Chapter 2—The Legal and Historical Standing of Parental Leave in the U.S.

Introduction

An understanding of the history of parental leave policy in the United States is integral to a complete understanding of contemporary public opinion surrounding paid parental leave. At the crux of this project is an attempt to answer the question of why. Why is the United States an outlier when it comes to paid parental leave policy? If one is to answer this, an examination of the history of the policy realm and attempts to initiate such a policy are relevant first steps. This chapter seeks to add to the discussion by providing such an historical backdrop.

In 2016, the issue of paid parental leave made its first appearance in the policy proposals of both major party candidates in the presidential election. Yet the potential beneficiaries of the proposed policy solutions in 2016 differed on the potential populations that each policy sought to benefit and how each policy's costs would be allocated. Nevertheless, in 2016 the appearance of competing paid parental leave programs in the presidential election opens an important question: when does paid parental leave become a desired governmental intervention in public opinion and is public opinion swayed by the way in which such policies are presented.

To date, the largest national policy movement toward parental leave was made in 1993 with the enactment of the Family and Medical Leave Act of 1993. The Act, or "FMLA," as it is commonly known, was the first signed by President Bill Clinton and represented the culmination of decades of work toward a national policy on parental leave. The FMLA did not guarantee a right to pay during the leave time and because of the myriad of legal requirements, only covers a fraction of U.S. adults, particularly leaving large swaths of women workers unprotected.

The FMLA is itself the product of compromise and reductions, leaving behind protections for pay, lower-income workers, and longer leave time. It has only been amended twice in the 24 years since it became law, neither time containing protections for pay. In the interim, some states have attempted to fill the void with localized policies. In the end, a fragmented system remains and the push for paid parental leave rests in the hands of advocates who echo the arguments for other legal protections for pregnancy and parenting in the past.

History of Parental Leave Policy

The roots of paid parental leave policy stretch back as far as the Industrial Revolution and gained steam in the Post World War II era in which white middle-class women who had gained work experience during the war wished to continue working but felt the tug of home life responsibilities as an impediment to their professional lives. As early as 1963, the federal government recognized the need for a paid parental leave policy—then a paid maternity leave policy—to improve the economic and social conditions of women. Yet in 2017, no such national policy exists.

The story of paid parental leave in America—or rather, its absence for Americans—is a complex one that often is the result of compromised policies. It places the scant protections for women as an afterthought in the periphery of legal protections prohibiting discrimination on the basis of sex and, later, pregnancy. What results—protected job status for some women but no pay protection on a federal level—is hardly surprising given the path that the current law took. This legal and political path does not exist in a vacuum and represents real choices made within the confines of a political and social system that have lasting repercussions for future policy and public opinion that are integral to understanding whether a paid parental leave policy might ever take shape on a national level.

A. A History of Parental Leave Policy in the U.S.

1. The Post War Era

During World War II, women were called upon to work outside of the home to aid in the war effort. More than half the women who entered the workforce at this time left soon after the war ended (Goldin 1991, p. 741-742). Women's work was not a matter of self-sufficiency or economic independence at this time, but rather, "a carefully orchestrated campaign to associate their work with patriotism and, at the same time, to make it clear that their leaving the workforce after the war was over would be equally patriotic," (Bernstein 2001, p. 47). Many women did leave the workplace, but the need for some women to work and the desire of others, as noted in Betty Friedan's seminal work, *The Feminine Mystique*.(1963).

In 1963, the President's Commission on the Status of Women issued their comprehensive report, "American Women," (Commission 1963). President Kennedy formed the Commission in an attempt to move the discontent over women's lack of employment opportunities in the Post

World War II era toward a productive yet contained end (Exec. Order 10980, December 14, 1961). The Commission, originally chaired by Eleanor Roosevelt, represented a massive effort to study the status of women in American society and provide recommendations based on their assessment. The report, released after Roosevelt's death on what would have been her 79th birthday, began with a letter addressing President Kennedy's concerns outlined in the Executive Order giving life to the Commission:

> The quality of women's exercise of their capacities and responsibilities will be higher as American institutions become more suitable to contemporary life. We have considered the basic framework of the education and training of girls and women, the counseling through which they become aware of opportunities, the conditions of their life in the home and outside of it in the years of their maturity. Our signed report conveys our major recommendations (p. iv).

In fact, the report contained many recommendations to advance the cause of girls and women, including recommendations for ensuring access to federal programs for women of color and the poor. Notably, on page 43, after assessing the lack of support for women in the workforce surrounding the birth of a child, noted the following:

> Paid maternity leave or comparable insurance benefits should be provided for women workers; employers, unions, and governments should explore the best means of accomplishing this purpose (p. 43).

Fifty-four years later, that recommendation still has not been fully implemented.

This recommendation, it seems, got caught up in the debates between feminists on the proper role of law and policy when it comes to feminist goals. Should the law offer a protectionist role to women so as to shelter them in at least some circumstances from the realities of life in the workforce? In 1908, the Supreme Court in *Muller v. Oregon* (208 U.S. 412) offered that women's unique "physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence," and argued that because of this the role of the law was to protect women "in order to preserve the strength and vigor of the race," (p. 421). Many Second Wave white feminists rejected such protectionism and pushed for equality under the law at all costs.

Led by Friedan and others, one branch of feminist thought was what Baxandall and Gordon (2002) call the "equal rights tendency," and many later called Liberal Feminism. Liberal feminists argued that the protectionism exhibited in cases like *Muller* led to the unacceptable

inferior legal standing of women. This stream of feminist activism rose from the ashes of, "the New Deal Democrats and the Old Left," and focused on equal rights for women, which would culminate in a ratified Equal Rights Amendment (pp. 2-3). While the tactics varied, the goal of this group of feminists, embodied by the National Organization for Women, headed by Friedan, was to enshrine equal status for the sexes in the law and ultimately the Constitution. Important to this endeavor was the rejection of any notion that women's reproductive roles led to differing needs and certainly that any reproductive function might warrant protection in the workplace environment (p. 3).

Liberal Feminism reached its zenith in NOW's amicus brief in the Ninth Circuit Court of Appeals in a case regarding the extension of disability benefits to pregnant women in California. In that case, the issue was whether the California Fair Employment and Housing Act, which required employers to extend disability benefits to pregnant women, was preempted by federal law prohibiting discrimination based on pregnancy. In arguing against the California law and for preemption, NOW, along with the National Women's Political Caucus, argued that "[d]istinctions based on pregnancy tend to perpetuate the stereotype of women's primary role and function as childbearer," (Brief, p. 12). In other words, NOW argued that state policy that recognizes differences in women's reproductive roles was necessarily perpetuating inequality and therefore both preempted by Congress and unwise as a matter of practicality. Equality politics required the pure equal treatment of women under the law, not equal treatment except for times of childbearing.

Another group of feminist thought arose alongside Liberal Feminism. In the late 1960s in response to the lack of gender considerations in radical left politics, "women's liberation," movement arose from a rebellion against the equal rights proponents as well as a discontent with leftist politics that failed to examine gender in its critique of social and political norms (Baxandall and Gordon, pp. 4-5). Black feminists and other feminists of color, began their own critiques of both the white feminist groups that provided little more than lip service (if that) to the concerns of women of color as well as the dominant social hierarchy (pp. 5-6). While these groups all held their own beliefs, they almost uniformly challenged the belief of Liberal Feminists that legal equality alone would ameliorate the condition of women, arguing instead that the "social and political system was inadequate, that the whole system should become more democratic and participatory," (p. 6).

The Liberal Feminist message was easy to incorporate into the legal system as it stood, though, and made significant political gains during this time. Language prohibiting discrimination in public accommodations and employment was included in Title VII of the Civil Rights Act of 1964. But this gain seemed to be short lived when it came to pregnant women. In 1972, Title IX of the of the Education Amendments Act of 1972 was passed, providing parity in educational pursuits based on sex (20 USCA. Sec. 168, Title IX. 1972).

Hope for equal treatment under the law was high. In 1971, the Supreme Court ruled in *Reed v. Reed* that a state law violated the Fourteenth Amendment's Equal Protection guarantee where its probate code enshrined a legal preference for men over women in matters of inheritance. That hope was short lived when it came to pregnancy discrimination. In *Gedling v. Aielo* (1974) the Court upheld a California law that excluded pregnant women from receiving disability benefits under a statewide disability plan, arguing that it was not a violation of the Equal Protection Clause of the Fourteenth Amendment to deny pregnant women from such protections as it would overburden the state to maintain such coverage. Two years later in *General Electric v. Gilbert* (1976), the Court shot down a challenge to an employer-provided disability program under Title VII arguing that the protections in Title VII did not extend to discrimination based on pregnancy.

After being lobbied by a large coalition after the *Gilbert* decision, Congress passed the Pregnancy Discrimination Act of 1978 ("PDA") (42 U.S.C. §§ 2000e et seq; Gelb and Palley 1987, 167-168). The PDA amends Title VII of the Civil Rights Act so as to cover discrimination on the basis of pregnancy in employment and the provision of health and/or disability plans. Prior to the PDA, "neither employers nor states treated pregnant women as workers," (Diner 2014, 467). Pregnant women were excluded from disability programs and unemployment insurance programs. As a result of an increased rate of single motherhood, the increased growth of the workforce that was attributable to childbearing-age women, and the *Gilbert* decision, focused attention was paid to the effects of discrimination against pregnant persons in the workplace (Kamerman 1983, Diner 2014).

Notably, the effort to enact the PDA did not embrace the promises of Liberal Feminism, but instead focused on differences inherent in the sexes and attempted to reshape the system to fit them. (Diner 2014) That said, it also did not "provide any special benefits," meaning it was "ideologically acceptable to the [Liberal Feminists]." (Bernstein 2001, 59) This lack of positive

action left the PDA as the only protection for pregnant women at a federal level. While it precluded employers and states from excluding pregnancy as a qualifying condition for receiving short-term disability benefits as a result of pregnancy-related matters, it did not *require* employers, the states, or the federal government to actually provide such benefits.

This legal ambiguity led to further legal case law. The Montana Supreme Court found that a Montana law that prohibited employment termination on the basis of pregnancy-related disability and required that employers give pregnant women a "reasonable leave of absence for the pregnancy," added to rather than contradicted the PDA (*Miller-Wohl Company v. Commissioner of Labor and Industry*, 629 P.2d. 1243, 1984). As such, the Montana law did not contradict the PDA. In 1987, the Supreme Court upheld a California law that provided greater job protection for pregnant women and new mothers than the standard disability protection allowed for other conditions (*California Federal Savings and Loan v. Guerra*, 479 U.S. 272, 1987). The Court argued that while the PDA set a "floor beneath which pregnancy disability benefits may not drop," it did not set a "ceiling above which they may not rise," (p. 285).

Notably, *Guerra* is the case in which NOW filed an amicus brief not on behalf of the side seeking to uphold the law, but on the side seeking to overturn the law. Liberal Feminism was officially at odds with pregnancy-related job protection. The schism in feminist thought that appeared in the 1960s was fully effective in the 1980s and shaped the formation and ultimately the passage of the Family and Medical Leave Act.

2. Compromise and the Family and Medical Leave Act

After *Guerra*, states were able to add to the protections offered by the PDA without violating the PDA. For better or worse, the history of pregnancy-related employment protections was now inextricably entangled with discrimination law, rather than enmeshed in a broader system of social welfare. Protection of time off and the potentiality of paid time off as was called for in the *American Women* report in 1963 was constrained by both social-economic forces but also by the path that previous pregnancy-related protections forged in the law.

a. The Introduction—HR 2020 (1985) and HR 4300 (1986)—99th Congress

On April 4, 1985, Representative Patricia Schroeder introduced the ambitious HR 2020, the Parental and Disability Leave Act of 1985 (HR 2020). At the time, Rep. Schroeder was the

senior woman in the House of Representatives and was "regarded as the foremost women's rights activist in Congress." (Radigan 1988, p. 13) The bill proposed a generous system of *unpaid* leave for both parental and medical purposes. Specifically, the bill called for the provision of 18 weeks of unpaid parental leave—defined as leave for birth, adoption, or serious illness of a child—over at 24-month period and 26 weeks over a 12-month period of unpaid medical leave for an employee's own serious health condition(s). The bill applied to all employers having five or more employees.

As Bernstein (2001) notes, "perhaps [the] most important compromise was not to propose paid leave," (148). In doing this, the bills' sponsors and advocates had hoped to gain credibility and utilize a passed unpaid leave protection bill to later scaffold into a paid leave plan. Evidence of this is the fact that the advocates' proposal that eventually led to HR 2020 also included recommendations for a commission to study national paid leave and/or a national disability policy and give recommendations within 2 years after passage of the bill (Radigan, 13).

Congress held hearings on HR2020. Ultimately, though, the bill stalled out when Schroeder voted against a bill sponsored by Representatives William Clay and Augustus Hawkins, who were then chairs of the education and labor committee (Bernstein 2001, p. 147). Other accounts note that the bill drew ire from organized labor who claimed the language may work against seniority systems in many collective bargaining agreements and disability rights activists who felt the use of the term "disability," in the bill was careless (Radigan, 16).

After consultation with labor organizations and key advocacy groups in the growing coalition for protected leave, a revised version of the bill was introduced in March 1986 (Radigan 16; HR 4300) as Clay as a principal co-sponsor of the bill along with Schroeder. The new bill—the Parental and Medical Leave Act of 1986—differed from HR 2020 in a few ways, the main difference being that HR 4300 applied to employers with 15 or more employees, changing the applicability of the act (HR 4300). Despite being flooded with organized opposition from the Chamber of Commerce (Radigan, 20), HR 4300 made it out of committee and had a rule approved for debate and voting on the floor. Congress adjourned before action was taken and the bill stalled. One thing became clear: the ability of the bill to survive in an otherwise unfriendly environment was "the willingness of the advocates to accept compromise." This compromise would continue to ensure the bill's passage but would also come at the cost of employee protections.

b. The Second Round—S 249 (1987), HR 925 (1987), S 2488 (1988)—100th Congress

The coalition strengthened in the second round and bills were introduced in both chambers around the same time. On January 6, 1987, S. 249, the Parental and Temporary Leave Act of 1987 was introduced. On February 3, 1987, HR 925, the Family and Medical Leave Act of 1987 was introduced. Both proposed 18 weeks of unpaid parental leave over a 24-month period and 26 weeks of unpaid medical leave over a 12-month period for an employee's own illness. Both applied to employers who had 15 or more employees. S249 only applied to parental leave—leave for the birth, adoption, or illness of a child—whereas HR 925 was more broadly drafted to include leave for the care of a parent.

HR 925 was identical to the version of HR 4300 that passed out of the Education and Labor Committee in the 99th Congress (Radigan, 23). The bills were promoted explicitly as "pro-family," measures and even "pro-life" by anti-abortion groups (Radigan, p. 23; Bernstein 152). This was strengthened by an explicit decision not to provide medical leave for abortion in the bills (Bernstein, p. 152). The United States Catholic Conference endorsed and lobbied for the bill, "helped to 'frame' family and medical leave not only as a feminist and labor issue, but also as a 'family values' issue that could be made attractive to pro-life social conservatives," (Bernstein, p. 153). As a result of the involvement of Catholic organizations, pro-life leader Rep. Henry Hyde agreed to support family and medical leave (Bernstein, p. 153).

The leaders in the House and the Senate convened hearings on their representative bills back-to-back to help bolster the cause. (Radigan, 24). But hearings proved somewhat difficult and the issue of leave time and employer size became points of contention again (Radigan, 24). A compromise was proposed by Republicans and accepted by the bill's sponsors: a phased-in employer size with the bill applying to employers with 50 or more employees in the first three years after enactment, moving to employers with 35 or more employees in the following year; provision of 10 weeks of family leave over a 24-month period and 15 weeks of medical leave over a 12-month period; the bill would not cover employees with less than 20 work hours per week or those whose salary was in the top 10 percent of the employer's workforce if that would prove to be a financial hardship for the employer (Radigan, p. 25).

The amended HR 925 was also joined by a new bill in the Senate (S 2488), which provided for 10 weeks of unpaid parental leave over a 24-month period and 13 weeks of medical

leave over a 12-month period. This bill applied to employers with 20 or more employees. It was favorably reported out of the Committee on Labor and Human Resources in July 1988 and filibustered on the Senate floor in September 1988.

c. ***The Third Round—S 345 (1989) and HR 770 (1989)—101st Congress***

While the second round of proposals was promising and gained key support from Republicans and Catholics, the bills still failed to gain adequate support to pass either chamber of commerce. On February 2, 1989 bills were introduced in both chambers of the house. S. 345 provided for 10 weeks of family leave in any 24-month period and 13 weeks of medical leave in any 12-month period for those at employers with 20 or more employees. HR 770 provided for 10 weeks of family leave time in a 24-month period and 15 weeks of medical leave in any 12-month period. For the first time, both the Senate and House versions had the same name: The Family and Medical Leave Act of 1989.

Both bills made it to and through committees in their respective chambers. The House bill extended coverage to congressional employees and addressed the coverage of school teachers. On the House floor, a proposed substitute—the Gordon-Weldon substitute—was approved. This substitute reduced the period of leave from 15 weeks per year for medical leave and 10 weeks every 2 years for family leave to 12 weeks per year for all circumstances covered in the bill. It moved employer coverage from 35 employees to 50 employees and expanded the conditions of family leave to cover spouses with serious health conditions. The bill was passed the House by a vote of 237-187. The Senate approved the House version with the Gordon-Weldon substitute by unanimous consent. However, in a blow to proponents of the bill, President George H.W. Bush vetoed the bill on June 29, 1990 and an attempt to override that veto failed in the House in July.

d. ***The Fourth Round—HR 2, S. 5—102nd Congress***

Stymied by a veto from then-popular President Bush, proponents of family leave moved to strengthen their case. They raised the number of hours an employee must work to be eligible for coverage to 1250 hours and retained the top earner exemption from previous rounds. Proponents rejected a compromise floated by President Bush to give tax credits to businesses that voluntarily choose to provide family and medical leave instead of mandating such leave (Bernstein, p. 160).

In January 1991, HR 2 and S 5 were introduced. Both bills proposed 12 weeks of unpaid family and medical leave for employees working for employers with 50 or more employees and who worked at least 1250 hours in the preceding year. The Senate Bill was amended to tighten notice and eligibility requirements and create an enforcement mechanism parallel to the Fair Labor Standards Act. The bills—both with this amendment—passed both chambers in the fall of 1991. A conference committee's proposed reconciliation of the bills was approved in August 1992 for the Senate and September 1992 for the House. President Bush once again vetoed the bill on September 22, 1992. The Senate was able to wrangle enough votes to veto, but the House was not able to do so. The election of President Bill Clinton—who had highlighted the issue on the campaign trail—proved to be a fortuitous moment for the coalition pushing for family and medical leave (Bernstein, p. 160).

e. The Fifth and Final Round—HR 1 and S 5—103rd Congress

With a new president, it seemed likely that the FMLA would become law. While there was some who questioned whether the proposal should be broadened to be more like the original proposal, many feared that this would cause a loss of momentum and even lose the support of the newly-elected president. In January 1993, HR1 and S5 were introduced. Both provided for 12 weeks of unpaid family and medical leave for employees who worked at least 1250 hours in the previous year for employers with 50 or more employees. It maintained the exemption for top earners. The House passed H.R. 1 on February 4, 1993. The Senate passed S. 5 the same day. On February 5, 1993, the Family and Medical Leave Act was signed into law by President Clinton with an effective date of August 5, 1993.

3. FMLA's Post-Enactment Life at the Federal Level

The substance of the FMLA has been amended twice, both times with limited effect. The first time was in 2008 within the National Defense Authorization Act for Fiscal Year 2008. The changes, proposed after Operation Enduring Freedom in Afghanistan and Operation Iraqi Freedom, created two types of military-specific leave: qualifying exigency leave, and military caregiver leave (Mayer, 2012, p. 6). Qualifying exigency leave includes 12 weeks in each 12-month period for dealing with a "short notice deployment," (seven days' notice or less), arranging for childcare, making legal or financial arrangements to address a military member's absence, attending official military ceremonies, counseling for one's self, the military member or

child. It also includes five days of leave time to spend with a military member on temporary leave for rest within a deployment (pp. 6-7). Military caregiver leave provides 26 weeks of protected leave to care for a covered service member who is injured in the line of duty while on active duty (Mayer, p. 7).

The second amendment was made in 2009 in the Airline Flight Crew Technical Corrections Act of 2009 (Public Law 111-119). This Act changed the way that the calculation of the 1250-hour requirement was calculated for airline flight crews. Specifically, it provided protected leave for a covered airline flight crewmember in certain cases that worked less than 1250 hours. In other words, the Act clarified that work hours were to count not only the hours spent in flight, but also all hours spent on duty (Mayer, pp. 3-4).

The passed amendments to the FMLA do not depict the scope of the work that has been done to improve upon the protections of the FMLA since its enactment. These attempts can broadly be categorized into two categories. First, there have been a series of attempts to broaden the application of the FMLA by redefining what it covers more expansively. Second, there is a body of sponsored legislation that has intensified in the past five years to implement paid leave as part of or in addition to the protections of the FMLA.

There have been many attempts to broaden the impact of FMLA without necessarily changing the core protections it provides. Almost since immediately after its passage, attempts were made at bringing the protections of the FMLA in a robust way to more employees by broadening the number of employers covered (HR 3847, June 21, 1996), eliminating the marriage penalty for two spouses working for the same employer (HR 3296, April 23, 1996), and even allowing FMLA time to count toward pension accrual (HR 4178, June 26, 1998). Likewise, attempts were made to broaden the number and type of employees that were eligible by amending the time of service to include part time and contingent workers (HR 3657, June 13, 1996; HR 5496, June 16, 2016), bring railroad employees into line given time on the clock (HR 5944, July 29, 2010) or even eliminate entirely the 1250-hour rule (HR 3297, November 10, 1999).

Perhaps the largest area for innovation in the attempts to amend and broaden the FMLA was in the scope of covered events for which leave can be taken. Proposals have been routinely made to allow the use of some FMLA time each month for the attendance of parents at their children's educational events (S 2145, September 27, 1996) and for use to attend to children's

medical and dental appointments, including well visits (HR 109, January 7, 1997). Proposed amendments also included broadening the covered events to include accepting a new foster placement or the medical care of a foster child's medical condition. (HR 3847, June 21, 1996) Proposed changes also included FMLA coverage for the medical condition of a domestic partner, grandparent, adult sibling, or adult child. (HR 2104, June 9, 1999) Proposed changes also sought to cover time off for the death of a spouse (HR 1312, March 29, 2001) or the death of a child (HR 6673, December 17, 2012; S 1358, July 13, 2011). Often, FMLA provisions were looked at through the lens of other legal changes, such as the protection of leave time for survivors of domestic violence (S 367, February 26, 1997), victims of federal hate crimes (HR 6776, August 1, 2008), living organ donors (HR 1857, May 18, 1999), and service-connected disabilities for military veterans (HR 5165, May 3, 2016). Not all attempts to modify this coverage were an attempt to broaden, though, such as HR 3751 (April 29, 1998), which sought to limit the definition of "serious health condition" and require employees to take half days instead of full days off or utilize, flex time to avoid employer distress. That said, other attempts to use flextime to supplement, rather than detract from, FMLA protected time were also being proposed (HR 4301, December 6, 2007; S 2419).

Congressional attempts to provide some paid leave have taken many forms throughout the years. One set of attempts focuses on the use of tax credits to the employer for providing paid time off (S 2354, December 3, 2015) or for allowing for flexible work schedules or telecommuting (HR 3836, July 17, 1996). Likewise, tax credits for the employee to offset the costs of utilizing such time or staying at home for childcare purposes have also been explored. (S 18, January 22, 2001; HR 265, January 30, 2001) Other attempts have been made to make flexible work schedules more possible for the purpose of helping families with their childcare obligations (HR 3836, July 17, 1996; HR 4301, December 6, 2007; S 2419).

The idea of a federally mandated paid leave benefit has been the subject of a great deal of legislative proposals. As early as 1999, attempts were made to provide for a federally guaranteed right to paid leave through a partnership with the states. The Family Income to Respond to Significant Transitions Insurance Act would have provided grants to the states to cover the federal share of the cost of carrying out a wage replacement program for families who used protected leave time for caregiving needs. (S 1355, July 13, 1999; HR 2500, July 13, 1999) The Paid Family and Medical Leave Act of 2005 (HR 3192, June 30, 2005) would have provided

employees with 55% of their weekly basic earnings for 12 workweeks during a 12-month period through the creation of a Family and Medical Leave Trust Fund at the Department of Treasury to provide such benefits. More recently, Senator Kirsten Gillibrand and Representative Rosa DeLauro have introduced the Family and Medical Insurance Leave Act or "FAMILY Act" would have provided 12 weeks of pay at 66% of the employee's weekly basic earnings by enacting a 0.2% payroll tax. (S 337, February 7, 2017; HR 947, February 7, 2017)

One other way in which there has been some policy innovation is with the federal government as a first mover of sorts. One early proposal would have had the Senate pay its employees for eight weeks of time for family and medical leave. (S 880, March 14, 2007) Another proposal enlarged that to include eight weeks of paid family and medical leave time for all federal employees. (HR 5781, June 19, 2008) Still other proposals have limited that paid time for federal employees to four weeks, such as HR 626 (June 4, 2009), which even passed the House in 2009. More recently, the trend has been to propose six weeks of paid time. (HR 532, January 26, 2015; S 2033, September 15, 2015) To date, none of these proposals have been enacted.

4. FMLA's Post-Enactment Life at the State Level

Five states and the District of Columbia have passed paid parental leave laws since the passage of the FMLA. These states—California, New Jersey, Rhode Island, New York, Washington—and the District of Columbia have had varying purposes and protections in their laws. Notably, only two states have had any experience with actually implementing these laws (Rhode Island and New Jersey) as the others phase into effectiveness between 2018 and 2020. (National Partnership for Women & Families, July 2017)

The states provide for differing amounts of paid leave and in different types. California (A.B. 908, 2015-2016 Leg. Reg. Sess. (Cal. 2016) and New Jersey (N.J. Stat. Ann. § 43:21-38) provide for six weeks of paid family leave. Rhode Island's law (R.I. Gen. Laws § 28-41-35(h)) provides for four weeks of paid family leave but 30 weeks for an employee's own disability or a combination of family and disability. New York's law (S. 6406C, Part SS, 239th Leg., Reg. Sess.(N.Y. 2016)) has a phase in plan where there will be eight weeks of protected family leave in 2018, 10 weeks in 2019, and 12 weeks in 2021 plus 26 paid weeks of disability leave. The District of Columbia provides for eight weeks of paid parental leave, six weeks of paid family

leave, and two weeks of paid disability leave. The only state to differentiate leave on the basis of pregnancy is Washington, whose law, the Family Leave Act (RCW 49.78.010 through 49.78.904), provides 12 weeks of paid family leave, 12 weeks of paid disability leave with a combined total of no more than 16 weeks of paid leave per year. If, however, the disability leave is on account of pregnancy, the disability leave itself is allowed 14 weeks and the combined total is 18 weeks.

B. Implementation and Application of the FMLA

The FMLA's changes during the legislative process before enactment coupled with the limited revisions after enactment have led to a system of protected leave that has many gaps. In order to properly understand the gaps in the law, it is important to understand exactly how the FMLA is applied both legally and in practice. There are two key definitions that control most of the FMLA's application: covered employer and covered employee. A covered employer is one who employs at least 50 employees within 75 miles of the worksite for 20 calendar workweeks in the preceding year and who engages in interstate commerce (29 U.S.C. § 2611). A covered employee is an employee who has worked at least 1250 hours in the previous 12-month period at a worksite of a covered employer.

Once it is determined that an employer and employee are a covered employer and covered employee, the type of leave or qualifying event becomes relevant. The Act protects 12 weeks of the employee's time during any 12-month period for the birth or adoption of a child, to care for a spouse, child, or parent of the employee who has a serious health condition, or to care for the employee's own serious health condition, including pregnancy. When leave is taken to care for one's own or a family member's serious health condition, the Act requires employees to provide medical "certification," so as to prevent abuse (Craig, p. 68).

When the Act was in its primordial state, it appeared that different eligibility reasons would call for different leave allowances. However, the Act has been construed to mean that a covered employee is provided up to 12 weeks unpaid protected leave *in total for all reasons* under the Act. Parents, for example, are not entitled to 12 weeks for each qualifying event (Craig, p. 70). Thus, leave taken for a prenatal disability or sickness could and does count against persons seeking to take FMLA-protected time once a child is born.

An employer must restore a covered employee who takes FMLA-protected time to the same or an "equivalent" position. An equivalent position is defined as one with "equivalent employment benefits, pay, and other terms and conditions of employment," (29 U.S.C. § 2614(a)(1)(B). This may mean that the employer has some room in reassigning an employee utilizing FMLA-protected leave and works against the intent to alleviate such concerns by those utilizing the protections of the Act.

The FMLA has several limitations. The first limitation is by specific design: leave under the FMLA is explicitly unpaid. While employers may decide to provide pay and some states may require it, there is no mandate that employers provide any pay to the employee during the leave time. The exception to this is that an employer must allow employees to utilize accrued paid leave time in the form of sick time and vacation time (Craig 73). However, the employer may specify how such time can be utilized in some circumstances, disallowing, for example, employees to utilize sick time to care for a sick family member (Craig, 74). In fact, employers can *require* substitution of paid leave for the unpaid leave protections of the FMLA, meaning that an employer may require an employee to utilize any paid accrued leave as a substitute for some or all of the FMLA unpaid time. As such, when accrued paid leave is available, employees may be mandated to utilize it to the point of exhaustion. Meanwhile, the employer can double-count FMLA and paid leave time so that the paid leave essentially substitutes for rather than supplements the FMLA protected time.

Other limitations present themselves as well. Spouses who work for the same employer are required to pool their FMLA-protected time into a total of 12-weeks between the two employees for the birth or adoption of a child or for the care of a sick parent (29 U.S.C. § 26129(f)). Also, "key employees," or top earners at an employer are not entitled to FMLA-protections, and thus may not be restored to their position upon returning from leave (Craig, 75).

These gaps coupled with the piecemeal process by which legislative fixes and enhancements to the FMLA have been made make it unlikely that any one potential fix will wholly alter the content and effect of the existing protections. Yet the slow and disjointed proposals that have come forth make it less likely that the promise of truly protected and paid family and medical leave will come to fruition. Like the forces of coalition building that led to the FMLA's enactment after decades of knowledge that a paid parental leave policy was

necessary for the full embrace of economic and social citizenship of all regardless of gender, the policy gets shaped by the discourse.

C. Equality or Equity in the Workplace and Among the Sexes

The battle for the FMLA makes one thing clear: the realms of reproduction and childrearing are inherently gendered territory. Decisions made to enlarge the rhetorical scope of the promise of the FMLA rested largely on gendered terms, couching benefits to mothers as benefits to children and families at large. Likewise, work and labor are gendered concepts—often invoking notions of typical gender roles even without the placement of gendered figures in them. The fact is that despite a long history of paid parental leave policy being nationally visible, no such national policy exists. This is unsurprising given the gender dynamics and uniquely positioned employment system in the United States.

Women who occupy space outside of the norm are often seen as deviant (Rosenthal 2008) or are not seen at all (Nacos 2005), echoing the biases that Hare-Mustin and Marecek (1988) identified. Moreover, work outside of the home is gendered, and women are more likely than men to spend time working in the home in addition to their professional responsibilities (Hook 2017).

Workplaces remain gendered and the lag in parental leave policy in the U.S. compared to other nations is an expected result from such an arrangement (Peterson and Albrecht 1999). The lack of a national paid maternity or parental leave policy can be seen as an expected result of these separate spheres. For most of the 20th century, "pro-family" policy was seen as a private need instead of a public problem (Kingston 1990, pp. 438-439). That change is not because women's struggles with the lack of such workplace policies became legitimate causes for concern in the dominant culture, but rather because of the overwhelming, "statistics about the prevalence of dual-income couples and single-parent families [that] have achieved common currency, almost moral weight, with the accompanying implication that changes in workplace practices are due," (p. 439).

In fact, employers have long had an easy time avoiding issues relevant to having women workers. Women have historically had less access to workplace benefits than have men (Berggren 2003, 2008). This includes a lack of access to employer-provided benefits (DeViney 1995; Hardy & Shuey 2000; Nelson 1994; Pearce 1987; Perman and Stevens 1989; Berggren

2008). One reason for this is the protectionism ensconced in the law when it comes to women as employees. In *Muller v. Oregon* (1908), the Supreme Court broke with its Industrial Era precedent in upholding an Oregon law that limited women workers to 10-hour days. Three years prior in *Lochner v. New York* (1905), the Court held that a New York statute limiting working hours for bakers was an impermissible use of state regulatory power. Nevertheless, without much of a shift on the Court in personnel or ideology, the Court held in *Muller* that the protection of women as workers was an appropriate subject of state intervention. This was particularly important, the Court noted, because of women's status as mothers or potential mothers.

The gender disparities in working conditions and benefits continued after the *Muller* decision. The Social Security Act, a hallmark of employee benefits stemming from the New Deal, was explicitly based on the "breadwinner-homemaker family, in which the husband worked and earned enough money to support his wife who stayed home to raise the kids," and this was ensconced into the structure of the program which allowed men to "earn" their pensions and benefit at retirement, whereas women who did not have active wages could not earn such a benefit (Wisensale 2001, pp. 33-34). Under the Aid to Dependent Children program, the government paid women to stay at home with their children *only if* their husbands were deceased or otherwise absent for legitimate reasons (Id.).

Fringe benefits available through the private-market were just as lacking for women in many ways. Women have routinely had less access to employer-based healthcare programs, even when part time and full-time stats are taken into account (Perman and Stevens 1989). Likewise, women are less likely to have access to and be able to take advantage of employer-based retirement programs (Diviney 1995; Hardy and Shuey 2000). This is often because women are often on the margins of employment—lacking permanence and status (Pearce 1987). Moreover, women are more likely than men to have precarious employment through the service sector (Nelson 1994).

The gap left by a nation that has no unified maternity or parental leave policy as a remnant of policies based on these separate spheres of family and work life disproportionally affects women. Women's wages are depressed when they become mothers in a way that is cannot be explained by differences in labor-market forces and appears across professions (Waldfogel 1997). Women who do have access to some maternity leave protections express a not

insignificant amount of stress surrounding the use of such protections as it places them outside of the (male) norm (Buzzanell and Liu 2005).

U.S. social policy on parental leave is not bolstered by a belief that caring for and raising children is a societal good, but rather that it is something expected to be done by women as a matter of responsibility (Bourne and Lentz 2009, p. 516). Instead, the U.S. reaction to women's entry into the workforce in larger numbers in the 1970s and 1980s was not to provide "changes that would support the needs of families with two working parents," but rather to respond "instead with the cultural myth of the supermom who can meet the demands of work and family with the assumption that the demands of the two will not compete for her time or energy," (Silverstein 1991, p. 1029, summarizing Hochschild 1989).

While the FMLA may have been a first attempt to deal with the issue, it was itself a gendered process that eliminated many of the provisions that would have been a unique benefit to women. One could argue that this is due to Americans' general ambivalence about social welfare policy (Feldman and Zaller 1992). Yet as has been seen by other forays into welfare policy reform, framing the recipients of a particular benefit may be just as strong an influence if not a stronger influence than the contest over the proper role of government in the provision of such benefits as a theoretical matter (Mead 2011).

The role of the gender dynamics within the FMLA's formation, implementation, and lack of thorough revision is pervasive. The success of the FMLA, its three-time passage, and eventually its enactment in 1993 was the story of reinforcing a pro-family message (Webber 2011). Specifically, the proponents argument that "the family unit was the best equipped to meet the needs of its individual family members," allowed such groups as the Catholic bishops and more conservative politicians to sign on to support it. That message undermined, though, the power of the final product, creating a situation where the enacted law favored dual-income households and middle-class families over lower class families, single parent households, and those with precarious or shifting work hours (Webber, p. 93). As others have pointed out, the FMLA's rules in practice end up providing less of a benefit for women who may need more than 12 weeks per year for a difficult pregnancy or other health concern. In the end, the bill's path from conception to enactment weakened the protections for women in favor of a gender-neutral and family-friendly bill that could be supported by a wider variety of political actors.

One could argue that the result should still be a positive one. The FMLA does protect 12 weeks of work, albeit unpaid, for many women. And the coverage of men under the Act should lead to some more egalitarian parenting that eliminates the separate spheres of work and family. What has happened instead, though, is women's roles as mothers are still not adequately defined and protected outside of the largely inapplicable anti-discrimination law and men have failed to take advantage of the protections of the FMLA, thus solidifying rather than eviscerating the gender-differences in childrearing that lead to gender disparities in work-life balance. Men are less likely to take leave even when they and their families would benefit to it (Han and Waldfogel 2003; Prohaska and Zipp 2011). Moreover, despite overtures toward more women-friendly workplaces, men in organizations tend to praise stay at home mothers and show hesitancy to promote and include women in organizational leadership (Tracy and Rivera 2010). Further, the courts' tendency to narrowly interpret the FMLA's coverage of an "eligible employee" has led to many women not being granted the right to take leave that might have been intended to be covered by the drafters of the Act (Magill 2014).

D. Reframing Policy Rhetoric in the Parental Leave Realm

The historical trek of paid parental leave from a formative promise of the 1963 President's Commission on the Status of Women's Report to a proposed national policy by both major party candidates in the most recent presidential election is instructive. It is, however, by no means dispositive to the question of why posed at the outset. If paid parental leave policy is to succeed in the United States at a national level, perhaps the path taken by the proponents of the FMLA in the early 1990s is worth taking again. In fact, it appears that many advocates for paid parental leave are doing just that: attempting to enlarge the support for such a policy by diminishing the differences between groups on issues like gender, work, and family.

What was necessary to enact the FMLA was a continual movement to the center that glossed over debates about the role of women in the home and the workplace and focused instead on the family unit as the beneficiary of the policy proposal. By doing this, proponents were able to enlarge the coalition of the willing and reframe the policy as pro-family rather than just equitable procedure. The changes made to attract such wide support were not substantive policy changes, but rather rhetorical changes that allowed every member of the coalition to see what they wanted from the policy without challenging underlying assumptions. In other words, the

family was the one that benefitted and the mother's ability to stay at home with her child was predicated on, rather than contrary to, well-established gender norms in society.

This balancing act between policy substance that furthers the economic and social parity of women and the predilection to favor policies that benefit the family is worth examining not only for its content but for its efficacy. Given that the system as it stands is disjointed and lacking behind other nations, does public opinion on paid parental leave necessitate finding that middle road that was found with the FMLA 25 years ago? If that middle road is found, is such a framing of the issue useful to bring the United States into parity with its peers around the world? This project attempts to investigate this to determine whether policy framing in the paid parental leave debate is enough to make strange bedfellows and forward policy surrounding paternity and maternity yet again. The framing literature investigated in the next chapter helps establish an empirical framework within which this investigation can occur.