Restructuring the Welfare State: Political Institutions and Policy Change

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CHAPTER THREE

Is America Becoming More Exceptional?: How Public Policy Corporatized Social Citizenship

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The Private Face of Social Insurance Exceptionalism

In 1950, T. H. Marshall suggested that "social citizenship" rights were the last frontier in formal citizenship protections. First came civil rights and basic freedoms in the eighteenth century, second came political rights with the extension of suffrage during the nineteenth century, and third came social rights with the development of national social insurance during the twentieth century. These three phases could be observed across developed nations. Yet in America, key social citizenship protections have been provided by employers rather than by the state, and hence the right to social protections has become a right linked to employment rather than a right linked to citizenship. As new social citizenship rights emerged in other developed countries, first to pension and health insurance and later to childcare provision and parental leaves, America saw the development of parallel rights within the corporation. The process has magnified American exceptionalism. I argue that federal policy stimulated the growth of this employment-related system of coverage, via tax incentives that encouraged corporate benefits expansion and complex regulations that encouraged firms to establish internal bureaucracies devoted to complying with the law—bureaucracies that became vocal advocates for the further expansion of private fringe benefits. The paradox of American exceptionalism, then, is that governmental activism has been the driving force behind the expansion of private social coverage.

Tax incentives first helped to popularize corporate health and pension insurance in the 1930s and 1940s (Stevens 1988; Wooten 1997). Congressional signals that public coverage would remain inadequate, in the case of pensions, and non-existent, in the case of health insurance, also stimulated employers to build coverage (Dobbin 1993; Dobbin and Boychuk 1996). Congress has since developed a discernable pattern of using tax incentives to stimulate employer-based benefits and of using complex regulations to shape those benefits. The tax incentives have largely financed these new benefits (Howard 1997) and the regulations have created an internal constituency within firms, in the form of accountants, human resources experts, and attorneys, with professional interests in the elaboration of these benefits.

This story helps to flesh out our understanding of the effects of political institutions on policy development by sketching the public policy origins of the "shadow welfare state" that developed in the United States. The private system of welfare emerged largely in response to the institutional form public policy took in this realm, which was in turn a consequence of America's weak party system, her peculiar federal state structure, and her weak administrative capacity in the realm of social coverage. These state characteristics contributed to public policies favoring corporate welfarism that depended on tax incentives and complex regulations.

While it was the state that stimulated corporate welfarism, that very welfarism has contributed to the sense that the American state is weak—to the sense that American social coverage is uniquely private in origins and execution. The form of federal legislation governing employment-based social protections—tax inducements and regulations enforced by private litigation—did little to expand state responsibilities or authority. The legislation did not demand new state powers or new state agencies of substantial size. Moreover, because Congress turned over responsibility for designing social protections to employers, managers and policymakers alike came to think that corporations were largely responsible for the various forms of job-based social protections.

By charting these developments I hope to enrich the institutional perspective on the origins of American exceptionalism. Early accounts of exceptionalism emphasized national character and political culture (Almond and Verba 1963; Inkeles 1979), but more recent accounts have traced exceptionalism to the weak capacities of the federal state (Steinmo 1994). I argue that federal institutional capacities helped to expand American exceptionalism in this case. First, the weak party system and weak labor traditions meant that it would be difficult to assemble political backing for an ambitious federal program in any of these realms of social coverage, leaving liberals who wanted new social protections with only one option, that of using tax expenditures to encourage the expansion of pension, health, maternity, and childcare coverage (Steinmo and Watts 1995). Second, the weak party structure and weak federal administrative capacities led Congress and several different administrations to adopt not a single tax-financed federal program in each area, but a complex set of regulations that required employers to hire a team of experts to make sense of the law and to construct compliant fringe benefits programs (Dobbin and Sutton 1998). Administrative weaknesses that precluded the forceful imposition of a simple system had the perverse effect of building administrative strength within corporations. The new personnel/benefits team, which had been built to respond to complex federal regulations, became an internal constituency that successfully lobbied corporate executives for the expansion of private coverage in each realm. Thus weak federal institutions spawned an elaborate private system of protections—albeit a system rife with holes and inequality of coverage.

The Origins of American Exceptionalism: Culture or Structure?

Political science and political sociology long attributed American exceptionalism to a culture of individualism and to antisocialist and anti-union sentiments. In these accounts, America's belief system was what distinguished her from her European counterparts. Institutionalists have challenged these accounts, suggesting that it is not a set of disembodied norms that marks the United States, but a set of concrete political institutions that delimit what is practicable and what is imaginable. From this institutional perspective, policy institutions sustain political culture.

Sven Steinmo (1994, 1995; Steinmo and Watts 1995) argues that America's weak party system, her weak labor traditions, and her weak government institutions make it exceedingly difficult to pass and put into effect ambitious social programs. Over time, the cumulative effect of these weaknesses is a relatively small federal bureaucracy and a thin social safety net. The face validity of these assertions is substantial, for a series of ambitious social engineering projects has been undermined by weak state capacities and by a tendency to roll back new programs. In the long run, the Progressive Era, the New Deal, and the Great Society programs have had modest effects—their most ambitious elements have been dismantled and their statist visions of the future have not been realized. Edwin Amenta (1998) has shown, for instance, that America's weak party system contributed to the dismantling of an aggressive job-provision system pioneered under the New Deal.

Steinmo, Amenta, and others have charted the effects of America's peculiar political institutions on the evolution of public social coverage, or more specifically on the failure of a system of public coverage to evolve. My goal in this chapter is to chronicle the effects of America's party system, of her federal structure, and of her administrative capacities on the evolution of corporate coverage. On the one hand, the weak party system has tended to produce not ambitious public social insurance programs such as those found in Northern Europe, but public incentives for private employment-related programs that are financed by employer and employee contributions and foregone tax revenues. On the other hand, the weak party system and weak administrative bureaucracy combine to generate not a single federally defined standard in each area of social coverage, but a complex set of regulations designed to maximize employer freedom (this is a consequence of the weak party system) and to be administered by the courts as they interpret the law (this is a consequence of the weak administrative bureaucracy). The result of these federal weaknesses oriented to maximizing private freedom is an elaborate and highly variable system of corporate social provision, backed by a series of complex and highly specialized *corporate* bureaucracies that (a) lobby industry from within for voluntary expansion of benefits and (b) sniff the administrative, legislative, and judicial winds for signs of legal changes that might justify further growth of corporate programs. Thus the result of these federal initiatives to expand the social safety net is an elaboration of the private corporate social insurance system, which has had the effect of magnifying American exceptionalism.

The congressional side of the story of how tax incentives were used to finance a shadow welfare state in America has been well told (Howard 1997; Wooten 1997). Here I chronicle the organizational side of the story, bringing it up to date by showing a pattern across four distinct benefits areas. The most basic point to be drawn from this story is that American welfare exceptionalism depends on two institutions, that of our seemingly weak state and that of our seemingly strong corporations. The weak state is a fiction, because relatively modest state policies have stimulated a flurry of activity and a host of new structures and programs in private corporations. The strong corporations are a fiction as well, for those corporations act largely in response to public policy rather than in response to internal dynamics.

My method is comparative, but the comparisons are across policy realms rather than across nations. Institutionalists usually use one of two methods to show that national political structures matter. One method is to control for policy arena and vary national political institutions, showing that different countries approach a common problem in different ways. The other method is to control for political institutions and to vary policy arenas, showing that a single country approaches different problems in a consistent way (Skocpol and Somers 1980). I pursue the latter approach, showing that in the case of several different policy realms, and across much of the twentieth century, America's peculiar state institutions have produced a common pattern of tax incentives and corporate regulations. These tax incentives and regulations have generated a common pattern of response among employers.

In the section that follows I describe the pattern by which government inducements led corporations to institutionalize four kinds of social protections. Then I describe in empirical terms how, since the 1970s, employers have come to institutionalize maternity leave, childcare provisions, pension insurance, and health insurance. In each case, the state created incentives for employers to build or expand private social protections. In each case, employers responded by creating new offices to signal a desire to comply with the law, and to scan the environment for concrete ideas about how to comply. In so doing they institutionalized a modern version of corporate "welfare work," and created corporate constituencies devoted to expanding corporate social protections—in new human resources management, antidiscrimination, and benefits specialists.

Note that my argument is parallel to that made by others who consider the role public policy has created for labor unions in labor market and social insurance management (King and Rothstein 1993, 1994; Western 1994). Where public policy institutionalized the role of labor unions in labor markets and social insurance provision, by making them key to job allocation or to the distribution of unemployment or other social insurance benefits, labor unions have grown accordingly in numbers and in administrative capacity. By contrast, where public policy has excluded labor unions from key roles in managing labor market and social insurance systems, unions have declined in both membership and administrative capacity. Likewise, where public policy has given responsibility for social coverage over to private employers, those employers have developed uniquely strong internal bureaucracies for administering social coverage. Those bureaucracies become internal advocacy groups pushing for further expansion of private benefits. Hence exceptionalism, whether American or Swedish, begets exceptionalism.

How Weak State Capacities Stimulate Strong Corporate Capacities

Weak Parties, Weak Labor, and Social Provision via Tax Incentives

Two aspects of American state capacities are salient here. America's weak party system and her weak labor unions have contributed to the form that legislation takes. This part of the puzzle has been well documented, and hence I do not dwell upon it here (Howard 1997; Steinmo 1995; Amenta 1998). America's weak party system is itself in part a consequence of federalism and regionalism. Federalism makes it possible for the chief of state and the majority in the legislature to come from different parties, and when this happens legislation is based on compromise. The strength of political regions, as compared to political parties, produces a pattern of cross-cutting political cleavages in the legislature. Where region can take precedence over party in legislative bodies, regional coalitions have the capacity to subvert the goals of the majority party—even when the majority party holds the presidency. In parliamentary systems, by contrast, the head of government is at the very least the leader of the largest parliamentary coalition. And in classical parliamentary systems, parties exercise discipline over the voting of members, such that regional considerations take a back seat to party considerations. In consequence, in parliamentary systems, left-leaning parties that hold power have demonstrated a substantial capacity to pass ambitious publicly funded social insurance programs. In the United States, Democratic presidents have found it difficult to pass ambitious social insurance programs even when their party holds a majority in Congress. Democrats have often settled for making incremental changes that depend on forgone tax revenues to subsidize corporate social coverage. Thus this system encourages the growth of employment-based social programs that are funded directly from corporate and employee contributions, and indirectly from foregone tax revenues, because those contributions are tax deductible.

State Institutional Weakness and the Elaboration of Corporate Structure

My focus in this chapter is not on the policymaking side of this process, but on the consequences of policy for the growth of corporate welfarism. How have public policy incentives contributed to the institutionalization of private social insurance? First, the weak party system tends to produce compromise legislation rather than set a clear federal standard for corporate social provision. This results in regulatory ambiguity and complexity designed to maximize employer freedom. Thus employers find themselves with a great deal of discretion in designing benefits programs, and tend to hire experts to do the job. Second, the weak federal bureaucracy fosters the reactive articulation of federal standards in the courts rather than the proactive articulation of standards by the public bureaucracy. Thus employers tend to hire experts in the law who can track emerging legal norms and tailor benefits programs to those norms.

In consequence, employers create internal bureaucracies staffed with experts whose careers depend on corporate welfarism, and who thus become vocal management-level advocates for the expansion of corporate welfarism.

Regulatory Ambiguity and Complexity

America's federalism and her weak party system combine to favor legislation that takes the form of broad guidelines rather than of clear mandates about how corporate social insurance systems should operate (Edelman 1990, 1992; Dobbin et al. 1993). Thus employers must design their own programs, but they must do so in the context of uncertainty about how exactly to comply with the law. They have responded by hiring experts in tax law and fringe benefits who can devise programs that appear to comply with the law.

Regulatory ambiguity and complexity lead employers to create professional departments not only to devise compliance mechanisms, but also to signal to regulators an intention to comply. As Meyer and Scott argue, "Each [U.S. organization] is more likely to have officers that symbolize safety, the environment, affirmative action ... and so on" (1992, p. 275). As Edelman (1992) and Dobbin et al. (1988) found in the case of regulations prohibiting employment discrimination, firms typically signal an intention to comply by establishing new offices. Marshall Meyer (1979) argues that observers, and by extension the courts, take signaling in the form of office-creation more seriously than signaling by announcement—by advertising a new goal or policy—largely because creating a new office is not cost-free. By establishing a new office, moreover, organizations absorb complaints spawned by new legislation. Thus when a university establishes an affirmative action office, "The environment is thereby signaled that (a) affirmative action principles have been accepted by the university in question, and (b) there is an individual to contact should affirmative action questions arise" (Meyer 1979, p. 494).

These offices try to make sense of the growing regulations that govern benefits directly, and also of seemingly unrelated regulatory arenas that may influence benefits programs. For instance, the Civil Rights Act of 1964 guarantees the right to nondiscrimination in employment. In 1972, the Equal Employment Opportunity Commission ruled that employer failure to treat maternity leave like other leaves for disability constituted sex discrimination. They reasoned that if an employer offers disability pay to men who sprain their ankles playing football with their children, she ought to have to offer such pay to women who are away from work due to childbirth. Many large employers responded by rewriting their disability provisions, offering maternity leave pay for the very first time even before the legal standing of the EEOC decision was clarified by the Supreme Court—which in fact overturned the EEOC position (Kelly and Dobbin 1999).

Regulation as a Moving Target

The relative weakness of the administrative branch and the relative strength of the courts has contributed to the corporate sense that employment law is a fast-moving target. Other common law countries permit judicial interpretation, but the United States Constitution guarantees the courts a particularly powerful position. Other civil-law countries give the courts little power to interpret the law (Merryman 1969). Firms have responded to the inconstant character of employment law by hiring specialists to track changes in the law and to try to predict evolving federal standards. They charge these offices with scanning the environment for defensible compliance mechanisms (DiMaggio and Powell 1983; Meyer and Rowan 1977).

As Meyer and Rowan argue, when the federal government began to pay attention to environmental safety, organizations set up internal units that could scan the environment for new compliance solutions: "environmental safety institutions make it important for organizations to create formal safety rules, safety departments, and safety programs" (1977, p. 350). Once new compliance mechanisms are approved by the courts, they act as powerful prescriptions for corporate behavior (Edelman 1992; Abzug and Mezias, forthcoming). "Subunits established to scan a particular part of the environment typically hire persons with expertise limited to one narrow segment" (Pfeffer and Salancik 1978, p. 270). Here the institutional argument is not unlike the argument Lawrence and Lorsch (1967) make, that environmental differentiation spawns organizational differentiation. Lawrence and Lorsch argue that organizations will gain resources to the extent that their structures match environmental demands. In the words of the systems theorist Walter Buckley, when the organization has acquired features oriented to the variety in the environment, "we say that the system has mapped part of the environmental variety and constraints into its organization" (1967, p. 63).

In the American context, we see this structural elaboration particularly in realms where the law is subject to constant amendment. Wages and hours legislation, for instance, is relatively stable and unambiguous. Hence we do not see the rise of new sub-units within firms charged with interpreting the law and designing corporate practices to comply with it. However, in realms where the law is highly variable over time, such as safety, environmental protection, equal opportunity, and fringe benefits, employers do tend to create new departments (Dobbin and Sutton 1998). This suggests that it is temporal variability in legal interpretation that drives the creation of these departments.

The Growth of an Internal Constituency for Corporate Welfarism

Thus the function of administering social protections becomes institutionalized within corporations, rather than in the state or in labor unions. The managers who are charged with these tasks develop commitments to the programs they devise, and to the notion of corporate welfarism. This is precisely the process of constituency formation that Philip Selznick (1957) documented, whereby new organizational duties develop constituencies among the managers charged with carrying them out.

The Privatization of Social Protections in Four Realms

Congress has generally extended social protections by creating inducements for employers to establish private protections, rather than by creating public programs. Social Security (for old age), Aid to Families with Dependent Children, Medicare (health coverage for the elderly), and Medicaid (health coverage for those in poverty) are the prime exceptions. In other realms, public inducements for employer-provided coverage have taken the form of tax incentives. In the case of maternity leave, civil rights law proved to be an inducement as well. Federal tax incentives for fringe benefits date to the 1920s, although by most accounts those incentives had little effect until the income tax was broadened to cover most of the working population, in the 1940s. In this section I chronicle changes in federal tax treatment of pension and health regulations in the 1940s, and again in the 1970s, and trace these changes to the growth of employer-provided coverage. I then chronicle the effects of federal law on the growth of corporate provision of maternity leave—tax treatment, workmans' compensation, and civil rights law all played roles here. Finally I turn to federal tax treatment of childcare assistance. Each change in federal law, I argue, created an ambiguous yet complex regulatory framework that was subject to judicial review and amendment. These regulations encouraged corporate social coverage, and they encouraged the elaboration of corporate benefits bureaucracies attuned to managing compliance. Members of those bureaucracies became vocal advocates for expanding corporate benefits.

Congress first created tax incentives for private pensions in 1926. In 1942, in the context of the downward expansion of income tax to all but the poorest of Americans, Congress made corporate expenditures for both pensions and health insurance tax-deductible. At the same time, Congress treated personal income in the form of pension and health benefits as nontaxable. This decision had the effect of shifting much of the cost of corporate pension and health benefits away from corporations themselves and from employees, and toward the federal government. In 1974 Congress passed the Employee Retirement Income Security Act (ERISA), also known as the Pension Reform Act, expanding federal tax incentives for employers creating certain kinds of benefits programs. The new law expanded regulation of pensions and health insurance programs financed with federal tax incentives and also covered corporate expenditures for temporary disability insurance and a number of other programs. In 1972 the EEOC had found that employers offering temporary disability coverage to workers must extend the coverage to workers disabled by pregnancy. Thus by 1975 employers were deducting expenditures for a host of different programs, including pension coverage, health insurance, and maternity leave wages financed by temporary disability insurance programs. Meanwhile in 1973, the Internal Revenue Service ruled that corporations could deduct their expenditures for employee childcare, and Reagan's 1981 Economic Recovery Tax Act extended this exemption. Tax expenditures clearly subsidized corporate welfarism in all four of these realms.

As I will argue below, America's weak political and administrative institutions produced legislation in each realm that gave great discretion to employers. Federal administrative weakness prevented the executive branch from developing clear prescriptions for how corporate programs should be structured. As a consequence, firms were left to design their own programs and they were left in some doubt about the eventual legality of the programs they did design. In each realm, judicial interpretation was a moving target. It was in this context that employers significantly expanded the role of benefits experts, institutionalizing the benefits function within the firm to the end of tracking changes in the law and adjusting corporate benefits policy accordingly.

In effect, the weakness of the federal bureaucracy stimulated the elaboration of the corporate bureaucracies dealing with welfare provision. Those who staffed these bureaucracies became internal advocates for the expansion of the corporate benefits function. They advocated new programs that anticipated legal changes and they advocated using corporate benefits for recruitment, retention, and motivation of employees. Federal law, in short, spawned an internal constituency for corporate benefits program—a constituency that was typically represented on the top management team by a vice president of human resource management and a vice president of benefits.

Federal Law and the Rise of Private Old Age and Health Insurance

Congress first used tax incentives to encourage employer-provided pensions in 1926 and they first used incentives to encourage employer-provided health insurance in 1942. The Revenue Act of 1926 allowed employers to deduct the cost of pension contributions and shelter the income on invested pension funds from taxation (Wooten 1997). In 1939 Congress expanded the scope of Social Security coverage without expanding contributions to the program and employers interpreted these changes as indicating that Social Security would not provide an adequate retirement wage (Dobbin 1992). The Revenue Act of 1942 was quite consequential from a tax perspective because it extended the income tax to most Americans and made health as well as pension insurance contributions tax deductible, providing employers made coverage available to most employees.

The Employee Retirement Income Security Act of 1974 expanded the regulation of pension and health benefits and again used the carrot of tax incentives to win corporate compliance. New fiduciary regulations were voluntary, but firms that did not comply with them could not deduct their pension expenditures from corporate profits. The act was designed, like the Revenue Act of 1942, to encourage employers to offer pension and health coverage to all employees. Contributions to plans that discriminated against low-wage employees were not deductible.

Thus on the one hand, ERISA used foregone tax revenues to finance corporate health and pension insurance—and a range of other fringe benefits as well. On the other hand, ERISA carried an aggravatingly complex and often ambiguous set of regulatory guidelines designed to (a) maximize employer latitude while guaranteeing plan solvency, and (b) ensure that employers could only deduct contributions that actually benefited employees and that benefited low-wage as well as high-wage employees. By dramatically expanding federal regulation of pension and health plans, ERISA encouraged employers to hire new benefits specialists. Despite the fact that the regulations increased the cost of insurance and the administrative costs associated with operating plans, they had a positive effect on the popularity of both pension and health insurance. This was the case, at least in part, because the new regulations stimulated firms to hire tax and benefits experts who heralded the advantages of pension and health programs, in terms of both taxation and employee management.

The Ambiguity and Complexity of Benefits Regulation

ERISA regulated health insurance and other fringe benefits, as well as retirement programs (Skolnik 1976). One goal of the act was to guarantee the pension and health insurance promises employers made. In addition to creating more stringent fiduciary requirements for pension plans, and regulating health insurance and other fringe benefits, ERISA insured private plans through the Pension Benefit Guaranty Corporation. A second goal was to insure that pension and other benefit plans would be offered democratically to all categories of employees, and this was accomplished by making fringe benefit plans that were restricted to the corporate elite taxable.

The final draft of ERISA was not for the feint of heart—only a tax attorney could make sense of it. It was widely viewed as "the most complex piece of legislation ever passed by Congress" (Tepper 1977, p. 105). By 1984, the act and Internal Revenue Code amendments to it filled 320 pages (Gill 1985). Rather than dictating the sort of uniform guidelines for pensions and health insurance found in some European countries, the act allowed employers to devise their own plans but regulated potential abuses of those plans in fine detail. In consequence, virtually all employers were forced to restructure pension and health insurance programs; in order to make sense of the complex regulations they hired tax accountants and tax lawyers and often established entirely new benefits departments.

The result of the legislation was that virtually every firm in the United States had to rewrite its pension plan, and in the process many rethought benefit schemes more generally. In the immediate wake of the legislation, at least 300,000 company pension plans were rewritten (Klein and Moses 1974). Because the legislation created a host of new regulations, rather than sketching a single pension standard, firms found that they had a whole roster of decisions to make. Virtually all companies changed vesting requirements. Most altered financing schemes and began contributing more money to provide the same level of benefits. One survey showed that a quarter of companies switched from flat rate plans, in which the pension provided a specified amount each month, to offset plans, in which the pension was guaranteed to supplement Social Security income to a combined, preset level (Meyer and Fox 1974, p. 53; Meyer 1981). Moreover, ERISA required employers to submit periodic, detailed reports on their pension programs to the Secretary of Labor, including annual statements of projected benefits for each employee (copies of which went to employees). To redesign plans and write these reports, most large employers hired benefits experts if they did not already have them.

Employer Response: The Creation of New Benefits Departments

An article in *Personnel* in 1980 concluded that ERISA, in combination with the restructuring of Social Security in the early 1970s, had boosted personnel administration and promoted the growth of the benefits function: "Personnel activities in many organizations [were] becoming increasingly important—largely because of the high cost of labor and benefits, the negative impact of government regulations, and the necessity of planning for future manpower needs" (Zippo 1980, p. 66). By the end of the 1980s, a survey summarized in *Business Insurance* reported great optimism among benefits managers about the future of the field: "Respondents most often said that increased government regulation not only provided more responsibilities for employee benefits departments, but added emphasis and credibility to their function in the corporation" (quoted in Geisel 1989, p. 15). And as one executive described the effects of the expansion of ERISA; "We see firms creating positions that did not exist five years ago. There are so many more headaches such as problems caused by legislation" (quoted in Geisel 1989, p. 15).

Whereas civil rights legislation had created a cadre of quasi-lawyers to revise and update organizational employment and promotion practices, ERISA created a cadre of quasi-accountants who could revise and update benefit programs and provide ongoing documenting of legal compliance both upward, to the state, and downward, to the employee.

The effect on the prevalence of benefits departments and personnel departments can be seen in figures 3.1 and 3.2. The data come from a retrospective survey I conducted with John Meyer, W. R. Scott, and John Sutton—details are reported in Dobbin and Sutton (1997). The figures show the proportion of 279 organizations that reported each type of office, annually. Each type of office increased dramatically in popularity after the early 1970s. These figures capture only part of the effect of the law, for many employers that had these departments before 1970 upgraded them after 1974, and many organizations too small to establish distinct departments nonetheless hired specialists to handle federal compliance.

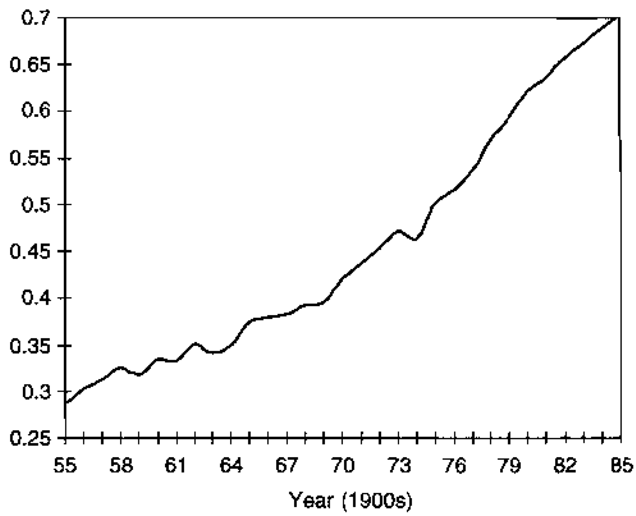

Figure 3.1 Proportion of Employers with Personnel/HRM Office

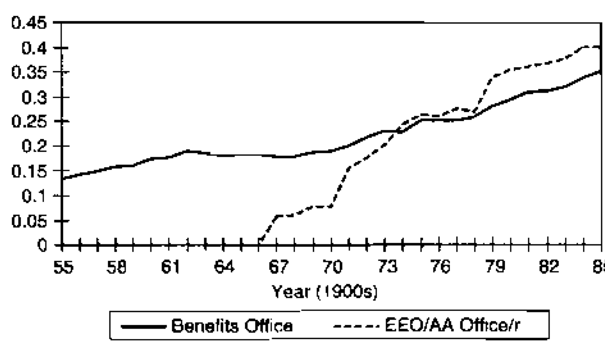

Figure 3.2 Proportion with Benefits Offices and EEO/AA Office/r

Benefits Departments and the Expansion of Pension Coverage

New corporate benefits departments championed the expansion of pension programs from the mid-1970s. Despite the fact that the new legislation caused the cost of pensions to rise, private pension coverage expanded significantly.

New regulations caused employer costs to rise for several reasons. New fiduciary requirements and insurance provisions forced employers whose pension schemes were underfunded to add significant capital. According to some estimates, the cost of the average pension plan rose 15 percent as a result of the legislation (Hakala and Huggins, 1976). ERISA also liberalized vesting requirements—the point at which accrued pension benefits become nonforfeitable in the event of termination of employment—reducing time to coverage for new employees and consequently increasing the cost to employers. A Conference Board study in 1972 found that the modal time to vesting among private firms was fifteen years. Seven years later, after the implementation of ERISA, no employer reported a time to vesting of more than ten years (Dobbin and Boychuk 1996). This change increased employers' pension costs as well.

But benefits experts began to aggressively promote generous pension and health coverage to executives, linking benefits packages to the firm's human resources strategy. This approach harkened back to the 1920s and 1930s, when proponents of corporate "welfare work" argued that benefits could improve employee morale and encourage worker commitment (Brandes 1976; Brody 1980). By the early 1980s, Fred Foulkes (1980) was advising firms to use benefits to win employee loyalty and squelch unionism, surveying unionized competitors and bettering their pension and benefit programs. Others were describing elaborate benefits packages as part of the strategic human resource function of the firm, arguing that they should be coordinated with corporate strategic planning and with projections for the retention and advancement of workers with skills that would be important to the firm's prosperity (Greene and Roberts 1983, p. 82; McCaffery 1986, p. 18).

Despite the rising cost of pensions, these benefits champions caused firms to expand coverage significantly. Figure 3.3, which reports the

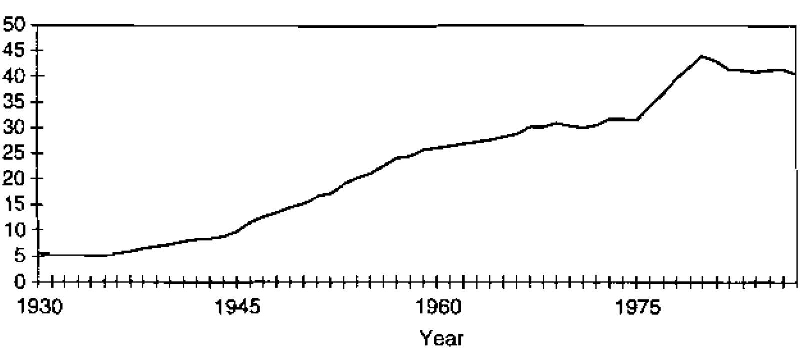

Figure 3.3 Proportion of American Employees with Private Pension Coverage

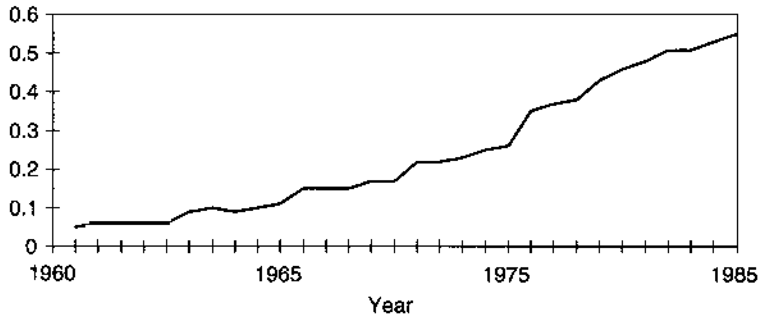

Figure 3.4 Proportion of Employers with Maternity Leave Programs

proportion of full-time American workers participating in private pension plans, shows the effects of this legislation (U.S. Bureau of the Census 1975; U.S. Treasury Department 1975–1985). After the 1974 legislation, private pension coverage rose substantially. In these years, personnel journals encouraged employers to install new pension programs and to expand existing programs. They touted the tax advantages of deferring wages via benefit plans. They also helped to popularize Individual Retirement Accounts, which are not included in the data reported in figure 3.4, as a means to use payroll deductions that would take advantage of federal tax savings.

Benefits Departments and the Expansion of Health Insurance

The sponsors of ERISA sought to guarantee the benefits promised by employers in a number of realms other than pensions. The legislation explicitly covers "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services" and the pension provisions extend to income deferral plans for retirement, severance pay, and supplemental retirement income plans (Klein 1986, p. 72).

Benefits administrators succeeded in popularizing health care plans after 1974 as well, and introduced a much wider range of health coverage options, from cafeteria-style benefit plans that allowed workers to apportion their benefit dollars among a range of different benefit options, to managed care plans. Figure 3.5 shows the resulting growth of group hospitalization insurance, which is purchased by employers. The data come from the *Source Book of Health Insurance Data, 1984–1985* (Health Insurance Institute of America 1985). After remaining flat for the first half of the 1970s, group health insurance coverage rose dramatically during the second half of the 1970s and the early 1980s.

Federal Law and the Rise of Corporate Maternity Leave and Childcare

In the early 1970s, federal administrative rulings encouraged employers to establish both maternity leave and childcare programs for their

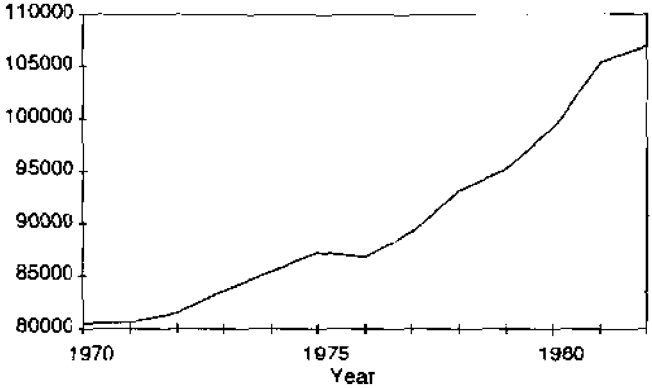

Figure 3.5 Number of Americans with Group Hospitalization Insurance (000s)

employees. Maternity leave programs and childcare facilities, both of which had been the province of government in much of Western Europe, thus came to be designed and built by private employers in the United States. I argue that federal antidiscrimination law, tax law, and benefits regulation helped to promote both programs at the corporate level. These laws had direct effects, and they also had indirect effects by generating new positions in personnel, equal employment, and benefits administration. The occupants of these new positions tracked subtle changes in federal law, promoting the creation of maternity leave and childcare programs after relatively obscure administrative rulings favored them. Had employers not put equal opportunity, benefits, and personnel experts into place, it is unlikely that they would have learned of these administrative rulings. In this case, by hiring experts to track changes in the law, employers made themselves acutely sensitive to subtle shifts in the legal environment in those particular realms of law. These experts were particularly important given the federal government's weak apparatus for promulgating new employment regulations—professional journals and associations in the fields of human resources and benefits have become the most important source of information about regulatory shifts. Those journals and associations champion new compliance programs as part of their profession-building function, with the explicit goal of expanding the corporate roles of their subscribers and members (Edelman, Abraham, and Erlanger 1992).

It was not deliberate congressional action that fostered maternity leave and childcare programs, but minor administrative rulings that were not widely known outside the field of personnel administration. The rulings created negative sanctions in one case and positive inducements in the other. A 1972 EEOC ruling that discrimination on the basis of pregnancy constituted sex discrimination under Title VII of the Civil Rights Act provided a negative sanction that encouraged employers to offer maternity leave. A 1973 IRS ruling that employer childcare expenditures were tax exempt created a positive inducement for employers to offer childcare.

In both cases, these new programs were financed in part by foregone tax revenues. In the case of maternity leave, replacement pay came from federally backed temporary disability insurance (TDI) programs. Corporate expenditures on this form of insurance were themselves tax deductible, and thus when employers expanded programs to cover maternity leave they faced increased out-of-pocket costs, but they were able to deduct those costs and to thereby shift part of the burden to the federal government.

In the case of childcare, substantial funding came through foregone tax revenues. An administrative ruling in 1972 made employer childcare costs tax deductible, and the Economic Recovery Act of 1981 further institutionalized the right of employers and employees to deduct childcare costs.

Ambiguity in Civil Rights Law

Ambiguity in antidiscrimination law led employers to develop extreme sensitivity to the utterances of public officials. Many expanded their personnel offices or established distinct equal employment opportunity or affirmative action offices to ensure that their practices were in compliance with the law. When federal officials suggested that failure to offer disability pay for employees absent due to maternity constituted sex discrimination, these new experts lobbied their employers to extend disability pay to cover maternity.

The ambiguity of the Civil Rights Act, which outlawed discrimination without defining it, had spawned a new personnel function within the firm. Following congressional reinforcement of the Civil Rights Act's employment stipulations, in 1971, personnel journals advised employers to hire legal experts to design equal employment and affirmative action programs. Those experts were also charged with tracking changes in case and administrative law and adjusting employment practices accordingly. It was those experts who, in the context of a high-profile court challenge to EEOC guidelines stipulating that failure to cover maternity disability under temporary disability insurance constituted sex discrimination, advised their employers to get ahead of the ball and install maternity leave programs to inoculate themselves against suits. Notwithstanding the fact that the Supreme Court eventually sided with the challengers, overturning the EEOC ruling, huge numbers of companies jumped on the maternity leave bandwagon, led by their equal employment specialists (Kelly and Dobbin 1999).

New personnel and AA/EEO offices had been spawned by Title VII of the Civil Rights Act of 1964, which outlawed employment discrimination on the basis of race, color, religion, sex, or national origin (Farley 1979, p. 12). The Equal Employment Opportunity Commission was given charge of Title VII. Corporate departments were given a further push by Lyndon Johnson's Executive Order (EO) 11246, which required federal contractors to take "affirmative action" to end inequality (Burstein 1985; Edelman 1990). Neither law mentioned any specific compliance standards at all. The ambiguity of the law left employers in the dark about how, exactly, to comply. The Civil Rights Act outlawed discrimination without giving employers any hint about how to comply. Johnson's executive orders did not define "affirmative action" (Edelman 1992). In the early 1970s, Washington stepped up enforcement of both the Civil Rights Act and Johnson's "affirmative action" order but did not clarify the standards of compliance. The new federal commitment to enforcement, coupled with the continuing ambiguity about compliance standards, led many employers to establish separate departments to take charge of compliance (Cabot 1987; Bradshaw 1987; DuRivage 1985, p. 362).

Employer Response: EEO/AA Departments

In the management practitioner literature, writers advocated the creation of separate AA/EEO departments. Some outlined the complex record-keeping and reporting requirements that were created in the early 1970s as part of affirmative action compliance. In an article titled "A Total Approach to EEO Compliance," Giblin and Ornati argued that compliance demanded that organizations "establish an internal audit and reporting system to monitor and evaluate programs" (1974, p. 37). Others outlined positive strategies for placing and promoting women and blacks, including formal testing, quota systems, and rules that would formalize hiring and promotion to preclude managerial favoritism (e.g., Bell 1971; Bassford 1974). Barbara Boyle wrote in the *Harvard Business Review* that equal employment administration required the establishment of a separate EEO office, "at the highest practicable level in the organization [i.e., outside the personnel office]. The establishment of an affirmative action program is not costly—its absence is" (1973, pp. 88–9). Antonia Chayes (1974), in an article in the same venue titled "Make Your EEO Program Court-Proof," recommended the naming of an Affirmative Action officer at a minimum. The authors of a 1973 article in *Personnel* suggested that to comply with the law, personnel departments would have to "require more of these specialists—to upgrade their knowledge and skills, to know more about testing, statistics, and psychology, and especially, more about what constitutes success in jobs" (Safren 1973, p. 35). These efforts met with substantial success. As early as 1975, Giblin and Ornati (p. 45) observed that many organizations had created separate EEO/AA offices. Many others created or expanded their personnel departments. These changes can be seen in figures 3.1 and 3.2.

Thus federal law created a new organizational constituency of personnel specialists and antidiscrimination experts. These groups saw in antidiscrimination law the potential for expanding their organizational roles. In 1974, an article in *Personnel* promoted the positive spinoffs of EEO law. On the one hand, it gave personnel administrators a chance to expand their duties within the organization and to establish new departments. On the other hand, it gave them a chance to institutionalize and expand their traditional expertise in the areas of employee selection and advancement (Froehlich and Hawyer 1974, pp. 62–8). In the same year, another article suggested that EEO law provided an ideal justification for expanding the personnel function, showing that a university personnel department had grown markedly by using EEO law to take control over all non-academic recruitment and screening (Garris and Black 1974).

New Personnel Departments and the Diffusion of Maternity Leave Programs
Once they had a toehold in organizations, new personnel and EEO/AA specialists advocated personnel programs that would expand their roles in the corporation. They became a constituency for the elaboration of social protections, such as maternity leave. Their power lay in their expertise in federal regulation, and it was often by exaggerating the risk of litigation that they succeeded in expanding personnel activities (Edelman, Abraham, and Erlanger 1992). Because corporations had installed in-house experts in employment regulation, and charged them with scanning the environment for changes in the law and for models of compliance, they learned of even minor administrative rulings affecting them in short order. The professional personnel journals spread the news about such rulings.

Civil rights legislation had been mute on the issue of maternity leave, but in 1972 the Equal Employment Opportunity Commission ruled that discrimination on the basis of pregnancy constitutes a violation of Title VII. It also ruled that employers should treat pregnancy as they treat any other temporary disability. This meant that employers who offer temporary disability insurance, as employers in five states were required to do and as employers in the other forty-five states were encouraged to do, should make disability payments available to workers who are disabled by pregnancy.

Lower courts issued mixed rulings on this issue before the Supreme Court, in 1976 (*General Electric Co. v. Gilbert et al.* [1976] 429 U.S. 125) ruled against the EEOC position. Between 1972 and 1976, coverage of several court challenges by the news media and by personnel journals had made employment law experts aware of the emerging federal position, and this translated into substantial change in corporate practices. Two years after the Supreme Court finding in favor of General Electric, Congress passed the Pregnancy Discrimination Act of 1978 to codify the EEOC's position. It required employers to treat pregnancy like any other medical condition in their health insurance and temporary disability programs. While neither the EEOC ruling nor the act required employers to establish formal maternity leave programs, from 1972 corporate EEO/AA specialists argued for and won such programs.

Now that maternity status was encompassed, at least loosely, by civil rights law, personnel managers advocated a codified, uniform policy. They argued that the only way to ensure compliance with the Pregnancy Discrimination Act was to create formal programs with explicit rules governing maternity leave. Without such programs, they argued, the treatment of pregnancy would be left to the discretion of individual managers. The risk that particular managers would violate the law was too great to bear, they contended. Only a formal maternity leave program with explicit rules governing eligibility, return to work, period of leave, compensation during leave, and the length of time a job would be held open, could inoculate an employer against discrimination suits. The effects of these events can be seen in figure 3.4, which reports the proportion of employers in the survey discussed above, with maternity leave programs. Formal maternity leave programs increased in number after the early 1970s.

During the 1970s and 1980s most large employers adopted formal maternity leave programs. In the 1980s many, fearful of discrimination suits, established new offices to manage work and family matters. The Family and Medical Leave Act of 1993 bolstered the authority of these new work/family offices, as well as the authority of HRM and EEO/AA offices in corporations. The new law required employers with at least fifty employees to make up to twelve weeks of unpaid maternity, paternity, and medical leave (for self or for care of family member) available to employees with at least one year, or 1250 hours, of work experience with the employer. Compensation during maternity leave continued to be paid from Temporary Disability Insurance funds, which were funded directly by employer and employee contributions and indirectly through foregone tax revenues.

Corporate Childcare Provision

As in the case of maternity leave, the legal watershed that promoted corporate childcare provision came in an administrative ruling in the early 1970s. In this case, it was a shift in tax law. In 1973, the year after the EEOC ruled that discrimination on the basis of pregnancy violated Title VII, the Internal Revenue Service (IRS) ruled that employer childcare expenses were tax deductible. This produced an incentive for employers to provide workers with childcare, because compensation in the form of childcare provision would not be taxed whereas compensation in the form of salary and wage payments would be.

Full corporate sponsorship of childcare programs would be quite expensive even if the federal government was picking up part of the tab, so the spread of corporate childcare centers was slow. Where they did appear, it was typically through the work of the employment-law specialists that had been hired to manage EEO and AA law—personnel managers in small firms and EEO/AA specialists in large ones. The tax experts that firms had hired to make sense of the Employee Retirement Income Security Act of 1974 also championed childcare benefits.

It was after the passage of the 1981 Economic Recovery Tax Act, and with its subsequent innovative interpretation by corporate personnel and benefits experts, that corporate childcare programs really began to take off. For the most part, benefits experts had understood the 1973 ruling to cover direct employer expenditures for childcare. The 1981 act created Dependent Care Assistance Programs, which were designed as a way to make corporate expenditures for childcare tax deductible for both employer and employee. Tax treatment of childcare contributions would be parallel to tax treatment for pension and health contributions. The original idea was that employers should be able to build a childcare center or to provide vouchers for use by employees. In either case, expenses would be deductible. Moreover,

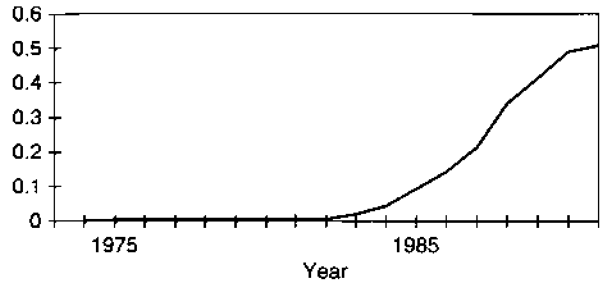

Figure 3.6 Proportion of Employers with Dependent Care Assistance Plans

employers who make capital expenditures for childcare facilities could use favorable amortization schedules. This reduced the cost of building such facilities.

As Erin Kelly (2000) has shown, benefits consultants worked to develop a program with a slightly different approach, permitting employees to contribute to a childcare fund from which they could be reimbursed for expenditures using before-tax dollars. It was these programs that became most popular—programs in which the employer's only contribution was to set up tax-free spending accounts and deduct the contributions to those accounts from employee paychecks.

Thus benefits experts devised the Dependent Care Expense Accounts (DCEA) as an inexpensive way for employers to offer childcare provision, financed entirely by foregone tax revenues and employee contributions. In most cases, these accounts were not used to finance employer-provided childcare centers, but to subsidize the purchase of care in the local market. Employees contributing to these accounts through payroll deductions do not pay taxes on the income they contribute, which they use to pay for childcare. In 1990 the Child Care Act further liberalized the terms of DCEAs (Pleck 1992; Bureau of National Affairs 1986), encouraging more employers to set up programs.

As in the case of maternity leave, it was benefits and civil rights professionals within corporations that promoted childcare programs to executives, arguing that Dependent Care Expense Accounts in particular could increase the net income of employees with childcare costs at very little cost to the employer.

Figure 3.6, which contains data from a survey of over 100 large employers reported in Witkowski 1997, charts the growth of dependent care assistance plans, the tax-exempt childcare accounts, over the period. Over half of the large employers sampled had these programs in place by the early 1990s.

Conclusion: The Institutionalization of Exceptionalism

In the early nineteenth century the French philosopher Henri de Saint-Simon worried that private, aristocratic corporations might supplant the state in the lives of citizens. They might undermine the direct relationship between citizen and state. Saint-Simon anticipated well what has been happening in the United States. Corporations have taken over responsibility for much of what T. H. Marshall (1950) described as rights of social citizenship.

Two characteristics of American exceptionalism—weak working class political organization and a weak state—are thought to work against the elaboration of social protections. However, since the 1960s, new protections have been institutionalized through a process that does not depend on strong working-class organizations or a strong state. Instead, policymakers devised new regulations that would encourage private employers to extend social protections. The third facet of American exceptionalism—weak social insurance—was thus transformed, as state policy produced an elaborate insurance system based on employment rather than citizenship.

Congress's history of reluctance to dictate to firms has produced a pattern of elaborate regulations, across several realms of employment law, that specify what firms *cannot* do. Instead of setting a single standard for pensions, for instance, Congress, under the guise of maximizing employer freedom in the design of pension programs, wrote a 300-page manual of Byzantine regulations. The pattern of corporate response to America's highly complex, ambiguous, and constantly evolving employment regulations has been described by institutionalists studying civil rights, occupational safety, and other realms of the law (Dobbin et al. 1988; Edelman 1990; Dobbin and Sutton 1997). The ambiguity and complexity of federal regulations causes employers to hire specialists to make sense of the law and to devise local compliance solutions. In the case at hand, new federal benefits and civil rights regulations led to the proliferation of personnel, antidiscrimination, and benefits offices in the 1970s. The new specialists occupying these offices became a constituency for the expansion of employment-related social protections, convincing executives to anticipate changing legal norms and to use benefits to recruit, retain, and motivate workers. In consequence, firms installed pensions, health insurance, maternity leave programs, and childcare assistance in large numbers.

What makes the American state exceptional here is not its refusal to pay for social protections, for these social protections were financed largely through "tax expenditures," or foregone tax revenues. Paid maternity leave has for the most part been financed by government-backed temporary disability insurance programs. Childcare, pension insurance, and health insurance have been financed in large measure by tax incentives that transfer a large proportion of the final cost to the federal government. What makes the American state exceptional is the fact that it makes benefits nominally private rather than public and ties them to employment rather than citizenship.

This is not what T. H. Marshall predicted, for he thought that social protections would be based in citizenship alone. In the United States, federal policy has created a three-tiered system based in employment status. In the areas I have discussed, federal policy subsidizes benefits for the employed but not for the unemployed. Even in arenas in which the American state has developed its own social programs—old age insurance, health care for the aged, and health care for those in poverty—public policy creates a two-tiered system in which the employed, or formerly employed, population enjoys a higher level of benefits. Federal tax incentives have also unintentionally created a third, intermediate tier. In the name of democratizing benefits, federal policy requires employers to extend benefits to all employees, or to face tax penalties. Employers responded by defining a third category, between that of employee and non-employee, of contract, temporary, and part-time workers who are "non-employees" and who are therefore ineligible for benefits. These groups of workers have grown rapidly since the 1970s (Pfeffer and Baron 1988). And of course, because benefits programs are largely voluntary, many firms have yet to offer coverage.

How is it that America's "weak" federal state can cause private employers to create elaborate new social protections? We have seen that the rhetorical weakness of the American state hides a substantial capacity to effect change at the workplace, but a capacity that challenges current weak state/strong state formulations. In the cases we have explored, it appears that while the American state has a weak party system and weak administrative capacities, its legislature's inclination has been to encourage the private sector to build a social insurance net of its own. The growth in corporate bureaucracy, and in corporate duties, we saw in these four realms did not emerge through some sort of internal dynamic: these changes emerged in direct reaction to federal policies. What we saw was a weak state deliberately making the private sector expand.

This is not to say that corporate welfarism is producing a private version of the universal welfare state we have seen, at certain times, in Northern Europe. As noted, the American system is spottier because it is voluntary, leaves the unemployed uncovered, and leaves a growing group of "contingent" workers out. Moreover, by sapping middle-class support for public social programs—the middle-class depends on employment-related programs—this system makes it hard for politicians to garner backing for expanding the public safety net (Esping Andersen 1985). Finally, the institution of judicial enforcement means that firms can fail to comply with the law with impunity. Even where employers offer pension, health, childcare, and parental leave programs, those programs may fail to meet government guidelines and hence the benefits may be difficult to obtain and may not be insured.

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