NEW FATHERS, OLD RIGHTS: HOW THE MASSACHUSETTS MATERNITY LEAVE ACT DISCRIMINATES AGAINST MEN

AYELET R. WEISS*

I. INTRODUCTION

Congressman Jared Polis, a Democrat from Boulder, Colorado, took three weeks paternity leave in October 2011 to care for his newborn son.[1] The *New York Times* speculated that this act "might have been the first paternity leave for a gay member of Congress."[2] In Massachusetts, where same-sex marriage has been legal for nearly a decade, many same-sex fathers, unlike the Congressman, lack the right to take paternity leave. The Massachusetts Maternity Leave

* Boston University School of Law, J.D., 2013; Harvard University, A.B., 2008.

[1] Jennifer Steinhauer, *Congressional Voting Records Show Few With Perfect Attendance*, N.Y. TIMES (Oct. 31, 2011), http://www.nytimes.com/2011/11/01/us/politics/congress-voting-records-show-few-with-perfect-attendance.html; *see also* Jessica Brady, *Gays Look to New Generation of Leaders*, ROLL CALL (Nov. 29, 2011), http://www.rollcall.com/issues/57_66/Gays-Look-to-New-Generation-of-Leaders-210628-1.html?zkMobileView=true; Allison Sherry, *Two Colorado Congressmen Juggling Late-Night Votes and Late-Night Feedings*, DENVER POST (Nov. 27, 2011), http://www.denverpost.com/search/ci_19419101.

[2] Steinhauer, *supra* note 1.

Act ("MMLA") explicitly excludes male employees from its coverage.[3] Although the MMLA excludes both heterosexual and homosexual fathers, the MMLA has the distinctive effect on male same-sex couples of precluding *both* parents of a newly born or adopted child from taking parental leave.[4] The legal recognition of the rights of same-sex couples has provided an impetus for a broad reexamination of gender norms in the law.[5] Consideration of the MMLA as applied to same-sex couples reveals the legal endorsement of traditional gender roles, a feature which often goes unnoticed in the more familiar context of heterosexual parenting.[6]

The MMLA discriminates against men by denying them parental leave benefits.[7] The MMLA guarantees up to eight weeks of unpaid maternity leave to qualified female employees upon the birth or adoption of a child.[8] The MMLA provides no parental leave benefits to men,[9] and Massachusetts has no other statute providing parental leave benefits to men.[10] Although not all states have parental leave statutes,[11] Massachusetts currently remains the only state with a parental leave statute that provides greater parental leave benefits to women than men without explicitly conditioning the extra leave available to women on the woman having a childbirth-related medical condition or disability that requires her absence from work.[12] Although two states initially provided greater childcare-related parental leave benefits to women than to men,[13] both of these

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[3] MASS. GEN. LAWS ch. 149, § 105D (2012).

[4] *See* David E. Frank, *Massachusetts Men Now Eligible for Maternity Benefits,* MASS. LAW. WKLY., June 9, 2008, *available at* http://www.masslawyersweekly.com/index.cfm.

[5] Todd Brower, *It's Not Just Shopping, Urban Lofts, and the Lesbian Gay-by Boom: How Sexual Orientation Demographics Can Inform Family Courts,* 17 AM. U. J. GENDER SOC. POL'Y & L. 1, 37 (2009).

[6] *Id.* at 37-38.

[7] *See* MASS. GEN. LAWS ch. 149, § 105D.

[8] *Id.*

[9] *See id.*

[10] *See* 57 MASS. PRACTICE *Construction Law* §10:90 (2010).

[11] Twenty-six states lack parental leave statutes. *See Expecting Better: A State by State Analysis of Parental Leave Programs,* NAT'L P'SHIP FOR WOMEN & FAM. (2005) (providing a comprehensive survey of state parental leave policies). Four states have significantly changed their parental leave statutes subsequent to the publication of this study. *See* ARK. CODE. ANN. § 9-9-105 (Supp. 2012); N.J. STAT. ANN. §§ 43:21-25 – 54A:6-31 (West 2010); TENN. CODE ANN. § 4-21-408 (2011); WASH. REV. CODE §§ 49.78.010 –.904 (2010).

[12] *See* sources cited *supra* note 11 and accompanying text.

[13] Vermont and Tennessee initially provided greater parental leave benefits to women than to men without conditioning the disparity on a childbirth-related medical condition or disability. *See* TENN. CODE ANN. § 50-1-501 (1987) (amended 1988, 2005) (providing four months of leave exclusively to female employees upon the birth or adoption of a child); VT. STAT. ANN. tit. 21, § 472 (1989) (amended 1992) (providing twelve weeks of leave exclusively to female employees upon the birth or adoption of a child).

states, unlike Massachusetts, have since amended their parental leave statutes.[14]

The MMLA raises significant concerns under state and federal constitutional and statutory anti-discrimination provisions. Courts and administrative agencies have consistently distinguished between parental leave policies that focus on promoting recovery from childbirth and parental leave policies that focus on facilitating parental childcare.[15] The former may provide greater benefits to women than to men without unlawfully discriminating on the basis of sex because only women can physically give birth to a child.[16] However, the latter violates anti-discrimination laws because men and women are equally capable of providing childcare.[17]

This Note will argue that the MMLA unlawfully discriminates against men because it provides unequal benefits to men and women, and its purpose is to facilitate parental childcare rather than to promote maternal health. The adoption provision of the MMLA, by definition, exclusively pertains to childcare and therefore would be struck down if challenged.[18] Although the birth provision of the MMLA ostensibly relates to childbirth, a close analysis reveals an underlying purpose of childcare.[19] Furthermore, the birth provision is not sufficiently narrowly tailored to survive the requisite level of scrutiny.[20] In addition, the MMLA could be challenged as sexual-orientation discrimination or as impinging on the fundamental right to parenting. Moreover, strong policy considerations favor amending the MMLA to provide broad parental leave benefits in a gender-neutral fashion.

The Massachusetts state legislature came very close to amending the MMLA during each of its two previous legislative sessions, but both attempts ultimately failed.[21] Given the discriminatory nature of the MMLA in its current form,

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[14] *See* 2005 Tenn. Pub. Acts ch. 224 (codified at TENN. CODE ANN. § 4-21-408 (2011)); 1992 Vt. Acts & Resolves 260 (codified at VT. STAT. ANN. tit. 21, § 470-74 (2009)).

[15] Johnson v. Univ. of Iowa, 431 F.3d 325, 328 (8th Cir. 2005) ("If the leave given to biological mothers is granted due to the physical trauma they sustain giving birth, then it is conferred for a valid reason wholly separate from gender. If the leave is instead designed to provide time to care for, and bond with, a newborn, then there is no legitimate reason for biological fathers to be denied the same benefit. Thus, the primary question for us to consider is whether the leave given to biological mothers is in fact disability leave"); *see also* Schafer v. Bd. of Pub. Educ., 903 F.2d 243, 248 (3d Cir. 1990); Danielson v. Bd. of Higher Ed., 358 F. Supp. 22, 27-28 (S.D.N.Y. 1972); Chavkin v. Santaella, 439 N.Y.S.2d 654, 657 (N.Y. App. Div. 1981); EEOC, POLICY GUIDANCE ON PARENTAL LEAVE (1990) [hereinafter EEOC GUIDANCE]; The Maternity Leave Act, Tenn. Op. Att'y Gen. 87-193 (1987) [hereinafter 1987 Opinion].

[16] *See* sources cited *supra* note 15.

[17] *See* sources cited *supra* note 15.

[18] *See* MASS. GEN. LAWS ch. 149, § 105D (2012).

[19] *See id.*

[20] *See id.*

[21] *See* S. 2247, 187th Gen. Ct. (Mass. 2012); S. 44, 186th Gen. Ct. (Mass. 2009). S. 2247 underwent a second reading in the Senate, after which it was sent back to the committee on

the Massachusetts legislature should persist until it succeeds in amending the MMLA to cover men as well as women.

II. LEGAL BACKGROUND

A. *An Overview of the MMLA and Its Legislative History*

The MMLA was passed by the Massachusetts legislature in 1972.[22] At the time of the passage of the MMLA, Massachusetts had a law in effect prohibiting women from working for the four weeks prior and the four weeks subsequent to giving birth.[23] Several states had similar mandatory maternity leave provisions, which forbade women from working shortly before and after childbirth.[24] In the wake of the Civil Rights Act of 1964, courts repeatedly struck down statutes aimed at protecting women, where the statute had the unintended effect of disadvantaging women.[25] This line of cases cast doubt on the enduring validity of mandatory maternity leave provisions under Title VII of the Act.[26] In 1971, The Massachusetts Attorney General expressed the position that the state's mandatory maternity leave law conflicted with Title VII,[27] but the law was not repealed until 1974.[28]

The MMLA was the first state statute to resolve the Title VII conflict by providing female employees with an entitlement to an optional maternity leave.[29] This solution empowered women with the choice of whether or not to

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Senate Ethics and Rules, where it expired at the end of the legislative session in January 2013. S. 44 passed in the Senate but never made it out of committee in the House. Accordingly, the bill expired when the legislative session ended in January 2011.

[22] 1972 Mass. Acts 770 (codified as amended at MASS. GEN. LAWS ch. 149, § 105D (2012)).

[23] MASS. GEN. LAWS ch. 149, § 55 (1972) (repealed 1974).

[24] As of 1971, Connecticut, Missouri, New York, Washington, and Puerto Rico had mandatory maternity leave provisions. Elizabeth Duncan Koontz, *Childbirth and Childrearing Leave: Job-Related Benefits*, 17 N.Y. LAW FORUM 480, 482 (1971). Vermont previously had a mandatory maternity leave statute that the state legislature repealed in 1970. *Id.* at 483.

[25] *See, e.g.*, Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969) (rejecting the argument that Title VII could not be violated by "reasonable state protective legislation [that] prevented women from occupying certain positions."); *see also* 1971 Mass. Op. Att'y Gen. 34 (listing post–Title VII cases concerning protective legislation for women).

[26] *See* Mass. Op. Att'y Gen. 34 (1971) (evaluating the validity of Massachusetts' mandatory maternity leave provision in light of post–Title VII judicial precedent concerning protective legislation for women). Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of sex. 42 U.S.C. § 2000e-2(a)(1) (2006).

[27] 1971 Mass. Op. Att'y Gen. Rep. 34 (1971). *But see* Mass. Op. Att'y Gen. 13 (1970) (expressing the view, later retracted, that mandatory maternity leave provisions do not conflict with Title VII).

[28] 1974 Mass. Acts 227.

[29] *See* Memorandum from the Mass. Law Reform Inst. to the Office of the Governor

take maternity leave without discriminating against them by barring them from work of which they were capable.[30] Critics of the MMLA feared that optional maternity leave would pose the same Title VII problem as mandatory maternity leave.[31] However, proponents of the MMLA addressed this concern by explaining that optional leave, unlike mandatory leave, does not disadvantage working women.[32] Thus, the Title VII concern that informed the MMLA's drafting and passage was whether optional maternity leave provisions share the discriminatory characteristics of mandatory maternity leave provisions.[33] The record of the MMLA's inception conspicuously lacks any mention of the more modern Title VII concern that the MMLA discriminates against men by excluding them from its coverage.[34]

The MMLA as originally passed in 1972 provided benefits to qualified female employees for childbirth only; the statute as originally passed made no mention of adoption.[35] A prior draft of the MMLA would have entitled women to eight weeks of maternity leave, with the possibility of another twenty-two weeks of extended leave.[36] The Committee on Commerce and Labor, however, adopted a draft that lacked the extended leave provision.[37] In 1984, the Massachusetts legislature amended the MMLA to expand its coverage to include an eight-week period of leave upon the adoption of a child under the age of three.[38] The Massachusetts Secretary of Labor proposed an alternate version of the amendment that would have extended the MMLA's coverage "to single adoptive male parents,"[39] but the amendment as passed applies only to female

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(1972) [hereinafter MLRI Memo] *available at* the Massachusetts State Archives (arguing for the passage of the MMLA, referencing judicial opinions striking down mandatory maternity leave policies, and describing the MMLA as "the first of its kind in the country").

[30] *See* Mass. Op. Att'y Gen. 34 (1971); MLRI Memo, *supra* note 29.

[31] *See* Memorandum from Henry Weaver to Jack Delaney, Assistant Legislative Secretary to the Governor (July 18, 1972) [hereinafter Weaver Memo] *available at* the Massachusetts State Archives (referencing the opinion of the Massachusetts Attorney General that mandatory maternity leave provisions violate Title VII and expressing the opinion that the MMLA would similarly violate Title VII).

[32] *See* MLRI Memo, *supra* note 29 (referencing guidelines published by the Equal Employment Opportunity Commission and expressing the view that the MMLA complies with these guidelines).

[33] *See* Mass. Op. Att'y Gen. 34 (1971); Weaver Memo, *supra* note 31; MLRI Memo, *supra* note 29.

[34] *See* Mass. Op. Att'y Gen. 34 (1971); Weaver Memo, *supra* note 31; MLRI Memo, *supra* note 29.

[35] MASS. GEN. LAWS ch. 149, § 105D (1982) (amended 1984, 1989).

[36] S. 230, 167th Gen. Ct. (Mass. 1972).

[37] S. 1220, 167th Gen. Ct. (Mass. 1972).

[38] 1984 Mass. Acts 900.

[39] Letter from Paul J. Eustace, Mass. Sec'y of Labor, to Richard Kendall, Dir., Governor's Legislative Office, (Dec. 19, 1984) [hereinafter Eustace letter] *available at* the Massachusetts State Archives.

parents.[40] In 1989, the Massachusetts legislature amended the MMLA for a second time, further expanding its adoption provision.[41] The 1989 amendment added a provision granting eight weeks of leave to female employees for the adoption of a child under the age of eighteen or a disabled child under the age of twenty-three.[42] There does not appear to have been any discussion at the time of extending the MMLA to cover men.[43]

The MMLA in its current form provides certain benefits related to job security to "[a] female employee . . . who is absent from [her] employment for a period not exceeding eight weeks for the purpose of giving birth or for adopting a child under the age of eighteen or for adopting a child under the age of twenty-three if the child is mentally or physically disabled."[44] The MMLA applies only to an employee who has completed an initial or probationary period of employment,[45] who is employed by an employer with six or more employees[46] and who has provided notice to her employer of her intention to take maternity leave at least two weeks in advance.[47] The MMLA provides a qualified female employee with robust job protection, including restoration upon return from leave "to her previous, or a similar, position with the same status, pay, length of service credit and seniority, wherever applicable, as of the date of her leave."[48]

The MMLA's benefits and scope of coverage rank in the middle when compared with parental leave provisions in other states.[49] Twelve states provide parental leave benefits to qualified employees regardless of gender upon the

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[40] 1984 Mass. Acts 900.

[41] 1989 Mass. Acts 642-43.

[42] *Id.*

[43] The Massachusetts State Archives contain no documentation of any discussion surrounding the passage of this amendment. Generally, "[t]here is comparatively little recorded legislative history in Massachusetts." *Massachusetts Legislative History*, STATE LIBRARY OF MASS., 13 (Mar. 29, 2002), http://archives.lib.state.ma.us/bitstream/handle/2452/35648/massachusettslegislativehistory.doc?sequence=1.

[44] MASS. GEN. LAWS ch. 149, § 105D (2012).

[45] *Id.* (defining the scope of the statute as limited to an employee "who has completed the initial probationary period set by the terms of her employment or, if there is no such probationary period, has been employed by the same employer for at least three consecutive months as a full-time employee"); *see also* 804 MASS. CODE REGS. 8.01(2) (2011) (defining "initial probationary period" as used in Chapter 151B as "the period of time not exceeding six calendar months set by an employer to establish initial suitability of an employee to perform a job notwithstanding the fact that the actual period required to attain tenure and other employment benefits may be longer").

[46] MASS. GEN. LAWS ch. 149, § 105D ("For the purposes of this section, an 'employer' shall be defined as in subsection 5 of section one of chapter one hundred and fifty-one B."); *see also* MASS. GEN. LAWS ch. 151B, § 1(5) (2012).

[47] MASS. GEN. LAWS ch. 149, § 105D.

[48] *Id.*

[49] See sources cited *supra* note 11 and accompanying text.

birth or adoption of a child.[50] Of these twelve states, two states provide paid leave,[51] whereas the other ten states provide only unpaid leave.[52] One state provides parental leave benefits only to adoptive parents.[53] Several states provide parental leave to women for the duration of any childbirth-related disability.[54] The length of the period of leave varies widely by state,[55] as do the qualifications for covered employers.[56]

In January 2009, Massachusetts State Senator Brian Joyce introduced a bill to amend the MMLA to cover men as well as women.[57] On April 15, 2010, the State Senate passed a substantially similar redrafted version of the bill, but the bill subsequently died in the House Committee on Ways and Means.[58] On the

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[50] The twelve states are California, Connecticut, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Tennessee, Vermont, Washington and Wisconsin. CAL. GOV'T CODE § 12945.2 (West 2012); CONN. GEN. STAT. § 31-51kk (2009); HAW. REV. STAT. § 398-3 (Supp. 2011); ME. REV. STAT. tit. 26 §§ 843–48 (2007); MINN. STAT. § 181.941 (2006); N.J. STAT. ANN. §§ 43:21-25 – 54A:6-31 (2010); OR. REV. STAT. § 51.659A (Supp. 2011); R.I. GEN. LAWS § 28-48-2 (Supp. 2011); TENN. CODE ANN. § 4-21-408 (2011); VT. STAT. ANN. tit. 21, § 472 (2009); WASH. REV. CODE §§ 49.78.010 – 904 (Supp. 2012); WISC. STAT. § 103.10 (Supp. 2012).

[51] The two states are California and New Jersey. CAL. UNEMP. INS. CODE § 3300-3306 (West Supp. 2011); N.J. STAT. ANN. §§ 43:21-25 – 54A:6-31 (West 2010). In 2011, Washington enacted a paid parental leave statute that goes into effect in 2015. WASH. REV. CODE §§ 49.86.030–904 (Supp. 2012).

[52] The ten states are Connecticut, Hawaii, Maine, Minnesota, Oregon, Rhode Island, Tennessee, Vermont, Washington and Wisconsin. CONN. GEN. STAT. § 31-51kk (2009); HAW. REV. STAT. § 398-3 (Supp. 2011); ME. REV. STAT. tit. 26 §§ 843–848 (2007); MINN. STAT. § 181.941 (2006); OR. REV. STAT. § 51.659A (Supp. 2011); R.I. GEN. LAWS § 28-48-2 (Supp. 2011); TENN. CODE ANN. § 4-21-408 (2011); VT. STAT. ANN. tit. 21, § 472 (2009); WASH. REV. CODE §§ 49.78.010 – 904 (Supp. 2012); WISC. STAT. § 103.10 (Supp. 2012). In 2011, Washington enacted a paid parental leave statute that goes into effect in 2015. WASH. REV. CODE § 49.86.030 (Supp. 2012).

[53] Kentucky provides up to six weeks of leave to all employees upon the adoption of a child. KY. REV. STAT. ANN. § 337.015 (West 2010).

[54] Several states have chosen to single out childbirth-related disabilities for greater statutory protection than other disabling conditions. *See, e.g.*, IOWA CODE § 216.6(2)(e) (2009); LA. REV. STAT. ANN. 23:342 (Supp. 2012); N.H. REV. STAT. ANN. § 354-A:7 (2009). Additionally, two states have family/medical leave provisions that allow female employees to take disability leave and childcare leave sequentially, thereby doubling the length of the period of leave potentially available. OR. REV. STAT. § 51.695A.162 (Supp. 2011); WASH. REV. CODE § 49.78.010 – 904 (Supp. 2012).

[55] *Compare* HAW. REV. STAT. § 398-3 (Supp. 2011) (four weeks parental leave), *with* TENN. CODE ANN. § 4-21-408 (2011) (four months parental leave).

[56] *Compare* VT. STAT. ANN. tit. 21, § 472 (2009) (covering employers with ten or more employees), *with* TENN. CODE ANN. § 4-21-408 (2011) (covering employers with one hundred or more employees).

[57] S. 44, 186th Gen. Ct. (Mass. 2009).

[58] S. 2381, 186th Gen. Ct. (Mass. 2010).

day of the bill's passage in the Senate, Senator Joyce explained the significance of the bill by stating "[w]e have accepted same sex marriage"[59] and giving the example of two men adopting a child together, neither of whom would be eligible for leave under the current version of the MMLA.[60] Senator Joyce explained that the proposed amendment would correct this deficiency and ensure that all qualified employees could take parental leave, regardless of gender.[61]

In January of 2011, three bills were filed to amend the MMLA to be gender neutral, two in the Senate and one in the House; however, all three bills expired at the end of the legislative session in January 2013.[62] One of the Senate bills was among dozens heard at a public hearing on January 17, 2012, but this bill was never reported on by the Joint Committee on Children, Families and Persons with Disabilities.[63] The bill filed in the House and the second bill filed in the Senate, both entitled "An Act Clarifying Parental Rights to Unpaid Leave," were referred to the Joint Committee on Labor and Workforce Development.[64] This pair of bills was among many on the agenda of a public hearing that was held on July 14, 2011,[65] but the bills were hardly mentioned at the public hearing.[66] On March 21, 2012, the Joint Committee recommended both bills favorably[67] and referred one of the bills to the Senate Committee on Ways and Means.[68] On April 19, 2012, the Senate Committee substituted a new draft of the bill, entitled "An Act Relative to Parental Leave."[69] Notably, the redrafted bill contained an offset provision whereby "any 2 employees of the same employer shall only be entitled to 8 weeks of parental leave in aggregate for the birth or adoption of the same child."[70] On May 8, 2012, the redrafted bill underwent a second reading in the Senate and was recommitted to the Committee on Senate Ethics and Rules, where it remained at the end of the legislative session.[71]

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[59] *Senate Session*, STATE HOUSE NEWS SERVICE (Apr. 15, 2010), http://67.154.101.181/cgi/as_web.exe?2010.ask+D+4067854.

[60] *Id.*

[61] *Id.*

[62] *See* H. 1409, 187th Gen. Ct. (Mass. 2011); S. 1863, 187th Gen. Ct. (Mass. 2011); S. 48, 187th Gen. Ct. (Mass. 2011).

[63] *See* S. 48, 187th Gen. Ct. (Mass. 2011).

[64] *See* H. 1409, 187th Gen. Ct. (Mass. 2011); S. 1863, 187th Gen. Ct. (Mass. 2011).

[65] *Joint Committee on Labor and Workforce Development - Hearing #3*, 187th Gen. Ct. (2011). A video recording of the hearing is available at http://www.malegislature.gov/Events/EventDetail?eventId=203&eventDataSource=Hearings.

[66] *Id.*

[67] *See* H. 1409, 187th Gen. Ct. (Mass. 2011); S. 1863, 187th Gen. Ct. (Mass. 2011).

[68] *See* S. 1863, 187th Gen. Ct. (Mass. 2011).

[69] *See* S. 2247, 187th Gen. Ct. (Mass. 2012).

[70] *Id.*

[71] *See id.*; S. 1863, 187th Gen. Ct. (Mass. 2011).

B. *The Relevance of the MMLA Subsequent to the Adoption of the FMLA*

In 1993, twenty-one years after Massachusetts adopted the MMLA, Congress passed the Family and Medical Leave Act ("FMLA").[72] The FMLA guarantees qualified employees unpaid leave for any of the following five purposes: the birth of a child, the adoption of a child, an employee's ill-health, an employee's need to care for an ill relative, and an employee's need to respond to an exigency caused by the military service of the employee's relative.[73] The FMLA explicitly states that its provisions do not "supersede any provision of any State or local law that provides greater family or medical leave rights."[74] Nonetheless, the FMLA largely superseded the MMLA by providing parental leave benefits that are broader in three respects.[75] First, the FMLA provides twelve weeks of leave compared with the MMLA's eight weeks of leave.[76] In addition, the FMLA covers both male and female employees,[77] whereas the MMLA covers only female employees.[78] Finally, under the FMLA an employee can take parental leave within one year from the date of the birth or adoption of his or her child.[79] By contrast, leave under the MMLA may not be taken "substantially earlier or substantially later" than the birth or adoption of the employee's child.[80] Thus, Massachusetts employees generally are entitled to broader parental leave benefits under the FMLA than under the MMLA.[81]

However, the FMLA did not entirely supersede the MMLA for several reasons. Most significantly, many Massachusetts employers are covered by the MMLA but not by the FMLA.[82] When Congress passed the FMLA in 1993, the FMLA failed to cover 94% of Massachusetts businesses.[83] The FMLA excludes employers with fewer than fifty employees, whereas the MMLA applies to employers who employ at least six employees.[84] Thus, employees of employers who employ between six and forty-nine employees are covered by the

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[72] Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601-2654 (2006).

[73] 29 U.S.C. § 2612(a)(1).

[74] *Id.* § 2651(b).

[75] *Compare* 29 U.S.C. §§ 2611-2612, *with* MASS. GEN. LAWS ch. 149, § 105D (2012).

[76] *Compare* 29 U.S.C. § 2612(a)(1), *with* MASS. GEN. LAWS ch. 149, § 105D.

[77] *See* 29 U.S.C. §§ 2611(2)(A), 2612(a)(1).

[78] MASS. GEN. LAWS ch. 149, § 105D.

[79] 29 U.S.C. § 2612(a)(2).

[80] MASS. COMM'N AGAINST DISCRIMINATION, *Maternity Leave Act* (2007), http://www.mass.gov/mcad/maternity3.html#11.

[81] *Compare* 29 U.S.C. §§ 2611-2612, *with* MASS. GEN. LAWS ch. 149, § 105D.

[82] *Compare* 29 U.S.C. § 2612(a)(1), *with* MASS. GEN. LAWS ch. 149, § 105D.

[83] JILLIAN P. DICKERT, UNIV. OF MASS. BOSTON, MAKING FAMILY LEAVE MORE AFFORDABLE IN MASSACHUSETTS: THE TEMPORARY DISABILITY INSURANCE MODEL 6 (1999).

[84] *Compare* 29 U.S.C. § 2611(2)(B)(ii), (4)(A)(i), *with* MASS. GEN. LAWS ch. 151B, § 1(5) (2012).

MMLA but not by the FMLA.[85] Currently, over 788,000 Massachusetts employees work for employers who employ between ten and forty-nine employees.[86] The FMLA does not cover these employees, but the MMLA does if they are otherwise qualified.

In addition, the MMLA covers employees who have completed an agreed-upon probationary period, or a period of three consecutive months of full-time employment in the absence of an agreed-upon probationary period.[87] By contrast, the FMLA covers only employees who have worked for their employers for at least twelve months and for at least 1,250 hours during the year immediately preceding the requested leave.[88] Thus, an employee in Massachusetts would be entitled to benefits under the MMLA after a shorter period of employment than under the FMLA.[89] The MMLA also contains a more generous notice provision than the FMLA.[90] The MMLA requires only two weeks' notice,[91] as opposed to the FMLA, which generally requires thirty days' notice.[92]

Furthermore, in certain circumstances, employees who qualify for coverage under both the FMLA and the MMLA may receive greater benefits under the MMLA than under the FMLA. The FMLA restricts the total amount of leave taken by an employee under any of its provisions to twelve weeks in a twelve-month period.[93] Therefore, a qualified employee who has recently taken over four weeks of leave under the FMLA for a non-parenting related purpose, for example to care for an ill relative, would be entitled to greater leave under the MMLA than under the FMLA.[94] Likewise, under the FMLA an employee can take no more than twelve weeks of leave in a twelve-month period for parenting purposes, whereas the MMLA provides eight weeks of leave per child.[95] Therefore, a qualified employee who adopts more than one child within a twelve-month period would be entitled to greater leave under the MMLA than

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[85] *Compare* 29 U.S.C. § 2611(2)(B)(ii), (4)(A)(i), *with* MASS. GEN. LAWS ch. 151B, § 1(5).

[86] MASS. EXEC. OFFICE OF LABOR & WORKFORCE DEV., LABOR MARKET INFORMATION: ESTABLISHMENTS AND EMPLOYMENT BY SIZE (2011), http://lmi2.detma.org/lmi/sizeclass.asp (reporting data regarding employers subject to state and federal unemployment laws). Additionally, over 223,000 Massachusetts employees work for employers who employ between five and nine employees. *Id.* The MMLA, but not the FMLA, would cover many, if not most, of these employees as well. *Compare* 29 U.S.C. § 2611(4)(A)(i), *with* MASS. GEN. LAWS ch. 151B, § 1(5).

[87] MASS. GEN. LAWS ch. 149, § 105D. *See also* 804 MASS. CODE REGS. 8.01(2) (2011).

[88] 29 U.S.C. § 2611(2)(A).

[89] *Compare* 29 U.S.C. § 2611(2)(A), *with* MASS. GEN. LAWS ch. 149, § 105D.

[90] *Compare* 29 U.S.C. § 2612(e)(1), *with* MASS. GEN. LAWS ch. 149, § 105D.

[91] MASS. GEN. LAWS ch. 149, § 105D.

[92] 29 U.S.C. § 2612(e)(1).

[93] 29 U.S.C. § 2612(a)(1).

[94] *Compare* 29 U.S.C. § 2612(a)(1), *with* MASS. GEN. LAWS ch. 149, § 105D.

[95] *Compare* 29 U.S.C. § 2612(a)(1), *with* MASS. GEN. LAWS ch. 149, § 105D.

under the FMLA.[96] Similarly, the Massachusetts Commission Against Discrimination ("MCAD") has interpreted the MMLA to guarantee qualified employees sixteen weeks of leave for the birth of twins.[97] The FMLA also permits an employer to limit the aggregate amount of parenting leave available to a husband and wife who are employed by the same employer.[98] Therefore, a woman who works for the same employer as her husband would be entitled to greater leave under the MMLA than under the FMLA if her husband has recently taken parenting leave under the FMLA.[99]

Thus, many female employees in Massachusetts are entitled to more generous parental leave benefits under the MMLA than under the FMLA.[100] This includes female employees who are entitled to parental leave exclusively under the MMLA, as well as female employees who are entitled to parental leave benefits under both the MMLA and the FMLA but who receive broader benefits under the MMLA because of their particular circumstances.[101] Well over 38,000 employers are covered by the MMLA but not by the FMLA.[102] Thus,

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[96] *Compare* 29 U.S.C. § 2612(a)(1), *with* MASS. GEN. LAWS ch. 149, § 105D.

[97] *Maternity Leave Act*, MASS. COMM'N AGAINST DISCRIMINATION, *Maternity Leave Act* (2007), http://www.mass.gov/mcad/maternity3.html#11 (stating that a mother of twins is entitled to sixteen weeks of leave). *But see* Kochis v. Mass. Dep't of Soc. Serv., Docket No. 02-SEM-04100 (Sep. 13, 2010), http://www.mass.gov/mcad/documents/Ann%20Kochis%20vs%20MA%20Dept%20of%20Social%20Services.pdf (declining to reach the question of the length of leave for the birth of twins but referencing the MCAD guidelines and cautioning that although the "guidelines are entitled to substantial deference, they do not carry the force of law," and that "this particular Guideline has not been reviewed by the state's appellate courts, nor has a decision on the legal issue it presents been rendered").

[98] The FMLA provides that "[i]n any case in which a husband and wife entitled to leave [to care for a newly born or adopted child] are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period." 29 U.S.C. § 2612(f)(1). However, Chapter 151B's ban on sexual orientation discrimination could preclude Massachusetts employers from taking advantage of the FMLA's offset provision because the FMLA permits an offset for married opposite-sex couples but not for married same-sex couples, thereby disadvantaging opposite-sex couples based upon their sexual orientation. *See* MASS. GEN. LAWS ch. 151B, § 4(1) (2012).

[99] *Compare* 29 U.S.C. § 2612(f)(1), *with* MASS. GEN. LAWS ch. 149, § 105D. *But see* S. 2247, 187th Gen. Ct. (Mass. 2012) (proposing an amendment to the MMLA including an offset provision akin to that of the FMLA).

[100] *Compare* 29 U.S.C. §§ 2611-2612, *with* MASS. GEN. LAWS ch. 149, § 105D.

[101] *Compare* 29 U.S.C. §§ 2611-2612, *with* MASS. GEN. LAWS ch. 149, § 105D.

[102] MASS. EXEC. OFFICE OF LABOR & WORKFORCE DEV., *supra* note 86 (reporting that 38,553 employers in Massachusetts have ten to forty-nine employees). Thirty-eight thousand is likely a low estimate of the number of employers covered by the MMLA but not the FMLA because it excludes employers with six to nine employees. Additionally, the figure excludes all employers not subject to state or federal unemployment laws. *See id.* Although the figure presumably includes employers that the MMLA excludes from coverage because

the MMLA remains an important source of benefits for Massachusetts employees despite the passage of the FMLA.

C. *Four Sources of Legal Conflict with the MMLA*

The MMLA raises sex-discrimination concerns under state and federal, statutory and constitutional anti-discrimination provisions. A constitutional analysis of the MMLA poses the question of whether Massachusetts can constitutionally maintain and enforce the MMLA in light of its discriminatory implications.[103] The two constitutional provisions implicated by the MMLA are the Equal Protection Clause of the Fourteenth Amendment and the Massachusetts Equal Rights Amendment ("Mass. ERA"). By contrast, a statutory analysis of the MMLA poses the question of whether a private employer, who complies with the MMLA, nonetheless violates anti-discrimination statutes by providing no more than the parental leave benefits mandated by the MMLA.[104] The two statutory provisions implicated by the MMLA are Title VII of the Civil Rights Act of 1964 ("Title VII") and the Massachusetts Fair Employment Practices Act ("Chapter 151B"). Although the aspects of the MMLA that are legally problematic under each of the four provisions are similar, the analysis required to determine whether a conflict exists between each provision and the MMLA differs.

A facially gendered statute[105] violates the Equal Protection Clause if the statute is not substantially related to an important government interest, irrespective of which gender the statute benefits.[106] In *United States v. Virginia*,[107] the Supreme Court may have slightly increased the level of scrutiny required in sex discrimination cases above general intermediate scrutiny by holding that a classification based upon sex requires an "exceedingly persuasive justification."[108]

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they constitute non-profit social clubs, the number of such employers in Massachusetts is presumably negligible. *See* MASS. GEN. LAWS ch. 151B § 1(5) (excluding non-profit social clubs from the definition of "employer").

[103] *See* 1987 Opinion, *supra* note 15.

[104] *See id.*

[105] For constitutional purposes, a statute is facially gendered when its terms explicitly distinguish between men and women. *See* Washington v. Davis, 426 U.S. 229, 241 (1976) (distinguishing between facially discriminatory statutes and facially neutral statutes that nonetheless have a discriminatory purpose or are applied discriminatorily).

[106] *See* United States v. Virginia, 518 U.S. 515, 533 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

[107] 518 U.S. 515.

[108] *Id.* at 524 (quoting *Hogan*, 458 U.S. at 724); *see also id.* at 571 (Scalia, J., dissenting) (protesting that the majority effectively adopts a standard of strict scrutiny for sex-based classifications); Deborah L. Brake, *Reflections on the VMI Decision*, 6 AM. U. J. GENDER & L. 35, 36-37 (1997) ("[*U.S. v. Virginia*] comes very close to applying the narrowly tailored strict scrutiny standard, requiring a perfect fit between the classification and the state's interest"); *but see* Cohen v. Brown Univ., 101 F.3d 155, 183 n.22 (1st Cir. 1996) ("We point out

Unlike the Federal Equal Protection Clause, the Massachusetts Constitution explicitly provides that "[e]quality under the law shall not be denied or abridged because of sex."[109] Moreover, the Massachusetts Supreme Judicial Court ("SJC") has held that "[a] statutory classification based on sex is subject to strict judicial scrutiny under the State ERA and will be upheld only if a compelling interest justifies the classification and if the impact of the classification is limited as narrowly as possible consistent with its proper purpose."[110] Thus, gender classifications warrant a higher level of scrutiny under the Massachusetts Constitution than under the Federal Constitution.

A statutory analysis of the MMLA is similar under Title VII and Chapter 151B. Chapter 151B provides that a qualified employer may not discriminate against an individual on the basis of sex "in terms, conditions or privileges of employment."[111] Similarly, Title VII states that a qualified employer[112] may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" on the basis of sex.[113] Under Title VII and Chapter 151B, an employee may prove sex-discrimination through either direct or circumstantial evidence.[114] Supreme Court precedent has established that a policy presents direct evidence of sex discrimination if its terms explicitly make a distinction between men and women. [115] According to this precedent, parental leave policies whose terms explicitly provide greater benefits to women than men appear to present direct evidence of sex discrimi-

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that *Virginia* adds nothing to the analysis of equal protection challenges to gender based classifications that has not been part of that analysis since 1979.").

[109] MASS. CONST. art. CVI.

[110] Lowell v. Kowalski, 405 N.E.2d 135, 139 (Mass. 1980); *see also* Attorney Gen. v. Mass. Interscholastic Athletic Ass'n, 393 N.E.2d 284, 291 (Mass. 1979) ("classifications on the basis of sex are subject to a degree of constitutional scrutiny 'at least as strict as the scrutiny required by the Fourteenth Amendment for racial classifications.'") (quoting Commonwealth v. King, 372 N.E.2d 196, 206 (Mass. 1977)).

[111] MASS. GEN. LAWS ch. 151B, § 4 (2012).

[112] For the purposes of Title VII "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b) (2006).

[113] 42 U.S.C. § 2000e-2(a)(1). Federal regulations explicitly prohibit discrimination based on sex with regard to fringe benefits, including leave. 29 C.F.R. § 1604.9(a), (b).

[114] Johnson v. Univ. of Iowa, 431 F.3d 325, 328-29 (8th Cir. 2005); Schafer v. Bd. of Pub. Educ., 903 F.2d 243, 247 (3d Cir. 1990); *see also* Gates v. Flood, 785 N.E.2d 1289, 1293 (Mass. App. Ct. 2003) (distinguishing between direct evidence cases and circumstantial evidence cases and finding the three-step burden-shifting analysis appropriate exclusively in circumstantial evidence cases).

[115] *See* Int'l Union v. Johnson Controls, 499 U.S. 187, 199 (1991) (finding discriminatory motive irrelevant because of the existence of direct evidence of discrimination where a policy's terms explicitly classify employees on the basis of sex).

nation.[116] Nevertheless, both the Third and Eighth Circuits have treated such policies as presenting cases of only circumstantial evidence of sex discrimination.[117] A three-step burden-shifting analysis ensues in a case based on circumstantial evidence.[118] Initially, the employee bears the burden of proving that he or she was treated differently than an employee not of his or her protected class.[119] Then, the burden shifts to the employer to prove that it had a legitimate non-discriminatory reason for any difference in treatment.[120] Finally, the burden shifts back to the employee to prove that the legitimate business reason proffered by the employer is a pretext for unlawful discrimination.[121]

In addition to raising concerns of gender discrimination, the MMLA implicates two additional matters of constitutional law. First, the legality of the MMLA can be analyzed as a classification based upon sexual orientation insofar as the MMLA disparately impacts same-sex and opposite-sex couples. The SJC has held that making distinctions between same-sex and opposite-sex couples for the purpose of marriage serves no legitimate state interest.[122] Additionally, Chapter 151B prohibits discrimination in the terms and conditions of employment on the basis of sexual orientation.[123]

The legality of the MMLA also can be assessed in terms of its impinging on fundamental parenting rights. The Supreme Court has recognized the fundamental nature of certain rights related to parenting, including "the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[124] The Court has analyzed classifications that implicate the fundamental right to parenting under heightened scrutiny, although the precise level of scrutiny remains ambiguous.[125] Massachusetts has adopted the Su-

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[116] *See id.*

[117] *See Johnson*, 431 F.3d at 328-29; *Schafer*, 903 F.2d at 243.

[118] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) (setting forth the three step analysis with regards to Title VII); Wheelock Coll. v. Mass. Comm'n Against Discrimination, 355 N.E.2d 309, 314-15 (Mass. 1976) (adopting the three-step analysis for claims brought under Chapter 151B).

[119] *See McDonnell Douglas*, 411 U.S. at 802; *Wheelock Coll.*, 355 N.E.2d at 315.

[120] *See McDonnell Douglas*, 411 U.S. 802-03; *Wheelock Coll.*, 355 N.E.2d at 315.

[121] *See McDonnell Douglas*, 411 U.S. at 804; *Wheelock Coll.*, 355 N.E.2d at 315.

[122] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003).

[123] MASS. GEN. LAWS ch. 151B, § 4 (2012).

[124] Troxel v. Granville, 530 U.S. 57, 66 (2000) (finding a fundamental right of parents to restrict grandparent visitation); *see also* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (according heightened "respect" to "the interest of a parent in the companionship, care, custody, and management of his or her children"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (recognizing the fundamental "liberty of parents and guardians to direct the upbringing and education of children under their control"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (acknowledging a fundamental right to "bring up children").

[125] *See Troxel*, 530 U.S. at 80 (Thomas, J., concurring) (noting a lack of clarity in the

preme Court's characterization of a fundamental right to parenting in comparable claims brought under the state constitution,[126] and the SJC has articulated that strict scrutiny is the appropriate standard to apply to such cases.[127]

D. *The Childbirth/Childcare Distinction*

Statutory and constitutional analyses of gendered parental leave provisions have centered on the distinction between childbirth-focused policies and childcare-focused policies.[128] Childbirth-focused policies aim to promote a woman's physical health prior and subsequent to giving birth.[129] By contrast, childcare-focused policies aim to enable a parent to care for a new child personally or to promote parent-child bonding.[130] Statutory and constitutional analyses of gendered parental leave policies have examined each policy's text, legislative history and substantive provisions in order to determine each policy's focus.[131] Courts and administrative agencies have consistently affirmed that certain childbirth-focused policies may provide leave exclusively to women, whereas childcare-focused policies may not discriminate between men and women.[132] This distinction rests on the biological reality that only women can undergo the physical experience of childbirth, whereas without resorting to gender stereotyping, men and women are presumed equally capable of childcare. By definition, adoption benefits relate solely to childcare because adoptive parents do not undergo the physical experience of childbirth. Therefore, parental leave provisions that provide adoption benefits exclusively to women have consistently been deemed discriminatory.[133]

E. *State and Federal Administrative Guidance*

The MCAD is the state agency charged with enforcing Massachusetts' antidiscrimination laws.[134] As part of this mandate, the MCAD has jurisdiction for enforcing the MMLA[135] and Chapter 151B.[136] Because of a work-share ar-

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majority opinion as to the standard of review and arguing for the application of strict scrutiny).

[126] Blixt v. Blixt, 774 N.E.2d 1052, 1059 (Mass. 2002).

[127] *Id.* at 1058-59.

[128] *See* Johnson v. Univ. of Iowa, 431 F.3d 325, 328 (8th Cir. 2005); Schafer v. Bd. of Pub. Educ., 903 F.2d 243, 248 (3d Cir. 1990); Danielson, v. Bd. of Higher Educ., 358 F. Supp. 22, 27-28 (S.D.N.Y. 1972); Chavkin v. Santaella, 439 N.Y.S.2d 654, 657 (N.Y. App. Div. 1981); EEOC GUIDANCE, *supra* note 15; 1987 Opinion, *supra* note 15.

[129] *See* sources cited *supra* note 128.

[130] *See* sources cited *supra* note 128.

[131] *See* sources cited *supra* note 128.

[132] *See* sources cited *supra* note 128.

[133] *See, e.g.*, 1987 Opinion, *supra* note 15.

[134] MASS. GEN. LAWS ch. 151B, § 3 (2012).

[135] *Id.* § 3(5).

[136] *Id.* § 4(1).

rangement with the Federal Equal Employment Opportunity Commission ("EEOC") "under which claims filed with either MCAD or the EEOC are effectively filed with both agencies,"[137] the MCAD also enforces some federal civil rights provisions, including Title VII.[138] Generally, one must file a complaint of discrimination at the MCAD prior to filing it in state court.[139]

The MCAD acknowledges that refusing to give eight weeks of parental leave to a qualified male employee would not violate the MMLA because of the statute's gender-specific language.[140] However, the MCAD has endorsed gender-neutral parental leave in two ways. First, the MCAD takes the position that providing more than eight weeks of parental leave to women but not men constitutes gender discrimination under Chapter 151B.[141] The MCAD arrives at this conclusion by viewing any leave in excess of the statutorily required eight weeks to be one of the employer's "terms, conditions or privileges of employment,"[142] and therefore an employer must provide any leave in excess of eight weeks to men and women equally.[143] Second, the MCAD's guidelines caution that providing eight weeks of parental leave exclusively to female employees may violate "federal prohibitions against sex discrimination" as well the Mass. ERA.[144] The guidelines conclude by advising employers to adopt gender-neutral leave policies in order to avoid any future legal challenges.[145]

On June 9, 2008, *Massachusetts Lawyers Weekly* reported that MCAD Commissioner Martin Ebel announced at a Foley Hoag client event that the MCAD would begin interpreting the MMLA to apply to men as well as women by allowing men to file MMLA complaints.[146] Commissioner Ebel pointed to the oddity in light of the legalization of same-sex marriage in Massachusetts that neither partner in a male same-sex marriage would be entitled to parental leave under the MMLA, whereas both partners in a female same-sex marriage would

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[137] 45 MASS. PRACTICE *Employment Law* § 8.4 (2011).

[138] *See id.*

[139] MASS. GEN. LAWS ch. 151B, § 9.

[140] MASS. COMM'N AGAINST DISCRIMINATION, *supra* note 80.

[141] *Id.*

[142] MASS. GEN. LAWS ch. 151B, § 4(1).

[143] MASS. COMM'N AGAINST DISCRIMINATION, *supra* note 80. The same logic arguably also applies to an employer who provides any amount of paid parental leave because the MMLA only mandates unpaid leave.

[144] *Id.*

[145] *Id.* Although the MCAD's guidelines "do not carry the force of law," the guidelines are entitled to "substantial deference" to the extent that the guidelines interpret an ambiguous provision of a statute administered by the MCAD, which includes Chapter 151B and the MMLA. *Cf.* Global NAPs, Inc. v. Awiszus, 930 N.E.2d 1262, 1268-69 (Mass. 2010) (rejecting the MCAD's interpretation of a provision of the MMLA deemed unambiguous); *see also* Ayanna v. Dechert LLP, 840 F. Supp. 2d 453, 456 (D. Mass. 2012).

[146] Frank, *supra* note 4.

be entitled to leave.[147] The announcement prompted many law firms to issue client alerts advising clients to adopt gender-neutral leave policies.[148] However, on June 23, 2008, *Massachusetts Lawyers Weekly* published a letter to the editor from all three MCAD commissioners clarifying the Commission's position on the matter of paternity leave.[149] The Commissioners stated that the Commission had not determined that the MMLA mandates paternity leave, but rather that providing leave exclusively to female employees may violate other anti-discrimination provisions.[150] The Commissioners also cited a preliminary determination issued by the Commission in *Bloom v. Metrowest Medical Center* finding that an employer may have violated Chapter 151B by giving more than eight weeks of leave exclusively to female employees.[151]

In 1990, the EEOC, the federal agency charged with enforcing Title VII, issued extensive policy guidance concerning parental leave.[152] Preliminarily, the EEOC's guidance distinguished between leave taken due to a disabling condition resulting from pregnancy or childbirth and leave taken for the purpose of childcare.[153] The guidance explains that an employer may offer the former exclusively to women, but an employer would violate Title VII by offering the latter to women but not to men.[154] The EEOC's Compliance Manual, published in 2006, briefly addresses parental leave and reiterates this position.[155] The 1990 guidance recognizes that an employee may have difficulty determining the purpose of an employer's parental leave policy.[156] However, the EEOC puts the burden on the employer to "justify any disparity in parental leave by proving that it is attributable to the woman's disability."[157] Furthermore, the guidance notes that if an employer "requires all other disabled employees to document their disability but does not impose the same requirement on preg-

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147 *Id.*

148 *See, e.g.*, *Employment Alert: MCAD Commissioner Announces That Male Employees Are Covered by the Massachusetts Maternity Leave Act*, MINTZ LEVIN (June 6, 2008), http://www.mintz.com/publications/1474/Employment_Alert_MCAD_Commissioner_Announces_That_Male_Employees_Are_Covered_by_the_Massachusetts_Maternity_Leave_Act; *MCAD Commissioner Announces That the Massachusetts Maternity Leave Act Applies to New Fathers*, FOLEY HOAG (June 4, 2008), http://www.foleyhoag.com/NewsCenter/Publications/Alerts/Employment-Bulletin/Employment-Bulletin-060408.aspx.

149 Malcolm S. Medley, Martin S. Ebel & Sunila T. George, Letter to the Editor, *MCAD Clarifies Its Position on Maternity Leave for Men*, MASS. LAW. WKLY., June 23, 2008.

150 *Id.*

151 *Id.*

152 EEOC GUIDANCE, *supra* note 15.

153 *Id.*

154 *Id.*

155 EQUAL EMP'T OPPORTUNITY COMM'N, COMPLIANCE MANUAL §626.6 (2006).

156 EEOC GUIDANCE, *supra* note 15.

157 *Id.*

nant women, it will be difficult to justify the inequality of treatment."[158] Thus, an employer must justify a parental leave policy that facially discriminates based on gender by establishing that the policy aims to accommodate childbirth-related disabilities rather than childcare obligations.[159] In a footnote, the EEOC proposes a model "safe harbor" parental leave policy that separates childcare leave for birth or adoption from disability leave, with disability defined to include childbirth-related medical conditions.[160]

The 1990 EEOC guidance also addresses facially neutral parental leave policies that have a disparate impact on one gender.[161] According to the EEOC, an employer could choose not to provide any parental leave without violating Title VII, even though a lack of a parental leave would likely disparately impact women as traditional primary caregivers.[162] However, the EEOC distinguishes this from parental leave policies that condition parental leave upon facially neutral criteria that have a disparate impact on men or women.[163] The guidance offers the following examples: "if an employer limits available parental leave only to those employees with working spouses, or to married employees whose income is less than half of the household income, or to employees whose working spouse is not also on leave, male employees will tend to be precluded from leave benefits."[164] In these cases, the guidance provides that standard disparate impact analysis under Title VII would apply, thereby placing the burden on the employer to justify the policy by proving that "the policy or practice serves, in a significant way, the legitimate employment goals of the employer."[165]

F. *Judicial Precedent from Other Jurisdictions*

Courts that have considered the Title VII and Equal Protection implications of parental leave policies have centered their analysis on the childbirth/childcare distinction.[166] Although courts have differed as to precisely how they classify a policy as childbirth-focused or childcare-focused, courts have consistently affirmed that certain childbirth-focused policies may provide leave exclusively to women, whereas childcare-focused policies may not.

In *Johnson v. University of Iowa*,[167] the Eighth Circuit held that the Universi-

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158 *Id.*

159 *Id.*

160 *Id.* at n.6.

161 EEOC GUIDANCE, *supra* note 15.

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.*

166 *See* Johnson v. Univ. of Iowa, 431 F.3d 325, 328 (8th Cir. 2005); Schafer v. Bd. of Pub. Educ., 903 F.2d 243, 248 (3d Cir. 1990); Danielson v. Bd. of Higher Educ., 358 F. Supp. 22, 27-28 (S.D.N.Y. 1972); Chavkin v. Santaella, 439 N.Y.S.2d 654, 657 (N.Y. App. Div. 1981).

167 *Johnson*, 431 F.3d at 325.

ty's parental leave policy did not violate Title VII or the Equal Protection Clause.[168] The policy permitted female employees to use accrued sick leave to cover "any period of pregnancy-related temporary disability."[169] Furthermore, the policy provided that "[b]ased on current medical practice, a leave of six weeks or less would not require the employee to provide disability documentation."[170] The policy also provided that "[a] newly adoptive parent, including a domestic partner, is entitled to one week (5 days) of paid adoption leave to be charged against accrued sick leave."[171] The Eighth Circuit framed its inquiry by considering the distinction between leave for childbirth and leave for childcare.[172] The Eighth Circuit found that the University's policy focused on childbirth rather than childcare due to medical evidence that six weeks constitutes a reasonable childbirth recovery period.[173] The court made this determination despite references to childcare in the policy's statements of purpose and despite the lack of a medical verification requirement during the period of presumptive disability.[174] Additionally, the court addressed petitioner's call for strict scrutiny due to the implication of the fundamental right of parenting.[175] Petitioner argued that his denial of parental leave prevented him from exercising his fundamental right to raise his child in the manner of his choosing.[176] The Eighth Circuit held that although parents may have a set of fundamental rights, these rights do not include an affirmative right to paid parental leave.[177]

By contrast, in 1972, a New York district court held that a male faculty member of a state university raised a "'colorable' constitutional claim" under Equal Protection sufficient to survive a motion to dismiss in challenging a university policy giving female employees up to three semesters of maternity leave where facts could show that the leave was for the purpose of child rearing.[178] Applying intermediate scrutiny, the court found that the case would turn on the factual question of whether the university provided female employees with

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168 *Id.*

169 *Id.* at 329.

170 *Id.* at 327.

171 *Id.*

172 *Id.* at 328 ("If the leave given to biological mothers is granted due to the physical trauma they sustain giving birth, then it is conferred for a valid reason wholly separate from gender. If the leave is instead designed to provide time to care for, and bond with, a newborn, then there is no legitimate reason for biological fathers to be denied the same benefit. Thus, the primary question for us to consider is whether the leave given to biological mothers is in fact disability leave.").

173 *Id.*

174 *Id.* at 328-29.

175 *Id.* at 331.

176 *Id.*

177 *Id.*

178 Danielson v. Bd. of Higher Educ., 358 F. Supp. 22, 28 (S.D.N.Y. 1972).

childcare leave.[179] The District Court also credited the plaintiff's claim that his denial of parental leave implicated his fundamental right of parenting as sufficiently plausible to withstand summary judgment.[180] The district court quoted Supreme Court precedent citing both Due Process and the right to privacy regarding the "essential" and "cardinal" importance of the right to "raise one's children."[181]

In 1981, a New York State appellate court reversed a decision by the State Human Rights Appeal Board dismissing a claim by a male city employee who was denied parental leave.[182] The city's parental leave policy allowed female employees to use accumulated sick leave upon the birth of a child.[183] Because the city policy did not require the female employees to document a medical condition upon taking leave, the court deemed the period of leave "infant care leave" and stated that "infant care leave" must be provided to male and female employees equally.[184] Similarly, in 1991 in *Schafer v. Board of Public Education*, the Third Circuit held that the maternity leave provision of a collective bargaining agreement between a teacher's union and a board of education violated Title VII.[185] The agreement provided up to one year of maternity leave exclusively to female employees, without requiring that the employee have suffered a pregnancy or childbirth-related disability.[186] The Third Circuit held that granting parental leave exclusively to women "beyond the period of actual physical disability on account of pregnancy, childbirth or related medical conditions" contravened Title VII.[187]

The Third Circuit in *Schafer* distinguished two types of challenges to maternity leave policies.[188] The court observed that some challenges to parental leave policies rest on a distinction between pregnant employees and other disabled employees.[189] Other challenges to parental leave policies rest on a distinction between male parent employees and female parent employees.[190] A line of Supreme Court cases beginning in 1974 held that disability leave policies that exclude pregnancy can survive Equal Protection and Title VII challenges.[191] In 1978, the Massachusetts Supreme Judicial Court diverged from

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[179] *Id.*

[180] *Id.*

[181] *Id.* (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

[182] Chavkin v. Santaella, 439 N.Y.S.2d 654, 658 (N.Y. App. Div. 1981).

[183] *Id.* at 656.

[184] *Id.* at 657.

[185] Schafer v. Bd. of Pub. Educ., 903 F.2d 243, 244 (3d Cir. 1990).

[186] *Id.* at 248.

[187] *Id.*

[188] *Id.* at 247-48.

[189] *Id.*

[190] *Id.*

[191] Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974).

the U.S. Supreme Court and found that disability leave policies that exclude pregnancy violate Chapter 151B.[192] Later that year, Congress passed the Pregnancy Discrimination Act ("PDA"), amending Title VII to define sex discrimination to include discrimination on the basis of pregnancy.[193] In *California Federal Savings and Loan v. Guerra*, the Supreme Court found that the legislative history of the PDA indicated Congress' disapproval of the earlier line of Supreme Court cases that permitted disability leave policies to exclude pregnancy.[194] Therefore, the Court held that the PDA required disability policies to include pregnancy-related disabilities.[195] However, the Court also held that the PDA did not preclude an employer from providing greater benefits to pregnant employees than other disabled employees because the PDA created "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."[196] Incidentally, the *Guerra* court noted that the maternity leave policy at issue was "narrowly drawn to cover only the period of *actual physical disability* on account of pregnancy, childbirth, or related medical conditions."[197] The Third Circuit in *Schafer*, in invalidating the maternity leave policy at issue in that case, found *Guerra* inapplicable on the basis that *Guerra* pertained to the distinction between pregnant employees and other disabled employees, as opposed to the distinction between male and female parents.[198] Additionally, the *Schafer* court distinguished the maternity leave policy at issue in that case from the one at issue in *Guerra* by noting that the Court found the policy at issue in *Guerra* to have a narrow focus on childbirth, whereas the policy at issue in *Schafer* did not focus on childbirth exclusively.[199]

G. *The Tennessee Example*

Until recently, Tennessee, like Massachusetts, had a parental leave statute that provided benefits exclusively to female employees.[200] The history of Ten-

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[192] Mass. Elec. Co. v. Mass. Comm'n Against Discrimination, 375 N.E.2d 1192, 1199 (Mass. 1978); *see also* Robert Bentley Rumrill, Case Comment, *Exclusion of Pregnancy Benefits Violates State Law – Massachusetts Commission Against Discrimination v. Massachusetts Electric Co.*, 13 SUFFOLK U. L. REV. 202 (1979).

[193] Pub. L. No. 95–555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(K)).

[194] Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 283 (1987).

[195] *Id.*

[196] *Id.* at 280.

[197] *Id.* at 290. The statute upheld in *Guerra* provided leave for the period of actual disability due to pregnancy or childbirth, not to exceed four months. *Id.* at 276; *see also* CAL. GOV'T CODE § 12945 (West 2012).

[198] Schafer v. Bd. of Pub. Educ. of the Sch. Dist. of Pittsburgh, Pa., 903 F.2d 243, 248 (3d Cir. 1990).

[199] *Id.*

[200] *See* TENN. CODE ANN. § 4-21-408(a) (1988) (amended 2005).

nessee's parental leave statute illustrates several of the features that distinguish a legally problematic parental leave statute from one that is not legally problematic. In 1987, the Tennessee state legislature passed the Tennessee Maternity Leave Act ("TMLA"), which provided four months of unpaid maternity leave to qualified female employees.[201] Like the current version of the MMLA, the TMLA provided maternity leave for both birth and adoption.[202] Additionally, the TMLA explicitly stated that "[n]othing contained within the provisions of this part shall be construed . . . to require any employer to provide maternity leave to male employees."[203] Thus, like the MMLA, the TMLA benefitted female employees exclusively. However, unlike the MMLA, which does not contain a purpose clause, the TMLA twice stated that the purpose of the Act is to promote bonding between a mother and her newly born or adopted child.[204]

Shortly after the passage of the TMLA, the Tennessee Attorney General issued an opinion stating that the TMLA likely conflicted with Title VII, as well as the Equal Protection Clause.[205] The Attorney General stated that an employer violates Title VII by providing disparate benefits to male and female employees, even when state law sanctions the disparity.[206] The Attorney General concluded that the adoption provision of the TMLA likely conflicted with Title VII because male and female employees are similarly situated with regards to the adoption of a child.[207] Furthermore, the Attorney General stated that "the four month leave granted by [the birth provision of] the Act may go beyond the time necessary for her recovery from childbirth and include time to nurture and bond with the child," in which case the birth provision of the TMLA would also conflict with Title VII.[208] With respect to the Equal Protection Clause, the Attorney General cited Supreme Court precedent requiring that any gender classification be substantially related to an important governmental interest.[209] The Attorney General concluded that the state does not have an important interest in facilitating mother-child bonding, as distinct from parent-child bonding.[210] Thus, the Attorney General focused his analysis on the distinction be-

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[201] 1987 Tenn. Pub. Acts ch. 738 (codified at TENN. CODE ANN. §§ 50-1-501 to 50-1-505 (1987)).

[202] § 50-1-501(a).

[203] § 50-1-503(2).

[204] §§ 50-1-501(a), 50-1-502(c).

[205] 1987 Opinion, *supra* note 15.

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.* The Attorney General recognized three additional purposes of the TMLA that do rise to the level of important state interests: "(1) to provide job security for women who need to be absent from their employment for the purpose of childbearing, (2) to redress past economic disadvantages to employed women who historically have lost employment opportunities and benefits as a result of bearing children, and (3) recognizing that women have

tween leave for childcare as opposed to childbirth, as evidenced by the inclusion of an adoption provision as well as by the statute's explicit references to the promotion of mother-child bonding.[211]

A few months after the Attorney General issued his opinion, the Tennessee state legislature amended the TMLA[212] by removing the adoption provision, thereby eliminating maternity leave for adoptive mothers.[213] Moreover, the amendment removed all references to "bonding," and instead redefined the purpose of the statute as "to provide leave time to female employees for pregnancy, childbirth, and nursing the infant, where applicable."[214] The amended statute retained the statement that "[n]othing contained within the provisions of this part shall be construed . . . to require any employer to provide maternity leave to male employees."[215] The amendment did not alter the length of the period of leave,[216] thereby ignoring the Attorney General's concern that four months of leave may exceed the period of time necessary for a woman to recover from childbirth. However, the amendment cured the Attorney General's two primary concerns, namely the adoption provision and the purported statutory purpose of mother-child bonding. Two subsequent attorneys general, in 1988 and 1991 respectively, issued opinions stating that the shift in focus of the amended TMLA from mother-child bonding to pregnancy-related disability resolved all conflicts between the statute and both Title VII and the Equal Protection Clause.[217] The amended TMLA remained in effect until 2005 when the Tennessee state legislature replaced the TMLA with a parental leave statute that provides parental leave for both birth and adoption to all qualified parents.[218]

III. ARGUMENT

The MMLA should be amended because it discriminates against men. The MMLA more closely resembles the childcare-focused parental leave policies that have been deemed problematic than the childbirth-focused parental leave

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historically borne the responsibility for child rearing, to redress past economic disadvantages to employed women who have lost employment opportunities and benefits as a result of their election to adopt children." *Id.* However, the Attorney General found that the TMLA was not substantially related to furthering any of these three government objectives. *Id.*

[211] *Id.*

[212] 1988 Tenn. Pub. Acts ch. 607 (codified at TENN. CODE ANN. § 4-21-408 (1988)).

[213] § 4-21-408(a).

[214] § 4-21-408(c)(3).

[215] § 4-21-408(d)(2).

[216] *Compare* TENN. CODE ANN. § 50-1-501(a) (1987), *with* TENN. CODE ANN. § 4-21-408(a) (1988).

[217] *See* Tenn. Maternity Leave Act, 1991 Tenn. Op. Att'y Gen. 91-22 [hereinafter 1991 Opinion]; 1988 Amend. to the Maternity Leave Act, 1988 Tenn. Op. Att'y. Gen. 88-133 [hereinafter 1988 Opinion].

[218] 2005 Tenn. Pub. Acts ch. 224 (codified at TENN. CODE ANN. § 4-21-408 (2011)).

policies that have not.[219] Since the MMLA contains both an adoption and a birth provision, the validity of each is considered in turn.

A. *The Adoption Provision of the MMLA*

Recent criticism of the MMLA has centered on its adoption provision. Both Senator Joyce and Commissioner Ebel recently called the validity of the MMLA into question by pointing to the disparity created by the MMLA between male and female same-sex adoptive parents.[220] Furthermore, precedent from other states highlights the discriminatory nature of gendered adoption provisions.[221] The Attorney General of Tennessee considered the adoption provision of the TMLA invalid because of its gendered nature.[222] Accordingly, the primary substantive change undertaken by the Tennessee state legislature to alleviate the concerns of the Attorney General consisted of removing adoption benefits entirely from the TMLA.[223] Notably, the parental leave policy upheld by the Eighth Circuit in *Johnson* contained a gender-neutral adoption provision,[224] as did the model "safe harbor" parental leave policy suggested by the EEOC in 1990.[225] These criticisms of gendered adoption provisions rely on the inherent focus of adoption benefits on childcare rather than childbirth. By comparison, this logic applies to the MMLA's adoption provision as well.

The MMLA's adoption provision cannot survive analysis under the Federal Equal Protection Clause or the Mass. ERA. The Supreme Court has held that a classification based upon gender must substantially relate to an important government interest.[226] Moreover, the Court has held that gender classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[227] The adoption provision of the MMLA facially contains a gender-based distinction between male adoptive parents and female adoptive parents.[228] Therefore, the adoption provision of the MMLA will survive Equal Protection analysis only if Massachusetts can

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[219] *See* EEOC GUIDANCE, *supra* note 15. *Compare* Schafer v. Bd. of Pub. Educ., 903 F.2d 243 (3d Cir. 1990); Danielson v. Bd. of Higher Ed., 358 F. Supp. 22 (S.D.N.Y. 1972); Chavkin v. Santaella, 439 N.Y.S.2d 654 (N.Y. App. Div. 1981); TENN. CODE ANN. § 50-1-501 – 50-1-505, *with* Johnson v. Univ. of Iowa, 431 F.3d 325 (8th Cir. 2005); TENN. CODE ANN. § 4-21-408 (1988).

[220] *See* Frank, *supra* note 4; STATE HOUSE NEWS SERVICE, *supra* note 59.

[221] *See, e.g.*, 1987 Opinion, *supra* note 15.

[222] *Id.*

[223] 1988 Tenn. Pub. Acts ch. 607 (codified at TENN. CODE ANN. § 4-21-408 (1988)). *See also* 1991 Opinion, *supra* note 217; 1988 Opinion, *supra* note 217.

[224] Johnson v. Univ. of Iowa, 431 F.3d 325, 327 (8th Cir. 2005).

[225] EEOC GUIDANCE, *supra* note 15, n.6.

[226] *See* United States v. Virginia, 518 U.S. 515, 533 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

[227] *United States v. Virginia*, 518 U.S. at 533.

[228] MASS. GEN. LAWS ch. 149, § 105D (2012).

show that excluding male adoptive parents from parental leave benefits substantially relates to an important governmental interest that does not depend on overbroad generalizations about gender.[229]

The courts and administrative agencies that have considered parental leave policies have uniformly found that the government has no legitimate interest, let alone an important interest, in promoting mother-child bonding as distinct from parent-child bonding.[230] Parental leave upon the adoption of a child inherently concerns childcare rather than childbirth. Therefore, the adoption provision of the MMLA cannot survive Equal Protection analysis because men and women are presumed equally capable of childcare. Since courts apply a higher level of scrutiny under the Mass. ERA than under the Federal Equal Protection Clause,[231] the adoption provision of the MMLA violates the Mass. ERA as well.

Furthermore, the MMLA's adoption provision conflicts with Title VII and Chapter 151B. Both Title VII and Chapter 151B prohibit discrimination on the basis of sex in the terms, conditions, and privileges of employment.[232] Because the MMLA distinguishes between male and female adoptive parents, an employer adhering to the MMLA would bear the burden of establishing a legitimate reason for the disparate treatment.[233] Judicial and administrative precedent has found no legitimate basis for distinguishing between mothers and fathers with regards to childcare responsibilities.[234] Thus, the adoption provision of the MMLA conflicts with Title VII and Chapter 151B for similar reasons that it is invalid under the state and federal constitutions, namely that parental leave for adoption inherently concerns childcare rather than childbirth, and no legitimate state interest exists for promoting childcare by mothers rather than fathers.

B. *The Birth Provision of the MMLA*

Under both statutory and constitutional analyses, a gendered parental leave statute must further the objective of promoting a woman's physical recovery from childbirth.[235] Therefore, a statute or policy may contain a disparity between the parental leave given to men and women upon the birth of a child only if the disparity can be justified as attributable to promoting a woman's physical

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[229] *See United States v. Virginia*, 518 U.S. at 533.

[230] *See* sources cited *supra* note 128.

[231] Lowell v. Kowalski, 405 N.E.2d 135, 139 (Mass. 1980); Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, 393 N.E.2d 284, 291 (Mass. 1979).

[232] 42 U.S.C. § 2000e-2(a)(1) (2006); MASS. GEN. LAWS ch. 151B, § 4 (2012).

[233] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Wheelock Coll. v. Mass. Comm'n Against Discrimination, 355 N.E.2d 309 (Mass. 1976).

[234] *See* sources cited *supra* note 128.

[235] *See* sources cited *supra* note 128.

recovery from childbirth.[236] Where the purpose of such a disparity is ambiguous, a close analysis of the text of the statute or policy, its legislative history, and its substantive provisions can reveal its underlying purpose. This analysis begins with the text of the provision itself, including any explicit statements of purpose.[237] A statute's legislative history can reveal the opinions of legislators and other interested parties, including any explication of the resulting disparity.[238] Furthermore, three types of substantive provisions can reveal whether a legitimate justification underlies a disparity. The juxtaposition of gendered birth benefits with similarly gendered adoption benefits suggests that an impermissible purpose underlies the statute as a whole.[239] Conversely, the inclusion of provisions that explicitly reference the medical or disabling aspects of childbirth, such as requiring a doctor's verification of a woman's inability to work, implies a nondiscriminatory purpose.[240] Lastly, the length of the period of leave can indicate its purpose.[241]

On its face, the birth provision of the MMLA contains no justification for the gender disparity in its distribution of benefits. Therefore, the factors listed above can determine the apparent purpose underlying the gender disparity in the MMLA's birth provision. Massachusetts statutes do not contain purpose clauses or preambles,[242] so the text of the MMLA leaves the statute's focus ambiguous. Likewise, "there is comparatively little recorded legislative history in Massachusetts that affords much insight into legislative intent."[243] However, the subsequent legislative history of the MMLA supports the proposition that the birth provision of the MMLA lacks a permissible justification for its gender disparity. The state legislature twice amended the MMLA solely to expand its adoption benefits,[244] suggesting that both sets of amending legislators regarded the MMLA as an appropriate forum for advancing parental childcare. Addi-

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[236] *See* EEOC GUIDANCE, *supra* note 15 (placing the burden on employers with gendered parental leave policies to "justify any disparity in parental leave by proving that it is attributable to the women's disability").

[237] *See* 1987 Opinion, *supra* note 15 (rejecting the stated purpose of the TMLA as impermissibly discriminatory).

[238] *See id.* (finding no redeeming justification in the "language or legislative history" of the TMLA).

[239] *See id.*; *cf. Johnson*, 431 F.3d at 325 (upholding a gendered birth provision juxtaposed with a gender-neutral adoption provision supplying a shorter period of leave).

[240] *See Johnson*, 431 F.3d at 325; *cf. Schafer*, 903 F.2d at 243 (reasoning that permitting a period of leave to extend beyond an explicitly delineated period of disability implies that the extended leave must be for childcare purposes).

[241] *Compare Schafer*, 903 F.2d at 243 (one year is excessive), and Danielson v. Bd. of Higher Ed., 358 F. Supp. 22, 22 (S.D.N.Y. 1972) (three semesters may be excessive), *with Johnson*, 431 F.3d at 325 (six weeks is reasonable).

[242] STATE LIBRARY OF MASS., *supra* note 43.

[243] *Id.*

[244] 1989 Mass. Acts 642-43; 1984 Mass. Acts 900.

tionally, in 1984 the state Secretary of Labor proposed amending the MMLA to provide adoption benefits, but not birth benefits, to men.[245] The Secretary of Labor appears to have incorporated into his proposal the logic that adoption and birth benefits serve different purposes; by rejecting the Secretary's proposal in favor of a gendered adoption provision, the 1984 legislature appears to have rejected this underlying logic.[246] Moreover, two of the four acts to amend the MMLA that were introduced during the last legislative session were entitled "An Act Clarifying Parental Rights to Unpaid Leave."[247] The use of the word "clarifying" may intimate that the proposed amendments are not intended to alter the underlying purpose of the MMLA. The proposed amendments are all gender-neutral, indicating that their proponents hold the opinion that the birth provision's purpose primarily pertains to childcare.

Furthermore, the substantive provisions of the MMLA as a whole suggest that the gender disparity in the MMLA's birth provision lacks a permissible purpose. The juxtaposition of birth and adoption benefits within one statute indicates a common purpose, namely facilitating parental childcare. In addition, the birth provision of the MMLA lacks any requirements or qualifications pertaining to pregnancy- or childbirth-related disabling medical conditions. On the other hand, the eight weeks of leave that the MMLA provides more closely resembles the six-week presumptive period of disability upheld in *Johnson*[248] than other, longer periods of leave that courts have deemed problematic.[249] However, the Tennessee example signifies that the length of leave may carry less weight than other factors in determining the validity of a statute's purpose.[250] The Tennessee state legislature did not alter the length of the period of leave provided by the TMLA when it amended the TMLA in 1987,[251] yet two state attorneys general subsequently approved of the amended TMLA because the legislature had made other substantive and formalistic changes.[252]

Thus, the gender disparity contained in the birth provision of the MMLA lacks a permissible justification. Viewed in this way, the MMLA violates the Federal Equal Protection Clause and the Mass. ERA and conflicts with Title VII and Chapter 151B. Under the Equal Protection Clause, a facially gendered statute must have an "exceedingly persuasive justification" that does not "rely

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[245] Eustace Letter, *supra* note 39.

[246] *See* 1984 Mass. Acts 900.

[247] H. 1409, 187th Gen. Ct. (Mass. 2011); S. 1863, 187th Gen. Ct. (Mass. 2011).

[248] Johnson v. Univ. of Iowa, 431 F.3d 325 (8th Cir. 2005); *but see* EEOC GUIDANCE, *supra* note 15 (intimating that a fourteen-week disparity may be problematic).

[249] Schafer v. Bd. of Pub. Educ., 903 F.2d 243 (3d Cir. 1990) (finding a one-year disparity to be excessive); Danielson v. Bd. of Higher Ed., 358 F. Supp. 22 (S.D.N.Y. 1972) (allowing for the possibility that a three-semester disparity may be excessive).

[250] *Compare* 1987 Opinion, *supra* note 15, *with* 1988 Opinion, *supra* note 217.

[251] 1987 Tenn. Pub. Acts ch. 373 (codified at TENN. CODE ANN. §§ 50-1-501 to 50-1-505 (1987)).

[252] 1991 Opinion, *supra* note 217; 1988 Opinion, *supra* note 217.

on overbroad generalizations about the different talents, capacities, or preferences of males and females."[253] Importantly, "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."[254] Therefore, one cannot superimpose on the MMLA *post hoc* the justification of facilitating maternal health if its true justification is the promotion of childcare. The facilitation of maternal childcare, as distinct from parental childcare, is impermissible because it "relies on overbroad generalizations about the different talents, capacities, or preferences of males and females."[255] Therefore, the birth provision of the MMLA violates the Equal Protection Clause because the true justification underlying its gender disparity is promoting childcare. Thus, the birth provision of the MMLA violates the Mass. ERA as well because the Mass. ERA mandates a higher level of scrutiny than the Federal Equal Protection Clause.[256] Analysis conducted under Title VII and Chapter 151B similarly requires that the justification for a gender disparity constitute the "real reasons" for the disparity.[257] Accordingly, an employer implementing the birth provision of the MMLA would violate Title VII and Chapter 151B if he lacked a non-discriminatory justification for the unequal distribution of parental leave benefits.

Moreover, the gendered nature of the MMLA's birth provision remains problematic, even if its true purpose is the facilitation of maternal health. The SJC has interpreted the Mass. ERA to mandate strict scrutiny.[258] Therefore, sex-based classifications must be narrowly tailored to a compelling government interest in order to survive a Mass. ERA challenge.[259] One method for determining whether a statute is narrowly tailored consists of considering whether the statute comprises the "least restrictive means available" to achieve the gov-

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253 United States v. Virginia, 518 U.S. 515, 533 (1996).

254 *Id.*

255 *Id.*; *see* Johnson v. Univ. of Iowa, 431 F.3d 325, 328 (8th Cir. 2005) (asserting the lack of any legitimate reason to deny fathers leave allowed to mothers "to care for, and bond with, a newborn"); EEOC GUIDANCE, *supra* note 15 ("When an employer assumes that only female employees should have the opportunity to participate in the child rearing process, it discriminates against male employees who want or need to take on a more active child rearing role. To base a policy on an assumption or stereotype about gender roles—even if the stereotype is statistically accurate—is to violate Title VII's fundamental precept: that employees are to be treated as individuals.").

256 Lowell v. Kowalski, 405 N.E.2d 135, 139 (Mass. 1980); Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, 393 N.E.2d 284, 291 (Mass. 1979).

257 Wheelock Coll. v. Mass. Comm'n Against Discrimination, 355 N.E.2d 309, 314 (Mass. 1976) (applying the "real reasons" principle to a claim made under Chapter 151B and citing an extensive list of cases that apply the identical principle to claims made under Title VII).

258 *Lowell*, 405 N.E.2d at 139; *Mass. Interscholastic*, 393 N.E.2d at 291.

259 *Lowell*, 405 N.E.2d at 139; *Mass. Interscholastic*, 393 N.E.2d at 291.

ernment's interest.[260] If the compelling government interest furthered by the birth provision of the MMLA is the facilitation of recovery from childbirth, the provision is not narrowly tailored to achieve this objective. A less restrictive means of achieving this objective would limit the period of leave to that of a woman's actual recovery from childbirth.[261] Because a less restrictive means exists for achieving Massachusetts' objective, the birth provision of the MMLA cannot survive strict scrutiny, and as such violates the Mass. ERA.

In addition, the birth provision of the MMLA also poses problems under the Equal Protection Clause, Title VII, and Chapter 151B, even when viewed as a childbirth-related provision. Although the standard of review for sex-based classifications is lower under the Equal Protection Clause than under the Mass. ERA,[262] the birth provision of the MMLA may fail a Federal Equal Protection challenge as well, even if one adopts the view that the justification for the provision's gender disparity is the facilitation of recovery from childbirth. Applying traditional intermediate scrutiny, the question of whether the birth provision of the MMLA substantially relates to the state's interest at issue is a close one. The outcome of this question ultimately depends on the factual accuracy of eight weeks as an approximation of the time generally required for a woman to recover from childbirth. Moreover, in *United States v. Virginia*, the Court intimated an impending increase in the level of scrutiny that applies to sex-discrimination claims.[263] If the Court adheres to this heightened standard, the likelihood that the childbirth provision of the MMLA would fail an Equal Protection challenge increases.

Under Title VII and Chapter 151B, an employer bears the burden of justifying "any disparity in parental leave by proving that it is attributable to the women's disability."[264] Therefore, an employer would bear the burden of proving that eight weeks is a factually precise measure of the time that a woman needs to recover from childbirth. Moreover, statistical averages about men or women, though often true, are insufficient to justify a gender disparity in employment practices.[265] The statutes demand a focus on the particular circumstances of each man or woman in order to justify a gender disparity.[266] Therefore, employers could not refute a gender discrimination claim by pointing to

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[260] Finch v. Commonwealth Health Ins. Connector Auth., 946 N.E.2d 1262, 1274 (Mass. 2011) (quoting Commonwealth v. Weston W., 913 N.E.2d 832, 842 (Mass. 2009)).

[261] *See, e.g.*, IOWA CODE § 216.6(2)(e) (2009); N.H. REV. STAT. ANN. § 354-A:7 (2009).

[262] *Compare* United States v. Virginia, 518 U.S. 515, 533 (1996), *with Lowell*, 405 N.E.2d at 139.

[263] *See supra* Part II.C for a discussion of the possible impact of *United States v. Virginia* on the level of scrutiny applicable in gender discrimination cases.

[264] EEOC GUIDANCE, *supra* note 15.

[265] City of Los Angeles v. Manhart, 435 U.S. 702, 707-08 (1978) (rejecting accurate statistics showing the disparate average lifespan of men and women as legitimate grounds for unequal mandatory retirement contributions).

[266] *Id.*

studies showing the average time needed by women to recover from childbirth. These restrictions render a statutory challenge to an MMLA-like parental leave policy highly likely to succeed.

C. *Sexual Orientation Discrimination*

An additional basis exists for invalidating both the adoption and birth provisions of the MMLA. In *Goodridge v. Department of Public Health*, the SJC declared that barring a couple from the benefits of civil marriage because of the couple's sexual orientation violates state constitutional guarantees of equal protection.[267] Additionally, Chapter 151B specifically bars discrimination in the "terms, conditions or privileges of employment" based on sexual orientation.[268] The MMLA divides married couples into three groups based upon the couples' sexual orientation with respect to the receipt of parental leave benefits. Both partners in a female homosexual marriage can take parental leave, in a heterosexual marriage only one partner can take leave, and in a male homosexual marriage neither partner can take leave.[269] Thus, the MMLA provides disparate benefits to married couples according to whether the couple's sexual orientation is female-homosexual, heterosexual, or male-homosexual.

This line of analysis requires one to view the parental leave benefit as a benefit bestowed upon a couple, like a tax benefit for a married couple filing jointly, rather than a benefit bestowed upon an individual employee.[270] However, one can plausibly classify parental leave benefits as benefits received jointly by a married couple given that married partners often coordinate with their spouses regarding the primary care-giving of their children. The law recognizes this reality to some extent, in that the FMLA,[271] the most recent attempt to amend the MMLA,[272] and some state parental leave statutes[273] contain offset provisions whereby, in certain circumstances, co-parents cannot both simultaneously take parental leave. Under *Goodridge*, Massachusetts could not justify the MMLA's unequal distribution of benefits as rational because it is based upon the couples' sexual orientation.[274] The recognition of sexual orien-

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[267] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

[268] MASS. GEN. LAWS ch. 151B, § 4(1) (2012).

[269] *See* MASS GEN. LAWS ch. 149, § 105D (2012).

[270] *See* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 394 (D. Mass. 2010) (finding the Defense of Marriage Act unconstitutional because it deprives same-sex couples of a host of "marriage-based benefits"), *aff'd*, 682 F.3d 1 (1st Cir. 2012).

[271] *See* Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2611(f)(1).

[272] S. 2247, 187th Gen. Ct. (Mass. 2012).

[273] *See, e.g.*, CAL. CODE REGS. tit. 2, § 7297.1 (1995) (permitting an employer to limit the amount of leave taken by co-parents under the California Family Rights Act only if both parents are employed by the same employer and the leave is taken for the birth, adoption or foster care placement of their child).

[274] *See Gill*, 699 F. Supp. 2d at 394 (asserting that rational basis review is not a "toothless" standard), *aff'd* 682 F.3d 1 (1st Cir. 2012).

tation as a protected class in Massachusetts further bolsters the pertinence of expanding the rights afforded to same-sex parents.[275] Moreover, an unlikely fact pattern could give rise to the MMLA conflicting with Chapter 151B on sexual orientation grounds. A male same-sex couple employed by the same employer could bring a sexual orientation claim under Chapter 151B if the employer had provided parental leave benefits to both partners in a female same-sex marriage.[276]

D. *Parental Leave as a Fundamental Right*

The argument that gendered parental leave policies, such as the MMLA, warrant heightened scrutiny because they implicate a fundamental right of parenting has been proposed, albeit with a only a modicum of success. Although the Eighth Circuit in *Johnson* rejected this argument,[277] the District Court in *Danielson* deemed the argument sufficiently plausible to withstand summary judgment.[278] The difficulty with this argument is that the Supreme Court has not defined the precise scope of the fundamental right of parenting,[279] and the Court has yet to extend the right to establish affirmative duties for the state to facilitate parenting.[280] Therefore, the fundamental right to parenting would not include an affirmative right to parental leave, and consequently the denial of parental leave to fathers would not trigger heightened scrutiny. Nonetheless, the line of cases that established a fundamental right to marry by analogy supports the extension of heightened scrutiny to cases involving the unequal distribution of parental leave benefits.[281] Presumably a state could decide to disestablish marriage as a civil institution; however, if a state chooses to perform civil marriages, it cannot facilitate marriages for only some

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[275] *See* MASS. GEN. LAWS ch. 151B, § 4 (2012).

[276] *See id.*

[277] Johnson v. Univ. of Iowa, 431 F.3d 325, 331 (8th Cir. 2005) ("Although the Supreme Court has recognized a number of fundamental rights concerning parents' ability to raise their children, Johnson offers no precedent establishing that these rights include the ability to take time off from work to bond with a child.").

[278] Danielson v. Bd. of Higher Ed., 358 F. Supp. 22, 28 (S.D.N.Y. 1972) (" 'The rights to conceive and to raise one's children have been deemed essential . . . basic civil rights of man . . . and [r]ights far more precious . . . than property rights . . . .' ") (alteration and omissions in original) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)) (internal quotation marks omitted).

[279] Troxel v. Granville, 530 U.S. 57, 78 (2000) ("Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child.").

[280] *See id.* (affirming a negative right to be free from government interference in parenting); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[281] *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

couples unless the distinction can survive heightened scrutiny.[282] Analogously, where the state has elected to facilitate parenting, including through the provision of parental leave, the state may not do so only for certain parents unless the disparity can survive heightened scrutiny.

E. *Policy Considerations*

Several policy considerations support amending the MMLA to include parental leave benefits for men. Men, women, children, and employers all benefit from providing men with parental leave. Parental leave can enable men to experience "a sense of personal achievement and intimacy" through time spent with a new child.[283] Additionally, men may experience greater job satisfaction if they are forced to make fewer difficult choices between spending time at work or with their children.[284] Women would benefit from the availability of paternity leave because the equalization of the roles of men and women in the home can prompt the equalization of gender roles in the workplace.[285] Children can benefit developmentally from engagement with more than one parent.[286] Employers also benefit from broad parental leave policies because the availability of parental leave can lower the costs of employee turnover.[287]

In addition, male same-sex couples and their children would benefit especially acutely from amending the MMLA. Citing robust evidence, Judge Joseph Tauro of the U.S. District Court for Massachusetts recently found that "a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to

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[282] *See Zablocki*, 434 U.S. at 374 (holding that a statute that significantly interferes with the fundamental right to marry "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests"); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 970-71 (Mass. 2003) (Greaney, J., concurring) (suggesting that banning same-sex marriage "constitutes a categorical restriction of a fundamental right" that the state can only justify by showing "a compelling purpose . . . that can be accomplished in no other reasonable manner").

[283] Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J. L. & GENDER 1, 18 (2005).

[284] *See id.*; Kathryn Frueh Patterson, *Discrimination in the Workplace: Are Men and Women Not Entitled to the Same Parental Leave Benefits Under Title VII?*, 47 SMU L. REV. 425, 442-43 (1994).

[285] Patterson, *supra* note 284, at 443-44; *see also* Lester, *supra* note 283.

[286] *See In re* Marriage of Hansen, 733 N.W.2d 683, 693 (Iowa 2007) ("[A] growing body of scholarship suggests that the continued presence and involvement of both parents is often beneficial to the lives of children . . . ."); Natasha J. Cabrera et al., *Fatherhood in the Twenty-First Century*, 71 CHILD DEV. 127, 129-30 (2000); Patterson, *supra* note 284, at 445 (1994).

[287] JILLIAN P. DICKERT, UNIV. OF MASS. BOSTON, MAKING FAMILY LEAVE MORE AFFORDABLE IN MASSACHUSETTS: THE TEMPORARY DISABILITY INSURANCE MODEL 10 (1999); Patterson, *supra* note 284, at 442.

be well-adjusted as those raised by heterosexual parents."[288] Therefore, Massachusetts should pursue the equalization of same-sex parenting as a worthwhile policy goal. Moreover, the equalization of same-sex parenting remains an important policy goal irrespective of whether one embraces Judge Tauro's characterization. In Massachusetts, nearly 6,000 adopted children live with same-sex parents.[289] Massachusetts also has the second highest percentage in the country of adopted children living with same-sex parents.[290] Given the prevalence of same-sex parenting in Massachusetts, the state should provide equal parental leave benefits to same-sex fathers because "[i]t cannot be rational . . . to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation."[291]

In general, parents, children and employers all benefit from the provision of childcare leave in addition to childbirth leave.[292] Therefore, providing childcare leave to all parents would most effectively cure the discriminatory implications of the MMLA. If Massachusetts removed the adoption provision from the MMLA and provided childbirth leave for the period of a woman's actual disability, the amended statute might be able to survive legal challenge, even under the Mass. ERA.[293] However, amending the MMLA by denying all parents childcare leave disadvantages both biological and adoptive mothers while ignoring the childcare difficulties all fathers face under the current statute. Since policy considerations support the provision of childcare leave in addition to childbirth leave, Massachusetts should amend the MMLA to provide leave for birth and adoption to all qualified employees.[294]

IV. CONCLUSION

Massachusetts pioneered parental leave by instituting the first statute in the nation to empower women to choose to take maternity leave without stigmatizing pregnancy by requiring pregnant women to take leave.[295] However, four decades later Massachusetts lags behind many other states in failing to correct

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[288] Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 388 (D. Mass. 2010), *aff'd*, 682 F.3d 1 (1st Cir. 2012).

[289] JENNIFER EHRLE ET AL., URB. INST. & UCLA L. SCH., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 10 (2007).

[290] *Id.*

[291] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 964 (Mass. 2003).

[292] *See* Lester, *supra* note 283 at 18; DICKERT, *supra* note 287 at 10; Patterson, *supra* note 284 at 442-43.

[293] *See supra* Part III.B for a discussion of the level of scrutiny to which an ostensibly childbirth focused statute would be subject under the Mass. ERA.

[294] The ideal length for childcare leave as well as the ideal qualifications for a covered employee are beyond the scope of this Note. However, it is worth noting that Massachusetts' current provisions on these matters rank mid-range nationally. *See* sources cited *supra* note 11 and accompanying text.

[295] *See* MLRI Memo, *supra* note 29.

the discriminatory nature of its only parental leave provision. Nearly ten years ago, Massachusetts served as a pioneer once more by being the first state to legalize same-sex marriage.[296] The discriminatory nature of the MMLA stands out particularly strikingly in the context of same-sex parenting. The MMLA raises statutory and constitutional discrimination concerns because it aims to promote childcare rather than facilitate maternal recovery from childbirth. Additionally, regardless of the MMLA's underlying purpose, the MMLA is not sufficiently narrowly tailored to survive a legal challenge. Furthermore, the MMLA may implicate sexual orientation discrimination and the fundamental right of parenting. Strong policy considerations also support the state's adoption of gender-neutral parental leave for both childcare and childbirth. Thus, the Massachusetts state legislature should heed the longstanding request of the MCAD and pass a gender-neutral version of the MMLA.

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[296] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).