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Corresponding author:
Kumar Ramanathan,
Email: kumar.ramanathan@u.northwestern.edu

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From civil rights to social policy: the political development of family and medical leave policy

Kumar Ramanathan

Department of Political Science, Northwestern University, Evanston, Illinois, USA

Abstract

Family and medical leave policy in the United States is often noted for its lack of wage compensation, but is also distinctive in its gender neutrality and its broad coverage of several types of leave (combining pregnancy leave with medical, parental, and caregiving leave). This article argues that the distinctive design of leave policy in the United States is explained by its origins in contestation over the civil rights policy regime that emerged in the 1960s. In the early 1970s, women's movement advocates creatively and strategically formulated demands for maternity leave provision that fit an interpretation of this new policy regime's antidiscrimination logic. Because of this decision to advance an antidiscrimination claim, advocates became committed to pursuing a leave guarantee on gender-neutral grounds, which in turn enabled the broad-coverage leave design. This case study suggests that scholars of social policy and American political development should pay greater attention to the impact of civil rights on social policy. This article also contributes to the study of policy development by providing an example of how political actors cross boundaries between policy domains during the policy making process and by presenting a reconceptualization of "policy regimes."

1. Introduction

The passage of the Family and Medical Leave Act (FMLA) in 1993 marked the culmination of a decades-long campaign to guarantee job-protected leave for workers in the United States. Employers covered by the FMLA are required to provide twelve weeks of unpaid, job-protected leave for employees who are pregnant, sick, new parents, or caring for an ill family member. Many states also passed similar laws in the years immediately preceding the passage of the FMLA. The design of these policies is unusual when compared to maternity and parental leave policies worldwide or to related social policies in the United States. Observers and scholars most commonly note the lack of a paid leave guarantee in federal policy, which sets the United States apart as a global outlier. American leave policies are distinctive in other ways as well: They are strictly gender neutral in their provisions and they bundle together several types of leave. This article investigates why those latter features emerged.

I argue that the distinctive policy design of family and medical leave in the United States is explained by its roots in contestation over the *civil rights policy regime* that emerged in the 1960s. This policy regime was embedded in a range of policies, including civil rights statutes and changing equal protection jurisprudence, that shared an antidiscrimination logic. Before the 1960s, advocates had unsuccessfully pursued maternity leave provision through a social insurance model akin to that of programs such as unemployment insurance. When the new civil rights policy regime emerged, it altered the resources that advocates of maternity leave expansion could draw from their institutional environment. Advocates creatively and strategically reformulated their demands to fit an interpretation of this new policy regime. They first pursued a nondiscrimination standard that would require employers to provide maternity leave on the same terms as other kinds of leave, advancing this claim in administrative agencies, courts, and legislatures during the 1970s. Contestation over this pregnancy nondiscrimination standard led advocates to pursue gender-neutral parental and medical leave legislation during the 1980s–90s. During this iterative policymaking process, the civil rights policy regime enabled advocates to make new claims in new venues, but it also constrained them as they sought to defend their gains and counteract alternative interpretations of the regime. Importantly, this approach was unable to counteract other factors that prevented the adoption of a paid leave policy.

This article makes several substantive and theoretical contributions. First, it argues that scholarship on U.S. social policy should pay more attention to the impact of civil rights on social policy development after the 1960s. In particular, social scientists have insufficiently analyzed the role of civil rights in the development of new social policies and programs.

Second, it builds on actor-centered theories of institutional change to show how political actors can draw on resources across policy domains during the policy process. The case analyzed here illustrates the significance of this kind of boundary-crossing across policy domains: Studying social policy without attention to advocates' deployment of civil rights claims would make it difficult to explain the distinctive design of family and medical leave. Third, this article offers a reconceptualization of "policy regimes" and argues that we can productively use this concept in the analysis of policy development. Specifically, it introduces the concept of the civil rights policy regime and illustrates the utility of this concept in the analysis of this case.

2. Family and medical leave policy in the United States

The provisions of family and medical leave policy vary across the United States, with a national floor set by the Family and Medical Leave Act of 1993 (FMLA). The FMLA guarantees up to twelve weeks of unpaid, job-protected leave per year for workers with one year of tenure in a firm with fifty or more employees. Employers are required to reinstate workers to the same or a similar position upon their return from leave. Eligible workers can take leave for several reasons: "Medical leave" can be taken during pregnancy, illness, or temporary disability, and "family leave" can be taken to care for a new child or an ill family member. In over twenty states, leave policies exceed the benefits of the FMLA either in the duration of leave provided or the leniency of eligibility requirements. Most of these state-level leave laws were passed in the late 1980s, and several have since been amended.[1] Since 2002, nine states and Washington, DC, have passed paid family and medical leave laws.[2]

The policy design of family and medical leave differs from that of other U.S. social policies that provide security for periods when individuals are unable to work. Unlike unemployment insurance or workers' compensation, family and medical leave at the national level does not adopt a social insurance model with a system of wage compensation managed by an administrative agency. Instead, family and medical leave policy requires employers to reinstate employees after a period of leave, and administrative agencies (such as the U.S. Department of Labor's Wage and Hour Division) are charged with enforcing these requirements. This design is more akin to fair labor standards policies, such as minimum wage requirements, and as such is part of the complex web of policies that form the *public-private welfare state*, wherein social provision is delegated to private actors such as employers.

This approach to providing leave contrasts starkly with leave policies in other countries. The most apparent and frequently cited cross-national differences are the lack of wage compensation and the short duration of guaranteed leave in the United States.[3] However, other features set U.S. policy apart as well. Family and medical leave policy is gender neutral—unlike the prevalent global pattern, there are no separate provisions for pregnancy or maternity. It also has unusually broad coverage of different types of leave: Job-protected leave for pregnancy, medical, parental, and caregiving are bundled together into one pool. In other developed economies, the general pattern of policy development was to enact maternity leave first, and then paternity and other types of leave, with the specific provisions varying across types of leave.[4] The United States was a relative latecomer in guaranteeing maternity leave: Out of twenty-three OECD countries, over 80 percent had passed maternity leave laws by 1964, and 86 percent had done so by 1993.[5] However, the United States was relatively early in guaranteeing paternity leave: by 1994, only 39 percent of developed economies did so.[6] The provision of leave to care for ill children and family members is even more uneven and recent, with many OECD countries only adopting such policies during the 1990s–2000s.[7]

The gender-neutrality and broad-coverage features of U.S. leave policy are particularly significant because efforts to create paid leave programs have been layered onto this policy design. All ten states and territories that have adopted paid family and medical leave policies have done so by creating wage compensation mechanisms on top of their existing leave policies.[8] Consequently, these jurisdictions offer paid leave for pregnancy, medical, parental, and caregiving purposes.[9] The most prominent federal proposal for paid leave also maintains the gender-neutral and broad-coverage features of the FMLA.[10]

[1]Women's Legal Defense Fund, "Appendix B: State Laws and Regulations Guaranteeing Employees Their Jobs after Family and Medical Leaves," in *Parental Leave and Child Care: Setting a Research and Policy Agenda*, ed. Janet Shibley Hyde and Marilyn J. Essex (Philadelphia, PA: Temple University Press, 1991), 468–89; National Partnership for Women & Families, *Expecting Better: A State-by-State Analysis of Laws That Help Expecting and New Parents*, 4th ed. (Washington, DC: National Partnership for Women & Families, August 2016).

[2]A Better Balance, "Overview of Paid Family & Medical Leave Laws in the United States," last modified February 10, 2021, https://www.abetterbalance.org/resources/paid-family-leave-laws-chart/.

[3]The United States remains one of only two countries to not guarantee paid maternity leave. See Laura Addati, Katherine Gilchrist, and Naomi Cassirer, *Maternity and Paternity at Work: Law and Practice across the World* (Geneva, Switzerland: International Labour Organization, 2014), 8.

[4]Addati et al., *Maternity and Paternity at Work*.

[5]A. H. Gauthier, Comparative Family Policy Database, Version 3 [computer file] (Netherlands Interdisciplinary Demographic Institute and Max Planck Institute for Demographic Research, 2011), www.demogr.mpg.de.

[6]Addati et al., *Maternity and Paternity at Work*, figs. 3.2 and 3.3. 67 percent did so by 2013, although only 14 percent guaranteed more than sixteen days of paternity leave. Notably, 92 percent of the developed economies with paternity leave policies include some wage replacement.

[7]The United States was middle of the pack in guaranteeing leave to care for children: Gauthier's data on OECD countries show that only 4 percent had childcare leave laws in 1964, rising to 72 percent by 1992. See Gauthier, Comparative Family Policy Database. In providing leave to care for ill family members, the United States was an early innovator. The earliest such policies were enacted in Sweden in 1989 and Japan in 1995; see Viola M. Lechner and Margaret B. Neal, eds., *Work and Caring for the Elderly: International Perspectives* (Minden, Germany: Brunner/Mazel, 1999). By 2010, two-thirds of OECD countries offered such leave, but policy design varied significantly. For example, Japan offered three months of leave with 40 percent wage replacement; Germany offered six months of unpaid leave; and the UK allowed for two days of "emergency" caregiving leave. See Ana Llena-Nozal, Jérôme Mercier, Frits Tjadens, and Francesca Colombo, "Help Wanted? Providing and Paying for Long-Term Care" (Paris, France: OECD, May 18, 2011), ch. 4.

[8]Together, these states and territories make up nearly 30 percent of the nation's population; see A Better Balance, *Overview of Paid Family & Medical Leave Laws*.

[9]This has led to a striking outcome in cross-national comparisons: U.S. states with paid leave programs still lag other OECD countries in the generosity of parental and medical leave benefits, but they match or exceed them in the generosity of leave benefits to care for ill family members. This is because the U.S. state programs offer a single pool of paid leave that can be taken for maternity, paternity, medical, or caregiving purposes. This pool of benefits is weaker than most OECD countries' programs for maternity or medical leave, but it is middle of the pack vis-à-vis leave to care for ill family members. See Addati et al., *Maternity and Paternity at Work*; Llena-Nozal et al., "Help Wanted?" ch. 4.

[10]National Partnership for Women & Families, *Fact Sheet: The Family and Medical Insurance Leave (FAMILY) Act* (Washington, DC: National Partnership for Women & Families, September 2017).

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3. Theory and concepts

3.1. Theorizing policy development

This article is situated in American political development scholarship that has demonstrated the variegated and complex structure of U.S. social policy, where "various social benefits remain operationally, fiscally, and symbolically separate from one another."[11] Scholars have shown how regulatory and fiscal tools have often been used to induce social provision through the private sector, a phenomenon that has been termed "the public-private welfare state" or "the hidden welfare state."[12] They have also shown that different social groups experience starkly different kinds and levels of social provision and regulation, amid dramatic subnational variation.[13] Taken together, this literature portrays U.S. social policy as multidimensional and fragmented, and cautions against taking a coherent "welfare state" for granted.[14]

Building on this tradition, I focus on a relatively understudied factor in the development of U.S. social policy: the impact of civil rights law and policy. Historical accounts have explored cases where civil rights laws have enabled challenges to some racial and gendered exclusions in social policy[15] and the role they have played in promoting women's employment and access to social protection.[16] A large literature has also examined the role of backlash to civil rights gains in driving support for social policy retrenchment.[17] However, social scientists have yet to more broadly assess the impact of civil rights law and policy on the design of social policies. This article presents evidence from one case where civil rights influenced the development of a new social policy program: It shows that contestation over civil rights (specifically, employment discrimination law) transformed the demands that advocates made for maternity leave provision, and consequently transformed the design of leave policy.

In the analysis below, I argue that the civil rights policy regime shaped the distinctive policy design of family and medical leave through the strategic and creative action of women's movement advocates. In making this argument, I adopt an actor-centered theory of institutional change, emphasizing the agency of policy advocates who reformulated their policy demands to fit an interpretation of the newly emergent policy regime. Advocates acted as policy entrepreneurs, engaging in a process of transposition, that is, "the application of preexisting routines and schemas to new circumstances."[18] Their initial act of transposition—applying the antidiscrimination logic of the civil rights policy regime to claims about maternity leave provision—initiated a policy process that resulted in a gender-neutral and broad-coverage leave policy.

The insight that significant policy changes can transform subsequent political processes is a familiar one in political development scholarship, most prominently found in the literature on "policy feedback."[19] While much policy feedback research has focused on how positive or negative feedback loops determine the survival of a given policy or on effects in the mass public, some of the literature has more broadly investigated how policy change reshapes future processes of agenda setting and problem definition.[20]

This broader line of policy feedback research converges fruitfully with actor-centered theories of institutional change, which emphasize how political actors can pursue change by creatively interpreting and recombining resources drawn from the wider institutional environment. In their theory of "creative syncretism," Gerald Berk and Dennis Galvan argue that institutions can be

[11]Margaret Weir, Ann Shola Orloff, and Theda Skocpol, "Introduction: Understanding American Social Politics," in *The Politics of Social Policy in the United States*, ed. Margaret Weir, Ann Shola Orloff, and Theda Skocpol (Princeton, NJ: Princeton University Press, 1988), 9.

[12]Beth Stevens, "Blurring the Boundaries: How the Federal Government Has Influenced Welfare Benefits in the Private Sector," in *The Politics of Social Policy in the United States*, ed. Margaret Weir, Ann Shola Orloff, and Theda Skocpol (Princeton, NJ: Princeton University Press, 1988), 123–48; Christopher Howard, *The Hidden Welfare State: Tax Expenditures and Social Policy in the United States* (Princeton, NJ: Princeton University Press, 1999); Marie Gottschalk, *The Shadow Welfare State: Labor, Business, and the Politics of Health Care in the United States* (Ithaca, NY: Cornell University Press, 2000); Jacob S. Hacker, *The Divided Welfare State: The Battle Over Public and Private Social Benefits in the United States* (New York: Cambridge University Press, 2002); Jennifer Klein, *For All These Rights: Business, Labor, and the Shaping of America's Public-Private Welfare State* (Princeton, NJ: Princeton University Press, 2006); Suzanne Mettler, *The Submerged State: How Invisible Government Policies Undermine American Democracy* (Chicago: University of Chicago Press, 2011); Kimberly J. Morgan and Andrea Louise Campbell, *The Delegated Welfare State: Medicare, Markets, and the Governance of Social Policy* (New York: Oxford University Press, 2011).

[13]Charles V. Hamilton, "Social Policy and the Welfare of Black Americans: From Rights to Resources," *Political Science Quarterly* 101, no. 2 (1986): 239–55; Weir et al., "Introduction"; Christopher Howard, *The Welfare State Nobody Knows: Debunking Myths about U.S. Social Policy* (Princeton, NJ: Princeton University Press, 2008); Edwin Amenta and Amber Celina Tierney, "Political Institutions and U.S. Social Policy," in *Oxford Handbook of U.S. Social Policy*, ed. Daniel Béland, Kimberly J. Morgan, and Christopher Howard (New York: Oxford University Press, 2014), 151–68.

[14]Jamila Michener, Mallory SoRelle, and Chloe Thurston, "From the Margins to the Center: A Bottom-Up Approach to Welfare State Scholarship," *Perspectives on Politics* (2020): 1–16; Daniel Béland, Christopher Howard, and Kimberly J. Morgan, "The Fragmented American Welfare State," in *Oxford Handbook of U.S. Social Policy*, ed. Daniel Béland, Christopher Howard, and Kimberly J. Morgan (New York: Oxford University Press, 2014), 3–20.

[15]See, for example, Nancy MacLean, *Freedom Is Not Enough: The Opening of the American Workplace* (Cambridge, MA: Harvard University Press, 2008); Dorothy Sue Cobble, *The Other Women's Movement: Workplace Justice and Social Rights in Modern America* (Princeton, NJ: Princeton University Press, 2005), chaps. 6–7.

[16]Julia S. O'Connor, Ann Shola Orloff, and Sheila Shaver, *States, Markets, Families: Gender, Liberalism and Social Policy in Australia, Canada, Great Britain and the United States* (New York: Cambridge University Press, 1999). O'Connor et al. argue that welfare state scholars have overlooked the role of antidiscrimination and affirmative action policies in facilitating women's employment. I concur with this argument and further argue that antidiscrimination law has reshaped the politics and design of social policy programs conventionally considered to be part of the "welfare state."

[17]See, for example, Jill S. Quadagno, *The Color of Welfare: How Racism Undermined the War on Poverty* (New York: Oxford University Press, 1994); Helene Slessarev, "Racial Tensions and Institutional Support: Social Programs during a Period of Retrenchment," in *The Politics of Social Policy in the United States*, ed. Margaret Weir, Ann Shola Orloff, and Theda Skocpol (Princeton, NJ: Princeton University Press, 1988), 357–80; Martin Gilens, *Why Americans Hate Welfare: Race, Media, and the Politics of Antipoverty Policy* (Chicago: University of Chicago Press, 2000). For the relationship between racism and social policy in the United States more broadly, see Jeff Manza, "Race and the Underdevelopment of the American Welfare State," *Theory and Society* 29, no. 6 (2000): 819–32; Sanford F. Schram, Joe Soss, and Richard C. Fording, eds., *Race and the Politics of Welfare Reform* (Ann Arbor: University of Michigan Press, 2003).

[18]Dylan Riley, "The Historical Logic of Logics of History: Language and Labor in William H. Sewell Jr.," *Social Science History* 32, no. 4 (November 20, 2008): 555–65.

[19]For a review of theories of institutional stability and change in American political development scholarship, see Adam Sheingate, "Institutional Dynamics and American Political Development," *Annual Review of Political Science* 17, no. 1 (2014): 461–77. For a review of historical-institutionalist theories of institutional change more broadly, see Kathleen Thelen and James Conran, "Institutional Change," in *The Oxford Handbook of Historical Institutionalism*, ed. Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate (New York: Oxford University Press, 2016), 51–70; Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate, "Historical Institutionalism in Political Science," in *The Oxford Handbook of Historical Institutionalism*, ed. Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate (New York: Oxford University Press, 2016), 3–28; James Mahoney and Kathleen Thelen, eds., *Advances in Comparative-Historical Analysis* (New York: Cambridge University Press, 2015).

[20]See Daniel Béland and Edella Schlager, "Varieties of Policy Feedback Research: Looking Backward, Moving Forward," *Policy Studies Journal* 47, no. 2 (2019): 184–205; Suzanne Mettler and Mallory SoRelle, "Policy Feedback Theory," in *Theories of the Policy Process*, ed. Christopher M. Weible and Paul A. Sabatier, 4th ed. (Boulder, CO: Westview Press, 2017), 103–34.

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seen as "bundles of resources available for creative reinterpretation and recombination" by political actors.[21] Philip Rocco and colleagues use the term "institutional reconfiguration" to describe how policy entrepreneurs can creatively recombine such resources to "develop new ideas, tactical repertoires, and infrastructures to challenge existing policies."[22] Similarly, Adam Sheingate argues that policy entrepreneurship is more likely to occur under "complex systems," which "provide *resources* for the creative acts of recombination at the heart of innovation."[23]

Such creative interpretation and recombination can enable policy entrepreneurs to advance their claims, but it also subsequently modifies and constrains their goals and strategies.[24] For example, in the case analyzed below, the emergence of the civil rights policy regime enabled advocates of maternity leave to pursue their goal of maternity leave provision in a new way: advancing claims that employment discrimination law required provision of maternity leave. When opponents later challenged state-level maternity leave laws using an alternative interpretation of employment discrimination law, however, advocates' earlier decision to formulate their demands in antidiscrimination terms constrained how they could respond.

Building on these actor-centered theories of institutional change, this article emphasizes that actors pursuing policy change can draw on resources across policy domain boundaries when formulating goals and strategies. While theories of policy feedback and actor-centered theories of institutional change invite inquiry about how actors move across policy domains, they rarely investigate such processes in practice. Policy feedback studies tend to investigate how feedback effects from prior policy changes affect future developments in the same policy domain or program.[25] A recent systematic literature review of research on policy entrepreneurs found that those studies that do address boundary-crossing tend to focus on *vertical* boundary-crossing between levels of government rather than *horizontal* boundary-crossing across policy domains.[26] This article provides evidence from one case of how actors can transpose resources across apparently distinct policy domains. Scholars and observers generally describe "civil rights" and "social welfare" as separate policy domains, reflecting how issues have been defined and constructed in U.S. politics. However, political actors need not perceive the boundaries between these policy domains as impenetrable. In the case analyzed here, advocates of maternity leave provision formulated their demand as a civil rights claim, which offered certain advantages (e.g., the ability to draw on the authority of civil rights enforcement agencies). This crucial decision to engage in transposition across policy domains subsequently led to family and medical leave policy's gender-neutral and broad-coverage design.

3.2. Policy regimes

I describe the change in the institutional environment to which advocates responded as the emergence of a new policy regime. I use the concept of *policy regimes* to refer to a governing arrangement embedded in a set of public policies.[27] The specific case of interest here is the *civil rights policy regime*, which emerged in antidiscrimination legislation and equal protection jurisprudence during the "rights revolution" of the 1950s–60s. I conceptualize a policy regime as having three dimensions. First, it contains a *policy logic*, shared across the policy instruments in which the regime is embedded, which defines a target problem and the corresponding role of government action. The civil rights policy regime's logic defines discrimination on the basis of a protected category as a target problem and defines the corresponding role of government as prohibiting such discrimination. While race was initially the central protected category, political actors successfully contested and expanded the definition to include sex and other categories. Second, the policy logic is *interpreted and enforced by political institutions*, such as administrative agencies or courts. The interpretation and enforcement of the civil rights policy regime occurs primarily through courts and agencies, such as the Equal Employment Opportunity Commission, and sometimes through legislatures. Third, political actors such as policymakers and interest groups develop *shared expectations* that political institutions will interpret and enforce the policy logic. These actors need not agree with each other but, rather, recognize the presence of a policy logic and contest its interpretation and enforcement. For example, both advocates and opponents contested the meaning of the civil rights policy regime's antidiscrimination logic, pressuring administrative agencies, courts, and legislators to adopt an interpretation that would align with their preferences.

This conceptualization differs from the most common use of the term policy regimes in the study of social policy, associated with the once-dominant welfare regimes theory. This theory

[21]Gerald Berk and Dennis Galvan, "Processes of Creative Syncretism: Experiential Origins of Institutional Order and Change," in *Political Creativity: Reconfiguring Institutional Order and Change* (Philadelphia: University of Pennsylvania Press, 2013). See also Gerald Berk and Dennis Galvan, "How People Experience and Change Institutions: A Field Guide to Creative Syncretism," *Theory and Society* 38, no. 6 (2009): 543.

[22]Philip Rocco, Andrew S. Kelly, Daniel Béland, and Michael Kinane, "The New Politics of US Health Care Prices: Institutional Reconfiguration and the Emergence of All-Payer Claims Databases," *Journal of Health Politics, Policy and Law* 42, no. 1 (2017): 14–15.

[23]Adam D. Sheingate, "Political Entrepreneurship, Institutional Change, and American Political Development," *Studies in American Political Development* 17, no. 2 (2003): 192.

[24]As Carlson has argued, advocates' strategic decisions to use law or public policy as a resource have both instrumental uses and constitutive effects on future goals and strategies. See Kirsten Matoy Carlson, "Making Strategic Choices: How and Why Indian Groups Advocated for Federal Recognition from 1977 to 2012," *Law & Society Review* 51, no. 4 (2017): 932.

[25]See the characterization of the policy feedback literature and examples of studies cited in Andrea Louise Campbell, "Policy Feedback," in *Oxford Bibliographies* (Oxford, UK: Oxford University Press, 2018); Béland and Schlager, "Varieties of Policy Feedback Research"; Mettler and SoRelle, "Policy Feedback Theory."

[26]Marijn Faling, Robbert Biesbroek, Sylvia Karlsson-Vinkhuyzen, and Katrien Termeer, "Policy Entrepreneurship across Boundaries: A Systematic Literature Review," *Journal of Public Policy* 39, no. 2 (2019): 393–422. Faling et al. find that few studies that analyze horizontal boundary-crossing focus on entrepreneurs' strategic reframing of issues to make their policy goals palatable to policymakers. This theorization of issue framing as a policy entrepreneurship strategy bears resemblance to the study of framing in the study of law and social movements. For example, Pedriana emphasizes how the "strategic framing of law's constitutive symbols" can enable social movements to advance their "grievances, identity, and goals." See Nicholas Pedriana, "From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s," *American Journal of Sociology* 111, no. 6 (2006): 1718–61. More broadly, social movement scholars have argued that changes in political opportunity structures and framing processes are interrelated causes of movement outcomes. See Doug McAdam, John D. McCarthy, and Mayer N. Zald, eds., *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings* (New York: Cambridge University Press, 1996); Sidney Tarrow, *Power in Movement: Social Movements, Collective Action and Politics* (New York: Cambridge University Press, 1994), 160.

[27]The term "regime" is used widely in international relations, urban politics, and other social sciences to describe governing arrangements of various kinds. Generally, social scientists who invoke the term use it to describe some pattern of governance that combines ideas, institutions, and interests. I similarly use the term to connote a pattern of governance in the realm of public policies. See Carter A. Wilson, "Policy Regimes and Policy Change," *Journal of Public Policy* 20, no. 3 (2000): 255–57.

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defined welfare policy regimes as "the specific institutional arrangements adopted by societies in the pursuit of work and welfare."[28] Gøsta Esping-Andersen proposed a typology of such regimes, each possessing a "social policy logic" arising from the "organization of state-economy relations."[29] Scholars have widely used this typology of regimes to characterize and explain cross-national variation in social provision.[30] For example, the United States was classified as a "liberal" welfare regime, characterized by means-tested benefits, traditional work-ethic norms, and a lack of decommodification.[31] Welfare regimes theory, however, has been subject to numerous sustained critiques. Feminist critiques from Ann Orloff, Jane Lewis, Diane Sainsbury, and others have argued that it fails to analyze how gender shapes systems of social provision.[32] Historical-institutionalists have argued that different factors explain social policy development in states classified in the same regime type and that regime patterns are not enduring in the face of changing structural and institutional contexts.[33] American political development research on the variegation and complexity of U.S. social policy also challenges the notion that this policy domain can be described as governed by a single, enduring regime.[34]

These critiques of welfare regime theory are persuasive, but we need not abandon the concept of policy regimes altogether in the analysis of social policy development. The core flaw of welfare regimes theory's conceptualization is that it first assumes a bounded problem or issue area ("work and welfare"), and then characterizes a policy logic underlying the set of policies that address that problem.[35] This approach leads to a deterministic view that has difficulty explaining incremental change or recognizing how multiple logics can shape policy development. To address this flaw, my reconceptualization decouples policy regimes from bounded policy domains.[36] Instead of describing stable features of a particular policy domain, policy regimes here describe contestable governing arrangements that actors encounter during the policy process. As such, this conceptualization allows for the possibility that multiple logics, embedded in multiple policy regimes, can interact during policy development.[37]

This conceptualization offers several further advantages for the study of policy development. First, identifying a policy regime rather than a specific policy as the independent variable enables us to see the effect of a logic embedded in *several* policies. In the case analyzed here, for example, it was not only the employment discrimination provision of Title VII of the Civil Rights Act that shaped policy development, but also other policies that shared this provision's antidiscrimination logic, including state-level employment discrimination laws, administrative regulations, and judicial rulings. Second, this conceptualization helps to further incorporate the role of ideas and agency in the analysis of policy change. Congruent with a growing body of work that shows how ideas and institutions interact in all stages of policy development, it enables analysis of one way in which political actors can creatively deploy ideas that are embedded in institutions to shape policy design.[38] Third, decoupling regimes from bounded policy domains enables us to see how actors can deploy the logic of a policy regime across multiple domains. This is one way in which actors can engage in the kind of horizontal boundary-crossing discussed above.

4. Argument

My core argument is that the gender-neutral and broad-coverage design of family and medical leave policy was the result of advocates' creative and strategic use of resources provided by the civil rights policy regime. The emergence of this regime, and particularly the prohibition against sex discrimination in employment, changed the bundle of resources available to advocates of maternity leave provision. Specifically, the regime offered advocates a new policy logic that they could apply to their demands and new venues in which to advance their claims. In response, state actors and opponents contested the meaning of the civil rights policy regime and how it applied to advocates' claims. Advocates continued to reformulate demands in order to defend prior policy gains and respond to opponents' use of the regime.

Table 1 summarizes the stages of this iterative policy development process. First, during 1964–72, advocates argued that antidiscrimination law required employers to provide pregnant workers the same leave benefits available to sick or temporarily disabled workers, and successfully secured an administrative

[28]Martin Rein, Gøsta Esping-Andersen, and Lee Rainwater, *Stagnation and Renewal in Social Policy: The Rise and Fall of Policy Regimes* (Armonk, NY: M.E. Sharpe, 1987), 6–7.

[29]Ibid.

[30]Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton, NJ: Princeton University Press, 1990), ch. 1; Edwin Amenta, "What We Know about the Development of Social Policy," in *Comparative Historical Analysis in the Social Sciences*, ed. James Mahoney and Dietrich Rueschemeyer (New York: Cambridge University Press, 2003), 101.

[31]Patrick Emmenegger, Jon Kvist, Paul Marx, and Klaus Petersen, "Three Worlds of Welfare Capitalism: The Making of a Classic," *Journal of European Social Policy* 25, no. 1 (2015): 3–13.

[32]For reviews of such critiques, see Ann Orloff, "Gender in the Welfare State," *Annual Review of Sociology* 22 (1996): 51–78; O'Connor et al., *States, Markets, Families*, ch. 1; Ann Shola Orloff, "Gendering the Comparative Analysis of Welfare States: An Unfinished Agenda," *Sociological Theory* 27, no. 3 (2009): 317–43; Diane Sainsbury, *Gender and Welfare State Regimes* (New York: Oxford University Press, 1999).

[33]For reviews of such critiques, see Emmenegger et al., "Three Worlds of Welfare Capitalism," 5–7; Ann Shola Orloff, "Social Provision and Regulation: Theories of States, Social Policies and Modernity," in *Remaking Modernity: Politics, History, and Sociology*, ed. Julia Adams, Elisabeth Clemens, and Ann Shola Orloff (Durham, NC: Duke University Press, 2005), 190–224.

[34]For reviews of such critiques, see Edwin Amenta, Chris Bonastia, and Neal Caren, "US Social Policy in Comparative and Historical Perspective: Concepts, Images, Arguments, and Research Strategies," *Annual Review of Sociology* 27, no. 1 (2001): 213–34; Béland et al., "The Fragmented American Welfare State." In their cross-national study of parental leave, Kamerman and Moss similarly call for "[qualification of] the generalisations that flow from studies of welfare regimes" and attention to a range of factors such as ideas, governing structures, and actors beyond business and labor in the policymaking process. Sheila Kamerman and Peter Moss, eds., *The Politics of Parental Leave Policies: Children, Parenting, Gender and the Labour Market* (Bristol, UK: Policy Press, 2009), 266–68.

[35]This approach to conceptualizing and identifying policy regimes is similar to the one later advocated in Peter J. May and Ashley E. Jochim, "Policy Regime Perspectives: Policies, Politics, and Governing," *Policy Studies Journal* 41, no. 3 (2013): 426–52.

[36]Making a similar intervention, Jochim and May use the term "boundary-crossing policy regimes" to describe governing arrangements that span across multiple policy domains. Ashley E. Jochim and Peter J. May, "Beyond Subsystems: Policy Regimes and Governance," *Policy Studies Journal* 38, no. 2 (2010): 303–27.

[37]This view aligns with the growing "many hands of the state" framework in the social sciences, which emphasizes that states encompass multiple institutions and thus that state action may evince "multiple and potentially contradictory logics." Kimberly Morgan and Ann Shola Orloff, "The Many Hands of the State," in *The Many Hands of the State: Theorizing Political Authority and Social Control*, ed. Kimberly Morgan and Ann Shola Orloff (New York: Cambridge University Press, 2017), 1–32. This kind of interaction between logics can lead to "intercurrence," the phenomenon where "politics is governed by multiple and overlapping sources of authority." See Sheingate, "Political Entrepreneurship," 464.

[38]For an overview, see Daniel Béland, *How Ideas and Institutions Shape the Politics of Public Policy*, Elements in Public Policy (New York: Cambridge University Press, 2019); Daniel Béland, "Ideas and Institutions in Social Policy Research," *Social Policy & Administration* 50, no. 6 (2016): 734–50.

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Table 1. Summary of the Iterative Policy Development Process

Stage	Policy Goal(s)	Role of the Civil Rights Policy Regime	Policy Demands	Result
1964–1972, policy advocates	Secure job protection and benefits for workers during pregnancy.	Advocates interpret the antidiscrimination logic in Title VII to require that pregnant workers and "temporarily disabled" must be treated the same.	Administrative agencies should create a pregnancy nondiscrimination standard, requiring that pregnant workers receive the same benefits as temporarily disabled workers.	EEOC creates rule adopting the pregnancy nondiscrimination standard.
1972–1978, policy advocates	Secure job protection and benefits for workers during pregnancy.	Advocates draw on the authority of the EEOC and state agencies to pressure employers and states to follow the pregnancy nondiscrimination standard.	Employers and states should comply with the pregnancy nondiscrimination standard by extending temporary disability benefits to pregnant workers.	Many employers come into compliance with the EEOC rule. Some state governments, as they incorporate the pregnancy nondiscrimination standard, create requirements that employers provide maternity/pregnancy leave.
1972–1978, policy advocates	Defend pregnancy nondiscrimination standard.	Courts interpret antidiscrimination logic counter to advocates' preferred interpretation.	Congress should pass legislation codifying pregnancy nondiscrimination standard.	Congress passes the Pregnancy Discrimination Act.
1978–1986, policy opponents in upper row & policy advocates in lower row	Challenge state laws requiring provision of pregnancy/maternity leave.	Opponents advance an interpretation that the pregnancy nondiscrimination standard invalidates state pregnancy/maternity laws on the grounds that they require unequal treatment.	Courts should strike down state pregnancy/maternity leave laws, since they require employers to "favor" pregnant workers.	Cases proceed through state and federal courts. Some courts preserve state laws, but a federal district court rules in favor of opponents.
	Counter opponents' challenges to state leave laws.	Advocates are compelled to respond to opponents' interpretation of the antidiscrimination logic.	No consensus among advocates on how to reconcile antidiscrimination logic and state leave laws.	
1984–1993, policy advocates	Secure an affirmative guarantee of job-protected leave.	Advocates' strategy is informed by the threat of the antidiscrimination logic being used to invalidate gender-specific leave laws.	Congress should pass legislation guaranteeing job-protected leave, bundling leave for childbirth/temporary disability and child rearing/parenting. Later, leave to care for ill family members is added to the bundle.	Congress passes the Family and Medical Leave Act, after significant concessions to opponents on scope and generosity. Several states pass similar laws.

regulation with this pregnancy nondiscrimination standard. During 1972–78, two processes occurred concurrently. Advocates and legislators used their newly won pregnancy nondiscrimination standard, and civil rights law more broadly, to pressure employers and states to increase pregnancy leave provision. Meanwhile, opponents successfully challenged the pregnancy nondiscrimination standard in the courts, and advocates responded by pursuing and securing legislation to codify this standard. Then, during 1978–86, opponents of leave policy deployed the civil rights policy regime's antidiscrimination logic to challenge recently passed state-level pregnancy leave statutes in the courts. In response, during 1984–93, advocates turned to a legislative strategy to establish an affirmative guarantee of job-protected leave that would withstand legal challenges.

By tracing contestation over these successive stages, we can see how the civil rights policy regime shaped the design of family and medical leave policy. By the final stage of the process, advocates were committed to pursuing a gender-neutral policy so as to defend prior policy gains and counter possible challenges from opponents. Over the course of the process, in order to make antidiscrimination claims, advocates had to analogize maternity leave to other kinds of leave available to men (e.g., analogizing leave for childbirth to leave for illness). Since this entailed a policy design that offered a pool of leave that employees could use for multiple purposes, it opened the possibility of adding and bundling further categories of leave, including leave to care for ill family members. As they embarked on their legislative campaign, advocates expressed a desire for paid leave benefits but faced significant barriers in pursuing a paid leave program. The civil rights policy regime, with its emphasis on individual rights, did not provide resources that could help overcome these barriers.

Stated formally, I argue that the civil rights policy regime was a *necessary* (but *not sufficient*) condition for the policy design of family and medical leave. Several other factors played a role in the policy process, but these cannot explain the gender-neutral and broad-coverage features of the policy. Advocates and policymakers referred to changing economic conditions and changes in the discourse on gender and family as they formulated goals and strategies during the policy process. However, while these trends may have contributed to the relative salience of the issue over time, they do not explain the key decisions pertaining to policy design.[39] Another key factor during this period was the influence

[39]The most relevant economic change during this time period was the steady increase in women's participation in the labor force. This trend was frequently cited during

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of business interests, which scholars often point to when explaining the weakness of U.S. social policy and patterns of retrenchment during the late twentieth century.[40] Business interests were the primary opponents of leave provision throughout the period studied in this article, and their political power does help explain the failure to adopt a paid leave policy. However, this constraint cannot explain how the gender-neutral and broad-coverage features of leave policy emerged. Both the strength of business interests and advocates' use of the civil rights policy regime must be considered together in order to explain family and medical leave's policy design.[41]

This article builds on existing research about family and medical leave policy. Several social science studies have examined the passage of leave legislation during this period. Most of these studies seek to explain *policy adoption*, investigating how party politics, interest group resources and strategies, and structural and economic changes explain the success or failure of federal and state proposals.[42] This article turns its focus to explaining *policy design*, particularly the gender-neutral and broad-coverage features of leave policy. Studies by Lise Vogel, Steven Wisensale, and Anya Bernstein have attended most closely to developments in policy design.[43] This article extends their work theoretically and substantively. It more closely investigates how advocates and opponents applied and contested the antidiscrimination logic of civil rights as they formulated demands, and traces how early decisions by advocates had significant downstream effects. It also draws on a wider range of historical evidence to show how the civil rights policy regime shaped the process across stages of policy development and levels of government.[44] For more on the sources used for historical evidence, see Appendix A.

5. Historical analysis

5.1. Maternity leave advocacy before 1964

Prior to the 1960s, advocates of maternity leave provision generally attempted to create a social insurance program similar to unemployment insurance or workers' compensation. Under such a policy, workers would be entitled to a specified period of leave for pregnancy and childbirth, during which they would receive partial wage compensation through a tax-funded program. This gender-specific social insurance approach was the norm across industrialized countries at the time, as reflected in a convention on maternity leave adopted by the International Labor Organization (ILO) in 1919. By 1952, at least forty countries had created social insurance programs for maternity leave provision.[45]

In the United States, there were several failed proposals for maternity leave through a social insurance model during the first half of the twentieth century. Legislative proposals for health insurance and social insurance programs in New York and Massachusetts during 1919–20 and in Congress during the 1930s–40s included provisions for wage compensation during maternity leave. Some of these proposals failed narrowly, while most did not gain much traction.[46] During the 1940s, labor feminists and advocates in the Women's Bureau and Children's Bureau pursued two strategies to expand provision of maternity leave benefits: campaigning for new social insurance programs

congressional hearings, and members of Congress sometimes pointed to it as a reason to take action. However, there is no clear evidence that labor force participation influenced the policy *design*. Indeed, if this was a primary factor, we should expect advocates and/or policymakers to pursue a gender-specific policy rather than a strictly gender-neutral one. Changes in the discourse on family and gender in national politics included the growing relevance of conservative "pro-family" discourse. These did sometimes inform advocates' and policymakers' strategies and frames, but when such ideational considerations conflicted with strategic considerations based on the civil rights policy regime, advocates were more committed to the latter. For example, during legislative debates in the 1980s, advocates resisted the argument from some members of Congress that a pregnancy-only leave bill could be framed in "pro-family" terms, insisting instead on a gender-neutral bill.

[40]For arguments about the role of business power in U.S. social policy development, see Tracy Roof, "Interest Groups," in *Oxford Handbook of U.S. Social Policy*, ed. Daniel Béland, Kimberly J. Morgan, and Christopher Howard (New York: Oxford University Press, 2014), sec. 5; Jacob S. Hacker and Paul Pierson, "Business Power and Social Policy: Employers and the Formation of the American Welfare State," *Politics & Society* 30, no. 2 (2002): 277–325.

[41]As the case study will show, business interests were the primary opponents of advocates in the judicial and legislative arenas. Pro-business interest groups such as the U.S. Chamber of Commerce and the National Association of Manufacturers consistently opposed *any* public policy requiring the provision of job-protected leave. During legislative debate on the FMLA, advocates and their allies in Congress made many concessions in the face of business opposition, but persisted in pursuing a gender-neutral policy design. They also *added* categories of leave during the legislative process, even though expanding the scope of the policy could further antagonize opponents.

[42]James C. Garand and Pamela A. Monroe, "Family Leave Legislation in the American States: Toward a Model of State Policy Adoption," *Journal of Family and Economic Issues* 16, no. 4 (1995): 341–63; Michelle Rose Marks, "Party Politics and Family Policy: The Case of the Family and Medical Leave Act," *Journal of Family Issues* 18, no. 1 (1997): 55–70; Sonja Klueck Elison, "Policy Innovation in a Cold Climate: The Family and Medical Leave Act of 1993," *Journal of Family Issues* 18, no. 1 (1997): 30–54; Anya Bernstein, "Inside or Outside? The Politics of Family and Medical Leave," *Policy Studies Journal* 25, no. 1 (1997): 87–99; Anya Bernstein, *The Moderation Dilemma: Legislative Coalitions and the Politics of Family and Medical Leave* (Pittsburgh, PA: University of Pittsburgh Press, 2001); Steven K. Wisensale, *Family Leave Policy: The Political Economy of Work and Family in America* (Armonk, NY: M.E. Sharpe, 2001).

[43]Lise Vogel, *Mothers on the Job: Maternity Policy in the U.S. Workplace* (New Brunswick, NJ: Rutgers University Press, 1993); Bernstein, *The Moderation Dilemma*; Wisensale, *Family Leave Policy*.

[44]Wisensale and Bernstein's studies trace the legislative processes around the FMLA and similar state laws during the 1980s–90s, and place them in the context of litigation over the Pregnancy Discrimination Act. I build on their work by pursuing a more focused analysis of the gender-neutral and broad-coverage design features, and by connecting my analysis of this latter period to earlier stages of development. Vogel's study offers the closest analysis to my own, tracing maternity policy from the Progressive Era through the debate over the FMLA. Her focus is on the shift from a difference framework to an equality framework. She places this shift in the larger strategic context that advocates faced and makes a normative argument for why the dichotomy between these frameworks should be resisted. This article has a narrower scope, within which it builds on Vogel's study in four ways. First, it draws on more primary source evidence to show how advocates inside and outside the government interpreted antidiscrimination and mobilized to pursue maternity leave provision during the 1960s–70s. Second, it shows that the state pregnancy leave statutes and regulations that emerged in the 1970s, which would later be challenged under the Pregnancy Discrimination Act, were themselves the result of adaptation to the civil rights policy regime. Third, it more consistently traces how opponents responded to advocates' claims. Finally, with the benefit of additional hindsight, it shows how the design of the FMLA has shaped post-1993 developments in leave policy.

[45]Eileen Boris, "No Right to Layettes or Nursing Time: Maternity Leave and the Question of United States Exceptionalism," in *Workers Across the Americas: The Transnational Turn in Labor History*, ed. Leon Fink (New York: Oxford University Press, 2011), 176.

[46]For "near misses" during 1919–20, see Alexis N. Walker and Dagny Ahrend, "The Historical Origins of the United States' Exceptionalism on Paid Family Leave" (working paper, St. Martin's University, Lacey, WA, 2020); Beatrix Hoffman, *The Wages of Sickness: The Politics of Health Insurance in Progressive America* (Chapel Hill: University of North Carolina Press, 2001). For examples of federal social insurance and health insurance proposals during the 1930s–40s that included maternity leave provisions, see Louis S. Reed, "Legislative Proposals for Compulsory Health Insurance," *Law and Contemporary Problems* 6 (1939): 631; David Montgomery, "Labor and the Political Leadership of New Deal America," *International Review of Social History* 39, no. 3 (1994): 349; Leo J. Linder and Morris A. Wainger, "The Wagner-Murray-Dingell Social Security Bill of 1945—A Social Security Charter for Peacetime America," *Lawyers Guild Review* 5, no. 4 (1945): 227.

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and securing benefits through collective bargaining.[47] In 1952, Frieda Miller and other advocates from the Women's Bureau played an important role in crafting new ILO standards on maternity benefits, which recommended the provision of job-protected maternity leave through a social insurance program. Despite their prominence at the ILO proceedings, these American advocates were barely able to launch public debate on the home front, let alone achieve policy adoption.[48]

One exception to the broader failure of the social insurance approach serves as an example of the road not taken. In the 1940s, several states considered legislation that would create tax-funded temporary disability insurance (TDI) programs. TDI programs provided wage compensation for ill or "temporary disabled" workers and were designed to bridge the gap between workers' compensation and unemployment insurance programs.[49] Rhode Island, the first state to adopt such a policy, included coverage of pregnancy in its 1942 law. In the program's early years, 22 percent of claims were made by pregnant women.[50] State officials complained that maternity benefits were a "drain" on the program, and the legislature curtailed the generosity of benefits in 1946 and 1950.[51] All four states that passed TDI programs after Rhode Island explicitly excluded pregnant workers.[52]

A Women's Bureau report in 1960 summarized the bleak situation: No states required employers to provide job-protected maternity leave, only Rhode Island provided wage compensation during maternity leave, six states had statutes requiring *mandatory* leave for pregnant women without job security or wage compensation, and thirty-five states excluded pregnant women from accessing unemployment insurance benefits.[53] Employers frequently dismissed pregnant workers or imposed mandatory leave without job protection.[54]

Existing scholarship offers some clues about why social insurance programs providing maternity leave were not adopted during this period. During the Progressive Era, the United States exhibited a "maternalist welfare state," where policies such as mothers' pensions and protective labor legislation were premised on the logic that women were primarily caregivers and exempted from formal employment.[55] The Sheppard-Towner Act of 1921 provided funding for maternity and infant care, but it did not address the impact of maternity on women's employment.[56] This gendered logic in social policy persisted in the New Deal Era, where new social insurance programs tended to reinforce the male-breadwinner model and presume that white women were outside the formal labor market. Agricultural and domestic work, in which many women of color were employed, were largely excluded from New Deal social insurance programs.[57] Advocates of maternity leave provision thus faced an unfavorable environment suffused with gendered assumptions about labor, race, class, and family structures.

By the early 1960s, advocates continued to support a social insurance approach to maternity leave provision, albeit with a lack of consensus on policy design. This state of affairs was reflected in the proceedings of the President's Commission on the Status of Women (PCSW), an advisory body that brought together representatives from labor unions, women's movement organizations, state governments, and federal administrative agencies. The PCSW was tasked with evaluating policies pertaining to women's issues and making recommendations to the executive branch.[58] In its 1963 report, the PCSW endorsed adopting maternity leave by expanding social insurance programs but remained vague on details.[59] The PCSW's Committee on Private Employment decried the lack of maternity leave provision in the United States but offered no clear policy recommendation.[60] The Committee on Social Insurance and Taxes reported that it was divided "as to the best method of securing or providing maternity benefits."[61] At this time, some activists such as Pauli Murray were lobbying the PCSW to make sex discrimination claims similar to the race discrimination claims that were prominent in national politics, but most PCSW members remained uncertain about such an approach.[62]

[47]Boris, "No Right to Layettes or Nursing Time," 179–80. For more on the collective bargaining approach, see Women's Bureau, *Maternity Protection of Employed Women* (Washington, DC: U.S. Department of Labor, Women's Bureau, 1952), 27–28; Jennie Mohr, "Maternity-Leave Clauses in Union Contracts," *The Child: Monthly Bulletin* 9, no. 11 (May 1945): 166–68; Women's Bureau, *Union Provisions for Maternity Leave for Women Members* (Washington, DC: U.S. Department of Labor, Women's Bureau, January 1945); Women's Bureau, *Bibliography on Maternity Protection* (Washington, DC: Women's Bureau, Department of Labor, 1951), 12–19.

[48]Boris, "No Right to Layettes or Nursing Time," 181–83; Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th Century America* (New York: Oxford University Press, 2001), 210–11.

[49]Only five states passed such programs, but at least twenty-one state legislatures considered proposals. See Arthur J. Altmeyer, "Temporary Disability Insurance Coordinated with State Unemployment Insurance Programs," *Social Security Bulletin* 10 (1947): 3–8.

[50]Thomas H. Bride, "Rhode Island Cash Sickness Compensation Program," *American Journal of Public Health and the Nation's Health* 39, no. 8 (1949): 1011–15.

[51]Boris, "No Right to Layettes or Nursing Time," 183. The chairman of the Rhode Island Unemployment Compensation Board discouraged inclusion of pregnancy when advising other states considering TDI programs. See Bride, "Rhode Island Cash Sickness Compensation Program."

[52]The federal Railroad Unemployment Insurance Act passed in 1946 did include paid benefits during maternity leave for railroad workers, but no state TDI programs followed suit. Merrick, "California's Disability Insurance System: Current Thought on Insurance Law"; Women's Bureau, *Maternity Benefit Provisions for Employed Women* (Washington, DC: U.S. Department of Labor, Women's Bureau, 1960), 22–24.

[53]Women's Bureau, *Maternity Benefit Provisions for Employed Women*, 32–38. For more on the mandatory pregnancy leave laws, see Women's Bureau, *Bibliography on Maternity Protection*, 10, 51–53. Notably, Puerto Rico's mandatory maternity leave law required job protection and 50 percent wage compensation from employers.

[54]Nancy E. Dowd, "Maternity Leave: Taking Sex Differences into Account," *Fordham Law Review* 54 (1986): n. 36.

[55]Virginia Sapiro, "The Gender Basis of American Social Policy," *Political Science Quarterly* 101, no. 2 (1986): 221–38; Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, MA: Harvard University Press, 1992); Julie L. Novkov, *Constituting Workers, Protecting Women: Gender, Law and Labor in the Progressive Era and New Deal Years* (Ann Arbor: University of Michigan Press, 2009).

[56]Skocpol, *Protecting Soldiers and Mothers*, ch. 9.

[57]Suzanne Mettler, *Dividing Citizens: Gender and Federalism in New Deal Public Policy* (Ithaca, NY: Cornell University Press, 1998).

[58]Esther Peterson, "The Status of Women in the United States," *International Labour Review* 89 (1964): 447–60.

[59]President's Commission on the Status of Women, *American Women: Report of the President's Commission on the Status of Women* (Washington, DC: President's Commission on the Status of Women, 1963), 43.

[60]President's Commission on the Status of Women, *Report of the Committee on Private Employment* (Washington, DC: President's Commission on the Status of Women, October 1963), 43.

[61]The report summarized: "It would not be practicable to set up a separate program. Several members believed that maternity benefits should be included in State temporary disability insurance legislation, with one member believing that no distinction should be made between temporary disability due to pregnancy and childbirth and other types of disabilities. Several other members believed that no progress could be looked for in the enactment of State temporary disability insurance and that the possibility of including maternity benefits under the OASDI program should be explored. One member felt that the current or foreseeable need for maternity benefits did not justify the disadvantages of Federal action or encouragement at this point." See President's Commission on the Status of Women, *Report of the Committee on Social Insurance and Taxes* (Washington, DC: President's Commission on the Status of Women, October 1963), 55–57.

[62]Serena Mayeri, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* (Cambridge, MA: Harvard University Press, 2011), chaps. 1–2; Kessler-Harris, *In Pursuit of Equity*, 230–33.

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5.2. 1964–1978: Pursuing a pregnancy nondiscrimination standard

The politics of maternity leave advocacy began to change after the enactment of the Civil Rights Act of 1964. Title VII of the Act included a prohibition on sex discrimination in employment.[63] Soon after the law passed, a debate ensued among women's movement organizations about how to interpret and react to the sex discrimination provision.[64] The National Organization for Women (NOW), formed in 1966, argued that Title VII should invalidate all employment legislation that made sex-based classifications. Many labor feminists and older women's movement organizations opposed this interpretation and sought to retain some "protective legislation" that relied on sex-based distinctions, such as laws that set maximum working hours for women.[65] A few advocates modified their position after the passage of Title VII. For example, Esther Peterson, a prominent labor feminist and then–special assistant to the president for consumer affairs, had initially opposed sex discrimination legislation but saw Title VII as an opportunity to standardize protective legislation with benefits for both women and men.[66] Despite this range of positions, women's movement advocates broadly agreed that policies requiring job-protected maternity leave were commensurate with Title VII. NOW's stance was that policies entailing differential treatment based on "real biological factors, such as maternity leaves, separate rest rooms, pregnancy and the like … [were] compatible with Title VII."[67] Pauli Murray and Mary Eastwood, two prominent advocates of the equal-treatment approach, argued that maternity legislation was an exception where sex-specific laws "would not be constitutionally objectionable if classification by sex were prohibited."[68]

The Equal Employment Opportunity Commission (EEOC) was charged with enforcing Title VII, but it was initially reluctant to enforce the sex discrimination provision due to neglect, confusion, and a lack of capacity.[69] Top-level EEOC officials believed their role was primarily to address racial discrimination, even though one-quarter of the complaints the agency received in its first year were about sex discrimination, among which the most frequently reported issue was "loss of jobs due to marriage or pregnancy."[70] NOW and other advocates pressured the EEOC to implement the sex discrimination provision by issuing guidelines on a number of topics, including job-protected maternity leave.[71] The EEOC did issue guidelines in 1966 stating that firing employees because of pregnancy was unlawful, but allowed several exemptions and enforced the rule weakly.[72] The agency gradually addressed sex discrimination more often in response to intensifying pressure, but its actions to protect pregnant workers remained limited.[73]

Meanwhile, some women's movement advocates were reformulating demands for maternity leave provision by drawing on the resources made available by the emerging civil rights policy regime. The application of an antidiscrimination logic to maternity leave provision was first made by the Citizens' Advisory Council on the Status of Women (CAC), which succeeded the PCSW in late 1963. In the initial years after the passage of Title VII, CAC members maintained frequent communication with EEOC officials and sought to balance the new law with protective legislation for women. From 1967 onward, the CAC increasingly embraced the sex discrimination provision in Title VII, responding to debates launched by NOW and to growing examples of successful judicial action by other interest groups.[74] This shift extended to their ongoing interest in maternity leave provision. In 1968, the CAC's Task Force on Social Insurance and Taxes recommended that "the general system of protection against temporary wage loss because of disability should include protection of working women against loss of earnings when they are unable to work before and after childbirth," suggesting that maternity leave could be analogized to paid leave provided for temporary disabilities.[75] In 1970, the CAC went further and formulated a policy demand for maternity leave provision centered on an antidiscrimination logic, recommending that:

> Childbirth and complications of pregnancy are, for all job-related purposes, temporary disabilities and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan of an employer, union, or fraternal society. Any policies or practices of an employer or union, written or unwritten, applied to instances of temporary disability other than pregnancy should be applied to incapacity due to pregnancy or childbirth, including policies or practices relating to leave of absence, restoration or recall to duty, and seniority.
>
> No additional or different benefits or restrictions should be applied to disability because of pregnancy or childbirth, and no pregnant woman employee should be in a better position in relation to job-related practices or benefits than an employee similarly situated suffering from other disability.[76]

[63]For the origins of the sex discrimination provision in Title VII, see Serena Mayeri, "Intersectionality and Title VII: A Brief (Pre-)History," *Boston University Law Review* 95 (2015): 713–32.

[64]Pedriana, "From Protective to Equal Treatment."

[65]Cobble, *The Other Women's Movement*, 173–77 and 182–90; Vogel, *Mothers on the Job*, 57.

[66]Cobble, *The Other Women's Movement*, 191.

[67]*Daily Labor Report*, May 2, 1967, quoted in Cobble, *The Other Women's Movement*, 186, n. 36.

[68]Their reasoning was that "if these laws were phrased in terms of 'persons' rather than 'men' or 'women,' the meaning or effect could be no different. Thus, the legislature by its choice of terminology has not made any sex classification." See Pauli Murray and Mary O. Eastwood, "Jane Crow and the Law: Sex Discrimination and Title VII," *George Washington Law Review* 34 (1965): 239–40. Murray and Eastwood were also cofounders of NOW.

[69]Katherine Turk, *Equality on Trial: Gender and Rights in the Modern American Workplace* (Philadelphia: University of Pennsylvania Press, 2016), ch. 1.

[70]Ibid., 25–26; Cobble, *The Other Women's Movement*, 215.

[71]They articulated a broad and general claim about maternity leave: "Women should be protected by law to ensure their rights to return to their jobs within a reasonable time after childbirth, without loss of seniority or other accrued benefits, and should be paid maternity leave as a form of social security and/or employee benefit." Other topics on NOW's agenda included appointment of women as EEOC commissioners, sex-segregated job advertisements, protective labor legislation, discrimination in retirement and pension plans, overall employment rates among women, and more. See Carol Kleiman, "Working Woman: N.O.W. Wants Action on Women's Bill of Rights," *Chicago Tribune*, August 18, 1968; Kathryn F. Clarenbach, Betty Friedan, and Caroline Davis, "Letter from NOW to EEOC Chair and Commissioners," November 11, 1966, box 5, A1 4, RG 403, National Archives at College Park. Pressure also came from feminists within the EEOC; see Turk, *Equality on Trial*, 33–34.

[72]Kessler-Harris, *In Pursuit of Equity*, 254–56. Officials in the EEOC had been planning to issue such guidelines since 1965, when they responded to the complaint a woman who was fired when she was five months pregnant. See Citizens' Advisory Council on the Status of Women, "Official Report of Proceedings, October 26, 1965," 1965, 26, box 46, A1 35080-G, RG 86, National Archives at College Park.

[73]Turk, *Equality on Trial*, 34; Vogel, *Mothers on the Job*, 59–65.

[74]Kessler-Harris, *In Pursuit of Equity*, 264–65. See also CAC meeting transcripts from October 1965, May-June 1966, and February 1967 in boxes 46–49, A1 35080-G, RG 86, National Archives at College Park.

[75]Citizens' Advisory Council on the Status of Women, *Report of the Task Force on Social Insurance and Taxes* (Washington, DC: Citizens' Advisory Council on the Status of Women, April 1968), 44.

[76]Citizens' Advisory Council on the Status of Women, *Women in 1970* (Washington, DC: Citizens' Advisory Council on the Status of Women, March 1971), 4, 20–22.

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The CAC's 1970 recommendation was intended to inform rule making by the EEOC and other administrative agencies.[77] The recommendation focused on "childbirth and complications of pregnancy," requiring that these be treated the same as other temporary disabilities that employees may experience. As CAC Chair Jacqueline Gutwillig later explained, this formulation made an implicit distinction between the "childbirth" and "child-rearing" aspects of maternity. Leave benefits for each of these could be pursued on gender-neutral grounds: The former could be analogized to temporary disability, while the latter was more straightforwardly applicable to both men and women.[78]

Adopting a nondiscrimination logic offered the advantage of using the enforcement capacity of the EEOC to expand access to maternity leave through "the present framework of fringe benefits" provided by employers, without the need for legislative action.[79] The civil rights policy regime enabled this new kind of claim, but it also presented certain limitations, as Catherine East, the executive secretary of the CAC, clearly explained: "EEOC has absolutely no authority to require an employer to set up a system of sick leave, or temporary disability, or any other system. All they have the authority to do is to say, if you do have one, you cannot discriminate against women or blacks or anything else."[80] The CAC defended its antidiscrimination formulation against the counterargument that pregnant workers should receive special benefits, arguing that "giving special treatment for pregnancy will inevitably lead to situations in which men and other women who are suffering from disabilities other than pregnancy will have less benefits than pregnant women," which it argued was "not sociologically or economically justified and would be divisive."[81]

As the CAC formulated its new policy demand, advocates elsewhere were also taking advantage of resources provided by the civil rights policy regime. Women's movement and civil rights advocates continued to lobby government officials to institute sex nondiscrimination policies similar to that in Title VII. In 1967, President Johnson added sex to the list of protected categories in an Executive Order banning discrimination by federal contractors.[82] The Office of Federal Contract Compliance (OFCC) issued guidelines to enforce this order in 1970, including a requirement that contractors provide job-protected maternity leave to pregnant workers.[83] Legal feminists and OFCC officials held joint conferences to train lawyers and activists to file complaints and suits under the new rules.[84] Starting in 1971, several state antidiscrimination agencies adopted new regulations requiring employers not to discriminate against pregnant workers in the provision of leave benefits, echoing the CAC's recommendation.[85] Some EEOC officials argued publicly that sex discrimination law should be interpreted as requiring the provision of job-protected pregnancy leave, pressuring the agency to take a clear position.[86] Internally, the EEOC had been formulating new guidelines addressing pregnancy leave since 1970, and feminists in the agency, such as Commissioner Ethel Walsh, were pushing for these to be finalized more quickly.[87]

The EEOC finally issued new guidelines on sex discrimination in April 1972, including a rule on "employment policies relating to pregnancy and childbirth."[88] The rule was two-pronged. First, it largely adopted the CAC's recommendation, stating that "disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment." This created an affirmative right for pregnant women to access any available leave programs. Second, the rule stated that "termination of an

[77]The immediate trigger for the CAC's deliberations were requests for comment on maternity leave from the Civil Service Commission, the Office of Federal Contract Compliance (OFCC), and the EEOC. The latter two agencies had legal authority to enforce sex discrimination laws. Notably, the Civil Service Commission had suggested a gender-specific maternity leave policy for federal employees, which the CAC forcefully rejected in favor of an antidiscrimination approach. See Citizens' Advisory Council on the Status of Women, "Official Report of Proceedings, October 29, 1970," 1970, 29, box 49, A1 35080-G, RG 86, National Archives at College Park.

[78]Address by Jacqueline G. Gutwillig, Chairman of the CAC, at the Conference of Interstate Association of Commissions on the Status of Women on June 19, 1971, reprinted in Citizens' Advisory Council on the Status of Women, *Women in 1971* (Washington, DC: Citizens' Advisory Council on the Status of Women, January 1972), 53–58. Gutwillig believed that "one of the most important contributions of [the CAC's] consideration of this issue" was "the semantic separation of leave for childbirth from leave for child rearing." She made an extended argument for why childbirth should be analogized to temporary disability for employment purposes. As for child rearing, she said, "we felt [it] was a separate topic that required separate treatment as both men and women have the responsibility to rear children." See also Elizabeth Duncan Koontz, "Childbirth and Child Rearing Leave: Job-Related Benefits," *New York Law Forum* 17 (1971): 480–502.

[79]Some CAC members were concerned about the impact it may have on state TDI program funds, but the wider consensus was that programs provided by employers and insurance companies could and should be affected. See Citizens' Advisory Council on the Status of Women, "Summary of Meeting October 28–29, 1970, 4th Meeting of Citizens' Advisory Council on the Status of Women," 1970, box 55, A1 35080-H, RG 86, National Archives at College Park. For the quoted phrase, see Koontz, "Childbirth and Child Rearing Leave," 495–96.

[80]Citizens' Advisory Council on the Status of Women, "Official Report of Proceedings, October 29, 1970," 146.

[81]The CAC further argued that since "the employer frequently pays all or part of the cost of such benefits, such policies could very well result in reluctance to hire women of childbearing age." See Citizens' Advisory Council on the Status of Women, *Women in 1970*, 22.

[82]Cobble, *The Other Women's Movement*, 185; Vogel, *Mothers on the Job*, 59.

[83]The guidelines stated: "Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time." See Office of Federal Contract Compliance, "Part 60-20—Sex Discrimination Guidelines," *Federal Register* 35, no. 111 (June 9, 1970): 8888–89. This rule had some overlap with the CAC recommendation that would be issued four months later, although the latter made a more expansive claim analogizing pregnancy to temporary disability. It is not clear from the available evidence whether the OFCC was inspired by the CAC or vice versa. In November 1970, the director of the OFCC sent a memo to federal agency heads clarifying the guidelines, using language that hewed more closely to the recently issued CAC recommendation: "Female employees on leave of absence for childbearing must continue to accrue all seniority rights for job security, promotion, and pensions and other fringe benefits if the same policy applies to other types of leave." See Erica B. Grubb and Margarita C. McCoy, "Love's Labors Lost: New Conceptions of Maternity Leaves Comments," *Harvard Civil Rights-Civil Liberties Law Review* 7, no. 1 (1972): 280–81.

[84]Carol Kleiman, "Conference on Women's Rights: A Focus on Discrimination," *Chicago Tribune*, February 10, 1972, sec. 2.

[85]At least four states (Illinois, Minnesota, Oregon, and Pennsylvania) adopted such rules in 1971, before the EEOC did so in April 1972. See Rosella Maria Gardecki, "The Labor Market Effects of Maternity Mandates" (PhD diss., Michigan State University, 1998), 15. For an illustrative example, see Sally Wagner, "Law Opens New Jobs to Women," *Chicago Tribune*, September 4, 1971.

[86]Sonia Pressman Fuentes, Director of the Legislative Counsel Division at the EEOC, argued in 1971 that this followed from the commission's rulings on mandatory maternity leave policies. See Koontz, "Childbirth and Child Rearing Leave," 489; Grubb and McCoy, "Love's Labors Lost," 269–70. John Burgess, a regional attorney in the New York EEOC office, argued that maternity leave was a "clear right," pointing to the OFCC's rules. See Marilyn Bender, "Maternity Leave: An Employe Right?" *New York Times*, May 2, 1971.

[87]Grubb and McCoy, "Love's Labors Lost," n. 54; Ethel Bent Walsh, "Memorandum on Proposed and New Revised Guidelines on Sex Discrimination Dated August 31," September 17, 1971, container 1, A1 27, RG 403, National Archives at College Park.

[88]Equal Employment Opportunity Commission, "Guidelines on Discrimination Because of Sex, Section 1604," *Federal Register* 37, no. 66 (April 5, 1972): 6819.

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employee who is temporarily disabled … by an employment policy under which insufficient or no leave is available" constituted a Title VII violation if it impacted one sex disproportionately. Since the rule considered pregnancy a temporary disability, this effectively meant that employers were required to reinstate pregnant workers who took a leave of absence, even if they offered no generic leave policy to all workers. This new rule came at a time when enforcement of the civil rights policy regime was being strengthened, with the passage of legislation that expanded the scope of employers covered by Title VII and gave the EEOC authority to sue employers.[89]

Meanwhile, the inclusion of sex as a protected category in employment discrimination law was becoming increasingly common on the state level. Out of the twenty-six state-level employment discrimination laws on the books in 1964, only the ones in Wisconsin and Hawaii included sex as a protected category.[90] In 1965, nine more states included sex discrimination provisions in their employment discrimination laws. Some, like Maryland and Nebraska, did so as part of new laws modeled on Title VII, whereas others, such as New York and Massachusetts, were adding sex discrimination provisions to employment discrimination laws that had existed since the 1940s. By 1970, nearly half of all states included sex as a protected category in their employment discrimination laws (see Figure 1). As state-level antidiscrimination agencies and the EEOC intensified enforcement of sex discrimination law, state-level protective legislation also came under increasing scrutiny. Despite labor feminists' earlier attempts to retain some protective legislation, the growing trend was either repeal or extension of benefits to men.[91]

In this context, the new EEOC rule equipped advocates to lobby employers and states to extend job-protected leave for pregnant workers.[92] As press coverage of the EEOC's new rule and subsequent litigation grew, employers became significantly more likely to adopt leave policies compliant with the rule.[93] Labor unions such as the United Steelworkers of America and the Communications Workers of America used the new guidelines to strengthen their position in negotiations with employers, with the latter filing over 100 charges at the EEOC as a part of their effort to secure better maternity leave benefits for workers.[94] State agencies enforcing employment discrimination laws continued to create pregnancy nondiscrimination rules, and over a dozen states had adopted such regulations by 1976.[95] Hawaii, Rhode Island, and New York all took action to cover pregnant workers in their state-run TDI programs between 1973 and 1976.[96]

During this period, it seemed that the CAC's vision of pursuing child-rearing leave on gender-neutral grounds was a viable one as well. In 1971, two men filed a complaint alleging that the New York City Board of Education was in violation of Title VII because they provided post-childbirth (i.e., child-rearing) leave for mothers but not for fathers. The EEOC seemed ready to rule in their favor before the Board of Education changed its policy to allow child-rearing leave for both men and women in 1973.[97] A male teacher in Seattle made a similar claim in a complaint to the Washington State Human Rights Commission in 1974, but the school district agreed to grant a one-year paternity leave and the teacher dropped his complaint.[98]

After early successes in changing state and employer policies, the viability of the pregnancy nondiscrimination approach was threatened by unfavorable judicial action. Initially, it seemed that the courts might support advocates' position: Several federal courts upheld the EEOC's guidelines in the early 1970s, and the Supreme Court struck down mandatory leave policies that dismissed pregnant workers without job protection in 1974.[99] However, in two subsequent cases, *Geduldig v. Aiello* (1974) and *GE v. Gilbert* (1976), the Supreme Court rejected the pregnancy nondiscrimination standard.

Geduldig v. Aiello began as two class-action lawsuits filed in 1972 by women who were denied benefits during pregnancy under California's TDI program. The plaintiffs, represented by feminist and labor lawyers, argued that the program's exclusion of pregnant workers violated the Fourteenth Amendment's equal protection clause. This argument was supported by a

[89]For more on the Equal Employment Opportunity Act of 1972, see Anthony S. Chen, *The Fifth Freedom: Jobs, Politics, and Civil Rights in the United States, 1941–1972* (Princeton University Press, 2009), ch. 5.

[90]These laws were passed in 1961 and 1963, respectively. See Murray and Eastwood, "Jane Crow and the Law," 246.

[91]For examples, see Citizens' Advisory Council on the Status of Women, "Significant Changes in State Protective Legislation in 1966 and 1967," October 25, 1967, item No. 144, box 44, A1 35080-F, Record Group 86, National Archives at College Park; David A. Levy, "State Labor Legislation Enacted in 1973," *Monthly Labor Review* 97 (1974): 26; David A. Levy, "State Labor Legislation Enacted in 1974," *Monthly Labor Review* 98 (1975): 17. EEOC Commissioner Aileen C. Hernandez, who later became president of NOW, was a strong proponent of reconciling protective legislation and Title VII by extending protections to men; see Aileen C. Hernandez, "Memorandum on Sex Discrimination and State Laws," October 10, 1966, and note dated October 16, 1966, container 4, A1, RG 43, National Archives at College Park.

[92]Marilyn Bender, "Many Companies Revising Maternity Leave Policies," *New York Times*, December 10, 1973.

[93]Erin Kelly and Frank Dobbin, "Civil Rights Law at Work: Sex Discrimination and the Rise of Maternity Leave Policies," 1999, 455–92.

[94]See testimony from union representatives in U.S. Congress, Senate, Committee on Human Resources, Subcommittee on Labor, *Discrimination on the Basis of Pregnancy*, 95th Congress, 1st Sess., 1977, 222–304. Notably, Leon Lynch from the United Steelworkers recounted that steel companies used the legal challenges to the EEOC guidelines that emerged in the late 1970s to justify delaying action on maternity leave.

[95]Gardecki, "The Labor Market Effects of Maternity Mandates," 15. The CAC saw such regulatory changes as a successful outcome of their advocacy efforts; see Jacqueline G. Gutwillig, "Citizens' Advisory Council on the Status of Women Meeting of October 5 and 7, 1972: Chairman's Notes," 1972, box 57, A1 35080-H, RG 86, National Archives at College Park. Alaska made this change legislatively, adding pregnancy and parenthood as protected categories in its employment antidiscrimination statute in 1975; see Deborah T. Bond, "State Labor Legislation Enacted in 1975," *Monthly Labor Review* 99 (1976): 18.

[96]Gardecki, "The Labor Market Effects of Maternity Mandates," 96. New York also took action in its capacity as an employer. As a response to the EEOC rule, state officials eliminated their mandatory leave policy for public employees and ruled that pregnant workers could access sick leave benefits in 1973. See "State Liberalizes Policy for Maternity Leaves," *New York Times*, August 21, 1973.

[97]Citizens' Advisory Council on the Status of Women, *Women in 1973* (Washington, DC: Citizens' Advisory Council on the Status of Women, May 1974), 9–10; Maurice Carroll, "U.S. Backs Child-Care Leaves for Men in a School Case Here," *New York Times*, January 6, 1973. One complainant, Gary Ackerman, argued: "Arbitrarily denying me a privilege that [the Board of Education] would grant to a woman is absolutely discriminatory." See Lisa Hammel, "Maternity Leave for Men? Two Fathers Who Say It's Only Fair," *New York Times*, May 4, 1971. Ackerman was elected to Congress a decade later and recounted his lawsuit while arguing in favor of the FMLA. See U.S. Congress, House, Committee on Post Office and Civil Service, Subcommittee on Civil Service, *Family and Medical Leave Act of 1987*, 100th Congress., 1st Sess., 1987, 2–4.

[98]Deborah Dinner, "The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966–1974," *Law and History Review* 28, no. 3 (2010): 360.

[99]By 1975, six circuit court decisions had upheld the EEOC guidelines. See Citizens' Advisory Council on the Status of Women, *Women in 1975* (Washington, DC: Citizens' Advisory Council on the Status of Women, March 1976), 10. For a discussion of "mandatory leave" or "pregnancy dismissal" policies, see Dowd, "Maternity Leave," 705–709. The Supreme Court struck down a public employer's mandatory leave policy as violating the due process clause in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). Lower courts had struck down mandatory leave policies under the equal protection clause and the EEOC had ruled that such policies violated Title VII since the late 1960s. See Jean Karen Beasley, "Constitutional Law—Women's Rights—Mandatory Pregnancy Leave Unconstitutional," *West Virginia Law Review* 77, no. 4 (1974): 796–807.

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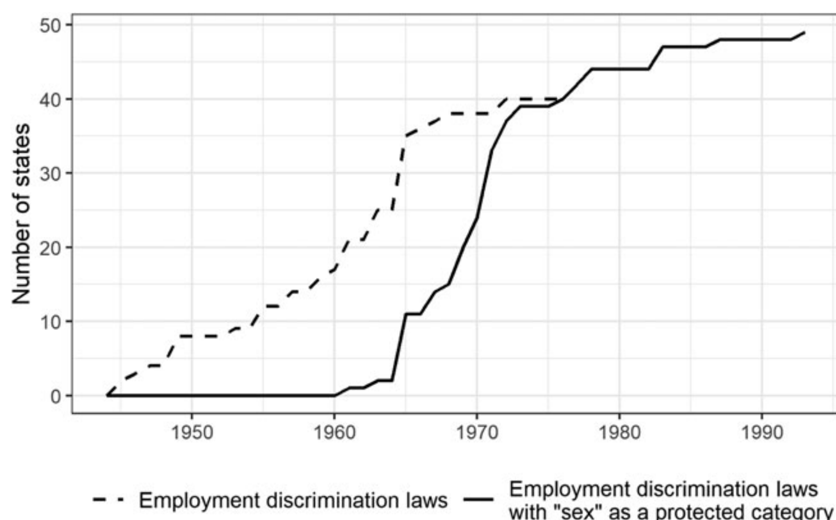

Figure 1. Growth of State Laws Prohibiting Sex Discrimination in Employment.
Sources: See Appendix B.

broad coalition of feminist, labor, and liberal groups as well as the EEOC.[100] In response, the state of California argued that pregnancy was not similar to temporary disability since it was a "normal" and voluntary condition, and that excluding pregnant workers was justified by concerns over program costs. Although the case concerned a state-run program, several interest groups representing businesses filed *amicus curiae* briefs, echoing California's arguments and using the opportunity to challenge the EEOC's 1972 guidelines.[101] A federal district court had ruled in favor of the plaintiffs in 1973, endorsing the pregnancy nondiscrimination standard. The next year, however, the Supreme Court ruled that the exclusion of pregnant workers did not constitute sex discrimination and was justifiable based on the state's rational interest in keeping the TDI program solvent.[102]

The EEOC continued to implement its guidelines after the setback in *Geduldig*, since it drew its regulatory authority from Title VII rather than the Fourteenth Amendment.[103] Policy advocates similarly emphasized that their pregnancy discrimination claims were based on the authority of Title VII and similar state laws, which they argued imposed a stricter standard than the Fourteenth Amendment.[104] This defense was tested in *GE v. Gilbert*, a case that arose when several General Electric employees challenged the company's exclusion of pregnant workers from disability benefits as a violation of Title VII. Feminist lawyers working on the case built on their arguments in *Geduldig* and further argued that the exclusion of pregnant workers from benefit programs was part of a broader pattern of favoring male breadwinners.[105] The Supreme Court's decision in 1976 dealt a major blow to advocates and the EEOC. The Court denied that pregnancy discrimination constituted sex discrimination, ruling that this interpretation was not supported by the "plain meaning" of Title VII nor by congressional intent, and struck down the EEOC's 1972 guidelines.[106]

The *Gilbert* ruling set off a firestorm among policy advocates. Within a week of the ruling, a coalition of feminist groups formed to pursue a congressional override. The Campaign to End Discrimination Against Pregnant Workers quickly ballooned to comprise more than 200 groups.[107] The coalition joined labor feminists, women's movement organizations such as NOW and the League of Women Voters, and civil rights groups such as the NAACP under the leadership of ACLU attorney Susan Deller Ross and labor attorney Ruth Weyand, who had been part of the litigation team in *Gilbert*.[108] In subsequent months, the coalition even expanded to include "strange bedfellows" such as some conservatives and antiabortion groups.[109]

The advocacy coalition pursued legislation that would codify the EEOC's guidelines on pregnancy discrimination. In

[100]*Amicus curiae* briefs were filed by NOW, the American Civil Liberties Union, the Center for Constitutional Rights, the AFL-CIO, the International Union of Electrical, Radio and Machine Workers (IUE), the Physicians Forum, the Women's Equity Action League Education and Defense Fund, and the EEOC.

[101]Opponents filing briefs included the U.S. Chamber of Commerce, the Merchants and Manufacturers Association, the National Association of Manufacturers, the Pacific Legal Foundation, and General Electric.

[102]*Geduldig v. Aiello*, 417 U.S. 484 (1974).

[103]See, for example, "U.S. Steel Is Accused of Sex Bias in Suit Filed by the EEOC," *Wall Street Journal*, July 14, 1975.

[104]Citizens' Advisory Council on the Status of Women, *Women in 1974* (Washington, DC: Citizens' Advisory Council on the Status of Women, May 1975), 10; Jacqueline G. Gutwillig, "Citizens' Advisory Council on the Status of Women Meeting of May 10–11, 1974: Chairperson's Notes," 1974, box 58, A1 35080-H, RG 86, National Archives at College Park; Virginia Lee Warren, "The Fight for Disability Benefits in Pregnancy," *New York Times*, September 16, 1975; Rhoda Bunnell, "The Impact of *Geduldig v. Aiello* on the EEOC Guidelines on Sex Discrimination," *Indiana Law Journal* 50 (1975): 592–606.

[105]This was a disparate-impact argument that went beyond the claim that the exclusion of pregnant women from benefit programs constituted sex-based disparate treatment. The lawyers expanded their argument both because of the failure of a disparate-treatment argument in *Geduldig* and the recent success of a disparate-impact framework in *Griggs v. Duke Power* (1971). See Mayeri, *Reasoning from Race*, 108–14.

[106]*General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

[107]Peg Simpson, "A Victory for Women," *Civil Rights Digest* 11 (Spring 1979): 17. This coalition included both sides of the "equal treatment" vs. "special treatment" debate that had emerged after Title VII's passage, indicating the widespread support for using an antidiscrimination approach to maternity protections in employment. See Wendy W. Williams, "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism," *Women's Rights Law Reporter* 7, no. 3 (1982): 193–94.

[108]Cobble, *The Other Women's Movement*, 217; Susan Deller Ross and Ruth Weyand, "Fact Sheet: Campaign to End Discrimination Against Pregnant Workers," December 1976, folder 12, box 55, NOW records, Schlesinger Library. Weyand was an attorney for the International Union of Electrical, Radio and Machine Workers (IUE).

[109]Deborah Dinner, "Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination," *Washington University Law Review* 91, no. 3 (2014): 453–530; Mayeri, *Reasoning from Race*, 120.

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Congress, advocates and their legislative allies framed the bill as protection for families, especially vulnerable mothers, during a time of market insecurity. Conservatives were particularly attracted to what Deborah Dinner has called "neomaternal" arguments emphasizing "the social value of reproduction."[110] Although advocates were making new kinds of arguments, the *content* of the bill was firmly situated in the civil rights policy regime. Continuing to pursue a nondiscrimination policy design offered two key advantages. First, it would allow advocates to defend gains made under the EEOC rule and similar state-level regulations and to continue their strategy of expanding leave provision through regulatory enforcement and litigation.[111] Second, even as they articulated the particular needs of pregnant workers, a nondiscrimination design enabled advocates to claim that the bill would not constitute special benefits for pregnant workers.[112] In response to advocates, business interests mobilized to oppose the bill, largely repeating their arguments from *Geduldig* and *Gilbert* that pregnancy could not be analogized to illness and that the proposed policy would impose significant costs on employers.[113]

Success came quickly—the Pregnancy Discrimination Act (PDA) was passed and signed into law in 1978. The PDA amended Title VII to state that sex discrimination included discrimination "on the basis of pregnancy, childbirth, or related medical conditions" and that women affected by those conditions "shall be treated the same for all employment-related purposes … as other persons not so affected but similar in their ability or inability to work."[114] As such, it codified the first of the EEOC rule's two prongs, analogizing pregnancy to temporary disability. This allowed advocates to continue their strategy from the mid-1970s, and indeed, the rate of litigation concerning maternity leave policies intensified after the passage of the PDA.[115] However, the statute did not adopt the EEOC rule's second prong, which required employers to reinstate workers who took a leave of absence for pregnancy regardless of the leave benefits they offered other workers.

While national-level advocacy had yet to yield an affirmative guarantee of job-protected maternity leave, several states were moving in this direction. Between 1972 and 1978, new regulations or legislation in at least six states required employers to provide voluntary job-protected pregnancy leave (see Table 2). This pattern of policy adoption was part of ongoing adaptation to the civil rights policy regime. Massachusetts, which passed a law guaranteeing eight weeks of voluntary job-protected pregnancy leave in 1972, did so after the state's Commission Against Discrimination had considered adopting a similar provision as part of its guidelines on sex discrimination and amid efforts to repeal earlier protective legislation.[116] Connecticut passed a law in 1973 that barred pregnancy discrimination and required employers to provide a "reasonable period" of leave with reinstatement rights, codifying the state antidiscrimination agency's existing interpretation of employment discrimination law.[117] Administrative agencies that enforced antidiscrimination laws in Washington, Kansas, and California created regulations that imposed an affirmative requirement on employers to provide job-protected pregnancy leave during 1973–74.[118] In Montana, the state legislature created a committee to study how protective labor legislation should be reconciled with antidiscrimination law. One of the commission's recommendations was to enact legislation requiring employers to provide a reasonable period of job-protected leave to pregnant workers, which the state legislature adopted as the Montana Maternity Leave Act in 1975.[119] In 1978, California passed legislation that codified its earlier administrative regulation and created an affirmative guarantee of four months of leave.[120]

After the passage of the PDA in 1978, only Hawaii and New Hampshire adopted policies requiring employers to provide a reasonable period of pregnancy leave, through administrative regula-

[110]Dinner, "Strange Bedfellows at Work," 491, 505–11. Dinner argues that neomaternal arguments "leveraged the social value of motherhood to overcome market libertarian opposition to pregnancy-related entitlements."

[111]Susan Deller Ross recounted that the groups in the coalition "were united by one concern—the realization of *Gilbert*'s enormous potential for harm in eradicating the rights which women workers had fought so hard to achieve in thirteen years since Congress enacted Title VII of the 1964 Civil Rights Act." Their preferred solution was a statute that "incorporates the theory of the EEOC pregnancy guidelines which the Supreme Court declined to follow." See U.S. Congress, House, Committee on Education and Labor, Subcommittee on Employment Opportunities, *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy*, 95th Congress, 1st Sess., 1977, 47–50. See also Ross and Weyand, "Fact Sheet: Campaign to End Discrimination Against Pregnant Workers."

[112]Advocates repeatedly stressed that the bill would only require "equal treatment" and "equal protection" in their testimonies at congressional hearings. See U.S. Congress, House, Committee on Education and Labor, Subcommittee on Employment Opportunities, *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy*; Senate, Committee on Human Resources, Subcommittee on Labor, *Discrimination on the Basis of Pregnancy*. See also Mayeri, *Reasoning from Race*, 121.

[113]See testimonies from representatives of the U.S. Chamber of Commerce, the National Association of Manufacturers, and several industry associations in U.S. Congress, House, Committee on Education and Labor, Subcommittee on Employment Opportunities, *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy*, 84–121; *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy, Part 2*, 95th Congress, 1st Sess., 1977, 3–61; Senate, Committee on Human Resources, Subcommittee on Labor, *Discrimination on the Basis of Pregnancy*, 80–107.

[114]*To Amend Title VII of the Civil Rights Act of 1964 to Prohibit Sex Discrimination on the Basis of Pregnancy*, Public Law 95-555, *U.S. Statutes at Large* 92 (1978): 2076–77.

[115]Kelly and Dobbin, "Civil Rights Law at Work," fig. 4. However, Kelly and Dobbin find the rate of voluntary adoption of leave policies by employers did not increase significantly after the passage of the PDA.

[116]The agency's draft regulation required employers to provide a "reasonable period" of leave, rather than the eight weeks specification that would appear in the legislation. See Draft of 1971 Massachusetts Commission Against Discrimination guidelines, cited in Arthur Larson, "Sex Discrimination as to Maternity Benefits," *Duke Law Journal* 1975, no. 4 (1975): n. 130. The legislation was debated as the Massachusetts attorney general investigated the validity of the state's existing mandatory pregnancy leave statute in the face of federal antidiscrimination law and jurisprudence. The AG found this statute invalid in 1971, and it was repealed in 1974. See Ayelet R. Weiss, "New Fathers, Old Rights: How the Massachusetts Maternity Leave Act Discriminates against Men," *Boston University Public Interest Law Journal* 22 (2013): 442–43; Sylvia Weissbrodt, "Changes in State Labor Law in 1972," *Monthly Labor Review* 96 (1973): 30.

[117]Testimony of Howard Orenstein, lawyer for the Connecticut Commission on Human Rights and Opportunities, in Connecticut General Assembly, Joint Standing Committee on Labor and Industrial Relations, *Hearing on Senate Bill 1565 and House Bill 8125*, 1973, located in legislative history for P.A. 647 compiled by the Connecticut State Library. See also Levy, "State Labor Legislation Enacted in 1973," 23.

[118]For Washington and Kansas, see Women's Legal Defense Fund, "Appendix B"; Dowd, "Maternity Leave," 731. For California, see California Commission on the Status of Women, "Commission on the Status of Women Newsletter, January 1975," 1975, folder 1, box 2, Commissions on the Status of Women collection, Schlesinger Library.

[119]Montana Legislative Assembly, Subcommittee on Judiciary, *Equality of the Sexes* (Helena: Montana Legislative Council, 1974); Herma Hill Kay, "Equality and Difference: The Case of Pregnancy," *Berkeley Women's Law Journal* 1, no. 1 (1985): 10–11; Bond, "State Labor Legislation Enacted in 1975," 24.

[120]See Richard R. Nelson, "State Labor Legislation Enacted in 1978," *Monthly Labor Review* 102 (1979): 26–42. This law was partially a response to the Supreme Court's ruling in *Gilbert*, which interest groups and legislators saw as potentially invalidating the California state agency's rule as well. See California State Assembly, Committee on Labor, Employment and Consumer Affairs, *Hearing on AB 1960: Employment Discrimination Based on Pregnancy*, 1978. Retrieved by request from the California State Archives.

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Table 2. State Statutes and Regulations on Pregnancy Leave, 1972–84

State	Year	Leave Duration	Policy Type	Enactment Context	Sex Discrimination in Employment Prohibited
Massachusetts	1972	8 weeks	Statute	Adopted amid proposed regulatory action by state antidiscrimination agency	Since 1965
Connecticut	1973	"Reasonable period"	Statute	Amendment to employment discrimination law	Since 1967
Washington	1973	"Reasonable period"	Regulation	Enforcement of employment discrimination law	Since 1971
Kansas	1974	"Reasonable period"	Regulation	Enforcement of employment discrimination law	Since 1970
California	1974	"Reasonable period"	Regulation	Enforcement of employment discrimination law	Since 1970
	1978	4 months	Statute	Amendment to employment discrimination law	
Montana	1975	"Reasonable period"	Statute	Enacted alongside repeals of protective legislation and amendments to employment discrimination law	Since 1971
Hawaii	1982	"Reasonable period"	Regulation	Enforcement of employment discrimination law	Since 1963
New Hampshire	1984	"Reasonable period"	Regulation	Enforcement of employment discrimination law	Since 1971

tions issued in 1982 and 1984.[121] Seven states amended their employment discrimination laws to include provisions prohibiting discrimination on the basis of pregnancy, childbirth, or related conditions, but—like the PDA—did not include affirmative guarantees of job-protected pregnancy leave.[122] It is unclear why the enactment of affirmative guarantees of leave stalled after 1978, but a plausible explanation is that ongoing litigation over pregnancy leave laws (discussed below) created uncertainty about whether such policies could survive legal challenges.

To summarize, there were three developments during 1964–78 where the civil rights policy regime influenced the strategic action and policy demands of political actors (as shown in rows 1–3 of Table 1). First, during 1964–72, women's movement advocates reacted to the inclusion of sex discrimination in Title VII by developing a pregnancy nondiscrimination standard and pressuring the EEOC to adopt it. Once it was adopted, they used the EEOC rule to pressure states and employers to expand maternity leave provision. Second, during 1972–78, these advocates defended their pregnancy nondiscrimination standard against judicial challenges, but the Supreme Court rejected their interpretation of the civil rights policy regime. They turned to a legislative strategy and succeeded in codifying a pregnancy nondiscrimination standard by statute. Third, also during 1972–78, state-level policymakers continued to adapt to the inclusion of sex as a protected category in the civil rights policy regime and the emergence of a pregnancy nondiscrimination standard. In addition to adopting rules similar to the EEOC's, several states went further and interpreted sex discrimination law as imposing an affirmative requirement to provide pregnant workers with job-protected leave.

5.3. 1978–1993: Pursuing a gender-neutral guarantee of leave

Both the pregnancy nondiscrimination standard and state laws affirmatively requiring the provision of pregnancy leave emerged out of adaptation to the civil rights policy regime and advocates' creative interpretation of it. State-level policymakers and EEOC officials saw the two types of policies as compatible with each other.[123] However, after 1978, opponents of leave policies began to use the pregnancy nondiscrimination standard to attack state pregnancy leave laws, arguing that the latter required employers to favor pregnant workers over those who were not pregnant. Opponents now deployed resources provided by the civil rights policy regime; rather than simply denying advocates' interpretation of the antidiscrimination logic, they advanced an alternate interpretation that fit their goal of restricting the provision of maternity leave.

The first major challenge was to the Montana Maternity Leave Act, in *Miller-Wohl Co. v. Commissioner of Labor & Industry*. In this case, an employer argued that the Montana statute's requirement to provide job-protected leave to pregnant women violated the PDA, since it offered a benefit to pregnant women but not to other workers.[124] This set off some debate among advocates about

[121]Women's Legal Defense Fund, "Appendix B"; Dowd, "Maternity Leave," 731. Hawaii had enacted a statute adding pregnancy as a protected category in its employment discrimination law in 1981; see Richard R. Nelson, "State Labor Legislation Enacted in 1981," *Monthly Labor Review* 105 (1982): 29–42. A 1979 bill in Illinois would have guaranteed child-rearing leave for both men and women, but it failed to pass. See "Maternity Leave for Dads?" *Chicago Tribune*, July 18, 1979.

[122]The states were Michigan (1978), Maine (1979), Ohio (1979), Kentucky (1980), Hawaii (1981), Connecticut (1981), and Wisconsin (1981). See Nelson, "State Labor Legislation Enacted in 1978"; Richard R. Nelson, "State Labor Legislation Enacted in 1979," *Monthly Labor Review* 103 (1980): 22–39; Richard R. Nelson, "State Labor Legislation Enacted in 1982," *Monthly Labor Review* 106 (1983): 44–56. Wisconsin's law was unusual: It prohibited discrimination "against any woman on the basis of … maternity leave." It was unclear whether this provision constituted an affirmative guarantee of maternity leave. See Dowd, "Maternity Leave," 730.

[123]Note that the EEOC's 1972 guidelines simultaneously prohibited discrimination in employee benefits on the basis of pregnancy *and* characterized the failure to provide pregnancy leave (regardless of what other leave benefits were available) as a form of discrimination.

[124]During oral arguments, an attorney for the plaintiffs illustrated their central argument about the contradiction between the PDA and the Montana statute as follows: "Federal [equal protection] law created a round hole into which the state could have

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how to respond. Some regional advocates and the state antidiscrimination agency argued in *amicus* briefs that while the Leave Act did create a gender-based classification, it did not constitute invidious discrimination and instead furthered the PDA's broader goal of equal employment opportunity.[125] Meanwhile, several organizations that were part of the coalition behind the PDA—including the ACLU and NOW—filed a joint brief arguing that both the PDA and the Leave Act imposed substantive obligations on the employer, which could be resolved by *extending* leave benefits to both sexes. In 1984, the Montana Supreme Court ruled against the employer using the simpler argument that the Leave Act fulfilled the broader goals of Title VII and the PDA, since "by removing pregnancy-related disabilities as a legal grounds for discharge from employment, the [Leave Act] places men and women on more equal terms."[126]

Meanwhile, a similar case from California was being heard in the federal judiciary. In *Cal Fed v. Guerra*, an employer challenged California's statute requiring four months of job-protected pregnancy leave as violating the PDA. Pro-business interest groups supported employers' arguments in both *Miller-Wohl* and *Cal Fed*, advancing an interpretation of the antidiscrimination logic in Title VII and the PDA as invalidating any state laws requiring "preferential treatment" of pregnant employees.[127] In 1984, a federal district court ruled in favor of the employer, finding that the California statute was preempted by the PDA.[128] This ruling made clear that opponents' mobilization of the civil rights policy regime to invalidate leave policies was viable, and it prompted advocates to find a strategy that would reconcile a pregnancy nondiscrimination standard with statutory provision of maternity leave.

The coalition that had advocated for the PDA (and the EEOC rule before it) was splintered in its responses to opponents' arguments in *Cal Fed*. The various *amicus curiae* briefs filed by advocates when the case made its way to the Supreme Court in 1986 captured the contours of this debate. Several feminist organizations, labor unions, and California elected officials formed the Coalition for Reproductive Equality in the Workplace, which defended the statute as consistent with the PDA because it relieved the discriminatory burden that inadequate leave policies placed on women (a similar argument to the Montana Supreme Court's ruling in *Miller-Wohl*).[129] Several other regional legal feminist organizations made similar arguments, with some arguing that *not* guaranteeing leave would constitute pregnancy discrimination.[130] The ACLU and NOW, joined by the AFL-CIO and several other feminist and labor organizations, repeated their position from *Miller-Wohl* that sex-specific leave statutes violated discrimination law, but that the proper remedy would be for courts to order job-protected leave benefits to be extended to *all* temporarily disabled workers, including men.[131]

Amid this lack of consensus, advocates soon found an opportunity to pursue a legislative strategy for securing job-protected leave policies that would be capable of withstanding judicial review. Rep. Howard Berman (D-CA), who had been the primary sponsor of California's pregnancy leave statute, introduced a similar pregnancy leave bill in Congress in 1984. Berman had promised to introduce a federal version of the bill during his 1982 congressional campaign. The overturning of his state's statute by the federal district court in 1984 spurred him to do exactly that.[132] News of Berman's proposal, however, was "greeted with chagrin by the handful of feminist attorneys and organization representatives who had formed themselves into a committee to draft a theoretically sound disability and parental leave bill for Congressional consideration."[133] This group of policy advocates included representatives from the Women's Legal Defense Fund (WLDF), NOW, and leaders from previous policy campaigns such as Wendy Williams and Susan Deller Ross.[134] Fearing that Berman's proposal for a gender-specific pregnancy leave law would face legal challenges, they convened to draft a gender-neutral alternative.[135]

The drafting effort was led by Donna Lenhoff, associate legal director and staff attorney at the WLDF. Lenhoff and a handful of other advocates met with Berman in 1984 to discuss their preference for a gender-neutral proposal.[136] At the meeting, Lenhoff

created complementary legislation. Instead, the state created a square peg." See Jim Robbins, "Montana Court Case Raises Issue of Pregnancy and Job Bias," *The Boston Globe*, September 30, 1984.

[125]Briefs of the Women's Law Section of the State Bar of Montana and the Montana Human Rights Commission cited in *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 214 Mont. 238 (Supreme Court of Montana 1984).

[126]*Miller-Wohl Co. v. Commissioner of Labor & Industry*.

[127]The Merchants and Manufacturers Association and the California Chamber of Commerce joined Cal Fed (the employer) as plaintiffs in the case. See *amicus curiae* briefs of the U.S. Chamber of Commerce, the Equal Employment Advisory Council, and the United States in *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272. These briefs cited similar arguments they had made in the *Miller-Wohl* case. For more on the Reagan administration's support for business interests' argument in this case, see Stuart Taylor Jr., "U.S. Agency Joins Pregnancy Fight: Justice Dept. Asks High Court to Forbid More Generous Benefits for Maternity," *New York Times*, November 29, 1985.

[128]*California Federal Savings & Loan Assn. v. Guerra*, 34 Fair Empl. Prac. Cas. (BNA) 562 (C.D. Cal. 1984).

[129]This coalition included some national feminist organizations (e.g., 9 to 5, National Association of Working Women, Planned Parenthood), state branches of some organizations (e.g., the California division of the American Association of University Women), several state and local professional associations and labor unions, prominent activists (e.g., Betty Friedan, Dolores Huerta), and many state legislators. See brief of Coalition for Reproductive Equality in the Workplace in *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272.

[130]Brief of Equal Rights Advocates, the California Teachers Association, the Northwest Women's Law Center, the San Francisco Women Lawyers Alliance and briefs of the Employment Law Center of the Legal Aid Society of San Francisco, Human Rights Advocates, and California Women Lawyers in *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272.

[131]Brief of NOW, National Women's Law Center, Women's Law Project, and Women's Legal Defense Fund and brief of the AFL-CIO, the ACLU, the League of Women Voters of the United States, the League of Women Voters of California, the National Women's Political Caucus, and the Coal Employment Project in *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272.

[132]Wisensale, *Family Leave Policy*, 134. Berman was also pressured to act in Congress by Maxine Waters, then a state legislator in California and a cosponsor of the original 1978 law. See Ronald D. Elving, *Conflict and Compromise: How Congress Makes the Law* (New York: Simon and Schuster, 1996), 19. Waters also met with representatives from NOW and other organizations to consider how to respond in California, and their discussions included a proposal that would extend parental leave to both women and men. See Jack Jones, "Women's and Labor Groups Join in Opposing Maternity Leave Ruling," *Los Angeles Times*, March 21, 1984.

[133]Anne L. Radigan, *Concept & Compromise: The Evolution of Family Leave Legislation in the U.S. Congress* (Washington, DC: Women's Research & Education Institution, 1988), 9. Rep. Pat Schroeder (D-CO) recounted that Berman was "unwilling to sponsor a [parental leave bill], preferring one that called for maternity leave only—even though the California law was being challenged in the courts because by extending benefits only to women, it discriminated against men." See Pat Schroeder, *Champion of the Great American Family* (New York: Random House, 1989), 50.

[134]Radigan, *Concept & Compromise,* 9; Elving, *Conflict and Compromise*, 20. Wendy Williams was a lead attorney in *Geduldig,* and Susan Deller Ross was the cochair of the PDA coalition.

[135]Elving, *Conflict and Compromise*, ch. 1; Elison, "Policy Innovation in a Cold Climate," 38–40; Wisensale, *Family Leave Policy*, 186; Schroeder, *Champion of the Great American Family*, 49–50.

[136]Also present at the meeting were California state legislator Maxine Waters, Diann Rust-Tierney from the National Women's Law Center, and Wendy Williams. See Donna

argued that pursuing a maternity-only bill would present tensions with civil rights law and pit feminists once again into an equal-versus-special treatment debate; that such a policy could prove counterproductive to women's empowerment; and that the growing publicity around *Cal Fed* offered an opportunity to pursue a broad, gender-neutral leave policy.[137] Working closely with the Congressional Caucus for Women's Issues (CCWI), the advocacy coalition's first draft offered twenty-six weeks of unpaid leave for temporary disabilities (including pregnancy) or care for a newborn or newly adopted child, and a separate pool of ten days of paid leave for illness or to care for ill dependents.[138] Berman and allied California legislators were concerned that a gender-neutral leave proposal of this kind would be too broad in scope to pass through Congress. They instead preferred a pregnancy-only bill, which they argued would appeal "to all the people who claim to be pro-family and pro-life."[139] By the end of 1984, however, the WLDF-led advocacy coalition had persuaded Berman, and he handed the bill sponsorship duties to Rep. Pat Schroeder (D-CO) and the CCWI.[140] In the subsequent year, the advocacy coalition continued to expand, adding numerous feminist organizations, liberal interest groups, and labor unions.[141] In 1985, Schroeder introduced the Parental and Disability Leave Act, which offered twenty-six weeks of temporary disability leave in any one calendar year and eighteen weeks of parental leave in any two years.[142] The coalition continued to recruit more support for the bill in Congress, focusing on chairs of key committees.[143] In 1986, Schroeder and Rep. William Clay (D-MO) introduced a new version of the bill entitled the Parental and Medical Leave Act, and Sen. Christopher Dodd (D-CT) introduced a parallel bill in the Senate.[144]

During 1984–86, the advocacy coalition and allied legislators made three significant decisions about policy design that persisted through the eventual passage of the FMLA. First, advocates insisted on *gender-neutral* leave provision. Anne Radigan, a CCWI staff member, recalled in 1988 that the advocacy coalition's position from the beginning was that "the only tolerable initiative was one that distinguished disability leave from parenting leave while ensuring both for everybody."[145] This approach was the legislative manifestation of the argument made by some feminists in *Miller-Wohl* and *Cal Fed* that the best way to reconcile sex discrimination and pregnancy leave laws was to extend leave benefits in a gender-neutral manner.[146] Besides the need to respond to legal challenges, advocates also feared that a pregnancy-only leave policy would deter employers from hiring women.[147] They further argued that gender-neutral leave could encourage men to take on more caregiving responsibilities.[148] Recounting the legislative process several years later, Lenhoff summed up the decision to pursue gender-neutral leave: "The FMLA's gender neutrality was built in so that the act would pass muster legally; women would not be the only ones taking time off from work to care for new children or seriously ill relatives, and employers would not have women's right to take leave time as an excuse not to hire or promote them."[149]

Advocates maintained their commitment to a gender-neutral policy design throughout the legislative process. As discussed above, they rejected Berman's initial proposal in 1984 for a pregnancy-only leave bill. In early 1985, several Californian members of Congress suggested a bill that would combine gender-specific pregnancy leave with gender-neutral parental leave; the advocacy coalition firmly rejected this proposal and insisted on a gender-neutral approach.[150] This commitment persisted even after the Ninth Circuit Court of Appeals in 1985 and the

R. Lenhoff and Lissa Bell, "Government Support for Working Families and for Communities: Family and Medical Leave as a Case Study," in *Learning from the Past—Looking to the Future*, ed. Christopher Beeem and Jody Heymann (Racine, WI: Work, Family, and Democracy Project, 2002).

[137]This characterization of the meeting comes from Elving, *Conflict and Compromise*, 22–23. Elving's account is based on several interviews with advocates and legislators including Lenhoff, but he does not specify which sources were used in this section. This account's accuracy is buttressed by a similar recounting of the arguments provided for pursuing gender-neutral leave in Lenhoff and Bell, "Government Support for Working Families and for Communities," 4. For more discussion on sources, see Appendix A.

[138]Elving, *Conflict and Compromise*, 29; Wisensale, *Family Leave Policy*, 136–37; Radigan, *Concept & Compromise,* 10–13. This proposal was entitled the "Family Employment Security Act."

[139]Berman, quoted in Elving, *Conflict and Compromise*, 32.

[140]Radigan, *Concept & Compromise,* 12–13; Elving, *Conflict and Compromise*, 30–34.

[141]In the early stages in 1984, representatives from the Association of Junior Leagues, the Coal Employment Project, and the Children's Defense Fund were involved. By 1985, the American Association of University Women, the ACLU, the National Federation of Business and Professional Women's Clubs, the National Women's Political Caucus, and the Women's Equity Action League had joined. More groups joined as the issue rose in prominence: the AFL-CIO, the National Education Association, the Coalition of Labor Union Women, the Disability Rights Education and Defense Fund, the National Council of Jewish Women, the League of Women Voters, the American Nurses Association, and the Older Women's League. See Radigan, *Concept & Compromise,* 9, 15, 16.

[142]U.S. Congress, House, *Parental and Disability Leave Act of 1985*, 99th Congress, 1st Sess., introduced April 4, 1985.

[143]Elving, *Conflict and Compromise*, 53; Wisensale, *Family Leave Policy*, 138–40.

[144]Elving, *Conflict and Compromise*, ch. 3; Wisensale, *Family Leave Policy*, 138–42. Schroder had worked to recruit Clay, who held a crucial position as chair of the subcommittee on labor management. The change of terminology from "disability" to "medical" leave was a response to disability rights activists' concerns; see Radigan, *Concept & Compromise,* 16.

[145]Radigan, *Concept & Compromise,* 11.

[146]For a clear statement of this argument, see WLDF statement in U.S. Congress, House, Committee on Education and Labor, Subcommittee on Labor-Management Relations, *Parental and Medical Leave Act of 1986*, 99th Congress, 2nd Sess., 1986. When recounting this decision, Lenhoff and a former WLDF colleague emphasized that the decision to combine childbearing and temporary disability leave in a gender-neutral framework would ensure that the proposal was "consistent with the language of the Pregnancy Discrimination Act." See Donna R. Lenhoff and Sylvia M. Becker, "Family and Medical Leave Legislation in the States: Toward a Comprehensive Approach Symposium: Legislative Approaches to Work and the Family," *Harvard Journal on Legislation* 26 (1989): 434. See also Wendy W. Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate," *New York University Review of Law & Social Change* 13 (1985): 325–80.

[147]Eleanor Holmes Norton, former EEOC chair, stated this argument clearly: "The fact remains that if [the pregnancy-only leave policy upheld by the Supreme Court's 1987 ruling in *Cal Fed*] becomes the model, employers will provide something for women affected by pregnancy that they are not required to provide for other employees. This gives fodder to those who seek to discriminate against women in employment." Although such discrimination would be illegal on paper, Norton noted that proving discrimination placed heavy burdens on the plaintiff, especially "in the present climate of diminished EEO enforcement." See U.S. Congress, House, Committee on Post Office and Civil Service, *Family and Medical Leave Act of 1987*. Many other advocates made similar arguments; see, for example, statement by WLDF and testimony of Irene Natividad, chair of the National Women's Political Caucus, in U.S. Congress, House, Committee on Education and Labor, Subcommittee on Labor-Management Relations, *Parental and Medical Leave Act of 1986*.

[148]See testimony of Lenhoff in U.S. Congress, House, Committee on Education and Labor, Subcommittee on Labor-Management Relations, *Family and Medical Leave Act of 1987*; testimony of Cheryle Mitvalsky (on behalf of the Association of Junior Leagues) in Senate, Committee on Labor and Human Resources, Subcommittee on Children, Family, Drugs, and Alcoholism, *Parental and Medical Leave Act, Part 1*, 100th Congress, 1st Sess., 1987.

[149]Lenhoff and Bell, "Government Support for Working Families and for Communities," 4.

[150]Elving, *Conflict and Compromise*, 38–39; Radigan, *Concept & Compromise,* 10; Bernstein, *The Moderation Dilemma*, 94–95, 98.

Supreme Court in 1987 upheld California's pregnancy leave law in appeals of the *Cal Fed* case, thus overturning the district court ruling that had initially sparked the legislative strategy.[151] Rep. Schroeder used the news as an opportunity to argue that the potential short-term benefits of a narrow gender-specific bill were no longer necessary since the California statute could remain on the books.[152] Rep. Berman and Sen. Dodd stated in hearings that they were pleased with the Supreme Court's ruling, but urged Congress to extend protections nationwide since only a few states had similar laws.[153] Some advocates were not convinced that legal challenges were over for good: Lenhoff argued that the Supreme Court's ruling was limited "to the issue of whether California was pre-empted from requiring pregnancy disability leave. The Court did not address the issue of whether California employers also subject to Title VII … could lawfully provide pregnancy leave only."[154] By 1988, when Sen. Dan Quayle (R-IN) proposed a maternity-only leave policy as an amendment during legislative debate, none of the legislators allied with the advocacy coalition were willing to entertain this alternative.[155]

Some scholars have argued that advocates' decision to "de-gender" the bill made it harder to achieve its passage. Megan Sholar argues that increasing the scope of coverage of the bill intensified opposition from the business lobby, and Anya Bernstein suggests that a maternity-only bill would have enjoyed more legislative support as it would have aligned with traditional gender norms and covered fewer people.[156] Rep. Berman and some of his Californian colleagues in Congress had expressed similar concerns during the drafting of the bill as well.[157] While the focus of my analysis is to explain policy design rather than policy adoption, it suggests that advocates' preference for a gender-neutral bill was strategically well-grounded. As discussed above, advocates had to take the threat of legal challenges seriously. A maternity-only proposal would also have made advocates vulnerable to the critique that they were pursuing a policy that offered "special benefits" to one social group. The gender-neutral approach allowed advocates and legislators to frame the bill as a "family bill" or as "parents legislation" that would provide benefits for a larger group of people.[158] They could also frame the bill as one that "discourages, rather than encourages, sex discrimination" on the part of employers and that would "not reify stereotypic gender roles for women and men."[159] Furthermore, as discussed in detail below, a design that pooled multiple reasons for leave would invite the addition of more types of leave and consequently broaden the advocacy coalition.

The second significant policy design decision that advocates made early on was to pursue *unpaid* leave.[160] In their early meetings, the advocacy coalition had agreed that an optimal policy would include wage compensation, but many members believed that passing a paid leave bill was unfeasible because of Republican control of the presidency and the Senate.[161] The bills they introduced instead called for a commission to study possible mechanisms to provide paid leave.[162] Advocates frequently mentioned the need for paid leave in congressional hearings, while supporting the unpaid leave proposal as a necessary and helpful "first step."[163] In one hearing, Rep. Schroeder candidly admitted that the lack of paid leave in the bill was a problem, saying, "I am sorry about that. We just are not sure that the country is ready to move that far that fast."[164] The debate on paid leave would reemerge periodically during the legislative process, but no wage replacement provision was ever included in a bill.[165]

The barriers facing any effort to create a paid leave program were high, and the civil rights policy regime did not offer any particular resources to overcome these barriers. By the 1980s, the United States was in a period of social policy retrenchment. Ascendant conservatives and allied pro-business interest groups attacked existing social programs and stymied efforts to create new ones.[166] These dynamics were manifested in the leave policy debate in Congress: Republican legislators and business interests

[151]*California Federal Savings & Loan Assn. v. Guerra*, 758 F.2nd 390 (U.S. Ct. App., 9th Cir. 1985); *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272 (1987). The Supreme Court ruled that the California statute served to advance the PDA's goal of equal employment opportunity and that while the PDA barred benefit ceilings for pregnant workers, it did not prohibit the creation of floors above which employers could equalize benefits if they wished.

[152]Elving, *Conflict and Compromise*, 45–46.

[153]Testimony of Rep. Berman in U.S. Congress, House, Committee on Education and Labor, Subcommittee on Labor-Management Relations, *Family and Medical Leave Act of 1987*; opening statement of Sen. Dodd in Senate, Committee on Labor and Human Resources, Subcommittee on Children, Family, Drugs, and Alcoholism, *Parental and Medical Leave Act, Part 1*.

[154]Lenhoff and Becker, "Family and Medical Leave Legislation in the States," 420.

[155]Elving, *Conflict and Compromise*, 108–109. The resistance to this proposal cannot be explained only because it came from a conservative Republican. As discussed below, advocates and congressional allies were willing to make a number of major compromises in order to win Republican support.

[156]Megan Sholar, *Getting Paid While Taking Time: The Women's Movement and the Development of Paid Family Leave Policies in the United States* (Philadelphia, PA: Temple University Press, 2016), 42–43; Bernstein, *The Moderation Dilemma*, 46.

[157]Elving, *Conflict and Compromise*, 23, 30–32, 38–39.

[158]For example, in a 1987 hearing, Rep. Schroeder argued: "Every other country has figured this is family legislation. Here people want to play like it is women's legislation. Well, I mean, this is really parents' legislation. All these children have fathers too, and they are concerned about this." Later in that hearing, Eleanor Smeal, president of NOW, argued "[This] deals with parental leave. And that is what we need today. A maternity leave bill alone would be old fashioned today. This is a very modern bill. It is also a family bill." See U.S. Congress, House, Committee on Education and Labor, Subcommittee on Labor-Management Relations, *Family and Medical Leave Act of 1987*. See also testimonies of Massachusetts state Representatives Mary Gibson and David Magnani in U.S. Congress, Senate, Committee on Labor and Human Resources, Subcommittee on Children, Family, Drugs, and Alcoholism, *Parental and Medical Leave Act, Part 1*.

[159]Lenhoff and Becker, "Family and Medical Leave Legislation in the States," 418.

[160]The advocacy coalition's very first draft, the "Family Employment Security Act," had included ten days of paid leave, but this was not included in any of introduced bills. Elving, *Conflict and Compromise*, 29.

[161]Members also cited the prominence of deficit concerns in Congress as another reason why a paid leave bill would not be viable. Radigan, *Concept & Compromise,* 11; Elving, *Conflict and Compromise*, 30; Wisensale, *Family Leave Policy*, 138.

[162]The provision for a study commission persisted through the final version of the FMLA, but it was no longer charged with exploring possibilities for paid leave.

[163]See testimonies of Wendy Williams and Joan Krupa (on behalf of the Association of Junior Leagues) in U.S. Congress, House, Committee on Post Office and Civil Service and Committee on Education and Labor, *Parental and Disability Leave*, 99th Congress, 1st Sess., 1985; testimonies of Thomas Donahue (AFL-CIO) and Irene Natividad (National Women's Political Caucus) and written statement of the WLDF in U.S. Congress, House, Committee on Education and Labor, Subcommittee on Labor-Management Relations, *Parental and Medical Leave Act of 1986*; testimonies of Karen Nussbaum (9 to 5, National Association of Working Women, SEIU) and Donna Lenhoff (WLDF) in U.S. Congress, House, Committee on Education and Labor, Subcommittee on Labor-Management Relations, *Family and Medical Leave Act of 1987*; testimony of Eleanor Holmes Norton in House, Committee on Post Office and Civil Service, Subcommittee on Civil Service, *Family and Medical Leave Act of 1987*.

[164]U.S. Congress, House, Committee on Post Office and Civil Service and Committee on Education and Labor, *Parental and Disability Leave*, 20.

[165]See, for example, Elving, *Conflict and Compromise*, 39; Bernstein, *The Moderation Dilemma*, 45. See also testimony of Massachusetts state legislators in U.S. Congress, Senate, Committee on Labor and Human Resources, Subcommittee on Children, Family, Drugs, and Alcoholism, *Parental and Medical Leave Act, Part 1*.

[166]Alex Waddan, "The U.S. Welfare State Since 1970," in *Oxford Handbook of U.S. Social Policy*, ed. Daniel Béland, Kimberly J. Morgan, and Christopher Howard (New York: Oxford University Press, 2014), 95–111; Slessarev, "Racial Tensions and Institutional Support"; Jacob S. Hacker, "Privatizing Risk without Privatizing the

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were the most prominent and consistent opponents of leave bills in Congress. Even though advocates anticipated this opposition and made no serious effort to propose paid leave, business interests still attacked their proposal as an unwarranted mandate that would impose heavy costs and logistical challenges on employers.[167] Advocates challenged these arguments in numerous ways, such as presenting alternative cost estimates and gathering testimony from employers who supported leave policies, but none of these responses drew specifically on the civil rights policy regime. Given that advocates had to make concessions in their unpaid leave proposal to win support from even a few Republican legislators, their assessment that a paid leave bill was not viable seems accurate. Antidiscrimination law, with its emphasis on individual rights, did not offer a bridge to redistributive policy design.[168] The inability to pursue paid leave during this period suggests that this lack of a redistributive orientation is a limitation of using the civil rights policy regime to pursue social policy expansion.

A third major policy design decision, made in mid-1986, was to expand parental leave into broader "family" leave that included leave to care for a seriously ill child, spouse, or parent. The House version of the bill was amended in committee in 1986 to include leave to care for ill parents, reportedly at the behest of key committee member Rep. Marge Roukema (R-NJ).[169] Future iterations of the bill were renamed the Family and Medical Leave Act and eventually covered care for ill spouses as well.[170] Members of the advocacy coalition were strongly in favor of broadly covering caregiving leave, arguing that workers in single-parent or dual-worker households—especially women—bore heavy caregiving burdens.[171] Including family care especially appealed to AARP, which took a more prominent role in the advocacy coalition from 1989 onwards and insisted that family leave cover care for both elder parents and spouses.[172] Michelle Marks argues that the broadening of the policy design was fueled by the inclusion of more coalition partners, which in turn strengthened the strategic alliance of interest groups advocating for the bill.[173] The civil rights policy regime indirectly enabled this broadening of coverage, as the decision to pursue a gender-neutral design that covered medical and caregiving leave as distinct categories created the possibility to add more categories of leave.[174]

While advocates held firm on these policy design decisions, they conceded a series of amendments that weakened the scope of the bill. Opposition from Republicans and business interests, led by the U.S. Chamber of Commerce and the National Federation of Independent Businesses, gained steam as the bill became more prominent. Opponents were unable to deploy an antidiscrimination logic to challenge the design of these leave bills, as they had done in challenges to state pregnancy leave laws. They did mobilize consistently and aggressively, however, and exerted influence over Republican legislators.[175] The advocacy coalition and the bill's cosponsors gradually agreed to several compromises during 1986–92 in an attempt to win Republican support and build a veto-proof majority.[176] As Anya Bernstein notes, "the decision to pursue a gender-neutral bill was virtually the only issue on which the leaders of the national family and medical leave coalition refused to compromise."[177] In these amendments, the overall length of leave was reduced, family leave and medical leave durations were combined into one pool of twelve weeks, and eligibility requirements were amended to exclude workers with under one year of tenure and all employers with fewer than fifty employees.[178]

Meanwhile, there was a wave of activity on leave bills in state legislatures, spurred by ongoing debate in Congress, the prominence of the *Cal Fed* case, and organizing by groups in the advocacy coalition.[179] During 1986–90, at least forty state legislatures considered some form of leave law.[180] Policy design in state proposals mirrored the trajectory of the federal bill: For example, in

Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States," *American Political Science Review* 98, no. 2 (2004): 243–60.

[167]For representative examples, see testimonies of Susan Hager (representing the U.S. Chamber of Commerce) in U.S. Congress, House, Committee on Education and Labor, Subcommittee on Labor-Management Relations, *Parental and Medical Leave Act of 1986*; Virginia B. Lamp (U.S. Chamber of Commerce) and Marsha Burridge (Independent Insurance Agents of America) in U.S. Congress, House, Committee on Education and Labor, Subcommittee on Labor-Management Relations, *Family and Medical Leave Act of 1987*; John J. Motley (National Federation of Independent Businesses) in Senate, Committee on Labor and Human Resources, Subcommittee on Children, Family, Drugs, and Alcoholism, *Parental and Medical Leave Act, Part 2*, 100th Congress, 1st Sess., 1987; and Earl H. Hess (U.S. Chamber of Commerce) and John J. Motley in U.S. Congress, House, Committee on Education and Labor, Subcommittee on Labor-Management Relations, *Hearing on H.R. 770, the Family and Medical Leave Act of 1989*, 101st Congress, 1st Sess., 1989.

[168]For a discussion of the tension between civil rights law's emphasis on individual rights and New Deal liberalism's (partial) redistributive orientation, see Reuel Schiller, *Forging Rivals: Race, Class, Law, and the Collapse of Postwar Liberalism* (New York: Cambridge University Press, 2014). See also Deborah Dinner, "Beyond Best Practices: Employment-Discrimination Law in the Neoliberal Era," *Indiana Law Journal* 92 (2016): 1059–118.

[169]U.S. Congress, House, *Family and Medical Leave Act of 1986*, H. Rep. 99-699/2, 99th Congress, 2nd Sess., reported August 8, 1986. Radigan reports that Roukema requested this change; see Radigan, *Concept & Compromise,* 22. The notion of covering leave to care for dependents other than children was not entirely new; the advocacy coalition's first draft in 1984 included a pool of short-term leave to care for oneself or dependents when ill, although this had not been seriously pursued.

[170]All House bills after August 1986 bore this new name and structure. Senate bills followed suit starting in 1990; see U.S. Congress, Senate, *Family and Medical Leave Act of 1990*, S. 2973, 101st Congress, 2nd Sess., introduced August 3, 1990.

[171]See testimonies of Eleanor Holmes Norton (on behalf of the advocacy coalition) and Beth Moten (National Federation of Federal Employees) in U.S. Congress, House, Committee on Post Office and Civil Service, Subcommittee on Civil Service, *Family and Medical Leave Act of 1987*; testimony of Gerald McEntee (AFSCME) in Senate, Committee on Labor and Human Resources, Subcommittee on Children, Family, Drugs, and Alcoholism, *Parental and Medical Leave Act of 1987, Part 1*.

[172]Elving, *Conflict and Compromise*, 66, 157; Radigan, *Concept & Compromise,* 21–22. See also testimony of Helen McDonald, AARP board member, in U.S. Congress, Senate, Committee on Labor and Human Resources, Subcommittee on Children, Family, Drugs, and Alcoholism, *Parental and Medical Leave Act of 1987, Part 2*; Louise Crooks, "Care-Giving at Home Should Not Cost You Your Job," *New York Times*, May 20, 1990.

[173]Marks, "Party Politics and Family Policy." See also Bernstein, *The Moderation Dilemma*, 98–99.

[174]Imagine a counterfactual scenario where Rep. Howard Berman's proposal for a pregnancy leave-only bill became the focus of congressional activity. Debate over such a bill would not have presented opportunities for adding types of leave in the same way that a gender-neutral bill that distinguished temporary disabilities and caregiving did.

[175]Radigan, *Concept & Compromise,* 20; Wisensale, *Family Leave Policy*, 143; Bernstein, *The Moderation Dilemma*, 101–5; Marks, "Party Politics and Family Policy," 59. Republican legislators consistently invited representatives from pro-business interest groups to give testimony during hearings on the leave bills.

[176]Although most Republicans opposed the bill throughout, support from a few such as Rep. Marge Roukema (R-NJ) and Sen. Arlen Specter (R-PA) helped the bill's eventual passage and enabled advocates to claim that support for the bill was bipartisan. See Elving, *Conflict and Compromise*, ch. 5.

[177]Bernstein, *The Moderation Dilemma*, 98. Advocates also firmly rejected amendments that would have incentivized rather than required employers to provide leave. See Bernstein, *The Moderation Dilemma*, 104.

[178]Advocates and legislative allies were initially more willing to compromise on eligibility restrictions than leave duration. As the bill struggled to pass with a veto-proof majority during 1988–92, they made concessions on leave duration. See Elving, *Conflict and Compromise*, 66, 95, 165, 210, 225; Radigan, *Concept & Compromise,* 21–25; Elison, "Policy Innovation in a Cold Climate," 38–41.

[179]Lenhoff and Becker, "Family and Medical Leave Legislation in the States," 416. Conversely, for a discussion on how state legislative activity affected the federal process, see Bernstein, *The Moderation Dilemma*, 108–13.

[180]Garand and Monroe, "Family Leave Legislation in the American States," 343.

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1987, there were twenty-eight gender-neutral proposals covering parental and medical leave, compared to seven that covered pregnancy only.[181] During 1986–92, thirteen states passed gender-neutral leave laws similar to the bills being debated in Congress, and nine more passed similar laws that applied only to state employees. Some of these early laws covered parental leave, but from 1988 onwards, family and medical leave became the most prevalent policy design. Meanwhile, only four states passed pregnancy-specific leave laws, and none of these passed after 1989, reflecting the consolidation of the gender-neutral and broad-coverage framework.[182]

On the federal level, family and medical leave became a prominent issue in partisan politics. In the 1988 election, George Bush expressed opposition to the bill and won the presidency, but Democrats who supported the bill won a majority in Congress as well. With added impetus from the passage of a childcare bill in 1990, Democrats brought Schroeder's leave bill to the floor and passed it in both chambers, only to face a presidential veto.[183] In 1992, with family values rhetoric dominating the election and Bill Clinton campaigning in support of the bill, Democrats in Congress passed it again to "bait" another veto from Bush. This time, the Senate overrode the veto, but the House failed to do so. Congress passed the bill for the third time in 1993, and it became the first major piece of legislation signed by the newly elected President Clinton.[184]

To summarize, there were two developments during 1978–93 where the civil rights policy regime influenced the strategic action and policy demands of political actors (as shown in rows 4–6 of Table 1). First, in the early 1980s, opponents challenged state pregnancy leave laws in the courts, advancing an interpretation that the antidiscrimination logic embedded in Title VII and the PDA invalidated these laws. In response, advocates diverged in their attempts to reconcile state leave laws with the antidiscrimination logic. Second, during 1984–93, advocates turned to a legislative strategy. Advocates insisted on a gender-neutral leave bill that would withstand legal challenges, and they decided to propose an unpaid leave bill because paid leave seemed unfeasible at the time. During legislative debates, advocates agreed to compromise on wage compensation, eligibility restrictions, and leave duration, but never on gender neutrality. A gender-neutral bill entailed pooling distinct types of leave; this enabled the addition of leave to care for ill family members. The unpaid, gender-neutral, broad-coverage model was adopted in many states during 1986–92 and was finally enacted federally as the FMLA in 1993.

5.4. Family and medical leave since 1993

The legacy of the FMLA and its state counterparts in expanding social protection has been mixed. The number of workers with access to job-protected leave did increase significantly after the passage of the FMLA.[185] However, family and medical leave policy continues to exclude many low-income workers due to the lack of wage compensation and the large number of workers exempted under the law's small-employer and tenure provisions.[186] As of 2020, about 89 percent of the civilian workforce had access to unpaid family leave, but only 21 percent had access to paid family leave.[187] Catherine Albiston has shown that cultural conceptions of work, gender, and disability have informed the behavior of courts and employers with respect to leave policy, hindering many workers from accessing leave benefits. However, Albiston has also shown that the FMLA created a framework of meaning that enabled workers to recognize collective grievances and mobilize rights in negotiations with employers.[188]

The impact of the FMLA's policy design on subsequent policy development, however, is clear and significant. Between 2002 and 2020, nine states and Washington, DC, passed paid family and medical leave laws, and all have retained the gender-neutral and broad-coverage design. Four of these new laws created a system for paid family leave benefits by expanding existing TDI programs, and six created or will create new tax-funded social insurance programs. In all cases, the paid benefit system was layered onto provisions in existing unpaid leave laws.[189] The most prominent federal proposal for paid leave, the Family and Medical Insurance Leave (FAMILY) Act, adds a tax-funded social insurance component to the existing gender-neutral, broad-coverage model.[190] This kind of layering is what policy advocates hoped for during the campaign for the FMLA, although the wave of paid leave legislation arrived later than they had hoped.[191]

The impact of the policy design formulated in the 1980s can also be seen in the recent wave of short-term paid leave policies that have been adopted in several municipalities and states since the early 2000s. Commonly referred to as "earned sick time" or "paid sick days," these policies allow employees to accrue paid sick days at a set rate per hour worked, which employers are required to pay for. As they only provide a few days of leave per year, these policies are not a replacement for long-term family and medical leave. However, it is notable that most paid sick days laws have borrowed the broad-coverage design of the FMLA, including provisions stating that sick days can be used for pregnancy and caregiving purposes.[192]

This is not to say that possibilities for alternative policy designs were completely foreclosed. In the late 1990s, a slew of paid leave proposals focused only on parental leave, largely in response to a Clinton administration regulation that enabled states to utilize

[181]Steven K. Wisensale and Michael D. Allison, "An Analysis of 1987 State Family Leave Legislation: Implications for Caregivers of the Elderly," *The Gerontologist* 28, no. 6 (December 1, 1988): 780. Only Massachusetts included paid benefits in its proposed law.

[182]For sources, see Appendix C. Vermont, which passed the last pregnancy-specific leave law in 1989, amended its law into a gender-neutral family and medical leave law in 1992.

[183]Elving, *Conflict and Compromise*, chaps. 9–10.

[184]Ibid., chaps. 11–15.

[185]Jane Waldfogel, "Family Leave Coverage in the 1990s," *Monthly Labor Review* 122, no. 10 (1999): 13–21.

[186]Wen-Jui Han and Jane Waldfogel, "Parental Leave: The Impact of Recent Legislation on Parents' Leave Taking," *Demography* 40, no. 1 (2003): 191–200; Ann O'Leary, "How Family Leave Laws Left Out Low-Income Workers," *Berkeley Journal of Employment and Labor Law* 28, no. 1 (2007): 1–62.

[187]U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2020* (Washington, DC: U.S. Department of Labor, Bureau of Labor Statistics, September 2020), table 31.

[188]Catherine R. Albiston, *Institutional Inequality and the Mobilization of the Family and Medical Leave Act: Rights on Leave* (New York: Cambridge University Press, 2010).

[189]A Better Balance, *Overview of Paid Family & Medical Leave Laws*. For an example of model state-level legislation supported by the contemporary paid leave advocacy coalition, see A Better Balance and National Partnership for Women & Families, "Model State Paid Family and Medical Leave Statute," 2015, https://www.nationalpartnership.org/our-work/economic-justice/state-paid-leave-laws.html.

[190]National Partnership for Women & Families, *Fact Sheet: The Family and Medical Insurance Leave (FAMILY) Act*.

[191]Lenhoff and Becker, "Family and Medical Leave Legislation in the States," 439–40; Lenhoff and Bell, "Government Support for Working Families and for Communities," 13–14. For an account of early efforts at adopting paid leave policies following the passage of the FMLA, see Bernstein, *The Moderation Dilemma*, ch. 6.

[192]National Partnership for Women & Families, *Expecting Better*.

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surplus unemployment insurance as wage replacement for new parents taking leave.[193] Since the 2000s, however, the design of the FMLA has become further entrenched as new paid leave enactments followed its model and advocates remained firmly committed to it. In 2017, when the Trump administration proposed a six-week paid parental leave policy funded through the unemployment insurance system, the contemporary advocacy coalition expressed strong opposition for this pared-down approach.[194] In 2020, the federal government created a temporary paid leave program that covered medical and caregiving needs related to COVID-19. Advocates pushed for stronger protections—including coverage of more types of leave and job protection guarantees—and used the opportunity to advance their campaign for a permanent, comprehensive guarantee of paid family and medical leave.[195]

6. Discussion and conclusion

In this article, I have argued that the gender-neutral and broad-coverage design of family and medical leave policy in the United States is explained by its origins in contestation over the civil rights policy regime. The emergence of the civil rights policy regime in the 1960s provided advocates with new resources: They could formulate demands based on the new policy logic and advance their claims in new venues by pressuring the institutions charged with civil rights enforcement to adopt their demands. Advocates' decision to use these resources in the early 1970s launched a policy development process that unfolded over the next two decades. As Table 1 shows, advocates reformulated their demands in each stage, in response to gains and losses from previous stages. The decision to use resources from the civil rights policy regime ultimately acted as a constraint on advocates, as they had to contend with other actors' competing interpretations and claims. As the process unfolded, advocates moved between venues and levels of government to advance their goal of securing job-protected leave for pregnant workers.

When the FMLA was finally passed into law in 1993, on the heels of state-level policy adoption during 1986–92, it marked a rare example of a new social policy program being created in an era of retrenchment. The limitations of the law—its lack of paid benefits and eligibility restrictions—reflected the challenges that advocates faced in a political environment dominated by conservative Republicans and business interests. It is striking that an advocacy coalition was able to pass a leave bill in this context. Their commitment to the legislation and their insistence on its gender-neutral design were the result of earlier advocates' creative interpretation and application of the civil rights policy regime to the issue of maternity leave in the 1970s.

The analysis of this case suggests that American political development scholars should pay greater attention to the impact of the civil rights policy regime on social policy. Several domain-specific studies have shown that civil rights law has been used to challenge discriminatory barriers in existing social policies such as higher education subsidies, homeownership policies, public assistance programs, and labor protections.[196] As this case has shown, civil rights law has also influenced the development of *new* social policies. In addition to family and medical leave, another area where this has occurred is disability policy.[197] While these developments have been studied separately, we lack a systematic analysis of the advantages, limitations, and downstream consequences of a civil rights approach to social policy expansion.[198] Such a systematic analysis is particularly worthwhile, given that many organizations in the civil rights movement of the mid-twentieth century had a "dual agenda" of achieving antidiscrimination protections and expanding social welfare provision.[199]

Theoretically, this article underscores how advocates, acting as policy entrepreneurs, can transpose resources across policy domains in creative and consequential ways. This case study offers an example of this kind of horizontal boundary-crossing by policy entrepreneurs. The outcome of this policymaking process, the FMLA, fits more neatly into the "social welfare" or "labor standards" domains than into "civil rights," which can obscure the crucial impact of the latter domain on the design of the policy. By tracing the historical origins of advocates' commitments and remaining open to the potential relevance of multiple policy domains, scholars can better explain how distinctive policy design features emerge. Analyzing boundary-crossing by advocates also shows the value of actor-centered theories of institutional change. Without attention to the agency of those who applied an antidiscrimination logic when formulating a demand for maternity leave, we cannot explain the gender-neutral and broad-coverage design of leave policy.

[193]Steven K. Wisensale, "Two Steps Forward, One Step Back: The Family and Medical Leave Act as Retrenchment Policy," *Review of Policy Research* 20, no. 1 (March 1, 2003): 135–52.

[194]National Partnership for Women & Families, "More Than 340 Organizations Urge Congress to Support Real Paid Leave, Reject Trump's 'Inadequate and Unworkable' Proposal," press release, June 28, 2017, https://www.nationalpartnership.org/our-impact/news-room/press-statements/more-than-340-organizations-urge-congress-to-support-real-paid-leave-reject-trumps-inadequate-and-unworkable-proposal.html; Claire Cain Miller, "Republicans Now Support a Form of Paid Leave. So What's the Holdup?" *The New York Times*, November 21, 2019.

[195]See, for example, PL+US, "With Emergency Paid Leave Expired, PL+US Urges Biden-Harris Administration to Prioritize Paid Leave in Coronavirus Relief Package," press release, January 12, 2021; Vicki Shabo and Steven Findlay, "Paid Sick Days and Paid Leave Are Health and Economic Recovery Requirements," *The Hill*, May 5, 2020, https://thehill.com/opinion/healthcare/496129-paid-sick-days-and-paid-leave-are-health-and-economic-recovery; Katie Bethell and Becka Klauber Richter, "Biden's Proposed Stimulus Package Includes Paid Leave and Childcare Support. These Policies Need to Be Permanent," *Business Insider*, January 24, 2021, https://www.businessinsider.com/biden-stimulus-paid-family-leave-childcare-support-permanent-policy-2021-1.

[196]Deondra Rose, *Citizens By Degree: Higher Education Policy and the Changing Gender Dynamics of American Citizenship* (New York: Oxford University Press, 2018); Chloe N. Thurston, *At the Boundaries of Homeownership: Credit, Discrimination, and the American State* (New York: Cambridge University Press, 2018); Karen M. Tani, *States of Dependency: Welfare, Rights, and American Governance, 1935–1972* (New York: Cambridge University Press, 2016); Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* (Princeton, NJ: Princeton University Press, 2007).

[197]Edward D. Berkowitz, "A Historical Preface to the Americans with Disabilities Act," *Journal of Policy History* 6, no. 1 (1994): 96–119; Jennifer L. Erkulwater, *Disability Rights and the American Social Safety Net* (Ithaca, NY: Cornell University Press, 2006); Howard, *The Welfare State Nobody Knows*, ch. 4; Thomas F. Burke and Jeb Barnes, "Layering, Kludgeocracy and Disability Rights: The Limited Influence of the Social Model in American Disability Policy," *Social Policy and Society* 17, no. 1 (2017): 1–16.

[198]This case study offers some initial suggestions. One possible advantage is that the civil rights policy regime offered advocates of social policy expansion new resources during a period of social policy retrenchment when creating new social insurance programs was difficult. One possible limitation is that the civil rights policy regime does not offer a bridge to redistributive policy design, since making an antidiscrimination claim generally requires pointing to some group that is already receiving a benefit in order to claim that benefit for another group. As such, the logic is not easily applied to the creation of comprehensive redistributive programs. One possible downstream consequence is that a civil rights approach to social policy expansion reinforces the public-private welfare state, where many social protections are delegated to private actors or rely on market mechanisms. Since the enforcement mechanisms of the civil rights policy regime generally involve the use of regulatory authority, it is more readily used to affect the behavior of private actors than to create complex public programs.

[199]Dona Cooper Hamilton and Charles V. Hamilton, *The Dual Agenda: Race and Social Welfare Policies of Civil Rights Organizations* (New York: Columbia University Press, 1997).

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In advancing its argument, this article has also offered a reconceptualization of "policy regimes" and introduced the concept of the "civil rights policy regime." Referring to a policy regime instead of a particular policy instrument has several advantages for the analysis of this case. First, the concept draws our attention to the causal role of a policy logic embedded in multiple policy instruments. It was not only Title VII but also Fourteenth Amendment jurisprudence, antidiscrimination regulations, and state employment discrimination statutes that played a role in this process. As they advanced their claims, advocates also embedded the antidiscrimination logic in additional regulations and statutes, further expanding the scope of the policy regime. Second, the concept emphasizes how the political institutions charged with interpreting and enforcing policy logics become venues for contestation. Since the antidiscrimination logic was embedded in multiple policy instruments, evoking it enabled advocates to advance their claims in a variety of venues, including the EEOC, state antidiscrimination agencies and legislatures, the courts, and Congress. Third, the concept reminds us that as political actors accept the presence of a policy logic over time, they may develop and advance conflicting interpretations of it. The alternative interpretations of the antidiscrimination logic advanced by opponents, which were sometimes accepted by courts, forced advocates to respond and reformulate their policy demands. This contestation influenced advocates' commitment to the policy design feature of gender neutrality.

Insofar as they offered limited social protection to workers, the FMLA and state leave laws were only partial victories for advocates. However, their distinctive policy design features continue to shape the development of leave policy. With more states adopting paid leave policies in the twenty-first century, the United States is finally beginning to incorporate paid maternity benefits in its social insurance system, as advocates envisioned and other countries did in the early twentieth century. Since these paid leave programs have retained the gender-neutral and broad-coverage features of the FMLA, the United States will remain cross-nationally distinctive in its leave policy. To understand why these features have persisted, we must recognize the creative and strategic ways in which advocates deployed the civil rights policy regime during the 1970s–90s.

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