PREDICTABILITY, AI, AND JUDICIAL FUTURISM: WHY ROBOTS WILL RUN THE LAW AND TEXTUALISTS WILL LIKE IT

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The question isn't whether machines are going to replace judges and lawyers—they are. The question is whether that's a good thing. If you're a textualist, you have to answer yes. But you won't—which means you're not a textualist. Sorry.

Hypothetical: The year is 2030. AI has far eclipsed the median federal jurist as a textual interpreter. A new country is founded; it's a democratic republic that uses human legislators to write laws and programs a state-sponsored Large Language Model called "Judge.AI" to apply those laws to facts. The model makes judicial decisions as to conduct on the back end, but can also provide advisory opinions on the front end; if a citizen types in his desired action and hits "enter," Judge.AI will tell him, ex ante, exactly what it would decide ex post if the citizen were to perform the action and be prosecuted. The primary result is perfect predictability; secondary results include the abolition of case law, the death of common law, and the replacement of all judges—indeed, all lawyers—by a single machine. Don't fight the hypothetical, assume it works. This article poses the question: Is that a utopia or a dystopia?

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* Harvard Law School, J.D. 2023. Heartfelt thanks to Matias Mayesh, Samuel Delmer, Kimo Gandall, Logan Knight, Tyler Tate, Ryan Brown, Tyler Dobbs, and the rest of the Joseph Story Society for knowing the time of day and bringing this idea to fruition. Grateful also to John C.P. Goldberg for his cherished advice, to Sydney Dove Allard for her brutal counters, and to the great John Erskine—whose skill with a Bluebook has proven the strongest rebuttal yet to my AI replacement theory. Special thanks to Garrett Snedeker and the James Wilson Institute for their support.

If you answer dystopia, you cannot be a textualist. Part I of this article establishes why: Because predictability is textualism's only lodestar, and Judge.AI is substantially more predictable than any regime operating today. Part II-A dispatches rebuttals premised on positive nuances of the American system; such rebuttals forget that my hypothetical presumes a new nation and take for granted how much of our nation's founding was premised on mitigating exactly the kinds of human error that Judge.AI would eliminate. And Part II-B dispatches normative rebuttals, which ultimately amount to moral arguments about objective good—which are none of the textualist's business.

When the dust clears, you have only two choices: You're a moralist, or you're a formalist. If you're the former, you'll need a complete account of the objective good—which has evaded man for his entire existence. If you're the latter, you should relish the fast-approaching day when all laws and all lawyers are usurped by a tin box. But you're going to say you're something in between. And you're not.

INTRODUCTION

Pawn to C4. Black resigns. In 1988, Garry Kasparov said there was "[n]o way" a computer would beat a grandmaster in the next decade.[1] He added, "if any grandmaster has difficulties playing computers, I would be happy to provide any advice."[2] It was classic hubris: Grandmasters started losing to computers that year, and within a decade Kasparov was one of the losers.[3] Today, the greatest player in the world could play the strongest chess engine ten thousand times and never manage a draw.[4]

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1. Andreas Nowatzyk et al., *A Grandmaster Chess Machine*, 263 SCI. AM. 44, 44 (1990).
2. *Id.*
3. *Id.*
4. *See* Yoni Wilkenfeld, *Can Chess Survive Artificial Intelligence?*, 58 THE NEW ATLANTIS 37, 43 (2019) ("To Blunder is Human"); *see also* Robert Siegel, *20 Years Later, Humans Still No Match for Computers on the Chessboard*, NPR (Oct. 24, 2016), https://www.npr.org/sections/alltechconsidered/2016/10/24/499162905/20- years-later-humans-still-no-match-for-computers-on-the-chessboard. [https://perma.cc/DW5W-CU8E].

Kasparov's loss to the Deep Blue chess engine was a landmark cultural moment.[5] In an instant, a generation of artificial intelligence doomsayers sounded markedly less insane. And the mainstream began courting the nervous question: What if everything is just chess with X number of squares and rules—such that the Kasparovs of every field might someday fall to a "tin box"?[6]

In 2022, ChatGPT became the most pivotal "Deep Blue" moment since Deep Blue itself.[7] And two years later, the Eleventh Circuit provided the Deep Blue moment for law: Judge Kevin Newsom's concurrence in *Snell v. United Specialty Insurance Co.*[8] His query in that otherwise innocuous insurance case grabbed headlines: Why can't judges use ChatGPT to find the ordinary meaning of words?[9] Judge Newsom may not have been the first to "th[ink] the unthinkable," but he was the first federal judge who had the guts to "sa[y] the unsayable" in writing.[10] In doing so, he gave all the closeted

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5. *See* BRUCE PANDOLFINI, KASPAROV AND DEEP BLUE: THE HISTORIC CHESS MATCH BETWEEN MAN AND MACHINE 7–8 (1997) ("Picture an embattled warrior, the weight of humanity on his shoulders, rising from a chessboard in anger and despair, walking off the stage in total defeat."); *see also* Max Larson, *Optimizing Chess: Philology and Algorithmic Culture*, 46 DIACRITICS 31, 45 (2018).

6. Marina Koren, *When Computers Started Beating Chess Champions*, THE ATLANTIC (Feb. 10, 2016), https://www.theatlantic.com/technology/archive/2016/02/when-computers- started-beating-chess-champions/462216/. [https://perma.cc/4GA4-BZWF].

7. *See* A.P. Leme Lopes, *Artificial History? Inquiring ChatGPT on Historiography*, 27 J. THEORY & PRAC. 2, 5 (2023).

8. 102 F.4th 1208, 1221 (11th Cir. 2024) (Newsom, J., concurring).

9. *Id.* ("Those . . . who believe that 'ordinary meaning' is the foundational rule for the evaluation of legal texts should consider—consider—whether and how AI-powered large language models like OpenAI's ChatGPT, Google's Gemini, and Anthropic's Claude might—might—inform the interpretive analysis."); *see also* Nate Raymond, *U.S. Judge Makes 'Unthinkable' Pitch to Use AI to Interpret Legal Texts*, REUTERS (May 29, 2024), https://www.reuters.com/legal/transactional/us- judge-makes-unthinkable-pitch-use-ai-interpret-legal-texts-2024-05-29/ [https://perma.cc/B8JS-L9FP].

10. *Id.* at 1234 ("[T]his is my bottom line—I think that LLMs have promise. At the very least, it no longer strikes me as ridiculous to think that an LLM like ChatGPT might have something useful to say about the common, everyday meanings of the words and phrases used in legal texts."). *See generally* Robert Buckland, *AI, Judges and Judgment: Setting the Scene* (M-RCBG Assoc. Working Paper, Paper No. 220, 2023), https://www.hks.harvard.edu/centers/mrcbg/publications/awp/awp220#:~:text=Proponents%20also%20argue%20algorithms%20could,complicated%20calculative%20balances%2C%20and%20discover. [https://perma.cc/W9W2-6N63].

judicial futurists the authority they needed to air their questions confidently in the public eye.

Judicial futurism—that's what I'm calling the genre Judge Newsom has created.[11] Because while the *Snell* concurrence's actual claim is quite modest and tentative, everybody knows where this rabbit hole leads: If the judges can use AI, why can't the judges just *be* AI?[12] It's a debate familiar to any baseball fan who has watched Angel Hernandez try to call balls and strikes—can't the machines already do this better?[13]

Adam Unikowsky at Jenner & Block LLP is already taking the plunge and saying what *Snell* wouldn't: If you ask ChatGPT or Claude the same seventy or so questions contested at the Supreme Court last term, it gets a lot of the same answers—and, to the extent

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11. *Snell*, 102 F.4th at 1234 ("Chief Justice Roberts cautioned that the 'use of AI requires caution and humility' . . . I wholeheartedly agree. Importantly, though, I also agree with what I take to be the report's assumption that AI is here to stay. Now, it seems to me, is the time to figure out how to use it profitably and responsibly." (citing CHIEF JUSTICE JOHN G. ROBERTS, JR., 2023 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (2023))).

12. *See, e.g.*, Buckland, *supra* note 10, at 3 ("Proponents also argue algorithms could improve the fairness of judgements because 'AI judges strictly follow precedents, restrict improper judicial discretion, prevent personal biases and preferences of individual judges, handle large amounts of information, complete complicated calculative balances, and discover statistical representations of variations of act patterns and legal factors.'" (quoting Jinting Deng, *Should the Common Law System Welcome Artificial Intelligence: A Case Study of China's Same-Type Case Reference System*, 3 GEO. L. TECH. REV. 223, 279 (2019))); *Snell*, 102 F.4th at 1225 (querying ChatGPT for the ordinary meaning of "landscaping").

13. *Cf.* Kimo Gandall et al., *Predicting Precedent: A Psycholinguistic Artificial Intelligence in the Supreme Court*, 14 CASE W. RES. J.L. TECH. & INTERNET, 220, 259–60 (2023) ("These implications suggest that either the rules alone or preexisting political affiliation do not sufficiently mediate the entire effect of emotivism, supporting a view that subconscious drives are often complex and multifaceted. Furthermore, SCOTUS_AI, with its generic dictionary of psychological phrases, offers support for the psycholinguistic framework: cognition and the subconscious elements that create a basis for it can serve as an independent but universally accessible predictor of human behavior."); *see also* Sunyoung Choi et al., *Robot Umpire vs. Human Umpire: The Spectators' Perception of Algorithm Errors in Baseball Games*, 23 INT'L CONF. ON ELEC. BUS. PROC. 744, 744 (2023) ("In the year 2019, the Atlantic League in the United States became the first to implement the usage of robot umpires, employing a trackman system to make ball/strike decisions.").

it gets different answers, those answers (to a frightening degree) can go toe-to-toe with the Court's.[14] Given the rate at which these large language models develop, it is starting to feel eerily as though the future is now—and if not now, who is to say it won't be next month?[15]

I will join Mr. Unikowsky in his leap of faith—and do so by way of the following sci-fi hypothetical:

> The year is 2030. AI's command of language and legal precedent has far eclipsed that of the median federal jurist.[16] A new

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14. *See* Adam Unikowsky, *In AI We Trust, Part II*, ADAM'S LEGAL NEWSLETTER (June 16, 2024), https://adamunikowsky.substack.com/p/in-ai-we-trust-part-ii [https://perma.cc/CL32-N97F] ("Let's start with the easiest thing I asked Claude (an LLM) to do: adjudicate Supreme Court cases. Claude consistently decides cases correctly.").

15. *See id.* ("AI is also rapidly improving. New AIs are currently under development that are expected to be significant improvements on today's state-of-the-art. Also, recall that Claude hasn't been fine-tuned or trained on any case law. It's a general-purpose AI. If we taught Claude the entire corpus of American case law, which could be done easily, its legal ability would improve significantly.").

16. This is highly technocratic idea of linguistics; that is, language can be expressed as nothing but a series of probabilistic tokens. *See* MARIA JOHNSEN, LARGE LANGUAGE MODELS (LLMS) 114 (2024) ("Unlike RNNs and CNNs, which process inputs sequentially or through local receptive fields, transformers leverage self-attention to weigh the importance of different words in a sentence. This mechanism allows transformers to consider all words simultaneously, capturing dependencies regardless of their distance apart. This capability significantly enhances the model's ability to understand context and improve performance on a wide range of NLP tasks, including language translation, sentiment analysis, and text generation."); Yunus Emre Isikdemir et al., *NLP Transformers: Analysis of LLMs and Traditional Approaches for Enhanced Text Summarization*, 32 ESKISEHIR OSMANGAZI UNIV. 1140, 1140 (2024) ("The purpose is to capture intricate linguistic patterns and generate coherent and contextually rich outputs. These language models, trained on extensive amounts of text data, have demonstrated remarkable capabilities in tasks such as machine translation, sentiment analysis, and question answering."). Or, perhaps, what linguistics means as an existential fact is irrelevant. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897) ("The object of our study then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts."); *cf.* ERNESTO EDWARDS, HOW TO STOP MINORITY REPORT FROM BECOMING A REALITY 1 (2021), https://ssrn.com/abstract=3997871 [] ("Accused not of crimes they have committed, but of crimes they will commit. It is asserted that these men, if allowed to remain free, will at some future time commit felonies." (quoting PHILLIP K. DICK, THE MINORITY REPORT 97 (1956))).

> democratic republic is created.[17] It uses human legislators to write laws and programs a state-sponsored Large Language Model (LLM) called "Judge.AI"—which operates according to the same principles that drive contemporary LLMs such as ChatGPT—to apply those laws to facts. Judge.AI then authors all legal opinions on the back end based on facts submitted to it when laws are violated.
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> But Judge.AI also works on the front end: 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. Call this the "ex ante" query function. Judge.AI carries the full force of federal law. 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.
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> Judge.AI is a perfectly neutral arbiter and interprets words with perfect mathematical accuracy. Therefore, between its ex ante and ex post functions, it offers perfect predictability as to any legal outcome.

Question: Is this a utopia or a dystopia? Based on this setup, I will draw the following conclusions: An intellectually honest textualist must concede that the above hypothetical is a utopia. That is, Judge.AI is the inevitable end result of the textualist project. Positive nuances of the American legal system that would prevent Judge.AI from taking root in this country—such as the separation of powers and the prohibition against advisory opinions—exist to mitigate human limitations and are thus expendable under an AI regime. Normative arguments against Judge.AI are not rooted in textualism. That is, a rejection of Judge.AI is a rejection of the textualist project.

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17. Of course, I could've made the hypothetical a monarchy or a commune—the abyss really is the limit when making stuff up. But I can't get too whimsical; for this paper to have any value, the hypothetical regime must look at least generally like America.

I. THE INEVITABLE END OF TEXTUALISM

To repeat my first premise: Judge.AI is optimal under a textualist framework and, indeed, is the logical end result of the textualist project. I reach this conclusion via two sub-premises: First, that textualism's sole end is predictability; and second, that Judge.AI, more than any other legal system, maximizes predictability.[18]

A. Textualism's Highest End: Predictability

Textualists are famously divided over what, exactly, textualism is and requires.[19] But our present query is broader: *Why* would somebody be a textualist? What's the point? On this count, textualists present a remarkably unified front. They tend to invoke one of several lodestars: predictability, legitimacy, democracy, the Constitution, republicanism, and concepts of *res ipsa loquitur*.[20] I contend that the first lodestar swallows the rest; predictability, and predictability alone, is the true bedrock aim of textualism.

Textualists frequently offer predictability as its own, unqualified rationale. This paper will talk about predictability in the Hume sense—which conceives of a function where every X input has a Y output and results can be predicted by deduction rather than

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18. From the outset, I want to make clear that the first premise of the hypothetical posits a new government. Accordingly—and perhaps curiously—this section will largely ignore textualist justifications that are premised solely on the Constitution (a point I'll make explicit later). A further implication is that this paper will strictly be about textualism, not originalism, insofar as the two are separable. But I reserve the right to cite originalist justifications to the extent they could just as easily buttress textualism.

19. I will address this issue in greater detail in Section III, *infra*. *Compare* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) ("Only the written word is the law, and all persons are entitled to its benefit."), *with id.* at 1825 (Kavanaugh, J., dissenting) ("There is no serious debate about the foundational interpretive principle that courts adhere to ordinary meaning, not literal meaning, when interpreting statutes. As Justice Scalia explained, 'the good textualist is not a literalist.'" (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION 24 (Amy Gutmann ed., 1997))).

20. I'm not delusional enough to think this handful of reasons embodies every reason ever given for why one ought to be a textualist—indeed, Caroline Bermeo Newcombe rattles off twenty from the top of her head. *See* Caroline Bermeo Newcombe, *Textualism: Definition, and 20 Reasons Why Textualism Is Preferable to Other Methods of Statutory Interpretation*, 87 MO. L. REV. 139 (2022).

induction.[21] Under this formulation, the past is not a logical predictor of the future—meaning mere continuity does not equal predictability. Accordingly, a despot who invariably rules in his own self-interest may be easy to predict as a general matter, but he is not predictable in the relevant sense; his actions are wholly compelled by whim and can change at his leisure. Written words have no such whim.

So construed, many textualists argue that it is desirable for people to know the laws that govern their actions before they act—and, accordingly, for the legislature to know ex ante that the specific words they write down matter.[22] Textualism facilitates this: People can read words before they act, but they cannot read the government's collective mind.[23] Subordinating that "hive mind" to the written text in legal applications keeps the citizen's obligations within his frame of access.[24]

Predictability loomed large for textualism's greatest Atlas and human litmus test, Justice Antonin Scalia—who "hope[d] to convince" his audience that "textualism [would] provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law."[25] Indeed, he deemed It essential for the legal enterprise writ large: "As laws have become more numerous

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21. *See* DAVID HUME, AN INQUIRY CONCERNING HUMAN UNDERSTANDING 18 (Tom L. Beauchamp ed., Oxford Univ. Press 2000) (1748) ("He has still some object in view; and however improper the means may sometimes be, which he chooses for the attainment of his end, he never loses view of an end; nor will he so much as throw away his thoughts or reflections, where he hopes not to reap some satisfaction from them.").

22. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1091 (2017) (positing that enforcing "hard-to-find" intentions of lawmakers "would make the law unpredictable or arbitrary.").

23. Clint Bolick, *The Case for Legal Textualism*, HOOVER INST. (Feb. 27, 2018), https://www.hoover.org/research/case-legal-textualism [https://perma.cc/379N-VHK9] (arguing that textualism is the best interpretive philosophy to advance the rule of law, stability, and certainty in judgment).

24. *See* Bermeo Newcombe, *supra* note 20 ("The word 'pre-existing' is italicized to emphasize that textualists decide cases based on statutory law that already exists, so as to provide fair notice to anyone affected by their decision. Fair notice of the law is another reason why textualism is preferable to pragmatism.").

25. ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 24 (2012).

. . . we can less and less afford protracted uncertainty regarding what the law may mean. Predictability . . . is a needful characteristic of any law worthy of the name."[26] Scalia's heirs apparent have endorsed this theme in his jurisprudence, and his critics have at least noted it.[27] And of course, where Scalia went, textualists of all stripes have followed—touting "predictability," "stability," "certainty," and "the rule of law" as textualism's flagship bonafides.[28]

26. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989); *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989).

27. As for heirs, Justice Kavanaugh touted Scalia's belief in "clear rules that would lead to predictable results." Brett Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1912 (2017). Justice Gorsuch likewise emphasized Scalia's disdain for systems that would allow "the judge . . . to revise the law willy-nilly." Neil Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 913 (2016). As for critics, Professor William Eskridge distilled Scalia's first principles like so: "[T]extualism is the only methodology faithful to the rule of law, which requires that legal interpretive rules be stable and that their application be predictable, consistent, objective, and neutral." William Eskridge, Brian Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1613 (2023).

28. *See, e.g.*, Thomas Lee & Stephen Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793 (2018) (embracing textualism on the grounds that it "yields greater predictability than any other single methodology"); Lawrence Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 194 (2006) ("Wholesale rejection of precedent would create another problem, which we might call doctrinal instability. Sensible formalists need not deny that some constitutional questions are close, even if one is committed to textualism and originalism. Without constitutional stare decisis, there would be no guarantee of stability and predictability of constitutional law." (emphasis added)); Lawrence Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 460 (2018) (listing "predictability, stability, and certainty" as animating maxims of legal formalism); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351 (2015) (highlighting "the rule of law, stability, [and] predictability" as feathers in the textualist cap); Jeffrey Denys Goldsworthy, *The Case for Originalism*, *in* GRANT JOHNSEN HUSCROFT & BRADLEY MILLER, THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 42, 42 (2011) ("[T]he judges' primary duty is to reveal and clarify [a law's] pre-existing meaning."); WILLIAM ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 35 (2016) (listing benefits flowing from textualists' concept of the rules of law—which include "notice to the public, protect[ing] reliance interests . . . [and] consistency of application[.]"); Jane Pek, *Things Better Left Unwritten?: Constitutional Text and the Rule of Law*, 83 N.Y.U. L. REV. 1979, 2004 (2008) ("The link between a well-

Now, I'm about to examine several other lodestars and claim that each is really predictability in disguise. Before I do that, we should ask: Is predictability, itself, a disguise for something deeper? I've already used the word "desirable" to describe it. Desirable why? What's predictability's end? Utility is a candidate, ditto individual autonomy—perhaps we want the laws to be predictable so that people can live free and without worry in their private sphere. But laws can be both predictable and restrictive; a well-defined private sphere is a cruel consolation for the slave who can predict the exact, claustrophobic contours of his bondage.

A better candidate: Legitimacy—perhaps the public views predictable laws as more legitimate. Of course, that's a vague concept; Seymour Lipset described legitimacy as "the capacity of a political system to engender and maintain the belief that existing political institutions are the most appropriate or proper ones for the society."[29] But legitimacy can't be the answer either—at least insofar as predictability undergirds textualism. For one, if textualism's end goal is legitimacy, it's not doing a good job of preserving that; the more textualist the Supreme Court has become, the more the public has come to hate the institution.[30]

Moreover, why do we want the law to be legitimate? I think the answer's plain: So that people will follow it. But why would we

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publicized constitution and rule-of-law values, such as a lack of governmental arbitrariness, inheres in the idea that the public must be familiar with what the constitution says before it can scrutinize government action according to such standards.").

29. Seymour M. Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69, 86 (1959). So construed, it's almost a con job—the state must buffalo the masses into buying the legal fiction that it has authority.

30. *See* William W. Taylor III, *How the Supreme Court Is Destroying Its Own Legitimacy*, ALL. FOR JUST. (Jan. 25, 2023), https://afj.org/article/how-the-supreme-court-is-destroying-its-own-legitimacy/; Jeffrey M. Jones, *Supreme Court Approval Holds at All Time Low*, GALLUP (Aug. 2, 2023), https://news.gallup.com/poll/509234/supreme-court-approval-holds-record-low.aspx [https://perma.cc/LS8K-GC8L]; Dahlia Lithwick, *The Supreme Court's Legitimacy Is Already Lost*, SLATE (May 2, 2022), https://slate.com/news-and-politics/2022/05/roe-falling-supreme-court-legitimacy-lost.html [https://perma.cc/TM4Y-4G88]. Of course, the authors of these kinds of articles may just believe textualism is wholly a smokescreen—or that, even if textualism exists and can be done well, the current Justices are not interested in doing it that way.

want people to follow the law? There are only two options. First: We may think the law is good and following it will make people better; since it is possible for a law that makes people worse to still be predictable, that's out.[31] Second is . . . well, predictability itself. That's because the opposite of rule- following is lawlessness and, at the extreme, rebellion; people in these settings act only on whim and are maximally unpredictable. Now, one might claim that the virtue I'm describing here is not predictability but merely order, safety or security—people don't fear rebellion because it's unpredictable, but because somebody might kill them. But the state kills people too; it commits violence just like any anarchic warlord. What separates the state from the warlord is that the state cannot kill on whim; it kills only in certain circumstances that are predictable to the citizens. So, it's not the existence of harm in the abstract that makes lawlessness scary; it's the randomness of it. Accordingly, I declare: Legitimacy is subservient to predictability, not the converse. In a strange twist, then—one which I'll describe later in detail—predictability strikes me as an end in itself.

B. Legitimacy

At risk of repeating myself, I'll add briefly that some academics float legitimacy as a full-fledged reason for textualism; Professor Tara Grove argues that "a judge should opt for formalistic textualism to help protect the legitimacy [specifically] of the judiciary itself."[32] But, insofar as the Lipset definition holds for judicial legitimacy as much as it does for the legitimacy of law in general, my above arguments do the trick here as well. At best, Professor Grove is describing a normative legitimacy—that reasonable people should realize that a well-behaved court's hands are tied by objective law and thus, for example, that the Dobbs decision is not the

31. One could rebut that obedience itself is good, and that there is virtue even in obeying suboptimal laws. But how "suboptimal" can the law get? The judgment at Nuremberg suggested that a lower found does exist; as such, obedience alone cannot justify rule-following in all cases.

32. Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 270 (2020) ("Formalistic textualism can, I suggest, help to mitigate . . . pressure on judicial legitimacy.

Supreme Court's "fault." But legitimacy cannot be theoretical; either the people like the courts or they don't, regardless of whether they're being reasonable or not. Thus, legitimacy cannot be the textualist's highest end to the extent that objective text disappoints public opinion or gives credence to resentful public narratives.[33] And, of course, my above conflation of legitimacy and predictability carries over; he who justifies textualism on both rationales repeats himself.

C. Democracy

Here's a legitimate contender.[34] Indeed, my hypothetical new country is still a democracy—and most of the thinkers cited above give democracy and predictability equal billing when justifying textualism.[35] It certainly weighed on Scalia's mind: "That is the assumption of democracy. [That] we are governed by text enacted by the Members of Congress, not by their purposes."[36] And Scalia's disciples have carried the torch, deeming the textualist judge a

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33. Formalist excoriations of Chief Justice Roberts's perceived cowardice in the face of the angry mob suggest that textualists do not view public opinion as a valid decisionmaking factor. *See* Dan McLaughlin, *Chief Justice John Roberts's Lack of Courage Is Damaging the Supreme Court*, NAT'L REV. (June 29, 2020), https://www.nationalreview.com/2020/06/chief-justice-john-robertss-lack-of-courage-is-damaging-the-supreme-court/ [https://perma.cc/ARZ3-YPNU].

34. *See* David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) ("The emphasis on text, or on the original understanding, reflects an implicit adherence to the postulate that law must ultimately be connected to some authoritative source: either the Framers, or 'we the people' of some crucial era."); *id.* at 928 ("A crucial part of the argument for textualist or originalist approaches is not just that they restrain judges but that they are more consistent with democracy. The objective of constitutional interpretation, on these accounts, is to uncover and enforce the will of 'we the people' as expressed in the Constitution.").

35. *See* Baude, *supra* note 28, at 2351–52 (2015) (listing "democratic self-governance" as among the "various values" textualism and originalism further); Solum, *supra* note 26, at 461 (adding "democratic legitimacy" to the list); Gorsuch, *supra* note 27, at 913 (stating that moral appeals are things a judge should not make "in a democratic society"); Goldsworthy, *supra* note 28, at 42 (stating that judicial activists "flout[] . . . the rule of law" as well as "the principle of democracy").

36. Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1613 (2012).

"faithful agent[] of the people rather than of Congress.[37]

For all their rhetorical force, though, these democratic appeals are ultimately surplusage because "democracy" is not an end unto itself. What is democracy's end?

Well, it can't be any form of morality or objective good.[38] That's

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37. Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2208 (2017) ("The textualist commitment to the ordinary-reader perspective might be explained by a competing conception of faithful agency—one that understands courts to be the faithful agents of the people rather than of Congress."); *see also* John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 747–48 (2017) (endorsing the idea that Justice Scalia "develop[ed] the affirmative claim that taking the text seriously best respects the democratic process."); William Pryor, Jr., *Scalia and Democracy*, 26 GEO. MASON L. REV. 1, 7 (2019) ("Nowhere was Justice Scalia's commitment to self-government more on display than in his defense of originalism in constitutional interpretation. Originalism is responsive to the counter-majoritarian difficulty."); William Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1514 (1998) ("Th[e] relative determinacy [of textualism] not only renders statutory interpretation more neutral, but also subserves both the rule of law (we citizens know what is expected of us) and democracy (the legislature can be certain that its statutes will be applied as written, not as judges wish they had been written)."). *But see* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 7 (2001) (stating that textualism "starts from the faithful agent premise—that a federal court is responsible for accurately deciphering and implementing the legislature's commands.").

38. *See* ALEXANDER DE TOCQUEVILLE, DEMOCRACY IN AMERICA 9 (Patrick Renshaw ed., Henry Reeve trans., Wordsworth Editions 1998) (1835) ("[A] democratic revolution has taken place in the body of society without that concomitant change in the laws, ideas, customs, and morals which was necessary to render such a revolution beneficial. Thus we have a democracy without anything to lessen its vices and bring out its natural advantages[.]"); ARISTOTLE, POLITICS 130–31 (Carnes Lord trans., Univ. Chi. Press 2d ed. 2013 (c. 350 B.C.) ("Tyranny is monarchy with a view to the advantage of the monarch, oligarchy rule with a view to the advantage of the well off, democracy rule with a view to the advantage of those who are poor; none of them is with a view to the common gain."); *see also* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 82 (2022) ("[D]emocracy, like any other regime form, is valuable insofar as it contributes to the common good, and not otherwise."); Franklin Gamwell, *The Question of Democracy*, 57 DEPAUL L. REV. 997, 1005 (2008) ("These accounts may seem to validate democracy independently of any comprehensive assessment, because they define universal moral principles independently of the ends or goals we pursue and, thus, of any comprehensive good. Kant himself defended a categorical obligation to respect the freedom of every person to determine her purposes."). *See generally* IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS (Thomas K. Abbott trans., Bobbs-Merrill 1949) (1785) (highlighting that if other systems of government may very well achieve the same ends of democracy, then democracy is an end to itself, democracy

because a majority can make a law standing for any thing at any time.[39] The only check on our Constitution's amendment process is difficulty; the United States could be North Korea in a month if the right amendments were duly ratified.[40] Any appeals to a natural or

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for democracy's sake—or that democracy's end is limiting the will of others, such that it fosters predictability and temperance). As a note, I am making an argument as to what the structure of democracy necessarily infers—it may be, as many classical thinkers believe, that the purpose of all political regimes is to legislate morally. *See* EMERICH DE VATTEL, THE LAW OF NATIONS loc. 2510 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758) ("The sovereign authority is then established only for the common good of all citizens; and it would be absurd to think that it could change its nature on passing into the hands of a senate or a monarch"); THE FEDERALIST NO. 57 (James Madison) ("The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust."). Thus, I speak of democracy specifically in its neutered, structuralist form—à la *Bostock*—one which refuses to attach moral significance as a necessary condition. *Compare* Riggs v. Palmer, 115 N.Y. 506, 512 (1889) ("So a will may contain provisions which are immoral, irreligious or against public policy, and they will be held void."), *with* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) ("Only the written word is the law[.]").

39. Madison simply seems to think that such a majority is improbable, given the structural constraints of a republic. *See* THE FEDERALIST NO. 10 (James Madison) ("Hence, it clearly appears, that the same advantage which a republic has over a democracy, in controlling the effects of faction, enjoyed by a large over a small republic, is enjoyed by the Union over the states composing it. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here again, the extent of the Union gives it the most palpable advantage."). *But see* Morton Horwitz, *Tocqueville and the Tyranny of the majority*, 28 REV. OF POL. 293, 298–99 (1966) ("However irksome an enactment may be, the citizen of the United States complies with it . . . not because it is the work of the majority, but because it is his own, and he regards it as a contract to which he himself is a party.").

40. Many scholars contend there are certain unamendable clauses. The most plausibly unamendable of these clauses is the part of Article V that demands equal representation for each State in the Senate. The least plausible unamendable is the amendment provision itself, which is at the core of Article V. *See* Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1835 (2005) ("[T]he theory of unamendments comports with constitutional populism. It understands Article V to allow citizens an ongoing role in the constitutional project by way of correcting and modifying the existing constitutional arrangements. However, citizen participation through Article V is limited; dualist-style transformations cannot occur through the Article V mechanisms."). Of course, a truly abusive majority could always refuse to seat minority

divine law are wishful and normative; positively, democracy is the war of all against all with a ballot box for a God.

That setup tells us something about a democracy's highest ideal. We can wave our flags and say the ideal is "freedom" or "individual autonomy" all we want—at least until a majority ratifies that freedom away.[41] But it is not freedom and it is certainly not a concept of the good—yours or mine.[42] What does that leave? *Predictability*.[43] And Scalia doesn't disagree, noting that "[t]here are times

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Senators, effectively frustrating the meaning behind such 'unamendable' clauses. *See* Barry v. U.S. ex rel. Cunningham, 279 U.S. 597, 615 (1929) ("Nor is there merit in the suggestion that the effect of the refusal of the Senate to seat Vare pending investigation was to deprive the state of its equal representation in the Senate. The equal representation clause is found in Article V, which authorizes and regulates amendments to the Constitution, 'provided . . . that no state, without its consent, shall be deprived of its equal suffrage in the Senate.' This constitutes a limitation upon the power of amendment and has nothing to do with a situation such as the one here presented."). The point of this quip is that America is, in effect, always one passionate majority away from a complete, 1984 dystopia.

41. Note that any Constitutional amendment can be repealed. See U.S. CONST. amend. XXI ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed."). It could have just as conceivably—though likely not just as easily—been the First or Second Amendment. See also TOCQUEVILLE, *supra* note 38, at 105 ("This is especially true in democratic states organized like the American republics, where the power of the majority is so absolute and irresistible that one must give up one's rights as a citizen and almost abjure one's qualities as a man if one intends to stray from the track which it prescribes."); id. at 103 ("Absolute monarchies had dishonored despotism; let us beware lest democratic republics should reinstate it and render it less odious and degrading in the eyes of the many by making it still more onerous to the few.").

42. Justice Kavanaugh does suggest that "individual liberty" may actually be an animating force behind American republicanism, stating that "the structural provisions of the Constitution—the separation of powers and federalism—are not mere matters of etiquette or architecture, but are essential to protecting individual liberty." Kavanaugh, *supra* note 27, at 1912. But the "protection" Justice Kavanaugh describes is not absolute; rather, it protects purely by practical impediment. It remains the case that, in America, nothing is procedurally impossible for a large enough majority.

43. The framers certainly had predictability on the brain. *See* Letter from James Madison to Charles Ingersoll (June 25, 1831), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 391 (Marvin Meyers ed., Brandeis Univ. Press 1981) (1973) (Madison quotes the Latin maxim *misera est servitus ubi jus est aut vagum aut incognitum*, meaning "Wretched is the Slavery, where Law is either uncertain or unknown."); BENJAMIN FRANKLIN, THE POLITICAL THOUGHT OF BENJAMIN FRANKLIN 126 (Ralph Ketchum ed., 1965).

when even a bad rule is better than no rule at all."[44] That phrasing sounds cabined and nuanced, but just look at the kinds of "times" Scalia had in mind: "Where the positive law places a judge in the position of being the instrument of evil, the judge must recuse from the case or (if there are many such cases) resign from the bench. Thus, if I were a judge in Nazi Germany, charged with sending Jews and Poles to their death, I would be obliged to resign my office[.]"[45]

Anyone claiming that democracy is a moral enterprise must ask himself why, in Scalia's hypothetical, the committed textualist must stop being a textualist—and, indeed, abandon his role in the democracy—in order to avoid moral complicity in the Holocaust.[46] Let's call the spade a spade; democracy is a largely nihilist endeavor.[47] That's not necessarily an insult, particularly to non-

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44. Scalia, *supra* note 26, at 1179.

45. CHRISTOPHER SCALIA & EDWARD WHELAN, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 248 (2017). Note that Scalia seems to contradict this statement later in the same speech as he tries to evade perceived moral culpability under a regime supporting abortion. *Id.* ("That is, by the way, not the position that Catholic judges are in with respect to abortion. They in no way participate in the killing of the baby. They merely hold, in accordance with the Supreme Court's determination of what natural law requires, that the government cannot prevent that killing."). This is a baffling sentence. It seems like Scalia is holding firm that natural law requires democratically enacted commands to take effect even if it would also require that Scalia himself not be the one to give them effect—a strange position to be sure. But query: Since when did the Supreme Court start making "determination[s] of what natural law requires?" Do those determinations make substantive impacts on what the natural law might require of Scalia qua Scalia? Given the Catholic position on abortion that Scalia references, it's hard to see where he truly diverges from his hypothetical Weimar holdover. Perhaps Scalia should be igniting a revolution against Planned Parenthood. *Id.* ("I would be obliged to resign my office (and perhaps lead a revolution)").

46. Justice Scalia might rebut that committing to one's political role so long as one occupies that role, come what may, is itself a moral good. He says as much. *Id.* ("Now, in my view, natural law does make its demands upon judges—but not the demand that they render judgments that contradict positive law."). This argument gets into the higher moral norms, if any, that undergird predictability itself—which I'll table for now. For present purposes, however, I find it sufficient that Scalia's own concept of natural law requires that the judge's professional sphere be amoral. That is the kind of job a machine can do.

47. *See, e.g.*, The Avalon Project, *Madison Debates* (June 4, 1787), YALE L. SCH., https://avalon.law.yale.edu/18th_century/debates_604.asp [https://perma.cc/S4Z5-

religious people. It simply captures the enlightened man's conclusion, after millennia of various despotisms, that it is impossible to know the good for certain—so we would rather be certain than good.[48] And Scalia's disciples carry that logic neatly into the textualist universe; for example, Professor Stephen Sachs makes explicit that "[s]ocial rules are morally arbitrary,"[49] and posits that "to figure out what someone ought to do according to [democratic and textualist] systems, we don't need to know what anyone really ought to do."[50]

4EFJ] ("MR. GERRY. The evils we experience flow from the excess of democracy. The people do not want virtue, but are the dupes of pretended patriots[.] One principal evil arises from the want of due provision for those employed in the administration of [Government]. It would seem to be a maxim of democracy to starve the public servants. He mentioned the popular [clamor] in [Massachusetts] for the reduction of salaries and the attack made on that of the Governor though secured by the spirit of the Constitution itself. He had he said been too republican heretofore: he was still however republican, but had been taught by experience the danger of the [leveling] spirit.").

48. Having mentioned "despotisms," I should note that democracy construes predictability in a more limited, group-based sense—that is, as to the hive mind of the body politic. To be sure, democratic elections inject unpredictability into an otherwise predictable written system—see, e.g., the Trump election and the Brexit vote. But electoral systems indulge the necessary legal fiction that "the people" act as one being—Athenian laws were "the will of the people" even if 49% of the people didn't vote for the law. It is not possible for a thing to surprise itself with its own desires. I won't entertain allegories of drunken people or involuntary spasms or spontaneously falling in love; normally functioning humans possess all the faculties to reasonably predict their own conscious actions—and so, if democracy is to make logical sense, do polities. As such, no electoral outcome is "unpredictable" in the relevant sense; the polity knows which factions exist and knows that all factions have some chance of winning.

Keep in mind that republicanism, to the extent it mitigates pure democracy, has a broader conception of predictability than the Humean sense I employ. *See infra* note 60.

49. Stephen Sachs, *According to Law*, 46 HARV. J.L. & PUB. POL'Y 1271, 1274 (2024).

50. *Id.* at 1280 (emphasis altered from original). Of course, there are arguments that democracy and Burkean minimalism are better than the alternatives when it comes to producing objectively good laws. *See, e.g.*, FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 36 (1960) ("All that we can know is that the ultimate decision about what is good or bad will not be made by individual human wisdom but by the decline of groups that have adhered to the 'wrong' beliefs."). That could be true—but it provides no mechanism (except Scalian abandonment) by which a principled "small- d" democrat could break from the public will (i.e., the text) in the rare event that it does produce objective evils. Thus, to the extent morality is an end of democracy, it cannot be the most significant end—because, unlike predictability, it is not broadly obtainable.

Now, maybe predictability is not the only amoral maxim in the running to anchor democracy. The other chief contender would be, again, our old friend legitimacy—which I have already established is, at bottom, one of predictability's many servants.[51] But, to the extent that democratic legitimacy is somehow unique from what I've already hashed out, I note that many of the incidents purportedly eroding faith in democracy—the threat of court packing, polarizing leaders, and allegedly activist judges—are perfectly legal according to duly enacted law.[52] As such, many attacks on democratic legitimacy do not truly oppose the democratic process as much as they oppose the democracy's results—namely, its failure to produce rules that stymie perceived bad actors. Results are not the textualist's business; thus, to whatever extent legitimacy is distinct from predictability as a democratic justification, it does not suggest a higher morality to textualism; rather, it counsels against using democracy as a justification for textualism in the first place.[53]

D. The Constitution

Still others argue that, in the American system, textualism is compelled by America's founding document. There are a number of these theories; some site the compulsion in the Constitutional oath, still others in the Constitution's meta-references to itself.[54] As

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51. *See* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1112, 1119 (1998) ("For the textualist a theory of political legitimacy comes first, followed by a theory of interpretation that is appropriate to the theory of obligation.").

52. No law prevented Mitch McConnell from blocking the Merrick Garland nomination; Justice Alito was allowed, legally, to decide *Dobbs* on whatever basis he so chose. Sure, it makes people angry when they think basic civil norms are being ignored and abused—but there's a reason we call them "norms" and not "laws."

53. And I'll note that, because Judge.AI's textualist utopia would make the rules governing our democratic process perfectly predictable ex ante, it would legitimize that process in the only way textualism knows how: through transparency.

54. *See* Josh Hammer, *Common Good Originalism*, THE AM. MIND (May 6, 2020), https://americanmind.org/features/waiting-for-charlemagne/common-good-originalism/ [https://perma.cc/D2RT-MASR] ("To solemnly vow to support the Constitution, so help you God, is to make an unbreakable commitment to faithfully interpret and dutifully execute the Constitution's commands."); Christopher R. Green, *'This Constitution': Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84

matters of Constitutional interpretation, these are interesting ideas—but they presuppose America's Constitution.[55] My hypothetical posits a new democratic republic whose constitution could say anything it wants. Accordingly, the hypo requires us to deduce why a judge would be a textualist in the abstract—regardless of which regime he judges under or which document he's adjudicating.

Now, I could imagine this rebuttal: We are textualists because we think the US Constitution is morally good. And, because the good US Constitution says we should be textualists, we obey it out of fidelity to that specific document. This argument would premise textualism upon morality, asserting that one should only be a textualist in support of good regimes. Respectfully, I don't buy it. Recall Justice Scalia's hypothetical: "If I were a judge in Nazi Germany . . . ."[56] Scalia never cited the German constitution for his subsequent remarks, nor any deeper morality of the German system that may have predated the Third Reich. It would seem, then, that he conceived of textualism as a good thing in any system.

And even if Justice Scalia was merely being hyperbolic about Nazi Germany, the idea that textualism is rooted in regime

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NOTRE DAME L. REV. 1607, 1674 (2009) ("Those who swear the Article VI oath should therefore be textualist semi-originalists who take the historic textually expressed sense as interpretively paramount."); Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 1 (2018) ("We contend that judges who take an oath to 'support this Constitution' enter into a fiduciary relationship with private citizens [whereby they] . . . are morally and legally bound to follow the instructions given to them in 'this Constitution' in good faith."); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 867 (2009) ("[The constitutional language] 'This Constitution,' means, each time it is invoked, the written document[.] The document specifies the document as authoritative . . . . Nothing not set forth in the writing that constitutes "this Constitution" is part of the Constitution.").

55. And they have their compelling detractors. *See* Cass R. Sunstein, *"This"*, 46 HARV. J.L. & PUB. POL'Y 410 ("[T]he phrase 'this constitution' need not be taken to entail any particular view about how to interpret it, and that those who take an oath to support it need not endorse any theory of interpretation, though they will probably have to choose one.").

56. SCALIA & WHELAN, *supra* note 45, at 248.

morality suggests that a textualist could change methodologies if he ever became convinced that the regime was immoral. When does the moral nation cross the immorality threshold? How many immoral laws outweigh the regime's inherent morality? Can one law be so immoral as to tip the scales? And immoral according to whom? If regime morality is the true basis for textualism, it might, in practice, look almost indistinguishable from activism.[57]

E. Republicanism

Now, there's one constitutional provision I will address in full: the Presentment Clause.[58] Some scholars—notably Professor Manning—cite this language in specific as textualist bedrock.[59] Insofar as Professor Manning and his compatriots cite bicameralism and presentment purely out of Constitutional fidelity, my previous subsection rebuts the argument. But one could also cite bicameralism and presentment out of respect for republican ideals. Since our hypothetical new country would be a republic—and thus necessarily have some institution resembling at least bicameralism—we should get in the weeds.

To begin, the institution of bicameralism and presentment explicitly exists to mitigate democracy.[60] The House of Representatives

57. I also find it circular and unintuitive that a written law could dictate the means of its own interpretation. Imagine you see a wire coat hanger hanging on a rod. The coat hanger is demonstrating its own function to you—but you wouldn't be wrong to unwind the thing and use it as a backscratcher. A thing cannot establish its own function simply by performing that function; you take words at their word not because you must, but because doing so serves an extratextual utility. Methods of using words, therefore—like methods for using any tool—are necessarily value judgments in the first instance, premised on what you're using them for.

58. U.S. CONST. art. I, § 7, cl. 2.

59. *See* John F. Manning, *Textualism As a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997) ("[T]extualists contend that giving decisive weight to legislative history assigns dispositive effect to texts that never cleared the constitutionally mandated process of bicameralism and presentment.").

60. *See* THE FEDERALIST NO. 10 (James Madison) ("[A] pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction . . . . A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking.");

alone is definitionally anti-democratic—as is any level of representation diluted beyond one man, one vote.[61] But even the House was too democratic for the Framers; they diluted the process further with the Senate, a body intended to be wiser and more deliberative than even the people's own representatives.[62] So, there's some virtue bigger than democracy motivating bicameralism and presentment. Arguably, that virtue is objective morality—Justice Story conceived of bicameralism as a means to avoid "subversi[on] of the general good."[63] Deliberate legislation, to the Framers, was wise legislation.[64] More neutrally, the virtue might be mere stability—

THE FEDERALIST NO. 51 (James Madison) ("It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority."); THE FEDERALIST NO. 62 (James Madison) ("It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it, may forget their obligations to their constituents, and prove unfaithful to their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one, would otherwise be sufficient.").

61. The number of Members of Congress is infinitesimally smaller than the number of American citizens who have attained the age of majority. And although the Internet does technically make direct democracy feasible, nobody's trying it and nobody wants to.

62. *See* THE FEDERALIST NO. 62 at 378–79 (James Madison) (Clinton Rossiter ed., 1961) ("[Bicameralism] doubles the security to the people by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient").

63. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 555 ("It is far less easy to deceive, or corrupt, or persuade two bodies into a course, subversive of the general good, than it is one; especially if the elements, of which they are composed, are essentially different.").

64. *See id.*, § 554 ("[Bicameralism] operates directly as a security against hasty, rash, and dangerous legislation; and allows errors and mistakes to be corrected, before they have produced any public mischiefs. It interposes delay between the introduction, and final adoption of a measure; and thus furnishes time for reflection . . . ."). Of course,

that is, predictability not in the Hume sense but in the Burkean sense that reveres consistency. See, Democracy's historical reputation was not strong at the Founding; Aristotle denounced it as a deviant form of government[65]—aggressive majorities would sweep to power and enact tyrannies against the minority, only to have the minority retake power and enact the equal opposite.[66] The Framers set out to curtail those perpetual vibrations by slowing down the legislative process and ratcheting up the difficulty.[67]

Morality and stability—neither of these two potential republican aims sound much like Hume predictability. But I'm not fazed, and that's because textualists cannot premise their methodology on pure republicanism—seeing as textualism furthers neither aim. I've already established that textualism is only as moral or stable as the words it interprets.[68] Insofar as bicameralism and presentment actually generate wise laws, textualism preserves that wisdom; but, on the off chance a supermajority does pass a "hasty, rash, and dangerous" law, the pure republican judge would betray his virtues to interpret that law by its text.

It seems that, instead, the pure republican judge should view himself as yet another reviewer in the wisdom-checking process. He wouldn't be crazy to do so; indeed, James Wilson analogized the Senate to an appellate court when pitching its moderating effect.[69] Such an instinct conceives of the judge as the Congressman's

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bicameralism is but a "security." It doesn't prevent rash lawmaking, but merely reserves it for commanding majorities.

65. ARISTOTLE, *supra* note 38 (listing democracy as the deviant form of polity).

66. *See* THE FEDERALIST NO. 9 (Alexander Hamilton) (fearing the "perpetual vibration between the extremes of tyranny and anarchy."); THE FEDERALIST NO. 62, at 378–79 (James Madison) (Clinton Rossiter ed., 1961) (noting that bicameralism "doubles the security to the people by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient").

67. *See id.*

68. *See supra*, note 48.

69. THE WORKS OF JAMES WILSON 290 (Robert Green McCloskey ed., 1967) () (In support of [bicameralism] . . . many arguments may be advanced. Let me introduce one, by the declaration of an admired judge, 'It is the glory and happiness of our excellent constitution, that, to prevent any injustice, no man is concluded by the first judgment; but that, if he apprehends himself to be aggrieved, he has another court, to

"junior partner"—a paradigm for many legal scholars, none of them textualists.[70] Accordingly, I suspect that textualists can only cite bicameralism and presentment out of constitutional fidelity rather than out of republican virtue—and thus dismiss the counter as beyond our scope.[71]

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which he may resort for relief.' Is less skill required—should less caution be observed—in making laws, than in explaining them? Are mistakes less likely to happen—are they less dangerous—is it less necessary to prevent or rectify them, in the former case, than in the latter?"). Writing later, Justice Story likewise invoked the concept of independent review. *See* STORY, *supra* note 63, at § 556 ("[I]t is of the greatest consequence to secure an independent review of [legislation] it by different minds, acting under different, and sometimes opposite opinions and feelings; so, that it may be as perfect, as human wisdom can devise.").

70. *See, e.g.*, Richard H. Fallon Jr., *On Viewing the Courts as Junior Partners of Congress in Statutory Interpretation Cases: An Essay Celebrating the Scholarship of Daniel J. Meltzer*, 91 NOTRE DAME L. REV. 1743, 1772 (2016) ("Legislation of [the Affordable Care Act's] kind, as of many other kinds, cannot be implemented successfully unless the courts assume the role of a junior partner to Congress."); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 378–408.

71. Note that this same rationale would apply to a rationale that some textualists invoke: the separation of powers. *See, e.g.*, King v. Burwell, 576 U.S. 473, 515 (2015) (Scalia, J., dissenting); SCALIA & GARNER, *supra* note 25, at xxvii–xxx; Manning, *supra* note 59, at 673; Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); *see also* Ofer Raban, *Is Textualism Required by Constitutional Separation of Powers?*, 49 LOY. L.A. L. REV. 421, 423 (2016). The same republican sentiments that underlie bicameralism and presentment underlie the separation of powers more generally. *See* THE FEDERALIST NO. 73 (Alexander Hamilton) (The propensity of the legislative department to intrude upon the rights and to absorb the powers of the other departments, has been already suggested and repeated.

From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the executive, upon the acts of the legislative branches. It not only serves as a shield to the executive, but it furnishes an additional security against the enaction of improper laws."). Thus I dismiss the basis on the same grounds—but also note that predictability also looms large in the separation of powers contend when it comes to assigning responsibility for statutory consequences. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 3 (1990) (lamenting protest marches that would process from the White House to the Supreme Court steps "with hardly a glance" at the Capitol building where the laws they were protesting had been made). Here, Judge Bork tacitly laments a predictability failing, as judicial activism had rendered these marchers ignorant as to where their indignation could technically be resolved. I will take up the separation of powers again in Section III, *infra*, as a positive systemic objection to Judge.AI.

E. *Res Ipsa Loquitur*

Lastly, this is the idea that written law, by its very nature, compels textualism because . . . well, it's got text in it.[72] But that's just begging the question. Why is law written?[73] Try researching that question and you'll find more middle school Quizlet flashcards than scholarly essays—the answer is obviously predictability.[74] In law were oral, people might forget things; and if they forget things, they might execute a law today that was not the law yesterday.[75] In governance as in grocery lists, you write things down

72. *See* Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435, 1442 (1997) ("I think that it is the writtenness of our Constitution—the text—that explains most of the constitutional epiphanies in our constitutional tradition."); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 626–27, 630 (1999) ("[T]he Constitution of the United States is a written document and it is its writtenness that makes relevant contract law theory pertaining to those contracts that are also in writing . . . . [O]riginal meaning follows naturally, though not inevitably, from the commitment to a written text . . . . [W]rittenness ceases to perform its function if meaning can be changed in the absence of an equally written modification or amendment."); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 50–61 (1999); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 303 (2007) ("Although the original expected application is not binding, the constitutional text is. That is because we have a written Constitution that is also enforceable law."); Goldsworthy, *supra* note 28, at 43 ("A law necessarily means something . . . its meaning is part of what it is."); Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321, 321 (2021) ("[V]irtually all originalist theories of meaning uncritically presuppose the nature of the object possessing that meaning: they take as given what the Constitution itself is and, by implication, what it has always been."); Gamble v. United States, 587 U.S. 678, 717 (Thomas, J., concurring) ("We operate in a system of written law in which courts need not—and generally cannot—articulate the law in the first instance.").

73. One might rebut that a thing's function inheres in its form—for example, a hammer's capacity to drive a nail is evident from its construction. But that's not the full story. To look at a hammer and think "that could drive a nail," one must already know what a nail is, know the value of hitting a nail forcefully as opposed to softly, and have reason to strike nails generally. Laws of physics, the presence of rain that necessitates a roof over one's head—these externalities are what add function to the hammer's form. Accordingly, textualism must be premised upon at least some extratextualities.

74. *See, e.g.*, almee3080, *Advantages of Written Constitutions*, QUIZLET (Apr. 2017), https://quizlet.com/gb/201981423/ ("Provides clear statement of how state should operate with no uncertainty over words."). This stuff isn't hard, folks.

75. *See* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 846–47 (2015) (describing law as a means to access forgotten maxims from

to counteract the unpredictability of human memory.

In sum, it's predictability all the way down. That's the sole reason why, if you're a textualist, your oft-repeated endeavor is "to say what the law is," "not what it should be."[76] Boy, have I got the machine for you.

II. WHY JUDGE.AI BEST ACCOMPLISHES THE TEXTUALIST END

To summarize: I'm adamant that the textualist's highest end—the most he can aspire to—is predictability. Now, let's get weird; I'm equally adamant that predictability is best served by eliminating the primary (if not only) source of unpredictability in the legal system: humanity. That's because the enemy of predictability is arbitrariness, which has three abstract causes: bias, error, and indeterminacy. Activist judges cause the first of these—and that's what textualism seeks to remedy. But human judges are all it takes cause the latter two—and they cause it inevitably.

Human judges. That phrase consists of two words, and each contributes to arbitrariness. First, and most obviously, is human. It goes without saying that humans can be biased—they're temperamentally imperfect.[77] Arbitrary. Likewise, they're also technically imperfect; judges can reach the wrong decision—even after two layers of appellate review.[78] Agan, arbitrary. More fundamentally, though, humans create questions that simply . . . don't have answers. We order society around vague concepts like "religion"[79]

that "foreign country" we call the past).

76. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Of course, Chief Justice Marshall only utters the first part of the phrase—"to say what the law is"—but members of Federalist Society chapters around the country should be familiar with the anti-normative rejoinder. *See About Us*, THE FEDERALIST SOC'Y, https://fedsoc.org/about-us [https://perma.cc/F9BP-KJFU].

77. Perhaps even morally imperfect under the Scalian norm that adherence to a limited judicial role is a normative moral obligation. Of course, it's uncontroversial that humans have a capacity for immorality under just about any moral conception. But query whether all people would view certain judicial caprices as immoral.

78. *See, e.g.*, King v. Burwell, 576 U.S. 473, 491–92 (2015) ("Congress passed much of the [Affordable Care Act] using a complicated budgetary procedure known as 'reconciliation.'").

79. *See, e.g.*, Young Israel of Tampa, Inc. v. Hillsborough Area Reg'l Transp. Auth.,

and "race"; we idealize poetic adjectives like "reasonable" and "cruel." These kinds of words put judges in the "construction zone," where textual meaning runs out.[80] Leading textualists of our day fill that gap with "history and tradition," but what if those run out? A morass of modern legal scholarship has been dedicated to answering that question—and it's a silly question because there's no answer. We're humans; sometimes we say things—even enact things—that just . . . don't have an objective meaning.

That's where our other shoe drops: judges. And the only importance of that word is that it's plural—we've got more than one judge in the country. To be sure, that helps mitigate human error. But, if there was just one judge for everything, predictability wouldn't be nearly as big of a problem. Across the mine run of cases, we'd get a sense for what the one, singular judge thinks the words mean; we could ask him on the street and he'd tell us the answer. And when he came to an inscrutable indeterminacy of language, he'd just make a judgment call. Based on other judgment calls he'd made, we would probably be able to guess what his latest one would be. And the next time he encountered the same indeterminacy, he would make that same call.

Of course, the United States doesn't have a one-judge-only system. And that's because of the obvious human limiters: His risk of bias would be astronomical,[81] he'd make a lot of mistakes with nobody to check his work, and there'd just be way too many cases for

89 F.4th 1337, 1353–57 (11th Cir. 2024) (Newsom, J., concurring) (discussing the inherent ambiguity of the word "religion").

80. *See* Amul J. Thapar & Joe Masterman, *Fidelity and Construction*, 129 YALE L.J. 774, 776 (2020); *see also* Barnett & Bernick, *supra* note 54, at 6 (discussing the same concepts in the originalist space).

81. That is, he wouldn't necessarily do any of the foregoing—the system wouldn't be Hume-predictable. There would be nothing binding his conduct, and he would probably flout the rules even if there was some formal limitation on such.

him to decide.[82] No man can be Dworkin's Hercules.[83] But let's be clear: The reason judicial methodology exists and is studied and debated is that our judicial system as a whole aspires to be that Herculean figure. Here's what I mean: take Scalia, Posner, or even Dworkin himself. Whenever a scholar devises an interpretive method he thinks best, make no mistake: He endorses and teaches it with the hope that every jurist in America will adopt that method.[84] He relishes the day when his opponent will admit that "we are all textualists now."[85] Indeed, his true, utopian goal is that the entire judicial system would operate de facto as a single Herculean being and always decide all cases in exactly the same manner. And when that utopian is a textualist, you already know his motive for the hive mind: maximum predictability.

You know where this is going. For obvious reasons, Judge.AI removes the unpredictability factor inextricably linked to human judges. For one, it's a single entity; it decides the Delaware case in the same manner as the Wyoming case and the district court case in the same manner as the Supreme Court case. And it's not bound by human working constraints; it could physically decide all the cases. Judge.AI is Dworkin's Hercule—except it's Scalia's Hercules,

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82. *See FAQs: Judges in the United States*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., https://iaals.du.edu/sites/default/files/documents/publications/judge_faq.pdf [https://perma.cc/G7J9-MKJ8] (reporting that federal courts hear approximately 400,000 cases a year).

83. *See* RONALD DWORKIN, LAW'S EMPIRE 239 (1986) ("I shall use for [illustrative] purpose[s] an imaginary judge of superhuman intellectual power and patience who accepts law as integrity. Call him Hercules.").

84. *See* Bolick, *supra* note 23 ("The principal safeguard against judicial excesses is the appointment of judges who consider themselves genuinely bound to the important yet limited powers assigned to them. That in turn requires citizens who care about our freedoms and the rule of law to be informed and vigilant about who is appointed to federal and state judgeships, especially at the appellate levels. A professed and manifest devotion to textualism is a good proxy for fidelity to the rule of law—and a good insurance policy to perpetuate the precious freedoms we inherited.").

85. *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, HARV. L. SCH. (Nov. 25, 2015) [hereinafter Scalia Lecture], https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/VDE6-MZW6]; *see also* Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 304 (2017).

with a complete understanding of language alone rather than the various capacious elements that inform a Dworkinian positivist.

The predictability of a literal "Scalian Hercules" is unprecedented. Because Judge.AI is one singular judge with one pre-ordained methodology, we could ask it on the front end what it would do in X case—and the answer we get would be the law if X case were actually to arise. Insofar as textualism seeks to metaphorically "interrogate the statute,"[86] Judge.AI would make the metaphor literal: The statute would be its own judge. Answer honestly: Isn't the textualist judge's ultimate goal to be the human instrument by which that symbiosis occurs?

The end result is pretty radical: You're an idiot if you ever end up in court. About to take X action? Run X action past Judge.AI before you leave the house just to be safe.[87] Unsure if you're part of a protected class? Ask it. Are you cheating on your taxes? Ask it. Notice what just happened: At the same moment it became your judge, the statute also became your lawyer. The result is perfect predictability and a precisely tailored private sphere—you have no doubt whatsoever as to where you stand. And, if you don't like where you stand, there's no question whatsoever as to the next step you should take: You can only petition the legislature to reword the statute or otherwise "patch" the algorithm. Legal unpredictability is dead along with caprice and error.[88]

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86. *See* Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 40 (2018).

87. I realize this constitutes an advisory opinion, an objection I address below.

88. There's another unpredictability that I don't address since, considered in full, it's an offshoot of bias. It's money—which is a proxy for expertise. Litigation is expensive, and you have to have a lawyer if you want to win. But text is only clarified—and common law is only applied—in legal cases. Accordingly, in many areas, the legal system only scrutinizes the areas of the law that moneyed people care about—and they only consider the constructions of those laws that moneyed people's lawyers present.

Dioguardi v. Durning, a classic civil procedure case, is a key example. 139 F.2d 774 (2d Cir. 1944). For all we know, pro se complainant Dioguardi was raising a revolutionary legal argument that would have exposed bedrock fallacies in American law. It's a mystery, though, because Dioguardi spoke broken English and could not afford a lawyer to communicate his case; his complaint was incomprehensible and dismissed at the district level accordingly. *Id.* at 774 (2d Cir. 1944). Though the Second Circuit reversed that dismissal, I'm pessimistic as to what Mr. Dioguardi's fate on remand

I'll address one rebuttal out of turn: What about indeterminacy? I've already argued, quite brazenly, that some textual questions are simply unanswerable. What does Judge.AI do in the construction zone? Genuine answer: I don't care—heck, it could flip a coin. The arbitrariness of heads or tails would be mitigated by the ex ante query feature, which would at least notify citizens of the arbitrary decision on the front end. Here's the irony: So long as Judge.AI: 1) picks an answer; 2) tells you that answer before you act; and 3) doesn't change its mind on the back end after you've acted, it could genuinely decide all cases by any methodology—textualist, living constitutionalist, or coin—and still be better equipped to perfectly embody public will over time than our current regime.

I've just said a lot. And, the more you think about it, I've said an awful lot. When say the statute becomes your judge becomes your lawyer, let's be clear—I am talking about the end of the legal profession. No more attorneys, no more creative legal arguments.[89] Only policymakers. Yes, I am claiming that the platonic end result of the textualist project is the abolition of the lawyer. How's that for a thesis?

III. OBJECTIONS

At this point, I'm likely courting an entire academic genre's worth of objections. This thought piece is obviously intended to stoke more debate than it settles—but I'll try to rebut the most significant concerns that jump to mind. To do so, I'm going to bifurcate the

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ended up being. To whom the facts of a landmark case might occur is often unpredictable; so, too, are that person's finances. And, while *Dioguardi* is an obvious case of a literal language barrier, communication breakdown has more nuance. Law, especially at its highest levels, has its own language and orthodoxy that separates the "serious" positions from the unserious ones. Will a client entrust his landmark facts to an unserious lawyer who doesn't quite speak the code? Again, unpredictable—especially since the average judge invariably lets his annoyance at a party's ignorance or inarticulation bias his decision in some cases. Judge.AI—with its low cost and absence of professional bias—would mitigate that unpredictability.

89. I can think of few greater unpredictabilities than the changes that would result from some of the most creative legal theories of our day. *See, e.g.*, Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 933 (2018).

universe of potential objections into two groups: (1) Objections rooted in the positive limitations of the American system, and (2) objections rooted in normative moral criticism.

The latter group needs to be taken seriously. The former group, at best, is merely a smokescreen for the latter. Insofar as the former group stands on its own merit, it exalts the status quo to an extent unbecoming of this thought experiment. Make no mistake: What I am positing here is a new form of government. I am not claiming that Judge.AI fits into America as it exists today; I'm claiming that, to the extent it doesn't, the intellectually honest textualist should be asking for an entirely new America.

A. *Positive Objections*

1. The Separation of Powers

Because a statute is a manifestation of the legislature, what I've described above is a blatant usurpation of the judiciary by the legislature because the statute becomes the judge. But that's how our system's already supposed to work; the legislature already programs the judiciary—that's what a statute is. Moreover, the separation of powers isn't divine—it's the opposite, rooted in the concept that men are not angels.[90] That just means they're prone to the very bias, error, and indeterminacy that Judge.AI eliminates.

I reject the argument that, under Judge.AI, the legislature would suddenly wield precisely the kind of consolidated power that the Framers so feared as tyrannical.[91] That's because they'd wield roughly the same power they would if all Judges hewed to a common interpretive methodology. Now, perhaps the Framers intended that unpredictability itself, manifest in disagreement and reconciliation among multiple judges, would be a check on ambition. But I can't find any textualists arguing that the Warren Court was essential to democracy because it checked textualist ambition;

90. *See* THE FEDERALIST NO. 51 (James Madison) ("But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.").

91. And, more vitally for our purposes, unpredictable.

rather, the textualist position tends to be that adherents to non-textualist methodologies actively undermine democracy.[92]

I do take the argument that whoever builds and maintains this AI would, as a technical matter, pose a much greater threat of consolidated power.[93] And yes, I could quite shamelessly write that off as fighting the hypothetical; my premises state that Judge.AI is truly neutral. But I also think that Judge Newsom's *Snell* concurrence adequately establishes just how difficult it is—if not impossible—to control an LLM in any capacity, much less wield it as a cherry-picking tool.[94] And even if the LLM is "riggable," that merely counsels in favor of devising a modern system of checks and balances aimed specifically at nullifying ambitious IT departments.[95]

2. The Prohibition Against Advisory Opinions

Insofar as the legislative-judicial hybrid of Judge.AI can still be considered "The judiciary," its ex ante declarations of law would be unconstitutional advisory opinions issued in absence of a live case or controversy. But you'll notice a trend emerging: The prohibition on advisory opinions only maximizes predictability insofar as it governs fallible human judges.

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92. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971) ("The man who . . . insists upon the rightness of the Warren Court's performance ought also, if he is candid, to admit that he is prepared to sacrifice democratic process to his own moral views. He claims for the Supreme Court an institutionalized role as perpetrator of limited *coups d'etat*.").

93. I will not take the argument that the legislature will also have the same perverse incentives. The same multimember stratification will check that. And, in our utopic vision, the AI is truly just reading the statute; insofar as it needs to be "patched" to accommodate for readings that majorities don't like, those patches will be democratically requested.

94. Snell v. United Specialty Ins. Co., 102 F.4th 1208, 1232 (11th Cir. 2024) (Newsom, J., concurring) ("It would likely be difficult, if not impossible to pollute the inputs retroactively. More fundamentally, it seems almost inconceivable that a would-be malefactor could surreptitiously flood any given dataset with enough new inputs to move the need—remember, just by way of example, that GPT-3.5 Turbo trained on more than 400 billion words.").

95. I realize it'd be more complicated than a mere "IT department"; it would likely be a huge corporation, either privately held or publicly controlled. It doesn't change my conclusion. One sometimes sacrifices a gallon of nuance for an ounce of punch.

Indeed, our current judiciary would sow chaos if it issued advisory opinions—predominantly because it would have to pick and choose which questions it answered. Only the parts of the law the judiciary felt like making predictable ex ante would become predictable. And, for all courts beneath the Supreme Court, multifarious pronouncements would become a dagger: What would advisory opinions even look like in the face of a circuit split? Even within circuits, ideological coalitions would be in a footrace to issue their advisory opinions first so as to speak for their peers. Unpredictable pandemonium.

But, again, Judge.AI is an inhuman singularity—and, accordingly, avoids all of these infirmities. And without said infirmities, advisory opinions become the ideal font of predictability. I see no reason, then, why the textualist would still find Article III's "cases or controversies" language necessary to cabin Judge.AI.[96]

96. I have a second rebuttal here, but relegate it to a footnote because it could (and should) be its own article: What makes advisory opinions illegal? In terms of judicial precedent, nothing; the prohibition against advisory opinions doesn't come from any legal case, but rather from a letter from the Jay Court to the Washington administration refusing to answer his offhand legal inquiries. *See* Letter from the United States Supreme Court Justices to George Washington (Aug. 8, 1793), *reprinted in* 5 THE SELECTED PAPERS OF JOHN JAY 545, 545 (Elizabeth M. Nuxoll ed., 2017). In terms of blackletter law, most scholars derive the prohibition on advisory opinions from the Constitution's "cases or controversies" language—and, to be sure, an advisory opinion does not present a case. But in what world does it not present a controversy? Any question meriting an advisory opinion is definitionally in controversy—somebody's asking about it, though I acknowledge that Article III limits the scope of "controversies" a court can hear by specifying various different arrangements of parties between whom the controversy must actively exist. See U.S. CONST. art. III, § 2. In truth, what even is a controversy? Surely it's something different than a case, lest our founding charter lapse into surplusage. To be sure, some legal thinkers have already prodded at Article III, § 2's nuances in the standing context. *See* Sierra v. City of Hallandale Beach, Fla., 996 F.3d 1110, 1122 (11th Cir. 2021) (Newsom, J., concurring). But the debate should extend to the advisory opinion context too, as all sorts of fascinating questions emerge from it. For example, what would happen if a judge did issue an advisory opinion? Would he be sanctioned? By whom? On what grounds? What would his punishment be? What if a different judge relied on the first judge's advisory opinion as precedent? Would he be punished? Would these sorts of opinions be allowed to remain in the federal reporter? Would citizens have a cause of action to have them taken out? Who would take them out?

3. Federal Common Law and the Equity Power

Third: What about America's nonstatutory sources of law? That is, what of federal common law and equity? There are many responses. The worst of these is *Erie Railroad Co. v. Tompkins*, which disavowed the existence of federal general common law.[97] That's a bad response because federal common law demonstrably still exists—to the point that even some modern textualists want to reassert its prominence.[98] Here's a better response: AI has already proven remarkably effective at applying common law and equity.[99] Especially in my utopian hypothetical—but also as a descriptive matter in the year 2025—I see no reason why Judge.AI couldn't simply digest the entire federal record and apply precedents accordingly. Insofar as the federal equity power calls for judicial discretion, I repeat my assertion that Judge.AI's ability to make spur-of-the-moment calls and repeat those calls uniformly across like cases would make it a more consistent and predictable wielder of equitable power than any judge working today.

More abstractly, though, this third rebuttal fights my hypothetical in that it forgets my first premise: I am positing a new government. I think it plain that, if one were to start a legal system from scratch against an AI backdrop, he'd look at common law and equity as bygone relics and cast them aside. To be clear, he wouldn't cast aside their principles and effects; rather, he'd simply codify these principles, as best he could synthesize them, into the nation's founding charter—or task the Congress with enacting them as

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97. 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.").

98. *See, e.g.*, William Baude et al., *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1185 (2024).

99. *See, e.g.*, Ray Worthy Campbell, *Artificial Intelligence in the Courtroom: The Delivery of Justice in the Age of Machine Learning*, 18 COLO. TECH. L.J. 323, 323–24 (2020).

bedrock statutes.[100] All law would be statutory law; it would be refined not through precedent, but through amendment.

Of course, this is its own can of worms—and I think it's worth opening. Such a system already exists: It's called civil law, and the vast majority of nations—particularly the continental European ones—have it.[101] And it's no coincidence that civil law nations are the ones lining up to have legal AI digitize and digest their legal codes; internally, they've already done the fast math this article is attempting to sketch out. But this is America—descended from the English. Am I really going to add to my list of tall claims that another natural end of the textualist project is a civil law system? Yes, actually—Judge.AI would literally be a civil law system.

Common law and equity are enemies of predictability because they're unwritten—at least in the relevant sense. Sure, they're technically "written" in that casebooks and legal opinions have printed words in them; but the former cost a quarter of a million in tuition dollars and the latter might even cost more depending on the deal you finagle with Westlaw.[102] Unlike statutes, these sources of law

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100. I realize that no First Congress, legislating on a totally blank slate, would immediately devise all the nuances of Western common law. In keeping with my forthcoming admission that common law likely does create better laws than pure statutory law, I also admit—perhaps to Hayekian applause—that it is precisely the slow-burning tradition and trial-and-error of common law that makes it so just. But notice that we're using words like "better" and "just." *See infra* Section III.B. These are not textualist concerns; thus, adherents should see no issue with thanking the common law for its service, stealing all of its best ideas, and then putting it out to pasture with the expectation that the legislature will carry the doctrinal load thenceforth.

101. Thanks to the University of Ottawa's helpful tool, you can jump online and check for yourself. *See JuriGlobe*, UNIV. OF OTTAWA, https://www.juriglobe.ca/eng/ [https://perma.cc/3FDB-EJGH]. You'll find I'm right.

102. A strange counter: What if Westlaw, through the grace of its own heart or that of some donor, became free to use? To the extent this would fix the problem, note that Judge.AI would basically create this exact scenario but faster—saving the masses the trouble of a Boolean search. But I also wonder if a layperson would have any concept of where to begin when faced with such a vast database. Query, of course, whether the layperson is any less overwhelmed when faced with the enormity of the U.S. Code. I still think the U.S. Code is preferable. There, at least, the inscrutable blocks of text one encounters are unquestionably binding law; on Westlaw, one might spend hours unwittingly reading disanalogous precedents—or cases with a rainbow of ominous flags beside them.

are not just a Google search away for the layperson; to even find them, let's face it—you have to work in a law office.

That's a shadow law, no matter how consistently judges may apply it in adherence to stare decisis. And the legal profession seems to know it deep down, as it's always had the innate impulse to codify the common law—evidenced at the state level by the various Restatements.[103] But state courts can decline to adopt these Restatements on a whim.[104] And, often, their answer to a pointed question of common law is a learned, scholarly shrug—the doctrine can be that muddled.[105]

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103. With modern prolixity of case law, note that these Restatements have become nightmarish to write—evidenced by the fact that the Third Restatement of Torts, helmed by some of the undisputed historical heavyweights of the private law sphere, has been a work in progress since about 1980. *Compare* RESTATEMENT (SECOND) OF TORTS (AM. L. INST. 1979) *with* RESTATEMENT OF TORTS, THIRD, PRODUCTS LIABILITY (AM. L. INST. 1998), RESTATEMENT OF TORTS, THIRD, APPORTIONMENT OF LIABILITY (AM. L. INST. 2000), RESTATEMENT OF TORTS, THIRD, LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (AM. L. INST. 2009 & 2012), and RESTATEMENT (THIRD) OF TORTS, LIABILITY FOR ECONOMIC HARM (2020). Assuredly, most of that difficulty comes from reconciling fifty different bodies of state law—a question I'll take up shortly. But some difficulties simply stem from the ambiguity of the doctrines themselves as they manifest in any state. Note also that statutory law, at both the federal and state level, is rapidly encroaching upon the common law sphere—and, some would say, by necessity. *See* J. Lyn Entrikin, *The Death of Common Law*, 42 HARV. J.L. & PUB. POL'Y 351, 356 (2019) ("The critical issues of the day simply cannot realistically be resolved by the slow pace of incremental, case-specific, common law adjudication.")

104. *See* Tincher v. Omega Flex, Inc., 628 Pa. 296, 309 (2014) (wherein the Pennsylvania Supreme Court "decline[s] to adopt the Restatement (Third) of Torts" in the products liability context); Bifolck v. Philip Morris, Inc., 324 Conn. 402, 408 (2016) (declining to follow the Restatement (Third) of Torts' recommendation to use the "risk-utility" test over the "consumer expectations" test in the products liability context); Weston Grp., Inc. v.

A.B. Hirschfeld Press, Inc., 845 P.2d 1162, 1165 (Colo. 1993) (declining to adopt the manifestation of intent requirement from the Restatement (Second) of Contracts); Crisp v. VanLaecken, 130 122 P.3d 926, 927 (Wash. Ct. App. 2005) (declining to apply the Restatement (Third) of Property regarding easements).

105. For example, the draft Restatement (Fourth) of Property declares that "control, for purposes of possession" in the trespass context, "is widely regarded as a matter of social fact." RESTATEMENT (FOURTH) OF PROPERTY § 1.2A (AM. L. INST., Tentative Draft No. 4, 2023). This raises an open question as to whether holders of certain tertiary possessory interests—such as family relation to a possessor—have standing to sue for trespass. Another morass within trespass: When a journalist uses misrepresentation to

Note, too, that these are just problems arising in the state law areas where we're lucky enough to have Restatements. Nobody's even attempted a Restatement (First) of Federal Common Law; indeed, debates rage as to what federal common law even is and how much of the stuff even exists.[106]

The bottom line is this: Unwritten norms like common law and equity are inaccessible to the common man and thus definitionally unpredictable. Of course, the normative counter here is that common law tends to make for better, more cohesive law than statutory law.[107] I don't disagree; any first year law student who's had to outline Torts and Constitutional Law in the same semester can attest that the former flows rather algorithmically while the latter is a morass. And that irony's not lost on us. See, common law is just Judge.AI in reverse—hear me out.

All legal systems must deal with the problem of fallible human legislators who cannot possibly anticipate, on the front end, all the consequences of the laws they pass. Common law evades this

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obtain consent to enter premises to investigate, does the misrepresentation vitiate the consent? *See id.*

106. *See* Sosa v. Alvarez-Machain, 452 U.S. 692, 725–26 (2004) (Scalia, J., concurring in part and concurring in the judgment) (discussing the changing conception of common law within federal jurisprudence as shifting from discovery to manufacture); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 855–56 (1997). *See also* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731–32 (Scalia, J.) (emphasizing a dynamic approach in interpreting the Sherman Act: "[W]e do not ignore common-law precedent concerning what constituted 'restraint of trade' at the time the Sherman Act was adopted . . . . It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.") Even ardent textualists like Justice Scalia admit that federal statutes may invoke the dynamic common law meaning of certain phrases; whether this is properly understood as federal common law is more of a semantic question when confronted with the unusual interpretive methodologies observed in federal antitrust jurisprudence. *See* United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001) (discussing the common law rule of reason and its operation in Sherman Act jurisprudence). *See also* William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the Common Law Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 (1982).

107. *See, e.g.*, Edward E. Cheng et al., *Bending the Rules of Evidence*, 118 NW. U. L. REV. 295, 302 (2023) (noting that codified versions of evidentiary rules regarding privilege tend to be "bent" more than their common law alternatives).

problem by creating a body of law that amends itself ex post in light of individual cases. If the existing doctrine didn't anticipate X occurrence, the doctrine changes, retroactively, to accommodate X occurrence going forward. And, insofar as doctrine cannot practically be changed to accommodate fringe cases, the equity power exists as a release valve for judicial mercy (or opprobrium). Whereas Judge.AI strives, with its ex ante statements, to make the law's results predictable (whatever those results may be), the common law judge strives, with his ex post review, to make the law's results good and functional (regardless of whatever the understanding of the law prior to the case might have been).[108] The common law is legislation via hindsight whereas the ex ante tool aids legislation via foresight.

I readily concede that hindsight might be far more conducive to making good laws than Judge.AI would be.[109] Indeed, the revered geniuses of American legal history tend to be the common law giants—Hand, Cardozo, and Traynor, among others.[110] But let's face it: We don't revere these men for their ability to parse a gerund. We revere them as policymakers, as Solomonic figures who looked at weird situations and made wise adjustments in light of them to

108. And retired Justice Stephen Breyer recently endorsed a sort of constitutional common law geared toward the same end of functionality—or, as he often dubs it, "workability." STEPHEN G. BREYER, READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM 111 (2024) ("[c]onsiderations of workability, not the use of . . . textualist methods, normally provide a better way" to interpret the Constitution). Justice Breyer trusts himself, as the wise ex post reviewer, to plug the holes that Congress lacked the foresight to fill.

109. At least in the short term.

110. *See, e.g.*, United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (wherein, upon realizing there is "no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels," the learned Learned Hand makes up his own without so much as a case cite—and coins the classic Hand formula); Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (wherein then-Judge Cardozo advances the famous—and unenumerated—proximate cause standard for tort negligence); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963) (wherein, a decade in advance of the Consumer Product Safety Act, Justice Roger Traynor of the California Supreme Court synthesizes several disparate tort precedents into the brand-new doctrine of strict products liability).

better work the law pure.[111]

That's not what the textualist project wants; between a system of good laws capriciously made and a system of bad laws publicly amendable, we already know which system Scalia and his lot would prefer.[112] I'm going to say here what Scalia, perhaps curiously, never would: Non-statutory law—be it common law, equity, or royal edict—is incompatible with the textualist project.[113]

111. *See* DWORKIN, *supra* note 83, at 400 ("Sentimental lawyers cherish an old trope: they say that law works itself pure."); LON L. FULLER, THE LAW IN QUEST OF ITSELF 140 (1940) (marveling at "the eternal process by which the common law works itself pure and adapts itself to the needs of a new day.").

112. *See* Scalia, *supra* note 26, at 1179. Indeed, Scalia even invokes Justice Holmes and company—as well as the classic common law cases, the likes of *Hadley v. Baxendale*, that Professor Kingsfield taught Mr. Hart—only to make the claim that the "fun . . . playing king [inherent in] common-law judg[ing] . . . would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy." SCALIA, *supra* note 19, at 6–9. It's curious, then, that Scalia clarifies: "My point in all of this is not that the common law should be scraped away as a barnacle on the hull of democracy. I am content to leave the common law, and the process of developing the common law, where it is." *Id.* at 12. Why? Apparently because "[i]t has proven to be a good method of developing the law in many fields—and perhaps the very best method." *Id.* But what are those "fields" in which common law is the "best method" of lawmaking—and does it bother Scalia that a legislature can, at its whim, intrude upon them? Note that Scalia makes these claims without any attempt to harmonize the common law and democracy, opining instead that "[a]n argument can be made that development of the bulk of private law by judges . . . is a desirable limitation upon popular democracy." *Id.* Why is private law so uniquely beyond the grasp of the majority to advance? Would Scalia really argue that the tort regime for when schoolchildren kick each other is too much for a state legislature to handle, but at the same time the U.S. Congress is perfectly equipped to lay out a health care regime for the entire nation without "aristocra[tic]" help? *Compare* Vosburg v. Putney, 50 N.W. 403 (Wis. 1891) *with* King v. Burwell, 576 U.S. 473, 500 (2015) (Scalia, J., dissenting) (decrying the majority's perceived aristocratic policy choice that "[t]he Affordable Care Act must be saved."). Of course, Scalia does clarify that our era can be distinguished from the common law heyday because "we live in an age of legislation, and most new law is statutory law." SCALIA, *supra* note 19, at 13. Pure applesauce. America has never not been in an "age of legislation"; Congress passed its first statute in 1789 and, even if had not done so until yesterday, it would have had the capacity to pass any number of laws at any point in its history. *See* 1 Stat. 23 (1789). So long as Congress could legislate away all vestiges of common law control (and, really, under any circumstances), I fail to see how Scalia can carve out any remaining role for the common law judge in a textualist world.

113. One might rebut that textualists are ideologically consistent in demanding

4. Federalism

This is less of a rebuttal and more of a genuine question: How would Judge.AI interact with a federal system? Would a newly formed Judge.AI government even want to retain federalism? I see no reason why it shouldn't. To be sure, federalism's highest end is not predictability but rather randomness or mutation as a means of incubating creative policy ideas.[114] But it pursues that end without sacrificing any of the predictability democracy provides; so long as the states themselves are democracies and their judges are textualists, society is always ordered towards predictability no matter how varied the policies may become across state lines.[115]

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textual adherence for statutory matters while keeping a looser leg for common law matters. That argument would hold purchase if statutory law and common law had unique spheres of matters over which they respectively presided. But they don't; Congress is free, at any time, to barge into any common law space it wishes and regulate it with a statute. Now, I take the point that Congressional silence might represent a tacit decision, on the people's behalf, to leave an area of law to the common law process—that is to say, common law judging is tacitly authorized by Congress. But there is no statute enacting or enabling the common law; statutory silence, without explicit assigning language, does not logically direct certain claims to a different legal system but rather places those claims beyond any legal system. One final rebuttal to address: Many statutes make explicit reference to the common law system and seek an interplay with it. *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731–32 (Scalia, J.) (emphasizing a dynamic approach in interpreting the Sherman Act: "[W]e do not ignore common-law precedent concerning what constituted 'restraint of trade' at the time the Sherman Act was adopted . . . . It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890."). All I can say is that this "dynamic" approach ensures that large swaths of statutory law reside in the bowels of Westlaw and thus beyond the public reach—undermining the textualist project.

114. Chief Judge Jeffrey Sutton of the Sixth Circuit refers to the states as "laboratories of constitutional experimentation." *See generally* JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2022). In doing so, he echoes Professor Michael Greve's longtime refrain. MICHAEL S. GREVE, AM. ENTER. INST., LABORATORIES OF DEMOCRACY 2 (2001) (touting the "genuinely diversified, experimental politics" states provide). Of course, Greve himself was admittedly borrowing a broader concept from Justice Louis Brandeis—albeit one which Greve sought to refine. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

115. Of course, there is a practical governance problem here: What if each state wants

The one place unpredictability does enter the federalist picture, of course, is in choice of law matters.[116] Insofar as I'm positing a from-scratch regime, we would want Judge.AI to come equipped with an ironclad set of federal choice of law rules that could be queried ex ante. I realize how that might sound like an aspirational handwave; the current state of choice of law analysis is greatly lacking in federal guidance, and leads, all too often, to judges making incredibly capricious decisions.[117] But this landscape—while likely digestible outright by Judge.AI—is another wellspring of unpredictability in which even Judge.AI's consistent coin-flip method would provide greater certainty than current doctrine.

5. *Stare Decisis*

Would Judge.AI refer to judicial precedents? Positing a from-scratch government in which all laws were specifically crafted to feed Judge.AI, the answer is no. Even if the machine did use its own decisions as a recall device, that would be the precedents' only function—and the precedent check would happen so quickly as to render it indistinguishable from the stock textual analysis. My

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to use its own AI? For that matter, what if one state doesn't want to use AI at all? And what if that one state further wanted to withhold its legal data from all the other AI models being used in the country? Or just wanted to withhold it from certain states' models? Or just from the federal model? What would the property rights regime look like here? And would the federal government want to standardize the field—or perhaps prevent withholding under a line of reasoning adjacent to the Dormant Commerce Clause? These are all questions our profession should do its best to get ahead of.

116. Stephen Sachs, Keynote Address on Appointment as Antonin Scalia Professor of Law at Harvard Law School: Life After *Erie* (Nov. 30, 2023) ("Yet starting with the very day Erie was decided, federal courts have honored this rule only in the breach—inventing "federal common law" that preempts state rules without any textual authority. And their attempts to force all these sources into state and federal boxes have left us unable to understand basic aspects of American jurisprudence . . .").

117. *Compare id.* ("Just as graders of a standardized test might be tasked with enforcing rules of grammar and spelling as they're generally practiced, so too judges might be tasked with applying law, and not making it—as the vast majority of lawyers and officials at the Founding understood that task to be.") *with* Joseph William Singer, *Multistate Justice: Better Law, Comity, and Fairness in the Conflict of Laws*, 2015 U. ILL. L. REV. 1923, 1959 (2015) ("Sometimes those reasons [for a conflict of laws case] will focus on achieving what the forum views as the substantively just result (better law).").

claim gets stranger the more you think about it: Is yet another end result of textualism the death of case law?

Yes. And it makes sense, as cases are not statutes; if predictability is our watchword, these inaccessible and undemocratic documents cannot have legal force in their own right. Perhaps the Supreme Court's most consequential living textualist, Justice Clarence Thomas, sort of takes this hardline view of precedent—expressing willingness to overturn cases whenever "clear error" is present.[118] In truth, though, even Justice Thomas' position leaves more wiggle room than Judge.AI would and a textualist should. At the algorithmic level, any amount of incorrectness is unacceptable and objectively demands change.[119]

Now, the Court's landmine decision in *Dobbs v. Jackson Women's Health Organization*[120] spurred much debate over reliance interests and the role stare decisis plays in maintaining predictability in the law. I don't deny that the national abortion regime would have remained more predictable, in one sense, had Roe survived—but that's predictability with an asterisk. Against a textualist backdrop, any case that's even arguably out of step with legal text has the looming potential to be overruled.[121] The court may prop it up for

118. Gamble v. United States, 587 U.S. 678, 711 (Thomas, J., concurring) ("I write separately to address the proper role of the doctrine of stare decisis. In my view, the Court's typical formulation of the stare decisis standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law."); *see also* Hon. Gregory E. Maggs, *Justice Thomas and Stare Decisis*, HARV. J.L. & PUB. POL'Y: PER CURIAM (Aug. 30, 2021) ("Justice Thomas, unlike his judicial colleagues, believes that the Supreme Court should never follow demonstrably erroneous precedent.").

119. Justice Thomas' position is not absolute, I'd imagine, due to a sense of judicial humility; while he might like for all of his pet legal theories to be correct, Justice Thomas would likely hesitate to subject the nation to each one for fear that some of them might prove to be wrong. Judge.AI would have no such scruple because, as a matter of zeroes and ones, it would always know that it was right.

120. 142 S. Ct. 2228 (2022).

121. And note that, against any other interpretive backdrop, precedents are even less safe from judicial whim. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 687–88 (2015) (Roberts, C.J., dissenting) (underscoring the dramatic regime change brought on by Justice Kennedy's alleged non- textualist activism). Now, I can imagine the rebuttal: If "looming textualist reversal" is what makes cases like Roe "unpredictable" according

decades based on unwritten respect for reliance interests, as it did with Roe, but the holding lives on borrowed time and so does the predictability of its regime—as shocked millions realized after Dobbs. And though Justice Thomas considered Roe one of those "clearly errant" cases, the same specter hangs over any case that is even slightly incorrect as a textual matter.[122] Ultimately, stare

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to my weird, Humeish use of the term, here's an idea—just don't overrule those cases. Rather, give the public the confidence that their rights are safe under those precedents and don't "loom" over them in any way. Okay—but would our objector desire that the Supreme Court never overrule any precedent? Even *Plessy*? Even *Dred Scott*? I presume not, which means our objector must define what she means by a Roe-type "super precedent" that "no serious person would propose to undo even if [it was] wrong." Amy C. Barrett & John C. Nagle, *Congressional Originalism*, 18 U. PA. J. CONST. L. 1, 2 (2016) What is a "serious person" and which cases does she hold sacred? Are they just cases where major rights are at issue? Cases that are close enough to correct? Cases with substantial reliance upon them? Note the word choice: "Major," "enough," "substantial." Each of these is a value judgment—meaning each metric varies by judge and thus breeds unpredictability. And, to the extent our objector would have the Court refrain—in whole or in part—from overturning precedents at all (perhaps even supporting a one-way ratchet favoring rights expansion), I renew my topline claim: Law made by precedent, if in any way a departure from or embellishment upon text, is not written law in the relevant sense and thus breeds unpredictability in its own right. Of course, my rebuttal preaches to the choir—our objector is likely well aware, already, that she is not a textualist and feels no need to justify her arguments according to textualist maxims. Fair enough—*see infra*, Section III.B.

122. *See Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) ("For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including Griswold, Lawrence, and Obergefell. Because any substantive due process decision is 'demonstrably erroneous.'"); Ramos v. Louisiana, 140 S. Ct. 1390, 1409 (2020) (Thomas, J., concurring in the judgment) (dubbing Obergefell an "incorrect decision[]" based on its treatment of fundamental rights); Gamble, 587 U.S. at 711 (Thomas, J., concurring) ("[T]hat demonstrably erroneous blunders of prior courts should be corrected . . . was accepted by state courts throughout the 19th century."). *But see* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1736 (2013) ("Once a case like *Brown v. Board of Education* achieves superprecedent status, its vitality is out of the Court's hands for as long as the widespread buy-in continues. Public support does not immunize these cases from overruling; it immunizes them from being challenged in the first place."). Then-Professor and now-Justice Barrett's theory of a "superprecedent" is a sleight of hand. To argue that judges should let sleeping dogs lie because a case is not, at present, seriously or sufficiently litigated, is to shirk from an honest textualist's responsibility. To argue otherwise is to argue for the development of a regime premised on error and uncertainty. Cementing clear error only furthers the harm; it does not advance a predictable jurisprudence. *See* Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992) (O'Connor, J.) ("The sum of the

decisis predictability is illusory whereas textual accuracy is immutable;[123] and, because a utopian Judge.AI kernel would never make textual errors, deference to precedent would be wholly unnecessary in any event.

6. Appeals

Would there still be appeals in the Judge.AI universe? Certainly not in the current sense; gone would be the practical "district," "appellate," and "Supreme" stratifications since Judge.AI could check its work twice in the span of an extra second. But surely something must check the machine's work at the margins. I realize that, by now, the "utopian" elements of my hypothetical probably come off like a collective deus ex machina to quell dissent. While I'm confident—to my own admitted disquiet—that Judge.AI could legitimately reach near-perfect predictability, there remains the eternal fear of a glitch, bug, or patent falsehood.

Having some other machine check that falsehood, though theoretically sound, doesn't feel satisfying. Likely, there would need to be some human entity screening for the most egregious syntactical errors. This is in keeping with the one backstop against literalist textualism that basically everyone agrees upon: A court's capacity to correct scrivener's error.[124] Human review in such a limited

precedential enquiry to this point shows Roe's underpinnings unweakened in any way affecting its central holding. While it has engendered disapproval, it has not been unworkable . . . . Within the bounds of normal stare decisis analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming Roe's central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.").

123. Of course, law itself is illusory. I realize I'm indulging several legal fictions when I treat judge-made concepts of stare decisis as any less "real" than the judge-created concept of textual fidelity. If predictability is the lodestar, why can't a judge just dogmatically adhere to stare decisis to that end instead of the text? Aren't they interchangeable? I take the point, but would redirect objectors to my explanation of the unpredictability inherent in non-statutory laws.

124. *See* Nix-Chavez v. Garland, 141 S. Ct. 1474, 1480 n.1 (2021) ("[T]he "scrivener's error" doctrine . . . applies only in exceptional circumstances to obvious technical drafting errors."); *see also* SCALIA & GARNER, *supra* note 25, at 237–38. For a parallel discussion on the future of oversight in a technological courtroom, *compare* Andrea Roth, *Machine Testimony*, 126 YALE L.J. 1972 (2016) *with* Edward K. Cheng & G.

capacity would not attack predictability, but the standard of review would have to be uniquely high to ensure that all errors not stemming from bugs in the code or ghosts in the machine would remain operative law.[125]

7. Gridlock

Here's a more practical concern: Congress doesn't legislate anymore. That would be a problem for Judge.AI; if Congress wrote a catastrophically broken law and the robot judiciary was bound to apply it by its terms, it would be all the more catastrophic if Congress was incapable of fixing that law. Even the strictest of purported textualists would likely complain that predictability is good until the prediction is that things will be perpetually bad.[126]

A few responses. First up is my tried and true: You're fighting the hypothetical.[127] But that cop-out plays into the second and more

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Alexander Nunn, *Beyond the Witness: Bringing a Process to Modern Evidence Law*, 97 TEX. L. REV. 1077 (2019).

125. I'm well aware that LLMs, in their current state, have been known to "hallucinate"—that is, they sometimes cite made-up cases that no court has ever decided. And, God knows, we've all heard of that one idiot in New York. *See* Benjamin Weiser, *Here's What Happens When Your Lawyer Uses ChatGPT*, N.Y. TIMES (May 29, 2023),https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html. But my hypothetical takes place in 2030—and you're fighting it again. I'm positing a utopian system that wouldn't hallucinate cases; scrivener's error, to the extent that it occurred, would be hen's tooth rare. And Judge Newsom suspected that my hypothetical might soon be reality: "LLM technology is improving at breakneck speed, and there's every reason to believe that hallucinations will become fewer and farther between." Snell v. United Specialty Ins. Co., 102 F.4th 1208, 1230 (11th Cir. 2024) (Newsom, J., concurring). He's right; already, some present-day LLM's—ones designed specifically for legal interpretation—have largely purged the hallucination issue.

126. Of course, as I'll discuss in Section III.B, those purported "strict textualists" likely wouldn't be strict textualists—or even textualists at all.

127. Now, I readily concede that, if we flipped a switch tomorrow and algorithmatized the entire U.S. legal system, the world would end—Congress would be woefully ill-equipped. But nobody's talking about doing this tomorrow; as a technical matter, I'm not even talking about doing this in America. *But see* Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev., 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring) ("Start with concerns that Congress cannot act fast enough in a crisis. The government's response to the coronavirus pandemic proves otherwise. Congress acted swiftly to pass broad relief for the general public. But it also switched out the hammer for the scalpel when necessary.").

substantive counter: The flagellation thesis.[128] Again, my hypothetical posits a new, from-scratch government; I think such a government, driven by Judge.AI, would be far less susceptible to a do-nothing legislature. Granting the fairly large assumption of a well-contained executive, the problem becomes existential: If Congress doesn't make the trains run on time, they won't run on time. Judge.AI removes one of Congress's escape valves by essentially removing a branch of government and, as a result, I predict legislative activity would increase dramatically—call it a culture of amendment.[129] Ex ante queries would reveal countless problems in the written law; countless petitions would be filed, and countless new laws would be passed.

Now, the Framers wouldn't have liked this.[130] And, ironically, that was for predictability reasons: If the laws change every day, how can you possibly predict what they'll be tomorrow? But I've already discussed how courts—via common law, equity, or outright atextual activism—make exactly the sort of slight tweaks that the Judge.AI legislature would be codifying. The Constitution tells the tale aptly: The original document was four handwritten sheets of parchment long—and it's not much longer today. Reading the words on the page, you'd think that no new Constitutional law had been created since 1992.[131] And yet, you'll find that the A+ Constitutional law outline in your local law school bank runs about a hundred pages long and changes annually. When you hold up that A+ outline, you are holding the true Constitution of the United States;

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128. That is, the thesis that strict textualism incentivizes clear drafting. *See* Hon. Jay Mitchell, *Textualism in Alabama*, 24 FEDERALIST SOC'Y REV. 98, 106 (2023) ("When judges refuse to fix policy problems for the legislature, the legislative branch has a stronger incentive to draft clear, coherent laws at the outset.").

129. *See* Lamie v. United States Trustee, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.").

130. *See* M'Culloch v. State, 17 U.S. (4 Wheat.) 316, 407 (1819) ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.").

131. *See* U.S. CONST. amend. XXVII.

it is prolix, it gets longer every year, and it costs a quarter of a million dollars to access. I'd prefer that our unpredictabilities be transparent and thus predictable in themselves; accordingly, I see no textualist argument against the culture of amendment that Judge.AI would foster.

8. Juries and Factfinding

Lastly, a genuine question: We see how Judge.AI could apply law to facts, but how does it find facts? Factfinding is law's most beguiling fiction—the idea that a person who did not see something happen can still somehow "know" that it happened.[132] Every legal system must indulge this fiction to function, but mine suspends the disbelief at a lower altitude than do civil law systems; whereas those systems do trust a single judge to discern facts in every case,[133] American law requires a consensus of twelve laypeople to support the fiction on the facts that really count.[134]

The platonic end of factfinding would seem to be truth; to the extent possible, we'd like factfinding to be less of a fiction.[135] And it seems at least somewhat intuitive that a thing must be—or at least seem—more true to convince twelve people than to convince just one. But part of that reason is the human flaw of bias. Indeed, the American system demonstrably fears the potential of bias even among a group of twelve men;[136] we can imagine how much they'd fear a judge as a one-man-jury. But the threat of this kind of bias

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132. It's hard to dispute that this is fictional, particularly according to Hume's definition of knowledge. *See generally* DAVID HUME, A TREATISE OF HUMAN NATURE 70 (Lewis Amherst Selby-Bigge ed., Oxford Clarendon Press 1896) (1739-40) (distinguishing "memory" from "imagination").

133. *See* Hugo Arias Salgado, *How Civil and Common Law Countries Treat Fact-Finding*, MONDAQ (Sept. 26, 2016), https://www.mondaq.com/civil-%20law/526638/how-civil-and-common-law-countries-treat-fact-finding [https://perma.cc/9X74-V8Q8].

134. That is, murder facts, rape facts, etc.—facts that lend themselves to substantial punishment and opprobrium.

135. *See, e.g.*, FED. R. EVID. 802 (the rule against hearsay); FED. R. EVID. 803, 804 (outlining exceptions to the rule against hearsay where circumstances surrounding the out-of-court statement are conducive to truthfulness); FED. R. EVID. 404, 406, 412, 413, 414, 415, 608, 609 (the rules and exceptions pertaining to proper character evidence).

136. *See generally* FED. R. CIV. P. 47 (outlining jury selection rules for civil cases); FED. R. CRIM. P. 24 (same for criminal trials).

isn't arbitrariness; here, we've found one American institution whose lodestar almost certainly is not predictability.[137] The threat is that bias will lead to objective falsehood; indeed, even now, we allow judges to rip the case from the jury's hands and issue a judgment notwithstanding the verdict if the jury's fact finding seems sufficiently implausible.[138] While predictability still cabins this system via various procedural and evidentiary rules, what happens between the lines is ultimately a truth-seeking endeavor.[139]

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137. American juries have not exactly been known for their predictable deliberations. *See* Neil Henderson & Marc Fisher, *O.J. Simpson Acquitted*, WASH. POST (Oct. 3, 1995), https://www.washingtonpost.com/archive/politics/1995/10/03/oj-simpson-acquitted/3307d174-cbe2-46c5-80c6-0d0b90a0d889/; *see also* Jonas Jacobson et al., *Predicting Civil Jury Verdicts: How Attorneys Use (and Misuse) a Second Opinion*, 8 J. EMPIRICAL LEGAL STUD. 99, 99 (2011). And don't get me started on the unpredictable vagaries inherent in burdens of proof and the dubious likelihood that juries properly understand them. Philosophy Larry Laudan's work on the subject is insightful. *See generally* Larry Laudan, *The Rules of Trial, Political Morality, and the Costs of Error: Or, Is Proof Beyond a Reasonable Doubt Doing More Harm than Good?*, *in* 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 195 (Leslie Green & Brian Leiter eds., 2011).

138. *See generally* FED. R. CIV. P. 50. Not very predictable—and note that the standards of review that would check a district judge's work on a judgment notwithstanding the verdict would suffer the same vagaries Laudan sees in burdens of proof.

139. Now, here's a great rebuttal I got from a colleague at Yale: If truth is the aim of trial, what accounts for evidentiary privileges like marital or attorney-client privilege? *See In re* Rsrv. Fund Sec. & Derivative Litig., 275 F.R.D. 154, 157 (S.D.N.Y. 2011) (articulating the common-law marital privilege); FED. R. EVID. 502. If a husband confesses a murder to his wife or lawyer, that's probably the truth. Indeed, the system almost views it as too true; due to the nature of the relationship between confessor and listener, we willfully bar that truth from trial. The same goes for various public policy exceptions, like prohibitions on evidence regarding subsequent remedial measures. FED. R. EVID. 107. What gives? Perhaps these exceptions are predictability-based—so that even criminals can retain some predictably safe confidants. More likely, though, they are morality-based, making the systemic decision that the sanctity of certain relationships is a social benefit that outweighs the social cost of keeping truth from a jury's ears. In any event, all I can really say is that these are exceptions and exceptions should not speak for the rule. And I'll note that these exceptions invariably dissolve in the face of a dire need for truth. *See, e.g.*, Morales v. Portuondo, 154 F. Supp. 2d 706 (S.D.N.Y. 2001) (suspending the attorney/client privilege when the evidence at issue is so vital that it's exclusion would frustrate the defendant's 6th Amendment right to present a case); *In re* Pfohl Bros. Landfill Litig., 175 F.R.D. 13, 18 (W.D.N.Y. 1997) (sketching out the crime/fraud exception to the attorney client privilege). On the whole, I don't think this nuance has any real impact on Judge.AI's capacity to play nicely with a fact finding regime. And, if sanctity of certain relationships is vital to the desired

How does Judge.AI fit into that scheme? A few ways. To begin, we can imagine a jury system coexisting with Judge.AI—but in a more passive role, simply establishing a record of what happened. For Judge.AI's ex ante input component to function, it would not suffer a jury reading a unanimous verdict; the jury would have to make decisions strictly as to facts and feed those facts into the machine so it could derive legal conclusions from them. Of course, this is a strange concept because it posits that trials would still occur in the Judge.AI universe—over which Judge.AI would presumably preside. Does this refute my earlier claim that Judge.AI spells the death of the lawyer? Potentially; bullish as I've been on AI's potential, even I'm skeptical that it could reliably deduce whether a witness is lying.[140] Perhaps Judge.AI could consult the pleadings and devise a series of questions designed to procure the facts necessary to feed the legal algorithm; still, I feel there's something inherently effective about direct and cross-examination that might better be left to humanity.[141]

But I'm starting to sound entirely too reasonable all of a sudden; tap the brakes—or rather, slam the gas. Let's close with a bit of pure futurism: How could Judge.AI best improve truth seeking? On its

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evidentiary regime, Judge.AI could easily make the accommodation.

140. *But see* Jonas Gonzalez-Billindon et al., *Can a Robot Catch You Lying? A Machine Learning System to Detect Lies During Interactions*, 6 FRONTIERS IN ROBOTICS & AI 1, 10 (2019) ("Considering all the classification results, it has been demonstrated that the eloquence, the time to respond, average and minimum pupil dilation, the number of saccades and question type can be used to train a lie detector system. Looking at the misclassifications errors of the different considered models between the robot and human data, interacting with a human interviewer produced better precision in detecting lies.").

141. Note that I wouldn't have Judge.AI flipping a coin to decide between characterizations of fact. That's not just because the specific granularities of competing fact patterns are unpredictable ex ante. It's also because we find ourselves, for once, in the midst of a truth-seeking endeavor that exists separate from the sphere of democratic governance. Let's be clear, though: I don't think the existence of this one truth-seeking enterprise undermines my claims of textualist or democratic nihilism. On the contrary, it bolsters them because we don't let juries decide the hot button questions in cases like *Dobbs* or *Heller*. While we employ a method specifically targeted at truth in pursuit of fact, we deliberately jettison that method for questions of pure law. What does that say about our priorities?

own, potentially not much. Enter: The Metaverse. I'm keeping a straight face and would ask that you do the same—especially given the billions of dollars Meta, Disney, and other corporate giants have poured into this nascent digital ecosystem.[142] As of today, it looks like The Sims, and nobody wants to use it. But the pandemic tested the extent to which people could work productively from home in a totally digital environment—and, in terms of productivity, if not emotion, people passed with flying colors.[143]

Elon Musk is developing a computer chip to put in your brain—and it's coming sooner than you think.[144] Why's he doing that? It's because that's what'll make the Metaverse work. Commenters have already seen enough: Once the Musk chip fully immerses our brains in the Metaverse, that's it—just as everybody has to have a smartphone today, everybody will have to be in the Metaverse just to stay economically relevant tomorrow.[145] What's this got to do with juries? Well, here's the funny thing: When you live your life inside of a computer simulation, the computer knows everything you do. That's the true death of every lawyer along with the death of the jury trial; hook Zuckerberg's Metaverse up to Kieffaber's Judge.AI and you have the utopian dream whereby predictability and objective truth intersect—at least objective truth as to what things have descriptively happened in the world. In the Judge.AI Metaverse, the state will have perfect command of all facts and all law such that there will never be any ambiguity again.[146] It's

142. *See Companies Want to Build a Virtual Realm to Copy the Real World*, ECONOMIST (Nov. 13, 2021).

143. *See* Mike Elgan, *Are We Destined to Work in the Metaverse?*, COMPUTERWORLD (Mar. 17, 2022), https://www.computerworld.com/article/1618983/are-we-destined-to-work-in-the-metaverse.html [https://perma.cc/DW6N-7642].

144. *See* Rupert Neate, *Elon Musk's Brain Chip Firm Neuralink Lines Up Clinical Trials in Humans*, GUARDIAN (Jan. 20, 2022), https://www.theguardian.com/technology/2022/jan/20/elon-musk-brain-chip-firm-neuralink-lines-up-clinical-trials-in-humans [https://perma.cc/6NZD-EN93].

145. *See id.*

146. Of course, in light of the Supreme Court's decision in *Moody v. NetChoice LLC*, 144 S. Ct. 2383 (2024), a very real debate lingers as to who will control this Metaverse. Will it even be the state? Or will it be private companies like Meta and X? If it's the latter, how would that interact with Judge.AI? Would the U.S. legal system have to pay

textualist heaven; doesn't that just sound lovely?

So much for the positive rebuttals, or at least the smattering I've provided. There's no doubt I missed a few, maybe even many—I hope, after all, that this paper sparks debate rather than preempts it. But I stress, in closing, that it is difficult for the judicial futurist to hypothesize about Judge.AI without unwittingly laying out a manifesto for an unprecedented new system of governance. Smirk if you want, I genuinely don't think I'm being fanciful here—AI is this big of a deal, and it must be grappled with at-scale. On to the normatives.

B. Normative Objections

Every objection I've considered to this point has argued that Judge.AI can't be done; I think I've shown, not merely on a technological but on a systemic level, that it can. I turn now to the arguments that it shouldn't be done. In this respect, I can see two general lines of reasoning; namely, there are arguments about how textualism should be performed, and there are arguments about what the ends of governance should be. Each group in turn.

1. Normative Methodological Objections

Judge.AI, by definition, would perform statutory interpretation in a mechanical way. Many textualists would rebut, perhaps angrily, "that's not how you do textualism." Just to really burn their bacon, I'll start off by rubbing it in: Some textualists actually do it that way. Justice Gorsuch demonstrates as much in the citation you've seen coming since you read the intro: *Bostock v. Clayton County*, where he reached the divisive conclusion that employers who discriminate because of sexual orientation have discriminated "because of sex" under Title VII of the Civil Rights Act.[147] He did so by breaking the phrase "because of sex" into two parts: "because

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private companies for the rights to objective facts? Would national governance beyond the Metaverse even matter at all? For a doomy read emphasizing the dire normative need for the state to take charge of the Metaverse while it still can, see Jack Kieffaber, *Spontaneous Disorder: The Protected Sphere and the Coming Web 3.0 Age*, HARV. J.L. & PUB. POL'Y: PER CURIAM (Apr. 14, 2023).

147. 140 S. Ct. 1731, 1737 (2020).

of," which refers to a "but-for cause," and "sex," which refers to biological sex, as it has since the Act's ratification.[148] Since the employers who fired Bostock had met him and knew his biological sex—and could thus denigrate him for not experiencing sexual attraction in a manner consistent with that biological sense—Justice Gorsuch determined that biological sex, as understood in 1964, was a cause of Bostock's firing.[149] And, given the "because of" language, that was all it had to be for the firing to be unlawful.[150]

It's debatable whether Justice Gorsuch got this one right even according to his own rationale, but that rationale is far and away the most conducive to the Judge.AI paradigm: that "express terms" beat "extratextual considerations"—and it's "no contest" because "only the written word is law."[151] I couldn't have said it better myself—but Judge Don Willett of the Fifth Circuit, in a concurrence written two days after *Bostock* and joined by textualist Judges Smith, Elrod, Duncan, and Engelhardt, did:

> In the *Bostock* majority's view, language codified by lawmakers is like language coded by programmers. A computer programmer may write faulty code, but the code will perform precisely as written, regardless of what the programmer anticipated. Courts, no less than computers, are bound by what was typed, and also by what was mistyped.[152]

Clearly, then, the mechanical impulse already lurks in textualism. But let's cut the tension: In textualist circles, *Bostock* was the shot heard 'round the world.

Enraged critics rushed to the fore to insist that there are multiple different types of textualism and that Justice Gorsuch had used the wrong one; the two leading critics in this regard happened to work

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148. *See generally id.* at 1739–41.
149. *Id.* at 1740.
150. *Id.* at 1741.
151. *Id.* at 1737.
152. Thomas v. Reeves, 961 F.3d 800, 825 (5th Cir. 2020) (en banc) (Willett, J., concurring in the judgment); *see also* John O. McGinnis, *Errors of Will and of Judgment*, LAW & LIBERTY (June 25, 2020), https://lawliberty.org/errors-of-will-and-of-judgment/ [https://perma.cc/2QT9-QH59] (remarking that Judge Willett's description of *Bostock* in *Thomas* does not come off as caustic but, rather, approving).

down the hall from him. Indeed, Justice Alito's Bostock dissent alleged that Justice Gorsuch hadn't been doing textualism at all; rather, his method was a "pirate ship . . . sail[ing] under a textualist flag, but . . . actually represent[ing] . . . a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society."[153] Justice Kavanaugh at least conceded that Justice Gorsuch had been doing textualism, but that he had used the very worstest kind: "literalist" textualism—the kind even Justice Scalia didn't like.[154]

Most would say that Judge Willett's soliloquy is the best definition of this term—it's a textualism that reads each word in a vacuum, assigns it a fixed value, and then adds up all the individual words at the end before hitting enter.[155] The alternative is "ordinary meaning"[156] textualism or what one might call "contextual textualism"—that's when "judges . . . ascribe to the words of a statute 'what a reasonable person conversant with applicable social conventions would have understood them to be adopting.'"[157] Justice Kavanaugh's dissent provided a compendium of instances where the reasonable man's understanding trumped the statute's literal

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153. *Bostock*, 140 S. Ct. at 1755–56 (Alito, J., dissenting) (quoting SCALIA, *supra* note 19, at 22).

154. *Id.* at 1825 (Kavanaugh, J., dissenting). To be sure, Justice Kavanaugh is correct that Justice Scalia spoke clearly against literalism. *See* SCALIA, *supra* note 19, at 24 ("[T]he good textualist is not a literalist.").

155. *See* Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 80 (2021) ("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."); McGinnis, *supra* note 153 (referring to interpretation as a "humanistic enterprise" as opposed to Justice Gorsuch's "mechanistic one.").

156. *Bostock*, 140 S. Ct. at 1824 (Kavanaugh, J., dissenting).

157. *Id.* at 1767 (Alito, J., dissenting) (quoting John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 77 (2006)). A citation to Manning is perhaps ironic given that, among blue-chip legal scholars, he is the most (and perhaps the only) associated with literalism. *See, e.g.*, Brian Flanagan, *Revisiting the Contribution of Literal Meaning to Legal Meaning*, 30 OXFORD J. LEGAL STUD. 255, 255 & n.1 (2010) (dubbing Professor Manning a "prominent exception" to the rule that "few legal theorists now believe that a statute's literal meaning is necessarily its legal meaning.").

meaning—even instances where the reasonable man's understanding was objectively incorrect.[158] There's *Nix v. Hedden*, where the Court read the word "vegetable" in a statute to include tomatoes because the reasonable person did not know that a tomato is, in fact, a fruit.[159] And there's *McBoyle v. United States*, where the Court concluded that the reasonable person didn't think of an aircraft as a "vehicle."[160] That's how you do it, says Kavanaugh; a supermajority of the textualist movement seems to agree.[161]

Let's face the music: Is Judge.AI a literalist? A few responses. First, no. Judge Newsom's ChatGPT query in *Snell* notes that "LLMs train on ordinary language inputs."[162] Indeed, these machines learn to speak human language by essentially reading the entire Internet; accordingly, Judge Newsom also expressed optimism towards LLMs' capacity to understand context.[163] Premise 2 of my hypothetical establishes that Judge.AI would be designed according to this basic learning paradigm—so Judge Newsom's insight here is on point: If that's not ordinary public meaning, what is?[164] Accordingly, "mechanical" does not necessarily mean

158. *Bostock*, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting).

159. 149 U.S. 304, 307 n.1 (1893).

160. 283 U.S. 25, 26 (1931).

161. *See, e.g.*, Berman & Krishnamurthi, *supra* note 156, at 80 ("As textualists repeatedly insist, textualism is not literalism."); Kevin Tobia et al., *Progressive Textualism*, 110 GEO. L.J. 1437, 1442 (2022) ("These traditional textualists interpret in overly literal ways, shop among conflicting dictionary definitions, and flexibly contract interpretive contexts in ways that ignore relevant context.") (citation omitted); Robin Dembroff & Issa Kohler-Hausmann, *Supreme Confusion about Causality at the Supreme Court*, 25 CUNY L. REV. 57, 64–66 (2022) (criticizing the *Bostock* majority approach to causality and endorsing Justice Alito's framework); Erik Encarnacion, *Text Is Not Law*, 107 IOWA L. REV. 2027, 2027 (2022) ("But text is not law—and cannot be. Conflating statutory text and law makes a category mistake . . . [it] facilitates the type of literalist interpretations that defenders of textualism purport to reject.").

162. Snell v. United Specialty Ins. Co., 102 F.4th 1208, 1226–27 (11th Cir. 2024) (Newsom, J., concurring).

163. *See id.* at 1227–28 ("The combination of the massive datasets used for training and this cutting-edge "mathematization" of language enables LLMs to absorb and assess the use of terminology in context and empowers them to detect language patterns at a granular level.").

164. *See id.* at 1227 ("Put simply, ordinary-meaning interpretation aims to capture how normal people use language in their everyday lives—and the bulk of the LLMs'

"literalist"; rather, I contend that LLM's are already advanced enough that any level of contextualism can be mechanically reproduced.

My second response is more confrontational: So what if it is a literalist? Justice Kavanaugh says there's "no serious debate" over this question[165]—so let's start some. Recall our bedrock premise: Textualism serves but one master whose name is predictability. Is "ordinary meaning" textualism predictable in the sense I've been describing? I frankly don't think so—and that's because it relies upon "a reasonable person conversant with applicable social conventions."[166] Who is that? Right away, we've got one of our bad human words: reasonable. Reasonable according to what metric? Is "reasonable" a synonym for median? If so, why not just say "median?" Or does "reasonable" imply some quotient of proximity to objective meaning? I doubt it; is the man with the crazy notion that an airplane is a vehicle somehow unreasonable? If enough people believe an objective falsehood, do the numbers alone make those people reasonable?

Then there's this business with "applicable social conventions." Whose? Supreme Court justices tend to run in very particular—that is, rich—social circles. Are we expecting the blue-collar worker to be able to predict the social conventions of that circle? More crucially, are we expecting the Supreme Court Justice and his Ivy

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training data seems to reflect exactly that.").

165. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting). To be clear, he's wrong. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390–91 (2003) (arguing that "respect for the legislative process requires judges to adhere to the precise terms of statutory texts" and precludes them "from making ad hoc exceptions to generally worded laws."). Query, however, the extent to which Professor Manning would admit that he is, in fact, a literalist—or close enough to one to take the rap. *See also* Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 NW. U. L. REV. 1033, 1041 (2023) (cataloging the various "debates over literalism" that have raged over the years). To be sure, these debates often amounted to judges accusing one another of being a literalist rather than individual thinkers defending the approach. Still, Professor Grove establishes that "the Supreme Court in the late nineteenth and twentieth centuries"—ironically, during the heyday of the great common law judges—read statutes quite literally. *Id.*

166. *Bostock*, 140 S. Ct. at 1767 (Alito, J., dissenting) (quoting Manning, *supra* note 158, at 77).

League law clerks to don their costume shop overalls and cosplay as the common man? And does the word "conversant"—as opposed to "fluent"—mitigate the social discrepancies? That is, are we tailoring these laws to the welder who could, in a pinch, hold his own at the Georgetown Prep reunion? For the mechanic who reads Emily Post? The "ordinary meaning" textualist prioritizes the proclivities of a fictitious human being over the objective taxonomy of a tomato. I can think of few greater unpredictabilities.

I'll sum up with a bold predictabilist claim: If context is necessary to understand the words in your law, you wrote a bad law. Often when textualists give examples of vague language that requires context to understand, they don't reference laws at all, but rather colloquial or folksy language. Professor Sherif Girgis uses the example of telling his daughter to be home "by dinner time,"[167] while Professor Lon Fuller offers the example of telling your maid to "drop everything and come running."[168] But neither a parent nor a rich housewife is the federal government; if the kid's not home by dinner time, the parent doesn't have the right to kill him. The federal government has that right; death is the end result of terminal noncompliance with any law.[169] That's the leviathan we all sign up for.

As such, cutesy linguistic examples disrespect the gravity of written law.[170] A statute that says "drop everything and come here" is a

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167. Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1509 (2023).

168. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 625–26 (1949).

169. Make no mistake, the threat of death is what animates all official laws—even the smallest ones. If the state asks you to do something and you don't do it, it can impose a fine. If you refuse to pay, it can send an officer to your house to collect. If you refuse the officer, he can arrest you. If you resist arrest, you can use equal and opposite force to overcome resistance. If you continue to not comply—that is, your resistance increases relative to the officer's compulsion—he can, eventually, kill you. Death undergirds every element of our legal system. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) ("'Legal interpretation' takes place in a field of pain and death.").

170. *See* FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 96 n.1 (Boston: Little & Brown 1839) ("[T]he object of law and politics is neither to amuse or touch."); *see also* Flanagan, *supra* note 158, at 261 (positing "a convention whereby [legislation] lack[s] ironic, counter-attributive or metaphorical meanings"). This footnote has been shamelessly stolen from Professor Grove. *See* Grove, *supra* note 166, at 1040 n.27. And,

terrible statute in that it is wildly unpredictable; just as technically unlawful precedent lives under the constant specter of reversal, technically absurd laws live under the constant specter of a technically accurate parsing. Other terribly written laws include "no vehicles in the park"[171]; still others, if I may be quite so bold, include "the freedom of speech," the call for "a well regulated Militia, being necessary to the security of a free State," the prohibition against "cruel and unusual punishment," and the reservation of "the powers not delegated to the United States."[172]

People don't disagree over what these laws mean because they're stupid and didn't study history; they disagree because these laws are unclear—and, if read according to their terms, tend to do weird stuff. If predictability is our lodestar, we should not worry seriously about implementing their perceived ends, but rather about pressuring our lawmaking bodies to fix them.[173] And the best way to do that is to enforce them at their word so their absurdity can be seen and subsequently amended.[174] Judge.AI would facilitate that dynamic.

2. Normative Moral Objections

I'll finish with arguments that Judge.AI is morally undesirable.

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come to think of it, Professor Grove's own statement on the subject is quite good: "Statutes and other legal texts do not communicate in figurative language; they do not use metaphor or irony." *Id.* at 1041.

171. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) ("A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called 'vehicles' for the purpose of the rule or not?").

172. U.S. CONST. amends. I, II, VIII, X.

173. *See* King v. Burwell, 576 U.S. 473, 515 (2015) (Scalia, J., dissenting) ("We lack the prerogative to repair laws that do not work out in practice, just as the people lack the ability to throw us out of office if they dislike the solutions we concoct. We must always remember, therefore, that our task is to apply the text, not to improve upon it.") (internal quotations omitted).

174. *See id.* at 516 ("[It is not] our place to make everything come out right when Congress does not do its job properly. It is up to Congress to design the laws with care, and it is up to the people to hold them to account if they fail to carry out that responsibility.").

But I want to remind you from the outset that I've never claimed the contrary—I've never argued that Judge.AI is good. I'm arguing that, if you think it's bad, you're not a textualist. that's where I'm heading—though I'm going to hash out Judge.AI's moral merits as best I can while en route. So let's begin: Judge.AI offers perfect predictability. If it still feels irksome, what could be missing?

Healthy Fear

First, maybe some unpredictability is healthy; that is, maybe we don't want people to know exactly where the boundary between legal and illegal lies, for fear that bad actors would operate precisely along that line.[175] This is the crux of the movie *Cape Fear*—that there are totally legal actions one can take that are nonetheless menacing and undesirable.[176] Max Cady, the film's iconic villain, operates quite like a legal LLM; over years in prison, he has mastered all the criminal statutes and has perfectly ordained the maximum lengths to which he can terrorize protagonist Sam Bowden without legal consequence.[177] If Cady didn't know the law as well as he did, he'd have likely been too scared of punishment to try some of his more aggressive impositions. His private sphere would've had a buffer around it—a one-way ratchet towards legality derived from a healthy fear of the state. One may reasonably fear that Judge.AI would give everybody the resources to become Max Cady—and that, just as chess engines are capable of playing deeper moves than anything a human could calculate over the board, Judge.AI could find loopholes that would have eluded even the A team at Williams & Connolly. Picture Max Cady, Inc. programming its own machines to jam thousands upon thousands of shady business actions down Judge.AI's gullet until one of them flashed green for

175. Paul Clement has made this very point with regard to presidential immunity. Federalist Society, *2024 Annual Supreme Court Roundup*, YOUTUBE at 32:25 (July 31, 2024), https://www.youtube.com/watch?v=LXr8Ez80kYI&t=1164s [https://perma.cc/ESG2-PBB5] ("[I]t's probably okay if the next President doesn't know exactly the line that he or she can go up to before they could be criminally indicted. I think a little haziness on that line [is] probably not all bad.").

176. *See* CAPE FEAR (Universal-International 1962).

177. *Id.*

"legal"—and then exploiting the loophole with impunity, to the financial ruin of countless Sam Bowdens.

I have some rebuttals. One is that there are still people like Max Cady today—they're just the richest people with the best lawyers. Not to scare you any more, but I'll note: In the next decade, the richest people with the best lawyers will have something like Judge.AI at their disposal—whether the government has it or not. Increasingly, you'll begin to see litigants raising bizarre doctrinal loopholes that have eluded generations of Harvard law professors—and, as textualism expands its institutional influence all the more, you'll start to see these loopholes win. A lot. At least Judge.AI would make everybody a legal genius so they could fight fire with fire. However: A thing's either legal or it isn't. Perfect legal knowledge can't stop Max Cady from performing a menacing but legal action; it can only let Sam Bowden retaliate in kind with an equally menacing legality. That's little comfort for decent people who don't want to have to become Max Cady themselves just to enjoy their lives.

But a saving grace might be my "culture of amendment" from Section III.A. The ultimate problem in Cape Fear isn't that Max Cady is terrorizing Sam Bowden, it's that the law is letting him do it. If the law allows badness, people need to know that so they can petition for the law to be changed. So construed, Max Cady is actually doing society a great service with his malfeasance: He's pinpointing the exact cracks in our legal system that need filling—perhaps the ones we would have never even thought to fill. And a culture of amendment means that an enterprising do-gooder could use AI to defend herself by beating the crooks to the punch—programming machines to scour Judge.AI for loopholes and then submitting her findings to the national Congress so that all the evils might be purged in one fell swoop.[178] Talk about the law "work[ing] itself pure."[179] Still, one could note that amendments don't happen

178. One could imagine that the day-to-day work of a law professor might look something like this under a Judge.AI regime; ditto a legislator's general counsel.

179. *See supra* note 112.

overnight,[180] and that the system would only become pure at the expense of countless Sam Bowdens suffering evil without recourse. How many ruined lives are worth achieving a pure legal system under which no life would ever be lawfully ruined again? Table this.

A third brief rebuttal is that the "buffer zone" around the private sphere works in two ways; while ambiguity dissuades some bad actors for fear of being caught, it also emboldens other bad actors on the suspicion that they might just get away with it. Judge.AI alone would likely decrease the latter incidence; Judge.AI in tandem with the Metaverse would eliminate it altogether. Note, also, that not all illegalities are created equal; murder can be a crime, but so can questioning the government. Most would want the buffer zone on the former to ratchet conduct towards legality, but the buffer zone on the latter to ratchet conduct towards illegality—or, another name for illegality, freedom. How do we decide which buffer zones go in which directions? One might answer: We'd do so according to which actions are desirable. Table that.

Mercy

Since we're talking movies, note that one of the enduring images in cinema is the man disproportionately punished. In *Les Misérables*, nobody contests that Jean Valjean stole the bread—the problem is that they gave him five years for it.[181] That's too many years—but if the text compelled it verbatim, Judge.AI would enforce it. Les Mis tugs our heartstrings because nobody wants to live in that world. Jean Valjean was poor and only trying to feed his family; we want to live in a system that, in spite of a ham-fisted statute, would show him mercy.[182]

180. Though, in a system moving at rapid AI speeds, who's truly to say it wouldn't adjust, over time, to do precisely this?

181. LES MISÉRABLES (Universal Pictures 2012). I know it's also a Hugo novel and a Schonberg musical—it's a segue, work with me.

182. *See generally* MARTHA MINOW, WHEN SHOULD LAW FORGIVE? (2019). But notice that even the kindhearted Professor Minow largely posits forgiveness in executive and statutory contexts; to the extent she posits it in judicial spaces at all, it's usually in areas like sentencing where legal codes already give the judge discretion. Interpretive mercy

Rebuttal: The problem with mercy is that it's the ultimate unpredictability—and perhaps the true villain of *Les Mis*. Why did Jean Valjean steal the bread? No doubt, he had a calculus. The primary factor in that calculus was the near-certainty that his family would starve to death without food—fine. He also probably considered the likelihood he'd be caught—okay. But, deep down, it also likely occurred to him that, because he was poor and his family was starving, he was a very sympathetic thief. At some level, he may well have thought that no judge would be so coldhearted as to throw him in jail for such an innocent act. We're back to the buffer zones—if Judge.AI is running Napoleonic France, Jean Valjean is probably too scared to steal the bread in the first place and doesn't go to jail. We all feel that our lives are unique and that anybody who really knew us would see, clear as day, that we're not what our actions suggest.[183] Mercy feeds this delusion.

Of course, we revisit a Dobbs rebuttal from earlier: That, while a system of no mercy might perhaps be better than a system of inconsistent mercy, far and away the best option would be a system of total mercy for Jean Valjean—where all judges circumvent the unjust law. Table this one too—but query which crimes should warrant mercy and how we should decide.

Freedom

Next, we have the defining trope of every popular dystopia: The government is too big and it infringes on people's freedom.[184] This is most acute in the Metaverse sub-hypothetical, of course, where

is not her focus.

183. Charles Stimson & Zack Smith, *"Progressive" Prosecutors Sabotage the Rule of Law, Raise Crime Rates, and Ignore Victims*, HERITAGE FOUND. (Oct. 29, 2020), https://www.heritage.org/crime-and-justice/report/progressive-prosecutors-sabotage-the-rule-law-raise-crime-rates-and-ignore [https://perma.cc/KZB6-Y7PQ] (explaining that mercy from progressive prosecutors emboldens repeat offenders and leaves communities in terror); *see also* Conor Friedersdorf, *Why California Is Swinging Right on Crime*, THE ATLANTIC (June 9, 2024), https://www.theatlantic.com/politics/archive/2024/06/california-criminal-justice-gavin-newsom/678631/ [https://perma.cc/XYR5-9J9Z].

184. *See* GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949). See also the thousands of lesser talents who have ripped him off.

Big Brother sees everything you do such that you're guaranteed to be caught for any given infraction. But it's just as palpable in the standard Judge.AI hypothetical as well. It just feels like too much law—letting the government constantly nose into people's business. But just as we only want mercy for certain crimes, we only want people to be free in certain ways. Murderers? Rapists? When it comes to these guys, we want the state to be all- powerful. Jaywalkers? Suddenly we don't even want a state at all. Polyamorous throuples? Hard to say; quite a few cases are still pending before the court of public opinion. At any rate, picking zones of freedom is just as tricky as picking zones of mercy. Table this.

But that tees up another point: "Freedom"—like mercy—is just the buffer zone rehashed. If America switched to Judge.AI tomorrow, the government would be exactly as big as it is today; it's just that, today, the government isn't capable of being as big as it claims to be on paper due to human limitations. Crafty lawyers woo impressionable judges; repeat players browbeat one-shotters into settling winnable cases. None of that bears on what the law actually is—and that crafty lawyer who derives his freedom from weak-minded jurisprudence is about to get substantially less free when he draws Ray Kethledge on appeal. If people want more freedom, they shouldn't pray for government ineptitude or willful blindness—but, rather, for the repeal of more laws. Again, Judge.AI informs the latter prayer by holding a mirror to the government and showing the people exactly how free they are.[185]

185. I'll note, too, that freedom can also emerge from executive discretion—as programs like DACA and DAPA have shown. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1918 (2020) (Thomas, J., concurring in part) ("To state it plainly, the Trump administration rescinded DACA [and DAPA] the same way that the Obama administration created [them]: unilaterally, and through a mere memorandum."). Such freedom is, to be sure, just as illusory as freedom stemming from judicial discretion. But this paper makes no comment on the executive regime that would accompany Judge.AI. To the extent it would remain the same as our current executive regime—and, candidly, I see no reason why it wouldn't—freedom under the Judge.AI regime might still look roughly as expansive as it does today.

Majesty

Each of the foregoing objections feed into a broader truth: We want people to respect the law. But, crucially, we don't want the law to have to earn the people's respect—because . . . what happens if it doesn't?[186] To be sure, the American system is unique in that it's one of few political orders to have been pitched on its merits rather than its compulsion. Here's how they pitched ancient Egyptian law: Our king is God and he'll damn you if you don't follow it. Um . . . sold. There were no Macedonian Federalist Papers; while Marx at least had a manifesto, Lenin wasn't holding many discussion groups.

But make no mistake: We deify our law too. Indeed, that's why the Constitution is so vague—nobody's tattooing AEDPA on his forearm, but "We the People" fits rather snugly. Even in today's world-weary age, the powers-that-be like to remind us, from time to time, that the founding spirit of America is the answer to all of our problems.[187] Mortal officeholders like politicians and judges have to earn our respect; ditto for their statutes and opinions. But the Founders' Immortal Vision™—whatever that is—is beyond having to impress us. It cannot seriously be disrespected. It is majestic. It is the kind of thing a soldier ought to lay down his life for.

It's odd, then, to imagine starting a country where a robot just tells you the law in plain English; all the romance and mystique are gone. In their place is the cold reality of what the law actually is: A big list of who can't do what when. And Judge.AI would present

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186. James Madison considered this rebuttal, noting at any time a state "appeal[s] to the people" to ask what the law should be, that ask "would carry an implication of some defect in the government." By that logic, Madison pondered whether "frequent appeals [to the people] would in great measure deprive the government of that veneration which time bestows on every thing, and without which perhaps the wises and freest governments would not possess the requisite stability." THE FEDERALIST NO. 49 (James Madison).

187. Indeed, whose faith in government wouldn't be restored by watching Hollywood's biggest actors read the Declaration of Independence? *See* THE DECLARATION OF INDEPENDENCE (Declaration of Independence Inc. 2003); *see also* LIN-MANUEL MIRANDA, HAMILTON: AN AMERICAN MUSICAL (Atl. Recording Corp. 2015). Every now and again, we're reminded that at least some Framers were just like us.

that list warts and all—middle school cynics could spend hours querying the ex ante function and finding every goofy loophole that some idiot Congressman forgot to plug. Everybody would be given a superpower that, today, only a select cadre of society has earned: The ability to laugh at the law.

Are soldiers going to lay down their lives for that? Are people going to obey? Well, that depends on who can't do what when and whether the people like it. Table that. But I do have one rebuttal: To the extent a culture of amendment works the law pure, Judge.AI might one day produce a law that did, objectively, win respect.[188] To be sure, it might not ever impress the electoral minority. But, insofar as Judge.AI perfectly mirrors the majority's wishes by way of prolonged Hegelian dialectic, the public might come to respect its machine overlord at least as much as it respects itself.

Justice

By now you've noticed a trend in this section: Every time I hit a moral question I don't have an answer to, I table it for later. Well, later is now because all of the foregoing objections—and any others in kind that I've missed—boil down to the same basic claim: Judge.AI leads to objective moral injustice. And here's the big rebuttal: Who cares?

Well, some people probably care. Devout religious people probably care.[189] Moralists probably care.[190] Some people think

188. Madison dreamt of this prospect, positing "a nation of philosophers" wherein "[a] reverence for the laws would be sufficiently inculcated by the voice of an enlightened reason." But he saw it as just that—a dream—lamenting that "a nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato." THE FEDERALIST NO. 49 (James Madison). Of course, a philosopher in Madison's legal sense would be someone with the tenets of logic and reason at his fingertips; Judge.AI would merely put the unvarnished law itself at the fingertips of a logically unenlightened people. Given that limitations of wisdom would still plague the general public, query how close my hypothetical could actually take us to Madison's utopia.

189. *See* Robert P. George, *Natural Law, God and Human Dignity*, *in* THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE 57, 66 (George Duke & Robert P. George eds., 2017) ("Most, but not all, natural law theorists are theists. They believe that the moral order, like every other order in human experience, is what it is because God creates and sustains it as such.").

190. This is surplusage insofar as a nonreligious moralist is an oxymoronic concept—

there exists a natural law that sits above human creation; and some people, even if they won't express it in such high and mighty terms, nevertheless believe in their gut that there are such things as right and wrong. Those people probably care. And here's my refrain: Those people cannot be textualists. Why? To be sure, I'm not claiming that textualists have no concept of objective good. But I've set out to show that "good" and "bad" for the textualist do not correlate to "right" and "wrong," but rather to "predictable" and "unpredictable."

The honest textualist has cabined the universe of virtue down to a single binary, for fear that the rest of that universe is unknowable because attempts to define it have invariably turned out badly. Badly by what metric? In his fear of that which will not be named, the textualist has chosen to forget any such metric. Shell-shocked to the point of denial by horrors bygone, he awakes with willful amnesia and only one directive in mind: that the only objective truth is what we all collectively write on this parchment. He cannot explain why that is so, just as the priest cannot truly explain the creation of the universe; it simply is. When God told Abraham to kill his son Isaac, Abraham had no basis upon which to tell God that doing so was wrong; such is the textualist's relationship to the text.

Now, I can imagine your rebuttal: "I am a textualist and I do believe in right and wrong. Checkmate." Wrong—pawn c4, black resigns. You are not a textualist; at the very most, you are a textualist until. Until what? Until any number of things. If you adhere to the common law, you are a textualist until a different system of lawmaking creates objectively better law that ought not be disturbed. If you seize upon equitable triggers to mitigate the full brunt of punishment, you are a textualist until you feel a pang of mercy. If you adhere to precedent—even largely correct precedent—simply because it is precedent, you are a textualist until a sufficient reliance interest is at stake. Appeals beyond the text, however slight, are appeals to definitions of justice that exceed the predictability binary.[191]

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a matter for a different paper and, indeed, a different journal.

191. And let's face it—even Justice Brennan was also a textualist until. *Compare* H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 236–37 (1989) (Brennan, J.) ("We begin, of course,

At the end of all this, you may just throw up your hands and say, "Well, if you're going to define textualism that narrowly, then nobody's a textualist." Correct. Actually, incorrect—there is one textualist. It's Judge.AI. And that's because human beings invariably have needs and wants and loves and hatreds—all of which exceed the predictability binary. Judge.AI is a textualist utopia because it is the only thing that is capable of being a textualist until nothing. It has no breaking point; when the Holocaust is duly enacted, it doesn't even resign its post.[192]

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with RICO's text . . . Our guides in the endeavor must be the text of the statute and its legislative history.") *with* Glass v. Louisiana, 471 U.S. 1080, 1083 (Brennan, J., dissenting from denial of cert.) ("[T]his Court long ago rejected [a] historical interpretation of the Cruel and Unusual Punishments Clause . . . This is because time works changes, and brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."). Ditto Justice Kagan. *Compare* Yates v. United States, 574 U.S. 528, 553 (2015) (Kagan, J., dissenting) ("I would begin with § 1519's text . . . . When Congress has not supplied a definition, we generally give a statutory term its ordinary meaning.") and Kloeckner v. Solis, 568 U.S. 41, 55 n.4 (2012) (Kagan, J.) ("[E]ven the most formidable argument concerning the statute's purposes could not overcome the clarity we find in the statute's text.") *with* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2317–18 (2022) (Kagan, J., dissenting) (critiquing majority opinion on policy grounds instead of linguistic grounds). Ditto Justice Sotomayor. *Compare* Dubin v. United States, 143 S. Ct. 1557, 1563 (2023) (Sotomayor, J., dissenting) ("The text and context of the statute do not support such a boundless interpretation" of identity theft) *with* Trump v. United States, 144 S. Ct. 2312, 2371 (2024) (Sotomayor, J., dissenting) (hypothesizing "nightmare scenarios" in a consequentialist rant that "the President is now a king above the law."). Non-textualists generally do begin their analyses as textualists. It's just their "untils" come a lot quicker than Justice Scalia.

192. There is, of course, the Fullerian objection that morality—or at least objective truth—inheres even in written law. Professor Lon Fuller believed that logical impossibilities, even if written in text, were not actually "law"; a law requiring all people to be twenty feet tall under penalty of death, for example, would not be law even if written because human beings objectively cannot grow to such a height. LON FULLER, THE MORALITY OF LAW 38–44 (2d ed. 1969) ("Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute.") The same, Fuller insists, would apply to moral impossibilities (whatever those may be). *Id.* at 96–97 ("What I have called the internal morality of law is . . . a procedural version of natural law . . . [in that it is] concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and

You may conclude, then, that "textualist until" is not so bad of a label—and that I'm coaching you towards it, if not towards some outright theocracy. But I'm not, because it's not that easy. What are you a textualist until and why? If there is objective morality, what are its specific contours? If you read treatises on natural law, you will swim in the depths of Aquinas and Ulpian; you will recite the Latin maxims of the classical legal tradition; you will speak of beauty and high art.[193] But you'll never, ever find a complete enumeration of the things that are objectively right or wrong as compelled by cold logic.[194] If somebody had managed, by now, to craft a Cartesian proof that begins at "I think, therefore I am" and runs clean through to the equitable doctrine of laches, it wouldn't reside in a dusty corner of SSRN with two dozen citing references; it would be the one world religion.[195]

Absent that enumeration, one has three options. The first is to

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administered if it is to be efficacious and at the same time remain what it purports to be.") I'm skeptical of that idea and fear that it's aspirational; if the state kills you for not being twenty feet tall, it would seem that the height statute had been the law whether it comported with objective reality or not. At any rate, however, I don't think that a true Fullerian can be a textualist as I find nothing in the literature that would permit a non-literal reading of the very clear language "must be twenty feet tall." To the textualist, it's the job of the legislature rather than the judiciary to screen out logical absurdities.

193. *See generally* HADLEY ARKES, MERE NATURAL LAW (2023).

194. Though you will, on occasion, catch a nice platitude. *See* ROBERT GEORGE, CONSCIENCE AND ITS ENEMIES 89 (2013)

195. *See, e.g.*, EDWARD FESER, *In Defense of the Perverted Faculty Argument*, *in* NEO-SCHOLASTIC ESSAYS 389, 398 (2015) ("Where some faculty F is natural to a rational agent A and by nature exists for the same of some end E (and exists in A precisely so that A may pursue E), then it is metaphysically impossible for it to be good for A to use F in a manner contrary to E."); Edward Feser, *What Counts as a Lie?*, EDWARD FESER (Nov. 15, 2010), https://edwardfeser.blogspot.com/2010/11/what-counts-as-lie.html#:~:text=As%20typically%20defined%20by%20natural,really%20thinks%20is%20not%2DP [https://perma.cc/FY7G-MVZP] ("The standard view within Scholastic natural law theory is that lying is always at least mildly immoral. As typically defined by naturally law theorists, a lie is willful speech or other communicative behavior contrary to one's mind. That is to say, one lies when one wills to communicate the message that P when what one really thinks is not P."). I single out Mr. Feser only because his work is so superlative. If there's anyone making objective morality accessible and applicable on a mass level today, it's him. And yet we live in nothing that resembles a Feserian society; the dusty Scholastic Manuals scattered about various secluded monasteries have suffered a similar fate in terms of influence.

prove the existence of God from scratch and then divine God's Will with sufficient certainty and specificity to order one's mortal affairs. The second is to become an anarchist serial murderer who thinks that *Catcher in the Rye* really means something. And the third is to take one last, hard look at Judge.AI. And to ask oneself very simply: Can we really do better than predictability? It's the very question the Framers of this country asked themselves, and we are living in their answer.

CONCLUSION

I'd like to take a step back and close with a broader point: I am not joking around here. My Judge.AI hypothetical, at the end of the day, really isn't a hypothetical at all. It's coming. It's coming because there's one institutional lodestar that trumps even predictability: money. Law, today, is an untenably expensive field; New York big law bills a first year associate who took the Bar last week at $700 an hour.[196] But the machines I'm describing can already do better work for a fraction of the cost—and the system I'm positing can do the work for nothing. If you're a partner at a major, multinational law firm, please listen to me: It's time to cash out. Right now. It's over.

The scary truth is that a primitive version of Judge.AI could probably run a judiciary today; various countries looking to save a buck are already paying nascent AI companies to put the wheels in motion.[197] And it certainly could trim a 200-lawyer firm down to a MacBook Pro and three SCOTUS-clerk partners who handle the oral advocacy. Plenty of lawyers know what time it is; that's why we're already seeing states—and, indeed, some nations—putting up

196. *See* Andrew Maloney, *Where Are Big Law Billing Rates Growing the Fastest*, THE AM. LAWYER (Jan. 24, 2024), https://www.law.com/americanlawyer/2024/01/24/where-are-big-law-billing-rates-growing-the-fastest/?slreturn=20250907173208 [https://perma.cc/TY4Z-WCTH].

197. *See, e.g.*, Gandall, *supra* note 13, at 268 ("China has comprehensively incorporated artificial intelligence into the judiciary, with system 206 included for 'case filing, investigation, approval for arrest, review, prosecution, court trial, [and] conviction,' and [it] is allegedly 97% accurate.").

barriers to AI.[198] It's job preservation—but the market always wins, and big companies will not be browbeaten into paying ridiculous rates when an alternative emerges. If you ban it in your state, the state next door will legalize it and Blackrock will spend its money there. If you ban it in this country, China will legalize it—and, for about a two-year period, you'll look around and notice that everybody's lawyer is suddenly Chinese. As for law firms, so for governments. This is a paper about predictability, but efficiency is the virtue that will truly put Judge.AI in control of your life. Any nation that wants to compete in the Web 3.0 era will be forced, by existential squeeze, to adopt a form of government that looks something like what I've sketched out here today.

So, I repeat my bottom-line question: Utopia or dystopia? I hold firm that, if you answer dystopia, you are not a textualist—or, at the very most, you are a textualist with much higher priorities in your life. The question then becomes: What are those priorities? And do you know them with such specificity that you could construct a lasting political regime ordered towards them? If you do, all I can say is that the world could greatly use your insight. And if you don't, be honest: Where does my system actually miss?

At any rate, welcome to the future. Enjoy yourself.

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198. *See, e.g.*, U.S. Court of Appeals for the Fifth Circuit, Notice of Proposed Amendment to 5th Cir. R. 32.3 (Nov. 22 2023), https://fingfx.thomsonreuters.com/gfx/legaldocs/mopajaxmava/11222023ai_5th.pdf [https://perma.cc/LKW9-TFLS] (". . . counsel and unrepresented filers must further certify that no generative artificial intelligence program was used in drafting the document presented for filing, or to the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human."); *see also* ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 512 (2024) ("Managerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI tools. Supervisory obligations also include ensuring that subordinate lawyers and nonlawyers are trained, including in the ethical and practical use of the GAI tools relevant to their work as well as on risks associated with relevant GAI use.").