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

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MARRIAGE EQUALITY, GENDER EQUALITY, AND THE WOMEN’S CONVENTION

Barbara Stark*

2013 MICH. ST. L. REV. 941

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“Want gender equality? Die childless at 30.”

– Joan Williams¹

* 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/STAR K.pdf](http://www.bu.edu/law/central/jd/organizations/journals/bulr/volume92n4/documents/STAR%20K.pdf), and I appreciate the opportunity to consider the issue of gender equality in the concrete, but rapidly changing, context of marriage.

1. Joan C. Williams, *Want Gender Equality? Die Childless at Thirty*, 27 WOMEN’S RTS. L. REP. 3 (2006).

INTRODUCTION

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.² Instead, I urged couples to draft their own “marriage proposals.” As an example, I attached a “Gender Equity Marriage Proposal.”³ 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)).⁴

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),⁵ the Affordable Care Act,⁶ and the Constitu-

2. Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CALIF. L. REV. 1479, 1486-87 (2001).

3. *Id.* at 1546-48.

4. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW]. President Jimmy Carter signed CEDAW in 1980. *Id.* 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 [the] treaty.” Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

5. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 7 (1993).

6. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

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

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).

8. In an influential early article, Nadine Taub dubbed this "nurturing work." Nadine Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381, 381 (1985).

9. ARLIE HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 3-4 (1989).

10. SUZANNE M. BIANCHI, JOHN P. ROBINSON & MELISSA A. MILKIE, *CHANGING RHYTHMS OF AMERICAN FAMILY LIFE* 177 (2006); see also Melissa A. Milkie et al., *The Time Squeeze: Parental Statuses and Feelings About Time with Children*, 66 J. MARRIAGE & FAM. 739, 740-41 (2004).

11. Catherine Rampell, *Women Now a Majority in American Workplaces*, N.Y. TIMES, Feb. 6, 2010, at A10; Hanna Rosin, *The End of Men*, ATLANTIC, July-Aug. 2010, at 56, 60, available at www.theatlantic.com/magazine/print/2010/07/the-end-of-men/8135/.

12. HANNA ROSIN, *THE END OF MEN: AND THE RISE OF WOMEN* 86 (2012).

13. *Id.* at 64.

caregiving responsibilities.¹⁴ 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,¹⁵ the lack of quality, affordable child-care, 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.¹⁶ These leaves, along with generous family leave policies, allow both parents to care for babies and young children at the state's expense.¹⁷ Although such programs are usually gender neutral, women are much more likely to take advantage of them than men.¹⁸ This results in weaker labor force attachments, in general, for women in Europe compared with women in the United States.¹⁹

Julie Suk has argued that this is problematic for American feminists who support generous family leave.²⁰ To the extent that such policies encourage women to leave the labor force, Suk suggests, they are at best a mixed blessing.²¹ Rather, she notes, the *absence* of such policies contributes to the shrinking wage gap between American women and men.²²

14. See Joan C. Williams, *The End of Men?: Gender Flux in the Face of Precarious Masculinity*, 93 B.U. L. REV. 699, 700 (2013).

15. See KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* (2013).

16. UNITED NATIONS, DEP'T OF ECON. & SOC. AFFAIRS, *THE WORLD'S WOMEN 2010: TRENDS AND STATISTICS* 213-17 (2010), available at http://unstats.un.org/unsd/demographic/products/Worldswomen/WW_full%20report_color.pdf. The United Kingdom, for example, covers 90% of wages for fifty-two weeks. *Id.* at 217. Sweden covers 480 days at 80% of wages. *Id.* at 216.

17. *Id.* at 105 & n.48, 216.

18. Veerle Miranda, *Cooking, Caring and Volunteering: Unpaid Work Around the World* 14-15 (OECD Soc., Emp. & Migration Working Papers, No. 116, 2011), available at <http://www.oecd.org/berlin/47258230.pdf>.

19. Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 3, 6 (2010).

20. *Id.* at 59.

21. *Id.*

22. *Id.* at 66. Based upon median income for full-time, year-round workers, in 2009, women earned 77% as much as men. CATALYST, *WOMEN'S EARNINGS AND INCOME* 3 (2011), available at http://s3.amazonaws.com/zanran_storage/www.catalyst.org/ContentPages/2447808282.pdf (citing CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S. CENSUS BUREAU, *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009*, at 11 fig.2 (2010), available at <http://www.census.gov/prod/2010pubs/p60-238.pdf>). Women's earnings increased 44% from 1970 to 2007, compared with 6% growth for men. *Id.* (citing RICHARD FRY & D'VERA COHN, PEW RESEARCH CTR., *WOMEN, MEN, AND*

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

THE NEW ECONOMICS OF WOMEN 2 (2010), available at http://www.pewsocialtrends.org/files/2_010/11/new-economics-of-marriage.pdf.

23. CATALYST, *supra* note 22, at 5 (citing STEPHEN J. ROSE & HEIDI I. HARTMANN, INST. FOR WOMEN'S POLICY RESEARCH, STILL A MAN'S LABOR MARKET: THE LONG-TERM EARNINGS GAP, at iii (2008), available at http://iwpr.org/pdf/C366_RIB.pdf).

24. *Id.* (citing ROSE & HARTMANN, *supra* note 23, at iii).

25. *Most do.* See JANE LAWLER DYE, U.S. CENSUS BUREAU, FERTILITY OF AMERICAN WOMEN: 2008, at 3 tbl.1 (2010), available at <http://www.census.gov/prod/2010pubs/p20-563.pdf> (showing that 54.3% of women between the ages of fifteen and forty-four raised at least one child in 2008); DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 10 (1997) ("Being a mother is considered a woman's major social role. Society defines all women as mothers or potential mothers.").

26. CATALYST, *supra* note 22, at 5. This correlates directly with women's assumption of family responsibilities: "During [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." *Id.* (citing ROSE & HARTMANN, *supra* note 23, at 27).

27. *Id.* (citing ROSE & HARTMANN, *supra* note 23, at 27).

28. See Barbara Stark, *At Last? Ratification of the Economic Covenant As a Congressional-Executive Agreement*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 107 (2011) (arguing that the United States should ratify the International Covenant on Economic, Social and Cultural Rights).

29. International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 3.

30. Robert Pear & Peter Baker, *Health Law Is Defended with Vigor by President*, N.Y. TIMES, May 11, 2013, at A11.

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

31. Pat Garofalo, *GOP Governors Play Politics with Life and Death*, U.S. NEWS & WORLD REP. (June 4, 2013), <http://www.usnews.com/opinion/blogs/pat-garofalo/2013/06/04/study-rejecting-obamacare-medicare-expansion-costs-gop-governors-money> (noting that fourteen Republican governors turned down the Medicaid expansion contained in the Affordable Healthcare Act, and in turn rejected \$8.4 billion in federal funding through 2016).

32. HUMAN RIGHTS WATCH, *FAILING ITS FAMILIES: LACK OF PAID LEAVE AND WORK-FAMILY SUPPORTS IN THE US* 23 (2011), *available at* <http://www.hrw.org/sites/default/files/reports/us0211webwcover.pdf>.

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

34. N.J. STAT. ANN. §§ 43:21-39, .1, .3 (2013).

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

36. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). See generally DENNIS P. ANDRULIS ET AL., JOINT CTR. FOR POLITICAL & ECON. STUDIES, *PATIENT PROTECTION AND AFFORDABLE CARE ACT OF 2010: ADVANCING HEALTH EQUITY FOR RACIALLY AND ETHNICALLY DIVERSE POPULATIONS* (2010), *available at* <http://www.jointcenter.org/sites/default/files/upload/research/files/Patient%20Protection%20and%20Affordable%20Care%20Act.pdf>.

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-

37. *The Patient Protection and Affordable Care Act Detailed Summary*, RESPONSIBLE REFORM FOR MIDDLE CLASS, <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. 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).

40. See *supra* text accompanying notes 26-29. See generally *Health Care in the U.S.*, AMNESTY INT’L USA, <http://www.amnestyusa.org/demand-dignity/health-care-is-a-human-right/page.do?id=1021216> (last visited Oct. 29, 2013); *Human Right to Health*, NAT’L ECON. & SOC. RTS. INITIATIVE, <http://www.nesri.org/programs/health> (last visited Oct. 29, 2013). But see Pear & Baker, *supra* note 30.

41. 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. Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1300 n.9 (2012).

44. *Id.*

45. See *id.* at 1319, 1324 (describing workplace ridicule and job loss suffered by caregiving men).

ously injured in a car accident, he was fired.⁴⁶ Hibbs had to take his case to the Supreme Court before he was reinstated.⁴⁷

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.”⁴⁸ 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,⁴⁹ the Court held in *Griswold v. Connecticut*⁵⁰ that reproductive rights were protected under a right to privacy, found in the penumbra of the Ninth Amendment.⁵¹

The idea of grounding reproductive rights in privacy has been criticized since it was articulated.⁵² Feminists have pointed out the implications of “privacy” for women.⁵³ As Linda McClain observes, “privacy connotes female seclusion and subordination, leading to women’s underparticipation in society and vulnerability to violence in the home.”⁵⁴ 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-

46. Nev. Dep’t Human Res. v. Hibbs, 538 U.S. 721, 725 (2003).

47. *Id.* at 725, 740.

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

49. See, e.g., Pierce v. Soc’y of the Sisters 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., CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 93-102 (1987) (arguing that the public/private distinction has been detrimental to women).

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

en become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion.”⁵⁵

“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 undercuts claims for public funding.⁵⁶ Because the United States does not recognize affirmative reproductive rights, American women enjoy only the reproductive rights they can afford.⁵⁷

American proponents of reproductive rights have long argued that these rights should be grounded in “equality.”⁵⁸ As Neil Siegel and Reva Siegel show, Justice Ginsburg relied on “equality” while representing a pregnant service woman in 1972.⁵⁹

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.”⁶⁰ In addition, sex-based clas-

55. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 893 (1992).

56. Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 116 (1989).

57. See, e.g., *supra* note 38 (describing the effects of the Stupak-Pitts Amendment).

58. “[A]bortion restrictions are deeply tied to stereotypical views about the sexes and about the duties of women . . .” Jack M. Balkin, *Roe v. Wade: An Engine of Controversy*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 3, 19 (Jack M. Balkin ed., 2005) (grounding reproductive rights in liberty and equality); see, e.g., 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, 435-55 (1995). See generally MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 294-95 (1999).

59. 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 Brief for Petitioner, *Struck v. Sec’y of Def.*, 409 U.S. 1071 (1972) (No. 72-178), 1972 WL 135840 and 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”). Katharine Bartlett, then a law student, made a similar argument. Katharine Bartlett, Comment, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532, 1564 (1974); see also Barbara Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 893-94 (1971); David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 806 (2012) (noting that the failure of the United States Constitution to assure women’s rights is one of the features that makes it a global outlier).

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.⁶¹ Unlike race, they do not trigger strict scrutiny. As Suzanne Goldberg has shown, this has produced a hopelessly convoluted jurisprudence.⁶²

Like privacy doctrine, moreover, “equal protection” imposes no affirmative obligations on the state.⁶³ 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.”⁶⁴ Robin West, similarly, faults the legalistic safeguards of *Roe* and *Casey* for neglecting the social and economic circumstances in which reproductive choices are made.⁶⁵ 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).

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

64. *Id.* at 2.

65. See generally 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.” 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.

66. Ruth Colker, *Feminism, Theology and Abortion: Toward Love, Compassion, and Wisdom*, 77 CALIF. L. REV. 1011, 1050 (1989) (footnote omitted). See generally RUTH COLKER, *ABORTION AND DIALOGUE: PRO-CHOICE, PRO-LIFE, AND AMERICAN LAW* (1992).

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

68. *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

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.*

71. See, e.g., Joanna L. Grossman, *Pregnancy, Work and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 569-78 (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. 31, 2012, at A25 (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”).

72. See Binyamin Appelbaum & Robert Gebeloff, *Even Critics of Safety Net Increasingly Depend On It*, N.Y. TIMES, Feb. 12, 2012, at 1 (noting that the share of federal benefits to the poorest 20% has declined from 54% in 1979 to 36% in 2007). These programs include CHIP, Vaccines for Children Program, Special Supplemental Nutrition Program for Women, Infants and Children, and Head Start. See *What Is CHIP?*, INSUREKIDSNOW.GOV, <http://www.insurekidsnow.gov/chip/index.html> (last visited Oct. 29, 2013) (explaining the

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-

program that provides free or low-cost health insurance for eligible children up to age nineteen); *Vaccines for Children Program (VFC)*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vaccines/programs/vfc/default.htm> (last updated Apr. 24, 2013); U.S. DEP'T OF AGRIC., WIC—THE SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN (2012), *available at* <http://www.fns.usda.gov/wic/WIC-Fact-Sheet.pdf>; U.S. Dep't of Health & Human Servs., *About Head Start*, HEAD START, <http://eclkc.ohs.acf.hhs.gov/hslc/hs/about> (last updated Oct. 1, 2013) (promoting “the school readiness of children ages birth to five from low-income families by enhancing their cognitive, social, and emotional development”).

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. Cmty. 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).

77. See, e.g., Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Charles L. Black, Jr., *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.” (quoting Michelman, *supra*, at 14)); see also Goodwin Liu, *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).

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

79. See *supra* note 72 (describing current healthcare programs).

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.⁸⁰ Unlike the Fourteenth Amendment or Title VII, women were not an afterthought, or a bad joke.⁸¹ CEDAW, drafted by women for women, takes women seriously.⁸²

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.⁸³ 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.⁸⁴ 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.⁸⁵ These rights also include less familiar economic and social rights, such as the right to work⁸⁶ and the right to health.⁸⁷ Thus, CEDAW imposes affirma-

80. See LARS ADAM REHOF, GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 6, 9 (1993).

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).

82. See generally Barbara Stark, *Women's Rights*, in 5 ENCYCLOPEDIA OF HUMAN RIGHTS 341 (David P. Forsythe ed., 2009) (offering a general introduction to CEDAW and the series of global conferences focusing on women and related UN initiatives).

83. See Judith Resnik, *What's Federalism For?*, in THE CONSTITUTION IN 2020, at 269, 274-75 (Jack M. Balkin & Reva B. Siegel eds., 2009).

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.

88. Charlesworth & Chinkin, *supra* note 62, at 217. See generally MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991).

89. CEDAW, *supra* note 4, at 16.

90. *Id.*

91. *Id.* There is an enormous amount of literature on CEDAW. Some sources especially pertinent here include: Rebecca J. Cook, *State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 228 (Rebecca J. Cook ed., 1994); Andrew Byrnes, *Human Rights Instruments Relating Specifically to Women, with Particular Emphasis on the Convention on the Elimination of All Forms of Discrimination against Women*, in *ADVANCING THE HUMAN RIGHTS OF WOMEN: USING INTERNATIONAL HUMAN RIGHTS STANDARDS IN DOMESTIC LITIGATION* 39 (Andrew Byrnes, Jane Connors & Lum Bik eds., 1997); REHOF, *supra* note 80; and Alda Facio & Martha I. Morgan, *Equity or Equality for Women? Understanding CEDAW's Equality Principles*, 60 ALA. L. REV. 1133 (2009).

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.⁹⁴ Second, it recognizes and requires the state to support “maternity as a social function.”⁹⁵

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 . . . [t]o 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.⁹⁶

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.”⁹⁷ Nigeria, similarly, reported on six ambitious 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).

97. United Nations, Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women: Slovakia, 41st Sess., June 30-July 18, 2008, U.N. Doc. A/63/38 (July 17, 2008) (recommending “that policies be developed and programmes implemented to ensure the eradication of traditional sex role stereotypes in the family, labour market, the health sector, academia, politics and society at large”).

tions which were previously considered masculine such as motor mechanic, welding, commercial drivers and motor-cyclists.”⁹⁸

The gendered division of labor may seem “universal” such as the widespread acceptance of female nurses.⁹⁹ Other examples are idiosyncratic, such as the outraged response to female cashiers in Saudi Arabia.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.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.*”¹⁰²

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

98. United Nations, Comm. on the Elimination of Discrimination Against Women, Consideration of Reps. Submitted by State Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women: Nigeria, 53, 41st Sess., June 30–July 18, 2008, U.N. Doc. CEDAW/C/NGA/CO/6 (Oct. 5, 2008).

99. See, e.g., WORLD BANK, FOOD & AGRIC. ORG. & INT’L FUND FOR AGRIC. DEV., GENDER IN AGRICULTURE SOURCEBOOK 315 (2007), available at <http://siteresources.worldbank.org/INTGENAGRLIVSOUBOOK/Resources/CompleteBook.pdf>; *Some Occupations Becoming More Gender-Neutral*, OCCUPATIONAL OUTLOOK Q., Winter 2004–2005, at 48, 48 (noting that men in United States increased their share of employment in nursing between 1983 and 2002, although the field remains dominated by women).

100. See, e.g., Fatima Sidiya, *Debate Rages over Saudi Women Working As Cashiers*, ARAB NEWS (Aug. 18, 2010), <http://www.arabnews.com/node/353055>. See generally Margarita Estévez-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).

101. D. BRENDAN NAGLE, *THE HOUSEHOLD AS THE FOUNDATION OF ARISTOTLE’S POLIS* (2006) (explaining “rightsholder” and “caregiver” stereotypes in Aristotle’s *polis*).

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.

Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 817 (2007).

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

104. *Id.* (quoting Rep. of the Comm. on the Elimination of Discrimination Against Women, 21st Sess., June 7-25 1999, ¶ 183, U.N. Doc. A/54/38/Rev.1; GAOR, 54th Sess., Supp. No. 38 (1999)).

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).

108. *See* Barbara Stark, *Reproductive Rights and the Reproduction of Gender*, in GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP 350-53 (Linda C. McClain & Joanna L. Grossman eds., 2009) (describing the objectives of the one-child policy in China, including women’s equality).

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 Undurruga, *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.”¹¹⁴ Article 14 sets out the right to family planning services for rural women in particular.¹¹⁵ Article 16 requires states to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.”¹¹⁶

CEDAW does not explicitly assure a right to abortion, reflecting the lack of consensus among states.¹¹⁷ But the CEDAW Committee has criticized states for prohibiting abortion¹¹⁸ and “continually asks States to re-

114. *Id.* The Committee’s General Recommendation No. 24 elaborates on Article 12.1, addressing women’s access to health care, including family planning services. The Committee recommends that “[w]hen possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion.” Rep. of the Comm. on the Elimination of Discrimination Against Women, 20th Sess., Jan. 19-Feb. 5, 1999, U.N. Doc. A/54/38/Rev.1; GAOR, 54th Sess., Supp. No. 38 (1999). For a more detailed formulation of these rights, see Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa art. 14, Doc. CAB/LEG/66.6 (Sept. 13, 2000), available at <http://www1.umn.edu/humanrts/africa/protocol-women2003.html>. See generally CTR. FOR REPROD. RIGHTS, THE PROTOCOL ON THE RIGHTS OF WOMEN IN AFRICA: AN INSTRUMENT FOR ADVANCING REPRODUCTIVE AND SEXUAL RIGHTS (2006), available at http://www.reproductiverights.org/pdf/pub_bp_africa.pdf.

115. CEDAW, *supra* note 4, at 18.

116. *Id.* at 20. Article 16 has received an unprecedented number of reservations. Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT’L L. 643, 702 (1990). “Two States Parties to the Convention—Malta and Monaco—explicitly 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.” LUISA BLANCHFIELD, CONG. RESEARCH SERV., R40750, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW): ISSUES IN THE U.S. RATIFICATION DEBATE 14 (2010).

117. See, e.g., Berta E. Hernández, *To Bear or Not to Bear: Reproductive Freedom As an International Human Right*, 17 BROOK. J. INT’L L. 309, 341 (1991); Conseil constitutionnell [CC] [Constitutional Court] Jan. 15, 1975, JCP 49 II 18030 (Fr.) (upholding France’s abortion law); Trybunalu Konstytucyjnego [Constitutional Court] r. Sygn. akt K. 26/96, May 28, 1997, ORZECZNICTWO TRYBUNALU KONSTYTUCYJNEGO 173 (Pol.) (detailing the decision of the Polish Constitutional Tribunal striking down legislation enacted to liberalize abortion, citing, *inter alia*, Poland’s Constitution); Law No. 239 (1970), as amended by Law No. 564 (1978) and Law No. 572 (1985) (Fin.), available at <http://cyber.law.harvard.edu/population/abortion/Finland.abo.htm> (describing the interruption of pregnancy). See generally 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 (1994); David Bradley, *Convergence in Family Law: Mirrors, Transplants and Political Economy*, 6 MAASTRICHT J. EUR. & COMP. L. 127, 134 (1999).

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.”¹¹⁹ 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.”¹²⁰ At the same time, CEDAW has been ratified without reservations by several states limiting abortion.¹²¹ As Professors Cook and Undurraga note, however, “States parties have entered no reservations to Article 12.”¹²²

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;

of the conscientious objection clause” (quoting Rep. of the Comm. on the Elimination of Discrimination Against Women, 18th Sess., 19th Sess., Jan. 19-Feb. 6, 1998, June 22-July 10, 1998, U.N. Doc. A/54/38/Rev.1; GAOR, 53rd Sess., Supp. No. 38 (1999); United Nations, Comm. on the Elimination of Discrimination Against Women, Concluding Comments of the Comm. on the Elimination of Discrimination Against Women: Poland, 5, 37th Sess., Jan. 15-Feb. 2, 2007, UN Doc. CEDAW/C/POL/CO/6 (Feb. 2, 2007)).

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

120. Rep. of the Comm. on the Elimination of Discrimination Against Women, *supra* note 114, at 3-4.

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.

- (g) 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 law¹³⁰ 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

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.*

127. See Jack Goldsmith, *The Unexceptional U.S. Human Rights RUDs*, 3 U. ST. THOMAS L.J. 311, 311-13 (2005).

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)).

129. 252 U.S. 416, 435 (1920). Federalism undoubtedly retained some force, at least in the context of state criminal law. See, e.g., *Medellín v. Texas*, 552 U.S. 491, 522-23 (2008), *stay of execution denied*, 129 S. Ct. 360 (2008).

130. E.g., Linda D. Elrod, *The Federalization of Family Law*, A.B.A. HUM. RTS., Summer 2009, at 6-9; Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 419-24 (2007); David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 538-39 (2008).

131. 133 S. Ct. 2675, 2695-96 (2013) (striking down the Defense of Marriage Act).

right to discriminate *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.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),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.¹³⁴

Precisely *because* Article 16 is unenforceable, its realization depends on vigilance in promoting gender equality throughout the culture. Equality *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.¹³⁵

132. Freeman, *supra* note 125, at 411.

133. CEDAW, *supra* note 4, at 17; *see supra* text accompanying note 102.

134. Freeman, *supra* note 125, at 416.

135. *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.”¹³⁶

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.¹³⁷ This both results from the United States’ long and troubled history with respect to international human rights, and perpetuates that history.¹³⁸

The Obama Administration has promised to do better. It has directed the Senate Foreign Relations Committee to move forward on CEDAW.¹³⁹ In 2013, Secretary of State John Kerry reaffirmed his support for CEDAW and the Administration’s support for ratification.¹⁴⁰ 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.

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

138. 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. LOUIS B. SOHN & THOMAS BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 964-65 (1973). The Eisenhower Administration was able to defeat the Bricker Amendment, but only by promising not to ratify any human rights treaties. *Id.*; *see also* 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).

139. *CEDAW Hearing Encouraging, U.S. Ratification Long Overdue*, NAT’L ORG. FOR WOMEN (Nov. 19, 2010), <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 [CEDAW]”). Ratification of CEDAW has been on the agenda for a long time. *See, e.g.*, MALVINA HALBERSTAM & ELIZABETH F. DEFEIS, *WOMEN’S LEGAL RIGHTS: INTERNATIONAL COVENANTS AN ALTERNATIVE TO ERA?* (1987).

140. Senate Foreign Relations Comm., *Summary of Kerry Nomination Hearing*, UNITED NATIONS ASS’N U.S.A., NAT’L CAPITAL AREA (Jan. 24, 2013), <http://www.unanca.org/news-events/news/102-summary-of-kerry-nomination-hearing> (summarizing the confirmation hearing in which John Kerry publicly pledged his support for CEDAW).

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 intercourse¹⁵² may further reduce the

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

142. 405 U.S. 438 (1972).

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").

145. 550 U.S. 124 (2007).

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.

150. *See* Garofalo, *supra* note 31.

151. *See* Sebelius, *supra* note 69; *see, e.g.,* Tummino v. Hamburg, No. 12-CV-763 (ERK)(VVP), 2013 U.S. Dist. LEXIS 49666 (E.D.N.Y. Apr. 4, 2013).

152. Gardiner Harris, *Panel Recommends Approval of After-Sex Pill to Prevent Pregnancy*, N.Y. TIMES, June 18, 2010, at A14 (noting that "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*, N.Y. TIMES, Aug. 1, 2010, at Wk8 (describing misoprostol, a single drug that may make abortion safer and easier around the world); Emily Bazelon, *The New Abortion Providers*, N.Y. TIMES

number of abortions sought.¹⁵³ The use of teleconferencing to enable women in the first nine weeks of pregnancy to obtain prescriptions for abortion pills,¹⁵⁴ moreover, is likely to reduce the number of surgical, as opposed to medical, abortions.¹⁵⁵ 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."¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ Reva Siegel has carefully documented the ways in which "constitutional culture channels social movement conflict"¹⁵⁹ 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.

157. Balkin, *supra* note 58, at 10.

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

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.¹⁶⁰ 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.¹⁶¹

The Roberts Court is apparently willing to leave reproductive rights to the states.¹⁶² 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."¹⁶³ 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.¹⁶⁴ These restrictions, even if upheld under the Constitution, could arguably be challenged under CEDAW's explicit protections.¹⁶⁵ Under the Supremacy Clause, moreover, CEDAW would trump inconsistent state law regarding reproductive rights.¹⁶⁶

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

160. 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).

161. Jeffrey Toobin, *Not Covered*, NEW YORKER, Nov. 23, 2009, at 37, 38.

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.

164. See GUTTMACHER INST., STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS (2013), available at http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf.

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").

166. 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 CEDAW, *supra* note 4, at 19. Since the *Medellín* fiasco in 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" or federal legislation having the same effect. See *Medellín v. United States*, 129 S. Ct. 360 (2008); Carlos Manuel Vázquez, *Treaties As Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 601-02 (2008) (explaining why the presumption that treaties are self-executing endures after *Medellín*). For an explanation of ratification as a congressional-executive agreement or federal legislation having the same effect, see Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008).

crèche system, as well as quality, affordable child and eldercare.¹⁶⁷ As noted earlier, the United States provides less support for reproductive work than any other industrialized state.¹⁶⁸ 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.