Johnson v. Department of Justice – an equal protection analysis

Under Penal Code section 290, all persons convicted of consensual oral copulation with a partner under 18 *must* register as a sex offender. In 2006, the California Supreme Court in *People v. Hofsheier* held 6-1 that the mandatory registration unconstitutionally denied the defendant the equal protection of the laws because a person convicted of consensual sexual intercourse with a partner under 18 (Penal Code section 261.5) would not be subject to mandatory registration. On January 29, 2015, however, *Johnson v. Department of Justice* overruled *Hofsheier* by a 5-2 vote and reinstated the mandatory registration requirement for those convicted of consensual oral copulation.

An unusual combination of resignations and delayed appointments led to a panel for the *Johnson* decision that was notably more conservative than would have existed one year earlier, or three months later. After the court granted review in *Johnson*, both Justice Kennard (who wrote *Hofsheier*) and Justice Baxter (the only dissenter in *Hofsheier*) announced their intention to retire. Justice Kennard simply retired. But Justice Baxter said instead that he would serve out his term. The Governor's appointments to both seats did not join the court until January 2015. Thus, when the case was argued in November 2014, Justice Baxter was still on the court, but Justice Kennard was not. Her seat was filled by Justice Frank Elia, a Court of Appeal justice sitting pro tem.

The *Johnson* opinion was written by Justice Baxter, sitting pro tem because his term had expired between the oral argument and the filing of the opinion. The opinion was signed by the Chief Justice, Justice Chin (who had voted with the majority in *Hofsheier*), Justice Corrigan, and pro tem Justice Elia. Justice Werdegar and Justice Liu dissented.

A 5-2 opinion signed by two pro tem justices is vulnerable, but a rehearing will require the votes of the new appointees, Mariano Florentino Cuellar and Leondra Kruger. Cuellar was a professor at Stanford Law School; Kruger a Deputy Assistant Attorney General in the federal Department of Justice. Neither has any judicial

experience and, of course, neither has had any occasion to express a view concerning the *Johnson* case. If and when the court grants rehearing in *Johnson*, there are some points deserving consideration.

Equal protection analysis of a challenged law depends on the level of scrutiny: suspect classifications such as race must pass strict scrutiny, while ordinary legislative classification need only rest on a rational basis. *Johnson* relied on older cases requiring a challenger to "negat[e] every conceivable basis" for the classification, including those not entertained by the legislature, supported by the record, or lacking in "wisdom, fairness, or logic." It is a standard that can almost never be met. This post will argue that the actual intent of the legislature is relevant to constitutionality in a case such as *Johnson* where the legislative intent was to harm a suspect or politically-handicapped class.

California expressly recognized homosexuals as a suspect class in *In re Marriage Cases* and the United States Supreme Court has similarly done so in effect in the DOMA case (*United States v. Windsor)*. The mandatory registration requirement, at issue in *Johnson*, however, originated many years earlier, when prejudice against homosexuals was widespread and socially acceptable. The different treatment of consensual intercourse and consensual oral sex originated in such prejudice. This author submits that a statue founded upon a desire to harm a suspect class cannot be saved because now, many years later, the Attorney General has conceived of a neutral reason for the law.

A similar issue arose in *Hunter v. Underwood*, a 1985 U.S. Supreme Court decision cited in Justice Werdegar's *Johnson* dissent. There, a provision of the Alabama constitution denied the right to vote to anyone who committed a "crime of moral turpitude." Although people of all races could commit such crimes, the delegates knew they could count on the police and the courts to carry out the provision's purpose true purpose of denying blacks the right to vote. So although one could conceive of rational, neutral grounds for limiting the franchise to law-abiding citizens, the record made it clear that the provision was enacted to achieve an unconstitutional goal, and so the U.S. Supreme Court held it unconstitutional.

In another similar case, *Plyler v. Doe*, the U.S. Supreme Court held that a Texas law

withholding funding for the education of illegal alien children denied equal protection. While "illegal alien children" is not a suspect class, it has many attributes of such. This country has a long history of prejudice and discrimination against illegal aliens. The illegal alien children have little ability to overcome this discrimination through the political process – they are subject to deportation, cannot vote, and for the most part cannot hold public office. But they acquired these disabilities because they (or their parents) broke the law, and thus the court was not willing to impose a strict scrutiny requirement. Nevertheless, when it applied the rational relationship test, the court took into account the history of prejudice and the legal disabilities of aliens. It rejected proffered grounds for the law, such as saving the cost of educating the children and discouraging illegal entry, that would probably have passed the traditional rational basis standard.

The class of sex offenders looks very much like the class of illegal aliens at issue in *Plyler*. That class is and has long been the subject of discrimination and opprobrium. It has far less ability to influence the political process than even illegal aliens do. But, as in *Plyler*, its members acquired this status by breaking the law. Thus, strict scrutiny is not warranted. But heightened equal protection analysis is warranted when the law in question discriminates against a class of persons who are the subject of prejudice and hatred.

Similarly, *Johnson* also involved a statute enacted to facilitate discrimination against a suspect class – homosexuals. It still has this effect. Moreover, at the time it was enacted, and for many years thereafter, the legislature could rely on and would expect discriminatory enforcement. *Hofsheier* called for a "serious and genuine" inquiry into the asserted relationship between the classification and legislative goals. Let's see where a "serious and genuine" inquiry will take us. The question to be addressed is whether the challenged statutory classification bears a rational relationship to the asserted goal of protecting a pregnant woman's interest in having the defendant pay child support, as the *Johnson* majority claimed.

The *Johnson* majority argued that one reason the Assembly in 1977 did not amend the law to provide for mandatory registration of persons convicted under section 261.5 (consensual intercourse) may have been concern for the teen mothers who would not want the fathers subject to a lifetime registration requirement. But one

would think little weight would be given to evidence of legislative intent that does not pertain to a measure enacted by the legislature and approved by the governor, but merely to one of several possible reasons one house of the legislature did not pass a bill.

When we look to the specific language of the statutes that were actually enacted, the first thing to strike the eye is that the legislature did not seem to care whether the woman was or could be pregnant. For example, a man who has intercourse with a woman who was already pregnant receives the benefit of judicial discretion, as does a man who has had a vasectomy. The next striking feature is that the legislature did not seem concerned with support for children not conceived by specific illegal act at issue. Registration is mandatory for consensual oral copulation or sodomy even if the woman already has a child, and mandatory registration will imperil the man's ability to support the child. Finally, the legislature seemed equally unconcerned whether the defendant has any duty to support children by other women. In 1947, the legislature probably assumed that that consensual oral copulation and sodomy were acts committed only by homosexuals, so the defendant would not have fathered any children.

In short, of all the consensual sexual offenses, the legislature has given trial judges discretion to reject sex offender registration in only one circumstance: where the act committed – sexual intercourse – is uniquely the one sexual act homosexuals are unlikely to commit. This makes it clear that the legislature that enacted the registration requirements was concerned with the nature of the sexual act – whether it was deemed a natural or unnatural act –and not at all interested in problems of child support.