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Craig M. Bradley

*Indiana University School of Law*

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# The Right Not To Endorse Gay Rights: A Reply to Sunstein

CRAIG M. BRADLEY\*

In his lecture and article *Homosexuality and the Constitution*,<sup>1</sup> Professor Sunstein advances the following argument: In *Bowers v. Hardwick*<sup>2</sup> the Supreme Court rejected the due process/privacy rationale as a ground for extending constitutional protection to homosexuals and homosexual acts. However, *Bowers*, limited by its facts to a statute that forbade the *act* of sodomy, did not answer the question of whether laws that disadvantage someone because of that person's homosexual *orientation* may be constitutionally defective.

Although a due process/privacy attack on "homosexual orientation" laws is not technically foreclosed by *Bowers*, Sunstein argues persuasively that it is likely to be unsuccessful in light of *Bowers*. He suggests that the Equal Protection Clause, designed as an "attack on traditions"<sup>3</sup> rather than a reflection of them, is the most "promising source of new constitutional doctrine," and one that is more likely to lead to a successful outcome for homosexual plaintiffs.<sup>4</sup>

Sunstein points out, however, that if the argument for striking down certain restrictions on homosexuals—such as the bans on homosexuals in the military and on homosexual marriages—is that such bans are "irrational," then such claims are likely to be unsuccessful, given the Supreme Court's proclivity to uphold legislative enactments against claims of irrationality.<sup>5</sup>

Although Sunstein believes that "discrimination against homosexuals should be subject to strict scrutiny,"<sup>6</sup> he acknowledges that the Supreme Court, after *Bowers*, is unlikely to accept this argument. Thus, Sunstein suggests a way to advance an argument for constitutional protection for homosexuals that is "buil[t] more narrowly on existing law."<sup>7</sup>

Sunstein concludes that discrimination against homosexuals, such as the disallowance of homosexual marriages, should be subject to intermediate scrutiny similar to discrimination on the basis of sex. He acknowledges,

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\* Louis B. Calamaras Professor of Law, Indiana University School of Law—Bloomington. I wish to thank Pat Baude, Dan Conkle, Lynne Henderson, Andrew Koppelman, Bill Popkin, and Susan Williams for their helpful comments on an earlier draft of this Article.

1. Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994).

2. 478 U.S. 186 (1986).

3. Sunstein, *supra* note 1, at 3.

4. *Id.*

5. *See id.* at 4-5. Sunstein explains, for example, that a ban on homosexual marriages could be justified on the ground that the ban is aimed at "restricting the benefits of marriage to relations that involve children." *Id.* at 6. He correctly observes that such arguments, while not very convincing, "could survive rationality review." *Id.* He concludes, correctly in my view, that "probably it can be said that discrimination on the basis of sexual orientation alone—unaccompanied by conduct—ought to be invalidated on rationality grounds." *Id.* at 5.

6. *Id.* at 9.

7. *Id.*

however, that sex discrimination does not appear on the face of such a ban since the state even-handedly forbids *everyone*, male and female, from marrying a person of the same sex.<sup>8</sup> Consequently, he acknowledges that "under current law . . . [this] argument gets nowhere."<sup>9</sup>

Adopting an argument that was originally made by Andrew Koppelman,<sup>10</sup> Sunstein argues that a ban on homosexual marriages is a form of discrimination against women—perpetuating their status as "second-class citizens[]." <sup>11</sup>

The reasoning behind this argument is sophisticated and interesting. Nevertheless, as I shall argue, it is not much more convincing as a legal argument than the other arguments for homosexual rights that have already been advanced and defeated. It will be particularly ineffective as to the ban on homosexual marriages.

The argument analogizes the ban on homosexual marriages to the ban on interracial marriages struck down by the Supreme Court in *Loving v. Virginia*.<sup>12</sup> In *Loving*, the Supreme Court struck down the Virginia anti-miscegenation statute because it "rest[ed] solely upon distinctions drawn according to race" and served no other legitimate state objective.<sup>13</sup> The Court rejected the argument that, since the statute even-handedly forbade blacks and whites from marrying members of the other race, it was not discriminatory

8. *Id.* at 18-19.

9. *Id.* Andrew Koppelman, in his latest paper, discussed *infra* at text accompanying note 19, refuses to make this concession, arguing that, since these statutes make gender relevant (because men are prohibited from doing that which women may do (*i.e.*, marrying men)), they are, by definition, discriminatory on the basis of gender, unlike the gender-neutral statute in a case such as *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979). See Koppelman, *infra* note 19, (manuscript at 2). Thus, they should be subjected to intermediate scrutiny and struck down under current equal protection principles. *E.g.*, *id.* at 26-27. Koppelman's position has semantic appeal, but is, at bottom, a disagreement with current law.

In *Bowers*, the Court assumed that it was dealing with a statute that was limited to prohibiting homosexual sodomy (and thus made the gender of the participants relevant to the application of the statute). *Bowers*, 478 U.S. at 188 n.2. Nevertheless, it upheld the statute without applying intermediate scrutiny. Thus, the Court was unwilling to consider laws that single out homosexual behavior for prohibition as constitutionally recognized "discrimination on the basis of gender." A statute that prohibits men from using the ladies room (and vice versa) in public buildings would also make gender relevant but would not require heightened scrutiny. In every case in which the Court has granted intermediate scrutiny, the plaintiff has claimed to be *disadvantaged vis à vis the opposite sex*. *E.g.*, *Craig v. Boren*, 429 U.S. 190 (1976) (holding invalid a state statute that barred only men under the age of 21 from purchasing beer). Here, by contrast, both sexes have been subjected to mirror image restrictions. If only males, but not females, were forbidden from marrying members of the same sex, then we would have a case of gender discrimination that should be subjected to intermediate scrutiny and struck down under current law. But if males and females are equally prohibited from marrying or having sex with their own gender, or using the restroom of the other gender, these statutes should not be subject to intermediate scrutiny. In any event, as I shall argue, *infra* at text accompanying notes 29-36, a statute forbidding same-sex marriages can also survive intermediate scrutiny.

10. Sunstein, *supra* note 1, at 16 (citing Koppelman, *The Miscegenation Analogy*, 98 YALE L.J. 145, 147 (1988)); see also Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 218-32 (arguing that "condemnation of homosexuality seeks to preserve the social meaning of gender," but basing her argument on "heterosexism"—discrimination against homosexuals as such). I agree with Sunstein that this argument is effectively foreclosed by *Bowers*.

11. Sunstein, *supra* note 1, at 13.

12. 388 U.S. 1 (1967).

13. *Id.* at 11.

because the obvious purpose of the statute was to "maintain White Supremacy."<sup>14</sup> That is, as Sunstein summarizes *Loving*:

[T]he ban [was] transparently an effort to keep the races separate and, by so doing, to maintain the form and the conception of racial difference that are indispensable to White Supremacy. Viewed in its context—in light of its *actual motivations and its actual effects*—the ban was thus part of a system of racial caste.<sup>15</sup>

Sunstein then argues that, just as the miscegenation ban was an effort to maintain white supremacy, so too the ban on homosexual marriages (and on homosexual intercourse outside of marriage) may be seen as an attempt to maintain *male* supremacy. Since homosexual intercourse can involve men acting "like women" (*i.e.*, playing a passive role in sexual intercourse),<sup>16</sup> it tends to blur the popular conception of men as "active in social and sexual arenas"<sup>17</sup> and consequently to defeat male supremacy. As such, bans on homosexual marriages and homosexual behavior, by perpetuating notions of male supremacy, discriminate against women in the same way that the miscegenation ban in *Loving* discriminated against blacks.<sup>18</sup>

In his recent paper, *Why Discrimination Against Lesbians and Gays Is Sex Discrimination*,<sup>19</sup> Andrew Koppelman discusses this argument in great detail. He makes a very convincing case that such motivation may well be one factor that underlies the extreme repugnance and repression with which society has traditionally treated homosexuals and homosexual conduct.

So far, Sunstein (and Koppelman) have stated their arguments effectively. They have unpacked laws and practices that discriminate against homosexuals and have shown that an underlying motivation for those laws may be similar to the underlying motivation for the miscegenation law struck down in *Loving*. It would thus seem to follow that laws discriminating against homosexuals should be evaluated under intermediate scrutiny and struck down as unjustifiable discrimination against women.

However, Sunstein has promised us not just a theoretical argument, but a *legal strategy* that is stronger than either the due process argument or the strict scrutiny argument, both of which, Sunstein concedes, appear to be losing approaches after *Bowers*.<sup>20</sup> But in order to succeed in an intermediate scrutiny/sex discrimination argument, the plaintiff must show *more* than that one possible, subconscious motive for the statute in question is discrimination

14. *Id.*

15. Sunstein, *supra* note 1, at 18 (emphasis added).

16. *Id.* at 21.

17. *Id.* at 22.

18. *Id.* at 20.

19. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

20. "This is not merely a philosophical or sociological observation. It is highly relevant to the legal argument. It suggests that, like the ban on racial intermarriage, the ban on same-sex marriages may well be doomed by a constitutionally illegitimate purpose." Sunstein, *supra* note 1, at 21.

on the basis of sex<sup>21</sup> or that such is its effect.<sup>22</sup> Rather, "classifications by gender" will be upheld if they "serve important governmental objectives" and are "substantially related to achievement of those objectives."<sup>23</sup> That is, even if it is assumed that this statute embodies gender discrimination,<sup>24</sup> it still must be shown that there is no (or no significant) justification for the statute that serves important and legitimate government objectives and is substantially related to those objectives.

The analogy to *Loving* breaks down here. As noted, the Supreme Court found in *Loving* that "[t]here can be no question but that Virginia's miscegenation statutes rest *solely* upon [illegitimate] distinctions drawn according to race."<sup>25</sup> Indeed, if we could have injected the Virginia legislators with truth serum and asked them why they passed this statute, they would surely have admitted that this was their motivation.<sup>26</sup>

By contrast, the Georgia legislators responsible for the sodomy statute in *Bowers*, and authors of statutes that forbid same-sex marriages would deny, truthfully and adamantly, that they had any purpose to discriminate against

21. See, e.g., *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979):

"Discriminatory purpose," however, implies more than intent as avolition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

*Id.* at 279 (citation omitted). Obviously, a motive of which the legislators themselves are unaware is going to pose an even weaker challenge than a partial motive. See also, *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 270 n.21 (1977) (noting that the burden of proving a discriminatory purpose in facially neutral government decisions lies with the party who is challenging those decisions).

22. *Feeney*, 442 U.S. at 256. In *Feeney*, a statute granting hiring preferences to veterans had the effect of making it much more difficult for women to get civil service jobs. Nevertheless, the Court upheld the preference on the ground that it was facially neutral and did not "reflect[] invidious gender-based discrimination." *Id.* at 274. As noted before, I am assuming that a ban on homosexual marriages is "gender neutral" on its face, even though it makes gender relevant in a sense that the statute in *Feeney* did not. See *supra* text accompanying notes 8-9. Thus, my "intermediate scrutiny" argument becomes relevant only in reference to the claimed de facto discrimination against women, not to Koppelman's argument, that a ban on homosexual marriages is facially discriminatory in that it forbids men from doing that which women may do, that is, marrying men. See *supra* note 9.

23. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

24. See *supra* notes 10-11 and accompanying text.

25. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (emphasis added).

26. As Koppelman observes:

*Loving* did not fully explain how the prohibition of interracial marriage was linked to white supremacy, but the existence of the linkage should have been clear to most Americans. Before abolition, the connection was clear: as one Virginia jury foreman put it in 1833, "the law was made to preserve the distinction which should exist between our two kinds of population, and to protect the whites in the possession of their superiority." Kingsley Davis observes that laws against interracial marriage are important for the continued functioning of a caste society. "Such laws indicate one thing: that the racial integrity of the upper caste is to be strictly maintained, to the degree that all persons of mixed racial qualities shall be placed unequivocally in the lower of the two castes."

Koppelman, *supra* note 19, (manuscript at 30) (footnote omitted) (quoting Kingsley Davis, *Interracial Marriage in Caste Societies*, 43 AM. ANTHROPOLOGIST (n.s.) 376, 389 (1941)).

Since interracial marriage led, in its offspring, to a literal blurring of the distinction between the races, it is much easier to attribute a "racial discrimination" motive to the legislature than in the case of homosexual marriages, which do not seem to blur the distinctions between the sexes much more than homosexuality itself does.

women. They would, in fact, be astonished by such a suggestion.<sup>27</sup> While such a subconscious motivation may have been one of a number of reasons behind the legislators' action, it likely was neither their conscious nor their primary purpose. In any event, it is highly unlikely that it could be *proven* to be such a purpose.<sup>28</sup>

What then is the motivation for such statutes? Surely the overwhelming response given by the legislators to such a question would be that it was simply to prevent or discourage homosexual behavior which has always been, as the *Bible*, Blackstone, and many other authorities adumbrate, "morally wrong."<sup>29</sup> This argument was a winning strategy in *Bowers*, where the Court recognized the judgment that sodomy was immoral as an acceptable basis for the sodomy statute.<sup>30</sup>

But *Bowers* was only applying the "rational basis" test. If a state still criminalizes sodomy, then a prohibition against homosexual marriage can easily be upheld, under either rational basis or intermediate scrutiny, as part and parcel of a general state policy of forbidding homosexual behavior. Nevertheless, in the twenty-seven states that no longer criminalize sodomy,<sup>31</sup> under intermediate scrutiny, a law banning homosexual marriage does not seem substantially related to the goal of preventing people from engaging in

27. "A gap in the analogy to  *Loving*  is that the connection between the discriminatory classification (sex) and the harm (reinforcing gender stereotypes) is . . . hard to connect with legislative motivations. Judges may find it difficult to understand how denying two gay men the right to marry is driven by an ideology that oppresses straight women." William Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1509-10 (1993).

28.  *Accord*   *Bray v. Alexandria Women's Clinic* , 113 S. Ct. 753 (1993). In holding that the goal of preventing abortion does not qualify as invidious discrimination against women for the purposes of the civil rights statutes, the Court noted that, to show such discrimination, plaintiffs must show "a purpose that focuses upon women by reason of their sex . . . . The record in this case does not indicate that petitioners' demonstrations are motivated by a purpose (malevolent or benign) directed specifically at women as a class . . . ."  *Id.*  at 759 (emphasis in original). Obviously, statutes aimed at preventing homosexual behavior or same-sex marriages are aimed far less at women as a class than are anti-abortion protests.

29. DERRICK S. BAILEY, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* ix (1975). Bailey states:

The Church taught and people universally believed, on what was held to be excellent authority, that homosexual practices had brought a terrible Divine vengeance upon the city of Sodom, and that repetition of such "offences against nature" had from time to time provoked similar visitations in the form of earthquake and famine.

*Id.*  Bailey goes on to cast doubt on the popular understanding of the biblical story of Sodom.  *Id.*  at 1-28. However, it is not the accuracy of the tradition, but the fact that it exists, that concerns us in this context. As Bailey notes, "[I]t is not as if, throughout the last two millennia, reluctant legislatures had been forced by the spiritual authority to enact laws and to prescribe punishments which they secretly detested."  *Id.*  at ix.

30. The  *Bowers*  Court stated:

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality . . . . [R]espondent . . . insists that majority sentiments about the morality of homosexuality should be declared inadequate.  *We do not agree . . . .*

*Bowers* , 478 U.S. at 196 (emphasis added).

31. See Jane Gross, *After a Ruling, Hawaii Weighs Gay Marriages*, N.Y. TIMES, Apr. 25, 1994, at A1, B8 (noting that in 23 states, sodomy remains a criminal act).

morally repugnant activity, since the law says nothing about, and will not substantially discourage, engaging in homosexual acts as such.

But, even the dullest legislator could have figured this one out in advance. Therefore, it is reasonable to suppose that a ban on homosexual marriages was designed to serve some function in addition to discouraging sodomy. The most obvious explanation is that, since practicing homosexuals engage, by definition, in the sort of morally repugnant behavior that was the subject of the Georgia sodomy statute, no legislator would want to give *legal recognition* to a relationship as to which such behavior would seem to be the *sine qua non*.<sup>32</sup> If a refusal to give such recognition to homosexual relationships is regarded as a legitimate governmental objective, and if the law is substantially related to achieving that objective, then the law will survive intermediate scrutiny, notwithstanding an incidental effect that it may have on societal attitudes toward women.<sup>33</sup>

A ban on same-sex marriages is not perfectly tailored to further the governmental interest in not giving homosexual relationships legal recognition since it forbids people of the same sex from entering into a legally recognized "marriage" regardless of their sexual proclivities (or lack of same).<sup>34</sup> It is, however, surely close enough to the mark to stand up to the "substantial relationship" test of intermediate scrutiny. That is, since virtually all applicants for same-sex marriages will be homosexuals, forbidding such marriages is a proxy for withholding legal recognition for homosexual relationships and the conduct that they entail.<sup>35</sup> Indeed, if same-sex marriages were recognized as legal, the participants would immediately use that legal recognition to claim *further* legal entitlements such as social security benefits, pension benefits, and "family" health insurance coverage. The legislature certainly has a legitimate concern about such fiscal matters as these.<sup>36</sup>

If society can express its moral repugnance for homosexual activity by making sodomy a crime, as Georgia did in *Bowers*, so too can it withhold legal recognition from a relationship which is very likely to be founded upon

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32. Cf. *Reitman v. Mulkey*, 387 U.S. 369 (1967) (finding constitutional significance in a state's implicit "authorization" of certain practices). In *Reitman*, improper state action was found in a state constitutional provision that declared the right of people to rent real property to whomever they chose, thus allowing landlords to discriminate on the basis of race.

33. I admit that my argument as to this point—that there is a legitimate governmental objective that is served by this statute—is influenced by my views of the initial argument—that the case for treating a same-sex marriage statute as discrimination against women is weak. If all women, as opposed only to homosexual women, were more obviously disadvantaged by the law in question, then the legislative justification of not wanting to endorse homosexual relationships might have less force.

34. For a historical and cross-cultural discussion of same-sex marriages, see Eskridge, *supra* note 27, at 1426.

35. Similarly, denying various benefits to heterosexual couples who cohabit would seem to be within the legislature's power—justified as an effort to encourage marriage. See, e.g., Sam H. Verhovek, *Texas Capital Ends Benefits for Partners*, N.Y. TIMES, May 9, 1994, at A8.

36. In Hawaii, the legislature seems to be prepared to grant homosexuals the financial benefits of marriage so long as it is not required to deem their partnership a "marriage" under Hawaii law. Gross, *supra* note 31, at B8.

such activity.<sup>37</sup> It is not enough to argue, as Sunstein does, that such a law has the effect or subconscious motivation of discriminating against women. The legislature can point to another purpose—discrimination against homosexuals—as the obvious, and Supreme Court-endorsed, purpose for the law.<sup>38</sup> Consequently, Sunstein's approach, which hides behind the skirts of a "discrimination against women" argument, is less likely to succeed than an approach which forthrightly takes on discrimination against homosexuals as constitutionally unacceptable per se.

Some states might make the alternative argument that marriage is for the purpose of procreation and the rearing of children and that, while marriage is obviously not limited to people who plan to procreate, it is acceptable to broadly limit marriage to male-female relationships that generally have that potential. Interestingly, *Loving* itself lends support to the constitutional validity of such a claim, noting that "[m]arriage is one of the 'basic civil rights of man,' *fundamental to our very existence and survival.*"<sup>39</sup> In what sense is marriage "fundamental to our very existence and survival"? People are, after all, perfectly capable of reproducing without the benefit of clergy. The Supreme Court must have been recognizing the fundamentality of marriage as an efficacious, and societally encouraged, means of both producing *and* rearing offspring.<sup>40</sup>

Since encouragement of heterosexual marriage as a "fundamental" institution would seem to be an "important governmental objective," and since forbidding people from marrying people with whom reproduction is impossible obviously serves this objective, it follows that a statute that forbids homosexual marriages will survive intermediate scrutiny. This would be true even if we consider the ban on homosexual marriages to be discrimination on the basis of gender.

But this argument is weakened by the fact that legislatures act in various other ways to *discourage* procreation. For example, the legislature may set limits on welfare payments for second children, may allow non-procreative marriages to occur, and may support the bearing and rearing of children out

37. Several courts of appeals have adopted this line of reasoning, *E.g.*, *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

38. *See Bray v. Alexandria Women's Clinic*, 113 S. Ct. 753, 60-61 (1993) (noting that a goal of discouraging abortion does not qualify as an invidiously discriminatory animus toward women).

39. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (emphasis added).

40. For example, the Catholic Church clearly states such a concern is the basis for its opposition to homosexual conduct, and, by extension, to homosexual marriage:

The bodily differences between a man and a woman given by God in His creative act are the physical means of expressing a familial *communio of persons*. Further, the bodily expression of love serves life, new life, because God willed that our love be fruitful as His love is fruitful. Homosexual activity can never be a physical expression of familial love. Familial love is precisely the union of a man and woman in a total self-donation, which is physically expressed through their masculine and feminine bodies. Since it is impossible for two men (or two women) to give themselves physically to one another, any attempted union between them ceases to be a gift. It becomes a using of each other, or, at least, a using of each others' bodies.

RICHARD M. HOGAN & JOHN M. LEVOIR, COVENANT OF LOVE: POPE JOHN PAUL II ON SEXUALITY, MARRIAGE, AND FAMILY IN THE MODERN WORLD 57 (1985) (emphasis in original). Consistent with this reasoning, the Church also condemns extra-marital sex, birth control devices, and abortion. *Id.* at 49-61.

of wedlock. Thus, legislatures are not likely to be quite as single-minded in pursuing the "encouraging procreation" goal, as in pursuing the "discrimination against homosexuals" goal. Hence, they may have a hard time proving that encouraging procreation really was their purpose. Nevertheless, this argument has the obvious advantage of not being automatically invalidated if *Bowers* is overruled. By contrast, the earlier legislative justification that forthrightly endorses discrimination against homosexuals as the legislature's purpose will necessarily fail if the courts should decide that such a purpose is illegitimate.<sup>41</sup>

The above arguments will work when the government tries to ban homosexual marriages. Neither of the above arguments will succeed, however, if a government is trying to enforce a ban on homosexuals in the military or as elementary school teachers. Obviously, such bans have nothing to do with encouraging procreation. Moreover, unlike the homosexual marriage applicants, the plaintiffs fighting these bans are not asking for a legal imprimatur on homosexual relationships or activities. Instead, they claim, "our homosexuality is irrelevant to the job in question." Assuming they can establish this claim, and as long as they do not argue that admission to the military or the school system also confers some right to engage in homosexual conduct, they are correct.

In these situations, if the plaintiffs obtain "intermediate scrutiny" review by making the Sunstein/Koppelman argument, they have a better chance of success in litigation, because it will be hard for the government to show that the prohibition in question bears a substantial relationship to the legitimate governmental interest in not endorsing homosexual relationships or in encouraging procreation (subject to the standing problem discussed below).<sup>42</sup> As the District of Columbia Circuit case of *Steffan v. Aspin*<sup>43</sup> (striking down the "no homosexuals in the military" policy) illustrates, however, such bans can also be defeated under the "rational basis" approach of current law—if rational basis analysis is taken seriously.<sup>44</sup>

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41. Once the underpinning of *Bowers* is removed, however, it is likely that the "encouraging procreation" rationale would also fail under intermediate scrutiny.

42. Consistent with the military's "Don't ask, don't tell" policy, it would be appropriate for either the school or military employer to insist that the potential employee keep his sexual orientation to himself. Otherwise, a teacher who advocated the "gay lifestyle" to his students, or a male soldier seen kissing another man on base, would put the employer/government in the position of appearing to condone behavior which, as discussed in the text, the government considers immoral. Thus, a person—homosexual or not—cannot be banned from employment because of a fear that he may engage in some sort of unacceptable conduct, but can be fired if he actually engages in such conduct. As discussed in the text, it is currently constitutional for homosexual behavior to be deemed "illegitimate." To what extent private homosexual conduct, in gay bars, for example, would justify expulsion of soldiers from the military under such a nonendorsement rationale, would be a matter to be litigated.

43. 8 F.3d 57 (D.C. Cir. 1993), *vacated*, 1994 U.S. App. LEXIS 9977 (1994). See Sunstein, *supra* note 1, at 4-5.

44. See *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (applying only the rational basis standard to strike down the requirement of a special use permit for a group home for the mentally retarded). The Court held that the requirement rested on "an irrational prejudice against the mentally retarded" that was not rationally related to any legitimate state interest. *Id.* at 450. The same can be said, as did the District of Columbia Circuit panel decision in *Steffan*, for much discrimination against homosexuals.

There probably is a class of cases where discrimination against homosexuals could survive rational basis analysis, but not intermediate scrutiny. In these cases, the Sunstein/Koppelman approach might make a difference. The claim that having gays in the military, even if they do not engage in homosexual activity, is "bad for morale" might be such a case. If, however, a court agrees that discrimination against homosexuals on the job in question is "rational," it is unlikely to subscribe to Sunstein's gender discrimination argument.

Another possible problem with Sunstein's argument as a litigation strategy is that of standing. Since he claims that laws disadvantaging homosexuals discriminate against women, then a woman should bring the suit. But no woman would be able to sue for an injury so uncertain and diffuse as, "These laws tend to maintain male superiority."<sup>45</sup> While homosexual males who wish to challenge the law can obviously satisfy the "injury in fact" criterion,<sup>46</sup> they will have a difficult time arguing that they have standing to protest a law whose only improper effect is to discriminate against women.<sup>47</sup> Homosexual females would seem to be in the best position to challenge the law, but even they will encounter the problem that the primary impact of the law is on male homosexuals, not women, rendering their injury, as women, too remote.

Finally, the issue of the "immutability" of homosexuality must be considered. In *Frontiero v. Richardson*,<sup>48</sup> a Supreme Court plurality held that immutability is a significant factor in determining whether discrimination based on a given characteristic is subject to heightened scrutiny. Sunstein argues that immutability alone is not a determining factor,<sup>49</sup> since some immutable characteristics, such as blindness, may be relevant to legitimate

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45. See Sunstein, *supra* note 1, at 20-23.

46. See, e.g., *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2137 (1992). In *Meinhold v. United States Dep't of Defense*, 1994 U.S. App. LEXIS 23705 (9th Cir. Aug. 31, 1994), the court struck down the discharge of a declared homosexual on equal protection grounds. The court concluded that, absent actual evidence of homosexual conduct, such a discharge was based on "status or propensity" and was unconstitutional. *Id.* at \*26. Neither the court nor, apparently, the government noted that it is not the appellee's "status" as a homosexual that is the basis of his discharge but the *act* of declaring that status. See *Powell v. Texas*, 392 U.S. 514 (1968) (plurality opinion) (upholding defendant's conviction, not for "being an alcoholic," but rather for public drunkenness). *Meinhold's* declaration is critical because it puts the Navy in the position of having to accept known homosexuals which, it should not be required to do. See *supra* note 42.

47. While the homosexual plaintiffs are clearly disadvantaged by such statutes, the "general rule, as frequently stated by the Court, is that 'one may not claim standing [to] vindicate the constitutional rights of some third party.'" GERALD GUNTHER, CONSTITUTIONAL LAW 1624 (12th ed. 1991). *But see* *Powers v. Ohio*, 499 U.S. 499 (1991) (holding that a white defendant may object to the exclusion of blacks from juries); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (holding that a male defendant may challenge the exclusion of women from his jury). These cases, which hinge on the notion that a defendant is entitled to a jury that represents a "fair cross-section" of the community, would not seem directly applicable here. Nor does such a case fit well within the guidelines governing third party standing. See *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992) (holding that a California resident may not qualify for heightened scrutiny on the ground that a state property tax discourages nonresidents from moving to California and hence interferes with their right to travel). See generally JOHN E. NOWAK & RONALD D. ROTUNDA, TREATISE ON CONSTITUTIONAL LAW 220 § 2.12(3) (4th ed. 1991).

48. 411 U.S. 677, 686 (1973). This position was later adopted by a majority in *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

49. Sunstein, *supra* note 1, at 9.

proscriptions, such as prohibiting the blind from driving. The Court recognized as much in *Frontiero*, adding the additional qualification that only those discriminations that “bear[] no relation to ability to perform or contribute to society” are relevant.<sup>50</sup>

Sunstein adds that, even if blacks could take a shot that would turn them into whites—thus rendering blackness “mutable”—discrimination against blacks would still be improper. This is surely correct, but it does not refute the basic point that the Supreme Court was trying to make—those groups which people choose to belong to and/or can readily change, such as membership in fraternal organizations or lifestyle preferences, are entitled to less protection than groups into which people are born, are involuntarily included, or cannot readily and reasonably change (such as race or sex, regardless of the technological possibility of changing). “[L]egal burdens should bear some relationship to legal responsibility.”<sup>51</sup> Thus, if homosexuality can be shown to be, at least in part, “immutable,”<sup>52</sup> the argument for gay rights will enjoy more success in the courts.<sup>53</sup>

As Sunstein notes at the beginning of his article:

In all likelihood, laws against homosexual orientation and behavior will soon come to be seen as products of unfounded prejudice and hostility, and private prejudice and hostility will themselves recede. Courts should play a limited if perhaps catalytic role in this process.<sup>54</sup>

I agree with this sentiment and prediction. In the meantime, the Sunstein/Koppelman proposal presents potential challengers to laws that discriminate against homosexuals with no more legal ammunition than they have now in same-sex marriage cases, and only a little more in other types of cases. I agree, however, that, in a few cases, that “little more” may be enough.

50. *Frontiero*, 411 U.S. at 686. I disagree with John Ely, who has argued that this “relevance” inquiry has rendered the immutability issue nugatory. JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 150 (1980). The goal of any legislation that discriminates against a group on the basis of a particular characteristic must be “relevant” to that characteristic, immutable or not. But if the characteristic is immutable, as are the characteristics of gender and illegitimacy that have led to intermediate scrutiny, it makes sense to scrutinize the legislation more closely—to require a higher standard of “relevance.”

51. *Frontiero*, 411 U.S. at 686.

52. This raises some interesting problems: If homosexuality is not genetically predetermined but, once established, is difficult or impossible to change, should it be regarded as “immutable”? If it is implanted in childhood, rather than as a result of a conscious adult decision, like heroin addiction, does that matter? The precise meaning of “immutable” for legal purposes is beyond the bounds of this Article.

53. For a detailed and insightful discussion of this issue, see Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994). Halley argues that, whatever the truth about a genetic predisposition toward homosexuality, it is not a wise strategy for pro-gay litigants to rely on it. As Halley makes clear, however, the mutability issue has played a key role in court decisions to date. *Id.* at 507-16.

54. Sunstein, *supra* note 1, at 2.