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Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA

Michael Selmi*

In a remarkable decision last Term, the Supreme Court upheld the Family and Medical Leave Act¹ as applied to state employers.² The decision was remarkable for at least three reasons. First, the decision signaled an important break from what had been a consistent pattern of invalidation of the application of civil rights statutes to state actors in the name of sovereign immunity.³ Second, the language of the decision was remarkable in terms of its focus on the discrimination that women continue to experience in the workplace, as well as the ways in which drafters designed the FMLA to remedy that discrimination. Chief Justice Rehnquist noted that the statute was designed “to protect the right to be free from gender-based discrimination in the workplace,”⁴ explaining that “Congress sought to adjust family leave policies in order to eliminate their reliance on and perpetuation of invalid stereotypes, and thereby dismantle persisting gender-based barriers to the hiring, retention, and promotion of women in the workplace.”⁵ Focusing on the way the policies had been established with women in mind as primary caregivers, the Chief Justice wrote:

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1. 5 U.S.C. §§ 6381–87 (2000); 29 U.S.C. §§ 2601–54 (2000 & Supp. I 2001–2002).

2. *See Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 123 S. Ct. 1972 (2003).

3. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (invalidating suit against the state under the Americans With Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (same, but under Age Discrimination in Employment Act); *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999) (same, but under Trademark Remedy Clarification Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (same, but under Religious Freedom Restoration Act); *Seminole Tribe Fla. v. Florida*, 517 U.S. 44 (1996) (same, but under Indian Gaming Regulation Act).

4. *Hibbs*, 123 S. Ct. at 1978.

5. *Id.* at 1981 n.10.

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

....

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.⁶

Without question, this is some of the Court's strongest language in the last two decades recognizing and condemning discrimination against women; the fact that it was written by Chief Justice Rehnquist, who is not known for his progressive views on gender, makes it all the more remarkable.⁷

6. *Id.* at 1982–83.

7. One author has speculated that Chief Justice Rehnquist's opinion and forceful language may have been attributable to his own recent experience. His daughter is a single mother and the article noted that, "Several times this term, the 78-year-old Chief Justice . . . left work early to pick up his granddaughters from school." Linda Greenhouse, *Evolving Opinions:*

The third reason that the case stands out has so far received no public attention, and it is the focus of this essay. Despite the Court's strong language, ten years after the FMLA's implementation, it is clear that the statute has not accomplished its goals with respect to combating stereotypes or discrimination against women in the workplace. To the extent it has had any effect at all on these issues, the statute has likely exacerbated both, though probably only to a socially insignificant degree.⁸ And contrary to Justice Rehnquist's emphasis, those portions of the statute that have proved most effective have not been the portions originally considered central during the legislative debate. By far, the FMLA is most frequently used by employees for their own serious illness—a fact that has effectively transformed the statute from one involving *family* leave to one involving *sick* leave. From this perspective, it was a marvelous feat of advocacy to have the *Hibbs* Court describe the FMLA as a guard against discrimination and stereotyping.

It is this part of the statute's history that I will focus on in this essay, as I want to explore how the statute came to deviate so significantly from its publicly stated goals. As will become clear below, this deviation was not the result of unexpected developments or hostile judicial interpretations; on the contrary, the statute has developed exactly as should have been expected by its legislative drafters.⁹ At the time the legislation was enacted, there was no substantial reason to believe that it would accomplish anything more than it has. There was no reason, for example, to believe that men would begin to take substantial leave under the Act. Nor was there reason to think that unpaid leave would significantly aid women following the birth or adoption of a child, except for those women

Heartfelt Words from the Rehnquist Court, N.Y. TIMES, July 6, 2003, § 4 (Week in Review), at 3.

8. One recent study measuring the employment and wage effects of the statute on women concluded that the effects were largely neutral. Jane Waldfogel, *The Impact of the Family and Medical Leave Act*, 18 J. POL'Y ANALYSIS & MGMT. 281 (1999). Although there appeared to be some net positive effects on women's employment, there were few wage effects, leading to the conclusion that "the[] effects to a large extent offset each other." *Id.* at 300. This study used data from the final year before, and the first two years after, passage of the FMLA. *Id.* at 294.

9. The one exception to this general premise is the fact that the sick leave provisions have become more important than originally contemplated by the drafters.

who could afford to take such leave, which, almost by definition, would tend to be high-wage earning women who were seeking to extend the leave their employers already provided.

This essay will explore some of the history that led to the FMLA's passage, and then will contrast the publicly stated expectations with the realities of the statute's use since its enactment. Two published studies have examined the extent and nature of leave taken or needed by employees pursuant to the FMLA. Those studies demonstrate that the leave provisions relating to the birth or adoption of a child have proved to be the least important parts of the statute to employees, in direct contrast to the emphasis within the legislation and its history.

I will then turn to a discussion of why the interest groups supporting the legislation were willing to settle for such a weak bill. Advocates of family leave legislation generally asserted two rationales for the importance of the statute: (1) Something was better than nothing, and relatedly, the FMLA would be, if nothing else, an important symbolic victory; and (2) that the FMLA would be a critical "foot in the door" leading to better and more progressive legislation in the future. I will question both of these rationales, and also analyze some of the important, and often overlooked, costs to the legislation that directly challenge the notion that some legislation is better than no legislation. I will also suggest that the special interests of the advocacy groups in passing legislation may have provided an important and unacknowledged rationale for pursuing the statute despite its obvious deficiencies. In this respect, this essay will also be a case study in legislative enactment and the various motives that can underlie what otherwise appears to be public-spirited legislation.

I. LEGISLATIVE EXPECTATIONS

Issues relating to work and family have been on the congressional agenda continuously since 1945.¹⁰ It was not, however, until 1981

10. See Paul Burstein et al., *Policy Alternatives and Political Change: Work, Family, and Gender on the Congressional Agenda, 1945–1990*, 60 AM. SOC. REV. 67 (1995). "Federal regulation of family and gender in the workplace has been on the congressional agenda continuously since 1945. Work-family bills have been introduced in every congress [sic], and by the end of 1990 the cumulative total of sponsorships supporting such bills reached 3,898." *Id.* at 74 (footnote omitted).

that Congress began to consider legislation that would accommodate work-family matters by providing leave for those with responsibilities to care for children.¹¹ More than a decade later, these legislative efforts culminated in the passage of the FMLA, which had originally been introduced in Congress in the mid-1980s. The history of the FMLA has been detailed elsewhere,¹² and I will not repeat it here. Rather, in this essay, I want to focus on one particular aspect of that history, namely the various rationales and expectations that surrounded the leave legislation, as compared with the reality of the legislation ultimately implemented.

Introduced in 1985 by Congresswoman Patricia Schroeder and two of her colleagues, the Parental and Disability Leave Act¹³ required employers to provide eighteen weeks of unpaid leave upon the birth or adoption of a child, to care for the serious illness of a child or for the temporary disabilities of the employee herself.¹⁴ The legislation also required that the employee be able to return to her job once the leave was over and retain her health insurance during the leave. Not surprisingly, this legislation—along with another bill, the Parental and Medical Leave Act—immediately met strong resistance from business groups, led by the Chamber of Commerce, which initially estimated that the legislation would cost businesses sixteen billion dollars per year.¹⁵

11. *Id.* at 77–78. The authors divide proposed legislation into three categories: (1) separate spheres legislation, intended to reinforce women working in the home; (2) equal opportunity legislation, designed to prohibit differential treatment of women and to enhance equal opportunity; and (3) work-family accommodation legislation, which sought to provide some accommodation to the competing demands of work and family. *Id.* at 69, 73. The authors developed a lengthy schema for determining which legislation fell into which category and ultimately concluded that most of the proposed legislation fit into one of the three categories. *Id.* at 72–74. They concluded that 14.5% of the legislation could be labeled separate sphere legislation, while 59.3% was categorized as equal opportunity, and 23.3% was accommodationist. *Id.* at 74.

12. See RONALD ELVING, *CONFLICT AND COMPROMISE* (1995). For an interesting history from two of the participants in the battle to pass the FMLA, see also DONNA R. LENHOFF & LISSA BELL, *GOVERNMENT SUPPORT FOR WORKING FAMILIES AND FOR COMMUNITIES*, available at <http://www.nationalpartnership.org> (last visited Apr. 19, 2004).

13. H.R. 2020, 99th Cong. § 103 (1985).

14. See Emily A. Hayes, Note, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 WM. & MARY L. REV. 1507, 1518–19 (2001) (discussing predecessors to the FMLA).

15. See Kerry Elizabeth Knobelsdorff, *Congress Enters the Debate over Time Off for*

These original attempts at unpaid leave legislation established the framework for what would ultimately become the FMLA. Certain provisions were weakened before the bill's final passage, while those relating to the care of others were strengthened.¹⁶ Two other important aspects of the legislation remained largely unchanged throughout the bill's history. Early in the legislative battle, legislators decided that the statute should include men, as well as women, within its scope, despite pressure from some of the earliest supporters of family leave legislation to offer leave only to women.¹⁷ Women's groups, the early and primary supporters of the statute, objected to limiting leave to women based largely on the feminist argument relating to the need for equality rather than accommodation for women.¹⁸ Others questioned whether providing leave only to women would raise legal concerns and might disadvantage women by making them more expensive to employers.¹⁹

Family Care, CHRISTIAN SCI. MONITOR, Aug. 5, 1987, at 10 (noting that the Chamber of Commerce initially estimated the cost of the Parental and Medical Leave Act [never enacted] as "roughly \$16 billion a year" while it later lowered its estimate to \$2.6 billion). The debate over the potential costs of the leave legislation led to some unusual arguments. Proponents argued that few men would take the leave, thus reducing costs, while the opponents stressed the likelihood of leave-taking. See Alice H. Cook, *Public Policies to Help Dual-Earner Families Meet the Demands of the Work World*, 42 INDUS. & LAB. REL. REV. 201, 211 (1989) (discussing the political battle over cost estimates).

16. The Act provides for twelve weeks of unpaid leave, and is limited in scope to apply only to employers of more than fifty employees. The minimum hour requirement (1250 hours for FMLA coverage) was also subsequently added. See Hayes, *supra* note 14, at 1519.

17. See ELVING, *supra* note 12, at 21–34. Although Patricia Schroeder came to be most closely aligned with the legislation as ultimately passed, two other male representatives from California, George Miller and Howard Berman were also significantly involved. Indeed, much of the precedent was established through hearings that Miller convened on childcare when some of those who testified emphasized the importance of allowing mothers the time to bond with their children after their birth. See *id.* at 27 (discussing testimony of Sheila Kamerman and others).

18. At the time the FMLA began to percolate in Congress, a lively debate was brewing among feminist academics between what were typically labeled models of equality and accommodation. Professor Wendy Williams was the leading academic voice at the time stressing the equality model, which deemed it essential that women be treated equally to men, rather than seeking any special accommodations for pregnancy; Williams was also closely involved in the coalition that supported the FMLA. See ELVING, *supra* note 12, at 39–42. For Williams's argument, see Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985), and for a useful summary of the debate, see Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate*, 86 COLUM. L. REV. 1118 (1986).

19. One of the leading groups behind the legislation, formerly known as the Women's

Equally significant, no bill or proposal ever included a provision for *paid* leave; indeed, there were never any serious discussions regarding the prospect of including paid leave as part of the legislation. From the outset of the legislative process, the bill's drafters determined that paid leave could not achieve majority support and was, for that reason, a non-starter.²⁰ Legislators widely acknowledged that the absence of paid leave was a glaring deficiency in the strength of the policy. Nevertheless, the legislation's chief advocates concluded that federal legislation with unpaid leave would be superior to having no federal legislation, a determination which was never seriously debated during the FMLA's seven-year journey to passage.

Once President Clinton signed the bill into law, the absence of paid leave led many to criticize the legislation, in significant part because critics perceived that only wealthy individuals would be able to benefit from the leave provisions.²¹ The legislative advocates responded with two principal arguments. First, and as mentioned above, was the political reality that the law would not have passed had paid leave been part of the legislative agenda. In this respect, the argument was essentially that something was better than nothing. Secondly, the advocates defined the legislation as an "important first step" toward more comprehensive leave legislation, which would ultimately include paid leave. As one advocate stated, "We all want it to be paid leave But this is a good first step. You set a standard

Legal Defense Fund and now known as the National Partnership for Women and Families, has published its own analysis of the legislation's history. See generally Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39 (1994).

20. See ELVING, *supra* note 12, at 30.

21. See Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335 (1993) (emphasizing importance of paid leave); Kathleen Gerson, *A Few Good Men: Overcoming the Barriers to Involved Fatherhood*, 16 AM. PROSPECT 78, 90 (1994) (calling the FMLA "an important start" but advocating paid leave); Paul Burstein, Editorial, *Family Leave Tests what Politicians Value*, L.A. TIMES, Sept. 10, 1992, at B7 (criticizing earlier bill for not including paid leave); Jordana Hart, *Few in Area Use Leave Law, Parents Can't Afford Time Off*, BOSTON GLOBE, July 22, 1994, at B1 (discussing limited use of the law by employees); L.M. Sixel, *Family Leave Goes into Effect Today: 60% of Workers Won't Be Covered*, HOUSTON CHRON., Aug. 5, 1993, at A1 ("The family leave act has been described as upper middle class, yuppie legislation—because those are the only people who can afford the cut in pay.").

and then you push companies to do more.”²² Karen Nussbaum, the Executive Director of 9to5, National Association of Working Women, and one of the leading proponents of the legislation, argued that the FMLA was both a necessary “minimum standard” and an important symbol “that our government understands that working people need help balancing work and family.”²³ These two responses were premised on an assumption that in a few years, following the mandated study of the legislation’s effect, amendments would likely make the FMLA more responsive to employees’ needs.

Another critical aspect of the FMLA’s development was the primacy placed by the media on the leave provisions relating to newborn or adopted children. Although every version of the legislation included provisions to grant individuals leave to care for the serious illness of a child or themselves, these provisions were never highlighted in the same way that the maternity or paternity leave provisions were. Virtually all of the news stories emphasized the birth and adoption provisions and how the legislation might (or in some cases might not) enable new parents to spend more time with their children.²⁴ These public stories typically mentioned the leave provisions relating to serious illness, but these provisions were rarely the central focus of the stories.

22. Mimi Hall & Blair S. Walker, *Family Leave Act Hits Home*, USA TODAY, Aug. 5, 1993, at 1B (quoting Helen Neuborne of the NOW Legal Defense and Education Fund).

23. Karen Nussbaum, Editorial, *This Is a Sound Start*, USA TODAY, Aug. 10, 1992, at 6A. Also note that the “first step” theory advancing the idea of future paid leave was even made by opponents of the legislation. These opponents were even more adamant that paid leave was on the horizon, echoing arguments advanced by the business community to oppose the unpaid provision of the legislation. See Richard Whitmire, *Family-Leave Law Raises Questions on “Next Step”*, CHI. SUN-TIMES, Feb. 6, 1993, at A6 (quoting Mary Reed of the National Federation of Independent Business: “It’s very likely mandated leave legislation will be expanded.”); Tom Kenworthy, *House Approves Bill Granting Unpaid Job Leave to Workers*, WASH. POST, May 11, 1990, at A1 (“Mandated leave is just the first step toward 100 percent coverage and paid leave.”); David R. Henderson, *The Europeanization of the U.S. Labor Market*, 113 PUB. INT. 66, 79 (1993) (arguing that advocates would seize on the low usage of the statute as support for requiring paid leave).

24. See, e.g., Michelle Neely Martinez, *FMLA Headache or Opportunity?*, 39 HR MAGAZINE 42 (1994) (discussing the work/family benefits already provided by some employers, as compared to the FMLA, and focusing on child leave provisions); Dawn Gunsch, *The Family Leave Act: A Financial Burden?*, 72 PERSONNEL J. 48 (1993) (concentrating on maternity leave provisions).

While the formal legislative history did refer to the serious illness provisions, it generally treated those provisions as the least significant portions of the legislation, giving them the shortest treatment.²⁵ In part, this lack of attention was attributable to the already broad availability of sick leave—or at least, broadly *perceived* availability of sick leave to employees.²⁶

From the legislative history, one can identify three expectations of FMLA's advocates. First, the statute was intended to ease the burden of balancing work and family issues. Second, the legislation would likely be a first step to a comprehensive family leave policy that would include paid leave, thus bringing the United States closer to the leave policies of other industrialized nations. Third, by extending the leave provisions to men, the statute was expected to break down some of the stereotypes regarding childcare, which was the focus of Justice Rehnquist's decision in *Hibbs*.²⁷

These were the publicly stated expectations of the parties working on the legislation. It is obviously a good deal more difficult to discern what the *private* expectations may have been, though in the next section I will suggest that the public expectations were plainly unrealistic in light of the facts known at the time.

II. THE REALITIES OF THE FMLA

The ten-year-old FMLA has filled a gap in many employees' benefit packages by allowing them to take periods of sick leave that

25. My assessment is based primarily on an impressionistic interpretation of the legislative record. I have not tried to count pages, nor have I calculated some weighted emphasis, but instead it seems clear that the provisions relating to the birth or adoption of a child were the primary impetus behind the statute. Indeed, initially the other leave provisions were limited to temporary disabilities and sick children, and were later expanded as a way of acquiring the support of the AARP, which was particularly interested in elder care. See ELVING, *supra* note 12, at 157.

26. See *infra* text accompanying note 42. More workers had access to maternity or paternity leave than may have been originally thought, and fewer workers had access to sick leave than was generally acknowledged. *Id.*

27. See Lenhoff & Withers, *supra* note 19, at 49 ("By granting both female and male employees the right to family and medical leave, the FMLA may help to change society's perception of child care, elder care, and other dependent care as 'women's work.'"); *supra* text accompanying notes 5–6, 8. Both Lenhoff and Withers were heavily involved in the passage of the FMLA through their work with the National Women's Law Center. Lenhoff & Withers, *supra* note 19, at 40.

they otherwise would not have been granted. But the statute has plainly revealed its limitations as a tool for balancing the demands of the workplace with family commitments. The statute's primary contribution has been as a form of unpaid sick leave; the family leave provisions have been used far less frequently. At the same time, the statute has proved beneficial to *low-wage* workers, contrary to the expectations of critics. This has largely been because such workers have the least access to voluntarily provided sick leave.

As part of the FMLA, a commission was established to study the statute's effect. That commission has now produced two reports detailing the use and scope of the FMLA, the first published in 1996 and the most recent study published in 2000.²⁸ The findings are consistent in the two reports, and they demonstrate that many employees take leave for one of the reasons stated within the FMLA. However, in both surveys the largest category of leave-takers consisted of those taking leave for their own illness. In 2000, 52.4% of leave takers took leave because of their own illness, while in 1996, the figure was nearly sixty percent.²⁹ In contrast, 18.5% of leave-takers took leave to care for newborn or newly adopted children in 2000 and 17.1% did so in 1996.³⁰ Consistent with the focus on illnesses, many of the leave periods were quite short. In the 2000 study, over half of the longest leaves were for ten or fewer workdays.³¹ The same was true for leave relating to the care of a newborn or newly adopted child, where the 2000 study showed that

28. See DAVID CANTOR ET AL., U.S. DEP'T OF LAB., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS, THE FAMILY AND MEDICAL LEAVE SURVEYS, 2000 UPDATE (2001) (also reproducing some facts of the 1996 survey) [hereinafter BALANCING THE NEEDS]; COMM. ON FAMILY AND MED. LEAVE, U.S. DEP'T OF LAB., A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES (1996) [hereinafter A WORKABLE BALANCE], available at <http://www.ilr.cornell.edu/library/downloads/keyworkplacedocuments/familymedical.pdf>. I have previously summarized and commented on the 1996 report in Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 763–65 (2000). This essay will concentrate on the more recent report.

29. See BALANCING THE NEEDS, *supra* note 28, at tbl.2.3; A WORKABLE BALANCE, *supra* note 28, at 94–95.

30. See BALANCING THE NEEDS, *supra* note 28, at tbl.2.3; A WORKABLE BALANCE, *supra* note 28, at 95. Caring for a sick child or spouse constituted the rest of the leave, and, together with caring for oneself or another, sick leave represented 83.3% of all of the leave taken in 2000. BALANCING THE NEEDS, *supra*, at tbl.2.3 (summing percentages for leave taken for “own health,” “care for ill child,” “care for ill spouse,” and “care for ill parent”).

31. *Id.* at fig.2.2.

55.1% of such leave was for ten or fewer days, and less than a third (31.5%) lasted longer than thirty days.³²

One important goal of the statute was to shift the responsibility for care-taking away from women so that men might share the responsibility more equitably. Based on the surveys, however, no apparent shift has occurred. Women are more likely than men to take FMLA leave: 58.1% of leave-takers in 2000 were women whereas women constituted only 48.7% of all employees in the surveyed population.³³ A recent report analyzing the patterns of leave-taking concluded that there was “little evidence that laws that grant additional weeks of leave to new fathers have had any effect on fathers’ unpaid leave taking or leave lengths.”³⁴

Both of the Commission surveys also sought to identify those individuals who needed to take leave but were unable to do so. For the 2000 survey, 2.4% of the surveyed population fell into this category, down from 3.1% in the 1996 survey.³⁵ Among the 2000 survey group, employees’ own illnesses constituted the most common need for untaken leave (48.1%), while only 9.3% were unable to take leave relating to the birth or adoption of a child.³⁶ The surveys also allowed employees to list multiple reasons for not taking

32. *Id.* at tbl.2.7 (summing percentage of longest leave for “1–3,” “4–5,” “6–10,” “31–60,” and “more than 60 days”).

33. BALANCING THE NEEDS, *supra* note 28, at tbls.A2–2.4, –2.5 (surveying population figures). Nearly twenty percent of all eligible women, but only 13.5% of eligible men, took leave under the FMLA. *Id.* at tbl.A.2–2.7.

34. Wen-Jui Han & Jane Waldfogel, *Parental Leave: The Impact of Recent Legislation on Parents’ Leave Taking*, 40 DEMOGRAPHY 191, 198 (2003). The authors also sought to determine the effect leave laws had on women, and came away with mixed conclusions, depending on how the data were analyzed. Based on their analyses, the authors suggested that “what [the] data indicate is the limited impact of unpaid leave policies.” *Id.* There is, however, a curious anomaly in the data that should be mentioned. Men were actually slightly more likely than women to take leave to care for a newborn: 22.8% of male leave-takers but only 15.3% of female leave-takers took leave to care for a new child. BALANCING THE NEEDS, *supra* note 28, at tbl.A2–2.6. The anomaly seems to be attributable to the way the data are classified, as there is also a separate category set out in some of the tables for “maternity-disability,” and when those figures are added together with the leave for a newborn or adopted child, women take significantly more such leave. *Id.*

35. BALANCING THE NEEDS, *supra* note 28, at tbl.2.14.

36. *Id.* at tbl.2.16.

leave. By far the largest category within both surveys was an inability to afford the leave.³⁷

Although these figures have been widely used and are helpful in understanding the needs of employees, they may overstate the effectiveness of the FMLA. The surveys identify all those who have taken, or have needed, leave that falls under the scope of the FMLA regardless of whether the employee actually took leave under the FMLA.³⁸ For example, both studies showed large percentages of employees who received pay during their leave periods, indicating that such leave was not taken pursuant to the FMLA.³⁹

Litigation involving the FMLA confirms the importance of the sick-leave provisions and the relative unimportance of the parental leave provisions. My review of eighty-four cases heard on appeal during the years 2000–01 indicated that sixty-one of the claims (72.6%) involved individuals who were seeking, or who took, leave for their own illness.⁴⁰ Just over fifteen percent of the cases involved leave that was related to the care of another, while only ten of the cases (11.9%) concerned care of a new child in the home.⁴¹ Although these appeals may not be representative of the universe of leave, the

37. *Id.* at tbl.2.17. 77.6% of those who were unable to take leave in the 2000 survey, and 65.9% in the 1996 survey, listed financial constraint as a reason for not taking leave. *Id.* Large numbers of employees also listed work-related reasons, with 52.6% indicating that work was too important, and 42.6% expressing a fear that the taking of leave would adversely affect their career advancement. *Id.*

38. *Id.*

39. In the 2000 survey, just over sixty-five percent of leave-takers received some pay during their longest leave, and 72.2% of leave-takers received full pay during their entire leave. *Id.* at tbls.4.4, 4.6. Sick leave was the most common form of paid leave, with vacation leave providing the second largest form of paid leave. *Id.* at tbl.4.5. Over seventy percent of male leave-takers received pay during their longest leave, while 62.5% of female leave-takers did. *Id.* at tbl.A2–4.1. 87.7% of salaried workers received pay during their longest leave, compared to fifty-four percent of hourly workers. *Id.* Of those leave-takers receiving less than full pay during their leave, 50.9% would have taken longer leave if additional pay had been available. *Id.* at tbl.4.9.

40. The review was conducted on Lexis on December 8, 2003 using the search “date (is 2001) and family /2 medical /1 leave”, which was then repeated for the year 2000. A significant number of cases that turned up in the search (sixty-nine) did not involve FMLA claims but instead made reference to the statute, and in twenty cases it was not possible to identify the basis for the leave. With respect to this last category, there is no particular reason to expect that the underlying bases would differ from those that were identifiable—in other words, there is no reason to think that this category of claim includes a disproportionately large number of cases involving leave relating to the birth or adoption of a child.

41. *Id.*

fact that the litigation parallels the documented leave-taking of employees suggests that the statute has, in fact, principally become an extension of sick leave rather than a parental leave statute.

Upon reflection, this development should not have been so unexpected. Serious illness frequently occurs without notice, and many employees may not have taken the steps necessary to store sick leave in anticipation of a serious illness. Furthermore, large and small employers are less likely to offer paid sick leave to blue-collar and service employees (for large and small employers respectively, fifty and forty percent) than to professional employees (eighty-seven and eighty-eight percent).⁴² As a result, many employees, particularly those likely to find themselves toward the bottom of the income ladder, are without significant sick leave policies and have undoubtedly benefited from the pertinent FMLA provisions.

In contrast, expectant parents can usually plan birth- or adoption-related leave in advance, and many employees will rely on unused vacation, sick, or disability leave before resorting to any form of unpaid leave.

III. WHY THE FMLA?

There remains the question of why the FMLA was enacted, and why it was so controversial—generating two presidential vetoes despite its predictably limited effects. President Clinton made an important symbolic gesture when he signed the FMLA as his first legislative act, but nothing about the statute has extended much beyond the symbolic. Most studies focusing on the legislative process try to explain legislation through one of two theories: public choice or public interest. The public choice theory, which has been particularly influential in law over the last two decades (although its influence now seems in decline), concentrates on the influence of small but well-organized interest groups and treats legislators as

42. See U.S. DEP'T OF LAB., BUREAU OF LAB. STATISTICS, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, 1999 SUPPLEMENTARY TABLES, at tbls.1, 3 (2000), available at <http://www.bls.gov/ncs/ebs/sp/ebs0001.pdf>. The government classifies medium and large employers (which I refer to as large) as those with 100 or more employees, while small employers include those having fewer than 100 employees. *Id.* at tbl.1 n.1, tbl.3 n.1. *Id.*

primarily interested in re-election.⁴³ The public interest model, on the other hand, views legislation as designed to promote the public interest, and likewise sees legislators as principally motivated by their desire to influence or shape that public interest.⁴⁴

While both theories offer important insights, they fail to explain much of what we know about the legislative process. Daniel Shaviro has aptly described the theories as “the stick figures of noble public interest and venal public choice.”⁴⁵ He has instead called for a messier conglomeration of the two theories, defining legislation as the product of a combination of competing interests, including reelection, the public interest, maintenance of power and status, and a possible future outside of politics.⁴⁶ This picture of the legislative process is certainly more accurate than is either of the two theories alone, but it is also more difficult to offer as a particular or coherent story, or even to define as a distinct theory. But, in the case of the FMLA, this multiple-motive approach works well to explain why the legislation became such a critical issue in Congress—certainly there was a public interest component to the legislation, one that was likely seen as benefiting working families, a traditionally important Democratic constituency. This legislation, however, did not come without significant costs, given the business community’s staunch opposition. In the context of public choice theory, this should have been an easy case for defeat of the legislation, but instead Congress considered and passed the legislation on three separate occasions. It

43. The seminal work in the area is MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). Within law, the standard reference work has become DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

44. See Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 6 n.16 (1990) (citing literature); Jonathan R. Macey, *Promoting Public Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (discussing and contrasting different approaches).

45. Daniel N. Shaviro, *Exchange on Public Choice*, 57 U. CHI. L. REV. 834, 839 (1990).

46. See Shaviro, *supra* note 44, at 111–23. Shaviro develops his theory in the context of the 1986 tax bill, but much of his analysis is applicable to other areas, as well. I should also note that much of my analysis in this essay is influenced by my experience living in Washington for most of the last fifteen years, as well as my limited involvement on the passage of the Civil Rights Act of 1991. Congress was considering the 1991 Act, which was also vetoed on one occasion, during the same time as the FMLA was being formulated.

may be that the watered-down version of the FMLA that ultimately passed represented a concession to the business community. Still, the business community fought every version of the Act, helping to produce two presidential vetoes, suggesting that whatever concessions Congress had made failed to mollify the business community.⁴⁷ Certainly if one theory must be chosen, the public interest theory better explains the FMLA. In this instance, a diffuse broad coalition of groups representing women and working families was able to override the interests of a well-established, well-organized, and well-funded interest group.

At the same time, the public interest theory would not fully explain the passage of the FMLA, given its many flaws. Almost certainly, the Act was seen as appealing to important constituencies, and in this instance, constituencies that often were not in alignment, given that both women's groups and many conservative-oriented family organizations joined in their support of the Act.⁴⁸ From this perspective, some conservative legislators may have supported the Act to gain the favor of conservative family groups, and in the process may have acquired some support among women as well.

This is obviously a quick overview of complicated issues, but I now want to turn away from the motives of legislators to focus on the interest groups behind the legislation, to understand why they pushed so hard for legislation that they should have known would have such a limited impact. I have already identified two of the asserted rationales for the legislation: (1) something was better than nothing, and (2) the legislation would be an important first step toward more comprehensive legislation (I will refer to this as the "foot in the door" argument). We should accept neither of these arguments at face value, and further analysis will show that neither argument provided a compelling rationale for the legislation. Equally important, many potential downsides to such weak legislation were widely ignored.

47. It has been noted that the threat of a Presidential veto can actually soften opposition to legislation, and this may be what occurred with the FMLA. See JOHN R. WRIGHT, *INTEREST GROUPS AND CONGRESS: LOBBYING, CONTRIBUTIONS, AND INFLUENCE* 65 (1996). It may also be that a Presidential veto strengthened the position of the advocates who may have been as determined to defeat the President as they were to pass the legislation.

48. See ELVING, *supra* note 12, at 108–22 (discussing the mixed coalition that included Republican groups).

I also want to explore a third interest that may help explain why the legislation became so important, which is the aim of interest groups to ensure that legislation passes for which it can claim credit. Indeed, an interest group often has goals that differ from those of its constituents, and that divergence may best explain the passage of the FMLA.

A. “*Something is Better than Nothing*”

Part of the drive to pass the FMLA was the sense that some legislation, as a minimum standard, was essential. It was always less clear, however, precisely *why* this was seen as essential. To the extent that minimum standards legislation would be costless, then it may be difficult to object to the legislation, at least from the perspective of employees. But as I will demonstrate, legislation is never costless, and any analysis must balance the costs against the gains to assess the statute’s importance.

One reason that proponents may have seen minimum standards legislation as necessary was for its symbolic effect, presumably sending a signal that the federal government considered work and family issues to be of critical importance. Another reason might be that minimum standards legislation would prompt employers to implement favorable policies, thus making the statute the “floor” of benefits—employers might then compete for employees by creating more generous policies. In the case of the FMLA, neither reason seemed to offer a persuasive justification, and neither reason was without its cost.

Symbols are certainly important to legislative activities, and there is a rich literature involving the importance of symbolic legislation.⁴⁹

49. See, e.g., Jack Citrin et al., *The “Official English” Movement and the Symbolic Politics of Language in the United States*, 43 W. POL. Q. 535 (1990); Hillard Pouncy, *Terms of Agreement: Evaluating the Theory of Symbolic Politics’ Impact on the Pluralist Research Program*, 32 AM. J. POL. SCI. 781 (1988); MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964) (describing the importance of symbols in politics). Within legal scholarship, the term “symbolic legislation” is typically used pejoratively. See, e.g., Suzanna Sherry, *Haste Makes Waste: Congress and the Common Law in Cyberspace*, 55 VAND. L. REV. 309, 314–15 (2002) (explaining that Congress may pass “easy statutes” when public opposition is negligible and thus neglect long-term problems); Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof-Rules*, 84 IOWA L. REV. 413, 413, 427–

Nevertheless, symbolic legislation typically offers more to the legislators than it does to the intended beneficiaries, and that seems true of the FMLA. According to the legislative advocates, the statute represented an important symbol of government support for working families, but as I have already discussed, that support was far less significant than it appeared, and far less than it should have been. In this way, the symbolic support could be described as deceptive—a way of creating the illusion that the government was committed to family issues without the need for a sincere, and more expensive, commitment. From an advocate’s perspective, symbolism should be a secondary rather than a primary value, and, at a minimum, the message must be accurate rather than misleading. As a result, it seems difficult to identify an important symbolic value to leave legislation that would likely prove of very limited utility to the majority of employees who could not afford to take unpaid family leave.

Rather than as a symbolic message, the symbolic importance of the legislation may have come in a potential spillover effect. Employers with existing leave policies may have felt a need to ratchet up those policies as a way of staying ahead of the market once minimum standards legislation was in place. From this perspective, one might see the legislation as akin to a minimum wage law, which typically pushes up even those wages that lie above the minimum wage. Ultimately, whether this strategy would prove successful is an empirical question, but there is no available evidence to indicate that the statute actually had this effect, nor is there any particular reason to expect such an effect. Unlike wages, which are the primary means employers use to compete for employees, minimum standards legislation governing benefits is less likely to generate competition among employers. We can see this in other minimum standards legislation, such as the overtime provisions of the Fair Labor Standards Act. Few, if any, employers offer more than the statutorily

46 (1999) (describing new tax legislation as a “pernicious exercise in symbolic legislation”); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233 (1990) (explaining, using environmental law as an example, that symbolic legislation distorts the regulatory process).

mandated time-and-a-half benefit for overtime, and in this respect, family leave legislation seems more like overtime than it does minimum wage legislation, in that it does not address the primary benefit most employers offer. This is not to say that a minimum standards law *could not* create competition among employers, but only that it will not necessarily do so.

Minimum standards legislation can also have the opposite effect, and there is some reason to believe that the FMLA has hindered rather than assisted efforts to pass more meaningful legislation, particularly on the state level. In the ten years prior to passage of the FMLA, a dozen states enacted family leave legislation, and another twenty had placed leave legislation on their agenda.⁵⁰ Since the passage of the FMLA, only one state (California) has passed any meaningful leave legislation.⁵¹ To be sure, much of the state legislation under pre-FMLA consideration likely would have replicated what was ultimately enacted, but there was also the possibility that state legislatures would have enacted *more favorable* legislation in response to their local constituencies. This has been true recently with the progressive childcare legislation that was enacted by several states, in part because there is no comprehensive federal program for public support of childcare.⁵² At the same time, the failure of all states to amend their unemployment compensation systems to include provisions for family leave, as advocated by the Clinton administration, may suggest that more progressive state legislation was not likely forthcoming.⁵³ While it is ultimately

50. See Jane Waldfogel, *Family Leave Coverage in the 1990s*, 122 MONTHLY LAB. REV., Oct. 1999, at 13. Of the thirty-four states that had enacted legislation, eleven only applied to public employees, and only twelve offered job-protected leave. *Id.*

51. See Act of Oct. 10, 2003, 2003 Cal. Legis. Serv. 797 (West) (codified in scattered sections of Labor Code, Unemployment Insurance Code). The California law provides for up to six weeks of paid leave through the state disability insurance program. *Id.* For a recent description of the legislation, see Natalie Koss, *The California Family Temporary Disability Insurance Program*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1079 (2003).

52. Minnesota, for example, passed a state-funded, at-home infant childcare program that allows working parents who meet income eligibility requirements to receive subsidies for children under one year old. See MINN. STAT. § 119B.061 (2002). The statute has subsequently been repealed. For a comprehensive discussion of various state initiatives, see NATIONAL CONFERENCE OF STATE LEGISLATURES, MAKING CHILD CARE BETTER: STATE INITIATIVES (1999).

53. See Karen Syma Czapanskiy, *Parents, Children, and Work-First Welfare Reform*:

difficult to know whether the federal legislation actually impeded the development of more progressive state legislation, it is clear that it did not spawn any such legislation.

In addition to stalling activity at the state level, it is also possible that the FMLA limited progress by individual employers. Before the FMLA's passage, approximately forty percent of employees had access to family leave, either by state mandate or more commonly by individual company policies, and the FMLA failed to increase coverage other than by modest percentages.⁵⁴ One of the great ironies of the FMLA is that it largely replicated leave that was already in the marketplace, given that large employers were far more likely to offer leave policies than smaller employers and only large employers are covered by the FMLA.⁵⁵ Once minimum standards legislation is passed it can quite easily become the ceiling, rather than the floor, of benefits. Outside of a few employers who may see these benefits as offering important recruitment tools, most employers will offer what appears to be a standard and reasonable package, and when a federal mandate exists, the standard and reasonable package is likely to mimic the federal standard. Again, this appears to have been the actual effect of the FMLA legislation, as there are no data to suggest that employers are offering more than what the FMLA requires, or more than they were offering before.⁵⁶

Where is the C in TANF?, 61 MD. L. REV. 308, 316 n.30 (2002) (noting that no state had sought to include family leave within unemployment compensation pursuant to federal regulation that granted the option to states).

54. See Waldfogel, *supra* note 50, at 14 tbl.1. Based on data from the National Longitudinal Survey of Youth, the percentage of women reporting maternity leave coverage increased from seventy-six percent in 1990 to seventy-eight percent in 1996. *Id.* at 16 tbl.4. Reports of paternity leave coverage increased from forty-three to fifty-six percent during the same time period. *Id.*

55. See Selmi, *supra* note 28, at 762 (noting that "nearly 90% of full-time employees at large firms had access to disability plans that included coverage for pregnancy").

56. Governmental surveys demonstrate no increase in *paid* maternity leave since the passage of the FMLA. From 1991 to 1997, the percentage of large employers (100 or more employees) that offer paid maternity leave has remained stable at two percent. Waldfogel, *supra* note 50, at 14 tbl.1. During that same period, paid paternity leave has increased from 1 to 2% of employers. *Id.* The only apparent positive effect is that some small employers that are not covered by the FMLA have changed their policies to incorporate FMLA leave, although the changes tend to apply only to women. See *id.* at 18.

B. “The Foot in the Door”

As discussed earlier, the primary rationale offered by legislative advocates was that the FMLA would lead to more progressive legislation in the future, and that it might do this by forging family leave benefits onto the national scene as an expected and important benefit.⁵⁷ This might be one of the more important effects of the legislation, an effect that could initially be labeled as symbolic in nature but with tangible expected changes in the future.⁵⁸ Mandating family leave would ultimately change employee expectations and employer perceptions about the workplace, informing both groups that employees have outside commitments that require accommodation in the workplace. This perceptual change, in turn, might ultimately lead to stronger legislation, including paid leave.

While there does seem to have been a change in perception—family leave has recently received substantially more attention than it had in the past—the hope for incremental legislation had little basis in experience. The history of civil rights law indicates that most legislative amendments have been in response to adverse judicial decisions or unexpected developments in the law or policy.⁵⁹ The Civil Rights Act of 1991,⁶⁰ for example, originated as a response to seven adverse court decisions rendered in the 1980s.⁶¹ Even though some provisions of that law went beyond reversing court decisions, there is little reason to believe that such provisions would have passed without the impetus provided by the Supreme Court’s decisions; indeed, Congress introduced no such legislation until after

57. See *supra* note 23 and text accompanying notes 22–23.

58. Within the social norms literature, symbolic legislation is thought to influence the development of social norms. See, e.g., Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 418–19 (1997).

59. For a classic article on legislation designed to overturn Supreme Court decisions, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991). Title VII was amended in 1972 to apply to state and local governments, but most of the subsequent amendments, as discussed in the text, have been in response to judicial decisions.

60. 42 U.S.C. § 1981 (2000).

61. See Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 606 (1996) (“The intent and purpose of the 1991 Civil Rights Act was to ‘liberalize’ antidiscrimination law as a congressional response to a series of Supreme Court decisions that had narrowed the law severely.”).

the Court's most restrictive decisions were issued in 1989. Likewise, the Age Discrimination in Employment Act of 1967⁶² has been amended on a number of occasions to respond to restrictive judicial interpretations,⁶³ and the same holds true for the Civil Rights Restoration Act of 1987, which was also passed in response to a Supreme Court statutory interpretation,⁶⁴ and the Pregnancy Discrimination Act.⁶⁵

Legislators have rarely amended other employment-related legislation, despite what is widely perceived as a need for substantial change. In substance, the Fair Labor Standards Act⁶⁶ remains largely as it was when it was enacted in 1938, except for periodic minimum wage adjustments. The Employee Retirement Income Security Act⁶⁷ (ERISA) remains virtually unchanged since its passage in 1974, despite the surge in litigation regarding the provisions of the act relating to health benefit plans. This list could continue, but the point should be clear: there was no good reason for FMLA proponents to believe that establishing a baseline for family leave would provide a "foot-in-the-door" toward a more comprehensive and stronger policy.

In fact, quite the opposite may be true. Passing weak legislation when an opportunity presents itself may forestall stronger legislation in the future; many legislators may be reluctant to revisit an issue once it is settled law. Again, that appears to describe the situation with the FMLA—no bill to amend the FMLA has emerged out of a Congressional Committee over the last ten years.⁶⁸ Even discussions

62. 29 U.S.C. §§ 621–34 (2000).

63. See James J. Brudney, *Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response?* 93 MICH. L. REV. 1, 15–16 (1994) (noting that the "principal purpose and effect of the [1990 Amendments] was to override the Court's decision").

64. See 20 U.S.C. § 1687–88, 29 U.S.C. §§ 706, 794; 42 U.S.C. § 2000d–4a; William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 636 (2000) (noting that the statute was intended to overturn the Supreme Court decision in *Grove City College v. Bell*, 465 U.S. 555 (1984)).

65. Pub. L. No. 95–555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2000)); see also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) (noting that the 1978 amendments to Title VII was in response to Supreme Court *Gilbert* decision).

66. Ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–19 (2000)).

67. 93 Pub. L. No. 93–406, 88 Stat. 829 (1974) (codified as amended at 26 U.S.C. §§ 410–11 (2000) and in scattered sections of 29 U.S.C.).

68. See Steven K. Wisendale, *Two Steps Forward, One Step Back: the Family and Medical Leave Act as Retrenchment Policy*, 20 REV. POL'Y RES. 135, 145–48 (2003)

regarding a very modest proposal to amend the statute to allow parents to attend parent-teacher conferences failed to produce any legislative activity.⁶⁹ Again, I do not mean to suggest that the advocates did not believe the FMLA would lead to stronger legislation in the future, only that they had little reason based on past experience to believe that would be a likely result. Whatever belief the advocates actually had might be better classified as a “hope” rather than an expectation.

C. The Interests of Interest Groups

If the stated motives do not fully explain the legislation, then what does? Another, often unacknowledged, reason why such limited legislation would be acceptable to its advocates involves the importance of passing legislation to the advocates themselves. Most of the important players in the push to pass national family leave legislation were Washington public-interest groups, such as the National Women’s Law Center and the Women’s Legal Defense Fund.⁷⁰ Other groups outside of Washington were also involved in the legislative process, but all of the groups shared a core interest in ensuring that legislation passed because of the direct benefits the groups receive because of their role in the process.

All of the groups received widespread publicity for their roles in passing the FMLA, and many of the groups touted their accomplishments as a way of increasing their exposure to donors and other interested parties.⁷¹ This was particularly important for the

(discussing efforts to amend FMLA).

69. On several occasions, President Clinton proposed amending the FMLA to allow parents twenty-four hours of leave to attend functions such as parent-teacher conferences. *See Clinton Steps up Pressure for Family Leaves*, N.Y. TIMES, Apr. 13, 1997, at A27. The efforts never went beyond early discussions.

70. For a list of the groups that participated in the lobbying efforts over the FMLA, see WRIGHT, *supra* note 47, at 63 tbl.3.4.

71. Ten years later, the passage of the FMLA remains prominent among the achievements of these groups. The National Partnership for Women & Families, which is the successor group to the Women’s Legal Defense Fund, devotes a significant portion of its website to its achievements under the FMLA. NAT’L P’SHP FOR WOMEN & FAMILIES, NATIONAL PARTNERSHIP CELEBRATES 10TH ANNIVERSARY OF THE FMLA!, *at* <http://www.nationalpartnership.org> (last visited Apr. 19, 2004) (“The National Partnership for Women & Families conceived, drafted and championed the FMLA during the almost-decade-long fight to make it

women's groups involved with the FMLA, because many of them had sharply reduced, if not eliminated, their litigation efforts by the time the Act was passed. As a result, accomplishments with respect to legislative efforts become important tangible benefits that interest groups could display to their donors, both as a way of justifying past expense and as a way of securing future financial support.

In this respect, the interest groups themselves have interests that are often distinct from the groups that they are purporting to represent, and that instead often mirror the interests of legislators. Most legislative models treat interest groups as a surrogate for defined interests, but many public interest groups differ from the traditional model in that they do not have any clients or even constituents, and instead, they largely establish the interests and preferences of those they purport to represent.⁷² This is true even of those groups with memberships, as it is rare that the membership would establish interests rather than follow the interests articulated by the leadership. Yet, because much of their funding comes from foundations,⁷³ interest groups' loyalties in the legislative process are often divided between creation of an activity that will lead to further or secured funding, and ensuring that the legislation will provide direct benefits to constituents. Often these goals are not in conflict, but when they do conflict, as may have been true with the FMLA, the funding concerns may ultimately prevail due to the essential need for funding to ensure institutional survival.

It is worth emphasizing that the model of representation by public interest groups differs significantly from other traditional lobbying groups, such as trade groups, which directly reflect the interests of a majority of their members. Public interest groups, on the other hand,

law.”).

72. See JEFFREY M. BERRY, *LOBBYING FOR THE PEOPLE* (1977).

73. For example, during fiscal year 2002–03, the National Women's Law Center received seventy-two percent of its funding from foundation grants. See E-Mail from Francis E. Thomas, Vice President of Administration, National Women's Law Center, to Stacy Garrick, author's research assistant (Oct. 24, 2003) (on file with author). In contrast, the National Partnership for Women and Families receives substantially fewer of its funds, approximately thirty percent, from foundations; rather, it obtains the majority of its funding from contributions. See NAT'L P'SHIP FOR WOMEN & FAMILIES, 1999–2000 ANNUAL REPORT 16 (2001). It is important to note that the source of the contributions are not identified, and it is quite likely that some, or perhaps most, come from corporate as opposed to individual sponsors.

more commonly follow the preferences of their leaders, largely under the assumption that those preferences will be in the best interests of the group.⁷⁴ However, as the leaders establish the preferences, the membership is rarely consulted.⁷⁵ The history of the Family and Medical Leave legislation confirms this perspective. Although the legislation's proponents occasionally urged its members to write letters to Congressional representatives in support of the legislation, they never appeared to solicit the views of the members regarding their needs and interests. This was true even for the union lobbyists, who were initially reluctant to go forward with unpaid leave legislation, but who ultimately offered their support because paid leave was seen as an unrealistic option.⁷⁶ There was no indication, however, that the unions ever surveyed their members regarding their need for unpaid leave, nor did the women's groups ever directly consult members or women about the legislation other than with respect to the letter-writing campaigns.

In addition to external concerns regarding funding, interest groups are also interested in preserving their influence and status within Washington. Failure to pass or support legislation may directly affect the lobbyists' influence with legislators in subsequent efforts. If legislative efforts deteriorate late in the process, legislators may feel that their time was wasted or that the lobbyists failed to assess accurately the prospects for successful passage of the legislation, with the likely effect that the lobbyists' credibility would be diminished in the future. This is another way in which pressure to pass legislation develops independent of the merits of the legislation—once legislators become invested in the process it becomes increasingly difficult for the advocates to withdraw their support without risking

74. See Robert H. Salisbury, *Interest Representation: The Dominance of Institutions*, 78 AM. POL. SCI. REV. 64, 66 (1984) ("Quite often group leaders espouse policy positions with only tenuous support from their members, although *severe* discrepancies between leader actions and member wishes are probably rare and generally short-lived.").

75. See SCOTT H. AINSWORTH, ANALYZING INTEREST GROUPS: GROUP INFLUENCE ON PEOPLE AND POLICIES 122–24 (2002) (noting how interests of leaders can differ from preferences of members and how many interest groups are "groups on paper only"); Shaviro, *supra* note 44, at 87–88 (discussing various interests of legislative advocates and their "desire for influence and concern about policy, as well as sheer enjoyment of the political game").

76. See ELVING, *supra* note 12, at 39–40.

future recriminations.⁷⁷ Similarly, a group's status within Washington often derives from its influence among legislators, and this symbiotic relationship may often result in accepting compromises that may not be in the best interests of the ultimate constituents. Compromises along these lines can be easy to justify because a group's enhanced status may lead to important influence on future legislation.

Not only do concerns about funding, influence, and status often determine legislative choices, but other factors compel the parties toward legislation even when the substance of the legislation remains far from the preferred goal. After working toward legislation for several years, it becomes very difficult psychologically to walk away from the process without something tangible in hand. The investment in the process is simply too substantial to leave behind, and as a result, that investment can influence how the lobbyists or advocates view potential legislation, causing them to view the legislation more optimistically while overlooking its flaws.⁷⁸ In many ways, lobbying for legislation resembles the investment process that frequently drives settlements in litigation; but unlike litigation, where a failed settlement leads to a trial, failed legislative efforts often lead to nothing other than the possibility of further efforts in subsequent years. This provides an even stronger incentive for compromise.

This analysis may suggest that interest groups have more power in the legislative process than they actually do, and it is easy to overstate the influence of interest groups, most of which rarely possess the power to ensure passage of legislation. At the same time, groups often *do* have the power to *halt* legislation, and this is particularly true for interest groups that comprise a natural constituency for the legislation. This was plainly the case for the FMLA. It is inconceivable that the congressional sponsors would have gone ahead with the legislation absent the support of women's groups. If those groups had determined that they would only support strong leave legislation, which would have presumably included paid

77. In Washington, these future recriminations may extend beyond work for the immediate group, as it is common that lobbyists move to different organizations and often rely on Congress and its world of contacts to make those moves.

78. This is certainly not a psychological phenomenon limited to lobbyists or litigators. For a recent book on the many ways we adaptive to our conditions, see TIMOTHY D. WILSON, *STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS* (2002).

leave, the FMLA as enacted would never have come to pass. The business opposition was too substantial and, without the support of women's groups, the legislators would have had no electoral payoff for passing a leave bill while facing significant costs from the business community. This is, of course, quite different from suggesting that the interest groups had the power to enact a paid leave law—they clearly did not. As such, the choice was either a weak law, or else no law at all; the advocacy groups chose to support the weak law.

I should add one final note, which is that I do not mean to criticize or blame the advocates for the limitations of the FMLA. Rather, what I mean to suggest is that the process surrounding the FMLA is part of the legislative process—it is part of what is to be expected, part of the ways in which legislation is enacted, and the distinct motivations of interests groups can often offer important insights into the limitations that emerge from legislation.

IV. CONCLUDING THOUGHTS

The FMLA presents an interesting case study in what can be labeled unintended but predictable consequences of legislation. The intent of the legislation was noble: to provide a minimum standard for parents to care for a new child or a sick person under their care. At the same time, what was offered was simply too little to be anything more than symbolic. Instead, the law may have limited the possibilities of stronger legislation in the future while creating a cottage industry of litigation regarding when one's own illness rises to the level of a "serious illness" covered by the statute. I do not mean to suggest that the law has been without any beneficial effects, or that it should be repealed. As noted earlier, many low-income workers have gained an important safety net that allows for the preservation of their jobs in the case of serious illness or a new child. That safety net likely proves critical for many families every day. Family leave issues have also gained in importance over the last decade, and it is quite likely that the FMLA has increased public awareness, though that awareness has not been matched by significant legislative aid.

In the end, whether the FMLA was worth the costs is a difficult question to answer. Nevertheless, it seems clear that neither the advocates nor the legislative sponsors took that question seriously. As a result we are left with leave legislation that remains among the weakest of any nation in the world, without any serious prospects for change.