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INTERPRETIVE CONTESTATION AND LEGAL CORRECTNESS

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INTRODUCTION

This Essay focuses on a basic puzzle about constitutional interpretation: Are there legally correct answers to contested questions concerning the methodology for interpreting the U.S. Constitution? Consider, for example, the debate about originalism.[1] Originalists claim that questions of constitutional law should be resolved by looking to the original public meaning of provisions in the text of the Constitution or the original intentions of the Framers concerning how the text should be applied. Nonoriginalists deny that either original meaning or original intentions are the touchstone for constitutionality. Is it the case that one party to this debate is legally correct and the other party legally incorrect?

Or consider the representation-reinforcement theory of interpretation proposed by John Hart Ely,[2] building on the famous footnote four of *United States v. Carolene Products Co.*[3] Ely's theory is one particular version of nonoriginalism. Ely argues that the Constitution should be interpreted so as to improve the process of majoritarian democracy.[4] In Ely's view, the First Amendment is centrally a protection for the political speech required for free and fair elections and for the process of crafting legislation, rather than a broader protection for all speech as a basic aspect of human liberty.[5] The Equal Protection Clause is seen to be focused on cleansing the political process of prejudice against racial minorities, rather than as, more minimally, a formal nondiscrimination guarantee or, more ambitiously, a constraint on laws that have a substantially disparate impact on minorities.[6] And, for Ely, the Due Process Clause is not a guarantee of substantive rights that would serve as constraints on a well-functioning political process, such as rights to contraception, abortion, or assisted suicide.[7] When Ely argues in

1. For a recent critical overview, citing many of the main contributions to the literature, see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

2. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

3. 304 U.S. 144, 152 n.4 (1938).

4. *See* ELY, *supra* note 2, at 102-03.

5. *See id.* at 105, 112, 116-17, 125-26.

6. *See id.* at 135-36.

7. *See id.* at 14-15, 18-21; John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe

favor of a representation-reinforcement methodology, while others disagree, can it be that one side to *this* dispute is legally correct and that the other side is making a legal mistake?

For short, I will refer to the following as "the Puzzle": Are there legally correct answers to contested questions concerning the methodology for interpreting the U.S. Constitution? In stating the Puzzle, I have chosen my words carefully. I am asking whether there are *legally* correct answers to contested interpretive questions, not whether there are correct answers in some other sense.[8] My focus is on *contested* questions of interpretive methodology. For reasons that will emerge in this Essay, I do not think it is hard to explain how there can be legally correct answers to *uncontested* interpretive questions. In particular, the vast majority of U.S. jurists and scholars and, I assume, citizens and officials agree that the text of the 1787 Constitution, as amended, is the primary source of constitutional law. Some believe it is the sole source;[9] others believe that the text can be supplemented with unwritten sources of constitutional law;[10] but no one espouses an approach to constitutional interpretation that would ignore the text or give it a minor role. Thus, explaining why it is legally correct for a U.S. judge to decide a constitutional case by looking to the text of the 1787 Constitution, as amended—rather than the text of the French Constitution, the German Constitution, or any other text outlining a system of governmental institutions and individual rights—is not too difficult. What *is* difficult is explaining why it would be legally correct for a U.S. judge to interpret that text using method *M*, rather than method *M**, when both method *M and* method *M** have significant support among jurists, scholars, officials, and citizens—

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v. Wade, 82 YALE L.J. 920, 933-35 (1973).

8. This Essay rejects a globally skeptical approach to legal correctness—the view that no legal propositions are correct or incorrect. However, I certainly do not mean to assume a global "right answer" thesis—that *every* legal proposition is correct or incorrect. As will emerge in this Essay, the extent of legal indeterminacy, specifically with respect to constitutional issues, is an open question.

9. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971).

10. *See, e.g.*, Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 715-17 (1975); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877, 879 (1996).

when there is no consensus regarding which method ought to be used.

The Puzzle, as I have stated it, concerns the U.S. Constitution. The Puzzle may translate perfectly into other legal regimes, or it may not. In any event, I am interested in making sense of constitutional disagreement in *our* legal system, given broad consensus that a particular text—the 1787 Constitution, as amended—is the primary source of constitutional law but a lack of consensus regarding the methodology for applying that text to resolve constitutional cases.

Finally, I train my attention on the possibility of right answers concerning foundational questions of interpretive methodology. To be sure, one might pose the problem more broadly. One might ask: How can there be a legally correct answer to *any* contested question of constitutional law? For example, given the absence of a consensus in this country about the existence of abortion rights, how can it be the case that, legally, women really do have a constitutional right to abortion, as was reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*?[11] Given the absence of consensus about the breadth of federal power under the Commerce Clause, how can it be the case that, legally, Congress really does have the power to prohibit noncommercial, intrastate activities—for example, barring the cultivation of marijuana for personal, medical use, as in *Gonzales v. Raich*?[12] Four Justices dissented in *Casey*;[13] three Justices dissented in *Raich*.[14] Why did the majority Justices feel confident that their position was legally warranted, in the teeth of disagreement by their dissenting brethren and those in the country at large who also held these dissenting views?

It seems to me that the possibility of right answers in cases such as *Casey* or *Raich* hinges on the answer to the Puzzle, as I framed it. Assume that there exists a legally correct interpretive methodology, despite the absence of consensus about what that methodology is. Then there could easily be a genuine legal right to abortion or a

11. 505 U.S. 833, 846 (1992).

12. 545 U.S. 1, 9 (2005).

13. More precisely, four Justices—Chief Justice Rehnquist and Justices White, Scalia, and Thomas—dissented from the reaffirmation of the constitutional right to abortion. *Casey*, 505 U.S. at 944 (Rehnquist, C.J., concurring in part and dissenting in part).

14. *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting).

genuine federal power to regulate intrastate noncommercial activities, notwithstanding disagreement on these issues. The dissenters in *Casey* or *Raich* might just be mistaken about the application of this methodology to the case at hand.

Conversely, if legally correct answers to contested questions of interpretive methodology do not exist, then it would seem that the possibility of right answers to more concrete constitutional disputes —disputes about the allocation of power between state and federal institutions, as in *Raich*, or about the content of individual rights, as in *Casey*—is also undermined.

This is a point that I will return to at the end of this Essay. I will suggest that a skeptical answer to the Puzzle may well engender a broader skepticism about the enterprise of constitutional law.[15] For now, however, I will place to one side broader questions and focus narrowly on the Puzzle itself: the legal status of contested interpretive methodologies.

I. POSSIBLE INTERPRETIVE METHODOLOGIES

At the threshold, let me stress that there are real and ongoing debates among U.S. scholars and jurists, and in our legal community more generally, about interpretive methodology. Perhaps this point is so obvious that it does not bear elaboration; but, out of an abundance of caution, I will elaborate a bit. Consider any given provision in the text of the Constitution—to use a concrete example, the Eighth Amendment. I see at least five different general methodologies for determining whether a given piece of legislation imposes "cruel and unusual punishments."[16] These methodologies, as I will describe them, are not fully precise—each is really a family of submethodologies—but they are still, clearly, distinct from each other. One might look, first, to the original public meaning of the phrase "cruel and unusual punishments" as of 1791, the date the Eighth Amendment was enacted; second, to the original intentions of the Framers of the Eighth Amendment; third, to traditional understandings, across time, concerning which punishments are "cruel and unusual"; or fourth, to current consensus on that

15. *See infra* Part III.D.

16. U.S. CONST. amend. VIII.

matter.[17] Note that an original meaning view, a traditional meaning view, and a current meaning view all look to social norms and practices in determining the meaning of a provision in the text, but they disagree about the temporal location of the relevant social norms and practices.[18] Note also that a precedent-based approach to deciding constitutional cases[19] can be seen as a submethodology within the broader family of traditionalism. To determine whether a statute violates the Eighth Amendment by examining the Supreme Court's Eighth Amendment case law is, in effect, to infuse meaning into the term "cruel and unusual punishments" by looking to judicial traditions concerning that term.

A fifth approach looks beyond social norms and practices in determining the meaning of a constitutional provision. Such a methodology instructs the judge to bring to bear certain moral considerations, even if those considerations are not directly supported by the text as read in line with original intentions, original meaning, traditional meaning, or contemporary meaning.[20] Subfamilies within

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17. Supreme Court cases giving substantial emphasis to original meanings or intentions, or to traditional understandings, are legion. For clear, representative examples of originalist and traditionalist reasoning, see, respectively, *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *Washington v. Glucksberg*, 521 U.S. 702 (1997). The Supreme Court has also explicitly adverted to current consensus as a tool of constitutional interpretation. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 563-65 (2005). For scholarly discussions of these different approaches, see, for example, LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 98-99, 104-09 (1991); HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION (1991); Berman, *supra* note 1. On the plurality of interpretive methods, see generally PHILIP BOBBITT, CONSTITUTIONAL FATE (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

18. Originalists focus on norms and practices at the Framing; current-meaning theorists focus on norms and practices at present; traditionalists take account of social norms and practices throughout our history.

19. *See* Richard H. Fallon Jr., *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 47 (Matthew D. Adler & Kenneth Einar Himma eds., 2009); Strauss, *supra* note 10.

20. Ronald Dworkin is perhaps the most famous scholarly proponent of the "moral reading" of the Constitution. Although Dworkin argues that moral reasoning by judges should be infused with "integrity," this requirement does not make original, traditional, or current conceptions of morality the touchstone of judicial decision making; rather, it means that "fit" with the legal community's practices, along with the judge's own understanding of moral requirements, is one element in the decisional process. *See* RONALD DWORKIN, FREEDOM'S LAW 1, 7-8 (1996); RONALD DWORKIN, LAW'S EMPIRE (1986) [hereinafter DWORKIN, LAW'S EMPIRE]. For a defense of a moralized approach to judicial decision making, including constitutional decision making, even less tethered to past or present social practices and conventions, see Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 286-88

this general methodology can be differentiated depending on the kind of moral considerations that judges are told to rely upon. For example, Ely's methodology says to specify the meaning of "cruel and unusual punishments" so as to advance the basic goal of a well-functioning democratic process.[21] A different submethodology within this fifth approach is that advocated by Richard Posner and other pragmatists who argue that judges should read the Constitution so as to maximize good consequences—good consequences being a certain kind of moral consideration.[22]

These methodologies can also, to some extent, be hybridized with each other—producing yet further possibilities. For example, one might advocate a two-step approach that employs moral considerations only as a fall-back, once original, traditional, or current meaning is unable to resolve a case. Gary Lawson has provoked a debate among originalists by arguing that a Supreme Court Justice should never allow her understanding of original public meaning to be overridden by prior Supreme Court case law.[23] The debate, here, is between a purely originalist methodology and a hybrid methodology that looks both to original meaning or intentions *and* to precedent.

II. DEBATES SURROUNDING THE METHODOLOGIES

To state the blindingly obvious, it is certainly not the case that there is scholarly consensus on one of these methodologies. Scholarly debates between originalists and nonoriginalists have raged for many years.[24] Academics who concur in supporting originalism argue about the best specification of that general

(1985). Justice Stevens is a recent judicial exponent of the view that judges must use their own judgment in reading value-laden constitutional language—such as the term "liberty" in the Due Process Clause—by giving due weight to history but also, potentially, transcending historical understandings. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3096-103 (2010) (Stevens, J., dissenting); John Paul Stevens, *The Bill of Rights: A Century of Progress*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 13, 21-22 (Geoffrey R. Stone et al. eds., 1992).

21. *See* ELY, *supra* note 2, at 96-97.

22. *See* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998).

23. Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); *see also* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not As Radical As It Sounds*, 22 CONST. COMMENT. 257, 259 (2005); Fallon, *supra* note 19, at 48-50.

24. *See, e.g.*, Berman, *supra* note 1.

view,[25] and the same is true of nonoriginalists.[26] At one time, these questions concerning interpretive methodology dominated the field of constitutional theory. I am not sure that is true now—problems of judicial review, judicial supremacy, and popular constitutionalism have prompted a huge amount of academic writing over the last decade[27]—but there continues to be much discussion of interpretive questions.

Nor is disputation limited to law professors; judges are not in consensus on interpretive methodology either. Most judges do not wear their interpretive hearts on their sleeves the way constitutional theorists do. Judges, even Supreme Court Justices, typically do not articulate a systematic interpretive methodology in their opinions. But some do: think of Justice Scalia. In any event, the claim I am making here is not that judges generally engage in visible and explicit contestation regarding interpretation; unlike law professors, they do not need to do that to earn tenure or respect. Rather, the claim I am making concerns judges' beliefs and commitments, which may not be spelled out or fully theorized. There is plenty of evidence, based both on judicial opinions and on judges' writings off the bench, that U.S. judges do not converge on a single interpretive methodology.[28]

It is also important, at the threshold, to distinguish between the picture of interpretive disagreement that I am painting and a superficially similar picture. My picture is this: jurists, scholars, and, one assumes, most officials and citizens are in consensus that certain methodologies for interpreting the Constitution are impermissible—such as reading animal entrails, focusing on the original meaning of the text of the Constitution as understood by those who *opposed* its enactment, or reading its words so as to maximize the preferences of the judge doing the interpreting. However, no single

25. *Compare* Richard Kay, *Adherence to the Original Intentions in Constitutional Adjudication*, 82 NW. U. L. REV. 226 (1988), *with* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1988).

26. *Compare* ELY, *supra* note 2, at 102-03, *with* Grey, *supra* note 10, at 704-05.

27. *See* sources cited in Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 720 nn.1-2 (2006).

28. *See* Matthew D. Adler, *Social Facts, Constitutional Interpretation, and the Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 19, at 193, 204-07 (surveying extrajudicial writing by Supreme Court Justices discussing interpretive methodology, as well as prominent scholarly discussions).

methodology is seen by all as legally correct. Rather, there is a plurality of methodologies, each of which has nontrivial support, but none of which has universal or even near-universal support. Moreover, it is not the case that all methodologies with some support are seen by all to be legally appropriate. One can imagine a legal community in which 10 percent of the members support method one, 10 percent method two, and so forth, and in which all of the members regard each of the ten methods as equally viable. In this community, each person says, "I favor this particular method —but I recognize that my fellow citizens have different beliefs, and I therefore believe that it is legally appropriate to employ any one of the ten methods that at least some of us support."

This is not the constitutional culture in which we live. Scholars and jurists who support a particular method regard, or often regard, that method as legally correct and competing methods as legally incorrect.[29] Perhaps the term "correct" is misleading. To say that a method is legally correct, in the strong sense, means that it is legally obligatory—that judges have a legal duty to employ that method and are legally prohibited from using competing methods. For purposes of this Essay, I am using "correct" in a weaker and more inclusive sense. In this weaker sense, a method is "correct" if it is legally favored. This could mean that the method is legally obligatory, or it could mean something like the following: the method is legally more appropriate than competing methods. It would be better, legally speaking, if judges employed the method; the balance of legal considerations favors judicial use of this method. Similarly, a method is "incorrect" if it is legally disfavored in some way.

Clearly, many scholars and jurists and, presumably, officials and citizens believe that originalism is legally favored and that nonoriginalism is legally disfavored. Consider Chief Justice Rehnquist's statement that nonoriginalism "misconceives the nature of the Constitution"[30] or Justice Scalia's statement that "[t]he principal theoretical defect of nonoriginalism ... is its incompatibility with the very principle that legitimizes judicial review of constitu-

29. Numerous examples are provided in Adler, *supra* note 28, at 206-09.

30. William H. Rehnquist, *The Notion of a Living Constitution*, 64 TEX. L. REV. 693, 699 (1976).

tionality.... If the Constitution were ... [an] invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts?"[31]

Reciprocally, there are many members of our legal community who espouse some nonoriginalist methodology, believing it to be legally favored. For example, Justice Stevens argues for an evolutionary approach to interpreting the Bill of Rights, and in the course of doing so points out that originalists have no basis for seeing the equal protection norm as constraining the federal government.[32] It is clear from his discussion that Justice Stevens believes his favored interpretive approach to be *legally* favored, and that he believes originalism to be *legally* problematic. Justice Stevens writes:

> The self-evident proposition enshrined in the Declaration [of Independence]—the proposition that all men are created equal—is not merely an aspect of social policy that judges are free to accept or reject; it is a matter of principle that is so firmly grounded in the "traditions of our people" that it is properly viewed as a component of the liberty protected by the Fifth Amendment.[33]

In short, I believe the following description of our legal community to be accurate. There is a plurality of interpretive methods, such that each is seen by some nontrivial fraction of the community to be legally correct. However, for each of these methods, there is also a nontrivial fraction of the community that believes that this method is legally incorrect and that some other method is legally correct. This contestation yields the Puzzle: How is it possible for any one of these interpretive methods to, in fact, be legally correct?

III. POSSIBLE RESPONSES TO THE PUZZLE

I wish I had a simple solution to the Puzzle. Unfortunately, I do not. I will now survey three nonskeptical responses to the Puzzle: responses that seek to show why an interpretive method can be legally correct even absent consensus about the correctness of the

31. Scalia, *supra* note 25, at 854.
32. Stevens, *supra* note 20, at 21-24.
33. *Id.* at 23-24.

method. I will call these three responses the natural law response, the rule-of-recognition response, and the Dworkinian response. After describing these responses and discussing why each is problematic, I will conclude by considering the troubling possibility that our legal community is massively in error about the legal status of interpretive methods—that no interpretive method is legally correct.

A. The Natural Law Response

Consider, first, a natural law approach to the concept of law and what this approach would say about the Puzzle. The natural law approach, in its simplest variant, equates law and morality. It says that *x* is legally required if and only if *x* is morally required; *x* is legally permitted if and only if *x* is morally permitted; *x* is legally appropriate if and only if *x* is morally appropriate; and so forth.[34]

At first blush, natural law jurisprudence is absurd. Consider a simple example: the speed limit. Depending on the content of the traffic code, it seems quite plausible that there could be a threshold rate of speed for any given road—for example, sixty-five miles per hour for highway driving—such that I have a legal obligation not to exceed that rate of speed and a legal permission to drive at any slower speed. But who believes that I have a moral obligation not to drive more than some specific rate of speed and a moral permission to drive at any slower rate?

At this point, the natural law theorist has a sophisticated response. She can say: "It is true that, in the state of nature, there is no moral speed limit. But in the social world, there may well be. That is because your moral positions—your moral duties, moral permissions, moral reasons, and so forth—are sensitive to social facts. If a certain body in your community is socially recognized as the legislature and has purported to require that you not drive faster than a certain rate of speed, then it is indeed the case that you are morally obliged not to do so."

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34. It is a truism that natural law conceptions of "law" draw a tighter connection between law and morality than positivist conceptions. What exactly this means is controversial. *See* Brian H. Bix, *Natural Law: The Modern Tradition*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 61, 64-65 (Jules Coleman & Scott Shapiro eds., 2002). I here consider the simplest version of a natural law approach.

The natural law theorist might continue: "The fact that moral positions are sensitive to social facts also helps us make sense of the legal status of, first, the text of the Constitution and, second, interpretive methods. On the one hand, there is broad support for a particular text: the 1787 Constitution, as amended. Given this social fact, it would be morally inappropriate for a judge to ignore that text in deciding a constitutional case. Further, there is universal opposition to certain methods for interpreting the text, for example, the method of looking at animal entrails. Given this social fact, it would be morally inappropriate for a judge to use one of these methods, however morally advisable they might otherwise be. On the other hand, if we are given two methods, *M* and *M**, such that both *M* and *M** have substantial community support, then social facts do not directly determine which method is morally and legally correct. Rather, that determination will depend upon more open-ended moral considerations: for example, which method produces better consequences, which one is likely to better protect moral rights, and so forth."

The natural law approach presupposes that morality itself is not an illusion—that various items (not just concrete actions, like killings or assaults, but items such as institutions or interpretive methods) can be properly assessed as morally better or worse, morally right or wrong. This is a presupposition I am quite willing to endorse. I am also quite willing to endorse the position that there can be correct moral answers to contested moral questions. Morality can function as a nontransparent criterion of correctness. There are morally right answers, and yet it is often far from clear or obvious what the answers are.[35] The natural law account thus provides a crisp, nonskeptical answer to the Puzzle. There can be correct moral answers to contested moral questions. When two individuals are arguing about which interpretive method is legally correct, they are really just arguing about which method is morally correct. Therefore, there can be correct legal answers to contested questions concerning interpretive methods. For example, it may indeed be morally best for judges to implement the Bill of Rights so as to

35. For example, I believe there is a right answer concerning the moral permissibility of various kinds of coercive interrogation used to combat terrorism, even though this question is now quite contested.

ensure the smooth functioning of a majoritarian democracy—even though many in our community defend a different interpretive approach, and even though the moral optimality of a representation-reinforcement interpretive method is far from obvious.

But the natural law approach provides a problematic account of the legal status of the text of the Constitution itself. If morality is not an illusion, then morality has critical force. Not only is it the case that there can be morally correct answers in the absence of social consensus; it is also true that morality can pierce social consensus and that prevalent social norms and practices can be morally problematic.[36] In other words, social consensus in favor of some institution is a moral factor in favor of that institution —ignoring the social consensus would be disruptive, would upset settled expectations, and so forth—but the social consensus in favor of the institution does not conclusively resolve the moral status of the institution.

Imagine, then, that there is some provision in the text of the Constitution that judges would be morally wise to ignore—*even taking account of the social disruption of doing so*. Perhaps there is no such provision, but perhaps there is.[37] If there were such a

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36. Bix, *supra* note 34, at 72-73 ("[I]t seems fairly clear that there are plenty of societies where immoral laws are recognized as binding and are enforced."). For example, for a very long stretch of American history, interracial romantic associations were socially stigmatized and worse, and yet such associations were perfectly morally permissible.

37. It is very plausible that antebellum judges would have been morally wise to ignore the provisions of the pre-Civil War Constitution abetting slavery—even perhaps a provision as basic to the structure of the Congress as the three-fifths compromise, and certainly others. U.S. CONST. art. I, § 2, cl. 3; *id.* art. I. § 9, cl. 1; *id.* art. IV, § 2, cl. 3; *id.* art. V. The plausibility of this *moral* assertion, of course, is not undermined by the historical fact that antebellum judges enforced the pro-slavery provisions. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 119-20 (1975). It is also plausible that there are contexts in which modern judges would be morally wise to ignore the age and citizenship qualifications for the President, senators, or representatives. (For example, imagine that the nation is facing a major economic, military, or environmental crisis, and it is discovered that an intelligent, competent, and politically skilled President is foreign-born or only thirty-four years old). Some believe that the Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000), averting continuing uncertainty about the 2000 presidential election, was morally justified even though the Court may have been legally incorrect in reversing the Florida Supreme Court. *See* Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 46-47.

For an anthology of critiques of constitutional provisions, see generally CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford Levinson eds., 1998). Of course, the critic of a given provision might take the position that the provision

provision, then—intuitively—it would be illegal for judges to ignore the provision, even if doing so would be morally advisable. The 1787 Constitution, as amended, is legally binding on U.S. judges, whether or not it turns out to be the morally best text for judges to use in deciding cases. Its *legal* status is more deeply rooted than its *moral* status. A similar point can be made about the speed limit: depending on the circumstances, it might well be morally advisable for me to break the speed limit, even taking account of the fact that a group socially recognized as the legislature enacted the speed limit. But, if I break the speed limit, I break the law.

B. The Rule-of-Recognition Response

So much for the natural law response to the Puzzle. H.L.A. Hart's rule-of-recognition model offers a second nonskeptical response to the Puzzle. According to Hart, every full-blown legal system rests upon a rule of recognition: an ultimate criterion of legal validity that is accepted as such by contemporary officials within the system; other laws are valid by derivation from the rule of recognition.[38] Hart suggests that the rule of recognition for Britain is: "[W]hat the Queen in Parliament enacts is law."[39] Imagine that Parliament has passed a statute establishing a food and drug agency; the agency has in turn enacted an administrative regulation barring dietary supplements that are carcinogenic. Whether a particular supplement is carcinogenic is a highly technical question, which is often unclear and a matter of dispute. Imagine that supplement *D* is, indeed, carcinogenic. On the rule-of-recognition account, vendors have a genuine legal duty not to sell supplement *D* even though there are some vendors, maybe many, who believe that *D* is perfectly safe. That duty derives from the administrative regulation. The administrative regulation, in turn, is legally valid because of the statute empowering the agency to regulate in the area of food

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morally ought not have been adopted, or ought to be repealed, but not that it morally ought to be ignored even without repeal.

38. *See* H.L.A. HART, THE CONCEPT OF LAW 100-01 (2d ed. 1994). For discussion of Hart's views and, more generally, the rule-of-recognition approach, see JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001); HART'S POSTSCRIPT (Jules Coleman ed., 2001).

39. HART, *supra* note 38, at 107.

and drugs. And the statute is itself legally valid by derivation from the ultimate rule of recognition for Britain—a rule whose legal status does not derive from some further rule but is based on the fact that contemporary officials accept the rule as the ultimate criterion of validity.

The rule-of-recognition account has a nice, simple answer to why U.S. judges should look to the text of the 1787 Constitution, as amended, regardless of whether that text is morally optimal. The answer is this: contemporary U.S. officials accept that text as part of the ultimate criterion of legal validity. Further, the rule-of-recognition account can, in principle, explain how there can be a legally correct interpretive method, notwithstanding disagreement about what that method is.

The rule-of-recognition account makes sense of legal disagreement by seeing it as disagreement about the *application* of some more fundamental legal rule—a rule higher up in the chain of legal validity.[40] A legal rule can have genuine content and yet be difficult to apply; thus there can be a right answer concerning the application of a legal rule, notwithstanding dispute about what that answer is.

Consider the dietary supplement example. Whether supplement *D* is legal depends upon whether the term "carcinogenic" applies to it. That question may be highly contestable, given humans' information and cognitive limitations, but nonetheless it has a right answer —a right answer determined by the laws of chemistry and biology. Similarly, imagine that there were some foundational legal rule that U.S. officials generally accepted and that contained criteria for determining the legal status of interpretive methods. These criteria, if rightly applied, would suffice to identify one particular interpretive method as legally correct. Then the method that satisfied these criteria would be legally correct, according to the rule-of-recognition model, notwithstanding uncertainty and disagreement concerning which particular method that is.

The difficulty is that argumentation about interpretive methods in the United States looks nothing like what the rule-of-recognition model would predict. In prior work, I examined how Supreme Court Justices (in published books and articles) and leading law professors

40. *See* COLEMAN, *supra* note 38, at 116-17.

argue about interpretive methods.[41] The rule-of-recognition model suggests that a defense of a particular method, method *M*, should proceed as follows: the writer should appeal to some foundational legal rule that either contains *M* or the application of which validates *M* and should assert or presuppose that this foundational legal rule is generally accepted by contemporary officials.[42]

In defending interpretive methods, law professors and Supreme Court Justices do nothing like this. Instead, the style of argumentation is a hodgepodge. Sometimes the analysis is conceptual. For example, originalists frequently argue that the status of the text of the Constitution as highest law necessitates orginalism. Sometimes, argumentation looks like ordinary moral argumentation about the pros and cons of different institutional structures: for example, argumentation that appeals to the protection for important moral rights that would be realized by some interpretive method; to the possibility of judicial abuse; or to the cost to democratic values of a judicial override of a statute passed by a majoritarian legislature.

Sometimes, argumentation is neither conceptual nor moral. Instead, the defenders of interpretive methods appeal to various types of social facts—but not in a manner that either the natural law account or the rule-of-recognition model would seem to countenance. Those facts, I found, include facts about the Framers' intent, facts about our constitutional culture and tradition, and facts about precedent. To give one example, in Justice Breyer's book defending the idea that courts should interpret the Constitution so as to promote what he calls "active liberty," Breyer devotes substantial effort to showing that the Framers valued "active liberty."[43] If one were trying to show that active-liberty style interpretation is morally superior to alternatives, I do not think that considerations of the Framers' intent would be very relevant. And if one were trying to show that the U.S. rule of recognition validates an active-liberty interpretive approach, the argumentation would proceed as follows: one would show that current officials are in consensus regarding the legal validity of the active-liberty approach or that current officials are in consensus regarding some more fundamental

41. *See* Adler, *supra* note 28.
42. *See id.* at 218-20, 222-25.
43. STEPHEN BREYER, ACTIVE LIBERTY 21-34 (2005).

rule from which an active-liberty approach can be derived. But Breyer's argumentation looks nothing like this.

The proponent of the rule-of-recognition approach might respond that Breyer—or others who fail to defend interpretive methods by appealing to some foundational rule accepted as such by present officials—are simply confused about what it takes for an interpretive method to be legally correct. This is possible. Even so, the rule-of-recognition model fails to provide a satisfying nonskeptical answer to the Puzzle. Why? There are a plurality of interpretive methods, each of which has substantial support, but none of which has universal support. Each is also rejected by a substantial portion of the community.[44] If one of these methods is indeed legally correct, according to the rule-of-recognition model, then there must be some deeper rule that *is* a matter of consensus within the legal community, or at least among officials. The right answer to contestation about interpretive methods is settled by application of that deeper rule.

What would the deeper rule be? Is it the case, for example, that both officials who espouse originalism and officials who espouse nonoriginalism share a deeper agreement about what it takes for an interpretive method to be legally valid—that they all accept not merely some vacuous criterion like "consistent with the U.S. Constitution" but a genuine, meaningful standard that could actually furnish a right answer to their dispute (in the way that a dietary supplement is actually carcinogenic or not)? I see no evidence of this sort of deep consensus.

C. Dworkin's "Constructive Interpretation" Response

Let us turn, finally, to the account of law set forth by Dworkin in his book, *Law's Empire*.[45] One of the chief aims of Dworkin's account is to show how there can be right answers to legal questions notwithstanding the absence of a community consensus on a rule of recognition. According to Dworkin, legal validity is a matter of what he calls "constructive interpretation."[46] In any given community,

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44. *See supra* Part II.

45. DWORKIN, LAW'S EMPIRE, *supra* note 20.

46. *See id.* at 379-99 (describing constructive interpretation with respect to constitutional adjudication).

there will be much disagreement—including disagreement about foundational matters—but also large pockets of consensus. Consider the total body of legal propositions for which there is community consensus. This is what Dworkin terms the "preinterpretive" data.[47] Then the criterion for legal validity in a community is the criterion that is best, all things considered, with respect to two different dimensions: "fit" and "justification."[48] First, different candidate criteria of legal validity will fit more or less snugly with the preinterpretive data. Second, different candidate criteria of legal validity will be more or less morally justified.

Dworkin's account, like the rule-of-recognition account, but unlike the natural law account, can easily explain why the text of the 1787 Constitution, as amended, is legally binding on judges. There is a strong consensus in the community that the text is indeed binding.[49] This is an important part of the preinterpretive data in our community. Any norm for constitutional adjudication that told judges to ignore the text would do very poorly on Dworkin's "fit" dimension.

Dworkin's account, like the natural law account, but unlike the rule-of-recognition account, can also readily explain how there can be legally correct answers to questions of interpretive methodology, even though the community is neither in consensus regarding interpretive methodology nor regarding some deeper rule whose application would validate one or another methodology as correct.[50] Imagine that method *M* is better than competing methods with respect to both fit and justification. Then *M* will be legally correct —the best constructive interpretation of U.S. legal culture—even if many members of the community support a different methodology. Indeed, the combination of legally correct answers and contestation about those answers is not only explicable by Dworkin's model but a natural and normal consequence of that model. Whether *M* is a better constructive interpretation of U.S. legal culture than *M** can be very difficult to ascertain.

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47. *Id.* at 91-92.

48. *Id.* at 255.

49. *See id.* at 91-92.

50. Indeed, as is well known, a key ambition of *Law's Empire* is to explain how there can be right answers to legal questions notwithstanding disagreements—including foundational disagreements—among judges, officials, and other members of the legal community. *See id.* at 3-6.

Moreover, actual argumentation about interpretive methods, by U.S. scholars and jurists, is more accurately described by Dworkin's model than by the rule-of-recognition model or the natural law model. I have mentioned that interpretive methods are often defended by appealing to social facts about U.S. culture and tradition, judicial precedent, and the Framers' intent.[51] The Dworkinian model can say that these facts are part of the preinterpretive data, which might not figure in a straight moral argument for a given method, but are quite properly appealed to in showing that the method is legally correct.

However, there is a key flaw in Dworkin's approach. The question on the table is *normative*. Constitutional law professors typically do not approach their topic from a purely descriptive perspective. Rather, they seek to determine what is legally required, permitted, or favored by the Constitution, on the assumption that this legal content has some normative bite. In particular, I am asking how it is possible for an interpretive method to be legally correct—and therefore for it to be the case that judges have a genuine reason to employ the method—notwithstanding contestation about the method. On the natural law account, the legally correct method is also morally correct, and thus judges straightforwardly have a genuine normative reason—a *moral* reason—to employ the method. On the rule-of-recognition account, the legally correct method is contained in or derivable from a rule stating ultimate criteria of validity, which is accepted as a matter of consensus by present officials. Thus it is plausible to think that departing from the method will be socially destabilizing and that judges—to this extent—have a reason to abide by it.[52] But why would judges have a reason to conform to an interpretive method just because it represents the best constructive interpretation of U.S. constitutional culture? Like others who have engaged *Law's Empire*, I am dubious that Dworkin ever persuasively shows why constructive interpretation has normative bite.[53]

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51. *See* Adler, *supra* note 28, at 205.

52. On the rule of recognition as a source of reasons, see COLEMAN, *supra* note 38, at 92-97.

53. *See* Adler, *supra* note 28, at 231-32; Denise Réaume, *Is Integrity a Virtue? Dworkin's Theory of Legal Obligation*, 39 U. TORONTO L.J. 380, 407-09 (1989).

D. The Skeptical Response

I have discussed, and criticized, the attempt to use Hart's rule-of-recognition model to furnish a nonskeptical response to the Puzzle. But the model might be deployed in a different manner. One might say: "Because the members of the U.S. legal community are neither in consensus about interpretive methods nor about some deeper rule that would validate interpretive methods, no single method is legally correct. Rather, if a method has nontrivial support within the community but is also opposed by some within the community, its legal status is indeterminate. Law itself provides no determinate constraint on judicial choice as between the various methods, each of which has some community support."

Hart himself is actually quite comfortable with certain cases of legal indeterminacy.[54] He discusses how this can arise by virtue of the indeterminacy of natural language. Hart provides the famous example of a statute that prohibits "vehicles" from being brought into a park.[55] It is indeterminate whether the prohibition covers certain boundary cases, for example, using a toy car with an electric motor. In such cases, Hart suggests, the judge has legal discretion either to allow the activity or to disallow it.

Indeterminacy in the application of a statute is not, perhaps, deeply troubling. But indeterminacy with respect to the legal status of interpretive methods *is* deeply troubling. Such indeterminacy would seem to undermine the possibility of determinate answers to a very wide range of constitutional questions.

Return, once more, to cases such as *Raich* or *Casey*. Supreme Court Justices disagree about some concrete question of constitutional law, such as the scope of federal power[56] or the existence of abortion rights.[57] Now, it is possible that the majority positions in *Raich* and in *Casey* were justified by the application of *every* interpretive method with some support in the community—or, alternatively, that the dissenting positions in *Raich* and in *Casey* were justified by the application of *every* interpretive method with some

54. *See* HART, *supra* note 38, at 125-36, 148-54, 272-75.

55. *Id.* at 127-29.

56. *See* Gonzales v. Raich, 545 U.S. 1, 42-43 (2005) (O'Connor, J., dissenting).

57. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

support in the community. But this seems implausible. In particular, it would seem that originalism, at least, supported the *Casey* and *Raich* dissenters, whereas respect for precedent supported the majorities. Assume that, in fact, the majority positions in these cases were justified by at least one interpretive method with some support in the community *and* that the dissenting positions were also justified by at least one interpretive method with some support in the community. If so, the skeptical response to the Puzzle now under consideration would imply that neither the majorities, nor the dissenters, were determinately legally correct. Whether there really is a federal power to regulate marijuana would be legally indeterminate—and so, too, would the existence of a constitutional right to abortion.

Another troubling implication of the skeptical response to the Puzzle is this: the scholars, jurists, and others who have engaged in such massive efforts debating interpretive methods are confused. Everyone in this debate argues in favor of some interpretive method, asserting it to be legally favored. But the skeptical response suggests that all parties to the debate are in error. No method is correct—or at least no method is determinately correct. The skeptical response offers an *error theory* of interpretive disputes[58]: because correct answers to questions of interpretive methodology are grounded in consensus, the very fact of disagreement undercuts right answers, and thus those who continue to assert right answers in the face of disagreement are confused.

For these reasons, I am very reluctant to embrace a skeptical response to the Puzzle: to embrace the position that there are no legally correct answers to contested questions of interpretive methodology. On the other hand, I have not found a persuasive nonskeptical response. Of course, I have only considered three possibilities in this Essay, and there are surely others worth considering.

58. *Cf.* J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 48-49 (1977) (offering an error theory of moral discourse).