

Privately Funded Family Medical Leave?

BERNIE D. JONES^a

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ABSTRACT

Upon the twentieth anniversary of the passage of the Family Medical Leave Act of 1993, activists have been pressed to correct its failure to grant American workers federally funded paid leave similar to those found in other nations that offer expansive social programming. Recent developments indicate, though, that supporters of paid leave might be more suc-

^a Associate Professor, Suffolk University Law School.

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cessful at the state level, not the federal one. Nonetheless, federally funded paid leave is presented as a pressing civil rights issue. In this article, I suggest an alternative, a property theory of paid leave, founded upon a newer formulation of pension benefits: private family leave pensions that might operate similar to deferred compensation plans, tax deferred or tax free, and available through employers and brokerage houses. This is about supporting self-investment—such plans have the potential to offer greater benefits than even the most generous of the prevailing state government-sponsored paid leave benefits programs. As such, more thought should be put into considering alternatives to federally funded paid leave.

I. INTRODUCTION

As advocates of paid family medical leave recognized the 20th anniversary of the passage of the Family Medical Leave Act (FMLA) of 1993,¹ they faced a crisis.² Their longstanding attempts to raise American workers'

1. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2012).

2. See Sarah Jane Glynn, *The Family and Medical Leave Act at 20: Still Necessary, Still Not Enough*, THE ATLANTIC (Feb. 5, 2013, 7:14 AM), <http://www.theatlantic.com/saxes/archive/2013/02/the-family-and-medical-leave-act-at-20-still-necessary-still-not-enough/272605/Clo> (author is a policy analyst for the Center for American Progress). Sarah Jane Glynn notes:

While the leave is unpaid, it does provide job protection and the extension of health insurance benefits for workers while they are unable to work. Prior to its passage, if a worker had a heart attack, or needed time off to take their spouse to chemotherapy appointments, or to provide care to a newborn or newly adopted child, there was nothing to guarantee that they would not be fired. And considering the fact that most FMLA leave is taken to recover from a serious illness or accident, or to care for an ill or injured family member, holding on to employer provided health insurance is clearly important.

But the Family and Medical Leave Act is not perfect, nor does it address all of the needs workers have. Because it is unpaid many workers cannot afford to take the leave even when they need to—in fact, nearly half of those who qualified for the leave but did not take it said that was due to financial reasons. And about four-in-ten workers do not qualify for FMLA leave in the first place, since it is restricted to workers who have been employed at their current job for at least a year, have worked a minimum of 1,250 hours in the 12 months before their leave is to begin, and who work for an employer with at least 50 employees within a 75-mile radius. The other half of workers who are not covered by the Family and Medical Leave Act may be able to cobble together some complicated amalgama-

“social wage” in the form of more expansive government benefits for working parents have not been realized.³ Women’s greater participation in the workplace spurred support for the Act, but workplace policy only resulted in what can be described as an incomplete maternalist accommodation with inclusion.⁴ Women can enter the workforce like men, but the parenting responsibilities of workers as a whole are only minimally recognized.⁵ Advocates have not gained what they desired the most: a program of paid family medical leave required by federal law.

Thus, advocates of paid leave have been drawn to the social insurance model found in other industrialized societies in Europe—expansive paid

tion of earned sick days or vacation time, but even access to those benefits are not guaranteed by law.

Id. (hyperlinks omitted).

3. See NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 2, 10 (William Chafe et al. eds., 2002) (discussing the “social wage”). See generally, WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991) (providing a general discussion of American labor history); CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960 (1985) (providing a general discussion of American labor history).

4. The article *Choice, Discrimination, and the Motherhood Penalty* discusses women’s strategies in seeking equal rights in the workplace. See, e.g., Tamar Kricheli-Katz, *Choice, Discrimination, and the Motherhood Penalty*, 46 LAW & SOC’Y REV. 557 (2012); KATHARINE T. BARTLETT & DEBORAH L. RHODE, GENDER LAW AND POLICY (Vicki Been et al. eds., 2010). See also, JOAN HOFF, LAW, GENDER AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN (Kathleen Barry ed., 1994).

5. See, e.g., Stephanie Coontz, Op-Ed, *Why Gender Equality Stalled*, N.Y. TIMES, Feb. 17, 2013, at SR1. She and various other commentators noted the 50th anniversary of Betty Friedan’s *The Feminine Mystique*, a book credited with spearheading the modern women’s rights movement and the push towards women’s participation in the workforce. Without question, women’s greater participation in the workforce beginning in the late 1960s and 1970s led to the eventual passage of the Family Medical Leave Act of 1993. The act is gender neutral, though, men as well as women are eligible for leave. But women tend to take leave the most, as they are the ones who give birth. Coontz explained that equality in the workforce has stalled, insofar as women have been leaving the workforce because of the inadequacies found in the Family Medical Leave Act: unpaid leave and for a brief period after a woman has given birth. *Id.*; see also KERSTIN AUMANN ET AL., WOMEN WHO OPT OUT: THE DEBATE OVER WORKING MOTHERS AND WORK-FAMILY BALANCE (Bernie D. Jones ed., 2012). Once the book came out in print, I did an interview with an NPR station on May 9, 2012. One comment that came up in the course of the conversation had to do with the limitations of the Family Medical Leave Act and the reasons why the United States had not developed comprehensive family leave policies on par with those in various European nations. I explained that Americans have had a long tradition of seeing parenting arrangements as private matters to be resolved within families. I discussed the possibility of states and private employers developing family leave policies in order to draw talented workers. Bernie Jones, *Mothers and the Delicate Work-Family Balance*, WYPR (May 9, 2012), <http://programs.wypr.org/podcast/wednesday-may-9-1-2-pm-mothers-and-delicate-work-family-balance>.

leave and for longer periods than what the FMLA requires.⁶ Lobbying efforts in Congress indicate their current emphases:

[T]he Center for American Progress has proposed Social Security Cares, a national paid family and medical leave insurance program that would cover the same life events that are covered under the FMLA and offer partial wage replacement that was funded through a small (less than one-half of one-percent) increase in the payroll tax.⁷

But it is important to emphasize one reason why these efforts have failed; Americans have traditionally seen family care matters as private, contrary to those European nations that believe the “social welfare of the individual citizen is a more public responsibility.”⁸ In the United States, though, the social insurance model has been effectuated, to some extent, in a state like California, which offers paid leave.⁹

Recent scholarship has focused primarily on proposing models for paid leave, for example, through disability insurance, employer funding, and a mix of Social Security type payroll deductions and deferred compensation contributions.¹⁰ I am going further, however, to suggest a program

6. For example, Scandinavian countries like Denmark have long been admired by many for their generous welfare state. However, in the wake of worldwide recession and austerity, some are beginning to reconsider. There are fewer workers to support the state’s generosity and fund what has been described as among the highest marginal tax rates in the world. Suzanne Daley, *Danes Rethink a Welfare State Ample to a Fault*, N.Y. TIMES (Apr. 20, 2013), <http://www.nytimes.com/2013/04/21/world/europe/danes-rethink-a-welfare-state-ample-to-a-fault.html?>

7. See Glynn, *supra* note 2.

8. MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 223 (2004). This article is thus not focused on a number of the complaints regarding the Family Medical Leave Act—that it doesn’t apply to all employers nor all employees, the leave is paltry, and only job security is available. See, e.g., JOAN WILLIAMS, *RESHAPING THE WORK FAMILY DEBATE*, 6-9 (2010). See also CATHERINE R. ALBISTON, *INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHT ON LEAVE* (Chris Arup et al. eds., 2010).

9. See, e.g., Caroline Cohen, Comment, *California’s Campaign for Paid Leave: A Model for Passing Federal Paid Leave*, 41 GOLDEN GATE U. L. REV. 213 (2011); Guissu Raafat, Note, *Does Paid Family Leave Really Pay for Small Businesses in California?*, 47 SANTA CLARA L. REV. 573 (2007); Jennifer Thompson, *Family and Medical Leave for the 21st Century?: A First Glance at California’s Paid Family Leave Legislation*, 12 U. MIAMI BUS. L. REV. 77 (2004); K. Nicole Harms, Note, *Caring for Mom and Dad: The Importance of Family-Provided Eldercare and the Positive Implications of California’s Paid Family Leave Law*, 10 WM. & MARY J. WOMEN & L. 69 (2003).

10. See, e.g., Anne Wells, *Paid Family Leave: Striking a Balance Between the Needs of Employees and Employers*, 77 S. CAL. L. REV. 1067 (2004) (paid family leave

that would be funded exclusively through employees' contributions, with the possibility of an employer match. My plan would minimize Americans' tax liabilities and contribute at the same time towards developing long-term investment strategies and income streams. Such programming would emphasize the importance of family units conserving their financial resources rather than requiring them to pay into a state or federal fund.

It is striking that advocates are not considering the possibility of family leave pensions funded privately through payroll deductions. These might be similar to 401(k) retirement plans authorized by the Internal Revenue Code¹¹ or the Traditional IRA¹² and Roth IRA plans¹³-both also authorized by the Internal Revenue Code. I am urging a reformulation of our current understanding of pensions to mean more than the income retirees receive from deferred benefit plans. The possibilities posed by privately funded pensions can reopen a discussion and urge consideration of a newer type of workers' rights formulation; one grounded in private property rights, not remuneration from the government only.

The federal government entitlement model found in Social Security has led to tunnel vision that publicly funded benefit plans are always better than private retirement plans. What I am ultimately proposing is a challenge to the perspective that family medical leave should always be funded through federal government initiatives. Its supporters were not effective at having paid leave included in the 1993 statute, and it is unclear whether efforts to gain it in the future will be successful. Moreover, Social Security, the basic retirement plan most are familiar with, is not likely to persist, as it is running out of money.¹⁴ Any paid leave plan which will rely upon it as a source of funding, or which will attempt a similar model of government funding, is thus likely to fail.

Yet, there are alternative models in the 401(k) plans and Roth IRA plans, and they have existed for some time. I am imagining a savings scheme for family medical leave which might do more than the typical savings account that one might use, and, especially since those who might raid their 401(k) retirement pensions to fund their unpaid family medical leave

would be funded through disability insurance, but without employer contributions); Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1 (2005) (paid family leave through government funding exclusively); Ashleigh Garvey & Claire Mitchell, Note, *Who's Your Daddy? A Paid Family Leave to Promote the Growth of Families*, 27 HOFSTRA LAB. & EMP. L.J. 199 (2009) (paid leave sponsored through a mix of social security type benefits and deferred compensation contributions).

11. 26 U.S.C. § 401(k) (2012).

12. 26 U.S.C. § 408 (2012).

13. 26 U.S.C. § 408(a) (2012).

14. Steven Hill, *Don't Cut Social Security—Double It*, THE ATLANTIC (Dec. 12, 2012, 8:20 AM), <http://www.theatlantic.com/politics/archive/2012/12/dont-cut-social-security-double-it/266095/>.

face penalties.¹⁵ Granted, those penalties could be removed and workers might then contribute to one pension plan to fund both medical leave and retirement, if that is all a worker can afford. Other innovations, however, are possible, especially since 401(k) type plans are available to more and more people. Thus, not only the wealthy and highly compensated are eligible, since traditionally defined benefit pensions have given way to defined contribution plans as per the 401(k) model.¹⁶ Unfortunately, this development has led to greater numbers of workers experiencing uncertainty, not only because of the possible effects of economic downturn,¹⁷ but in other ways as well. Not only are lower income workers¹⁸ less likely to participate

15. For example, financial writers have discussed the dangers of cashing out a 401(k) retirement before reaching retirement age: not only is there a ten percent penalty for those under the age of 59 ½ who make withdrawals or liquidate, but the sums are treated as income in the year the account is closed out. *See, e.g.*, JEAN CHATZKY, MAKE MONEY, NOT EXCUSES: WAKE UP, TAKE CHARGE, AND OVERCOME YOUR FINANCIAL FEARS 194-95 (2006); SUZE ORMAN, WOMEN AND MONEY: OWNING THE POWER TO CONTROL YOUR DESTINY 135-38 (2007). Apparently, numbers of employees tend to pursue that strategy when they leave a job; rather than roll over the retirement account into another account, for example, a rollover IRA, they withdraw the money in its entirety.

16. *See, e.g.*, Keith Ambachtsheer, *The Dysfunctional "DB vs. DC" Pensions Debate: Why and How to Move Beyond It*, 5 ROTMAN INT'L J. OF PENSION MGMT. 36 (2012), available at <http://utpjournals.metapress.com/content/72782781qv313681/fulltext.pdf>. Government employers, as well as private companies, are finding that defined benefits pensions are becoming too expensive. They are funded primarily through employers' budgets and offer pensioners a fixed benefit. In the wake of increased competition and financial recession, companies can't afford them. Workers contribute a specific sum of money each year towards defined contribution plans, based upon limitations imposed by the I.R.S. These sums are then invested by employers on the workers' behalf. The workers don't receive a specific guaranteed income; market forces determine their rate of return.

17. Steven Greenhouse, *Should the 401K be Reformed or Replaced?*, N.Y. TIMES, Sept. 11, 2012, at F1.

18. The Living Wage project, sponsored by Penn State University and the Massachusetts Institute of Technology, offers the "Living Wage Calculator": In many American communities, families working in low-wage jobs make insufficient income to live locally given the local cost of living. Recently, in a number of high-cost communities, community organizers and citizens have successfully argued that the prevailing wage offered by the public sector and key businesses should reflect a wage rate required to meet minimum standards of living. Therefore we have developed a living wage calculator to estimate the cost of living in your community or region.

Dr. Amy K. Glasmeier & Mass. Inst. Tech., *Poverty in America, Living Wage Calculator*, MASS. INST. TECH., <http://livingwage.mit.edu/> (last visited Sept. 26, 2014). The calculator lists typical expenses, the living wage and average wages for different industries. In addition, there are permutations for calculating the expenses incurred by different types of households, such as for a single adult, or a married couple with or without children. Thus, it is possible to determine what types of employment and average wages would be inadequate in covering day-to-day expenses, and thus, would most likely result in impoverishment. Yet, it

in these plans when they need the support the most,¹⁹ but as workers are required to take more initiative, they face certain challenges. They have a difficult time choosing their investment plans, determining their allocations, and managing their portfolios over time. But that does not mean, though, that employees cannot be educated to manage family medical leave pensions.²⁰

The sections of this Article are organized as follows. In section two, I discuss the role of the Family Medical Leave Act in highlighting policy changes that developed in response to working mothers' increasing presence in the workplace. In section three, I assess recent congressional attempts to improve upon the FMLA and implement paid leave. In addition, I explain various states' family medical leave policies. In light of failed attempts at the federal level to gain paid leave and since only a few states have been successful at implementing paid leave, private family medical leave pensions offer a viable alternative. Section four explains and assesses private family medical leave pensions modeled after deferred compensation plans, such as the 401(k) and the Roth IRA. It considers strategies drawn from behavioral economics in encouraging individuals to save and invest. Of significance as well, is the matter of constitutionality-how Congress might support these plans but without running afoul of *National Federation of Independent Business (NFIB) v. Sebelius*.²¹ The Article concludes in section five with a discussion of innovative companies developing family friendly policies to attract and keep employees in the workplace. If private family medical leave pensions were authorized by law, companies might want to offer them to their employees.

Private family medical leave pensions can be justified or rejected on the basis of at least two distinct visions of property law theory: communitarian v. libertarian. Supporters of expansive family medical leave policy draw upon arguments relating to the communitarian theory: "[T]he extent to which we choose to address the worst of the excesses resulting from the

can also be used to determine the wages that would most likely put a working person into a comfortable wage-earning category, where expenses would be covered and money could be saved and invested for the future.

19. See, e.g., Jeff Schwartz, *Rethinking 401(k)s*, 49 HARV. J. ON LEGIS. 53 (2012). Schwartz argues that the current 401(k) model is flawed: "[W]hile the 401(k) system may be of help to some, it also wastes billions of dollars a year, exacerbates economic inequality, and leaves 401(k) participants overly exposed to the Janus-faced nature of financial markets." *Id.* at 54. He believes waste follows in the wake of employees' tendencies to mismanage their investment accounts. See *id.*

20. Editorial, *The Road to Retirement*, N.Y. TIMES, Sept. 16, 2012, at SR10.

21. Nat'l Fed'n Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (considering the constitutionality of the Patient Protection and Affordable Health Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), insofar as the act included an individual mandate that all Americans obtain health insurance).

growing gap between the wealthy and the poor in our late capitalist society.”²² They aim to cultivate an ethos of social responsibility: “Beyond our accountability to individuals who are destitute, how responsible are we as a society for providing basic social services . . . taken for granted in other industrialized democracies?”²³ Looked at in another fashion, human flourishing arguments are relevant, the extent to which property owners should be called upon to “contribute out of their resources or to share their property in order to sustain those social matrices”²⁴ necessary for all to flourish. Contrary then to the rational calculator who cares only about his individual wellbeing, the argument is that we each have a stake in the wellbeing of community members, and thus tax policy has a role: “Modern capitalism has become synonymous with redistributive state interventions coexisting with a background market economy.”²⁵

The traditional conservative arguments against “state-compelled wealth redistribution ha[ave] come from libertarian property theory;”²⁶ where “property rights seem to constitute the full embodiment of individual rights and so are the only kinds of rights worth discussing.”²⁷ In this Article, I am not using a libertarian notion of property rights to limit social service demands upon the public coffers, but I believe that notions of property and human flourishing should be considered in maximizing individuals’ abilities to minimize their taxes and in support of private medical leave for themselves and their families. This is about building networks of financial support in the most familiar of places—among individuals and their families—which should have universal support.

One foundational myth in American society explains: “Autonomy is the term we use when describing the relationship between the individual and the state. Autonomy in this regard is individual freedom from state in-

22. FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY 175 (Martha Albertson Fineman & Terence Dougherty eds., 2005) [hereinafter FEMINISM CONFRONTS HOMO ECONOMICUS]. See also MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 11 (2004) (discussing a reformulation of the social contract—the parameters of the agreement Americans have among themselves and with their government with respect to public provisioning of resources). Fineman explained: “[T]he theory that modern states exist because individuals, who are free by nature, joined together and decided to create an agency—the state—to act on their mutual behalf.” *Id.* Thus, she notes: “[O]ne of the primary ordering mechanisms of the American social contract is the creation of categories such as public and private . . . the categories . . . structure the relationships between the state and the market (the public category) and the state and the family (the private category).” *Id.* at 233.

23. FEMINISM CONFRONTS HOMO ECONOMICUS, *supra* note 22, at 175.

24. GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 95 (2012).

25. *Id.* at 105.

26. *Id.* at 113.

27. *Id.*

tervention and regulation, the ability to order one's activities independent of state dictates."²⁸ Yet, this perspective on autonomy is one found traditionally among the middle class: "[I]t is a privileged and culture-specific understanding of what it means to be a person that flows seamlessly from the resources, opportunities, and experiences linked with middle-class American standing in society."²⁹ Apparently, a different model exists among the working class. It is one of interdependence, not one grounded in autonomous individuals eager to establish their independence. This interdependence model, I argue, can resonate in private family medical leave pensions that might be purchased by individuals in support of a family unit,³⁰ regardless of class, and if anything, it should be built upon a minimizing of tax burdens that would take resources away from individuals and their families. Drawing upon the language of autonomy, the emphasis should be on autonomous families.³¹

Private family medical leave pensions support this type of autonomy. The plans would offer the benefits of the 401(k) plan and the Roth IRA, but workers would not experience the detriments of taking withdrawals before retirement, since workers would only use the funds once a family medical leave occurrence arises. Like 401(k) plans, there could be minimal withdrawals, thus minimizing the tax consequences from lump sum withdrawals. What I'm proposing can offer the benefits of long term growth and tax benefits through employer-sponsored investment vehicles and products that

28. FEMINISM CONFRONTS HOMO ECONOMICUS, *supra* note 22, at 20.

29. Nicole M. Stephens et al., *It's Your Choice: How the Middle-Class Model of Independence Disadvantages Working-Class Americans*, in *FACING SOCIAL CLASS: HOW SOCIETAL RANK INFLUENCES INTERACTION* 87, 88 (Susan T. Fiske & Hazel Rose Markus eds., 2012) (citing Alana C. Snibbe & Hazel R. Markus, *You Can't Always Get What You Want: Educational Attainment, Agency, and Choice*, 88 *J. PERSONALITY & SOC. PSYCHOL.* 703 (2005)).

30. In Part IV, I discuss my vision of such a plan: an individual might purchase a family medical leave pension plan while single, in the hope of using the funds once a family medical leave occurrence arises, for example, the birth of a child and the parent must take time off from work. The money could also be used for elder care, for example, in taking time off to provide care for elderly relatives. At the end of life, the fund might be made part of the individual's estate, to be passed on to the decedent's beneficiaries. *See infra* Part IV.

31. *See, e.g.*, Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 *SETON HALL L. REV.* 1 (2013) (noting the significance of grandmothers like Marian Robinson, who retired and moved to the White House in order to become caretaker to the Obama children. As the children's last surviving grandparent, she has had a crucial role in raising them). This strategy resonates among the middle class parents, in various ways, and as Jessica Dixon Weaver noted, one example can be found among middle class grandmothers who undertake childcare in order that their professional daughters might manage work-family balance. In my model, the parent who must take time off would have funds available for meeting day-to-day expenses while at home. Or, if she doesn't take much time off, the funds might provide compensation to the grandparent who made major adjustments in order to care for the new mother and her newborn infant. *Id.*

employees might purchase on their own through brokerage houses. They would operate only as an optional program of income support for those who are interested, but without eliminating the possibility of state-sponsored paid leave plans for those who cannot afford a private family medical leave pension. Because these plans would not depend upon employment with a specific employer, they might be eligible for rollover. In addition, they might be inherited through a participant's estate.

What I am envisioning is similar to medical savings accounts, the consumer-driven healthcare spending accounts authorized by the Medicare Prescription Drug, Improvement, and Modernization Act.³² These accounts can operate just like any brokerage account; the account holder owns the funds he/she uses for spending on healthcare. Participants in the health care plans tend to have high deductible insurance plans for which they must cover large out of pocket costs up front. The benefit is that these vehicles enable participants to make contributions to their accounts pre-tax; in addition, the income on the accounts is not taxed. Participants make withdrawals to cover expenses as they arise. The funds need not be used in any one year, but can be rolled over from year to year and passed onto a beneficiary upon death. Spouses who inherit do not pay taxes on the transfers. However, as my emphasis is on income, the 401(k) retirement model better fits what I have in mind.

A proposal such as this, with implications for private investment and wealth accumulation, is one that has obvious and serious implications for social class, but the implications are rarely discussed openly: "In the United States, people attach particular significance to the ideal of equality. Yet the empirical picture is clear. Social-class differences and the inequality they reflect now organize American society more than ever."³³ Furthermore, "[d]ifferences in resources and in the associated status and cultural capital"³⁴ influence outcomes. But I do not believe the class implications should deter support for the program I have in mind.

One objection might be that such a program would not be of interest to those who are of lower income, that they need instead social programming of the redistributive sort that animates the prevailing paid family leave perspective. Leadership and support for a private family medical leave pension

32. Medicare Prescription Drug, Improvement, and Modernization Act, Pub. L. No.108-173, 117 Stat. 2066 (codified as amended in scattered sections of 42 U.S.C. & 26 U.S.C. (2003)). See also Paul Fronstin, *What Do We Really Know About Consumer-Driven Health Plans*, EMPLOYEE BENEFIT RESEARCH INSTITUTE 2 (Aug. 2010), http://www.ebri.org/pdf/briefspdf/EBRI_IB_08-2010_No345_CDHPs.pdf.

33. Hazel Rose Markus & Susan T. Fiske, *Introduction: A Wide Angle Lens on the Psychology of Social Class*, in *FACING SOCIAL CLASS: HOW SOCIETAL RANK INFLUENCES INTERACTION 1*, 1 (Susan T. Fiske & Hazel Rose Markus eds., 2012).

34. *Id.*

will undoubtedly come from highly paid workers, many of who might already have paid leave and vacation time available for their use. The inquiry is worthwhile, nonetheless.³⁵ To state otherwise would mean support for a troubling redistributive policy argument that limits the options of those with higher incomes merely because lower income workers cannot afford them.

Without question, this proposal is unorthodox and arguably controversial, insofar as the current perspective within the academy and among policy analysts on the left is for a social insurance model, and the model I propose does not address the possibilities of unforeseen circumstances that interfere with carefully laid plans. But I think this thought experiment is a worthy one: an attempt to think outside the box and imagine other possibilities beyond the conventional. Drawing upon an analogy in what has been called a social welfare model of property, I agree with those property scholars who presume that maximizing social welfare is the primary goal of a property system.³⁶

Finding inspiration in behavioral economics,³⁷ one can argue that utility can take different meanings: some tend to care more about absolute wealth, while others tend to care more about relative wealth,³⁸ which is their status in relation to those they see around them. I would argue that social welfarists, who are more concerned about individuals' relative status, might be more interested in those types of policies that promote the greatest equalizations of benefits for everyone, and thus would support paid family leave through social insurance (i.e. federally funded paid leave), while absolutists are merely interested in maximizing their own resources in the best fashion possible. If anything, my argument in favor of private family medical leave pensions takes an absolutist bend.

35. Even then, one can argue that wealth is relative, especially in light of cost of living. What might seem wealthy in one location is not in another. Quite often, the presumption among supporters of redistributive tax policies is that certain tax deductions, like mortgage interest deductions, support the wealthy, when in reality there are many people of average means who would not be able to afford a home without it. Ann Carrns, *Use of Mortgage Interest Deduction Depends on Where You Live*, N.Y. TIMES BUCKS BLOG: MAKING THE MOST OF YOUR MONEY (May 2, 2013, 11:45 AM), <http://bucks.blogs.nytimes.com/2013/05/02/use-of-mortgage-interest-deduction-depends-on-where-you-live/>.

36. Lior Jacob Strahilevitz, *Absolute Preferences and Relative Preferences in Property Law*, 160 U. PA. L. REV. 2157, 2158 (2012).

37. The field of behavioral economics criticizes the presumption in classical economic theory that all individuals are rational calculators at seeking their self-interest. What if economic behavior is influenced by emotional contexts or even irrationality? See, e.g., LINDA BABCOCK ET AL., CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds., 2000).

38. *Id.*

My proposal draws upon as inspiration arguments in favor of a “libertarian paternalism,”³⁹ that “in general, people should be free to do what they like—and to opt out of undesirable arrangements if they want to do so,”⁴⁰ yet, “it is legitimate for ‘choice architects’ to try to influence people’s behavior in order to make their lives longer, healthier, and better.”⁴¹ Realizing that many people might make less than optimal choices, policy analysts might support those “self-conscious efforts, by institutions in the private sector and also by government, to steer people’s choices in directions that will improve their lives.”⁴² Encouraging Americans to think ahead about their possible future needs for care and fund them, would make a positive contribution towards Americans’ self-investment.

II. THE FAMILY MEDICAL LEAVE ACT: SUCCESSES AND LIMITATIONS

The roots of the Family Medical Leave Act can be found in the Pregnancy Discrimination Act (PDA) of 1978⁴³ addressing the limitations of Title VII and categorizing pregnancy discrimination as gender discrimination, thus removing a limitation that once made it difficult for courts to find on behalf of plaintiff employees. Prior to the act, pregnant workers faced discrimination from employers who tended to see working mothers as not belonging in the workplace altogether, or who wanted to minimize the presence of pregnant women in certain jobs. Without the PDA, courts based their analysis on a male standard: women were not being treated differently from men in the workplace; as a result, there was no discriminatory treatment and no inequality.

This analysis missed the point that men cannot become pregnant; as such, no man would experience discrimination based upon pregnancy. In addition, if pregnancy is a normal occurrence, employers denied disability leave to women who had given birth: normal pregnancies were not disabilities in the traditional sense, of a person, male or female, who was injured or who had fallen sick and who needed time off because these prevented the employee from working at full capacity. Thus, the Act added an amendment to Section 703 of Title VII that “because of sex” or “on the basis of sex” included:

39. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* 5 (2008) (emphasis omitted). *See also* David Brooks, *The Character Factory*, N.Y. TIMES, July 31, 2014, at A23.

40. *Id.*

41. *Id.* (internal quotation marks added).

42. *Id.*

43. Pregnancy Discrimination Act of 1978 § 995, Pub. L. No. 95-555, 92 Stat. 2076.

[B]ecause of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.⁴⁴

The Supreme Court left open the possibility that states might develop their own policies protecting pregnant workers and workers who had given birth; the federal statute did not preempt the field, thus enabling states to offer more protections than the federal statute offered.⁴⁵ There was no preemption because the federal statute did not expressly state it would do so; the federal scheme of regulation was not so comprehensive that states could not provide additional protections, and there was no conflict between the federal and state laws that would have posed, for example, a challenge to federal policy.⁴⁶ The federal statute set forth a floor below which employers could not go, but it did not impose a ceiling prohibiting additional protections.

That states could grant more protections against pregnancy discrimination than the federal government, left room then, once the Family Medical Leave Act was passed, for states to develop their own policies, as long as there was no preemption and the states did not offer less than the floor the federal policy required. Their ceilings could go as high as they wished. Although the push for a Family Medical Leave Act in the 1990s had much to do with women's greater participation in the workforce, once social movement mobilization pushed women's greater interest in "financial independence while establishing their own careers,"⁴⁷ there was more at stake. The ability of parents to support their families was key.

[D]espite a booming economy in the 1990s, the economic picture over the long term indicates that many American families have found it very difficult to keep pace economically. Therefore, in order to compensate for a steady decline in real income over the last thirty years, the traditional

44. *Id.* (internal quotation marks omitted).

45. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 290 (1987).

46. *See id.* at 280-92.

47. STEVEN K. WISENSALE, *FAMILY LEAVE POLICY: THE POLITICAL ECONOMY OF WORK AND FAMILY IN AMERICA* 76 (2001).

breadwinner/homemaker household gave way to the dual-earner couple.⁴⁸

More families found that the traditionalist model could no longer be maintained as easily as before in the face of financial pressures pushing mothers into the workplace. These mothers faced family-work balance conflicts in ways older generations of mothers did not experience under the traditionalist model of stay-at-home wife to a working husband. These younger mothers were the ones at the forefront of the movement to have Congress intervene and determine national standards for family medical leave policies. Thus, the Supreme Court upheld the Family Medical Leave Act in light of the Commerce Clause regulating private employers and enforcing the Equal Protection Clause of the Fourteenth Amendment against state employers.⁴⁹

Rosalind Rosenberg explains the context for the passage of the Family Medical Leave Act in 1993. The result of twelve years of lobbying efforts, it was the first piece of legislation signed by President William J. Clinton in February of that year. The law “enabled workers to take up to twelve weeks of unpaid leave to care for a new baby or ailing family member,”⁵⁰ but it applies only to those employed by businesses employing more than fifty employees,⁵¹ and those who worked at least twenty hours per week.⁵² It had been in the works for about eight years, ever since 1985, “the year in which Congresswoman Patricia Schroeder (D-CO) introduced the nation’s first family-leave bill.”⁵³ At that time, “135 countries had already established maternity-leave benefit programs and, of these, all but 10 mandated paid maternity leave.”⁵⁴

But conflict over the bill’s provisions was resolved only through compromise amongst feminist groups: those in support of substantive equality to make gains for working mothers through maternity leaves, as compared to those in support of formal equality—parental leaves for men as well as women.

Those who argued that feminists should concentrate on supporting mothers in the workforce sought fully paid leave for new mothers Their opponents charged that maternity benefits perpetuated the stereotype of the woman

48. *Id.*

49. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003).

50. ROSALIND ROSENBERG, *DIVIDED LIVES: AMERICAN WOMEN IN THE TWENTIETH CENTURY* 263 (2008).

51. *Id.*; *see also* 29 U.S.C. § 2601 (1993).

52. JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT, AND WHAT TO DO ABOUT IT* 112 (2001).

53. WISENSALE, *supra* note 47, at 109.

54. WISENSALE, *supra* note 47, at 109.

as caregiver and tempted employers to discriminate against all women to reduce costs Supporters of maternity leaves secured a state-mandated leave. Equal-parenting advocates won a leave that was gender neutral.⁵⁵

Williams notes, although “the FMLA is a significant and important accomplishment, it is also a drop in the bucket: It covers only a small percentage of those employed in the United States, and offers only an unpaid leave that many women cannot afford to take.”⁵⁶

Supporters and opponents of expansive family leave policies have seemed to speak to each other at cross purposes, because they have different conceptualizations of the role of parents in raising their children, whether government should support it or not, and how, if it should.⁵⁷ Arguing

55. ROSENBERG, *supra* note 50, at 263.

56. WILLIAMS, *supra* note 52, at 237.

57. See, e.g., MARTHA ALBERSTON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCE* xiv-xv (2004). She notes that rejection of the idea that there is some collective responsibility for dependency is not surprising in a society such as ours. American political ideology offers an iconic construct of the autonomous individual and trusts the abstraction of an efficiency-seeking market as an ordering mechanism. We have an historic and highly romanticized affair with the ideals of the private and the individual, as contrasted with the public and the collective, as the appropriate units of focus in determining social good Children are considered to be like any other item of consumption, a matter of individual preference and individual responsibility. The idea that the private is generally preferable as a means of responding to need and dependency has become more and more firmly enmeshed with our sense of social justice during the last few decades—informing the unwritten ‘social contract’ that guides and gauges the relationship among individuals, societal institutions, and the state. As it evolves, what may be referred to as a distinctly American version of the social contract seems to be expanding along the private axis. Privatization is increasingly seen as the solution to the complicated social problems reflecting persistent inequality and poverty. The rhetoric surrounding many current policy debates urges previously public concerns to be transferred to the magical realm of the private solution. From welfare reform to the construction of the ideal educational or prison systems, the assertion is that the private market can better address historical public issues than can the public government. My argument in this book is a mirror image of such arguments about the perceived advantages of the private sector’s taking over tasks historically located within the public sphere. I am arguing for the assertion of collective or public responsibility for dependency—a status or condition that his-

primarily from an ethical position instead of an economic one, advocates have contended that such policies ultimately strengthen families, reduce stress, improve worker morale, and reduce employee turnover.⁵⁸ Opponents to the FMLA drew upon traditionalist views of family governance which had prevailed for so long, and newer perceptions of economic incentives: “parents should raise their children at home . . . government mandated programs such as family leave are intrusive and create unnecessary costs for businesses.”⁵⁹

In an interesting twist on the discrimination against women argument, opponents argued that policies aiming to support working parents discriminated instead against other employees in an organization:

Such an approach interferes with the natural functioning of the free market and the basic laws of supply and demand. Not only is government intervention uncalled for and economically inefficient, it discriminates Forcing business to provide leave is both inefficient and unjust. It in effect discriminates against single persons and against married women and men with no children or with grown children. It’s one thing to call for a gender-neutral productivity test for pay hikes and promotions, but another to make business give preferences to persons with young children.⁶⁰

That Congress passed the FMLA in 1993 with President Clinton in support, notwithstanding the objection of opponents, and its falling short of more

torically has been deemed appropriately assigned to the public sphere. The theory of dependency I set forth develops a claim of ‘right’ or entitlement to support and accommodation from the state and its institutions on the part of caretakers—those who care for dependents. Their labor should be treated as equally productive even if unwaged, and should be measured by its societal value, not by economic or market indicators. The fact that dependency work has been un- or undervalued in the market is an argument *for* governmental intervention and restructuring to mandate adjustment and market accommodation, as well as more direct reparations.

Id. (footnotes omitted).

58. WISENSALE, *supra* note 47, at 100.

59. WISENSALE, *supra* note 47, at 100.

60. WISENSALE, *supra* note 47, at 58 (quoting Gary S. Becker) (internal quotation marks omitted).

expansive plans as urged by some supporters,⁶¹ indicates that Americans as a whole might not have been ready for expansive federal policies for working parents. Yet, a working parent's access to paid leave can determine whether she will return to work.⁶²

Joan Williams and Cynthia Calvert have explained that employee leave under the Family Medical Leave Act can be intermittent or continuous. Intermittent leave "means taking leave in blocks of time rather than continuously, or reducing a normal weekly or daily work schedule."⁶³ They noted that these apply primarily to these employees that are taking care of a family member who has a serious illness, while continuous leave applies primarily to those who are caring for a newborn upon giving birth. Employees are to be reinstated upon their return, to the "former position" or a similar one "with equivalent pay, benefits, terms and conditions,"⁶⁴ provided the leave was within the twelve weeks prescribed by the Act. Moreover, choosing to take leave should not be the basis for retaliation, "a negative factor in employment actions, such as hiring, promotions or disciplinary actions"⁶⁵ or the loss of any benefit the employee "earned or was entitled to before using FMLA leave."⁶⁶

If the employee is placed in a comparable position, that position must include the same privileges, perquisites and status as the employee's former position, and must involve the same or substantially

61. Joan C. Williams & Holly Cohen Cooper, *The Public Policy of Motherhood*, 60 J. SOC. ISSUES, 849-65, 857 (2004) available at <http://onlinelibrary.wiley.com/doi/10.1111/j.0022-4537.2004.00390.x/full>, include a nineteen point plan for modifying family leave policies. Among the items was a proposal that family and medical leave be paid by employers and that employers might be given tax incentives to adopt family friendly workplace policies. *Id.* Wisensale notes that in the course of the 1992 presidential campaign, President George H.W. Bush supported tax incentives over a mandated policy and rejected the Democrats' plan: "I want to strongly reiterate that I have always supported employer policies to give time off for a child's birth or adoption or for family illness and believe it is important that employers offer these benefits," he stated in his veto message. "I object, however, to the federal government mandating leave policies for America's employers and work force." WISENSALE, *supra* note 47, at 149 (quoting George H.W. Bush) (internal quotation marks omitted).

62. JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE* 35-36 (2010).

63. Joan C. Williams & Cynthia Thomas Calvert, *WorkLife Law's Guide to Family Responsibilities Discrimination*, CTR. FOR WORKLIFE LAW 2-2 (November 2006), available at www.worklifelaw.org.

64. *Id.*

65. *Id.* at 2-3 (quoting 29 C.F.R. § 825.220(c)) (internal quotation marks omitted).

66. *Id.* at 2-3.

similar duties, responsibilities, skill level, effort, and authority at the same or a nearby worksite.⁶⁷

As a matter of categorization, the Federal Family Medical Leave Act can be described as an earner-carer model that presumes men and women both participate in earning wages outside the home and perform caretaking inside the home. This model is distinct from the care perspective model of women alone providing care work in the home but not working outside the home. The earner-carer model has emphasized women's rights and the extent to which policies "render women's difference costless."⁶⁸ This model is one that enables "[the] strengthen[ing] [of] women's ties to employment and men's to caregiving . . . men and women engage symmetrically in both paid work and unpaid caregiving." But this American model, critics find, is not without its shortcomings: "Unfunded employer mandates are widely understood to have problematic consequences for women's employment prospects,"⁶⁹ insofar as "[f]inancial designs affect the political and economic viability of leave programmes [sic] and they have important behavioural [sic] consequences, especially vis-à-vis employer behavior."⁷⁰ There is no significant trend, though, for large numbers of employers to cover these as part of paid benefits.

A survey by the Society for Human Resources Management (SHRM) indicates how employers have worked within the guidelines provided by the Family Medical Leave Act.

The federal Family and Medical Leave Act (FMLA) of 1993 guarantees eligible employees 12 weeks of unpaid job-protected leave during any 12-month period for an employee's serious medical condition or to care for a parent, spouse or child. During this leave, the employee retains his or her benefits. Some states have further FMLA requirements as well. Federal law does not require FMLA leave to be paid, but 25% of organizations did offer paid family leave. Eighteen percent of organizations offered family leave above required federal and state FMLA leave. In addition, 18% reported

67. *Id.* at 2-2.

68. Rebecca Ray et al., *Who Cares? Assessing Generosity and Gender Equality in Parental Leave Policy Designs in 21 Countries*, 20 J. EUR. SOC. POL'Y 196, 198 (2010), available at <http://www.lisdatacenter.org/wp-content/uploads/parent-leave-report1.pdf> (internal quotation marks omitted).

69. *Id.* at 208.

70. *Id.*

offering parental leave above federal FMLA requirements, 17% reported offering parental leave above state FMLA requirements, and 11% reported offering elder care leave above federal and state FMLA requirements.⁷¹

Data from the Bureau of Labor Statistics indicates who these workers are that receive the benefits of paid leave.⁷² They work for larger employers employing five hundred or more workers. They tend to be highly paid workers in management and professional fields or teachers and registered nurses, including those who work for state and local government. In the private sector, management level, professional, business, and financial sector employees tend to receive those benefits as well; these also tend to be employees at the higher levels of the wage scale. Critics argue, though, that problems of accessibility can be minimized, if social insurance policy supports it: “[F]inancing allows risk to be shared across all employers, greatly reducing the financial burden for individual employers and minimizing incentives for discrimination against women of child-bearing age.”⁷³

Today, the contentions over expansive social programming can be found in debates over the resources to fund these family-friendly social policies. As the global recession that arose from the collapse in international financial markets in 2008 indicates, such policies do not always gain universal support when budget deficits are on the rise and governments consider austerity measures to forestall the threat of increasing budgets and rising taxes.⁷⁴

71. SOC’Y FOR HUMAN RES. MGMT., *EMPLOYEE BENEFITS: EXAMINING EMPLOYEE BENEFITS AMIDST UNCERTAINTY* 35 (2011).

72. Bureau of Labor Statistics, *National Compensation Survey*, Table 33 (March 2011), available at <http://www.bls.gov/ncs/ebs/benefits/2011/ebb10048.pdf>.

73. Ray et al., *supra* note 68, at 208.

74. Just recently, Americans have been dealing with bitter partisan divides over federal government efforts to balance the budget and manage deficits leading to the fiscal cliff and sequestration. See American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (increasing payroll taxes in early 2013); Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 (leading to automatic federal budget cuts as per the sequestration in early March of 2013). As a result of these recent changes in fiscal policy, decreasing the deficit through further tax increases remains extremely controversial. See, e.g., David Brooks, *The Progressive Shift*, N.Y. TIMES, Mar. 19, 2013, at A27:

Today, progressives are calling on government to be the growth engine in all circumstances. In this phase of the recovery, just as the economy is finally beginning to take off, these Democrats want to take an astounding \$4.2 trillion out of the private sector and put it into government where they believe it can be used more efficiently. How do the House Democrats want to get this money? The top tax rate would shoot up to 49 percent. There’d be new taxes on investment, inheritance, cor-

As experts in human resource management have noted:

Organizations offer a wide range of traditional and nontraditional benefits. In the past, the dilemma for organizations was how to offer the right mix of these benefits to attract and retain top performers while also balancing increasing costs of benefits. Today, organizations are managing these ever-increasing costs amidst the uncertainty of the U.S. economy and the complex health care reform law.⁷⁵

For example, in a random survey of human resources professionals conducted by SHRM, seventy-seven percent of respondents noted that employee benefits were negatively affected by the downturn. If employers find they can't cover expansive paid leave, should recourse be found in Congress? I would caution against doing so, in light of recent efforts to gain such comprehensive reform. The next section assesses recent bills that failed in Congress to gain paid leave for American workers.

III. FAILED ENDEAVORS AND SUCCESSES: RECENT FEDERAL AND STATE ATTEMPTS TO LEGISLATE PAID LEAVE

As Caroline Cohen noted not long ago in her discussion of California's successful paid leave program, recent attempts to pass paid leave at the federal level have failed.⁷⁶ These bills were under consideration during the midst of the financial recession: H.R. 2339, Family Income to Respond Significant Transitions Act of 2009; and H.R. 1723, Family Leave Insurance Act of 2009. Another, H.R. 626, Federal Employees Paid Parental Leave Act of 2009, would have applied only to federal and congressional employees. This last program would have provided an additional four

porate income, financial transactions, banking activity and on
and on.

Id. Contra Richard Eskow, *David Brooks v. Progressives: Genteel Ignorance as Economic Warfare*, ALTERNET (Mar. 20, 2013), <http://www.alternet.org/economy/david-brooks-vs-progressives-genteel-ignorance-economic-warfare> (arguing that increasing taxes leads to an improved economy). See also Monica Davey & Mary Williams Walsh, *Billions in Debt, Detroit Tumbles into Insolvency*, N.Y. TIMES, July 19, 2013, at A1 (noting Detroit's recent declaration of bankruptcy, leading to more questions about the state of local governments' resources). A dramatic decrease in population over the past fifty years has meant a dramatic decrease in tax revenues and a corresponding inability to provide basic services. The city's debt obligations include pension benefits to municipal employees. It is unclear how these will be managed in light of the city's bankruptcy. *Id.*

75. SOC'Y FOR HUMAN RES. MGMT., *supra* note 71, at 3.

76. Cohen, *supra* note 9, at 214.

weeks of paid parental leave in addition to the eight weeks the Office of Management and Budget already has regulatory authority to provide.

The Family Income to Respond to Significant Transitions Act⁷⁷ would have provided grants over the course of three years to states interested in establishing a paid leave program or to supplement an existing program. Through this endeavor, states would have covered partial or full wage replacement for a minimum of six weeks for those taking leave under the FMLA or other federal, state, or local law, or under a private plan or program. Benefits would have been paid directly to a beneficiary, through an insurance program. States without existing programs would have been able to implement one, pay for administrative costs, and cover the cost of employee wage replacement. States with existing programs in turn would have received funding to conduct outreach and education, cover wage replacement, administrative costs, and incentives for employers exempt from compliance with FMLA.⁷⁸

Congress was to appropriate \$1,500,000,000 for fiscal years 2010-2013 towards funding the legislation. If a state wanted to create a new program, the federal government would have covered one-hundred percent of the cost to implement and develop over the course of three years and cover wage replacement. Funding would have been at fifty percent for those taking leave under the FMLA, and seventy-five percent for those taking leave for other reasons authorized by the state. Any non-federal share of funding would have been provided by participating states, local or private sources, or from federal sources other than the act authorized.⁷⁹

The Family Leave Insurance Act of 2009,⁸⁰ in turn, would have authorized the Secretary of Labor to establish a family and medical insurance program. States would have contracted with the federal government to establish a program or expand an existing program. In addition, there was to be a federal-state initiative where the Commissioner of Social Security established the insurance program. The program would have benefitted those covered by the traditional Family Medical Leave Act, providing insurance benefits for twelve work weeks during a twelve-month period because of the birth or adoption of a child; caring for a relative with a serious health condition; the employee's serious health condition that prevented her from working; or a qualifying exigency related to military service. Health care providers were to certify medical leave, similar to certification under the FMLA.⁸¹

77. H.R. 2339, 111th Cong. (2009).

78. H.R. 2339, 111th Cong. (2010).

79. *Id.*

80. H.R. 1723, 111th Cong. (2009).

81. *Id.*

After these various bills failed to leave committee, recently retired Representative Lynn Woolsey (D-Calif.) proposed the H.R. 2346 Balancing Act of 2011.⁸² Her proposal called for paid family leave; public universal pre-school; major investments in child care; universal school breakfast; benefits for part-time workers; and telecommuting incentives.⁸³ The bill was referred to the House subcommittee in September of 2011, and then sent along to the Subcommittee on Early Childhood, Elementary, and Secondary Education.

Key provisions of the bill would have amended the Family and Medical Leave Act of 1993⁸⁴ to direct the Secretary of Labor to establish a Family and Medical Insurance Program enabling eligible employees to receive family and medical leave insurance benefits for a total of twelve work weeks of leave during any twelve month period. The program would have required the Director of the Office of Personnel Management to establish a similar Civil Service Family and Medical Leave Insurance Program for federal employees. The Treasury would have managed the Family and Medical Leave Insurance Fund and the Internal Revenue Code would have been amended to impose a family and medical leave premium on employees and employers. More workers would have been eligible for benefits under the Family and Medical Leave Enhancement Act, as the FMLA would have been amended to increase the number of employers to which it applies by reducing from fifty to twenty-five employees the threshold number triggering application of the Act. Eligible employees and federal employees would have had the opportunity to take specified additional leave for parental involvement and family wellness.⁸⁵

In the wake of these failed federal bills, it is important to consider recent endeavors that have worked at effectuating the paid family medical leave goals that advocates seek. The most effective plans have been implanted at the state level, though. Cohen explains Californians gained paid leave because reformers were effective at presenting plausible rationales for policy—"unbiased cost expectations" indicated the costs would be minimal.⁸⁶ Finally, that the new policy supported "a wide range of people across different classes, sexes, and ages," resulted in broad support.⁸⁷ She urges supporters of federal policy to consider these strategies and reinvigorate the efforts to pass the failed federal leave bills. Progressive supporters of expansive family medical leave policies are not in the best position to find support for their goals, however. President Barack Obama was recently re-

82. H.R. 2346, 112th Cong. (2011).

83. *Id.*

84. 29 U.S.C. §§ 2601-54 (2012).

85. *Id.*

86. Cohen, *supra* note 9, at 246.

87. Cohen, *supra* note 9, at 246.

elected to office in 2012, but since then, the Democrats lost seats in Congress in 2012 and 2014. They currently have forty-four seats in the Senate while the Republicans have fifty-three seats in the Senate. The Republicans currently have 244 seats in the House of Representatives while the Democrats have 186.⁸⁸

Nonetheless, as the Family Medical Leave Act has reached its twenty-year mark, support for paid leave has gained even more momentum among groups of policy analysts. This poses a challenge, then, for private family medical leave pensions. Yet, the mainstream academic policy view has not been successful in fighting the uphill battle they face in gaining widespread support: “People really see this as an individual struggle that they need to be responsible for rather than the societywide [sic], systemic issue it is.”⁸⁹ An emphasis on localism, rather than a top-down federalism, has thus meant less universalism in benefits.

Some states have taken it upon themselves to bolster the rules and now cover a broader swath of workers or provide some paid leave. And companies that tend to work the hardest to lure employees . . . have gone much further to fill in the governmental gaps Despite the myriad benefits of paid leaves, the number of employers that offer the time off is dismal . . . only 11 percent of all private industry workers . . . the average time . . . was seven weeks of fully paid maternity leave.⁹⁰

As for concrete proposals, the NPWF and the Center for American Progress are interested in “legislation that would provide up to twelve weeks of paid leave for the arrival of a new child or for a parent’s serious illness or that of a family member.”⁹¹ They imagine that “costs would be split between workers and their employers, who would each contribute two-tenths of one per cent of workers’ wages to pay for insurance that would replace up to sixty-six percent of a worker’s usual wages, subject to a cap of about one thousand dollars per week.”⁹² Thus, the plan they envision would entail at most, twelve thousand dollars in paid benefits.

⁸⁸ 2014 Senate Election Results, POLITICO (Nov. 15, 2014, 1:32 AM), <http://www.politico.com/2014-election/results/map/senate/>.

⁸⁹ Tara Siegel Bernard, *In Paid Family Leave, U.S. Trails Most of the Globe*, N.Y. TIMES, Feb. 23, 2013, at B1 (quoting Vicki Shabo, director of work and family programs at the National Partnership for Women and Families (NPWF)). The NPWF helped draft the 1993 law. *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* (hyperlink omitted).

⁹² *Id.*

As there has been no success at the federal level to implement paid family medical leave, it is worthwhile to consider what might be possible at the state level. A survey of state family medical leave act programs indicate that a fair number mirror the federal statute, and like the federal statute, they do not offer paid leave. As Siegel notes, and as California's successful paid leave plan indicates, states are free to develop their own family friendly leave policies, and numbers of them have aimed to fill the gaps left by the federal FMLA: "A handful of states have already struck out on their own and devised similar programs that might serve as models."⁹³ The federal policy covers employees in the private and public sector that have fifty or more employees. Eligible employees must have worked for at least twelve months and 1250 hours in the year preceding the proposed leave. A total of twelve weeks unpaid leave during a twelve-month period is available for caring for the birth of a newborn child, placement of a child with an employee for adoption or foster care. Employees experiencing a serious medical crisis or who are providing care for a parent, spouse, or child who has a serious health condition, are also covered. Leave is unpaid and is limited to twenty-six weeks during a single twelve-month period.⁹⁴ This section highlights family leave policies implemented by various states. It is important to note that only three states currently offer paid leave: California, New Jersey, and Rhode Island.⁹⁵

Eligibility under New Jersey law kicks in once a covered employee has worked at least twelve months and for one thousand hours during the twelve month period prior to the leave period.⁹⁶ Six weeks of family leave insurance benefits at two-thirds of an employee's weekly salary are available for eligible employees; these are funded through employee payroll tax-

93. *Id.*

94. 29 U.S.C. §§ 2601-54 (2012).

95. Rhode Island passed its paid leave law in July of 2013. *See, e.g.*, Jon M. Anderson & Jonathan R. Shank, *Rhode Island Becomes The Third State To Provide Paid Family Leave For Employees*, MARTINDALE.COM (JULY 18, 2013), http://www.martindale.com/employee-benefits-law/article_Edwards-Wildman-Palmer-LLP_1892890.htm.

On July 11, 2013, Governor Lincoln Chafee signed into law a bill that provides employees with up to four weeks of paid leave per year to care for a new child or a sick family member. The law's stated purpose is to establish 'a temporary caregiver insurance program to provide wage replacement benefits . . . to workers who take time off work to care for a seriously ill child, spouse, domestic partner, parent, parent-in-law, grandparent, or to bond with a new child'. . . . The new law expands Rhode Island's temporary disability insurance (TDI) program.

Id. *See also The Need for Paid Family Leave*, ABETTERBALANCE.ORG (Sep. 21, 2014, 11:15 PM), <http://www.abetterbalance.org/web/ourissues/familyleave>.

96. N.J. STAT. ANN. § 34:11B-1 (West 2014).

es. In neighboring Pennsylvania, the basic federal leave policy is expanded to include pregnancy, disability, and leave for childbirth as well as for child rearing/child care. Companies of four or more employees fall under the state's medical leave policies. Men as well as women are eligible for childrearing and childcare leave.⁹⁷

Massachusetts is similar to Pennsylvania in extending family medical leave eligibility to employees working in small companies; thus, companies of at least six employees must offer leave. The Maternity Leave Act applies to female employees who have completed any applicable probationary period. If there is no probationary period, an employee is eligible if she has worked for the same employer for at least three consecutive months as a full time employee. There is eight weeks of leave for the birth or adoption of a child. Maternity leave may be paid or unpaid, depending on the employer's discretion. Parental/family medical leave pursuant to the Small Necessities Leave Act is the same as required by the FMLA: employees in workplaces of fifty or more employees, and who worked at least 1250 hours for twelve months prior to eligibility. Coverage is for unpaid leave for the birth of a child, for a child placed for adoption or foster care, for employee sick leave, or providing care for sick family members. Unpaid leave is also available for parents to participate in children's school activities, to accompany children and elderly relatives to routine medical and dental appointments, or other professional services related to elder care.⁹⁸ North Carolina went further and beyond the Federal Family Medical Leave Act by extending applicability to all employers. Eligible employees are parents, guardians or persons in loco parentis of a school-aged child. There are four hours of leave for parental involvement each year. Unpaid leave is available for attending and being involved in a child's school.⁹⁹

In Maryland, the Flexible Leave Act applies to employers that provide paid leave and employ fifteen or more employees. An employee might use leave provided that it has been earned and is available to the employee. Earned leave includes sick leave, vacation time, paid time off, and compensatory time that can be used to care for an immediate family member.¹⁰⁰ Pregnancy leave in New York applies to employers with four or more employees. All employers are required to make adoption leave available to all employees if they grant leave to those who become parents by birth. There is a temporary disability insurance program which requires employers to

97. 43 PA. STAT. ANN. §§ 951-963 (West 2014); 16 PA. CODE §§ 41.101-41.104 (West 2014).

98. MASS. GEN. LAWS ANN. ch. 149, § 105D (West 2014).

99. N.C. GEN. STAT. ANN. § 95-28.3 (West 2014).

100. MD. CODE ANN., LAB. & EMPL. §§ 3-801, 3-802 (West 2014).

provide short term disability insurance for their employees; this can be used by pregnant employees, as pregnancy is seen as a disability.¹⁰¹

Wisconsin covers employees who work for employers of more than fifty permanent employees, including public employers. Those employed for more than fifty-two consecutive weeks and who worked at least one thousand hours in the previous fifty-two week period are eligible. During a twelve month period, employees can get six weeks leave for the birth or adoption of a child, two weeks for a serious health condition of a child, spouse, domestic partner, or parent, or two weeks for the employee's own serious health condition. Leave is unpaid.¹⁰² California follows a state family medical leave policy identical to the federal one, but there are some differences. Pregnancy disability rules apply to employers of five or more employees; pregnant women who are disabled by pregnancy, childbirth, or a related medical condition are eligible. Leave is for a reasonable period of time not to exceed four months. An employee's family and medical leave under state law runs concurrently with federal FMLA leave if the employee is eligible for both. Employees with accrued and available sick leave can use their leave for kin care, of up to six months of accrued sick leave to care for an ill child, parent, spouse, or domestic partner.¹⁰³ As was discussed earlier, the state's disability insurance can provide a source of paid leave.

Florida's plan is identical to the federal law: covered employees in the private sector must work for employers of fifty or more employees in at least twenty weeks of the current or preceding year. Eligible employees had to have worked for at least twelve months, for at least 1250 hours. Generally, leave is of up to twelve weeks during a twelve-month period. Unpaid leave is available for the birth of a child, or the placement of a child with an employee for adoption or foster care, or providing care for a parent, child or spouse with a serious health condition or the employee's own serious health condition.¹⁰⁴

In Louisiana, the federal FMLA leave laws apply and provide basic guidance. In addition, special protections are available to pregnant workers. These apply to employers with more than twenty-five employees in the state. For normal pregnancy, childbirth, or related medical condition, there is disability leave of up to six weeks. For an employee who is disabled on account of pregnancy, childbirth, or related medical condition, there is a

101. N.Y. LAB. LAW §§ 201-c, 202-a, 202-i, 202-j (McKinney 2014); N.Y. EXEC. LAW § 296 (McKinney 2014).

102. WIS. STAT. § 103.10 (West 2013) (effective Apr. 25, 2014).

103. CAL. GOV'T CODE § 12945.2 (West 2014) (describing family and medical leave); CAL. GOV'T CODE § 12945 (West 2014) (describing pregnancy disability leave); CAL. LAB. CODE § 233 (West 2014) (describing Kin Care).

104. FLA. STAT. ANN. § 741.313 (West 2014).

disability leave of up to four months.¹⁰⁵ The leave is unpaid. Minnesota's leave program goes beyond the typical of leave for childbirth, or the adoption, or fostering of a child. Employers who have at least twenty-one employees fall under the state's requirements. Employees who have worked for at least twenty-one consecutive months are eligible, including those who have worked half-time. Six weeks are available for birth or adoption, unless the employee and employer agree to a longer period. Personal sick leave benefits can be used to attend to a sick or injured child. Up to sixteen hours can be used during a twelve-month period for school conferences and school-related activities. The leave is unpaid for the birth or adoption of a child, or for school-related activities.

In the state of Washington, family and medical leave applies to employers of fifty or more employees, while pregnancy disability leave applies to employers of eight or more employees. The family and medical leave is similar to the federal provision. Female employees with pregnancy-related disabilities can receive pregnancy disability leave. State family and medical leave is of up to twelve weeks during any twelve-month period; it runs concurrently with FMLA leave and is in addition to any pregnancy disability leave. There is no specific period of leave for pregnancy disability; for a typical pregnancy without complications, leave is for six to eight weeks. Family and medical leave is unpaid for the birth of a child, the placement with an employee of a child for adoption or foster care. It is also unpaid when an employee is providing care for a child, parent, spouse, or registered domestic partner with a serious health condition, or for the employee's own serious health condition. Pregnancy disability leave is a reasonable accommodation for pregnancy-related disabilities, which should be treated the same as that received by other employees on leave for sickness or temporary disability. For example, if others get paid leave, the pregnant woman should get paid leave as well. With respect to family sick leave, employees can use any or all of their earned sick leave or other earned paid time off to care for relatives—children, spouse, domestic partner, parent, parent-in-law, or grandparent—who have experienced a major emergency, such as a serious health condition.¹⁰⁶

In sum, state family medical leave policies tend to emphasize several different possibilities: mirroring the exact requirements that the federal Family Medical Leave Act requires, or augmenting to an extent. Eligibility under the federal law is the basic determinant of eligibility under state law.

105. LA. REV. STAT. ANN. §§ 23:341, 23:342 (2014).

106. WASH. REV. CODE ANN. § 49.78 (West 2014) (family and medical leave); WASH. REV. CODE ANN. § 49.60 (West 2014) (Washington Laws against Discrimination); WASH. REV. CODE ANN. § 49.12.265 (West 2014) (family sick leave); WASH. ADMIN. CODE § 162-30-020 (2014) (pregnancy disability).

With respect to paid leave under state law, one possibility enables employees to gain paid leave through the state's disability benefits program or through the state's unemployment benefits, as is done in California. These are feasible options that other states might follow, insofar as family medical leaves can be tied to some type of medical need or disability, and failure to gain paid leave can result in a demand for benefits similar to those who are unemployed. Some might be troubled, though, by the lack of a uniform national standard of paid leave. The paucity of states offering paid leave has resulted in the federalist model of states determining their own requirements. This means that only those who are fortunate to live in more liberal states gain the benefit of expansive policies. Thus, the push has persisted for paid leave under the federal Family Medical Leave Act.

However, if supporters of paid family leave persist in supporting a government funded model, perhaps they should switch their focus from federally funded paid leave to state-funded programs, where success might be more likely. California's plan seems a feasible one, in which workers' payroll deductions fund the program and enable short term paid leave. The State inaugurated its paid leave program in 2002 merely by expanding the existing disability insurance fund to include family leave. It was the first in the country, and nearly all non-governmental employees in California pay into through payroll deductions. By 2004, nearly all non-governmental employees in California became eligible to receive up to six weeks of benefits within a twelve-month period. These are insurance benefits provided to those who have experienced a family medical leave occurrence. All workers throughout the state pay the tax, a deduction of one percent on the first \$108,000 of income.¹⁰⁷ Thus, the sum they now contribute to unemployment insurance is higher because of the new expansion in the program.¹⁰⁸

This state-administered fund pays disability benefits to contributing employees when they are unable to work, due to non-occupational causes, after a seven-day waiting period . . . [The fund] does not provide full income replacement. The benefit amount may be offset by any other sources of income.¹⁰⁹

107. State of Cal. Emp't Dev. Dep't, *State Disability Insurance Tax* (2014), http://www.edd.ca.gov/payroll_taxes/State_Disability_Insurance_Tax.htm.

108. Jennifer A. Kearns, *California's Paid Family Leave Law 1*, DUANE MORRIS, LLP (Oct. 6, 2004), http://www.duanemorris.com/alerts/static/A_EBICAFamilyLeave1004.pdf.

109. *Id.*

Those eligible to receive benefits must have taken at least seven days off from work to care for a seriously ill child, spouse, parent, or registered domestic partner, or to bond with a new child. These terms of eligibility come directly from the federal Family Medical Leave Act and the California Family Rights Act; employees must be eligible under one of them in order to receive paid leave. Although the Family Medical Leave Act and the California Family Rights Act both set forth specific criteria determining eligibility based upon the size of an employer and an employee's length of service,¹¹⁰ "the Paid Family Leave program imposes no such constraints." Both full and part time workers are eligible.¹¹¹

The California Employment Development Department 2013 guidelines for employees determine average weekly benefits. These sums are determined based upon the highest quarter of earnings in the year prior to the worker's family medical leave occurrence. Claimants seeking benefits in January through March have a base period covering the twelve months ending in September 30, 2012. Those looking towards April, May, or June have a base in December 31, 2012. Those taking benefits in July, August, or September begin calculating from March 31, while those considering leave in October, November, or December use June 30 as their base period.¹¹² It is unclear whether this calculation is based upon the pre-tax salary or the adjusted gross income subsequent to taxes and other deductions. For obvious reasons, a worker's adjusted gross income is going to be lower than the gross income before deductions, and depending upon which one is used, a claimant might get more in benefits.

A worker who earned about \$7500 per quarter, about thirty thousand dollars per year, is likely to receive benefits of about \$318 per week for six weeks. At fifteen thousand dollars per quarter or sixty thousand dollars per year, the benefit is \$635 weekly, while those earning about ninety thousand dollars per year, or \$22,500 per quarter, will get \$952. The lowest benefit is fifty dollars per week for those who earned between seventy-five dollars and \$1149.99 per quarter, while the highest benefit listed is at \$1,067 for those who earned between \$25,196.37 and \$25,220.00. These correspond to yearly salaries at the lowest level of \$300 to \$4599.96, compared to the

110. See, e.g., U.S. Dep't of Labor, Wage and Hour Div., *Need Time? The Employee's Guide to the Family Medical Leave Act* 2, <http://www.dol.gov/whd/fmla/employeeguide.pdf> (last visited Oct. 17, 2014). The FMLA applies to employers of at least fifty workers and employees who have worked at least 1250 hours and for at least twelve months prior to seeking leave. See also California Family Rights Act, CAL. GOV'T CODE § 12945.2 (West 2014).

111. Morris, *supra* note 108, at 2.

112. State of Cal. Emp't Dev. Dep't, *Paid Family Leave Benefits* (2014), http://www.edd.ca.gov/Disability/PFL_Benefit_Amounts.htm.

highest salaries at \$100,785.48 to \$100,880 per year.¹¹³ Benefits are subject to federal, but not state taxes.¹¹⁴ These sums amount then to a range of benefits from three hundred dollars for six weeks at the lower end of the scale to \$6,402 at the highest. As the maximum coverage is for six weeks, claimants don't get full coverage for the time period authorized by the FMLA. They only get coverage for half of the FMLA authorized twelve-week period of unpaid leave.

Cohen explained that the California legislature justified paid leave in light of the needs of working parents—married or single—to provide care for family members. Paid family medical leave aimed to lessen the demands put onto the state's unemployment insurance and welfare systems, as the legislature found that partial wage replacement benefitted both employees and employers. The former adapted to their family and work responsibilities while the latter experienced increased worker productivity and reduced employee turnover. The legislature enabled greater support for workers beyond the mere job protection offered by the federal FMLA and California Family Rights Act. In addition, it broadened disability insurance to cover leave for providing care for sick relatives or for bonding with a new child.¹¹⁵ Paid family medical leave brought the two together through the state disability insurance program: job protection plus some income support for workers at all income levels.

California's plan thus addresses the argument that low-income individuals might prefer a state-sponsored plan covered through disability insurance, and thus might not be interested in private family medical leave pensions. A state plan like California is straightforward: workers can easily calculate their benefits. It operates similar to a defined benefit program. But a family medical leave pension might not offer such certainty, insofar as it might be similar to defined contribution plans where workers' contributions do not guarantee a specific income. Yet, if a state were to broaden its state disability insurance law, like California did, and authorize family medical leave pensions, it is plausible that these efforts might be of greater benefit to higher income workers.

It is unclear whether other states will follow California's example and legislate paid leave. Perhaps state legislators believe the federal plan is sufficient and whatever plans their jurisdictions offer in support are good enough. Nonetheless, paid leave policies can become important as candi-

113. State of Cal. Emp't Dev. Dep't, *Disability Insurance (DI) and Paid Family Leave (PFL) Weekly Benefit Amounts in Dollar Increments*, http://www.edd.ca.gov/pdf_pub_ctr/de2589.pdf (reflecting maximum weekly benefit amounts for claims beginning on or after Jan. 1, 2014).

114. State of Cal. Emp't Dev. Dep't, *Fact Sheet, Paid Family Leave 2*, http://www.edd.ca.gov/pdf_pub_ctr/de8714cf.pdf (last visited Oct. 17, 2014).

115. Cohen, *supra* note 9, at 222-24, 240-49.

dates run for state office and pledge support for family-friendly policies. For example, Massachusetts treasurer, Steven Grossman, recently spoke at the state Democratic Convention regarding his interest in running for governor: “[I]f a paid family leave policy had not become law by January 2015, he would file it as his first legislative measure.”¹¹⁶ But in the meantime, things are at a standstill in most states, while a viable alternative is not being considered.

IV. THINKING OUTSIDE THE BOX: PRIVATE FAMILY MEDICAL LEAVE PENSIONS

Critics of the prevailing family medical leave policy are troubled by developments to date. The FMLA has not mandated paid family leave, and of the range of possibilities presented by state government initiatives, nothing is exactly on point, since no state offers the ideal: twelve weeks (or more) of fully funded paid leave. Granted, the NPWF is developing proposals for federal and state funded leave, but it is unclear what might happen in the future. If their efforts are not successful, there is an alternative that policy analysts don’t seem to be considering. I argue it is time to think outside the traditional box of government-funded plans and consider private pensions.

Funding for family medical leave pensions might be set up similar to private pension plans under the 401(k) model of employees getting tax deductions which can be put towards a long-term paid leave benefits program.¹¹⁷ This type of benefit could be available to employees at all income levels, and especially for employees who might be drawn to those incentives, for example, the highly skilled and well compensated. Once the individual needed the funds because of a family medical leave occurrence, the funds could be drawn to provide income upon proof of the event. Currently, individuals can contribute up to \$17,500 towards 401(k) retirement plans.¹¹⁸ Contributions are not taxed, but withdrawals are. If participants decide to set up retirement accounts with a brokerage company, such as those offered by companies in the mutual fund industry, these are more likely to be Indi-

116. Jim O’Sullivan, *Grossman Pledges Paid Family Leave if Elected Governor*, BOSTON.COM (July 13, 2013, 1:59 PM), <http://www.boston.com/metrodesk/2013/07/13/state-democrats-gather-lowell-for-convention/k5thKP1olkL9LfSQEHDRiN/story.html>.

117. 26 I.R.C. § 401(k) (2012).

118. Fin. Planning Body of Knowledge, *401(k) Resource Guide - Plan Participants - Limitation on Elective Deferrals*, [http://financialplanningbodyofknowledge.com/wiki/401\(k\)_Resource_Guide_-_Plan_Participants_-_Limitation_on_Elective_Deferrals](http://financialplanningbodyofknowledge.com/wiki/401(k)_Resource_Guide_-_Plan_Participants_-_Limitation_on_Elective_Deferrals) (last visited Oct. 15, 2014). The limit was seventeen thousand dollars for 2012 and will be \$17,500 for 2013. It was \$16,500 in 2011.

vidual Retirement Accounts (IRAs), where participants might be able to deduct a portion of their contributions tax free, but pay taxes at the time of withdrawal.

These type of accounts might be set up as life style and life cycle funds modeled after the IRAs offered by the mutual fund retirement planning industry¹¹⁹ and which need not be employer managed and funded.¹²⁰ These pension funds would go beyond what seems to be the current model of family friendly policies under the federal tax code: childcare credits and deductions for dependents. For purposes of convenience, these new plans might be called “private family medical leave pension plans” sold through private brokerages and mutual fund companies like T. Rowe Price, Fidelity, or Vanguard, if not offered through employers’ plans. If companies were to offer private family medical leave pensions, a participant who wants to pur-

119. See, e.g., The National Association of Government Defined Contribution Administrators, *Guide to Lifestyle/Lifecycle Funds for Asset Allocation* 2-3, <http://www.nagdca.org/dnn/portals/45/Publications/Issues/lifestyleFunds.pdf> :

Lifestyle funds (also called “risk-based” funds) are designed to offer each individual investor a simplified choice of preferred risk exposure. Typically 3-5 different funds are offered in a set, labeled progressively from “conservative” to “aggressive.” The investor decides which label best describes his own risk tolerance; the asset manager makes the asset allocation decision based on the fund's labeling. Typically the investment manager does not change the risk exposure of a particular fund over time; in other words, the allocation is static. An alternative approach is to assume that an investor's age should be the primary driver of risk appetite - that younger investors should take more risk, while older investors should take less risk. *Lifecycle* funds (also called “target-date” or “age-based” funds) are constructed using this notion. A set of funds is offered, and each fund has an associated “target date” For simplicity, funds are usually offered in 10-year or 5-year increments. Funds with a long time horizon are initially invested in a risky allocation, and then over time the allocation is gradually tempered to a more conservative allocation.

Id.

120. See, e.g., U.S. Dep’t of Labor, *Retirement Plans, Benefits & Savings: Employee Retirement Income Security Act (ERISA)*, <http://www.dol.gov/dol/topic/retirement/erisa.htm> (last visited Oct. 15, 2014). ERISA sets forth rules and guidelines for regulating private pension fund management as well as health insurance plans. *Id.* In order to cover employees’ benefits, companies might set up their own plans or use outside companies to manage these on behalf of the company and its employees. Note that defined contribution plans are those where an employee contributes a specific amount towards future benefits but returns are not guaranteed at a set amount. Defined benefits, in turn, are those that determine a specified sum in benefits. U.S. Dep’t of Labor, *Retirement Plans, Benefits and Savings: Types of Retirement Plans*, <http://www.dol.gov/dol/topic/retirement/typesofplans.htm> (last visited Oct. 15, 2014). Companies that already offer extensive family medical leave might consider plans like these an additional benefit to offer their employees.

sue a conservative (lifestyle) strategy might consider a selection of funds that pose low risks to loss of capital. Someone who is interested in a life cycle fund might consider when he/she might need family medical care leave income and select a fund based upon that time period—for example, within five, ten, or fifteen years of joining. Participants choose a plan; the company's fund managers assess opportunities for investment and choose strategies.

If a participant decides to use the family medical leave pension earlier than anticipated, such a situation would not pose a problem; for example, a participant imagined that he/she might need the income in ten years, but instead became a stay-at-home parent in five years. Participants would be able to remove their contributions and income; but contrary to the current 401(k) model and traditional IRA model, there should not be a penalty for early withdrawals.¹²¹ With an ability to remove contributions and income but without any penalties, the plans would be quite effective. With respect to concerns that there might be insufficient time for the accounts to grow, especially if a prospective participant is a young adult at a first job without much of a salary but with student loans, there might be some options. Perhaps investment programs might be available for those as young as eighteen years of age who are planning ahead for the possibility of child rearing after marriage in their twenties or beyond. As for those without children or whose children have grown, funds might be available for wages that might be lost from providing care to others.

Rather than providing income for younger parents, private family medical leave pensions might provide a different life cycle fund for those who care for the elderly. The child who stays at home to care for an elderly parent or who brings an elderly parent into her home wouldn't have to lose income, as the family medical leave pension plan would offer coverage. A family medical leave pension could operate not only as a source of income, but as an additional long term care insurance program to fund the needs of an elderly clientele for home health aides, transportation for health care needs, or medical devices. Granted, existing health insurance and Medicare plans might cover these, but it is not uncommon for there to be deductibles that must be met before coverage might begin. Flexible spending accounts benefit younger people who are working; they gain the pre-tax deductions when they set aside funds to cover those costs. Health savings accounts do the same. A Medicare Medical Savings Account might seem to offer benefits similar to Health Savings accounts, but for elderly people:

121. I.R.S., *Topic 424—401(k) plans* (Aug. 19, 2014), <http://www.irs.gov/taxtopics/tc424.html>. Early withdrawals penalties apply to those under the age of 59 ½; not only are they subject to a ten percent penalty, but the withdrawals are taxed as ordinary income.

A Medicare Medical Savings Account (MSA) plan is a type of Medicare Advantage plan that combines a high-deductible health plan with a medical savings account. Enrollees of Medicare MSA plans can initially use their savings account to help pay for health care, and then will have coverage through a high-deductible insurance plan once they reach their deductible. Medicare MSA plans can provide Medicare beneficiaries with more control over health care utilization, while still providing coverage against catastrophic health care expenses.¹²²

Yet they can't be used by people who already have health insurance.

But what would distinguish a family medical leave pension plan from the traditional retirement plan is that withdrawals from the latter are expected to accrue way into the future, as indicated by retirement plans currently being sold to younger workers.¹²³ There would be a shorter time span of five to fifteen or twenty years; a family medical leave pension for those who might become parents or who might choose to care for their elderly parents.¹²⁴ The downside of this possibility is that withdrawals from 401(k)

122. Ctrs. for Medicare and Medicaid Servs., *Fact Sheet on Medicare Medical Savings Account Plans*, <http://www.cms.gov/Medicare/Health-Plans/MSA/downloads/MSAFactSheet-3-13-08.pdf> (last visited Oct. 17, 2014). See, e.g., I.R.S., *I.R.S. Publication 969*, <http://www.irs.gov/publications/p969/ar02.html> (last visited Oct. 15, 2014) (generally discussing flexible spending accounts, health savings accounts, and medical savings accounts).

123. For example, T. Rowe Price has a listing of the retirement funds in their portfolio spanning a fifty-five year period from 2005 through 2060, and in five year increments to match a large span of retirement dates, from those in their seventies who retired nine years ago to those in their twenties who might retire in about forty-five years. T. Rowe Price, *T. Rowe Price Target Date Funds*, <http://individual.troweprice.com/public/Retail/Mutual-Funds/Retirement-Funds> (last visited Oct. 15, 2014). See also Ron Lieber, *Summer Job? Time to Start a Roth I.R.A.*, N.Y. TIMES, Aug. 1, 2014, at B1. Long term planning retirement even for minors has thus caught on in the mutual fund industry and is currently being promoted by a financial news reporter who urges parents to consider opening up accounts for their teenage children who are entering the workforce for the first time.

124. For example, Coverdell education savings accounts use a shorter investing period, five to ten or fifteen years, might be used as a model for a family medical leave pension, so that they might appeal to younger employees. Only a maximum of two thousand dollars can be contributed per year, these are not tax deductible, but withdrawals for qualified educational expenses are not taxable. Even a two thousand dollars per year maximum contribution to a private family medical leave pension for over the course of five to ten years can arguably fund a decent sized account, where withdrawals for a qualified family medical leave occurrence would then not be taxed. It should be easy to ensure that funds are spent only on family medical leave expenses, such as compensation for lost wages-forms and receipts might be submitted by participants to their plan managers. See, e.g., I.R.S., *Topic*

plans and traditional IRAs are taxable, as taxes are deferred; participants in the plans get the benefit of a tax deduction when they contribute, provided they meet the income thresholds, but must pay taxes at a later date, upon making qualified withdrawals.¹²⁵ To avoid the possibility of paying taxes on withdrawals, family medical leave pension plans might be treated like Roth IRAs, where contributions are from after-tax income, and as a result, all qualified withdrawals are tax free.¹²⁶

Individuals would then choose which type of family medical leave pension plan they prefer. Those participants who might be concerned about paying taxes on future income might want a private family medical leave pension fund, similar to a Roth IRA. Those who prefer to take a current deduction might find the traditional IRA model to be the better choice. As it currently stands, Congress has seen fit to impose contribution limits on both types of IRAs, as these maximize taxes. But, I believe it should be up to individuals to determine what their financial needs are and decide accordingly how much they would want to contribute in before or after-tax deductions. Thus, there should be no contribution limit to private family medical leave pension plans. But, if there is one, the question is whether the current limits of \$5,500 per year, using the Roth IRA as an example, should be imposed.¹²⁷ I would argue that contributions limits should be higher, in order that individuals might build larger funds over time.

As participants in a private family medical leave pension would want to replace income as best as he/she possibly can and as participants will want to use the funds much earlier than retirement, participants should be able to contribute more than the \$5,500 per year currently permitted for those under age fifty pursuant to the Roth IRA model. If there were to be a maximum, perhaps it would be set at ten thousand dollars per year. However, if the Roth 401K model were used, an individual under the age of fifty in 2013 might contribute up to \$17,500 in after tax income, but all withdrawals would be tax free.¹²⁸ Even if someone contributed \$2,400 per year at fifty dollars per week from the time she turned eighteen, with an average return of four percent per year, her savings could amount to as much as thirty-four thousand dollars by the time she reached the age of twenty-eight

310 - *Coverdell Education Savings Accounts* (June 18, 2014), <http://www.irs.gov/taxtopics/tc310.html>.

125. I.R.S., *401(k) Plans* (Oct. 14, 2014), [http://www.irs.gov/Retirement-Plans/401\(k\)-Plans](http://www.irs.gov/Retirement-Plans/401(k)-Plans); I.R.S., *Traditional IRAs* (Mar. 6, 2014), <http://www.irs.gov/Retirement-Plans/Traditional-IRAs>.

126. I.R.S., *Roth IRAs* (Feb. 20, 2014), <http://www.irs.gov/Retirement-Plans/Roth-IRAs>.

127. *Id.* The contribution limit is \$6,500 for those above the age of fifty.

128. I.R.S., *Roth Comparison Chart* (Sept. 30, 2014), <http://www.irs.gov/Retirement-Plans/Roth-Comparison-Chart>.

and had a child.¹²⁹ If a participant didn't use all the funds in taking leave while caring for young children or taking care of elderly relatives, but died with funds available in her account, they might be made part of her estate. This is already possible under existing IRAs. Thus, a parent might pass on a private family medical leave pension fund to children, grandchildren, or other beneficiaries.

Without question, plans like these might tend to benefit those who work for large companies that can create their own plans for their employees, as well as the more sophisticated and highly compensated workers who can afford to put aside relatively large sums of money into a private pension plan. What, then of those who can't afford to participate?¹³⁰ As was dis-

129. See, e.g., Moneychimp, Compound Interest Calculator, http://www.moneychimp.com/calculator/compound_interest_calculator.htm (last visited Oct. 16, 2014). Note, for example, historical and current average rates of return on various bond funds sold by T. Rowe Price. T. Rowe Price, *Mutual Fund Research Tool* (2014), <http://www3.troweprice.com/fb2/mfpathways/pathways.otc?facets=domesticBond>.

130. When it comes to taking responsibility and planning for one's financial wellbeing, the current understanding is that most Americans—of whatever income—are having a hard time managing. See, e.g., Lynn Stuart Parramore, *Everything You've Been Told About Personal Finance is Dead Wrong—Here's the Truth*, ALTERNET (Mar. 5, 2013), <http://www.alternet.org/economy/everything-youve-been-told-about-personal-finance-dead-wrong-heres-truth>:

There are so many factors contributing to the retirement crisis it is hard to succinctly list them all. But once upon a time, a majority of us at least had the possibility of receiving a pension when we retired. That's no longer the case. We're now expected to do this on our own. And, frankly, most of us aren't capable of this task, and we have 30 years of evidence - that is, the lifespan of the 401(k) - to prove this fact. We do everything wrong we possibly can. We are unable to save enough money and we don't invest it well. At the same time, we lack the crucial ability to see the future. We don't really know when we will retire and why that will occur. We don't know if our investments will pan out. We don't know how the greater economic environment will either pay out or interact with our lives.

Id. Equally troubling are critiques that followed in the wake of a City of New York ad campaign sponsored by the Human Resources Administration Department of Social Services urging teenagers not to have children before they are financially capable. Office of Communications and Marketing, *Teen Pregnancy Campaign OER Notes*, THE OFFICIAL WEBSITE OF THE CITY OF NEW YORK, http://www.nyc.gov/html/hra/downloads/pdf/news/campaigns/teen_pregnancy/citation_notes.pdf (last visited Nov. 18, 2014). In the advertisements, children were talking to their parents about how teen pregnancy affects parents and children. One example included the message: "If you finish high school, get a job and get married before having children, you have a 98% chance of not being in poverty." Critics decried the ads as "shaming teen mothers," and didn't seem to see the value in educating young women and men about the risks to mothers

cussed earlier, states might follow California's example and develop their own paid family leave plans through their disability insurance. However, the tax benefits that might follow a private pension plan, for example, in using a Roth IRA model, might even be more appealing to workers—contributions of up to \$5,500 per year, but with no taxes on the withdrawals.

Private pension plans available to more workers might make moot the debates over higher income parents being able to afford unpaid leave that other parents cannot take. This debate would become less significant, but only if state government plans were available to low income workers. If private family medical leave pension plans existed, they might co-exist with state-sponsored plans, like California's. If higher income parents are more likely to have a solid cushion of savings to support them during the course of their maternity leaves, perhaps lower income women need the support of government-sponsored paid leave even more. But should higher income women be able to access paid family medical leave at the same time they might have a private pension plan? Some would argue that it hardly seems fair that they might be required under law to contribute but be barred from gaining the benefits. Nonetheless, if this issue of fairness was incorporated into the policy, as was mentioned earlier, there might be a sliding scale for those who already have their own private plans, with benefits cut off at a certain income. State benefits for an individual worker might decrease as participation in family medical leave pensions increases.

Through the possibility of lower income women also accessing private family medical leave pensions, they would be able to gain the same benefits of staying at home that wealthier women are able to experience, but without having to quit their job and lose much needed income. If anything, they would have more income to spend on the greater expenses that inevitably follow upon giving birth to a child or taking care of other dependents. Scholars have suggested, though, that these types of savings and investing plans don't benefit lower income workers as much. Crystal Hall notes for example, that even though many low-income single mothers might appear independent and self-reliant, their "circumstances . . . are unreliable and unpredictable—both socially and financially," through "a combination of economic disadvantage, restricted social and financial opportunities, and

and children that correlate with early single parenting. *See, e.g.,* Gloria Malone, *I was a Teenage Mother*, N.Y. TIMES (Mar. 15, 2013), http://www.nytimes.com/2013/03/16/opinion/i-was-a-teenage-mother.html?nl=todaysheadlines&emc=edit_th_20130316&r=0. *See also* Richard V. Reeves, *Shame is Not a Four-Letter Word*, N.Y. TIMES (Mar. 15, 2013), <http://www.nytimes.com/2013/03/16/opinion/a-case-for-shaming-teenage-pregnancy.html?ref=opinion>.

general social isolation.”¹³¹ Finally, the instability they experience means that “severely disadvantaged mothers are driven by their immediate needs rather than long-term goals for themselves and their families.”¹³²

Others have argued that private pensions do not help lower income workers, but that they achieve the best type of savings through tax incentives, like the Earned Income Tax Credit.¹³³ Childcare credits, including the Earned Income Tax Credit, as an example, help working parents offset some of their tax liability and receive a refund.¹³⁴ I am imagining, though, that the ideal low income participant in a private family leave pension plan is one who does not yet have any children, similar to the young worker who might be a few years out of college and in the early stages of a career.¹³⁵ That money could be put into a tax free private family medical leave pension and accrue savings—dividends or interest—to be used at a later date. But contrary to the Earned Income Tax Credit, there would be no income limitation to participating in a private family medical leave pension.

Some might object to these types of plans because many people don’t know whether they will ever have children, or they don’t know they will ever need to take a family medical leave. Here, Fineman’s argument is important to remember. We all experience caretaking at some time in our lives; when we were children and others took care of us, or if we offer caretaking to others, children, or other dependents, before we might finally need

131. Crystal C. Hall, *Behavioral Decision Research, Social Class, and Implications for Public Policy*, in *FACING SOCIAL CLASS: HOW SOCIETAL RANK INFLUENCE INTERACTION* 177 (Susan T. Fiske & Hazel Rose Markus eds., 2012).

132. *Id.*

133. See, e.g., Vada Lindsey, *Encouraging Savings Under the Earned Income Tax Credit: A Nudge in the Right Direction*, 44 U. MICH. J.L. REFORM 83 (2010) (suggesting that the EITC might be used as a retirement savings vehicle among low income workers).

134. I.R.S., *EITC Income Limits, Maximum Credit Amounts and Tax Law Updates* (Mar. 27, 2014), <http://www.irs.gov/Individuals/EITC-Income-Limits,-Maximum-Credit--Amounts-and-Tax-Law-Updates>. For example, for 2012, the following limitations were placed on the EITC: \$45,060 (\$50,270 married filing jointly) with three or more qualifying children; \$41,952 (\$47,162 married filing jointly) with two qualifying children; \$36,920 (\$42,130 married filing jointly) with one qualifying child; \$13,980 (\$19,190 married filing jointly) with no qualifying children. Tax Year 2012 maximum credit: \$5,891 with three or more qualifying children; \$5,236 with two qualifying children; \$3,169 with one qualifying child; \$475 with no qualifying children. *Id.*

135. This strategy might resonate among certain groups of low income workers. For example, Joan C. Williams described a distinction among working-class Americans who pursue the politics of respectability and adhere to the notion of a disciplined self as they are “enacting the importance of a world in moral order . . . the central organizing principle of working-class life” dedicated to “routine . . . to protect their families from falling from middle-class status.” Joan C. Williams, *The Class Culture Gap*, in *FACING SOCIAL CLASS: HOW SOCIETAL RANK INFLUENCES INTERACTION* 41 (Susan T. Fiske & Hazel Rose Markus eds., 2012) (citation omitted). She notes that in this cohort religious conservatism provides stability, as does an emphasis on marriage and family.

care ourselves as elderly people. The mere existence of private family medical leave pensions would enable Americans to begin having significant conversations about caretaking in families and throughout the lifespan.

Thus, private family medical leave pension plans are not just about the social contract and whether government should provide better support for caretakers of children, but it addresses a topic many don't want to consider, the possibility of vulnerability, implicit in Fineman's discussion of dependency.¹³⁶ We as a society recognize vulnerability and dependence in motherhood, childbearing, and child care. But we hesitate to talk about adult's dependence and vulnerability in old age.¹³⁷ What role should the social contract have in providing care for the elderly? Medicaid has an answer with respect to medical care. Private family medical leave pensions provide an answer with respect to other types of financial matters and necessary care.

As for those who might be worried about fraud, for example, participants using their pensions when they not really required, and thus improperly gaining the benefits of the tax incentives, proof of a family medical leave occurrence could be a prerequisite for withdrawing the funds. Another objection might be that such plans are unnecessary, as people can save for their own needs, for example, through their own investments. A fair number do so already; however, as Thaler and Sunstein noted, prior to the subprime mortgage crisis, "In 2005 the personal savings rate for Americans was negative for the first time since 1932 and 1933—the Great Depression years. On average, American households spent more than they earned and borrowed more than they saved."¹³⁸

In addition, when people save, they might not get the same tax incentives as I'm imagining here. Interest income on savings accounts is taxed, as are dividends; the interest from federal government bonds is considered income as well. But the Roth IRA might work in providing an incentive in that all earnings are tax free, which is why these plans might be of interest to the industry. Moreover, the possibilities to be found in public service advertising campaigns on the values of saving for the long term are certainly worthwhile. For example, the Ad Council already does educational cam-

136. Fineman addressed the topic of vulnerability in her article, *The Vulnerable Subject: Anchoring Equality in the Human Condition*. Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1-23 (2008).

137. See, e.g., PHILIP SIMMONS, *LEARNING TO FALL: THE BLESSINGS OF AN IMPERFECT LIFE* (2000); MURIEL R. GILICK, *THE DENIAL OF AGING: PERPETUAL YOUTH, ETERNAL LIFE, AND OTHER DANGEROUS FANTASIES* (2006); GEORGE E. VAILLANT, M.D., *AGING WELL: SURPRISING GUIDEPOSTS TO A HAPPIER LIFE FROM THE LANDMARK HARVARD STUDY OF ADULT DEVELOPMENT* (2002); DONALD CAPPS, *THE DECADES OF LIFE: A GUIDE TO HUMAN DEVELOPMENT* (2008); DR. ROBERT N. BUTLER, *THE LONGEVITY REVOLUTION: THE BENEFITS AND CHALLENGES OF LIVING A LONG LIFE* (2008).

138. THALER & SUNSTEIN, *supra* note 39, at 103.

paigns on financial literacy for young adults.¹³⁹ These can be adapted to inspire young adults to consider private family medical leave pension plans as a new vehicle for saving and investing towards family medical leave events.

Insights from the field of behavioral economics address other reasons to support these types of plans. For example, the Corporation for Enterprise Development¹⁴⁰ is supporting studies by local grassroots groups that attempt to help lift low income people out of poverty. They are fulfilling an interest in understanding the behaviors and attitudes that influence economic activity. Thus, they challenge the argument that investment accounts, like the ones I propose, are not of benefit to low income Americans.¹⁴¹ Other efforts at using behavioral economics include encouraging young adults to think about saving more for their retirement in a world where there are fewer fixed pensions. As younger adults tend to be present-oriented, they don't develop a sense of future orientation and don't save as much as they should:

139. See, e.g., Ad Council, *About Us: Effecting Positive Social Change* (2014), <http://www.adcouncil.org/About-Us>; Ad Council, *Financial Literacy* (2014), <http://www.adcouncil.org/Our-Campaigns/Education/Financial-Literacy>.

140. Corp. for Enter. Dev. (CFED), *Purpose* (2014), http://cfed.org/about/purpose/our_vision/. The CFED is a national nonprofit 501(c)3 organization that emphasizes the economic empowerment of low income people:

CFED believes every family can save, build assets and create a more prosperous future for themselves and their children. The proof lies not only in the results of rigorous evaluations, but in the lives of tens of thousands of low-income and even very poor families who have turned opportunity into enduring economic and social benefits. We believe that such an opportunity economy will not only produce a fairer, more cohesive and inclusive society, but a more prosperous, resilient and sustainable one.

Id.

141. Corp. for Enter. Dev. (CFED), *I've got 99 Problems and Helping People to Save is One: A Summary of 99 Challenges Identified in Proposals to theBETA Project 1* (Apr., 2013), http://cfed.org/assets/pdfs/99Problems_final.pdf:

[N]onprofit and local government human services providers are turning to the field of behavioral economics to modify and develop programs that improve the economic condition of lower-income families. Organizations hope to use behavioral insights to "tweak" their programs in ways that increase their impact with minimal additional cost. . . . [In addition, the behavioral economics technical assistance project aims] to use behavioral theory to improve the effectiveness and reach of products and services that help people increase their financial stability. We do this by providing technical assistance to financial capability and asset-building programs for the incorporation of behavioral insights into their program designs.

Id.

Low earnings and high temptations are obvious reasons. But perhaps the most basic cause is a fundamental human frailty: We view our future selves as strangers.

Estimating with any precision what you will want 30 or 40 years from now is almost impossible. You don't know your future desires, because you don't know your future self. What will you want or need when you are 65 or 70 or 80 or older? Who knows?

Viewed this way, it isn't surprising that the young typically don't want to save for their retirement, since that stage of life feels as if it will be lived by someone else. And when you save money today on behalf of your remote future self, you deprive your immediate present self of cash you could use right now.¹⁴²

One means of broadening their self-conceptualization can include virtual reality labs that help participants envision what their future selves might be like when they reach retirement age. Once they do so, they become more capable of imagining that they should think about what they will need in the future. Merrill Edge is already using this strategy in their “face retirement campaign: meet the future you.”¹⁴³

It is certainly feasible that sort of narrative development could just as easily work well in helping young single adults envision their lives as young married parents needing money to fund a family medical leave occurrence. The facial imaging strategy for such a scenario might not be as stark as encouraging a young twenty-something woman to imagine herself as an elderly woman in her seventies. But the development of narrative might be just as effective. If anything, it might be easier as the young adult woman is in a place to imagine having a family in a number of years. With that awareness in mind, she might think about how she can begin today to fund her future needs.

Yet, the question might be whether a young person can be relied upon to save for both at the same time, especially if she is in the early stage of a

142. Jason Zweig, *Meet 'Future You.' Like What You See? New 'Virtual Reality' Techniques Could Help Solve The Age-Old Problem of Saving for Retirement*, WALL ST. J. (Mar. 26, 2011), <http://online.wsj.com/article/SB10001424052748703410604576216663758990104.html>; see also Aprilage Inc., <https://www.aprilage.com/> (last visited Oct. 17, 2014).

143. Marcus Wohlsen, *Know What You'll Look Like in 30 Years — Maybe Then You'll Max Out Your 401(k)*, WIRED (Dec. 5, 2012), <http://www.wired.com/business/2012/12/retirement-magic-mirror/>. See also Merrill Edge, *Face Retirement* (2014), <http://faceretirement.merrilledge.com/>.

career and has not earned much income. It is true, that saving under those circumstances would be a challenge, but just because some might not be able does not mean that others who can do both—save for future childrearing and save for their retirement—should be denied the possibility of pursuing such savings and investment strategies. However, the very existence of such policies could provide an incentive for younger people to think about strategies, even before they begin working.

Private family medical leave pension plans address the needs of those individuals that Thaler and Sunstein call the “Econs,” the “sensible spenders and savers. They put money away for a rainy day, and for retirement, and they invest that money as if they had MBAS.”¹⁴⁴ Those they describe as “Humans” do the opposite. They are less likely to plan for the future, and if they do plan, they don’t do a good job of it. Like the nudges Thaler and Sunstein proposed, employer sponsored private medical leave pensions could to avoid the problem of inertia, of individuals making no choices whatsoever. These might be pushed into programming as a matter of default, as numbers of workplace mutual fund retirement plans do. If employees do not opt out, they might be brought into a plan with allocations according to predetermined contributions that will build up over time. Contributions might be automatic, for example, into the most conservative of plans and at the most conservative sums—something like fifty dollars per week.

These types of prompts are not new, as the Federal Government has recognized these possibilities; the Treasury Department “directed the Internal Revenue Service to issue a series of rulings . . . that defined, approved, and promoted the use of automatic enrollment in 401(k) and other retirement savings.”¹⁴⁵ In addition, the Pension Protection Act “offers employers an incentive to match employee contributions, automatically enroll them in the plan, and automatically increase their contributions over time.”¹⁴⁶ If anything, employers should support plans such as these, and brokerage houses should as well. Private family medical leave pension plans could contribute to employees resisting the temptation to quit work if they don’t have paid leave or if they don’t have enough money to take care of their financial needs in the wake of a family leave occurrence. In addition, the possibility of a match could provide an incentive to begin saving in the hope of earning more.

Some might object that plans such as these would only contribute to decreased federal revenues, as the government would be underwriting the tax benefits that would accrue to participants. This might be especially

144. THALER & SUNSTEIN, *supra* note 39, at 101.

145. *Id.* at 115.

146. *Id.* at 115-16.

troubling, in light of the federal government's ongoing fiscal woes.¹⁴⁷ Wealthier taxpayers who might be presumed not to need the support would gain not only the benefit of their 401(k) plans but also this additional benefit. In addition, they will pay less in taxes, when some might argue that they can well afford to pay more. Notwithstanding these arguments, I think this sort of saving plan is still beneficial as a whole because of a more immediate need. Recent observations about Americans' saving rates indicate that Americans should do better,¹⁴⁸ and, if anything, they need as many nudges as possible to push them into the direction of better self-investment and long-term planning for their futures. Saving money on their taxes would contribute towards this worthy goal.

As it currently stands, the model I am drawing from in the 401(k) retirement plan is an optional retirement plan in the United States. No one need participate if they choose not to. Thus, participation in a private family medical leave pension plan need not be mandatory. The question remains, however, what if Congress authorized private family medical leave pension plans, could they require all Americans to participate? Drawing upon *Sebelius v. NFIB*,¹⁴⁹ the case that tested the constitutionality of the Affordable Care Act,¹⁵⁰ if Congress were to require Americans to fund their own private family medical leave pensions, the legislation might be vulnerable to challenges under the Commerce Clause, as the Supreme Court justices are skeptical of forcing Americans to participate in commerce. So for example, if Congress were to require individuals to buy private family medical leave pensions, it might be problematic. However, incentives to participate might work.

It is noteworthy what was not at issue in the appeal—the constitutionality of requiring employers who do not provide their employees' health insurance and share in the cost in case the federal government must provide

147. See, e.g., Jonathan Schwabish & Courtney Griffith, *The U.S. Federal Budget*, CONGRESSIONAL BUDGET OFFICE, <http://www.cbo.gov/sites/default/files/cbofiles/attachments/budgetinfographic.pdf> (last visited Oct. 17, 2014). Not only did the federal government experience the threat of the fiscal cliff in early 2013, but the recent government shutdown in the end of the third quarter over failed budget negotiations indicate the significance of growing deficits; Jonathan Weisman & Jeremy W. Peters, *Government Shuts Down in Budget Impasse*, N. Y. TIMES, Oct. 30, 2013, at A1.

148. A.C.S., *Too Thin A Cushion*, THE ECONOMIST (Apr. 2, 2013), <http://www.economist.com/blogs/freeexchange/2013/04/saving>; John Glower, *Savings: 5 signs Americans are forgetting the lessons of 2008*, CHRISTIAN SCI. MONITOR (Feb. 7, 2013), <http://www.csmonitor.com/Business/2013/0207/Savings-5-signs-Americans-are-forgetting-the-lessons-of-2008/Debt-remains-at-distressing-levels>.

149. Nat'l Fed'n Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

150. Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care Education and Reconciliation Act of 2012, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

coverage. Perhaps that was a non-issue, in that many employers already provide health care benefits, and the statute included incentives in the form of tax credits for small businesses to provide coverage.¹⁵¹ A study of the Patient Protection and Affordable Care Act of 2010 (ACA)¹⁵² and its aftermath in *Sebelius* thus offers an opportunity for assessment and critique. Through such an inquiry, policy makers might consider what a newly enacted private family medical leave pension plan might look like, the challenges such legislation might pose, and the possibility of unconstitutionality.

The ACA was controversial from the moment of its passage. The goal of the statute was to ensure that all Americans would be covered by health insurance and thus lower the cost of health care services. The Supreme Court decision in *Sebelius v. NFIB*¹⁵³ thus provides a unique opportunity to look at how Congress and the Court recently addressed policy matters relating to expanding social insurance and requiring individuals to seek coverage. According to the individual mandate, everyone in the United States is required to have health insurance; either they purchase it if they don't have any, or they maintain their current coverage. The Act did recognize certain groups as being exempt. Members of religious organizations that oppose acceptance of health insurance benefits are not required to violate their religious beliefs and procure coverage. Illegal aliens, the incarcerated, and members of Native American tribes are not bound to comply. In addition, there is what might be considered hardship exemptions, applicable to those of low income. Others can receive subsidies for their coverage.¹⁵⁴

Those without coverage are to procure health insurance or face taxes.¹⁵⁵ The Court considered several possible rationales for such a requirement. It was not a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause, as the mandate could not be

151. Kristen McNamara, *What Health Overhaul Means for Small Businesses*, WALL ST. J. (Mar. 25, 2010), <http://online.wsj.com/article/SB10001424052748703312504575141533342803608.html>.

152. Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care Education and Reconciliation Act of 2012, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

153. *Sebelius*, 132 S. Ct. at 2566-2609.

154. See, e.g., Cynthia Cox & Larry Levitt, *The Individual Mandate: How Sweeping?*, HENRY J. KAISER FAMILY FOUND. (Mar. 21, 2012), <http://policyinsights.kff.org/2012/march/the-individual-mandate-how-sweeping.aspx>; I.R.S., *Your Federal Income Tax: For Individuals*, 4 (2012), <http://www.irs.gov/pub/irs-pdf/p17.pdf> (listing minimum income requirements for filing federal taxes).

155. Henry J. Kaiser Family Found., *The Requirement to Buy Coverage under the Affordable Care Act* (2014), <http://healthreform.kff.org/the-basics/requirement-to-buy-coverage-flowchart.aspx>. As it currently stands, though, it appears that there is no enforcement mechanism in the ACA to enforce collection of the tax. Unless enforcement is to take place through the Internal Revenue Service's traditional auditing process, it is unclear how effective this will be.

seen as relating to the regulation of commerce. In addition, the Necessary and Proper Clause was ineffective, as the enumerated power linked to the exercise of the power must be clearly enunciated in the Constitution.¹⁵⁶ But the individual mandate could be upheld, though, pursuant to Congress's power to tax:

[T]he shared responsibility payment may for constitutional purposes be considered a tax. The payment is not so high that there is really no choice but to buy health insurance. . . . None of this is to say that payment is not intended to induce the purchase of health insurance. But the mandate need not be read to declare that failing to do so is unlawful. Neither the Affordable Care Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS.¹⁵⁷

This rationale to support the individual mandate makes sense. When health insurance is available and affordable but people do not procure it for whatever reason—they are not sick, or they don't imagine they will need it—the government might be called upon to cover their care in case they do need it in the future. So, they can't be compelled to purchase it, but it is only reasonable that they pay something towards the possibility that they might need future coverage. If they had paid for their own health insurance and health care expenses and then fell sick, their coverage would have already existed. That is the purpose of insurance programs—to cover the possibility of risk in the midst of uncertainty.

Thus, if Congress were to require individuals to purchase their own private family medical leave pensions, it should look to the taxing power. Congress might create an incentive to urge individual participation by including tax benefits. Those who participate might gain more deductions or credits on their federal return, or lose them if they do not. Or, the tax incentives might take place at the state level, as was implemented in 2006 when Massachusetts became a trailblazer and began its own campaign to ensure mandatory coverage for all its residents.¹⁵⁸ Those who don't get coverage

156. *Sebelius*, 132 S. Ct. at 2566.

157. *Id.* at 2574.

158. An Act Providing Access to Affordable, Quality, Accountable Health Care, ch. 58, 2006 Mass. Sess. Law, available at <https://malegislature.gov/Laws/SessionLaws/Acts/2006/Chapter58>; Henry J. Kaiser Family Found., *Massachusetts Health Care Reform: Six Years Later* (May 1, 2012), <http://www.kff.org/healthreform/upload/8311.pdf>.

lose their tax deductions on their state taxes; this was the inspiration for the taxes found in the ACA.

In addition, Congress might consider tax incentives for private companies to develop these plans. For example, brokerage houses could receive incentives to do the same, just as health insurance companies that already offer health savings accounts might be incentivized to add these choices to their menu of options for consumers. Brokerage accounts and health savings accounts both draw upon consumer savings and investing; thus, it would not be difficult to imagine these possibilities applied to private family medical leave pension plans. United Health Care notes in its marketing:

Since you need to select a financial institution to administrate your savings account, and the health insurer offering the HSA plan also has a financial institution available, it can make the process of setting up and using an HSA much easier and more convenient. Some insurers have their own bank and offer a single enrollment process so you can sign up for both the health insurance plan and the bank account at the same time, eliminating the need to go through two separate enrollment processes. Also, one way to turn HSA funds into long-term health-care savings is to invest that money in mutual funds or other opportunities. So make sure that the bank you choose has investment options available.¹⁵⁹

Once individuals have available to them private family medical leave pension plans, they would then be on a path to pursue investment strategies that meet their needs.

V. CONCLUSION: NEW FRONTIERS

Innovative companies have put themselves in the forefront of creating family friendly policies that draw potential employees purely as a matter of competing for talent, notwithstanding the FMLA not requiring employers to offer paid leave. For twenty-six years, Working Mother Magazine has reported on the top one hundred workplaces for working mothers. In their recent study from 2011, they indicate the characteristics shared by the com-

159. United Health Care Servs. Inc., *Is an HSA Plan the Right Choice for Me?*, HSACENTER.COM (2014), <http://www.hsacenter.com/rightchoice.html>.

panies that have proven to be the best workplaces for them. The 2011 Working Mother 100 Best Companies employ 2.5 million people in eighteen industries at more than 37,700 worksites nationwide. Of these employees, 1.21 million are women.¹⁶⁰

These are companies in the following fields: accounting, apparel, chemicals, consumer products, education, financial services, hospitals/healthcare, hospitality, insurance, legal, management consulting, manufacturing, media, internet & advertising, pharmaceutical, professional services, technology, telecommunications, and utilities.¹⁶¹ All of them provide paid maternal leave; seventy-nine percent provide paid adoption leave and seventy-six percent provide paternal leave.¹⁶² Yet, in the past year at the Working Mother 100 Best Companies, the number of partially-paid weeks of maternity leave increased, while the number of fully-paid weeks of maternity leave declined.¹⁶³ Thus, employees in those companies still need alternative sources of funding for family leave.

The Institute for Women's Policy Research explained further: "In 2010, 16 percent of companies on the *Working Mother* '100 Best Companies' list offered paid maternity leave of more than 12 weeks and 8 percent provided 11-12 weeks of paid leave."¹⁶⁴ The greatest majority offered between one-two weeks (twelve percent), three-four weeks (thirteen percent), five-six weeks (twenty-three percent), or seven-eight weeks (fifteen percent).¹⁶⁵ As for paternal leave, most companies offered one to two weeks (fifty-one percent) or three to four weeks (eleven percent).¹⁶⁶ For both female and male workers, "[y]ears on the job influence[d] the amount of paid leave an individual worker might be entitled to in many establishments" with the leave designations cited as the maximum which can be taken.¹⁶⁷ Nonetheless, "such policies are not the rule among companies that present themselves as family-friendly,"¹⁶⁸ they note. These elite companies'

160. WORKING MOTHER, 100 BEST COMPANIES 2011: EXECUTIVE SUMMARY 6 (2011), available at http://www.wmmsurveys.com/2011Working_Mother_100Best_Executive_Summary.pdf.

161. *Id.*

162. *Id.* at 9.

163. *Id.* at 12.

164. Annamaria Sundbye & Ariane Hegewisch, *Fact Sheet: Maternity, Paternity, and Adoption Leave in the United States*, INSTITUTE FOR WOMEN'S POLICY RESEARCH 1 (May 2011), <http://google.com> (type "Fact Sheet: Maternity, Paternity, and Adoption Leave in the United States"; then, click on the second search result link).

165. *Id.* at 3.

166. *Id.* But note, though, that fathers of newborns are considering the possibility that the fewer weeks of paternity leave discriminates against them and denies them the longer periods their wives have to recuperate and bond with their infants. See, e.g., Tara Siegel Bernard, *Standing up for the Rights of New Fathers*, N.Y. TIMES, Nov. 9, 2013, at B1.

167. SUNDBYE & HEGEWISCH, *supra* note 164, at 2-3.

168. *Id.* at 2.

paid parental-leave policies fall short of families' needs, with some not offering any paid maternity leave at all and 30 percent offering no more than 4 weeks of paid maternity leave. The share of companies with such low family provisions grew from 24 percent in 2006 to 30 percent in 2010.¹⁶⁹

[Nonetheless,] as part of a national political culture that nurtures a split personality of family obligations on one side and government responsibilities on the other, corporations often find themselves trapped in the middle. It is within this context that liberal politicians . . . argue that family-friendly policies are both affordable and profitable The business community, however, often responds . . . that government intervention is unnecessary.¹⁷⁰

Companies that offer paid leave and who believe that government intervention is unnecessary since they are capable of attracting desirable talent through incentives, might offer such benefits as part of their traditional benefits packages and paid for by the companies themselves. However, one possibility includes the development of private family medical leave pension plans offered as part of compensation packages and paid through employee contributions, provided these were authorized by Congress. This proposal might be troubling, though, for those who support a social wage view of compensation.

If employers are seen as having an obligation to employees as part of a bargain that employees work for their livelihood, and employers support them in providing a decent standard of living with adequate benefits throughout the lifespan, private family medical leave pensions might be troublesome. There would be no costs to employers, but employees would bear all the costs of their own leave without employers contributing in any fashion. Private family medical leave pensions emphasize the individual's efforts.¹⁷¹ Yet, if a match were possible, as exists under the 401(k) retirement plan, employers would bear some costs and gain the benefit of workers experiencing better work-family balance.

169. *Id.*

170. WISENSALE, *supra* note 47, at 100.

171. See Thomas Friedman, *It's a 401(k) World*, N.Y. TIMES, May 1, 2013, at A25 (discussing newer trends towards personal autonomy). "Government will do less for you. Companies will do less for you. Unions can do less for you. There will be fewer limits, but also fewer guarantees. *Your* specific contribution will define *your* specific benefits much more. Just showing up will not cut it." *Id.*

Supporters of paid family leave have long operated under the presumption that the federal government should provide funding. It is certainly understandable; in the modern world, federal government funding has traditionally been seen as the ideal, dating back to the passage of retirement pensions under the Social Security Act of 1935.¹⁷² Everyone contributes to the fund through their payroll taxes, and the federal government provides a fixed benefit to all retirees based upon income and years of employment, as costs are shared among everyone—the wealthy and the poor. But these sorts of programs are not free. In a time of fiscal austerity stemming from rising deficits, it will be difficult for supporters of paid family leave to overcome longstanding cultural presumptions that families undertake the management of their parenting responsibilities and make their own arrangements.

A more feasible possibility is that more and more states might be urged to develop their own plans through existing state disability programs. All workers would pay into the system; family medical leave might then be classified as a type of disability. Nonetheless, drawing upon the example of California's successful plan, state-sponsored paid family medical leave programs demonstrate that government benefits are not always generous. Moreover, they can be taxable. As a result of these features, families who want full income replacement must make private arrangements to supplement their income once a family medical leave occurrence arises. Thus, I urge consideration of newer ways of thinking about funding for family medical leave: private family medical leave pensions as part of self-investment.

If Congress were to undertake support for paid family leave, the lesson of *Sebelius v. NFIB*¹⁷³ is that any individual mandate cannot be grounded in the Commerce Clause. The Internal Revenue Code might provide inspiration. It might provide an incentive, in the form of tax credits for brokerage houses to create such plans and for companies to do the same for their employees. Implementing tax incentives in the form of pre-tax deductions and tax-free withdrawals that encourage saving and investing would be helpful to individual workers. The field of behavioral economics has the potential to show how workers might be urged to pursue these strategies. Decreasing the taxes Americans pay and enabling them to save for their own futures through private family medical leave pensions presents a viable option, notwithstanding arguments that Americans face difficulties in saving and investing. It is time to think outside the box.

172. Pub. L. No. 74-271, 40 Stat. 620 (1935), *amended by* Social Security Act, Pub. L. No. 112-275 (2013).

173. *Nat'l Fed'n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).