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PERMISSIVE INTERPRETATION

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Justice Elena Kagan famously remarked not only that "we're all textualists," but also that "we are all originalists now."[1] Recent Supreme Court decisions have made those claims more plausible than ever, as a new conservative supermajority has prompted all the justices to focus on text and history like never before.[2] Yet judicial practice remains more complex. As justices and commentators have noted, the Court does not treat its own statements regarding interpretive methodology as strictly binding.[3] Instead of following a single mandatory approach, each justice harbors her own distinctive views on interpretation.[4] And even judges who espouse a mandatory interpretive method sometimes feel free to deviate from it.[5] As Justice Kagan herself has more recently acknowledged, the "current Court is textualist only when being so suits it."[6] So while individual cases may be textualist or originalist, the overall practice of interpretation remains flexible and multifaceted.

For a recent and relatively simple example of the Court's actual interpretive practice, consider *Alabama Association of Realtors v. Department of*

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1 *See* Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:25-31 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFToTg [http://perma.cc/LJH8-FPJD]; *see also The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) [hereinafter Kagan Nomination Hearing] ("So in that sense, we are all originalists.").

2 *See, e.g.*, Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 268-69 (sharply criticizing the Court's simplistic textualism).

3 *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2444 (2019) (Gorsuch, J., concurring) ("[W]e do not regard statements in our opinions about . . . generally applicable interpretive methods . . . as binding future Justices with the full force of horizontal *stare decisis*." (citing Evan J. Criddle & Glen Staszewski, Essay, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1577 & n.12 (2014))); Chad M. Oldfather, *Methodological Stare Decisis and Constitutional Interpretation*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 135-136 (Christopher J. Peters ed. 2013)); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1765-66 (2010) ("Indeed, the Court does not give stare decisis effect to *any* statements of statutory interpretation methodology.").

4 *See* Richard M. Re, Essay, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV 824, 826 (2023) ("Justices view their own past rulings as evidence of how they should rule today, and they also have strong incentives to remain personally consistent."); *infra* note 23 (discussing an example).

5 *See generally* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1302 (2018) (reporting based on a survey of federal appellate judges concerning their approaches to statutory interpretation that most judges are willing to consider many different kinds of argument and few were "willing to associate himself or herself with 'textualism' without qualification").

6 West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (complaining that the Court uses "special canons like the 'major-questions doctrine'" as "get-out of-text-free cards"); *see also* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1278 (2020) (discussing the Supreme Court's ongoing use of canons to achieve purposive interpretation); text accompanying *infra* note 15 (discussing the major questions doctrine).

Health and Human Services.[7] In the hope of combatting the COVID-19 pandemic, the Center for Disease Control issued a controversial moratorium on residential evictions.[8] Debate over the moratorium's lawfulness consumed public and legal attention for weeks, yielding three kinds of argument. First, there was a broad text—one that, read literally, would grant the CDC sweeping powers to combat infectious disease.[9] Second, the statute seemed to have been enacted with relatively limited goals in mind, as some of its provisions mentioned "fumigation" or "disinfection"—not evictions.[10] Third, the practical stakes were high, whether assessed in terms of potentially spiking death rates or the property interests of landlords.[11] So literal text, legislative goals, and practical concerns were all in sharp conflict. In that difficult but all-too-familiar situation, does the law of interpretation provide an answer?

Judges and commentators insisted that there was a correct answer as to whether the moratorium was statutorily authorized—though they disagreed about what it was.[12] For its part, the Court promptly divided along predictable ideological lines, but for surprising reasons. The three liberals emphasized the "plain meaning" of the statute's broad grant of agency authority.[13] By contrast, the six conservatives viewed the statute's expressly nonexhaustive list of examples as not just "illustrating" the agency's power but sharply circumscribing it.[14] The conservatives also doubted that Congress would intend to give "breathtaking" power over economic matters to an agency specializing in infectious disease.[15] The Court's supposedly textualist majority

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7 141 S. Ct. 2485, 2492 (2021).

8 *See* Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43244, 43245 (Aug. 3, 2021).

9 The agency head may "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases . . . ." 42 U.S.C. § 264(a).

10 *Id.* ("[T]he Surgeon General may provide for such inspection, fumigation, disinfection . . . and other measures, as in his judgment may be necessary.").

11 *See* discussion and sources discussed *infra* notes 15–17.

12 *See Ala. Ass'n Realtors*, 141 S. Ct. at 2492 (Breyer, J., dissenting) ("[L]ower courts have split on this question."); *see also* Mark Sherman, Jessica Gresko & Joshua Boak, *Biden's New Evictions Moratorium Faces Doubts on Legality*, ASSOCIATED PRESS (Aug. 5, 2021), https://apnews.com/article/joe-biden-health-coronavirus-pandemic-us-supreme-court-8d397f378c01c369f0d8618a4d9b3a83 [http://perma.cc/H8D8-3QU3] (noting expert disagreement).

13 *Ala. Ass'n Realtors*, 141 S. Ct. at 2491 (Breyer, J., dissenting).

14 *Id.* at 2488. The list of statutory examples ended with an open-ended catch-all: "and other measures, as in his judgment may be necessary." 42 U.S.C. § 264(a).

15 *Ala. Ass'n Realtors*, 141 S. Ct. at 2489. The Court buttressed this claim by invoking the major questions doctrine, which posits that Congress "speak[s] clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Id.* (citation omitted). In a permissive regime, the major questions doctrine could be recast as a subrule dictating how to ascertain legislative goals pursuant to the mischief rule, and perhaps also as a plaudit assigning praise for certain applications of the mischief rule. See *infra* Section I.B discussing subrules and the text accompanying note 130 discussing plaudits.

thus inferred an implicit or atextual limit on the agency's regulatory power.[16] The dueling opinions also stressed pragmatic points: the liberals found it intuitive that Congress would give the CDC all "necessary" power to save lives in a pandemic,[17] while the conservatives emphasized the moratorium's high cost to landlords.[18]

The lesson of the eviction moratorium case, and many similar controversies, is that the actual practice of legal interpretation cuts across familiar interpretive approaches like textualism and purposivism. As a matter of first principles, the three primary interpretive inputs in the United States legal system are literal text, legislative goals, and pragmatic consequences.[19] When two or more of these incommensurable factors strongly conflict, as in the eviction moratorium case, formal principles of law do not dictate how to weigh or reconcile them. Judges instead pick their own personally preferred interpretive approaches, or else blend all the factors within an eclectic analysis. Legal practice is thus left in denial. Judges sometimes claim to be governed by mandatory interpretive principles and even criticize one another on that basis. But both formal law and actual practice allow jurists to choose among a wide range of interpretive theories. The result is a vast and unregulated set of de facto interpretive permissions.

A better approach would elevate the justices' interpretive permissions, making them both explicit and regulated. To that end, this Article proposes an approach to interpretation modeled on the three "basic rules" that have long structured British statutory interpretation[20] and that once held sway in the United States as well.[21] The literal rule calls for adherence to a text's literal meaning. The mischief rule permits deviation from literal meaning when doing so advances the lawmaker's specific goals. And the golden rule allows deviation from literal meaning when doing so averts what is widely recognized as catastrophic or senseless harm. These rules are moderated versions of textualism, purposivism, and pragmatism in that they respectively authorize judges to rely on certain textual, purposivist, and pragmatic

16 141 S. Ct. at 2489. The liberals, too, deviated from textualism by invoking legislative history showing legislative "purpose." *Id*. at 2491-92 (Breyer, J., dissenting).

17 *See id*. at 2493 (Breyer, J., dissenting) ("The CDC invokes studies finding nationally over 433,000 cases and over 10,000 deaths may be traced to the lifting of state eviction moratoria.").

18 *See id*. at 2489 (estimating the moratorium's economic impact at $50 billion based on emergency rental assistance provided to landlords).

19 *See infra* Section I.A (discussing the three primary interpretive inputs).

20 *See, e.g.*, MICHAEL ZANDER, THE LAW-MAKING PROCESS § 3.2 (8th ed. 2020) ("It is often said that there are three basic rules of statutory interpretation — the literal rule, the golden rule and the mischief rule.").

21 For instance, the first three principles of interpretation described in Hart and Sacks's foundational treatise are the mischief rule, the golden rule, and the literal rule. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1111-13 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

considerations.[22] The eviction moratorium case supplies an apt example. Under the basic rules, both the majority and the dissent adopted permissible views—the majority under the mischief rule and the dissent under the literal rule. The justices' dueling pragmatic arguments were too controversial to trigger the golden rule, but they did provide nonlegal grounds for choosing among permissions. The basic rules thus reflect that the eviction moratorium case was—and should be—formally indeterminate.

First principles aside, the basic rules can be viewed as a second-best response to the fact of *interpretive personality*—that is, individual jurists' distinctive interpretive commitments and ways of exercising discretion.[23] In effect, the basic rules curb adventuresome forms of both purposivism and pragmatism, even as they add flexibility to strict textualism. So, rather than heroically assuming that methodological consensus is achievable,[24] the basic rules call for each of the major interpretive theories to moderate, while leaving ample space for personal variation. Moreover, the basic rules operate *as rules* and so are far more determinate than eclectic approaches that simply accept interpretive pluralism, without structuring it. The counterintuitive result is that legal practice would become *more* determinate if it were organized around shared interpretive permissions, rather than individualistic mandates. Once recognized for what it is—limited, ineliminable, and often good—the zone of interpretive discretion can be both monitored and narrowed.

Interpretive permissions also create room for legal outcomes to be not just right or wrong, but praiseworthy. Consider our everyday lives. People face countless morally permissible options, only some of which are praiseworthy. Likewise, a judge choosing between two permissible interpretations might nonetheless recognize that one is legally preferred. Precedential reasoning often works in just this way: judges earn legalistic praise for logically extending precedential reasoning to new situations, even when stare decisis doesn't demand it. These praise-giving principles, or "plaudits," offer a more nuanced and plausible picture of adjudication. And, precedent aside, many legal values are worth encouraging through plaudits, rather than mandates.

Constitutional practice, too, can be recast in light of the basic rules. For example, the modern "strict scrutiny" framework, particularly the idea that constitutional rights can be defeated by "compelling interests," is best

22 The basic rules are for prescriptive texts like statutes and may not apply to all legal interpretation, such as interpretations of conventions, judicial precedents, or affidavits.

23 To give an example discussed below, Justice Gorsuch is more of a literal or semantic-meaning textualist, whereas Justice Alito is more of a mischief-rule or original-applications textualist. *See infra* note 204 and accompanying text.

24 *Cf.* Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1766 (1994) ("The bait is the promise that a consensus will eventually be reached as to the 'best' theory of constitutional interpretation.").

understood as a way of implementing the golden rule. Take political speech that foreseeably and immediately threatens a fatal stampede—and so can be regulated for the sake of public safety.[25] This pragmatic exceptionalism is uninvited by the Constitution's text, and it is conventionally portrayed as ahistorical, too.[26] But it actually has an ancient foundation in British and early American interpretive rules.[27]

The argument begins by describing and defending the basic rules before considering refinements and, finally, studying *Bostock v. Clayton County* and *Dobbs v. Jackson Women's Health Organization* as recent exemplars of permissive interpretation.[28]

I. WHAT ARE THE BASIC RULES?

This Part describes the "basic rules," starting with their content and then turning to their permissive nature.

A. *Content*

Statutory interpretation in the United Kingdom and, for a time, the United States, has been marked by three "basic rules."[29] The *literal rule* generally requires courts to adhere to the literal meaning of legal texts. The *mischief rule* allows courts to construe texts in light of the specific issue that the legislature aimed to address. Finally, the *golden rule* allows courts to deviate from the text when its practical effects are widely viewed as catastrophic or senseless. Below, I describe each of the basic rules and their interrelationship, while also recognizing especially interesting glosses and variations.

The *literal rule* is, well, literal. It focuses on what is sometimes termed linguistic or "semantic meaning" and doesn't demand the sort of contextual or historical specification that even most textualists endorse.[30] In particular, a literalist is free to focus on present-day understandings of the relevant words, rather than striving to recover their received meaning at the time of

25 *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (establishing the "imminent lawless action" standard for proscribing advocacy).

26 *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268 (2007) (noting that there is not "any textual basis, nor any foundation in the Constitution's original understanding, for the modern test . . . .").

27 *See supra* note 20 and accompanying text.

28 140 S. Ct. 1731 (2020); 142 S. Ct. 2228 (2022).

29 *See supra* notes 20–21.

30 *See* Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 991 (2017) ("[A]ppealing to a speaker's practical ends can be necessary in cases of what some philosophers of language call 'expansion' or 'pragmatic enrichment.'" (footnotes omitted)); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 487 (2013) ("In law, we refer to semantic content as 'literal meaning.'"); *infra* note 213 (describing semantic or literal meaning).

enactment. When asked to apply an 1800 statute barring "cruelty," for instance, a literalist could resolve the case by consulting a modern dictionary and then asking (without historical inquiry) whether the challenged conduct exhibits a "disposition to inflict pain or suffering or to enjoy its being inflicted."[31] In this way, the literal rule allows for interpretive dynamism.[32] The literal rule also differs from textualism in that it is subject to the other basic rules and so allows for other methodologies.

The *mischief rule* most resonates with purposivism. The lawmakers' goals or intentions, on this view, can justify deviations from the literal meaning of the text. The mischief rule is thus a limited form of contextual enrichment.[33] We might imagine that a spate of violence prompts a law against any "shedding blood in the municipal palace," which is then construed not to bar surgeries.[34] Just what qualifies as "the mischief," and how to find it, is of course open to further specification.[35] Key, however, is that the legislative goal must be actual and specific. That demand precludes abstract or hypothetical purposes of the sort often associated with Hart and Sacks.[36] At the same time, the mischief rule makes for strange bedfellows: it is compatible with recourse to legislative history in statutory cases and to founding-era history in constitutional ones.[37]

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31 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 456 (1976). By treating the concept of cruelty as law, the literal rule invites contestation over competing conceptions of cruelty (and other morally inflected concepts). *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 75 (1996); *see also infra* note 166 and accompanying text (providing examples of courts taking indeterminate constitutional terms at face value).

32 *See* Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825, 828 (2022) (suggesting that textualism could ask "what the relevant statutory language means *now*"); *see also* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (defending a mode of dynamic statutory interpretation); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 919 (1996) ("[I]n some areas, the law has developed in a way that can be squared fairly easily with the text but is plainly at odds with the Framers' intentions."); Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 124-125 (2021) (characterizing modern textualism as "a form of dynamic statutory interpretation").

33 For rich discussion, including how to identify the mischief based on publicly known facts antecedent to legislation, see generally Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967 (2021).

34 *Id.*

35 *Id.* On the possible role of legislative history, see *infra* note 41 (identifying operation of the mischief rule in historical statutory interpretation).

36 *See* Bray, *supra* note 33, at 973 (explaining that, on Hart and Sacks's view, "the interpreter starts with the mischief and then from it infers 'the general purpose'" (citing HART & SACKS, *supra* note 21, at 1415-16)). For a narrower and more approving reading of Hart and Sacks, see Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 384-88 (2012).

37 *See* Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 160 (1990) (noting that Justice Scalia's textualism excludes legislative history sources akin to the ones that his originalism entertains); *see also* Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian*

Finally, the *golden rule* represents a form of pragmatism.[38] When the text of a law leads to results that are widely regarded as extremely or senselessly harmful, judges may deviate from the text to avoid those results. Under this rule, a law requiring fireworks displays might be read not to apply when available fireworks are too unstable for safe storage and use. This rule survives in the United States today as the beleaguered "absurdity doctrine," which similarly allows courts to interpret texts in ways that avoid widely shocking results.[39] The golden rule differs from the mischief rule both because it doesn't require any showing as to the lawmaker's actual goals and because its use may undermine those goals. Yet the golden rule also stops far short of embracing pragmatism *tout court*. Again, the rule demands extreme or senseless harm and is keyed to widespread views. Thus, a result with significant public support cannot trigger it.

The basic rules are notably silent as to any number of other rules, canons, and interpretive principles, such as the *ejusdem generis* canon.[40] Does that mean that those precepts are necessarily abandoned? No, but neither are they unchanged. When ascertaining whether a basic rule applies, interpreters might resort to various subsidiary principles. And those "subrules" could very well be mandatory, even if they apply only in connection with a particular basic rule. So, for example, text-based canons like *ejusdem generis* might be mandatory when applying the literal rule, evidentiary precepts regarding legislative history might guide the mischief rule,[41] and canons pertaining to

Difficulty, and the Separation of Powers, 99 GEO. L.J. 1119, 1124 (2011) ("[T]extualism in the academy defines itself in opposition to legislative history."); discussion *infra* note 41.

38 The golden rule can be viewed as purposivism once removed, if we assume that the legislature's goal is not to impose catastrophic or pointless harm. *See* SMITH AND BAILEY ON THE MODERN ENGLISH LEGAL SYSTEM 362 (3d ed. 1996) (noting the view that the golden rule is actually a "less explicit form" of the mischief rule).

39 *See* ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 234 (2012) ("A provision *may* be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve." (emphasis added)); *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) ("[T]he absurdity must be so gross as to shock the general moral or common sense."); Sturges v. Crowinshield, 17 U.S. (4 Wheat.) 122, 203 (1819) ("It must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."). *But see* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390-92 (2003) (criticizing the absurdity canon on textualist grounds).

40 *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-15 (2001) ("[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." (citation omitted)).

41 Debates over legislative history can be understood as disagreement about which sources should be considered when assessing the legislature's goals under the mischief rule. For related historical discussion, see generally Jonathan Green, *The Misunderstood History of Interpretation in England* (2022) (unpublished manuscript) (on file with author); *see also supra* note 15 (suggesting that the major questions doctrine could operate as a mischief-based subrule).

practicalities, like the canon of constitutional avoidance, could shade the golden rule.[42]

B. *Permissiveness*

Perhaps the most important thing about the basic rules (at least as understood here) is that they afford *permissions*.[43] What I mean by this is that a judge has the lawful option to rely on any of the three rules in any given case. On this view, the basic rules will generate determinate results in many "easy" cases. All three rules might point in the same direction, for instance, or only one rule might be activated given the facts at hand.[44] But when two rules diverge, either of the resulting options is lawful.

The basic rules' permissiveness is somewhat obscured by the fact that the literal rule, as indicated above, is typically presented as a mandate (subject to the other rules).[45] The literal rule's mandatory framing affords it a pride of place: it is the only rule that must be considered—and considered first—in every case.[46] Yet the literal rule is conditioned on the mischief and golden rules, and they generally are *not* framed as mandates. The judge "may," not must, attend to certain legislative goals and practical consequences. That the

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42 *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 958 (2013) (discussing possible bases for the constitutional avoidance canon).

43 Consider John Gardner's pointed discussion:

> 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[.]

JOHN GARDNER, LAW AS A LEAP OF FAITH 123 n.74 (2012) [hereinafter GARDNER, LAW AS A LEAP OF FAITH]; *see also* Interview by Richard Marshall with John Gardner, 3:16, https://316am.site123.me/articles/law-as-a-leap-of-faith [https://perma.cc/W2PP-8MVA] [hereinafter Interview by Richard Marshall with John Gardner] ("The common law doctrine is that the three main canons of statutory interpretation (the literal rule, the mischief rule, the golden rule) are permissive.").

44 The basic rules are thus distinct from the claim that either the law or language is necessarily indeterminate. *Cf.* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 800 (1983) (arguing that the past is too indeterminate for interpretivism to constrain judges).

45 The literal rule's mandatory aspect creates the need to comply with at least one basic rule. That is, the literal rule has both permissive and prohibitory aspects that (i) permit adherence to text and (ii) presumptively bar all other actions, subject to the other rules.

46 *See* Adam M. Samaha, *Starting with the Text—On Sequencing Effects in Statutory Interpretation and Beyond*, 8 J. LEGAL ANALYSIS 439, 440-43 (2016) (discussing the effects of the maxim to "start with the text"). The literal rule's subtle priority reflects the fact that literal meaning is almost always accessible, even when a statute's mischief or consequences are obscure.

basic rules are permissive, at least in effect, has frequently been recognized—including by their critics.[47]

To be sure, the basic rules could be understood as mandatory rather than permissive. On some accounts, the rules, or versions of them, form a single, composite algorithm, such as: (i) adhere to the text's literal meaning, (ii) but resolve textual ambiguities based on the mischief, (iii) but avoid absurd or catastrophic results.[48] More recently, the rules have sometimes been used eclectically, such that their respective interests are weighed against one another.[49] In different ways, these approaches cast the rules as the obligatory way to find "legislative intent," interpretation's asserted lodestar.[50]

During the early twentieth century, however, commentators began to observe—or complain—that no principle controlled how jurists should adjudicate conflicts among the basic rules.[51] The resulting permissions could be viewed as "weak,"[52] in that they result from a simple lack of applicable law, namely, the absence of a "meta-principle" governing the basic rules.[53] In time,

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47 *See, e.g.*, F.A.R. BENNION, STATUTORY INTERPRETATION: A CODE 467-68 (4th ed. 2002) (criticizing permissive accounts of the basic rules).

48 Some treatises can be read somewhat similarly. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *59-61 (laying out a method of interpretation calling for exploration of "the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law").

49 *See* BENNION, *supra* note 47, at 469 (arguing that courts "weigh all the relevant interpretative factors, and arrive at a balanced conclusion"); ELMER A. DRIEDGER, CONSTRUCTION OF STATUTES 85-87 (2d ed. 1983) (discussing the basic rules before concluding that, in Canada, they have been fused into one modern principle that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament"). At its inception, each rule presented itself as supreme and so vied for interpretive supremacy. *See* SMITH & BAILEY, *supra* note 38, at 355-58.

50 This view presupposes that "legislative intent" lacks determinate content beyond what is contained in the basic rules themselves. *See* Willis, *infra* note 51, at 16-18; *see also* H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1534 (1987) (arguing that "intent" was originally a constructed concept built up from founding-era interpretive principles); Doerfler, *supra* note 30, at 1044 ("[L]egislative intent is a fiction."). *But see generally* RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT (2012) (theorizing legislative intent).

51 *See* John Willis, *Statutory Interpretation in a Nutshell*, 16 CANADIAN BAR REV. 1, 16 (1938) ("A court invokes whichever of the rules produces a result that satisfies its sense of justice in the case before it."). Willis can be viewed as a realist, debunking the "rules" in somewhat the way that Llewellyn debunked canons. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 399 (1950).

52 *See* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 67, 117 n.4 (1979) (distinguishing "weak" from "strong" permissions).

53 *See* sources cited and accompanying text *supra* note 51 (discussing Willis's influential paper); *see also* GARY SLAPPER & DAVID KELLY, THE ENGLISH LEGAL SYSTEM 106 (14th ed. 2013) ("It 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 173 (11th ed. 1994) ("[T]he three so-called 'rules' . . . are not rules at all since there is no compulsion to apply them . . . . There is no set order of priority."); William S. Jordan, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F. L. REV. 1, 4-6 (1994) ("Three rules have long dominated this arena: the literal rule, the golden rule,

however, some commentators described interpretive rules as overtly permissive.[54] The result: "strong" permissions, that is, affirmative authorities allowing for the use of any given rule, where it applies. As a formal matter, weak and strong permissions both create discretion. But the experience of applying them may be different. Weak permissions might seem more accidental, obscure, and unstable, whereas strong permissions are more deliberate, visible, and permanent.

Insofar as they are permissive, or can be imagined to be, the basic rules pose a basic challenge to mandatory interpretive methods: are interpretive permissions desirable?

II. WHY THE BASIC RULES?

This Part makes the case for the permissive basic rules. That is, I argue for certain shared interpretive permissions, as opposed to mandatory-but-individualistic principles.

A. *First Principles*

The case for the permissive basic rules begins with a first-principles account of legal interpretation.

At least in Anglo-American law, there are three kinds of things that are critical to interpretation.[55] These *primary interpretive inputs*, as I will call them, can be stated in general terms as follows. First, the formal text that conveys a legal principle. Second, the lawmaker's goals—that is, the reason for promulgating a legal change. And, finally, the myriad practical consequences associated with the relevant law. Further, these three categories are analytically distinct, in that each involves considerations that are irreducible and incommensurable.[56] That is, the set of factors that bear on the text, such as semantic meanings, are just qualitatively different from legislative goals or practical consequences.

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and the mischief rule . . . . [T]hey 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.").

54 Works on British statutory interpretation frequently propose alternative versions of the "basic rules." *See, e.g.*, RUPERT CROSS, STATUTORY INTERPRETATION 41-44 (2d ed. 1987).

55 Virtually every guide to interpretation in the United States includes the three inputs described in the main text, often while affording some or all of them some sort of priority. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reason*, 42 STAN. L. REV. 321, 353-62 (1990); *see also* sources cited and text accompanying *infra* note 178–182. What generally varies, in other words, is the prioritization among the three inputs, their scope or breadth, and any additional inputs.

56 For discussion of Richard Fallon's important early work on the "incommensurability problem," *see infra* notes 179–193 and accompanying text.

The reasons for attending to each of these three kinds of interpretive inputs are probably self-evident, but they merit some explanation.[57] Text matters both because it provides the most specific, accessible information bearing on what the lawmakers believed they were doing and because many actors will look to the text to gain insight into the law.[58] So the risks of interpretive error and inadequate notice both caution against atextual adventures.[59] Yet text is often indeterminate, and even conscientious lawmakers can succumb to failures of expression or foresight.[60] Thus, respect for a lawmaker's formal authority can itself lead interpreters to look beyond formal texts. Interpreters may depart from text to consider the lawmaker's goals as well as practical consequences. Why, after all, would a lawmaker intentionally promulgate a measure that is contrary either to the lawmaker's own goals or to sensible policy?[61] And the public at large will often appreciate it when courts adopt interpretations that accord with legislative goals or widely shared pragmatic concerns, even if those readings are textually surprising.

So far, I have outlined the three key 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. There are two obvious strategies, both of which are familiar. First, we could choose one of the three sorts of inputs and declare it to be paramount. This approach yields textualism, purposivism, and pragmatism, with all their subvarieties. In the scholarly literature, the focus has long been on debating these "grand theories," which seem locked in never-ending combat.[62] Second, we could accept that text, purpose, and pragmatics

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57 *See* DRIEDGER, *supra* note 49, at 81-89 (discussing the three rules and their sources of appeal).

58 *See, e.g.*, W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991) ("The best evidence of [congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President."); Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 551 (2009).

59 *See generally* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006) (defending textualism as reliable and efficient).

60 *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 34-37 (1991) (discussing the Hartian notion of "open texture"); ARISTOTLE, NICOMACHEAN ETHICS 1138a (Terence Irwin trans., 3d ed. 2019).

61 *See e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 113 n.7 (2010) ("[T]he absurdity doctrine . . . rests on the premise that Congress could not have intended a statute to apply in ways that contradict widely held social values.").

62 For critique of grand or foundational statutory theories, *see* Eskridge & Frickey, *supra* note 55, at 321, 324-45. Due to their respective shortcomings, the "grand theories" tend to morph into one another, yielding regular claims that they are converging. *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006) (arguing that modern textualism has converged with purposivism). Or perhaps these theories "circle" one another by shifting focus from one to another of the same three basic rules. *Cf.* Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1821-22 (2016) (discussing how legal theories "work themselves impure"). That is, any theory that categorically denies some of the

are all inputs into every act of interpretation. Proponents of this eclectic approach can maintain that there is, in principle, one legally best answer to virtually every legal question.[63] But the difficulty of weighing incommensurable factors yields impressionistic reasoning and considerable discretion. Most judges work somewhere within this broad category.[64]

Yet there is a third option: each of the three primary interpretive inputs could be treated as irreducible and unweighable, such that the presence of any one of them suffices to justify a result.[65] This last strategy is one of *interpretive permissions*. Unlike other strategies, interpretive permissions provide guidance by establishing standards within each of the three primary interpretive inputs, without attempting to either rank or aggregate them. Instead of calling on judges to weigh text, goals, and consequences against one another, permissions can specify when each of those variables is powerful enough to create a lawful option. This focus on legal sufficiency still requires a form of line-drawing and yields the sort of borderline indeterminacy associated with the application of any principle.[66] But it also sidesteps the incommensurability problem with combining different inputs. It is coherent, even intuitive, to assess when a given sort of thing is adequately present. What's harder is finding a principled way to compare apples and oranges.

To be clear, the permissive basic rules go well beyond interpretive pluralism—that is, they do much more than simply acknowledge multiple inputs into interpretation. Again, the basic rules dictate *when* each input renders an outcome permissible. Some interpretive pluralists address this issue by maintaining that an outcome is allowable if it is more supported than opposed by any one interpretive input.[67] But that approach leaves too much undecided. For instance, should judges identify permissible readings based on either abstract goals that no legislator actually contemplated or controversial prudential judgments? By itself, pluralism allows for those possibilities, but the basic rules do not. That constraint fosters determinacy and prevents any one rule from being so easily met as to drain the others of practical significance.

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basic rules (such as when textualism rejects legislative goals or pragmatism denigrates literal texts) will come in for criticism on that basis—until it reverses course.

63 *See* discussion *infra* Section V.C.

64 *See generally* Gluck & Posner, *supra* note 5 (finding that the approach most commonly employed the surveyed federal judges was "intentional eclecticism").

65 *See* Interview by Richard Marshall with John Gardner, *supra* note 43 ("Judges get a free choice about how to interpret, within these three rival approaches, subject to binding interpretative precedents.").

66 *See generally* TIMOTHY A. O. ENDICOTT, VAGUENESS IN LAW (2000).

67 *See, e.g.*, Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1923 (1994) ("[W]ithin a single modality . . . the standards for the better argument are supplied by the modality itself."). On the possibility that Bobbitt's theory isn't fully permissive, see discussion *infra* note 183 and accompanying text.

At the same time, the permissive approach candidly recognizes the intractable real-world disagreement that arises when primary interpretive inputs strongly point in different directions, such as when the text is squarely at odds with legislative goals or common sense. Those situations are the stuff of casebooks, classroom hypotheticals, and divided rulings.[68] Theorists, lawyers, and judges predictably line up on opposing sides of these cases, adducing more or less persuasive reasons for doing so. But does formal law really dictate these choices? Or, instead, does a clash involving two or more primary interpretive inputs mean that the law is simply at an end, and that efforts to resolve these disputes on assertedly "legal" grounds are actually making a category error? To use terms associated with Hartian positivism, a strong conflict between primary interpretive inputs yields a "hard case," where the law is indeterminate and idiosyncratic or nonlegal factors predominate.[69] But whereas Hart viewed hard cases as the often-concealed result of the law's inevitable indeterminacy,[70] permissions openly and deliberately recognize where certain zones of discretion exist.[71]

The fact of disagreement in these cases also points toward a normative rationale for interpretive permissions. Legal practitioners as a group lack confidence about how to resolve clashes between primary interpretive inputs. This uncertainty could operate at the level of grand theory. For instance, practitioners may disagree as to whether textualism, purposivism, or pragmatism has priority. Alternatively, the uncertainty could be more subtle: perhaps there is confident, group-level agreement on how to resolve these cases in the abstract, but no confident ability to express that agreement in a rule-like way, given case-specific variables. These types of uncertainty call for partially withdrawing mandatory principles from the decisional space. Doing so allows for experimentation, debate, and evolving views about how to

68 For instance, the chestnut *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), involved the literal and golden rules. The question was whether the Endangered Species Act prevented an almost-completed dam from being finished, due to the risks it posed to snail darters. 437 U.S. at 156. The majority relied on the statute's "plain language," which "admits of no exception," *id.* at 172-73, whereas the dissent accused the majority of being "literalist" and found its result "absurd," *id.* at 196, 202 (Powell, J., dissenting). *See also* cases cited *infra* note 195 (collecting cases).

69 Interpretive permissions fit easily alongside Hartian positivism, which recognizes "hard" cases of legally unguided discretion. *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961). By contrast, interpretive permissions seem at odds with Ronald Dworkin's "one right answer" thesis. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 119-45 (1985) [hereinafter DWORKIN, A MATTER OF PRINCIPLE]. But perhaps legal permissions could be viewed as rules establishing when the Dworkinian requirement of "fit" is met, and what I treat as informal or nonlegal factors might be recast as principles bearing on "justification."

70 *See* HART, *supra* note 69, at 126-29.

71 Some scholars celebrate "closure rules" that inject determinacy into otherwise indeterminate areas. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1110-12, 1145 (2017). Because permissions mark and protect indeterminacy, they might be termed "opening rules."

resolve hard cases, without locking any single solution into the law of interpretation. And by recognizing the legitimacy of divergent outcomes, permissions curb the absolutism resulting from motivated reasoning or groupthink. Interpretive permissions thus operate as formal law, which is self-consciously followed, interpersonally shared, and lasting, while creating space for the more authorial, individualistic, or fleeting considerations of "personal precedent," as well as other informal aspects of judicial decision-making.[72] In short, the basic rules can help make sense of where the law should—and should not—offer mandatory interpretive guidance.

Some readers will balk at the prospect of openly using permissions to manage interpretive discretion. Weighty judicial actions, such as judicial review, may seem legitimate only if dictated by law.[73] How else could an unelected court wield such authority?[74] On this view, interpretation is either mandatory or else illegitimate. But this objection focuses on permissive interpretation to the exclusion of other types of legal indeterminacy, including the indeterminacy within mandatory theories and the even broader indeterminacy regarding which mandatory theory to adopt. The difference between mandates and permissions, while important, is just one aspect of the larger question of how to manage legal indeterminacy and judicial discretion, in all their forms. So, if permissions can help in that overall endeavor, there is no automatic reason to resist them. The choice to insist on a thoroughly mandatory approach to interpretation is just that—a choice. We should investigate its desirability.

B. *Curbing Discretion*

The hazards of judicial discretion may seem like the obvious downfall of interpretive permissions. Whenever the law contains permissions, after all, there can be multiple lawful ways of deciding a case. The apparent result is an increase in unpredictable or arbitrary outcomes. On balance, however, a well-designed system of interpretive permissions would manage judicial discretion as well as or better than more familiar interpretive strategies.

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72 This Article generally uses the unadorned term "law" to mean formal law or Hartian law. I thus reserve my argument, advanced elsewhere, that personal rules constitute the law. *See* Re, *Personal Precedent*, *supra* note 4, at 858-60 (outlining "personal positivism").

73 *See* William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 330-32 (2020) (discussing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803)).

74 Even if permissive interpretation were incompatible with judicial review, that would only raise the question of which one should go. *See infra* text accompanying notes 90 & 175 (discussing the concerns associated with discretionary judicial authority); *cf.* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002) (identifying the perceived conflict between democracy and judicial review).

The key is to see that any determinacy *within* interpretive methodologies is undermined by the substantial indeterminacy *across* them. Judges currently enjoy vast discretion as to what interpretive method to adopt. Legal practice has included, and continues to celebrate, opposing methodological stalwarts ranging from Justice Antonin Scalia (textualism) to Judge Robert Katzmann (purposivism) to Judge Richard Posner (pragmatism).[75] Moreover, most judges are methodologically eclectic, with few if any hewing to a set interpretive approach across all cases.[76] Even the newly "textualist" Supreme Court exhibits substantial methodological complexity.[77] Current practice can thus be viewed as affording de facto permission to choose from a vast range of interpretive methods.[78] In other words, mandatory interpretation is itself optional.

Against that backdrop, the basic rules offer a compromise or second-best response to the fact of methodological pluralism.[79] As we have seen, text, purpose, and pragmatism all lay claim to being irreducible inputs into interpretation, and different interpreters are in fact strongly drawn to one or more of them. Those realities make it implausible to expect consensus on how to prioritize primary interpretive inputs.[80] Convergence on the basic rules is more realistic precisely because those rules leave significant room for flexibility and personalization. By sometimes letting each judge go her own way, a permissive regime can plausibly expect all judges to qualify and curb their own interpretive instincts.

At the same time, the basic rules specify relatively simple, determinate formulations of textualism, purposivism, and pragmatism. Texts are not subject to pragmatic or historical enrichment under the literal rule but are instead read according to contemporary usage. Purpose in an abstract sense

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75 *Compare* ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (Amy Gutmann ed., 1997), *with* ROBERT A. KATZMANN, JUDGING STATUTES 32 (2014), *and* Richard A. Posner, Response, *Comment on Professor Gluck's "Imperfect Statutes, Imperfect Courts"*, 129 HARV. L. REV. F. 11, 11 (2015).

76 *See* Gluck & Posner, *supra* note 5.

77 *See supra* notes 7–18 and accompanying text (discussing *Alabama Association of Realtors v. Department of Health and Human Services*); *infra* Part IV (discussing *Bostock v. Clayton County* and *Dobbs v. Jackson Women's Health Organization*).

78 *Cf.* Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193, 193 (2015) ("Among the reasonable alternatives, no approach to constitutional interpretation is mandatory."); 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) ("[There is] an astonishing diversity of senses of meaning that constitute what I call potential 'referents' for claims of legal meaning.").

79 On interpretive method and the fact of pluralism, see generally RANDY J. KOZEL, SETTLED VERSUS RIGHT (2017); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 (2013); Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421 (2003). On divergence between the law and rules of interpretation, see generally Mark Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 136 (2020).

80 Ad hoc exceptions to textualism or originalism are hardly new. *See, e.g.*, Manning, *The Absurdity Doctrine*, *supra* note 39, at 2391-92 (commenting critically on textualists' general willingness to invoke the absurdity doctrine); sources cited and text accompanying *supra* note 6; discussion *infra* Part IV.

is not fair game under the mischief rule, but only the specific purpose that motivated the historical lawmaker.[81] And freewheeling pragmatism is not allowed by the golden rule, but only attention to outcomes widely viewed as senseless or catastrophic. So, the basic rules are far more determinate than many versions of textualism, purposivism, or pragmatism would be in isolation.

In addition, the presence of multiple permissions can, counterintuitively, promote predictable convergence among judges. Imagine for instance that the best textual reading is hard to ascertain. A textualist can then say only that the law's meaning is obscure: any contested reading might be either permitted or prohibited, depending on how the difficult question of textual meaning is resolved. By comparison, the basic rules can say more—namely, that some readings are permissible pursuant to the mischief or golden rules. And that knowledge would matter because time-strapped judges would often want to take advantage of it. When faced with intractable texts, in other words, judges would often converge on interpretations that they obviously have permission to adopt.[82]

Scholars have proposed other ways of grappling with interpretive personality, apart from permissions. Most auspiciously, some commentators have proposed combining various interpretive inputs into a single, composite analysis.[83] And we have seen that the basic rules themselves can be combined in this way.[84] But proponents of composite solutions face a conundrum. If they attempt to cabin discretion by adopting mandatory rules, then they will not offer enough opportunity for flexibility and personalization, given the strength of many judges' interpretive commitments. Textualists, for instance, will not happily abide a demand that they regularly bow to atextual considerations. And both purposivists and pragmatists will often be unwilling to blind themselves to the consequences of following even clear texts.[85] To avoid

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81 Bray distinguishes the mischief, which is a "spur to act[ion]," from the "purpose" or "general purpose" that the action aims to achieve. *See* Bray, *supra* note 33, at 972-73 ("There will be instances of convergence between the mischief and the purpose, instances in which the purpose is no more than the removal of the mischief ('because of *a*, the statute *b*, so that not *a*')."); *see also id.* at 993 (discussing the "motivating mischief" (quoting Krishnakumar, *supra* note 6, at 1319)). I treat amelioration of the mischief as a kind of purpose and the mischief rule as a kind of purposivism.

82 *See* Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 923 (2021) (arguing that permissions foster "convergence from convenience").

83 *See* Eskridge & Frickey, *supra* note 55, at 3530-62 (describing a multi-input "funnel of abstraction," or ranked set of inputs, that interpreters use to "test[]" various readings in a "dialectical" process); Gluck, *supra* note 3, at 1758 (describing "modified textualism," which Gluck defines as a "compromise version of textualism . . . that retains the fundamental text-first formalism of traditional textualism and yet still appears multitextured enough to offer a middle way in the methodological wars").

84 *See* text accompanying *supra* note 48.

85 *See infra* note 129. This point may explain why those approaches flourish in state courts, not federal ones: national politics has rendered federal judges especially ideologically committed. *Cf.* Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 262 (2019) (noting the various ways in which the judiciary is affected by increased political polarization in the United

that problem, composite approaches must admit a vast amount of implicit discretion.[86] By comparison, the basic rules are genuine rules, even as their permissiveness creates flexibility. Moreover, the discretion that does obtain under the basic rules is open and accountable—which leads to the next Section.

C. *Surfacing Discretion*

Permissions surface a large, identifiable zone of methodological discretion that would otherwise be obscure. The practically relevant choice here is not so much between permissions and mandates, as between overt permissions and de facto ones. And, on balance, a regime that accepted interpretive permissions would be more conducive to judicial candor, tolerance, and humility.

Judges usually conceal their interpretive discretion behind a rhetoric of mandates. One option is to insist that a particular type of input, such as text, is exclusively legitimate. But the primary interpretive inputs all have such strong intuitive appeal that few if any jurists categorically prioritize any one of them. More fundamentally, a judge's commitment to textualism (or purposivism, etc.) elides the choice to be textualist in the first place. Another option is to adopt an eclectic approach and insist that the balance of all interpretive inputs favors one's own side. But this solution founders on the now-familiar difficulty of weighing qualitatively different inputs—a problem often solved, at least as a rhetorical matter, by strained claims that all inputs uniformly point toward a single outcome.[87] The result is dueling majority and dissenting opinions that read like briefs, with both claiming to find support for their views in all relevant considerations. This disingenuous reasoning shrouds judicial opinions with a false sense of ease.

States); Gluck, *supra* note 3, at 2010 ("Methodological stare decisis—the practice of giving precedential effect to judicial statements about methodology—is generally absent from the jurisprudence of mainstream federal statutory interpretation, but appears to be a common feature of some states' statutory case law." (footnote omitted)).

86 Gluck describes a "modified textualism" with three tiers corresponding to text, legislative history as a mischief-like factor, and "policy presumptions" that call to mind the golden rule's pragmatism. Judges can then move beyond the text only when it is unclear. *See* Gluck, *supra* note 3, at 1758. But judges' interpretive personalities will covertly influence their assessments of whether movement across tiers is warranted. That is, a purposivist might eagerly find textual unclarity, "mandating" a move to the second tier. *See* Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1534 (2019) ("[T]ext-oriented jurists may find legal certainty . . . more often or more readily than their less textualist colleagues."). Or a pragmatist might eagerly find both first- and second-tier unclarity.

87 *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) ("[J]udges still typically write as if they were absolutely certain [but] everyone (including the judges) knows that's not necessarily the case."); Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 59 (2011) ("Judicial opinions are notoriously—even comically—unequivocal.").

By instead acknowledging the existence of an identifiable, recurring zone of methodological discretion, practitioners and commentators can begin to change legal culture. In a regime governed by the basic rules, judges who choose one applicable permission would acknowledge at least the possibility that other positions may also be lawful. For example, a textualist could disfavor a purposivist's reliance on the mischief rule, but the textualist could not condemn the mischief rule itself as legally unavailable. In that sense, the textualist could not hide behind a legalistic rhetoric of compulsion. Her decisions would at least sometimes be the result of her own methodological choices. And those open, discretionary choices would then be subject to criticism or debate on moral and other nonlegal grounds. In other words, judges would both exhibit greater respect for interpretive differences and personally own their methodological choices.[88]

A permissive approach would also reduce pressure on judges to advance strained legal claims. Because legal culture currently assumes that interpretive principles are mandatory, judges are under pressure to conclude that their results are compelled. If text and legislative purpose diverge, for instance, judges must either assert that one of those considerations is automatically superior or else deny that the divergence exists. Either of those options would be rhetorically strained, as well as incorrect. A permissive regime offers an alternative solution that aligns with the best understanding of relevant legal materials: simply argue from any basic rule that *does* apply. In some cases, the judge might go further and explain why she would rest on her chosen permission even if another rule was available. True, judges would still be tempted to claim that their position finds support across all the basic rules, rendering their opponents legally impermissible. But the felt need to make these strong claims would diminish, since the two opposing sides would no longer be trapped in a zero-sum game to determine the "one best answer" as a matter of law. Controversy would accordingly shift to informal aspects of legal reasoning, such as interpretive personality or discretionary choices among permissions.[89]

Preserving and surfacing discretion may also alter judicial outcomes. Because they efface judicial agency, mandates are conducive to harsh, aggressive rulings. When discretion is open for all to see, by contrast, the judge's personal responsibility is likewise unavoidable. Judge Richard Posner has therefore suggested that greater awareness of judicial discretion would foster humility and restraint, given the intuitive awkwardness of unelected

88 I give a brief illustration below. *See* text accompanying *infra* notes 239–241 (identifying examples of permissive interpretation in *Dobbs v. Jackson Women's Health Organization*).

89 In addition, raising overall expectations regarding the quality of legal arguments would make strained arguments more conspicuous. *See infra* Section III.A.

lawyers overriding the views of democratic institutions.[90] For similar reasons, though sometimes cutting in a different direction, arguments put forward by Professor Robert Cover suggest that overtly discretionary decisionmaking might foster greater compassion.[91] After all, a judge may be uncomfortable with the idea of exercising discretion in ways that severely harm people. Moreover, judges often have to compromise to reach majoritarian outcomes.[92] Permissions help meet that need by affording greater opportunities for convergence around sensible rules and outcomes.[93]

In some ways, legal culture is already on the cusp of making the transition to open interpretive permissions. When Supreme Court justices are appointed, for instance, they now express interpretive views in a highly personal register, often in the same breath that they assert avowedly nonlegal commitments.[94] Further, judicial opinions routinely buttress their interpretive choices with claims about essentially moral values like fairness or democracy.[95] These claims currently occupy a marginal role in judicial reasoning, sometimes touching on doctrine,[96] but at other times appearing as informal codas or nonlegal rhetoric.[97] A permissive approach would cast these claims in a new light. Judges would, through such statements, be placing their own mark on the decision at hand. They would be assuming a kind of personal

90 *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 331 (1999) ("Candor requires admitting that the judge's personal policy preferences or values play a role in the judicial process. This admission promotes judicial self-restraint . . . by exposing judges as people who exercise political power . . . .").

91 *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 235 (1975) (noting, in the context of fugitive-slave cases, that "[t]he discomfort incidental to a difficult choice will be heightened insofar as the judge views himself as having had personal responsibility for a choice from among many alternatives before him").

92 On the role and legitimacy of judicial compromise, see Wald, *supra* note 87, at 1377-78; Micah Schwartzman, Essay, *Judicial Sincerity*, 94 VA. L. REV. 987, 990-91 (2008).

93 Bostock v. Clayton County, 140 S. Ct. 1731 (2020), affords an example. *See infra* Section V.A (examining *Bostock* as a choice between interpretive rules).

94 *See, e.g.*, The Nomination of Amy Coney Barrett to be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 116th Cong. (2020), https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Testimony.pdf [https://perma.cc/DV8L-WKBR] ("I believe Americans of all backgrounds deserve an independent Supreme Court that interprets our Constitution and laws as they are written.").

95 *See* text accompanying *infra* notes 215–216 (referencing moral assertions in the *Bostock* majority and dissent).

96 *See, e.g.*, United States v. Lanier, 520 U.S. 259, 266 (1997) (noting the link between the rule of lenity and notice-based fairness to individuals).

97 These codas often appear in controversial, morally saturated cases. *Compare* Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (describing marriage as a profound union that "embodies the highest ideals" and concluding that the claimants "ask for equal dignity in the eyes of the law"), *with id.* at 712 (Roberts, C.J., dissenting) (defending a "a much different view of the Court's role" and criticizing the majority for basing its decision on alleged "insight into moral and philosophical issues"). *Cf.* Leah M. Litman, *"Hey Stephen"*, 120 MICH. L. REV. 1109, 1115 (2022) (book review) (describing an example in *Manhattan Community Access Corp. v. Halleck*).

responsibility for their exercise of discretion. And that is also how their actions would be understood by others.

Some readers may worry that surfacing discretion is undesirable. After all, interpretive permissions draw attention to the law's boundaries and the discretionary power of courts and so invite pointed questions about judicial legitimacy.[98] The judiciary's public support may even depend on its appearing constrained by mandatory principles. On that view, an openly permissive approach, even if more honest and humbling, might make it alarmingly easy to criticize the Court's frequent exercises of interpretive discretion, thereby jeopardizing the judiciary's overall public esteem.

But we should pause before endorsing an interpretive regime based on a sleight of hand. Discretion that cannot be defended publicly may not be as valuable as its supporters secretly believe.[99] And if the authority of courts really depends on falsehoods, then the judiciary's power probably ought to decline. Consistent with that view, the basic rules offer an attractively candid picture of legal interpretation: they honor the popular ideal that law is separate from politics, but they also insist that interpretation involves discretion. That relatively nuanced picture can foster and clarify public debate on the role of the judiciary and the possible need for court reform.[100] The basic rules also comport with an important practical reality that mandatory approaches suppress—namely, the link between democracy and interpretation. Political actors select for specific judicial personalities, and the selected jurists then take advantage of interpretive permissions.[101] The basic rules thus highlight that politics can influence, and perhaps legitimate, judicial outcomes.

In all events, worries about the judiciary's perceived legitimacy are best met with arguments on the merits. Precisely because the basic rules are legally

98 *See* Baude, *supra* note 73, at 330-32 (objecting to standardless discretion). *But see* Re, *Precedent as Permission*, *supra* note 82, at 934 (arguing that permissive discretion is no more objectionable than discretion resulting from legal indeterminacy); *supra* Section II.A (comparing permissive discretion and legal indeterminacy).

99 *See* Jason Iuliano, *The Supreme Court's Noble Lie*, 51 U.C. DAVIS L. REV. 911, 917 (2018) (criticizing the Supreme Court's "noble lie" that it is an impartial institution); Schwartzman, *supra* note 92, at 991 (defending a duty of candor).

100 *See* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1724 (2021) (discussing "disempowering" and "personnel" reforms for the Supreme Court); Nikolas Bowie, *Testimony Before the Presidential Commission on the Supreme Court of the United States* (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf [https://perma.cc/H4N9-ZA5C] (evaluating reforms that would curtail judicial review of federal legislation).

101 *See, e.g.*, Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 381 (2007) (noting the role of judicial appointments in shaping constitutional law). This point of course explains why judicial nominations occasion political controversy.

and morally attractive, their use can garner respect. The next Section offers additional reasons why.

D. *Preserving Discretion*

There is a case for permissions not just despite, but because of, their tendency to create discretion in some places where it would otherwise be absent. This argument can proceed even if—contrary to what I have argued so far—permissions significantly increased judicial discretion overall.

A sketch of the argument has already been made. In an interview, the late scholar John Gardner praised interpretive permissions precisely because they foster unpredictability.[102] Legislators should live with some uncertainty about how the laws that they enact will later be interpreted.[103] Permissions, Gardner argued, foster that uncertainty, which in turn fosters legislative "humility."[104] Gardner thus viewed the law of interpretation as a means of shaping legislative incentives and curbing legislative power.

Gardner's sketched argument is powerful but incomplete. For one thing, the goal of hindering legislative efficacy might seem at odds with the purpose of statutory interpretation and so be more at home among the agonistic principles associated with the separation of powers.[105] Further, the basic rules might not be the best means of checking lawmakers. A general judicial

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102 *See* Interview by Robert Marshall with John Gardner, *supra* note 43. Here is Gardner's discussion:

> 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[l] a measure of caution or humility in law-makers who may otherwise be too keen to leave their indelible stamp on the world.

Id.; *see also* GARDNER, LAW AS LEAP OF FAITH, *supra* note 43, at 123 n.74 (similar).

103 *Cf.* William D. Araiza, *The Trouble with* Robertson*: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1095 (1999) (arguing that legislative "prospectivity" generally "leaves Congress not completely sure as to the scope of the statute's application" and so unable to "single out" targets).

104 Interview by Robert Marshall with John Gardner, *supra* note 43.

105 A strict distinction between (facilitative) statutory interpretation and (antagonistic) separation of powers may be more illusory than real, insofar as it assumes a "faithful agent" model of interpretation that must in turn rest on a separation-of-powers theory. *Cf.* Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1691-92 (1988); John F. Manning, *Statutory Pragmatism and Constitutional Structure*, 120 HARV. L. REV. 1161, 1170 (2007).

authority to update statutes would better serve that goal, for instance.[106] By comparison, the basic rules don't actually cabin legislative power in all instances: there will be many easy cases, after all, in which the three rules point in the same direction, leaving only whatever discretion would exist absent any permissions at all.[107] Thus, the basic rules do afford legislatures considerable power to control outcomes, notwithstanding Gardner's express desire to the contrary. 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. The case for binding later judges is at its maximum when legislators have so arranged their work as to align all the primary interpretive inputs—that is, when a statute's literal text addresses a specifically contemplated problem in a practicable, commonsense way. The basic rules encourage that form of legislative action by obliging judges to honor it. But, to the extent that legislators draft language that is misaligned with legislatively recognized problems or common sense, the case for judicial discretion is far stronger. A poorly drafted law, or a law that appears to address matters far beyond legislative contemplation, *should* be one where permissions give jurists a degree of wiggle room.[108] By contrast, one-input approaches, like textualism, are indifferent to these mixed-input scenarios and so withhold discretion where it is called for.

III. Objections and Accommodations

Interpretive permissions face objections relating to three independently interesting topics—namely, prohibitions, plaudits, and contingent mandates.

A. *Prohibitions*

Permissions are susceptible to abuse. Imagine a judge who picks among permissions based on an objectionable criterion, such as whether the judge's favored political party would benefit. Could that really be allowed? The simplest answer is to say no. Certain reasons for choosing permissions might be impermissible, and using them could withdraw an otherwise valid

106 *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 353 (7th Cir. 2017) (Posner, J., concurring) (discussing "judicial interpretive updating").

107 *See, e.g.*, Ezekiel v. Dixon, 3 Ga. 146, 158 (1847) ("And when the language, as in this instance, is clear, direct, and positive, leading to no absurd results but affording a suitable if not a sufficient remedy to an existing evil, I do not feel at liberty to speculate upon the imperfection of the law as it is.").

108 We might follow *Chevron* in treating ambiguous statutes as implicit delegations to courts—an idea that once had wide support. *See* Barrett, *supra* note 61, at 123 ("When Congress has delegated resolution of statutory ambiguity to the courts, it is no violation of the obligation of faithful agency for a court to exercise the discretion that Congress has given it.")

permission.[109] Permissions could thus be checked by prohibitions (or anti-permissions). Criteria that are generally unconstitutional when employed by governmental actors, such as invidious race discrimination, are the most obvious candidates.[110] Other reasons for choosing among permissions may run afoul of due process. A judge might accordingly lack permission to rule in a particular way in order to improve his stock portfolio or otherwise enrich himself.[111] Perhaps reasons that are demonstrably faulty, like astrological forecasts, should likewise lie out of bounds.[112]

But two cautions are in order. First, prohibitions must not be so extensive as to render permissions practically insignificant. If "poor reasoning" were prohibited, for instance, then permissions would in effect be supplanted by a mandatory standard of reasonableness. Prohibitions must accordingly be reserved for the worst of the worst reasons, lest interpretive permissions cease to exist. Second, and relatedly, implementing prohibitions is easier said than done. They could operate as internal checks within the minds of conscientious judges.[113] They could represent a professional expectation that judges in good standing will provide a permissible account of their actions. Or they could be enforced by a legal duty to give at least some plausible explanation of one's use of permissions.[114] In all events, however, badly motivated judges could give disingenuous-yet-ingenious explanations, obscuring their impermissible reasons.[115]

Moreover, permissions may outperform prohibitions when it comes to addressing bad faith. We have seen that when judges can openly recognize the

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109 For deep discussion of forbidden considerations for adjudication, portraying them as both stabilizing and destabilizing the (permissible) modalities, see generally David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729 (2021).

110 *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) (reiterating the Court's position that invidious discrimination is unconstitutional).

111 *See* Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 872 (2009) ("[T]he probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable." (citations omitted)); *see also* Webster v. Doe, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting) ("[T]here is no governmental decision that is not subject to a fair number of legal constraints . . . beginning with the fundamental constraint that [an official] decision must be taken in order to further a public purpose rather than a purely private interest . . . .").

112 *See* Frederick Schauer, Essay, *Authority and Authorities*, 94 VA. L. REV. 1931, 1947 (2008) (giving this example).

113 *See generally* William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213 (2017) (discussing the role of constraint in judicial decisionmaking).

114 *See generally* H L Ho, *The Judicial Duty to Give Reasons*, 20 LEGAL STUD. 42 (2000); Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483 (2015); Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179 (1992); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

115 *Cf.* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) ("[J]udges who regard themselves as free to distort or misstate the reasons for their actions can avoid the sanctions of criticism and condemnation that honest disclosure of their motivation may entail.").

law's lacunae, as well as their own discretion, they may feel less pressure to generate contrived arguments for the unique correctness of their views. In a case where the literal and mischief rules diverge, for instance, we might imagine unanimous agreement that the case was hard in the sense of being a matter of discretionary judgment. The majority and dissent could then forgo the sort of strained or overstated interpretive claims that currently mark divided rulings. The average quality of actual legal arguments would increase, raising overall professional expectations. The upshot is that contrived claims, including unconvincing invocations of the basic rules, would become more conspicuous, making them subject to greater professional and public criticism.

B. *Plaudits*

The permissive nature of the basic rules creates room for *plaudits*, that is, for principles that deem certain conduct praiseworthy, without requiring or forbidding anything.

The case for plaudits begins, not with malicious judges, but rather with a softer worry. As hard-charging professionals with vast responsibilities, 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 costs of deciding either way are high, a case can feel like a Sophie's choice. When lacking a clear moral intuition—or when reluctant to assert too much authority on contested issues[116]—judges want guidance beyond the reassurance that they have two or more lawful options.[117] And while judges often sidestep this problem by conflating their own interpretive personalities with the law, we have seen that interpretive permissions tend to thwart that rhetorical maneuver and so surface judges' methodological discretion.[118]

Yet legal guidance can come in forms other than mandates. And while text, purpose, and pragmatism are the primary inputs into interpretation, others may also exist. Consider that the literal and mischief rules respectively focus on the legislature's written product and goals. But the work of other government actors could also matter. Executive branch statutory interpretations, for instance, might guide judges under doctrines like

116 *Cf.* Kagan Nomination Hearing, *supra* note 1, at 195 ("[T]he courts themselves have not been elected by anybody. There is no political accountability . . . .").

117 Relatedly, there may also be a felt need to resist external criticism through a projection of ineluctable authority. *See generally* COVER, *supra* note 91.

118 *See supra* Section II.C.

Skidmore deference,[119] even if those interpretations never bind courts.[120] The upshot is that the basic rules may not capture certain secondary interpretive inputs. An additional analytic tier may be required to capture those lesser inputs, and their net effect on an interpretive question might be to make certain options praiseworthy, without rendering any option either impermissible or mandatory.

This second tier of interpretive principles would consist of plaudits. When applying a plaudit, a judge who is choosing between two permissible rulings might reason as follows: "Both options are strongly supported by a primary input into legal interpretation, and it would be legally permissible to rule in favor of either one. But only one option is legally recommended or favored and so would yield praise."[121] The distinction between legal mandates and plaudits parallels the distinction in moral theory between obligation and supererogation.[122] Failing to do what is obligatory is wrong and condemnable, whereas not doing what is supererogatory comes only at the cost of praise. So perhaps the legal world, like the moral one, has not just mandates and permissions, but plaudits, too.

One might object that legal supererogation is irrational, since a judge should simply do whatever is (or seems) legally "best."[123] On that view, judges should receive praise when they act as they are supposed to—and condemnation when they do not.[124] A similar objection is well-rehearsed in moral theory. For example, if surrendering one's possessions to the poor is deserving of praise, isn't the failure to do so necessarily wrongful?[125] But, as noted, some inputs into right conduct may be strong enough to warrant permissions or praise but not so critical that their absence requires

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119 *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (discussing the "decisive weight" given to some administrative decisions based in part on their "power to persuade").

120 Executive or other governmental views and practices might still affect interpretation through other principles. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636-38 (1952) (Jackson, J., concurring); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Thomas W. Merrill, *Judicial Deference to Executive Precedent,* 101 YALE L.J. 969, 972-75 (1992).

121 *See also* Richard H. Fallon, Jr., Essay, *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2290 (2017) (distinguishing the "permissible" from the "admirable").

122 *See generally* Joseph Raz, *Permissions and Supererogation*, 12 AM. PHIL. Q. 161 (1975) (arguing that permissions, or certain exclusionary reasons, are necessary to warrant the category of moral supererogation).

123 *Cf.* DWORKIN, A MATTER OF PRINCIPLE, *supra* note 69, at 119-45 (discussing the right-answer thesis).

124 *See* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 803 (2022) ("[P]raise-or-blame questions concern the right decision procedure.").

125 *See* Raz, *supra* note 122, at 164 (recounting this objection); *cf.* Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1310-19 (2015) (defending certain "imperfect legal duties").

condemnation.[126] So morality might yield a *duty* requiring people to eschew harmful conduct, a *permission* allowing them to favor their own personal interests, and a *plaudit* entitling them to praise for privileging the interests of others.[127] Those diverse principles would reflect competing moral concerns, such as personal integrity and overall welfare.[128]

Similar reasoning extends to law. Much as individuals would reject a moral demand to neglect their own interests and provide unlimited assistance to strangers, judges might view a legal demand that they categorically suppress their own deeply held interpretive views as an infringement on personal identity.[129] So instead of directing judges to suppress their own views, the law might adopt a more complex posture. That is, a judge might have a *duty* requiring her to abide by the basic rules, a *permission* allowing her to privilege her own interpretive method when selecting among the rules, and a *plaudit* entitling her to praise for privileging the interpretations of other institutional actors. On this view, the old principle of *Chevron* deference could be recast as a plaudit for deferring to executive-branch interpretations, and the now-ascendant major questions doctrine might similarly be rethought as a plaudit for hewing to certain legislative goals under the mischief rule.[130]

There is another complementary basis for interpretive plaudits, one that sounds more in economics than ethics: treating certain choices as legally

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126 *See generally* SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS (1994) (defending a "hybrid" moral theory that permits *either* the pursuit of the greatest overall good *or* actions that avoid transgressing deontological principles).

127 For a famous statement on these principles, see *Matthew* 19:17-21 (New International Version) ("If you want to enter life, keep the commandments . . . . If you want to be perfect, go, sell your possessions and give to the poor . . . .").

128 *See generally* J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST (1973); JOHN RAWLS, A THEORY OF JUSTICE 117 (1971).

129 *See* Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1149 (2019) (noting that a jurist might balk when "faced with the prospect of subordinating her individual view to the Court's institutional identity," particularly when "urged to apply an interpretive methodology"); Evan J. Criddle & Glen Staszewski, Essay, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1593 (2014) ("[M]ethodological decisions are frequently intertwined with a judge's most fundamental beliefs and commitments about the rule of law and democracy."); *cf.* Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101, 105-07 (2020) (defending vertical interpretive precedent); Christopher J. Baldacci, Note, *The Common Law of Interpretation*, 108 VA. L. REV. 1243, 1247 (2022) (defending a diffuse, flexible form of interpretive precedent).

130 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); sources cited *supra* note 15 (discussing the major questions doctrine). For discussion of how the mischief rule might relate to the major questions doctrine, see Bray, supra note 33, at 1011-12; *see also* Ilan Wurman, *Importance & Interpretive Questions*, 110 VA. L. REV. (forthcoming 2024) (manuscript at 46-48) (discussing the major questions doctrine and the mischief rule while emphasizing that textualism is not literalism); *cf.* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 110 VA. L. REV. (forthcoming 2023) (manuscript at 27-28) (arguing, among other things, that the major questions doctrine is not being applied in a manner consistent with textualism).

praiseworthy (but not required) might encourage desirable decisionmaking.[131] Here's an example. Even if 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 tension, the law might in effect say: "We will categorically assign praise to judges who follow 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 forgo deference when doing so appears, on the facts at hand, to be strongly preferable." Under this approach, a judge might choose to lose out on categorically available deference-based praise in order to obtain more case-specific praise based on the wisdom of a specific outcome.

Many familiar doctrines can be recast as plaudits—that is, as legal principles triggering praise where satisfied (and no condemnation even when unsatisfied). Apart from the already mentioned examples, the rule of lenity might be viewed as a nonbinding preference for readings that side with criminal defendants.[132] That reimagining 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 that 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.[133] This understanding also has the virtue of explaining how the rule of lenity manages to live on, even as it so often goes unapplied.[134] Similarly, the avoidance canon might be recast as a plaudit for permissible readings that avoid constitutional problems. That approach alters the canon's scope: while some modern avoidance cases accord with the basic rules, others do not.[135]

The most important plaudit has to do with case law. Often, the precedential reasoning of past cases points in a particular direction, even if the "square

131 The idea of praise as a useful reward or incentive is of course pervasive. *See generally* Ezra Goldschlager, *Praise and the Law*, 49 CREIGHTON L. REV. 353 (2016) (noting that praise is often a uniquely desirable means by which law can shape behavior); DAVID A. J. RICHARDS, A THEORY OF REASONS FOR ACTION 196-211 (1971) (discussing praise and blame as alternatives to coercive responses to wrongdoing).

132 *See* Intisar A. Rabb, Response, *The Appellate Rule of Lenity*, 131 HARV. L. REV. F. 179, 183 (2018) (discussing lenity as a discretionary "interpretive precedent").

133 *See, e.g.*, Lockhart v. United States, 577 U.S. 347, 361 (2016) (declining to apply the rule of lenity).

134 The point can be stated more broadly: when a legal principle "hangs around," popping up now and again but neglected as often as intoned, it could be viewed as a rule entering desuetude, a factor so weak that it is typically overridden, or—and this is the new idea—as an abiding permission or plaudit.

135 For example, no basic rule supported Immigration and Naturalization Service v. St. Cyr, 533 U.S. 289 (2001). More generally, the basic rules would disallow some "strong avoidance" interpretations.

holding" of the case is more limited.[136] In these situations, precedent has 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.[137] When the latter applies, it is customary to think that case law supplies a "best" answer, yet lawyers 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. Doing so advances a secondary interpretive input—coherence—by rendering the law more orderly, predictable, and easy to learn. This mix of norms and practices is plausibly described in terms of supererogation. That is, the court would merit praise for ruling a certain way, but it would also be permitted to rule otherwise. Much, if not most, precedential reasoning thus trades on plaudits.

C. *Contingent Mandates*

Finally, permissions can be tempered with mandates—more particularly, mandates that are contingent on special circumstances. The point of contingent mandates is twofold. First, they can increase legal determinacy, rendering the law more predictable. Second, they can account for interests that, while not as foundational as the primary interpretive inputs honored by the basic rules, are compelling where they do apply.

Of course, a proliferation of mandates would undo a regime of interpretive permissions by rendering judicial discretion the exception rather than the rule. Yet a limited set of mandates can be compatible with generally permissive interpretation—especially if the mandates are contingent in three dimensions. First, mandates might be triggered by conditions different in kind from the primary interpretive inputs that activate the basic rules.[138] Second, mandates might operate only on select actors, leaving others free to apply the basic rules. And, finally, mandates may be subject to override and so be only moderately constraining even where they apply.

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136 *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 110-115 (1978) (distinguishing a case's enactment force, which affects the decision only of future cases that fall squarely within the language of its holding, and its gravitational force, which may nonetheless affect the decision of cases that "lie outside its particular orbit"); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51-52 (1921); JOSEPH RAZ, THE AUTHORITY OF LAW 186 (1979).

137 *See, e.g.*, White v. Woodall, 572 U.S. 415, 427 (2014) (allowing certain habeas relief only based on "the rules 'squarely established' by this Court's holdings" (citation omitted)).

138 *Cf.* Aaron Tang, *Consequences and the Supreme Court*, 117 NW. U. L. REV. 971, 1024 (2023) (discussing "contingent modalities" of legal argument that become available when other modalities are indeterminate).

All three dimensions of contingency come together in binding case holdings—which, uncoincidentally, Gardner mentioned in his discussion of the permissive basic rules.[139] Once a court has applied an interpretive permission, that result could become mandatory, at least for lower courts. Treating case holdings as sometimes binding would counter worries that interpretive permissions generate excessive discretion.[140] Moreover, this picture of mandatory case *holdings* complements the aforementioned idea that a plaudit renders adherence to case *reasoning* praiseworthy.[141] Holdings that are "on point" would then bind, while case reasoning would merely recommend. Still, case holdings are more contingent than mandatory at the Supreme Court, which famously (or infamously) exercises great flexibility when it comes to stare decisis. So perhaps the Court is not mandated so much as permitted to follow its own past decisions[142]—and a plaudit entitles it to praise for doing so.

IV. THE BASIC RULES AND THE CONSTITUTION

As British imports, the basic rules were designed with statutory interpretation in mind. Constitutional law poses distinctive challenges that merit focused attention.

A. *Is Constitutional Law Different?*

Does the case for the permissive basic rules extend to constitutional interpretation? From one standpoint, the answer is straightforwardly "yes." Text, purpose, and consequences, after all, are plausibly regarded as the primary inputs into not just statutory but also constitutional interpretation—a proposition corroborated by leading attempts to synthesize actual legal practice.[143] Thus, many of the foregoing arguments easily carry over.

Yet constitutional and statutory provisions typically implicate these three inputs quite differently.[144] As to text, constitutional provisions tend to be

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139 *See* Interview by Robert Marshall with John Gardner, *supra* note 43; *see also* THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob. E. Cooke ed., 1961) (insisting that federal judges would be "bound down by strict rules and precedents").

140 *See* Re, *supra* note 82, at 948 (considering the view that "[s]trict stare decisis . . . might compensate for indeterminacy in underlying law").

141 *See infra* Section IV.B (arguing that these praiseworthy principles are made possible by the basic rules).

142 *See generally* Re, *Precedent as Permission*, *supra* note 82 (defending a permission model of precedent); *see also* Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 123 (arguing that stare decisis is weak at the Supreme Court).

143 *See, e.g.*, *infra* notes 178–179 and accompanying text.

144 *See generally* Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1 (2004) (challenging interpretive convergence with regard to constitutional and

much more indeterminate and value-laden, partly because there are orders of magnitude fewer words in constitutions than statute books.[145] As to legislative goals, the historical remove of most U.S. constitutional provisions makes it difficult to understand lawmakers' actual goals, whereas the objectives of ever-revised statutes tend to be more accessible because they are closer to the here and now. Finally, as to practicalities, constitutional provisions tend to have greater and more unpredictable consequences, often touching on the basic operation of government or on human rights. In short, constitutional law is much more likely to involve capacious, old, and consequential provisions.

So constitutional cases generally afford greater opportunity to prioritize expansive texts over narrow purposes, broad purposes over narrow texts, and vast consequences over narrow texts and purposes alike. True, a few constitutional cases involve picayune or recently adopted provisions, whereas some statutory cases involve anything but. In fact, we will explore a statutory case that feels constitutional: *Bostock v. Clayton County*, which involved an open-ended, fairly old, and vitally consequential provision.[146] Even so, *Bostock* is the exceptional statutory case. Most constitutional cases are like *Bostock*, and some are even more like *Bostock* than *Bostock* itself.

The general differences between constitutional and statutory questions profoundly affect the operation of the basic rules. The Constitution's open-ended language renders the literal rule a vehicle for unexpected legal transformations.[147] By contrast, the mischief rule offers a way of resisting legal change, in favor of hewing to the dated goals of long-dead lawmakers. The result is a role reversal, as the practical valence of these two rules flips. That is, the literal rule is associated with rigid textualism in statutory cases but with living constitutionalism in constitutional ones. And the mischief rule is aligned with dynamic purposivism in statutory cases but with historically grounded originalism in constitutional ones. This reversal helps explain why conservativism has often been associated with statutory textualism but constitutional historicism.[148]

In addition, the high stakes in constitutional cases render the golden rule a more widely useful tool. Eventually, almost any interpretation of an aged

statutory interpretation); Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701 (2016) (critically discussing "constitutional exceptionalism").

145 The literal rule can have either broad or narrow effect: when texts are expansive, so too are the interpretations available under the literal rule.

146 *See infra* Section V.A for further discussion.

147 *See* RICHARD A. POSNER, HOW JUDGES THINK 191-192 (2008) ("Literal interpretations can be astonishingly broad.").

148 *See supra* note 37 (explaining the differences between Justice Scalia's approaches to statutory interpretation and constitutional interpretation). *But see infra* text accompanying note 172 (discussing examples of conservative constitutional rulings that are more compatible with literalism than historicism).

constitutional principle will threaten extreme or senseless harms, as judged by now-prevailing public opinion. The golden rule manages that risk by allowing for pragmatic exceptions in extraordinary cases. And, by and large, that is what modern constitutional doctrine has done. We can see this in decisions issued during times of crisis, such as the Court's lax interpretation of the Contract Clause during the Great Depression.[149] More systematic is "strict scrutiny," which allows constitutional rights to be overridden by a "compelling governmental interest."[150]

The golden rule grounds these doctrines and outcomes. The deep idea behind strict scrutiny is not ad hoc, lawless, or even a recent invention.[151] It is instead the modern descendant of an ancient maxim familiar to Blackstone and sophisticated lawyers at the founding.[152] Further, strict scrutiny's relationship to the golden rule points out ways of specifying it. Commentators debate how to identify what qualifies as a "compelling interest" within the strict scrutiny framework.[153] The golden rule affords guidance, directing judges to consider interests that enjoy current, widespread social recognition and that have been adversely affected in an extreme or senseless way. That approach both limits strict scrutiny's corrosive effect on individual rights and clarifies that "compelling interests" can—and should—change dynamically with evolving consensus views.

B. *Mandatory Theories*

Because the basic rules generate a great deal of discretion in constitutional cases, they also yield anxiety—among judges and bystanders alike—about how the judiciary will employ that discretion. The upshot is special pressure to adopt a mandatory principle capable of offering determinacy and constraint.[154] Perhaps some version of the mischief rule should be obligatory, or the elected branches entitled to pragmatic deference, or precedent strongly binding. These responses should sound familiar, as they roughly correspond

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149 *See* Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 439 (1934) ("It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake.").

150 *See, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (describing the strict scrutiny analysis).

151 *Cf.* Fallon, *supra* note 26, at 1268 (noting the conventional view of the test's ahistorical basis).

152 *See* BLACKSTONE, *supra* note 48, at *60-61 ("As to the effects and consequence, the rule is, where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them.").

153 *See* Fallon, *supra* note 26, at 1321-22 (canvassing a variety of approaches).

154 That pressure may explain why the basic rules lost salience in the United States during the twentieth century, as the Supreme Court made increasing use of constitutional review. *Cf. supra* note 21 and accompanying text.

to originalism,[155] the New Deal settlement,[156] and common-law constitutionalism.[157] Yet none of these options is entirely satisfying, or could realistically hope to be, because each focuses on just one interpretive input. So, interpreters will frequently feel—and should feel—pressure to defect from any mandatory, monist interpretive theory.

By comparison, the basic rules offer an attractive strategy for honoring the primary interpretive inputs, even in constitutional cases. If the diversity of mandatory theories shows us anything, it is that there is no consensus on what to do when the primary interpretive inputs are strongly at odds. This obvious lack of agreement evidences a gap in the positive or descriptive rules of legal practice. And, from a more normative perspective, the same disagreement calls for caution, since there is no specific, widely appealing solution to the interpretive questions posed by constitutional law. As with coffee and wine, the perfect blend of inputs has yet to be discovered. The basic rules honor that uncertainty by creating a zone of experimentation where different judges can adopt their own preferred jurisprudence.[158]

We can appreciate the cautious humility underlying the basic rules by considering their relationship to living constitutionalism. Again, the basic rules authorize dynamism pursuant to the literal rule. To wit, landmark ahistorical rulings, such as *Brown v. Board of Education*,[159] *Gideon v. Wainwright*,[160] and *Cohen v. California*,[161] all find plausible support in the Constitution's modern, literal meaning.[162] Racially segregated public education denies persons the "equal protection of the law."[163] Trying an

155 Most contemporary originalists attend to the lawmaker's actual goals, in part because those goals are evidence of original meaning. *See, e.g.*, *Scalia: Abortion, Death Penalty "Easy" Cases*, CBS NEWS (Oct. 5, 2012, 4:14 AM), https://www.cbsnews.com/news/scalia-abortion-death-penalty-easy-cases [http://perma.cc/78YH-A2UQ] ("Abortion? Absolutely easy. Nobody ever thought the Constitution prevented restrictions on abortion."); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 3-6 (2018) (emphasizing original semantic meanings as well as a provision's "original functions" or "purpose").

Originalists who place greater emphasis on original semantic meaning tend to treat broad provisions in ways more consistent with the literal rule. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 35-58 (2011). But even those commentators may see a strong case for treating the mischief rule as mandatory when contemporary semantic meaning yields senseless results. The standard example is "domestic Violence." U.S. CONST. art. IV, § 4; *see* BALKIN, *supra*, at 348 n.5.

156 *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); Lawrence B. Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 3 (2013).

157 *See* Strauss, *supra* note 32, at 879; *see also* text accompanying *supra* note 140 (exploring how stare decisis curbs or guides discretion).

158 *See* text accompanying *supra* note 72 (discussing authorial differences and "personal precedent").

159 347 U.S. 483 (1954).

160 372 U.S. 335 (1963).

161 403 U.S. 15 (1971).

162 *See generally* Strauss, *supra* note 32 (developing essentially this point).

163 *See* U.S. CONST. amend. XIV.

indigent person without an attorney violates the right "to have the Assistance of Counsel" in "all criminal prosecutions."[164] And punishing someone for vulgar opposition to the draft amounts to "abridging the freedom of speech."[165] These rulings all take indeterminate constitutional terms at face value and then reason constructively from that starting point—an approach that lends itself to dynamism in light of changed social understandings and practices.[166] The basic rules leave the details of that dynamic process unspecified—and a good thing, too. Just how to interpret and apply an underdetermined constitutional text is a proper subject of personal precedent and academic debate, but it is best understood as lying beyond the ambit of formal law. It makes no more sense to mandate the latest version of living constitutionalism than Mr. Herbert Spencer's Social Statics.[167]

That caution about what lies within the bounds of law should appeal to originalists. Here, too, *Brown*, *Gideon*, and *Cohen* are useful examples. Originalists often feel pressure to embrace these and other widely cherished rulings, but their efforts to do so, while ingenious, are strained or else come at the cost of the core intuition motivating many originalists—namely, that courts should hew to the original lawmaker's actual goals.[168] After all, race segregation remained widespread in the wake of the Fourteenth Amendment's ratification.[169] A general right to publicly supplied counsel was unheard of at the creation of the Bill of Rights.[170] And draconian restrictions on political and other speech likewise obtained at the founding.[171] The basic rules offer a way out. A proponent of the mischief rule can closely adhere to

164 *See* U.S. CONST. amend. VI.

165 *See* U.S. CONST. amend. I.

166 *See supra* notes 31–32. On the link between constitutional law and political or social change, see for example Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, *in* THE CONSTITUTION IN 2020 at 26 (Jack M. Balkin & Reva B. Siegel eds., 2009) (defending "democratic constitutionalism," which sees "important aspects of American constitutional law" as "evolv[ing] in response to substantive constitutional visions that the American people have mobilized to realize"); Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 FORDHAM L. REV. 1739, 1745 (1997) (linking "the relaxed pace at which constitutional interpretations change" with "the incremental nature of social evolution").

167 *Cf.* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

168 *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953 (1995) (providing an ingenious originalist effort to defend *Brown*).

169 *See* Michael J. Klarman, Response, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1886 (1995) ("Throughout most of the rest of the former nonslaveholding states, segregation remained the rule at the state level . . . .").

170 *See* Alexander Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U. L.Q. REV. 1, 7-8 (1944) ("[F]rom its adoption in 1791 until 1938, the right conferred on the accused by the Sixth Amendment 'to have the assistance of counsel for his defense' was generally understood as meaning that in the Federal courts the defendant in a criminal case was entitled to be represented by counsel retained by him.").

171 *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 259 (2017) (arguing that founding-era views on free speech were "weak in their legal effect").

history in the mine-run *and* leave room for ahistorical but literalist decisionmaking in extraordinary cases.

In fact, self-declared originalists have been eager to take advantage of literal readings in many cases, even when doing so was unsupported by either historical goals or precedent. Again, the "freedom of speech" was weak historically, yet conservative originalists have construed that right to allow judicial nullification of (for example) campaign-finance regulations.[172] Similarly, the Second Amendment has the express goal of securing well-regulated militias, yet the right "to keep and bear arms" has been read to apply to hunting and personal defense.[173] And the Equal Protection Clause, which originally aspired to protect former slaves from oppression, has been understood to restrict race-based affirmative action in higher education.[174] In short, constitutional literalism forms a part of every justice's toolkit, conservative originalists included.

Finally, some readers might argue that the basic rules suggest a different solution to the challenges of constitutional interpretation—namely, a moderated Thayerianism, in which "clear" and therefore justiciable unconstitutionality would arise only in the absence of any conflict among the basic rules.[175] That approach would respond to the legitimacy concerns associated with discretionary judicial authority.[176] But it would also greatly reduce judicial power to enforce the Constitution. In particular, it would mean that judicial review could reach only mischief of the kind contemplated by the constitutional framers and ratifiers. So, for example, the courts might no longer have constitutional authority to protect basic equality with respect to race, sex, or sexual orientation. In time, that sort of opposition to judicial review may prove popular.[177] For now, however, few seem prepared to support it.

So, despite the rhetorical appeal and comfort that mandatory interpretive rules bring, there is no prospect of consensus on just what those rules are or ought to be. The result, once again, is extensive discretion and interpretive personality. And that state of affairs may be as appropriate as it is inevitable. The interpretability of constitutional law is a feature as much as a bug, in that it affords the federal judiciary an abiding, dynamic role in national life. If anxiety and risk are the consequence of having a constitutional system with

172 *See supra* note 171; Fed. Election Comm'n v. Ted Cruz for Senate, 142 S. Ct. 1638, 1650-1656 (2022).

173 *See* U.S. CONST. amend. II; Dist. of Columbia v. Heller, 554 U.S. 570, 599 (2008).

174 *See* U.S. CONST. amend. XIV; Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

175 *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (allowing for judicial review only when a law's unconstitutionality is "so clear that it is not open to rational question"). The main text represents a "moderated" Thayerianism because it would allow judicial review when all three basic rules are deemed to be in accord, even if the directionality of any one rule remains "open to rational question." *Id.*

176 *See supra* note 73.

177 On court reform, see *supra* note 100 and accompanying text.

judicial review, then—so long as the system persists—the law should confront that reality, rather than deny it.

C. *Permissive Pluralism*

Some accounts of constitutional interpretation are pluralist, with two leading examples being Philip Bobbitt's "multiple modalities"[178] and Richard Fallon's "constructivist coherence theory."[179] These authors respectively distinguish among six and five overlapping interpretive inputs (to use my term), with the total list of unique inputs being: text, history, framers' intent, precedent or doctrine, structure, theory, prudence, ethical claims, and value choices.[180] Bobbitt acknowledges what I call interpretive personality by asserting that each judge's "style" or "conscience" dictates which inputs are preferred.[181] By contrast, Fallon proposes that jurists seek a "reflective equilibrium" in which all the inputs align (or, failing that, apply a ranked ordering of inputs), thereby reaching the legally best answer.[182] So while Bobbitt's constitutional pluralism is at least somewhat permissive,[183] Fallon's is not.

The basic rules essentially prescribe a new type of pluralism—and an attractive one at that. While permissive in a way akin to Bobbitt's modalities, the basic rules are more determinate—in part because they are *rules*, not just

178 *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

179 *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1192-3 (1987). For an aggregative pluralist view, see Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1330-31 (2018).

180 Bobbitt's unordered list is: history, text, structure, doctrine, ethos, and prudence. Fallon's ordered list is: text, framers' intent, theory, precedent, and value. Both authors subdivide these categories, such as by distinguishing contemporary and historical textual meaning. *See, e.g.*, Fallon, *supra* note 179, at 1244-45.

181 *See* BOBBITT, *supra* note 178, at 8 ("[T]he *style* of a particular judge . . . can be explained as a preference for one type of argument over others."); Bobbitt, *supra* note 67, at 1874 (noting that "resolution" of "conflicts" among modalities is reserved "for the conscience of the decider"); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 167-68 (1991) ("When these conflicts [among modalities] occur, however, the system of constitutional interpretation prescribes a role for the individual conscience . . . ."). For a related view, *see* Robert Post, *Theories of Constitutional Interpretation*, REPRESENTATIONS, Spring 1990, at 13, 35 ("[J]udges can legitimately select a specific interpretive theory in light of the circumstances of a particular case.").

182 Fallon, *supra* note 179, at 1189. When reflective equilibrium cannot be achieved, Fallon argues for prioritizing inputs in the order set out in note 180 *supra*.

183 Bobbitt's view appears not to have been fully permissive, insofar as he suggested that an interpreter must pursue all modalities and arrive at an irreconcilable conflict before choosing among them. *See, e.g.*, Bobbitt, *supra* note 67, at 1874 ("It is only when assailed by doubt . . . that one resorts to one's conscience."); *see also* William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2404 (2015) (exploring relevant ambiguities in Bobbitt's theory). The approach that I propound here makes no such demand.

modalities of argument or a process of introspective reasoning.[184] In addition, the basic rules address a narrower set of considerations. Literal texts are qualified by only two relatively limited precepts—that is, the basic rules replace an open-ended appeal to history or original intentions (including "abstract" or "imagined" intentions[185]) with attention to the legislature's actual, specific goals. And the basic rules afford legal effect to prudence, structure, and ethical claims only if those considerations yield harms that would widely be viewed as senseless or catastrophic. Precedent also plays a more limited role: as to open questions, case law reasoning renders some already valid options praiseworthy.

What is excluded by the basic rules' relative narrowness? Perhaps most glaring is the omission of structural argument, as well as Fallon's somewhat broader category of constitutional theory.[186] Omitting these inputs could be problematic, given that at least structural arguments form an important part of actual practice.[187] Yet the basic rules do not eliminate structural and theoretical claims so much as cabin them. In many instances, literal text or the mischief will support claims that can be labeled structural or theoretical. The literal rule can trade on textual patterns across different provisions,[188] and the mischief rule can likewise identify the goals behind complex enactments or programs. Structural or theoretical reasoning thus fails to trigger the basic rules only when it is so abstruse as to be divorced from both literal text and the mischief.

One might respond that the basic rules nonetheless open the door to forms of discretion that other forms of pluralism rule out. Mandatory theories like Fallon's at least attempt to capture the total set of legally relevant considerations, whereas interpretive permissions allow personal and nonlegal considerations to determine the choice among lawful options. So, the basic rules may ultimately let back in the considerations that they initially seem to exclude—and much more besides. But the discretion to choose among the basic rules is more limited than the discretion to add new options. At any rate, mandatory accounts can be plausible only by including broad factors, as

184 On Bobbitt's suggestion that an outcome is allowable if more supported than opposed by any one interpretive input, see text accompanying *supra* note 67.

185 *See* Fallon, *supra* note 179, at 1254-56 (noting the distinction between specific and abstract intent); BOBBITT, *supra* note 178, at 23-24 (exploring the difficulties of historical "imagining").

186 Fallon, *supra* note 179, at 1200 (noting that structure affords one type of "theory" argument, along with, for instance, Ely's democracy theory).

187 *Cf.* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969) (describing "the method of inference from the structures and relationships created by the [C]onstitution" and introducing several cases where it proves useful).

188 *See, e.g.*, Ratzlaf v. United States, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."); *see also supra* note 41 (discussing subrules).

well as an indeterminate mode of aggregation or equilibration that invites concealed consideration of nonlegal factors. For instance, Fallon's approach accepts arguments based on "theory" and "value," categories that seem nearly as open-ended as the set of nonlegal considerations available under the basic rules.[189] The permissive basic rules create space for those sorts of factors without granting them the strength or status of formal law.[190]

Taking a different tack, interpretive permissions could seem inadequate insofar as they cannot even purport to determine all legal outcomes. And such determinacy may be expected or demanded. As we have seen, many legal interpreters acutely feel the burden of judgment and so imagine—or desire—that there are best answers to all important questions.[191] Interpretive permissions cannot meet that felt need in all cases: whenever more than one legal permission applies, judicial personality and nonlegal considerations can play a determinative role. By contrast, Fallon maintains that judges should try to align (or else rank) all relevant inputs.[192] And while that process is discretionary because it is underdetermined, it at least holds out the hope of guiding judges to specific outcomes in all cases.[193]

Yet not all hopes should be indulged. The dilemma of mandatory interpretive theories is that they are pitched either so abstractly as to be highly indeterminate or else so granularly as to be hotly divisive among actual interpreters.[194] In that sense, indeterminacy *within* any given theory can be overcome only by increasing indeterminacy *across* theories. Permissive interpretation confronts that tradeoff and so seeks out the optimal way of balancing both types of indeterminacy. Under the basic rules, interpretive discretion would be reduced in scope, more complete where it exists, and newly visible. Rather than hiding behind a rhetoric of mandates, jurists of different stripes would openly locate themselves, and their distinctive interpretive personalities, against a backdrop of shared permissions. While that approach would entail a fundamental shift in expectations about what the law of interpretation can achieve, the tradeoff is worthwhile. By making its aspirations more modest, the law of interpretation can play a more productive role.

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189 *See* text accompanying *supra* notes 179–186 (discussing Fallon's account).

190 Larry Alexander has argued that "each modality represents a different Constitution" and that "it is incredible to believe that advocates are invoking a modality—a Constitution—and asking the court to choose it for this case only." Larry Alexander, *Telepathic Law*, 27 CONST. COMMENT. 139, 147 (2010). But advocates in a permissive regime are arguing within a single legal system that sometimes allows multiple outcomes. In that respect, permissions resemble the indeterminacy present within any mandatory interpretive regime. *See supra* note 98 and accompanying text.

191 *See* text accompanying *supra* note 182.

192 *See* Fallon, *supra* note 179, at 1193; *supra* note 182 (discussing Fallon's use of rankings).

193 On composite approaches, see text accompanying note 83, *supra*.

194 *See* text accompanying *supra* note 85.

V. PERMISSIONS IN PRACTICE

To a great extent, the basic rules already describe interpretive practice. That is, many if not all hard interpretive cases can be viewed as posing a choice between two or more basic rules.[195] Two of the richest and most salient recent examples are *Bostock v. Clayton County*,[196] which held that discrimination on the basis of sexual identity or orientation is prohibited as "discriminat[ion] . . . because of . . . sex,"[197] and *Dobbs v. Jackson Women's Health Organization*, which held that there is no right to abortion under the Due Process Clauses.[198] This Part discusses *Bostock* and *Dobbs* to show how the permissive basic rules implicitly underlie the argumentative structure of our legal system's most contested cases.

A. *Bostock v. Clayton County*

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, Justice 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 and role model, the late Justice Antonin Scalia.[199] The result was a spectacle of judicial personality, as dissenters put greater emphasis on the hypothetical views of a deceased justice than on any legal

195 Recent statutory examples include *Alabama Association of Realtors v. HHS*, which was discussed in the Introduction, as well as *Bond v. United States*, 572 U.S. 844, 857-60 (2014), *Yates v. United States*, 574 U.S. 528, 537 (2015), and *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015). *See also* text accompanying note 12, *supra*; Bray, *supra* note 33, at 971-976 (discussing some of these cases); *see also* John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 73 (2014) (noting cases that "recall at least the flavor of *Holy Trinity*").

196 140 S. Ct. 1731 (2020).

197 42 U.S.C. § 2000e-2(a)(1).

198 *See* 142 S. Ct. 2228, 2243 (2022).

199 *See, e.g.*, Richard Primus, *The Supreme Court Case Testing the Limits of Gorsuch's Textualism*, POLITICO (Oct. 15, 2019), https://www.politico.com/magazine/story/2019/10/15/lgbt-discrimination-supreme-court-gorsuch-textualism-229850 [http://perma.cc/8T4X-DEPA] ("Gorsuch is a proud and articulate textualist."); *see also* William N. Eskridge, Jr., *Textualism's Moment of Truth*, SCOTUSBLOG (Sept. 4, 2019), https://www.scotusblog.com/2019/09/symposium-textualisms-moment-of-truth [http://perma.cc/D3ZN-3326] (arguing from what "[t]he chief justice says" regarding legal interpretation).

rules.[200] And Justice Gorsuch's majority opinion responded in kind.[201] In total, the *Bostock* opinions invoked Justice Scalia by name no fewer than 21 times.

Second, none of the published opinions was exclusively textualist. True, Justice Gorsuch's majority opinion as well as the dissents by Justices Alito and Kavanaugh all contained emphatic textualist statements.[202] But the majority relied on case law to specify the statute's otherwise ambiguous text, as well as to defeat textualist counterarguments that many commentators found persuasive.[203] The dissents also focused on the legislature's limited expectations and so relied on what would typically be viewed as paradigmatically nontextualist claims.[204] These justices' efforts to seem, without actually being, exclusively textualist show that even the most committed textualists still feel the pull of nontextualist argument.

Finally, consider the justices who *didn't* write opinions. Some of the majority's silent joiners—Justice Breyer, for instance—are not textualists. Yet these justices had no problem joining an avowedly textualist majority opinion.[205] In this way, the joiners, like some commentators, helped themselves to 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 "result-oriented" (as Professor Michael Dorf put it) as to be unconcerned with fidelity to any interpretive method?[206] There is another, more compelling explanation.

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200 As Justice Alito's dissent put it: "The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled . . . . [W]hat it actually represents is a theory of statutory interpretation that Justice Scalia excoriated . . . ." *Bostock*, 140 S. Ct. at 1755-56 (Alito, J., dissenting).

201 *See id.* at 1747, 1749 (twice citing Justice Scalia and also citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (Scalia, J.)).

202 *See, e.*g., *id.* at 1754 ("Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations."); *id.* at 1755 (Alito, J., dissenting) ("[O]ur duty is to interpret statutory terms to mean what they conveyed to reasonable people at the time they were written." (internal quotation marks omitted)).

203 *See, e.g.*, *id.* at 1744 (emphasizing the "lessons these cases hold for ours"); *see also infra* note 213 (describing a scholarly critique of *Bostock*'s asserted textualism).

204 *See* Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 293 n.184 (2020) (comparing a passage in Justice Alito's dissent in *Bostock* with one from *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892)). Grove shows that the dissent's thought experiment about what "ordinary citizens [would] have taken 'discrimination because of sex' to mean" closely parallels *Holy Trinity*. *See id.* (quoting *Bostock*, 140 S. Ct. at 1767 (Alito, J., dissenting)). Grove also argues that Justice Kavanaugh's dissent, too, can be viewed as considering original expected applications. *See id.* at 285 n.127 ("Justice Kavanaugh also underscored how ordinary people would have expected a prohibition on sex discrimination to apply.").

205 *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.").

206 *See* Michael C. Dorf, *Will Liberal Justices Pay A Price For Signing Onto Justice Gorsuch's Textualist Opinions?*, DORF ON LAW (July 22, 2020), http://www.dorfonlaw.org/2020/07/will-liberal-

Start by stepping away from the *Bostock* opinions for a moment and looking at the matter in terms of the three primary inputs into interpretation, plus precedent. First, the statute's textual breadth supported a prohibition on discrimination based on sexual orientation or sexual identity.[207] Second, these forms of discrimination lie very far from the mischief actually contemplated by the enacting legislature, or even any later amending legislature.[208] Third, whether to prohibit sexual orientation or identity discrimination remained significantly controversial as a political matter when *Bostock* was decided.[209] Fourth, earlier Court decisions had already applied the statute to many forms of conduct that lay beyond the mischief.[210]

What to do with these sensible observations? Courts could pick one of these four sources of interpretive guidance—text, mischief, pragmatism, or case law—and declare it supreme. Doing so would bespeak allegiance to a Grand Theory of interpretation. But, as we have seen, none of the justices' opinions followed that path and, at any rate, doing so would not reflect overall legal practice.[211] 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 closer to what the opinions in *Bostock* (and many other cases) actually purported to do, but it is also unsatisfying, if only because the justices have no principled means of weighing fundamentally incommensurable inputs. The mollifying claim of One Right Answer thus clashes with both legal principle and actual practice.

A permissive approach offers a more attractive first-principles account of *Bostock* and supplies a more charitable description of what was going on in the various justices' minds. On the permissive approach, both the majority

justices-pay-price-for.html [http://perma.cc/YZS9-YP9W] ("You can't hoist result-oriented justices by their own methodological petards because they don't have methodological petards.").

207 *See generally* Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63 (2019) (discussing how a textualist approach supports reading Title VII as prohibiting discrimination based on sexual orientation).

208 *See generally* Bray, *supra* note 33, at 973 (discussing the mischief rule in connection with cases leading up to *Bostock*). Andrew Koppelman has argued that the mischief rule supported the majority, but he does so primarily by asserting that the statute "by its terms" defines the mischief. Andrew Koppelman, Essay, Bostock*, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 24-25 (2020). That move collapses the mischief rule into the literal rule.

209 For example, the issue remained a topic of political dispute. *See Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting) (noting that members of Congress had tried, but failed, to amend Title VII to define discrimination based on sex to include sexual orientation or gender identity).

210 *Id.* at 1751 ("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."); Rick Hills, *Bostock, Cline, and the SCOTUS's Repression of Textualism's Unresolvable Contradictions*, PRAWFSBLAWG (Sept. 10, 2020), https://prawfsblawg.blogs.com/prawfsblawg/2020/09/bostock-cline-and-the-scotuss-repression-of-textualisms-unresolvable-contradictions.html [http://perma.cc/3M3L-96CV] ("[S]ince 1964, the doctrine has expanded Title VII's coverage . . . .").

211 *See supra* Section II.B.

justices and the dissenters espoused permissible interpretations. That is, the majority had literal text on its side, whereas the dissenters had the mischief in hand. Amusingly, the dueling opinions realized this—but only about one another. The majority (accurately) accused the dissenters of focusing on "the legislature's purposes" and "certain expectations" regarding the statute's operation,[212] while the dissenters (again, accurately) accused the majority of "literalism."[213] When it comes to plaudits, the majority had the advantage, given the broad reasoning in earlier case law. Precedent thus rendered the majority's view legally praiseworthy. Still, the dissenters had the lawful option to reach a different result, based on the mischief rule.

That simple description accounts for all three of the oddities mentioned earlier. First, it explains why Justice Alito invoked Justice Scalia's legacy in attacking the majority opinion's methodology: without any binding legal principle to invoke, Alito had no choice but to marshal other considerations, like Justice Gorsuch's desire for personal methodological consistency.[214] Second, a permissive approach accounts for the supposedly textualist justices' markedly atextual claims—including their open invocation of moral considerations, such as formal equality (majority[215]) and democratic legitimacy (dissenters[216]). Even more remarkably, the dissenters, though self-proclaimed textualists, focused on the legislature's actual goals—an approach that is virtually the antithesis of textualism but the very definition of the mischief rule.[217] Finally, the permissive picture explains why the nontextualist justices could easily join the expressly textualist majority: not because interpretive method is irrelevant to them, but rather because they retain permission to be nontextualist in later cases.

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212 *Bostock*, 140 S. Ct. at 1745.

213 *Id*. at 1825 (Kavanaugh, J., dissenting). Mitchell N. Berman and Guha Krishnamurthi argue that *Bostock* defied modern textualism, but they do so by distinguishing that approach from "literalism"—which, of course, is precisely what the literal rule allows. *See* Mitchell N. Berman & Guha Krishnamurthi, Bostock *was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV 67, 80 (2021) ("As textualists repeatedly insist, textualism is not 'literalism,' where literalism is roughly 'dictionary meaning': the meaning that could be assigned an utterance by piecing together word meanings gleaned from a contemporary dictionary according to rules of syntax.").

214 Justice Kagan was engaged in a similar appeal to Justice Gorsuch's and other justices' personal precedents when she recently complained about the Court's defections from textualism. *See* text accompanying *supra* note 6; *see also* RICHARD H. FALLON, JR., LAW AND LEGITIMACY AT THE SUPREME COURT 131 (2018) (suggesting that methodological consistency, subject to reconsideration, underlies forms of judicial legitimacy).

215 *See, e.g.*, *Bostock*, 140 S. Ct. at 1751 ("[The dissent] 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.").

216 *See, e.g.*, *id.* at 1822 (Kavanaugh, J., dissenting) (worrying that "the Judiciary would become a democratically illegitimate super-legislature").

217 *See supra* note 204 (discussing how some textualist-minded justices actually considered Congress's goals).

Bostock vividly illustrates the fundamentally permissive nature of actual interpretive practice at the Court. And that complex practice is only obscured by rehashing stale debates between mandatory theories like textualism and purposivism.

B. *Dobbs v. Jackson Women's Health Organization*

Dobbs, too, contains methodological oddities. First, every member of the *Dobbs* majority professes adherence to originalism, yet the Court grounded its analysis, not in originalism as such, but rather in "history and tradition."[218] As commentators of all stripes have observed, the Court did not purport to identify the original meaning of any part of the Constitution.[219] Instead, the Court emphasized that, both at and after its ratification, the Fourteenth Amendment had not been understood to create abortion rights.[220] Yet originalists generally agree that original expectations and applications are not binding or conclusive evidence of original meaning,[221] and *Dobbs* made no effort to grapple with that obvious originalist problem—even though the dissent pressed it, emphasizing both the broad text at issue and the blinkeredness of nineteenth-century actors.[222]

Second, *Dobbs* presents itself as a remarkably selective application of its own interpretive method. On the one hand, the Court argued that history and tradition are essential to the due process analysis.[223] On the other hand, the Court repeatedly insisted that its reasoning was confined to abortion case law and so did not "threaten" or even "cast doubt on" other similarly ahistorical and untraditional rulings.[224] These claims are plainly in tension, as pointed out by many commentators, the dissenters, and Justice Thomas's

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218 *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244 (2022).

219 *See, e.g.*, Cass R. Sunstein, *Dobbs and the Travails of Due Process Traditionalism* (Harv. Pub. L. Working Paper No. 22-14, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4145922 [http://perma.cc/QJC7-QPNX] ("[T]he Court's opinion is emphatically not originalist."); Lawrence Solum (@lsolum), TWITTER (May 6, 2022, 8:16 AM), https://twitter.com/lsolum/status/1522550847745531904?lang=en [http://perma.cc/Q9YM-WYXL] ("[Justice] Alito's draft opinion in Dobbs is not an originalist opinion.").

220 *Dobbs*, 142 S. Ct. at 2248.

221 *See, e.g.*, Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 381-86 (2013) (discussing opposition to reliance on "expected applications").

222 *Dobbs*, 142 S. Ct. at 2325-26 (joint dissent) (criticizing the majority's reliance on "original applications").

223 The Court embraced *Glucksberg*, not for originalist reasons, but to foster judicial restraint. *See Dobbs*, 142 S. Ct. at 2247-48 ("[W]e must . . . exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

224 *Id*. at 2277-78, 2280.

candid concurrence.[225] Yet the Court embraced this two-facedness, and even the dissenters agreed that the Court might ultimately approach other issues differently from abortion.[226]

Finally, *Dobbs* is similarly selective in its reliance on precedent. Most fundamentally, *Dobbs* exercised discretion in choosing to ground its substantive due process analysis in *Washington v. Glucksberg*, even though subsequent cases (particularly *Obergefell v. Hodges*) had departed from that framework.[227] Further, *Dobbs* confidently relied on precedent to bat down abortion-rights arguments rooted in the Equal Protection Clause, even as it overruled dozens of Court precedents and even precedents on precedent.[228] Case law thus resembles constitutional history: an authority that can be treated as dispositive or not, as the justices see fit.

To consider *Dobbs* afresh, we should return to the three primary inputs into interpretation, plus precedent. And, once again, their guidance is fairly straightforward. First, the text of the Due Process Clauses is broad on its face, essentially insisting that all government acts that "deprive any person of life, liberty, or property" must be accompanied by whatever process, if any, is "due" or appropriate.[229] That text, which even the *Dobbs* majority called "capacious," allows that *no* existing process may duly authorize abortion restrictions.[230] Second, the actual goals motivating the adoption of the Due Process Clauses did not include establishing abortion rights, or anything remotely similar.[231] Third, public views on both abortion and constitutional abortion rights remain extremely controversial. Fourth, abundant precedent squarely supported constitutional abortion rights.[232]

Dobbs thus provides yet another clash between the literal rule and the mischief rule. That is, the dissenters emphasized the "majestic but open-ended words of the Fourteenth Amendment,"[233] whereas the majority extensively documented "the most important historical fact—how the States

225 *See id*. at 2301 (Thomas, J., concurring); *id*. at 2331 (joint dissent).

226 *Id*. at 2332 (joint dissent).

227 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2620-21 (2015) (Roberts, C.J., dissenting) ("[T]he majority goes out of its way to jettison the 'careful' approach to implied fundamental rights taken by this Court in *Glucksberg*.").

228 *Dobbs*, 142 S. Ct. at 22450-46; *id*. at 2333 (joint dissent).

229 U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV.

230 142 S. Ct. at 2247-48; *see generally* Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT 253 (2016) (discussing the textual basis for "substantive due process"). Literalism likewise supports dynamic abortion-rights arguments rooted in the Equal Protection Clause. U.S. CONST. amend XIV; *see generally* Brief for Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

231 *Dobbs*, 142 S. Ct. at 2248-50.

232 *Id*. at 2333 (joint dissent).

233 *Id*. at 2326 (joint dissent).

regulated abortion when the Fourteenth Amendment was adopted."[234] And while precedent squarely supported the dissent, we have seen that stare decisis at the Court is more of a permission or plaudit than a mandate.[235] What drove the two sides apart were nonlegal concerns—such as the majority's attention to "the critical *moral* question posed by abortion," namely, the claim of "potential life,"[236] and the dissent's concern regarding women's health and equality.[237]

That simple, permissive picture explains all the oddities discussed above. First, academic theories of originalism are not formal law, so we should not be surprised that the Court felt no need to hew to them. What mattered most was that the lawmaker's actual goals offered a legitimate basis for decision, and the majority took advantage of that opportunity. Second, the Court was indeed free to undertake an historical analysis into the mischief without committing itself to the same approach in cases involving same-sex marriage or contraception. Finally, the Court could pick some precedents while throwing others aside because it generally treats stare decisis as a source of permissions or praise—not a mandate.

Perhaps this permissive picture is a bit *too* simple. As we have seen, the literal rule's application to the Constitution's broad language often generates anxiety about judicial discretion, yielding pressure to adopt relatively constraining supplemental principles.[238] The *Dobbs* opinions spent a lot of time on such principles, with the majority focusing on *Glucksberg*'s history and tradition inquiry and the dissent on accumulated case law.[239] But while those dueling precepts may guide or constrain each faction's recourse to the literal rule, they are not best understood as formal law. They are instead personal precedents or explanations for each side's choice among the basic rules. Again, the majority itself disclaims any obligation to follow history and tradition when reviewing other ahistorical rights; and the dissent is, well, a dissent. In future cases, both literal text and the mischief will remain available as a basis for decision. That permissive conclusion is especially vital for the dissenters: their constitutional vision, though defeated, lives on to fight another day.

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234 *Id*. at 2267.

235 *See supra* Section III.B.

236 142 S. Ct. at 2258 (emphasis added).

237 *Id*. at 2318-19 (joint dissent).

238 *See* text accompanying *supra* note 142.

239 The Chief Justice focused on a different—and, I think, attractive—constraint: minimalism. *Dobbs*, 142 S. Ct. at 2310 (Roberts, C.J., concurring in the judgment) ("If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more."). My focus here is on the available interpretations, not whether the Court should have reached its interpretation specifically in *Dobbs*.

Dobbs also illustrates interpretation's permissiveness and openness to judicial personality. From the standpoint of any particular mandatory theory (whether originalism, "history and tradition," constitutional common law, or whatever), the *Dobbs* majority seems incoherent or disingenuous—a point that the dissent drove home. Yet *Dobbs*'s methodological oddities are not best viewed as legal errors or imperfections, but rather as expressions of the fundamental permissiveness of existing law. Only once that permissiveness is confronted can it also be managed. In cases like *Dobbs*, formal law simply does not dictate an answer. The outcome instead turns on the justices' personal precedents and discretion.

And the dissent could have made that point, thereby facilitating a broader cultural shift toward permissive interpretation. To illustrate, the dissent in *Dobbs* might have said something like this: "Regardless of whether the majority's approach is permissible, our interpretation is. After all, the relevant constitutional text is sweeping. And our understanding of what 'process' is 'due' has the virtue of promoting women's health and equality, to say nothing of having the strong endorsement of precedent. The majority instead places its faith in the legislative process. But politics are often biased by sexism or otherwise fail to account for the intensely fact-bound considerations at stake in personal medical decisions. Ultimately, the only thing that can explain today's abrupt departure from case law is party politics operating through the confirmation process. Yet the judiciary shouldn't operate, or even seem to operate, as a vessel for partisanship."[240]

This way of framing the dispute would resemble, or repurpose, much of what is actually argued in the *Dobbs* dissent. However, it would bring three improvements. First, it avoids denying the obvious plausibility of the majority's more limited, tradition-based understanding of due process—a view that has had strong support at least since the demise of *Lochner*.[241] Second, it avoids elevating precedent in an implausible and ultimately self-defeating way. In arguing that the Court defied stare decisis, the *Dobbs* dissent struggled.[242] After all, precedent is and ought to be quite flexible when the Court decides constitutional cases. And now that *Dobbs* is the law, the dissenters have seemingly boxed themselves in. Finally, a permissive dissent would help clarify that judicial personality is driving the train on *both* sides

240 Dissenting opinions have sometimes adopted this stance. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 510 (1966) (Harlan, J., dissenting) ("The Court's opening contention . . . is perhaps not an impermissible extension of the law but it has little to commend itself in the present circumstances."); *see also id.* at 504 (calling the majority's decision "poor constitutional law" with "harmful consequences").

241 *Compare* Lochner v. New York, 198 U.S. 45, 53 (1905), *with* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

242 *See Dobbs*, 142 S. Ct. at 2324 (joint dissent).

of *Dobbs*. Bringing that fact to the foreground can foster political debate about the role of the justices and so facilitate appropriate court reform.[243]

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Because they supply a simple way of explaining the argumentative structure of salient cases, including features that would otherwise be anomalous, the basic rules can lay claim to descriptive accuracy. That is, they plausibly offer the best, most parsimonious account of existing interpretive practice, particularly at the Supreme Court. Of special note, the permission-based account has the benefit of anticipating the structure of judicial disagreement in hard cases like *Bostock* and *Dobbs*. Even better, the permissive approach shows *why* these cases were hard: they were under-determined, not in the abstract, almost throwaway sense that any principle must be indeterminate at the margins, but rather because the fundamental determinants of legal interpretation were strongly at odds. When the basic rules are at loggerheads, there is an expectation of legal disagreement, even among sophisticated experts—but there is no room for legal condemnation. The basic rules thus provide a way to talk about legal correctness in a way that has purchase across the range of interpretive methods that are actually in use.

CONCLUSION

What should the law of interpretation aim to do? Many judges and commentators offer a straightforward answer: prescribe the *best* way of construing legal materials. But when the ingredients of interpretation sharply diverge, there is no one right way to reconcile them. What fills the breach is each judge's interpretive personality, along with vast, if concealed, discretion.

The law of interpretation should pursue a different goal: prescribe *permissible* ways of construing legal materials. That more modest objective creates room for methodological compromise, allows for praise-giving principles, and surfaces judges' distinctive legal personalities. On balance, permissions can manage interpretive discretion better than mandates.

Yet successful management calls for something much more than simple interpretive pluralism. To not only accommodate but also corral interpretive personality, added guidance is needed. The basic rules fit the bill: they offer a realistic framework to both cabin and guide judges' diverse interpretive personalities, while preserving the most desirable features of interpretive discretion.

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243 *See supra* note 100 and accompanying text (discussing proposals for Supreme Court reform); *see also* Andrew Coan, *What is the Matter with* Dobbs*?*, at 38-39 (Ariz. Legal Stud. Discussion Paper No. 22-24, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4294242 [http://perma.cc/GVA5-SEK6] (arguing that *Dobbs* is best criticized on avowedly moral grounds).

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