Dear Readers,

*Thank you* for your thoughts on this early draft! I’m very grateful.

And I'll look forward to discussing.

Richard
Interpretive Permissions

(Draft of October 16)

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In the United States, lawyers and judges are accustomed to thinking that there is, at least in principle, one correct answer to interpretive questions.1 Certainly that is what the rhetoric of virtually all judicial opinions would have us believe.2 Yet we are equally accustomed to thinking that each judge is free to choose her own interpretive method. Thus, we have textualist, purposivist, pragmatic, and eclectic judges—all claiming to have found the One Right Answer to any number of interpretive questions.3 And, relatedly, each judge generally thinks that her own interpretive approach is the One Right Method. In this sense, there is determinacy within interpretive methodologies, but indeterminacy across them.

There is another way of doing interpretation. In the United Kingdom, the prevailing (not undisputed) view is not that each individual jurist chooses from a vast list of mandatory interpretive principles, believing (or hoping) to have picked out the right one. Rather, UK judges have permission, in any given case, to apply one of a few shared interpretive principles. These principles, sometimes called “the basic rules,” are the literal rule, the golden

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1 For some readers, the main text will trigger reflections on Ronald Dworkin’s famous (or infamous) “one right answer” thesis. See, e.g., RONALD DWORIN, A MATTER OF PRINCIPLE 119-45 (1985). Because my project emphasizes the permissive nature of law, it more naturally fits alongside Hartian positivism, which of course embraces the possibility of “hard” or indeterminate cases yielding legally unguided discretion. Perhaps I should simply stop there. But I suspect that the account of interpretive permissions outlined here is actually compatible with Dworkin’s jurisprudence: legal permissions might be viewed as directed toward the Dworkinian requirement of “fit,” whereas what I treat as non-legal considerations might be recast as immanent moral principles bearing on Dworkinian justification.

2 See, e.g., Patricia M. Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U. CHI. L. REV. 1371, 1417 (1995) (noting that “judges still typically write as if they were absolutely certain about the rightness and soundness of their analysis and decisions,” even though “everyone (including the judges) knows that’s not necessarily the case.”).

3 On the avowed lack of methodological stare decisis, see Abbe R. Gluck, The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes, 54 WM. & MARY L. REV. 753, 757 (2013) (positing that interpretive stare decisis “has been rejected by all federal courts and most scholars”); Sydney Foster, Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?, 96 GEO. L.J. 1863, 1864 (2008); Alexander Volokh, Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else, 83 N.Y.U. L. REV. 769, 804 (2008) (“[T]here is little indication that lower-court judges consider themselves bound to use any grand theory [of interpretation], perhaps because there is little indication that the Supreme Court considers its use of these methods binding either upon lower courts or upon itself.”). Cf. Aaron Bruhl, Eager to Follow: Methodological Precedent in Statutory Interpretation, N. CAR. L. REV. (forthcoming 2020) (recognizing, while challenging, the “conventional view within the field of statutory interpretation . . . that propositions of interpretive methodology generally do not, as a descriptive matter, enjoy precedential status in the federal courts”).
rule, and the mischief rule. These three rules are essentially moderated versions of textualism, pragmatism, and purposivism, in that they allow judges to interpret statutes based on certain textual, pragmatic, and purposivist considerations.

“Hold on,” you might be saying, “Isn’t this permission stuff just familiar interpretive discretion under another name?” No. While there is plenty of discretion in the United States, familiar approaches assess all valid inputs into legal interpretation with the goal of finding a uniquely correct or best result. So, at the end of Scalia’s textualist inquiry, or Eskridge and Frickey’s “funnel of abstraction,” or the average circuit judge’s interpretive eclecticism, the interpreter says: “By my lights, C is correct, or the uniquely best, legal answer available (but ymmv)”. Under the permissions approach, by contrast, the interpreter looks to a subset of legitimate interpretive inputs and says: “C is at least one permissible answer, based on our common set of interpretive principles.”

What should we make of the contrast between the US picture of individualistic but mandatory interpretation and the UK picture of shared but permissive interpretation? I suggest a few tentative answers. First, the

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4 See, e.g., JOHN GARDNER, LAW AS A LEAP OF FAITH 123 n.74 (2012) (“American theorists tend to assume, mistakenly, that the main US rules of legislative and constitutional interpretation must be mandatory rules, such that in cases of dissensus, at least one of the dissentients must be in breach of legal duty (if only we could work out which). British theorists, by contrast, almost universally acknowledge the permissive character of the main UK rules of legislative interpretation” (citing RUPERT CROSS, STATUTORY INTERPRETATION 43 (1976)); David Kelly, SLAPPER AND KELLY’S THE ENGLISH LEGAL SYSTEM 115 (19th ed. 2020) ([I]t is sometimes suggested that the rules of interpretation form a hierarchical order . . . . On consideration, however, it becomes obvious that no such hierarchy exists’); TERENCE INGMAN, THE ENGLISH PROCESS 256 (1994) (“The three so-called ‘rules’ . . . are not rules at all since there is no compulsion to apply them . . . There is not set order of priority.”); SMITH AND BAILEY ON THE MODERN ENGLISH LEGAL SYSTEM 319 (1991) (“Three ‘rules’ of statutory interpretation have been identified: the ‘mischief rule,’ the ‘golden rule’ and the ‘literal rule,’ each originating at different stages of legal history. To call them ‘rules’ is somewhat misleading: it is better to think of them as general approaches.”); see also William S. Jordan, Legislative History and Statutory Interpretation: The Relevance of Legal Practice, 29 U.S.F. L. REV. 1, 5-6 (1994) (“Three rules have long dominated this arena: the literal rule, the golden rule, and the mischief rule. . . . While these are generally recognized as the rules that govern statutory interpretation in England, they have been subject to the criticism that there is no overarching rule to determine which of these three is to be followed in a particular case.”); infra note 46. Cf. note 17 (competing views).

5 See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION.


US approach can largely be recharacterized as a UK-style system of permissions, except perhaps that the range of permissible options in the United States is even greater than in the United Kingdom. Second, the US approach differs from UK practice in that it tends to submerge or deny the existence of discretion, whereas permissive interpretation surfaces that discretion. Third, the UK system, though overtly permissive, is probably less discretionary overall than its US counterpart. Finally, US judges can profit by learning from, even emulating, the UK model. In short, American lawyers and jurists should consider moving away from individualistic, mandatory interpretation and toward a more candid, shared approach characterized as much by permissions as by prohibitions or mandates.

The discussion so far has focused on statutory interpretation, consistent with the traditional ambit of the United Kingdom’s basic rules. But most of the arguments I have so far discussed are framed in broader terms that could carry over to the constitutional context. Should they? That question takes us well beyond UK practice, given that legal system’s historical lack of a written constitution. And constitutional interpretation does pose certain complications for permissive interpretation. In particular, constitutional interpretation more often involves old, broadly written texts, such that constitutional analogs to the basic rules would yield a worrisomely high degree of discretion. That problem may explain why US judges converted the openly permissive or indeterminate principles of British law into the mandatory precepts we know today. But even if so, the basic rules might still best describe or illuminate US constitutionalism.

The argument proceeds as follows. Part I explores and analyzes UK interpretive practice, focusing on its permissive quality. Part II argues for the permissive approach’s appeal. In short, it accounts for widely valued and incommensurables interpretive inputs—text, purpose, and pragmatism—while both surfacing and curbing discretion. Part III addresses certain objections and adjustments to the permissive approach, while building out some independently interesting ideas, such as supererogatory interpretation. Part IV discusses the foregoing points in connection with the recent, fascinating, and monumental decision Bostock v Clayton County.\(^8\) And, finally, Part V briefly explores how the foregoing theory of interpretive permissions extends to constitutional law.

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\(^8\) Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731 (2020).
I. The Basic Rules as Permissions

This Part outlines the basic rules that govern in the United Kingdom and then explores their theoretical properties, ultimately offering a clarifying reformulation.

A. What Are the Basic Rules?

I begin with intellectual arbitrage. In the United Kingdom, statutory interpretation has long been marked by three “basic rules.” The literal rule provides that courts must adhere to the plain meaning of statutory text. The mischief rule allows courts to interpret texts in light of the specific evil that the legislature aimed to ameliorate. Finally, the golden rule allows courts to add or subtract from the statutory text to the extent that the text’s practical implications are absurd or unreasonable.  

These brief statements of course gloss over a considerable degree of complexity and debate. For instance, the mischief rule allows for creative or contextual readings but only with a degree of textual plausibility. And the golden rule is sometimes said to come in both narrow and broad varieties, with the difference turning on the degree of absurdity or unreasonableness required to trigger it. (Unsurprisingly, the broad “unreasonableness” version is much more controversial and rarely applied.) Further, all three of the basic rules are linked to the lodestar of “legislative intent,” which in its empty generality supposedly stands as the common first principle of statutory interpretation, giving rise to all three rules. Still, the three rules survive as a classic, hornbook trio, and leading authorities have summarized them much as I just did, in three succinct sentences.

For our purposes, the most important thing about the basic rules is that they are, both formally and in effect, permissions. What I mean by this is that a judge has the lawful option or permission to rely on any of three

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9 See supra note 4 (collecting sources).
10 See INGMAN, supra note 4, at 232.
11 See id.
12 To underscore the main text, the permissive nature of the basic rules is critically dependent on the premise that “legislative intent” lacks determinate or useful content. Any legal principle more basic than the basic rules could in principle rank their importance in any given case and adjudicate among their dictates—thereby eliminating the rules’ individual permissions. But whenever two rules apply but point in different directions, and there is no “meta-rule” above them, then there would appear to be pure discretion, or permission. Cf. infra notes 13 (discussing Willis, who expressly describes legislative intent as a vacuity) and 113 (discussing Blackstone’s depiction of interpretive discretion at the founding). See also Tr. of Oral Arg. in Kisov. v. Wilkie, No. 18-15, at 60 (2019) (Kagan) (“usually those kinds of presumed legislative intent are based on other views”).
rules in any given case. This point is somewhat obscured by the fact that, as above, the rules are typically presented as a mandate to obey text, followed by exceptions allowing attention to absurdity or the mischief. Yet the two exceptions are not framed as mandates. The judge “may,” not must, attend to the golden rule and mischief rule. This permissive aspect of the basic rules is widely recognized and has long endured searing criticism. Yet it remains the conventional view of the law. So, is there any merit in presenting the literal rule as mandatory? I suggest two possibilities. First, the literal rule’s mandatory quality effectively prohibits interpretations that are unsupported by any of the three rules. That is, the literal rule has both prohibitory and permissive aspects and can be decomposed accordingly: it (i) permits adherence to plain language and (ii) by default prohibits all other actions. That default prohibition matters. Second, the literal rule’s mandatory framing may give it a priority or pride of place among the rules, insofar as a jurist is seemingly obligated to consider statutory text in every case, even if there is always the option to deviate pursuant to the other two rules, provided they apply. The result may be a textualist framing effect.

B. Reformulating the Rules

Under the foregoing understanding, the basic rules can be reformulated as a limited set of permissions set against a background

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13 For a canonical critique on this score, from a Canadian perspective on British law, see John Willis, Statutory Interpretation in a Nutshell, 16 CAN. BAR REV. 1, 1-2, 9-10, 16 (1938) (“[A] court invokes whichever of the rules produces a result that satisfies its sense of justice in the case before it. . . . In short, the all-important practical question—which of the three approaches the court will adopt in my case—is a question which does not admit of an answer.”). Willis can be viewed as a proto-realist, debunking the “rules” in somewhat the manner that Llewellyn debunked canons. Cf. Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons of About How Statutes are to be Construed, 3 VAND. L. REV. 395, 399 (1950). Yet Willis’s realism shouldn’t be overstated. He identified the permissive (because underdetermined and partially contradictory) nature of what he perceived to be governing legal principles. Moreover, Willis didn’t claim that judges are left with total discretion, but rather discretion to choose among the rules.

14 See supra note 4 (collecting sources). This conventional view may be changing, for interesting reasons. See infra note 106.

15 I have separately argued that precedent may represent a freestanding permission, without influencing the lawfulness of rulings unsupported by precedent. See Richard M. Re, Precedent as Permission, TEX. L. REV. (forthcoming 2021).

16 This framing effect may be akin to the US precept that courts are to “start with the text.” See Adam Samaha, Starting with the Text, 8 JOURNAL OF LEGAL ANALYSIS (2016).
prohibition. That is, we might restate the basic rules as follows,\(^\text{17}\) with little or no change in substance:

Rule 1: A judge is permitted to adopt any interpretation that:
   (a) accords with the statutory text’s plain meaning,
   (b) construes the text to address the mischief to which the statute was addressed, or
   (c) adjusts the text to avoid absurdities.

Rule 2: No other interpretation is permissible.

This reformulation preserves the pride of place afforded the literal rule by framing the golden rule and mischief rules as deviations from plain textual meaning. And the reformulation’s Rule 2 also preserves the content of the literal rule’s mandatory aspect. One might ask what to do if no interpretation can satisfy Rule 1, but that problem (if realistic) is also shared by the canonical statements of the basic rules.

The reformulation also draws attention to the fact that the golden and mischief rules are each framed as adjustments to the literal rule, without referencing each other. That structure reflects an important substantive point: there may be no realistic or permissible way for the golden rule and mischief rule to point in opposite directions. That is, it may simply be impossible for an interpretation to both (i) address the mischief under the mischief rule and (ii) be absurd under the golden rule.\(^\text{18}\) A court that would otherwise find absurdity, one might say, would have to bow if the would-be absurdity also served the mischief. If so, the mischief rule would have a limited or subtle sort of priority over the golden rule. The conventional UK means of articulating the basic rules seems to anticipate this point by framing both the golden rule and the mischief rule as permissive exceptions to the literal rule, without referencing each other at all.

One last point: like the basic rules, the reformulation is silent as to any number of other canons and interpretive principles, such as the rule of lenity or ejusdem generis canon. Does that mean that those precepts are necessarily abandoned? No, but neither are they unchanged. When

\(^{17}\) Works on British statutory interpretation often open by summarizing the basic rules and then trying to provide a superior rule system. Some, like Cross’s famous volume, offer new rules that remain expressly permissive (“may”). See CROSS, supra note 4 (cited for this reason in GARDNER, supra note 4). By contrast, Drieger’s work on Canadian law discusses the basic rules at great length before concluding that, in Canada, they have been fused into one “modern rule.” ELMER DRIEGER, THE CONSTRUCTION OF STATUTES 67 (1975).

\(^{18}\) Cf. Bailey, supra note 4, at 325 (noting the view that the golden rule is actually a “less explicit form” of the mischief rule).
ascertaining whether a basic rule applies, interpreters might resort to various principles. Those “subrules” persist within permissive interpretation. And they could very well be mandatory. But they might apply only in connection with a particular basic rule. So, for example, if we are trying to ascertain the meaning of texts, canons bearing on drafting conventions might be appropriate. But when we are trying to figure out what qualifies as absurd or within the mischief, other rules might apply. For a more particular illustration, ejusdem generis might be mandatory when applying the literal rule, whereas a canon pertaining to practical consequences, perhaps like the federalism canon, could shade the golden rule.¹⁹

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Some readers might reasonably doubt that the permissive account of the basic rules is really so conventional in the United Kingdom, or anywhere in the Commonwealth of Nations. As I have indicated in the margins, there are competing views of the rules—indeed, it seems that a preoccupation among British scholars has been to offer one’s own preferred alternative to the basic rules. And not all of those alternative descriptions or proposals are permissive in the way I have described (though some are).²⁰ Ultimately, though, the argument I advance here—or, most of it—doesn’t depend on whether interpretive permissions are actually in use. The idea of interpretive permissions has descriptive and normative appeal for US lawyers, even if it lacks support across the Pond. Or so I will now argue.

II. Why Interpretive Permissions?

Taking inspiration from the United Kingdom’s basic rules and the conventional way of understanding them, this Part outlines the case for shared interpretive permissions, as against the mandatory but individualistic approach that predominates in the United States.

A. Interpretive Inputs and Strategies

Begin with a simple first-principles account of interpretation, focusing on statues. At least in Anglo-American legal systems, there are three kinds of things that seem critical to interpretation. First, the formal statutory text

²⁰ See supra note 17.
that conveys a legal principle. Second, the goals that the lawmaker had in mind when promulgating a change in the law. And, finally, the myriad practical or moral consequences associated with the relevant legal change. Each of these categories involves considerations that are irreducible and incommensurable. In other words, the set of factors that bear on the text, such as semantic practices, are just qualitatively different from legislative goals or practical consequences.

The reasons for attending to each of these three kinds of interpretive input is probably self-evident, but they bear some explication. Text matters both because it provides the most specific, accessible information bearing on what the lawmakers believed they were doing and because myriad actors will look to the text to gain insight into the law. So the risks of interpretive error and inadequate notice both caution against atextual adventures. Yet text can often be indeterminate, and even conscientious lawmakers often succumb to failures of communication or foresight. Thus, respect for the formal authority of the lawmaker can lead interpreters to look beyond formal texts. In particular, interpreters may depart from text to consider both the lawmaker’s goals and practical consequences. Why, after all, would a lawmaker have promulgated law that is contrary to the lawmaker’s own goals or to intelligent policy? And, of course, the public will appreciate interpretations that yield outcomes that accord with legislative goals or widely shared pragmatic concerns—even if those interpretations are surprising in light of the text.

So we have outlined the key values and inputs that underlie interpretation. Now we need an interpretive strategy. That is, we need a decision-procedure that can tell interpreters, particularly judges, what to do with formal texts, legislative goals, and pragmatic concerns. In the United States, there are two obvious strategies, each of which is familiar. First, we can choose one of the three sorts of input and declare it to be paramount. This approach yields textualism, purposivism, and pragmatism, in all their myriad subvarieties. In the scholarly literature, the focus has long been on debating

21 For a similar overview of the set out from a British tradition, see Elmer Driedger, The Construction of Statutes (2nd ed. 1984).
23 See, e.g., Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 35-37 (1993) (discussing the Hartian notion of “open texture”).
24 See, e.g., Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 182 n.5 (2010) (critically noting the view that “the absurdity doctrine . . . rests on the premise that Congress could not have intended a statute to apply in ways that contradict widely held social values”).
these Grand Theories, which seem locked in never-ending combat. Second, we can accept that text, purpose, and pragmatics are all inputs into every act of interpretation. This approach can maintain that there is, in principle, One Best Answer to every question. Yet the evident difficulty of weighing incommensurable factors tends to lead instead to impressionistic eclecticism. Most US judges work somewhere within this category.

Yet there is a third option—one that, we have seen, roughly captures UK practice even as it is almost entirely absent in the United States: Each of the three basic inputs into interpretation could be treated as irreducible and unweighable, such that application of any one of them would suffice to justify a result. Unlike the other strategies, this final one abandons the idea that there must be one unique answer to interpretive questions. I will refer to this last strategy as one of “interpretive permissions.”

B. Curbing Discretion

For many readers, the hazards of judicial discretion will seem like the obvious downfall of interpretive permissions. When the law is governed by permissions, after all, there can be multiple lawful ways of deciding any given case. The result: adopting interpretive permissions would mean an increase in unpredictable or arbitrary case outcomes, frustrating litigants and judges alike. That worry is important and contains a kernel of truth, but it is overstated. On balance, a well-designed system of interpretive permissions is likely to manage discretion better, along a number of dimensions, than more familiar interpretive strategies.

To see why, consider that conventional methods of interpretation currently foster discretion at two distinct levels of analysis. At the level of first principles, there is discretion as to what interpretive method to adopt, with the range of recognized (permissible?) methods ranging from textualism to pragmatism to eclecticism. That is, we have, and celebrate, not just Justice Scalia but also Judge Posner and the Honorable Milquetoast. And, at the level of implementation, there is additional discretion built into the execution of each available method. It is often difficult to ascertain what qualifies as the one and only “best” way to vindicate text, purpose, pragmatism, or whatever. So while US interpreters might insist that they are finding uniquely correct answers, they often exercise first- and second-level discretion within a range of indeterminacy.

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26 See Gluck & Posner, Statutory Interpretation on the Bench, supra note 7.
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Interpretive permissions offer the hope of improvement at each analytical level. For expository purposes, let me start with the level of implementation. One might fairly observe that a system with three permissive first principles is necessarily more indeterminate than any one of them. But it is not quite true that the UK's basic rules simply replicate textualism, purposivism, and pragmatism. Rather, purposivism and pragmatism are cabined, not just because textualism is always available as an option, but also because the basic rules allow for consideration of only limited forms of purpose and pragmatics. Purpose in general is not fair game under the mischief rule, but only the specific purpose that motivated the historical lawmaker; and even then, only to construe text, not to override it. And pragmatism writ large is not allowed by the golden rule, but only grave, widely recognizable worries akin to absurdity.

True, allowing consideration of purpose and pragmatics will make the permissive approach more indeterminate than the form of textualism embodied in the literal rule. The point here is not that textualism is perfectly determinate—of course it is not—but rather that the basic rules replicate and then increase whatever indeterminacy textualism does possess. But, in practice, textualism must give way to carve outs and exceptions or else lead to results that few can accept. For almost all judges, clear text too often runs the risk of outcomes that are counterproductive, harmful, or just senseless. And the most compelling circumstances for such exceptions are well captured by the mischief rule and golden rule. So permissions desirably bring determinacy to purposivism and pragmatism while simultaneously adding necessary flexibility to textualism.

That brings us to the way that permissions can add determinacy at the level of first principles. In short, the three basic rules in the UK can be viewed as a kind of compromise or second-best solution to methodological pluralism. As we have seen, text, purpose, and pragmatism can all lay claim

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28 For a rich discussion of the mischief rule as a means to contextualize statutes, see Samuel L. Bray, The Mischief Rule, 109 GEO L. J. (forthcoming 2021). Consistent with my argument above, Bray is careful to position the mischief rule as lying in-between (or adjacent to) pure textualism and purposivism. Viewing the mischief rule as an input that ought to be considered, however, Bray does not take up its traditionally permissive quality.


30 Cf. RG Lipsey & K. Lancaster, The General Theory of the Second Best, 24 REV. ECON. STUD. 11 (1956). There is a growing literature applying compensating adjustments in connection with interpretive method and the fact of pluralism. See, e.g. RANDY J. KOZEL, SETTLED VERSUS RIGHT (2017); Amy Coney Barrett, Precedent
to being inputs into interpretation, and different interpreters are in fact
drawn variously to one or more of them. That reality makes the domination
of any exclusive interpretive method, such as textualism, implausible. Yet
interpretive pluralism also creates room for convergence on a set of principles
that leave room for judicial personalization. In other words, textualists and
purposivists (and so on) will never converge any one method, but they might
be prepared to converge on a set of permissions that simultaneously (i) offer
significant guidance and (ii) permit significant personal methodological
variation. The status quo is worse in that it amounts to a permission to
choose from a wide range of methods, including rigid textualism, abstract
purposivism, imaginative reconstructionism, and strong pragmatism, along
with still other options and various hybrids. ³¹

The basic rules thus offer a template for realistic reform in the law of
interpretation. The reform strategy, in short, is to limit overall judicial
discretion by expressly adopting formal interpretive rules that allow for it. By
creating significant but limited room for each judge to go her own way, the
permissive regime gives all judges a reason to qualify and curb their own
interpretive instincts. The leading reform proposals in the United States, by
contrast, combine various interpretive inputs into a single algorithm or
standard that is enough of a compromise that (so the argument goes) diverse
jurists can all buy into it. ³² This solution has undoubted appeal, and Abbe
Gluck has shown that some state courts have indeed adopted such composite
methods, proving their viability within US legal culture. ³³

But there are three reasons to disfavor single-method, composite
solutions. First, they may not offer enough opportunity for judicial
personalization, given the strength of many judges’ first-best interpretive
preferences. Some textualists, for instance, simply will not
abide a demand
that they themselves routinely rely on atextual considerations. Indeed, this
inability to reckon with ideological purism may help explain why Gluck finds

³¹ Cf. Cass R. Sunstein, There Is Nothing that Interpretation Just Is, 30
CONST. COMMENT. 193 (2015); Richard H. Fallon, Jr., The Meaning of Legal
“Meaning” and Its Implications for Theories of Legal Interpretation, 82 U. CHI. L.
REV. 1235, 1239 (2015) (noting “an astonishing diversity of senses of meaning that
constitute what I call potential ‘referents’ for claims of legal meaning”).
³² See Abbe R. Gluck, The States as Laboratories of Statutory Interpretation:
Methodological Consensus and the New Modified Textualism, 119 YALE L.J. 1750,
1758 (2010) (describing a “state textualism” or “modified textualism,” that is, a
“compromise version of textualism . . . that retains the fundamental text-first
formalism of traditional textualism and yet still appears multitempered enough to
offer a middle way in the methodological wars”).
³³ See supra note 32.
these compromises in state courts, not federal ones. Second, these compromises obscure the inevitably significant discretion that springs from combining incommensurable interpretive inputs into a single composite method. Take the compromiser’s common practice of holding that text is binding unless unclear. Such clarity doctrines risk instability in an environment where judges’ divergent method preferences can influence their assessments of clarity. Yet the language of clarity can make this sort of discretion invisible, allowing it to have unchecked influence. Finally, the composite method might just be wrong. Perhaps the most defensible account of interpretation is indeed that there can be multiple permissible answers, such as when text points strongly in one direction and actual legislative goals strongly point in another. The composite method’s insistence on a single right answer in that sort of case may just be wishful thinking. And, if that wishful thinking were abandoned, the composite approach would likely turn out to be no different from a system of interpretive permissions.

C. Surfacing Discretion

That leads to a distinct but related source of appeal: permissions tend to surface exercises of discretion that would otherwise be obscure or at least uninterrogated. When text, purpose, or pragmatism point in different directions, US jurists typically adopt one of two rhetorical poses. One option is to insist that one type of input into interpretation (often text) is exclusively legitimate or otherwise overwhelms other factors. But because the various inputs into interpretation all have strong intuitive appeal, few if any judges consistently abide by this kind of methodological absolutism. Recourse to textualism (or purposivism etc) in any given case thus elides the choice to be textualist in the first place, a choice that (again) few of any jurists make consistently across cases.

The other option is to insist that the balance of all interpretive inputs favors one’s own side. The ever-popular result is a laundry list of factors that, when somehow added up, weigh in favor of the author’s preferred result. This option founders on the difficulty of weighting qualitatively different inputs into interpretation, a problem often “solved,” at least as a rhetorical matter,

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34 See id. In other words, national politics may have rendered the federal courts more ideologically stratified, as compared with most state courts.

35 See, e.g. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) (“[W]here, as here, the statute’s language is plain, ‘the sole function of the court is to enforce it according to its terms’”),


37 See supra note 27. As we will see in connection with Bostock, justices sometimes obfuscate their actual method in order to claim personal methodological consistency, without actually being quite so consistent. See infra Part IV.
by strained claims that all inputs actually uniformly point toward a single outcome. Thus, we often see dueling majority and dissenting opinions that both somehow claim to find support in all relevant considerations. The resulting rhetoric shrouds both opinions with a false sense of ease. This strange behavior probably results from some combination of motivated reasoning and professionalization: people who think they are right on the bottom line tend to think they are right in every respect; and the norms of legal writing emphasize argumentativeness over candor.

In contrast, interpretive permissions create breathing space that draws attention to judicial discretion. When basic rules diverge, jurists must go further to justify, on a case specific basis, why they have opted for one rule over another. But, how should a judge use the discretion afforded by permissions? Additional legal rules could guide or constrain that discretion. For instance, permissive interpretive rules could be combined with a duty to give some reasoned account of how the permission is used—an embellishment worth serious consideration.

But for now, let us sit with the pure or simple version of the interpretive permissions outlined above. On that view, a jurist who relies on a permission must openly embrace what current practice often entails but attempts to elide—namely, that non-legal considerations must partially underlie the resolution of discrete cases. Perhaps such a judge would simply seek the most readily available permission and, upon concluding that one applies, more or less end all reasoning and explanation there. Such an opinion would be legally sufficient. Or a judge could go further and point out the reasons for generally treating one or more basic rules as legally sufficient. While lawful and sometimes appropriate, these reactions to the existence of permissions would not yield any great boon in judicial reflection, public understanding, or the quality of legal reasoning.

But, even when there is no legal duty to explain, judges will often feel that some added engagement is called for, perhaps to address especially powerful claims bearing on morality, politics, or personal consistency. Additional reasoning will be especially important to the degree that judges criticize one another’s use of interpretive permissions—criticism that, again, would sound in a non-legal register. When judges do choose to give more elaborate reasons, they might repurpose arguments they already make. Judges currently wrap up their interpretive arguments with claims about the

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39 See Fallon, supra note 59, at 2304 (“[M]y preferred standard would require judges and Justices to be more forthcoming in disclosing the justifications for their methodological choices in particular cases than many and perhaps most would think necessary today.”).
importance of legal stability, fairness to individuals, or aloofness from politics. These claims now occupy a real but marginal role in judicial reasoning, sometimes touching doctrine (such as when the rule of lenity directs attention to individual notice\textsuperscript{40}), but other times appearing in brief codas or as non-legal rhetoric.\textsuperscript{41} The claims are brief and subsidiary. A permissive approach would cast them in a new light. Judges would, through such statements, be placing their own personal mark on the decision at hand. They would be assuming a kind of moral responsibility for their exercise of discretion.\textsuperscript{42} And that is also how their actions would be understood by others. The upshot is a greater recognition of judicial discretion, the law’s limitations, and the role of wise judgment.

One might respond that any explanation would in effect become part of binding law, at least insofar as it would be part of a precedential opinion. But, on the pure or simple picture of interpretive permissions, that conclusion would not follow. A judge’s use of permissions, even if reasoned, would be no more binding on the court than one executive official’s use of *Chevron* discretion would bind her successor.\textsuperscript{43} A judicial opinion might even mark the end of binding legal analysis and then overtly transition to discretionary reasons. The fact that the discretionary reasons are enshrined in a judicial decision might establish beyond peradventure that those reasons are legally available, but they would in no way require that any later decision-maker must exercise their discretion similarly. The virtue of this picture is that it allows judges to respond more freely to case-specific circumstances, without worrying about suffering a critique of unlawfulness. For example, the US convention that each justice should stick to a first-principles methodology may foster admirable individual integrity, but it can impair creation of compromises necessary to form judgments and precedents.\textsuperscript{44} By contrast, a

\textsuperscript{40} See, e.g., United States v. Lanier, 520 U.S. 259 (1992).

\textsuperscript{41} These codas often appear in the most controversial, morally saturated cases. Compare Obergefell v. Hodges, 576 U.S. 644, 681 (2015), with id. at 712 (Roberts, C.J., dissenting).

\textsuperscript{42} This kind of possibility—integrating morality into case adjudication, alongside consideration of formal legal reasoning—relates to my earlier, especially tentative suggestion that interpretive permissions are compatible with Dworkinian jurisprudence. See supra note 1.

\textsuperscript{43} I am somewhat oversimplifying here. In the *Chevron* scenario, the first official’s view might somewhat hamper the successor by requiring the successor to give a reason for her change of view. That form of arbitrary-and-capriciousness review would not operate under the pure or simple version of interpretive permissions, but it would closely resemble the possible addition of a “reasoned decision-making” requirement, as canvassed below.

permissive approach affords greater freedom to reach compromises that yield clearer or more sensible outcomes.\textsuperscript{45}

D. Preserving Discretion

There is a case for permissions even if they would substantially increase overall discretion, or even create discretion where it would otherwise be entirely absent. Indeed, a sketch of the argument has already been made. In a fascinating interview (that helped inspire this essay), the late John Gardner praised the permissive nature of UK statutory interpretation on the interesting ground that it fostered unpredictability.\textsuperscript{46} Essentially invoking a conception of the separation of powers, Gardner argued that legislators should have to live with a degree of uncertainty about how the laws that they enact will later be interpreted. Permissions, he argued, foster this state of affairs, which in turn fosters a degree of legislative humility.\textsuperscript{47} Gardner thus views the law of interpretation in part as a means of curbing malign or dangerous legislative power.

Gardner’s sketched argument is powerful but (understandably) incomplete. For one thing, the goal of hindering legislative efficacy might seem at odds with the central purposes of statutory interpretation (and more properly at home in more antagonistic constitutional rules relating to the separation of powers).\textsuperscript{48} But even if we take that goal as proper and relevant,

\textsuperscript{45} Again, Bostock affords an example, as illustrated by the liberal justices’ votes. For an example of the conservatives acting similarly, see this tweet by Professor Adil Haque, discussing Rehaif: https://twitter.com/AdHaque110/status/130849164352858120?s=20.

\textsuperscript{46} See Gardner, supra note 4. Gardner’s entire relevant discussion in the interview is worth reproducing:

The common law doctrine is that the three main canons of statutory interpretation (the literal rule, the mischief rule, the golden rule) are permissive. Judges get a free choice about how to interpret, within these three rival approaches, subject to binding interpretative precedents. This seems eminently sensible to me. All three canons have their rival advantages. So why not take the same view with constitutional interpretation, e.g. in Canada or the United States? In one way the resulting legal indeterminacy is healthy. It makes it harder for those who lay down written laws to predict what exactly their laws will achieve, and that tends to instil[!] a measure of caution or humility in law-makers who may otherwise be too keen to leave their indelible stamp on the world.

\textit{Id. See also} supra note 4(quotting the relevant footnote in Gardner’s book).

\textsuperscript{47} See id.

\textsuperscript{48} Perhaps the main text’s distinction between (facilitative) statutory interpretation and (antagonistic) separation of powers is illusory: it implicitly assumes a “faithful agent” model of statutory interpretation that must in turn rest on a separation-of-powers theory. Cf. Jerry Mashaw, \textit{As If Republican Interpretation}, 97
it is hardly clear that the permissive basic rules are the appropriate means of tempering lawmakers’ power. A general judicial power to update statutory law would better serve that goal, for instance.\footnote{See Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 353 (7th Cir. 2017) (Posner, J., concurring) (discussing “judicial interpretive updating” in a precursor to \textit{Bostock}).} By comparison, the basic rules don’t actually cabin legislative power in all instances: there will be many easy cases, after all, in which all three rules point in the same direction, leaving only whatever discretion would exist absent any permissions at all. Another way to put this is that the basic rules do afford a lot of legislative power to control outcomes, notwithstanding Gardner’s express desire for discretion. So, is that admittedly reduced degree of legislative control acceptable, or still excessive?

We can build on Gardner’s account by justifying the specific form of legislative disempowerment that interpretive permissions foster. Again, let us assume that there are three incommensurable, primary inputs into interpretation. The case for binding later judges is then at its maximum when legislators have so arranged their work as to align all the major interpretive inputs—that is, when text points toward a practical solution to a recognized problem. The basic rules encourage that form of legislative action. But, to the extent that legislators draft language that is misaligned with practical sense or recognized problems, the case for judicial authority is at its height (and even then, the basic rules don’t give judges free reign). So, for example, a poorly drafted law, or a law that appears to address matters far beyond legislative contemplation, \textit{should be} one where permissions give jurists a degree of wiggle room.\footnote{We might even follow \textit{Chevron} in treating such statutes as implicit delegation of judicial discretion—something that even strong skeptics of judicial discretion are open to allowing. \textit{See} Barrett, \textit{supra} note 24.} By contrast, salient one-method approaches are indifferent to these sorts of mixed-input problems, either denying extra discretion where discretion is needed (textualism) or creating discretion where none is called for (purposivism / pragmatism).

\section*{III. Objections and Accommodations}

There are three related problems with interpretive permissions. These problems lead to discussion of three independently interesting topics, namely, counter-permissions, supererogation, and contingent mandates.
A. Counter-permissions

As we have already seen, it would be a mistake to think that the permissive approach characteristic of the United Kingdom increases overall judicial discretion. But in the eyes of many, permissions will seem to afford a particularly pernicious form of discretion.\(^51\) A vivid example is of a judge who picks among legally available permissions based on an objectionable criterion, such as whether the judge’s favored political group would benefit. Could that really be allowed?

The most direct response to this problem is simply to say, No. Certain criteria for choosing permissions might themselves be impermissible, such that their operation triggers the withdrawal of an otherwise valid permission.\(^52\) Criteria that are generally unconstitutional when employed by governmental actors, such as invidious race or gender preferences, are the most obvious candidates.\(^53\) And additional criteria may be objectionable when employed by judges, perhaps for reasons of due process.\(^54\) It thus seems likely that a judge lacks permission to rule based on a party’s political affiliation or the best way to nomination to a higher court.

These sorts of qualifications to the permissive approach may seem straightforward, but they can be implemented in various ways. They could operate as internal checks within the mind of the conscientious judge.\(^55\) They could sometimes prompt the judge to insulate herself from criticism by providing some non-objectionable account of her actions. And they could be strengthened by a separate, freestanding obligation to give an explanation—or, at least, enough of an explanation to give a prima facie valid account of one’s choice, under the circumstances.\(^56\)

But wait—couldn’t a badly motivated judge simply give a disingenuous explanation, thereby obscuring her invidious and impermissible reasons for action? Yes. Those efforts at self-concealment could be more or less effective in any given instance, but the risk is always present. And it


\(^{52}\) For deep discussion of apparently forbidden considerations for adjudication, portraying them as both stabilizing and destabilizing the (permissible) modalities, see David Pozen & Adam M. Samaha, Anti-Modalities, MICHL. REV. (forthcoming).


\(^{55}\) See William Baude, Originalism As A Constraint on Judges, 84 U. CHI. L. REV. 2213 (2017) (discussing the psychology of a judge who wants to be guided or constrained by law).

would be a mistake to discount them. This sobering point may supply cause
to doubt that a duty to explain is all that desirable after all. The more
effective mode of discipline may be internal, as fostered by personal oaths
and promises, or other general statements of principle, rather than case-
specific explanations.

B. Supererogation

Pernicious discretion aside, one might pose a softer worry, somewhat
akin to existential angst. As hard-charging professionals with vast
responsibility, judges often want to do the best job possible. And they will
sometimes feel anxiety about failing to do so. In low-stakes cases, the most
readily ascertainable lawful answer might be good enough. But when the real
costs of deciding either way are high, a case can feel like a Sophie’s choice.
Without a clear moral intuition—or perhaps reluctant to assert too much
moral authority on contested issues—judges will want guidance beyond the
reassurance that they have two lawful options.\textsuperscript{57} Of course, US judges
already have to deal with legal indeterminacy. But, for better or worse, they
generally do so by denying that it exists. By contrast, we have seen that
permissions tend to surface that discretion, rendering it unescapable. In
short, the permission approach seems to deny precisely what these anxious
judges will insist on, namely, determinate, binding law.

Yet there may be a way out. As we have seen, text, purpose, and
pragmatism are intuitively viewed as the primary, irreducible inputs into
interpretation. Yet even that list, capacious as it is, may not exhaust the
range of legally relevant inputs. In particular, that list seems to focus on the
legislature to the exclusion of the other two branches of government. But
while the statutory text and the legislature’s goals are paramount, other
departments’ formal outputs and designs could also matter, even if
qualitatively less. Think of executive-branch statutory interpretations, for
instance, which might be preferred under doctrines like \textit{Skidmore},\textsuperscript{58} even if
they never strictly bind. Further, we have seen that the basic rules are
narrower than broad invocations of purpose and pragmatism. And even
“pragmatism,” as I have been using that term, is somewhat truncated insofar
as it means “pragmatism as assessed by courts”—a concept that would not
capture “pragmatism as assessed by expert officials.”

The upshot is that the basic rules may not even aspire to capture
certain secondary inputs into interpretation. An additional analytic tier may

\textsuperscript{57} Relatedly, there may also be a felt need to resist external criticism through
a projection of ineluctable authority. See David L. Shapiro, \textit{In Defense of Judicial
\textsuperscript{58} See \textit{Skidmore v. Swift & Co.}, 323 U.S. 134 (1944).
be required to capture those inputs, and their net effect on an interpretive question might be to make certain options better than others, without rendering any option either impermissible or mandatory. A judge choosing between two permissible rulings might be able to say: “Both options are strongly supported by a primary input into legal interpretation, and it would be wrong to force a judge to rule in defiance of either one. However, one option is legally recommended or favored.”59 This distinction roughly tracks the ethicist’s distinction between obligation and supererogation.60 Failing to do what is obligatory is wrongful, whereas not doing what is supererogatory comes only at the cost of praise.

One might object that supererogation is irrational in this context, since a judge should simply do whatever is (or seems) legally “best.”61 A similar objection is well-rehearsed in scholarship on ethics: If surrendering almost all of one’s possessions to the poor is morally superior, isn’t someone’s failure to do so necessarily wrongful?62 But, as already indicated, some inputs into right conduct may be strong enough to warrant praise but not so critical that their absence requires condemnation. For instance, people might have a moral duty to avoid harmful conduct and assist others, but also have permission to disproportionately favor themselves, friends, and family. Somewhat similarly, a judge might have a legal duty to abide by the basic rules but nonetheless retain a degree of freedom to privilege her own preferred interpretive considerations. A legal demand to completely suppress one’s own interpretive views could even be viewed as an infringement on a judge’s integrity, that is, her interpretive conscience.

There is also another, complementary sort of answer, one that sounds more in economics than ethics: treating certain choices as legally praiseworthy (while withholding legal condemnation) might encourage desirable decision-making. For instance, we might think that while judges often reach more legally correct results by bowing to executive-branch interpretations of statutes, there is also an important, ill-defined set of cases in which such deference fosters error. To manage this difficulty, the law might in effect say: “We will categorically assign praise for judges who follow

59 For a similar distinction, see Richard H. Fallon, Jr., A Theory of Judicial Candor, 117 COLUM. L. REV. 2265, 2290 (2017) (distinguishing the “permissible” from the “admirable”).

60 See generally Joseph Raz, Permissions and Supererogation, 12 AMERICAN PHILOSOPHICAL QUARTERLY 161 (1975) (arguing that permissions, or certain exclusionary reasons, are necessary to explain and justify the category of moral supererogation).

61 We again hear Dworkin’s echo. See supra note 1.

agency readings, thereby encouraging such rulings. At the same time, we will withhold condemnation of undeferential rulings, so as to allow and encourage judges to forego deference when doing so appears, on the facts at hand, to be highly preferable (for legal or non-legal reasons).” In crasser terms, a judge might choose to lose out on categorically available deference-praise in order to obtain more case-specific praise based on other legal precepts or on non-legal considerations such as morality.

Many familiar doctrines can be recast as supererogatory legal principles. Apart from the already-mentioned example of *Skidmore*, the rule of lenity might be recast as a non-binding preference for readings that side with criminal defendants.63 That reimagining of lenity can help breathe life back into the lenity doctrine: some justices might be willing to find ambiguity for purposes of lenity more readily if doing so triggers only a preference, as opposed to a mandate. And, on a preference-based view, decisions not to apply the rule of lenity wouldn’t stand as precedents against the rule’s use, so much as choices not to invoke the rule where doing so would have been praiseworthy. (That reframing also has the virtue of explaining how the rule manages to live on, even as it so often goes unapplied.)64 Similarly, constitutional avoidance and other substantive canons might be recast as a preference for permissible readings that also avoid constitutional problems. Notably, that recasting amounts to a real change: while some modern avoidance cases accord with the basic rules, others don’t.65

But the most important supererogatory principle has to do with the force of case law. Often, the precedential reasoning of past cases points in a particular direction, even if the “square holding” of the case is more limited.66 In these situations, we are accustomed to thinking of precedent as effectively having two tiers: a binding tier relevant to the relatively specific holding on a set of (somewhat generalizable) facts, and a separate tier pertaining to case logic, which might guide a court in answering a range of later questions.67

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65 For example, *Bond*, 572 U.S. 844 (2014), applied a constitutionally inflected federalism canon to reach an interpretation in accord with the mischief rule. But *INS v. St. Cyr*, 533 U.S. 289 (2001), doesn’t seem to find support in any basic rule—at least, not unless we assume that statutory restrictions on habeas relief are ipso facto absurd or unreasonable under the golden rule. (Of course, even if the statutory ruling in *St. Cyr* were wrong, the Court could invalidate the statute if unconstitutional under the Suspension Clause.)
66 Cf. RONALD DWORKIN, LAW’S EMPIRE 225–75 (1986) (discussing the enactment force of case law versus its gravitational force); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921). See also Joseph Raz on distinctions.
67 In some deference regime, the two tiers stand out with greater vividness because the “square holding” remains operative whereas the tilt of case reasoning is deemed legally irrelevant. E.g., *White v. Woodall*, 572 U.S. 415 (2014) (holding that
When the latter applies, we often think that case law supplies a “best” answer, yet we simultaneously acknowledge that there is no “on point” precedent. The court is not bound to follow the tilt of precedential reasoning—it needn’t overrule anything to do so, for instance—and yet there is a sense in which it should follow the path laid out before it. This mix of intuitions and practices is plausibly described in terms of supererogation. The court would merit praise for ruling a certain way, but it would also be permitted to rule otherwise.

C. Contingent Mandates

Finally, there is the option of tempering permissions with mandates—particularly, mandates whose operation is contingent enough to preserve significant space for permissions. The point of having such mandates is twofold. First, they can provide determinacy where unchecked permissions would not, thereby rendering the law more predictable. Second, they can account for interests that, while not as foundational as the ones honored in permissive rules, are compelling where they do apply.

Here, too, there are many options. Some ways of incorporating permissions would bring the permissive approach relatively close to existing US practice. For instance, we could imagine a regime in which courts have permission to follow any of the basic rules only when sufficiently activated—that is, when text, mischief, or absurdity strongly points in a specific direction; in other cases, courts would have to do their best to weigh whatever amorphous interpretive inputs they can discern.

At nearly the other end of the spectrum, we might locate Chevron deference. In applying the (increasingly beleaguered) doctrine, courts have often said: that there are two reasonable interpretations of a statute, that the agency has chosen one, and that the court will defer to the agency. We can understand this chain of claims to mean that the law afforded the court two permissible options and that the executive branch’s preference for one option made it mandatory. So, to the extent Chevron is still the law, perhaps it does or should operate as a mandate within a regime of permissions.

The most widely appealing form of contingent mandate is probably the one that Gardner himself alluded to: binding case law. Once a court has applied a permission, Gardner suggests, that application and its result become mandatory for some set of interpreters, such as lower courts and later

Section 2254(d)(1) allows habeas relief only when state courts have failed to “reasonably apply the rules ‘squarely established’ by this Court’s holdings”.


69 See Gardner, supra note 46.
incarnations of the deciding court (subject to principles of stare decisis). And, of course, there may also be interdepartmental deference to judicial rulings. So, for instance, we might—or might not—think that a judicial application of a permission binds later administrative interpreters.\textsuperscript{70}

There are several reasons why mandatory precedents will seem attractive. For one thing, this set of contingent mandates would naturally complement the supererogatory precedential preferences discussed earlier. Further, mandatory precedent can be viewed as a natural complement to permissive interpretation: if underlying law is permissive and indeterminate, mandatory precedent can afford desirable fixity.\textsuperscript{71}

But for all their appeal, calls for contingent mandates can be too quick. As we have seen, mandates can be ineffectual, unnecessary, or counterproductive as compared with, for instance, permissions. And a similar line of thought can apply not just to interpretive principles but also (for example) to precedent, in a significant range of circumstances.\textsuperscript{72} So the present investigation into permissions can help remind us to scrutinize the supposed need for contingent mandates.

\textbf{IV. A Study in Method: Bostock}

Many of the Court’s most hotly debated statutory cases can be viewed as posing a choice between two or more of the basic rules. Typically, one outcome is strongly supported by text and another by the mischief rule.\textsuperscript{73} Salient examples include \textit{Bond v. United States}\textsuperscript{74} and \textit{Yates v. United States}.\textsuperscript{75} But the best example is also the most recent. In June 2020, the Court issued an epochal, 6-3 Title VII ruling in \textit{Bostock v. Clayton County}.\textsuperscript{76} In essence, Justice Gorsuch’s opinion for the Court concluded that discrimination on the basis of sexual identity or orientation qualifies as “discrimination … because of … sex.”\textsuperscript{77}

\begin{footnotesize}
\textsuperscript{70} See, e.g., National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U.S. 967 (2005). Perhaps the executive should treat prior judicial readings as preferred?

\textsuperscript{71} See Re, supra note 15.

\textsuperscript{72} I critically discuss the case for mandatory precedent elsewhere, arguing that permissive precedent does, and should, play an important role, perhaps even more important than mandatory precedent. See Re, supra note 15.

\textsuperscript{73} See Bray, supra note 28(discussing these cases, among others); Richard M. Re, \textit{The New Holy Trinity}, 18 \textsc{Green Bag} 407 (2015) (same).

\textsuperscript{74} 572 U.S. 844 (2014).

\textsuperscript{75} 574 U.S. 528 (2015).

\textsuperscript{76} Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731 (2020).

\end{footnotesize}
There is much to say about Bostock, and I cannot do the case full justice here. Still, a few pages on Bostock can help us better understand the case for interpretive permissions.

A. Three Oddities

Begin with Bostock’s three methodological oddities. First, the published opinions followed many commentators in taking for granted that at least Justice Neil Gorsuch had a strict duty to be textualist—but not because the law required it. Rather, Gorsuch was assertedly bound to textualism because he had personally averred that he was a textualist, indeed, a textualist in the mold of his predecessor, arch-textualist Justice Antonin Scalia.78 The result was a spectacle of judicial personality, as the dissenting justices seemingly put more emphasis on the hypothetical preferences of a now-dead justice than on any binding legal rules.79 And the Court pointedly cited Scalia (by name) in response.80

Second, none of the published opinions is actually all that textualist. Yes, they all contain emphatic textualist statements.81 But the majority heavily relied on case law to specify statutory meaning and defeat textualist counterarguments that many on the left find compelling.82 And the dissenting opinions invoked what would typically be regarded as paradigmatically non-textualist arguments.83 This attempt to seem, without actually being,
rigorously textualist shows that even the most emphatically committed textualists still feel the pull of non-textualist argument.

Finally, consider the justices who didn’t write opinions. With the possible exception of Justice Kagan, none of the silent joiners (Breyer, for instance) is particularly textualist. Yet these justices had no problem joining an avowedly textualist majority opinion. In this way, the joiners—like some commentators—seemingly wanted to help themselves to rigidly textualist arguments without tying themselves to textualist methods. Did the joiners feel that the Court’s textualism was more show than substance? Are they so “outcome oriented” (as Michael Dorf put it) as to be unconcerned with fidelity to any interpretive method? In the next section, I suggest that there is there another explanation.

B. A Permissive Picture

Let us step away from the Bostock opinions for a moment and look at the interpretive question afresh. After doing so, a few conclusions seem both compelling and widely appealing. First, the statute’s textual breadth supported (even if it did not require) the view that the statute reaches discrimination based on sexual identity. Second, sexual-identity discrimination lies very far from the mischief actually contemplated by the enacting legislature, or even any later amending legislature. Third, case law on Title VII did not directly control, but nonetheless supported the broader reading, in part because prior courts had applied the statute to many forms of conduct that also lay outside the scope of the mischief.

What are we to do with these sensible premises? We could pick one of these three sources of interpretive guidance—text, mischief, and case law—and declare it supreme and sufficient. But, as we have seen, that is not what

84 See, e.g., Bostock 140 S. Ct. at 1737 (“When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest.”).

85 See Michael Dorf, Will Liberal Justices Pay A Price For Signing Onto Justice Gorsuch’s Textualist Opinions?, DORF ON LAW (July 22, 2020) (“You can’t hoist result-oriented justices by their own methodological petards because they don’t have methodological petards.”).

86 For an incisive argument that Title VII’s text could very well have been read differently, see Rick Hills, Bostock, Cline, and the SCOTUS’s Repression of Textualism’s Unresolvable Contradictions, PRAWFSBLAWG (Sept 10, 2020). In brief, Hills points out that Cline construed a very similar phrase in the ADEA (“discrimination … because of . . . age”) to permit discrimination because of old age, thereby allowing preferences for the old.

87 See Bostock, 140 S. Ct. at tk (“If we applied Title VII’s plain text only to applications some (yet-to-be-determined) group expected in 1964, we’d have more than a little law to overturn.”); see also Hills, supra note 86 (“[T]he doctrine has expanded Title VII’s coverage in such a way as to make it ludicrous to exclude anti-gay discrimination from the scope of Title VII’s prohibition”).
any of the opinions actually did and, at any rate, would not reflect overall legal practice. Another option would be to put all of these inputs into a blender and then call whatever comes out the Uniquely Correct Result. That glib description comes a little closer to what the opinions in Bostock (and many other cases) actually purported to do; but it is also dissatisfying, if only because the justices are bound to arrive at different conclusions, as of course took place in Bostock itself. The mollifying claim of One Right Answer thus clashes with both legal principles and actual practice.

By contrast, the permissive approach to interpretation offers a more attractive first-principles account of the legal issue Bostock and also supplies a more charitable description of what was going on in the various justices’ opinions and minds. On that approach, both the majority justices and the dissenters were espousing permissible interpretations: the majority had text on its side, whereas the dissenters had the mischief in hand. And while supportive case law rendered the majority’s view legally preferable and, therefore, praiseworthy, the dissenters had the lawful option to disagree, based on their own expressed moral views.

That simple description accounts for all three of the oddities mentioned earlier. It explains why Justice Alito had to invoke Justice Scalia’s legacy in attacking the majority, as opposed to any binding legal principle. It accounts for the supposedly textualist justices’ markedly atextualist claims—particularly their reliance on: case law (majority), the mischief (dissenters), and non-legal moral considerations such as formal equality (majority) and democratic legitimacy (dissenters). And, finally, the permissive picture explains why the non-textualist justices could easily join the expressly textualist majority: not because interpretive method is irrelevant to them, as commentators appear to believe, but rather because those justices know that they will retain permission to be non-textualist in later cases, based on their own moral views.

So there is a straightforward sense in which the permissive approach is a superior descriptive account of what the justices are already doing. At a

88 See supra Section II.B.
89 See, e.g., id. at 1751 (“[T]o refuse enforcement … because the parties before us happened to be unpopular at the time of the law’s passage … would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law’s terms.”).
90 See, e.g., id. at 1822 (Kavanaugh, J., dissenting) (“If judges could, for example, rewrite or update securities laws or healthcare laws or gun laws or environmental laws simply based on their own policy views, the Judiciary would become a democratically illegitimate super-legislature.”).
91 See supra note 85.
92 I say “a sense” because, of course, actual US practice is still decidedly non-permissive insofar as no jurist expressly recognizes that permissions exist. Readers may disagree about how to weight that admittedly important consideration, with
minimum, the permissive approach helps us better see features of current practice that would otherwise go unappreciated.

C. Are Permissions Preferable?

More fundamentally, the permission-based account has the formidable benefit of recognizing what should be obvious: Bostock was a hard case, in the jurisprudential sense of not admitting if a single legally correct result. More importantly, the permissive approach shows why it was hard: it was underdetermined, not in the abstract, almost throwaway sense that any legal principle can be indeterminate at the margins, but rather because the fundamental determinants of interpretation were strongly at odds. Once we see that the basic rules were at loggerheads, there is of course an expectation of legal disagreement—but there is no longer room for legal condemnation, even if case law or other (perhaps non-legal) factors favor one side. Allowing for this sort of discretion is indeed the only way to talk about legal correctness in a way that has any plausible appeal across the range of legally acceptable interpretive methods.

Is there any cost to encouraging the legal community to view Bostock and similar cases through the permissive paradigm? The most salient worry, I think, is that some justices might behave differently if they could not plausibly claim that their preferred view is uniquely correct and therefore required. In Bostock, for instance, Justice Gorsuch might have been more uncomfortable ruling against his political allies and (perhaps) his personal intuitions if doing so were understood to rest at least in part on non-legal considerations. As it was, by contrast, Gorsuch could assert with a very straight face that his ruling was mandated by law. His hands were tied. Observers who bought that story accordingly accepted or tolerated the result, even if they otherwise wouldn’t.

This is a real worry, but also one that is easily exaggerated, for reasons that Bostock again showcases. In a permissive regime, Gorsuch (or whoever) could still vote in a rigidly textualist way and even adduce many of some emphasizing formal declarations and others peering through rhetoric to practical reality. Cf. William Baude & Stephen E. Sachs, Grounding Originalism, 113 Nw. U. L. Rev. 1455 (2019) (arguing for the decisive importance of the law’s “official story” when identifying the content of the law); infra note 94.

93 See supra note 23 (discussing Schauer on Hart on indeterminacy and open-texture in the law).

94 Cf. Butler v. McKellar, 494 U.S. 407, 415 (1990) (Rehnquist, C.J., writing for the Court) (“Courts frequently view their decisions as being ‘controlled’ or ‘governed’ by prior opinions even when aware of reasonable contrary conclusions reached by other courts”).

95 See, e.g., Bostock, 140 S. Ct. at 1737 (opening by emphasizing “the law’s demands”).
the same reasons for being a rigid textualist. For instance, Gorsuch’s case law arguments could still have a home in a permissive system, as could his marginalized (but real) moralistic arguments about formal equality. What he would have to give up is the claim that other approaches and rulings are legally disallowed — something that, really, should be obvious anyway, given that other justices (including in Bostick) routinely interpret with different methods and reach different results. And precisely because the claim of being strictly bound is so facially untenable, Gorsuch’s harshest critics were not much calmed by his protestations.

V. Permissive Constitutional Interpretation

I have so far focused on statutory interpretation, but most of my arguments aren’t so limited. The question accordingly arises: what about permissive interpretation in the context of constitutional law? The basic rules offer a fascinating point of comparison. I will begin with an analysis of how permissive interpretation might work in the constitutional context. This Part is especially tentative, and sometimes even conjectural.

A. Is Constitutional Law Different?

Does the case for permissive interpretation extend to constitutional interpretation? From one standpoint, the answer is clearly “yes.” Text, purpose, and pragmatics, after all, are plausibly regarded as the primary inputs into not just statutory but also constitutional interpretation. So many of the foregoing arguments easily carry over.

Yet the average constitutional and statutory provisions implicate these variables quite differently. At the level of text, constitutional provisions tend to be much more indeterminate and value-laden, partly because there are orders of magnitude fewer words in constitutions than statute books. At the level of purpose, the historical remove of most constitutional provisions (at least in the United States) makes it difficult to understand lawmakers’ actual goals, whereas the operative versions of ever-revised statutes tend to be more accessible because closer to the here and now. Finally, at the level of pragmatics, constitutional provisions tend to be far more consequential and complex, often touching on the basic operation of government or on human

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96 See supra notes including note 89.
97 Cf. Burgess Everett, Hawley on LGBTQ ruling: Conservative legal movement is over, POLITICO (June, 16, 2020). This cite is a “Cf” because the other obvious way to view Senator Josh Hawley’s disappointment is that he isn’t actually interested in legal correctness at all, but only political outcomes.
rights. In short, constitutional interpretation is much more likely to involve capacious, old, and consequential provisions.

“Much more likely” is hardly a clean division between the two sorts of case. A few constitutional cases involve picayune, and recent provisions, whereas some statutory cases involve anything but. Indeed, we have just explored a statutory case that in many ways feels constitutional: Bostock involved an open-ended, fairly old, and vitally consequential provision. We might say that almost every constitutional case is like Bostock. And some are even more like Bostock than Bostock itself.

The upshot is pressure to supplement permissive interpretation in constitutional cases (and certain statutory cases), so as to limit the expansive discretion that the basic rules tend to confer. This pressure implicates several ideas we have already encountered. Perhaps should precedent be contingently mandatory, or the mischief rule obligatory, or elected branches entitled to pragmatic deference. These responses to the problem of discretion roughly correspond to common-law constitutionalism, many forms of originalism, and the New Deal settlement. Yet none of these options is entirely satisfying, or could realistically hope to be, because each focuses on just one basic form of interpretive input.

Another kind of response would be to reject judicial authority, or least the authority of judicial review, whenever judicial permissions confer discretion. If, for example, the mischief rule supported a reading of the Constitution that would sustain a challenged statute, a court might have to adopt that reading, even if the literal rule suggested a different result. Only if all the basic rules supported invalidation could a court (on this view) strike down a statute. The result would be a sort of Thayerianism, in that “clear” (and therefore justiciable) unconstitutionality would arise if, and only if, all the permissive rules point in the same direction—thus yielding no permissive discretion at all. But, of course, that solution would bring about a precipitous decline in judicial power to enforce the Constitution.

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98 See supra Part III.
102 See James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129 (1893) (allowing for judicial review only when a law’s unconstitutionality is “so clear that it is not open to rational question.”).
103 The force of having all three basic rules point in the same direction may help explain Jed Rubenfeld’s observation that the Court generally adheres to original application understandings but overrides original no-application understandings:
particular, it would mean that judicial review could reach only evils specifically contemplated by legislatures, pursuant to the mischief rule. That is of course a respectable position, à la Thayer—but not one that many current theorists or judges would be prepared to live with.

So while permissive interpretation is more problematic in constitutional cases, it remains hard to shake off. Despite near-consensus on the need for mandatory strictures in constitutional law, there is no prospect of consensus on just what those structures are or ought to be.

B. Permissions and Practices

Does permissive interpretation teach us something about US constitutional law? I suggest three affirmative answers.

First, I speculate that the US penchant for mandatory interpretive principles with respect to all legal interpretation was at least partly caused by its tradition of written constitutionalism. In the United Kingdom, by contrast, non-statutory law has long been focused on unwritten common law, equity, and constitutional traditions. Within that distinctive legal environment, permissive statutory interpretation was not all that jarring. If anything, it left judges more constrained, as compared with the other salient modes of legal reasoning. In the early United States, by contrast, written constitutionalism created the above-described pressure for ways of cabining judges’ interpretive discretion. And as judges became accustomed to thinking and talking about constitutional interpretation as mandatory, that frame of mind probably spilled over to influence other modes of legal interpretation rooted in texts. The upshot is that permissive interpretation expired or failed to take hold in the United States—and not just in constitutional law, but also in statutory interpretation, and everywhere else.

104 See generally J.H. Baker, An Introduction to English History (1990), and forgive me this rudimentary citation.

105 Compare the early discussion of absurdity in United States v. Bright, 24 F. Cas. 1232, 1235 (CCD Pa. 1809) (noting that in the face of an “absurdity,” “a more liberal course may be pursued”), with the later, constitutionally inflected ruling in Sturges v. Cowinshield, 17 U.S. (4 Wheat.) 122, 209 (1819). Both cases are noted in Manning, supra note 29, at 2388 n.3. Bright contends that the absurdity doctrine adapts in constitutional cases: “But if upon any occasion the strict rule should be observed, it ought to be in expounding the constitution . . . .” Id.

106 If this conjecture is correct, then we might expect UK law to follow suit, given its increasing use of textual basic law, such as (most recently) the Human Rights Act of 1998 and the European Convention on Human Rights. And, indeed, I think movement in that direction has already been taking place.
Second, the UK’s basic rules offer an attractive alternative to several influential accounts of “pluralist” constitutional law. Two leading works are Philip Bobbitt’s account of constitutional law’s “multiple modalities”\textsuperscript{107} and Richard Fallon’s “constructivist coherence theory.”\textsuperscript{108} These theories respectively distinguish among six and five overlapping inputs (to use my term), with the total list of unique inputs being: text, history or original intentions, prudence, precedent, structure, theory, and ethics. For these theorists, all of the approved inputs into constitutional interpretation are assumed to be operating on all judges, yielding a sort of eclecticism. The basic rules support the foregoing pluralist accounts while also offering a way of tightening them. As we have seen, the basic rules suggest a more specific taxonomy: three primary legal considerations (text, mischief, and absurdity), with the choice among them guided by a combination of precedent and a catch-all, non-legal category of morality. So scholars have inferred versions of a legal system that UK jurists long ago invented. And the systems’ differences plausibly redound to the basic rules’ advantage. If nothing else, these legal theories should be brought into discussion.\textsuperscript{109}

Finally, a number of monist, or non-pluralist, constitutional theories begin with a descriptive claim about US legal practice. Most salient in recent years is work by Will Baude and Steve Sachs.\textsuperscript{110} In brief, Baude and Sachs argue that the “best” account of legal practice represents the law that judges swear to, and generally must, obey. For the authors, that binding account is “inclusive originalism.”\textsuperscript{111} Permissive interpretation challenges the Baude-
and-Sachs project in at least two ways. First, it introduces a new contender for best account of current practice. In particular, we have seen that the permissive approach is in some ways akin to more familiar pluralist accounts, except more defined, constraining, and rooted in Anglo-American law. Second, and relatedly, permissive interpretation introduces, or at least strengthens, the argument that interpretive pluralism is originalist. If we start with the goal of identifying original interpretive practices, as Baude and Sachs do, we should begin with principles inherited from UK courts. And if those inherited principles were permissive, then the burden would fall on Baude and Sachs to show how and when that original pluralism lawfully evolved into monism. I am now investigating whether and how permissive interpretation governed at the founding. This historical inquiry into lawful permissions opens a new front in the scholarly literature on the founding era’s interpretive practices.

112 Baude suggests a similar idea—essentially, that originalism is an option available to jurists—as a fallback position. See William Baude, Essay, Is Originalism Our Law?, 115 COLUM. L. REV. 2349 (2015).

113 There is evidence of permissive interpretation at the Founding, though not precisely in the manner of the basic rules as articulated twentieth-century sources. In a leading colonial source, for instance, Blackstone linked the mischief rule with considerations of “equity” and concluded: “Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law.” 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *62-63 (1765-1769). That key claim prefigures twentieth-century observations that there is no meta-rule governing which basic rule to apply. Yet Blackstone appeared to view the golden rule as mandatory, and his overall discussion is arguably consistent with interpretive eclecticism. See id.

Founding-era debates emphasized—or exaggerated—both aspects of Blackstone’s discussion of interpretive “rules.” On the one hand, Brutus cited and summarized Blackstone (including paraphrases of both the mischief rule and the golden rule) before concluding that federal judges “will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution.” ANTIFEDERALIST No. 80 (Brutus). On the other hand, Hamilton asserted (with equal but opposite hyperbole) that federal judges would be “bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.” THE FEDERALIST No. 78. A more accurate account of founding-era practice would be more moderate than either of those partisan arguments: Anglo-American judges had permission to follow the mischief and golden “rules” as a way to achieve equity.

114 For some leading, if opposed, entries focused on the power of text (as opposed to the nature and degree of the judge’s permission to be textualist), see John F. Manning, Textualism and the Equity of the Statute, 101 COLUM. L. REV. 1, 10-15 (2001); William N. Eskridge, Jr., All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806, 101 COLUM. L. REV. 990 (2001); John F. Manning, Deriving Rules of Statutory Interpretation from the Constitution, 101 COLUM. L. REV. 1648, 1653 (2001) (“The evidence concerning both the early state court practice and the founding debates simply does not significantly address, much less settle, the appropriate role of the federal courts in matters of
Conclusion

Permissive interpretation can be viewed as a way to manage two challenges faced by any legal system: indeterminacy within any given interpretive method, and disagreements about which method is correct. Permissions deal with the first challenge by allowing interpreters to switch between methods when any one method is intractable or else gives rise to distinctive problems. And permissions deal with the second challenge by offering a new kind of compromise across methods: rather than crafting a single compromise approach, interpreters have limited access to several methods at once. At present, the federal courts essentially operate under a covert system of permissions. There is no single composite approach shared by all. Instead, each judge is allowed to choose among a set of interpretive options, each of which is avowedly lawful. Yet judges act as though these permissions did not exist, obscuring their own discretion and stymying opportunities for methodological reform. That should change.

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(statutory interpretation."). Again, these debates focus on the scope of the various rules, such as the degree to which the mischief rule applies, given relatively clear text. But these debates don’t emphasize the potentially discretionary nature of whether to invoke or rely on any particular rule at all.