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119. Cook & Undurraga, supra note 109, at 322.


121. "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 REPROD. RTS., THE WORLD’S ABORTION LAWS: 2007 (2007), http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Abortion%20Map_FA.pdf.

122. Cook & Undurraga, supra note 109, at 332.
The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.\(^{123}\)

Article 16 explicitly provides for gender equality within marriage.\(^{124}\) For this reason, it has triggered more reservations than any other article.\(^{125}\) States take reservations to treaty provisions to which they object. Reservations to Article 16 cite conflict with religious or cultural norms, or are simply included in general reservations to the entire Convention, on the ground that state religious or constitutional law must trump.\(^{126}\)

The United States has taken such a general reservation—i.e., a reservation to the effect that, if any provision of the treaty conflicts with the United States Constitution, the United States will not be bound by it—to other human rights treaties it has ratified.\(^{127}\) It intends to do so here. But the CEDAW Committee has strongly discouraged such reservations, and they would not support marriage equality.\(^{128}\)

The argument here would be the familiar federalism argument; that is, that domestic relations law is the province of the states. Whatever force this argument retained after Missouri v. Holland,\(^{129}\) it has surely lost in view of the "federalization" of family law\(^{130}\) and the Supreme Court's recent holding in United States v. Windsor.\(^{131}\) Even if states sought to challenge CEDAW, moreover, it is difficult to imagine a winning argument against a state's

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123. CEDAW, supra note 4, at 20.
124. Id.
125. Marsha A. Freeman, Article 16, in CEDAW COMMENTARY, supra note 92, at 409, 441.
126. Id.
128. While some pornography permitted by the United States Constitution may well be condemned under CEDAW, this is beyond the scope of this Article, since pertinent articles focus on trafficking and those who oppose CEDAW in the United States are not arguing that it would have a chilling effect on trafficking or Internet porn. See generally Janie Chuang, Article 6, in CEDAW COMMENTARY, supra note 92, at 169, 177 (noting that it was proposed, but rejected, "that Article 6 should refer to ‘combating also those forms of commercial advertisement and exploitation which use the female body in a way contrary to human dignity’" (quoting U.N. Secretary-General, Draft Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 79, UN Doc. E/CN.6/591 (June 21, 1976)).
right to discriminate \textit{against} a woman in this context, especially in view of CEDAW's affirmative recognition of maternity.

As Professor Marsha A. Freeman astutely observes:

[Article 16] breaks the presumptive privacy barrier that has historically prevented examination of the family equality and power dynamic in the name of "protecting the family." Article 16 provides a map for examining that dynamic, indicating that protection of the family requires protection of spouses' individual human rights and promotion of equality between them, rather than maintaining family.\textsuperscript{132}

In other words, if gender inequality saturates the culture, it will almost certainly pervade the family, which is by definition private, outside the view of the public. For the Convention to require states to promote equality within the family, accordingly, means that individuals, women and men, are encouraged—and expected—to internalize these norms. The specific provisions of Article 16 set out in detail how this is to be accomplished.

The paradox of Article 16, of course, is that most of it is obviously unenforceable. If women and men in fact receive the "family education" set out in Article 5(b),\textsuperscript{133} presumably they will at least notice inequality within the family. But the invisibility of deeply entrenched norms has been well documented. As Professor Freeman explains:

Most inequalities within families do not reach the public, formal level of evaluation and decision-making, as those mechanisms usually are invoked only when a family experiences a death or a breakup. The quotidian dynamic of sharing responsibilities within intact families occurs behind the real or virtual walls that surround families in every social and cultural context. The operation of "same rights and responsibilities" is worked out in negotiations based on unwritten rules that may or may not be subject to discussion. The negotiations are private.\textsuperscript{134}

Precisely \textit{because} Article 16 is unenforceable, its realization depends on vigilance in promoting gender equality throughout the culture. Equality \textit{within} marriage, in short, is only attainable if equality becomes the norm, so that not only both parties are aware of the discrimination faced by fathers who take parental leave, but also that such discrimination is rejected across the board. As Professor Freeman put it:

As a practical matter, laws providing for equality in sharing household tasks and care of children are not amenable to enforcement. States cannot monitor whether daily decision-making is based on imbalance of power between the parties and traditional gender roles. They can and must, however, provide for full legal capacity and economic equality and work towards elimination of customs and stereotypes that prevent women from engaging on an equal basis with men in making these decisions. Changing this dynamic transforms the institution.\textsuperscript{135}

\textsuperscript{132}. Freeman, \textit{supra} note 125, at 411.
\textsuperscript{133}. CEDAW, \textit{supra} note 4, at 17; see \textit{supra} text accompanying note 102.
\textsuperscript{134}. Freeman, \textit{supra} note 125, at 416.
\textsuperscript{135}. \textit{Id}. at 439 (footnote omitted).
Referring to the widely accepted “respect-protect-fulfill” framework for states in meeting their human rights obligations, Professor Freeman notes that in order to “fulfill” its obligations under Article 16, “States must also provide for education on family life issues from an early age, and for other efforts to change attitudes, with a view towards addressing gender stereotypes and power imbalances between male and female that . . . perpetuate inequality in the family.”

B. In the United States

Ratification of CEDAW would 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, understandings, and declarations (“RUDs”) intended to limit their impact. This both results from the United States’ long and troubled history with respect to international human rights, and perpetuates that history.

The Obama Administration has promised to do better. It has directed the Senate Foreign Relations Committee to move forward on CEDAW. In 2013, Secretary of State John Kerry reaffirmed his support for CEDAW and the Administration’s support for ratification. Taking the Administration at its word, the rest of this Section assumes that the United States ratifies CEDAW in good faith and analyzes CEDAW’s impact on United States law.

136. Id. at 440-41.
As explained in the next Section, CEDAW would operate like a federal statute, supporting and clarifying the line of cases beginning with *Griswold*\(^{141}\) and including *Eisenstadt v. Baird*,\(^{142}\) *Roe v. Wade*,\(^{143}\) *Casey*,\(^{144}\) and *Gonzalez v. Carhart*.\(^{145}\) 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, including “the common responsibility of men and women” for their children.\(^{146}\) As discussed above, CEDAW recognizes the obligation of the larger community to provide material support for maternity—before, during, and after birth.\(^{147}\) As Professor 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.”\(^{148}\)

Under Article 12, all American women would have access to contraception, which would probably limit the need for abortion.\(^{149}\) This would include those women who would have been covered under the Affordable Care Act but whose governors rejected federal Medicaid.\(^{150}\) Age restrictions on Plan B, the morning-after pill, have recently been struck down in federal court.\(^{151}\) The recent development of an after-sex pill that can prevent pregnancy if taken within five days of intercourse\(^{152}\) may further reduce the

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143. 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).
144. 505 U.S. 833, 878-79 (1992) (affirming the “central 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”).
146. CEDAW, *supra* note 4, at 17.
147. *See supra* Section III.A.
148. Law, *supra* note 60, at 956; *see* David Leonhardt, *A Market Punishing to Mothers*, N.Y. TIMES, Aug. 4, 2010, at B1 (“With Australia’s recent passage of paid [parental] leave, the United States has become the only rich country without such a policy.”).
149. The Affordable Care Act, similarly, requires coverage for contraception for covered women. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2712, 124 Stat. 119, 131 (2010). 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 58, at 5.
number of abortions sought. The use of teleconferencing to enable women in the first nine weeks of pregnancy to obtain prescriptions for abortion pills, moreover, is likely to reduce the number of surgical, as opposed to medical, abortions. 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. Justice Ginsburg viewed Roe v. Wade as a political mistake, for example, which "prolonged divisiveness and deferred stable settlement of the issue." 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. 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. Reva Siegel has carefully documented the ways in which "constitutional culture channels social movement conflict" and how the right has tailored

Mag., July 18, 2010, at 30, 44 (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., Op-ed, Respect for Women in Uniform, N.Y. Times, Feb. 15, 2010, at A20 (commending the Pentagon's decision to make morning-after emergency contraception available to women in the military, criticizing the 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).

153. Harris, supra note 152, at A20 ("[M]ore 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." (citing James Trussell, director of the Office of Population Research)).

154. Monica Davey, Abortion Drugs Given in Iowa Via Video Link, N.Y. Times, June 9, 2010, at A1 (noting that 1,500 abortions have been performed in Iowa using teleconferencing equipment at sixteen Iowa clinics since June 2008).

155. Bazelon, supra note 152, at 46 ("Abortion 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.").

156. Ruth Bader Ginsburg, Speaking In a Judicial Voice, 67 N.Y.U. L. Rev. 1185, 1208 (1992); see Balkin, supra note 58, at 11.


159. 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 the "equal protection doctrine prohibiting sex discrimination was forged in the Equal Rights Amendment's defeat").
its arguments to reflect cultural change. 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.

The Roberts Court is apparently willing to leave reproductive rights to the states. As Dawn Johnsen notes, "Since 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." As a practical matter, abortion is no longer a real option for some women following the passage of recent laws imposing time and place restrictions. These restrictions, even if upheld under the Constitution, could arguably be challenged under CEDAW's explicit protections. Under the Supremacy Clause, moreover, CEDAW would trump inconsistent state law regarding reproductive rights.

Equally important, CEDAW mandates state support for reproductive work. This includes quality, free or affordable pre-K care, like the French

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162. Charles M. Blow, Op-Ed., Abortion's New Battle Lines, N.Y. TIMES, May 1, 2010, at A19 (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').

163. Dawn E. Johnsen, A Progressive Reproductive Rights Agenda for 2020, in THE CONSTITUTION IN 2020, supra note 83, at 255, 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 41.


165. See CEDAW, supra note 4, at 17-20. But see Johnsen, supra note 163, 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").

crèche system, as well as quality, affordable child and eldercare. As noted earlier, the United States provides less support for reproductive work than any other industrialized state. By requiring state support for such work, and explicitly recognizing men's responsibilities for such work, CEDAW would help bring the United States up to par. At the same time, it would make equality within marriage a real possibility.

CONCLUSION

This Article has explained why gender equality within marriage is a fantasy as long as there is no gender equality outside of marriage, in the broader society. Think of a country, like the United States (in which gender inequality is the norm), as a country below sea level. Hoping that you can put your marriage up on stilts is a futile exercise, especially because within marriage, the quintessential private relationship, the perpetuation of inequality is invisible to the outside world.

Part I has explained the gendered division of labor, how it is replicated, and the ongoing costs to American women, despite changes in the labor market. Part II has explained why American law has not affectively addressed this problem and why it cannot be expected to. Part III has explained how CEDAW addresses the lacunae in American law. By making gender equality an actual reality in American life, CEDAW would make marital equality a real possibility for American women and men.

167. See supra Subsection III.A.1.
168. See CEDAW, supra note 4, at 16-17.