SAME-SEX MARRIAGE AND *PERRY*: A CASE FOR JUDICIAL MINIMALISM?

GRAHAM GEE[†]

I.
INTRODUCTION

If the question for an increasing number of polities is not whether to recognize same-sex marriage, but how, it seems no less difficult to answer. In many respects, *Perry v. Brown* exemplifies the difficulty of this question, which encompasses debates not only about the moral, social, and legal significance of marriage, but also the proper roles of and limits on majoritarian and non-majoritarian decision-making. As the case heads towards the Supreme Court, I draw on Cass Sunstein's work to call for a minimalist decision.[1] Minimalism is typified by narrow decisions closely tailored to the specific facts of individual cases—and, in this, is often an expression of judicial concern to avoid venturing beyond the issues at hand. In the final analysis, minimalism may entail leaving unanswered the most challenging and contentious legal questions. I share with Professor Sunstein a belief that there is no justification for a general recourse to minimalism; rather, it is sensible in some, but far from all, contexts.[2] My primary objective is thus to sketch some reasons why *Perry* is an appropriate case for minimalism and why, in particular, the Justices should take into account whether a minimalist ruling might, over the long haul, supply a surer foundation for marriage equality nationally. A second objective is to situate *Perry* within recent international developments. But before this, I reflect on whether the Ninth Circuit's opinion in *Perry* is aptly characterized as minimalist.

II.
MINIMALISM AND THE NINTH CIRCUIT

California's Proposition 8 was a voter initiative passed in November 2008 revising the state constitution by restricting marriage to opposite-sex couples, and thereby reversing the decision of the state supreme court six months earlier.[3] The Ninth Circuit held that Proposition 8 violated the Equal Protection Clause.[4]

[†] Graham Gee is a lecturer in law at the University of Birmingham in England. His primary research interest lies in the nature of the British constitution, but he has written on the legal regulation of same-sex marriage in Canada, Massachusetts and South Africa.

1. *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME (1999) (exploring the connection between judicial minimalism and democratic self-government, arguing that certain minimalist decisions promote rather than undermine democratic processes).

2. Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1910 (2005).

3. *See generally In re* Marriage Cases 43 Cal. 4th. 757 (2008).

4. Perry v. Brown, 681 F.3d 1065, 1096 (9th Cir. 2012), *cert. granted sub nom.*

Relying on *Romer v. Evans*,[5] Judge Reinhardt found that Proposition 8 took away an entitlement enjoyed by gays and lesbians—namely, the right to have the designation of marriage ascribed to their partnership—for no rational reason. Absent any rational reason, Proposition 8 merely expressed popular disapproval of gays and lesbians and their relationships. In reaching this conclusion, Reinhardt emphasized facts unusual and specific to California. Rather than merely failing to extend the right to marry in the first place, Proposition 8 had taken away this right that gays and lesbians in California had previously, if briefly, enjoyed. At the same time, Proposition 8 left in place the state's domestic partnership law that conferred the substantive benefits of marriage, but not its official status. For Reinhardt, the centrality of these considerations limited the scope of his ruling to one state: California.[6]

Despite this stress on California-only considerations, it is not clear whether Judge Reinhardt's reasoning is aptly characterized as minimalist.[7] On the one hand, he studiously avoided announcing a general right for gays and lesbians to marry. In this, he departed from (and indeed all but ignored) the far-reaching decision of the district court, where Judge Walker had relied on both equal protection and due process grounds to decide that California was under a constitutional obligation to provide marriage on an equal basis.[8] Although finding that Proposition 8 could be invalidated on the ordinary rational basis standard, Walker also suggested that sexual orientation satisfied the legal test for a suspect classification triggering strict scrutiny.[9] Reinhardt, by contrast, avoided stipulating a new tier of scrutiny, relying instead on the heightened rational basis standard from *Romer*.[10]

On the other hand, minimalism might seem a bizarre characterization for a

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Hollingsworth v. Perry, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

5. Romer v Evans, 517 U.S. 620 (1996).

6. Perry v. Brown, 681 F.3d at 1063 ("All that Proposition 8 accomplished was to take away from same-sex couples the right to be granted marriage licenses and thus legally to use the designation of 'marriage,' which symbolizes state legitimization and societal recognition of their committed relationships. Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples.").

7. *Compare* Dale Carpenter, *Reinhardt's Minimalism, Lowering the Stakes*, VOLOKH CONSPIRACY (Feb. 9, 2012, 2:01AM), http://www.volokh.com/2012/02/09/reinhardts-minimalism-lowering-the-stakes/ ("The panel's decision is not so much *under*-theorized in the way minimalists love; it hardly has any theory. It is so minimalist one might call it minisculist.") *with* Ilya Somin, *Judicial Minimalism and Same-Sex Marriage*, VOLOKH CONSPIRACY (Feb. 10, 2012, 12:52 AM), http://www.volokh.com/2012/02/10/judicial-minimalism-and-same-sex-marriage/ ("If the Supreme Court embraces Reinhardt's reasoning, a state that enacts a civil union law would have to embrace gay marriage as well. That's not a minimalist result confined to one or a few states, and the Supreme Court justices are likely to realize that.").

8. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

9. *Id.* at 994.

10. Perry v. Brown, 681 F.3d at 1080–82.

judicial decision upending a ballot initiative in which over thirteen million people voted.[11] The consequence of the Ninth Circuit's decision is, subject to a stay, to reinstate same-sex marriage in the country's largest state in the face of popular opposition, even though state regulation of family relationships tends not to be easily challenged in federal courts.[12] What is more, there must be some doubt whether Reinhardt's reasoning can be limited successfully to California. It is not clear, after all, why the constitutionality of treating same-sex and opposite-sex couples differently should depend on whether they were once treated similarly. Bluntly put: why should it depend on "the happenstance of a short-lived court decision overturned by the people?"[13] In his opinion, Reinhardt also suggested that there was no rational reason to deny same-sex couples the official appellation of "marriage" if they have already been granted the rights associated with it. Yet far from being limited to one state, this reasoning seems potentially very wide: it could apply to *any* state where gays and lesbians can formalize their relationships in civil unions, but not in civil marriage.

The suggestion, then, is that evaluating whether Reinhardt's opinion is minimalist is not clear-cut. Like many decisions, it seems to blend minimalist and non-minimalist elements. For Sunstein, however, minimalism ultimately has two central characteristics, each a matter of degree: narrowness and shallowness.[14] Minimalist decisions strive to resolve individual cases rather than to expound general rules (*narrow*), and to avoid taking unnecessary stances on the controversial questions of the day (*shallow*). The fact that a court overturns a state constitutional amendment does not preclude its decision being minimalist (and, indeed, Sunstein identified *Romer* as minimalist even though the Justices invalidated an amendment to Colorado's constitution prohibiting legal protections against discrimination on the basis of sexual orientation).[15] On Sunstein's reading, *Romer* was minimalist insofar as the Justices relied on relatively narrow and shallow grounds when invalidating the amendment.[16] Similarly, it seems plain that Reinhardt strived to be both narrow (stressing California-centric considerations) and shallow (eschewing the ambitious grounds articulated by Judge Walker in order to avoid setting out a blueprint for recognizing same-sex marriage throughout the nation). Admittedly, it might become clear over time that Reinhardt's reasoning cannot be limited to California. For now, however, it seems reasonable to characterize his opinion as

11. Debra Bowen, *Statement of Vote* 13 (Nov. 4, 2008), *available at* http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

12. Trammel v. United States, 445 U.S. 40, 50 (1960) (noting that "the laws of marriage and domestic relations are concerns traditionally reserved to the states").

13. David Cole, *Gambling with Gay Marriage*, NYRBlog entry, N.Y. REV. BOOKS (Feb. 9, 2012), http://www.nybooks.com/blogs/nyrblog/2012/feb/09/gambling-gay-marriage/.

14. Cass R. Sunstein, *Foreword* to *The Supreme Court 1995 Term*, 110 HARV. L. REV. 4, 15–21 (1996).

15. *Id.* at 53–71.

16. *Id.* at 53–54.

relatively minimalist inasmuch as it avoided addressing, directly and explicitly, the larger question of whether there is a fundamental right for gays and lesbians to marry. No doubt when compared with Walker's maximalist decision, Reinhardt's opinion might have disappointed the plaintiffs and their supporters. But this minimalist approach arguably paves a more secure path towards national marriage equality—and one that, in my view, the Supreme Court should follow.

III.
MINIMALISM AND THE SUPREME COURT

The case for minimalism is strongest where the Supreme Court is grappling with a complex and contentious question that remains the subject of vibrant, yet volatile, political debate. Whether to recognize same-sex marriage is plainly such a question. That this is a complex question is reflected in the fact that it implicates a range of not only difficult moral and social questions (relating, for example, to equality, dignity, privacy, the family, procreation, and the economic distribution of private and governmental benefits), but also detailed policy questions (What package of benefits and obligations, if any, should be provided to same-sex couples? Should this differ from the package that flows from marriage? Should there be a scheme for registering same-sex relationships, and what status should it have?).[17] Further complicating matters is how best to decide whether to recognize marriage equality (via statute, constitutional amendment, or judicial decision, and at federal or state level?).[18]

That recognizing same-sex marriage remains contentious is almost too obvious to mention (although the propensity of proponents of marriage equality to overstate "the wondrous progress [made] over the past decade" and downplay the extent of "dispiriting setbacks"[19] suggests that salutary reminders of the unsettled nature of public attitudes are required). True, polling suggests steadily increasing support, with surveys in the last couple of years recording majority support. Yet, only nine states and the District of Columbia have legalized same-sex marriage.[20] Meanwhile, thirty-one states have amended their constitutions over the last fifteen or so years to ban same-sex marriage, with legislation in a further eight.[21] Only in Minnesota have voters rejected an anti-equality

17. *See* ROBERT WINTEMUTE, *Conclusion in* LEGAL REGULATION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 759, 763 (R. Wintemute & M. Anedenas eds., 2001) (articulating common issues faced by all jurisdictions considering the legal recognition of same-sex partnerships).

18. *See generally* Kevin J. Worthen, *Who Decides and What Difference Does It Make? Defining Marriage in 'Our Democratic, Federal Republic'?*, 18 B.Y.U. J. PUB. L. 273 (2004) (comparing the relative advantages of different methods of legalizing same-sex marriage).

19. Laurence H. Tribe, *The Constitutional Inevitability of Same-Sex Marriage*, SCOTUSBLOG (Aug. 26, 2011), http://www.scotusblog.com/2011/08/the-constitutional-inevitability-of-same-sex-marriage/.

20. HUMAN RIGHTS CAMPAIGN, *Marriage Center*, http://www.hrc.org/marriage-center (last visited Jan. 11, 2013).

21. *Id.*

amendment to a state constitution. In California alone, voters have twice asserted a traditional definition of marriage. True, the tide in favor of marriage equality may very well be turning, with important victories at the ballot box in November 2012 in Maine, Maryland, Minnesota, and Washington.[22] The point remains, however, that same-sex marriage is one of those rare issues that polarize popular opinion to an unusual degree.

The question that arises is whether the Supreme Court, if it reaches the merits in *Perry*, ought to resolve definitively the difficult and divisive question of whether there is a constitutional right to same-sex marriage. Minimalism counsels to decide *Perry* in a way that promotes democratic deliberation.[23] A threshold condition for what Professor Sunstein terms "democracy-forcing" minimalism is a reasonably well-functioning democratic process where divisive issues are subject to sustained political debate. The case for minimalism is less strong where the issue at hand is not on the political agenda, or where there are unreasonable delays blocking social change, or excessively powerful interest groups distort the working of the political process. There can be little doubt that same-sex marriage easily satisfies Sunstein's threshold. We might not always like the results emerging from political processes (although legislatures in three states together with the District of Columbia have recognized same-sex marriage), but there can be no denying that marriage equality is receiving sustained and (for the most part) good faith political debate.

By affirming the Ninth Circuit's decision, and by following Reinhardt's attempt to cabin its opinion to California, the Supreme Court's minimalist ruling would avoid prematurely foreclosing debate on an especially divisive issue. It would provide more time and space for the issue to be further debated—and, it is to be hoped, ultimately determined—in the states by legislative institutions or by voters at the ballot box. A minimalist ruling that decides California's appeal, but no more, would avoid further nationalizing the issue. A state-by-state approach encouraged by a minimalist ruling allows more time for greater public acceptance of same-sex marriage, thereby reducing the risk of social and political backlash. By contrast, a maximalist decision on the equal protection or due process arguments in favor of a constitutional right to same-sex marriage shortcuts the political process and risks the issue of same-sex marriage "festering"[24] (by, for instance, embittering its opponents or reenergizing them to make same-sex marriage a litmus test in judicial confirmation battles).

For some, the case for minimalism, whether in *Perry* or otherwise, will

22. Erik Eckholm, *As Victories Pile Up, Gay Rights Advocates Cheer 'Milestone Year'*, NYTIMES (Nov. 7, 2012), http://www.nytimes.com/2012/11/08/us/same-sex-marriage-gains-cheer-gay-rights-advocates.html.

23. Sunstein, *Foreword*, *supra* note 14, at 38.

24. Charles Fried, *The Courts, the Political Process and DOMA*, SCOTUSBLOG (Aug. 25, 2011), http://www.scotusblog.com/2011/08/the-courts-the-political-process-and-doma/ ("A favorable Supreme Court ruling would abort that political process and cause the issue to fester in political discourse, with the familiar bad effects.").

seldom be convincing. It is axiomatic that people subscribe to rather different conceptions of the proper role of the Supreme Court. Skeptics of minimalism view it as a violation of the Court's role as a court of final appeal charged with protecting constitutional rights. Leaving questions to the majoritarian political process, according to this view, "is not an inherent good in a democratic society."[25] Skeptics of minimalism will find unpersuasive the argument that the Justices should not offer definitive answers to even the most divisive of legal and political questions.[26] They challenge proponents of judicial minimalism in a case like *Perry*, asking "why wait?" For minimalists, however, "democratic self-government is one of the rights to which people are entitled . . . and judicial foreclosure may represent not a vindication of rights but a controversial choice of one right over another."[27] For minimalists, the question is not why wait, but "[w]hat's the rush?"[28] The state-by-state approach promoted by a minimalist ruling allows other states to learn from the experience in the "pioneer states" that recognize marriage equality; it allows states to learn, as William Eskridge puts it, that "the sky did not fall after lesbian and gay couples were eligible for civil marriage licenses."[29] At the heart of these differing views on judicial minimalism lie rival and opposing views on the proper limits of majoritarian and non-majoritarian decision-making—and, in the final analysis, on competing accounts of the extent to which social change can, or for that matter should, be achieved through judicial decisions.

The strongest argument against minimalism in a case like *Perry* is that it requires the Justices to make "seat-of-the-pants calls about the political marketplace."[30] In the absence of reliable data, and with no certainty about how popular opinions on even the most disputed of issues will develop in the near future, the Justices are required to speculate about the consequences of a broad and deep maximalist ruling. Yet political moods are very hard to read. Proposition 8 itself is an odd combination of nullifying a specific right for a historically-disadvantaged group, while leaving in place an extensive package of benefits that would have seemed remarkable fifty years ago. Even aside from the fact that their evaluations of the likely backlash and the future development of social norms might be faulty, the risk is that minimalism requires judges "to make precisely those judgments that its premise [that political decisions are best

25. Neil R. Siegel, *A Theory in Search of a Court and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2014 (2005).

26. *See, e.g.*, Erwin Chemerinsky, *Reflections on a Dialogue: Getting to Marriage Equality*, SCOTUSBLOG (Aug. 29, 2011), http://www.scotusblog.com/2011/08/reflections-on-a-dialogue-getting-to-marriage-equality/ ("Laws that prohibit same-sex marriage deny gays and lesbians of the right to marry and discriminate against them solely based on their sexual orientation. It is the judicial role to strike such laws down . . . .").

27. Sunstein, *Foreword*, *supra* note 14, at 32–33.

28. William N. Eskridge, Jr., *Six Myths that Confuse the Marriage Equality Debate*, 46 VAL. U. L. REV. 103, 114 (2011).

29. *Id.* at 115.

30. Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1989 (1999).

left to political actors] asserts that judges should not make."[31] There is real force to this objection, as Sunstein himself has conceded.[32] But if the choice confronting a court is to make a political judgment by asserting a new constitutional right on a divisive issue on the one hand or making a political judgment about the risk of backlash on the other, the judicial minimalist will chose the latter in the confident expectation that, if nothing else, the right of self-government will be vindicated. For proponents of minimalism, even those who believe in marriage equality, this is no small thing.

IV.
MARRIAGE EQUALITY AND MINIMALISM IN INTERNATIONAL PERSPECTIVE

The pace of international recognition of the right of gays and lesbians to marry is, in many ways, eye-catching. Eleven countries in eleven years have legalized same-sex marriage—namely, Argentina, Belgium, Canada, Denmark, Iceland, Netherlands, Norway, Portugal, Spain, South Africa, and Sweden.[33] The same-sex marriage debate is also currently a topic of lively political debate in many other countries (including the UK, France, and Germany).[34] At the same time, it must be recalled that although eleven countries have full marriage equality, they remain a very small minority.

There are three tentative lessons to draw from the international move towards marriage equality. First, the movement tends to be a step-by-step process in which rights are gradually extended to gay and lesbian couples: for example, the repeal of laws regulating intimate relations; the reduction in the age of consent; the extension of cohabitation rights; the introduction of a domestic partnership scheme short of civil marriage; and, finally, the recognition of full marriage equality.[35] Second, the recognition of same-sex marriage in any given

31. Mark Tushnet, *How to Deny a Constitutional Right: Reflections on the Assisted-Suicide Case*, 1 GREEN BAG 55, 60 (1997).

32. Cass R. Sunstein, *If People Would be Outraged by their Rulings, Should Judges Care?*, 60 STAN L. REV 155, 155 (2008) ("There is also an argument for banning consideration of the effects of public outrage on rule-consequentialist grounds: judges might be poorly suited to make the relevant inquiries, and consideration of outrage might produce undue timidity.").

33. *Same-sex Marriage Around the World*, CBCNEWS (Feb. 7, 2012), http://www.cbc.ca/news/world/story/2009/05/26/f-same-sex-timeline.html.

34. *See* Fred Pleitgen & Janina Bembenek, *Germany's High Court Expands Gay Rights*, CNN (Aug. 9, 2012) http://articles.cnn.com/2012-08-09/world/world_europe_germany-gay-rights_1_lesbian-couples-gay-couples-tax-equality (discussing the same-sex marriage debate in Germany); Ed West, *Gay Marriage, Bigots, and the Effect of State Funding on Civilised Debate*, TELEGRAPH (Nov. 1, 2012), http://blogs.telegraph.co.uk/news/edwest/100187456/gay-marriage-bigots-and-the-effects-of-state-funding-on-civilised-debate/ (discussing the same-sex marriage debate in the United Kingdom); Tom Heneghan & Alexandria Sage, *France's Gay Marriage Bill Hits Opposition, Bureaucratic Delays*, REUTERS (Oct. 22, 2012), *available at* http://www.huffingtonpost.com/2012/10/22/france-gay-marriage-bill-opposition-delays_n_2000516.html (discussing the same-sex marriage debate in France).

35. *See* William N. Eskridge Jr, *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 642 (2000) (discussing the progression "slowly but surely" towards same-sex unions).

country is inevitably the result of a unique combination of political and social factors, yet there have been very considerable similarities in the types of arguments made in the public debate in different countries.[36] It is also true that in many countries, arguments about the appropriate roles of courts and legislatures have occurred in the shadow of the larger debates about whether or not to recognize same-sex marriage. Third, it has been legislative action, more so than judicial action, which has driven the push towards full marriage equality in many countries (as was true in the Netherlands, Belgium, Spain, Norway, Sweden, Iceland, Portugal, Argentina, and Denmark).[37] Even in Canada and South Africa where the push has been more clearly driven by constitutional challenges in the courts, the top courts have taken care to leave room for legislative action.[38]

For example, when Canada's top court was asked to give an advisory opinion on the constitutionality of a legislative proposal redefining marriage to encompass same-sex relationships, the Canadian Justices offered a fairly narrow and shallow opinion suggesting that the federal parliament had the authority to redefine civil marriage to include same-sex couples in a manner consistent with the Canadian Charter of Rights and Freedoms.[39] But they did not answer the larger and more controversial question: whether opposite-sex marriage was inconsistent with the Charter. By offering only relatively minimal conclusions on whether the Canadian Parliament could redefine traditional marriage, and by declining to opine on the constitutionality of traditional marriage, the Canadian Justices left the debate on same-sex marriage open for democratic deliberation in Parliament. The result was that the Civil Marriage Act redefining traditional marriage became law throughout Canada in 2005.[40] A somewhat similar dynamic was evident in South Africa. In 2005, the Constitutional Court declared that traditional marriage was a denial of equal protection of the law and unfair discrimination.[41] But the court suspended its declaration for a year in order to allow Parliament to correct the constitutional defect. Within a year, the Civil Union Act became law, extending the common law definition of marriage to same-sex couples.[42] While there are reasons to criticize the Constitutional

36. Nicholas Bamforth, *Same-Sex Partnerships: Some Comparative Constitutional Lessons*, EUR. HUMAN RIGHTS LAW. REV. 47, 48 (2007).

37. *See, e.g.*, Renwick McLean, *Spain Legalizes Same-Sex Marriage*, N.Y. TIMES (June 30, 2005), http://www.nytimes.com/2005/06/30/international/europe/30cnd-spain.html?_r=0 (discussing the progression of a bill legalizing same-sex marriage through the Spanish legislature).

38. *See* Graham Gee & Grégoire C.N. Webber, *Same-sex Marriage in Canada: Contributions from the Courts, the Executive, and Parliament*, 16 KINGS L. J. 132 (2005); Graham Gee & Grégoire C.N. Webber, *A Confused Court: Equivocations on Recognizing Same-Sex Relationships in South Africa*, 69 MOD. L. REV. 831 (2006).

39. *See Reference re* Same-Sex Marriage, 3 S.C.R. 698 (2004).

40. *See Same-Sex Marriage Law Passes 158-133*, CBCNEWS (June 29, 2005), http://www.cbc.ca/news/canada/story/2005/06/28/samesex050628.html.

41. *Minister of Home Affairs v Fourie*, 2005 SA 2 (CC) at 50 (S. Afr.).

42. Jeannie Shaw, *South Africa Assembly Passes Civil Unions Bill*, JURIST (Nov. 14, 2006),

Court's maximalist declaration, its more minimal remedy provided scope for legislative authorization of same-sex marriage.

What relevance does the comparative constitutionalism of same-sex marriage have for a decision by the Justices in *Perry*? On the one hand, it is not directly relevant if the Court is motivated by decisional minimalism. If striving to issue a narrow and shallow ruling that says no more than necessary to determine the constitutionality of Proposition 8, the Justices would have little need to look at the experience of the eleven countries that have recognized full marriage equality. There would be little need, in other words, for the Court to draw on sociopolitical data from those countries to upend some of the more outlandish arguments made by opponents about the likely consequences of same-sex marriage. The comparative experiences of these eleven countries are indirectly relevant, however, in that they point to the prudence of a minimalist ruling in *Perry* that encourages political actors to settle the question of whether to recognize same-sex marriage. By attempting to nurture democratic deliberation on same-sex marriage, the Court would ensure that political communities throughout the United States are broadly in line with the pioneer countries that have gradually come to recognize marriage equality.

V.
CONCLUSION

For those who support the movement towards marriage equality for gays and lesbians, the attraction of a "heroic"[43] decision by the Supreme Court setting out a fundamental right to same-sex marriage is plain. Yet, in the final analysis, the right for gays and lesbians to marry must rest on a secure political foundation. In those very rare circumstances where an exceptionally divisive issue is not the subject of settled popular opinion, the case for decisional minimalism is made. As Sunstein put it, "[i]n its own small way, minimalism can be heroic too."[44]

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http://jurist.org/paperchase/2006/11/south-africa-assembly-passes-civil.php.

43. Siegel, *supra* note 25, at 2015 (discussing the Supreme Court's decision in *Brown v. Board of Education*).

44. Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123, 129 (2005).