1994

With All Deliberate Speed? A Reply to Professor Sunstein

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INTRODUCTION

In his article, *Homosexuality and the Constitution*,[1] Professor Cass Sunstein does an admirable job elaborating the strengths and weaknesses of various legal theories for attaining federal constitutional protection for lesbians and gay men. To a gay activist, what is most notable about his discussion is his repeated insistence that the federal courts act cautiously in deciding cases that raise the theories he discusses.[2] In particular, he suggests that "the judicial role is properly limited in this context, especially because of a need to limit the clash between public judgments and judicial judgments in so sensitive an area."[3] Citing the divisive aftermath of *Roe v. Wade*[4] as an example, he fears that precipitous judicial action might lead to backlash that would harm the gay rights movement.[5]

To the extent that Professor Sunstein is simply arguing that controversial cases should be decided upon the narrowest possible ground, his caution is unobjectionable. But to the extent he is recommending that federal courts refrain from finding antigay state action unconstitutional because of a concern for the long-term good of the gay rights movement,[6] his analysis is subject to at least three levels of criticism. At a doctrinal level, courts need not handle equal protection analysis with the kind of caution appropriate for nontextual rights such as the right to privacy. At an institutional level, the lower federal courts are ill-equipped to judge whether society is "ready" for a particular constitutional result, and probably should not rely on such a judgment to decide particular cases in any event. Finally, at a personal level,

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* Professor of Law, University of Miami School of Law. The Author wishes to thank Michael Fischl, Steve Schnably, Jonathan Simon, and Alan Swan for helpful comments on earlier drafts of this Essay, and Linda Casey and Paul Ranis for helpful research assistance. The title, of course, refers to the Supreme Court's desegregation order in *Brown II*. *See* Brown v. Board of Education, 349 U.S. 294, 301 (1955). The Court's failure to clarify the meaning of "all deliberate speed," according to one commentator, "in effect, gave the South ten years of delay" in implementing school desegregation. *See* DERRICK BELL, AND WE ARE NOT SAVED 112 (1987).

1. Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994).
2. *See, e.g., id.* at 1-2, 26-27.
3. *Id.* at 1-2.
4. 410 U.S. 113 (1973).
5. Sunstein, *supra* note 1, at 25-26.
6. For example, Sunstein argues that judges presently should not accept the argument that antigay discrimination is a form of gender discrimination. *Id.* at 16-20. He fears that such a decision could well jeopardize important interests: it could galvanize opposition; it could weaken the antidiscrimination movement itself; it could provoke more hostility and even violence against gay men and lesbians; and it could well produce vigorous calls for a constitutional amendment to overturn the Court's decision. *Id.* Similarly, he fears that a Supreme Court decision providing protection for same-sex marriages might lead to "a constitutional crisis, . . . an intensifying of homophobia, a constitutional amendment overturning the Court's decision, and much more." *Id.* at 26. Thus, he clearly suggests that caution by the courts is in the best long-term interest of lesbians and gay men.

Professor Sunstein is asking individual litigants to sacrifice individual justice in the short-term for the possibility that doing so might improve the chances for justice for all gay people in the long-term. These litigants already risk status and security merely to pursue their claims[7] and should not be expected to give up important tangible benefits for an amorphous long-range hope. This Essay will explore each of these criticisms in turn and conclude by suggesting that the federal courts should look to *Brown v. Board of Education*[8] in addition to *Roe* as a model for deciding controversial constitutional issues.

I. THE NATURE OF EQUAL PROTECTION

Roe v. Wade, of course, was a substantive due process case.[9] Arguably, judicial restraint is especially appropriate when dealing with substantive due process claims because they involve rights not explicitly enumerated in the Constitution[10] and because they effectively may prevent the government from regulating in a particular area at all.[11] Before placing such broad unenumerated limits on the powers of government, the Supreme Court often has been careful to demonstrate that the particular claim is supported by a strong historical tradition.[12]

By contrast, the Equal Protection Clause specifically enumerates rights. It does not preclude regulation in entire substantive areas, but instead limits the

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7. These litigants generally become well-known to the public. Yet public acknowledgment of gay identity often has undesirable consequences in our society ranging from estrangement from family and friends to loss of employment to violence. *See generally* Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511, 570-607 (1992). For example, two different men who each attempted to obtain marriage licenses with a male partner subsequently lost state jobs at least in part because of their lawsuits. *See* Singer v. United States Civil Serv. Comm'n, 530 F.2d 247, 248-49 (9th Cir. 1976), *vacated*, 429 U.S. 1034 (1977); McConnell v. Anderson, 451 F.2d 193, 194 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972). Joseph C. Steffan was told that he could not graduate from the Naval Academy because he had admitted that he was gay. When he sued, the lawyers for the government tried to force him to answer questions about his sexual experiences before and after he left the Academy, even though his sexual behavior was not at issue when he left the Academy. The court of appeals ruled that the questions were irrelevant. *See* Steffan v. Aspin, 920 F.2d 74, 74-76 (D.C. Cir. 1990).

8. 347 U.S. 483 (1954).

9. *See Roe*, 410 U.S. 113, 152-54 (1973).

10. Much of the criticism of the decision in *Roe* centers around this concern. *See, e.g.*, Doe v. Bolton, 410 U.S. 179, 221-22 (1973) (White, J., dissenting); John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 926-37 (1973). *See also* Bowers v. Hardwick, 478 U.S. 186, 194-96 (1986) (arguing that the Supreme Court must be especially careful when dealing with unenumerated rights).

11. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-7, at 1454 (2d ed. 1988).

12. *See* Moore v. East Cleveland, 431 U.S. 494, 503-04 (1977); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); *id.* at 493-96 (Goldberg, J., concurring); *see also* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1170-71 (1988) (noting the importance of tradition to substantive due process case law). The Court also has rejected claims of unenumerated rights where it perceived that the claims were not grounded in tradition. *See* Michael H. v. Gerald D., 491 U.S. 110, 124-30 (1989) (plurality opinion); Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986); *see also* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2859-60 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (suggesting that *Roe* should be overruled because the right to an abortion is not historically grounded).

government's power to classify within the particular areas it chooses to regulate.[13] Thus, a court may reasonably see less need to use extreme caution in expanding the scope of equal protection.

More importantly, as Professor Sunstein has noted in an earlier essay,[14] the Equal Protection Clause especially protects classes of people who are likely to be at risk in the political process because they traditionally are disfavored by the majority.[15] If, in trying to determine the scope of equal protection, a court defers to the majority or waits for popular approval, it stands the provision on its head. Equal protection is inherently countermajoritarian; the comfort level of the majority surely is not an element of the claim.

In his essay, Professor Sunstein applies his cautionary approach to the current controversy regarding the inclusion of lesbians and gay men in the armed forces. He argues that we "might . . . believe" that the military's ban "should be presumed unconstitutional by Congress and the President, without also believing that federal courts should strike down the ban except perhaps in the most egregious cases."[16] In practice, however, the conjunction of these beliefs is unhelpful and yields results at odds with the purpose of equal protection. President Clinton may well believe that both the former and the present military policies are unconstitutional. Because of a lack of will or of perceived political power, he also appears to believe that he cannot defy Congress on this issue. Thus, the military can and will exclude openly gay people in the short run. If the ban violates the Constitution, what benefit is derived if the lower federal courts choose not to say so? Any decision upholding the ban seems likely to solidify it further, may help convince the public that it is just, and will have some precedential value, even in "egregious cases." Judicial restraint hardly furthers the protection of the class of people at risk from the majority in this intensely political process. Yet this is the very protection that the Equal Protection Clause should afford.

II. DECIDING CASES, NOT CAUSES

Professor Sunstein cites Abraham Lincoln's treatment of the slavery issue as a positive example of appropriate restraint.[17] However, Lincoln was an elected official, unpopular for most of his first term, who was trying to maintain sufficient political control over the country to manage a civil war. The astuteness of his political thinking does not necessarily serve as an appropriate model for the judiciary, whose job, after all, is to decide

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13. *See* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 292 (1990) (Scalia, J., concurring).

14. Sunstein, *supra* note 12, at 1174.

15. *See id.*

16. Sunstein, *supra* note 1, at 5. An additional concern raised by this point is the definition of "egregious." Sunstein suggests that a case involving status but no sexual conduct would be "arguably" egregious. *Id.* at 5 n.14. However, it also is "arguably" egregious to treat differently the private, consensual, off-duty, sexual activity of gay military personnel. The current policy allows the discharge of gay (but not non-gay) military personnel for just this conduct. *See* Chandler Burr, *Friendly Fire*, CAL. LAW., June 1994, at 54, 60, 98.

17. Sunstein, *supra* note 1, at 23-24.

individual cases. Judges cannot and should not try to determine the popularity of the cause before deciding the case.

Determining when Americans are "ready" for a particular constitutional decision is complicated at best.[18] Recent polls indicate that a majority of Americans "accept" the "gay lifestyle"[19] and favor laws protecting lesbians and gay men from employment discrimination.[20] Do these statistics mean that Americans are ready for constitutional protection for gay people, at least regarding jobs? Other recent statistics show that a majority of Americans oppose state recognition of same-sex marriages and adoptions by gay people.[21] How much change would be needed to suggest that constitutional intervention in these areas would be appropriate?

Even if these questions were easier to answer, courts are not particularly good institutions to determine the popular will. Unlike Lincoln, who had the benefit of information services and much unsolicited input, courts depend on what is placed in front of them. The same limited factfinding ability that suggests that courts defer to legislatures on complex issues[22] also suggests that courts should not try to determine public opinion before issuing constitutional opinions.

Even if courts could read trends well, they probably should not try to do so. The Constitution gave federal judges life tenure precisely to shield them from the popular will.[23] As Chief Justice Rehnquist recently noted, "The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution."[24] Similarly, federal judges are not in the business of trying to determine what result is likely to cause the fewest future political problems for people like the plaintiff. For example, *Bowers v. Hardwick* makes clear that the states have a legitimate

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18. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2865 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (noting the difficulty of ascertaining public opinion on controversial issues).

19. *See* Brad Knickerbocker, *Gay-Rights Advocates Step Up Campaigns*, CHRISTIAN SCI. MONITOR, Aug. 12, 1994, at 3 (reporting on a poll showing that 52% of Americans accept the "gay lifestyle"). I find the poll data interesting because I have no firm idea what the term "gay lifestyle" really means. Lesbians and gay men exist in all professions at all levels of society. Harvey Fierstein, Martina Navratilova, and I all think of ourselves as gay, but our "lifestyles" are quite dissimilar. The question is particularly curious because antigay advocates often use "gay lifestyle" as a shorthand for loveless, promiscuous lives. *See* Fajer, *supra* note 7, at 537-46. I hope that the data indicate that Americans are becoming more comfortable with *openly* gay people.

20. *See* Kara Swisher, *Odd Jobs*, WASH. POST, July 31, 1994, at H7 (reporting on a poll showing that 75% of Americans support laws protecting gay men and lesbians from discrimination in the workplace).

21. *See id.*; Knickerbocker, *supra* note 19, at 3.

22. *See* Sunstein, *supra* note 1, at 4.

23. *See* Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes From History*, 36 U. CHI. L. REV. 665, 667 (1969) (arguing that federal judges should be free from political pressure).

24. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2865 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

interest in preventing at least same-sex sexual activity on grounds of morality.[25] At some point, to get around the morality claim in equal protection cases, the federal courts will have to decide whether sexual orientation merits some form of heightened scrutiny and, if it does, whether morality constitutes an important or compelling (as opposed to merely legitimate) state interest.[26] In fact, Professor Sunstein himself has argued that the morality rationale has "little or no weight in the context of an equal protection challenge[.]"[27] Suppose a particular court believes that the Constitution requires using heightened scrutiny and agrees with Sunstein that the morality arguments are insufficient to overcome that level of scrutiny. Should the judges refrain from deciding the case that way if they believe in the long run that gay people will be better off if the plaintiff loses? Such "restraint" is not within the usual understanding of the proper judicial role.

Thus, the desirability of Abraham Lincoln (or any legislator or executive) adopting Professor Sunstein's advice says little about the proper role of the courts. The historical success of Lincoln's approach to slavery surely does not suggest that either *Dred Scott v. Sandford*[28] or *Plessy v. Ferguson*[29] were correctly decided.

III. THE IMPLICIT SACRIFICE

If courts heed Professor Sunstein's advice to wait for sufficient signals from the political branches before approving equal protection arguments in gay rights cases, some litigants will lose cases that they otherwise would win.[30] His position necessarily implies sacrificing individual litigants to benefit the movement for gay and lesbian rights in the long run. This approach may be appropriate for gay advocacy organizations, which choose cases to support with an eye to long-term strategy. Indeed, these organizations sometimes employ just the kind of strategic thinking the approach suggests.[31] It is harsh advice indeed, however, for those individuals who are willing to bear the not inconsiderable burden of bringing a test case,[32] especially because Professor Sunstein may be wrong about the long-term effects of his strategy.

Judicial restraint may or may not prevent antigay backlash. The rash of antigay ballot initiatives proposed in 1994[33] appears to have arisen in

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25. Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

26. *See* Sunstein, *supra* note 1, at 6-7 (noting possible limits on morality as a state interest).

27. Sunstein, *supra* note 12, at 1176.

28. 60 U.S. 393 (1856).

29. 163 U.S. 537 (1896).

30. *See* Sunstein, *supra* note 1, at 26 ("The Supreme Court might . . . accept the most narrow arguments, and reject or (better) avoid passing on the more general and intrusive ones.").

31. For example, Lambda Legal Defense and Education Fund recently announced that it currently would not pursue gay marriage claims "in states where the prospect for defeat seems great," pending the outcome of its case in Hawaii. *See Lambda's Strategic Perspective on Litigating Our Right to Marry*, LAMBDA UPDATE (Summer 1994), at 15.

32. *See* cases cited *supra* note 7.

33. *See* John Gallagher, *Pride and Prejudice*, THE ADVOCATE, July 12, 1994, at 32.

response to the general increased visibility of, and improved climate for, gay men and lesbians, rather than as an attempt to counter any particular judicial decision. Indeed, I cannot think of any pro-gay court decision to date that has sparked significant national discussion. Professor Sunstein specifically expresses fear that if courts grant rights too quickly to gay men and lesbians, an angry populace will push for a constitutional amendment to undo their decisions.[34] However, even *Roe* never created sufficient backlash to incite Congress to pass any of the amendments proposed to overrule it.[35] On the other hand, clear statements of principle from the judiciary may help legitimate the idea that gay people should be treated equally. In any event, the public response to particular cases is likely to be quite fact-specific and hard to predict.[36]

Despite this uncertainty, Sunstein urges the path of restraint as the best road for gay rights in the long run. Is this really an acceptable answer to the individual litigants who will lose their cases as a result? Could you confidently reassure Joe Steffan, whose brilliant tenure at the Naval Academy was cut short three weeks before graduation by his admission that he was gay, that his sacrifice would be worthwhile?[37] What about Colonel Margarethe Cammermeyer, who was forced to end a distinguished career as a military nurse?[38] Or Sharon Bottoms, who lost custody of her child due to the judge's presumption that a lesbian mother is unfit?[39] I would need much more evidence than we presently possess before I would be comfortable telling the brave individuals whose lives underlie important gay rights cases that in losing their battles, we are winning the war. These individuals have a right to have courts consider their cases on the merits without judges including the popularity of the result as an element of the claim.

CONCLUSION

This Essay has argued that Professor Sunstein's cautious approach to constitutional adjudication of gay rights issues is inappropriate. The Equal Protection Clause inherently requires courts to challenge current majoritarian beliefs. Courts should decide cases without regard to guesses as to how their decisions will affect the political climate regarding the issues under dispute.

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34. *See* Sunstein, *supra* note 1, at 26.

35. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 521 (12th ed. 1991).

36. The polling data cited above support the fact-based nature of people's responses to different gay issues. *See supra* notes 19-20.

37. *See* JOSEPH STEFFAN, HONOR BOUND: A GAY AMERICAN FIGHTS FOR THE RIGHT TO SERVE HIS COUNTRY 134-67 (1992).

38. *See* Eric Schmitt, *Pentagon Must Reinstate Nurse Who Declared She is a Lesbian*, N.Y. TIMES, June 2, 1994, at A1.

39. *See* Elizabeth Kastor, *The Battle for the Boy in the Middle; Little Tyler's Mom is a Lesbian, so Grandma Got to Take Him Away*, WASH. POST, Oct. 1, 1993, at C1. The decision was reversed by the Virginia Court of Appeals, but the case still is pending before the Virginia Supreme Court. *See Grandmother Appealing Decision Giving Lesbian Custody of Son*, N.Y. TIMES, June 26, 1994, at 22.

Litigants have a right to have their claims heard on the merits at the time they bring them.

Professor Sunstein's caution appears to rest, at least in part, on his perception that Justice Blackmun's opinion in *Roe* was divisive and harmful to both the women's rights and the abortion rights movements.[40] Yet federal courts would do well to remember that *Roe* is not the only example of controversial constitutional decision-making available as a model. In *Brown*, the Supreme Court not only set out a clear statement of principle that was not yet firmly settled in the collective consciousness, but actively eschewed the "limited role" that Sunstein envisions for the federal courts in the struggle for gay rights.[41] Despite the power of that decision, many view the social tasks undertaken by *Brown* as incomplete forty years later.[42] How much more incomplete would the task be had the federal courts followed then the advice Professor Sunstein offers today?

40. *See* Sunstein, *supra* note 1, at 25-26.

41. *Id.*

42. *See, e.g., Forty Years and Still Struggling*, N.Y. TIMES, May 18, 1994, at A22; Bob Herbert, *In America: After Brown, What?*, N.Y. TIMES, May 18, 1994, at A23; *see generally* BELL, *supra* note *.