

# INVENTING THE “TRADITIONAL CONCEPT” OF SEX DISCRIMINATION

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This Article is about the so-called “traditional concept” of sex discrimination: the idea that an employment practice constitutes discrimination “on the basis of sex” only if it treats all men one way and all women another way. This concept of sex discrimination exerts an enormous influence over contemporary employment discrimination law. It constrains the law’s understanding of what constitutes discrimination “on the basis of sex,” and makes it difficult for plaintiffs to prove that they have been the victim of such discrimination. Courts insist that this is the only neutral and objective interpretation of Title VII’s ban on sex discrimination because it is the “traditional” interpretation: it is how the legislators who enacted Title VII in 1964 understood the concept of discrimination. This Article draws on extensive original primary-source research to demonstrate that, in fact, this concept of discrimination is neither neutral nor “traditional.” It was an argument originally, and explicitly, constructed by employers in the late 1960s in order to limit the reach of antidiscrimination law. When courts in the 1970s began to transform this argument into doctrine, however, they told a different story about its origins. They asserted that this formalistic conception of discrimination was deeply rooted in the American legal tradition, whereas more substantive or sociological accounts of discrimination reflected normative judgments rather than neutral legal interpretation. This Article shows that the “traditional concept” of sex discrimination is itself the product of a set of normative judgments about how forcefully, if at all, antidiscrimination law should seek to combat employment practices that enforce traditional conceptions of men and women’s sex and family roles. In fact, this concept is the product of resistance: rather than being a neutral interpretation of Title VII’s prohibition on sex discrimination, it is an argument whose original purpose, and continuing effect, is to limit the scope of that prohibition.

## **Serena Mayeri, Marriage as the Foundation of Constitutional Sex Equality Law**

Many of the landmark constitutional sex equality cases of the 1970s involved individuals or couples seeking to make the rights and responsibilities of marriage equally available to husbands and wives. Taken together, these cases established that, under constitutional equal protection guarantees, the government may not allocate benefits based on what historians often call the “family wage” model—a household containing a husband/father/breadwinner and a (dependent) wife/mother/homemaker. That so many of the 1970s sex equality cases involved married couples and government benefits is not surprising. Marriage was a key site of the sexbased

inequalities feminists were attacking. Marriage—and the family wage model—were also central to the allocation of government benefits as well as to public policy more generally. At the same time, important transformations in the social meaning and demographics of marriage, divorce, cohabitation, date from this period. Challenges to gender roles, heterosexual hegemony, and traditional sexual mores abounded. Some observers feared (or hoped) that marriage and the nuclear family were on the verge of extinction. More radical reformers dreamed of marriage’s abolition, and of a fundamental restructuring of family relationships. But feminist legal reforms to marriage were just that—reforms—designed not to abolish the institution but to make it more egalitarian. Though changes in marriage’s form and function persisted and arguably accelerated during the 1970s, Americans emerged from the no-fault, sexual, and civil rights “revolutions” of the 1960s and 1970s as committed to marriage as ever. This paper, part of a larger project on challenges to the “hegemony” of marriage from the 1960s to the present, is a preliminary exploration of the role of marriage and non-marriage in 1970s constitutional litigation.

## **Deborah Dinner, The Neo-Maternalist Turn: The Legal Feminist Crisis in the Reagan Era**

This paper re-examines the crisis among legal feminists in the mid-1980s that erupted in response to the Supreme Court case of *California Savings & Loan v. Guerra*. The conventional

narrative is that *Cal Fed* divided legal feminists between ideological adherents of equal treatment

and special treatment. I argue that the internal controversy within legal feminism resulted not from an inherent ideological divide so much as from a division of strategies and priorities, in response to external constraints and opportunities.

*Cal Fed* involved an employer's claim that the Pregnancy Discrimination Act of 1978 (PDA) preempted a California state law guaranteeing pregnancy disability leave to female workers. Some feminist organizations agreed with the employer that the PDA's equal treatment mandate conflicted with California's provision of more generous leave to pregnant workers than other temporarily disabled workers. By contrast, other feminist organizations argued that the state law remedied the disparate impact that the dearth of leave had on women workers.

The split within legal feminists resulted from the obstacles posed by increasingly conservative federal courts and the opportunities posed by social conservatism in state legislatures. Reagan appointees to the federal courts evinced narrow interpretations of the PDA, which largely foreclosed disparate impact claims that might have yielded more expansive leave policies for all workers. At the same time, a neo-maternalist strain in the larger political culture sought to mitigate advances in legal sex equality, maternal employment, and changing gender roles, with renewed state protection for motherhood. Neo-maternalism overcame business opposition to greater protections for pregnant women, when extending such protections to all workers proved politically infeasible. Market conservatism within the courts and social conservatism within the state legislature made it impossible to synthesize feminist commitments to social protection and sex equality. Feminists divided over the question of which these commitments to prioritize.