Federal Family Policy and Family Values From Clinton to Obama, 1992-2012 and Beyond

Linda McClain

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This Article considers the evolution of federal family law and policy during a twenty-year time slice, 1992-2012. The “and beyond” in this Article’s title captures the point that, with President Obama re-elected and serving his second term in office, this Article’s topic is more than simply of historical interest. The Article uses the term “Clintonism” to refer to the core political concepts associated with the candidacy and presidency of William Jefferson Clinton. 1 Clinton and other members of the Democratic Leadership Council conceived themselves as “New Democrats” and devel-

oped a “Third Way” political philosophy with three key themes: opportunity, responsibility, and community. Clintonism’s New Covenants of opportunity, responsibility, and community also appealed to values such as work, family, faith, individual liberty, and inclusion. An examination of Democratic platforms in each election year since 1992 reveals both continuity and evolution with respect to the family, family values, and family policy. To anchor this Article, I consider the trajectory of three statutes enacted during Clinton’s presidency: the Family and Medical Leave Act (1993) (FMLA), the welfare reform law with the unwieldy name of the Personal Responsibility and Work Opportunity Reconciliation Act (1996) (PRWORA), and the Defense of Marriage Act (1996) (DOMA). I also argue that, while the Obama administration’s approach to family law and policy shows a continuity with the basic tenets of Clintonism, Obamaism has also introduced some new and distinctive tenets.

This Article focuses on 1992-2012—and beyond—because some of the debates about family values and family policy from twenty years ago resonate today. In that sense, those years were formative years. This retrospective, however sweeping it must be, may prove illuminating. Studying both the political rhetoric and the policies of this time period reveals the prevalence of an idea that I have addressed in other work: that there is an important relationship between the state of the family and the state of the nation and that families matter not just to the individuals in families but to society and, ultimately, to the polity. This is why battles over family law and policy, and in turn family values, can be so fierce when people disagree over things like how to define family and the balance between personal and public responsibility for supporting families. In keeping with this symposi-

2. For a “present at the creation” account of the development of this philosophy and its place in Clinton’s candidacy and presidency, see the recent political memoir, A PLACE AT THE CREATION: THE NEW DEMOCRATS AND THE RETURN TO POWER (2013). On opportunity, responsibility, and community as the three core themes of Clinton’s New Democrat philosophy, see id. at 148-49, 151-81.

3. Id. at 4, 177.


um’s theme, this Article teases out how issues of equality are part of these battles.

Family leave and welfare reform featured prominently in Clinton’s New Covenant, which instead of “punishing the poor or preaching to them,” would aim at “empowering Americans to take care of their children and improve their lives.” Clintonism stressed giving people the tools they needed to succeed at home and at work and to eliminate false or forced choices (for example, between the job they needed and the family they loved). By contrast, Clinton did not campaign for the Defense of Marriage Act, and the bill seemed to be at odds with his stated commitment to address discrimination against gay men and lesbians. These three laws charted significant points on a map of federal family policy and shaped public discourse over the place of families and family values. For example, in the time period I examine, one finds evident bipartisan agreement on the principle—arguably a legacy of Clintonism—that government should help to strengthen families, but considerable disagreement over how government should do so and even which families to recognize. Until recently, one paradox in this federal family policy was that, on the one hand, the government promoted marriage for some; on the other, with DOMA, it excluded others from marriage. As this Article discusses, President Obama’s evolving approach to DOMA and, more broadly, to marriage equality reflects the Obama administration’s sharpest departure from Clintonism. Moreover, former President Clinton himself has evolved on the issue, repudiating DOMA and supporting marriage equality.

By providing the Obama administration with the final judicial resolution it sought, the Supreme Court’s recent ruling, in United States

10. See From, supra note 2, at x-xi (prefacing his political memoir with a Foreword by Bill Clinton asserting that the DLC “called for an end to the era of false choices”); supra Part I for elaboration.
11. In selecting these three laws, I do not mean to deny that other legislation passed during Clinton’s presidency has significantly shaped federal family policy, broadly defined. For example, as he promised to do when campaigning, President Clinton signed the Violence Against Women Act (VAWA). See Clinton and Gore, supra note 9, at 49 (pledging to sign VAWA to “[c]rack down on violence against women and children”). During his second term, Clinton signed the Adoption and Safe Families Act of 1997, a major piece of federal child welfare legislation. Remarks on Signing the Adoption and Safe Families Act of 1997, 33 Weekly Comp. Pres. Doc. 1863 (Nov. 17, 1997). One central piece of the Clinton–Gore family agenda that the Clinton administration failed to achieve was its call “to guarantee affordable, quality health care for every American” so that “[n]o American family should have to go from the doctor’s office to the poorhouse.” Clinton and Gore, supra note 9, at 108; Mark E. Rushefsky & Kant Patel, Politics, Power & Policy Making: The Case of Health Care Reform in the 1990s 245-46 (1998) (discussing reasons for the failure of the Clinton administration to deliver on the promise of health care reform).
v. Windsor, that § 3 of DOMA is unconstitutional has initiated a new phase of federal family law and policy—at least with respect to the equal treatment, for purposes of federal law, of same-sex couples and opposite-sex couples lawfully married under state law. The impact of the Obama administration’s broader embrace of marriage equality for same-sex couples as a matter of fundamental federal constitutional rights remains to be seen.

While DOMA’s fate reflects a dramatic change in the constitutional and political landscape over the nearly twenty years since its enactment and a significant shift from inequality to equality, the theme of unfinished business better characterizes the FMLA and PRWORA. At the time of its passage, the FMLA was an important first step toward a federal family leave policy, but then, as now, it was not sufficient to address the needs of workers for paid family leave and for workplace flexibility. One distinctive feature of the Obama administration’s approach to work–family policy has been to make the personal political by highlighting the challenges the First Family faces as emblematic of the broader challenges Americans face, with far fewer resources than the Obamas possess. A second distinctive element is President Obama’s focus on women and girls in designing federal policy even as he insists that workplace flexibility and work–family conflict are “not just women’s issues,” but issues affecting men, families, the economy, and the broader society. A third distinctive feature of Obamaitism is its call for a “new New Deal,” in which the economy, governmental policies, and institutions (such as the workplace) must catch up with the realities and needs of twenty-first century families and workers.

Finally, PRWORA legitimated governmental promotion of marital, two-parent families as a proper aim of welfare policy and, during the reauthorization process, came to include dedicated federal funding streams for promoting responsible fatherhood and healthy marriage. As the Obama administration has continued such funding, here too the Obamas have made the personal political by referencing their own marriage when discussing the value of marriage education and relationship skills. President Obama’s narrative about father absence in his own life has punctuated his administration’s insistence on the importance of fathers doing the right thing and living up to their responsibilities.

13. See 133 S. Ct. 2675, 2682-83, 2695 (2013). For discussion of post-Windsor federal policy toward married same-sex couples, see infra Part III.
14. See infra Part III for discussion.
While welfare reform was a burning issue in the 1990s’ campaigns, the 1996 welfare reform law had the effect of taking the issue off the table. In subsequent presidential campaigns, it was as though the issue had disappeared because Congress had—as Clinton pledged to do—ended welfare as we know it. This Article charts the course of the two prongs of PRWORA: moving mothers on welfare from welfare to work and moving mothers on welfare into marital, two-parent families and deterring nonmarital family formation. With the economic recession, poverty—rather than welfare reform as such—features as unfinished business. Here, too, the legacy of Clintonism is evident, since a premise is that Americans willing to work hard and play by the rules should not be in poverty. Moreover, just as Clinton repeatedly interpreted the value of “community” as meaning that “we are all in this together, and we are going up or down together,” candidate and President Obama appealed to “the idea that we’re all in this together” to justify economic policies to fight the Great Recession. Even though the conversation has shifted from welfare to poverty and how to help the working poor, it is evident that the role of government in providing opportunity continues to be a source of political controversy, particularly in election years. Thus, in the 2012 presidential campaign, Republican nominee Mitt Romney notoriously referred to the 47% dependent on governmental entitlements and who lacked personal responsibility. Republican candidate Newt Gingrich labeled President Obama the “most successful food stamp president in . . . history.” The 2012 campaign revealed deep disagreements, at a time of growing inequality, about the proper role of the federal government in helping individuals and families.

In Part I, I begin by introducing basic themes of Clintonism, sounded in the 1992 presidential campaign. I focus particularly on how the pairing of responsibility and opportunity applied to families and to family values. In Part II, I discuss the translation of rhetoric about family values and valuing families into family policy. The FMLA and PRWORA both were statutory embodiments of campaign promises, although the latter reflected compro-

18. FROM, supra note 2, at 148, 165-66.
19. GRUNWALD, supra note 17, at 51.
22. Cf. GRUNWALD, supra note 17, at 454 (contrasting Romney and Obama and predicting that “the 2012 election will be about values, about the purpose of the federal government, about our obligations to each other as Americans”).
mise legislation. DOMA, by contrast, did not fulfill a campaign promise and seemed in tension with Clintonism’s themes of condemning homophobia, promoting inclusion, and restoring community. In Part II, I also discuss unfinished business with the FMLA and PRWORA evident by the end of Clinton’s second term and in the rhetoric of the 2000 and 2004 elections, including concern over values polarization. In Part III, I consider Clintonism in the Obama era, highlighting both continuity and change. I conclude by suggesting the relevance of the trajectories this article traces to President Obama’s identification, in recent speeches, of addressing growing economic inequality as “the defining challenge of our time.”

I. BASIC THEMES OF CLINTONISM: THE 1992 PRESIDENTIAL CAMPAIGN

The Republicans have lectured America on the importance of family values. But their policies have made life harder for working families . . . . A Clinton-Gore Administration will demand more from families, but it will offer more, too.

In linking family values and family policies, Democratic presidential nominee Governor Bill Clinton and his running mate Senator Al Gore successfully harnessed values talk in a way that challenged the idea that concern for family values was the domain only of the Republicans. At the time of the 1992 presidential campaign, Republicans had held the White House since 1981, and, indeed, except for Jimmy Carter’s single term, had held it since 1968. New Democrats have credited Clintonism’s “New Democrat principles” for fashioning a winning “progressive politics” that led the Democratic Party out of the “political wilderness”—the two-term presidency of Ronald Reagan and the one term of his vice president, George H.W. Bush, 1980-1992—to victories in the 1992 and 1996 presidential elections.

During his 1992 presidential campaign, Governor Bill Clinton called for and elaborated a “New Covenant.” In a trio of speeches delivered at Georgetown University, he set out its basic elements: linking governmental opportunity to personal responsibility, rebuilding the American community, restoring “our basic values,” empowering citizens, and addressing the plight of the “forgotten middle class”—the “millions of decent, ordinary people who worked hard, played by the rules, and took responsibility for their own actions,” but whom, under Republican regimes, fell behind and lived a “life of

24. CLINTON & GORE, supra note 9, at 100.
25. FROM, supra note 2, at 5-14.
26. See id. (describing 1968-1992 as “the wilderness” for the Democrats); id. at 249 (“Bill Clinton and the New Democrats saved the Democratic Party from the political wilderness”); From, supra note 1, at 48; Al From, The New Democrat Decade, DLC.ORG (Nov. 1, 1999), http://www.dlc.org/ndol_ci6d0a.html?kaid=86&subid=84&contentid=1008.
struggle.” In his memoir, My Life, Clinton recalls that this trio of speeches articulated “the ideas and proposals I had developed over the previous decade as governor and with the Democratic Leadership Council”—a cluster of ideas some New Democrats have called “Clintonism.” Indeed, Democratic Leadership Council (DLC) founder and Clinton advisor Al From recounts that the DLC and its research arm, the Progressive Policy Institute (PPI), provided the “New Democrat DNA” for the Clinton campaign and presidency, an assessment shared by Clinton. The speeches included important slogans that would recur in the campaign, the Democratic Platforms of 1992 and 1996, and Clinton’s presidency: government should honor the values of the “forgotten middle class”; help the working poor by “making work pay”; and empower the welfare poor by investing in poor people and requiring them to go to work, thus breaking “the cycle of [dependency]” and ending “permanent dependence on welfare as a way of life.”

Melding “basic American values of work and family, freedom and responsibility, faith, tolerance, and inclusion” with new ideas; linking opportunity to responsibility; and rewarding families who “work hard and play by the rules” are distinctive features of “Clintonism.” This “centrist, progressive” political vision elaborated by Clinton, the DLC, the PPI, and other New Democrats was also characterized as a form of “Third Way” politics. Such a politics includes “an ethic of mutual responsibility that equally rejects the politics of entitlement and the politics of social abandonment.”

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29. From, supra note 1, at 48.
30. FROM, supra note 2, at 163.
31. In the Foreword to From’s recent political memoir about the DLC, Clinton acknowledges his debt to the DLC and From and states: “From the start of my first term until the day I left office, I promoted the policies of the New Democrats.” Id. at x.
32. Clinton, supra note 27.
33. CLINTON, supra note 28, at 381.
34. Id. at 365, 420.
35. Id. at 446.
37. On the New Democrats as charting a Third Way politics, which influenced the parallel development of “the Third Way” in the United Kingdom (associated with Tony Blair and the New Labour party, in particular) and continental Europe, see FROM, supra note 2, at 239-48. See also ANTHONY GIDDENS, THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY 1-3, 154-55 (1998). The DLC ceased operating in 2011 and is now part of the Clinton Foundation. See FROM, supra note 2, at 255. However, a newer organization, the Third Way, espouses similar principles. See Third Way, SOURCEWATCH.ORG, http://www.sourcewatch.org/index.php?title=Third_Way (last visited Nov. 12, 2013).
38. Third Way, supra note 37.
this ethic: “We believed . . . that government has a responsibility to its citizens to create opportunities, and that citizens have an obligation to their country to give something back to the commonwealth.” As the newly elected Clinton would later tell Congress, urging both political parties to “break . . . old habits”: “we will find our new direction in the basic values that brought us here: opportunity, individual responsibility, community, work, family, and faith. . . . We must say there can be no more something for nothing, and we are all in this together.”

In speeches, Clinton articulated a “third way to approach the American family—beyond the . . . [Bush] Administration’s cheerleading for family values on the one hand, and on the other hand, the old big-government notion that there is a program for every social problem.” What families should be entitled to expect—and what would be expected of them—under the New Covenant also feature in Clinton and fellow New Democrat Al Gore’s campaign book, Putting People First: How We Can All Change America. The book skillfully pairs catchy slogans with concrete policies. In a memorable slogan, Clinton and Gore declared: “Parents should not have to choose between the job they need and the family they love.” Here Clinton and Gore articulate the DLC’s call for “an end to the era of false choices.”

Thus, in calling for support for “[p]ro-family and [p]ro-children [p]olicies,” Clinton and Gore pledged to sign the FMLA, which President George H.W. Bush vetoed, “so that no worker is forced to choose between maintaining his or her job and caring for a newborn child or sick family member.” The FMLA, they asserted, would give American workers “a right enjoyed by workers in every other advanced industrial nation.” So too, the Democratic Party Platform of 1992 (1992 Platform), A New Covenant with the American

39. FROM, supra note 2, at 2.
40. Id. at 194 (quoting Clinton’s first State of the Union address delivered on February 17, 1993).
42. See FROM, supra note 2, at 178 (observing that Al Gore “shared Clinton’s New Democrat philosophy” and that, by selecting a fellow DLC member as his running mate, Clinton “broke the tradition of a president balancing the ticket with his vice presidential choice” and sent a “clear message that this was a different kind of Democratic ticket”).
43. CLINTON & GORE, supra note 9, at 15.
44. FROM, supra note 2, at x (detailing Clinton’s characterization of DLC’s “fundamental mission”).
45. CLINTON & GORE, supra note 9, at 50-51.
46. Id. at 15.
People, asserts, “Family . . . leave will ensure that workers don’t have to choose between family and work.”

A second powerful trope about what families can expect from government is that “no American with a family who works full-time” should be “forced to live in poverty” or “forced to raise children in poverty.” In Putting People First and the 1992 Platform, Democrats employ these slogans. They stress concrete legislative measures, such as the Earned Income Tax Credit (EITC), which rewards people who “play by the rules” by working hard. As with the FMLA, an expanded EITC recurs throughout Putting People First as a “[p]ro-family and [p]ro-children” policy. The EITC even appears in the chapter on “Civil Rights,” as among those policies fostering “[e]conomic [e]mpowerment” and “equal economic opportunity,” in line with American values of “work, family, individual responsibility, [and] community.”

Perhaps Clintonism’s most famous slogan is the pledge to “end welfare as we know it.” This third rhetorical trope expressing Clintonism’s family policy features in Putting People First, along with the related slogans that welfare should be “a second chance, not a way of life” and that “[n]o one who can work should be able to stay on welfare forever.” At the same time, Clinton and Gore also declare that (as with the EITC): “No one who works full-time and has children at home should be poor anymore.” They contend that due to current economic conditions (fueled by Republican policy), “[t]oday almost one of every five people who works full-time doesn’t earn enough to keep his or her family above the poverty level.” Welfare reform consistent with the New Covenant’s overarching principle of rewarding those who work hard and play by the rules would require “ending welfare as we know it—not by punishing the poor or preaching to them, but by empowering Americans to take care of their children and improve their lives.” As Clinton would often reiterate: “[g]overnments don’t raise children; people do.”

48. CLINTON & GORE, supra note 9, at 104.
49. Id. at 50; see also id. at 167-68.
50. Id. at 14-15.
51. Id. at 50; id. at 104 (as policy to reward working families); id. at 165 (as policy to guarantee a working wage).
52. Id. at 65-66 (emphasis omitted).
53. Id. at 14.
54. Id. at 104, 164.
55. Id. at 164.
56. Id.
57. Id.
58. Id. at 14; HISTORY OF THE WHITE HOUSE, supra note 41, at 4.
Clinton and Gore charged that prior Republican administrations “praised the virtue of hard work” and “talked about ‘family values,’” but their policies “hurt hardworking Americans,” failed to “put people back to work,” and failed to “value families.” By contrast, a Clinton–Gore welfare plan would “[e]mpower people,” through providing education, training, and child care, so that they can “break the cycle of dependency.” It would also “demand responsibility”: after two years, it would “require those who can work to go to work,” either in a private sector job or in community service, and would help those who cannot find work to do so. To support the transition from welfare to work, and ensure that no one who works should live in poverty, government would adopt measures like the FMLA and the expanded EITC, as well as “[g]uarantee affordable, quality health care to every American” so that no one would be “forced to stay on welfare because going back to work would mean losing medical insurance.” In their chapter on “Welfare and Work,” Clinton and Gore also call for “[c]rack[ing] [d]own on [d]eadbeat [p]arents” who fail to take care of their children by paying child support.

The 1992 Platform reiterates these promises and slogans about welfare, calling for “[e]mpowering [t]he [p]oor and [e]xpanding [t]he [m]iddle [c]lass” by moving “away from subsistence and dependence and toward work, family[,] and personal initiative and responsibility.” Implicit both in Putting People First and the 1992 Platform, but made more explicit in subsequent debates over welfare reform, was that the welfare poor were somehow isolated from American middle-class values as well as from the economic mainstream and needed to be brought back into line with them. Missing from either document is how, other than through the FMLA, governmental policy will address the challenge low-income parents will face in earning wages while also ensuring good quality nurture and the physical care of their children. “Taking care” of their children seems primarily to mean breadwinning.

Finally, looking back at Clinton’s articulation of the New Covenant, Putting People First, and the 1992 Platform, there is one striking omission:

59. CLINTON & GORE, supra note 6, at 164.
60. Id. at 164-65.
61. Id.
62. Id. at 165 (emphasis omitted).
63. Id. at 168.
64. 1992 Platform, supra note 47.
65. For an assessment confirming this analysis, see HISTORY OF THE WHITE HOUSE, supra note 41, at 27-28 (prepared for the Clinton Administration History Project, 2001) (explaining Clinton’s approach to welfare reform: “Bill Clinton . . . believed that we could only make good on our best intentions as a nation if we chose policies that reinforced our values instead of undermining them, and sought to bring all our citizens into the mainstream of American life instead of leaving them isolated at the margins”).
66. See CLINTON & GORE, supra note 9, at 164.
a stance on whether government should recognize and support the intimate
relationships and families established by gay men and lesbians. DOMA, in
other words, was not yet an agenda item, although in just a few years, this
issue would demand attention after the Hawaii Supreme Court held that
under Hawaii’s constitution, denial of marriage licenses to same-sex cou-
pies was sex discrimination and that, on remand, government must show a
compelling state interest to justify excluding same-sex couples from mar-
riage.87 Amidst Clintonism’s rhetoric about “family values” and empower-
ing families, there is no reference to families formed by same-sex couples.
The New Covenant, however, was not otherwise silent on the rights of gay
men and lesbians. To the contrary, Putting People First proposes to “help
heal America” by moving beyond Republican tactics of dividing people
into “us” and “them” to protecting “[r]ights for [a]ll,” including “federal civil
rights legislation for gays and lesbians” (with a religious freedom exemp-
tion).88 Similarly, the 1992 Platform’s section on “Civil and Equal Rights”
affirms that “Democrats will continue to lead the fight” against discrimination
or deprivation on the basis of “sexual orientation,” among other “irrelevant
characteristics and expresses a commitment to “provide civil rights . . .
for gay men and lesbians and an end to Defense Department discrimi-
nation.”89 In the section on “Restoring Community,” the 1992 Plat-
form refers to America’s “special genius” of forging “a community of shared
values” from people of “diverse backgrounds”; as the “party of inclusion,” it
condemns “homophobia.”90

II. FAMILY VALUES AND FAMILY POLICY DURING THE CLINTON
PRESIDENCY

In this section, I discuss the translation of Clintonism’s campaign slo-
gans and promises about family values and valuing families into federal
family policy. I focus on the enactment of the FMLA and PROWRA. I dis-
cuss the growing recognition, by the end of the Clinton Presidency, of the
limitations of both of these laws and the need for further federal efforts. I
also discuss the enactment of DOMA, which did not grow out of a cam-
paign pledge and, instead, seemed in tension with Clintonism’s commit-
tment to civil rights for all Americans. I briefly discuss how these three statutes
featured in the 2000 and 2004 presidential campaigns.

68. CLINTON & GORE, supra note 9, at 63-64 (emphasis omitted).
69. 1992 Platform, supra note 47.
70. Id.
A. Relieving a Forced Choice Between Work and Family: The Family and Medical Leave Act

On February 5, 1993, President Clinton signed—as promised—the FMLA. To explain the new law’s significance, Clinton returned to the powerful language of relieving workers of a harsh, forced choice between work and family:

I believe that this legislation is a response to a compelling need—the need of the American family for flexibility in the workplace. American workers will no longer have to choose between the job they need and the family they love.

... As a rising number of American workers must deal with the dual pressures of family and job, the failure to accommodate these workers with adequate family and medical leave policies has forced too many Americans to choose between their job security and family emergencies. ... It is neither fair nor necessary to ask working Americans to choose between their jobs and their families—between continuing their employment and tending to their own health or to vital needs at home.

Clinton referred to the changing demographics of the American workforce: the dramatic rise in the percentage of mothers with children under eighteen in the labor force; the rising cost of living, making two incomes a necessity; the rapid growth in single-parent families; and, as America’s population ages, the greater need for working Americans to take time off to care for elderly parents.

Clinton’s predecessor, George H.W. Bush, vetoed the FMLA twice, noting its likely impact of robbing businesses of the flexibility they needed to succeed and its intrusion into individual employer–employee negotiations. By contrast, President Clinton stated that failing to give sufficient family and medical leave “has come at a high cost to both the American family and to American business,” noting a “direct correlation between health and job security in the family home and productivity in the workplace.” In My Life, Clinton characterized the FMLA as allowing the United

72. Id.
73. Id. at 145.
75. Presidential Statement on Signing FMLA, supra note 71, at 145.
States to join “more than 150 other countries in guaranteeing workers some time off when a baby is born or a family member is sick.”

For the Clinton administration, the FMLA served as a powerful symbol of linking family values to actual family policies by helping employees who were parents (and other caregivers) to balance work and family. Moreover, in establishing the gender-neutral “family” leave—rather than “maternity leave”—Congress also passed a law that allowed men—as well as women—to take leave. The FMLA was intended [to] accomplish [its] purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

The FMLA, in other words, sought to minimize sex discrimination by framing family leave as seeking “to balance the demands of the workplace with the needs of families”—rather than, say, the needs of working mothers, even though, typically, it is upon mothers that the primarily responsibility for care taking often falls.

As the United States Supreme Court observed, in upholding the constitutionality of the FMLA in Nevada Department of Human Resources v. Hibbs, Congress sought to address the problem of the continuing hold of “mutually reinforcing stereotypes” about women’s domestic roles and a “lack of domestic responsibilities for men.” Such stereotypes, the Court explained, “created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees.” The perhaps surprising source of this language is former Chief Justice Rehnquist, one of the most conservative members of the Court. His rather progressive views in this case, some say, stemmed in part from his first-hand experience caring for his granddaughter and seeing the struggles his daughter, a single parent, faced.

More than a symbol, the FMLA was also a significant practical step toward achieving work–family balance, as evidenced by the millions of

76. CLINTON, supra note 28, at 490.
78. Id. (explaining the purpose of the FMLA).
79. Id.
81. Id.
workers who have taken leave under the FMLA.\footnote{\textit{Wage \& Hour Div., U.S. Dep’t of Labor, \textit{Balancing the Needs of Families and Employers: Family and Medical Leave Surveys 2-2 tbl2.1} (2000), available at http://www.dol.gov/whd/fmla/chapter2.htm.}} Indeed, in \textit{My Life}, observing that, during his presidency, thirty-five million people would avail themselves of the FMLA, Clinton commented: “In the next eight years, and even after I left office, more people would mention it to me than any other bill I signed,” sharing with him their stories of how the FMLA helped them reconcile work and home obligations.\footnote{\textit{Clinton}, supra note 28, at 490.}


Thus, in Congress, some lawmakers pointed out that “the United States is the only industrialized country without a national family leave policy” and that most policies went beyond the proposed FMLA in terms of the duration of leave and income replacement.\footnote{139 Cong. Rec. 1705 (1993) (statement of Rep. John Sarbanes in support of FMLA).} Notably, in \textit{My Life}, Clinton recounts that, upon their daughter Chelsea’s birth, while he was governor of Arkansas, “Hillary told me that most other advanced countries provided paid parental leave to all citizens.”\footnote{Clinton, supra note 28, at 273 (emphasis added).} Hillary Clinton’s observation has even more force today, given the evolution of paid leave policies in other countries since 1993.\footnote{See discussion infra Subsection III.C.4.} Twenty-one years after Clinton signed the FMLA, it is evident that the FMLA has not solved the problem of work–family or work–life conflict (as I elaborate in Part III). It was a necessary, but not sufficient, step toward a better work–family balance. Indeed, by the end of the Clinton presidency, some of the limits of the FMLA were clear. First, because it authorizes unpaid—not paid—leave, a continuing problem is that some
workers who need leave and are eligible for it do not take it because they cannot afford to take an unpaid leave.\textsuperscript{90} Second, the FMLA only covers twelve weeks.\textsuperscript{91} Third, it does not apply to private employers who have fewer than fifty employees;\textsuperscript{92} approximately 40\% of workers are not covered.\textsuperscript{93} Fourth, despite the gender-neutral language of the FMLA, comparatively fewer men than women actually take leave under the FMLA and, when they do, it is for shorter periods of time.\textsuperscript{94} One explanation for this gender difference in leave taking is that, when leave is unpaid, it makes more economic sense for the lower-paid worker (more typically, the mother) to take it rather than the higher-paid worker (typically, the father) to forego income.\textsuperscript{95} As I will discuss in Part III, other factors include continuing societal expectations about men as breadwinners and women as caregivers and the relative perceived costs to each of taking leave.

By the end of his second term, President Clinton himself identified unfinished business concerning the FMLA. He called for “extend[ing] family leave to [the] 10 million more Americans working for smaller


\textsuperscript{92} Id. at 4 (explaining that the FMLA applies to public agencies “regardless of the number of employees,” but only to “private employers who are engaged in commerce and who employed 50 or more employees for at least 20 weeks in the preceding or current calendar year”).


\textsuperscript{94} WAGE & HOUR DIV., supra note 83, at 3-7 tbl.3.3 (indicating that 42.3\% of men take FMLA leave as opposed to 57.7\% of women); Wage & Hour Div., U.S. Dep’t of Labor, Executive Summary: 1995 Family and Medical Leave Commission Report, http://www.dol.gov/whd/fmla/1995Report/summary.htm (last visited Nov. 12, 2013) (“In general, men take more leave for their own serious health condition. Women (who alone take maternity leave) are somewhat more likely than men to need leave, to take leave and to take longer periods of leave.”).

companies." To provide for paid leave, his administration issued a rule that would have permitted the use of unemployment insurance funds to provide for paid family leave. However, no state enacted the rule, and the Bush administration repealed it.

In his final State of the Union address, Clinton proclaimed, “We’ve helped parents to succeed at home and . . . work with family leave, which 20 million Americans have now used to care for a newborn child or a sick loved one.” But he also urged that the nation pledge that, in the twenty-first century, “[e]very family will be able to succeed at home and at work.”

B. The FMLA in the 2000 and 2004 Campaigns

The association of the FMLA with progress as well as unfinished business also featured in the subsequent unsuccessful 2000 and 2004 presidential campaigns of Vice President Al Gore and Senator John Kerry. Thus, the 2000 Democratic Party Platform praised the FMLA for “[v]aluing [o]ur [f]amilies,” but called for expanding it to cover “parent–teacher visits and children’s routine medical appointments” and “to cover more employers.” And it urged employers to explore policies to “provide income support for workers during periods of family and medical leave.” For New Democrats of that era, the FMLA not only stood as “[o]ne of the most successful initiatives of the Clinton administration,” helping families, but also providing

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96. Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 62, 65 (Jan. 19, 1999) [hereinafter 1999 State of the Union Address].


100. Id.


102. Id.
benefits to businesses that “offset or outweighed the costs.”\textsuperscript{103} But New Democrats also called for a next generation of family leave policies, including paid family and medical leave, to “make[] family leave a more viable option for middle- and lower-income workers.”\textsuperscript{104} In 2002, California, for example, initiated an employee-financed system whereby employees pay into their own disability insurance fund.\textsuperscript{105} This scheme and other local and state paid family leave laws, the DLC stated, could provide useful models for other states to consider in order to “provide workers the tools they need to excel as workers and family caregivers.”\textsuperscript{106}

With this rhetoric of empowering workers with tools to succeed at work and at home, the DLC hearkened back to the powerful tropes of Clintonism about policies to alleviate forced choices between family and work. In the wake of poll data indicating that “values voters” contributed to the reelection of George W. Bush in 2004, the DLC announced a “heartland strategy,” designed to gain ground in the “red” states, of championing and leading—not following—the family values debate.\textsuperscript{107} One element of this strategy was supporting paid family leave as a tool to help parents spend more time with their families.\textsuperscript{108} I will pick up the thread of this effort in Part III when I discuss the successful presidential campaign of Senator Barack Obama.

C. Ending Welfare as We Know It: The Personal Responsibility and Work Opportunity Reconciliation Act of 1996

On August 22, 1996, a few months before the November presidential election, and after vetoing two Republican-authored welfare bills,\textsuperscript{109} President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).\textsuperscript{110} Upon signing the bill, Clinton

\begin{footnotes}
\item[103] Paid Family Medical Leave, Paid Sick Leave, and At-Home Infant Care, DLC (June 30, 2007), http://www.dlc.org/print1e5f.html?contentid=251930.
\item[104] Id.
\item[106] Paid Family Medical Leave, Paid Sick Leave, and At-Home Infant Care, supra note 103.
\item[108] See Marshall, supra note 107, at 15.
\end{footnotes}
stated that the Republican-authored bill, although “far from perfect,” was “bipartisan legislation” that was “significantly better” than the bills that he vetoed.\textsuperscript{111} Further, he said it “provides an historic opportunity to end welfare as we know it and transform our broken welfare system by promoting the fundamental values of work, responsibility, and family.”\textsuperscript{112} He praised the bill not only as appropriately “tough on work,” by imposing work requirements, but also for allocating more for child care than the vetoed bills, thus facilitating parents going to work.\textsuperscript{113}

In My Life, Clinton characterized PRWORA as a “landmark welfare reform bill” with broad bipartisan support, which he signed because he “thought it was the best chance America would have for a long time to change the incentives in the welfare system from dependence to empowerment through work.”\textsuperscript{114} Signing the bill, he recounts, “was one of the most important decisions of my presidency,” because moving people “from welfare to work” had been a key focus of “most of my career.”\textsuperscript{115} Thus, at the signing ceremony, “several former welfare recipients spoke up for the bill,” including Arkansas resident Lillie Harden.\textsuperscript{116} Clinton often referred to Harden’s comment that the best thing about leaving welfare for work was that “when my boy goes to school and they ask him, ‘What does your mama do for a living?’ he can give an answer.”\textsuperscript{117} So too, in his remarks to the press about the 1996 welfare law, Clinton invoked Harden’s remark and the example of her success as having had a powerful impact on him.\textsuperscript{118} Characterizing the law as an attempt to help the people “trapped on welfare” and exiled from work, he invoked the late Robert F. Kennedy’s extolling of work, adding that the bill signals that, instead of a “never-ending cycle of wel-

\textsuperscript{111}Id. In his statement, Clinton criticized—and promised to work to remedy—the exclusion of legal immigrants from benefits and overly deep cuts to the Food Stamps program. Id. at 1329.
\textsuperscript{112}Id. at 1328.
\textsuperscript{113}Id. at 1328-29.
\textsuperscript{114}Clinton, supra note 28, at 720.
\textsuperscript{115}Id. at 721.
\textsuperscript{117}Clinton, supra note 28, at 720-21. For an example from Clinton’s first presidential campaign, see Clinton, supra note 27. For an example contemporaneous with his signing of PRWORA, see Jeff Jacoby, Op-Ed., Welfare Reform Success, Boston Globe, Sept. 13, 2006, at A9.
\textsuperscript{118}Remarks on PRWORA & Exchange with Reporters, supra note 116, at 1325.
fare,” the Nation’s answer “will be the dignity, the power, and the ethic of work.”

Whatever ambivalence Clinton and other Democrats had about PRWORA, they quickly championed the new law as powerful evidence of the fulfillment of the campaign promise to “end welfare as we know it.”

Indeed, DLC leader Al From had advised Clinton that “signing the welfare bill will redeem your most important promise of 1992” and “take [Republican presidential candidate Robert] Dole’s most powerful potential issue away from him.”

Thus, during Clinton’s reelection campaign, the 1996 Democratic Party Platform credited the Clinton administration with realigning the welfare system with “mainstream American values” of “work, family, and . . . responsibility.”

It declared, “Now, because of the President’s leadership and with the support of a majority of the Democrats in Congress, national welfare reform is going to make work and responsibility the law of the land.”

The Republican Platform countered, taking credit: “Within a few weeks, Bill Clinton will sign into law a Republican reform of welfare. With a straight face, after twice vetoing similar legislation, he will attempt to take credit for what we have accomplished.”

The Republican Platform stressed the inadequacy of the Clinton administration, charging that President Clinton “repeatedly vetoed pro-family welfare reforms before surrendering to the demands of the American people.”

The 1996 welfare law, and in particular the Temporary Assistance for Needy Families (TANF) block grant, which replaced Aid to Families with Dependent Children (AFDC), was in harmony with Clintonism’s emphasis on requiring personal responsibility through the movement from welfare to work—thus rejecting welfare as a way of life—and in requiring parental responsibility by cracking down on “deadbeat” parents and imposing super-

119. Id. As I will discuss in Subsection III.A.4, Robert F. Kennedy’s words about poverty feature in later Democratic platforms.

120. Statement on Signing PRWORA, supra note 110, at 1328; see Clinton & Gore, supra note 9, at 14 (stating that Clinton–Gore strategy will “end welfare as we know it”).

121. From, supra note 2, at 229; see also History of the White House, supra note 41, at 3 (“The centerpiece of Clinton’s new social contract was his pledge to reform welfare.”).


123. Id.


125. Id.
But PRWORA also reflected a Republican vision of the central aims of welfare reform in some tension with Clinton’s own. Although Clinton sent his welfare plan to Congress in June 1994, “the 103rd Congress, mired in a bitter battle over health care, never took up the measure.”127 Subsequently, in the 1994 mid-term elections, the Republicans gained control of both the House and the Senate.128 While the Republican-authored bills “borrowed some aspects from Clinton’s proposal,” they also included “many extremist measures” that were contrary to Clinton’s philosophy of “rewarding and requiring work.”129 Although the bill Clinton signed was less extreme,130 many Democrats voted against it;131 many critics of the new law saw it as an unholy alliance between Clinton and House Speaker Newt Gingrich.132 For example, candidate Clinton—and the 1992 Platform—laid the blame for the failed welfare system at the door of Republican administrations, charging them with irresponsibility and neglect and for failing to put people back to work.133 By contrast, the Republican’s Contract with America (Contract), a call to action co-written by Representative Newt Gingrich after Republican victories in the 1994 mid-term elections, issued a scathing indictment of Democratic President Lyndon Johnson’s Great Society programs of the 1960s.134 Those programs, the Contract charged, had the “unintended consequence of snaring millions of Americans into the welfare trap” and breeding “illegitimacy, crime, illiteracy, and more poverty.”135 An often-cited text here was Charles Murray’s Losing Ground, which contend-

126. See supra text accompanying note 63; see also supra text accompanying notes 109-13.
128. See From, supra note 2, at 228.
130. Id. at 33-34 (noting the bill “included most of the improvements the President had sought on welfare reform, but contained deep, extraneous cuts in legal immigrant benefits that had nothing to do with welfare reform”).
131. See id. at 33.
133. 1992 Platform, supra note 47; CLINTON & GORE, supra note 9, at 164.
135. Id. at 65.
ed that welfare law had “unintended outcomes.”

Also influential was Murray’s provocative Wall Street Journal article, The Coming White Underclass, warning that the growing rate of white non-marital births was approaching that of African-American women in the 1960s, at the time of the Moynihan report. Murray urged cultural and legal measures to end illegitimacy, including the revival of stigma and premising men’s parental rights and duties only on marriage. The Contract’s welfare reform bill, the proposed Personal Responsibility Act (predecessor of PRWORA), highlighted “illegitimacy” as a core problem that welfare reform must attack and reduce.

A central theme in congressional debates over welfare reform was that welfare had been a life-support system for “irresponsible” reproduction. Thus, among PRWORA’s findings were declarations about the threat posed by illegitimacy and about marriage being the foundation of society, just as among its purposes were ending illegitimacy and encouraging the formation of two-parent families. PRWORA included an “illegitimacy” bonus for states achieving the greatest reduction in non-marital births without increasing the number of abortions. It also authorized governmental funding for “abstinence-until-marriage” sex education in schools.

Was this Republican rhetoric of ending irresponsibility simply an intensification of what was implicit in Clinton’s indictment of welfare for not promoting American (middle-class) values of work, family, and responsibility? The answer is complicated. The Contract’s sweeping attack on liberalism and on the 1960s, and Republican rhetoric about the moral poverty of the poor—that their real problem was a “poverty of values”—was far more strident in tone than anything articulated in the New Covenant, which claimed to eschew punishment of the poor in favor of empowerment. Indeed, media coverage spoke of “the war on [w]elfare [m]others,” and pro-

138. Murray, supra note 137.
142. § 403, 110 Stat. at 2118-29.
143. § 912, 110 Stat. at 2353-54.
144. For use of this term, see Dan Quayle, Address to the Commonwealth Club of California (May 19, 1992) (transcript available at http://www.vicepresidentdanquayle.com/speeches_StandingFirm_CCC_1.html).
testors (including some prominent Democrats) decried the “[c]ontract on America.” And, to reduce “illegitimacy,” the Contract’s proposed Personal Responsibility Act would have required states to exclude mothers seventeen and younger from any cash assistance and housing benefits, and gave states the option of extending that exclusion to mothers aged eighteen, nineteen, and twenty—exclusions Clinton rejected. By contrast to the Contract with America’s numerous references to “illegitimacy,” Putting People First’s discussion of welfare makes no mention of marriage, illegitimacy, or moral poverty.

Clinton’s own form of tough love as applied to welfare recipients put the first priority on requiring work. However, such tough love did include calls to personal responsibility in matters of reproduction and parenting. Thus, Putting People First called for cracking down on “[d]eadbeat [p]arents” to collect unpaid child support—something PRWORA also addressed. In elaborating the New Covenant, Clinton spoke of the need to preach to young people that they should not have children unless they could afford to do so. In sending Congress his proposed welfare bill, the Work and Responsibility Act of 1994, Clinton identified “[p]reventing teen pregnancy and out-of-wedlock births” as “a critical part of welfare reform.” He also called for a “national campaign against teen pregnancy” and encouraged the launching of the National Campaign to Prevent Teen Pregnancy. That campaign, successfully launched during his presidency, is still in existence and has broadened its mission to address not only adolescent

145. See, for example, the June 20, 1994 cover of Time magazine, The War on Welfare Mothers: Reform May Put Them to Work, but Will It Discourage Illegitimacy?, and related story, Ann Blackman & James Carney, “We Go After the Real Source of This Problem,” Time, June 20, 1994, at 28. See also Jesse Jackson, Address at the Democratic National Convention (Aug. 27, 1996) (transcript available at http://www.pbs.org/newshour/bb/politics/july-dec96/jackson_08-27.html), referring to protest by Jackson and others about the welfare bill President Clinton signed and urging that it is necessary to stop Rep. Gingrich’s “[c]ontract on America.”

146. Contract with America, supra note 134, at 70; see VETO OF H.R. 4, supra note 109.

147. Clinton & Gore, supra note 9, at 164-68.

148. For example, the section in Putting People First is called “Welfare and Work.” Id. at 164.


150. Clinton, supra note 27.


152. See id.
pregnancy but also the high rates, in America, of unintended or unplanned pregnancy.\textsuperscript{153} Clinton opposed categorical exclusion of groups of mothers from welfare, but his own plan would have given states the option of limiting benefits for additional family members (that is, imposing a “family cap”).\textsuperscript{154} In contrast to AFDC, which indexed the level of a family grant to family size, the family cap allowed the state to cap the level of benefits so that if a mother who was receiving welfare had another child, the benefit level to her family did not increase. Despite the low level of welfare benefits and the lack of empirical evidence that such low rates of welfare payments encouraged women to have additional children while on welfare, family caps were a popular rallying cry on the premise that welfare payments subsidized irresponsible reproduction and it just was a matter of simple logic that what you subsidize, you get more of.\textsuperscript{155} One force at work here, as political cartoons of the era and feminist critique reveal, was the racial stereotype of the Welfare Queen, living the good life at the expense of taxpayers.\textsuperscript{156} Rhetoric in favor of the cap stressed the importance of the welfare poor learning to live by the same rules as working families, where parents could not simply expect a raise because they wished to have more children.\textsuperscript{157}

Long before Clinton signed PRWORA, his administration gave New Jersey a waiver from AFDC’s requirements to adopt a family cap.\textsuperscript{158} Indeed, reflecting Clinton’s view of the importance of state experimentation, his administration gave a record number of waivers to encourage state experi-

\begin{itemize}
\item \textsuperscript{154} Work and Responsibility Act of 1994, H.R. 4605, 103d Cong. § 502 (1994).
\item \textsuperscript{155} See McClain, supra note 140, at 353-54; DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 210-25 (1997) (critiquing family cap and underlying myths about welfare and reproduction).
\item \textsuperscript{157} See McClain, supra note 140, at 353-54.
mentation with welfare reform. Proponents of New Jersey’s family cap linked it to encouraging rational and responsible reproductive decisionmaking by poor families, on the logic that responsible reproducers only have children if they can afford them and do not expect outside assistance. A state and federal court in New Jersey upheld the family cap as constitutional, against the challenge supported by an unusual alliance of women’s rights groups and pro-life/anti-abortion groups concerned about the cap coercing women’s reproductive choices and encouraging abortion. Under the 1996 welfare law, implementing family caps was an option, which many states adopted.

A reasonable conclusion, in light of the above contrast between the Clinton and the Republican visions of welfare reform, is that Clinton shared with Republicans a common diagnosis that welfare law should—but had failed to—demand personal responsibility with respect to work, reproduction, and parenting. Their differences appear to lie more in just how tough “tough love” should be and how much opportunity government should provide as recipients made the transition “from welfare to work.” The Contract’s proposed Personal Responsibility Act, for example, would end the “entitlement status” of Aid to Families with Dependent Children and numerous other public assistance programs. In a historic departure from decades of federal policy, and over the protests of Senator Daniel Patrick Moynihan, the Democrats’ leading welfare expert, PRWORA enacted this

159. See State Welfare Waivers, supra note 158, (noting President Clinton’s expanded use of waivers and that, “[b]etween January 1993 and August 1996, the Department of Health and Human Services approved welfare waivers in 43 states”); see also History of the White House, supra note 41, at 31 (noting Clinton’s knowledge of benefit of state experimentation and reporting: “From 1993 to 1996, at the President’s insistence, the Administration granted over 80 welfare reform waivers to 43 states—more welfare waivers than had been granted under all previous administrations combined”).

160. See Changes in State Welfare Reform Programs: Hearing Before the Subcomm. on Soc. Sec. & Family Policy of the S. Comm. on Fin., 102d Cong. 4-15 (1992) (statements of James Florio, Governor of the State of New Jersey, and Wayne Bryant, Assemblyman, New Jersey State Assembly). For an analysis of the tension between the family cap and public restrictions on abortion funding to encourage childbirth over abortion, see McClain, supra note 140, at 353-54, 396-408.


163. Contract with America, supra note 134, at 72.

end to entitlement, replacing AFDC with a block grant, under which states had more discretion.\textsuperscript{165}

Although there had been bipartisan support for the idea that some form of welfare reform was necessary, some child advocacy groups, and even politicians, concluded that the new welfare law was abandoning children in the name of reform.\textsuperscript{166} For example, after Clinton signed PRWORA, two high profile Clinton administrators, Peter Edelman and Mary Jo Bane, resigned in protest.\textsuperscript{167} Marian Wright Edelman, a close friend of Hillary Clinton and director of the Children’s Defense Fund, who had written an “open letter”\textsuperscript{168} to President Clinton not to sign PRWORA, denounced it as “welfare repeal” rather than “real welfare reform.”\textsuperscript{169} By contrast, DLC leader From viewed Clinton’s signing the bill as cementing into place “the final cornerstone of our Clinton revolution.”\textsuperscript{170}

D. Measuring the Success of Welfare Reform

1. From Welfare to Work

PRWORA set in motion two parallel tracks of welfare reform: the imperative of moving from welfare to work, and the imperative of ending illegitimacy and encouraging the formation of two-parent families. In other words, mothers on welfare could find a way out of poverty through the dignity of work or through marriage. What, then, would count as success under that law? In claiming success in achieving the goal of work, President Clinton—like many politicians and his successor George W. Bush—pointed to dramatic declines in the number of persons on the welfare rolls and in the poverty rate.\textsuperscript{171} But had welfare reform really “made work pay” and moved parents away from dependency toward independence and the “dignity” of a “real job”?\textsuperscript{165}

\begin{itemize}
\item \textsuperscript{165} See Lawrence M. Mead, The Politics of Conservative Welfare Reform, in The New World of Welfare, supra note 164, at 201, 201-12 (chronicling the success of the conservative attack on AFDC and entitlement, culminating in the passage of PRWORA).
\item \textsuperscript{166} See Heclo, supra note 164, at 192 (stating that Senator Moynihan protested against abandonment of the AFDC).
\item \textsuperscript{168} Review & Outlook: At Last, a Choice, WALL ST. J., Nov. 13, 1995, at A14.
\item \textsuperscript{170} From, supra note 2, at 229.
\item \textsuperscript{171} See, e.g., 1999 State of the Union Address, supra note 96, at 66; 2000 State of the Union Address, supra note 99, at 129.
\end{itemize}
Measured against such strong promises must be actual accounts—in the years following PRWORA’s enactment—of many low-income mothers struggling to reconcile work and family obligations. Some evaluations revealed that many welfare poor had simply joined the ranks of the working poor. For example, a study of Wisconsin Works, one of the most heralded experiments in moving mothers from welfare to paying jobs, found that “a substantial percentage of those who are employed [and their children] remain in poverty,” and that “publicly financed programs,” such as child care subsidies, are “essential to supporting [their] employment.”

In her book, *Flat Broke with Children*, Sharon Hays found that many mothers had achieved merely the “appearance of independence,” because the realities of low-wage work left this ideal out of reach. Moreover, the steep declines in the welfare rolls did not mean that all those no longer on welfare had found jobs. Due to an array of factors, including time limits, sanctions, and state tactics to divert people from being or remaining on the rolls, the reduction in rates did not mean, in all cases, the successful transition to work and independence. Further, TANF built in incentives for states to reduce their caseloads, since that reduced the percentages they had to achieve under the work requirements.

Even welfare reform enthusiasts came to notice this gap between the rhetoric of the dignity of work and the actual experiences of families with welfare reform. Thus, toward the end of Clinton’s second term, as Congress began the process of reauthorizing TANF, which would expire on October 1, 2002 unless continued, an emerging theme was that evaluating the success of welfare reform must look beyond the measure of caseload reduction, or even rate of participation in the paid labor force to consider the impact upon families and child well-being. In the words of Wisconsin’s Governor Tommy Thompson, an ardent champion of welfare reform: “A second measure of success must be the direct impact the program has on our participants, their families and, most importantly, their children.”


By the end of Clinton’s presidency, it was evident that unfinished business remained. The idea that government should support “working families” by helping to give former welfare recipients the tools they needed to achieve independence seemed to enjoy bipartisan support. Indeed, in his final State of the Union address, President Clinton declared, “If there is any single issue on which we should be able to reach across party lines, it is in our . . . commitment to reward work and strengthen families.”

In that address, Clinton called for a “21st century revolution to reward work and strengthen families by giving every parent the tools to succeed at work and at the most important work of all, raising children.” To the extent that this reference to the “most important work” of raising children implicitly includes parental nurture and care, and not only financial provision, this speech points to the practical problem of how parents can reconcile their responsibilities as earners and caregivers and suggests governmental responsibility to help solve this problem. By contrast, the earlier focus on “welfare to work,” and on recipients experiencing the “dignity” of a real job, implicitly signaled that unpaid parental labor lacked social value, at least when government, rather than a spouse, financially supported that labor.

2. Family Formation and Marriage Promotion

What about the 1996 welfare law’s other pathway to personal responsibility: its family formation goals? Did the Clinton administration or Congress conclude that that prong of PRWORA had been successful? What is the legacy of those family formation goals? In the reauthorization debates, which began toward the end of Clinton’s second term, a common view was that states, under the new law, had done far more to move mothers from...

177. 2000 State of the Union Address, supra note 99, at 133.
178. Id. at 132.
179. The literature on this problem, particularly by feminist scholars, is extensive. See, e.g., Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It (2000); Katherine B. Silbaugh, Foreword: The Structures of Care Work, 76 Chi.-Kent L. Rev. 1389, 1389 (2001) (introducing the lengthy symposium, The Structures of Care Work, and observing, “[a]s the roles and expectations of both men and women have evolved in the family, in the workforce, and in civic life, the institutional arrangements that have dominated care work for the past century have proved themselves to be in need of significant re-envisioning”). For my own argument for governmental responsibility to support care as a public value, see McClain, The Place of Families, supra note 8, at 85-114 and McClain, Care as a Public Value, supra note 8.
180. See generally Martha Albertson Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies 101–42 (1995) (identifying and critiquing the construction in poverty discourses of single mothers as “deviant”).
welfare to work than to promote marriage and responsible fatherhood. In the protracted reauthorization process, during the first several years of the George W. Bush administration, healthy marriage emerged as a key focus of further welfare reform.

Even before the enactment of PRWORA, the Clinton administration promoted “responsible fatherhood.” Vice President Al Gore, for example, hosted large conferences on it. Beginning in the mid-1990s, many states launched fatherhood initiatives of one kind or another as part of a broader effort to strengthen families, encourage more two-parent families, and reduce divorce rates. Several national organizations championed fatherhood, and policy institutes explored ways to promote it. Vice President Gore also spoke of “[p]romoting responsible fatherhood [as] the critical next phase in welfare reform,” as did the 2000 Democratic Party Platform on which he ran. In part, this meant requiring personal responsibility from fathers by being tough on “deadbeat dads” with unpaid child support. This focus expanded, however, to include helping “deadbroke dads” find and keep paid work and reconnect with their children. Research and demonstration projects funded during the Clinton administration revealed the difficult socioeconomic circumstances facing many unmarried, low-income fathers, such as unemployment or underemployment. Such projects stressed eco-

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181. See, e.g., Office of the Press Sec’y, The White House Unveils New Responsible Fatherhood Initiative to Promote Work and Boost Child Support Payments, The White House (Jan. 26, 2000), http://clinton4.nara.gov/WH/New/html/20000204.html (“The initiative to be announced today is an important next step in welfare reform, which has moved millions of single parents (mainly mothers) into the workforce, and it is a logical extension of the existing Welfare-to-Work funds, which are helping long-term welfare recipients and low-income fathers work and support their families.”).

182. U.S. DEP’T OF HEALTH & HUMAN SERVS., MEETING THE CHALLENGE: WHAT THE FEDERAL GOVERNMENT CAN DO TO SUPPORT RESPONSIBLE FATHERHOOD EFFORTS (2001), available at http://fatherhood.hhs.gov/guidance01/ch1.htm (opening report by stating that “[t]hroughout the Clinton-Gore Administration, the President and Vice President have worked hard to promote responsible and engaged fatherhood”).

183. Id.


187. See OOMS, COHEN & HUTCHINS, supra note 185 (discussing many of these projects); Ronald B. Mincy, Serena Klempin & Heather Schmidt, Income Support Policies for
nomic empowerment, but also aimed at improving parent–child relationships and cooperative relationships with the mother of the child (which might or might not lead to marriage).\textsuperscript{188}

Proponents of responsible fatherhood differed on whether promoting marriage should be a core goal of promoting responsible fatherhood. A look back at the various “responsible fatherhood” bills proposed by members of Congress reveals these different emphases.\textsuperscript{189} These differing views played out more fully during the subsequent administration of George W. Bush, as I will discuss below.

Governmental promotion of healthy marriage, which would emerge as a pillar of President George W. Bush’s welfare plan for strengthening families, also reflected the efforts of the marriage movement, which, beginning in the mid-1990s, had sought ways of making the ties that bind sturdier.\textsuperscript{190} While the marriage movement stressed renewing a “marriage culture,” it clearly advocated governmental efforts to strengthen marriage as well.\textsuperscript{191}

3. \textit{The Bush Administration: Healthy Marriage as a Cornerstone of Welfare Reform}

The focus on marriage intensified during the administration of George W. Bush. Indeed, some TANF reauthorization hearings focused specifically

\textit{Low-Income Men and Noncustodial Fathers: Tax and Transfer Programs, ANNALS AM. ACAD. POL. & SOC. SCI., May 2011, at 240, 240-51.}

\textsuperscript{188} See Wade F. Horn, \textit{Foreword} to \textit{Paula Dressel, Responsible Fatherhood Investments, 1994-2009: Influence, Impact, \& Leverage 5, 5-7 (2010)} (providing an overview not only of the Annie E. Casey Foundation’s efforts, but also of what was done at the federal and state level, and tracking the shift from “deadbeat” dads rhetoric to emphasis on families and fatherhood).

\textsuperscript{189} For a helpful overview of tensions within Congress and between the House and Senate about bills to promote responsible fatherhood and healthy marriage, see OOMS, BOUCHET \& PARKE, supra note 184, at 7-8. For examples of responsible fatherhood legislation proposed during this era, see McClain, \textit{The Place of Families, supra note} 8, at 104-05.

\textsuperscript{190} A February 27, 1995 \textit{Time} magazine cover, for example, featured a bride and groom bound together with twine, and the caption: “For Better, For Worse: The growing movement to strengthen marriage and prevent divorce.” \textit{Time}, Feb. 27, 1995, \textit{available at} http://www.time.com/time/covers/0,16641,19950227,00.html.

\textsuperscript{191} INST. FOR AM. VALUES, \textit{The Marriage Movement: A Statement of Principles} 3-4, 22-23 (2000), \textit{available at} http://www.americanvalues.org/pdfs/mariagemovement.pdf. This “[s]tatement of [p]rinciples” was adopted in 2000; its sponsors were the Institute for American Values; the University of Chicago’s Religion, Culture, and Family Project; and the Coalition for Marriage, Family, and Couples Education. \textit{Id.} at 2. I have critically evaluated the marriage movement and governmental promotion of marriage elsewhere. \textit{See} McClain, \textit{The Place of Families, supra note} 8, at 117-54.
on welfare and marriage.\textsuperscript{192} At such hearings, lawmakers explained that the “logic” of the 1996 law’s family formation goals was that by allowing states to use “cash welfare funds to promote marriage and family formation[, . . . welfare dependence will shrink and children will be better off.”\textsuperscript{193} The problem, however, was that “only a few States have taken up this challenge.”\textsuperscript{194} Witnesses in such hearings contended that “[i]f the single most potent antidote to poverty is work, marriage is not far behind.”\textsuperscript{195} One conviction expressed in these hearings was that marriage was the only way to secure responsible fatherhood.\textsuperscript{196}

The Bush administration’s welfare plan, \textit{Working Toward Independence}, identified “child well-being” as the overarching purpose of TANF and spoke of strengthening families through promoting “healthy marriage” and promoting responsible fatherhood as a cornerstone of securing child well-being.\textsuperscript{197} It included proposals to use federal funds to further these ends. Reflecting the Bush administration’s “compassionate conservatism,” the plan envisioned state governments partnering with private and faith-based organizations to develop successful programs, which the federal government would then evaluate and disseminate to other states.\textsuperscript{198} The plan appealed to research concerning child outcomes and claimed, “[I]t is simply wise and prudent to reorient our policies to encourage marriage, especially when children are involved.”\textsuperscript{199} In 2002, the Bush administration launched a “healthy marriage” initiative, housed in the administration for Children and Families (ACF), within the Department of Health and Human Services.\textsuperscript{200}


\textsuperscript{193}. Id.

\textsuperscript{194}. Id.; see also OOMS, BOUCHET & PARKE, supra note 184, at 7 (“[A]s TANF reauthorization approached, many conservatives complained that the states had not done enough to pursue the program’s family formation goals.”).


\textsuperscript{196}. Welfare and Marriage Issues, supra note 192, at 44 (statement of David Popenoe, Co-Director, Nat’l Marriage Project).


\textsuperscript{198}. Id.

\textsuperscript{199}. Id.

The first director of this initiative at ACF was Dr. Wade Horn, a prominent leader in the responsible fatherhood movement.\footnote{On ACS’s marriage initiative, see Welfare Reform Reauthorization Proposals, supra note 200, at 17. For Dr. Horn’s support for marriage promotion even before joining ACS, see Wade F. Horn, Take a Vow to Promote Benefits of Marriage, WASH TIMES, Nov. 2, 1999, at E2. Prior to his appointment to ACS, Wade Horn was president of the National Fatherhood Initiative. See Meet Dr. Wade F. Horn, Ph.D., DELLOITTE, http://www.deloitte.com/view/en_US/usf4ca87895e55f110VgnVCM100000ba42f00aRCRD.htm (last visited Nov. 12, 2013).}

Ultimately, in the Deficit Reduction Act of 2005, Congress approved an annual $150 million of federal funds for promoting healthy marriage and responsible fatherhood.\footnote{Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7103(a)(2)(D), 120 Stat. 4, 138-40 (2006).} This money would provide for federal grants for “demonstration projects” by governmental and nongovernmental entities to undertake such activities as: public advertising campaigns on the value of marriage and the skills needed to increase marital stability and health; education in high school on the value or marriage, relationship skills, and budgeting; various marriage education and relationship skills programs; divorce reduction programs that teach relationship skills; and marriage mentoring programs using married couples as role models and mentors in “at-risk” communities.\footnote{§ 7103(a)(2)(A)(iii)(I)-(VIII), 120 Stat. at 138-39.} Fundable activities to promote responsible fatherhood included relationship and parenting education, enhancing employment skills, marriage promotion, and the like.\footnote{§ 7103(a)(2)(C), 120 Stat. at 139.}

In emphasizing marriage promotion, the Bush administration linked responsible fatherhood tightly to married fatherhood on the premise that marriage is the best guarantor of paternal responsibility. It would be inaccurate to suggest that there was a clear partisan divide over marriage promotion as a tool of welfare policy. Nonetheless, it is fair to say that, as the reauthorization debate proceeded, more Democratic than Republican legislators were skeptical about marriage promotion than about promoting responsible fatherhood.\footnote{See, e.g., Press Release, Sen. Max Baucus, Statement of U.S. Senator Max Baucus: Welfare Reform Reauthorization Markup (Mar. 9, 2005), available at http://www.finance.senate.gov/imo/media/doc/030905mb.pdf (noting that the markup of the reauthorization bill includes “funding for marriage promotion programs, of which [he has] been highly skeptical,” but that it “also incorporates constructive safeguards,” such as recognizing “a role for domestic violence prevention,” and clarifying that “participation in these programs is strictly voluntary”).}

In addition, feminist advocacy groups and organizations committed to ending domestic violence repeatedly raised concerns about whether marriage promotion by government would steer or even coerce poor women into unsafe marriages and insisted that any legislation...
adequately address domestic violence. In response to such concerns, which some Democratic legislators also raised, the final legislation mentions domestic violence several times and requires applicants for federal funds to “consult with experts in domestic violence or relevant community domestic violence coalitions in developing the programs and activities.”

In Part III, I will discuss the continuation of healthy marriage and responsible fatherhood initiatives during the Obama administration and how President Obama has appealed to his own family experience to support such initiatives.

E. The Defense of Marriage Act

I turn now to a third federal statute from the Clinton era charting points in federal family policy, the Defense of Marriage Act (DOMA). This statute illustrates the paradox that, over the last few decades, even as federal family law and policy has actively promoted marriage for some people, stressing marriage’s foundational role as the most basic social institution, it has actively precluded other people from marriage in the name of preserving or defending marriage. On June 26, 2013, in United States v. Windsor, the Supreme Court ruled that the provision of DOMA concerning the federal definition of marriage (§ 3) is unconstitutional, as I discuss in Part III; however, § 2, the provision regarding states’ rights to refuse to recognize out-of-state same-sex marriages, is still in effect.

On September 21, 1996, near the end of his first term, in a closed, after-midnight session to avoid publicity, President Clinton signed DOMA, Introduced in the House of Representatives in May 1996 by Republican


207. See Baucus, supra note 205 (noting that the revised reauthorization bill reflects steps taken to address Baucus’s concern over making sure “marriage promotion programs are safe”).


211. Peter Baker, President Quietly Signs Law Aimed at Gay Marriages, WASH. POST, Sept. 22, 1996, at A21; see also Baker, supra note 12 (making the point that President Clinton avoided publicity at the signing of DOMA). The discussion of DOMA’s enactment in text accompanying notes 211-34 is taken directly from a portion of my recent article, McClain, supra note 15, at 412-16.
Representative Bob Barr (Georgia),\textsuperscript{212} and in the Senate by Republican Senator Dom Nickels, with presidential candidate Republican Senator Robert Dole as co-sponsor,\textsuperscript{213} DOMA’s “two primary purposes” were “to defend the institution of traditional heterosexual marriage” and “to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.”\textsuperscript{214} To achieve the second purpose, § 2 provides that no state “shall be required to give effect to any public act . . . or judicial proceeding” of another state with respect to a “relationship between persons of the same sex that is treated as a marriage under the laws of such other State.”\textsuperscript{215} Section 3, the provision recently struck down by the U.S. Supreme Court, after successful challenges in federal court, defines marriage, for purposes of federal statute, regulation, or administrative interpretation, as meaning “only a legal union between one man and one woman as husband and wife” and “spouse” as referring “only to a person of the opposite sex who is a husband or a wife.”\textsuperscript{216} This federal definition of marriage and spouse meant that none of the over 1000 federal laws referring to marriage\textsuperscript{217}—including various governmental benefits and obligations—would apply to marriages between two men or two women—even though such marriages were valid as a matter of state law.

The impetus for DOMA, as the House Report explains, was a “very particular development in the State of Hawaii[: . . . state courts in Hawaii] appear to be on the verge of requiring that State to issue marriage licenses to same-sex couples,” and that prospect “threatens to have very real consequences both on federal law and on the laws (especially the marriage laws)

\textsuperscript{212} For an informative look back at the history of DOMA, see Chris Geidner, Marriage Wars, METRO WkLY. (July 14, 2011, 2:11 AM), http://www.metroweekly.com/news/?ak=6427.
\textsuperscript{215} Id. at § 3.
\textsuperscript{216} Id. at § 3.
\textsuperscript{217} For this number, see United States v. Windsor, 133 S. Ct. 2675, 2683 (2013) (“The enactment’s comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms . . . does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law.” (citing Dayna K. Shah, U.S. Gov’t Accounting Office, GAO-04-353R, Defense of Marriage Act: Update to Prior Report (2004))). The House Report accompanying DOMA used slightly different numbers: “The word ‘marriage’ appears in more than 800 sections of federal statutes and regulations, and the word ‘spouse’ appears more than 3,100 times.” Canady, supra note 214, at 10.
of the various States.”218 In effect, members of Congress perceived that an “orchestrated legal assault being waged against traditional heterosexual marriage by gay rights groups and their lawyers” had met with initial success in the Hawaiian courts (by contrast to earlier lawsuits brought in other states) and that “it appears that judges in Hawaii are prepared to foist the newly-coined institution of homosexual ‘marriage’ upon an unwilling Hawaiian public,” and also, ultimately, on other States, as couples married in Hawaii and then demanded that their home States recognize their marriages.219 A decision by the Hawaiian court, in other words, could spawn a sort of “marriage tourism” that would threaten the sovereignty of individual states.220 At the time Congress voted on DOMA, the Hawaii Supreme Court had ruled, in a 1993 opinion, that denying gay and lesbian couples the right to marry presumptively violated the sex-discrimination provisions of its state constitution and that the state would have to justify its marriage law under a strict scrutiny standard.221 A trial was scheduled for September 1996. Hawaiian State Representative Terrance Tom urged Congress that it must act if it could act “to preserve the will of the people as expressed through their elected representatives,” and that congressional “inaction . . . runs the risk that a single judge in Hawaii may re-define the scope of federal legislation, as well as legislation throughout the other forty-nine states,” surely a “dereliction of the responsibility” invested in members of Congress by voters.222

DOMA moved through the House quickly and successfully, perhaps because of the dominance of the Contract with America Republicans.223 The Senate held just one day of hearings on the DOMA bill.224 While some Democratic Senators (such as Senator Edward Kennedy) strongly opposed DOMA as unconstitutional, more typical was the stance of Senator Tom Daschle, then Senate Democratic leader, who voted for DOMA as the lesser of two evils, fearing that a proposed federal constitutional marriage amendment was “inevitable.”225 Moreover, some rationalized that if they went along on DOMA, they might, as a compromise, get their colleagues to support the Employment Nondiscrimination Act (ENDA).226 Dissenters, like Senator Kennedy, argued that DOMA was unnecessary since states have always had the authority to refuse to recognize out-of-state marriages that

219. Id. at 2-3, 6.
220. Id. at 7-8.
221. Id. at 4 (citing Baehr v. Lewin, 852 P.2d 44 (Haw. 1993)).
222. Id. at 17 (emphasis omitted).
223. Geidner, supra note 212.
224. Geidner, supra note 213.
226. Geidner, supra note 213.
offended the strong public policy of the state, and it was by no means clear that marriages even fell within the Full Faith and Credit Clause. Dissenters noted that there was “no emergency,” since the trial in Hawaii had not even taken place and, in the meantime, “14 states have enacted laws which in some fashion make explicit those states’ objections to same sex marriages.”

Further, some members of Congress and some constitutional law experts questioned DOMA’s constitutionality. Notably, in light of the role played by the Department of Justice in supporting the recent challenges to § 3 of DOMA, in 1996, the DOJ consistently gave its opinion that DOMA was constitutional, even reiterating that view after the U.S. Supreme Court released its opinion in *Romer v. Evans*, striking down Colorado’s Amendment 2, which barred homosexuals from the protection of antidiscrimination laws. The House Report, while highly critical of *Romer*, nonetheless asserted that “nothing in the Court’s recent decision suggests that the Defense of Marriage Act is constitutionally suspect.”

Congress, thus, passed DOMA. Later in 1996, the couples challenging Hawaii’s law prevailed at trial when the state failed to demonstrate a compelling state interest to exclude them from marriage. That victory in court was short-lived. While the trial court ruling was on appeal to the Hawaii Supreme Court, Hawaii voters, on November 3, 1998, approved by a substantial margin (69% to 29%) a constitutional amendment, proposed by the Hawaii legislature, that gave the legislature “the power to reserve marriage to opposite-sex couples.” Meanwhile, the Hawaii legislature approved a Reciprocal Beneficiaries Law, giving same-sex couples and various pairs of individuals who could not marry access to a small subset of the benefits and rights linked to marriage.

Was Clinton’s signing of DOMA—in an election year—consistent with the vision of anti-discrimination articulated in the New Covenant? Or were his midnight signing and—by contrast with the signing of the FMLA

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227. See *Canady*, supra note 214, at 36-37.
228. *Id.*
229. See *id.* at 27-28 (citing 142 CONG. REC. S5931-33 (daily ed. June 6, 1996) (statement of Sen. Edward Kennedy) (referring to Senator Edward Kennedy introducing Professor Laurence Tribe’s letter into the Congressional Record)).
230. *Id.* at 33-34 (including letters from DOJ Office of Legislative Affairs to Hon. Henry J. Hyde); 517 U.S. 620 (1996).
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and PRWORA—the absence of any press conference replete with the personal stories of lives helpfully touched by the legislation’s uneasy fit with the New Covenant’s promises of opportunity and responsibility? After all, if same-sex couples in a committed, loving relationship stood ready to assume the responsibilities of marriage, should not government encourage the acceptance of such responsibility and afford them the opportunities that marriage law provides for security, stability, and mutual dependency?

Retrospectives on the history of DOMA report that many in the Clinton administration, including advisors on gay and lesbian rights issues, viewed the proposed law as a “Republican Party campaign stunt to box Clinton in and to give them something to run on against him.” Senator Bob Dole, his opponent, after all, was a Republican co-sponsor in the Senate. By announcing his support for DOMA, Clinton could defuse the issue for the 1996 reelection. Although Al From is strikingly silent about DOMA and its role in the 1996 election in his political memoir, his discussion of the impact of Clinton’s efforts to fulfill his campaign promise about ending discrimination against homosexuals in the military may be instructive. From describes that promise as “an early lightning rod,” and several times laments that, by the time of the 1994 mid-term elections, Clinton’s presidency and its achievements were being “overshadowed by,” among other things, the “gays in the military” issue, a “liberal agenda” item. Indeed, on that issue, From urged the president that the “forgotten middle class voter” is “concerned about the values message you’ve delivered so far, and the public institution he most respects (the military) is suspicious of you,” leading such voter to “question how you’re different from the Democrats he’s been voting against for a quarter century.”

Two years later, we might infer that DLC associates similarly warned Clinton of the political fallout of vetoing DOMA and harming his “values” message. Nonetheless, when he signed DOMA, Clinton explained his action as consistent with his own long opposition to “governmental recognition of same-gender marriag-

235. On the timing of the signing as tied to minimizing publicity, see Baker, supra note 211. On the contrast between this signing with other, more typical signing ceremonies, see William N. Eskridge, Jr., Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules, 100 Geo. L.J. 1881, 1953 n.295 (2012).

236. See Geidner, supra note 225 (quoting Richard Socarides, who worked in the White House gay and lesbian liaison’s office at time of enactment of DOMA and quoting Barney Frank, Democratic Representative, who noted that the Dole campaign was “lagging behind Clinton” and “saw this as a classic wedge issue”).

237. Id.

238. Id. at 194-96, 209.

239. Id. at 196-97 (quoting from memo From wrote to Clinton entitled, “The Next Hundred Days”).
Indeed, his advisors had recommended he lacked a “‘substantive basis’” for not signing the legislation, in light of his “‘stated and longstanding opposition to gay marriage.’” Similarly, prior to DOMA’s enactment, his administration issued a policy statement that “‘[t]he President . . . has long opposed same sex marriage,’” and thus would sign H.R. 3396 (the DOMA bill) if it “‘were presented’” to him.

At the same time, upon signing DOMA, Clinton declared that he could reconcile doing so with his life-long “strenuous[]” opposition to “discrimination of any kind, including discrimination against gay and lesbian Americans.” He pointed out that, in his view, DOMA would not have any effect on “current federal, state, or local anti-discrimination law” or any new discrimination laws. Indeed, he urged Congress to pass ENDA, “which would extend employment discrimination protections to gays and lesbians in the workplace.” While some Democratic Senators similarly had tried to push ENDA instead of fighting DOMA, just a few hours after the Senate passed DOMA, it failed to pass ENDA by one vote. During his second term, referring back to this one-vote margin, President Clinton again urged Congress to enact ENDA as a matter of basic fairness; he pointed to the Executive Order he signed “making permanent a long-standing Federal policy against discrimination based on sexual orientation in the civilian Federal workplace” and urged Congress to make it a national policy. ENDA would appear as unfinished business in each subsequent Democratic Party Platform, beginning in 1996 and continuing into the Obama era.


243. President on Signing Same Gender Marriage Ban, supra note 240.

244. Id.

245. Id.

246. See Geidner, supra note 213. For a conservative account of this defeat, see ‘America Dodges the Bullet,’ Bauer Says of ENDA Defeat, PR NEWSWIRE (Sept. 10, 1996).


What did the Clinton–Gore campaign promise with respect to civil rights for gay men and lesbians, such that Clinton could claim signing DOMA was not inconsistent with it? 

Putting People First proposed to “help heal America” by moving beyond Republican tactics of dividing people into “us” and “them” to “[p]rotect [r]ights for [a]ll,” including “federal civil rights legislation for gays and lesbians” (with a religious freedom exemption). Clinton and Gore also called for issuing “executive orders to repeal the ban on gays and lesbians from military or foreign service,” which morphed into the controversial policy dubbed “Don’t Ask Don’t Tell,” repealed by President Obama in 2011. Similarly, the 1992 Democratic Party Platform’s section on “Civil and Equal Rights” affirms that “Democrats will continue to lead the fight” against discrimination or deprivation on the basis of “sexual orientation,” among other “irrelevant” characteristics, and expresses a commitment to “provide civil rights protection for gay men and lesbians and an end to Defense Department discrimination.”

Thus, although the Clinton administration justified Clinton’s willingness to sign DOMA, if passed, as consistent with the fact that the President just “doesn’t believe in same-sex marriage,” a Clinton spokesperson also characterized DOMA as “an attempt to try to divide Americans on the controversial issue” — rhetoric reminiscent of the New Covenant’s promise (noted above) to move beyond Republican “tactics” of dividing people into “us” and “them.” Nonetheless, in his reelection campaign, Clinton attempted to make strategic use of his signing DOMA, mentioning his support

American Community,” that “[w]e will enact the bipartisan legislation barring workplace discrimination based on sexual orientation”). For discussion of ENDA in the Obama era, see infra Part III.

249. CLINTON & GORE, supra note 9, at 64 (emphasis in original).
250. Id.
252. 1992 Platform, supra note 47.
253. Id.
255. See supra Part I.
for the legislation in ads placed on Christian radio stations.\footnote{256} When Republicans aired the same ad in San Francisco as a wake-up call to Clinton’s gay and lesbian supporters, and in the face of the protests by gay rights groups over the radio ads, Clinton’s campaign pulled the ads.\footnote{257} While the Democratic Party Platform of 1996 was silent about DOMA, the Republican Party Platform credited congressional Republicans with passing DOMA and noted its federal definition of marriage and that it “prevents federal judges and bureaucrats from forcing states to recognize other living arrangements as ‘marriages.’”\footnote{258}

Clinton and Gore both subsequently indicated support for affording gay men and lesbians relationship protection through civil unions. Indeed, a tenet of Clintonism came to be opposing same-sex marriage, but supporting some other form of governmental recognition of the committed, intimate relationships of same-sex couples, such as civil unions. Notably, this was the stance taken by most Democratic presidential candidates—and by Democratic Party Platforms—in the 2000, 2004, and 2008 presidential elections.\footnote{259} As I elaborate in Part III, until his stance “evolved,” this was the stance of Barack Obama as a presidential candidate in 2008 and well into the first term of his presidency.\footnote{260}

In 1999, for example, the Vermont Supreme Court in \textit{Baker v. State} ruled that the Vermont Constitution’s Common Benefits Clause required that gay and lesbian couples have access to the same set of benefits and obligations as married couples.\footnote{261} Notably, the court left the issue of remedy—whether civil marriage or some other civil status—to the legislature, which opted to enact a civil union law.\footnote{262} Vice President Gore declared his support for the ruling:

I applaud the non-discrimination and equality principles inherent in Vermont’s State Supreme Court ruling . . . that same-sex couples must be given the same benefits and protections as different-sex couples. . . . I am not for changing the institution of marriage as we have traditionally understood it. But I am for legal protections for domestic partnerships.263

A few days after the ruling, prominent talk show host Larry King asked his guest President Clinton if he agreed “with the Vermont judiciary that while marriage may be wrong, they are entitled, couples who live together who are gay, to equal benefits,” and Clinton responded, similar to Gore:

I do. I think that’s a good thing. That’s always been my position, that—you’ve got gay couples that, for example, have been together for years now. One of them . . . has a heart attack; one of them gets sick; one of them is in the intensive care unit in the hospital; and only family members can come in; and sometimes they’re not allowed in—that kind of thing. . . . I think that, in terms of health care coverage at work or in terms of property and willing of property to your closest family member, that sort of thing, I think they ought to be able to do that.264

Here, Clinton uses the language of family—family members caring for each other, providing for each other—to explain why certain benefits and protections are appropriate. He refers to this as having always been his position, but you will not find it in his famous speeches about the New Covenant, in Putting People First, or in the 1992 Platform. Perhaps this is because, at the time of the 1992 election, the modern generation of challenges to state marriage laws was not yet visible on the horizon.265

In the interview with Larry King, Clinton also sounds a theme that will feature prominently in American society’s evolution on the civil rights of gay men and lesbians. Clinton laments that “there are too many people who don’t know gay men and lesbian women in the ordinary course of their lives,” and thus don’t realize that gay men and lesbians are among them as


265. Although the plaintiffs in Hawaii filed their lawsuit in 1991, it was dismissed by the trial court, and plaintiffs did not receive a favorable ruling from the Hawaii Supreme Court until 1993 (in Baehr v. Lewin), which was after the 1992 election. See BALL, supra note 232 at 156-57, 162-69. Further, in the early 1990s, as many have documented, litigating for access to civil marriage was not high on the priority lists of national gay and lesbian rights groups. See id. at 172 (“It is fair to say that the Baehr opinion caught the LGBT rights movement unawares.”). Subsequently, Evan Wolfson, the “only lawyer from a national LGBT rights organization” who had “been in touch with [plaintiffs’ lawyer] regularly during the lawsuit’s first two years,” was able to persuade LAMBDA to help plaintiffs’ local attorney with the next phase of the lawsuit. Id. at 172-73.
“their friends, their sisters, their brothers, their sons, their daughters, their coworkers.”266 Reprising some familiar themes of the New Covenant, but pushing them in a new direction, he continues: “my view is that every American that works hard, obeys the law, [and] plays by the rules ought to be treated with dignity and respect and have a part in our American family.”267 Even so, he could not accept using the term “marriage” to cover such relationships, because “marriage in our culture and to me has a certain connotation, . . . it’s basically a union for the purpose of, among other things, having children.”268

Clinton’s reference to gay men and lesbians as being part of the “American family,” and as being among their fellow Americans as friends, neighbors, and the like employs an important rhetoric of inclusion that also featured in the Supreme Court of Vermont’s opinion, Baker v. State.269 The Vermont high court characterized the “essential aspect” of plaintiffs’ claim as “simply and fundamentally for inclusion in the family of state-sanctioned human relations”; pointing to prior examples of the law’s failure “to see a human being when it should have,” the court concluded by appealing to “recognition of our common humanity.”270 This rhetoric would recur, in 2003, in the decision by Massachusetts’s highest court, Goodridge v. Department of Public Health, that its marriage laws must be open to same-sex couples.271 The Massachusetts high court referred to the plaintiffs—the gay men and lesbians seeking to marry the person of their choice—as friends, neighbors, co-workers, and members of the community.272

266. Clinton, supra note 264, at 2335.
267. Id.
268. Id.
269. 744 A.2d 864 (Vt. 1999).
270. Id. at 889.
272. Id. at 949. This idea of gay men and lesbians as friends and neighbors is most striking in Justice Greaney’s concurring opinion, which expresses hope that opponents of same-sex marriage will come to accept the Court’s ruling with something other than “grudging acknowledgment of the court’s authority to adjudicate the matter” because [the plaintiffs are members of our community, our neighbors, our coworkers, our friends. As pointed out by the court, their professions include investment advisor, computer engineer, teacher, therapist, and lawyer. The plaintiffs volunteer in our schools, worship beside us in our religious houses, and have children who play with our children, to mention just a few ordinary daily contacts. We share a common humanity and participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect.]

Id. at 973 (Greaney, J., concurring). For further discussion of the movement of toleration in the direction of acceptance and respect in this context, see James E. Fleming & Linda C. McClain, Ordered Liberty: Rights, Responsibilities, and Virtues 172-76 (2013).
By the time of the 2000 presidential election, this political move toward inclusion of gay men and lesbians within the concept of “family”—although not all the way to full marriage equality—was evident in the Democratic Party Platform: “We support the full inclusion of gay and lesbian families in the life of the nation. This would include an equitable alignment of benefits.” The 2000 Republican Platform was silent on the issue of gay and lesbian rights and, surprisingly, on marriage itself.

In a close election that led to the Supreme Court, in effect, deciding the outcome in *Bush v. Gore*, George W. Bush prevailed over Vice President Al Gore. A new evident double threat to marriage emerged. First, in 2003, the U.S. Supreme Court, in *Lawrence v. Texas* and struck down Texas’s sodomy law targeting only homosexuals. The majority’s ruling was that, by analogy to its privacy precedents and in view of *Romer v. Evans*, the state could not punish homosexuals for private, consensual sexual conduct in the home. Although the majority opinion stated, more than once, that it was not taking up the issue of public recognition of same-sex relationships, Justice Scalia, in dissent, warned that people should not believe the majority opinion (authored by Justice Kennedy) and predicted the end of all morals legislation, including marriage laws restricting marriage to one man and one woman. *Bowers*, after all, was a central precedent relied upon in supporting DOMA, and *Lawrence* certainly undercut the appeal to traditional morality as a sufficient basis for treating homosexuals in a discriminatory manner.

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275. 531 U.S. 98, 100-03 (2000).
277. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (declaring that “Bowers was not correct when it was decided, and it is not correct today”).
278. Id. at 568-74.
279. Id. at 578 (“[T]he present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).
280. Id. at 604 (Scalia, J., dissenting) (saying, of the majority’s disclaimer, “Do not believe it” and asserting that “[t]oday’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned”).
281. See CANADY, supra note 214, at 15-16 (citing Bowers in support of the propriety of civil law advancing collective moral judgment in favor of heterosexual marriage and moral disapproval of homosexuality).
282. For further discussion of the Court’s evolving approach to this issue, see McClain, supra note 15.
The second evident new threat to marriage was when the Massachusetts Supreme Judicial Court, in Goodridge v. Department of Public Health, interpreted Massachusetts’s Constitution as requiring opening up civil marriage to same-sex couples. Goodridge drew on Massachusetts’s privacy and equal protection jurisprudence, as well as that of the U.S. Supreme Court, particularly Lawrence. By contrast to the Vermont Supreme Court, the Massachusetts high court issued a subsequent opinion clarifying that civil unions were not enough and that the legislature must amend its marriage laws to permit same-sex couples to marry. The Massachusetts legislature did so, and, commencing in May 2004, for the first time, same-sex couples could lawfully marry somewhere in the United States.

Thus, during the 108th Congress, Representative Marilyn Musgrave introduced, and the House of Representatives approved, the Federal Marriage Amendment (FMA), which provided:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

This version of the FMA (sometimes called the Musgrave Amendment) would have imposed a uniform definition of marriage on the nation and, thus, bar not only federal and state courts but also state legislatures from allowing same-sex couples to marry. By the time President Bush announced support for the FMA, citing the Goodridge decision as spurring his support, even more states than at the time DOMA was passed had enacted their own “Defense of Marriage” acts, declaring their strong public policy that marriage was between one man and one woman. At the state level, many states had also amended their constitutions to bar marriage between

283. 798 N.E.2d 941, 948 (Mass. 2003).
284. Id. at 958-59.
287. Bush Calls for Ban on Same-Sex Marriages, CNN.COM (Feb. 25, 2004), http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.marriage (stating that “‘[a]fter more than two centuries of American jurisprudence and millennia of human experience, a few judges and local authorities are presuming to change the most fundamental institution of civilization . . . . Their actions have created confusion on an issue that requires clarity’”). The other impetus Bush identified was San Francisco Mayor Gavin Newsom’s decision to give marriage licenses to same-sex couples. Id.
288. Compare CANADY, supra note 214, at 36-37 (explaining in the section on “Dissenting Views,” dissenters from the Report point out that “as of today, 14 states have enacted laws which in some fashion make explicit those states’ objection to same sex marriages. This federal legislation is therefore an unwarranted response to a non-issue”), with MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 59 (2013) (“By 2001, thirty-five states had enacted defense-of-marriage laws or amendments.”).
two persons of the same-sex, thus precluding a state court ruling that the constitution required allowing same-sex couples to marry. As Michael Klarman reports on the impetus for such state constitutional amendments: “Amendment backers insisted that Goodridge had forced their hand: statutory bans on gay marriage, which thirty-nine states had enacted by 2004, were no longer sufficient.”

What the federal marriage amendment would have done, in enshrining a uniform national definition of marriage, is to preclude states (whether through the judicial, legislative, or ballot initiative process) themselves from defining marriage in a manner other than the union of one man and one woman. President Bush and some lawmakers indicated support for a version of the FMA that would allow states the freedom to create parallel institutions, such as civil unions and domestic partnerships, but they could not call them marriage.

Although the House passed the Musgrave Amendment and Congress held hearings on the FMA on more than one occasion, the FMA had not come to the floor for a vote in the Senate before the 2004 election. Indeed, subsequently, in the 109th Congress, it never received sufficient support to become a credible amendment. Nonetheless, it is important to appreciate that this issue was a topic of intense concern to certain members of Congress, and at certain points this concern was at a fever pitch. Indeed, it may have shaped the outcome of the 2004 presidential election, as I discuss below. For example, rhetoric about traditional marriage’s foundational role over the millennia as the fundamental unit of a civilized society featured in arguments for such an amendment. Sponsors appealed to the United States’ founding documents, such as the Declaration of Independence, to assert that those texts assumed that “[t]he self-evident differences and complementary design of men and women are part of [God’s] created order” within which our “rights exist.”

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289. Klarman, supra note 288, at 105.
290. Id. at 106.
291. Bush Calls for Ban on Same-Sex Marriages, supra note 287 (reporting Bush’s statement that state legislators should be left to define “legal arrangements other than marriage,” “implying “that such an amendment would allow states to establish civil unions for same-sex couples”).
293. See id.
294. For a detailed account of how “backlash” against Goodridge and other steps in the direction of marriage equality shaped congressional and election politics, see Klarman, supra note 288, at 89-118.
295. For an argument that it did, see id. at 105-14.
297. Id. at 313 (quoting Federal Marriage Amendment (The Musgrave Amendment): Hearing on H.R.J. Res. 56 Before the Subcomm. on the Constitution, H. Comm. on the Judi-
tive Terrance Tom urged Congress to act to ward off activist judges foisting same-sex marriage upon the nation.\textsuperscript{298} Massachusetts Governor Mitt Romney testified that Congress should approve the FMA lest the nation “‘abandon marriage as we know it, and as it’s been known by the framers of our [C]onstitution’’ and that the FMA would declare a proper “national standard” for raising children.\textsuperscript{299} Goodridge was a cautionary tale for what might happen in other states without such a federal amendment to constrain “judicial activism.”\textsuperscript{300}

While many Democratic legislators voted for DOMA in 1996, fewer supported the FMA. By the time of the 2004 presidential campaign, for example, while Democratic candidates generally supported the civil union path rather than marriage for same-sex couples, they opposed the Federal Marriage Amendment.\textsuperscript{301} The 2004 Democratic Party Platform, for example, repudiated “President Bush’s divisive effort to politicize the Constitution” by pursuing the FMA and stated that marriage should continue—as it has always been—to be “defined at the state level”—leaving open the possibility of same-sex marriage.\textsuperscript{302} It also declared, “We support full inclusion of gay and lesbian families in the life of our nation and seek equal responsibilities, benefits, and protections for these families.”\textsuperscript{303} This stance, on the one hand, leaves it to the states to decide whether to recognize same-sex marriage or go the route of civil unions or expansive domestic partnerships, but on the other, the reference to “equal” declares a threshold commitment to treat gay and lesbian families the same as other families, impliedly, with respect to the legal incidents—if not the name—of marriage. I have suggested this stance is a legacy of Clintonism.

By contrast, the Republican Party Platform of 2004 included a section on “Protecting Marriage,” which voiced strong support for “President Bush’s call for a Constitutional amendment that fully protects marriage” and contended that “anything less than a constitutional amendment . . . is

\textsuperscript{298} CANADY, supra note 214, at 17. See supra text accompanying note 222 for a discussion of Tom’s testimony in the DOMA hearings.


\textsuperscript{300} This was the topic, for example, of a congressional hearing. See Judicial Activism vs. Democracy: What Are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws? Hearing Before the Subcomm. on the Constitution, Civil Rights, & Property Rights of the S. Judiciary Comm., 108th Cong. 205 (2004).

\textsuperscript{301} KLARMAN, supra note 288, at 105.

\textsuperscript{302} 2004 DEMOCRATIC PLATFORM, supra note 248, at 38.

\textsuperscript{303} Id.
vulnerable to being overturned by activist judges.” The Platform charged that, “after more than two centuries of American jurisprudence, and millennia of human experience, a few judges and local authorities are presuming to change the most fundamental institution of civilization, the union of a man and a woman in marriage,” a change that would have “serious consequences throughout the country.” Thus, a constitutional amendment would ensure that “neither federal nor state judges nor bureaucrats” could “force states to recognize other living arrangements as equivalent to marriage.”

The Platform promised that President Bush would “vigorously defend the Defense of Marriage Act” (noting the bipartisan vote for it) and supported a Republican bill to “withdraw jurisdiction from the federal courts over” DOMA, “so that activist federal judges cannot force 49 other states to approve and recognize Massachusetts’ attempt to redefine marriage.”

President Bush defeated Senator Kerry in the 2004 election. Post-election analyses of the 2004 election suggest that the Bush campaign successfully mobilized “values voters” by championing the FMA and opposing same-sex marriage while linking Kerry—who personally opposed same-sex marriage but had opposed DOMA—to same-sex marriage in his home state of Massachusetts (which became available in May 2004).

Indeed, Kenneth Mehlman, manager of Bush’s reelection campaign and now openly gay and involved in fighting for marriage equality, has apologized for not speaking out against the “aggressive anti-gay marriage stance” of that campaign.

The 2004 election spurred extensive analysis of America as divided


305. Id. at 83

306. Id. For Bush’s remarks on the FMA, see Bush Calls for Ban on Same-Sex Marriages, supra note 287.


308. See Election Reinforces USA’s Religious Schism, USA TODAY (Nov. 4, 2004), http://usatoday30.usatoday.com/news/politicselections/2004-11-04-religion_x.htm; Mark J. Rozell & Debasree Das Gupta, “The Values Vote”: Moral Issues and the 2004 Elections, in THE VALUES CAMPAIGN?: THE CHRISTIAN RIGHT AND THE 2004 ELECTIONS 11, 17-18 (John C. Green, Mark J. Rozell & Clyde Wilcox eds., 2006); see also Klarmann, supra note 288, at 111 (arguing that while “[t]he most salient issues in the 2004 presidential campaign were the war in Iraq, terrorism, and the economy, and such issues undoubtedly influenced the candidate preferences of most swing voters[,] . . . the outcome of the election quite possibly turned on gay marriage”).

into red and blue states and as facing an alarming degree of values polarization.310

Voters concerned over “values”—especially family values—supported Bush, rather than Kerry.311 This result contrasted with Clintonism’s successful marshaling of values talk in the 1992 and 1996 elections, in which Clinton won a dozen “red” states (states that went for Bush in 2000 and/or 2004).312 It was a heavy blow indeed for New Democrats, leading them, in post-election strategizing, to bemoan the Republican Party’s effective use of gay marriage as “their wedge issue of choice.”313 New Democrats called for a “winning heartland strategy” that would “reassure” “working families” that “Democrats share their values” and hearken back to Clinton’s successful weaving of “personal responsibility and middle-class opportunity into a single narrative that promised to reward families that ‘work hard and play by the rules.’”314

What values, exactly? Hearkening back to Clinton’s own philosophy, which avoided an “‘us versus them’ posture on cultural issues,” the heartland strategy called for “‘values centrism’” and seeking “common ground”; it claimed that apparent “cultural gaps” could be closed by appealing to Democratic—and common—“bedrock cultural values of tolerance, social inclusion and equal opportunity, and liberty of conscience.”315 Further, the strategy of appealing to values centrism and to the “vital center” seemed to be the path of state experimentation.316 For a time, it seemed that, as more and more states enacted statutes and constitutional amendments banning same-sex marriage—and sometimes also banning any legal status that is substantially equivalent to marriage—this pathway would not lead to inclu-


312. On the 2000 election, see Gerald M. Pomper, The 2000 Presidential Election: Why Gore Lost, 116 POL. SCI. Q. 201, 202 fig.1, 203 (2001) (“[T]he source of Bush’s victory was his success in moving eleven states—including Gore’s Tennessee and Clinton’s Arkansas—that had supported the previous Democratic ticket into the Republican column, adding 112 electoral votes.”). For charts illustrating the division of red and blue states in the 2004 election, as well as earlier elections, see Election of 2004, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/showelection.php?year=2004#axzz2gK9u8agF (last visited Nov. 12, 2013).


314. Id.

315. Id. at 15.

sion, opportunity, and equality. However, by the time of the 2008 election, as I will discuss in Part III, several states had moved all the way to marriage equality, and several others offered civil unions and domestic partnerships. Some had done so because of a judicial ruling interpreting a state constitution; others had done so through the legislative process. In Part III, I will take up how the 2008 presidential campaign tackled the values polarization issue and will detail President Obama’s evolution on the issue of marriage equality.

III. CLINTONISM IN THE OBAMA ERA: CONTINUITY AND CHANGE

In this Part, I examine how the foundations laid during the Clinton era with respect to federal family policy and the basic tropes about family, work, responsibility, opportunity, and community have played out during the administration of President Barack Obama. I return to the fate of the three statutes considered in Part II: the FMLA, PRWORA, and DOMA. I highlight basic continuity with Clintonism in the Democratic presidential campaign rhetoric from 2008 and 2012, for example, themes of valuing families and not just talking about family values, rewarding those who work hard and play by the rules, and insisting that “we’re all in this together.” I reveal that some of the same unfinished business that remained by the end of the Clinton administration, such as taking the next steps with the FMLA and workplace flexibility, remained unfinished as President Obama began his second term.

Barack Obama, however, also introduced some distinctive themes, such as the idea of the need for a “new New Deal,” in which, faced with the “worst crisis since the Great Depression,” governmental policy as well as institutions must catch up with the realities and needs of twenty-first century families and workers. Another significant theme is that basic issues about work—family conflict, employment discrimination, violence against women, and the like are “not just women’s issues,” but issues affecting men, families, the economy, and the nation. President Obama, for example, established the White House Council on Women and Girls and his administration has made women and girls a central focus of domestic and foreign policy. In addition, President Obama and First Lady Michelle Obama have made the personal political by appealing to their own marriage and family life as illustrating the challenges American families face, more generally, in sustaining healthy relationships and finding work—family balance.

317. Obviously, with three years of President Obama’s second term remaining, it is premature to offer an assessment of Obamanism and its legacy with respect to federal family policy.
318. GRUNWALD, supra note 17, at 7. 9. Grunwald offers a thorough account of Obama’s Economic Recovery Act as the centerpiece of this “new New Deal.”
Finally, I note the dramatic shift made by President Obama with respect to DOMA and marriage equality. Even former President Clinton himself has repudiated this aspect of Clintonism, calling DOMA a relic of an earlier era and supporting marriage equality.

A. The 2008 Campaign

In the 2008 campaign, Democrats called for a new New Deal, on the premise that “[o]ur government’s policies—many designed in the New Deal era—have not kept up with the new economy and the changing nature of people’s lives.” The 2008 Democratic Party Platform, Renewing America’s Promise (the 2008 Platform), asserted, “From health care to pensions, from unemployment insurance to paid leave, we need to modernize our policies in order to provide working Americans the tools they need to meet new realities and challenges.” Similarly, the 2008 Republican Party Platform contrasted today’s economy and workplace with those of earlier era, declaring that “[t]he workplace must catch up with the way Americans live now.”

The 2008 Platform and then-Senator Barack Obama’s presidential campaign reveal important continuity with basic tenets of Clintonism as well as some new and distinctive elements. First, consistent with the New Covenant of 1992, the 2008 Platform affirms “personal responsibility” as one of the “core moral principles” entailed in “renewing the American Dream for a new era,” along with “a fair shot for all.” The 2008 Platform also refers to the basic bargain of expecting to succeed if one works hard and plays by the rules: “In America, if someone is willing to work, he or she should be able to make ends meet and have the opportunity to prosper.” This is Clintonism’s basic pairing of demanding personal responsibility and providing opportunity. Work, in effect, remains a precondition for entitlement and a measure of personal responsibility.

1. Work–Family Conflict: The FMLA and Beyond

The 2008 Platform also reflects continuity and change with respect to work–family policy. It deploys familiar Clintonian or New Democratic rhetoric about the need to value families and not just talk about family val-

320. Id.
322. Renewing America’s Promise, supra note 319, at 6.
323. Id. at 14.
ues. The section on “Work and Family” builds on the achievements of the Clinton era, such as the FMLA, while pointing to the FMLA’s limitations and the need for paid leave:

Over the last few decades, fundamental changes in the way we work and live have trapped too many American families between an economy that’s gone global and a government that’s gone AWOL. It’s time we stop just talking about family values, and start pursuing policies that truly value families. We will expand the Family and Medical Leave Act to reach millions more workers than are currently covered, and we will enable workers to take leave to care for an elderly parent, address domestic violence and sexual assault, or attend a parent-teacher conference. Today 78 percent of the workers who are eligible for leave cannot take it because it’s unpaid, so we will work with states and make leave paid. We will also ensure that every American worker is able [to] earn up to seven paid sick days to care for themselves or an ill family member.324

The Platform, similar to prior Democratic platforms, supports encouraging “employers to provide flexible work arrangements.” Similar to prior Democratic platforms, it also commits to expanding the childcare tax credit; providing children with affordable, quality early childhood education; and providing various other educational measures.326

Elder care as a worker obligation receives more prominent attention than in prior platforms. The Platform promises “assistance . . . to the working men and women of this country who do the heroic job of providing care for their aging relatives,” declaring, “[a]ll Americans who are working hard and taking responsibility deserve the chance to do right by their loved ones. That’s the America we believe in.” This is a striking statement. It combines in one sentence the value of personal responsibility (“taking responsibility”), work, and care (doing right by one’s loved ones). Similarly, in a section, “Children and Families,” the Platform observes, “We also must recognize that caring for family members and managing a household is real and valuable work.” Here, caregiving and managing a home are explicitly characterized as work with social value. To be sure, earlier presidential campaigns included rhetoric about being a parent—particularly, a responsible father—as an important duty or job.330 The 2008 Platform, however,

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324. Id. at 15 (emphasis added).
325. Id.; see, e.g., 2000 Platform, supra note 101 (asserting, in the section on “Balancing Work and Family,” that “we should urge employers to make workplaces more parent-friendly”).
326. Id.; see, e.g., 2000 Platform, supra note 101 (calling for making child care more affordable “through targeted tax cuts and other investments”); 2004 Democratic Platform, supra note 248, at 25 (calling for increasing tax credits to pay for child care and elder care).
327. RENEWING AMERICA’S PROMISE, supra note 319, at 15 (emphasis added).
328. Id.
329. Id. at 49.
330. For examples from George W. Bush and Al Gore in the 2000 campaign, see McClain, Care as a Public Value, supra note 8, at 1721-22.
seems to move further by identifying this form of taking responsibility as a source of desert or entitlement. But how does this “real” work count as a basis for entitlement?

The 2008 Platform, thus, acknowledges that workers have caregiving responsibilities for family and that women have disproportionate responsibility for caregiving. Indeed, as the above passages indicate, the Platform takes a step beyond some Clinton-era and post-Clinton-era Democratic platforms in saying more about caregiving (and women’s disproportionate responsibility for it) and the need to accommodate the care obligations of workers.

The 2008 Platform also included a section, “Empowering Families for a New Era,” which notes that “Americans change jobs more frequently than ever and compete against workers around the world for pay and benefits.”

Consider this passage, which even recognizes the challenges faced by the “sandwich generation,” a term reflecting the dual demands of childcare and elder care:

Today, in the majority of families, all parents work. Millions of working Americans are also members of a new “sandwich generation,” playing dual roles as working parents and working children, responsible not only for their kids but for their aging mothers and fathers. They are working longer hours than ever, while at the same time having to meet a new and growing set of caregiving responsibilities.

2. Not Just a “Women’s Issue”

Reflecting a distinctive emphasis of the Obama campaign and subsequent administration, the Platform highlights the place of women as workers and caregivers and the need to support their efforts through a “comprehensive work and family agenda.” Thus, in a section, “Opportunity for Women,” the Platform notes that “women still earn 76 cents for every dollar that a man earns” and supports passing various federal legislation to end pay discrimination and require equal pay. That pay gap, it continues, “doesn’t just hurt women; it hurts families and children”; conversely, “when America extends its promise to women, the result is increased opportunity for families, communities, and aspiring people everywhere.” After announcing other employment opportunity policies, the Platform continues: “We recognize that women still carry the majority of childrearing responsibilities, so we have created a comprehensive work and family agenda.”

331. Renewing America’s Promise, supra note 319, at 9.
332. Id.
333. Id. at 16.
334. Id.
335. Id. at 16.
336. Id.
work–family conflict remains, if not a “woman’s problem,” then one with particular impact on women. As I shall elaborate, this is a distinctive feature of the Obama administration, or Obamaism: the insistence that work–family conflict, like many other social and economic issues, is “not just a ‘women’s issue,’” but one that affects families, men, the economy, and the nation.337

Recognition that women, especially, bear the brunt of work–family conflict is found in a campaign booklet, Barack Obama’s Plan to Support Working Women and Families, issued by the campaign of then-Senator Obama.338 The booklet’s focus is Obama’s “agenda to strengthen women and families” and his policies “to expand opportunities for working women raising families and help make life affordable for stay-at-home moms.”339 One recent analysis characterizes this document as “the most aggressive and ambitious work–family agenda in American history,” suggesting it was part of Obama’s efforts to secure the critical support of female voters.340 The messages from both Barack and Michelle Obama refer to families feeling that the American Dream is slipping away and speak of seeking to help women realize the American dream for themselves and their families.341 The booklet itemizes policies similar to those found in the Platform. It mentions the “great success” achieved in Great Britain by a program “permitting employees to petition to request flexible arrangements” and promises that “Obama will replicate it throughout the federal government.”342

337. For a recent example employing this quoted phrase, see the report by THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, KEEPING AMERICA’S WOMEN MOVING FORWARD: THE KEY TO AN ECONOMY BUILT TO LAST, at i (2012). For further discussion of this theme, see infra Part III. C. Karen Kornbluh, principal author of the 2008 Democratic Party Platform and Barack Obama’s Policy Director when he was a Senator, has argued that “the critical issues that arise because mothers are working and often raising children alone” are “too often left out of the economic security and poverty debates and discussed separately as women’s issues.” Karen Kornbluh & Rachel Homer, The New Family Values Agenda: Renewing Our Social Contract, 4 HARV. L. & POL’Y REV. 73, 77 (2010).

338. OBAMA FOR AM., BARACK OBAMA’S PLAN TO SUPPORT WORKING WOMEN AND FAMILIES (2008), available at http://obama.3cdn.net/2e7cc8323be6bb7941_pam6bxkpff.pdf. See also, infra Part III. C.

339. Id. at 2, 5.


341. Id. at 1-2, 5-6.

The booklet is a striking combination of policies proposed in gender-neutral terms and policies aimed directly at helping women, where women are situated comparatively worse than men (for example, pay equity, access to pensions, incentives for retirement savings, and increasing child care tax credits for low-income women).  

3. Responsible Fatherhood and Healthy Marriage

Notably, neither the 2008 Platform nor the campaign booklet proposes governmental efforts to encourage men to take on more child rearing responsibility, in light of women’s disproportionate responsibility. In the section on “Children and Families,” however, the 2008 Platform includes a subsection on “Fatherhood” aimed at addressing the problem that “[t]oo many fathers are missing—missing from too many lives and too many homes.” This focus on fathers is consistent with Clintonism and with Barack Obama’s own convictions, expressed in his writing and in his efforts, as a senator, even before his presidential campaign. This father absence, the Platform continues, increases the risk of certain negative consequences for children, such as living in poverty, dropping out of school, ending up in prison, and engaging in other antisocial behavior. Fathers should “realize that responsibility does not end at conception” and “that what makes a man is not the ability to have a child—it’s the courage to raise one.” The Platform indicates support for fathers by job training, “removing tax penalties on married families, and expanding maternity and paternity leave.” Reminiscent of the Clinton administration’s distinction between deadbroke and deadbeat dads, the Platform combines carrots and sticks. The carrots include “providing transitional training to get jobs, removing tax penalties on married families, and expanding maternity and paternity leave.” Those who are responsibly supporting their children will get a tax credit, and the support payments will go directly to the families, instead of the government; but the federal government will “crack down on men who avoid child support payments.” As I will now discuss, “policies that pro-

343.  OBAMA FOR AM., supra note 338, at 7-9.
344.  RENEWING AMERICA’S PROMISE, supra note 319, at 49.
345.  See discussion infra Subsection III.B.1.
346.  RENEWING AMERICA’S PROMISE, supra note 319, at 49-50.
347.  Id. at 50.
348.  Id.
349.  Id.
350.  Id.
mote responsible fatherhood” also feature as a way to combat women’s disproportionate poverty.\textsuperscript{351}

4. Poverty and Welfare

One striking feature of both the 2008 Democratic and Republican party platforms is the absence—by contrast to platforms in the last several elections—of any reference to welfare as a pressing or contentious issue. Perhaps this reflected a conviction by both parties that the welfare problem had been solved by the 1996 welfare law and its subsequent reauthorization. Indeed, the sole mention of welfare reform in the Republican Platform is to hold up “the model of Republican welfare reform, which . . . has accomplished a major transfer of resources and responsibility from the federal government back to the states—with an accompanying improvement in the program itself,” as a guide for further “[e]mpowering the [s]tates” and honoring the Tenth Amendment.\textsuperscript{352}

The 2008 Democratic Platform does have a section on “Poverty.”\textsuperscript{353} Invoking Robert F. Kennedy’s question about “poverty along the Mississippi Delta[,] . . . ‘How can a country like this allow it?’,\textsuperscript{354}” the Platform states: “Forty years later, we’re still asking that question. The most American answer we can give is: ‘We won’t allow it.’\textsuperscript{355}” The proposed policies include providing a “world-class education” for children and a number of employment-related programs, such as job training, expanding the Earned Income Tax Credit (also a Clinton–Gore theme), and raising the minimum wage.\textsuperscript{356}

The Platform also has a distinctive focus on women and poverty. It observes that “[t]he majority of adults in poverty are women” and declares, “to combat poverty we must work for fair pay, support for mothers, and policies that promote responsible fatherhood.”\textsuperscript{357} An implicit premise in this passage may be that poor women are working women, many of whom are single mothers without regular financial contribution from fathers.\textsuperscript{358} In ef-

\textsuperscript{351} Id. at 15.

\textsuperscript{352} 2008 Republican Platform, supra note 321, at 17.

\textsuperscript{353} RENEWING AMERICA’S PROMISE, supra note 319, at 15-16.


\textsuperscript{355} RENEWING AMERICA’S PROMISE, supra note 319, at 15.

\textsuperscript{356} Id.

\textsuperscript{357} Id.

\textsuperscript{358} See Kornbluh and Homer, supra note 337, at 77 (arguing for the critical need to “inject gender—specifically the critical issues that arise because mothers are working and often raising children alone—into the decisions about how to address economic security and poverty”). Kornbluh was a principal author of the 2008 Platform. Id. at 73 n.*.
fect, the move from “welfare to work” has solved the problem that the poor were not living according to basic American values of work and responsibility. Now they join the ranks of working Americans who work hard and play by the rules, and should, as a result, be able to support their families.

This reading is supported by a separate passage, “Opportunity for Women,” in which the Platform reiterates that “women are the majority of adults who make the minimum wage, and are particularly hard-hit by recession and poverty.” Programs to combat poverty and improve education should help “parents and children . . . lift themselves out of poverty.” By contrast, the Republican Party Platform stresses tax relief as a primary vehicle to support American families.

5. Civil Rights for Gay Men and Lesbians: DOMA and Marriage

In Part II, I noted that, by the time of the 2008 election, most Democratic candidates embraced a stance opposing the federal marriage amendment, declining to embrace same-sex marriage, but supporting civil unions and letting states work things out for themselves. The 2008 Platform, in the section, “A More Perfect Union,” states:

We support the full inclusion of all families, including same-sex couples, in the life of our nation, and support equal responsibility, benefits, and protections. We will enact a comprehensive bipartisan employment non-discrimination act. We oppose the Defense of Marriage Act and all attempts to use this issue to divide us.

The context of this passage is striking, since this section also commits Democrats to “fight to end discrimination” based on many characteristics, including “sexual orientation [and] gender identity, . . . because that’s the America we believe in.” (The Platform does not name ENDA, but implicitly references it here.) Immediately before the passage quoted about inclusion of the families of same-sex couples “in the life of our nation,” the Platform asserts continuity with present and past efforts to fight injustice and calls for “removing the barriers of prejudice and misunderstanding that still exist in America.”

In his campaign, candidate Barack Obama resisted the idea of an America divided into red states and blue states and countered with an appeal

359. Id. at 16.
360. Id.
362. RENEWING AMERICA’S PROMISE, supra note 319, at 52.
363. Id. at 51.
364. Id. at 52.
to the United States of America\textsuperscript{365} and to “values and ideals we hold in common as Americans.”\textsuperscript{366} No doubt the troubling state of the economy—after eight years of a Republican presidency—was one factor in Senator Obama’s victory over Senator McCain, but Obama’s emphasis upon “social Gospel” types of values, upon strong families, personal responsibility, and the role of faith in public life resonated with many religious and “so-called values voters.”\textsuperscript{367} In successfully harnessing values talk, Obama sounded certain themes of Clintonism.

Obama’s initial position about marriage and same-sex couples also was consistent with Clintonism. As a candidate and early in his presidency, Obama opposed a federal marriage amendment and instead appealed to federalism. For example, in an “open letter” to LGBT Americans, seeking their support, he promised to “use the bully pulpit to urge states to treat same-sex couples with full equality in their family and adoption laws,” but also added that, while

I personally believe that civil unions represent the best way to secure that equal treatment . . . I also believe that the federal government should not stand in the way of states that want to decide on their own how best to pursue equality for gay and lesbian couples—whether that means a domestic partnership, a civil union, or a civil marriage.\textsuperscript{368}

He called for repealing DOMA so that civil union partners would be eligible for federal benefits tied to marriage.\textsuperscript{369} At that time, he explained that he did not support same-sex marriage because of his personal understanding of what marriage is.\textsuperscript{370} He argued for recognizing common ground by “quietly” forging consensus that gay and lesbian couples “should be
treated with dignity” and have some core protections, like hospital visitations and health care benefits.\footnote{Id.} Here, too, Obama echoes Clinton, although he departs from Clintonism (and prior Democratic party platforms) in calling for a repeal of DOMA.\footnote{One would not expect such a call in the 1996 platform, given that Clinton ran for reelection on it after signing DOMA. \textit{See supra} Section II.E. The 2000 and 2004 platforms are also silent about DOMA.}

B. “From the White House to Your House”

In considering the implementation of federal family policy during the Obama era, it is helpful to begin by noting a distinctive feature of the Obama administration: how President Barack Obama and First Lady Michelle Obama have made the personal political, a move I capture with the slogan, “from the White House to Your House.” By this, I mean to mark not only the intense attention paid to the First Lady, the First Family, and the First Marriage but also the prominence given by the Obama administration to the challenges of negotiating healthy, happy marriage and work–family balance and its willingness to use the Obama family’s own experience as an instructive example. Moreover, the First Lady has used the White House kitchen to teach lessons about nutrition and obesity and has stressed that the White House is the people’s house.\footnote{André Leon Talley, \textit{Leading Lady}, \textit{Vogue}, Mar. 2009, at 431; \textit{Mrs. Obama’s Washington}, \textit{Conde Nast Traveler}, May 2010, at 221. The cover of this magazine quotes the First Lady as saying: “This White House is Yours.”}

First, while candidate Barack Obama referred often to women’s efforts to break the glass ceiling, First Lady Michelle Obama herself broke a different kind of glass ceiling, defying many racial stereotypes as America’s first black (or African-American) first lady.\footnote{\textit{See} Verna L. Williams, \textit{The First (Black) Lady}, 86 \textit{Den\textsc{v}}. U. L. \textsc{Rev.} 833 (2009).} Although it is beyond the scope of this Article to delve fully into her emergence as “America’s instant icon,”\footnote{\textit{A recent blog post praising Michelle Obama asserted: “Our first lady will be remembered as the first African-American first lady who helped America in taking us into the 21st century.” Irena Medavoy, \textit{21st Century First Lady Michelle Obama on the First Day of Black History Month} (Feb. 2, 2012, 1:36 PM), \url{http://www.huffingtonpost.com/irena-medavoy/black-history-month-michelle-obama_b_1250235.html}.} her status as role model and exemplary public figure bears mention. Just as a central theme in the 2008 campaign was helping Americans realize the American Dream, Michelle Obama’s 2008 Convention Speech referred

\begin{itemize}
\item \footnote{Katie Couric, \textit{Michelle Obama: Your First Lady}, \textit{Glamour}, Dec. 2009, at 222, 224.}
\end{itemize}
to her own life as evidence that “the American dream endures.”\textsuperscript{376} That life story is of an African-American girl, great-great-great-granddaughter of a slave, raised by working-class parents on the South Side of Chicago, who went on to excel at Princeton University and then Harvard Law School, and to hold important jobs in the private and public sector.\textsuperscript{377} In part, political strategists stressed her story to counter concern that President Obama had not had “the black experience.”\textsuperscript{378} As \textit{Glamour} magazine put it, in putting her on the cover of its 2009 Women of the Year issue, she is “a powerful symbol of our nation’s progress” and “America’s instant icon.”\textsuperscript{379} \textit{Vogue} magazine celebrated her as “the First Lady the world’s been waiting for.”\textsuperscript{380} Michelle Obama has spoken of her sense of responsibility to “serve as a role model [and] to provide good messages.”\textsuperscript{381} This relates to another signature theme of the Obama administration—empowering women and girls.\textsuperscript{382} Generally, Michelle Obama has enjoyed very high public approval ratings, higher than her immediate successors, Hillary Clinton and Laura Bush.\textsuperscript{383}

Michelle Obama, as First Lady, has performed domesticity in a markedly different way than Hillary Clinton. Perhaps she learned from the latter’s problems, exemplified in the media circus surrounding Hillary Clinton’s “now infamous remark” during the 1992 presidential campaign, “‘I suppose I could have stayed home, baked cookies and had teas.’”\textsuperscript{384} First, instead of stressing her professional qualifications, Michelle Obama has emphasized her paramount roles as mother and wife. In the 2008 campaign,

\begin{itemize}
  \item \textsuperscript{377} \textsuperscript{377} See Williams, supra note 374, at 833 (detailing Michelle Obama’s life story and observing, “Certainly, as a Black woman opening the Democratic National Convention, Michelle Obama could claim the moment as a transcendent break from the nation’s troubled past”).
  \item \textsuperscript{378} \textsuperscript{378} Williams, supra note 374, at 834 n.15 (reporting that, “worried that Mr. Obama’s far-flung upbringing and his lack of deep roots leave some voters unsure and untrusting, the campaign is essentially substituting Mrs. Obama’s family background for his own”).
  \item \textsuperscript{379} \textsuperscript{379} Couric, supra note 375, at 224.
  \item \textsuperscript{380} \textsuperscript{380} The March 2009 issue of \textit{Vogue} features Mrs. Obama with the caption: “Michelle Obama: The First Lady the World’s Been Waiting For.” \textit{Vogue}, Mar. 2009.
  \item \textsuperscript{381} \textsuperscript{381} Angela Burt-Murray, \textit{A Mother’s Love}, ESSENCE, May 2009, at 107.
  \item \textsuperscript{382} \textsuperscript{382} See Couric, supra note 375, at 225, 284 (referring to her work in mentoring young girls, bringing them into the White House—which she dubs “the People’s House”—to open up for them the possibilities in their lives).
  \item \textsuperscript{383} \textsuperscript{383} Michelle Obama’s Strong Personal Image, PEW RESEARCH CTR. (Jan. 21, 2010), http://pewresearch.org/pubs/1470/michelle-obama-person-image-remains-very-favorable.
  \item \textsuperscript{384} \textsuperscript{384} Carla Hall, \textit{Hillary the Homemaker?: Candidate’s Wife Brings Cookies, Advice to Weekday TV Audience}, WASH. POST, Sept. 17, 1992, at C1. The context of her remark was candidate “Jerry Brown’s charge that her law firm benefited unfairly from” her role as wife of Arkansas’s governor. \textit{Id}.
she stated that, if she became First Lady, her first job would “‘continue to be mom-in-chief.’”\textsuperscript{385} She elaborated that she would be “‘making sure that in this transition, which will be even more of a transition for [her daughters Malia and Sasha,] . . . that they are settled and that they know they will continue to be the center of our universe.’”\textsuperscript{386} Indeed, on her official White House website, she describes herself “first and foremost” as “Malia and Sasha’s mom.”\textsuperscript{387} In her vitally important speech at the 2012 Democratic Convention, she reiterated her role as “mom-in-chief.”\textsuperscript{388} She also sounded the theme of how much she loved her husband, as though his performance as a husband and father should reassure voters about his merits as President.\textsuperscript{389} This speech responded, in effect, to Ann Romney’s emphasis, in her speech, upon the Mitt Romney she knew as a husband and father to her children and why this made him worthy of the votes of Americans.\textsuperscript{390} By contrast, the term “Billary” captured the prominent (and for some, problematic) policy and advising role Hillary Clinton played while Bill Clinton was governor of Arkansas, and that she was expected to play in the White House.\textsuperscript{391} In the White House, she broke with tradition and located her office in the West Wing, rather than the East Wing, with the other senior poli-

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\item \textsuperscript{385} Harriette Cole, \textit{The Real Michelle Obama}, \textit{EBONY}, Sept. 2008, at 73, 84.
\item \textsuperscript{386} Id.
\item \textsuperscript{387} \textit{First Lady Michelle Obama, THE WHITE HOUSE}, http://www.whitehouse.gov/administration/first-lady-michelle-obama/ (last visited Feb. 27, 2014).
\item \textsuperscript{389} Id. In the 2008 campaign, she also proved to be a great campaign asset; Barack’s own courtship and winning of Michelle somehow became a metaphor for him winning over the confidence and trust of the voters. Commentators have discussed the careful cultivation of Michelle Obama’s image. As Verna Williams details, there was also some hostility toward and disparaging treatment of Michelle Obama in the media. Williams, supra note 374, at 833-34. Some critics found her too candid and critical of her husband—“‘emasculating,’” even—as others found her candor about his foibles at home refreshing. Low points came when her remark about being “‘really proud’” of her country for the first time when the public embraced her husband’s candidacy was endlessly repeated in sound bites and when the \textit{New Yorker} magazine, in a supposed parody of public opinion, depicted her as a 1970s type Angela Davis, with Afro, semi-automatic weapon, and a burning flag and her husband, evidently, as a Muslim. Id. (citing Barry Blitt, \textit{The Politics of Fear}, \textit{NEW YORKER}, July 21, 2008, available at http://www.newyorker.com/magazine/covers/2008 (picture on cover of the magazine)).
\end{itemize}
cy advisors. President Clinton also gave her a prominent role in drafting his health care proposal.

Second, Michelle Obama has made issues about family and children her signature issues, by contrast, for example, to the unsuccessful health care reform efforts undertaken by Hillary Clinton. Michelle Obama downplayed her professional credentials and made the personal political, speaking as a concerned mother and wife. Thus, during the 2008 campaign, she spoke of keeping at the top of her mind such issues as “[w]ork/family balance and how to make sure our policies are structured in a way that supports that balance, whether it’s more work/family leave, whether it’s better health care. There are a lot of policies that go along with allowing women that freedom.” As I elaborate below, she made clear that work–family conflict and workplace flexibility would be issues of great concern for her.

During President Obama’s first term, First Lady Michelle Obama made childhood obesity her signature issue, launching her “Let’s Move” campaign to “rally our nation to achieve a single, ambitious goal: solving the problem of childhood obesity in a generation, so that children born today will reach adulthood at a healthy weight.” Certainly, there are political land mines with childhood obesity, but many of the facets of that campaign—growing vegetables, bringing more farmers’ markets to underserved areas, “finding new ways for kids to be physically active, both in and out of school” —could garner public approval more readily and seem less threatening than national health care legislation.

Even the “Let’s Move” campaign has a connection with the First Lady’s role as a mother and her focus on work–family conflict and balance. Journalists noted this campaign was Michelle Obama’s “official debut in a high-profile role,” a “chance to complete her transition away from being the mom in chief to taking a more active policy role within [the President’s] administration.” At the same time, she explained the childhood obesity issue as one “of great concern to me not just as a First Lady, but as a

393. Id.
396. Let’s Move Launch, supra note 395.
mom.” After all, food preparation and child nutrition have been traditional concerns of women. Moreover, the campaign illustrates how she has connected the White House to the homes of American families. For example, she has explained that she came to the issue of promoting childhood health and nutrition from the perspective of her pre-White House days, when she was “a working mother with a busy husband, a very demanding job and two little kids to feed . . . in a country where fast food is abundant, where time is a rarity, where eating out is a trend, because families are so busy.” She also referred to the need to pay attention to her own daughters’ body mass index and make sure they were not overindulging in sweets and unhealthy snack food.

Some elements of the campaign have allowed the First Family to set an example for other families. For example, to promote families growing their own vegetables and eating locally grown food, the First Lady planted the White House Kitchen Garden, becoming the First Lady to do so since Eleanor Roosevelt planted a victory garden during World War II. She publicized the importance of eating local fruits and vegetables through such techniques as the televised challenge, *Iron Chef America*, in which the White House Executive Chef Cristeta Comerford (“the first woman and the first Asian American to hold the position of White House Executive Chef”) and Iron Chef Bobby Flay competed with super chef Emeril Lagasse and Iron Chef Mario Batala. Evidently the only First Lady to appear in a reality television show, Michelle Obama announced that the “secret ingredient” the chefs must use was “anything from the White House garden.”

Some elements of the “Let’s Move” campaign point both to broader issues of education and to neighborhoods and infrastructure. For example, among the four pillars of the campaign was giving parents “the information that they need to make healthy decisions for their families.” Another plan

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399. Couric, supra note 379, at 225.
400. Stolberg, supra note 397, at A16.
404. Id.
405. Id.
was to eliminate “‘food deserts’ so that folks have easy and affordable access to the foods they need right in their own neighborhoods.” These pillars both relate to food choices and food access—a concern here is the ready availability of fast food and time constraints on family meals. Finally, the campaign also sought to “get healthier food into our nation’s schools,” encouraging Congress to pass new school lunch legislation and the Department of Agriculture to release new rules to improve the nutritional quality of school lunches.

The First Lady and Jill Biden, wife of Vice President Joe Biden, have also devoted themselves to working compassionately on behalf of families of veterans, launching, in 2011, the initiative Joining Forces: Taking Action to Serve America’s Military Families. This initiative again shows Michelle Obama’s strong identification with the realm of the family.

During President Obama’s second term, First Lady Michelle Obama has again drawn on her personal story and her commitment to children to announce a new initiative bearing on America’s growing economic inequality: increasing the number of low-income students who apply to and graduate from college. Referencing her own path from being the daughter of a pump worker to a graduate of Princeton University, the First Lady has told audiences of high schools students, “I’m here today because I want you to know that my story can be your story;” she intends to make similar speeches around the country and to use social media to stress the critical role of higher education as a “door to a wider world.”


406. Id.
407. Id.
408. Let’s Move Launch, supra note 395.
410. The website for Joining Forces describes it as “a national initiative to engage all sectors of society to give our service members and their families the opportunities and support they have earned.” Joining Forces, THE WHITE HOUSE, http://www.whitehouse.gov/joiningforces/about (last visited Feb. 27, 2014), The First Lady several times praised men and women in uniform and their families in her 2012 Democratic Convention Speech. See Obama, supra note 376.
411. Joining Forces, supra note 410.
413. Steinhauer, supra note 412.
414. Id.
which will seek to increase the efforts of public and private universities to recruit and graduate low-income, first generation students, responds, in part, to reports of a troubling “undermatching” problem, that is, that “high-achieving low-income students don’t apply to the competitive colleges where they would likely be accepted.”

Third, by contrast to the highly publicized challenges faced by First Lady Hillary Clinton in light of President Clinton’s alleged marital infidelity and impeachment over lying about infidelity, First Lady Michelle Obama and President Obama seem to have an exemplary marriage and have used their own marriage as a platform to address not only the challenges of work–family balance, but also the challenge of negotiating a modern, egalitarian partnership. Indeed, the media portrays the First Marriage as part of the President’s brand. As I now elaborate, the emphasis upon relationship skills and negotiation fits into the President’s support for the healthy marriage and responsible fatherhood initiatives of prior administrations.

1. The First Marriage and Promoting Responsible Fatherhood and Healthy Marriage

Commentators have described the First Marriage as part of President Obama’s “brand.” For example, in a New York Times Magazine cover story on the Obama marriage, journalist Jodi Kantor observed, “the Obamas mix politics and romance in a way that no first couple quite have before,” and she observes the “centrality of the Obama marriage to the president’s political brand.” The cover explains, “The First Marriage. It’s modern. It’s a formidable international brand. And it’s an ongoing negotiation.” Certainly, people have been fascinated by the First Marriage and the photogenic, tall, glamorous first couple. Michelle Obama once called the President her “best accessory,” saying, “[w]e complement each other in almost every respect. In the way that a wonderful pair of shoes looks great with a good suit.”

The President and the First Lady have used their relationship experience as a way to frame the broader importance of young people forming

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415. Stratford, supra note 412 (citing studies identifying the “undermatching” problem).
416. See infra Subsection III.B.1 for discussion.
418. Id.
419. Cole, supra note 385, at 82. She also stated: “The best thing I love having on me is Barack on my arm and vice versa, whether it’s having him standing there smiling at me, or watching him mesmerize a crowd or talk to some seniors in a senior center.” Id.; see also Michelle Obama Describes Duty as Mother-in-Chief, USA Today (July 4, 2006, 6:37 PM), http://usatoday30.usatoday.com/news/politics/election2008/2008-08-04-michelle-obama_N.htm.
healthy relationships. For example, in an interview with Katie Couric in the *Glamour* “Women of the Year” issue, when a reader asked the First Lady how she “landed such a good guy” and what dating advice she could give a twenty-six year old professional, Michelle Obama spoke of Barack Obama’s many good qualities, such as his honesty, sincerity, and compassion for other people.⁴²⁰ She then advised young women to look beyond looks and bank books to qualities of character, particularly how a man “treats his mother and what he says about women [and] [h]ow he acts with children,” exhorting them that “you should always feel good” and should not marry a man if he “doesn’t make you completely happy and make you feel whole.”⁴²¹

Returning to the news headline that the First Marriage is “modern” in part because it is an “ongoing negotiation,” it has been widely reported that Michelle Obama initially was not enthusiastic about her husband’s political ambitions as they took a toll on family life.⁴²² Kantor suggests that the Obamas have turned their own “who-does-what battles” in their marriage “into a teachable moment, converting lived experience into . . . a political message.”⁴²³ That “political message” is that marriage is hard work, involving an ongoing negotiation over role division and sacrifices. Kantor’s article makes clear that, to date, the costs have largely been borne by Michelle Obama as she resisted, resigned herself to, and then actively supported her husband’s political career. She commented that the challenges she has faced might be instructive for young people, “[i]f my ups and downs, our ups and downs in our marriage can help young couples sort of realize that good marriages take work.”⁴²⁴ She makes clear that “[t]he image of a flawless relationship is ‘the last thing that we want to project . . . . It’s unfair to the institution of marriage, and it’s unfair for young people who are trying to build something, to project this perfection that doesn’t exist.’”⁴²⁵

The First Lady offers a long-term view of equality in marriage. She states, “The equality of any partnership is measured over the scope of the marriage. It’s not just four years . . . . We’re going to be married for a very long time.”⁴²⁶ This suggests a vision of equality that allows for sequencing; it does not require each partner to be doing the same thing or making the same investment in work and family at every point. Upon President Obama’s reelection, commentators have begun to ponder what First Lady

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⁴²⁰ Couric, supra note 375, at 285.
⁴²¹ Id.
⁴²² Kantor, supra note 417, at 52.
⁴²³ Id.
⁴²⁴ Id.
⁴²⁵ Id. at 52-53.
⁴²⁶ Id. at 62.
Michelle Obama will do after his second term ends, asking whether there is “another elected Obama in our future.”

Making the personal political in this way is consistent with the President’s own stance on governmental promotion of healthy marriage and responsible fatherhood. The Obama administration supports the federal government funding marriage education for low-income couples and more generally promotes responsible fatherhood and healthy marriage as legitimate governmental policy goals. Thus, the Obama organization also continues the Healthy Marriage Initiative dating from the Bush administration. A quote on the official website of the Administration for Children and Families, within the Department of Health and Human Services, is from President Obama’s book, *The Audacity of Hope*:

Finally, preliminary research shows that marriage education workshops can make a real difference in helping married couples stay together and in encouraging unmarried couples who are living together to form a more lasting bond. Expanding access to such services to low income couples, perhaps in concert with job training and placement, medical coverage, and other services already available, should be something everybody can agree on.\

President Obama has made the personal political in stressing the lessons he has learned from father absence in his own life. His memoir, *Dreams from My Father*, chronicled his experience growing up without a father and his quest to know his father. In *The Audacity of Hope*, with an eye on a presidential candidacy, he acknowledges the role that the women in his life—his mother and grandmother—played and the challenges they faced raising him “without a strong male presence in the house.” He also expresses his determination that his “father’s irresponsibility toward his children, my stepfather’s remoteness, and my grandfather’s failures would all become object lessons for me, and that my own children would have a father they could count on.” As a Senator, he co-sponsored federal legisla-
tion to fund the promotion of “[r]esponsible [f]atherhood and [h]ealthy [f]amilies.” 432

The Obama administration, with President Obama as “the First Father,” 433 has continued the TANF-funded governmental initiatives for promoting healthy marriage and responsible fatherhood. As noted above, The Audacity of Hope expressed support for expanding access to marriage education to low-income couples and, more generally, for “policies that strengthen marriage for those who choose it and that discourage unintended births outside of marriage.” 434 There is continuity both with Clintonism and with the Bush administration’s emphasis upon enlisting the federal government in service of family formation and strengthening goals. On the website of the federally funded National Responsible Fatherhood Clearinghouse, for example, prominently displayed is a photo of President Obama with his two daughters and, just below, an invitation to “Sign the Fatherhood Pledge.” 435 The Clearinghouse has funded media campaigns with the slogan, “Take time to be a dad today.” 436

During the 2012 reelection campaign, the White House released a report, Promoting Responsible Fatherhood, which provides an instructive look at the Obama administration’s commitments and efforts surrounding fatherhood.437 First, once again linking the personal to the political, the report leads with a statement by President Obama about how he “‘came to understand the importance of fatherhood through its absence—both in my life and in the lives of others’” and that even though government should seek to “‘provide good jobs and good schools and safe streets for our kids,’” government can never fill “the ‘hole [that] a man leaves when he abandons his responsibility to his children.’” 438 There is remarkable continuity with prior rhetoric by Democratic and Republican presidential candidates about how being a father “is one of the most important jobs a man can have.” 439

433. For this coinage, see Jessica Dixon Weaver, The First Father: Perspectives on the President’s Fatherhood Initiative, 50 Fam. Ct. Rev. 297 (2012) (critiquing the fatherhood initiatives of Presidents Clinton, George W. Bush, and Obama).
434. OBAMA, supra note 428, at 334.
436. For examples of these ads, see Nat’l Responsible Fatherhood Clearinghouse, Multimedia, FATHERHOOD.GOV, http://www.fatherhood.gov/multimedia (last visited Nov. 12, 2013).
438. Id. at 2.
439. Id.; see McClain, Care as a Public Value, supra note 8, at 1677-78 (discussing statements in support of responsible fatherhood efforts by Vice President Al Gore and then-Governor George W. Bush).
What is “responsible fatherhood?” The report explains in a way that captures economic, emotional, and social aspects, resisting reducing fathers to paychecks: “Responsible fathering means taking responsibility for a child’s intellectual, emotional, and financial well-being. This requires being present in a child’s life, actively contributing to a child’s healthy development, sharing economic responsibilities, and cooperating with a child’s mother in addressing the full range of a child’s and family’s needs.”

The report refers to several efforts undertaken during President Obama’s first term, including launching the Fatherhood and Mentoring Initiative, “leading forums across the country to discuss how we, as a country, can work together to promote responsible fatherhood through personal and community responsibility,” and forming an interagency workshop group, the Interagency Responsible Fatherhood Working Group, to coordinate “policy, programmatic activities, and engagement efforts on fatherhood across federal agencies.” Notably, one of the leaders of this Working Group is the White House Office of Faith-based and Neighborhood Partnerships, the office launched by President George W. Bush as part of his “compassionate conservativism” but retained (albeit renamed and somewhat revised) by the Obama administration. Both President Bush—and President Clinton before him—spoke of problems government alone cannot solve and of the need to enlist religious groups and communities; the Obama administration has similarly reached out to enlist faith-based and community (neighborhood) groups as partners in efforts to strengthen families and, in particular, help fathers. One notable feature of the Obama administration’s approach, given the controversy over whether governmental promotion of marriage or fatherhood has or can have any positive impact,

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440. THE WHITE HOUSE, supra note 437, at 2.
441. Id. at 3.
443. THE WHITE HOUSE, supra note 437, at 4.
446. For a recent evaluation, see THE COMMUNITY HEALTHY MARRIAGE INITIATIVE EVALUATION: IMPACTS OF A COMMUNITY APPROACH TO STRENGTHENING FAMILIES, OFFICE OF PLANNING, RESEARCH, & EVALUATION, at ES-8 to 9 (2012), available at
is the emphasis upon promoting the “identification and use of evidence-based practices” and fostering “high-quality research on fathers” to “support policy and program development.”


The Obama administration, the President, and the First Lady have stressed the need for workplace flexibility as a step toward work–life balance. Expanding the FMLA features as a part of this agenda. There are several distinct features of the Obama administration’s approach. One feature is the characterization of work–family conflict, and a host of other issues, as “not just a woman’s issue,” while focusing on women and girls in policy initiatives. A second theme is the need to fix the disconnect between the twenty-first century workforce and the twenty-first century workplace. A third theme is that of negotiation; that is, given the unfinished gender revolution in men’s and women’s roles and given this gap between social institutions and people’s needs and daily lives, spouses, parents, employees, and employers find themselves engaged in negotiating these issues.

The Obamas have used their own struggles with work–family conflict as a template for the broader issue and as a personal narrative that informs the case for institutional reform. The First Lady has also addressed the issues she faces as resonating with issues women, more generally, face.

By now, the story of how Michelle Obama realized she had to take time for herself is familiar. She uses the anecdote of her “aha” moment concerning making her health a priority as an entry into the societal issue of negotiating work–life–family balance:

http://www.acf.hhs.gov/sites/default/files/opre/chmi_impactreport.pdf (finding no evidence of community-level impact of access to relationship and marriage education, but noting difficulties in evaluating reasons for lack of impact; see also Philip A. Cowan et al., Marriage and Fatherhood Programs, FUTURE OF CHILD., Fall 2010, at 223, available at http://futureofchildren.org/futureofchildren/publications/docs/20_02_FullJournal.pdf (suggesting the “jury is still out” on whether low-income married couples or fragile families and their children can benefit from marriage education the way that middle-class couples can, but that “[r]ecent research has shown that low-income married couples and unwed couples in fragile families can benefit from father-involvement interventions, especially those that pay attention to the relationship between the father and mother of the child”); Ted L. Huston & Heidi Melz, The Case for (Promoting) Marriage: The Devil Is in the Details, 66 J. MARRIAGE & FAM. 943, 955 (2004) (concluding that “[a]lthough the promotion of family health and stability as public policy is laudable, our reading of the available research suggests that social policies that promulgate the value of marriage are misguided”); McCLEAN, THE PLACE OF FAMILIES, supra note 8, at 121-41 (discussing variables in whether and how low-income, unmarried parents would benefit from healthy marriage and responsible fatherhood programs).

447. THE WHITE HOUSE, supra note 437, at 4.
I’ve always been a closet jock, but when I got married and had kids, that fell by the wayside. My “ahah” moment came when our first daughter, Malia, was 4 months old. My husband’s exercise routine hadn’t changed a bit; he was still getting his workouts in, and I was getting irritated . . . . Then I realized he was just prioritizing it differently. So I said, “If I get up and out before the first feeding, I will work out.” That will engage my husband to do that first feeding with the baby. So I started getting up at 4:30 in the morning and going to the gym.448

Michelle Obama has spoken of the “ripple” effects from putting herself on the priority list that flow to her husband and children and her own health.449 Women, she argues, should give themselves permission to be healthy and happy. And she relates this to a more general point about women: “That’s hard for women to own; we’re not taught to do that. It’s a lesson that I want to teach my girls so they don’t wait for their ‘aha’ moment until they’re in their 30s like I was.”450

Both during the 2008 campaign and in the White House, the First Lady stressed the importance of work–family conflict, using her own life to identify the challenges. On the campaign trail, for example, in an interview with Katie Couric, when asked about the cause she would like to adopt and pursue, she mentioned national service as well as work–life–family balance.451 Even as she used her own struggles to speak of the more general struggle, she noted her greater position of privilege and access to resources to make balance possible and expressed concern for women with fewer resources:

I am a mother and a professional—and a wife. And I know the struggles of trying to balance work/life/family. And I know that it’s something that every woman that I know is struggling with, and every family in America is impacted by the challenges that we face when we try to do it all without resources and support . . . informal structures of support.

The only way that I manage every day is because of all these informal support structures in my life; whether it’s my mom or a set of girlfriends or the flexibility on a job because I’m a vice president and I can set my hours when I need to. I’ve managed because of that. But how on earth are single-parent mothers doing it, nurses and teachers and folks who are on shifts?452

Michelle Obama also spoke of structural problems, such as lack of access to decent childcare, decent health care, and good school systems. She noted the “emotional and psychological toll” this takes on women and fami-

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449. Id.
450. Id.
452. Id.
lies.\textsuperscript{453} Even as she used her own life as relevant testimony to the problem, she also noted that the “vast majority” of women in the country do not have the flexibility she has. She stated that these problems “transcend[] race and socioeconomic status and political affiliation.”\textsuperscript{454} She learned this through talking to women throughout the country “about this impossible balance, and the toll that it’s taking.”\textsuperscript{455} She spoke of the impossibility of trying to manage and have it all: “[A]s a woman, I’ve been told, ‘You can have it all, and you should be able to manage it all.’ And I’ve been losing my mind trying to live up to that. And it’s impossible. We’re putting women and families in a no-win situation.”\textsuperscript{456} She stressed the need to “figure this out”—“how do we define roles for ourselves as women that are healthy and balanced and make sense?”\textsuperscript{457}

In the White House, the First Lady hired, as her personal policy director, Jocelyn Frye, long-time general counsel for the non-profit group National Partnership for Women & Families, “which advocates for more family-friendly leave policies.”\textsuperscript{458} In interviews, Michelle Obama was repeatedly asked about how she finds balance in her life. Early on, in an interview with \textit{Essence}, she said that she planned to continue the “conversation” about work–life balance because it “is really just a manifestation of my life, and of what all the women that I know are grappling with.”\textsuperscript{459} She called for “truthful and honest conversations about what it requires to do all that we ask of families and women.”\textsuperscript{460} Once again, she distinguished her level of resources—her mom, the White House Staff, not having a full-time job—from the situation of most women.\textsuperscript{461}

Perhaps the First Lady’s message resonates so well with women because she readily admits that in her own marriage she has had to make sure to take time for herself. From that she draws the more general lesson that women, particularly mothers, need to give themselves “permission” to care about their own happiness, to take time for themselves.\textsuperscript{462} In other words, she learned she had to renegotiate her routines to include herself in the cir-

\textsuperscript{453} Id.
\textsuperscript{454} Id.
\textsuperscript{455} Id.
\textsuperscript{456} Id.
\textsuperscript{457} Id.
\textsuperscript{458} Luiza Ch. Savage, \textit{Michelle Obama’s Real Agenda: The First Lady Is a Woman of Ideas, and Some of Those May Turn Out to Be Pretty Radical}, \textit{Maclean’s} (Apr. 12, 2009, 9:00 PM), http://www2.macleans.ca/2009/04/12/michelle-obama%E2%80%99s-real-agenda/.
\textsuperscript{459} Burt-Murray, \textit{supra} note 381, at 109.
\textsuperscript{460} Id.
\textsuperscript{461} Id.
\textsuperscript{462} Vaccariello, \textit{supra} note 448 (describing the “aha” moment in her own life).
circle of care. When asked how she manages all her duties, she has noted the role of her mom and her supportive husband, but has also referred to always trying to put her kids first, and then herself “a really close second, as opposed to fifth or seventh.” In an interview in *Glamour*, she observed:

One thing that I’ve learned from male role models is that they don’t hesitate to invest in themselves, with the view that, if I’m healthy and happy, I’m going to be a better support to my spouse and children. And I’ve found that to be the case: Once my kids were settled, the next thing I did was take care of my own health and sanity. And made sure that I was exercising and felt good about myself. I’d bring that energy to everything else that I did, the career, relationship, on and on and on.

Due to this interview and similar statements about work–life balance, Michelle Obama has become an inspiration and role model for many women. At the same time, the notion that women have to give themselves “permission,” while men’s lives go on as usual is an all too familiar problem. It suggests the challenges that remain for living out an ideal of marriage as an equal partnership.

C. Workplace Issues as “Not Just ‘Women’s Issues’”

The focus in the First Lady’s various speeches on work–family conflict as particularly a concern of women is in some tension with another theme of the Obama administration: that workplace flexibility and work–family conflict are not just “women’s issues” but issues affecting the economy, families, and, ultimately, the nation. I turn now to that theme. There is an understandable tension here: as the 2008 campaign indicated, it makes sense to address women as a group in need of a comprehensive work and family agenda because women disproportionately bear the burden of work–family conflict and face the costs more than men. However, the administration also insists that these issues have broader significance. This

463. I refer here to Carol Gilligan’s work on women’s stages of moral reasoning. See Carol Gilligan, *In A Different Voice* 128-74, 149, 166 (1982); Carol Gilligan, *Adolescent Development Reconsidered*, in *Mapping the Moral Domain* xxx-xxxi (Carol Gilligan et al. eds, 1988). As I have written elsewhere about this theme in Gilligan’s work:

Perhaps precisely because of their greater tendency to focus on care for others, women must learn to focus on themselves in order to attain personal integrity. Gilligan teaches that women must learn to include themselves in the circle of care, or to bring justice, equality, and rights to bear on a care perspective.


465. *Id.*

466. *See generally Kitchen, supra note* 340 (relating candidate Obama’s work-family agenda to women’s support for him in the election); Kornbluh and Homer, *supra note* 337, at 75 (“Women are disproportionately affected by the gaps in the social contrast programs we discuss.”).
tension relates to the strong emphasis that the Obama administration has placed on making women and girls a focal point for domestic and foreign policy. No doubt women’s support for President Obama contributed to his election victory in 2008 (after his victory over Hillary Clinton for the Democratic nomination) and to his 2012 reelection. Just as First Lady Michelle Obama references her own life experience, so too candidate and then President Obama has spoken of his familiarity with work–family issues as a husband of a working mother and as a father of two daughters. The White House has treated work–life issues as pertinent to its policies about “women,” “family,” and the economy.467

Some concrete examples of White House initiatives that are “not just women’s issues,” but that particularly effect women will help illustrate my point: (1) signing the Lilly Ledbetter Fair Pay Act; (2) establishing the White House Council on Women and Girls; (3) hosting a forum—and initiating a national conversation—on workplace flexibility; (4) calling for an expansion of the FMLA; and (5) advancing the idea that women are key to a new economy.

1. Lilly Ledbetter Fair Pay Act

As a candidate, President Obama criticized the Supreme Court’s opinion in Ledbetter v. Goodyear Tire & Rubber Co., which interpreted the statute of limitations for pay discrimination in a way that foreclosed a discriminatory wage claim by Lilly Ledbetter, a woman who had experienced many years of unequal pay and sued upon learning of it.468 Justice Ruth Bader Ginsburg, a chief architect of the successful equal protection challenges brought in the 1970s to sex-based laws, took the fairly unusual step of reading an oral dissent in which she spoke directly to the female workers whose quest would be harmed by the Court’s ruling and stated that it was up to Congress to act to counter the Court’s “cramped” and “parsimonious” read-


ing of Title VII.\textsuperscript{469} Subsequently, Congress did act, passing the Lilly Ledbetter Fair Pay Act, the first new law President Barack Obama signed.\textsuperscript{470} In a characteristic rhetorical move, he first stressed that Lilly’s story was that of “countless women” across the country who still do not receive equal pay and then declared that “equal pay is by no means just a women’s issue—it’s a family issue.”\textsuperscript{471} He linked equal pay to America’s founding principles about equality and the pursuit of happiness, as well as to the need for just laws that help people “make a living and care for their families and achieve their goals.”\textsuperscript{472}

In introducing Lilly Ledbetter after the signing, the First Lady praised Ms. Ledbetter’s commitment and noted that, as she traveled the country during the campaign, she heard “Lilly’s story and the broader issue of equal pay” voiced as concerns over and over as a “top and critical priority for women of all racial and ethnic backgrounds.”\textsuperscript{473} She linked pay equity to the broader issue of meeting the needs of working women, observing:

This legislation is an important step forward, particularly at a time when so many families are facing economic insecurity and instability. It’s also [the] cornerstone of a broader commitment to address the needs of working women who are looking to us to not only ensure that they’re treated fairly, but also to ensure that there are policies in place that help women and men balance their work and family obligations without putting their jobs or their economic stability at risk.\textsuperscript{474}

2. White House Council on Women and Girls

On March 11, 2009, President Obama announced the creation of the White House Council on Women and Girls (the Council), with the purpose of ensuring “that American women and girls are treated fairly in all matters of public policy” and that all federal agencies “take into account the particu-

\begin{footnotes}
\item[469] Id. at 661 (Ginsburg, J., dissenting); see Nichola Gutgold, \textit{Ruth Bader Ginsburg: Cautiously Communicative}, \textit{Comm. Currents} (Oct. 2010), http://www.natcom.org/CommCurrentsArticle.aspx?id=995 (stating in an interview about her oral dissent in \textit{Ledbetter} that “if I want to emphasize that the Court not only got it wrong, but egregiously so, reading aloud a dissent can have an immediate objective”).
\item[472] Id.
\item[474] Id.
\end{footnotes}
lar needs and concerns of women and girls.” In his remarks on the occasion, President Obama stated that making progress on a number of issues, including work–family balance, economic security, health care, and preventing violence against women, would be an important measure of whether we are truly fulfilling “the promise of our democracy for all our people.” This remark illustrates his broader point: that the issues the Council will address “are not just women’s issues,” but also family and economic issues. A striking comparison with the administration of George W. Bush may help. President Bush created the Office of Faith-Based and Community Initiatives and tasked federal agencies to make sure religious organizations were being treated fairly with regard to government contracts for providing services.

President Obama linked signing the order establishing this Council not only to his role as President, but also to his experience “as a son, a grandson, a husband, and a father”; seeing his grandmother’s experience hitting a glass ceiling in banking; seeing “Michelle, the rock of the Obama family[,] . . . juggling work and parenting with more skill and grace than anybody that I know”; and seeing his mother’s own struggles to raise him on her own. He related the stories of the women in his life to “the broader story of women in this country—a story of both unyielding progress and also untapped potential.”

Both the President and First Lady have stressed the role of women as the foundation of communities and the economy. For example, on the day the President announced the establishment of the Council, the First Lady spoke at the State Department Women of Courage Awards ceremony, explaining the goal of the Council is “to ensure that young girls have no limits on their dreams and no obstacles to their achievements.”

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477. Id.

478. See McClain, supra note 442, at 363, 371 (noting President Bush’s call for a “level playing field” for religious organizations in the government contracting process and the “institutionalization” of Bush’s faith-based initiative within a dozen federal departments and agencies).

479. Id.

480. Id.

481. Press Release, Office of the First Lady, Remarks by the First Lady at the State Department Women of Courage Awards (Mar. 11, 2009), available at
her belief, shared by the President, that “communities are only as strong as the health of their women” and that strong women often make the difference between both a “struggling” and “healthy” family and a “broken” and a “thriving” community.\(^{482}\)

### 3. Workplace Flexibility

In March 2010, the Council on Women and Girls hosted a White House Forum on Workplace Flexibility,\(^ {483}\) coinciding with the release of a report by the Office of Economic Advisors, *Work-Life Balance and the Economics of Workplace Flexibility*.\(^ {484}\) The report notes the dramatic change in the workforce in the past half century, particularly due to women’s growing entrance into labor force\(^ {485}\) and families’ increased reliance “on more than one earner to make ends meet.”\(^ {486}\) Children, the report continues, still need care, as do elderly parents.\(^ {487}\) The report concluded that we need to organize the twenty-first century workplace for the twenty-first century workforce.\(^ {488}\)


482. *Id.* Mrs. Obama expressed a similar view at her 2010 Mother’s Day tea, referring to the distinguished women present at the tea as showcasing “just how crucial women are in guiding our families, and in our neighborhoods, and in our country.” Press Release, Office of the First Lady, Remarks by the First Lady at Mother’s Day Tea (May 7, 2010), http://www.whitehouse.gov/the-press-office/remarks-first-lady-mothers-day-tea. She also described women as the “shoulder that we lean on as individuals” and “collectively . . . the shoulders that form the foundation of our communities.” *Id.*


485. *Id.* at 24.

486. *Id.* (Executive Summary).

487. *Id.* at 24.

488. *Id.* at 26. For a similar conclusion, see HEATHER BOUSHHEY & ANN O’LEARY, CTR. FOR AM. PROGRESS, OUR WORKING NATION: HOW WORKING WOMEN ARE RESHAPING AMERICA’S FAMILIES AND ECONOMY AND WHAT IT MEANS FOR POLICYMAKERS 1 (2010) (stating that “the movement of women out of the home and into paid employment stands out as one of the most important transformations” of twentieth century workers and their families; “4 in 10 mothers are either the sole breadwinner . . . or are bringing home as much or more than their spouse”; half of all workers on payroll are women; and “[t]he movement of women into employment has transformed how we work and live[.] yet government, business, educational, and other social institutions all around us are not keeping pace”).
The report detailed what workplaces currently do and do not do in terms of areas of flexibility, such as “flexibility in the scheduling of hours, the place of work, and number of hours worked.” It also stressed the business case—the economic benefits to employers—of creating greater workplace flexibility, as well as the tangible benefits to employees. As you might expect, white collar, more highly educated, and professional workers tended to have work environments with more flexibility than blue-collar workers and workers with less than a high school degree.

At a workplace flexibility event, President Obama sounded two characteristic themes. First: “Workplace flexibility isn’t just a women’s issue. It’s an issue that affects the well-being of our families and the success of our businesses. It affects the strength of our economy—whether we’ll create the workplaces and jobs of the future we need to compete in today’s global economy.” Second, he spoke of the serious “disconnect between the needs of our families and the demands of our workplace.” Again, he stressed that this disconnect “reflects a broader problem[.] . . . [W]e as a society still see workplace flexibility policies as a special perk for women rather than a critical part of a workplace that can help all of us” and also perceive that “an employee who needs some time” to attend to family responsibilities is not “fully committed to his or her job.” President Obama also noted the perception that “if you make a workplace more flexible, it necessarily will be less profitable.”

The President also personalized the issue by relating the juggling in which many American families engage and the “high wire act” of having everything scheduled down to the minute with “no room for error” to what he and Michelle “have struggled with in our own family.” He also noted their relative position of privilege and access to resources:

[It wasn’t that long ago that both of us were working full-time outside the home while raising two young daughters. I was away for days on end for my job, and Michelle was working hard at hers, so a lot of times we felt like we were just barely keeping everything together. When we were at work, we were worrying about

490. Id. at 16.
491. Id. at 7.
493. Id.
494. Id.
495. Id.
496. Id.
what was happening at home. When we were at home, we were worrying about work. We both felt our overloaded schedules were taking a toll on our marriage.

And we had it relatively easy. We could afford good health care. We had a wonderful mother-in-law, grandmother[,] who could help out. We had to ship her in, even in the White House. . . . We both had jobs where we could rework our schedules in an emergency without risking being fired or having our paychecks docked.497

One striking part of the President’s remarks is a rhetorical claim he made about the importance to society of caretaking and of the need to support this “most important job”:

[U]ltimately, [workplace flexibility] reflects our priorities as a society—our belief that no matter what each of us does for a living, caring for our loved ones and raising the next generation is the single most important job that we have. I think it’s time we started making that job a little easier for folks.498

In her opening remarks at the White House Forum on Workplace Flexibility, First Lady Michelle Obama said, “[F]lexible policies actually make employees more, not less, productive—because . . . instead of spending time worrying about what’s happening at home, your employees have the support and the peace of mind that they desperately need to concentrate on their work.”499 The First Lady also referred to her own efforts to juggle work and family prior to life in the White House, commenting that, even with “very accommodating jobs” and “understanding bosses,” she felt that she was not keeping up enough with work or at home.500 She also welcomed the pioneering companies at the Forum, whose best practices would help show ways to support employees and also boost companies’ “bottom lines.”501

What practical policies flow from this conviction about the importance of care taking and the need for a better fit between twenty-first century workplace and workforce? Some of the ideas discussed at the forum included: expanding the FMLA to cover more workers and other needs; encouraging states to experiment with paid leave; providing more funding for childcare and a higher child-care tax credit; supporting people caring for aging

497. Id.
498. Id.; see supra text accompanying notes 438-40 for similar rhetoric about responsible fatherhood.
500. Id.
501. Id.
relatives; and providing more workplace flexibility in when to work, where to work, and how long to work.502

The summit also discussed examples of best practices, such as telecommuting.503 As I discuss below, the administration also launched a National Dialogue on Workplace Flexibility to continue the conversation about best practices. Many of these best practices mentioned at the summit and, perhaps, in these dialogues are still on a wish list.

4. The FMLA: Moving Beyond Talk of “Family Values” to Policies That “Value Families” Is Still Unfinished Business

In Part II, I discussed the symbolic and practical importance of the FMLA as a necessary but not sufficient step toward helping workers address family responsibilities. The Obama administration has made a similar assessment. Thus, on the twentieth anniversary of its passage, the Obama administration celebrated with a press release stating, “[T]his law helped level the playing field by extending protections to both women and men, so that more workers could meet their responsibilities to themselves and their families without jeopardizing their livelihood.”504 Yet, the statement continued, more work remained to be done, since “[n]ot all employees are covered by the law” or can “afford to take unpaid leave.”505 I noted above that the 2008 Democratic Party Platform called for expanding the FMLA. So, too, the 2012 Platform sounded the familiar rhetoric that we must “stop . . . talking about family values and start pursuing policies that truly value families,” among them “broadening the Family and Medical Leave Act, and partnering with states to move toward paid leave.”506 The Platform also states, “We believe that all parents and caregivers—regardless of gender—need more flexibility and support in the workplace.”507 This statement perhaps reflects President Obama’s evolved stance toward families formed by gay men and lesbians. For example, in 2010, the administration extended FMLA benefits

502. Videos of the sessions, including on best practices, are available on the White House website. See Jarrett, supra note 483; see also COUNCIL OF ECON. ADVISERS, supra note 484.

503. See Jarrett, supra note 483. For a contemporaneous “policy roadmap,” see BOUSH & O’LEARY, supra note 488.


505. Id.


507. Id.
to same-sex parents and others who might lack a biological relationship with their children.\textsuperscript{508}

During Obama’s first term, the Department of Labor released a study finding that “[e]mployers generally find it easy to comply with the [FMLA], and employees generally do not abuse it.”\textsuperscript{509} The twentieth anniversary of its passage sparked some conservative commentators to argue that it was needless and confusing regulation, even as feminists and others argued that it is working for some employees, but should be expanded to cover more workplaces and to include paid leave.\textsuperscript{510} Comparative examinations of where the United States stands with respect to nations of comparable wealth continue to show that the United States is unusual in not having a national paid family leave policy.\textsuperscript{511} Nonetheless, a series of paid leave bills introduced during Obama’s first term failed.\textsuperscript{512} The prospects for making any headway in the current “do-nothing” Congress seem slim. Nonetheless, one difference between 1993 and 2014 is that several states, beginning with California, followed by New Jersey and Rhode Island, have now experimented with paid family leave.\textsuperscript{513} It may be that the prominent media attention given in the last few years to the challenges of women “having it all,” following on the heels of diagnoses of “the end of men,” and of the need, in light of the changing economy and the demands of work and home, for society to support new conceptions of masculinity will generate sufficient public conversation about the desirability of paid family leave that there will be consensus that the time has come for such leave.\textsuperscript{514} Indeed, some scholars argue

\textsuperscript{508} Obama Administration Expands FMLA to Benefit Same-Sex Parents, Others, GLBT LAW BLOG (July 30, 2010), http://glbtlaw.wordpress.com/2010/07/30/obama-administration-expands-fmla-to-include-same-sex-parents/.

\textsuperscript{509} FMLA Is Working, Employers Tell DOL, 21 No. 1 FAM. & MED. LEAVE HANDBOOK NEWSL., Apr. 2013, at 2.


\textsuperscript{512} See Kitchen, supra note 340, at 244-55 (detailing failed legislative bills for various forms of paid leave introduced in Congress during Obama’s first term).


\textsuperscript{514} See generally HANNA ROSIN, THE END OF MEN AND THE RISE OF WOMEN (2012); Anne-Marie Slaughter, Why Women Still Can’t Have It All, ATLANTIC (June 13, 2012, 10:15
that the primary barrier today to equalizing gender roles at home and work is not people’s attitudes; instead, “structural impediments”—such as the lack of any federal initiative since the FMLA “to help workers accommodate their work and family demands”—“prevent people from acting on their egalitarian values, forcing men and women into personal accommodations and rationalizations that do not reflect their preferences.”515 Noting that working fathers report feeling more work–family conflict that working mothers do, Liza Mundy has recently argued that evidence from other countries indicates that paid parental leave is a “brilliant and ambitious form of social engineering” that “has been shown to boost male participation in the household, enhance female participation in the labor force, and promote gender equity in both domains.”516 Perhaps more states may move in California, New Jersey, and Rhode Island’s direction of paid family leave or the federal government may—finally—expand the FMLA.517 One thing is clear: the discussion of work–family conflict and balance now addresses a broader range of issues, including women’s overall role in the economy, as I now discuss.

5. Beyond the FMLA: Women as Key to a New Economy

In April 2012, perhaps as a campaign document, the White House Council on Women and Girls released a lengthy report, Keeping America’s Women Moving Forward: The Key to an Economy Built to Last. This report exemplifies the Obama administration’s tenet that economic issues affecting women are not just a “women’s issue” but also affect families, men, the economy, and the nation. This report leads with the “central role” women play in the American economy.518

It notes that women are “nearly 50% of our workforce, are a growing number of breadwinners in their families, and are the majority of students in our colleges and graduate schools,” and also own 30% of small business-
The problem, the report continues, is that “women still face barriers to participation in the workplace and marketplace.”

Instead, the pay gap hurts “entire families”; inadequate family leave or sick leave “also hurts men who need to help care for a new baby or an ailing parent.” When women entrepreneurs have a harder time accessing capital, it “hurts our entire economy.” Further, “when approximately two million women fall victim to domestic violence each year, that costs our nation $8 billion annually in lost productivity and health care expenses and results in the loss of 8 million paid days of work a year.”

The report explains that because of the critical link between “[t]he success of American women” and “the success of American families and the American economy,” and “to keep moving forward, women must be able to help provide for their families and contribute fully to our economy.” Thus, the report quotes the President’s statement that “[l]ifting women up lifts up our economy and lifts up our country.”

The Chair and Executive Director of the White House Council on Women and Girls explains that because of this critical link, President Obama created the White House Council on Women and Girls “with the explicit mandate to ensure that every agency, department, and office in our federal government—with the policies they draft, the programs they create, and the legislation they support—takes into account the needs and aspirations of American women and girls.”

The report then credits the administration with working “tirelessly to promote equality[,] enhance women’s economic security[,] and ensure that women have the opportunities they need and deserve at every stage of their lives.”

The report offers a “sampling” of “the policies, programs, and legislative initiatives that have resulted from these efforts,” reflecting “the depth and breadth of the President’s commitment to the lives of women and girls.” This report’s tenor suggests its role as a possible campaign document.

Turning to the “sampling” itself, it is striking that there is no mention whatsoever of the FMLA. The report does mention workplace flexibility when it states, “Safe, flexible, and fair workplaces are critical for the suc-
cess of all employees.”530 It also references its March 2010 White House Forum on Workplace Flexibility and the “first ever” published report by the Council on Economic Advisors on the economic benefits of workplace flexibility (discussed above).531 It also reports that the Department of Labor Women’s Bureau “launched a National Dialogue on Workplace Flexibility in ten cities across the country.”532 Those dialogues brought “together industry leaders, employers, unions, workers, advocates, and government officials to share best practices and discuss solutions for workplace flexibility across industries.”533 The report, however, does not indicate any imminent proposal for paid family or parental leave. It does mention “[e]nsuring the [f]ederal [g]overnment is a [m]odel [e]mployer,” through the President signing the Telework Enhancement Act, which requires federal agencies to promote teleworking, and through federal agencies and offices “implementing” various “workplace flexibility policies.”534

Notably, welfare reform and welfare policy are almost entirely absent. There is one reference to TANF in the report’s discussion of steps taken by the administration to open “[p]athways [b]ack to [w]ork for [w]omen.”535 Thus, the TANF Emergency Contingency Fund provided “wage subsidies for companies that hire low-income workers,” thus, supporting “260,000 jobs, 83% of which went to women.”536 The report notes that the President proposed expanding these efforts through further legislation “to invest $12.5 billion to provide subsidized employment for low-income Americans.”537 There are some references to keeping women out of poverty through, for example, refundable tax credits like the Earned Income Tax Credit (EITC) and the Child Tax Credit.538 There is continuity with Clintonism here in the rhetoric of “[m]aking [w]ork [p]ay” and in the role of the EITC.539 For example, the report mentions the Making Work Pay Tax Credit passed in 2009 and 2010 and historic expansions of the EITC and Child Tax Credit.540

The report indicates a comprehensive approach to the role of American women in the economy—federal policies aimed at providing “[s]ecurity and [o]pportunity for American [w]omen at [e]very [s]tage of [t]heir

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530. Id. at 44.
531. Id. See supra Subsection III.C.3 for this discussion.
532. Id. at 45.
533. Id.
534. Id.
535. Id. at 41.
536. Id.
537. Id.
538. Id. at 8.
539. Id. at 9.
540. Id. at 14.
Perhaps this is a manifestation of the “new New Deal” mentioned in the 2008 campaign.

We might ask, what about men? Has the Obama administration grappled adequately with claims about the impact of the recession on men’s place in the economy? Is its focus on women as the engine of economic success leaving men and boys behind? As noted above, even as the Obama administration has directed federal agencies to make women and girls a proper focus of policy making, it has similarly directed agencies to focus on promoting responsible fatherhood. What may be needed is a more comprehensive look at federal family policy as such and the relevance of gender and negotiation as gender roles evolve and adapt to changing economic realities. Instructive in this regard may be a report on the role of working women in the economy by the Center for American Progress (released in 2010), which suggests:

Perhaps one of the biggest underreported implications of this transformation is the impact on men. No longer do men always bear the full burden of earning the majority of the family’s finances, but they are now more likely to have—and want—to take time off work to attend to their family. With most mothers contributing to the family’s budget, there are relatively few families with a full-time stay-at-home wife. Men and women are now left to negotiate the challenges of work-family conflict, such as who will go in to work late to take an elderly family member to the doctor or stay home with a sick child. Given this, it comes as no surprise that men in dual-earner couples today are reporting even more work-family conflict than women.542

D. The 2012 Campaign and Platform: Unfinished Business on Work, Family, Poverty, and Welfare

I conclude this discussion of the legacy of Clintonism and the distinctive features of the Obama era with respect to work, family, and welfare by looking at the 2012 Platform. There are obvious traces of Clintonism’s New Covenant and its familiar tropes; for example, the link between family values and valuing families and the idea of rewarding those who work hard and play by the rules. The Platform also departs from Clintonism in its explicit embrace of full equality for gay men and lesbians, including marriage equality (as I discuss below).

On family values, the Platform declares, “It’s time we stop just talking about family values and start pursuing policies that truly value families.”543 As noted above, one such policy—an important piece of unfinished business—is to expand the FMLA and partner with states “to move toward paid

541.  Id. at ii.
543.  2012 Platform, supra note 506 (emphasis added).
The Platform also appeals to values when it echoes Clintonism’s premise of rewarding people who work hard and play by the rules, cast in 2012 in terms of how to restore economic security for the middle class:

Reclaiming the economic security of the middle class [requires] . . . restoring the basic values that made our country great, and restoring for everyone who works hard and plays by the rules the opportunity to find a job that pays the bills, turn an idea into a profitable business, care for your family, afford a home you call your own and health care you can count on, retire with dignity and respect, and . . . give your children the kind of education that allows them to dream even bigger and go even further than you ever imagined.545

Echoing prior Democratic rhetoric, the 2012 Platform speaks of caring for family members as “real” work in need of societal support. It also expands the notion of caregivers beyond parents: “We must protect our most vulnerable children by supporting our foster care system, adoption programs for all caring parents, grandparents, and caregivers, and protecting [our] children from violence and neglect. We recognize that caring for family members and managing a household is real and valuable work.”546

By contrast to 1992 and 1996, but consistent with 2008, there is no reference to welfare or welfare reform. Instead, the Platform refers to the imperative of ending poverty: “Poverty. Too many Americans live[d] without hope for a better future or access to good, family-supporting jobs. . . . The economic crisis has hit low-income American families particularly hard . . . . We must make ending poverty a national priority.”547 The Platform also refers to providing “ladders of opportunity for those working hard to join the middle class.”548

Commentators suggest that one dividing line between the Democratic and Republican candidates in the 2012 election was their underlying view of the role of government; that is, whether it could be a force for good and had a responsibility to provide opportunity, or whether government worked best by getting out of the way to let human freedom and initiative bloom.549 Romney’s infamous reference to the 47% who lacked personal responsibility and depended upon and expected governmental entitlements provided an occasion to look carefully at deeper ideological divides over what types of good things the federal government could and should do to promote oppor-

544. See supra Subsection III.C.4.
545. 2012 Platform, supra note 506 (emphasis added).
546. Id.
547. Id.
548. Id.
tunity and what the social contract should entail. In critiquing “Republicans like Mitt Romney” who would return to economic policies “that benefited the wealthy but crashed our economy,” the 2012 Democratic Platform (echoing a Clintonism trope) stresses that “we are all in it together” and that the economy must work for everyone, so that “everyone gets a fair shot, everyone does their fair share, and everyone engages in fair play.”

Notably, during the 2012 campaign, candidate (and architect of the Contract with America) Newt Gingrich labeled President Obama as the “most successful food stamp president in American history,” charging him with creating food stamps rather than jobs. Gingrich pointed to the growth in the number of people receiving food stamps during President Obama’s first term. That growth is attributable not only to the serious economic recession that began in December 2007, a year before Barack Obama took office, but also to efforts begun during the Bush administration to encourage eligible people to apply and continued when President Obama, as part of a stimulus bill, suspended food stamps’ work requirements. This incident, with Gingrich’s evident exploitation of stereotypes about aid recipients, triggered discussion about the important role of food stamps as an anti-poverty measure and safety net when the economy falters; the fact that many recipients live in households where family members are employed; and the fact that, in applying, recipients are “playing by the rules.” As the welfare rolls shrink, and people reach time limits under TANF, food stamps may be the only source of income for some families.

This flare up over food stamps raises the question of what has happened with TANF during the Obama administration and the question of welfare reform’s relative success. The serious economic recession that began in the last year of the Bush administration contrasts sharply with the economic “boom” conditions of the late 1990s when states began imple-

553. Id.
One troubling development is that “despite the worst economy in decades, the cash welfare rolls have barely budged,” in part because a number of states have used “permissive rules” to turn away the poor and use their federal TANF dollars for other programs. Moreover, those poor families who do receive TANF benefits are receiving benefits “at least 20 percent below their 1996 levels in 34 states, after adjusting for inflation,” and benefits fall below the poverty line in all states. At the same time, when some states sought more flexibility in implementing TANF’s work requirements in order to find more effective ways to move recipients to employment, the Obama administration’s announcement of its willingness to give waivers “to test alternative ways ‘to improve employment outcomes for needy families’” drew sharp criticism from Republicans. Republican candidate Mitt Romney capitalized on this in rhetoric (consciously or unconsciously) echoing Clintonism’s tropes. Asserting that “President Obama ‘wants to strip the established work requirements from welfare,’” he stated that “[t]he [P]resident’s action [was] completely misdirected” because “[w]ork is a dignified endeavor, and the linkage of work and welfare is essential to prevent welfare from becoming a way of life.” What this critique fails to recognize is that the Obama administration had sought input from the states about TANF’s work requirements and how the federal government could better support state efforts to help people get jobs; the use of waivers and experimentation also is consistent with Clintonism’s approach.

555. Jason DeParle, a journalist who covered the 1990s welfare debates, observes: “Perhaps no law in the past generation has drawn more praise than the drive to ‘end welfare as we know it,’ which joined the late-‘90s economic boom to send caseloads plunging, employment rates rising and officials of both parties hailing the virtues of tough love.” Jason DeParle, Welfare Limits Left Poor Adrift as Recession Hit, N.Y. TIMES, Apr. 7, 2012, at A1. He continues, “But the distress of the last four years has added a cautionary postscript: much as overlooked critics of the restrictions once warned, a program that built its reputation when times were good offered little help when jobs disappeared.” Id.

556. Id.


560. Id.

561. Id.
In sum, whether or not welfare reform has been a success, measured at the time of the 2012 election or today, will draw sharply contrasting assessments. Conservative welfare theorist Lawrence Mead points out, for example, that although PRWORA “included antigovernment features,” in terms of the call to “downsize and devolve,” PRWORA’s “main impact was to build up welfare work programs and support services rather than cut back welfare defined broadly.”\footnote{562} Thus, while the number of people receiving cash aid plummeted in the later 1990s, “caseloads grew in other means-tested income programs—food stamps and the Earned Income Tax Credit,” with the result that, “overall, the nation spent more to reform welfare than it had spent on the unreformed system.”\footnote{563} Not only Republicans seeking radical reform but also Clinton and many Democrats viewed part of their task as including behavioral reform—bringing the poor back into line with values of personal responsibility.\footnote{564} Looking back at congressional politics about welfare, Mead usefully identifies tensions between, on the one hand, a focus on “dependency” and the conservative sense that government should do less and expect the poor to do more and exercise “personal responsibility” and, on the other, a liberal focus on governmental provision of opportunity, on what obstacles the poor face, and on what action government may need to take to “promote more equal opportunities and outcomes for ordinary Americans.”\footnote{565} Clintonism attempted to meld personal responsibility and governmental provision of opportunity, although, as I argued above, PRWORA was a harsher synthesis than he envisioned.

If the central aim of PRWORA was to move people “from welfare to work,” then it has been only a partial success. Government studies of TANF’s work requirements have identified a sizeable gap between TANF’s work participation rates and what states have actually achieved. One study found that, in fiscal year 2009, “the national average TANF work participation rate was 29.4% for all families and 28.3% for two-parent families. This is well below the statutory 50% and 90% standards.”\footnote{566} Most states, nonetheless, have “met their standard” because of various features in TANF, such as caseload reduction credits, that allow them to reduce their work participation percentages.\footnote{567} Critics of TANF label this caseload reduction feature of TANF as a “perverse incentive” to states and also fault TANF for allowing states to shift funds away from direct cash assistance to more polit-

\footnote{562. Lawrence M. Mead, Welfare Politics in Congress, 44 POL. SCI. & POL. 345, 353 (2011).}
\footnote{563. Id. at 353-54.}
\footnote{564. See id. at 354; see also discussion supra Part II.C.}
\footnote{565. Mead, supra note 562, at 348.}
\footnote{566. FALK, supra note 175, at 25.}
\footnote{567. Id.}
ically popular programs. TANF, some critics contend, “shredded the safety net,” evidenced by the below-poverty level of TANF benefits, the perpetuation of women’s employment in “low wage ‘women’s work,’” arbitrary exclusions due to time limits, family caps, and “full family sanctions” often imposed erroneously or for trivial reasons.

Facing these criticisms, Mead might well respond that one needs to look at the increase in spending in programs other than cash assistance, such as food stamps and the EITC, an antipoverty program championed by New Democrats and Obama. However, Congress’s recent “stripping out the food stamp program” (Supplemental Nutrition Assistance Program) from the Farm Bill authorizing funding of agriculture followed by the House Republicans pushing through a bill “that slashes billions of dollars from the food stamp program, over the objections of Democrats and a veto threat from President Obama,” are troubling signs that the 2012 Democratic Platform pledge to “end poverty as we still know it” is becoming a casualty of congressional dysfunction. It is not surprising, and, indeed, encouraging, that President Obama is taking to the bully pulpit, warning that growing economic inequality is fraying the nation’s social fabric and that “[m]aking sure our economy works for every working American” is “the defining challenge of our time.”

E. The Fate of DOMA: President Obama’s Evolving Stance

When Congress passed—and Clinton signed—DOMA, no state allowed same-sex couples to marry. By 2009, as President Obama began his first term, Massachusetts no longer stood alone in allowing same-sex cou-

568. CASEY, supra note 557, at 9.
569. Id. at 1.
570. See Jonathan Weisman & Ron Nixon, House Republicans Push Through Farm Bill, Without Food Stamps, N.Y. TIMES, July 12, 2013, at A14; Editorial, Missing: The Food Stamp Program, N.Y. TIMES, July 13, 2013, at A16 (“The choice made by the House in cutting apart the farm bill was one of the most brutal, even in the short history of the House’s domination by the Tea Party.”).
574. Press Release, supra note 23. I return to this in the Conclusion.
ples to marry and, as couples in Massachusetts and those other states encountered the full force of DOMA’s § 3, DOMA’s “teeth” were evident. As spouses and as states themselves (like Massachusetts) brought lawsuits asserting that § 3 of DOMA was unconstitutional—because it barred federal recognition of such marriages for purposes of any federal benefits—the Obama administration found itself in a precarious position. It initially defended DOMA in federal court, even as it called for Congress to repeal it. While it rejected most of the rationales for DOMA that Congress asserted, such as encouraging responsible procreation and providing an optimal setting for child rearing, it asserted there was a rational basis for § 3 of DOMA, for example, that “[g]iven the evolving nature of this issue, Congress was constitutionally entitled to maintain the status quo pending further evolution in the states.” The State of Massachusetts and those same-sex couples challenging § 3 prevailed in federal district court.

After an outcry by Obama supporters that Obama had promised to support the repeal of DOMA, and as new lawsuits were filed by couples married in Connecticut (Pedersen v. OPM) and by a widow whose Canadian marriage was recognized by New York (Windsor v. United States), the Obama administration announced that the President’s position was “evolving.” Then, on February 23, 2011, in a much-discussed letter to Congress, Eric Holder, Attorney General, announced that these new lawsuits had spurred further study of DOMA and that the Executive Branch would not defend § 3 of DOMA in the new lawsuits. Holder’s letter indicated that the President had concluded that § 3 of DOMA, “as applied to same-sex couples who are legally married under state law,” violates equal protection. The administration had concluded that § 3 should be subject to heightened (that is, intermediate) scrutiny because sexual orientation was similar enough to race and sex in that stereotypes and prejudicial attitudes might be shaping legislative classifications. Because DOMA could not survive such heightened review, the administration would no longer defend it. Holder noted that the social-science data did not support the claim that optimal child rearing justified restricting marriage to heterosexuals. Holder also

575. Geidner, supra note 225.  
580. Id.
stated, “The record contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships—precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.”581 Here, Holder cited to *Romer v. Evans*, as well as *City of Cleburne v. Cleburne Living Center* and *Palmore v. Sidoti*.582 Holder invited Congress to defend the law, if it chose to do so.583 Thus, the Obama administration’s stance was that it would leave any further defense of DOMA to Congress, but it would continue to enforce it until there was a final judicial ruling on its constitutionality.584

Subsequently, the Bipartisan Legal Advisory Group (minus its two Democratic members) stepped in to defend DOMA.585 It appealed to responsible procreation and optimal childrearing and stayed away from the moral disapproval part of DOMA’s legislative record, although various amici stressed that theme in the Supreme Court proceedings in the *Windsor* litigation.586 In 2012, both the First Circuit, in the older DOMA lawsuits, and the Second Circuit, in the newer ones, held that § 3 of DOMA was unconstitutional.587 The First Circuit looked to *Romer, Cleburne*, and other cases as providing a guide to what the Supreme Court would likely do. It used an intensified, or more careful, form of rational basis review.588 Although the federal district court in New York reasoned along similar lines,589 the Second Circuit, like the Obama administration, concluded intermediate scrutiny should apply to classifications based on homosexuality and that § 3 failed such a test.590

President Obama’s stance evolved further when Vice President Joe Biden announced his own support for same-sex marriage, leading President Obama to announce that “I’ve just concluded that—for me personally, it is important for me to go ahead and affirm that—I think same-sex couples should be able to get married.”591 Thus, the 2012 presidential campaign

581. *Id.*
583. *Id.*
584. *Id.*
586. For an analysis of these arguments about moral disapproval, see McClain, *supra* note 15, at 430-60.
587. *Id.* at 15; *Windsor v. United States*, 699 F.3d 169, 176 (2d Cir. 2012).
marked the first time both that the Democratic nominee openly supported marriage equality and that a major party’s political platform did so. Repeating its prior call for the repeal of DOMA and for effectuating that repeal through passing the Respect for Marriage Act, the 2012 Platform declares further: “Freedom to Marry. We support the right of all families to have equal respect, responsibilities, and protections under the law. We support marriage equality and support the movement to secure equal treatment under law for same-sex couples.”  

By contrast to the polarizing role that marriage equality played in the 2004 election, there was surprisingly little mention of marriage equality in the presidential debates. That relative absence was itself striking. Even more significant was that, in his inaugural address, President Obama linked Stonewall to Seneca Falls and Selma as historic civil rights struggles and stated, “Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law . . . for if we are truly created equal, than surely the love we commit to one another must be equal as well.”  

The evolved stance of the Obama administration on the issue of same-sex marriage also led the United States to file a friend of the court brief in the federal litigation over Proposition 8, Hollingsworth v. Perry, in favor of the couples challenging Proposition 8 as violating the federal constitution. The United States again argued for heightened scrutiny of laws that target gay men and lesbians and rejected appeals to responsible procreation and optimal child rearing as rationales for Proposition 8. Instead, it contended that prejudice played a role in the campaign for Prop 8. Citing Lawrence, the United States argued that to the extent that moral judgments about gay men and lesbians underlie the appeals to protecting children, they cannot suffice to justify Proposition 8; so too, it cited Lawrence and Equal Protection precedents to argue that “reference to tradition, no matter how long established, cannot by itself justify a discriminatory law under equal protection principles.” The Supreme Court, in Hollingsworth v. Perry, declined to address the merits of the plaintiffs’ federal constitutional claims, instead


595. 595. Id. at 6-7.

596. 596. Id. at 12.

597. 597. Id. at 29.
throwing out the Ninth Circuit’s opinion because the proponents of Proposition 8, as private parties, lacked standing to appeal the federal district court’s ruling in favor of the same-sex couples’ federal constitutional challenge to Proposition 8.\footnote{1713}

I need not belabor the point that President Obama has evolved dramatically on the issue of DOMA and, more broadly, whether same-sex couples should have access to civil marriage. Notably, many prominent politicians have evolved in that direction.\footnote{599} In March 2013, former President Clinton became a poster child for marriage equality with the Human Rights Campaign featuring his statement that he joined with “the Obama administration, the petitioner Edith Windsor, and the many other dedicated men and women who have engaged in this struggle for decades in urging the Supreme Court to overturn the Defense of Marriage Act.”\footnote{600} In a news story, Clinton stated that he signed DOMA to head off something even worse, “a constitutional amendment banning same-sex marriage, but realized now that ‘the law is itself discriminatory’ and ‘it should be overturned.’”\footnote{601} Indeed, in an op-ed, Clinton stated: “I believe that in 2013 DOMA and opposition to marriage equality are vestiges of . . . an unfamiliar society.”\footnote{602}

Even before the DOMA legal challenges made their way to the Supreme Court, which ruled that § 3 was unconstitutional, some members of Congress attempted to repeal DOMA in its entirety. They introduced and held a hearing on the Respect for Marriage Act.\footnote{603} Some supporters of that new bill, such as Representative Blumenauer, stated that they regretted their vote for DOMA.\footnote{604} Further, at the hearing on the Respect for Marriage Act, Representative Lewis, recipient of a presidential medal for his role in the civil rights movement, analogized the ban on same-sex marriage to racial hierarchy laws in the South, including the ban on interracial marriage.\footnote{605} Members of Congress argued that “the issue of civil rights” is not “merely one for the history books” and that Congress needs “to keep our Nation
moving toward equality in our continuing efforts to form a more perfect union."\(^{606}\) Senator Leahy, of Vermont, whose legislature had moved from civil unions to civil marriage, brought in people from Vermont to talk about the practical hardship as well as the denial of dignity they experience when their marriages, valid under state law, are not recognized for purposes of federal law.\(^{607}\)

The Respect for Marriage Act did not come up for a vote before the 2012 election.\(^{608}\) Nonetheless, in the \textit{Windsor} litigation before the Supreme Court, 172 members of the House of Representatives and forty United States Senators filed a friend of the court brief in support of Edith Windsor.\(^{609}\) The lawmakers stated that DOMA should be struck down under heightened judicial scrutiny because gay men and lesbians lack meaningful political power and that DOMA could not even survive a lower level of scrutiny. Relying on \textit{Romer}, and its invocation of Justice Harlan’s dissent in \textit{Plessy}, the brief asserts that “DOMA is constitutionally impermissible ‘class legislation.’”\(^{610}\) Further, it asserts that “[v]irtually every aspect of DOMA and its legislative history . . . [—including] the open desire of some to express disapproval of that minority group—distinguishes it from routine Acts of Congress.”\(^{611}\)

On June 26, 2013, the Supreme Court, in a 5-4 decision, with the majority opinion authored by Justice Kennedy, struck down § 3 of DOMA as unconstitutional.\(^{612}\) Kennedy drew on his opinion in \textit{Romer v. Evans}, which taught that “[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision”;\(^{613}\) he concluded that DOMA could not survive under the principle that “the Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”\(^{614}\) This ruling gave the Obama administration the final judicial resolution it sought so that it could stop enforcing DOMA. Subsequently, federal governmental officials

\(^{606}\) \textit{Id.} at 1-2 (statement of Sen. Patrick J. Leahy, Vt.).

\(^{607}\) \textit{Id.}

\(^{608}\) On June 26, 2013, the day of the Supreme Court’s \textit{Windsor} ruling, it was introduced in the 113th Congress by Representative Jerry Nadler, in the House, and by Senator Dianne Feinstein, in the Senate. \textit{See Respect for Marriage Act, HUMAN RIGHTS CAMPAIGN} (July 30, 2013), http://www.hrc.org/laws-and-legislation/federal-legislation/respect-for-marriage-act.


\(^{610}\) \textit{Id.} at 12 (quoting \textit{Romer v. Evans}, 517 U.S. 620, 636 (1996)).

\(^{611}\) \textit{Id.} at 3.


\(^{613}\) \textit{Id.} at 2692 (quoting \textit{Romer}, 517 U.S. at 633).

\(^{614}\) \textit{Id.} at 2693 (quoting Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
in relevant departments have been implementing a policy change to treat marriages of same-sex couples valid under state law as valid for purposes of federal law.

President Obama has cited to *Windsor* and to this change in federal policy as evidence that “America is at a turning point,” “not only becoming more accepting and loving as a people,” but also “more just as a nation.” The President made those remarks in an op-ed urging Congress—to pass ENDA, sounding familiar ideas from Clintonism to explain why “every single American deserves to be treated equally in the eyes of the law”: “We believe that no matter who you are, if you work hard and play by the rules, you deserve the chance to follow your dreams and pursue your happiness. That’s America’s promise.” Indeed, on November 6, 2013, in a historic, bipartisan vote, the Senate passed ENDA. Although Representative Boehner is not expected to bring ENDA to the floor, and has contended it “would burden businesses with ‘frivolous litigation’ and ‘cost American jobs,’” members of the Senate have hailed the Senate vote as a “tremendous milestone.”

**CONCLUSION**

In this Article, I have considered the evolution of federal family policy from the Clinton Era to the Obama Era. Focusing on both campaign rhetoric and the translation of campaign promises into concrete federal policy, I have highlighted the issues both of family values and of equality. As a framing device, I considered three statutes signed by President Clinton, the Family and Medical Leave Act, the Personal Responsibility and Work Opportunity Reconciliation Act, and the Health Insurance Portability and Accountability Act. The President made those remarks in an op-ed urging Congress—to pass ENDA, sounding familiar ideas from Clintonism to explain why “every single American deserves to be treated equally in the eyes of the law”: “We believe that no matter who you are, if you work hard and play by the rules, you deserve the chance to follow your dreams and pursue your happiness. That’s America’s promise.” Indeed, on November 6, 2013, in a historic, bipartisan vote, the Senate passed ENDA. Although Representative Boehner is not expected to bring ENDA to the floor, and has contended it “would burden businesses with ‘frivolous litigation’ and ‘cost American jobs,’” members of the Senate have hailed the Senate vote as a “tremendous milestone.”

615. It is beyond the scope of this article to address the question of which state’s law is relevant here: the state where the couple married (place of celebration) or the state of their domicile. Where agencies use the former rule, it avoids the problem that a couple who lives in a state that does not recognize their marriage would not be eligible for federal benefits. See, e.g., REV. RULING 2013-17, IRS (2013), available at http://www.irs.gov/pub/irs-drop/rr-13-17.pdf.


618. Id. (reprinting op-ed published in the Huffington Post).


620. Id. (quoting Boehner and, on the “milestone,” Senator Tammy Baldwin, first openly gay member of Senate).
tunity Reconciliation Act, and the Defense of Marriage Act, tracing their evolution over time. While the first two laws fit comfortably with Clintonism’s pairing of responsibility with opportunity, the third was not part of the New Democrat vision and seemed in tension with Clintonism’s core theme of community and the values of inclusion. As this article has recounted, by the time of the Obama Era, Clinton himself had repudiated DOMA as a relic of an earlier era. Other basic commitments of Clintonism, however, seem to have a secure place in Obamaism, such as the trio of responsibility, opportunity, and community, the repeated call not just to talk about family values but to enact policies that value families, and the notion that “we’re all in this together,” such that people who work hard and play by the rules should be able to succeed.

While I have demonstrated the continuing hold of New Democrat rhetoric and policy, and of core commitments of Clinton’s New Covenant, I have also identified certain features distinctive to President Obama’s campaigns and presidency. One striking feature is the way in which he and First Lady Michelle Obama have made the personal political in relating the stories of their upbringing, marriage, and experience as parents to concrete policies, such as workplace flexibility, promoting responsible fatherhood and healthy marriage, and more recently, encouraging low-income students to pursue higher education. I also discussed the Obama administration’s distinct focus on women and girls and its insistence that many economic and social issues are not just “women’s issues,” but affect families, men, the economy, and the nation. Finally, I elaborated on Obamaism’s call for a “new New Deal,” and of the need to adapt governmental policies as well as institutions (such as the workplace) to the twentieth century. I discussed President Obama’s evolution on the issue of marriage equality and the sea change in federal policy since the Supreme Court struck down § 3 of DOMA.

It is too early, of course, to offer a retrospective on Obamaism, as I have tried to do on Clintonism. Just as Clinton was not able fully to implement his New Covenant—with the compromise welfare reform bill as one prominent example—President Obama has encountered fierce pushback to many of his agenda items in his vision of how to restore the economy and help families. Some political commentators argue that “[t]he first two years of the Obama presidency were two of the most productive years in modern political history,” pointing to how the Economic Recovery put into place the pillars of his new New Deal, but then they contrast this with the “stalemate” ensuing in 2011, and the “rising fury about government” exemplified by the Tea Party and its ascending power in Congress.621 While Bill Clinton’s unsuccessful pursuit of health care reform—rather than welfare reform—early

621.  GRUNWALD, supra note 17, at 418, 454.

In this environment, with steady talk of congressional dysfunction and of a Congress on track to be the least productive in decades, President Obama has turned to the bully pulpit. I would like to conclude by addressing his emphasis in recent speeches about the need to address the “relentless, decades-long trend” toward a “dangerous and growing inequality and lack of upward mobility that has jeopardized middle-class America’s basic bargain—that if you work hard, you have a chance to get ahead.”\footnote{Press Release, Office of the Press Sec’y, supra note 23.} The message is consistent with Clintonism’s pairing of responsibility and opportunity, and also (reminiscent of Clinton and Bush) recognizes the role of “harnessing the power of community to expand opportunity.”\footnote{Id.} Obama insists that the American way is equality of opportunity, not a promise of “equal outcomes”; increasingly, however, there is an “opportunity gap” in America that is “now as much about class as it is about race.”\footnote{Id.}

President Obama further insists that government “is us” and, thus, “should reflect our deepest values and commitments.”\footnote{Id.} Hearkening back to New Democrat philosophy, Obama speaks to how these values relate to families, calling for raising the minimum wage: “[I]f you work hard, you should make a decent living. . . . If you work hard, you should be able to support a family.”\footnote{Id.} “Work,” as used here, refers exclusively to market labor, not family care elsewhere discussed in this article as real and socially crucial work, thus leaving open the question of how this “opportunity” model accounts for and support such care. Strikingly, the President also stresses the negative impact of growing inequality for families and for community (another core New Democrat theme): in circumstances of greater inequality, “we tend to trust our institutions” and “each other less;” inequality also creates a “vicious cycle” for children, with the children born into low-income homes at a disadvantage from children from well-off fami-
lies, with that disadvantage compounding over time. Part and parcel of this concern over how inequality affects children is the First Lady’s new initiative, which he mentions, to encourage low-income high school students to pursue and succeed in higher education and to enlist institutions of higher learning to recruit and retain such students. It is hard to think of a more important way to bring the rhetoric of family values to bear on family policy than to take seriously the role of government in addressing this growing economic inequality.

628. Id.
629. Id.