

WHY TEXTUALISTS WOULD EMBRACE AN INFALLIBLE AI ADJUDICATOR

*Michael Showalter**

INTRODUCTION

In a recent thought-provoking article built on what he calls a “sci-fi hypothetical,” Jack Kieffaber imagines a Judge.AI machine that resolves all disputes correctly and is installed as the judicial branch in a new country with a new constitution.¹ He contends that textualists should—but will not—embrace Judge.AI.² The Judge.AI judiciary represents a textualist utopia, Kieffaber argues, because Judge.AI is maximally predictable, and Kieffaber believes that predictability is textualism’s ultimate objective.³ But he predicts that textualists would resist Judge.AI, which in his view demonstrates that they are not really textualists. No one is actually textualist, he asserts, when push comes to shove.⁴

While Kieffaber astutely recognizes that the development of AI forces textualists to reexamine first principles, he misunderstands textualism and miscalculates how textualists would respond to Judge.AI. If it could be harnessed appropriately, a machine that infallibly provides correct textualist answers is obviously appealing from a textualist perspective. Kieffaber’s gotcha is no gotcha at all because textualists have no reason to reject Judge.AI with all the qualifications and protections built into the hypothetical.

Kieffaber is also mistaken about the primary reason why textualists would value his hypothetical machine. Textualism and originalism are

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* J.D. 2016, Yale Law School. The views expressed in this Essay are those of the author alone writing in his personal capacity.

1 Jack Kieffaber, *Predictability, AI, and Judicial Futurism: Why Robots Will Run the Law and Textualists Will Like It*, 48 HARV. J.L. & PUB. POL’Y 895, 899 (2026).

2 *Id.* at 895.

3 *Id.* at 896.

4 *Id.* at 900.

not foremost about promoting predictability; they are foremost about enforcing agreements. The central evil they guard against is a judge's de facto amendment of the law, which robs people of the agreement reached about how their society will be governed (their constitution), or how their freedoms and obligations will be regulated (statutes), or anything else (contracts). An AntiJudge.AI reaching the atextualist result in every case could not be defended to textualists on the ground that it is predictable. Honoring agreements, not predictability, is textualism and originalism's animating principle. Because the hypothetical Judge.AI always honors the agreement, it fully accomplishes textualism and originalism's primary aim.

To bring the hypothetical closer to the real world, I'll imagine a machine arbitrator rather than judge. Suppose Arbitrator.AI stands ready to correctly resolve all disputes out of court—no new country or new constitution needed. Companies would not refuse to sign machine-arbitration clauses on the ground that Arbitrator.AI lacks human touch. They would be grateful for the promise of correct resolutions at minimal expense. The same should be true for the rest of us. The hypothetical is a hypothetical, but if We the People could be assured that all disputes would be instantly resolved in a manner accurately reflecting the law we adopted through our representatives or in our contracts, that most definitely would be desirable.

I anticipate that many objections to my thesis will fight the hypothetical by resisting the premise that Arbitrator.AI can reliably produce correct answers. Of course machines cannot currently do this, and of course we should be wary of their biases and dangers, and of course in the real world we will need human oversight of machine-produced decisions even as they become more accurate. But those observations fight the hypothetical and miss the point.

A more nuanced objection, invoking the "law runs out" theory articulated by Justice Elena Kagan and certain constitutional-law theorists, is that there is no such thing as a single correct answer in every case.⁵ Law-runs-out theory asserts that when legal text is contestable, questions of law are legally unanswerable and they become questions of policy instead.

But that objection is unfounded and is antithetical to textualism. Under textualism and originalism, even when a legal text's meaning or application is contestable, the law never "runs out." Legal text is not interpreted in a vacuum—background legal principles guide the resolution of cases involving indeterminate text. So there is always a best interpretive answer. The Supreme Court's originalist majority, accordingly, forcefully repudiated law-runs-out theory in its 2024 *Loper*

5 See, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

Bright decision.⁶ As originalists see it, America benefits the more often the correct answer is reached.

I. KIEFFABER'S ARTICLE

Kieffaber perceptively recognizes that the development of AI highlights longstanding theoretical questions about adjudication in general and the interpretation of legal texts in particular. As Kieffaber's article displays, AI will force textualists to revisit why they are textualists and develop arguments for how and when adjudication should employ AI.⁷

Kieffaber's article is built on a "sci-fi hypothetical."⁸ He imagines a machine judge named Judge.AI that perfectly resolves all disputes by applying only the law as written.⁹ Recognizing that constitutional obstacles would prevent Judge.AI's adoption in the United States, Kieffaber posits a new country with a new constitution that installs Judge.AI as its judiciary.¹⁰ Because this hypothetical constitution does not prohibit advisory opinions, citizens can learn in advance whether a given course of conduct is lawful simply by asking Judge.AI.¹¹ As Kieffaber describes, Judge.AI's infallibility ensures that legal texts are interpreted and applied consistently and accurately.¹²

6 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262–68 (2024).

7 I will use the terms textualism and originalism interchangeably because they are methodologically indistinguishable. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., new ed. 2018) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text . . ."); Diarmuid F. O'Scannlain, Remarks, "We Are All Textualists Now": *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 309 (2017) ("[O]riginalism . . . is merely textualism applied to constitutional interpretation."). This is apparent when considering that an originalist/textualist would interpret the Judiciary Act of 1789 and provisions of the original Constitution with the same principles. Different types of laws may have different audiences, and the audience will account for the identity of the speaker and the context of the speech. But in all cases, under both original-meaning originalism and textualism the question is what the text communicated to the audience when adopted. See Michael Showalter, Palmer v. Amazon: *A Case Study in Textualism and the Fixed-Meaning Canon*, 14 WAKE FOREST L. REV. ONLINE 112, 120 n.47 (2024). For more detailed discussions of these points, see Lawrence B. Solum, *Pragmatics and Textualism*, 33 J.L. & POL'Y 2 (2025) and Showalter, *supra*, at 119–22.

8 Kieffaber, *supra* note 1, at 899.

9 *Id.* at 900 ("Judge.AI is a perfectly neutral arbiter and interprets words with perfect mathematical accuracy.").

10 *Id.*

11 *Id.* ("A citizen can access Judge.AI and type in the real-life action he would like to take; after the citizen hits 'submit,' Judge.AI will tell him if that action is legal or illegal under the relevant statute and why. . . . The answer it gives you on the front end is precisely what it will hold on the back end if you go through with your desired action and are prosecuted.").

12 *Id.*

Kieffaber's central claim is that textualists should embrace Judge.AI because it achieves predictability, which he regards as textualism's ultimate aim. According to Kieffaber, predictability is "textualism's sole end."¹³ He surveys several other virtues often attributed to textualism—promoting legitimacy, ensuring democratic rule, and so on—but concludes that on inspection these virtues amount to "predictability all the way down."¹⁴

Because Judge.AI "maximizes predictability," Kieffaber concludes, textualists should consider it utopian.¹⁵ Human judges, he observes, "can be biased," remain "imperfect" even when impartial, and often disagree with each other.¹⁶ Judge.AI does not share these shortcomings.

Yet Kieffaber predicts that self-described textualists would resist Judge.AI, attributing their resistance to a latent hypocrisy.¹⁷ Judge.AI, he argues, exposes a dissonance between textualist rhetoric and textualist practice.¹⁸ In the end, Kieffaber asserts, "nobody's a textualist."¹⁹

But Kieffaber's arguments both misunderstand textualism and miscalculate how textualists will respond to AI if it reaches the degree of reliability he envisions.

II. THE POINT OF TEXTUALISM AND ORIGINALISM

In a well-known Star Wars scene, a character protests that Darth Vader has violated "a condition of our agreement."²⁰ Darth Vader famously responds: "I am altering the deal. Pray I don't alter it any further."²¹ Under American morality, that might-makes-right response is the response of a villain. Americans believe that when an agreement is reached, it should be honored.

Textualism and originalism's core justification is that they uphold that ethic.²² In the United States, the founding generation decided that our society would be ruled by the agreement of We the People, not by

13 *Id.* at 901.

14 *Id.* at 919, 905–19.

15 *Id.* at 901, 900.

16 *Id.* at 919.

17 *See id.* at 958–61.

18 *See id.*

19 *Id.* at 959.

20 STAR WARS: THE EMPIRE STRIKES BACK (EPISODE V), Disney+, at 1:31:15–1:31:16 (Lucasfilm 1980).

21 *Id.* at 1:38:12–1:38:15.

22 *See, e.g.,* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) ("[Statutes] should be read, like a contractual offer, to find their reasonable import. They are public documents, negotiated and approved by many parties"); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 447 (2005) ("[E]nforcing the clear semantic meaning of a statute represents the best, if not the only, way to preserve the unknowable legislative bargains that produced the final text.").

Vader-like strongmen. We are ruled by law, not men—the wishes of governing officials are subordinate to the wishes that We the People have made law.²³

But to say that we are ruled by law raises a fundamental question: what is the law? Textualists' answer is straightforward: When written, the law is the communicative content that the writing conveys to its audience, as informed by the background legal principles against which the text is enacted.²⁴ Writing it down is the human way of memorializing the agreement reached, which is often a bargain made in the face of conflicting visions.²⁵ When we write it down, we mutually understand that the meaning of the written words will control future application of the law we are creating. “The text of the law is the law.”²⁶

Textualism and originalism, then, are grounded in two principles, one descriptive and one normative:

- (1) The text of the law is the law (the agreement), and
- (2) The agreement should be honored.

The central evil textualism and originalism guard against is breach of the agreement. When a judge applies an atextual interpretation, the judge has failed to honor the agreement. We the People agreed to one thing but got something else instead. The judge effectively amended the

23 I do not take a position on the age-old debates over how to justify law's bindingness. See, e.g., J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022); Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615 (2009) (discussing similarities and differences between constitutions and contracts). Textualism and originalism presuppose that law is binding, but their primary purpose is honoring agreements no matter how that bindingness is justified. In the case of the U.S. Constitution and statutory law, the agreement is the one reached by the people's representatives.

24 See Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013).

25 See, e.g., 2 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 848 (Richard Tuck ed., Liberty Fund, Inc. 2005) (1625) (“[B]ecause the inward Acts and Motions of the Mind are not in themselves discernible, and there would be no Obligation at all by Promises, if every Man were left to his Liberty, to put what Construction he pleased upon them, therefore some certain Rule must be agreed on, whereby we may know, what our Promises oblige us to.”); *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (“[I]f [the meaning of laws] could shift with the latest judicial whim, the point of reducing them to writing would be lost.”).

26 Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (emphasis added). This principle is somewhat contingent in that a society theoretically could make law in ways other than text. See Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 157 (2017) (“[O]riginalism doesn't need to be about the meaning of any text. A society can be recognizably originalist without having a written constitution, written law, or any writing at all.”). And it is an oversimplification. See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1093 (2017) (“If language alone can't finish the job, as we agree it often can't, then something else must. We suggest that this something else is law.”). But enacted text is the touchstone of the law.

law outside the strictures of our agreed-upon process for amendment.²⁷ The judiciary altered the deal, and we can only pray it doesn't alter it further.

Kieffaber is therefore mistaken to assert that predictability is textualism's central aim. While predictability is a generally desirable byproduct of textualism, it is subordinate to the principle of honoring agreements. Imagine a hypothetical AntiJudge.AI that consistently rules against the textualist outcome. AntiJudge.AI maximizes predictability no less than Judge.AI yet is undesirable because it discards the people's agreements.

III. WHY ARBITRATOR.AI IS DESIRABLE

Kieffaber recognizes that the hypothetical Judge.AI would be desirable from a textualist perspective, but he misidentifies the reason why. No doubt, Judge.AI's predictability is a feature of substantial value, as textualists and non-textualists should agree. But the reason hypothetical Judge.AI accomplishes textualism's primary aim is that it guarantees that the people's agreements are honored.

To illustrate the desirability of flawless machine adjudication, I'll adjust Kieffaber's hypothetical slightly to imagine an Arbitrator.AI that arbitrates disputes out of court. By situating the adjudicating machine in the context of private dispute resolution, I avoid certain institutional and constitutional objections to Judge.AI, as well as the need to imagine a new country with a new constitution. But I'll otherwise maintain Kieffaber's hypothetical suppositions.

The hypothetical Arbitrator.AI is clearly beneficial because it resolves disputes correctly and with little expense. Imagine you are a general counsel with a fiduciary obligation to act in your company's best interests. While negotiating a deal, your counterparty proposes that all disputes be resolved by Arbitrator.AI. The counterparty observes that this machine-arbitration clause will guarantee that the parties will receive their respective benefits of the bargain and will drastically reduce dispute-resolution costs. If you decline because Arbitrator.AI lacks human touch, or because you worry for the lawyers, or because you are uncomfortable with machines, you are not acting in your company's best interests. Your duty is to secure the benefits of the bargain and minimize unnecessary expense—remembering that this hypothetical machine guarantees those outcomes, it should not matter *how* the deal is enforced.

27 See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 82–83 (2012) (“When government-adopted texts are given a new meaning [by a judge], the law is changed,” and “[a]llowing laws to be rewritten by judges is a radical departure from our democratic system.”).

Arbitrator.AI is hypothetical, but eventually companies will turn to machines that fall short of its perfection yet offer significant gains in accuracy and efficiency. And AI's dispute-resolution potential extends beyond commercial contexts. Ordinary Americans navigating small claims or consumer disputes, for example, could benefit immensely from an arbitrator that consistently reaches correct outcomes at minimal expense.

As an interpretive methodology, textualism has nothing to say about how much anyone must spend on litigation—textualists and non-textualists can equally appreciate the societal value of reducing litigation costs. But for textualists specifically, Arbitrator.AI addresses the evil they seek to avoid: adjudicative failure to honor the agreement. It ensures that the agreed-upon text prevails, leaving no room for atextual rulings that steal from people the terms adopted.

Kieffaber is mistaken to suggest that textualists would naturally resist the hypothetical Judge.AI or Arbitrator.AI. Kieffaber asserts, for example, that an “intellectually honest textualist must concede” that the Judge.AI hypothetical is utopian.²⁸ But he does not explain why this is a concession or why it might require soul-searching. It would be more than strange for textualists, after decades of objecting to atextualist decisions, to oppose a hypothetical tool that eliminates all atextualist decisions. Textualist objections to machine adjudication might arise from real-world concerns—for example, bias in training data or the opacity of machine reasoning—but these objections are irrelevant under Kieffaber's hypothetical, which assumes Judge.AI's infallibility. He hasn't revealed any textualist hypocrisy; he has simply pushed his thought experiment to the limit by imagining a world in which the textualist answer always prevails. If you doubt whether this outcome is desirable, consider all the Supreme Court cases you believe were wrongly decided and imagine that each one was correctly decided instead thanks to a fail-safe machine clerk.

IV. LAW-RUNS-OUT THEORY IS ANTITEXTUALIST

The primary objection to my thesis likely will be a variation of the assertion that the law sometimes “runs out,” meaning that there is no single correct answer in every case. Kieffaber briefly advances this view, asserting that humans sometimes enact laws that “don't have an objective meaning,” so the law has “run out.”²⁹ When that happens, he proposes that Judge.AI might “flip a coin,” a methodology he deems

28 Kieffaber, *supra* note 1, at 900.

29 *Id.* at 920.

acceptable so long as the coin flip occurs at the ex ante advisory-opinion stage.³⁰

But the contention that the law runs out whenever a legal text is contestable is a legal-realist fallacy that is antithetical to textualism and has been repudiated by the Supreme Court.³¹ Some background is helpful for understanding how this theory relates to textualism and machine adjudication.

While nearly everyone agrees that judges must start with the text and end there when it's clear, we are not all originalists now when legal text doesn't provide an incontestably clear answer. Many believe that original understanding controls regardless. But the U.S. Supreme Court's *Chevron* doctrine, for example, held that a legal question of interpretation morphs into a policy question whenever there are multiple reasonable readings of a statutory text.³² Justice Elena Kagan elaborated this theory in 2019, asserting that when there is interpretive uncertainty, the law has "run[] out" and only a "policy-laden choice" remains.³³

Law-runs-out theory traces back to H.L.A. Hart's discussion of "hard cases." Hart argued that there are sometimes "legally unregulated cases" in which "no decision either way is dictated by the law," and the law is therefore "incomplete."³⁴ In these cases, according to Hart, a judge must "make law."³⁵ In other words, the judge must "act just as legislators do,"³⁶ i.e., "by deciding according to his own beliefs and values."³⁷ Hard cases turn on the judge's moral reasoning.³⁸

More recently, certain constitutional-law theorists have echoed this view by arguing that when there is interpretive uncertainty the law has "run out" and judges must enter a "construction zone" in which political considerations apply. As one pioneer of the construction-zone idea put it, the theory is a "normative and pragmatic" approach that allows the Constitution to "adapt to changing circumstances, political

30 See *id.* at 923.

31 See Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266–68 (2024); Michael Showalter, *The Supreme Court Versus the Construction Zone: The Justices Reject Law-Runs-Out Theory*, 32 GEO. MASON L. REV. F. 49 (2025).

32 *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), *overruled by Loper Bright*, 144 S. Ct. 2244.

33 *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

34 H.L.A. HART, *THE CONCEPT OF LAW* 272 (with a Postscript edited by Penelope A. Bulloch & Joseph Raz eds., 3d ed. 2012); see also JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 182 (1979).

35 HART, *supra* note 34, at 272 (emphasis omitted).

36 RAZ, *supra* note 34, at 197.

37 HART, *supra* note 34, at 273.

38 See *id.* at 275.

pressures, and values” instead of being “stuck in the past.”³⁹ By approaching the Constitution “creatively” and “politically,” “construction appeals to its attractiveness and utility to the contemporary context rather than to its historical fidelity.”⁴⁰

Whatever its merits, law-runs-out theory is anathema to originalism. The entire point of originalism is that judges are bound by original understanding and may not resort to normative policy. There is no conceptual reason to treat contestable and incontestable text differently under originalism—its justifications apply equally to both. Construction-zone proponents have not shown why a finding of indeterminacy justifies turning to policy rather than continuing to seek the best legal reading. Originalists believe that indeterminacy must be resolved through “the fixed rules which govern the interpretation of laws,” as a *Dred Scott* dissent put it, rather than judicial policymaking.⁴¹ Judges are empowered merely to apply existing We-the-People-made law.

Making matters worse, the idea of a construction zone filled with normative considerations gives ever-present cover for the judge’s ever-present temptation to exercise will rather than judgment. Most cases involve debatable interpretations; an enterprising pragmatist can always declare indeterminacy to justify an atextual result. That’s precisely the harm originalism seeks to prevent.

It’s unsurprising, then, that the Supreme Court’s originalist majority has decisively rejected law-runs-out theory. Overruling *Chevron* in *Loper Bright v. Raimondo*, the Court reestablished the constitutional principle that the interpretation of legal text always concerns law and not policy.⁴² Judges may not “throw up their hands”⁴³ by claiming the law has “run out” just because the text is reasonably contested;⁴⁴ rather, they must find the “best reading.”⁴⁵ It is always “the

39 Keith E. Whittington, *On Pluralism Within Originalism*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 70, 76 (Grant Huscroft & Bradley W. Miller eds., 2011).

40 *Id.* at 75–76.

41 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 621 (1857) (enslaved party) (Curtis, J., dissenting), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *see also* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 774 (2009). So even if one might argue that the text “runs out” on occasion, that does not mean the law “runs out.” *See* Baude & Sachs, *supra* note 26, at 1093–97.

42 *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2267–68, 2273 (2024).

43 *Id.* at 2266.

44 *Id.* (quoting *id.* at 2294 (Kagan, J., dissenting)).

45 *Id.*

province and duty of the judicial department to say what the law is”⁴⁶—nothing changes when an interpretive question is contestable.

Law-runs-out theory lost because *Chevron*, Justice Kagan, and academic proponents could not reconcile it with the Supreme Court majority’s originalist commitments. The modern originalist movement arose as a counterrevolution against perceived judicial policymaking.⁴⁷ A theory compelling judicial policymaking, therefore, was never likely to persuade an originalist Court.

This repudiation of a policymaking construction zone has direct implications for machine adjudication. Because interpretation involves law and not policy, and because there is always a best interpretive reading, judges have no discretion in interpretive cases. Their sole task is to reach the answer that best reflects the agreement at issue—that is, the answer that the hypothetical Judge.AI would provide.⁴⁸ As Chief Justice John Roberts explained during his confirmation hearing, when judges “choos[e] between two reasonable interpretations based on personal preferences” instead of “finding the better legal answer,” the result is “rule of men, not the rule of law.”⁴⁹ There is no choosing; there is only finding.⁵⁰

So even when an interpretive dispute is hotly contested, there is one correct answer. To the extent a tool can help us uncover it, that tool is originalist gold.

46 *Id.* at 2257 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

47 See J. Joel Alicea, *Dobbs and the Fate of the Conservative Legal Movement*, CITY J. (Winter 2022), <https://www.city-journal.org/article/dobbs-and-the-fate-of-the-conservative-legal-movement> [<https://perma.cc/Y86W-B8UW>].

48 See *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) (“[M]y vision of the process of judging is unabashedly based on the proposition that there are right and wrong answers to legal questions.” (quoting Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 5 (1996))); Michael Showalter, *The Honorable Robot: AI Adjudication and the Judicial Virtues*, 86 OHIO ST. L.J. ONLINE 1 (2025).

49 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 569–70 (2005) (statement of John G. Roberts, Jr., J., D.C. Cir.).

50 See *Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2229–30 (2025) (observing that judges are “charged with applying the law as they find it”).