The Genesis of *Sail'er Inn* in the California Constitution

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To the majority of men who convened in Sacramento in late September 1878, the concept of "women's rights" was foreign indeed. Their minds were preoccupied with such matters as California's economic turmoil, the burgeoning Working Man's Party, the corruptive power of government and corporations, and the elimination of Chinese labor. Most of them considered the role of women to be well-established by legal precedent and societal customs; a proper woman was limited to maternity and the domestic sphere, under the protection of her husband.

Nonetheless, the final version of California's 1879 constitution contained two major sections dealing with what would today be called "women's rights," and a brief reference in a third section prohibiting a specific form of gender discrimination. In the face of the vehement antagonism to women's suffrage in the 1878 convention, it seems anomalous that an employment provision, fairly far-reaching in its implications, generated so little controversy among the delegates when it was offered as an amendment. Article XX, Section 18 in its final form provided that "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession." During discussion in Committee of the Whole concerning the proposals that later became Article XX: Miscellaneous Subjects, Charles Ringgold of San Francisco offered this new section prohibiting disqualification for business on the basis of sex. The proposed addition was adopted without reported discussion,[1] and the amendment was later concurred in, again without discussion, by the entire convention, on February 20, 1879.

Article XX, Section 18 had a long history of judicial interpretation—sometimes to establish that the constitutional provision meant what it said, and sometimes to limit its applicability in situations where regulations stemmed from what the court saw as a reasonable exercise of the police power or a necessary protection and preservation of the public health. The first of these interpretations was not long in coming.

Regardless of the provision in the newly adopted constitution of 1879, the San Francisco Board of Supervisors, in mid-1880, passed an

ordinance prohibiting the employment of females in places where beer or hard liquor was sold. California's highest court, in *In the Matter of Mary Maguire*,[2] held that the language of the ordinance plainly incapacitated a woman from pursuing a business lawful for men, and hence was "in conflict with and inconsistent with the Constitution, and therefore void." The contention that the inhibition on Mary Maguire's employment was not on account of sex, but on account of its immorality, was rejected by the court on the grounds that such arguments are an attempt "to do that by indirection which cannot be done directly."

The man who challenged a Stockton ordinance a decade later was not so fortunate as Mary Maguire. The city of Stockton's ordinance fixed a higher rate for the licensing of saloons where females were employed, and intoxicating liquors were sold in quantities less than one quart, than for saloons where women were not employed.[3] The California Supreme Court found nothing unfair, unreasonable, or arbitrary in this ordinance, perceiving it to be a valid exercise of the police power in regulating the employment of women. There was no allusion to the fact that economic discouragement of the employment of women was simply another form of doing by indirection what could not be done directly. The city of San Francisco also found an indirect means of reinstating its ordinance by making it unlawful to sell liquor in places where there is dancing or where musical, theatrical, or other public exhibitions are given and where females attend as waitresses. A challenge to this ordinance on the basis of discrimination against women in the matter of employment was disallowed on the grounds of police power in regulating intoxicating beverages.[4]

Erosion of Article XX, Section 18 continued into the early twentieth century as California joined other states in the wave of so-called protective labor laws. Limitation of working hours,[5] and establishment of minimum wages for women were upheld, the latter added in 1914 as a constitutional provision not repealed until 1976 (Article XX, Section 17 1/2).

What was left of Article XX, Section 18 was further restricted in 1918 by an appellate court decision (with hearing by the supreme court subsequently denied) upholding an Oakland rule that "In the case of the marriage of a woman employed by the board of education, her position shall at once become vacant. . . ."[6] Without responding to the constitutional basis for the petition—namely, that the rule operated as a restraint

upon marriage and discrimination against women in violation of the direct prohibition of Article XX, Section 18—the court noted that in California, "boards of education may exercise an unlimited discretion in the employment and dismissal of teachers under like employment with appellant," and that thus "the power of the board to discharge plaintiff was unrestricted and absolute."

Finally, in the landmark 1971 case *Sail'er Inn v. Kirby*,[7] the wheel came full circle. In a unanimous opinion by Justice Peters, the California Supreme Court returned to the thinking of Justice Thornton in *Matter of Maguire*, noting that "Well before the turn of the century this court enunciated the meaning and effect to be given this section of the Constitution in a case quite similar to the instant one." After extensive quotations from *Maguire*, Justice Peters ruled that "section 18 does not admit of exceptions based on popular notions of what is a proper, fitting or moral occupation for persons of either sex. . . . [M]ere prejudice, however ancient, common or socially acceptable" is not a justification for discrimination. Elaborating on the point, Justice Peters responded to many of the arguments made in the long line of cases progressively restricting Section 18. "The desire to protect women from the general hazards inherent in many occupations," he said, "cannot be a valid ground for excluding them from those occupations under section 18." Legal restrictions on employment opportunities based on "chivalrous concern for the well-being of the female half of the adult population" are discriminatory.

But the most significant aspect of *Sail'er Inn v. Kirby* is the interpretation of the "equal protection" clauses of the federal and state constitutions in their applicability to the use of gender as a classification. The case dealt with two provisions of the Declaration of Rights of the 1879 constitution, Article I, Section 11 ("All laws of a general nature shall have a uniform application"), and Section 21 ("No special privileges or immunities may ever be granted which may not be altered, revoked, or repealed by the legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.") Although the California Constitution was amended in 1976, the judicial interpretation in *Sail'er Inn v. Kirby* is equally applicable to the new Section 7 of Article I, which prohibits the denial of equal protection of the laws.

The unanimous 1971 *Sail'er Inn* decision first analyzed the proper standard of review for classifications under the equal protection clause. In "cases involving 'suspect classifications' or touching on 'fundamental interests,' the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." The *Sail'er Inn* court then probed the reasons for strict scrutiny in classifications based on sex. "Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by accident of birth . . . the characteristic frequently bears no relation to ability to perform or contribute to society." The conclusion drawn is that "sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment."[8]

The importance of declaring sex a suspect classification is that the "reasonable" basis of the earlier decisions that eroded the impact of Article XX, Section 18, and of other laws prohibiting gender-based discrimination, is no longer applicable in California. Instead, the "strict standard" of review demanded by a suspect classification requires that the state bear "the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose."[9] In *Sail'er Inn*, the court found no compelling state interest for prohibiting women from being employed as bartenders and struck down the statute as violative of the state constitution.

NOTES

[1]Willis and Stockton, *Debates and Proceedings of the Constitutional Convention of the State of California, 1878* (State Printing Office, 1880), II, 1395.

[2]57 Cal. 604.

[3]*Ex parte M. Felchin*, 96 Cal. 360.

[4]*Ex parte Joseph Hayes*, 96 Cal. 555.

[5]*In the Matter of the Application of F. A. Miller*, 162 Cal. 687.

[6]*Catania v. Board of Education*, 37 Cal.App. 593, at 594.

[7]5 Cal.3d 1.

[8]5 Cal.3d 1, at 16, 18, 20.

[9]5 Cal.3d 1, at 16-17, quoting *Westbrook v. Mihaly*, 2 Cal.3d 765, at 784-785.