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A TRIP DOWN LEGISLATIVE MEMORY LANE: HOW THE FMLA CHARTS A PATH FOR POST-COVID-19 PAID LEAVE REFORM

Abstract: Before the COVID-19 pandemic, the United States was the only highly-developed nation in the world not to guarantee paid family and medical leave (PFML) for its citizens. In 2020, during the early days of the pandemic, Congress passed temporary PFML to alleviate the hardship on families forced to choose between health and a paycheck. That legislation is no longer in effect. Many interest groups and lawmakers feel that the COVID-19 crisis has finally presented the moment to make PFML permanent in the United States. Yet, other conservative and pro-business groups resist the idea. The dynamics unfolding over the future of PFML are highly reminiscent of a policy debate that took place during the 1980s and 1990s over the Family and Medical Leave Act of 1993 (FMLA). The current debate over PFML provides a fortuitous opportunity to look back and learn from history. First, this Note suggests that the legislative history of the FMLA provides an insightful model of bipartisanship and coalition-building that should inform present PFML policy-making. Second, this Note gives an instructive comparison of the corporate and political landscape in the 1980s versus 2020s to frame these policies. Finally, this Note offers potential solutions for the roadblocks to PFML imposed by the business community, which mirror similar pushbacks against the FMLA three decades ago.

INTRODUCTION

In September 2020, on their children’s first day of school, a group of mothers in New Jersey gathered in solidarity outside their homes to let out a unified scream.¹ After many months living with the coronavirus (hereinafter “COVID-19” or “the Pandemic”), many parents and caregivers simply could

¹ See Julia Carmel, *To Hear America’s Mothers, We Let Them Scream*, N.Y. TIMES (Feb. 6, 2021), <https://www.nytimes.com/2021/02/06/insider/primal-scream-section.html> [<https://perma.cc/K84Y-7V4R>] (recounting the stories of mothers around the country and their struggle with at-home work and parenting). During the first seven months of the coronavirus pandemic, over one million parents left their jobs due to school closures. *Id.* As part of a larger series exposing the widespread troubles of American parents, the New York Times tracked the daily lives of three women, all mothers. Jessica Bennett, *The Primal Scream: Three Mothers, on the Brink*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/interactive/2021/02/04/parenting/covid-pandemic-mothers-primal-scream.html> [<https://perma.cc/RP75-BSWT>]. The three women conveyed unique, but thematically similar tales of the hardships that accompanied parenting during a global pandemic without adequate government support. *See id.* (documenting the stories of three women living in Maryland, Washington, and California).

not take it anymore.² Due to the Pandemic, American families broke beneath the weight of simultaneous at-home work, virtual schooling, and caretaking of loved ones.³ The lack of child care forced approximately twenty-five percent of working women in the United States to reduce their work schedules or leave their jobs entirely.⁴ Analysts anticipate that the negative effects of this unexpected flight of women from the workforce will reverberate through the American economy for years to come.⁵

The lack of national paid family and medical leave (PFML) has made the Pandemic uniquely difficult for American families.⁶ PFML guarantees employees paid time off for long-term absences from work to care for a child, loved one, or themselves.⁷ Before COVID-19, the United States was the only

² See, e.g., Anne Marshall-Chalmers, 'How Am I Going to Keep This up?' *COVID Intensifies Plight of Family Caregivers*, CALMATTERS (Jan. 21, 2021), <https://calmmatters.org/health/2021/01/covid-family-caregivers-plight-california/> [<https://perma.cc/C4CT-CDRL>] (reporting that some professional caretakers experienced a surge in business from exhausted family members); Heidi Stevens, 'Parents Are Spinning 8 Plates at a Time Right Now.' *Stop Shaming Them for Relying on Screen Time to Make It Through a Pandemic*, CHI. TRIB. (Jan. 22, 2021), <https://www.chicagotribune.com/columns/heidi-stevens/ct-heidi-stevens-parents-feel-screentime-shamed-covid-0122-20210122-74mo3bk4mfgzrlkv5xfrihyok2y-story.html> [<https://perma.cc/U4H9-L38J>] (describing the novel challenges of parenting during coronavirus (hereinafter "COVID-19" or "the Pandemic").

³ See Ruth Igielnik, *A Rising Share of Working Parents in the U.S. Say It's Been Difficult to Handle Child Care During the Pandemic*, PEW RSCH. CTR. (Jan. 26, 2021), <https://www.pewresearch.org/fact-tank/2021/01/26/a-rising-share-of-working-parents-in-the-u-s-say-its-been-difficult-to-handle-child-care-during-the-pandemic/> [<https://perma.cc/9G2C-374B>] (finding that the number of parents reporting stress and difficulty balancing their duties has increased since the onset of the Pandemic).

⁴ See Alicia Sasser Modestino, *Coronavirus Child-Care Crisis Will Set Women Back a Generation*, WASH. POST (July 29, 2020), <https://www.washingtonpost.com/us-policy/2020/07/29/childcare-remote-learning-women-employment/> [<https://perma.cc/9XXU-E66E>] (analyzing the long-term economic ramifications of the number of women suddenly leaving the American workforce). The impact of child care is significant for the United States economy because working parents represent approximately fifty million people. *Id.*

⁵ See Abby Vesoulis, 'If We Had a Panic Button, We'd Be Hitting It.' *Women Are Exiting the Labor Force En Masse—And That's Bad for Everyone*, TIME MAG. (Oct. 17, 2020), <https://time.com/5900583/women-workforce-economy-covid/> [<https://perma.cc/PL6L-U4WE>] (explaining that the economic outcomes for women due to COVID-19 will prolong the United States' future economic recovery from the Pandemic).

⁶ See Diana Boesch, Sarah Jane Glynn & Shilpa Phadke, *Lack of Paid Leave Risks Public Health During the Coronavirus Outbreak*, CTR. FOR AM. PROGRESS (Mar. 12, 2020), <https://www.americanprogress.org/issues/women/news/2020/03/12/481609/lack-paid-leave-risks-public-health-coronavirus-outbreak/> [<https://perma.cc/4WM5-JEK7>] (opining that the absence of paid leave in the United States forces workers to choose between caring for themselves or ill family members and job loss); *How the Lack of Paid Sick Leave Will Make Coronavirus Worse*, ECON. POL'Y INST., <https://www.epi.org/multimedia/coronavirus-paid-sick-leave-explainer/#:~:text=Over%2030%20million%20American,Economist%20Elise%20Gould%20explains> [<https://perma.cc/7JYN-NWYQ>] (projecting that the large segment of Americans without access to paid leave may augment the effects of the pandemic).

⁷ See U.S. DEP'T LAB., *WHAT'S THE DIFFERENCE?: PAID SICK LEAVE, FMLA, AND PAID FAMILY AND MEDICAL LEAVE 1* (2016), <https://www.dol.gov/sites/dolgov/files/oasp/legacy/files/paidleavefinalrulecomparison.pdf> [<https://perma.cc/6BLK-566H>] (defining paid family and medical leave (PFML)). Generally, when this Note uses the term "PFML," it refers to a federal policy imposing a government-mandated minimum standard for PFML benefits for private sector employers. See *id.*

highly-developed country in the world without a national PFML policy.⁸ After the global COVID-19 outbreak, the United States' outlier status became glaringly obvious and, even worse, devastating for public health.⁹ During the Pandemic, more Americans died per capita than any other country in the world, with some experts suggesting that the lack of national PFML contributed to the disproportionate impact.¹⁰

(reviewing the various federal programs that provide leave benefits to working Americans). This Note briefly discusses PFML programs at the state level, as opposed to federal level, but this usage is limited. *See infra* Part I.C. (laying out various state PFML policies). The scope of this Note, however, is limited to policies affecting private employers, not the government or public sector. *See infra* note 142 and accompanying text (providing statistics regarding the percentage of Americans with access to PFML, referring exclusively to the private sector).

⁸ HYE JIN RHO, SHAWN FREMSTAD & JARED GABY-BIEGEL, CTR. FOR ECON. & POL'Y RSCH., CONTAGION NATION 2020: UNITED STATES STILL THE ONLY WEALTHY NATION WITHOUT PAID SICK LEAVE 3 (2020), <https://cepr.net/wp-content/uploads/2020/03/2020-03-Contagion-Nation-2020.pdf> [<https://perma.cc/R5XC-MN2A>] (finding that the United States is the sole country out of twenty-two highly-industrialized nations to not grant any payment to workers suffering from short-term illness). The other nations included in the March 2020 study were: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, and the United Kingdom. *See id.* at 5 (graphing the paid sick leave provisions provided by twenty-one nations plus the United States). The study selected the twenty-two nations based on the United Nations' Human Development Index, with the caveat that all countries had verified cases of COVID-19 as of March 2020. *Id.* at 4. The United States is also the only Organization for Economic Cooperation and Development (OECD) member nation not to provide any type of paid family leave policy. *See* Stefan Pichler, Katherine Wen & Nicolas R. Ziebarth, *COVID-19 Emergency Sick Leave Has Helped Flatten the Curve in the United States*, 39 HEALTH AFFS. 2197, 2197 (2020), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2020.00863> [<https://perma.cc/26NC-M3E2>]; *see also* *Where: Global Reach*, OECD, <https://www.oecd.org/about/members-and-partners/> [<https://perma.cc/A7KE-HAJB>] (listing the thirty-seven member countries of the OECD). The OECD is a global organization aimed at implementing economically and socially beneficial policies around the world, and membership is selective. *Id.* Within the OECD nations, there is a wide range of family leave policies. SARAH A. DONOVAN, CONG. RSCH. SERV., R44835, PAID FAMILY LEAVE IN THE UNITED STATES 11 (2019). For example, Spain offers citizens up to three days of paid leave to care for a terminally ill family member, whereas Denmark offers unlimited paid leave under similar circumstances. *See id.* at 14 (comparing the paid family leave policies of OECD nations).

⁹ *See* Pichler et al., *supra* note 8, at 2197 (noting the attention the United States garnered for its lack of national paid leave policies amid the COVID-19 outbreak); *see also* Taylor Bleistein, *The United States' "Most Inclusive" Paid Parental Leave Policy Pales in Comparison to Foreign Countries Policies*, 41 WOMEN'S RTS. L. REP. 52, 68 (2019) (calling the United States an "[i]nternational [e]mbarrassment" compared to other industrialized nations that offer a minimum paid leave of two-thirds of an employee's wage for at least fourteen weeks). As of January 2021, the United States sustained twenty-one million contracted cases of COVID-19 and suffered 360,000 deaths due to the virus. Mark Katov, *U.S. Records More Than 4,000 Dead in 1 Day from COVID-19, a Grim New Record*, NPR (Jan. 8, 2021), <https://www.npr.org/sections/coronavirus-live-updates/2021/01/08/954848161/u-s-records-more-than-4-000-dead-in-1-day-from-covid-19-a-grim-new-record> [<https://perma.cc/R7Q7-VARK>].

¹⁰ *See* Jason Beaubien, *Americans Are Dying in the Pandemic at Rates Far Higher Than in Other Countries*, NPR (Oct. 13, 2020), <https://www.npr.org/sections/health-shots/2020/10/13/923253681/americans-are-dying-in-the-pandemic-at-rates-far-higher-than-in-other-countries> [<https://perma.cc/SS7H-JGVP>] (finding that the death rate from COVID-19 in the United States was 85% higher than in

When the Pandemic struck, the Family and Medical Leave Act of 1993 (FMLA) governed family and medical leave benefits in the United States.¹¹ The FMLA, still law, guarantees job protection for employees taking long-term absences from work, but without any provision for paid leave.¹² Because the FMLA dictates most Americans' leave benefits, the Pandemic forced many individuals to make an impossible choice between caring for themselves and their loved ones or continuing to go to work and earning a paycheck.¹³ This moral quandary highlighted the inadequacy of unpaid family and medical leave.¹⁴

some European countries when adjusted for population); *see also* *How the Lack of Paid Sick Leave Will Make Coronavirus Worse*, *supra* note 6 (noting the harmful effects of a lack of PFML on Americans during the Pandemic). Scholars studied the effects of a lack of paid leave on working populations. *See, e.g.*, Johanna Catherine Maclean, Stefan Pichler & Nicolas R. Ziebarth, *Mandated Sick Pay: Coverage, Utilization, and Welfare Effects 2* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26832, 2020) (studying "presenteeism behavior" or "working sick"). Essentially, employees without access to paid benefits are less likely to take sick leave and more likely to report to work ill, thus increasing the spread of contagious or infectious diseases in the workplace. *Id.*

¹¹ Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601.

¹² *See id.* § 2612(c) (describing the unpaid leave provision of the FMLA); *id.* § 2614(a)(1) (describing the guaranteed job protection for employees taking qualifying FMLA leave). This Note will use the term "leave benefits" as a catchall description for the privileges that employees receive while taking absences from work. *See, e.g.*, U.S. BUREAU LAB. STAT., U.S. DEP'T LAB., NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2019, at 119 (2019), <https://www.bls.gov/ncs/ebs/benefits/2019/employee-benefits-in-the-united-states-march-2019.pdf> [<https://perma.cc/JL5D-37ED>] (showing that the United States Bureau of Labor Statistics uses "[l]eave benefits" as an umbrella term to include sick leave, holidays, military leave, and family leave—both paid and unpaid). These privileges may include wage replacement, job protection, or any other benefits offered by the employer during the leave period. *See id.* (exemplifying the breadth of leave benefits). Within the broader category of leave benefits, there is paid and unpaid leave, sick leave, and family and medical leave. *See infra* notes 39–42 and accompanying text (laying out the different types of leave benefits employers typically offer).

¹³ *See* Kim Bellware, *Paid Family and Sick Leave Could Expand for the First Time in Decades Because of the Pandemic*, WASH. POST (Feb. 6, 2021), <https://www.washingtonpost.com/politics/2021/02/06/coronavirus-paid-leave/> [<https://perma.cc/4R22-WBCL>] (documenting the difficulties that COVID-19 imposed on many Americans, especially women, to balance work and health).

¹⁴ *See* 50 *Prominent Women Run Full Page Ad in the New York Times Calling on President Biden to Implement Marshall Plan for Moms in First 100 Days*, GIRLS WHO CODE (Jan. 26, 2021), <https://girlswhocode.com/news/50-prominent-women-run-full-page-ad-in-the-new-york-times-calling-on-president-biden-to-implement-marshall-plan-for-moms-in-first-100-days> [<https://perma.cc/6FJR-RYSX>] (displaying an ad sponsored by female business leaders and celebrities campaigning for more generous family policies from the new presidential administration). Statistical evidence shows that job loss during COVID-19 disproportionately affected women. *See* CLAIRE EWING-NELSON, NAT'L WOMEN'S L. CTR., ALL OF THE JOBS LOST IN DECEMBER WERE WOMEN'S JOBS 1 (2021), <https://nwlc.org/wp-content/uploads/2021/01/December-Jobs-Day.pdf> [<https://perma.cc/96FV-BKVG>] (stating that women have endured over half of the net job loss during the Pandemic, at a total 5.4 million net jobs). This Note occasionally emphasizes the plight of mothers over fathers because the battle to balance work and family, historically, falls unevenly upon women. *See* I-Hsuan Lin, *Work-Family Conflict and Gender Equality: Theory Development, Responses of Policy Regimes, and Immigrants' Experiences 74–75* (August 2019) (Ph.D. dissertation, Indiana University) (ProQuest) (analyzing the gendered dynamic implicit in work and family duties). This slanted emphasis toward women and mothers does not discount the struggles of working fathers, which is the subject of gender legal studies beyond the scope of this Note. *See, e.g.*, Joseph Rebello, Note, *Red, White, and Blue-Collar Dads*:

In March of 2020, Congress took action and passed the first PFML law in American history.¹⁵ The legislation Congress enacted, however, was only a temporary measure.¹⁶ The benefits from the law expired in March 2021, and now, once again, the United States remains the sole developed nation without guaranteed paid leave.¹⁷ Meanwhile, the COVID-19 PFML program stoked the flames of the paid leave policy debate.¹⁸ More so than ever, lawmakers and citizens want permanent PFML.¹⁹ Policy-makers are reviving paid leave proposals that have been languishing for years in hopes they may find fertile ground in a post-COVID-19 environment.²⁰

Other health crises over the past fifteen years quell this optimism.²¹ In 2009, the swine flu outbreak caused rampant school closures that sparked a

Using International Examples to Establish a Paid Federal Parental Leave Policy to Benefit Low-Income Fathers in the United States, 50 CAL. W. INT'L L.J. 139, 146 (2019) (discussing how the stereotype of women as primary caretakers leaves men behind in family policy reform).

¹⁵ See generally Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127, 134 Stat. 178 (2020) (implementing emergency paid leave benefits for American workers).

¹⁶ Families First Coronavirus Response Act (FFCRA), H.R. 6201, 116th Cong. § 3102(a)(1)(F) (2020) (enacted).

¹⁷ See Pichler, *supra* note 8, at 2197 (commenting that the United States is the only nation among its peers to not provide paid leave to private sector workers).

¹⁸ See Abby McCloskey & Angela Rachidi, Opinion, *The Pandemic Has Exposed a Need for Better Paid Leave Policies*, AEI (May 26, 2020), <https://www.aei.org/op-eds/the-pandemic-has-exposed-a-need-for-better-paid-leave-policies/> [<https://perma.cc/U9AP-3GAY>] (discussing the legislative proposals and debates that Congress raised in the wake of the Pandemic). Some scholars, however, caution that the paid leave policies enacted during the Pandemic should not necessarily lay the roadmap for permanent legislation. *Id.* The Pandemic bears unique challenges that may not transfer to a post-COVID-19 world. *Id.* Even so, the momentum spurred by COVID-19 reforms will be difficult for many Americans to forget, as the new laws gave many citizens PFML benefits for the first time. See Austin R. Ramsey, *Calls for Permanent Paid Leave Grow as Temporary Measures Fade*, BLOOMBERG L. (Jan. 27, 2021), <https://news.bloomberglaw.com/daily-labor-report/calls-for-permanent-paid-leave-grow-as-temporary-measures-fade> [<https://perma.cc/ZA88-RSM8>] (stating that the new paid leave laws passed during the Pandemic provided additional coverage for approximately eighty-seven million Americans).

¹⁹ See Press Release, The White House Briefing Room, Fact Sheet: The American Families Plan (Apr. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/> [<https://perma.cc/B4U9-QANH>] (outlining President Joseph Biden's most recent plan to address the lack of paid leave support for American families at the federal level). In the spring of 2021, President Biden announced his American Families Plan, which would introduce twelve weeks of PFML by the end of the program's ten-year arc. *Id.*

²⁰ See *id.* (demonstrating that because of COVID-19 family and medical leave is a legislative priority). Several bills previously proposing paid leave resurfaced during COVID-19 with greater support as a result of the Pandemic. See, e.g., New Parents Act, S. 920, 116th Cong. § 219(b) (2019) (proposing paid leave for parents after the birth or adoption of a child); FAMILY Act, S. 248, 117th Cong. § 4(a) (2021) (creating a federally-funded paid leave program for family and medical leave).

²¹ See, e.g., Marianne DelPo Kulow, *Legislating a Family-Friendly Workplace: Should It Be Done in the United States?*, 7 NW. J.L. & SOC. POL'Y 88, 89, 90 (2012) (discussing the impact of the swine flu outbreak on American families).

similar outcry for expanded paid leave for working parents.²² Despite health and policy experts impressing the importance of parental paid leave, no lasting legal change resulted.²³ Given previous public health episodes like the swine flu, the potential benefits of national PFML are not news.²⁴ COVID-19 has merely created another window of opportunity to finally implement PFML at the federal level.²⁵ Congress cannot allow such a rare opportunity to pass again.²⁶

²² *Id.* The lack of paid sick leave for working parents exacerbated the negative effects of the swine flu outbreak and subsequent school closures. See JEFFREY LEVI, THOMAS V. INGLESBY, LAURA M. SEGAL & SERENA VINTER, TRUST FOR AMERICA'S HEALTH, PANDEMIC FLU PREPAREDNESS: LESSONS FROM THE FRONTLINES 10 (2009), <https://www.tfah.org/wp-content/uploads/archive/assets/files/pandemic-flu-lesson.pdf> [<https://perma.cc/4SPG-JEP8>] (announcing that 48% of American employees had to decide between going to work and taking care of their children during the swine flu school closures because they did not have paid sick leave).

²³ See Kulow, *supra* note 21, at 89 n.7 (introducing the legislative initiatives for employee benefits proposed in response to the swine flu). In 2009, Representative Rosa DeLauro introduced the Healthy Families Act to Congress, a bill that would have mandated employees to provide up to fifty-six hours of paid sick time depending on the number of hours worked. Healthy Families Act, H.R. 2460, 111th Cong. § 5(b) (2009). The bill has recently gained traction in Congress. See *All Actions: H.R. 2465—117th Congress (2021-2022)*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/2465/all-actions?q=%7B%22search%22%3A%5B%22healthy+families+act%22%5D%7D&r=2&overview=closed&s=1#tabs> [<https://perma.cc/UZW7-64XR>] (showing that Congress referred the bill to the House Committee on Education and Labor and the Committee on House Administration, and Oversight and Reform on April 13, 2021). The parallel version of the bill in the Senate has also gained momentum recently; it was last read before the Senate Health, Labor, Education, and Pensions Committee in April 2021. *S. 1195—Healthy Families Act*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/senate-bill/1195/text> [<https://perma.cc/Q2M9-TKPV>]. Further, President Biden officially endorsed the legislation in a spring 2021 announcement. Press Release, White House, *supra* note 19. Even though the endorsements from both the White House and Congress show some progress for family leave policy, generally, the Healthy Families Act provides only for paid sick time, not PFML. *Id.*

²⁴ See, e.g., *Examining the Importance of Paid Family Leave for American Working Families: Hearing Before the S. Subcomm. on Soc. Sec., Pensions & Fam. Pol'y of the S. Comm. on Fin.*, 115th Cong. 2 (2018) [hereinafter *Senate Hearing 2018*] (statement of Sen. Bill Cassidy, Chairman, Subcomm. on Soc. Sec., Pensions & Fam. Pol'y, Comm. on Fin.) (documenting the inadequacy of the FMLA and noting that many American families are struggling without access to guaranteed paid family leave); see also Bellware, *supra* note 13 (acknowledging the notable bipartisanship behind PFML legislation since the onset of the Pandemic).

²⁵ See Bellware, *supra* note 13 (explaining the urgency circling around PFML proposals in the aftermath of COVID-19). Scholars note the significant impact that cultural and social evolutions have had, historically, on the enactment of legislative reform. See, e.g., Kulow, *supra* note 21, at 108 (emphasizing that when business interest groups were willing to undergo change, legislative enhancements to the workplace were most successful); JOHN H. LANGBEIN, DAVID A. PRATT & SUSAN J. STABILE, PENSION AND EMPLOYEE BENEFIT LAW 81 (5th ed. 2010) (analyzing the early public attraction to pension reform that eventually led to the Employee Retirement Income Security Act (ERISA)).

²⁶ *Cf. Senate Hearing 2018*, *supra* note 24, at 3 (statement of Sen. Bill Cassidy, Chairman, Subcomm. on Soc. Sec., Pensions & Fam. Pol'y, Comm. on Fin.) (“We must address this looming crisis Doing nothing is not an option.”).

This Note uncovers the legislative history of PFML to understand why, after decades of congressional effort, PFML is still not the law of the land.²⁷ Without addressing the roadblocks that have thwarted PFML, Congress cannot expect to enact lasting legal change.²⁸ The origins of PFML stem from the earliest days of the FMLA.²⁹ Despite the FMLA's criticisms, policy experts view the law's legislative history as a commendable tale of bipartisan compromise.³⁰ The FMLA's successful coalition-building model offers hope for the stalled efforts to implement federal PFML.³¹ Most importantly, the legislative history of the FMLA reveals the deeply-rooted resistance from corporations to a national paid leave policy.³²

²⁷ See, e.g., Kelly McDonald Garrison, Avantica Shinde, Mary Stoney, Daniel Wood & Xiaodan Zhang, *The Family and Medical Leave Act & Parental Leave Policies*, 21 GEO. J. GENDER & L. 333, 365 (2020) (postulating that if employers paid for FMLA leave, the policy would ameliorate the entrenched gender norms that assume men will be breadwinners and women will be caretakers); Juan C. Flores, Note, *12 Months, 12 Weeks, 1250 Hours, 75 Miles, and 50 Employees: Why the Numbers of the FMLA Don't Add Up for New Parents of Color and Low-Wage Workers*, 54 U.S.F. L. REV. 313, 336 (2020) (theorizing that an ideal PFML statute would be flexible to the needs of local economies and avoid an overly simplistic approach); Ryan H. Nelson, *Federalizing Direct Paid Leave*, 20 U. PA. J. BUS. L. 623, 629 (2018) (proposing a statute to standardize paid leave called the "Uniform Direct Paid Leave Act ('UDPLA')"); Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 14 (2005) (exploring the potentially adverse effects PFML could have on employers and employees under an insurance theory lens).

²⁸ See Kulow, *supra* note 21, at 108 (indicating that legislation can be a better instrument for reform when private actors respond slowly to society's demands for change).

²⁹ Megan A. Sholar, *The History of Family Leave Policies in the United States*, ORG. AM. HISTORIANS (Nov. 2016), <https://www.oah.org/tah/issues/2016/november/the-history-of-family-leave-policies-in-the-united-states/> [<https://perma.cc/65PP-EHQ>] (noting that early proponents of family and medical leave reform in the 1980s sought paid leave benefits).

³⁰ See, e.g., Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, a New Solution*, 31 HOFSTRA LAB. & EMP. L.J. 327, 347, 351 (2014) (addressing the pitfalls of the FMLA, including that employees abuse FMLA leave and it is difficult for employers to comply with the law's various regulations); see also Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 J. GENDER, SOC. POL'Y & L. 459, 474 (2008) (critiquing the FMLA for providing limited access to benefits for underrepresented groups, such as women, minority populations, and low income communities). The FMLA did, however, show a successful effort by policy-makers to compromise and build strong interest group coalitions. See DONNA R. LENHOFF & LISSA BELL, NAT'L P'SHIP FOR WOMEN & FAMS., GOVERNMENT SUPPORT FOR WORKING FAMILIES AND FOR COMMUNITIES: FAMILY AND MEDICAL LEAVE AS A CASE STUDY 1 (2002), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fmla/fmla-case-study-lenhoff-bell.pdf> [<https://perma.cc/7CHS-776J>] (chronicling the almost decade-long effort required to gain enough support to pass the FMLA).

³¹ See LENHOFF & BELL, *supra* note 30, at 1 (urging today's policy-makers to seek better family leave benefits to follow the successful example established by FMLA advocates).

³² See Lisa L. Tharpe, Comment, *Analysis of the Political Dynamics Surrounding the Enactment of the 1993 Family and Medical Leave Act*, 47 EMORY L.J. 379, 381, 383 (1998) (stating that the FMLA endured "a turbulent history in politics" and that pro-business lobbyists opposed the law from its inception).

This Note transforms the business community's long-held defiance against PFML into an instructive tool for today's policy-makers.³³ Part I of this Note first gives an overview of the American approach to employee benefits law before delving into the legislative history of the FMLA.³⁴ Part II provides an objective comparison of the political and economic landscapes in the 1980s during the FMLA debate and today during the PFML debate, with a particular focus on the corporate lens.³⁵ Part III asserts that the arguments corporations use to delay PFML are vestiges of a bygone era and ineffectual in a Pandemic-ridden America.³⁶ This Note concludes by suggesting that the legislative history of the FMLA offers a valuable template to dismantle the roadblocks corporations pose against future PFML legislation.³⁷

I. THE PROGRESSION OF FAMILY AND MEDICAL LEAVE

Generally, leave benefits give employees job security in the event that they become ill, get summoned to military duty, give birth to a child, or any other reason that would require taking time away from work.³⁸ Leave benefits fall into three principal categories: sick leave, family leave, and medical leave.³⁹ Sick leave refers to the time an employee is eligible to take off work after accruing a certain number of hours working at a job.⁴⁰ Family leave encompasses absences to care for a sick, or otherwise in-need, family member.⁴¹

³³ Donna R. Lenhoff, *Family & Medical Leave in the United States: Historical & Political Reflections 7* (Oct. 1, 2004) (unpublished conference paper) (on file with Western Oregon University) (explaining that the success of the FMLA model came from its ability to harness the power of existing coalitions to overcome the bill's roadblocks). Donna R. Lenhoff was an attorney for the Women's Legal Defense Fund during the evolution of the FMLA in the 1980s and remains a key policy expert on the topic. *Id.* at 1. Lenhoff notes that any policy reform seeking to impose government-mandated labor standards on employers can expect a fervent opposition from business lobbying groups. *Id.* at 6.

³⁴ *See infra* notes 38–155 and accompanying text.

³⁵ *See infra* notes 156–249 and accompanying text.

³⁶ *See infra* notes 250–286 and accompanying text.

³⁷ *See infra* notes 287–326 and accompanying text.

³⁸ *See* U.S. DEP'T LAB., *supra* note 7, at 1.

³⁹ *See id.* (outlining the different forms of leave benefits available in the United States).

⁴⁰ *Id.* Sick leave is intended for short-term illnesses or absences. AEI-BROOKINGS WORKING GRP. ON PAID FAM. LEAVE, THE AEI-BROOKINGS WORKING GROUP REPORT ON PAID FAMILY AND MEDICAL LEAVE 13 (2018), <https://www.aei.org/wp-content/uploads/2018/09/The-AEI-Brookings-Working-Group-Report-on-Paid-Family-and-Medical-Leave.pdf> [<https://perma.cc/LVW8-DKPV>]. Although the federal government does not mandate paid sick leave, many employers offer it voluntarily because it promotes a consistent and healthy workforce. *Id.*; *Sick Leave*, U.S. DEP'T LAB., <https://www.dol.gov/general/topic/workhours/sickleave> [<https://perma.cc/993Q-W4HK>]. Sick leave can be either paid or unpaid, but usually it is paid. *See infra* note 142 and accompanying text (discussing the availability of paid sick leave in the United States compared to PFML).

⁴¹ U.S. DEP'T LAB., *supra* note 7, at 1. The definition of "family member" varies depending on the state. *See* U.S. CHAMBER COM., A POLICY PATCHWORK: PAID FAMILY LEAVE LAWS IN THE STATES 50 (2020), https://www.uschamber.com/sites/default/files/023871_empl_paid_family_leave_report_jan_web1.pdf [<https://perma.cc/3X35-2ZJG>] (providing an overview of covered family mem-

Medical leave covers time away from work because the employee themselves is ill.⁴² Typically, lawmakers classify sick leave separately and bundle family and medical leave together.⁴³ Lawmakers tend to regulate family and medical leave in tandem because both involve long-term absences from work, whereas sick leave covers short-term absences.⁴⁴

This Note focuses only on family and medical leave policy because, as the Pandemic illustrated, American employees often struggle the most to receive pay during long-term absences from work.⁴⁵ Section A of this Part gives a brief overview of the origins of employee benefits law, particularly on the development of leave benefits.⁴⁶ Section B provides a thorough legislative history of the FMLA.⁴⁷ Part C explains the existing laws governing family and medical leave in the United States: the FMLA at the federal level, as well as state-level policies.⁴⁸ Finally, Part D introduces the temporary measures Congress enacted to address the Pandemic.⁴⁹ This historical background of American family and medical leave policy informs lawmakers' struggle to enact PFML—even in the wake of an unprecedented global health crisis.⁵⁰

A. A Brief Introduction to Employee Benefits Law

In the United States, most people receive basic benefits through their employers, such as retirement funds and health insurance.⁵¹ Employers are also the conduit for funding marquee programs like Social Security and Medicare

bers across different states). For example, California, New York, and Washington state include grandchildren in defining the term under their state paid family leave laws, whereas Rhode Island does not. AEI-BROOKINGS WORKING GRP. ON PAID FAM. LEAVE, *supra* note 40, at 23.

⁴² U.S. DEP'T LAB., *supra* note 7, at 1.

⁴³ AEI-BROOKINGS WORKING GRP. ON PAID FAM. LEAVE, *supra* note 40, at 13.

⁴⁴ U.S. DEP'T LAB., *supra* note 7, at 1. An example of a short-term absence prompting an employee to use sick leave is a doctor's appointment. See AEI-BROOKINGS WORKING GRP. ON PAID FAM. LEAVE, *supra* note 40, at 13 (discussing the parameters and details of sick leave).

⁴⁵ See *infra* notes 51–326 and accompanying text.

⁴⁶ See *infra* notes 51–67 and accompanying text.

⁴⁷ See *infra* notes 68–120 and accompanying text.

⁴⁸ See *infra* notes 121–142 and accompanying text.

⁴⁹ See *infra* notes 143–155 and accompanying text.

⁵⁰ See *infra* notes 68–120 and accompanying text (discussing the history of the FMLA and family and medical leave policy, more broadly); see also *infra* notes 241–249 and accompanying text (presenting some of the current challenges to enacting paid leave reform).

⁵¹ See COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 1 (3d ed. 2011) (introducing the broad concept of employee benefits within the American landscape of social entitlements). In 2019, approximately 55% of Americans received health care through their employer. See KATHERINE KEISLER-STARKEY & LISA N. BUNCH, U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2019, at 3 (2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-271.pdf> [<https://perma.cc/CHB3-FY8Y>] (reporting that in 2019 the percentage of Americans with employer-provided health care was 55.4%).

through payroll taxes.⁵² As a result, businesses large and small have a significant stake in the development of employee benefits law and play key roles in its policy-making.⁵³

Employee benefits law intertwines social, tax, and corporate policy.⁵⁴ The provision of benefits hinges on employers' general incentive to maintain a healthy, productive workforce.⁵⁵ Offering employee benefits aids employers by attracting the best job candidates and preventing health-related absences disruptive to workflow.⁵⁶ Providing employee benefits, however, is an expensive undertaking for employers.⁵⁷ For this reason, some employers classify their workers as "independent contractors" instead of "employees" to avoid paying

⁵² See JAMES A. MORONE & DANIEL C. EHLKE, *HEALTH POLITICS AND POLICY* 254 (5th ed. 2013) (stating that employers provide health insurance for most Americans). Employers have been the largest purchasers of private health plans since President Franklin Delano Roosevelt signed the Social Security Act of 1935. *Id.* at 255. Further, payroll taxes paid by most American workers fund Social Security and Medicare. *How Is Social Security Financed?*, SOC. SEC. ADMIN., <https://www.ssa.gov/news/press/factsheets/HowAreSocialSecurity.htm#:~:text=Social%20Security%20is%20financed%20through,self%20employed%20pay%2012.4%20percent> [<https://perma.cc/3MTZ-CDP6>]; *How Is Medicare Funded?*, MEDICARE.GOV, <https://www.medicare.gov/about-us/how-is-medicare-funded> [<https://perma.cc/6DTE-V5CM>].

⁵³ See LANGBEIN ET AL., *supra* note 26, at 85 (framing employee benefits as a labor-focused area of law). When Congress first began regulating pension funds, the government had to decide whether regulations should be promulgated from the Department of Labor (DoL) or the Securities and Exchange Commission (SEC). *Id.* Lawmakers decided on the DoL to assure employers and labor unions that their interests would be acknowledged in forthcoming regulations. *Id.*

⁵⁴ See MEDILL, *supra* note 51, at 2 (explaining the breadth of issues encompassed in employee benefits and the public policy implications for the American workforce). The tax implications of employee benefits are complex and inextricable. *Id.* at 3. This Note will briefly mention or allude to tax policies as necessary, but the intersection of tax and employee benefits planning is a robust area of study unto itself and is not the focus here. *Id.* See generally Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177 (1989) (exploring more deeply the economic implications of mandated government programs).

Although they are ubiquitous in the twenty-first century, employee benefits are a relatively recent legal invention. See MEDILL, *supra* note 51, at 4 (explaining that companies did not begin to embrace employee benefits plans until the 1930s and 1940s). In the early 1920s, there was minimal legal regulation over employers regarding employee benefits, so individual businesses could elect to provide any or no sort of benefit beyond compensation. *Id.* at 3. Then, the 1960s bore an era of legislative revolution for American social benefits, known as the "Great Society." Eva Bertram, *Democratic Divisions in the 1960s and the Road to Welfare Reform*, 126 POL. SCI. Q. 579, 600 (2011). During this time, the notion of expanding government entitlements to support poor and underserved Americans gained popularity, setting the stage for progressive reform. *Id.*

⁵⁵ See MORONE & EHLKE, *supra* note 52, at 255 (noting that employers benefit from providing employees with health insurance).

⁵⁶ See, e.g., *id.* (using health insurance as an example of an employee benefit with positive externalities for businesses).

⁵⁷ See Jessica Looman, *The True Cost of Misclassification*, U.S. DEP'T LAB. BLOG (May 6, 2021), <https://blog.dol.gov/2021/05/06/the-true-cost-of-misclassification> [<https://perma.cc/V7G5-B3TS>] (explaining that employers do not need to pay for benefits such as healthcare, overtime, or paid leave if workers are not properly classified as "employees").

for employee benefits.⁵⁸ This practice frequently leads to “worker misclassification” litigation, particularly in the gig economy.⁵⁹ These lawsuits involve claims that employers intentionally and erroneously mischaracterized workers to circumvent the cost of employee benefits.⁶⁰

In 1974, Congress laid the cornerstone of American employee benefits law by enacting the Employee Retirement Income Security Act (ERISA).⁶¹ Although ERISA only governs retirement benefits, its legislative history set the stage for all employee benefits reform that came after, including family and medical leave.⁶² The collective realization from the American public that fed-

⁵⁸ See *id.* (noting that the Pandemic showed an increase in employer misclassification practices); Abigail S. Rosenfeld, *ABC to AB 5: The Supreme Court of California Modernizes Common Law Doctrine in Dynamex Operations West, Inc. v. Superior Court*, 61 B.C. L. REV. E. SUPP. II.-112, II.-116 (2020), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3857&context=bclr> [<https://perma.cc/C3WU-U643>] (explaining the essential difference between employees and independent contractors for labor protections and rights); *How Well Are Independent Workers Prepared for Retirement?*, PEW RSCH. CTR. (June 28, 2019), https://www.pewtrusts.org/-/media/assets/2019/06/independentworkers_brief.pdf [<https://perma.cc/S6QS-ETSB>] (same).

⁵⁹ See Mark Anderson & Max Huffman, *Labor Organization in Ride-Sharing—Unionization or Cartelization?*, 23 VAND. J. ENT. & TECH. L. 715, 737 (2021) (discussing the prevalence of worker misclassification cases brought by drivers for ride-sharing companies, such as Uber) (citing O’Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015)). Ride-share companies hesitate to provide their drivers with “employee status” because this characterization entitles them to state and federal protections, which impact workers’ ability to organize. See *id.* (recognizing that independent contractors do not share the same rights as employees regarding collective bargaining rights).

⁶⁰ See, e.g., Harper v. Amazon.com Servs. Inc., No. 19-21735, 2020 WL 4333791, at *1 (D.N.J. July 28), *appeal filed*, No. 20-2614 (3d Cir. Aug. 11, 2020) (alleging that delivery drivers were employees not independent contractors); Cunningham v. Lyft, Inc., 450 F. Supp. 3d 37, 39 (D. Mass.), *appeal filed*, No. 20-1567 (1st Cir. June 17, 2020) (challenging the worker classification of app drivers); Colopy v. Uber Techs., Inc., No. 19-cv-06462, 2019 WL 6841218, at *1 (N.D. Cal. Dec. 16, 2019) (arguing that Uber app drivers were misclassified as independent contractors). In some states, Attorneys General play an active role in bringing and settling these cases on behalf of workers. See, e.g., Healey v. Uber Techs., Inc. & Lyft, Inc., No. 2084-cv-01519, at *1 (Mass. Super. Ct. Mar. 25, 2021) (denying the defendants’ motion to dismiss the worker misclassification claims brought by Massachusetts Attorney General Maura Healey); Settlement Agreement, New York v. FedEx Ground Package Sys., Inc., No. 402960/10, at 1 (N.Y. Sup. Ct. filed Dec. 20, 2018) (settling a case over the classification status of certain FedEx Corp. drivers); Complaint, District of Columbia v. Power Design, Inc., No. 2018-CA-005598, at 2 (D.C. Super. Ct. filed Aug. 8, 2018) (demanding an employer pay restitution to workers deprived of the District of Columbia’s minimum wage).

⁶¹ See MEDILL, *supra* note 51, at 17–18 (calling ERISA the beginning of an evolution in employee benefits law). See generally Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001–1461 (creating national standards and regulations for employee retirement plans)).

⁶² See MEDILL, *supra* note 51, at 18 (acknowledging that employee benefits have changed since ERISA, but that ERISA provides the foundation for modern changes to employment law). The pivotal moment for ERISA occurred in 1963, when a major auto plant in South Bend, Indiana closed. *Id.* Studebaker-Packard Company (Studebaker), the employer, infamously mismanaged private pension funds for its employees resulting in the loss of retirement funds for thousands of workers. LANGBEIN ET AL., *supra* note 26, at 78–80. The idea that decades of hard-earned retirement savings could vanish in an instant because of an employer’s capriciousness shocked the public. See *id.* at 86 (describing the explosiveness of the Studebaker case for the American public).

eral regulations could safeguard their individual livelihoods generated support behind ERISA.⁶³ ERISA's passage proved that public opinion can tremendously influence sweeping policy reform.⁶⁴ Congress bitterly debated the minutia of ERISA for years, but eventually the undeniable will of the American people forced the legislature's hand to end the squabbling and pass the bill.⁶⁵ In ERISA's wake, Congress passed a slew of other policies to regulate the employee benefits space and to meet the expectations of an increasingly modern workforce.⁶⁶ This era of reform shows that family and medical leave did not grow in a vacuum, but rather represents one piece of a broader movement toward more progressive employee benefits over the last fifty years.⁶⁷

B. The Genesis & Evolution of the Family and Medical Leave Act of 1993

Until the late 1970s, family-focused policies were not a legislative priority for the federal government.⁶⁸ Then in 1976, in *General Electric Co. v. Gilbert*, the Supreme Court ruled that an employer's failure to provide disability benefits to a pregnant employee did not constitute sex discrimination.⁶⁹ This ruling surprised members of Congress and spurred legislative action to protect

⁶³ See LANGBEIN ET AL., *supra* note 26, at 80 (observing that many scholars have cited the Studebaker incident as a rallying point for federal regulation of employee benefits).

⁶⁴ See *id.* at 92 (asserting that there was a huge imperative for Congress to pass ERISA because the idea of federally-regulated pension plans had already enraptured the minds of American workers). In the wake of the Pandemic, lawmakers have been similarly motivated by the strong public opinion in favor of PFML. See *infra* note 321 and accompanying text (noting the momentum built behind PFML as a result of COVID-19).

⁶⁵ See LANGBEIN ET AL., *supra* note 26, at 91–92 (detailing the negotiations taking place in the Senate committees over the particulars of the ERISA, and the ultimate, inevitable result to pass the bill at the behest of broader public opinion). The passage of ERISA succeeded largely because social activists were ready to capitalize on the Studebaker incident and convert the energy that Studebaker created into support for pension reform. See James A. Wooten, “*The Most Glorious Story of Failure in the Business*”: *The Studebaker-Packard Corporation and the Origins of ERISA*, 49 *BUFF. L. REV.* 683, 684 (2001) (observing the impact that Studebaker made by initiating lasting change for employee benefits).

⁶⁶ See MEDILL, *supra* note 51, at 18 (using employees' transition away from outdated employer-managed pension funds to modern employee-managed retirement plans as an example of the evolving regulatory needs in employee benefits law). Other federal laws regulating employee benefits include: Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, Americans with Disabilities Act, 42 U.S.C. § 12101, Family and Medical Leave Act, 29 U.S.C. § 2601, Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301, Age Discrimination in Employment Act, 29 U.S.C. § 621. *Id.* at 363.

⁶⁷ See *id.* at 363 (showing the legislative development over time to expand employee rights).

⁶⁸ See Sarah E. Towne, *Developing Family-Friendly Policies in the Public Sector in Wake of the Civil Rights Act of 1964*, at 7 (Aug. 1, 2013) (Ph.D. dissertation, American University) (Soc. Sci. Rsch. Network) (explaining that family-focused policies took a backseat to other, seemingly more pressing issues like the economy and ongoing military conflicts).

⁶⁹ See 429 U.S. 125, 145–46 (1976) (holding that the denial of disability benefits did not violate Title VII of the Civil Rights Act of 1964).

mothers in the workplace.⁷⁰ In 1978, Congress passed the Pregnancy Discrimination Act (PDA) to protect female employees from discrimination at work because they are pregnant.⁷¹ These events drew attention from the White House and led President Jimmy Carter to summon a conference dedicated to family-centered policies.⁷² The conference exposed the panoply of social issues brewing in American society including same-sex marriage rights, abortion, and school prayer.⁷³ Although it did not yield tangible legislative or administrative policy changes, the conference served as an incubator for a diverse slate of policy reforms, including parental leave.⁷⁴

In 1983, Congress charged a Select Committee on Children, Youth, and Families to investigate the gaps in child and family welfare policy in the United States.⁷⁵ When the Select Committee issued its report in 1985, it recommended that Congress enact legislation incentivizing private companies to of-

⁷⁰ See Rozlyn Fulgoni-Britton & Joel P. Schroeder, *Tackling the Challenges of Accommodating Pregnant Workers Under the Pregnancy Discrimination Act and the Americans with Disabilities Act*, 61 FED. LAW. 35, 35 (2014) (noting that the Pregnancy Discrimination Act (PDA) was Congress's answer to the unexpected outcome of the Supreme Court's ruling in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)).

⁷¹ See Pregnancy Discrimination Act, Pub. L. No. 95-555, sec. 2, § 2000e(k), 92 Stat. 2076, 2076 (1978) (amending Title VII of the Civil Rights Act of 1964); see also H.R. REP. NO. 95-1786, at 4 (1978) (Conf. Rep.) (clarifying that the legislation intentionally covered all conditions related to pregnancy including abortion). Despite this progress, some lawmakers viewed the PDA as only the tip of the iceberg for the parental rights that American families needed. See Anthony, *supra* note 30, at 465 (referencing legislators' conclusion that any amendments to Title VII would not be sufficient to address family or parental leave).

⁷² See Jimmy Carter, President U.S., White House Conference on Families Remarks at a White House Reception (July 20, 1979) (calling on the government to consider reforms to "strengthen American families"). These remarks came one week after President Jimmy Carter's famous "Crisis of Confidence" speech. *Crisis of Confidence*, PBS: AM. EXPERIENCE (July 15, 1979), <https://www.pbs.org/wgbh/americanexperience/features/carter-crisis/> [<https://perma.cc/Z2HK-472K>] (addressing tangible problems facing the United States—like the 1970s energy crisis—as well as a broader admonishment for the loss of faith in the American spirit).

⁷³ See Spencer Rich, *Carter Opens Conference on Families*, WASH. POST (June 6, 1980), <https://www.washingtonpost.com/archive/politics/1980/06/06/carter-opens-conference-on-families/c9a4d872-0ea5-46e9-ba52-0140d4ac2046/> [<https://perma.cc/YAW5-V5RT>] (discussing the various interest groups attending the White House Conference on Families and their platforms).

⁷⁴ See Leo P. Ribuffo, *Family Policy Past as Prologue: Jimmy Carter, the White House Conference on Families, and the Mobilization of the New Christian Right*, 23 REV. POL'Y RSCH. 311, 333 (2006) (discussing the range of social and political groups present at the White House Conference on Families). President Carter's conference partially served its intended purpose to spur policy ideas, but it also backfired politically. *Id.* The progressive reforms unearthed by the conference sparked even greater conservatism among right-wing groups that eventually swelled to a Republican-led movement against President Carter. *Id.* In fact, some scholars mark the conference as a catalyst for the Christian right movement. See Seth Dowland, "Family Values" and the Formation of the Christian Right Agenda, 78 CHURCH HIST. 606, 631 (2009) (explaining that President Carter's conference broadened the appeal to the Christian right movement by inadvertently politicizing the term "family").

⁷⁵ See SELECT COMM. ON CHILDREN, YOUTH, & FAMS., FAMILIES & CHILD CARE: IMPROVING THE OPTIONS, H.R. REP. NO. 98-1180, at 10 (2d Sess. 1985) (investigating the impact that the growing number of working mothers had on the availability of child care).

fer parental leave benefits.⁷⁶ This recommendation planted the seed for widespread parental leave reform in the private sector.⁷⁷

Prompted by the Select Committee report, progressive lawmakers introduced the Parental and Disability Leave Act (PDLA) in 1985.⁷⁸ The PDLA marked the first bill to propose a national mandate for parental leave.⁷⁹ The bill included unpaid, job-protected leave for reasons such as the birth of a child or temporary disability.⁸⁰ Concurrently, a critical ruling from the Ninth Circuit Court of Appeals propelled support for heightening leave benefits standards.⁸¹

⁷⁶ See *id.* at 21 (listing increased leave benefits as one option that the private sector could adopt to alleviate the financial pressure of child care).

⁷⁷ See *id.* (proposing progressive family-centered policies to Congress for legislative action). During the early 1980s, lawmakers and scholars were still reckoning with the dramatic demographic shifts in the American workforce since the 1960s, particularly the significant increase in working mothers. See *Parental & Disability Leave: Joint Hearing on H.R. 2020 Before the H. Subcomm. on Civil Serv. & the H. Subcomm. on Compensation & Emp. Benefits of the H. Comm. on Post Office & Civil Serv. & the H. Subcomm. on Lab. Mgmt. Relations & the H. Subcomm. on Lab. Standards of the H. Comm. on Educ. & Lab.*, 99th Cong. 26–27 (1985) [hereinafter *House Hearing 1985*] (statement of Sheila B. Kamerman, Ph.D., Professor of Social Policy and Planning, Columbia University School of Social Work & Alfred J. Kahn, Ph.D., Professor of Social Policy and Planning, Columbia University School of Social Work) (introducing statistics concerning the number of women re-entering the workforce after having a child).

⁷⁸ See generally *Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong. (1985)* (setting forth unpaid, job-protected leave for parents and employees with a disability).

⁷⁹ See Sholar, *supra* note 29 (clarifying that the Parental and Disability Leave Act (PDLA) was the first paid family leave bill brought to the House floor). The first bill written, although never formally introduced to Congress, was the Family Employment Security Act (FESA). See *id.* (calling FESA the first introduction to a national family-leave provision); see also Jillian J. Rennie, Comment, *Constructive Notice Under the Family and Medical Leave Act*, 118 *YALE L.J.* 795, 799 n.24 (2009) (clarifying that the drafters of FESA also wrote the PDLA and what would eventually become the Family and Medical Leave Act of 1993 (FMLA)). These proposals aimed to establish a minimum legal standard for parental and disability leave benefits because the federal government regulates a minimum required standard for other workplace benefits. See generally *Fair Labor Standards Act of 1938*, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219) (establishing baseline standards for employment conditions, such as minimum wages and prohibiting certain types of child labor). Following this notion, this Note will use “mandate” in the same way policy-makers use the term in the PFML context: to refer to a minimum legal standard of leave benefits set and regulated by the federal government. LENHOFF & BELL, *supra* note 30, at 7 (using the term “mandates” to refer to minimum standards of labor conditions enforced by the government).

⁸⁰ See H.R. 2020 (requiring at least eighteen weeks for parental leave and twenty-six weeks for disability leave). The PDLA did not limit the size of the employers to be covered; even large companies would be required to comply with the bill’s minimum standard. See *id.* (noting that the bill does not contain an employer threshold).

⁸¹ See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985) (finding that the state maternity leave law did not violate Title VII of the Civil Rights Act), *rev’g* No. 83-4927R, 1984 WL 943 (C.D. Cal. Mar. 21, 1984), *aff’d* 479 U.S. 272, 292 (1987). Despite the Ninth Circuit’s ruling upholding the maternity leave law, national policy-makers worried that a federal law protecting only mothers would spur future Title VII litigation and risk being overturned. See Patricia A. Shiu & Stephanie M. Wildman, *Pregnancy Discrimination and Social Change: Evolving Consciousness About a Worker’s Right to Job-Protected, Paid Leave*, 21 *YALE J.L. & FEMINISM* 119, 125 (2009) (acknowledging that equality legislation could potentially spur different treatment between genders in parental leave laws). At the FMLA’s inception, proponents settled that all future proposals would

In 1985, in *California Federal Savings & Loan Ass'n v. Guerra*, the Ninth Circuit upheld a California maternity leave law, reasoning that it did not give women unlawful, preferential treatment under Title VII of the Civil Rights Act of 1964.⁸² The court held that Congress intended the PDA to establish a minimum standard for women's rights in the workplace, not to impose a limitation upon them.⁸³ The Ninth Circuit's decision preserved the potential for greater rights to working women in the future, affirming that leave mandates merely create a floor for minimum employment standards, not a ceiling.⁸⁴

Although *Guerra* created modest momentum for parental leave reform, generally, the legislative environment in the early 1980s was still unfavorable for paid leave, specifically.⁸⁵ Since the FMLA's inception, policy-makers grappled with whether to make leave paid or unpaid.⁸⁶ Even policy experts supportive of the bill balked at the task of building a new entitlement program from the ground up.⁸⁷ The same experts noted, however, that the failure to give

be inclusive to avoid potential litigation. See Towne, *supra* note 68, at 8 (emphasizing the importance of the "special treatment" versus the "equal treatment" issue in the early iterations of the FMLA).

⁸² See *Guerra*, 758 F.2d at 396 ("[A] state law that guarantees pregnant women a certain number of pregnancy disability leave days . . . is neither inconsistent with, nor unlawful under, Title VII."). The Ninth Circuit rejected California Federal Savings's argument that the law was unequal under the standards of Title VII. See *id.* (noting that in the disability rights community, under the social model of disability, equality is measured by providing functionally equivalent opportunities based on differing needs, not literally identical services). The disability rights community defines the "[s]ocial [m]odel of [d]isability" as a movement to reimagine the popular understanding of what it means to be a disabled person. See Michelle A. Travis, *Disabling the Gender Pay Gap: Lessons from the Social Model of Disability*, 91 DENV. U. L. REV. 893, 914 (2014) (explaining the goal of the social model of disability). The term implies that the common, and false, understanding of a "disability" as a fundamental physical affliction results from unchallenged social norms and restrictive environmental structures. See *id.* (differentiating an "impairment" from a "disability" under the social model lens); see also Stephen Bunbury, *Unconscious Bias and the Medical Model: How the Social Model May Hold the Key to Transformative Thinking About Disability Discrimination*, 19 INT'L J. DISCRIMINATION & L. 26 (2019) (advancing the adoption of the social model of disability within legal frameworks).

⁸³ *Guerra*, 758 F.2d at 396.

⁸⁴ *Id.* ("[T]he PDA's enactment . . . makes clear that Congress intended . . . to construct a floor beneath which . . . benefits may not drop—not a ceiling above which they may not rise.").

⁸⁵ See STEVEN K. WISENSALE, *FAMILY LEAVE POLICY: THE POLITICAL ECONOMY OF WORK AND FAMILY IN AMERICA* 138 (2001) (remarking that the political and economic forces at work in the 1980s that were unfriendly to paid leave).

⁸⁶ See *id.* at 136 (discussing the many factors that early policy-makers considered when drafting the FMLA). Policy-makers wanted to ensure that any future bill contained a provision for job protection while employees are on leave. See *id.* at 136–37 (including job protection as one of the original goals of FMLA policy-makers). Paid leave was a primary issue for policy-makers at the beginning of the FMLA. See *id.* at 138 (indicating that paid leave, or "wage replacement," was one of the major concerns for FMLA policy-makers early on). Although the proposed law would guarantee job protection for employees, it did not require that employers would pay them during their absence. See *id.* at 139 (remarking that offering job protection without a paid-leave provision would make the American law conservative compared to industrialized European countries).

⁸⁷ See, e.g., *House Hearing 1985*, *supra* note 77, at 12–13 (statement of Wendy W. Williams, Associate Professor of Law, Georgetown University Law Center) (supporting the legislation by listing the three areas where the PDLA would supplement the PDA). In her testimony, Professor Williams

some level of wage replacement would make the United States an outlier when compared to other countries.⁸⁸ Instead of providing paid leave immediately, the bill created a special commission charged with investigating the possibility of a paid leave policy in the future.⁸⁹ This measured approach accommodated the hesitancy from policy experts and the outright opposition from business interest groups.⁹⁰ Policy-makers' decision to sacrifice paid leave proved to be a strategic one because it insulated the bill from extraneous criticism and ultimately preserved its future.⁹¹

Between 1986 and 1987, leave legislation gained momentum because both Congressional chambers introduced bills on the floor.⁹² On this foundation, proponents of the proposal began a serious coalition-building effort to broaden support for leave benefits reform.⁹³ Progressives successfully recruited key groups—like labor unions—to their side.⁹⁴ Additionally, the bill gained

acknowledged that the tax and administrative implications of financing a new paid leave benefit program would be significant. *See id.* (endorsing the careful approach of the PDLA to compensation). Further, she noted that several models for paid leave exist in the United States at the state-level and around the world, and that it may be beneficial for Congress to first learn from the experience of these other entities. *Id.*

⁸⁸ *See id.* at 13 (stating that a wage replacement provision was “[c]onspicuous by its absence”); *see also* 131 CONG. REC. 8318 (1985) (statement of Rep. Patricia Schroeder) (urging that it is time for the United States to join other industrialized nations and enact some form of paid leave).

⁸⁹ Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong. (1985) (calling for a congressional commission to investigate paid leave policies and make recommendations to Congress in two years).

⁹⁰ *See House Hearing 1985, supra* note 77, at 13 (statement of Wendy W. Williams, Associate Professor of Law, Georgetown University Law Center) (advocating for an exploratory committee to investigate the ramifications of a paid leave program in the United States); WISENSALE, *supra* note 85, at 138 (discussing the leverage from business interest groups on lawmakers to not support the proposed family leave measures).

⁹¹ *See* WISENSALE, *supra* note 85, at 138 (explaining Democrats' motivation to avoid a conflict in Congress over the cost of their proposed paid leave program).

⁹² *See id.* at 141–42 (noting that for years Representative Patricia Schroeder was the lone sponsor on House Bill 2020, and no parallel bill had been introduced in the Senate). In 1986, Senator Christopher Dodd introduced a bill to the Senate. Parental and Medical Leave Act of 1986, S. 2278, 99th Cong. (1986); WISENSALE, *supra* note 85, at 142.

⁹³ *See* LENHOFF & BELL, *supra* note 30, at 5 (listing the groups that progressives recruited to support the family and medical leave bill). For example, Congress changed the name of the bill from the “Parental and Disability Leave Act” to the “Parental and Medical Leave Act” because the term “disability” was offensive to some interest groups. WISENSALE, *supra* note 85, at 141 (recognizing the blowback from advocates in the disability community). Lawmakers circulated the bill through the relevant committees in the House of Representatives. *See generally* Parental & Medical Leave Act of 1986: Joint Hearing on H.R. 4300 Before the H. Subcomm. on Lab.-Mgmt. Rels. & the H. Subcomm. on Lab. Standards of the H. Comm. on Educ. & Lab., 99th Cong. 11 (1986) [hereinafter *House Hearing Educ. & Lab. 1986*] (reviewing the ramifications of the bill for labor industry groups); *House Hearing 1985, supra* note 77, at 54–57 (including testimony from women in labor unions); *id.* at 3 (setting forth the purpose of the bill as addressing the increased number of parents in the workplace without access to child care).

⁹⁴ *See House Hearing Educ. & Lab. 1986, supra* note 93, at 80–92 (including letters of support for H.R. 4300 from multiple labor unions); WISENSALE, *supra* note 85, at 138 (explaining the strong

support from two powerful interest groups: the Catholic Church and the American Association of Retired Persons (AARP).⁹⁵ In fact, the AARP persuaded lawmakers to change the name of the bill to the FMLA, as a gesture to the elderly community.⁹⁶ These changes indicate the significant progress the FMLA bill made during the late 1980s as it churned through congressional hearings and gained traction with influential policy groups.⁹⁷

Despite measured bipartisan progress, pushback from the business community and conservative lawmakers persisted during this time.⁹⁸ Conservatives vocalized two major criticisms of the FMLA bill.⁹⁹ First, critics predicted that the bill would harm small businesses.¹⁰⁰ Opponents asserted that imposing a

backlash from business groups, such as the United States Chamber of Commerce); LENHOFF & BELL, *supra* note 30, at 4 (emphasizing that support from labor unions was instrumental for the FMLA because the bill sought to regulate federal labor standards).

⁹⁵ See U.S. CATH. BISHOPS, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY 46, ¶¶ 207–208 (1986), https://www.usccb.org/upload/economic_justice_for_all.pdf [<https://perma.cc/8U2J-HHFD>] (expressing support for public policy initiatives to improve resources and leave benefits for working parents); *Parental & Medical Leave Act of 1987: Hearing on S. 249 Before the Subcomm. on Children, Fam., Drugs & Alcoholism of the S. Comm. on Lab. & Human Resources*, 100th Cong. 183 (1987) [hereinafter *Senate Hearing 1987*] (statement of Reverend Monsignor Daniel F. Hoye, United States Catholic Conference) (advocating for greater parental and disability leave); *Family & Medical Leave Act of 1987: Joint Hearing on H.R. 295 Before the H. Subcomm. on Lab. Mgmt. Relations & the H. Subcomm. on Lab. Standards of the H. Comm. on Educ. & Lab.*, 100th Cong. 69 (1987) [hereinafter *House Hearing 1987*] (statement of John Denning, President, American Association of Retired Persons (AARP)) (calling the FMLA “critical” to caregivers and families); Sholar, *supra* note 29 (describing the AARP’s motivation to lobby in favor of the bill in order to make eldercare a protected excuse for leave).

⁹⁶ See 132 CONG. REC. 26,373 (1986) (statement from Rep. William (Bill) Clay) (calling the bill the “Family and Medical Leave Act of 1986”). The AARP persuaded sponsors of the bill, including co-sponsor Representative William Clay, to change the word “Parental” to “Family.” See Sholar, *supra* note 29 (signaling the AARP’s influence as the reason for the change in the bill’s name from the “Parental and Disability Leave Act” to the “Family and Medical Leave Act”). The word “Family” showed that the legislation would also cover the need to leave work to care for elderly family members, as well as children. *Id.*

⁹⁷ See LENHOFF & BELL, *supra* note 30, at 6 (listing the many advocacy groups that ultimately joined the FMLA coalition, including Business and Professional Women USA, the Children’s Defense Fund, the United Steel Workers, the National Senior Citizens Council, the Epilepsy Foundation, the American Academy of Pediatricians, and the Union of American Hebrew Congregations). Importantly, 1987 was also the year when the Supreme Court affirmed the Ninth Circuit’s ruling in *California Federal Savings & Loan Ass’n v. Guerra*. See 479 U.S. 272, 292 (1987) (upholding the Ninth Circuit’s reasoning that a California maternity leave law was not preempted by Title VII of the Civil Rights Act), *aff’g* 758 F.2d 390, 396 (9th Cir. 1985). The Court’s ruling amplified support for the FMLA as it continued to move through Congress. See *id.* (affirming that leave laws supporting mothers were lawful); see also WISENSALE, *supra* note 85, at 140 (observing that the Supreme Court’s decision in *Guerra* came at a pivotal moment in the FMLA’s development).

⁹⁸ See LENHOFF & BELL, *supra* note 30, at 8–9 (noting the strong Republican opposition to the FMLA that prevented its passage in 1986).

⁹⁹ See *infra* notes 100–104 and accompanying text (explaining the conservatives’ critique that the bill would negatively impact both businesses and employees).

¹⁰⁰ See 132 CONG. REC. 30,426 (1986) (statement of Rep. David Dreier) (suggesting that the FMLA would worsen the financial struggles of small businesses already operating with limited budg-

national standard would unfairly impact small businesses that rely on the particularized skills of individual employees to operate.¹⁰¹ Small businesses, they argued, do not necessarily have the same liberty that large businesses do to grant employees extended periods of leave.¹⁰² Second, the bill's opponents argued that the FMLA would restrict employers' right to contract.¹⁰³ Pro-business lawmakers purported that employers would be forced to compensate for the additional cost of the FMLA by cutting other employment benefits, thereby restricting their flexibility to contract optimal terms with employees.¹⁰⁴

To address these concerns, conservative politicians proposed an amendment to limit the FMLA's scope.¹⁰⁵ Principally, the amendment altered the bill's "employer threshold," to cover only employers with more than one hundred employees, as opposed to the fifteen-employee threshold progressives originally proposed.¹⁰⁶ The employer threshold remained a key point of con-

ets and narrow profit streams); 132 CONG. REC. 23,365 (1986) (statement of Rep. Larry Combest) (stating, explicitly, that the federal leave mandate was a "threat to small business[es]").

¹⁰¹ See *House Hearing Educ. & Lab. 1986*, *supra* note 93, at 70 (statement of Frank S. Swain, Chief Counsel for Advocacy, Small Business Administration) (opining that a government mandate for family and medical leave benefits would harm small businesses because these businesses could not afford the disruption of allowing their limited labor resources to take long-term absences).

¹⁰² See *id.* (emphasizing the adverse effect on small businesses when an employee leaves for a long period of time).

¹⁰³ See 132 CONG. REC. 25,385 (1986) (statement of Rep. Tom DeLay) (stating that businesses should be empowered to "set up leave policies . . . that suit[] them and their employees"); 132 CONG. REC. 25,382 (1986) (statement of Rep. Alfred McCandless) (claiming that the FMLA would "shortchang[e]" employees in negotiations).

¹⁰⁴ See, e.g., 132 CONG. REC. 30,426 (1986) (statement of Rep. David Dreier) (opposing the idea of a federal mandate on all businesses regardless of size); 132 CONG. REC. 25,385 (1986) (statement of Rep. Tom DeLay) (suggesting that the bill would prevent businesses from "hiring women of child-bearing age"); 132 CONG. REC. 25,382 (1986) (statement of Rep. Alfred McCandless) (accusing the bill of limiting the "flexibility" employers need); 132 CONG. REC. 23,365 (1986) (statement of Rep. Larry Combest) (expressing concern for the effect of House Bill 4300 on small businesses); 132 CONG. REC. 23,369 (1986) (statement Rep. Tom DeLay) (calling the FMLA a "yuppie bill").

¹⁰⁵ See H.R. REP. NO. 99-699, pt. 2, at 49 (1986) (indicating the objections to House Bill 4300 from Representative Marge Roukema and discussing some proposed revisions).

¹⁰⁶ See *id.* (dissenting to House Bill 4300, Rep. Roukema and some of her conservative colleagues felt the bill was overreaching). Rep. Roukema urged her House colleagues to consider raising the threshold for eligible employers and acknowledge the hardships a uniform standard would impose on small businesses. See *id.* at 50 (calling for Congress to consider increasing the employer threshold to one hundred employees or more to protect more small businesses, among other suggested reforms). Ultimately, Rep. Roukema would propose her own bill to counter H.R. 4300, calling for a mandate to cover employers with fifty employees or more. See Linda Greenhouse, *Momentum and 'Family Leave'*, N.Y. TIMES (Feb. 3, 1987), <https://www.nytimes.com/1987/02/03/us/washington-talk-momentum-and-family-leave.html> [https://perma.cc/XMZ6-8JPW] (detailing Rep. Roukema's impact in the family leave debate, particularly in regard to the fifty-employee threshold). Rep. Roukema's proposed reforms significantly impacted the final version of the FMLA, which implemented her suggested fifty-employee threshold. See WISENSALE, *supra* note 85, at 142 (noting Rep. Roukema's influence on the minutia of the FMLA).

tention for the business community throughout the FMLA's progression.¹⁰⁷ By the end of the congressional term in 1986, however, politicians could not reach a consensus and the bill hung in legislative purgatory.¹⁰⁸

Then in 1988, President George H.W. Bush was voted into office.¹⁰⁹ The Bush White House signaled a specific aversion to the FMLA, but demonstrated a general willingness to consider family-friendly issues.¹¹⁰ Under the new administration, progressives fostered much needed support from conservative lawmakers by framing the FMLA as a pro-family and anti-abortion bill.¹¹¹ By 1990, the FMLA accumulated enough bipartisan congressional support to send it to President Bush's desk.¹¹² President Bush, however, vetoed the bill making it clear that he did not support a mandatory national standard for employee benefits.¹¹³

¹⁰⁷ See WISENSALE, *supra* note 85, at 142 (describing how Rep. Roukema fought to raise the employment threshold throughout the FMLA's development). Ultimately, Congress raised the employer threshold in the final version of the FMLA to fifty employees, largely as a result of the push from the business community. *Id.*

¹⁰⁸ See 132 CONG. REC. 33,620 (1986) (statement of Rep. William (Bill) Clay) (applauding the progress the FMLA made accumulating bipartisan support in 1986). Rep. Clay, an early co-sponsor of the FMLA, stated that the 1986 legislative session "laid the groundwork" for the FMLA, and implored Congress to enact the law in the following session. *Id.*

¹⁰⁹ E.J. Dionne Jr., *The 1988 Elections; Bush Is Elected by a 6–5 Margin with Solid G.O.P. Base in South; Democrats Hold Both Houses: How the Poll Was Taken*, N.Y. TIMES (Nov. 9, 1988), <https://www.nytimes.com/1988/11/09/us/1988-elections-bush-elected-6-5-margin-with-solid-gop-base-south-democrats-hold.html> [<https://perma.cc/PK4D-967B>].

¹¹⁰ See David Hoffman, *Bush to Address Parental Leave, Wage Floor*, WASH. POST (Sept. 11, 1988), <https://www.washingtonpost.com/archive/politics/1988/09/11/bush-to-address-parental-leave-wage-floor/e48cb1a3-8053-43d0-9f96-8b324de283a1/> [<https://perma.cc/4NLU-DUAY>] (relaying President George H.W. Bush's campaign promise to promote "kinder, gentler" policies to support workers and families). President Bush did not, however, support the FMLA bill because he did not believe in a uniform standard for employer-provided benefits. *Id.* Subsequently, in 1990, President Bush signed a child care bill into law that paved the way for more support behind the FMLA. WISENSALE, *supra* note 85, at 146; see also CONG. RSCH. SERV., RL30785, THE CHILD CARE AND DEVELOPMENT BLOCK GRANT: BACKGROUND AND FUNDING 1 (2014) (explaining the evolution of the Child Care and Development Block Grant, initially enacted by President Bush in 1990, which assisted families in need with procuring child care).

¹¹¹ See WISENSALE, *supra* note 85, at 146 (framing the legislation to remove the impetus for women to abort their pregnancies in the interest of saving their jobs).

¹¹² See *id.* at 147 (stating that the House of Representatives passed the bill by a 237–187 vote).

¹¹³ See MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, VETO OF H.R. 770, THE "FAMILY AND MEDICAL LEAVE ACT OF 1990," H.R. DOC. No. 101-209 (1990) (criticizing the FMLA as a "one size fits all" approach). The House of Representatives could not muster enough votes to override President Bush's veto. See Steven A. Holmes, *House Backs Bush Veto of Family Leave Bill*, N.Y. TIMES (July 26, 1990), <https://www.nytimes.com/1990/07/26/us/house-backs-bush-veto-of-family-leave-bill.html> [<https://perma.cc/PW9W-TDYB>] (describing the outcry from Republicans and Democrats regarding President Bush's veto). Senator Dodd, the bill's lead sponsor in the Senate, vowed to bring the law to President Bush's desk every year until he agreed to sign it. *Id.* Representative Roukema, one of the initial critics of the FMLA whose amendments significantly altered the final bill, was incensed by the veto. See *id.* (quoting Rep. Roukema saying that President Bush's rejection of the law

In his 1992 presidential campaign against Bill Clinton, President Bush proposed his own leave policy to counter the FMLA.¹¹⁴ President Bush's policy embodied the strong opposition the business community harbored against the FMLA from the beginning.¹¹⁵ Notably, the proposal heeded the original criticism from conservatives over the employer threshold.¹¹⁶ To appease pro-business supporters, President Bush's policy included the highest employer threshold ever proposed—a five-hundred-employee threshold—effectively exempting every large corporation in America.¹¹⁷

Yet, in 1992, Congress dismissed Bush's alternative proposal by passing the FMLA again, forcing the President to veto it a second time on the eve of the presidential election.¹¹⁸ President Bush lost the race to Bill Clinton, whose first act as President was signing the FMLA.¹¹⁹ After an almost nine-year ef-

was “beyond [her] understanding”); *see also supra* notes 105–107 and accompanying text (chronicling Rep. Roukema's activism during the FMLA legislative process).

¹¹⁴ *See* WISENSALE, *supra* note 85, at 148–49 (describing President Bush's proposed policy). The alternative plan President Bush suggested in his veto of the 1992 FMLA was business-friendly. *See id.* (outlining a program funded by tax incentives instead of imposing a federal mandate and setting a five-hundred-employee threshold).

¹¹⁵ *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, VETO OF S. 5, THE FAMILY AND MEDICAL LEAVE ACT OF 1992, S. DOC. NO. 102-26, at 1 (1992). President Bush proposed that instead of mandating employers to provide family leave, the government should incentivize them by offering businesses refundable tax credits. *Id.* at 2 (calling for a leave policy that would “provide the flexibility workers and employers need” to reach “the optimal package of benefits”). The proposal to finance leave benefits through tax incentives in lieu of payroll taxes is a common policy among Republicans today. *See infra* notes 205–208 and accompanying text (laying out paid leave policies currently proposed by Republicans). When rolling out his policy, President Bush argued that many big businesses had their own existing family leave policies, and thus should not be required to meet a federal standard. Michael Wines, *Bush Vetoes Bill Making Employers Give Family Leave*, N.Y. TIMES (Sept. 23, 1992), <https://www.nytimes.com/1992/09/23/us/bush-vetoes-bill-making-employers-give-family-leave.html> [<https://perma.cc/XF4G-DYMS>]. Also, President Bush stated that a national mandate would disadvantage small businesses who would struggle to afford leave benefits. *Id.*

¹¹⁶ *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, VETO OF S. 5, THE FAMILY AND MEDICAL LEAVE ACT OF 1992, *supra* note 115 (calling for an exclusion for companies with more than five hundred employees).

¹¹⁷ *Id.* President Bush's proposal is the first reported leave policy to suggest a five-hundred-employee threshold, planting the seed for the employer threshold in later pieces of legislation like the Families First Coronavirus Response Act (FFCRA). *See infra* notes 225–227 and accompanying text.

¹¹⁸ WISENSALE, *supra* note 85, at 149.

¹¹⁹ *See* Remarks on Signing the Family and Medical Leave Act of 1993, 29 WEEKLY COMP. PRES. DOC. 144 (Feb. 5, 1993) (acknowledging the FMLA as his first bill signed into law as President). *See generally* Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 U.S.C. and 29 U.S.C.) (implementing new leave benefits for American employees). In his statement signing the FMLA, President Bill Clinton lauded the new legislation as a “fair and sensible” solution for families. Presidential Statement on Signing the Family and Medical Leave Act of 1993, 29 WEEKLY COMP. PRES. DOC. 145 (Feb. 5, 1993). At the end of his presidency, President Clinton authorized the DoL to pass regulations allowing unemployment insurance (UI) funds to compensate working parents taking leaves of absence after the adoption or birth of a new child. Lester, *supra* note 27, at 8. The program was repealed by President George W. Bush. Unemployment Compensation—Trust Fund Integrity Rule; Birth and Adoption Unemployment Com-

fort, the United States finally secured a national family and medical leave policy, albeit unpaid.¹²⁰

C. *The Existing Law: The Reign of FMLA & the Rise of State Paid Leave*

The FMLA still anchors family and medical leave policy in the United States.¹²¹ The law grants eligible employees twelve weeks of job-protected leave during any twelve-month span of time due to family or personal reasons, such as the birth of a child or military duty.¹²² Further, the law allows employees to take leave if they suffer from a health condition that inhibits them from performing their job.¹²³ The FMLA standards apply to all private employers

pensation; Removal of Regulations, 68 Fed. Reg. 58,540 (Oct. 9, 2003) (codified at 20 C.F.R. pt. 604). In his 2016 presidential campaign, then-candidate Donald Trump proposed a similar scheme to the one President Clinton enacted, allocating UI funds to provide parental paid leave. Debra Fitzpatrick & Colleen Manchester, Gender Pol’y Report, *Baby UI Revisited: Paid Parental Leave Under Trump*, U. MINN. (Feb. 8, 2017), <https://genderpolicyreport.umn.edu/baby-ui-revisited-paid-parental-leave-under-trump/> [https://perma.cc/P4MY-6H2P]. President Donald Trump never implemented the policy during his four-year term. See Isabel V. Sawhill & Sarah Nzau, *What Are the Challenges to Adopting a Federal Paid Leave Program?*, BROOKINGS INST. POL’Y 2020 (Oct. 15, 2019), <https://www.brookings.edu/policy2020/votervital/what-are-the-challenges-to-adopting-a-federal-paid-family-leave-program/> [https://perma.cc/8R4S-27Y9] (noting that President Trump’s paid leave plan had not garnered much support among legislators in Congress). Policy experts debate the merits of a national UI-funded parental leave program, but that conversation goes beyond the scope of this Note. See, e.g., Fitzpatrick & Manchester, *supra* (debating the pros and cons of a parental leave program funded through UI).

¹²⁰ See Remarks on Signing the Family and Medical Leave Act of 1993, *supra* note 119, at 144 (observing that “it took [eight] years and two vetoes” to pass the FMLA); LENHOFF & BELL, *supra* note 30, at 1 (describing the FMLA as an almost decade-long effort beginning in 1984).

¹²¹ Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601; see also Bellware, *supra* note 13 (recognizing the stagnancy of family and medical leave policy during the last twenty-eight years). The FMLA aims to give employees flexibility between work and family responsibilities. See 29 U.S.C. § 2601(b)(1) (describing the purpose of the law); see also Donna Lenhoff & Claudia Withers, *Implementation of the Family & Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39, 48–50 (1994) (outlining the three principal goals of the FMLA).

¹²² 29 U.S.C. § 2612(a)(1). The permissible reasons for leave under the FMLA have come under scrutiny from those who believe the definitions of “child,” “spouse,” and “parent” unfairly narrow the scope of the law. See generally Jennifer Ludden, *FMLA Not Really Working for Many Employees*, NPR (Feb. 5, 2013), <https://www.npr.org/2013/02/05/171078451/fmla-not-really-working-for-many-employees> [https://perma.cc/2PQW-QZVE] (reporting that American workers feel the FMLA does not have an adequate understanding of which relationships encompass family).

¹²³ 29 U.S.C. § 2614(c)(3)(C)(i). The FMLA defines “serious health condition” as a medical state that requires the employee to either be physically in the hospital or receive ongoing care from a healthcare professional. *Id.* § 2611(11).

with more than fifty employees.¹²⁴ Ultimately, the FMLA trades unpaid leave for federally-mandated, guaranteed job protection.¹²⁵

But, the FMLA's coverage is not universal.¹²⁶ The most recent available data shows that just over forty percent of American workers, about thirty-four million people, do not qualify for FMLA leave.¹²⁷ Among those who do not qualify, low-wage workers, women, and workers of color are disproportionately represented compared to the broader population.¹²⁸ Moreover, even employees that do qualify for FMLA leave often fail to take it because they cannot afford leave without pay.¹²⁹ As a result of these structural gaps, the FMLA fails

¹²⁴ *Id.* § 2611(4)(A). The DoL enforces and interprets the meaning of the FMLA. MEDILL, *supra* note 51, at 368. The DoL provides further guidance on such matters as intermittent leave and substitutions for other available paid leave accrued by the employee. *See id.* (detailing how the DoL regulations play a crucial role for employers interpreting the FMLA).

¹²⁵ *See* 29 U.S.C. § 2612(c) (noting that FMLA leave may be unpaid by law); *id.* § 2614(a)(1) (stating that the FMLA entitles employees to resume their former employment or a substantially similar job upon returning from FMLA leave).

¹²⁶ *See* SCOTT BROWN, JANE HERR, RADHA ROY & JACOB ALEX KLERMAN, ABT ASSOCS., EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FAMILY AND MEDICAL LEAVE ACT: RESULTS FROM THE 2018 SURVEYS 7 (2020), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHDFMLA2018SurveyResults_FinalReport_Aug2020.pdf [<https://perma.cc/6T7E-H5B2>] (prepared for the U.S. Dep't of Labor) (showing the percentage of American employees covered by FMLA); *see also* Lenhoff, *supra* note 33, at 2 (clarifying that while the FMLA helped millions of people, it still left notable gaps). Most people who claim FMLA leave do so to care for their own illness. *See* BROWN ET AL., *supra*, at 32 (reporting that 51% of Americans used FMLA leave for personal health reasons).

¹²⁷ BROWN ET AL., *supra* note 126, at 43. Some employees do not qualify under the FMLA because they work at a business with fewer than the required fifty employees or have not worked for the requisite number of hours. *Id.* at 7.

¹²⁸ *See id.* at 21 (presenting 2018 data on the unequal outcomes for FMLA leave). In 2018, 80% of moderate-to-high wage workers had access to FMLA leave to care for their own medical condition, while only 52% of low-wage workers shared that same access. *Id.*; *see also* Sharon Terman, *Protecting Workers' Jobs and Income During COVID-19*, in ASSESSING LEGAL RESPONSES TO COVID-19, at 205 (Scott Burris, Sarah de Guia, Lance Gable, Donna E. Levin, Wendy E. Parmet & Nicolas P. Terry eds., 2020), https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f445e858d971650463d0f2e/1598316165870/Chp28_COVIDPolicyPlaybook-Aug2020.pdf (announcing that in 2020, 71% of Latinx adults were ineligible for FMLA leave as opposed to 59% of white adults); Ann P. Bartel, Soohyun Kim & Jaehyun Nam, U.S. Bureau Lab. Stat., *Racial and Ethnic Disparities in Access to and Use of Paid Family and Medical Leave: Evidence from Four Nationally Representative Datasets*, MONTHLY LAB. REV., Jan. 2019, at 2, <https://www.bls.gov/opub/mlr/2019/article/pdf/racial-and-ethnic-disparities-in-access-to-and-use-of-paid-family-and-medical-leave.pdf> [<https://perma.cc/KZJ3-FSF7>] (supporting the finding that Hispanic people have less access to all categories of paid leave compared to non-Hispanic people). Studies consistently report that employees in higher-paid, managerial, or white-collar professions are more likely to have access to paid leave benefits than workers in the service industry or lower-wage jobs. *See* AEI-BROOKINGS WORKING GRP. ON PAID FAM. LEAVE, *supra* note 40, at 8 (explaining that lower-earning jobs often require employees to be physically present at work, and thus cannot provide the same flexibility as managerial jobs).

¹²⁹ *See* BROWN ET AL., *supra* note 126, at 41 (finding that most FMLA-qualified employees who do not take leave do so because they cannot afford to go without a paycheck). Women and low-wage earners predominate the group of employees who choose to forego FMLA leave in the interest of continued earnings. Naomi Gerstel & Amy Armenia, *Giving and Taking Family Leaves: Right or*

to provide financial coverage for millions of Americans taking leave for family and medical reasons.¹³⁰

To fill these gaps, some states took initiative to enact their own PFML laws, providing the paid leave the FMLA lacks.¹³¹ Currently, nine states and the District of Columbia have PFML laws.¹³² These state-level policies contain

Privilege?, 21 YALE J.L. & FEMINISM 161, 172 (2009). Some female-dominated occupations report returning to work prematurely because of the perceived stigma to taking leave. *See id.* (drawing conclusions from a case study of female nurse assistants who rarely used their eligible FMLA leave due to fear of retaliation from their employers). Additionally, single-income households are more likely to forego FMLA leave in the interest of earning a paycheck than dual-income households. BROWN ET AL., *supra* note 126, at 41. Critics of the FMLA argue that the policy perpetuates patterns of inequity among already disadvantaged groups. *See* Gerstel & Armenia, *supra*, at 170 (claiming that the FMLA aggravates existing dynamics of economic inequality).

¹³⁰ *See Paid Family and Sick Leave in the U.S.*, KAISER FAM. FOUND. (Dec. 14, 2020), <https://www.kff.org/womens-health-policy/fact-sheet/paid-family-leave-and-sick-days-in-the-u-s/> [<https://perma.cc/BH4S-2XWP>] (acknowledging that many American employees are at the mercy of their employers' generosity when it comes to PFML). The only other paid option some employees have for medical leave is disability insurance. *See* AEI-BROOKINGS WORKING GRP. ON PAID FAM. LEAVE, *supra* note 40, at 6 (discussing long-term and short-term disability insurance for medical reasons). Federally, there is Social Security Disability Insurance, which allows eligible workers to apply for benefits in the event of a long-term medical need. *Benefits for People with Disabilities*, SOC. SEC. ADMIN., <https://www.ssa.gov/disability/> [<https://perma.cc/59Y6-ZM7X>]. Additionally, five states mandate temporary disability insurance (TDI), which provides benefits for qualifying short-term needs. *See Which States Require Employers to Have a Short-Term Disability Plan?*, SOC'Y FOR HUMAN RES. MGMT. (Feb. 11, 2019), <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/stateswithstd.aspx> [<https://perma.cc/3KTV-XLDA>] (listing California, Hawaii, New Jersey, New York, and Rhode Island as requiring TDI). Some women who live in TDI states use this benefit during pregnancy or maternity leave. AEI-BROOKINGS WORKING GRP. ON PAID FAM. LEAVE, *supra* note 40, at 6. In addition to government programs, some private employers voluntarily provide long-term and short-term disability benefits to their employees. *Id.* That said, among private employees in March 2019, 42% had access to short-term disability insurance and 34% had access to long-term benefits. U.S. BUREAU LAB. STAT., *supra* note 12, at 59. It is important to be aware of disability insurance programs in the landscape of PFML because these programs add to the inconsistency of benefits available across different states. *See infra* Part I.C. (explaining how disability benefits interact with leave benefits at the state level).

¹³¹ *See generally* NAT'L P'SHIP FOR WOMEN & FAMS., STATE PAID FAMILY AND MEDICAL LEAVE INSURANCE LAWS 1 (2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/state-paid-family-leave-laws.pdf> [<https://perma.cc/L94J-L7W4>] (laying out presently enacted state PFML laws). State policies serve as critical vehicles for policy experimentation as a precursor for federal reform. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *cf.* Lenhoff, *supra* note 33, at 7 (calling state laws a "prerequisite" for federal legislation, in specific reference to the FMLA). Many municipalities have also experimented with PFML laws, but the detailed policies of these localities go beyond the scope of this Note. *See* Nelson, *supra* note 27, at 645–55 (providing a comprehensive list of state and municipal PFML laws).

¹³² *See* NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 131, at 1 (listing the states with PFML laws). *See generally* S.B. 83, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted); A. 3975, 218th Leg., Reg. Sess. (N.J. 2019); R.I. GEN. LAWS § 28-41-35(h) (2021); S. 6406C, Part SS, 239th Leg., Reg. Sess. (N.Y. 2016) (enacted); D.C. CODE § 32-541.03 (2021); S.B. 5975, 65th Leg., 3d Special Sess. (Wash. 2017) (enacted); MASS. GEN. LAWS ch. 175M, § 6(d) (2018); 2019 Conn. Pub. Acts. No. 19-

different eligibility requirements to qualify for leave and different amounts of time for leave, among other variations.¹³³ Some states offer some form of exception to the PFML mandate for small businesses.¹³⁴ Otherwise, private employers in PFML states must prove that their leave benefits are at least as generous as the mandated state standard or participate in the state-run program.¹³⁵

Consequently, the overlap of FMLA and state-level PFML laws weaves a complicated web of policies for employers and employees to navigate.¹³⁶ Em-

25 1; H.B. 2005 § 63, 80th Leg. Assemb., Reg. Sess. (Or. 2019) (enacted); COLO. REV. STAT. §§ 8-13.3-501–524 (reflecting the most recent legislative activity for the above PFML states). States usually fund PFML programs through payroll taxes. See NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 131, at 8 (outlining the funding mechanisms for each state's PFML program). Although the level of pay in each state varies, some states provide employees with as much as 100% of their regular wage during family and medical leave. See *id.* at 11–12 (showing that the benefit rate in Oregon is one hundred percent for low-wage employees). Weekly cap limits often determine the amount of wage compensations for paid leave at the state level. *Family Medical Leave*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx> [<https://perma.cc/VT4Q-A9CS>]. For example, New Jersey guarantees paid leave for as much as two-thirds of an employee's wage capped at \$524 per week for six weeks. *Id.*

¹³³ See generally NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 131 (outlining all of the differences in PFML policies among nine states and the District of Columbia). For example, some states offer as few as four weeks of family leave while others offer as many as twelve weeks. Compare R.I. GEN. LAWS § 28-41-35(d)(1) (providing four weeks of family leave in Rhode Island), with COLO. REV. STAT. § 8-13.3-505 (providing twelve weeks of family leave in Colorado). Additionally, Massachusetts exempts small businesses from coverage. See, e.g., MASS. GEN. LAWS ch. 175M, § 6(d) (providing an exception for employees with fewer than twenty-five employees from paying into the state PFML program); see also NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 131, at 10–11 (showing the types of employers exempted from state PFML programs).

¹³⁴ See, e.g., MASS. GEN. LAWS ch. 175M, § 6(d) (providing an exception for employees with fewer than twenty-five employees from paying into the state PFML program); see also NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 131, at 10–11 (clarifying which employees do not fall within the state PFML mandates).

¹³⁵ See, e.g., *Benefit Requirements for Private Paid Leave Plan Exemptions*, MASS.GOV, <https://www.mass.gov/info-details/benefit-requirements-for-private-paid-leave-plan-exemptions> [<https://perma.cc/K57R-HVEK>] (noting the exemption policy for employers in Massachusetts); *Voluntary Plans*, WASH. PAID FAM. & MED. LEAVE, <https://paidleave.wa.gov/voluntary-plans/> [<https://paidleave.wa.gov/voluntary-plans/>] (allowing employers to adopt their own plans for family and medical leave by application to prove that their coverage is as good or better than the state mandate). Today, state PFML laws are commonplace, making studies about their effectiveness widely available. See generally EILEEN APPELBAUM & RUTH MILKMAN, LEAVES THAT PAY: EMPLOYER AND WORKER EXPERIENCES WITH PAID FAMILY LEAVE IN CALIFORNIA 4 (2011) (analyzing the impact of California's PFML laws); NAT'L P'SHIP FOR WOMEN & FAMS., PAID LEAVE WORKS: EVIDENCE FROM STATE PROGRAMS 2 (2019), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/paid-leave-works-evidence-from-state-programs.pdf> [<https://perma.cc/TRQ4-5M4L>] (surveying PFML laws implemented in states across the country).

¹³⁶ See Lisa Nagele-Piazza, *How Can Employers Navigate Multiple Leave Laws?*, SOC'Y FOR HUMAN RES. MGMT (Mar. 15, 2018), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/navigating-multiple-family-leave-and-sick-leave-laws.aspx> [<https://perma.cc/PS6T-HXN4>] (acknowledging the complexity of complying with leave benefits laws). The FMLA permits employers to run unpaid FMLA leave concurrently with any other state paid leave, paid sick leave, or other paid leave the employee may have accrued. See 29 C.F.R. § 825.207(a) (2021) (explaining the term “substitute,” as meaning any paid time off granted by an employer “will

ployers operating in multiple jurisdictions often face the challenge of adhering to numerous state PFML standards, which translates to steep compliance costs.¹³⁷ Employers not bound by individual state PFML policies may elect to go above and beyond the minimum standard imposed by the FMLA, but few do.¹³⁸ In 2002, in *Ragsdale v. Wolverine World Wide, Inc.*, the Supreme Court noted that generous leave policies tend to make employers' compliance obligations more complicated and expensive.¹³⁹ The Court reasoned that employers have little incentive to stray from the FMLA standard, which establishes clear guidelines and, as a result, simpler compliance.¹⁴⁰ As the Court predicted, data

run concurrently with the unpaid FMLA leave"). Additionally, neither an employer nor an employee may elect to forego FMLA leave if the reason for leaving qualifies as an FMLA absence. See U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter 2 (Mar. 14, 2019) (quoting *Strickland v. Water Works & Sewer Bd. of Birmingham*, 239 F.3d 1199, 1204–06 (11th Cir. 2001)) (clarifying that employers cannot decide to deny FMLA leave to absences that warrant protection under the law). Essentially, employers cannot grant employees a free pass by choosing not to designate leave as "FMLA" so that the employee can preserve their twelve-weeks for a later time. See *id.* at 2 n.3 (citing *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1244 (9th Cir. 2014)) (rejecting a ruling from the Ninth Circuit that allowed an employer to give its employees more than twelve weeks of FMLA-qualifying leave by failing to designate some of the absences as "FMLA"). In 2002, in *Ragsdale v. Wolverine World Wide, Inc.*, the Supreme Court reasoned that Congress deliberately assigned twelve weeks of leave for FMLA purposes, and thus regulations of the law must respect that time limit. 535 U.S. 81, 94 (2002) (holding a DoL regulation allowing employers to delay designation of FMLA leave to be invalid). Although the DoL requires employers to be as generous as possible under the constraints of the FMLA, they cannot go beyond the scope of the law. See Dep't of Labor, Wage & Hour Div., *supra*, at 3 (explaining that while employers may provide paid leave policies to compensate for the unpaid portion of FMLA leave, the amount of time taken off by an employee for an FMLA-qualifying reason can still not exceed twelve-weeks). As a result, employees working in states that have PFML programs do not get the twelve-week FMLA leave entitlement in addition to the state's provision for PFML. *Id.* at 2.

¹³⁷ See Nelson, *supra* note 27, at 675. Multijurisdictional employers struggle with compliance because they must adhere to different PFML laws in each place where their employees operate. See *id.* (enumerating the unique challenges that a variety of PFML laws present to multijurisdictional employers).

¹³⁸ See 28 U.S.C. § 2653 (1993) (noting that Congress did not intend any provision of the FMLA "to discourage employers from adopting or retaining leave policies more generous than any" required by the FMLA); 29 C.F.R. § 825.700 (clarifying that the FMLA does not bar employers from offering greater benefits than those included in the law); see also *Ragsdale*, 535 U.S. at 95 (observing that Congress wanted the FMLA to "pull certain employers up to the minimum standard," knowing that "it might push more generous employers down"); cf. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985) (noting that Congress designed the PDA to "construct a floor beneath which . . . benefits may not drop—not a ceiling above which they may not rise"), *rev'g* No. 83-4927R, 1984 WL 943 (C.D. Cal. Mar. 21, 1984), *aff'd* 479 U.S. 272, 292 (1987).

¹³⁹ See *Ragsdale*, 535 U.S. at 96 (reasoning that generous employers risk penalization from the DoL for "erroneous characterization of an absence as non-FMLA leave"). As a result, the Court reasoned, employers may find "the simpler, less generous route is the preferable one." *Id.*

¹⁴⁰ See *id.* at 95 (suggesting that "unforeseen liabilities" would "discourage employers from adopting policies that varied much from the basic federal requirements"). That said, some employers do voluntarily offer paid leave benefits that far exceed FMLA requirements. See Stacy Pollack, *6 Companies Redefining Parental Leave*, NBC: KNOW YOUR VALUE (Mar. 20, 2019), <https://www.nbcnews.com/know-your-value/feature/6-companies-redefining-parental-leave-ncna984946> [https://

shows that most employers follow the minimum FMLA requirements.¹⁴¹ Because most American employees work under FMLA-compliant policies, only nineteen percent of employees have access to PFML from supplementary state-level laws.¹⁴²

perma.cc/FRL4-AQZR] (listing private companies with generous paid parental leave including Microsoft Corp., Deloitte LLP, and KPMG International Ltd.). For example, in 2018 Netflix offered its employees up to one year of fully paid leave after the birth or adoption of a child. Rani Molla, *Netflix Parents Get a Paid Year Off and Amazon Pays for Spouses' Parental Leave*, VOX (Jan. 31, 2018), <https://www.vox.com/2018/1/31/16944976/new-parents-tech-companies-google-hp-facebook-twitter-netflix> [<https://perma.cc/J9BU-67D3>].

¹⁴¹ Compare Kathryn Mayer, *Large Employers Set Sights on Paid Leave*, HUM. RES. EXEC. (Feb. 18, 2020), <https://hrexecutive.com/large-employers-set-sights-on-paid-leave/> [<https://perma.cc/T6GG-SZ68>] (reporting that 39% of big businesses tried to expand their paid leave benefits in 2019), with U.S. BUREAU LAB. STAT., *supra* note 12, at 120 (showing that 72% of employees working at companies with more than five hundred employees did not have access to paid family leave as of March 2019).

¹⁴² See *Ragsdale*, 535 U.S. at 96 (reasoning that employers receive greater benefit by providing only the minimum benefits due to compliance issues); see also U.S. BUREAU LAB. STAT., *supra* note 12, at 119 (showing that 81% of American employees currently do not receive paid family leave benefits from their employers). Despite paid sick leave becoming fairly common, PFML remains uncommon. Compare NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 131, at 1 (comparing the family and medical leave laws among nine states plus the District of Columbia), with NAT'L P'SHIP FOR WOMEN & FAMS., PAID SICK DAYS STATUTES 2–4, 20–23 (2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-sick-days/paid-sick-days-statutes.pdf> [<https://perma.cc/3YVF-BPY3>] (comparing the sick leave laws of fourteen states plus the District of Columbia to the laws of over a dozen cities and counties). About 76% of Americans have access to some form of paid sick leave through their employer. See Isabel V. Sawhill & Morgan Welch, *Reopening America: We Shouldn't Reopen the Economy Without Paid Sick and Family Leave*, BROOKINGS INST. (July 2, 2020), <https://www.brookings.edu/blog/up-front/2020/07/02/reopening-america-we-shouldnt-reopen-the-economy-without-paid-sick-and-family-leave/> [<https://perma.cc/8D2M-EKWS>] (representing data from all American workers, public and private). Additionally, in 2015, President Barack Obama passed Executive Order 13706, which mandated paid sick leave for federal contractors. Exec. Order No. 13706, 3 C.F.R. § 13706 (2016); see *Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/government-contracts/sick-leave> [<https://perma.cc/XX9R-FHFR>]. This was the closest policy to a national mandate for paid sick leave before the emergency reforms enacted during COVID-19. See *infra* note 145 and accompanying text (introducing the temporary laws enacted in response to the Pandemic). Consequently, this Note does not intend to suggest that the portion of the American population without sick leave is insignificant. See Alex Zhang, Note, *Pandemics, Paid Sick Leaves, and Tax Institutions*, 52 LOY. CHI. L.J. 383, 385 (2021) (discussing the lack of a nationally mandated paid sick leave). The percentage of Americans without sick leave translates to approximately 30 million people. *Id.* This Note focuses on paid leave benefits available in the private sector; unless specified otherwise, statistics and data cited for the remainder of this Note represent only private employees. See, e.g., U.S. BUREAU LAB. STAT., *supra* note 12, at 119 (providing employment data for both private and public sector American employees).

D. Temporary PFML During the Pandemic

Federal family and medical leave policy in the United States remained unchanged until the Pandemic hit in March 2020.¹⁴³ Then, due to the catastrophic impact of COVID-19, the prospect of a national PFML shifted from a policy dream to a public health imperative.¹⁴⁴ Congress passed the Families First Coronavirus Response Act (FFCRA), which included an expansion of the FMLA (the EFMLA).¹⁴⁵ Although the Pandemic-relief legislation expired, the Act and its critical measures rekindled the paid leave conversation.¹⁴⁶

¹⁴³ See Zhang, *supra* note 142, at 387 (describing the legislative reforms to family and medical leave that Congress implemented in response to the Pandemic). In the absence of a national paid sick leave statute, most of the pre-COVID-19 policy in this subgenre of employee benefits law exists at the “state and local level.” *Id.* at 391. This Note is focused on federal regulation and policy of paid leave, and therefore will not go into the specific state and municipal sick leave statutes. See, e.g., Dylan Karstadt, Note, *Too Sick to Work? Defending the Paid Sick Leave Movement and the New Jersey Paid Sick Leave Act*, 44 SETON HALL LEGIS. J. 145, 149 (2020) (analyzing state-level ramifications to the New Jersey Paid Sick Leave Act enacted in 2018).

¹⁴⁴ See Claire Cain Miller, *Coronavirus Brings a New Legislative Push for Paid Sick Leave*, N.Y. TIMES (Mar. 10, 2020), <https://www.nytimes.com/2020/03/10/upshot/coronavirus-paid-sick-leave.html> [<https://perma.cc/F36F-2YKC>] (describing the struggle for many Americans to abide by stay-at-home orders because they cannot afford to go without pay). There was major concern in the early months of the virus in 2020 that employees were reporting to work sick, perpetuating the spread of COVID-19. *Id.* Social economists label this phenomenon as “contagious presenteeism,” a behavioral tendency to report to work sick and spread infectious illnesses. Stefan Pichler & Nicolas R. Ziebarth, *The Pros and Cons of Sick Pay Schemes: Testing for Contagious Presenteeism and Noncontagious Absenteeism Behavior* 33 (Nat’l Bureau of Econ. Rsch., Working Paper No. 22530, 2016). Some scholars find that the existence of a paid sick leave social safety-net statistically reduces the occurrence of contagious presenteeism and, as a result, helps contain the spread of infectious disease. See *id.* (explaining the correlation between market incentives for providing sick leave and the positive outcomes of more sick workers staying home).

¹⁴⁵ Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127, 134 Stat. 178 (2020). The FFCRA contained two provisions related to leave: (1) the Expansion of the Family and Medical Leave Act (EFMLA); and (2) the Emergency Paid Sick Leave Act (EPSLA). See Families First Coronavirus Response Act (FFCRA), 116th Congress §§ 3101–3106 (2020) (enacted) (creating the Expansion of FMLA, an extension of the existing FMLA); *id.* §§ 5101–5111 (enacting the EPSLA, an entirely new policy providing national paid sick leave). The key difference between these two policies is that the EFMLA builds upon the existing foundation of the FMLA, whereas the EPSLA is a wholly new policy for paid sick leave. See Hiba Hafiz, Shu-Yi Oei, Diane Ring & Natalya Shnitser, *Regulating in Pandemic: Evaluating Economic and Financial Policy Responses to the Coronavirus Crisis* 35 (Bos. Coll. L. Sch. Legal Stud., Research Paper No. 527, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3555980 [<https://perma.cc/64UB-VCTG>] (calling the EPSLA “an entirely new regime” as compared to the EFMLA). The EPSLA mandates that qualifying employers provide employees with paid sick time for the following reasons: (1) sickness or quarantine from COVID-19; (2) order from a health care professional to self-isolate due to the virus; (3) experience of COVID-19 symptoms pending a diagnosis; (4) caring for an individual with or in quarantine from COVID-19; (5) watching a child sent home from school as a result of the virus; or (6) a reason similar to those listed above as specified by the Secretary of Health and Human Services. H.R. 6201 § 5102(a)(1)–(6) (listing the qualifying reasons for paid sick leave under the COVID-19 emergency measure). Depending on which reason an employee records for leave, the benefits vary. *Id.* § 5110(a)(5)(A) (outlining the law’s compensation scheme for paid sick time). The EPSLA leave substantively amounts to two weeks of paid sick time off. *Id.* § 5102(b)(2). Similarly to the EFMLA,

The EFMLA broadened the existing eligibility requirements of the FMLA to encompass COVID-19-related absences.¹⁴⁷ For example, the EFMLA covered working parents requiring time off from work due to emergency school closures.¹⁴⁸ Most importantly, however, the EFMLA required employers to pay qualifying employees no less than two-thirds of their regular wage during leave.¹⁴⁹ This provision made the EFMLA the first ever federal PFML policy in the United States.¹⁵⁰ Although the EFMLA largely followed existing FMLA requirements, the new law increased the FMLA's fifty-employee threshold to a five-hundred-employee threshold, essentially eliminating all large corporations from its coverage.¹⁵¹ Additionally, the new law allowed businesses with fewer than fifty employees to apply for an exemption from the new paid leave man-

this policy contains a five-hundred-employee threshold and permits an exemption for businesses with fewer than fifty employees. *Id.* § 5110(2)(b)(i), § 5111(2). Of note, the funding for the EFMLA and the EPSLA programs comes through another provision of the FFCRA, which grants tax credits to employers for complying with the new leave requirements. *Id.* § 7001. Essentially, employers pay for both programs upfront and then later receive reimbursement from the government. *Id.* Therefore, as enacted, the government fully subsidizes the EFMLA and EPSLA programs. *Id.*

¹⁴⁶ *Temporary Rule: Paid Leave Under the Families First Coronavirus Response Act*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/ffcr> [<https://perma.cc/8VRX-VJX5>] (stating that the FFCRA requirements expired on December 31, 2020); *see also infra* note 155 and accompanying text (expanding on the paid leave policies and initiatives that have spouted from the FFCRA).

¹⁴⁷ *See* H.R. 6201 § 110(a)(1)(A) (redefining "eligible employee"); *id.* § 110(a)(2) (adding "qualifying need related to public health emergency" and "public health emergency" definitions to include any COVID-19 related emergency as a valid reason to request FMLA leave).

¹⁴⁸ *Id.* § 110(a)(2)(A).

¹⁴⁹ *Id.* § 110(b)(1). The legislation stipulates that the first ten days of an employee's FMLA leave is to be unpaid, and then for the remainder of the twelve-week period the employee shall receive no less than two-thirds of their regular wage. *Id.* The amended FMLA leave also caps the employee's pay to \$200 per day and \$10,000 overall, regardless of their typical pay rate. *Id.* § 110(b)(2)(B)(ii).

¹⁵⁰ *See id.* § 110(b) (providing paid leave).

¹⁵¹ *Id.* § 110(a)(1)(B) (amending the FMLA's original fifty-employee threshold to a five-hundred-employee threshold); *see also Technical Corrections to H.R. 6201 § 110(a)(1)(B)* (Mar. 16, 2020), <http://www.majorityleader.gov/sites/democraticwhip.house.gov/files/COVID-19%20Amendment%20Language%2003162020%20741%20FINAL.pdf> [<https://perma.cc/UH5C-XYZT>] (amending the employer threshold from employers with more than fifty employees to those with fewer than five hundred employees). Hafiz et al., *supra* note 145, at 31 (noting that Congress implemented the Technical Corrections immediately before passing the FFCRA because of an outcry from the business community over the scope of the law). The Technical Corrections change to the employer threshold resulted from a concerted lobbying effort from entities such as the United States Chamber of Commerce and the National Federation of Independent Businesses (NFIB). *See* Letter from Thomas J. Donohue, Chief Exec. Officer, U.S. Chamber Com., to The President, Hon. Nancy Pelosi, Speaker House Representatives, & Hon. McConnell, Majority Leader 2-3 (Mar. 16, 2020) (on file with Chamber Comm.) (demonstrating the argument from business groups that the original employer threshold in the COVID-19 relief bill would harm companies with more than five hundred employees); Ilma Hasan & Tatyana Monnay, *Business Associations Lobby Trump, Congress to Ease Paid Sick Leave Requirements*, OPENSECRETS (Mar. 18, 2020), <https://www.opensecrets.org/news/2020/03/business-associations-lobby-trump-sick-leave/> [<https://perma.cc/J27S-7L7W>] (indicating a compromise between House Speaker Nancy Pelosi and Treasury Secretary Steve Mnuchin to change the employer eligibility requirements of the FFCRA). Business lobbying groups spent approximately \$121 million on advocating for desired changes to the FFCRA. *Id.*

date.¹⁵² As a result, the law contained a fairly sizeable carveout for the smallest and largest employers.¹⁵³ Nonetheless, the FFCRA expired at the end of the 2020 legislative session, and Congress has yet to renew it.¹⁵⁴ Despite being short-lived, the temporary COVID-19 measures revived the debate for making PFML permanent.¹⁵⁵

¹⁵² H.R. 6201 § 110(a)(3)(B). The DoL issued regulations clarifying the standard for granting the small employer exemption. *See* Paid Leave Under Families First Coronavirus Response Act, 85 Fed. Reg. 19,336 (Apr. 6, 2020) (to be codified at 29 C.F.R. pt. 826) (explaining the need for further clarification on the exemptions included in the FFCRA). To qualify, employers must have fewer than fifty employees and meet at least one of three criteria: (1) the business does not have the budget to support the cost of paid leave; (2) the employee requesting leave has irreplaceable value to the business; (3) the businesses do not have adequate labor available to compensate for the absence of the employee requesting leave. *Id.* Thus, the FFCRA does not automatically exempt employers with fewer than fifty employees. *See* *Kofler v. Sayde Steeves Cleaning Serv. Inc.*, No. 8:20-cv-1460, 2020 WL 5016902, at *3 (M.D. Fla. Aug. 25, 2020) (rejecting an employer's argument that because it employs fewer than fifty people it automatically qualified for the FFCRA exemption).

¹⁵³ *See* Hafiz et al., *supra* note 145, at 34 (explaining that 96% of the employers with fewer than five hundred employees actually have fewer than fifty employees). Therefore, the majority of the employers that fell within the FFCRA's scope were eligible for an exemption. *Id.*

¹⁵⁴ *See* H.R. 6201 § 3102(a)(1) (setting the expiration for the EFMLA on December 31, 2020); *id.* § 5109 (same); *see also* Press Release, Wage & Hour Div., U.S. Dep't Lab. Publishes Guidance on Expiration Paid Sick Leave & Expanded Fam. & Med. Leave for Coronavirus (Dec. 31, 2020), <https://www.dol.gov/newsroom/releases/whd/whd20201231-1> [<https://perma.cc/T7Y8-G2UE>] (announcing the expiration of the EFMLA). The looming December deadline forced Congress to revisit a COVID-19 relief package and potential extension of benefits at the end of 2020. *See* Rachel Siegel, Jeff Stein & Mike DeBonis, *Here's What's in the \$900 Billion Stimulus Package*, WASH. POST (Dec. 27, 2020), <https://www.washingtonpost.com/business/2020/12/20/stimulus-package-details/> [<https://perma.cc/J4YM-JRDS>] (detailing the contents of the relief package passed by Congress at the end of December 2020). In time for the new year, Congress renewed many of the COVID-19 support programs, but elected not to extend the FFCRA. Emily G. Massey, Grant B. Osborne & Hayley R. Wells, *COVID-19 Paid Leave in 2021: The Impact of New Federal Relief Bill on Employers*, WARD & SMITH, P.A. (Jan. 5, 2021), <https://www.wardandsmith.com/articles/covid-19-paid-leave-in-2021-the-impact-of-new-federal-relief-bill-on-employers> [<https://perma.cc/F2HD-CXS9>]. Congress only extended the FFCRA tax credits through March 2021 for employers who chose to continue providing paid leave on a voluntary basis. Consolidated Appropriations Act, 2021, H.R. 133 § 286 (2020) (enacted).

¹⁵⁵ *See* McCloskey & Rachidi, *supra* note 18 (cautioning that permanent leave policies should not necessarily mimic emergency COVID-19 measures). As policy experts begin to visualize what a permanent paid leave scheme in the United States might look like, a major consideration is how paid leave actually benefits employers despite the additional costs. *See* Joan Michelson, *How Small Companies Can Offer Great Paid-Leave Programs*, HARV. BUS. REV. (Jan. 7, 2021), <https://hbr.org/2021/01/how-small-companies-can-offer-great-paid-leave-programs> [<https://perma.cc/FK8M-GJ38>] (explaining that generous paid leave policies can help employers attract top talent). At the time of this writing, the Biden Administration is proposing a COVID-19 relief plan called the American Rescue Plan, that includes PFML. *See* Press Release, The White House Briefing Room, President Biden Announces American Rescue Plan (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/legislation/2021/01/20/president-biden-announces-american-rescue-plan/> [<https://perma.cc/E3XL-L2AY>] (calling for an expanded PFML policy). President Biden's plan proposes more extensive family and medical leave than the FFCRA and expands the policy to cover employers with more than five hundred employees. *Id.* The Biden plan suggests extending the number of weeks for paid leave from ten to fourteen and purportedly covers 106 million more employees than the FFCRA. *Id.*

II. LET'S DO THE TIME WARP AGAIN: THE POLITICAL ECONOMIES OF 1980S VS. 2020S AMERICA

The Pandemic prompted a renewed interest in PFML among the general public while the private sector resisted the possibility, just as it did for the FMLA.¹⁵⁶ During the early stages of the FMLA, the business community worried that the law would be too costly and harm employers, particularly small businesses.¹⁵⁷ Business-based arguments against federally regulated leave benefits must be framed in their appropriate political and economic contexts to shed light on their validities and misgivings.¹⁵⁸

Section A of this Part discusses the context in which Congress debated, amended, and finally enacted the FMLA throughout the 1980s and early 1990s.¹⁵⁹ Section B then reviews the current political and economic climate surrounding PFML policy conversations, encompassing factors related and unrelated to COVID-19.¹⁶⁰

A. 1980 to 1993: An Era for Conservatism & Corporations

In the early 1980s, the American economy was in a recession.¹⁶¹ Under President Carter, inflation skyrocketed causing businesses to suffer.¹⁶² Federal

¹⁵⁶ See Usha Ranji, Michelle Long & Alina Salganicoff, *Coronavirus Puts a Spotlight on Paid Leave Policies*, KAISER FAM. FOUND. 1 (Dec. 14, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/coronavirus-puts-a-spotlight-on-paid-leave-policies/> [<https://perma.cc/EPM2-DCPQ>] (noting the sense of public urgency for the institution of federal paid leave in light of the Pandemic). The FMLA faced opposition from business groups early on. See WISENSALE, *supra* note 85, at 144 (recognizing the large anti-FMLA coalition of forty-three business groups assembled by the late 1980s); see also LENHOFF & BELL, *supra* note 30, at 8 (discussing the context and outside factors that impacted leave benefits legislation). The pushback from business lobbyists particularly affected the progression of the FMLA because the resistance from corporate actors forced policy-makers to make compromises in the bill. *Id.* at 9.

¹⁵⁷ See Dawn Gunsch, *The Family Leave Act: A Financial Burden?*, 72 PERS. J. 48, 49 (1993) (discussing the overall impression among the business community that the newly enacted FMLA harms companies financially). For example, the Small Business Administration projected that six months of some FMLA policy provisions would cost about \$612 million annually. *Id.*

¹⁵⁸ See Tharpe, *supra* note 32, at 395 (indicating that a proper understanding of the FMLA requires an appreciation for the political intricacies that defined Congress during the law's enactment). The various social interests and political pressures surrounding a piece of legislation informs its evolution and offers a fuller understanding of its ultimate impact. *Cf. id.* at 397 (using the impact that the 1992 presidential election had on the final passage of the FMLA as an example).

¹⁵⁹ See *infra* notes 161–193 and accompanying text.

¹⁶⁰ See *infra* notes 194–249 and accompanying text.

¹⁶¹ See 1980–82 *Early 1980s Recession*, BANCROFT LIB. UNIV. CAL. BERKELEY: SLAYING DRAGON DEBT, <https://bancroft.berkeley.edu/ROHO/projects/debt/1980srecession.html> [<https://perma.cc/E4TU-ZHP3>] (discussing the United States economy between 1980 and 1982).

¹⁶² See John Hogan, *Economic Crises & Policy Change in the Early 1980s: A Four Country Comparison*, 65 J. AUSTL. POL. ECON. 106, 109 (2010) (describing the extreme inflation during the Carter Administration); see also Lois M. Plunkert, U.S. Bureau Lab. Stat., *The 1980's: A Decade of Job Growth & Industry Shifts*, MONTHLY LAB. REV., Sept. 1990, at 3, <https://www.bls.gov/opub/>

regulation of the private sector also increased exponentially.¹⁶³ By the end of the decade, businesses grew tired of President Carter's approach, which they felt was hindering growth and prolonging the economic decline.¹⁶⁴

To combat the government oversight that many felt defined the Carter Administration, corporate American began to consolidate.¹⁶⁵ New advocacy groups like the Business Roundtable formed during this time, and existing organizations like the United States Chamber of Commerce acquired newfound political power.¹⁶⁶ In 1972, Congress enacted campaign finance legislation creating political action committees (PACs), that created an avenue for corpora-

mlr/1990/09/Art1full.pdf [https://perma.cc/G5TT-3XAG] (mapping the different levels of impact that the recession had on different industries within the American economy).

¹⁶³ See Michael Useem, *Business and Politics in the United States and United Kingdom: The Origins of Heightened Political Activity of Large Corporations During the 1970s and Early 1980s*, 12 THEORY & SOC'Y 281, 295 (1983) (remarking on the augmented regulatory schemes of the 1970s, particularly in certain industries). Throughout the 1970s, Congress established the Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), and other entities to augment federal oversight of private companies. See *id.* (listing the most influential government programs implemented during the Carter Administration). The cost of complying with the regulations promulgated from these agencies exacerbated the existing fiscal challenges for businesses in a languishing market. See *id.* (acknowledging the impact of increased federal regulations for American companies); Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, THE ATLANTIC (Apr. 20, 2015), https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/ [https://perma.cc/2VPN-C6G7] (discussing the compliance burdens that came with more federal oversight in the 1970s). As the United States slid into a recession at the end of the 1970s, the answer from the Carter Administration was to tighten its monetary policy even more. See Hogan, *supra* note 162, at 109 (describing President Carter's strategy to intensify federal regulation of the private sector in response to rising inflation).

¹⁶⁴ See Drutman, *supra* note 163 (suggesting that corporations felt their very existence was at stake under the regulatory regime of the 1970s).

¹⁶⁵ See Useem, *supra* note 163, at 300 (explaining the desire among business actors to organize as a defense against government overreach).

¹⁶⁶ See Drutman, *supra* note 163 (reviewing the history of the burgeoning lobbying industry during the 1980s); see also History, BUS. ROUNDTABLE, https://s3.amazonaws.com/brt.org/archive/legacy/uploads/studies-reports/downloads/BRT_History_1172011.pdf [https://perma.cc/J79U-WPZG] (stating that a collective of chief executive officers founded the Business Roundtable in 1972 to advocate for advantageous business policies). At the start of the 1980s, the United States was still grappling with what the implications of political action committees (PACs) would be and the role of private business in political elections. See David E. Rosenbaum, *Politics: Business Antes Up*, N.Y. TIMES (Jan. 13, 1980), https://www.nytimes.com/1980/01/13/archives/politics-business-antes-up-the-1980-campaign-business-could.html [https://perma.cc/8EFV-2TBP] (dissecting the legal and political ramifications of rising corporate contributions through PACs). After corporate PAC spending became ubiquitous throughout the 1980s, the United States Chamber of Commerce became one of the top spenders and powerhouses in the political sphere. See Alex Gangitano, *US Chamber of Commerce Nudged Out of Top Lobbying Spender Spot for First Time in 20 Years*, THE HILL (Jan. 27, 2021), https://thehill.com/business-a-lobbying/536082-us-chamber-nudged-out-of-top-lobbying-spender-spot-for-first-time-in-20 [https://perma.cc/7HGL-42NA] (mentioning the long-term preeminence of the Chamber of Commerce PAC). See generally *About the U.S. Chamber of Commerce*, U.S. CHAMBER COM., https://www.uschamber.com/about/about-the-us-chamber-of-commerce [https://perma.cc/72QR-RUF5] (stating the mission and membership of the United States Chamber of Commerce).

tions to donate political contributions.¹⁶⁷ By the 1980s, the business community savvily harnessed their spending power to influence policy in Washington.¹⁶⁸ Private businesses used political spending to amplify their advocacy for free market principles and to block the draconian regulations of the Carter Administration.¹⁶⁹

To further these goals, pro-business groups of the 1980s tended to support Republican candidates over Democratic candidates.¹⁷⁰ Corporations wanted lower taxes and looser federal regulations, policies that the Republican Party platform explicitly endorsed.¹⁷¹ Consequently, corporate America helped elect Ronald Reagan in 1980 and won Republicans the majority in both chambers of

¹⁶⁷ See Federal Election Campaign Act, 52 U.S.C. §§ 30101–30126 (1972) (creating the Federal Election Commission (FEC) and implementing other policies regulating contributions to political campaigns). After the campaign finance reform of the 1970s, contributions from corporations to political campaigns increased rapidly. See Ruth S. Jones & Warren E. Miller, *Financing Campaigns: Macro Level Innovation and Micro Level Response*, 38 W. POL. Q 187, 188 (1985) (observing that between 1974 and 1984 the number of corporate PACs registered with the FEC jumped from less than five hundred to over 3,500). Through PACs, private companies outpaced the influence of other entities such as labor unions because they began spending more money on elections. See Useem, *supra* note 163, at 298 (reporting that, by the late 1970s, business PACs spent more than \$17 million in contributions to political candidates while labor unions spent \$10 million).

¹⁶⁸ See Useem, *supra* note 163, at 297 (noting that PACs offered businesses an avenue to assert their influence in the political process). Michael C. Jensen, *The New Corporate Presence in Politics*, N.Y. TIMES (Dec. 14, 1975), <https://www.nytimes.com/1975/12/14/archives/the-new-corporate-presence-in-politics-the-rush-is-on-to-develop-in.html> [<https://perma.cc/G2SX-NP2M>] (providing background about the FEC's ruling on the Sun Oil Co.'s ability to financially support political candidates). Political spending continues today, although federal law limits the amount of money corporations may donate to the official campaign funds of political candidates. See, e.g., *National Federation of Independent Business Federal Political Action Committee*, FED. ELECTION COMM'N, <https://www.fec.gov/data/committee/C00101105/?cycle=2020> [<https://perma.cc/725P-N692>] (documenting total disbursements of political contributions for the 2020 election cycle); *Chamber of Commerce of the United States of America PAC (US Chamber PAC)*, FED. ELECTION COMM'N, <https://www.fec.gov/data/committee/C00082040/?cycle=2020> [<https://perma.cc/4F5X-YVL9>] (same); see also *Making Disbursements as a PAC*, FED. ELECTION COMM'N, <https://www.fec.gov/help-candidates-and-committees/making-disbursements-pac/> [<https://perma.cc/Y3G8-RXFU>] (explaining the different rules for political contributions depending on the type of entity).

¹⁶⁹ See Useem, *supra* note 163, at 295 (calling the consolidation of corporate political power “a joint counteroffensive” against federal regulations); Tharpe, *supra* note 32, at 396 (observing that the FMLA was divided along ideological lines, with Republicans denouncing the bill and Democrats supporting it).

¹⁷⁰ See Curtlyn Kramer, *Vital Stats: The Widening Gap Between Corporate and Labor PAC Spending*, BROOKINGS INST. (Mar. 31, 2017), <https://www.brookings.edu/blog/fixgov/2017/03/31/vital-stats-corporate-and-labor-pac-spending/> [<https://perma.cc/SQ3D-4ZBX>] (noting that corporate PACs give more indiscriminately to Republican candidates compared to the targeted spending strategy of labor unions, typically on Democratic candidates).

¹⁷¹ See *Republican Party Platform of 1980*, AM. PRESIDENCY PROJECT (July 15, 1980), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1980> [<https://perma.cc/EQ39-M84R>] (calling for “tax rate reductions, spending restraints, and regulatory reforms” during the 1980 Republican National Convention).

Congress.¹⁷² The Republican resurgence curated an atmosphere in Washington, D.C. that was generally friendly to corporate interests and adverse to expanding government power.¹⁷³

Unfortunately for Democrats, this environment was not conducive to enacting progressive reforms, such as national parental and disability leave benefits.¹⁷⁴ In the wake of the Carter presidency, businesses wanted less regulation, not more.¹⁷⁵ The general resistance to government oversight during the 1980s explains why paid leave was a nonstarter for conservatives in Congress, and why even unpaid leave saw notable backlash.¹⁷⁶ Conservatives acknowledged that the number of working parents, especially women, in the workforce presented a growing problem.¹⁷⁷ Despite that recognition, groups like the United States Chamber of Commerce emphatically opposed any sort of federal mandate.¹⁷⁸

¹⁷² See Lou Cannon, *Ronald Reagan: Campaigns and Elections*, UNIV. VA.: MILLER CTR., <https://millercenter.org/president/reagan/campaigns-and-elections> [<https://perma.cc/XUX8-LHMJ>] (describing the resistance from the “rank-and-file” Republicans to the expanding role of federal regulators under the Carter Administration and, subsequently, President Reagan’s promise to loosen the grip of federal oversight during his administration). The Republicans had not controlled the majority in both chambers of Congress since 1954. *Id.* The Reagan presidency did usher in modest economic recovery, although scholars dispute the specific causes and ramifications. See 1980–82 *Early 1980s Recession*, *supra* note 161 (calling the economic recovery of the 1980s a “source of considerable dispute”); see also James Pethokoukis, *Again, the 1980s Boom Was About More Than Just the Reagan Tax Cuts*, AEI: AEI IDEAS (May 4, 2015), <https://www.aei.org/economics/again-the-1980s-boom-was-about-more-than-just-the-reagan-tax-cuts/> [<https://perma.cc/AEG3-RXJL>] (weighing the impact of the Reagan era tax reductions). The economic resurgence of the 1980s was not uniform, and some sectors like the service industry recovered better than others. See Plunkert, *supra* note 162, at 3, 13 (distinguishing between service and retail industries, which flourished in the 1980s, and manufacturing and mining trades, which experienced significant job loss). President Reagan enacted the tax cuts that corporations longed for and embraced free market principles over government regulation. See Hogan, *supra* note 162, at 113 (describing the “Reaganomics” policy as one defined by lower taxes, fewer government regulations, and cuts to public spending).

¹⁷³ See Hogan, *supra* note 162, at 114 (explaining how President Reagan’s novel economic reforms destabilized the policy landscape in Washington, D.C.).

¹⁷⁴ See WISENSALE, *supra* note 85, at 138 (contextualizing the political landscape in 1984 as inhospitable for fostering progressive policy reforms, such as family and medical leave).

¹⁷⁵ See Useem, *supra* note 163, at 303 (observing that during the 1970s and 1980s corporate America focused considerable energy on stemming the tide of expanding government power).

¹⁷⁶ See WISENSALE, *supra* note 85, at 138 (explaining that pro-business entities, like the United States Chamber of Commerce, were not at all open to considering a paid leave policy in the 1980s).

¹⁷⁷ See *House Hearing Educ. & Lab. 1986*, *supra* note 93, at 63 (statement of Susan Hager, representing the United States Chamber of Commerce) (proposing parental leave to address the increase in the number of parents returning to the workforce after starting families); see also 132 CONG. REC. 30,426 (1986) (statement of Rep. David Dreier) (acknowledging that Congress needed to address the growing problem of access to child care).

¹⁷⁸ See *House Hearing Educ. & Lab. 1986*, *supra* note 93, at 63 (criticizing a federal mandate and advocating for business flexibility); WISENSALE, *supra* note 85, at 143 (noting the strong opposition from the National Association of Manufacturers, the NFIB, and the United States Chamber of Commerce to an early version of the FMLA bill).

The business community presented two main points against the proposal.¹⁷⁹ First, and most importantly, interest groups stressed the damage that a federal mandate would inflict upon small businesses.¹⁸⁰ Small businesses cited their strained budgets and limited workforces to explain why guaranteeing long-term leave would be overly burdensome.¹⁸¹ Second, business leaders contended that greater flexibility to contract benefits advantages businesses and employees.¹⁸² Opponents of the bill argued that the costs of a federal mandate would inhibit employers' ability to contract.¹⁸³ Conservatives expressed concern that the added burden of paying for leave benefits would hamper employers' ability to offer other benefits, such as healthcare, that employees may prefer.¹⁸⁴ Further, opponents argued that free market competition would create natural incentives for those businesses able to afford more generous leave to provide it voluntarily, making a federal mandate unnecessary.¹⁸⁵

Republican lawmakers fought vigorously against a federal mandate.¹⁸⁶ The law embodied precisely the type of federal oversight conservatives hoped

¹⁷⁹ See *infra* notes 182–189 and accompanying text.

¹⁸⁰ See *House Hearing Educ. & Lab. 1986, supra* note 93, at 71 (statement of Frank S. Swain, Chief Counsel for Advocacy, Small Business Administration) (calling the carveout in the FMLA bill for small businesses insufficient and categorically dismissing the potential of any paid leave provision); *Senate Hearing 1987, supra* note 95, at 97 (statement of Frances Shaine, representing the United States Chamber of Commerce) (expressing concern as a small business owner that a federally mandated parental leave would deprive businesses of needed flexibility).

¹⁸¹ See *House Hearing Educ. & Lab. 1986, supra* note 93, at 70, 72 (statement of Frank S. Swain, Chief Counsel for Advocacy, Small Business Administration) (explaining the prohibitive costs of providing employee leave on top of health benefits). Further, the Small Business Administration asserted that a federal mandate would discourage small businesses from hiring workers of child-bearing age to avoid granting long-term parental leave. *Id.* at 73.

¹⁸² See *Senate Hearing 1987, supra* note 95, at 8 (statement of Sen. Strom Thurmond, Member, S. Comm. on Lab. & Human Res.) (acknowledging that many employers offer parental leave to employees already).

¹⁸³ See DEBORAH WALKER, CATO INST., POL'Y ANALYSIS NO. 108, MANDATORY FAMILY-LEAVE LEGISLATION: THE HIDDEN COSTS 1, 5 (1988), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa108.pdf> [<https://perma.cc/3YU9-9GUN>] (discussing various cost estimates for the FMLA from the United States Chamber of Commerce and the General Accounting Office (GAO)). In 1987, the Chamber of Commerce estimated that at worst, the FMLA proposal would cost \$16.2 billion, meanwhile the GAO projected a total expense of less than \$500 million. *Id.*

¹⁸⁴ See *House Hearing 1987, supra* note 95, at 100, 104 (testimony of Virginia Lamp, Labor Relations Attorney, United States Chamber of Commerce) (observing scholars' concern that employers forced to internalize higher taxes to fund a federal leave program would lay off employees, particularly women of child-bearing age, and reduce other workers' benefits). The United States Chamber of Commerce maintained that the existing benefits system, allowing private businesses to contract with employees outside of government oversight, "[was] already pretty responsive to the needs and capabilities of both employers and employees." *Id.* at 99–100.

¹⁸⁵ See *id.* at 99, 100 (testimony of Virginia Lamp, Labor Relations Attorney, United States Chamber of Commerce) (arguing that "flexibility . . . is the most appropriate answer" and "mandated benefits are not cost-free").

¹⁸⁶ See, e.g., *House Hearing Educ. & Lab. 1986, supra* note 93, at 2 (statement of Rep. Marge Roukema, Member, H. Comm. on Educ. & Lab.) (expressing concern about the "length and breadth"

to eliminate.¹⁸⁷ Pro-business advocates in Congress pressed for high eligibility requirements and higher employer thresholds to narrow the legislation's coverage.¹⁸⁸ Despite vehement opposition from the business community, bipartisan compromise on the specific terms of coverage gained enough Republican votes to pass the law.¹⁸⁹ Although Republicans did not get everything on their wish list, the final version of the FMLA that President Clinton signed in 1993 reflected immense political pressure from the business community.¹⁹⁰ Not only did the final FMLA not include paid leave, an express demand from pro-business groups, but the employer threshold was raised from businesses with fifteen employees or more to businesses with fifty employees or more.¹⁹¹ These changes immediately excluded nearly thirty-two percent of employers from the FMLA's scope.¹⁹² The move to raise the employer threshold signaled that, from the beginning, the private sector sought to escape federal regulation of family and medical leave benefits.¹⁹³

B. 2020 and the New Pandemic Reality: A Nation Ready for Reform

As COVID-19 notably shifted the response to PFML among corporations and politicians, this Note presents the pre-Pandemic and ongoing-Pandemic landscapes separately.¹⁹⁴ Subsection 1 of this Section describes the state of the

of the leave policy needed to cover most private employers uniformly); *cf. Senate Hearing 1987, supra* note 95, at 29 (statement of Sen. Orrin Hatch, Member, Senate Comm. on Lab. & Human Res.) (criticizing that the pending FMLA bill would make leave benefits mandatory for businesses).

¹⁸⁷ See Useem, *supra* note 163, at 295 (describing the fight against federal regulation in the 1980s).

¹⁸⁸ See WISENSALE, *supra* note 85, at 142 (describing the initiative led by Rep. Roukema to amend the early FMLA bill versions to exclude more employers and raise the qualifications for employees to receive benefits).

¹⁸⁹ See *id.* at 148 (indicating that the Republican commitment to family values swayed enough lawmakers to support the FMLA). Beside the fifty-employee threshold, other compromises included lowering the length of the leave period to twelve weeks and limiting which eligible family members the FMLA covered. LENHOFF & BELL, *supra* note 30, at 9.

¹⁹⁰ See WISENSALE, *supra* note 85, at 142 (noting that Congress implemented most of Roukema's requests were implemented in the version of the FMLA that President Clinton signed in 1993).

¹⁹¹ See *id.* (noting the increase in the employer threshold). When the FMLA was enacted, the fifty-employee threshold exempted roughly 32% of employers in the United States from the law's regulations. See *Table F. Distribution of Private Sector Employment by Firm Size*, U.S. BUREAU LAB. STAT., https://www.bls.gov/web/cewbd/table_f.txt [<https://perma.cc/NZ2R-U6X6>] (providing data on the breakdown of employer sizes in 1993).

¹⁹² See *Table F. Distribution of Private Sector Employment by Firm Size, supra* note 191 (showing that employers with less than fifty employees comprised 31.77% of the United States economy in 1993).

¹⁹³ See WISENSALE, *supra* note 85, at 142 (explaining the private sector's and conservative politicians' disinterest in broader coverage for the FMLA).

¹⁹⁴ See generally Bellware, *supra* note 13 (highlighting the impact of COVID-19 on PFML reform).

nation regarding PFML prior to the Pandemic.¹⁹⁵ Subsection 2 illustrates Americans' changing attitudes toward PFML after COVID-19 struck, and as it continues to impact our nation and the globe.¹⁹⁶

1. Before the Pandemic

In 2017, three years before COVID-19 hit, the American public overwhelmingly supported PFML.¹⁹⁷ Both sides of the political aisle held positive views of PFML as well.¹⁹⁸ After several decades under the FMLA, lawmakers understood that the FMLA's failure to cover nearly half of American employees was obviously problematic.¹⁹⁹ Although lawmakers agreed about the problem, the proposed solutions to address this gap differed drastically.²⁰⁰

¹⁹⁵ See *infra* notes 197–217 and accompanying text.

¹⁹⁶ See *infra* notes 218–249 and accompanying text. As of August 2021, the Pandemic continues to inflict harm upon the American population. See *Delta Variant*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 26, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html> [<https://perma.cc/7E9Y-E3PZ>] (explaining the ongoing effects of the “Delta variant,” the latest strain of COVID-19). The Biden Administration continues to announce new policies to address the evolving crisis, with particular implications for paid leave. See, e.g., Press Release, The White House Briefing Room, FACT SHEET: President Biden to Announce New Actions to Get More Americans Vaccinated and Slow the Spread of the Delta Variant (July 29, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-president-biden-to-announce-new-actions-to-get-more-americans-vaccinated-and-slow-the-spread-of-the-delta-variant/> [<https://perma.cc/7KBX-BWF2>] (announcing the federal government's plans to subsidize medium- to small-sized businesses for employees' time off to get themselves, and their family members, vaccinated from COVID-19).

¹⁹⁷ See JULIANA HOROWITZ, KIM PARKER, NIKKI GRAF & GRETCHEN LIVINGSTON, PEW RSCH. CTR., AMERICANS WIDELY SUPPORT PAID FAMILY AND MEDICAL LEAVE, BUT DIFFER OVER SPECIFIC POLICIES 4 (2017), <https://assets.pewresearch.org/wp-content/uploads/sites/3/2017/03/22152556/Paid-Leave-Report-3-17-17-FINAL.pdf> [<https://perma.cc/JQ3E-KDNY>] (reporting that 85% Americans believe workers should receive paid medical leave, 67% think workers should get paid family leave to care for a family member with an illness, and 82% believe in access to paid maternity leave). In the same survey, approximately 62% of Americans polled said they had a need for PFML. *Id.* at 6. Yet, the data showed disagreement over specific provisions of paid leave. See *id.* at 9 (displaying the divergence in public opinion over who should fund pay leave—employers or the government); see also NAT'L P'SHIP FOR WOMEN & FAMS., VOTERS' VIEWS ON PAID FAMILY + MEDICAL LEAVE: FINDINGS FROM A NATIONAL SURVEY 24 (2018), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/voters-views-on-paid-family-medical-leave-survey-findings-august-2018.pdf> [<https://perma.cc/A5T9-47RK>] (finding that 29% of Democrats would be willing to receive paid leave through a federally funded program despite tax increases, as opposed to 11% of Republicans).

¹⁹⁸ See Yuki Noguchi, *Lawmakers Agree on Paid Family Leave, but Not the Details*, NPR (Feb. 27, 2018), <https://www.npr.org/2018/02/27/585133064/lawmakers-agree-on-paid-family-leave-but-not-the-details> [<https://perma.cc/ZAE5-5NSM>] (noting that Democrats and Republicans diverge on the particulars of paid leave programs, but agree that American employees would benefit from overall policy reform).

¹⁹⁹ See BROWN ET AL., *supra* note 126, at 21 (discovering that just under 60% of the American workforce qualified for FMLA leave in 2012).

²⁰⁰ Compare S. 920, 116th Cong. (2019) (proposing paid parental leave for parents only after adopting or giving birth to a child), with H.R. 1185, 116th Cong. § 5(j) (2019) (proposing paid leave for most family and personal medical reasons); see also Megan Sholar, *Yes, Gillibrand and DeLauro*

For Democrats, PFML is not a new policy initiative; the party's advocacy dates back to the early 1980s.²⁰¹ In 2019, Democrats introduced their hallmark PFML policy: the FAMILY Act.²⁰² The legislation provides twelve weeks of PFML, covers employers of all sizes, and contains a payroll tax—split between the employer and employees—to fund the paid leave program.²⁰³ The drafters of the FAMILY Act designed the bill to follow the payroll tax model of state PFML programs.²⁰⁴

In recent years, Republicans also adopted support for paid leave.²⁰⁵ Although Republicans introduced several bills in the last several years, most of

Introduced a Family Leave Bill. More Important, Republicans Are Introducing Paid Leave Bills, Too., WASH. POST (Feb. 20, 2019), <https://www.washingtonpost.com/politics/2019/02/20/yes-gillibrand-delauro-introduced-family-leave-bill-more-important-republicans-are-introducing-paid-leave-bills-too/> [<https://perma.cc/WNZ6-4LSR>] (describing the bills introduced by Democrats and Republicans to address paid leave).

²⁰¹ See Sholar, *supra* note 29 (remarking that FMLA policy-makers originally hoped to make family and medical leave paid when they first proposed the policy). PFML is a lingering policy point on the Democratic Party platform. See, e.g., *Paid Family and Medical Leave*, OFF. HILLARY RODHAM CLINTON, <https://www.hillaryclinton.com/issues/paid-leave/> [<https://perma.cc/7PQT-TRSY>] (introducing PFML to Hillary Clinton's platform for President in the 2016 election). Hillary Clinton's PFML plan proposed that the top earners in the United States should shoulder the tax financing the policy, as opposed to businesses through payroll taxation. Claire Cain Miller, *Hillary Clinton's Twist on Paid Leave: She Plans to Tax Wealthiest*, N.Y. TIMES (Jan. 8, 2016), <https://www.nytimes.com/2016/01/09/upshot/hillary-clintons-twist-on-paid-leave-she-plans-to-tax-wealthiest.html> [<https://perma.cc/X2K9-7FG3>].

²⁰² H.R. 1185; FAMILY Act, S. 463, 116th Cong. (2019); see also NAT'L P'SHIP FOR WOMEN & FAMS., FACT SHEET: THE FAMILY AND MEDICAL INSURANCE LEAVE (FAMILY) ACT, 1, 2 (2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/family-act-fact-sheet.pdf> [<https://perma.cc/DNC9-HSAP>] (reviewing the provisions of the proposed FAMILY Act and potential benefits for American families). Another Democratic proposal is the Providing Americans Insured Days of Leave Act (PAID) Act, introduced by Senator Patty Murray in March 2020. PAID Act, S. 3513, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/senate-bill/3513> [<https://perma.cc/6DVX-LXNM>].

²⁰³ See S. 463 § 7(c) (laying out the tax structure funding the bill).

²⁰⁴ See NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 202, at 3 (showing that most states fund their PFML programs through payroll taxes and state-run insurance programs). Although the legislators designed the bill to be self-financing through payroll taxes, some data analysts question whether the financing scheme of the bill is fiscally sound. See, e.g., Ben Gitis, *The Fiscal Implication of the FAMILY Act: How New Paid Leave Benefits Increase Leave-Taking and Drive up Estimated Program Costs*, AM. ACTION F. (Mar. 21, 2019), <https://www.americanactionforum.org/research/the-fiscal-implications-of-the-family-act-how-new-paid-leave-benefits-increase-leave-taking-and-drive-up-estimated-program-costs/> [<https://perma.cc/BA8Y-HZCE>] (questioning the adequacy of the payroll tax scheme to fully fund the benefits promised under the FAMILY Act).

²⁰⁵ See Noguchi, *supra* note 198 (showing that President Trump planted the seed for paid family leave as a Republican Party issue in his 2018 State of the Union address); see also Donald J. Trump, President U.S., Address Before a Joint Session of the Congress on the State of the Union (Jan. 30 2018), in 2018 DAILY COMP. PRES. DOC. 64, <https://www.govinfo.gov/content/pkg/DCPD-201800064/pdf/DCPD-201800064.pdf> [<https://perma.cc/7LT7-6TGM>] (calling for Congress to enact paid family leave). See generally Steven Kull, *The Coronavirus May Be Boosting Republican Support for Family and Medical Leave*, WASH. POST (May 14, 2020), <https://www.washingtonpost.com/politics/2020/05/14/coronavirus-may-be-boosting-republican-support-family-medical-leave/> [<https://perma.cc/>]

their policies focus on parental leave over medical leave.²⁰⁶ Further, Republican PFML policies tend to propose financing structures that do not raise payroll taxes.²⁰⁷ Most conservative PFML bills propose to fund paid leave either through tax credit incentives or by allowing employees to prematurely withdraw future, promised benefits—like Social Security payments or child tax credits.²⁰⁸

Neither of the Republican nor Democratic bills made it out of committee before the Pandemic hit.²⁰⁹ The only notable progress on paid leave pre-

R5RY-LR2G] (reporting that more Republicans, especially elderly people, support PFML policies in light of the Pandemic).

²⁰⁶ See Sholar, *supra* note 200 (describing the policies introduced by Republican members of Congress, which focus on family leave). One of the leading bills among Republicans before the Pandemic, the New Parents Act, would have created national parental leave. S. 920, 116th Cong. § 219(b) (2019) (allowing new parents to allocate three months of benefits from their Social Security fund to finance paid parental leave).

²⁰⁷ Sholar, *supra* note 200. The Republican aversion to raising taxes to finance leave benefits dates back to the policy President Bush proposed during the 1992 presidential election. See *supra* notes 114–117 and accompanying text (introducing President Bush’s paid leave proposal, funded by tax incentives and limited to employers with fewer than five hundred employees).

²⁰⁸ See, e.g., S. 920 § 219(f) (deducting an employee’s present parental leave payments from their future Social Security benefits); Press Release, Joni Ernst, U.S. Sen., Ernst, Lee Put Forward Paid Parental Leave Plan That Is Budget Neutral and Flexible for Parents (Mar. 12, 2019), <https://www.ernst.senate.gov/public/index.cfm/press-releases?ID=BBE412DC-1656-46E8-9D42-1D00A902A63C> [<https://perma.cc/9FHK-7EZ2>] (introducing a plan to receive up to three months of Social Security benefits to fund paid parental leave); SENATOR BILL CASSIDY & SENATOR KYRSTEN SINEMA, A BIPARTISAN SOLUTION TO HELP WORKING FAMILIES 1 (2021), <https://www.sinema.senate.gov/sites/default/files/2019-07/Cassidy%20Sinema%20Proposal%20One-Pager.pdf> [<https://perma.cc/BS2U-BT6J>] (describing a plan to allow working parents to advance as much as \$5,000 of their Child Tax Credit). These plans appeal to businesses because they shift the onus of funding paid leave onto existing government programs and away from the employer’s bottom line. See McDonald Garrison et al., *supra* note 27, at 359 (discussing the benefits of the New Parents Act for employers). In 2020, then-President Trump proposed a family leave policy funded by money from future earned child tax credits. Claire Cain Miller, *Trump Called for Paid Family Leave. Here’s Why Few Democrats Clapped.*, N.Y. TIMES: THE UPSHOT (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/upshot/paid-leave-trump.html> [<https://perma.cc/JHF7-A2V9>].

²⁰⁹ See, e.g., H.R. 1185—FAMILY Act, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/1185> [<https://perma.cc/3LWH-2ZK2>] (showing that the House most recently referred the bill to the Subcommittee on Worker and Family Support on the House Ways and Means Committee in February 2019); S. 463—FAMILY Act, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/463/cosponsors?searchResultViewType=expanded> [<https://perma.cc/EH6C-59QJ>] (showing that in the Senate the bill was last read and referred to the Committee on Finance in February 2019); S. 920—New Parents Act of 2019, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/920/text?q=%7B%22search%22%3A%5B%22New+Parents+Act%22%5D%7D&r=2> [<https://perma.cc/7VGL-TUGL>] (showing that the Senate most recently referred the bill to the Senate Committee on Finance in March 2019). Before the Pandemic, Congress held a hearing on the possibility of paid family leave, opening the conversation to various proposals. See generally *Senate Hearing 2018*, *supra* note 24, at 1 (denoting the purpose of the hearing was for paid family leave in the United States). The hearing presented a range of policy proposals. *Id.* at 7–8. These proposals ranged from Democratic Senator Kirsten Gillibrand’s FAMILY Act, focusing on a payroll tax-based plan, to a Republican-led policy containing zero tax increases. Compare *id.* at 7 (statement of Sen. Joni Ernst) (allowing citizens to draw forward Social Security funds to cover parental leave),

pandemic was the expansion of paid sick and parental leave for federal workers.²¹⁰ Still, Washington insiders expressed cautious optimism that paid leave legislation was on the horizon.²¹¹

Business interest groups also seemed less averse to PFML before COVID-19.²¹² In January 2020, one investigative report published by the United States Chamber of Commerce actually recommended that Congress create a national standard for paid leave.²¹³ The variety among state PFML laws today burdens multi-state employers with hefty compliance costs, making a consistent, national standard more appealing.²¹⁴ Additionally, some employers began expanding paid leave coverage simply because it was good for business.²¹⁵ In 2017, businesses with paid leave policies reported improved retention, in-

with id. at 8 (statement of Sen. Kirsten Gillibrand) (proposing a state-based model of payroll tax-funded leave).

²¹⁰ *See, e.g.*, 5 C.F.R. § 630 (2020) (providing twelve weeks of paid parental leave to federally employed workers covered by the FMLA); 29 C.F.R. § 13 (2020) (establishing seven-day paid sick leave for all federally employed contractors through Executive Order 13706, signed by President Obama). In June 2021, Representative Janice Schakowsky introduced a bill that requires corporations to offer their employees seven days of PFML to be eligible for Department of Defense contracts. *See* Patriotic Corporations of America Act of 2021, H.R. 4186, 117th Cong. § 2(a) (2021) (proposing an amendment to add a new § 4715 to the current United States Code, *see* 41 U.S.C. §§ 4701–4714, mandating private sector defense contractors to provide PFML). This new bill attempts to impose a federal PFML mandate through coveted defense contracts, but the bill lacks bipartisan support and its viability is uncertain. *See id.* (displaying only Democratic co-sponsors on the House bill).

²¹¹ *See* Naomi Jagoda & Niv Elis, *New Push to Break Deadlock on Family Leave*, THE HILL (July 11, 2018), <https://thehill.com/policy/finance/396396-new-push-to-break-deadlock-on-paid-family-leave?rl=1> [<https://perma.cc/844M-RXSN>] (noting that both Democrats and Republicans support a form of paid leave for families).

²¹² *See* JULIA ISAACS, OLIVIA HEALY & H. ELIZABETH PETERS, URBAN INST., PAID FAMILY LEAVE IN THE UNITED STATES: TIME FOR A NEW NATIONAL POLICY 6 (2017), https://www.urban.org/sites/default/files/publication/90201/paid_family_leave_0.pdf [<https://perma.cc/35XW-4ZHY>] (finding that in states with PFML laws, businesses were more likely to report positive or neutral outcomes on the policy than negative outcomes); *see also* U.S. CHAMBER COM., *supra* note 41, at 55 (recommending the United States adopt a national PFML policy). In 2014, PFML became more palatable to the business community because of its demonstrated benefits. *See* COUNCIL OF ECON. ADVISORS, EXEC. OFF. OF THE PRESIDENT, THE ECONOMICS OF PAID AND UNPAID LEAVE 17 (2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/leave_report_final.pdf [<https://perma.cc/64LY-VBC8>] (discussing the positive outcomes on profits, work environment, and recruitment reported by businesses with paid family leave). Some businesses, however, remained defiant because the long-term ramifications of paid family leave were too uncertain. *See id.* at 18 (explaining that many businesses prioritize short-term “cost-saving measures” over “long-run benefits” when it comes to paid family leave policy).

²¹³ U.S. CHAMBER COM., *supra* note 41, at 55.

²¹⁴ *See id.* (expressing the difficulty employers face when complying with ten different paid leave programs).

²¹⁵ *See* Mayer, *supra* note 141 (showing that four of the ten largest employers, or 39%, were broadening paid leave benefits for employees in 2019). Companies expanding leave benefits reported a range of motivations, including improving worker productivity and reflecting positive company values. *Id.*

creased productivity, and positive media attention.²¹⁶ Greater awareness of these benefits caused support for PFML to bloom in the business community, challenging their traditional resistance to the policy.²¹⁷

2. The Pandemic—Now and Beyond

The Pandemic continues to shine a national spotlight on the struggle of many Americans to balance health, work, and familial demands.²¹⁸ Consequently, many policy-makers and businesses are more attuned to the need for national PFML now than ever before.²¹⁹ Although the FFCRA helped many families during the Pandemic, it was only a temporary fix.²²⁰ The response of political and business actors to the FFCRA's paid leave mandate indicates how permanent PFML conversations might unfold in the future.²²¹

Even though corporations indicated support for PFML before 2020, COVID-19 changed their tune.²²² As the Pandemic worsened in the spring of 2020, pro-business interest groups made their views clear: they did not support a uniform, nationally mandated PFML policy.²²³ This shift in public messaging

²¹⁶ See Trish Stroman, Wendy Woods, Gabrielle Fitzgerald, Shalini Unnikrishnan & Liz Bird, *Why Paid Family Leave Is Good Business*, BOS. CONSULTING GRP. (Feb. 7, 2017), <https://www.bcg.com/publications/2017/human-resources-people-organization-why-paid-family-leave-is-good-business> [<https://perma.cc/H5CK-CARE>] (listing the reasons why businesses augmented leave benefits for their employees, even before the Pandemic). Although many of these benefits are intangible, some statistical studies show that implementing paid leave is not financially detrimental to companies. See *id.* (finding that 92% of businesses that offer paid family leave experience either beneficial outcomes or no discernable effect on their profits).

²¹⁷ See Jagoda & Elis, *supra* note 211 (noting the rare bipartisanship in Washington D.C. over paid leave).

²¹⁸ See Bennett, *supra* note 1 (reporting the stories of working mothers struggling in the Pandemic).

²¹⁹ See, e.g., Akayla Gardner, *Pandemic Drives Business Support for Paid Leave, Study Finds*, BLOOMBERG: BUS. (Jan. 26, 2021), <https://www.bloomberg.com/news/articles/2021-01-26/covid-19-pandemic-drives-up-support-for-u-s-national-paid-leave> [<https://perma.cc/E5NL-CJJW>] (describing the lack of paid leave during COVID-19 as a crisis for American businesses).

²²⁰ See Families First Coronavirus Response Act (FFCRA), H.R. 6201, 116th Cong § 3102 (2020) (enacted) (enacting a temporary expansion of the FMLA that expired on December 31, 2020).

²²¹ See *infra* notes 223–242 and accompanying text.

²²² See Letter from Ginni Rometty, Chair, Educ. & Workforce Comm., Bus. Roundtable, to The President (Dec. 11, 2019) (on file with Bus. Roundtable) (emphasizing the need for businesses to be open-minded to future federal paid leave proposals).

²²³ See Letter from Neil Bradley, Exec. Vice President & Chief Pol'y Officer, U.S. Chamber of Com., to Members U.S. Congress (Mar. 12, 2020) (on file with U.S. Chamber Com.), https://www.uschamber.com/sites/default/files/200312_coronaviruslegislation_congress.pdf [<https://perma.cc/3XXS-PWXE>] [hereinafter Chamber of Commerce Letter 2020] (insisting that the Pandemic is not an opportunity to impose permanent paid leave legislation on employers); Letter from Neil Bradley, Exec. Vice President & Chief Pol'y Officer, U.S. Chamber Com., to Members U.S. Congress (Feb. 2, 2021) (on file with U.S. Chamber Com.), https://www.uschamber.com/sites/default/files/210202_americanrescueplanresponse_potus_congress.pdf [hereinafter Chamber of Commerce Letter 2021] (endorsing the FFCRA solely as a Pandemic-induced policy aimed at small business relief). Small businesses strongly opposed federally mandated PFML during the Pandemic as well. See Press Release, Nat'l Fed'n Indep. Bus., NFIB Urges Congress Not to Harm Small Bus. Recovery (Jan. 15,

and political advocacy confused the support businesses expressed before the Pandemic.²²⁴ To shield themselves from the COVID-19 paid leave mandate, corporations harnessed their financial power and lobbied Congress to alter the employer threshold of the FFCRA to exclude employers with more than five hundred employees.²²⁵ Even though corporations expressed interest in PFML before the Pandemic, when the moment arrived for Congress to enact a PFML law, they lobbied for an exemption.²²⁶ This exemption—the five-hundred-employee threshold—immediately excluded sixty million Americans from the law’s coverage by excluding large employers from the law’s paid leave mandate.²²⁷

Big businesses argued two principal points against PFML during the Pandemic.²²⁸ First, a PFML mandate would damage small businesses already suffering during COVID-19.²²⁹ Small business owners expressed concerns about compensating for the extra work during employees’ absences.²³⁰ Second, a federal mandate would be doubly ineffectual because it both imposes hefty costs on companies unable to provide paid leave and unnecessarily regulates

2021), <https://www.nfib.com/content/press-release/economy/nfib-to-congress-focus-on-small-business-recovery/> [<https://perma.cc/PN5N-B3MF>] [hereinafter NFIB Press Release Jan. 15] (resisting the paid leave mandates introduced by the Biden Administration as harmful to small businesses).

²²⁴ Compare U.S. CHAMBER COM., *supra* note 41, at 55 (observing the Chamber of Commerce’s support for a national PFML law before the Pandemic), with Chamber of Commerce Letter 2020, *supra* note 223 (indicating the Chamber of Commerce’s opposition to a federal PFML policy during the Pandemic).

²²⁵ See Hasan & Monnay, *supra* note 151 (reporting that business associations spent \$121 million on lobbying during 2019).

²²⁶ See Siobhan Hughes, Natalie Andrews & Kate Davidson, *House Democrats Scale Back Paid-Leave Program in Coronavirus-Aid Bill*, WALL STREET J. (Mar. 17, 2020), <https://www.wsj.com/articles/house-democrats-scale-back-paid-leave-program-in-coronavirus-aid-bill-11584424805> [<https://perma.cc/BBG8-S4KY>] (describing the pressure that corporations applied against legislators to revise the COVID-19 relief package to exempt certain employers).

²²⁷ Steven Findlay, *Congress Left Big Gaps in the Paid Sick Days and Paid Leave Provisions of the Coronavirus Emergency Legislation*, HEALTH AFFS. BLOG (Apr. 29, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200424.223002/full/#:~:text=Workers%20would%20have%20to%20use,than%20fivehundred%20workers%20are%20eligible> [<https://perma.cc/7DG6-7FVK>].

²²⁸ See *infra* notes 229–232 and accompanying text.

²²⁹ See Press Release, Nat’l Fed’n Indep. Bus., Renewed Efforts to Mandate Paid Sick Leave (Jan. 6, 2021), <https://www.nfib.com/content/news/virginia/renewed-efforts-to-mandate-paid-sick-leave/> [<https://perma.cc/3UFN-VML8>] [hereinafter NFIB Press Release Jan. 6] (denouncing the “cookie cutter approach” to paid leave laws); see also Chamber of Commerce Letter 2020, *supra* note 223 (discouraging Congress from enacting policies that “would hamper . . . workplace flexibility on Main Street”).

²³⁰ See, e.g., Jon Chesto, *Small Businesses Face New Challenges as State’s Paid Leave Program Kicks In*, BOS. GLOBE (Dec. 31, 2020), <https://www.bostonglobe.com/2020/12/31/business/small-businesses-face-new-challenges-states-paid-leave-program-kicks/> [<https://perma.cc/WB6T-J9ZN>] (reporting on the impact of Massachusetts’s new PFML benefits, activated during COVID-19, on small businesses).

companies with existing paid leave policies.²³¹ Mid-sized to large employers also assert that the freedom to contract their own employee benefits plans allows them to attract top talent and create new solutions for paid leave that best suit their employees.²³²

It is true that some companies over the five-hundred-employee threshold voluntarily increased paid leave benefits to employees during COVID-19.²³³ Other companies, however, failed to provide adequate leave benefits to employees and furloughed workers, while issuing stock dividends and augmenting executive compensation packages.²³⁴ For example, Amazon.com, Inc. (Amazon) expanded paid leave during the Pandemic, but required documentation of

²³¹ See U.S. CHAMBER COM., *supra* note 41, at 55 (acknowledging that many employers already have corporate policies for paid leave). When lobbying for the five hundred employee exemption, then-Treasury Secretary Mnuchin raised the key point that most large corporations have existing paid leave. See Jaclyn Diaz, *Big Business Covid-19 Paid Leave Exemption May Get Another Look*, BLOOMBERG L. (Mar. 31, 2020), <https://news.bloomberglaw.com/daily-labor-report/big-business-covid-19-paid-leave-exemption-may-get-another-look?context=article-related> [<https://perma.cc/66T8-GAWQ>] (describing the Republican belief that excluding large corporations from Speaker Pelosi's bill would preserve economic resources). One article notes that 89% of big businesses offer some type of paid sick leave, but that is not the same as PFML. See Greg Rosalsky, *Paid Leave vs. the Pandemic*, NPR (Mar. 17, 2020), <https://www.npr.org/sections/money/2020/03/17/816849671/paid-leave-vs-the-pandemic> [<https://perma.cc/KAM4-P8YB>] (including data from the U.S. Bureau of Labor Statistics).

²³² See, e.g., Stroman et al., *supra* note 216 (citing a survey from one company that reported 77% of its employees were persuaded to join the company based on the generous leave benefits). Mid-size employers communicated concerns to the Biden Administration that expanded paid leave mandates would be underfunded and risk the vitality of their businesses. See Chamber of Commerce Letter 2021, *supra* note 223 (indicating the opposition from mid-sized employers to the new paid leave mandate proposed by President Biden). Small businesses also argued that paid leave benefits can set them apart from their competitors. See Ali C.M. Watkins, *Boulder County, Front Range Businesses Weigh Impact of Paid Family Leave*, DAILY CAMERA (Nov. 29, 2020), <https://www.dailycamera.com/2020/11/29/boulder-county-front-range-businesses-weigh-impact-of-paid-family-leave/> [<https://perma.cc/8STQ-6P4C>] (conveying a counterargument that paid leave benefits can help small businesses draw the employees they need, especially in industries with limited human capital).

²³³ See, e.g., Press Release, MetLife, Inc., *MetLife Offers Paid Leave to Qualified Workers Who Want to Fight COVID* (May 11, 2020), <https://insurancenewsnet.com/innarticle/metlife-offers-paid-leave-to-qualified-workers-who-want-to-fight-covid#>.Xr1J-BNKiqA [<https://perma.cc/HA58-SZPS>] (providing incentive for healthcare workers to take leave to assist the COVID-19 effort); Press Release, Apple Inc., *Apple's COVID-19 Response* (Mar. 13, 2020), <https://www.apple.com/newsroom/2020/03/apples-covid-19-response/> [<https://perma.cc/23M9-W55N>] (vowing to increase leave benefits during COVID-19); cf. Statement, Mary Barra, Chairman & CEO Gen. Motors & Chair of the Bus. Roundtable Educ. & Workforce Comm. & Chair Racial Equity & Just. Subcomm. Educ. & Workforce, Bus. Roundtable (July 21, 2020), <https://www.businessroundtable.org/business-roundtable-ceos-paid-time-off-and-flexibility-for-voting-are-best-practices> [<https://perma.cc/UFH4-BBV4>] (encouraging employers to give employees better paid leave and time off benefits, specifically for the purpose of voting in the 2020 elections).

²³⁴ See, e.g., Peter S. Goodman, *Big Business Pledged Gentler Capitalism. It's Not Happening in a Pandemic.*, N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/2020/04/13/business/business-roundtable-coronavirus.html?searchResultPosition=4> [<https://perma.cc/UT7F-ZPHD>] (using Marriot International as an example of a company backtracking on its promises by prioritizing stockholders and executives over its employees during the Pandemic).

testing results that were either impractical or unattainable before workers could actually receive their benefits.²³⁵ Stories like this cast doubt upon the curated media images of benevolent corporations opening their coffers to struggling employees.²³⁶

Moreover, government actors played an active role prodding large companies, like Amazon, to expand their paid leave benefits.²³⁷ In March 2020, Massachusetts Attorney General Maura Healey wrote a letter to Whole Foods Market, Inc. (Whole Foods) and Amazon, co-signed by thirteen other state attorneys general, urging the companies to implement more generous paid leave policies.²³⁸ The letter from the Attorneys General noted that the policies prom-

²³⁵ See Annie Palmer, *'Amazon Is Not Taking Care of Us': Warehouse Workers Say They're Struggling to Get Paid Despite Sick Leave Policy*, CNBC (Apr. 8, 2020), <https://www.cnbc.com/2020/04/08/amazon-warehouse-workers-say-they-struggle-to-get-paid-despite-sick-leave-policy.html> [<https://perma.cc/VQ5N-SLB2>] (detailing a first-hand account of Amazon.com Inc. (Amazon)'s failure to provide promised leave benefits to an employee). Amazon initially announced unlimited paid leave for its employees, but workers found it difficult to take advantage of this promise due to administrative hurdles that the company imposed. Karen Weise & Kate Conger, *Gaps in Amazon's Response as Virus Spreads to More Than 50 Warehouses*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/05/technology/coronavirus-amazon-workers.html> [<https://perma.cc/JHG6-7EB6>]. In one case, Amazon simply told the employee to use her unpaid leave instead. *Id.*

²³⁶ See, e.g., Weise & Conger, *supra* note 235 (implying that Amazon's promise of paid leave did not pan out for many employees); Goodman, *supra* note 234 (revealing that Marriot International prioritized executives and stockholders over employees during the Pandemic).

²³⁷ See Letter from Maura Healey, Attorney Gen., Commonwealth Mass. Off. Attorney Gen., to John Mackey, Chief Exec. Officer, Whole Foods Mkt., Inc. & Jeffrey P. Bezos, President, Amazon.com, Inc. 1 (Mar. 25, 2020) (urging Amazon and Whole Foods Market, Inc. (Whole Foods) to expand their COVID-19 benefits).

²³⁸ *Id.* Two days after Attorney General Maura Healey sent the letter to Amazon and Whole Foods, Amazon informed Representative Ilhan Omar that the company was expanding its paid leave policies even further. See *id.* (showing the letter dated March 25, 2020); Letter from Brian Huseman, Vice President, Pub. Pol'y, Amazon.com Inc., to Rep. Ilhan Omar (Mar. 27, 2020). State attorneys general have played an important, active role in protecting workers' rights in recent years, and the COVID-19 crisis has proved no exception. See TERRI GERSTEIN, ECON. POL'Y INST., WORKERS' RIGHTS PROTECTION AND ENFORCEMENT BY STATE ATTORNEYS GENERAL 1 (2020), <https://www.epi.org/publication/state-ag-labor-rights-activities-2018-to-2020/> [<https://perma.cc/6RWM-UCAJ>] (detailing greater efforts from state attorneys general's offices to better advocate for workers' rights). For example, in April 2020, in *New York v. United States Department of Labor*, New York State Attorney General Letitia James challenged the DoL regulations curtailing the FFCRA's eligibility requirements as exceeding the scope of the DoL's authority. 477 F. Supp. 3d 1, 6 (S.D.N.Y. 2020); see 29 C.F.R. § 826 (2020) (limiting the reach of the FFCRA); see also Hafiz et al., *supra* note 145, at 32 (commenting that the regulations enacted by the DoL spawned confusion over the interpretation of the new law); Eric W. Leonard & Nicole E. Giles, *Paid Leave During COVID-19: Complying with a Moving Target*, COVID-19 RSCH. CTR. (Wiley Rein LLP, New York, N.Y.), Oct. 2020, at 1, <https://www.wiley.law/newsletter-Paid-Leave-During-COVID-19-Complying-with-a-Moving-Target> [<https://perma.cc/8QD4-EY43>] (tracking the evolving changes to paid leave throughout the Pandemic as a result of DoL efforts to alter the language passed by Congress). The court found that the DoL surpassed its authority by limiting the scope of the FFCRA, and thus overturned some of the new regulations. See *New York v. Dep't of Lab.*, 477 F. Supp. 3d at 18 (reasoning that the DoL "jumped the rail" by enacting regulations beyond its purview). The court invalidated three of the regulations implement-

ulgated by Amazon and Whole Foods did not comply with the FFCRA standard binding smaller employers.²³⁹ This concern from the Attorneys General exemplifies a common criticism over the FFCRA's exemption for employers with more than five hundred employees.²⁴⁰

Meanwhile, the political attitude toward PFML remained enthusiastic among progressives and lukewarm among conservatives.²⁴¹ On the one hand, Republican lawmakers urged caution and stated a desire to delay any permanent PFML measures in the interest of immediate COVID-19 relief.²⁴² On the other hand, Democrats seemed eager to use the Pandemic as a springboard for permanent leave policy.²⁴³ In particular, progressives pushing for permanent PFML want to avoid any future exemptions for large employers like the five-hundred-employee threshold in the FFCRA.²⁴⁴ Employers with over five hundred employees provided jobs for approximately forty-eight percent of American employees in 2020.²⁴⁵ Many of these large corporations employ the same

ed by the DoL: (1) a new work-availability requirement, (2) the altered definition to "health care provider," and (3) the new time and documentation requirements. *Id.*

²³⁹ Letter from Maura Healey, *supra* note 237, at 3 ("[W]e ask [Amazon and Whole Foods] to provide their employees with what smaller employers are required to provide under the [FFCRA] . . .").

²⁴⁰ See Findlay, *supra* note 227 (noting that the carveout for large employers results in the exclusion of roughly sixty million American workers, constituting about half of the country's full time labor force, from the FFCRA's coverage); Editorial, *There's a Giant Hole in Pelosi's Coronavirus Bill*, N.Y. TIMES (Mar. 14, 2020), <https://www.nytimes.com/2020/03/14/opinion/coronavirus-pelosi-sick-leave.html> [<https://perma.cc/W32Y-MNZZ>] (criticizing the FFCRA for excluding companies with more than five hundred employees, when these businesses employ approximately 54% of the American workforce).

²⁴¹ Compare Sawhill & Welch, *supra* note 142 (showcasing the progressive view that the economy should not reopen unless Congress makes paid leave reform permanent), with Barbara Sprunt, *Meeting with Republicans on COVID-19 Relief, White House Says Biden 'Will Not Settle'*, NPR (Jan. 31, 2021), <https://www.npr.org/sections/coronavirus-live-updates/2021/01/31/962554923/10-senate-republicans-plan-to-detail-slimmed-down-covid-19-counteroffer> [<https://perma.cc/5QFX-NP8F>] (observing the conservative delegation's dedication to targeted COVID-19 relief over long-term spending packages).

²⁴² See Letter from Susan M. Collins, U.S. Sen., Lisa Murkowski, U.S. Sen., Bill Cassidy, U.S. Sen., Mitt Romney, U.S. Sen., Rob Portman, U.S. Sen., Shelley Moore Capito, U.S. Sen., Todd Young, U.S. Sen., Jerry Moran, U.S. Sen., M. Michael Rounds, U.S. Sen., & Thom Tillis, U.S. Sen., to President Joseph Biden (Jan. 31, 2021) (on file with U.S. Senate) (reiterating the importance of economic support through direct stimulus payments, unemployment benefits, and nutritional assistance, but not paid leave).

²⁴³ See Press Release, Kirsten Gillibrand, U.S. Sen., Gillibrand, DeLauro Introduce Fam. Act, Urge Congress to Pass Permanent Paid Leave Solution to Spur Econ. Recovery (Feb. 5, 2021) (on file with author), <https://www.gillibrand.senate.gov/news/press/release/gillibrand-de-lauro-introduce-family-act-urge-congress-to-pass-permanent-paid-leave-solution-to-spur-economic-recovery> [<https://perma.cc/TC9S-F4FR>] (noting Democrats' desire to enact paid leave legislation immediately).

²⁴⁴ See generally H.R. 1185, 116th Cong. (2019) (making PFML available to all individuals regardless of the size of their employer).

²⁴⁵ See Table F. *Distribution of Private Sector Employment by Firm Size*, *supra* note 191 (displaying the percentage share that different sized employers occupy within the entire United States labor market, organized by year and measured by total number of employees).

workers—women and people of color—who are statistically more likely to fall through the cracks of FMLA coverage.²⁴⁶ Due to the outsized impact that large companies have as the nation’s largest employers, progressives believe that any meaningful PFML policy must cover these corporations.²⁴⁷

Overall, as COVID-19 worsened throughout 2020 and continues to persist, federal PFML has garnered a renewed sense of immediacy.²⁴⁸ Despite the tragic losses of the Pandemic, it also provides a rare opportunity to reassess the legislative strategy surrounding PFML, offering some hope for the future.²⁴⁹

III. APPLYING THE FMLA MODEL TO PFML POLICY

Thirty years of the FMLA and a global Pandemic have ripened the United States to implement national PFML.²⁵⁰ Although nine states successfully implemented PFML laws and many businesses see its benefits, companies at large continue to block PFML at the federal level.²⁵¹ Lawmakers have grappled with this opposition repeatedly since the early 1980s.²⁵²

²⁴⁶ See BROWN ET AL., *supra* note 126, at 8 (displaying data that FMLA-ineligible employees are more likely to be female, people of color, leading single-income households, or to have a high school diploma or lower level of education); Claire Cain Miller, *Walmart and Now Starbucks: Why More Big Companies Are Offering Paid Family Leave*, N.Y. TIMES: THE UPSHOT (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/upshot/parental-leave-company-policy-salaried-hourly-gap.html> [<https://perma.cc/HL5C-QV9R>] (stating that hourly workers at large corporations are the most in need of paid leave but less likely to receive it than salaried workers). Employees with a greater need for paid leave tend to be women, Black, Latinx, or people whose education level does not go beyond a high school diploma. *Id.*

²⁴⁷ See generally Editorial, *supra* note 240 (criticizing the exception for large companies).

²⁴⁸ See Lisa Nagele-Piazza, *Will Biden Administration Push to Expand Paid-Leave Benefits?*, SOC’Y FOR HUM. RSCH. MGMT. (Nov. 24, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/biden-administration-paid-leave.aspx> [<https://perma.cc/PX9Z-4HXN>] (reporting on the enthusiasm in the new Biden administration for expanding the FMLA and creating paid leave).

²⁴⁹ *Id.*

²⁵⁰ See ISAACS ET AL., *supra* note 212, at 1 (stating that the United States is “ripe” for nationalized PFML); NAT’L P’SHIP FOR WOMEN & FAMS., *supra* note 197, at 15 (presenting data that shows eight out of ten Americans think that Congress should revisit the FMLA); Bellware, *supra* note 13 (remarking on how the Pandemic has revived enthusiasm for paid leave policy); Igielnik, *supra* note 3 (stressing the difficulties of parenting and obtaining child care during COVID-19).

²⁵¹ See Hasan & Monnay, *supra* note 151 (illustrating the tactics of pro-business lobbyists to create a carveout for corporations in the FFCRA bill).

²⁵² See COUNCIL OF ECON. ADVISORS, EXEC. OFF. OF THE PRESIDENT, *supra* note 212, at 18 (questioning why the United States still does not have PFML despite its proven benefits for numerous businesses). After the swine flu outbreak in 2009, employers expressed concerns that paid leave for working parents would be harmful to their businesses. Kulow, *supra* note 21, at 91. Even then, data proving the financial benefits of family-centered policies was widely available to combat these concerns. *Id.*

COVID-19 must be the watershed moment for PFML reform.²⁵³ Section A of this Part highlights the reasons why the traditional case companies make against PFML does not apply in a modern, post-Pandemic America.²⁵⁴ Section B analyzes the formidable obstacles the business-lobby poses to enacting PFML in the future.²⁵⁵ Finally, Section C discusses how the FMLA coalition-building model from the 1980s should inspire policy-makers today in removing some of those challenges.²⁵⁶

A. *The Corporate Case Against Paid Leave*

American author Mark Twain said, “[h]istory doesn’t repeat itself, but it often rhymes.”²⁵⁷ This adage neatly encapsulates the familiarity of the present PFML policy debate to the FMLA’s evolution from decades ago.²⁵⁸ Since progressive lawmakers first introduced the idea of PFML in the early 1980s, corporations have recycled the same arguments to oppose the policy.²⁵⁹ Businesses raise two main points: (1) PFML imposes unfair costs or unnecessary restrictions on larger employers that already offer some form of paid leave; (2) PFML will hurt smaller employers that cannot afford such benefits.²⁶⁰ Although these concerns may have been valid in the 1980s, they do not command

²⁵³ See Kulow, *supra* note 21, at 108 (cautioning against the government’s reliance on businesses to voluntarily implement effective policy change). Paid leave reform is overwhelmingly popular in the United States. See HOROWITZ ET AL., *supra* note 197, at 4 (reporting that 85% of Americans support paid medical leave, 82% support paid maternity leave, 69% support paid paternity leave, and 67% support paid family leave). This enthusiasm and the devastating effects of COVID-19 on working women created heightened urgency for national PFML. See Vesoulis, *supra* note 5 (predicting that any progress made to narrow the gender pay gap will be frozen or reversed as a result of the COVID-19 economic fallout against women). It is time for Congress to enact legislation to reflect the changing attitude toward PFML. See Kulow, *supra* note 21, at 108 (“[C]ultural change is so often a product of both legislative enforcement and social evolution.”).

²⁵⁴ See *infra* notes 259–286 and accompanying text.

²⁵⁵ See *infra* notes 287–302 and accompanying text.

²⁵⁶ See *infra* notes 303–326 and accompanying text.

²⁵⁷ Brian Adams, *History Doesn’t Repeat, but It Often Rhymes*, HUFFPOST (Jan. 18, 2017), https://www.huffpost.com/entry/history-doesnt-repeat-but-it-often-rhymes_b_61087610e4b0999d2084fb15 [<https://perma.cc/9GXG-AJMX>].

²⁵⁸ See *id.* (analogizing the similarities between the PFML and FMLA to Mark Twain’s famous quote about the repetition of history).

²⁵⁹ See WISENSALE, *supra* note 85, at 145 (explaining that the Chamber of Commerce fought against paid leave in the 1980s because the group believed it would be too costly); *cf.* Chamber of Commerce Letter 2021, *supra* note 223 (opposing the expansion of paid leave after COVID-19 because it would create federally imposed mandates without adequate funding).

²⁶⁰ See *supra* notes 172, 176 and accompanying text (introducing the arguments that pro-business groups originally asserted against PFML when lawmakers first proposed it in the 1980s); see also Nelson, *supra* note 27, at 662 (indicating that one of the arguments employers raise most frequently against paid leave is that it restricts their freedom to contract employee benefits).

as much relevance today and certainly do not outweigh the benefits national PFML would bring for American employees and families.²⁶¹

First, the myth that PFML imposes prohibitive costs on employers must be dispelled.²⁶² Now that several states have implemented PFML programs, policy-makers possess hard data proving that paid leave policies do not necessarily harm employers, large or small.²⁶³ For example, in 2004, benefits from California's state-level Paid Family Leave program began to pay out to claimants.²⁶⁴ Seven years later, the majority of employers in California reported either a positive effect on their bottom line or no effect at all.²⁶⁵ Other PFML states have reported similarly positive outcomes from their programs.²⁶⁶ Individual businesses with generous PFML policies have also seen improvements in profitability, employee retention, and workplace morale.²⁶⁷ In fact, the multitude of state-level policies cropping up in the absence of national PFML has increased compliance costs for many employers.²⁶⁸ Therefore, a national standard for PFML would actually suppress costs for businesses by eliminating the complexity of complying with multiple state programs.²⁶⁹ Policy-makers' apprehension in the 1980s over federally mandated leave made sense because

²⁶¹ See Press Release, The White House Briefing Room, *supra* note 155 (noting that expanded mandates could reach over 100 million Americans who currently cannot access paid leave). Today, it is well-documented both that mothers are struggling without a national PFML guarantee and that more generous paid leave policies actually help businesses at the bottom line. See COUNCIL OF ECON. ADVISORS, EXEC. OFF. OF THE PRESIDENT, *supra* note 212, at 17 (observing that paid leave helps businesses in their recruitment, profitability, creating a positive work environment, and retaining women in the workforce); ISAACS ET AL., *supra* note 212, at 3 (reporting that mothers who did not graduate from college were less likely to have access to paid parental leave, and thus more likely to be fired or forced to quit their jobs after childbirth); *50 Prominent Women Run Full Page Ad in the New York Times Calling on President Biden to Implement Marshall Plan for Moms in First 100 Days*, *supra* note 14 (listing high-profile American executives and celebrities demanding legislative action for PFML to help struggling mothers).

²⁶² See Chamber of Commerce Letter 2021, *supra* note 223 (stating the opposition of mid-sized employers to paid leave policies because of their cost).

²⁶³ See APPELBAUM & MILKMAN, *supra* note 135, at 4 (reviewing the positive outcomes for California employers after the state passed its paid family leave law).

²⁶⁴ *Id.* at 1.

²⁶⁵ See *id.* at 4 (reporting that 89% of employers documented either a beneficial or no effect on their business from California's paid leave program).

²⁶⁶ See NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 135, at 2 (reporting beneficial results for employers in New Jersey, Rhode Island, and New York).

²⁶⁷ See, e.g., *Senate Hearing 2018*, *supra* note 24, at 16 (statement of Carolyn O'Boyle, Managing Director, Deloitte Services LP) (reporting that the expanded paid leave program offered by Deloitte accrued lower costs than the company expected and marked improvements in employee retention); Stroman et al., *supra* note 216 (noting that Google LLC's move to augment paid maternity leave corresponded to a 50% reduction in female employee turnover).

²⁶⁸ See Nelson, *supra* note 27, at 629 (stating that the "tortured web of direct paid leave laws" imposes "Herculean compliance efforts" upon large employers).

²⁶⁹ See *id.* at 681 (theorizing that the benefits of a national paid leave law would help employers by standardizing benefits, creating predictable legal outcomes, and minimizing burdensome compliance costs).

no proof of its effectiveness existed.²⁷⁰ But today, after decades of experimentation at the state-level and among individual companies, policy-makers have the data and experience necessary to implement PFML nationally.²⁷¹

Additionally, the popular claim that most large employers already offer PFML was simply untrue by 2020.²⁷² Reports concerning private sector paid leave benefits often confuse paid sick time, which is fairly common, with PFML, which is extremely uncommon.²⁷³ In March 2019, approximately seventy-two percent of employees working for businesses with more than five hundred employees did not have access to paid family leave.²⁷⁴ Companies purposefully obfuscate PFML and paid sick time, allowing these businesses to enjoy an underserved reputation for generous paid leave benefits when, in reality, they do not offer PFML at all.²⁷⁵

Corporations must be held accountable for perpetuating the false narrative that the United States does not need PFML because most large companies already provide it.²⁷⁶ As long as lawmakers believe this myth, corporations will be able to carve out exclusions in future PFML bills just as they did in the

²⁷⁰ See *House Hearing 1985*, *supra* note 77, at 13 (statement of Wendy W. Williams, Associate Professor of Law, Georgetown University Law Center) (supporting the cautious approach to paid leave because of the administrative hurdles and structural uncertainties).

²⁷¹ See generally JACOB ALEX KLERMAN, KELLY DALEY & ALYSSA POZNIAK, ABT ASSOCS. INC., FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT (2014) (providing meticulous data concerning the effectiveness and coverage of the FMLA); NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 131, at 1 (demonstrating the numerous models states have created for a national PFML program).

²⁷² See Ranji et al., *supra* note 156, at 8 (showing a table of paid family leave accessibility among the American workforce in 2020). Although access to paid family leave was much more common among higher wage earners and larger employers in 2020, the rate of availability in these groups was only approximately 30%. *Id.*

²⁷³ See, e.g., Rosalsky, *supra* note 231 (using the statistic that 89% of big businesses offer paid sick leave as evidence to support the notion that most large employers already offer paid leave benefits, when that statistic reports the provision of paid sick time, not PFML).

²⁷⁴ U.S. BUREAU LAB. STAT., *supra* note 12, at 120.

²⁷⁵ See *id.* (illustrating the reality that PFML is an uncommon benefit for most American employees). In reality, many businesses allow employees to run other forms of paid leave, such as paid sick time, concurrently with their unpaid FMLA leave in order to receive wages during their extended time off. See 29 U.S.C. § 2612(D)(2) (allowing employees to run different types of leave concurrently with leave under the FMLA). This approach is not, however, the same thing as providing separate PFML because it forces employees to sacrifice their other paid leave entitlements to cover family and medical needs. See *id.* (permitting employees to accept paid forms of leave during unpaid FMLA leave as a means of receiving wages during long-term work absences).

²⁷⁶ U.S. BUREAU LAB. STAT., *supra* note 12, at 120 (showing that most companies with over five hundred employees do not offer paid family leave). Even among large corporations with generous PFML policies, there is wide variety of the benefits offered. See Miller, *supra* note 246 (displaying a table of the paid parental leave offered by the some of America's largest corporate employers). The range of benefits available in corporate America provides additional evidence that the patchwork of PFML policies in the United States provides unreliable coverage for employees. See *id.* (showing that the length of paid maternity leave among large corporate employers ranges from twenty weeks to zero weeks).

FFCRA.²⁷⁷ If big businesses are as generous as they claim to be, then they should have no problem abiding by a national PFML standard and proving their compliance by applying for an exemption.²⁷⁸ Even the Supreme Court reasoned that corporations will always sink to the lowest common denominator when it comes to leave benefits.²⁷⁹ Congress must pass a federal law that raises the floor above the FMLA standard to close loopholes for large employers and make leave paid.²⁸⁰

Second, lawmakers must prevent big corporations from using small businesses as scapegoats.²⁸¹ Business interest groups continue to vocalize the potentially adverse effects of PFML on small businesses.²⁸² Studies of state PFML programs show, however, that many small businesses have benefited from PFML laws at the state level.²⁸³ Even so, the concerns of the small busi-

²⁷⁷ See Hasan & Monnay, *supra* note 151 (discussing the compromise between House Speaker Nancy Pelosi and Treasury Secretary Steve Mnuchin to change the employer eligibility requirement).

²⁷⁸ See, e.g., *Benefit Requirements for Private Paid Leave Plan Exemptions*, *supra* note 135 (allowing employers with existing leave programs to apply for an exemption from the state policy); *Voluntary Plans*, *supra* note 135 (same). If anything, employers already offering PFML to employees should be the most unaffected by a federal law because they already supply the service the law would seek to guarantee. See Nelson, *supra* note 27, at 681 (“[T]hose employers already offering industry-standard paid leave to their employees should be unaffected.”); cf. Summers, *supra* note 54, at 180 (explaining the underlying economic theory for the relative valuation of an employee benefit by an employer versus a government mandate).

²⁷⁹ See *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 96 (2002) (noting that when employers offer leave benefits that are more generous than the FMLA standard, they complicate their own compliance obligations). Employers do not benefit from providing benefits above and beyond the FMLA requirements. *Id.*

²⁸⁰ See *id.* (explaining why employers have no incentive to be more generous than the FMLA requires). If employers offer unique leave benefits, these can be difficult to categorize and report within the FMLA system. *Id.* Misreporting FMLA leave penalizes employers, and thus many businesses find the risk of creating more generous benefits for employees is simply too great. *Id.*

²⁸¹ See Letter from Susan M. Collins, *supra* note 242, at 1 (focusing legislative priorities on immediate COVID-19 relief); Findlay, *supra* note 227 (criticizing the five-hundred-employee threshold Congress embedded in the FFCRA). The FFCRA incorporated waivers for small businesses able to demonstrate that the law’s regulations would unduly harm their business. See Families First Coronavirus Response Act (FFCRA), H.R. 6201, 116th Cong § 110(a)(3)(B) (2020) (enacted) (providing a carveout for small businesses that can prove the law’s requirements would “jeopardize the viability of [their] business”); Paid Leave Under Families First Coronavirus Response Act, 85 Fed. Reg. 19,336 (Apr. 6, 2020) (to be codified at 29 C.F.R. pt. 826) (specifying the threshold requirements for circumventing FFCRA regulations). These regulations are evidence that PFML can be implemented nationally while giving small businesses the allowances they need to survive. See, e.g., H.R. 6201 § 110(a)(3)(B) (illustrating an example of an exception for small businesses); Paid Leave Under Families First Coronavirus Response Act, 85 Fed. Reg. 19,336 (Apr. 6, 2020) (same).

²⁸² See, e.g., NFIB Press Release Jan. 15, *supra* note 223 (demonstrating the outrage from the small business community over paid leave reforms); NFIB Press Release Jan. 6, *supra* note 229 (same).

²⁸³ See, e.g., APPELBAUM & MILKMAN, *supra* note 135, at 4 (finding that small businesses were even less likely than big businesses to report negative outcomes from paid leave); see also Flores, *supra* note 27, at 333 (reporting positive outcomes from California businesses under the state’s PFML law, particularly for employee retention and morale).

ness community are valid.²⁸⁴ Congress should not, however, give large corporations a handout by extending to them the same leniencies that they extend to small businesses.²⁸⁵ Big businesses should be held to a higher standard because they can afford to comply with more generous leave benefits than the FMLA currently requires.²⁸⁶

B. The Roadblocks

Despite the hollow corporate case against PFML, the business community still poses formidable roadblocks to passing PFML in the future.²⁸⁷ First, the corporate lobby controls tremendous spending power in Washington.²⁸⁸ In 2020, the National Federation of Independent Business and the United States Chamber of Commerce PACs spent over one million dollars combined in offi-

²⁸⁴ See, e.g., Chesto, *supra* note 230 (discussing small business owners' struggles with the new Massachusetts PFML law); Watkins, *supra* note 232 (reporting the pros and cons of paid family leave for Colorado business under the new state law).

²⁸⁵ See Chesto, *supra* note 230 (exemplifying the difficulty small businesses face to provide their employees with more generous paid leave laws); Watkins, *supra* note 232 (same).

²⁸⁶ See Findlay, *supra* note 227 (recognizing that with carveouts for the largest and smallest employers, federal paid leave mandates exclude millions of American employees). By 2018, employers with over five hundred employees comprised about 47% of the American workforce. *Table F. Distribution of Private Sector Employment by Firm Size*, *supra* note 191. Only 28% of the employees in that group had access to paid family leave. U.S. BUREAU LAB. STAT., *supra* note 12, at 120. These statistics show that most employees working at companies with more than five hundred employees do not have access to PFML. *Id.* The number of employees without PFML access at large companies sums to approximately 43 million people, hardly a negligible number. *Table F. Distribution of Private Sector Employment by Firm Size*, *supra* note 191; U.S. BUREAU LAB. STAT., *supra* note 12, at 120.

²⁸⁷ See Jones & Miller, *supra* note 167, at 189 (noting the significant impact of PACs and corporate spending on the landscape of federal elections and American politics more broadly). Republicans and business interest groups have already laid the groundwork for separating COVID-19 emergency legislation from permanent policy frameworks post-Pandemic. See Chamber of Commerce Letter 2020, *supra* note 223 (urging Congress to address Pandemic and permanent legislative proposals separately). The highly contagious nature of COVID-19 created an unprecedented threat to business and workplace safety that may never be paralleled. See Hafiz et al., *supra* note 145, at 23 (discussing the prioritization of "spatio-behavioral management" during the most critical moments of the Pandemic); Maclean et al., *supra* note 10, at 2 (exploring the phenomenon of "presenteeism behavior" and the intersection of employee benefits and contagious diseases). Generally, people are more likely to go to work sick if there is no social safety net that allows them to take time off and be paid. *Id.* As a result, certain policy proposals, such as increased paid sick time, may bolster the "spatio-behavioral" regulation of COVID-19. Hafiz et al., *supra* note 145, at 23. These dynamics explain why some may view the Pandemic as a long-awaited opportunity to enact PFML, while others see it merely as a unique set of circumstances illustrative of other human behaviors that do not lend themselves to permanent, uniform legislative change. Compare Sawhill & Welch, *supra* note 142 (suggesting that permanent paid leave reform should be a prerequisite for reopening the economy), with Chamber of Commerce Letter 2020, *supra* note 223 (framing COVID-19 legislation as a temporary fix for a specific problem, not a window for sweeping legislative reform).

²⁸⁸ See Jones & Miller, *supra* note 167, at 188 (laying the foundation for PACs and the transformation of the political process after corporate money became a part of elections); Hasan & Monnay, *supra* note 151 (noting that in 2019 business lobbying groups spent over \$121 million on federal elections).

cial campaign donations to political candidates—all Republicans.²⁸⁹ This spending yields tangible results, including the lobbying effort responsible for adopting the five-hundred-employee threshold into the FFCRA.²⁹⁰ Meanwhile, the primary Democratic PFML bill in Congress does not possess a single Republican co-sponsor.²⁹¹ Barring major changes in campaign finance law, the political spending power of corporations will be a significant barrier to enacting PFML legislation that includes a mandate for large corporations.²⁹²

Second, the PFML proposals currently on the table in Congress are highly partisan.²⁹³ The leading Democratic bill—the FAMILY Act—is a progressive wish list for PFML, but not a realistic bipartisan option.²⁹⁴ Most notably, Dem-

²⁸⁹ See *National Federation of Independent Business Federal Political Action Committee*, *supra* note 168 (reporting \$699,646.46 in total spending to the official campaigns of political candidates in the 2020 election cycle); *Chamber of Commerce of the United States of America PAC (US Chamber PAC)*, *supra* note 168 (reporting \$695,700.00 in total spending to the official campaigns of political candidates in the 2020 election cycle). Notably, the total contributions reported represent the donations made by the organization's official PACs to the campaigns of political candidates subject to the contribution limits imposed by the Federal Election Commission. See *Making Disbursements as a PAC*, *supra* note 168 (explaining the differences between PACs and other contributing entities). Additional donations made by individuals, corporations, and Super PACs are not included in these totals. *Id.*

²⁹⁰ See Technical Corrections to H.R. 6201 § 110(a)(1)(B), *supra* note 151 (inserting a cutoff to the FFCRA at employers with more than five hundred employees); Hafiz et al., *supra* note 145, at 43 (suggesting that the Technical Corrections to H.R. 6201 were the result of a last-minute shift in the policy dynamics and incentives amongst political actors); Hasan & Monnay, *supra* note 151 (reporting on the lobbying effort to get the Technical Corrections implemented in the FFCRA bill).

²⁹¹ See S.463—FAMILY Act, *supra* note 209 (listing two Independent senators as the only two non-Democrat co-sponsors to the FAMILY Act).

²⁹² See generally Jones & Miller, *supra* note 167 (studying the impacts and implications of campaign finance law on corporate political donations).

²⁹³ See McDonald Garrison et al., *supra* note 27, at 358–61 (outlining the paid leave bills from the Democratic side and the Republican side). The proposals from opposite sides of the political aisle share very little policy overlap, principally in their funding mechanisms. See *id.* (distinguishing between the Democratic approach to increase taxes and the Republican approach to avoid any tax increases).

²⁹⁴ See S.463—FAMILY Act, *supra* note 209 (showing an utter lack of Republican support for the FAMILY Act). Sen. Gillibrand has stated that large employers support her bill. See *Senate Hearing 2018*, *supra* note 24, at 9 (statement of Sen. Kirsten Gillibrand) (“[The FAMILY Act] has . . . been endorsed by a lot of larger businesses that already provide leave, because they know how good it is for their business.”). Sen. Gillibrand reintroduced the FAMILY Act to Congress in the new legislative session on February 4, 2021. See S.248—FAMILY Act, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/senate-bill/248/text?q=%7B%22search%22%3A%5B%22%5C%22paid+family+and+medical+leave%5C%22%22%5D%7D&r=20&s=1> [<https://perma.cc/9M86-WWD8>] (providing information on the newest version of the FAMILY Act and stating that the Senate most recently referred it to the Senate Committee on Finance in February 2021). The bill text is the same as the version previously proposed and still does not possess any Republican co-sponsors. *Id.* The absence of Republican co-sponsors on the legislation, paired with the significant financial contributions Republican candidates receive from the business lobby, suggests that there is not as much business support for Sen. Gillibrand's bill as she claims. See *About the U.S. Chamber of Commerce*, *supra* note 166 (declaring that the Chamber of Commerce represents businesses of all sizes and acts as their advocates in Washington); *Chamber of Commerce of the United States of America PAC (US Chamber PAC)*, *supra*

ocrats insist on funding PFML through a payroll tax, which is not a winning strategy at the federal level.²⁹⁵ The strong aversion to payroll taxes bears a long history in the Republican party.²⁹⁶ Although Democrats and Republicans agree on the overall need for PFML, the parties remain in a stalemate over the payroll tax.²⁹⁷

Finally, the growing pushback from major corporations against the rights of independent contractors and the proliferation of worker misclassification lawsuits casts a shadow on the prospect of PFML.²⁹⁸ In the United States, employee benefits are limited to “employees,” and thus contingent workers, independent contractors, on-call workers, and various other groups outside this cat-

note 168 (showing that the Chamber of Commerce’s political spending is universally supportive of Republican political candidates).

²⁹⁵ See Lenhoff, *supra* note 33, at 7 (distinguishing between state and federal policy-making). Sen. Gillibrand endorses the payroll tax model based on its success at the state level, but as history shows, state-level policies cannot simply be transposed to the federal level. See *id.* (explaining that the level of effort, investment, and resources required to mobilize change at the federal level is unparalleled compared to the state level). As with the FMLA, enacting PFML nationally may require Congress to weigh different political compromises and solutions than state legislators. See *id.* (acknowledging that state populations are often more liberal than the nation as a whole).

²⁹⁶ See *supra* note 115 and accompanying text (noting President Bush’s tax incentives proposal for companies offering paid leave); see also Tharpe, *supra* note 32, at 396 (explaining that Republicans initially opposed the FMLA because of its potential impact on the private sector). In 1992, President Bush stated his aversion to funding paid parental leave through payroll taxes and suggested tax credit incentives as an alternative. *Supra* note 115. Incidentally, President Bush’s 1992 proposal was also the first time the five-hundred-employee threshold was suggested, a vestige that the business-lobby unearthed decades later during the FFCRA negotiations. See *id.* (clarifying that the five-hundred-employee threshold was not a novel creation of conservatives in 2020); see also *supra* note 151 (reporting the effort by big businesses to lobby for an exclusion to the FFCRA provisions for companies with more than five hundred employees).

²⁹⁷ Compare *Senate Hearing 2018*, *supra* note 24, at 8 (statement of Sen. Kirsten Gillibrand) (urging Republicans to support her bill, the FAMILY Act, funded by a payroll tax and denouncing plans funded through Social Security), with *Senate Hearing 2018*, *supra* note 24, at 7 (statement of Sen. Joni Ernst) (advocating for paid leave funded through Social Security while noting that “[f]ew businesses can afford more taxes”).

²⁹⁸ See, e.g., *Harper v. Amazon.com Servs. Inc.*, No. 19-21735, 2020 WL 4333791, at *8 (D.N.J. July 28), *appeal filed*, No. 20-2614 (3d Cir. Aug. 11, 2020) (denying Amazon.com, Inc.’s motion to compel arbitration without prejudice, with the stipulation that arbitration may be compelled after discovery); *Cunningham v. Lyft, Inc.*, 450 F. Supp. 3d 37, 39 (D. Mass.), *denied stay pending appeal*, No. 1:19-cv-11974, 2020 WL 2616302 (D. Mass.), *appeal filed*, No. 20-1567 (1st Cir. filed June 17, 2020) (disputing the classification of app drivers); *Colopy v. Uber Techs. Inc.*, No. 19-cv-06462, 2019 WL 6841218, at *1 (N.D. Cal. Dec. 16, 2019) (claiming that Uber app drivers were misclassified as independent contractors). In some of these cases, state attorneys general have been taking an active role to advocate for workers’ rights. See, e.g., *Healey v. Uber Techs., Inc. & Lyft, Inc.*, No. 2084-cv-01519, at *1 (Mass. Supp. Mar. 25, 2021) (finding that Attorney General Healey presented a case concerning the classification of Uber and Lyft drivers); *Complaint, District of Columbia v. Power Design, Inc.*, No. 2018-CA-005598, at 2 (D.C. Super. Ct. Aug. 8, 2018) (asserting that an electric company misclassified its workers in an attempt to “slash costs, evading taxes and costs associated with payroll that are concomitant with a typical employer-employee relationship”).

egory are not covered by employee-based leave laws.²⁹⁹ Amid the rise of the gig economy, benefits coverage for these workers represents an increasingly prevalent issue.³⁰⁰ As long as companies are able to avoid granting workers “employee” status, many employers will be able to circumvent PFML regulations.³⁰¹ Thus, on a broad scale, worker misclassification practices threaten to undermine the impact of any future PFML law.³⁰²

C. The Path Forward

The FMLA-era path of coalition-building grooms a hopeful road ahead for the future of PFML.³⁰³ Democrat and Republican lawmakers both support PFML.³⁰⁴ Even though the underlying policy motivations for both parties differ, this was also the case for the FMLA.³⁰⁵ By reframing the FMLA as a family values bill, Democrats gained the needed support from traditionally conservative lawmakers and interest groups, ultimately allowing the bill to pass.³⁰⁶

Paid leave advocates can deploy the same strategy today by identifying key interest groups that will amass a supportive, diverse coalition behind PFML.³⁰⁷ For example, advocates of PFML reform need to reframe the policy as friendly, not merely palatable, for employers.³⁰⁸ Clearly, large corporations

²⁹⁹ See Rosenfeld, *supra* note 58, at II.-116 (explaining the different rights of employees and non-traditional workers in the American system).

³⁰⁰ See generally *How Well Are Independent Workers Prepared for Retirement?*, *supra* note 58 (describing the different categories of workers in America and their various rights).

³⁰¹ See *id.* (illustrating the large segment of Americans who work in non-employee status jobs).

³⁰² See Looman, *supra* note 57 (emphasizing the threat of worker misclassification to withhold critical benefits and care to millions of Americans).

³⁰³ See LENHOFF & BELL, *supra* note 30, at 5 (remarking on the broad diversity among the interest groups that ultimately supported the FMLA).

³⁰⁴ Jagoda & Elis, *supra* note 211 (acknowledging the rare bipartisanship behind paid leave reform); Noguchi, *supra* note 198 (describing the underlying common ground between political parties on paid leave).

³⁰⁵ See WISENSALE, *supra* note 85, at 141, 146 (noting the various policies that different advocacy groups and politicians hoped to advance or represent through the FMLA). The FMLA coalesced the interests of advocates from the disability community, the Catholic Church, the retired community, pro-life Republicans, and labor unions to formulate the bill. *Id.* at 141, 146.

³⁰⁶ *Id.* at 146.

³⁰⁷ See LENHOFF & BELL, *supra* note 30, at 14 (“The federal FMLA history shows . . . that work-family advocates can succeed if they have a well-developed legislative strategy, a broad coalition, a solid lobbying and public education infrastructure, a well-developed message, and a readiness to seize opportune moments, especially when the political winds shift in their favor.”). Although some policy-makers have, historically, viewed PFML as a women’s rights issue, a political alliance could arise by connecting the policy more explicitly with the rights of workers of color. See Flores, *supra* note 27, at 330–31 (explaining how the fifty-employee threshold embedded in the FMLA disadvantages Hispanic men over white men in the construction industry); BARTELE ET AL., *supra* note 128, at 7 (presenting evidence that the lack of national PFML adversely affects Hispanic people and employees of color more than white employees).

³⁰⁸ Cf. WISENSALE, *supra* note 85, at 146 (explaining how policy-makers reframed the FMLA to gain conservative support).

that voluntarily gave employees generous paid leave benefits before COVID-19 see business advantages to the policy.³⁰⁹ Progressive lawmakers need to amplify these success stories and aggressively promulgate the positive data outcomes for employers in PFML states.³¹⁰

PFML proponents should also retain the carveout for small businesses included in the FFCRA and communicate that proposal to small businesses.³¹¹ If small businesses do not feel targeted or threatened by PFML, policy-makers are much more likely to recruit powerful business interest groups to their side.³¹²

Further, if Democrats are serious about recruiting a bipartisan coalition around PFML, the party must be willing to set aside the payroll tax.³¹³ In the 1980s, pro-business groups immediately identified paid leave as a nonstarter and rather than digging their heels in, drafters promptly pivoted to other provisions that offered common ground.³¹⁴ Today, Republican lawmakers propose

³⁰⁹ See Mayer, *supra* note 141 (recognizing big businesses that are voluntarily expanding their paid leave benefits); Stroman et al., *supra* note 216 (stating that for many businesses the benefits are worth the expense of providing paid family leave).

³¹⁰ See, e.g., Stroman et al., *supra* note 216 (listing the many positive results for large employers that adopted generous paid leave policies); NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 135, at 2 (showing beneficial results for employers in New Jersey, Rhode Island, and New York). The government has both the power and the responsibility to advocate for PFML policies that have been proven to help businesses and employees. See COUNCIL OF ECON. ADVISORS, EXEC. OFF. OF THE PRESIDENT, *supra* note 212, at 18 (calling for government action on spreading awareness of the efficacy of paid family leave in the private sector).

³¹¹ See Paid Leave Under Families First Coronavirus Response Act, 85 Fed. Reg. 19,336 (Apr. 6, 2020) (to be codified at 29 C.F.R. pt. 826) (describing the qualifications for small business waivers from the FFCRA regulations).

³¹² See *id.* (exemplifying how federal policies can shield small businesses from burdensome paid leave requirements).

³¹³ See Noguchi, *supra* note 198 (suggesting there is room for compromise between the political parties on paid leave). Payroll taxes are the dominant source of funding for American social entitlement programs, which explains why Democrats and state PFML policy-makers have defaulted to this model. See Lester, *supra* note 27, at 54 (noting that payroll tax revenues are the historically popular method for funding programs like Social Security and Medicare). In contrast, many European countries fund PFML programs through general revenue taxes, meaning that the funds are pulled from a broader base of taxpayers rather than the narrower pool of people likely to benefit from the tax. *Id.* at 61. The fundamental differences in these approaches to taxpayer-funded social programs explains why the United States has not implemented similar paid leave policies to European nations. See *id.* (explaining that the European model of general tax revenue funding distributes the cost of paid leave more evenly, lessening the burden on employers); see also *supra* note 8 and accompanying text (discussing the generous paid leave policies available in most industrialized European countries). The economic theory behind paid leave goes beyond the scope of this Note, but the range of financing models available underscores the point that Democrats should not pigeonhole themselves and fellow policy-makers into relying only on the payroll tax. See Lester, *supra* note 27, at 66 ("A number of models have been proposed for implementing a paid family leave program.")

³¹⁴ See WISENSALE, *supra* note 85, at 138 (explaining the decision by Democrats to drop paid leave early on in the negotiation process in the interest of appealing to influential Republicans).

several financing schemes that do not involve increasing payroll taxes.³¹⁵ To gain support from Republicans, and the business groups that contribute heavily to their campaigns, Democrats must consider financing options beyond a payroll tax.³¹⁶ Alternatively, paid leave laws contain many other elements—such as employee eligibility requirements—that provide other opportunities for compromise.³¹⁷ The FMLA proved that meaningful change is possible when policy-makers endure hard sacrifices.³¹⁸ Overall, Democrats must demonstrate a greater willingness to accommodate the concerns and interests of the business community in the interest of coalition-building that will lead to greater legislative outcomes.³¹⁹

Equally important, proponents of PFML must capitalize on the public enthusiasm in support of paid leave.³²⁰ As history proved when Congress passed

³¹⁵ See McDonald Garrison et al., *supra* note 27, at 359–61 (outlining the various paid leave proposals introduced by Republican senators). The most notable bills on the Republican side involve advancing funds from existing entitlements like Social Security or the Child Tax Credit in lieu of increasing payroll taxes. *Id.* Although most state PFML programs operate through a payroll tax, policy-makers must set different expectations for what policies are viable at the federal level. See Lenhoff, *supra* note 33, at 7 (describing the difference between enacting policy change at the state versus federal level).

³¹⁶ See, e.g., *Paid Family and Medical Leave*, *supra* note 201 (outlining a proposal from Democratic candidate Hillary Clinton to tax the wealthiest Americans to pay for PFML rather than putting the burden on businesses); Miller, *supra* note 201 (same). Although, at the time of this writing, the Democratic Party holds the majority in both chambers of Congress and may not feel they need to compromise, the margin of this majority is razor-thin. Jennifer Haberkorn, *Fragile Senate Majority Means a Tightrope Act for Democrats*, L.A. TIMES (Jan. 6, 2021), <https://www.latimes.com/politics/story/2021-01-06/what-georgia-senate-results-mean-for-congress-biden> [<https://perma.cc/DK5N-KZTM>]. Relying on their technical majority is not an advisable strategy for enacting lasting policy change necessary to help American families. See *id.* (observing that even a small number of Democratic abstentions could derail the passage of key policies); see also Tharpe, *supra* note 32, at 396 (pointing out that when President Bush vetoed the FMLA bills in the early 1990s Democrats were the majority party, and yet the party had insufficient votes to override the two-thirds veto threshold).

³¹⁷ See Nelson, *supra* note 27, at 655–61 (listing several components of paid leave laws including employee coverage, the length of leave, leave accrual, methods of payment, notice requirements, retaliation provisions, and more). Paid leave laws are complex and contain a multitude of elements that offer opportunities for policy compromises. *Id.* at 655–56. These elemental details provided the windows of compromise necessary to pass the FMLA, and offer the same potential for PFML. See *supra* note 106 and accompanying text (noting that Rep. Roukema’s amendment on the employer eligibility threshold gained significant Republican support on the FMLA bill).

³¹⁸ See Lenhoff, *supra* note 33, at 2 (detailing the various compromises legislators and policy-makers made to pass the FMLA). Iterating the compromises embedded in the FMLA, including the absence of paid leave, an exception for employers with fewer than fifty employees, and restrictions regarding the employees and types of illnesses covered. *Id.*; see also WISENSALE, *supra* note 85, at 144 (detailing the significant push and pull between Democrats and Republican over the specific parameters for the FMLA).

³¹⁹ See Lenhoff, *supra* note 33, at 2 (urging that policy-makers can learn important lessons from how policy-makers in the 1980s built and advocated for the FMLA).

³²⁰ See generally HOROWITZ ET AL., *supra* note 197, at 4 (demonstrating broad-based support for some form of national PFML).

ERISA in 1974, public opinion pulls a powerful lever in Washington.³²¹ Through the ongoing devastation of the Pandemic and the unprecedented challenges faced by American families, parents are literally screaming for change.³²² Currently, eighty-five percent of Americans believe medical leave should be paid and eighty-two percent believe maternity leave should be paid.³²³ The public overwhelmingly supports this policy, which means lawmakers have the wind at their backs for passing PFML.³²⁴

Lastly, the continued activism from state Attorneys General to fight worker misclassification lawsuits will play a critical long-term role in leave benefits reform.³²⁵ Until non-traditional workers receive the same benefits as bona fide employees, there will be a gaping and growing hole in any future PFML law that leaves millions of hard-working Americans behind.³²⁶

³²¹ See Wooten, *supra* note 65, at 684 (“A calamity is more likely to draw attention to a social problem when people interested in the problem are prepared to take advantage of the opportunity the calamity presents.”). COVID-19 has certainly created a calamity that policy-makers must be ready to convert into real, lasting change for American families. *Cf.* LANGBEIN ET AL., *supra* note 26, at 92 (emphasizing the critical role public opinion played to pass ERISA).

³²² See Carmel, *supra* note 1 (describing the plight of at-home work and parenting during COVID-19).

³²³ See HOROWITZ ET AL., *supra* note 197, at 4 (showing poll data on public support for PFML).

³²⁴ See *50 Prominent Women Run Full Page Ad in the New York Times Calling on President Biden to Implement Marshall Plan for Moms in First 100 Days*, *supra* note 14 (demonstrating the strong call to action for the government to enact paid leave reform).

³²⁵ See GERSTEIN, *supra* note 238 (noting the significant efforts from state Attorneys General to advocate for workers’ rights, including in worker misclassification cases). For example, the District Attorney of Washington D.C. raised a major lawsuit against a utility company for misclassifying its workers as independent contractors. *See generally* Complaint, District of Columbia v. Power Design, Inc., No. 2018-CA-005598, at 2 (D.C. Super. Ct. filed Aug. 8, 2018). In 2018, the New York Attorney General settled a two-million-dollar lawsuit with FedEx for misclassifying its drivers. *See generally* Settlement Agreement, New York v. FedEx Ground Package Sys., Inc., No. 402960/10, at 1 (S.D.N.Y. filed Dec. 20, 2018). Some Attorneys General take other active measures to prevent worker misclassification in the gig economy. *See, e.g.,* Healey v. Uber Techs., Inc. & Lyft, Inc., No. 2084-cv-01519, at *1 (Mass. Supp. Mar. 25, 2021) (ruling on a claim brought by Massachusetts Attorney General Maura Healey against rider app companies alleging worker misclassification of drivers as independent contractors); DoorDash, *AG Shapiro and DoorDash Announce Expanded Gig Worker Protection During COVID-19 Emergency*, CISION: PRNEWSWIRE (May 4, 2020), <https://www.prnewswire.com/news-releases/ag-shapiro-and-doordash-announce-expanded-gig-worker-protection-during-covid-19-emergency-301052195.html> [<https://perma.cc/BM4S-H4FD>] (announcing a partnership between the Attorney General of Pennsylvania and DoorDash, Inc., a mobile app delivery company, collaborating to create protections for workers).

³²⁶ See Summers, *supra* note 54, at 181 (“The most obvious problem with mandated benefits is that they only help those with jobs.”). In May 2017 there were over 10.6 million people in the United States working as independent contractors. Press Release, U.S. Bureau of Lab. Stat., Contingent & Alternative Emp’t Arrangements—May 2017 (June 7, 2018) (on file with author). Some policies, such as Sen. Gillibrand’s FAMILY Act, avoid the worker misclassification problem by simply expanding the eligibility threshold to include all workers, not just official employees. *See Senate Hearing 2018*, *supra* note 24, at 91 (statement of Vicki Shabo, Vice President for Workplace Policies and Strategies, National Partnership for Women & Families) (noting the inclusion of independent contractors in Sen. Gillibrand’s bill). While this strategy is a noble attempt at inclusivity, it presents yet another reason

CONCLUSION

COVID-19 exposed a major fracture in the American social safety net—the lack of PFML. The United States is the only industrialized country that does not provide government-guaranteed PFML to private sector employees. During the Pandemic, the fallout from this national shortcoming was catastrophic, forcing many Americans to continue working despite the need to care for children, ill family members, or themselves.

Today, a perfect storm of circumstances makes PFML a reality for the first time in decades. After COVID-19, the American public resoundingly supports PFML. Politicians on both sides of the political aisle support the policy in some form. And finally, state-level PFML laws and some corporate policies offer ample evidence to support its effectiveness. But despite all of this momentum, PFML is still not the law of the land because corporations oppose it. The business-lobby has been able to successfully manipulate specific provisions in PFML bills, like the employer threshold, to create convenient carve-outs for corporations. Any future federal PFML mandate that does not bind the largest companies (and employers) in America, and therefore largest employers, will be effectively useless.

Right now, politicians agree on the overarching policy of PFML, but continue to squabble over the details. To succeed, lawmakers must learn from FMLA policy-makers in the 1980s and 1990s. The FMLA was not a perfect law—but it passed. Politicians today ignore the history of the FMLA and the model it offers for converting big policies ideas into major, lasting legislative reform. Without a conscious effort to compromise and build cross-party coalitions, the support for PFML will not be strong enough to overcome the powerful and well-funded resistance of corporations.

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why pro-business Republicans are unlikely to back the policy. *See* U.S. CHAMBER COM., *supra* note 41, at 56 (encouraging any future PFML policy to follow the existing employee eligibility requirements of the FMLA, which do not cover independent contractors).