ANTI-STEREOTYPING AND "THE END OF MEN"

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INTRODUCTION

As scholars have recently shown, Justice Ruth Bader Ginsburg's earliest sex discrimination work was grounded in anti-stereotyping theory.[1] The particular stereotype she challenged was that of males as breadwinners and females as homemakers.[2] As Cary Franklin notes, Justice Ginsburg's approach was grounded in "constitutional limits on the state's power to enforce sex-role stereotypes."[3] While Justice Ginsburg herself has come to realize that anti-

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[1] Neil S. Siegel & Reva B. Siegel, Struck *by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010); *see also* Ruth Bader Ginsburg, *A Postscript to Struck* by Stereotype, 59 DUKE L.J. 799, 800 (2010) (stating that "[t]he authors have captured just what was on my mind and in my heart"); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

[2] Siegel & Siegel, *supra* note 1, at 779.

[3] Franklin, *supra* note 1, at 86.

stereotyping may not suffice to combat sex discrimination,[4] her early focus on the ways in which stereotyping affects men, specifically men who did not fit the breadwinner stereotype, and her argument that only state-sanctioned stereotypes are constitutionally offensive, remains a compelling paradigm. This Article compares Justice Ginsburg's notion of prohibited stereotypes with the much broader ban set out in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[5] which requires states 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[.][6]

Part I explains how the U.S. Constitution addresses gender stereotypes in the context of reproductive rights and reproductive work. Part II describes how CEDAW treats stereotypes in these contexts. Part III describes the "economic and cultural power shift from men to women" documented by Hannah Rosin in *The End of Men*,[7] which makes gender stereotypes increasingly outdated, especially, as Justice Ginsburg insisted forty years ago, for American men.

I. STEREOTYPES AND THE CONSTITUTION

Civil and political rights have been constitutionally protected in the United

[4] Justice Ginsburg has stated that she "would not look to the U.S. Constitution if [she] were drafting a constitution in the year 2012." Interview by Al Hayat with Justice Ruth Bader Ginsburg, in Cairo, Egypt (Jan. 30, 2012), *available at* http://www.memritv.org/clip/en/3295.htm. She suggests that the South African Constitution, Canadian Charter of Rights and Freedoms, or the European Convention on Human Rights might be more useful as models. Adam Liptak, *'We the People' Loses Followers*, N.Y. TIMES, Feb. 7, 2012, at A1. All three instruments expressly assure gender equality and positive rights. S. AFR. CONST., 1996 § 9 (stating that the "state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including . . . gender"); Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) ("[T]he rights and freedoms referred to in [this Charter] are guaranteed equally to males and females."); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221 ("The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex . . . .").

[5] Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, at 193 (Dec. 18, 1979) [hereinafter CEDAW]. President Jimmy Carter signed CEDAW in 1980. 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, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

[6] CEDAW, *supra* note 5, art. 5 (emphasis added).

[7] Hanna Rosin, *The End of Men*, ATLANTIC, July/August 2010, at 56.

States for more than 200 years. These rights are worth most to women whose lives are most like those of men. When women seek "formal" equality, demanding the same rights as men to freedom of speech, for example, they can rely on well-developed equality jurisprudence.[8]

When women assert reproductive rights, or seek support for reproductive work, they are in less-well-charted territory. Because reproductive rights and reproductive work focus on experiences – conception, pregnancy, childbirth, child rearing – that affect women more directly than they affect men, these experiences are not reflected in traditional rights discourse.[9] These rights were not given constitutional protection until 1965.[10] The scope of that protection, and its limits, are considered below.

A. *Reproductive Rights*

Reproductive rights were first articulated in the United States in *Griswold v. Connecticut*,[11] which challenged a Connecticut statute barring the use of contraceptives. The Court situated the right to privacy in the penumbras of "several constitutional guarantees," including the Ninth Amendment.[12] *Griswold*, however, only protected the *couple's* freedom from state intrusion into the marital bedroom.[13] This both reflected and perpetuated women's subordination within marriage, since the husband was the decisionmaker in the traditional couple.[14]

The privacy rationale for reproductive rights has been criticized since it was articulated.[15] Feminists have focused on the implications of "privacy" for women.[16] First, as Linda McClain observes: "[P]rivacy connotes female seclusion and subordination, leading to women's underparticipation in society

[8] *See, e.g.*, Mary Becker, *Patriarchy and Inequality: Toward a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 35.

[9] Men, too, have reproductive rights and these, too, may be denied. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (finding that a state's sterilization of a particular set of habitual criminals violated the criminals' right to equal protection). The ways in which the denial – and the assurance – of *men's* reproductive rights reinforce gender stereotypes are beyond the scope of this Essay.

[10] Griswold v. Connecticut, 381 U.S. 479, 505-06 (1965) (striking down a Connecticut law barring the provision of contraceptives and medical advice regarding their use).

[11] *Id.* at 479.

[12] *Id.* at 484-85.

[13] *Id.* at 485-86.

[14] Carolyn J. Frantz, *Properties of Marriage*, 104 COLUM. L. REV. 75, 91-92 (2004) ("Patriarchal marriages allow men to capture a disproportionately high share of the benefits (including decisionmaking power) of marriage and bear a disproportionately low share of its costs.").

[15] *See, e.g.*, John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 11-12 (1978)

[16] *See, e.g.*, CATHARINE A. MACKINNON, *Privacy v. Equality*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93-102 (1987).

and vulnerability to violence in the home."[17] These concerns are particularly pertinent in the context of reproductive rights, as Justice Sandra Day O'Connor noted in striking down Pennsylvania's spousal notification law in *Planned Parenthood v. Casey*.[18]

Second, "privacy" is negative; it requires the state to refrain from taking action rather than imposing any affirmative obligations. Grounding reproductive rights in privacy, accordingly, undercuts claims for public funding.[19] Because the United States does not recognize affirmative reproductive rights, American women enjoy only the reproductive rights they can afford.[20]

American proponents of reproductive rights have long argued that these rights are better grounded in the Equal Protection Clause of the Fourteenth Amendment.[21] Justice Ginsburg relied on equality while representing a pregnant service woman in 1972.[22] But there are problems with the equality argument. Sylvia Law notes its "lack of focus on biological reproductive differences."[23] In addition, sex-based classifications are only viewed as "quasi-suspect."[24] Unlike race, they do not trigger strict scrutiny, resulting in a hopelessly convoluted jurisprudence.[25] Like privacy doctrine, moreover, equal protection imposes no affirmative obligations on the state.[26]

Finally, "equality" doesn't go far enough. As Martha Fineman explains, "We understand equality in terms that are formal, focused on discrimination, and inattentive to underlying societal inequities."[27]

B. *Reproductive Work*

Like reproductive rights, reproductive work – bearing, caring for, and

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

[18] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 893 (1992).

[19] Frances Olsen, Comment, *Unraveling Compromise*, 103 HARV. L. REV. 105, 113 (1989).

[20] *Id*. at 116.

[21] *Id*. at 108.

[22] Brief for Petitioner at 9, Struck v. Sec'y of Def., 409 U.S. 1071 (1972) (No. 72-178); David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. Rev. 762 (2012); Siegel & Siegel, *supra* note 1, at 773.

[23] Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 955 (1984).

[24] Craig v. Boren, 429 U.S. 190, 197 (1976).

[25] Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 485 (2004).

[26] *See* Maher v. Roe, 432 U.S. 464, 470 (1977) (holding that the Equal Protection Clause of the Fourteenth Amendment does not require state funding of abortions for indigent women).

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

educating children – has been recognized by the Supreme Court as protected from state interference under the Constitution. States cannot prohibit parents from having their children taught a foreign language in school[28] or force them to send their children to public school.[29] The parameters of this protection are fiercely contested, especially with respect to pregnancy.[30]

But what is *not* contested, what is not even discussed, is that virtually none of this protection is entitled to material state support. With the exception of public education, and a few struggling federal programs,[31] reproductive work is not supported in this country. Thus, while the *decision* whether to bear a child is protected as a fundamental liberty interest,[32] the consequences of that decision are not supported at all. New parents are not entitled to paid leave.[33] The United States provides far less material support for reproductive work than any other industrialized democracy.[34] The little the United States does provide takes the form of ephemeral policy preferences;[35] its support is not anchored in *rights*.

The Constitution has nothing to say about the social importance of reproduction. As Law notes, "Silence, absolute and deafening, is the central theme of the original founders' discussions of women and families."[36] The

[28] Meyer v. Nebraska, 262 U.S. 390, 402-03 (1923).

[29] Pierce v. Soc'y of Sisters, 268 U.S. 510, 536 (1925).

[30] *See, e.g.*, Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 613-27 (2010).

[31] *See, e.g.*, *What is CHIP?*, INSUREKIDSNOW.GOV, http://www.insurekidsnow.gov/chip/index.html (last visited Nov. 5, 2012).

[32] Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of* Planned Parenthood v. Casey, 45 AM. U. L. REV. 77, 122 (1995) ("By identifying abortion as part of a more general liberty interest, the Court [in *Casey*] raised the stature of the abortion decision, at least by implication.").

[33] JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 35 (2010) ("[T]he United States was an outlier, offering zero weeks of paid leave.").

[34] *See id.* at 1 ("The United States has the most family-hostile public policy in the developed world . . . .").

[35] These programs include, among others, the Children's Health Insurance Program (CHIP), the Vaccines for Children Program, the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and Head Start. *About Head Start*, HEAD START, http://eclkc.ohs.acf.hhs.gov/hslc/hs/about (last updated May 8, 2012) (promoting "the school readiness of children ages birth to five from low-income families by enhancing their cognitive, social, and emotional development"); *Special Supplemental Nutrition Program for Women, Infants & Children (WIC)*, U.S. DEP'T OF AGRIC. FOOD AND NUTRITION SERV., http://www.fns.usda.gov/cga/factsheets/WIC_Quick_Facts.htm (last updated Aug. 8, 2012); *Vaccines for Children Program*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/vaccines/programs/vfc/index.html (last updated Nov. 14, 2012); *What is CHIP?*, *supra* note 31 (explaining the CHIP program that provides free or low-cost health insurance for eligible children up to age nineteen).

[36] Sylvia A. Law, *The Founders on Families*, 39 U. FLA. L. REV. 583, 586 (1987).

Constitution is as oblivious to reproductive work as the Founding Fathers themselves.[37] At best, those claiming reproductive rights are "left alone" in the private sphere, rather than welcomed into the public sphere with appropriate accommodations for pregnant or nursing workers.[38] Rather, the Constitution allows the widespread discrimination against pregnant workers described by Joanna Grossman.[39] It ignores what Joan Williams calls "our family-hostile public policy,"[40] the dearth of support which distinguishes American workplaces from their European counterparts.[41]

II. STEREOTYPES AND CEDAW

Cary Franklin has described the development of gender equality in Sweden and its impact on Justice Ginsburg.[42] But long after Justice Ginsburg came home, women in Sweden, and women throughout the world, continued to work toward gender equality. This work culminated in CEDAW, as well as far-reaching U.N. initiatives.[43]

CEDAW addresses the major American critiques of reproductive rights jurisprudence and the lack of support for reproductive work. First, CEDAW is broader in scope than equal protection. It bars *all* forms of discrimination; there is no requirement of intent, state action, or disparate impact.[44] Second, it requires states to proactively address the social and economic circumstances in which reproductive choices are made.[45] Third, CEDAW assures positive as well as negative rights, imposing affirmative obligations on the state.[46] Finally, CEDAW explicitly addresses reproduction and reproductive work.[47]

A. *Women's Human Rights*

CEDAW requires states to assure women's human rights, including their

[37] *See* MARY BETH NORTON, FOUNDING MOTHERS & FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY 3-17 (1996).

[38] WILLIAMS, *supra* note 33, at 8 ("American public policy to resolve such [work-family] conflict is virtually nonexistent, forcing us all to cobble together individually negotiated solutions in the private marketplace.").

[39] *See, e.g.*, Grossman, *supra* note 30.

[40] WILLIAMS, *supra* note 33, at 33.

[41] *Id.* at 35.

[42] Franklin, *supra* note 1, at 97-105.

[43] *See* Barbara Stark, *Women's Rights*, *in* 5 ENCYCLOPEDIA OF HUMAN RIGHTS 341, 342 (David Forsythe ed., 2009).

[44] *Id.* at 347.

[45] *See id.* at 345.

[46] *Id.* at 347-48 ("If laws treating women the same as men in employment do not result in women becoming equal to men in employment, for example, additional measures, including measures that treat women more favorably, may be required.").

[47] CEDAW, *supra* note 5, arts. 12.2, 14.

civil and political rights, familiar to Americans from our own Constitution,[48] but they also include less familiar economic rights, such as the right to health.[49] Under CEDAW, moreover, rights are to be assured in fact as well as in law. CEDAW goes beyond formal equality (equality of opportunity) to require equality of *outcome*.[50] Article 4 provides for affirmative action "aimed at accelerating *de facto* equality."[51] CEDAW, in short, requires the state to assure actual equality between women and men, sooner rather than later.

B. *Reproduction and Reproductive Work*

CEDAW, crucially, addresses reproduction and reproductive work.[52] Under Article 5, reproduction is both supported by the state and disaggregated from women's traditional roles. First, as noted above,[53] Article 5(a) recognizes that gender stereotypes are socially constructed, neither immutable nor "natural," and that they violate women's rights.

Like the other human rights conventions, CEDAW requires states parties to file periodic reports, documenting how each state is meeting its obligations.[54] These are reviewed by a committee of experts, which holds annual sessions at which state representatives appear.[55] The Committee's responses have clarified the scope of Article 5. 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."[56] It

[48] *See, e.g.*, *id*. art. 15.4.

[49] *Id*. art. 12.

[50] HILARY CHARLESWORTH & C. M. CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 217 (2000). *See generally* MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 3 (1990) ("While 'rule,' or formal, equality may avoid the pitfalls of protective or 'special treatment' rules, which can be used to disadvantage women as well as to help them, the application of equal treatment assumes that those subjected to the rules are in fundamentally the same position.").

[51] CEDAW, *supra* note 5, art. 4. There is extensive literature on CEDAW. Some sources especially pertinent here include: THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY (Marsha A. Freeman, Christine Chinkin, & Beate Rudolf eds., 2012); 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); Alda Facio & Martha I. Morgan, *Equity or Equality for Women? Understanding CEDAW's Equality Principles*, 60 ALA. L. REV. 1133 (2009).

[52] CEDAW, *supra* note 5, art. 12.

[53] *Id*. art. 5(a).

[54] *Id*. art. 18.

[55] *Id*. art. 17 ("For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination Against Women . . . .").

[56] Concluding Observations of the Comm. on the Elimination of Discrimination Against

commended Nigerian programs undertaken to eliminate stereotypes, including a new "National Policy on Education . . . aimed at encouraging increased participation of the girl child in science and technology," as well as data indicating that Nigerian women are "beginning to undertake those vocations which were previously considered masculine such as motor mechanic, welding, commercial drivers and motor-cyclists."[57]

Gender stereotypes may resonate across cultures, such as the widespread acceptance of female nurses, or they may not, such as the outrage generated when a Saudi supermarket chain announced that it would hire female cashiers.[58] Article 5 bars *all* such stereotypes, even as it recognizes women's unique reproductive capacity and men's responsibility for reproductive work.[59] Under CEDAW, women, like men, have rights and men, like women, are expected to assume caregiving responsibilities.[60]

As noted above, reproductive rights are not reflected in traditional rights discourse.[61] CEDAW corrects this omission by recognizing women's reproductive work and requiring the state – and men – to support it.[62] 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 elective abortions), whether imposed on all women or a discrete group, whether the objective is to disempower women or to promote women's equality, the denial of women's reproductive rights is barred by CEDAW.

Second, Article 5(b) demands recognition of maternity as a "social function" and requires states to educate men to share in reproductive work.[63] Like Justice Ginsburg's early reliance on male plaintiffs, Article 5 recognizes that stereotypes limit men as well as women and that "equality" must address both. Additionally, CEDAW recognizes and requires the state to support "maternity as a social function."[64]

Later provisions spell out what this requires. Article 11.2, for example, focuses on the right to work,[65] including a prohibition of dismissal for

Women: Slovakia, 41st Sess., June 30-July 18, 2008, ¶ 32 U.N. Doc. A/63/38 (July 17, 2008).

[57] Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women: Sixth Periodic Report of States Parties: Nigeria (Oct. 5, 2006), http://www.unhcr.org/refworld/docid/4efb36213.html.

[58] *See, e.g.*, Fatima Sidiya, *Debate Rages over Saudi Women Working as Cashiers*, ARAB NEWS (Aug. 18, 2010), http://www.arabnews.com/node/353055.

[59] CEDAW, *supra* note 5, art. 5.

[60] *Id.*

[61] *See supra* Part I.

[62] CEDAW, *supra* note 5, arts. 2-5, 11, 12, 16.

[63] *Id.* art. 5.

[64] *Id.*

[65] *Id.* art. 11.2.

pregnancy or maternity leave,[66] maternity leave with pay or "comparable social benefits,"[67] and childcare facilities.[68] Article 12 requires states to "ensure access to healthcare services, including those related to family planning" and, more specifically, to "services in connexion with pregnancy, confinement and the postnatal period, . . . as well as adequate nutrition."[69] Article 14 reiterates the right to family planning services for rural women.[70] Finally, Article 16 requires states to "eliminate discrimination against women in all matters relating to marriage and family."[71]

Actual compliance with CEDAW varies enormously. In Sweden, for example, recent reports suggest ongoing progress.[72] Other states remain notorious for their ongoing violations.[73] Where those seeking gender equality have access to the law, however, CEDAW has become a mainstay of the legal culture.[74] The next section describes the obstacles CEDAW faces here, and how proponents may finally clamber over them.[75]

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[66] *Id*. art. 11.2(b).

[67] *Id*.

[68] *Id*. art. 11.2(c).

[69] *Id*. art. 12.2. The Committee's General Recommendation No. 24 elaborates on Article 12.1, addressing women's access to health care, including family planning services. *See* U.N. Report of the Comm. on the Elimination of Discrimination Against Women, 20th Sess., Jan. 19-Feb. 5, 1999, 21st Sess., June 7-25, 1999, U.N. Doc. A/54/38/Rev.1; GAOR, 54th Sess., Supp. No. 38 (1999).

[70] CEDAW, *supra* note 5, art. 14.

[71] *Id*. art. 16. 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) ("Article 16 is the principal provision of the Women's Convention requiring states parties to eliminate discrimination against women in matters affecting marriage and family relations. It is the most heavily reserved of the substantive articles.").

[72] Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women: Combined Sixth and Seventh Periodic Report of States Parties: Sweden (Sept. 14, 2006), http://www.unhcr.org/refworld/publisher,CEDAW,STATEPARTIESREP,SWE,45c30c320,0.html.

[73] *See* U.S. DEP'T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: AFGHANISTAN 40 (April 8, 2011), *available at* http://www.state.gov/j/drl/rls/hrrpt/2010/ ("Afghanistan, Bangladesh and Yemen, have persistent human rights problems including . . . violence and societal discrimination against women.").

[74] *See, e.g*., U.N. DEP'T ECON. & SOC. AFFAIRS, THE WORLD'S WOMEN 2010: TRENDS AND STATISTICS 111-25 (2010), http://unstats.un.org/unsd/demographic/products/Worldswomen/WW_full%20report_color.pdf.

[75] *See* Law & Versteeg, *supra* note 22, at 840 n.203 (describing a "substitution effect" in which treaty rights substitute for constitutional rights). This is particularly useful where, like in the United States, the Constitution is rarely amended.

III. ONCE INSURMOUNTABLE OBSTACLES

Opposition to CEDAW, like opposition to all human rights treaties in the United States, is grounded in xenophobia and American "exceptionalism." But it has a misogynist edge that opposition to the other treaties has not inspired. This Part first compares CEDAW to the Constitution, showing how both are gendered. It then explains why this doesn't matter as much as it used to.

As noted earlier, the United States provides less support for reproductive work than any other industrialized state.[76] This results in greater parity between male and female wage earners here *until* women have children.[77] Historically, American women have paid the price in the form of weakened labor force attachment.[78] Women are now the majority in the workforce, however, and they are also better educated than men.[79] Patterns are changing.

CEDAW supports reproductive rights and reproductive work, for men as well as women. As Justice Ginsburg recognized forty years ago, men have *always* needed support for this work.[80] And as Hannah Rosin explains, they have never needed it more. The global economy is undergoing a sea change, in which "thinking and communicating have come to eclipse physical strength and stamina as the keys to economic success."[81] During the Great Recession, for example, "three-quarters of the 8 million jobs lost were lost by men. The worst-hit industries were overwhelmingly male and deeply identified with macho: construction, manufacturing, high finance."[82]

These men, like Justice Ginsburg's early plaintiffs, are victims of outmoded gender stereotypes.[83] Again, like Justice Ginsburg's plaintiffs, these men need support. Their employment prospects are disheartening: "Men dominate just two of the 15 job categories projected to grow the most over the next decade: janitor and computer engineer. Women have everything else – nursing, home health assistance, child care, food preparation."[84] Unlike women, who increasingly take jobs once reserved for men, men avoid traditionally pink-collar jobs.[85] Like many gender issues, this is both internalized and overdetermined.[86] Some of these jobs require social intelligence that men *often*

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[76] *See supra* Part I.B.

[77] *See* WILLIAMS, *supra* note 33, at 15 ("[W]omen who are childless at age thirty work hours and earn wages similar to men's. Women, it seems, have achieved equality as long as they die childless at thirty.").

[78] *Id*. at 131.

[79] Rosin, *supra* note 7, at 60.

[80] Brief for the Petitioner, *supra* note 22, at 55.

[81] Rosin, *supra* note 7, at 58.

[82] *Id*. at 60.

[83] *See id*. at 64.

[84] *Id*. at 63.

[85] *Id*. at 64.

[86] *See* Siegel & Siegel, *supra* note 1, at 779.

lack.[87] Others require bachelor's degrees, almost sixty percent of which are now awarded to women.[88] The most stubborn, and irrational, factor may be that they are perceived as "female" jobs. Boys don't wear pink.[89]

These are precisely the perceptions addressed by CEDAW's bar on gender stereotypes.[90] First, for men like Justice Ginsburg's plaintiffs,[91] CEDAW affirms their caregiving work and requires the state to support it. Second, CEDAW might encourage men who have shied away from such work because of its perceived stigma to "come out," and take advantage of state-supported flex time, for example.[92] Third, over time, CEDAW might allow even the diehards to slip some of the bonds of gender, or at least enough of them to get a job. It might encourage children, including the majority of American children who are now being raised in "non-traditional families," to take a more relaxed approach to gender in general. CEDAW, in short, would build on developments already well underway.

CONCLUSION

Justice Ginsburg's early anti-stereotyping work has been re-discovered by a new generation of scholars. This Essay has picked up where they left off. As Justice Ginsburg herself suggests, anti-stereotyping is only the beginning.[93] This Essay has explained why anti-stereotyping alone cannot assure gender equality, what else is needed, and why the Constitution cannot be relied upon to provide it.

Part I explained how gender stereotypes are formed and the consequences for men, women, and the societies in which they live. Part II analyzed the

[87] Rosin, *supra* note 7, at 64 ("[White-collar economy] requires communication skills and social intelligence, areas in which women, according to many studies, have a slight edge.").

[88] *Id*. at 66.

[89] JO B. PAOLETTI, PINK AND BLUE: TELLING THE BOYS FROM THE GIRLS IN AMERICA, at XVIII (2012) ("From the introduction of pink and blue as nursery colors, to their gradual acceptance as feminine and masculine hues, to today's ubiquitous use of pink as a sign of femininity, the complicated story provides insight into the deep changes in adult attitudes toward children's gender and sexuality.").

[90] As Franklin notes, the benefits for men of the eradication of gender stereotypes have long been recognized in Sweden. *See* Franklin, *supra* note 1, at 97-102. American feminists, including Justice Ginsburg, quickly grasped the significance of this argument. *Id*.

[91] *See, e.g*., Franklin, *supra* note 1, at 104-05. This would include the growing numbers of single fathers in this country, *see* NANCY E. DOWD, REDEFINING FATHERHOOD (2000), as well as the growing numbers of married fathers assuming caregiving responsibilities, *see* Alex Williams, *Wait Until Your Mother Gets Home*, N.Y. TIMES, Aug. 12, 2012, at ST1 ("In the last decade, though, the number of men who have left the work force entirely to raise children has more than doubled.").

[92] *See* Katrin Bennhold, *Flexible Workweek Alters the Rhythm of Dutch Life*, N.Y. TIMES, Dec. 30, 2010, at A13.

[93] *See supra* note 4 and accompanying text.

limitations of the Constitution in this context, specifically its failure to recognize women's rights. Because of these lacunae, the Constitution cannot effectively address gender stereotypes. Part III showed how CEDAW does, and why CEDAW is as necessary for men as it is for women.

Finally, this Article has referenced *The End of Men* and its description of an unprecedented "economic and cultural power shift from men to women."[94] Gender stereotypes, widely viewed as "natural" only forty years ago, are increasingly recognized as anachronisms, for men as well as for women, as Justice Ginsburg insisted even then.

[94] *See* Rosin, *supra* note 7, at 64.