NOTE

Looking for Mr. Bobb: Equal Protection and Gender-Based Discrimination in *Bobb v. Municipal Court*

*By Karen A. Wells**

Introduction

In *Bobb v. Municipal Court*,[1] the California Court of Appeal[2] overturned a judgment of contempt[3] entered against Carolyn Bobb, a prospective juror who refused to answer questions during voir dire[4] about her marital status and husband's occupation.[5] Only women were asked these questions.[6] The judge asked Carolyn Bobb "Do you have a Mr. Bobb—is there a Mr. Bobb?" and "What is your husband's occupation?"[7] One appellate justice held that the questions violated equal protection of the law[8] as guaranteed by the California Constitution[9] and the Fourteenth Amendment of the United States Constitution.[10] Another justice concurred in the judgment, but did not reach the equal protection

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1. 143 Cal. App. 3d 860, 192 Cal. Rptr. 270 (1983).

2. The California Supreme Court is the state's highest court. The California Court of Appeal, an intermediate appellate court, is divided into six districts, which are further subdivided into divisions. CAL. CONST. art. VI, §§ 1-3. This Note analyzes a decision of the Court of Appeal, First District, Division Two.

3. The judgment of contempt was entered by the municipal court and later affirmed by the superior court for Monterey County, Salinas Division. 143 Cal. App. 3d at 863, 192 Cal. Rptr. at 271.

4. The phrase "voir dire," literally "to speak the truth," "denotes the preliminary examination which the court may make of one presented as a witness or juror, where his competency, interest, etc. is objected to." BLACK'S LAW DICTIONARY 1412 (5th ed. 1979).

5. *See infra* note 14.

6. 143 Cal. App. 3d at 862, 192 Cal. Rptr. at 270.

7. *Id.* at 862-63, 192 Cal. Rptr. at 270-71.

8. *See infra* notes 22-47 and accompanying text.

9. For the text of the relevant provisions of the California Constitution, see *infra* note 34.

10. For the text of the Fourteenth Amendment of the United States Constitution, see *infra* note 35.

issue.[11] A third justice found that no constitutional issue was involved.[12] The California Supreme Court denied a hearing.[13]

This Note evaluates the approaches taken by the three appellate justices in *Bobb v. Municipal Court*. These approaches demonstrate that judicial sensitivity to gender discrimination may be important to the outcome of equal protection challenges.

Part I summarizes the facts of *Bobb* and reviews the three opinions. The next two parts trace the historical development of the equal protection guarantee as it relates to gender-based discrimination, first under the United States Constitution and then under the California Constitution. This historical overview continues with a discussion of gender-based discrimination issues raised in California appellate courts since 1971 and concludes with further examination of *Bobb*. Finally, part IV evaluates the role of judicial sensitivity in equal protection analysis in gender-based discrimination cases and argues for greater sensitivity and continued strict scrutiny in these cases.

I. *Bobb v. Municipal Court*

A. The Facts

Carolyn Bobb, an attorney, appeared for jury duty in Monterey County, California, on January 26, 1982. As the municipal court judge conducted voir dire, Bobb noticed that he questioned only women jurors about their marital status and their spouses' occupations. When she was called to the jury box as a prospective juror, Bobb refused to answer these questions.[14]

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11. *See infra* notes 48-60 and accompanying text.

12. *See infra* notes 61-69 and accompanying text.

13. An order of the California Supreme Court denying a petition for transfer to that court after a decision by a court of appeal "may be taken as an approval of the conclusion there reached, but not necessarily of all of the reasoning contained in that opinion." Eisenberg v. Superior Court, 193 Cal. 575, 578, 226 P. 617, 618 (1924).

14. The voir dire, conducted by the trial judge, proceeded as follows:

The Court: Miss Bobb, what is your occupation?
Miss Bobb: I'm an attorney.
The Court: And in your practice do you practice criminal law as well as civil law?
Miss Bobb: No, I practice entirely bankruptcy law.
The Court: All right. Is there a Mr. Bobb?
Miss Bobb: I have some difficulty with that question because I've noticed only the women have been asked to answer that.
The Court: Yes, I know. Do you have a Mr. Bobb—is there a Mr. Bobb?
Miss Bobb: Are you going to pool [sic] the men to see if they care to disclose—
The Court: No, I'm just going to ask you if you have a husband or not. Do you have a husband?
Miss Bobb: I don't care to answer it then. What's relative to women is relative to men.
The Court: Yes, I know. What is your husband's occupation?
Miss Bobb: I don't care to answer that.
The Court: I instruct you to answer.

After a brief colloquy, the judge held Bobb in contempt of court, and she was taken to a holding facility. Approximately fifteen minutes later, she was released on her own recognizance, on the condition that she return to court for sentencing.[15] At the hearing that afternoon, Bobb requested a continuance in order to obtain counsel and to do research.[16] The court denied the continuance. Bobb then attempted to explain her objections to the court's questioning.[17] Although the judge acknowledged her sincerity, he repeated his belief that the questions were valid and held that Bobb's refusal to answer the questions constituted contempt of court.[18] He then sentenced her to one day in jail.[19]

Miss Bobb: I don't think I should.
The Court: I've got—you understand that you'll be in contempt of Court—jury—you're an attorney, you understand these rules, don't you?
Miss Bobb: No, I do not understand why only the women are asked certain questions and the men aren't asked the same questions.
The Court: The question to you, Mrs. Bobb—you're an attorney at law, you understand the rules and regulations of—of—of being an attorney. And the question to you now simply is: What is your husband's occupation?
Miss Bobb: I refuse to answer.
The Court: You're held in contempt of Court, Mrs. Bobb.

143 Cal. App. 3d at 862-63, 192 Cal. Rptr. at 270-71.

15. *Id.* at 863, 192 Cal. Rptr. at 271.

16. *Id.* It is unclear from the *Bobb* opinion whether Bobb specified the issues she wished to research. It may be assumed that she wished to research her right to refuse to answer discriminatory questions. Since Bobb apparently had been released late in the morning and the afternoon hearing took place at 3:00 p.m., she had little time for research. *Id.*

17. *Id.* These portions of Bobb's explanations at the sentencing hearing were set forth in Presiding Justice Kline's opinion:

> What I was objecting to . . . was the inference . . . that [women] would be influenced by their spouse and the men, on the other hand, . . . wouldn't be influenced by their spouses because you had no questions of any man . . . as to what their spouses did. And, I felt this line drawn between the men and women prospective jurors this morning very, very strongly. And I was hoping I wouldn't be called . . . to the jury box because I knew I would have to object. I had wanted to keep my objections to possibly a letter to you afterwards, but, unfortunately, when my name was called and I had to go forth and answer the questions, I had to decide whether I was going to participate in this or not and I elected not to and I don't feel as a citizen I have to . . . . I did not come in here to make a statement. I'm not known for my espousal of erratical [sic] causes. All I know is it just hurt my gut. And that's why I took the stand I did.

Id. at 871, 192 Cal. Rptr. at 276-77 (Kline, J., concurring) (ellipses in original).

18. *Id.* at 863, 192 Cal. Rptr. at 271. The responses of the municipal court judge included these statements:

> I think you're honest about that and—that does give me some feelings for this too. If you were a person who just thumbed their nose at authority, just flat because it's authority, then I would see it a different way. But I don't see it in that way with you. I think you're a woman of high principles and an attorney of high principles and that you've done this feeling that, in your own mind, justifiably, that you were going to make a stand and you did make the stand . . . . You raise no grounds—no reason why you should not answer those questions—any constitutional reasons that would tend to incriminate you or any such privilege you may have. Consequently, the Court had no alternative but to feel that you were directly opposed to answer the question by your own will. You just did not want to answer the question. You weren't going to. And that's contemptuous of the Court's power . . . . I under-

Bobb petitioned the superior court for a writ of certiorari and requested that the order of the municipal court be annulled and set aside. The superior court denied the petition and affirmed the municipal court's contempt judgment.[20] Bobb then appealed. The California Court of Appeal reversed the judgment of contempt on June 14, 1983.[21]

B. Justice Miller's Opinion: Embracing Equal Protection Analysis

On appeal, Bobb argued "that the questions put to her, when administered in a gender-neutral context, were constitutionally valid."[22] However, she contended that when the questions were posed as part of a discriminatory pattern, they constituted a denial of equal protection.[23] Bobb reasoned that the municipal court exceeded its jurisdiction when it ordered her to answer the questions. She therefore maintained that she did not act in contempt of court when she refused to obey the municipal court's unconstitutional order.[24] Bobb cited several cases in which the United States Supreme Court reversed contempt citations that were based on unconstitutional court orders.[25] Although the Monterey superior court found these cases "inapposite" to Bobb's situation, on appeal

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stand your position, as a matter of fact, I agree with your position, and have all along."

Id. at 871-72, 192 Cal. Rptr. at 277 (Kline, J., concurring) (ellipses in original).

19. *Id.* at 863, 192 Cal. Rptr. at 271.

20. *Id.* (Superior Court of Monterey County, No. 77832, Edmund J. Leach, Jr.).

21. *Id.* at 860, 192 Cal. Rptr. at 270.

22. *Id.* at 863-64, 192 Cal. Rptr. at 271.

23. *Id.* Bobb cited Yick Wo v. Hopkins, 118 U.S. 356 (1886), in which the Court struck down San Francisco ordinances which made it unlawful to operate laundries without the city's consent except in brick or stone buildings. Approximately 240 out of San Francisco's 320 laundries were owned by Chinese aliens and about 310 of the 320 were constructed of wood. *Id.* at 358-59. The facts established "an administration directed so exclusively against a particular class of persons" as to require a conclusion that, whatever the intent behind the ordinances, they were applied with "a mind so unequal and oppressive as to amount to a practical denial by the State" of equal protection. *Id.* at 373.

Bobb's argument demonstrates a basic element of equal protection analysis: the requirement of some form of discrimination (unequal treatment of similarly situated persons or groups). Discrimination is a "failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored." BLACK'S LAW DICTIONARY 420 (5th ed. 1979). *See infra* notes 117 & 121-22 and accompanying text. If the judge had asked the potential jurors of both sexes the same questions about marital status and spouse's occupation, no discrimination would have occurred.

24. 143 Cal. App. 3d at 864, 192 Cal. Rptr. at 271.

25. *Id.* Bobb cited: Hamilton v. Alabama, 376 U.S. 650 (1964) (per curiam), *rev'g Ex parte* Hamilton, 275 Ala. 574, 156 So. 2d 926 (1963); Johnson v. Virginia, 373 U.S. 61 (1963) (per curiam) (reversing a conviction of contempt for a black man's refusal to comply with a judge's instructions to sit in the section of the courtroom reserved for blacks); *In re* Berry, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968) (granting a writ of habeas corpus to release four persons charged with criminal contempt for violating a temporary restraining order which forbade union picketing activity).

Justice Miller considered them "directly on point."[26]

Justice Miller found the facts in *Hamilton v. Alabama*[27] "the most analogous" to the situation confronting Bobb.[28] In *Hamilton*, a black woman was called on her own behalf at a hearing on a petition for writ of habeas corpus. She refused to answer questions on cross-examination because the examining attorney addressed her as "Mary" instead of "Miss Hamilton."[29] The municipal court judge held her in contempt, fined her, and sentenced her to five days in jail.[30] The conviction was later reversed by the United States Supreme Court.[31] Justice Miller agreed with Bobb's argument, based on *Hamilton* and similar cases, that "a court which issues an unconstitutional order acts in excess of its jurisdiction and, accordingly, there is no contempt of court on the part of one who refuses to obey such an order."[32]

Justice Miller then analyzed the *Bobb* facts to determine whether the municipal court's contempt order violated equal protection principles.[33] After acknowledging that the relevant provisions of the Califor-

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26. 143 Cal. App. 3d at 864, 192 Cal. Rptr. at 272.

27. *Ex parte* Hamilton, 275 Ala. 574, 156 So. 2d 926 (1963), *rev'd sub nom.* Hamilton v. Alabama, 376 U.S. 650 (1964) (per curiam).

28. 143 Cal. App. 3d at 864, 192 Cal. Rptr. at 271.

29. The cross-examination of Mary Hamilton was as follows:

Q What is your name, please?
A Miss Mary Hamilton.
Q Mary, I believe—you were arrested—who were you arrested by?
A My name is Mary Hamilton. Please address me correctly.
Q Who were you arrested by, Mary?
A I will not answer a question—
BY ATTORNEY AMAKER: The witness's name is Miss Hamilton.
A —your question until I am addressed correctly.
THE COURT: Answer the question.
THE WITNESS: I will not answer them unless I am addressed correctly.
THE COURT: You are in contempt of court—
ATTORNEY CONLEY: Your Honor—your Honor—
THE COURT: You are in contempt of this court, and you are sentenced to five days in jail and a fifty dollar fine.

275 Ala. 574, 574, 156 So. 2d 926, 926 (1963).

30. *Id.*

31. 376 U.S. 650 (1964). The Court's per curiam disposition consisted of this brief announcement, not accompanied by a full opinion: "The petition for writ of certiorari is granted. The judgment is reversed. Johnson v. Virginia, 373 U.S. 61." In *Johnson*, the Court had reversed, on equal protection grounds, a contempt citation for a spectator's refusal to comply with a judge's order to move to a section of the courtroom reserved for blacks. The *Hamilton* majority apparently relied on *Johnson* to show: (1) a court order based on a denial of equal protection of the laws is unconstitutional; and (2) a person who refuses to obey such an order cannot be held in contempt merely for the refusal. Justice Black's concurrence in *Hamilton* cited four cases reversing contempt convictions on due process grounds. 376 U.S. at 650 (Black, J., concurring). Three Justices would have denied certiorari in *Hamilton*. *Id.* at 650 (Clark, Harlan, & White, JJ., dissenting).

32. 143 Cal. App. 3d at 864, 192 Cal. Rptr. at 271.

33. *Id.* at 864-65, 192 Cal. Rptr. at 272. Justice Miller went directly to the "standard of review" issue. He did not analyze threshold issues that were not before the court: whether

nia Constitution[34] are substantially equivalent to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution,[35] he noted that the California provisions " 'are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable.' "[36] *Bobb* presented this type of case, for California equal protection provisions demand "a standard of review different from that applied by federal courts[37] under the Fourteenth Amendment in cases

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state action was involved; whether there was discrimination between persons who were similarly situated; and whether plaintiff was a member of a suspect class.

The facts of *Bobb* clearly establish the presence of state action since, for Fourteenth Amendment purposes, state action "refers to exertions of state power in all forms." Shelley v. Kraemer, 334 U.S. 1, 20 (1948). "State judicial action is as clearly 'state' action as state administrative action." Bell v. Maryland, 378 U.S. 226, 255 (1964) (Douglas, J., concurring).

The municipal court judge in *Bobb* did not deny that he had differentiated between women and men during voir dire. 143 Cal. App. 3d at 862, 192 Cal. Rptr. at 270. The state apparently did not argue that potential female jurors and potential male jurors were not similarly situated. Finally, Carolyn Bobb, as a woman, was obviously a member of a suspect class under California law. *See infra* notes 117-22 & 168-73 and accompanying text.

34. CAL. CONST. art. I, § 7: "(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . ; (b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens."

35. U.S. CONST. amend. XIV, § 1 provides, in pertinent part:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

36. 143 Cal. App. 3d at 864, 192 Cal. Rptr. at 272 (quoting Serrano v. Priest, 18 Cal. 3d 728, 764, 557 P.2d 929, 950, 135 Cal. Rptr. 345, 366 (1976), *cert. denied*, 432 U.S. 907 (1977)). In *Serrano*, the California Supreme Court noted that, as to fundamental civil liberties, the state supreme court sits as a court of last resort, " 'subject only to the qualification that [its] interpretations may not restrict the guarantees accorded the national citizenry under the federal charter.' " *Serrano*, 18 Cal. 3d at 764, 557 P.2d at 950, 135 Cal. Rptr. at 366 (quoting People v. Longwill, 14 Cal. 3d 943, 951 n.4, 538 P.2d 753, 758 n.4, 123 Cal. Rptr. 297, 302 n.4 (1975)). California courts will look first to California law. Decisions of the United States Supreme Court defining fundamental rights are persuasive authority, but are to be followed by California courts only when they provide no less protection than that guaranteed by California law. *Serrano*, 18 Cal. 3d at 764, 557 P.2d at 950, 135 Cal. Rptr. at 366.

In *Serrano*, plaintiffs challenged school district funding that was based on assessed property values in each district. The court applied strict scrutiny to discrimination in educational opportunity because, under California law, wealth-based discrimination is a suspect classification and education is a fundamental right. *Id.* at 765-66, 557 P.2d at 951, 135 Cal. Rptr. at 367. *See infra* notes 109-11 and accompanying text for discussion of the doctrine of independent state grounds.

37. The United States Supreme Court has developed an intermediate tier of analysis for gender-based discrimination. *See infra* notes 103-08 and accompanying text.

which involve classifications based on gender."[38] The standard of review in California cases is

> the traditional two-tier test of equal protection, [by which] distinctions involving "suspect classifications" or classifications that impair "fundamental rights" will be subjected to strict scrutiny by the courts, and [by which] the state will be required to bear the heavy burden of showing both that it has a compelling interest which justifies the classification and that the classification is necessary to further that compelling interest.[39]

Justice Miller quoted extensively[40] from *Sail'er Inn, Inc. v. Kirby*,[41] the pivotal California case which held that gender-based distinctions are suspect classifications subject to the strict scrutiny standard of review.[42]

Justice Miller noted that the California Supreme Court "has consistently reaffirmed" its *Sail'er Inn* holding and observed that "courts have consistently held that if a classification involves either a suspect classifi-

38. 143 Cal. App. 3d at 864-65, 192 Cal. Rptr. at 272. As support for this statement, Justice Miller cited Molar v. Gates, 98 Cal. App. 3d 1, 12, 159 Cal. Rptr. 239, 245 (1979). In *Molar*, the court applied the strict scrutiny standard of review and determined that female inmates of the county jail must be assigned to jail facilities and granted privileges comparable to those available to male prisoners. *Id.* at 20, 159 Cal. Rptr. at 251.

39. 143 Cal. App. 3d at 865, 192 Cal. Rptr. at 272.

40. *Id.* at 865-66, 192 Cal. Rptr. at 272-73.

41. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (en banc). In *Sail'er Inn*, the California Supreme Court held unconstitutional a statute that made it unlawful to hire women as bartenders. Liquor license holders sued the state agency that administered the statute, arguing that the statute violated the state constitution by barring persons from pursuing a lawful occupation solely because of gender. The court held that the statute violated equal protection guarantees:

> Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.
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> Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities.

Id. at 18-19, 485 P.2d at 540-41, 95 Cal. Rptr. at 340 (citations and footnotes omitted).

42. "The California Supreme Court [in *Sail'er Inn, Inc. v. Kirby*] was the first to declare unequivocally that sex is a suspect classification requiring strict scrutiny." Comment, *Camping on Adequate State Grounds: California Ensures the Reality of Constitutional Ideals*, 9 SW. U.L. REV. 1157, 1182 (1977). The California Supreme Court's "unanimous decision in *Sail'er Inn v. Kirby* is the most far-reaching state court decision on the subject of sex discrimination, and seems destined for landmark status." Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 686 (1971).

cation *or* fundamental interest, strict scrutiny must be applied."[43] Since gender-based discrimination is a suspect classification under California law, Justice Miller rejected the state's contention that, because jury service is not a fundamental right, the strict scrutiny standard should not be applied.[44]

Applying strict scrutiny to the voir dire of Carolyn Bobb, Justice Miller found that the questions, as asked, rested on an assumption of inferiority, much like the assumption of inferiority in *Hamilton*:

> [N]o significant difference can be seen between ordering a witness to submit to an attorney's imposition of a "relic of slavery" such as addressing blacks only by their first names, and ordering only female prospective jurors to announce their marital status and husbands' occupations which is likewise a relic of a bygone age when women were presumed incapable of independent thought. Both orders reinforce a stigma of inferiority and second-class citizenship.[45]

Justice Miller noted the absence of any compelling state interest for the classification and held that the lower courts had violated Bobb's right to equal protection.[46] As a result, he concluded that Bobb was "justified in her refusal to comply with [the] discriminatory questioning" and that the contempt judgment should be reversed.[47]

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43. 143 Cal. App. 3d at 866, 192 Cal. Rptr. at 273 (emphasis original). Once again, Justice Miller cited Molar v. Gates, 98 Cal. App. 3d 1, 159 Cal. Rptr. 239 (1979). He pointed out that minimum security jail facilities and related prisoner privileges were not fundamental rights, yet the court still applied strict scrutiny because the facilities and privileges were provided differentially, based upon gender. 143 Cal. App. 3d at 866-67, 192 Cal. Rptr. at 273. Justice Miller also noted that in Inmates of Sybil Brand Institute for Women v. County of Los Angeles, 130 Cal. App. 3d 89, 102, 181 Cal. Rptr. 599, 605 (1982), the court applied strict scrutiny to Los Angeles County's differential treatment of female and male prisoners. 143 Cal. App. 3d at 867, 192 Cal. Rptr. at 273.

44. 143 Cal. App. 3d at 866, 192 Cal. Rptr. at 273. In *Sail'er Inn*, the California Supreme Court emphasized that employment is a fundamental right, but its holding did not depend on this determination. 5 Cal. 3d at 20, 485 P.2d at 541, 95 Cal. Rptr. at 341.

45. 143 Cal. App. 3d at 866, 192 Cal. Rptr. at 273.

46. *Id.* at 867, 192 Cal. Rptr. at 273-74.

> Applying the strict scrutiny standard to the case at bench, respondent does not suggest and we cannot think of any compelling governmental interest for posing one set of questions to female jurors but not to male jurors. Clearly, administrative convenience cannot justify a suspect classification in the face of the strict scrutiny test. The fact that counsel was free to ask the men the same questions as were put to the women does not alter the fact that the judge initiated and reinforced the practice of special treatment for female jurors.

Id. (citation omitted).

47. *Id.* at 867, 192 Cal. Rptr. at 274. Bobb also contended that her due process rights were violated by the municipal court's denial of a continuance. Justice Miller did not find it necessary to address that contention since the court reversed the contempt conviction on equal protection grounds. *Id.*

C. Presiding Justice Kline's Opinion: Avoiding Equal Protection Analysis

Presiding Justice Kline agreed that the lower court judgment should be reversed, but stated that Justice Miller had "reached the right result for the wrong reason."[48] Justice Kline thought it "unnecessary to reach the constitutional issue"[49] and would not have sustained the contempt judgment "even if persuaded the [municipal] court's questioning were constitutionally valid."[50] Justice Kline believed that "the most significant issue raised by this case relate[d] more to the proper treatment of jurors than the rights of women."[51] Consequently, he avoided equal protection analysis by focusing on the role and treatment of jurors and on the nature of the court order challenged by Bobb.

Justice Kline cautioned that "the summary contempt power is the ultimate judicial weapon and must therefore be employed with great prudence and caution, lest it be improperly used to stifle freedom of thought and speech."[52] Furthermore, the judicial system must respect "the diverse views that are today commonly and properly represented on a venire in this state."[53] In Justice Kline's view, a contempt action against a juror required a specific wrongful intent, lest a criminal penalty be imposed for "conscientious commitment to principle."[54] Justice Kline reviewed the initial interchange between Bobb and the municipal court

48. *Id.* (Kline, J., concurring).

49. *Id.* Justice Kline cited three cases for the principle that a "court will not decide a constitutional question unless such construction is absolutely necessary." *Id.* at 867 n.1, 192 Cal. Rptr. at 274 n.1. In People v. Williams, 16 Cal. 3d 663, 547 P.2d 1000, 128 Cal. Rptr. 888 (1976), and in Palermo v. Stockton Theatres, Inc., 32 Cal. 2d 53, 195 P.2d 1 (1948), the California Supreme Court did not decide the constitutional questions presented because statutory construction achieved the results sought by the parties raising the constitutional questions. In *In re* Estate of Johnson, 139 Cal. 532, 73 P. 424 (1903), a determination as to standing disposed of the case. The *Palermo* majority noted that it is not "good judicial practice" to gratuitously make an opportunity to reach or declare constitutional questions. 32 Cal. 2d at 66, 195 P.2d at 9. However, three of the seven justices on the *Palermo* court would have reversed on the additional ground of unconstitutionality. *Id.* at 66, 195 P.2d at 9 (Gibson, C.J., Carter & Traynor, JJ., concurring). The general rule of not reviewing matters unnecessary to a decision has been riddled by numerous exceptions. *See* 6 B. WITKIN, CALIFORNIA PROCEDURE §§ 224-25 (2d ed. 1971). There were no statutory or jurisdictional issues in *Bobb*, and the court did not have to "make an opportunity" to reach the constitutional question.

50. 143 Cal. App. 3d at 868, 192 Cal. Rptr. at 274 (Kline, J., concurring).

51. *Id.* Justice Kline overlooked the extent to which the rights of women intersect with the proper treatment of jurors. Absolute exclusion of women from jury participation continued in three states until the late 1960's and exemptions were common in many states until recently. B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, WOMEN'S RIGHTS AND THE LAW 264-65 (1977).

52. 143 Cal. App. 3d at 868, 192 Cal. Rptr. at 274 (Kline, J., concurring). Justice Kline's reference to First Amendment rights shows that he did not avoid constitutional issues altogether.

53. *Id.* at 869, 192 Cal. Rptr. at 275.

54. *Id.*

judge, a colloquy which Justice Kline estimated "could not have lasted much longer than a minute and a half,"[55] and found that "[n]owhere in the order appealed from is there any statement regarding petitioner's intent or any indication that her conduct was insolent, rude or disrespectful."[56]

After surveying reported cases,[57] Justice Kline concluded that it was inappropriate to punish Bobb for refusing to answer particular questions for reasons of conscience,[58] particularly when other alternatives were available.[59] Because Bobb asserted a moral principle "respectfully and in good faith," Justice Kline concurred in the judgment setting aside the contempt order.[60]

D. Justice Rouse's Dissenting Opinion: Rejecting Equal Protection Analysis

Justice Rouse determined that "the only issue before this court is whether appellant had the right to refuse to answer the questions 'Do you have a husband?' and 'What is [his] occupation?' "[61] The "refusal to answer such innocuous questions" was not "a matter of constitutional dimension."[62] Justice Rouse observed that "as a trial lawyer and a trial judge," he "asked similar questions of prospective jurors on many occasions, blissfully unaware of the sinister nature of the inference now ascribed to them by appellant." He concluded that these questions were "a proper area of inquiry."[63]

Justice Rouse found the *Hamilton* case "readily distinguishable" from the *Bobb* facts because "the court's behavior toward Mrs. Hamilton

55. *Id.* at 871, 192 Cal. Rptr. at 276.

56. *Id.* at 870, 192 Cal. Rptr. at 276. Justice Kline dismissed the fact that Bobb was an attorney, since "jurors serve only in their capacity as citizens." *Id.* at 872, 192 Cal. Rptr. at 277.

57. Justice Kline found no cases on point; the few reported cases in which prospective jurors were held in contempt of court involved concealment or wilful misstatement of facts during voir dire. *Id.* at 872 n.7, 192 Cal. Rptr. at 277 n.7. Justice Kline examined analogous cases involving prospective jurors cited for contempt for refusal to serve and found that motive and intent were important factors in these cases. *Id.* at 872-73, 192 Cal. Rptr. at 277-78.

58. *Id.* at 873, 192 Cal. Rptr. at 278.

59. Justice Kline mentioned these alternatives: (1) to put the question in issue to male as well as female jurors, "as counsel were sure to do in any case"; (2) to excuse Bobb from service on the case; and (3) to pass the question objected to and leave further questioning to counsel. *Id.* at 874, 192 Cal. Rptr. at 278-79.

60. *Id.* at 875, 192 Cal. Rptr. at 279. Justice Kline limited his decision to "the uncommon situation in which a prospective juror, acting upon moral principle, is conscientiously and in good faith unwilling to fully participate in voir dire for an articulate reason rationally related to the asserted principle and does so in a respectful manner." Justice Kline stated that his rule would not "deprive the courts of any power essential to [their] function." *Id.*

61. *Id.* at 875, 192 Cal. Rptr. at 280 (Rouse, J., dissenting).

62. *Id.*

63. *Id.*

was personally demeaning with racial overtones," whereas in Bobb's case "there was nothing demeaning to appellant, either in the questions themselves or in the manner in which they were asked."[64]

Furthermore, Justice Rouse found Bobb's refusal to answer "a courteous, but nonetheless defiant"[65] criticism of the trial judge's way of conducting his court, a criticism inappropriate at that time and in that place. As an attorney, Bobb was an officer of the court and her act of defiance was a challenge to the presiding officer's authority.[66] Although he found the sanction "somewhat severe," Justice Rouse felt that this matter should be left to the trial court's discretion.[67]

Finding all the requisite elements of contempt present in *Bobb*,[68] and seeing no reasonable alternative for handling Bobb's behavior, Justice Rouse voted to affirm the contempt judgment.[69]

II. The Fourteenth Amendment of the United States Constitution

Bobb sought to overturn her contempt conviction on equal protection grounds, but her arguments did not persuade all three justices. The three opinions illustrate that a court may embrace equal protection analysis, avoid it, or reject it. The history of the Fourteenth Amendment and the language of the Equal Protection Clause shed some light on the varying responses and explain why equal protection has been "a fertile source of Supreme Court business."[70]

64. *Id.* at 876, 192 Cal. Rptr. at 280. Justice Rouse's conclusion suggests that a judge's values have a significant impact on equal protection analysis. Contrast his assertion that there was nothing demeaning in the questions asked of Carolyn Bobb with Bobb's own statement that she objected to the inference that women are influenced by their spouses' opinions, while men are not so influenced, an inference that "hurt [her] gut." *Id.* at 871, 192 Cal. Rptr. at 276-77. Katherine Stoner, the ACLU cooperating attorney who argued the case before the court of appeal, said "The attack was on her dignity as a person . . . . The underlying assumption is that women have no independent legal status and don't have the ability to think for themselves. It harks back to the idea that a woman loses her identity when she marries." Rasmussen, *Jailed Woman Juror Cleared of Contempt*, ACLU News, Aug.-Sept. 1983, at 5. *See also* Howell, *Inadmissible Evidence*, MS. MAGAZINE, Feb. 1984, at 19 ("Bobb's case could be called one of the relics of male domination").

65. 143 Cal. App. 3d at 876, 192 Cal. Rptr. at 280 (Rouse, J., dissenting).

66. *Id.* In contrast, Justice Kline believed that Bobb's status as an attorney was irrelevant. *See supra* note 56.

67. 143 Cal. App. 3d at 876, 192 Cal. Rptr. at 280 (Rouse, J., dissenting).

68. *Id.* at 876-77, 192 Cal. Rptr. at 280-81. Justice Rouse derived the elements of contempt from a lower federal court case, United States v. Cantillon, 309 F. Supp. 700, 703 (C.D. Cal. 1970). These elements were: (1) disruption of the court's judicial business; (2) deliberate refusal to answer by one aware of the duty to answer; and (3) an order by the court that the individual answer.

69. 143 Cal. App. 3d at 877, 192 Cal. Rptr. at 281 (Rouse, J., dissenting).

70. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972).

In 1868, Congress added the Fourteenth Amendment to the United States Constitution. The Amendment contained three significant clauses in section one that limited governmental power: the Privileges or Immunities Clause; the Due Process Clause; and the Equal Protection Clause. Of the three, only the Equal Protection Clause "added new language to the Constitution," and "[i]t alone is found in virtually all the forms of the proposed amendment in the Thirty-ninth Congress. . . . [I]t was the common meeting ground of those who carried the Amendment through the Thirty-ninth Congress."[71] The Fourteenth Amendment provides simply that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[72]

A. Development of the Two-Tiered Approach

1. Early Limitations and the Rational Basis Standard

In 1873, the *Slaughter-House Cases*[73] gave the Supreme Court its first significant opportunity to interpret the Fourteenth Amendment. The Court relied on historical grounds to reject plaintiffs' equal protection arguments against the creation of an exclusive monopoly to operate stockyards in New Orleans:

> We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause]. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.[74]

This restrictive reading of the Equal Protection Clause severely limited its scope. Indeed, years after the *Slaughter-House Cases*, Justice Holmes described the Equal Protection Clause as "the usual last resort of constitutional arguments."[75]

In the decades following the *Slaughter-House Cases*, the Supreme Court developed a standard of review that reflected its restrictive view of

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71. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 341-42 (1949).

72. U.S. CONST. amend. XIV, § 1. See *supra* note 35 for the complete text of the amendment.

73. 83 U.S. (16 Wall.) 36 (1873) (butchers in New Orleans sought relief from a Louisiana statute that created a 25 year monopoly for one slaughterhouse, conferring privileges on a few while depriving many of the right to exercise their trade).

74. *Id.* at 81.

75. Buck v. Bell, 274 U.S. 200, 208 (1927) (Holmes, J).

> It is the usual last resort of constitutional arguments to point out shortcomings of this sort [unequal effect on different groups]. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow.

Id.

the Equal Protection Clause. The Court determined that "the 14th Amendment does not prevent the states from resorting to classification for the purposes of legislation"[76] and that equal protection demands only *reasonableness* in legislative and administrative classifications.[77] This approach is often described as the rational basis standard of review. In an early case, the Court formulated the standard as follows:

> 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion . . . .
> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.
> 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.[78]

Since this interpretation of "reasonableness" was quite permissive, "the original test afforded virtually no scope for review" of governmental classifications.[79]

Later, the Supreme Court explained that "the classification . . . must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[80] This more demanding formulation of the test permitted some scope for review, but in practice courts continued to defer to legislative determinations and required only minimal rationality in the nature of the classification, as "tested by the classification's ability to serve the purposes intended by the legislative or administrative rule."[81]

The rational basis standard comprises the first tier of the two-tier test of equal protection which ultimately developed.[82]

2. *The Strict Scrutiny Test*

In 1949, scholars declared that "after eighty years of relative desue-

76. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (held unconstitutional a Virginia statute that taxed domestic corporations doing business within and without the state on the basis of income from all sources, while domestic corporations doing business solely outside the state were completely exempt from taxation).

77. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 994 (1978).

78. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911) (New York statute regulating pumping of mineral waters held not to violate equal protection guarantee).

79. L. TRIBE, *supra* note 77, at 995.

80. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

81. L. TRIBE, *supra* note 77, at 995.

82. *See supra* note 39 and accompanying text. Recent Supreme Court cases indicate that a "middle" tier of Equal Protection Clause review has developed. *See infra* notes 103-08 and accompanying text.

tude, the equal protection clause is now coming into its own."[83] Nevertheless, most courts continued to apply the permissive rational basis standard and to reject equal protection claims except in the context of racial discrimination.[84] In the 1960's, however, a "new equal protection" standard evolved.[85] Under this new analysis, governmental classifications that involve suspect classes[86] or that abridge fundamental rights[87] are subject to strict judicial scrutiny.[88] In these cases, the state bears the heavy burden of showing that the classification is necessary to further a compelling governmental interest.[89] This analysis is often described as the strict scrutiny standard of review.

Early cases limited suspect classes to racial classifications, in accordance with the early view that the Fourteenth Amendment was meant to remedy wrongs inflicted upon blacks.[90] However, by the late 1960's the Court had recognized new suspect classifications, such as alienage.[91] In *San Antonio Independent School District v. Rodriguez*,[92] the Court listed the indicia of a suspect class: whether the class is saddled with disabilities, relegated to "political powerlessness," or subjected to "a history of purposeful unequal treatment."[93]

While the rational basis test has proved to be so permissive that classifications are seldom held to violate equal protection under that standard, strict scrutiny review has proved to be so strict that classifications seldom satisfy it.[94] "[T]he aggressive 'new' equal protection . . . was 'strict' in theory and fatal in fact."[95]

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83. Tussman & tenBroek, *supra* note 71, at 341.

84. Gunther, *supra* note 70, at 8.

85. *Id. See also* J. BAER, EQUALITY UNDER THE CONSTITUTION 112-13 (1983).

86. A suspect class is a class which is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

87. The Court describes a fundamental right as a right "among the rights and liberties protected by the Constitution" and as one "explicitly or implicitly guaranteed by the Constitution." *Id.* at 29, 33-34.

88. Gunther, *supra* note 70, at 8.

89. *See* Forrester, *Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645, 646 (1975).

90. *See supra* note 74 and accompanying text. *See also* L. TRIBE, *supra* note 77, at 1012.

91. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971) ("classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny").

92. 411 U.S. 1 (1973).

93. *Id.* at 28.

94. "[T]here are very few cases which strictly scrutinize and yet uphold instances of impaired fundamental rights." L. TRIBE, *supra* note 77, at 1000. See *supra* notes 86-87 for definitions of *suspect class* and *fundamental right*.

95. Gunther, *supra* note 70, at 8.

The strict scrutiny standard comprises the second tier of the two-tier test of equal protection.

B. Equal Protection and Gender-Based Discrimination

Gender-based discrimination has posed a special problem for the Supreme Court. On the one hand, women appear to meet the criteria described in *San Antonio Independent School District v. Rodriguez*, since, as a class, women have been subjected to "a history of purposeful unequal treatment," have been relegated to "a position of political powerlessness," and are "saddled with . . . disabilities."[96] However, a majority of the Supreme Court has never recognized gender as a suspect classification and does not require strict scrutiny of gender-based differentiations.

1. Early Protectionism

The Court's reluctance to recognize gender as a suspect classification may be rooted in the early protectionist attitude courts and legislatures held toward women.[97] In an early Supreme Court case sustaining an Illinois law that denied women the right to practice law, a concurring opinion illustrated the philosophy underlying protectionist laws:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . [The] paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.[98]

This paternalistic view resulted in laws that limited women's working hours,[99] restrained women from engaging in occupations like bartending,[100] and excluded women from jury duty unless they elected to register.[101] These laws were largely immune from attack under the Equal Protection Clause because courts applied the permissive rational basis

96. 411 U.S. at 28.

97. For a historical survey of protectionism in the United States, see Comment, *Equal Protection of the Sexes in Kentucky: The Effect of the* Hummeldorf *Decision on a Woman's Right to Choose Her Surname*, 9 N. KY. L. REV. 475, 478-81 (1982); *see also* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 20, 485 P.2d 529, 541, 95 Cal. Rptr. 329, 341 (1971) (en banc) ("The pedestal upon which women have been placed has all too often . . . been . . . a cage.").

98. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

99. Muller v. Oregon, 208 U.S. 412 (1908).

100. Goesaert v. Cleary, 335 U.S. 464 (1948) (statute allowed a woman to work as a bartender only if she was the wife or daughter of the male owner).

101. Hoyt v. Florida, 368 U.S. 57 (1961). *See also supra* note 51.

standard.[102]

2. *Toward a Middle-Tier of Analysis*

In the past decade, the Court's deference to gender-based classification has waned. However, rather than recognize gender as a suspect classification, the Court has developed a middle-tier of equal protection review. While the standard is "clearly more intensive than the deference" of the rational basis test, it is still "less demanding than the strictness" of the strict scrutiny test.[103] The new standard is

> "intermediate" with respect to both ends and means: where ends must be "compelling" to survive strict scrutiny, "important" objectives are enough here; and where means must be "necessary" under the new equal protection, and merely rationally related under the old equal protection, they must be "substantially related" to survive the intermediate level of review.[104]

The evolution of this middle-tier standard has allowed the Court to exercise flexibility in gender discrimination cases. For example, the Court has continued to apply a rational basis type of analysis when it wishes to uphold ameliorative gender-based classifications that compensate for past discrimination against women.[105] In effect, the Court is able to apply "strict scrutiny for purely discriminatory classifications and permissive review for ameliorative classifications."[106] Some scholars, and some

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102. Note, *The Emerging Bifurcated Standard for Classifications Based on Sex*, 1975 DUKE L.J. 163, 163-64.

103. G. GUNTHER, CASES AND MATERIALS ON INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 294 (3d ed. 1981). This middle-tier scrutiny occurs when the Court finds "bite" in the Equal Protection Clause "after explicitly voicing the traditionally toothless minimal scrutiny standard." Gunther, *supra* note 70, at 18-19. *See also* Choper, *Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645, 658-59 (1975) (describing a "newer equal protection" consisting of a "minimal rationality- with-bite approach" and characterized by the application of "greater scrutiny than [the Court] asserted"); J. BAER, *supra* note 85, at 118-26.

104. G. GUNTHER, *supra* note 103, at 294. The new standard has been applied primarily in gender discrimination cases, but similar intermediate standards have been applied to classifications based on illegitimacy and alienage. *Id.*

105. *See, e.g.*, Califano v. Webster, 430 U.S. 313, 317 (1977) ("Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as . . . an important governmental objective").

106. Note, *supra* note 102, at 186-87. *Compare* Reed v. Reed, 404 U.S. 71, 75-77 (1971) (statutory preference for men as administrators of estates is unconstitutional gender discrimination); Frontiero v. Richardson, 411 U.S. 677, 682-88 (1973) (requirement that female service personnel prove spouses are dependents is unconstitutional gender discrimination); Weinberger v. Wiesenfeld, 420 U.S. 636, 642-45 (1975) (Social Security provision favoring women as dependents but not as wage earners is unconstitutional gender discrimination); Stanton v. Stanton, 421 U.S. 7, 13-17 (1975) (statute requiring child support of female children to age 18 and male children to age 21 is unconstitutional gender discrimination); Craig v. Boren, 429 U.S. 190, 199-204 (1976) (different legal drinking ages for females and males is unconstitutional gender discrimination); Califano v. Goldfarb, 430 U.S. 199, 207-09 (1977) (Social Secur-

Supreme Court Justices, theorize that the Court is working toward a universal intermediate standard to replace the two-tier test entirely.[107] Uncertainty prevails.[108]

III. Equal Protection Under the California Constitution

A. Strict Scrutiny of Gender-Based Classifications

Although the equal protection guarantee of the California Constitution has been interpreted as substantially equivalent to that of the United States Constitution, the doctrine of independent state grounds[109] permits California "to determine, without federal review, whether its constitution provides suspect classifications or fundamental interests beyond those found at the federal level, since such a determination expands upon

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ity death benefits paid to women regardless of dependency but to men only if dependent is unconstitutional gender discrimination); *and* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-33 (1982) (exclusion of men from nursing school is unconstitutional gender discrimination) *with* Kahn v. Shevin, 416 U.S. 351, 355-56 (1974) (state tax law favoring widows is constitutional); Schlesinger v. Ballard, 419 U.S. 498, 505-10 (1975) (federal law providing servicewomen with longer period to earn promotions is constitutional); Califano v. Webster, 430 U.S. 313, 316-20 (1977) (per curiam) (statute favoring women in computation of Social Security old-age benefits is constitutional); *and* Michael M. v. Superior Court, 450 U.S. 464, 468-73 (1981) (statute making only men liable for statutory rape is constitutional).

107. *See* Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring); Vlandis v. Kline, 412 U.S. 441, 458 (1973) (White, J., concurring); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting); J. BAER, *supra* note 85, at 281; G. GUNTHER, *supra* note 103, at 293-95.

108. Justice O'Connor's presence on the Supreme Court is an element in the uncertainty. In Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), Justice O'Connor wrote the majority opinion (Burger, C.J., and Blackmun, Powell & Rehnquist, JJ., dissenting). The Court held that a state statute that excluded males from a state-supported professional nursing school violated the Equal Protection Clause of the Fourteenth Amendment. Justice O'Connor applied the middle-tier analysis. *Id.* at 724. She appeared to oppose ameliorative gender-based classifications:

> [The test] must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

Id. at 724-25. However, she qualified this position by saying that "[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Id.* at 728. In *Hogan*, there was no showing that women were disproportionately burdened, and, therefore, the law was unconstitutional. *Id.* at 729.

109. The doctrine of adequate and independent state grounds is based on "the principle that federalism, embodied in the ninth and tenth amendments of the United States Constitution, dictates that the states are the ultimate expositors of state law as long as their interpretations do not conflict with, or infringe upon federally guaranteed rights." Comment, *supra* note 42, at 1157. "Expansive state treatment is most likely to occur in areas left open by the United States Supreme Court. Terms such as 'suspect classification' . . . illustrate vague Court guidelines that are highly susceptible to expansive interpretation by the states." *Id.* at 1162.

rather than discriminates against federal guarantees."[110]

California courts have relied upon the doctrine of independent state grounds in deciding gender-based discrimination cases since the landmark decision of *Sail'er Inn* in 1971. In that case the court held that "classifications based upon sex should be treated as suspect."[111] The court compared classifications based on sex to classifications designated by the Supreme Court as suspect and concluded that gender should be a suspect class: sex, "like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth."[112] Sex "frequently bears no relation to ability to perform or contribute to society," and "the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members."[113] The court also found that all suspect classifications, including sex, carry with them an underlying "stigma of inferiority and second class citizenship."[114] Thus, under California law, gender-based classifications receive closer scrutiny than they receive under the United States Constitution. Suspect classifications are "presumptively invidious,"[115] and the state has the burden of demonstrating that its classifications have been precisely tailored to serve compelling governmental interests.[116]

Despite this demanding standard, gender-based discrimination claims do not prevail automatically. Claimants must first meet the preliminary requirements for equal protection actions in general. The California Supreme Court has held that the "prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups

110. *Id.* at 1169. The Supreme Court recently affirmed the validity of the independent state grounds doctrine: "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." Michigan v. Long, 103 S. Ct. 3469, 3475 (1983). However, Justice O'Connor announced a new rule in *Long*:

> [W]hen the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. at 3476.

111. 5 Cal. 3d at 17, 485 P.2d at 539, 95 Cal. Rptr. at 339. *See also supra* notes 41-42.

112. 5 Cal. 3d at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340.

113. *Id.*

114. *Id.* at 19, 485 P.2d at 540, 95 Cal. Rptr. at 340. The court cited examples of the severe legal and social disabilities imposed on women, blacks, aliens, and the poor: denial of the right to vote; ineligibility to serve as jurors; exclusion from employment and educational opportunities; and disadvantages in laws relating to property, contracts, and business ownership. *Id.* at 19, 485 P.2d at 540-41, 95 Cal. Rptr. at 340-41.

115. Darces v. Woods, 35 Cal. 3d 871, 886, 679 P.2d 458, 467, 201 Cal. Rptr. 807, 816 (1984) (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982)).

116. *Id.*

in an unequal manner."[117] This prerequisite showing contains three separate and equally important components: (1) state action; (2) similarly situated persons or groups; and (3) discrimination (classification has an unequal effect). Every equal protection claim is subject to a threshold analysis of these components.

The state action component is satisfied when the equal protection claimant demonstrates the presence of legislation, adjudication, executive act, or administrative conduct.[118] Nonlegislative action is more likely to discriminate subtly because "no official use" is made of a suspect classification. When this occurs, the record may leave a suspect classification as the only plausible explanation for governmental conduct.[119]

The second component, that similarly situated persons or groups are affected by the classification, requires an analysis of where the persons or groups stand with respect to the legitimate purpose of the law.[120] In this component, courts must determine whether different people share common characteristics in relation to a legislative or administrative goal.

The final component, discrimination, requires an analysis of how the state's classification affects similarly situated people. While case law does not reveal a formula, California courts have not required the unequal effect of a suspect classification to reach any particular level of disadvantage.[121] In fact, strict scrutiny is required "irrespective of the nature of the interest implicated because [suspect] classifications in and of themselves are an affront to the dignity and self-respect of the members of the class set apart for disparate treatment."[122]

Thus, the California Supreme Court's landmark holding in *Sail'er Inn* did not remove all obstacles to gender discrimination claims. Claim-

117. *In re* Eric J., 25 Cal. 3d 522, 530, 601 P.2d 549, 553, 159 Cal. Rptr. 317, 320 (1980) (emphasis original).

118. L. TRIBE, *supra* note 77, at 1025.

119. *Id.*

120. 25 Cal. 3d at 530-31, 601 P.2d at 553, 159 Cal. Rptr. at 321. The "similarly situated" component has been analyzed most often in criminal cases, e.g., People v. Macias, 137 Cal. App. 3d 465, 473, 187 Cal. Rptr. 100, 104 (1982) (persons convicted of different crimes are not similarly situated for equal protection purposes). For an interesting noncriminal case, see Johnson v. California St. Dep't of Social Servs., 123 Cal. App. 3d 878, 177 Cal. Rptr. 49 (1981). The *Johnson* court held that parents of children in day nurseries are not "similarly situated" to parents of children in public schools for purposes of state regulations proscribing corporal punishment of children in private nurseries while permitting corporal punishment in public schools with parental consent. 123 Cal. App. 3d at 884-85, 177 Cal. Rptr. at 52-53.

121. One member of the United States Supreme Court has argued that an equal protection claim should receive strict scrutiny or intermediate scrutiny only if the claim is "serious." Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 742 (1982) (Powell, J., dissenting). However, the majority of the Court rejected that requirement: "[T]he analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual Members of the Court." *Id.* at 724 n.9 (O'Connor, J.).

122. Molar v. Gates, 98 Cal. App. 3d 1, 16, 159 Cal. Rptr. 239, 248 (1979).

ants must first demonstrate state action affecting similarly situated persons in an unequal manner. Only then may courts apply strict scrutiny to a gender-based classification.

B. Application of Strict Scrutiny Since *Sail'er Inn*

Sail'er Inn effected "significant statutory readjustments," but "judicial repercussions have been limited to a handful of cases."[123] Since 1971, at least ten claims of equal protection in the context of gender-based discrimination have reached the California appellate courts.[124] In most of these cases, threshold requirements were not at issue on appeal, and courts were able to use the strict scrutiny standard to invalidate discriminatory statutes and practices,[125] just as Justice Miller did in *Bobb*.

For example, in *Arp v. Workers' Compensation Appeals Board*,[126] the California Supreme Court considered the constitutionality of a workers' compensation law that applied a conclusive presumption of total dependency to widows but not to widowers of deceased employees. The court examined the threshold issue of whether men and women were similarly situated with regard to the purpose of the statute.[127] The state agency argued that men and women were not similarly situated because of past economic discrimination against women and that the statute's purpose was to compensate women for the continuing consequences of this discrimination.[128] The court, however, determined that the provision was based on an "outmoded" presumption[129] that wives are dependent on their husbands. It declared this presumption "the relic of an era in which the majority of persons—certainly the majority of those in posi-

123. Comment, *supra* note 42, at 1182.

124. *See, e.g.*, Arp v. Workers' Compensation Appeals Bd., 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977) (en banc); Hiatt v. City of Berkeley, 130 Cal. App. 3d 298, 181 Cal. Rptr. 661 (1982); Molar v. Gates, 98 Cal. App. 3d 1, 159 Cal. Rptr. 239 (1979); Cotton v. Municipal Court, 59 Cal. App. 3d 601, 130 Cal. Rptr. 876 (1976); Boren v. California Dep't of Employment Dev., 59 Cal. App. 3d 250, 130 Cal. Rptr. 683 (1976); Eckl v. Davis, 51 Cal. App. 3d 831, 124 Cal. Rptr. 685 (1975); Hardy v. Stumpf, 37 Cal. App. 3d 958, 112 Cal. Rptr. 739 (1974); Allyn v. Allison, 34 Cal. App. 3d 448, 110 Cal. Rptr. 77 (1973); and People v. Olague, 31 Cal. App. 3d Supp. 5, 106 Cal. Rptr. 612 (1973) (disapproved in Cotton v. Municipal Court, 59 Cal. App. 3d 601, 607, 130 Cal. Rptr. 876, 880 (1976)); *see also* People v. Superior Court (Hartway), 19 Cal. 3d 338, 347-54, 562 P.2d 1315, 1319-23, 138 Cal. Rptr. 66, 70-74 (1977) (en banc) (women prostitutes made a claim of gender-based discrimination in the special context of discriminatory law enforcement but failed to prove that they were deliberately singled out for prosecution and that the prosecution would not have been pursued but for a discriminatory design); People v. Municipal Court (Street), 89 Cal. App. 3d 739, 750-51, 153 Cal. Rptr. 69, 75-76 (1979) (women prostitutes made a prima facie showing of discriminatory prosecution and were entitled to a discovery order giving them access to prosecution statistics).

125. *See infra* notes 126, 136-42 and accompanying text.

126. 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977) (en banc).

127. *Id.* at 403, 563 P.2d at 853, 138 Cal. Rptr. at 297.

128. *Id.* at 403-04, 563 P.2d at 853, 138 Cal. Rptr. at 297.

129. *Id.* at 405-06, 563 P.2d at 854, 138 Cal. Rptr. at 299.

tions of power—accepted as axiomatic that 'the God of nature made woman frail, lovely and dependent . . . .' "[130]

Finding men and women similarly situated with respect to the legitimate purpose of the law, the court applied strict scrutiny to the classification.[131] It found no compelling governmental interest in treating widows and widowers differently, because there was no evidence that the legislature intended ameliorative economic redress.[132] In addition, even if the alleged ameliorative purpose were not merely speculative, the classification was not the least restrictive means of achieving this legislative objective.[133] The statute's broad presumption of dependency benefited some financially independent widows and denied equal protection of the laws to widowers and employed women: an employed woman could not provide financial security to her widower in the event of a fatal industrial accident, while an employed man could provide such security to his widow.[134] The gender-based classification thus failed the strict scrutiny test.

California courts of appeal have used strict scrutiny to invalidate a variety of statutes and governmental practices that differentiated on the basis of gender.[135] In some cases, as in *Arp*, the decisive factor in the analysis was the lack of a compelling state interest.[136] In other cases, a compelling state interest was present, but the state failed to establish that the classification was necessary to further the state interest.[137] For exam-

130. *Id.* at 404, 563 P.2d at 854, 138 Cal. Rptr. at 298 (quoting J. BROWNE, DEBATES IN THE CONVENTION OF CALIFORNIA 259 (1850)).

131. The *Arp* court first examined federal precedents. It found ten major gender discrimination cases decided by the United States Supreme Court since 1971. Six cases invalidated gender-based classifications, while four cases upheld them. 19 Cal. 3d at 400, 563 P.2d at 851, 138 Cal. Rptr. at 295. The *Arp* court, observing that the Supreme Court's standard of review was unclear, reaffirmed California's use of the strict scrutiny standard in gender discrimination cases. *Id.*

132. *Id.* at 404-06, 563 P.2d at 853-55, 138 Cal. Rptr. at 298-99.

133. *Id.* at 406-07, 563 P.2d at 855, 138 Cal. Rptr. at 299.

134. *Id.* at 406, 563 P.2d at 855, 138 Cal. Rptr. at 299.

135. *See infra* notes 136-42 and accompanying text.

136. *See, e.g.*, Hiatt v. City of Berkeley, 130 Cal. App. 3d 298, 181 Cal. Rptr. 661 (1982) (Rouse, J.); Boren v. California Dep't of Employment Dev., 59 Cal. App. 3d 250, 130 Cal. Rptr. 683 (1976). In *Hiatt*, classifications in the city's affirmative action plan were based solely on race and sex; the classifications were unconstitutional because the mere existence of racial imbalance or of a disproportionate representation of the sexes does not give rise to a compelling state interest. 130 Cal. App. 3d at 311, 181 Cal. Rptr. at 667. In *Boren*, a state unemployment insurance provision disqualified any person who left his or her job because of marital or domestic duties, if that person did not supply the family's major support. 59 Cal. App. 3d at 253, 130 Cal. Rptr. at 684. In a representative year, 99% of the claimants declared ineligible under the provision were women. *Id.* at 255, 130 Cal. Rptr. at 686. The state demonstrated "some legitimate policy choices but no compelling governmental interest." *Id.* at 260, 130 Cal. Rptr. at 689.

137. *See, e.g.*, Molar v. Gates, 98 Cal. App. 3d 1, 17-18, 159 Cal. Rptr. 239, 249-50 (1979) (state has a compelling interest in protecting female jail inmates from sexual assault while they

ple, in *Hardy v. Stumpf*,[138] height and weight requirements for police officers were held unconstitutional. While the police department had a compelling interest in hiring persons who could perform the duties of a police officer, the court of appeal found no relationship between job performance and the height and weight requirements.[139] Thus, the department failed to carry its burden under the strict scrutiny test because it did not prove that the requirements were necessary to further its compelling state interest. Similarly, in *Cotton v. Municipal Court*,[140] the court of appeal considered a statute that made fathers primarily responsible for the support of their minor children. The court found a compelling state interest in securing support for minor children and in protecting the public from the burden of supporting children whose parents could afford to provide for them.[141] However, differentiating between mothers and fathers was not necessary to further the compelling state interest.[142]

The strict scrutiny standard of *Sail'er Inn* did not prove to be "fatal in fact" in two unusual cases. In *Eckl v. Davis*,[143] the court of appeal considered a city ordinance that proscribed nudity on public beaches. One part of the ordinance permitted men, but not women, to sunbathe and swim with their breasts uncovered.[144] Plaintiffs challenged this portion of the ordinance on equal protection grounds.[145]

In an analysis notable only for its brevity,[146] the *Eckl* court did not discuss any threshold issues. In this early interpretation of *Sail'er Inn*,[147] the court declared that strict scrutiny was not required since the gender-based classification in question did not relate to a fundamental right.[148] As Justice Miller noted in *Bobb*, it is now clear that strict scrutiny must be applied to any classification involving either a fundamental interest *or* a suspect class.[149] Because of its erroneous interpretation of *Sail'er Inn*,

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are incarcerated, but depriving women of a minimum security facility is not the only effective way to insure their safety).

138. 37 Cal. App. 3d 958, 112 Cal. Rptr. 739 (1974).

139. *Id.* at 962-64, 112 Cal. Rptr. at 742-44.

140. 59 Cal. App. 3d 601, 130 Cal. Rptr. 876 (1976).

141. *Id.* at 606, 130 Cal. Rptr. at 880.

142. *Id.* at 606-07, 130 Cal. Rptr. at 880.

143. 51 Cal. App. 3d 831, 124 Cal. Rptr. 685 (1975).

144. *Id.* at 835, 124 Cal. Rptr. at 687.

145. *Id.* at 847, 124 Cal. Rptr. at 695.

146. The *Eckl* opinion is 17 pages long in the official reporter. The discussion of the equal protection claim occupies less than one page.

147. *Eckl* was decided in 1975, four years after *Sail'er Inn*. The only relevant appellate decision in that four year period was Allyn v. Allison, 34 Cal. App. 3d 448, 110 Cal. Rptr. 77 (1973), which neither mentioned *Sail'er Inn* nor provided a correct model for equal protection analysis. *See infra* notes 154-66 and accompanying text.

148. 51 Cal. App. 3d at 848, 124 Cal. Rptr. at 695.

149. 143 Cal. App. 3d at 866, 192 Cal. Rptr. at 273. *See supra* note 44 and accompanying text. *See also* Darces v. Woods, 35 Cal. 3d 871, 885, 679 P.2d 458, 467, 201 Cal. Rptr. 807, 816 (1984).

the *Eckl* court applied the rational basis test to the ordinance. The court found that the classification was reasonable.[150]

The ordinance declared that nudity would unreasonably interfere with the right of all persons to use and enjoy the city's public beaches and parks by causing many people to leave or to stay away from these facilities.[151] Since "nudity in the case of women is commonly understood to include the uncovering of the breasts," it was necessary for the ordinance to differentiate between men and women in defining nudity.[152] A proper application of strict scrutiny might not have changed the outcome in *Eckl*, since the court could have reasoned, at the threshold level, that men and women were not similarly situated with respect to the legitimate purpose of the law, because "[n]ature, not the legislative body, created the distinction between that portion of a woman's body and that of a man's torso."[153]

In *Allyn v. Allison*,[154] the other unusual California case decided since *Sail'er Inn*, the court of appeal considered a voter registration statute that required women but not men to designate their marital status.[155] Women plaintiffs in *Allyn* raised an equal protection argument against this requirement.[156]

Although the court did not analyze threshold issues, it considered—virtually as an afterthought—the disadvantage component.[157] Citing the United States Supreme Court, the *Allyn* court stated that " 'the Equal Protection Clause goes no further than invidious discrimination.' "[158] Designation of marital status, the court continued, did not disadvantage women "in any way" because there was "nothing private about the status of marriage or its termination" and because the requirement was not "onerous or burdensome."[159] Therefore, the court found no invidious discrimination. This conclusion ignored the fact that men enjoyed privacy as to their marital status when registering to vote. More impor-

150. 51 Cal. App. 3d at 848, 124 Cal. Rptr. at 696 ("The classification . . . rests upon a ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike.").

151. *Id.* at 836 n.1, 124 Cal. Rptr. at 687 n.1.

152. *Id.* at 848, 124 Cal. Rptr. at 696.

153. *Id.*

154. 34 Cal. App. 3d 448, 110 Cal. Rptr. 77 (1973).

155. *Id.* at 450, 110 Cal. Rptr. at 78.

156. *Id.* at 451, 110 Cal. Rptr. at 78-79. Plaintiffs also raised issues relating to the right to vote guaranteed by the California Constitution and the Nineteenth Amendment to the United States Constitution. *Id.*

157. *Id.* at 453, 110 Cal. Rptr. at 80.

158. *Id.* (quoting Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955)). In *Lee Optical*, opticians asserted an equal protection claim against a regulatory scheme that exempted sellers of ready-to-wear glasses. 348 U.S. at 488. In this commercial context, the Court found no "invidious discrimination." *Id.* at 489.

159. 34 Cal. App. 3d at 453, 110 Cal. Rptr. at 80.

tantly, the justices failed to consider whether the gender-based requirement disadvantaged women by diminishing their dignity and self-respect. Plaintiffs had asserted that they were "affronted and offended by having to choose between MISS and MRS. and thereby designate their marital status."[160] If the justices had been sensitive to the implications of the requirement, they could have recognized the presence of disadvantage.

The court also decided that men and women were not similarly situated because "use of multi-names and titles" was unique to women.[161] Knowledge of the marital status of a woman was "an aid in assuring that a previous registration [had] been cancelled and that a woman does not vote twice," whereas knowledge of a man's marital status would provide no such aid.[162] These conclusions are based on the assumption that every woman adopts her husband's surname upon marriage and on the implication that many women take advantage of name changes to vote twice. A more incisive analysis would have found that men and women were similarly situated in relation to the legitimate purpose of the law.

The main thrust of the *Allyn* decision, however, was its application of the rational basis test. Although *Sail'er Inn* had been decided two years earlier, the court relied on California case law predating *Sail'er Inn* in evaluating the reasonableness of the voter registration requirement.[163] Plaintiffs agreed that prevention of voter fraud was a reasonable governmental objective, but they argued that requiring the use of the designation Miss or Mrs. was not necessary to accomplish the state's objective and was therefore unreasonable.[164] Under the permissive rational basis test, the burden was on the plaintiffs to show that the requirement had no reasonable relationship to the purpose of the statute. Proper application of the strict scrutiny test would have made a crucial difference at this stage of the analysis. Correct strict scrutiny analysis would have placed the burden on the state to show that the requirement was precisely tailored and necessary to the compelling governmental interest of preventing voter fraud. Plaintiffs pointed out that other questions on the registration affidavit, particularly a question asking each elector to report whether he or she had previously registered under another name, provided the essential information.[165] Thus, the outcome of *Allyn* should have been similar to other cases in which a compelling state interest was present but the state failed to establish that the classification was necessary to further the interest. The strict scrutiny requirement of *Sail'er Inn*

160. *Id.* at 454, 110 Cal. Rptr. at 81 (Fleming, J., concurring).

161. *Id.* at 452-53, 110 Cal. Rptr. at 80.

162. *Id.* at 452, 110 Cal. Rptr. at 80.

163. *Id.* at 451-53, 110 Cal. Rptr. at 79-80.

164. *Id.* at 451, 110 Cal. Rptr. at 79.

165. *Id.* at 451-52, 110 Cal. Rptr. at 79.

failed in this case because the *Allyn* court did not apply it.[166]

C. Application of Strict Scrutiny in *Bobb v. Municipal Court*

1. Justice Miller's Opinion

Justice Miller's opinion embraced the model of equal protection analysis originally developed by the United States Supreme Court and strengthened by the California Supreme Court. Justice Miller correctly recognized that in California a proper equal protection claim alleging gender-based discrimination demands strict scrutiny review. The plaintiff must, of course, first meet the preliminary requirement for equal protection claims: state action that affects similarly situated persons unequally.[167]

Justice Miller did not analyze all of the threshold issues since they were not at issue on appeal.[168] The facts show that state action was present in the form of judicial action.[169] The opinion does not reveal any argument that women and men were not similarly situated as potential jurors, and the municipal court judge admitted that he had differentiated between women and men during voir dire.[170] Justice Miller found that Bobb was disadvantaged by the stigma implied in the pattern of questioning.[171] Since the order to answer the questions reinforced a stigma of inferiority and second-class citizenship,[172] it gave rise to a presumption of invidious discrimination.[173]

Thus, Justice Miller applied strict scrutiny and placed the burden on the state to show that a compelling governmental interest required the gender classification.[174] Since the state did not proffer *any* reason for the disparate questioning, much less a compelling governmental interest, the classification violated California's equal protection guarantees.[175]

Justice Miller's ability to discern the parallel between Bobb's position as a prospective woman juror and Hamilton's position as a black

166. The California Supreme Court denied a hearing, although three justices dissented from that denial. *Id.* at 455, 110 Cal. Rptr. at 81. The court of appeal noted that legislation was pending that would effect the change sought by plaintiffs. *Id.* at 453 n.4, 110 Cal. Rptr. at 80 n.4. *See infra* note 197. The supreme court may have denied hearing because of this legislation.

167. *See supra* notes 117-22 and accompanying text.

168. *See supra* note 33 and accompanying text.

169. Bell v. Maryland, 378 U.S. 226, 255 (1964) (Douglas, J., concurring) (state judicial action is as clearly "state action" as state administrative action); Shelley v. Kraemer, 334 U.S. 1, 20 (1948) ("state action" for the purposes of the Fourteenth Amendment refers to exertions of state power in all forms). *See supra* note 33 and accompanying text.

170. 143 Cal. App. 3d at 862, 192 Cal. Rptr. at 270.

171. *Id.* at 866, 192 Cal. Rptr. at 273.

172. *Id.*

173. *See supra* notes 115, 121 and accompanying text.

174. 143 Cal. App. 3d at 866-67, 192 Cal. Rptr. at 273.

175. *Id.* at 867, 192 Cal. Rptr. at 273-74.

witness demonstrated sensitivity to subtle issues of dignity and equality. This sensitivity is critical at the preliminary stage of equal protection analysis when plaintiffs must demonstrate that they have been disadvantaged by classifications based on suspect criteria. When this sensitivity is missing, the protection accorded Californians by the strict scrutiny holding of *Sail'er Inn* is unavailing.

2. *Justice Kline's Opinion*

Justice Kline's opinion avoided equal protection analysis entirely, despite the fact that Bobb sought to overturn her contempt conviction on equal protection grounds.[176] He believed that jurors' rights were more important than women's rights in this case.[177] He thus avoided *Sail'er Inn's* strict scrutiny review by relying on the general legal principle that courts should not decide constitutional issues unnecessarily.[178]

While superficially Justice Kline's decision favored Bobb, his analysis accorded limited protection to prospective jurors. He suggested that a juror's remedy for discriminatory questioning is to refuse to answer on the grounds of conscience. His holding leaves lower courts free to continue discriminatory questioning; those jurors who refuse to answer can be excused from service.[179] The net result of this procedure could be to reduce the number of women available for jury service.[180]

Justice Kline's avoidance of equal protection analysis reveals insensitivity to the stigma implied in the municipal court's questioning. The justice acknowledged "the widely shared belief that women should be treated no differently than men,"[181] and he cited a study of adverse juror reaction to sexually discriminatory questions asked of women on voir dire.[182] Nevertheless, he avoided equal protection analysis, which offered complete redress for gender-based discrimination. He chose to make a statement about jurors' rights in a decision that would oblige each potential woman juror to fight a separate battle of conscience. His approach places a needlessly heavy burden on each victim of discrimination and does not address the larger context in which the discrimination occurs. By avoiding equal protection analysis, Justice Kline refused to extend to prospective jurors the important safeguards established by *Sail'er Inn*.

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176. *See supra* note 47.

177. 143 Cal. App. 3d at 868, 192 Cal. Rptr. at 274 (Kline, J., concurring).

178. *Id.* at 867-68, 192 Cal. Rptr. at 274.

179. *Id.* at 874, 192 Cal. Rptr. at 279.

180. Practices that tend to exclude women from juries deprive litigants of a verdict delivered by a fair cross-section of the community, discriminate against men with regard to frequency of jury service, and may have a differential impact on the treatment of male and female litigants. B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, *supra* note 51, at 262.

181. 143 Cal. App. 3d at 874, 192 Cal. Rptr. at 279.

182. *Id.* at 874 n.11, 192 Cal. Rptr. at 279 n.11.

3. Justice Rouse's Opinion

Justice Rouse rejected equal protection analysis. The legal grounds for this rejection are not entirely clear. In general, Justice Rouse focused on threshold issues rather than on application of the strict scrutiny test. He seemed to focus on the discrimination component. He was unable to discern a parallel between the situation of Mary Hamilton and that of Carolyn Bobb.[183] He read the record as a "not unfriendly exchange" in which the municipal court judge "[m]ore than once" gave Bobb a chance to respond.[184] Using a personal yardstick, Justice Rouse found that the disparate questioning did not attain "constitutional dimension"[185] or "constitutional magnitude."[186] Since a gender-based classification is presumptively invidious if any disadvantage is shown,[187] Justice Rouse applied an inappropriate and ill-defined requirement of "magnitude."

Justice Rouse's rejection of equal protection analysis demonstrates insensitivity to the stigma implied in the municipal court judge's questioning. While he found that the questions were not personally demeaning in *content* or *manner*,[188] Justice Rouse failed to consider *context*. He was unable to see that the questions were demeaning when directed only to women, thereby attributing to women inferior status and dependence on their husbands. The questions themselves were innocuous, just as the name "Mary" is innocuous apart from any context. In *Hamilton*, the stigma implied in the use of the name "Mary" derived from the deliberate disparate use of titles in a courtroom setting.[189] Thus, Justice Rouse's opinion, like that of *Allyn*,[190] focused inappropriately on the discrimination component of analysis and rejected strict scrutiny review.

IV. *Bobb* in Context

A. Triviality or Symbolism?

Much has been written about the nature and the process of judicial review. "Judicial authority to select the most apt of several possible avenues of decision is a sensitive and a powerful weapon. . . . It is a weapon which strengthens the wielder, but which tests him as well."[191] Part of the test stems from the fact that truth is composed of nuances

183. *Id.* at 876, 192 Cal. Rptr. at 280 (Rouse, J., dissenting). *See supra* notes 27-32, 45, 64 and accompanying text.

184. 143 Cal. App. 3d at 877, 192 Cal. Rptr. at 281 (Rouse, J., dissenting).

185. *Id.* at 875, 192 Cal. Rptr. at 280.

186. *Id.* at 877, 192 Cal. Rptr. at 281.

187. *See supra* notes 115, 121-22.

188. 143 Cal. App. 3d at 876, 192 Cal. Rptr. at 280 (Rouse, J., dissenting).

189. *See supra* note 45 and accompanying text.

190. *See supra* notes 154-66 and accompanying text.

191. Pollak, *The Supreme Court and the States: Reflections on* Boynton v. Virginia, 49 CALIF. L. REV. 15, 17 (1961).

that are not equally visible to everyone.[192] In the search for truth, each judge brings to bear all of his or her knowledge, experience, and principles, but, as Judge Cardozo observed, there are more subtle forces, far beneath the surface, by which "judges are kept consistent with themselves, and inconsistent with each other."[193] These subtle forces include "the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man."[194] In cases of gender-based discrimination, our predominately male judiciary must sometimes make a special effort to overcome subconscious pressures of prejudice, to hear and see with sensitivity, and, above all, to avoid discounting as trivial issues of great importance to individuals seeking redress.

In his concurring opinion in *Allyn v. Allison*, Presiding Justice Roth described the requirement that only women designate their marital status on their voting registration as "a discrimination so trivial" that it did not "engender sufficient provocation to attempt to correct [it] through the judicial process."[195] He asserted that "the difference complained of is [sic], and over a long period of years has had, so little effect upon the allegedly wronged party" that the discrimination would have to be "whipped and beaten" to reach constitutional proportion.[196] Justice Fleming's concurrence in *Allyn* began: "Like titles of military rank the market in titles for women never ceases to fluctuate. The earlier respected title of MISTRESS has fallen on hard times, and the once vaunted title of MADAM has suffered a worse fate, rehabilitative efforts of Frances Perkins and Pearl Mesta notwithstanding."[197] The opinion continued at some length in that vein.

In *Bobb*, Justice Rouse's characterization of the trial judge's questions as "innocuous" and his inability to see Bobb's refusal to answer as a "matter of constitutional dimension"[198] echo the comments in *Allyn*. One commentator has argued that the issues in *Allyn* were not so trivial: "Precisely because the justices [in *Allyn*] thought they were dealing with a constitutional trifle, they failed to address themselves to the principal issue in the case."[199]

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192. A. BICKEL, THE LEAST DANGEROUS BRANCH 238 (1962).

193. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 11-12 (1921).

194. *Id.* at 167.

195. Allyn v. Allison, 34 Cal. App. 3d at 454, 110 Cal. Rptr. at 80 (Roth, J., concurring). *But cf. supra* note 121 and accompanying text.

196. 34 Cal. App. 3d at 453-54, 110 Cal. Rptr. at 80.

197. *Id.* at 454, 110 Cal. Rptr. at 81 (Fleming, J., concurring). In the opinion of the court, Justice Compton adopted a less whimsical style, but dismissed the problem by noting that the legislature was considering amending the law. *Id.* at 453 n.4, 110 Cal. Rptr. at 80 n.4.

198. 143 Cal. App. 3d at 875, 192 Cal. Rptr. at 280 (Rouse, J., dissenting).

199. Karst, *"A Discrimination So Trivial": A Note on Law and the Symbolism of Women's Dependency*, 35 OHIO ST. L.J. 546, 546 (1974).

The plaintiffs in both *Allyn* and *Bobb* were concerned with dignity and self-respect, not trifles. Bobb, like the plaintiffs in *Allyn*, sought "to be treated as one who is free to make independent choices,"[200] not as one who is dependent or inferior. "[T]he most destructive dependency of all is psychological, the dependency that limits a woman's sense of who she is and what she can do."[201] It is especially devastating for the judicial system to "add the judiciary's own special *imprimatur* of legitimacy on the symbolism of women's dependency."[202] Instead, the courts should display "judicial sensitivity to the impact of legislative symbolism on any person's sense of first-class citizenship, on any person's sense of individuality, independence and self-worth."[203] In cases like *Allyn* and *Bobb*, in which the state's interest is insubstantial or nonexistent, the lack of substance behind the disparate treatment heightens the symbolic impact of the governmental action.[204] In light of that heightened symbolism, the refusal of one or more judges to take a complaint seriously is an additional insult.[205] The California justices in effect told "the *Allyn* plaintiffs to go away and stop bothering them with trifles,"[206] much as Justice Rouse discounted Bobb's reaction to a few "innocuous questions."

A 1971 study concluded that "the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable."[207] Many judges have failed to apply to this issue the "detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues."[208] The study detected a pattern of "flagrant judicial insensitivity"[209] that permits or encourages an all-too-pervasive reinforcement of group stereotypes.[210] The authors of the study found several reasons for the failure of male judges to perceive the harmful effects of sex discrimination: (1) lack of knowledge about the injurious effects of sex discrimination; (2) close personal association with women who may appear to be satisfied with their

200. *Id.* at 551 n.22 (discussing Morris, *Persons and Punishment*, 52 THE MONIST 475, 493 (1968)).

201. Karst, *supra* note 199, at 552.

202. *Id.* at 552. *See also* Stan, *Can Justice Survive Bias on the Bench?*, MS. MAGAZINE, Feb. 1984, at 19:

> In the continuing fight for equality, the courts are often the final ground upon which women battle for their rights. But even there, they often confront judges with stereotyped images of women. According to New York attorney Lynn Hecht Schafran, "Discrimination against women is the last publicly acceptable form of discrimination in our country." She contends that sexist attitudes still abound in the nation's courts.

203. Karst, *supra* note 199, at 552-53.

204. *Id.* at 553.

205. *Id.*

206. *Id.* at 555.

207. Johnston & Knapp, *supra* note 42, at 676.

208. *Id.*

209. *Id.* at 697.

210. *Id.* at 740.

roles; (3) personal attitudes (prejudices, fears); (4) inability to engage in empathy because of sex-role socialization; and (5) hostility to change, especially fundamental change in basic institutions.[211] In order to combat these forces, judges must avoid the temptation to dismiss claims that appear at first blush to lack substance, learn to empathize with a variety of female points of view, and educate themselves about stereotypes.[212] It is important that judges, who occupy a special position in our society,[213] free themselves from their social conditioning in sex discrimination cases.[214]

B. Beyond Triviality: Toward Greater Equality

Legal challenges to gender-based discrimination can be seen as efforts to enforce the affirmative duty of government "to promote liberty, equality, and dignity."[215] Women who seek the right to register to vote without disclosing marital status or the right, as prospective jurors, not to be subjected to discriminatory questioning based on traditional assumptions of women's dependence on men are seeking these objectives. They are not trivial goals.

"[A]bstractly equal status in terms of legal doctrine" is not enough.[216] Women and members of other suspect classes need equal protection of the laws in the small but telling symbolic matters that bear on morale and psyche. When Mary Hamilton insisted that she be addressed as "Miss Hamilton" rather than "Mary," she sought recognition of her dignity and independence.[217] Like Carolyn Bobb, she found herself held in contempt of court.[218] Both Hamilton and Bobb received equal protection of the laws at the hands of appellate judges who looked beyond the apparently trivial.

Perhaps the Equal Protection Clause attained a "new respectability"[219] in the decades during which the strict scrutiny standard developed, but effective use of the clause awaits the full cooperation of a judiciary whose members are able to distinguish triviality from symbolism. Strict scrutiny is an important aspect of equal protection in gender-

211. *Id.* at 741-44.

212. *Id.* at 745.

213. "[I]ndividual rights do not get protected by majorities or by elected representatives . . . . The judiciary . . . mediate[s] between the state and the individual." J. BAER, *supra* note 85, at 282.

214. Johnston & Knapp, *supra* note 42, at 747.

215. Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 93 (1966).

216. *Id.* at 108.

217. 275 Ala. 574, 156 So. 2d 926 (1963), *rev'd sub nom.* Hamilton v. Alabama, 376 U.S. 650 (1964).

218. *Id.*

219. Note, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1067 (1969).

based discrimination cases, but a threshold sensitivity to subtle assaults on dignity is a vital prerequisite to such scrutiny.

Conclusion

Justice Miller, relying on the Equal Protection Clause of the United States Constitution and the corresponding provisions of the California Constitution, applied the strict scrutiny standard mandated by California decisions based upon independent state grounds. Consequently, Justice Miller voted to reverse Carolyn Bobb's contempt conviction. Presiding Justice Kline avoided the equal protection issue by choosing to focus, not on women's rights, but on jurors' rights. He did find in Bobb's favor, but his opinion fashioned a form of redress limited to individual cases. By ignoring the discriminatory context of the questions, Justice Kline placed a heavy burden on victims of discrimination and did not confront the discrimination itself. Justice Rouse also failed to recognize or confront the implicit discrimination in the municipal court judge's questioning of the female jurors. Justice Rouse was unable to see beyond a world in which women discuss husbands and their occupations at "social affairs, various agencies in the private and public sectors, and even in the courtroom."[220] His belief that the questions were innocuous placed an inappropriate burden on Bobb to show that she was sufficiently disadvantaged to meet his standard.[221]

"Virtually strangled in infancy by post-civil-war judicial reactionism, long frustrated by judicial neglect, the theory of equal protection may yet take its rightful place in the unfinished Constitutional struggle for democracy."[222] The unfinished struggle for democracy includes the eradication of gender-based discrimination. Strict scrutiny of such discrimination is essential in effecting that eradication, but no degree of scrutiny will avail if the eyes that scrutinize cannot see. Thus, the struggle also demands judges who can see—and have the courage to confront—the constitutional dimension of seemingly trivial affronts to human dignity.

220. 143 Cal. App. 3d at 875-76, 192 Cal. Rptr. at 280 (Rouse, J., dissenting).

221. *See supra* note 122 and accompanying text.

222. Tussman & tenBroek, *supra* note 71, at 381.