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AN ORIGINALIST UNDERSTANDING OF MINIMALISM

*Suzanna Sherry**

The main burden of Professor Perry's paper is to demonstrate that an originalist may, but need not, be a minimalist. In the course of this project, Perry reiterates his earlier arguments in favor of originalism. He also tentatively endorses minimalism as a background presumption, suggesting that non-minimalist or aggressive judicial review must be affirmatively justified and should be limited to questions that are "vulnerable to majority sentiment."¹ His primary argument in favor of minimalism is a democratic or majoritarian one: as between historically plausible interpretations of the written Constitution, the people and their elected representatives, rather than the unelected judiciary, ought to prevail on policy questions.

Neither Perry's originalism nor his majoritarian defense of minimalism is novel. As he himself notes, both are standard conservative arguments against the Supreme Court's relatively aggressive protection of individual rights. Where he differs from these standard arguments is in his insistence that originalism does not entail minimalism and, thus, that minimalism must be defended separately.

Professor Perry justifies his endorsement of (partial) minimalism as a matter of policy rather than as a matter of history. He is not a historian, nor does he claim to be. Indeed, later in the book from which his paper is taken he explicitly relies on "credible analysts of the historical record," eschewing independent "exploration of the relevant historical materials."² If he *were* a historian, his discussion of the relationship between originalism and minimalism might have taken a different shape. Rather than asking in the abstract whether minimalism is an appropriate judicial strategy, he might have explored the original intent regarding normative or interpretive strategies. In other words, he might have asked whether the founders were judicial minimalists. I propose to answer just that question in this Essay and then to explore the implications

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¹ Michael J. Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 Nw. U. L. REV. 84, 150 (1993) (quoting John H. Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 834 n.4 (1991)).

² MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS* (forthcoming 1994).

of Perry's simultaneous endorsement of originalism and weak or partial minimalism.

What was the original intent with regard to minimalist or non-minimalist judicial review? Did the founding generation intend to put primary responsibility for what Perry labels interpreting constitutional provisions and specifying constitutional norms in the majoritarian branches or in the courts? An examination of the historical record suggests that *a true originalist must almost certainly be a non-minimalist*.³

The founders believed, in the words of Roger Sherman, that "the people . . . should have as little to do as may be about the Government."⁴ The founders distrusted the common people and structured the Constitution to put as little power as possible in the hands of the masses. They expected instead that their newly created democracy would be run by people like themselves, people they could trust. Thomas Jefferson, the great democrat, reflected that sanguine trust in an aristocratic judiciary when he wrote to James Madison in 1789, praising judicial review as a necessary safeguard for the soon-to-be-written Bill of Rights. "[W]hat degree of confidence," he wrote, "would be too much for a body composed of such men as Wythe, Blair, and Pendleton?"⁵

Evidence for my conclusion—that the founding generation mistrusted democracy and therefore would have approved of judges acting in a non-minimalist manner in interpreting and implementing the Constitution—may be found in what Americans said and did during the founding era. In 1776, when the newly independent states first began writing constitutions, those constitutions were very popularly based. Most state constitutions gave great power to the legislature and little or none to the executive, who was usually appointed by the legislature.⁶ New Hampshire's 1776 Constitution did not even provide for a state executive.⁷ State legislatures were also kept on a short leash. Members of the lower house served only one or two year terms; upper house terms ranged from one to five years. Many state constitutions contained additional devices

³ I obviously cannot give all the evidence for this conclusion here. For some overviews that provide supportive evidence, see DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* (1990); FORREST McDONALD, *NOVUS ORDO SECLORUM* (1985); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* (1969); Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 798 (1987); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 616-20 (1993).

⁴ As reported by James Madison, *reprinted in* FARBER & SHERRY, *supra* note 3, at 113.

⁵ Letter from Thomas Jefferson to James Madison (March 15, 1789), *reprinted in* 14 THE PAPERS OF THOMAS JEFFERSON 659 (Julian P. Boyd ed., 1958). At the time, all three men sat on Virginia's highest court. Pendleton was the President (equivalent to Chief Justice) of that court, and Blair would soon be appointed to the United States Supreme Court by George Washington. Wythe (who had been Jefferson's teacher) was an ex officio member of the Virginia court because he was Virginia's sole chancellor. All three men wrote or joined opinions endorsing broad, aggressive judicial review. See Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 183-96 (1992).

⁶ See generally FARBER & SHERRY, *supra* note 3, at 80-81.

⁷ *Id.* at 81.

designed to make the legislature popularly accountable, including provisions guaranteeing the people's right to instruct their representatives or delaying votes on proposed bills until after an intervening election.⁸

Experience with self-government changed American views. By the 1780s, state constitution-writers began to back away from directly democratic government. The state constitutions of the 1780s are much less popularly based than those of the 1770s.⁹ The 1787 federal constitution is even less democratic: in addition to the relatively long legislative terms and the absence of any devices to increase legislative accountability, the federal constitution establishes a number of new devices that effectively filter, or mediate, democratic impulses.¹⁰

The movement away from popular democracy stemmed from general dissatisfaction with the behavior of the highly democratic state legislatures. Americans—at least those who wrote and ratified the federal constitution—became convinced that too much democracy was dangerous. Some sentiment to this effect existed even before the Revolution. John Randolph wrote in 1776: “When I mention the public, I mean to include only the rational part of it. The ignorant vulgar are as unfit to judge of the modes, as they are unable to manage the reins of government.”¹¹ Benjamin Rush opined in 1776: “They call it a democracy—a mobocracy in my opinion would be more proper. All our laws breathe the spirit of town meetings and porter shops.”¹²

By 1787, this elitist, antidemocratic perspective permeated the Philadelphia convention. Edmund Randolph defended his Virginia Plan—the very first draft of what became the United States Constitution—by cataloging the problems with the state constitutions and the Articles of Confederation. He complained of the excess of democracy: “Our chief danger arises from the democratic parts of our constitutions. It is a maxim which I hold incontrovertible, that the powers of government exercised by the people swallow up the other branches. None of the constitutions have provided sufficient checks against democracy.”¹³ On May 31, Elbridge Gerry opened his comments on the proposed federal legislature by noting: “The evils we experience flow from the excess of democracy. . . . He had he said been too republican heretofore: he was still however republican, but had been taught by experience the danger of the

⁸ See *id.* at 111.

⁹ *Id.* at 81 (discussing the strengthening of the executive branch in state constitutions of the 1780s).

¹⁰ I include in this description the election of Senators by the state legislatures and the electoral college.

¹¹ WOOD, *supra* note 3, at 113-14.

¹² Harding, *Party Struggles over the First Pennsylvania Constitution*, 1895 ANN. REP. AM. HIST. ASS'N 1894, at 386.

¹³ As reported by James McHenry, *reprinted in* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 26-27 (Max Farrand ed., 1911).

levelling spirit."¹⁴ Even Madison advocated an aristocratic senate, "to protect the people [against] the transient impressions into which they themselves might be led."¹⁵

This antidemocratic vision was not confined to Federalists. Gerry became a prominent Antifederalist, and a number of other Antifederalists voiced similar sentiments. A Maryland "Farmer" suggested that in democratic governments, "the tyranny of the legislative is most to be dreaded."¹⁶ "Agrippa" wrote that "[i]t is therefore as necessary to defend an individual against the majority in a republick as against the king in a monarchy."¹⁷

It is important to note here that I am not making a neo-Beardian argument. Beard contended that the founders were antidemocratic elitists who sought only to protect their own narrow economic interests.¹⁸ My own view is that the source of the founders' limited vision of democracy is classical or civic republicanism. Although there is a great deal of controversy over the extent to which classical republicanism influenced the American founding generation, most scholars concede that it had some influence.¹⁹ To the extent that the founders *were* good civic republicans, their elitism was derived not so much from economic self-interest as from a belief that only the "natural aristocracy" had the education, leisure, and inclination to deliberate rationally and disinterestedly about the good of the nation. The Constitution they wrote and ratified reflected at least this republican reliance on the few rather than the many.

Popular ratification of the Constitution suggests that the vision of a natural aristocracy was shared to some extent even by the lower classes. Others have noted that the concept of deference to one's social superiors—one component of a republican ideology of natural aristocracy—was still influential, although waning, in the last decades of the eighteenth century.²⁰ My own evidence suggests that both proponents and opponents of the Constitution were, by our standards today, antidemocratic. Moreover, because some Antifederalists specifically

¹⁴ As reported by James Madison, *reprinted in* FARBER & SHERRY, *supra* note 3, at 113-14, and *in* RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 13, at 48.

¹⁵ As reported by James Madison, *reprinted in* FARBER & SHERRY, *supra* note 3, at 143, and *in* RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 13, at 421.

¹⁶ Essay by a Farmer (Feb. 15, 1788), *in* 5 THE COMPLETE ANTI-FEDERALIST 15 (Herbert J. Storing ed., 1981).

¹⁷ Letter from Agrippa to the Massachusetts Convention (Feb. 5, 1788), *in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 16, at 111.

¹⁸ CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

¹⁹ For a thorough recent overview of republicanism, liberalism, and the historiographical debate over the relative influence of each, see STEVEN M. DWORETZ, THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION (1990). For a fascinating discussion of the historiographic evolution of republicanism, see Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992).

²⁰ See generally GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992).

charged that the Constitution was an aristocratic document,²¹ it is unlikely that the Federalists duped a gullible public into ratifying a document with hidden aristocratic implications.

Thus, the evidence suggests that attributing a decidedly antidemocratic view of government to the entire founding generation is a fair portrayal of original intent. Under Professor Perry's own interpretive theory, then, originalism actually entails non-minimalism. The founders, mistrusting the people and seeking to protect the nation from popular folly, would have been quite comfortable entrusting primary authority for discretionary constitutional interpretation to the branch that is most removed from the people and least electorally accountable.

But we all know that I have just stated a ridiculous and untenable conclusion. Our Constitution, which establishes essentially a majoritarian democratic republic, cannot possibly be interpreted to *prefer* (not just to tolerate unapologetically, but to prefer) non-elected to elected policymakers. What implications can we draw from the implausibility of my conclusion?

First, of course, I might have gotten the history wrong. But the historical evidence in support of my conclusion (which encompasses more than the bare evidence I present here), though it may not ultimately be conclusive, is no less plausible than the evidence we might find to support a conclusion that the founders were strong democrats and thus also judicial minimalists. As Perry acknowledges, the historical evidence yields two equally plausible conclusions in many cases. His solution is that a judge should prefer the historical answer which comports best with her own views of the judicial role, including her views on whether judges should be minimalists. That solution might work when the question is which of two readings of (for example) the Eighth Amendment to adopt, where one reading accords the judiciary more, and one less, discretion about what constitutes cruel and unusual punishment. But in the context of deciding whether the founders were minimalists, Perry's solution is simply tautological: it tells the originalist judge to be a historical minimalist (*i.e.*, to believe the founders were minimalists) if she is inclined to judicial minimalism herself. Perry's solution also means that originalism drops out as an interpretive strategy, because the key question is simply whether the judge views her own role as minimalist or non-minimalist.

A second implication of the inconsistency between my conclusion and our instincts about the Constitution is that, as many have argued before, originalism is not a useful doctrine. If my history is wrong, originalism is a sham because anyone with a few research skills can manipulate the historical record to reach any conclusion. If my history is

²¹ See, e.g., Essay by Montezuma (Oct. 17, 1878), in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 16, at 53-57.

right, then originalism is impossible because the gulf between ourselves and the founding generation is unbridgeable: we cannot possibly envision a world view that makes "our" Constitution an antidemocratic document designed to keep government away from the people.

Given these arguments, how can a scholar as thoughtful and sophisticated as Professor Perry maintain that he is an originalist? We might also ask how he can be a minimalist if, despite his originalist stance, he never presents us with evidence that the original intent plausibly encompassed minimalism. The answers lie not in the discussion of minimalism which is published here, but in other chapters of the book of which his paper on minimalism is a part. That book, titled *The Constitution in the Courts: Law or Politics?*,²² focuses on applying Perry's unique combination of originalism and partial minimalism to the rights and liberties protected by the Fourteenth Amendment. Perry's thesis is as follows:²³ The originalist directive of the Fourteenth Amendment is that the government is prohibited from discriminating if (and only if) the discrimination is premised on an incorrect view that a particular trait is relevant to an individual's status as a human being. Clear violations of this directive are unconstitutional. In less clear cases, the question will usually revolve around the process of what Perry calls "specifying" the directive. In specifying the antidiscrimination directive—that is, determining whether the characteristic is in fact relevant to one's status as a human being as well as whether the discrimination is wrongfully premised on viewing it as relevant—the courts ought to be aggressive rather than minimalist. Thus, in more familiar terms, the Court should apply heightened scrutiny to instances of discrimination that the Court believes rest on irrelevant characteristics. However, only the antidiscrimination directive is subject to aggressive specification. With regard to all other rights and liberties protected by the Fourteenth Amendment, courts should take a minimalist or deferential approach, approving any historically plausible legislative interpretation of the Constitution. In other words, except when it is implementing the antidiscrimination directive, the Court should apply minimal scrutiny (the rational basis test).

Although this scheme is quite complicated, and takes much of the book to set out, the doctrinal results are fairly easy to summarize:

Intentional discrimination against nonwhites is almost always unconstitutional, because it is premised on the illegitimate view that race is relevant to one's status as a human being—that is, that nonwhites are inferior human beings—and thus it violates the antidiscrimination directive.

Intentional discrimination against women will be unconstitutional *if*

²² PERRY, *supra* note 2.

²³ The explication of his thesis, as well as its doctrinal implications, are found in chapters 6, 7, and 8.

it is premised on the illegitimate view that gender is relevant to one's status as a human being, that is, that women are inferior human beings. Perry believes that sex discrimination is, in fact, often predicated on just such an illegitimate view and will thus often be unconstitutional.

Intentional discrimination on the basis of sexual orientation is identical to gender discrimination because Perry believes such discrimination is often premised on the illegitimate view that sexual orientation is relevant to one's status as a human being, in other words, that homosexuals are inferior human beings. Notice that at this point Perry's aggressive, non-minimalist approach to specifying the directive becomes crucially important. It is the Court (or Perry himself, if the Court adopts his reasoning) that determines whether homosexuality *is* relevant to one's status as a human being; the *Court* decides that governments cannot act on the basis of a belief that nonwhites, women, or homosexuals are inferior. In my own view, this is both a legitimate role for the Court and a laudable decision on the merits (in all three cases). But Perry's conclusion that the government may not make (or act on) moral judgments about homosexuality is difficult to reconcile with any straightforward originalist-minimalist approach. It is only Perry's rather complex scheme, demanding unyielding fidelity to the originalist nondiscrimination directive but aggressive judicial action in specifying it, that allows a result that would strike many as contrary to both the majoritarian will and the framers' intent.

To return to the doctrinal results of Perry's scheme: affirmative action will almost always be constitutional, because it is rarely if ever premised on a view that anyone is inferior to anyone else and thus it does not violate the antidiscrimination directive.

Finally, general laws prohibiting or regulating abortion are constitutional, because they do not violate the antidiscrimination directive and are part of the residual Fourteenth Amendment liberties subject only to minimal scrutiny (Perry's minimalist background assumption). However, certain antiabortion laws—namely, those that prohibit abortion if the pregnancy is the result of rape or incest, if carrying the pregnancy to term would cause grievous and irreparable damage to the woman's health, or if the pregnancy would result in a severely deformed fetus with a limited life expectancy—would not have been passed (according to Perry) in the absence of "sex selective indifference" and thus are likely unconstitutional. In other words, these particular restrictions, unlike most abortion restrictions, would not have been passed if men could get pregnant, and they therefore violate the antidiscrimination directive. Perry dismisses out of hand the possibility that few if any restrictions on abortion would exist if men could get pregnant.

This list of results makes me very suspicious. We all know Professor Perry's own politics (in part from his previous writing). He is basically a good, party-line liberal, except that he has great difficulty with abortion

rights. Is it surprising that his “interpretive” commands—to be an originalist always and a minimalist sometimes—just happen to yield exactly the combination of results that he favors politically?

Perry is not alone. Somehow, whenever people start talking about constitutional theory or constitutional history, the soundest theory and the best history support their own particular political views. An astute reader might recall how the best history just happened to support my view (at least for purposes of this Essay) that the founders were antidemocratic elitists. Thayer’s own survey suggested just the reverse in support of his majoritarian theory of minimalism.

But if talking about interpretive strategies—originalism, minimalism, and the like—is just a cover for the speaker’s substantive views of the Constitution, where does that leave us? Dare I suggest that we stop talking about judicial review and theories of interpretation? This symposium celebrates one hundred years of scholarship on judicial review and the manner in which it ought to be exercised, and we are no further than we started. The debates are still as unresolved, and as rancorous, as they have ever been. So instead of arguing over whether the Supreme Court was right or wrong to second-guess the legislature in a particular instance, let’s start talking about substance: about what kind of a polity we want (and why), and what we need to do to get there.²⁴

²⁴ And if you insist on referring to interpretive strategies, I guess that makes me a pragmatist. See Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988). But I can be an originalist too. In addition to suggesting in this Essay that the founders were elitist and therefore antiminimalist, I have previously suggested that the founders believed in judicial enforcement of evolving natural rights, which means that virtually anything a judge wants to find in the Constitution can be justified on the basis of original intent. See Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001 (1988); Sherry, *supra* note 5.