

NORMATIVE INDETERMINACY AND THE PROBLEM OF JUDICIAL ROLE

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None of the points I am about to make presupposes, claims, or entails either that an originalist approach to constitutional interpretation is the proper approach or that it is not the proper approach. For present purposes, therefore, I need not address the question "What is originalism?" or the related question "What is the best originalist approach?" Were I to address such questions, I could hardly do better than to follow the lead of Richard Kay, whose contribution to this Symposium exemplifies his important work.¹ The points I am about to make are relevant and indeed important *both* for originalists *and* for those who reject any or all originalist approaches.

I. TEXTUAL INDETERMINACY V. NORMATIVE INDETERMINACY

Because a fundamental confusion infects much that Michael Dorf has said this morning,² I must first emphasize an important distinction. It is not always clear which norm (or norms) a written legal text, such as a constitutional provision, represents. A legal text can be, in the political community whose text it is, opaque, vague, or ambiguous. To interpret a legal text is to (try to) identify the norm the text represents. The aim of the interpretive inquiry is to translate or decode the text; it is to render the text intelligible by identifying the meaning of the text—by identifying, that is, the norm represented by the text. A legal text can be indeterminate, in the sense that, given all the available relevant data, the members of the political community whose text it is can reasonably disagree about what norm the text represents. Even if it is agreed—or, at least, even if it is not presently in question—that a legal text represents a particular norm, the norm itself can be indeterminate in the context of a particular case. Persons who agree about: (1) what the relevant facts are; (2) what the other relevant legal norms are; and (3) what the

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1. See Richard S. Kay, "Originalist" Values and Constitutional Interpretation, 19 HARV. J.L. & PUB. POL'Y 335 (1996).

2. See Michael C. Dorf, *A Nonoriginalist Perspective on the Lessons of History*, 19 HARV. J.L. & PUB. POL'Y 351 (1996).

implications of those other norms for the case are; nonetheless can disagree—*reasonably* disagree—about how, given the norm, the case should be decided and the conflict resolved. A norm that governs a conflict, or that is relevant to the conflict, or that is implicated by it, but that is indeterminate in the context of the conflict must be specified. To “specify” an indeterminate norm, in the special sense in which I use the term here (and in my book³), is to shape the norm; it is to render the norm determinate in the context of a conflict to which it is relevant but in which it is indeterminate.

Notice that textual determinacy-indeterminacy and normative determinacy-indeterminacy are independent: a legal text can be determinate in the sense that there is only one plausible conclusion about what norm or directive the text represents, but the directive can be indeterminate in the context of the conflict to be resolved; or a legal text can be indeterminate in the sense that there is more than one plausible conclusion about what directive it represents, but one or more of the candidate directives, or even all of them, can be determinate in the context of the conflict to be resolved.

As I have explained in my book, “originalism” is a position about the proper judicial approach to the interpretive inquiry.⁴ It bears emphasis that originalism is not a position about the proper judicial approach to the *normative* inquiry, that is, the inquiry about what shape to give, in a particular context, an indeterminate directive represented, or believed to be represented, by a particular provision of the constitutional text. Originalism, properly understood, is a position about constitutional interpretation, not about constitutional specification. (Constitutional adjudication comprises both interpretation and, if the relevant directive is indeterminate in the context of the conflict to be resolved, specification.)

Ronald Dworkin has suggested that the originalist conception of constitutional interpretation is fundamentally confused:

The problem a judge “committed” to original understanding has is not deciding what an abstract provision says—it says something as abstract as the words it uses—but deciding what impact it has in concrete cases. He is trying to *establish* the

3. See MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 73-74 (1994).

4. See *id.* at 28.

Constitution's meaning in that sense, and it is no help to tell him that he must *first* discover its meaning.⁵

Originalists, like Robert Bork (whose position Dworkin was criticizing in the quoted passage), do not suggest, however—nor does their advice presuppose or entail—that the problem an originalist judge faces is deciding what a constitutional provision—a piece of the constitutional text—abstractly worded or otherwise, *says*. They understand that the problem is deciding what the piece of text *means*. In particular, the problem is deciding what the text means in two senses: first, deciding what directive the text, as originally understood, represents, and, second, deciding what that directive requires, in the context of the conflict to be resolved. An originalist judge—indeed, any judge, originalist or not—must *first* “discover” the meaning of the *text* by identifying the directive represented by the text *before* she can address the question of the meaning of the *directive* represented by the text for both the conflict at hand and for relevantly similar conflicts thereafter. She must do so before she can, in that sense, “establish” the *contextual* meaning of the directive. A judge simply cannot do the latter until she has first done the former.

Perhaps Dworkin believes that the question of a constitutional provision's meaning is a nonquestion. For example, he might believe that the question, “What does the Free Exercise Clause of the First Amendment, as originally understood, mean—what directive does it represent?” is not a serious question. Perhaps he wants to minimize the question by answering (impatiently?), “It means what it says, that ‘Congress shall make no law . . . prohibiting the free exercise [of religion]’ *That* is the directive the text, as originally understood, represents. Our political ancestors meant what they said and said what they meant, no more, no less!” Such a response, however, is conspicuously unhelpful. *We* do not always succeed in communicating precisely what we mean to communicate, even when we succeed in saying precisely what we meant to say, and there is certainly no reason to assume a priori that, in writing a constitutional provision as they did, our political ancestors invariably succeeded in communicating precisely what they meant to communicate (even if they invariably succeeded in saying what they meant to say), that is, in communicating precisely the directive they meant to communicate. And,

5. Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657, 668 n.9 (1990).

indeed, with respect to the Free Exercise Clause, they did not succeed in communicating precisely the directive they meant to communicate. In the American political community, there is no widely shared agreement about what directive they meant to communicate by saying what they did. According to some scholars, the Free Exercise Clause (as originally understood) represents only the directive that Congress is not to discriminate against one or more religions; according to others, it represents the directive that Congress is not only to refrain from discriminating against one or more religions, but that, even when regulating behavior in a nondiscriminatory way, Congress is to tread as lightly around religious practice as it practically can.⁶

It is not surprising that sometimes in the American political community there is no widely-shared understanding of the meaning of something our political ancestors wrote in the Constitution, of the directive they meant to communicate by writing what they did. Sometimes texts—not least, old texts—are or become, in the life of the community, opaque, vague, ambiguous, and so on. Sometimes, therefore, a text must undergo a serious interpretive effort—a serious effort at translation or decoding—if the message it was meant to communicate is to be received. Constitutional texts are no exception. Some constitutional provisions are opaque, vague, or ambiguous, and some constitutional provisions therefore must undergo a serious interpretive effort if the directives they were meant to communicate are to be received. It is not true of every constitutional provision, even if it is true of some, that the question of its meaning—of what directive it represents—usefully can be answered by a statement of what the provision says. Referring to Article II of the Constitution, which provides in relevant part that “[n]o person except a natural born Citizen . . . shall be eligible to the Office of the President,”⁷ John Ely has observed that “[u]nless we know whether ‘natural born’ meant born to American parents on the one hand or born to married parents on the other, we don’t know what the ratifiers thought they were ratifying and thus what we should recognize as the constitutional command.”⁸

6. On the contemporary debate about the original meaning of the Free Exercise Clause, see PERRY, *supra* note 3, at 59-61.

7. U.S. CONST. art. II, § 1, cl. 5.

8. JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 16 (1980).

The question of the meaning of a *constitutional provision* can be a serious question, therefore, and almost certainly is a serious question in the absence of a widely-shared understanding of the meaning of the provision—in the absence, that is, of a widely shared understanding of what directive the provision represents. A judge must first answer that question before “establishing,” in the context of the case at hand, the meaning of *the directive represented by the provision*. Even in the presence of a widely-shared contemporary understanding of the meaning of a constitutional provision, the question of the *original* meaning of the provision—of what directive the provision, as originally understood, represents—can be a serious question. The widely shared present understanding may diverge radically from the original understanding.

Of course, the question of the meaning of a constitutional provision is not invariably a serious one. If there is, in a community, a widely-shared understanding of the meaning of a text, the question, “What does it mean?” if posed by a member of the community, may elicit the impatient reply “It means what it says!” Consider, for example, Section 3 of Article I of the Constitution, which provides, *inter alia*, that “[t]he Senate of the United States shall be composed of two Senators from each State”⁹ Because there is a widely shared understanding of the meaning of the provision in the American political community, the question, “What does the provision mean?” (if posed by a member of the community) would seem strange.¹⁰ We might be tempted to reply, “It means what it says, that there shall be two senators—no more, no less—from each State.” This is not to deny that to say of a text, “It means what it says!” is to interpret the text; it is just to emphasize that the question, “What does it mean?” may seem strange in the presence of a widely-shared understanding of the meaning of the text. But the question, “What does the Free Exercise Clause mean?” does not seem strange. Given the absence of a shared understanding of the clause, the possible Dworkinian reply, “The Free Exercise Clause means what it says!” *would* seem not merely strange but perverse.

9. U.S. CONST. art. I, § 3, cl. 1.

10. If posed by someone not a member of the community, the question would not seem strange, or as strange. That there is in a community a widely-shared understanding of the meaning of any provision or text is, of course, a contingent fact, not a necessary one. The situation could be otherwise.

In responding to Dworkin, I have relied on the distinction between the interpretive inquiry (which, for the originalist, is an historical inquiry)—*interpreting* the constitutional *text*, in the sense of identifying the directive represented by a piece of the text—and the normative inquiry—*establishing* the contextual meaning of a directive represented by the text (if the directive is contextually indeterminate) by means of the process I call “specification.”

I can anticipate two objections to my distinction. The first objection is a challenge to the familiar dichotomy between “understanding” a law and then “applying” the law (now understood, to resolve a case). This objection insists, with Hans-George Gadamer, that “[u]nderstanding . . . is always application.”¹¹ This objection misconceives my distinction. My distinction is not—nor does it presuppose, entail, or even track—the problematic dichotomy Gadamer rightly challenged: the distinction between, on the one hand, understanding a legal norm or directive and, on the other, “applying” the norm—in the sense of “bringing it to bear”—in adjudicating a particular conflict. That distinction is not my distinction. Indeed, the second part of my distinction—what I call the normative inquiry—presupposes that Gadamer is right. It presupposes that there is no difference between understanding the *contextual* meaning of a legal norm or directive and “applying” the norm in the case at hand; to do the latter is to establish the contextual meaning of the norm (by specifying the norm). The first part of my distinction simply recognizes that some legal texts—not all, but some—are, to the Court, initially unintelligible (opaque, vague, ambiguous, and so on), in the sense that it is not initially clear to the Court what norm or directive the text represents or, *pace* originalism, was meant to represent. If it is not clear to the Court what directive a legal text was meant to represent, the Court must translate or decode the text by trying to identify the directive the text was meant to represent. *Before* the directive the text was meant to represent can be “understood”-“applied”—which, *pace* Gadamer, is not two moves, but one—the directive the text was meant to represent must be identified. (In many cases, of course—perhaps in most cases—the interpretive inquiry will be unnecessary: The Court will already

11. HANS-GEORG GADAMER, *TRUTH AND METHOD* 275 (Garrett Barden & John Cummings eds., 1975).

have identified, in an earlier case now deemed authoritative, the directive the text was meant to represent.)

The second objection goes like this:

The Court's identification of the directive of a particular constitutional provision (the "first" text) constitutes a further text (the "second" text): the Court's statement of the directive. But the second text, no less than the first, may be, to the Court, unintelligible (opaque, and so on) and thus necessitate the Court's translating-decoding it before the Court can begin the process of specification. Therefore, after the interpretive inquiry, there may be only more interpretive inquiry, and so on, *ad infinitum*. Alternatively, if the second text is intelligible to the Court and therefore does not necessitate translation before the Court can begin the process of specification, why can't the first text be intelligible to the Court and therefore not necessitate translation before the Court can begin the process of specification?¹²

I want to respond to this objection, in two steps, from the perspective of originalism. First, a particular constitutional provision *can* be initially intelligible, rather than unintelligible, to the Court, in the sense that it is clear to the Court from the outset what directive the provision was meant to represent. (Consider, again, this provision, "The Senate of the United States shall be composed of two Senators from each State . . .") In that case, the Court need not translate the provision—it need not try to identify the directive the provision was meant to represent. But, with respect to some constitutional provisions, it is not clear to the Court from the outset what directive the provision was meant to represent, in which case the Court must identify the directive that, in its view, the provision was meant to represent. Second, the Court's identification of the directive that, in its view, a particular constitutional provision was meant to represent does indeed constitute a further text: the Court's statement of the directive. But, as I explain in my book, the possibility seems more hypothetical than real that, after exhausting the interpretive inquiry, the Court will end up only with a translation of the provision that is itself unintelligible to the Court—a statement, like "Plot the knot," that because of its unintelligibility prevents the Court from getting on with the business of deciding if the provision has been violated.¹³

12. I am grateful to Steven Smith for suggesting this objection.

13. See PERRY, *supra* note 3, at 39-42.

II. NORMATIVE INDETERMINACY AND THE PROBLEM OF JUDICIAL ROLE

The remainder of my comments concern normative, not textual, indeterminacy. My first point concerns those legal directives by which a democratic political community agrees to remove certain choices or options from the agenda of ordinary politics. Some of those directives are indeterminate—or, more precisely, underdeterminate—in the context of at least some of the conflicts that implicate the directives. The indeterminate legal directives that most interest me are directives concerning what we now, since the end of World War II, call human rights. I do not want to get involved in an argument here about how many or how few of the directives concerning human rights that inhabit the Constitution of the United States are indeterminate in how many or how few contexts. Of course, one's precise answer to that question depends on the approach to constitutional interpretation one pursues. If one is an originalist, one's answer depends on *which* originalist approach to constitutional interpretation one pursues. For purposes of the points I want to make this morning, however, the question how many or how few indeterminate directives concerning human rights inhabit the United States Constitution is a distraction.

To marginalize that distraction, I shall illustrate my present point not by reference to the U.S. Constitution, but by reference to the international law of human rights. (A national political community can agree to remove certain choices or options from the agenda of ordinary politics by ratifying legal directives established in conventional international law.) Consider Article 18 of the International Covenant for the Protection of Civil and Political Rights.¹⁴ Article 18 provides:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. . . . Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect pub-

14. The United States ratified this International Covenant, including Article 18, in 1992. See BASIC DOCUMENTS ON HUMAN RIGHTS 125, 132 (Ian Brownlie ed., 3d ed. 1992).

lic safety, order, health, or morals or the fundamental rights and freedoms of others.¹⁵

Surely there can be room for a reasonable difference in judgments about precisely what, at one or another time in one or another place, "the public morals" require—or about precisely what, at one or another time in one or another place, is "necessary to protect public safety, order, health, or morals." Therefore, there is room for a reasonable difference in judgments, intraculturally no less than interculturally, about what Article 18, in conjunction with all other relevant factors, prohibits in the context of at least some of the conflicts that implicate it.

Now, my second point. In a legal regime in which the judiciary is charged with enforcing constitutional-legal or international-legal directives that are indeterminate in the context of at least some of the conflicts that implicate them, it must be decided whether the judiciary should play a secondary role or a primary role. It must be decided, that is, whether—and, if so, when—the judiciary should defer to any not-unreasonable, if implicit, judgment by another branch or agency of government about what the directive requires in the context of the conflict at hand—or whether, instead, the judiciary should resolve the conflict on the basis of its own judgment about what the directive requires, even if that means opposing itself to challenged governmental action that presupposes a different but not-unreasonable judgment about what the directive requires. In other words, a Thayerian role—or a non-Thayerian one? A minimalist role—or a nonminimalist one?¹⁶

Of course, different persons—different judges—may well draw the boundaries of "the reasonable" in different places. What I am referring to here is not an algorithm of choice, but a judicial stance, a judicial attitude. Although, at the limit, one or another judge may always or almost always draw the boundaries of "the reasonable" so that they are substantially congruent with "what I, the judge, believe," most of us recognize the arrogance and the dogmatism in that. There will be some occasions, perhaps many, on which we want to say to our interlocutors, "Your position, I have to admit, is not an unreasonable one. Nonetheless, I disagree with you. I think you are wrong."

15. *Id.* at 132.

16. See PERRY, *supra* note 3, at 70-115. See generally Symposium, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 Nw. U. L. REV. 1 (1993).

My third point. For one who accepts an originalist approach to constitutional interpretation, the question whether the judiciary should play a primary role or only a secondary, Thayerian one in cases arising under the United States Constitution could be answered by the Constitution. Listen, in that regard, to Gary Lawson, who wrote in his review of my book:

[W]hile Professor Perry is entirely correct that originalism and minimalism are logically distinct concepts, he does not explore the possibility that originalism can resolve the minimalism/nonminimalism debate. Does “the judicial power of the United States,” as originally understood in 1789, carry with it an understanding of the judicial role that compels either minimalism or nonminimalism as a strategy for [the specification of indeterminate constitutional directives]?”¹⁷

Lawson has raised a fair question and identified an important inquiry. Let me just say that, at the moment, I am deeply skeptical that a constitutional consensus was ever achieved about the best answer, all things considered, to the minimalism-nonminimalism question.

My fourth point. Assume, at least for the sake of discussion, that the Constitution does not answer the question. On the basis of what, then, does it make sense for one to answer the question? Whether the judiciary should play a primary role or a secondary surely depends to a significant extent on one’s estimate of the importance of the directives involved and on one’s judgment—one’s necessarily speculative judgment—about how things will likely play out, all things considered, if the judiciary plays a secondary role as opposed to a primary one. One’s speculative judgment about how things likely will play out consists in large measure of one’s estimate of the capacity of ordinary politics on the one side, and the capacity of the judiciary on the other—that is, their capacity as a general matter and over time—to respond to the directives, understood as limits on governmental power, generously rather than in a miserly way. Such judgments seem to me to involve generalizations that are, at best, perilous. So, one probably has to decide, finally, which way it makes more sense to resolve the benefit of the doubt.¹⁸

17. Gary Lawson, *Recommended Reading: Michael J. Perry’s The Constitution in the Courts: Law or Politics?*, THE FEDERALIST PAPER, July 1994, at 9-10.

18. Moreover, even if one views the capacity of the judiciary to respond to the directives generously—that is, the capacity of the judiciary we have or are likely to have—as regrettably weak, we can nonetheless inquire what capacity would we like the judiciary to

Notice, however, that, as I emphasized in my book,¹⁹ one does not have to answer the question about the role the judiciary should play—a primary one or a Thayerian one—the same way with respect to all indeterminate directives. (Nor does one have to answer it the same way with respect to all the branches or agencies of government.) There may be good reasons for the judiciary to play a secondary role with respect to some directives and a primary role with respect to some others.

Now, my fifth and final point. I began by saying that the points I wanted to make here do not presuppose, claim, or entail that an originalist approach to constitutional interpretation is, or that it is not, the proper approach. Why then have I bothered to make the points I have made at a Symposium on originalism? Because I believe that the points are relevant even to those who are committed to an originalist approach to constitutional interpretation. Why? Because an originalist approach to constitutional interpretation may sometimes yield a constitutional directive that is indeterminate in the context of at least some of the conflicts that implicate the directive. An example? The Free Exercise Clause of the First Amendment.

According to what many, including Michael McConnell, believe, the Free Exercise Clause, as originally understood, represents something very much like the directive recently established in the Religious Freedom Restoration Act of 1993,²⁰ according to which “government should not substantially burden religious exercise without compelling justification.”²¹ According to the Act: “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).”²² Subsection (b) provides: “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”²³ Let us assume that McConnell’s position about the original understand-

have; in particular, would we like it to have a capacity such that it would make sense for the judiciary to play a primary role rather than a secondary one?

19. See PERRY, *supra* note 3, at 88-89.

20. 42 U.S.C. § 2000bb (Supp. V 1993).

21. *Id.*

22. *Id.* § 2000bb-1(a).

23. *Id.* § 2000bb-1(b).

ing of the Free Exercise Clause is accepted by a majority of the Court. In deciding if a governmental interest is "compelling" or not, or in deciding if a means "is the least restrictive means of furthering that governmental interest," there sometimes will be room for a reasonable difference in judgments. In answering such questions, should the judiciary—in particular, the Supreme Court of the United States—play a primary role or a secondary one. Should the stance of the Court be Thayerian or non-Thayerian?

In his book, *Democracy and Distrust*,²⁴ John Ely does not address the question whether to pursue the "minimalist" (Thayerian) approach to the specification of constitutional indeterminacy. Ely's concern is mainly with the different question of what unenumerated constitutional rights, if any, the judiciary—in particular, the Supreme Court—may legitimately enforce.²⁵ But Ely's argument is nonetheless relevant to the question of the role the Court should play—primary or secondary, large or small, active or passive—in enforcing the indeterminate constitutional rights, *whether enumerated or not*, it may or must enforce.

In 1991, Ely characterized the essential argument of *Democracy and Distrust* as follows: "[P]ublic issues generally should be settled by a majority vote of [sane adults] or their representatives . . ." ²⁶ But, Ely continued, public issues of three sorts are sensibly resolved—resolved as *constitutional* issues—principally by the judiciary:

(1) the question whether, "where a majority of such persons [sane adults or their representatives] votes to exclude other such persons from the [political] process or otherwise to dilute their influence on it," it may do so;²⁷

(2) the question whether, "where such a majority enacts one regulatory regime for itself and another, less favorable one, for one or another minority," it may do so;²⁸ and

(3) the question whether, where such a majority makes a political choice that implicates a "side constraint" with a certain pedigree, the choice violates the side constraint: a side constraint that, because it is "sufficiently important (and vulnerable to ma-

24. ELY, *supra* note 8.

25. *See id.* at ch. 1.

26. John Hart 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).

27. *Id.*

28. *Id.*

jority sentiment),” was designated by a supermajority “in a constitutional document and thereby render[ed] . . . immune to displacement by anything short of a similar supermajority vote in the future.”²⁹

Ely then explained: “[P]recisely because of their tenure, courts are the appropriate guardians of at least exceptions (1) and (2). . . .”³⁰ Ely added, with respect to exception (3)—which, unlike exceptions (1) and (2); concerns enumerated rights, not unenumerated ones—that on “the supposition that no right is to be thus designated *unless it is unusually vulnerable to majority sentiment*,” courts are the appropriate guardians of exception (3) as well.³¹ Finally, Ely writes: “What does not follow from anything said above, or in my opinion from anything sensible said ever, is that judges are also to be given a license to create or ‘discover’ further rights, not justified by exceptions (1) or (2) nor ever constitutionalized by a supermajority, and protect them as if they had been.”³²

One could agree with Ely’s position about the rights the Court may enforce—both the enumerated rights (exception (3)) and the unenumerated ones (exceptions (1) and (2))—and yet insist that if and to the extent any such right is indeterminate, the Court should play only a secondary role—a Thayerian role—in specifying it. One could say, in that regard, that answering the question of the best or optimal specification of an indeterminate constitutional right requires many “judgment calls” (as Ely has described them),³³ and that so long as the judgment calls implicit in the challenged governmental action are not unreasonable, the Court should defer to them.

Nonetheless, Ely’s argument lends support to the position that as a comparative matter, as an issue in the allocation of competencies, the judiciary—not least, the federal judiciary—is institutionally well-suited to play the primary role in specifying any right- or liberty-regarding directive it is charged with enforcing *if our historical experience suggests that the directive is “unusually vulnerable to majority sentiment.”* The First Amendment directive protecting the free exercise of religion is surely one example—even a conspicuous one—of a right- or liberty-regarding directive un-

29. *Id.*

30. *Id.*

31. Ely, *supra* note 26, at 834 n.4 (emphasis added).

32. *Id.*

33. ELY, *supra* note 8, at 103.

usually vulnerable to majority sentiment. To settle for our elected representatives, and not the judiciary, playing the primary role in specifying such a directive is probably to settle for many specifications that, although "not unreasonable" for purposes of Thayer's minimalist approach to constitutional adjudication, are nonetheless suboptimal: specifications that fail to give the important constitutional value at stake—the value privileged by the directive, in this instance, "the free exercise of religion"—its full due.

Of course, that the Supreme Court chooses to exercise the principal responsibility for specifying one or another indeterminate constitutional directive—such as the Free Exercise Clause—does not preclude the possibility that in exercising that responsibility the Court will, on occasion, act too timidly, or with insufficient sensitivity or vigilance, thereby failing to give the constitutional value at stake its full due. But that possibility does not begin to support the argument that the Court should exercise only a secondary responsibility, that it should pursue only the Thayerian approach to the specification of the directive. Even if in exercising the principal responsibility the Court occasionally acts too timidly, the American political community is no worse off than it would be if the Court were to exercise a secondary responsibility *as a matter of course*, habitually deferring to political judgments that, although arguably reasonable for purposes of Thayer's approach, nonetheless give the constitutional value less than its full due. Indeed, the community is better off, so long as the Court acts too timidly only occasionally.

For a depressing example of the kind of suboptimal specification the Thayerian approach might well affirm, consider the political judgment to which Thayer's most prominent judicial disciple, Justice Felix Frankfurter, deferred in *West Virginia State Board of Education v. Barnette*.³⁴ In that case, Justice Frankfurter dissented alone from the Supreme Court's decision striking down a public school regulation that compelled students, including Jehovah's Witnesses who conscientiously objected on religious grounds, to salute the American flag and recite the Pledge of Allegiance. It was, insisted Justice Frankfurter, a judgment "upon which men might reasonably differ. . . . And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view

34. 319 U.S. 624 (1943).

of the State of West Virginia.”³⁵ One may fairly think that if the Thayerian approach plausibly yields Justice Frankfurter’s position in *Barnette*, so much the worse for the Thayerian approach.

Frankfurter’s Thayerian performance in *Barnette* illustrates that, because legislatures so rarely make political choices about whose constitutionality men and women may *not* reasonably differ, the Thayerian approach to the specification of any constitutional directive effectively marginalizes the directive—virtually to the point of eliminating it—insofar as constitutional adjudication is concerned. It is not obvious, therefore, why one would advocate the minimalist approach to the specification of a directive unless one thought that the directive *should be* marginalized. Now, one might think that some directives should be marginalized because mechanisms other than constitutional adjudication—political as distinct from judicial mechanisms—are adequate, more or less, to the protection of the directives: namely, directives regarding the allocation of power, whether between the national government and the governments of the States or among the three branches of the national government. One might also think that some right- or liberty-regarding directives are relatively unimportant, or at least inappropriate to a constitution that is to be judicially enforced, and therefore should be marginalized. But it is not obvious why one would want to marginalize any right- or liberty-regarding directive—that is, why one would support the Thayerian approach to the specification of any such directive—that one thought was relatively important, and appropriate to a constitution, unless one concluded that, overall, political mechanisms are somehow better suited than constitutional adjudication to protect the directive. But surely such a conclusion is seriously questionable with respect to many important right- or liberty-regarding directives.

III. WHAT IS A “PRINCIPLE”?

In an article my copanalist, Steve Smith, published in 1993, he asked a “fundamental, and ultimately ontological, question: What *is* a principle? Where, or in what form, can a principle be said to exist, or to be real?”³⁶ More recently, in his book, *Foreor-*

35. *Id.* at 666-67 (Frankfurter, J., dissenting).

36. Steven D. Smith, *Idolatry in Constitutional Interpretation*, 79 VA. L. REV. 583, 621 (1993).

dain'd Failure: The Quest for a Constitutional Principle of Religious Freedom,³⁷ Steve wrote

[Legal scholars should try] to clarify just what a "principle" is. As far as I can tell, nearly all judges and constitutional scholars talk freely about "principles" but without having any clear or satisfactory notion about what sort of thing a "principle" is, or what the ontological status of a "principle" might be.³⁸

Smith seems bewitched by the admittedly ubiquitous word "principle" in a way that is wholly unnecessary in the context of American constitutional discourse. If we talk, as I think we should, not in terms of constitutional "principles," but in terms of constitutional "directives"—the directives or imperatives that constitute the constitution, the directives constitutionmakers issue—Smith's ontological inquiry seems puzzling. "What is a directive?" In its central case, a directive is simply a direction, an imperative, issued by one person (or persons) to another. For example, "Don't prohibit the free exercise of religion." With respect to such imperatives, the serious question is not, "Where can a directive be said to exist?" One serious question, for some, is, "Did they in fact issue the directive they are claimed to have issued, or did they issue a different directive (or perhaps no directive)?" Another serious question: "What does the directive require us to do in *this* context, in which the directive is, as directives sometimes are, indeterminate?"

Another serious question (and this, I suspect, is what Smith is really addressing) is the question that, in my view, Paul Campos's important comments during a previous Panel discussion³⁹ challenge us to address: how can, or how does, a directive from a moment ago, perhaps a long moment ago, function in this moment in the ongoing moral discourse that somehow and to some extent the directive originates and focuses. How can it function, or how does it function, in the life of a moral tradition—whether a political-moral tradition, which is what our constitutional tradition is (whatever else it is) or a religious-moral tradition—that the directive, along with other directives, somehow and to some extent originates (founds, or refounds) and focuses?

37. STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995).

38. *Id.* at 166 n.7.

39. See Paul F. Campos, *A Text is Just a Text*, 19 HARV. J.L. & PUB. POL'Y 327 (1996).