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ARTICLE

The Supreme Court Versus the Construction Zone: The Justices Reject Law-Runs-Out Theory

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[O]ur peculiar security is in the possession of a written Constitution. [L]et us not make it a blank paper by construction.

Thomas Jefferson, 1803[1]

Serious danger seems to be threatened to the genuine sense of the Constitution . . . by an unwarrantable latitude of construction. . . .

James Madison, 1817[2]

[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, . . . we have no longer a Constitution. . . .

Benjamin Curtis, 1857, *Dred Scott* dissent[3]

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1 Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), *in* 41 THE PAPERS OF THOMAS JEFFERSON 346, 347 (Barbara B. Oberg ed., 2014) (footnote omitted).

2 Letter from James Madison to James Monroe (Dec. 27, 1817), *in* 8 THE WRITINGS OF JAMES MADISON 403, 406 (Gaillard Hunt ed., 1908).

3 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 621 (1857) (Curtis, J., dissenting).

Introduction

We're all originalists and textualists now—when the text is clear. But there remains deep disagreement about whether original understanding controls when legal text doesn't provide an incontestably clear answer. The U.S. Supreme Court's *Chevron* doctrine, for example, held that a legal question of interpretation becomes a policy question whenever a statutory text has multiple reasonable readings.[4] Justice Elena Kagan elaborated on this theory in 2019, asserting that when there is interpretive uncertainty, the law has "run[] out" and "policy-laden choice" is all that remains.[5] And some constitutional theorists have similarly asserted that interpretive uncertainty means that the law has "run out" and judges must enter a "construction zone" in which "political," "normative" considerations apply.[6]

In a series of summer 2024 cases, the Supreme Court forcefully rejected the law-runs-out theory. Overruling *Chevron* in *Loper Bright Enterprises v. Raimondo*,[7] the Court reestablished the constitutional principle that the interpretation of legal text always concerns law and not policy.[8] Judges facing uncertainty about statutory meaning, the Court wrote, may not "throw up their hands" because the law has "supposedly 'run out.'"[9] Rather than declaring the interpretive question unanswerable whenever it is reasonably contested, courts must determine the best reading.[10] It is *always* the province and duty of the judicial department to say what the law is—nothing changes when reasonable people might disagree with the judicial department's answer.[11]

Three days after *Loper Bright*, the Court practiced this principle in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*[12] by focusing exclusively on law despite interpretive disagreement.[13] The lower courts had focused on policy concerns rather than statutory text, and at oral argument Justice Kagan defended the lower courts by asserting that

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4 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843, 845 (1984).

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

6 *See infra* note 35.

7 144 S. Ct. 2244 (2024).

8 *Id.* at 2268.

9 *Id.* at 2266.

10 *Id.* at 2262–66.

11 *Id.* at 2257–58.

12 144 S. Ct. 2440 (2024).

13 *See id.* at 2453–54.

"there's not much in the text to look at."[14] But the Court's majority opinion methodically examined the linguistic meaning, background cluster of ideas, and precedent surrounding the pertinent statutory phrase.[15] Whether one thinks it was correct or not, the majority undeniably used legal reasoning to answer a legal interpretive question. Even though the majority's conclusions drew a dissent, and the interpretive answer may not have been obvious at first glance, the law did not "run out."

The concurring opinions in *United States v. Rahimi*,[16] meanwhile, reject law-runs-out theory in the constitutional context.[17] Justice Neil Gorsuch stressed that the judicial inquiry concerns original understanding even when there is indeterminacy.[18] Justice Brett Kavanaugh likewise argued that judges must not resort to policy when applying broadly worded or vague constitutional language.[19] According to Justice Amy Coney Barrett, similarly, original understanding controls even with respect to contestable text like the Second Amendment's.[20]

The Supreme Court rejected law-runs-out theory because *Chevron*, Justice Kagan, and law-runs-out scholars could not reconcile the theory with the *Loper Bright* Justices' originalist commitments. The modern originalist movement began as a counterrevolution against perceived judicial policymaking.[21] Its central emphasis is that judges must judge and not legislate. A theory compelling judicial policymaking, therefore, was never likely to succeed at this Court. It failed because its proponents could not show that the ordinary rules of originalism no longer apply when there is interpretive indeterminacy.

I. Law-Runs-Out Theory

Over the past five years, Justice Kagan has provocatively asserted that the law sometimes "runs out." In a 2019 opinion, for example, she wrote that sometimes the law "runs out" and "policy-laden choice is what is left over."[22] The law runs out, she said, when the law doesn't "give[] an

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14 Transcript of Oral Argument at 12, *Corner Post*, 144 S. Ct. 2440 (No. 22-1008) [hereinafter *Corner Post* Transcript].

15 *See infra* notes 75–80 and accompanying text.

16 144 S. Ct. 1889 (2024).

17 *See infra* Part IV.

18 *Rahimi*, 144 S. Ct. at 1909 (Gorsuch, J., concurring).

19 *Id.* at 1912 (Kavanaugh, J., concurring).

20 *Id.* at 1925 n.* (Barrett, J., concurring).

21 *See* J. Joel Alicea, Dobbs *and the Fate of the Conservative Legal Movement*, CITY J. (Winter 2022), https://perma.cc/2RRG-JUPM.

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

answer."[23] And the law doesn't give an answer, she continued, when there is more than one "reasonable construction."[24] In sum, when reasonable people can disagree about the answer to an interpretive question, the legal question is unanswerable and a policy question is all that is left.

While the phrase "law runs out" did not appear in any Supreme Court opinion until 2019, the theory has made its mark on the Court's jurisprudence. In particular, as Justice Kagan has recognized, the Supreme Court premised its *Chevron* and *Auer* deference doctrines on law-runs-out theory.[25] *Chevron* held that when there are multiple "permissible construction[s] of [a] statute," there is a "policy choice" "for the agency to make."[26] In other words, interpretive uncertainty shifts the question from one of law to one of policy.[27] Dissenting in *Loper Bright*, Justice Kagan defended *Chevron* by arguing that only a policy question is left when the law has "run out" and that courts do not have policymaking authority.[28]

The law-runs-out theory has roots in H.L.A. Hart's idea of "hard cases" first advanced in the mid-twentieth century. Hart asserted that there will sometimes be "hard cases"—"legally unregulated cases" in which "no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete."[29] In these cases, according to Hart, a judge must "make law."[30] To make law, the judge must "act just as

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23 *Id.*

24 *Id.*

25 *Id.* ("[T]he core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over."); Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2294 (2024) (Kagan, J., dissenting) ("Who should give content to a statute when Congress's instructions have run out? . . . The answer *Chevron* gives is that it should usually be the agency, within the bounds of reasonableness.").

26 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843, 845 (1984).

27 For examples of commentary connecting *Chevron* to the law-runs-out and construction-zone concepts, see Frederick Liu, Chevron *as a Doctrine of Hard Cases*, 66 ADMIN. L. REV. 285, 290 (2014); Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465, 1470 (2020).

28 *Loper Bright*, 144 S. Ct. at 2294 (Kagan, J., dissenting).

29 H.L.A. HART, THE CONCEPT OF LAW 272 (2d ed. 1994); *see also* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 182 (1979) (defining "unregulated disputes" as those in which "the law contains a gap" and thus "fails to provide a solution").

30 HART, *supra* note 29, at 272 (emphasis omitted); *see also* Liu, *supra* note 27, at 300 (describing Hart's theory: "[T]he case can be resolved only by saying what the law should be."); William N. Eskridge, Jr., *Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J. 865, 874 (2013) ("Where the law runs out, the judge must make a policy choice, according to Hart and other leading positivist theorists."); *id.* at 882–83 ("As Scott Shapiro has demonstrated, Hartian positivism is an anti-formalist approach to statutory interpretation, for it concedes and even celebrates the realist insight that the law runs out in a lot of cases, and judges then fill gaps in the law with policy judgments." (citing SCOTT J. SHAPIRO, LEGALITY 246–48 (2011))).

legislators do"[31]—that is, "by deciding according to his own beliefs and values."[32] Hard cases, then, turn on the judge's moral reasoning.[33]

More recently, some constitutional-law theorists have invoked the law-runs-out concept to propose what they call a "construction zone."[34] When there is interpretive uncertainty about the Constitution, these scholars argue, the law has "run out" and judges must resolve disputes by entering a "construction zone" in which "political," "normative" considerations apply.[35]

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[31] RAZ, *supra* note 29, at 197.

[32] HART, *supra* note 29, at 273.

[33] *See id.* at 275; Frederick Liu, Comment, *The Supreme Court Appointments Process and the Real Divide Between Liberals and Conservatives*, 117 YALE L.J. 1947, 1951 (2008) (reviewing CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS (2007)) (attributing to Hart the view that "[w]here the law has run out, the judge must resort to moral reasoning to fill in the gap"); RAZ, *supra* note 29, at 199 ("[I]n their law-making judges do rely and should rely on their own moral judgment.").

[34] While constitutional interpretive formalism is associated with the term *originalism* and statutory interpretive formalism with *textualism*, original-meaning originalism and textualism are theoretically identical. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed. 1997) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text . . . ."); *see* Nomination of Amy Coney Barrett to the U.S. Supreme Court: Questions for the Record Submitted October 16, 2020 (Justice Barrett asserting that judges must apply the "original public meaning of the statutory text"); Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 309 (2017) ("[O]riginalism . . . is merely textualism applied to constitutional interpretation."). This is apparent when considering that an originalist/textualist would interpret the Judiciary Act of 1789 and provisions of the original Constitution with the same principles. Different types of laws may have different audiences, and the audience will account for the identity of the speaker and the context of the speech. But in all cases, under original-meaning originalism and textualism the question is what the text communicated to the audience when adopted. For more detailed discussion of these points, see Lawrence B. Solum, *Pragmatics and Textualism*, 33 J.L. & POL'Y 2 (2025).

[35] *See, e.g.*, Keith E. Whittington, *On Pluralism Within Originalism*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 75–76 (Grant Huscroft & Bradley W. Miller eds., 2011) ("Constitutional construction .... approaches the Constitution creatively, politically, in order to resolve indeterminacies."); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 10 (2009) (construction is a "political . . . exercise"). Professor Randy Barnett, one of the pioneers of the construction-zone concept, explicitly tied the construction zone to the runs-out concept, arguing in 2011 that "one's underlying normative commitments" control when original meaning "runs out." Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 70 (2011). Barnett has since disavowed that view. *See infra* note 39. Construction-zone scholars start by making a narrow claim that there is a distinction between discerning a legal text's linguistic meaning (they call this "interpretation") and determining the legal text's legal effect (they call this "construction"). *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 457 (2013). As Professor Solum observes, that claim should be uncontroversial. *See id.*

As Professor Lawrence Solum recounts, Professor Keith Whittington "brought the notion of constitutional construction into contemporary constitutional theory" with two books published in 1999.[36] According to Whittington, by enabling interpreters to approach legal text "creatively" and "politically," the construction zone allows the law to "adapt to changing circumstances, political pressures, and values" instead of being "stuck in the past" with appeals to "historical fidelity."[37] Next, Solum's history continues, Professor Randy Barnett adopted Whittington's construction idea in an influential article of his own.[38] Although Barnett has since stated that he was mistaken,[39] at the time he asserted that "when original meaning runs out," it is "not originalism that is doing the work" but rather "one's underlying normative commitments."[40] Barnett and Whittington's work in turn influenced Jack Balkin, who advanced what he called "living originalism" and argued that the construction zone supports a constitutional right to abortion.[41]

From there, Professor Solum became a leading expositor of the construction-zone concept.[42] One enters the construction zone, according to Solum, when the answer to an interpretive question is "unclear,"

("[E]very constitutional theorist should embrace the distinction itself . . . ."). But that claim does not establish that indeterminate legal text should be treated differently from determinate legal text. Regardless how clear a legal text's linguistic meaning is, its legal effect is always determined by legal principles. Consider the question whether a fish is a "tangible object" under the Sarbanes-Oxley Act, *see Yates v. United States*, 574 U.S. 528, 532 (2015), or whether a surgeon called into an emergency "drew blood in the streets," WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 60 (quoting a medieval statute). Even though the semantic meaning is crystal clear in both cases, judges still must determine the text's legal import with reference to background legal principles. The notion that judges should shift into a different mode of analysis when the text is less clear, therefore, is mistaken.

36 Solum, *supra* note 35, at 467 (citing KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING; KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT & JUDICIAL REVIEW); *see also* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, & JUDICIAL REVIEW 7 (1999) (characterizing interpretation as "essentially legalistic" and construction as "essentially political").

37 Whittington, *supra* note 35, at 75–76.

38 Solum, *supra* note 35, at 467–68 (citing Randy Barnett, *An Originalism for Nonoriginalists*, 5 LOY. L. REV. 611 (1999)).

39 Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 4–5 (2018).

40 Barnett, *supra* note 35, at 70.

41 Solum, *supra* note 35, at 468 (first citing Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007); and then citing JACK M. BALKIN, LIVING ORIGINALISM (2011)).

42 *E.g.*, Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2011); Solum, *supra* note 35.

"contested," "uncertain."[43] But like Barnett more recently, Solum rejects the notion that sometimes the law runs out and judges must legislate.[44]

It is not always clear *why* Justice Kagan and law-runs-out theorists like Balkin and Whittington believe the turn to policy is justified. It could be a belief that sometimes it is *impossible* to apply law because no law exists; or alternatively it could be a belief that the fact of contestability means that interpreters *should* apply policy instead of law.

The "runs out" metaphor seems to convey the first idea—that law-application sometimes becomes impossible.[45] Normally when something has run out—a printer has run out of ink, or a phone has run out of battery—it is unusable no matter how badly one might want to use it. To the extent law-runs-out theorists are using the ordinary meaning of their terms, therefore, they are saying that interpreters sometimes must rely on extralegal considerations because there is no other option.

Alternatively, law-runs-out theorists might mean to say that while one could apply law when an interpretive question is reasonably contestable, the law's indeterminacy means that one should apply policy instead. This theory seems most consistent with Justice Kagan's assertion that law runs out whenever there is more than one "reasonable construction" of a legal text.[46] In such situations one could simply apply the superior reading, but according to Justice Kagan, one should turn to policy instead.

Whichever of those alternatives is intended, the Supreme Court is not on board.

II. *Loper Bright* Rejects *Chevron*'s Law-Runs-Out Premise

In *Loper Bright*, the Supreme Court overruled *Chevron* and rejected its law-runs-out premise. The Court held that judges "may not defer to an agency interpretation of the law simply because a statute is ambiguous."[47] Instead, courts must "exercise independent judgment" to reach the text's "best reading."[48] Even when there is interpretive uncertainty, "there is a

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43 Solum, *supra* note 35, at 469.

44 *Id.* at 528–31; Barnett, *supra* note 39, at 4–5.

45 *See* O'Scannlain, *supra* note 34, at 305 ("[T]he legal realists and their intellectual heirs . . . argued that judges do not in fact decide cases in accord with the law—not because judges are willful or incompetent, but because the law itself is radically indeterminate.").

46 Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019). Like most people since the founding, Justice Kagan uses "construction" and "interpretation" interchangeably—here, her use of "construction" refers to interpretation, not what construction-zone theorists call construction.

47 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

48 *Id.* at 2262, 2266.

best reading all the same."[49] And "[i]n the business of statutory interpretation, if it is not the best, it is not permissible."[50]

The majority opinion, written by Chief Justice John Roberts, started by recounting fundamental principles of the Constitution's separation of powers. Article III assigns to the federal judiciary the power to adjudicate cases and controversies.[51] The Framers "appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear."[52] But they envisioned that the "final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.'"[53] As the Court put it in *Marbury v. Madison*,[54] "[i]t is emphatically the province and duty of the judicial department to say what the law is."[55] Even "'in cases where [a court's] own judgment . . . differ[ed] from that of other high functionaries,' the court was 'not at liberty to surrender, or to waive it.'"[56] The Administrative Procedure Act, by providing that courts "shall decide all relevant questions of law" and "interpret constitutional and statutory provisions,"[57] "codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment."[58]

Then the Court took on law-runs-out theory directly. The existence of indeterminacy or reasonable disagreement, the Court explained, does not allow judges to "throw up their hands" and declare that law has "'run out.'"[59] The law-runs-out premise of *Chevron* and the *Loper Bright* dissent—that "interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts"—"rests on a profound misconception of the judicial role."[60] Resolving interpretive uncertainty "involves legal interpretation," and that task is "not . . .

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49 *Id.* at 2266.

50 *Id*.

51 *See* U.S. CONST. art. III, § 2.

52 *Loper Bright*, 144 S. Ct. at 2257.

53 *Id.* (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

54 5 U.S. (1 Cranch) 137, 177 (1803).

55 *Loper Bright*, 144 S. Ct. at 2257 (alteration in original) (internal quotation marks omitted) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

56 *Id.* at 2258 (alterations in original) (quoting United States v. Dickson, 40 U.S. (15 Pet.) 141, 162 (1841)).

57 *Id.* at 2261 (quoting 5 U.S.C. § 706).

58 *Id.*

59 *Loper Bright*, 144 S. Ct. at 2266 (internal quotation marks omitted) (quoting *Loper Bright*, 144 S. Ct. at 2294 (Kagan, J., dissenting)).

60 *Id.* at 2267–68.

policymaking."[61] The law never runs out—"no matter how impenetrable" the text may be.[62]

III. *Corner Post* Demonstrates that the Law Never Runs Out

Three days later, the Court provided a case study illustrating that strictly legal analysis remains possible even when interpretive questions are contested. In *Corner Post*, the Court held that "[a] claim accrues when the plaintiff has the right to assert it in court," and for purposes of the statute of limitations applied to APA claims, that means "when the plaintiff is injured by final agency action."[63] Even though that interpretation was contested (including by three Supreme Court Justices and the United States Solicitor General), the Court based its holding on considerations of law and not policy.[64] The law did not run out.

The case arose when Corner Post, a convenience store that started in 2018, sued under the APA to challenge a 2011 Federal Reserve regulation that increases its fees for debit-card transactions.[65] The six-year limitations period of 28 U.S.C. § 2401(a), which applies to actions against the United States, begins when "the right of action first accrues."[66] The Federal Reserve argued that the limitations period started in 2011 with final agency action—so it expired in 2017 before Corner Post even existed.[67] Corner Post argued the limitations period started in 2018 when Corner Post first was injured—so the Federal Reserve's 2011 regulation remains vulnerable to suit beyond six years from promulgation.[68]

As the litigating positions highlight, a legislature's choice about when to start a limitations period involves a policy tradeoff that is consequential whenever there is a temporal gap between the defendant's allegedly unlawful act and the plaintiff's injury. Anytime a legislature enacts a limitations period, it must decide whether to enact a statute of limitations (which starts the limitations period when the plaintiff is injured) or a statute of repose (which starts its limitations period when the defendant acts unlawfully). Each option will sometimes carry negative consequences. Under a statute of repose, some injured plaintiffs will have no opportunity to sue—the limitations period may expire before their injury. Under a statute of limitations, some defendants will never have

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61 *Id.* at 2268.

62 *Id.* at 2266.

63 Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2448 (2024).

64 *Id.* at 2453–54.

65 *Id.* at 2448.

66 *Id.* at 2450 (emphasis omitted) (quoting 28 U.S.C. § 2401(a)).

67 *Id.*

68 *Id.* at 2448, 2450.

complete repose—at any time someone could be newly injured by the defendant's unlawful act and file suit. In previous cases, the Supreme Court had explained how to tell the difference: A statute of repose is "not related to the accrual of any cause of action,"[69] whereas a statute of limitations is "based on the date when the claim accrued."[70]

In the decision on review, the Eighth Circuit held that Section 2401(a) barred Corner Post's suit because it starts the clock at final agency action as a statute of repose.[71] But like the several other circuit courts that had reached that conclusion, the Eighth Circuit did not even perfunctorily examine Section 2401(a)'s linguistic meaning.[72] Rather than focusing on statutory text, the lower courts had focused on policy, balancing interests and settling on a framework that to them "ma[de] the most sense."[73]

When Corner Post's lawyer pointed this out at oral argument, Justice Kagan defended the lower courts by responding that when it comes to Section 2401(a), "there's not much in the text to look at."[74] Justice Kagan meant, it seems, that Section 2401(a)'s text provides no clear answer to the question presented—the law "ran out," as she put it in *Kisor* and *Loper Bright*—and that justified the circuit courts' turn to policy.

The *Corner Post* majority disagreed. With sustained examination of the various legal considerations at issue, the Court held that Section 2401(a)'s limitations period started when Corner Post was injured in 2018. The Court started by observing that under APA Sections 702 and 704, a litigant cannot bring an APA claim before suffering injury from final agency action.[75] The Court then turned to Section 2401(a).[76] The Court discussed Section 2401(a)'s history.[77] Then, citing "contemporaneous dictionaries" and "[its] precedent," the Court noted that at the time of enactment, "'accrue' had a well-settled meaning"—a right accrues "when the plaintiff has a complete and present cause of action."[78] And Congress

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[69] CTS Corp. v. Waldburger, 573 U.S. 1, 7 (2014) (internal quotation marks omitted) (quoting 54 C.J.S. Limitations of Actions § 7 (2010)).

[70] *Id.* at 7 (internal quotation marks omitted) (quoting BLACK'S LAW DICTIONARY (9th ed. 2009) ("[A] statute of limitations begins to run when the cause of action 'accrues' . . . ." (quoting Heimeshoff v. Hartford Life & Accident Ins. Co., 571 U.S. 99, 105 (2013))).

[71] *See* N.D. Retail Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., 55 F.4th 634, 641, 643 (8th Cir. 2022), *rev'd and remanded*, *Corner Post*, 144 S. Ct. 2440 (2024).

[72] *See id.* at 639, 641.

[73] Wind River Mining Corp. v. United States, 946 F.2d 710, 715 (9th Cir. 1991).

[74] *Corner Post* Transcript, *supra* note 14, at 12.

[75] Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2449–50 (2024).

[76] *Id.* at 2450.

[77] *Id.* at 2450–51.

[78] *Id.* at 2451 (internal quotation marks omitted) (quoting Gabelli v. SEC, 568 U.S. 442, 448 (2013)).

"knew how" to write a statute of repose when it wanted—for example, "[j]ust six years before it enacted § 2401(a)," Congress started a statutory limitations period at sixty days after agency action.[79] By reading Section 2401(a) as a statute of repose for APA suits but a statute of limitations for others, moreover, the Federal Reserve's reading would "give the same statutory text . . . different meanings in different contexts," an "odd result."[80]

After *Loper Bright* explained why the law-runs-out concept fails in theory, *Corner Post* showed how it fails in practice. Justice Kagan, the most powerful law-runs-out proponent in the world, categorized *Corner Post* as a hard case—with "not much in the text to look at," a turn to policy was justified.[81] But the *Corner Post* opinion disproves the notion that law-application is impossible in such cases. Regardless of whether one thinks the *Corner Post* Court reached the correct legal answer, it is undeniable that its reasoning was legal. Rather than asking whether a statute of limitations or statute of repose would be more desirable for APA suits (a policy question), the Court asked which one Congress had chosen (a legal question).[82] And as it turned out, there actually was quite a lot of law to look at. Page after page, the Court examined linguistic meaning, statutory history, statutory context, and judicial precedent, and employed longstanding principles of interpretation. The Court did not "make law" with "moral reasoning" by "deciding according to [its] own beliefs and values."[83] The Court gave its best answer as to what the law *is*.

IV. The *Rahimi* Concurring Opinions Explain that Judges Cannot Legislate in Constitutional Adjudication Either

In *United States v. Rahimi*, a Second Amendment case, the three newest Justices in the *Loper Bright* and *Corner Post* majorities each wrote concurring opinions that implicitly took on law-runs-out theory. Their opinions reflect the Court's view that judges may not act as legislators in any context—statutory or constitutional, easy cases or hard cases.

Observing that "[d]iscerning what the original meaning of the Constitution requires" in a particular case "may sometimes be difficult," Justice Gorsuch asserted that this nonetheless "is the only proper question a court may ask."[84] That question "keeps judges in their proper lane," which is to "honor the supreme law the people have ordained rather than

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79 *Id.* at 2452.

80 *Id.* at 2456.

81 *Corner Post* Transcript, supra note 14, at 12.

82 *See Corner Post*, 144 S. Ct. at 2458–60.

83 HART, *supra* note 29, at 272–73; Liu, *supra* note 33, at 1951.

84 United States v. Rahimi, 144 S. Ct. 1889, 1909 (2024) (Gorsuch, J., concurring).

substituting [the judges'] will for theirs."[85] Even when there is "indeterminacy," judges must stick with law—they must heed "the Constitution's original meaning" rather than resort to "judicial policymaking."[86]

Justice Kavanaugh wrote that in constitutional cases, a court "does not implement its own policy judgments" but rather "interprets and applies the Constitution."[87] While the Constitution uses "majestic specificity" with respect to "many important provisions," other provisions "are broadly worded or vague."[88] Justice Kavanaugh noted that some argue that courts should interpret vague constitutional text "by looking to policy."[89] But Justice Kavanaugh rejected that approach: For even vague or open-ended constitutional text, policy is "not . . . the proper guide."[90] Judges faced with vague text should instead "examine[] the laws, practices, and understandings from before and after ratification" to "discern the meaning of the constitutional text and the principles embodied in that text."[91] That is "more consistent with the properly neutral judicial role than an approach where judges subtly (or not so subtly) impose their own policy views on the American people."[92]

While Justice Barrett did not address the issue as directly, her concurring opinion reflects the same principles. "[D]etermining the scope of the pre-existing right[s] that the people enshrined in our fundamental law," Justice Barrett observed, can be "complicated."[93] The inquiry requires analogical reasoning from historical principles, and "reasonable minds sometimes disagree about how broad or narrow the controlling principle should be."[94] But even when the inquiry is complicated and produces reasonable disagreement, Justice Barrett believes that original meaning "controls" all the same.[95]

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85 *Id.*

86 *Id.*

87 *Id.* at 1910 (Kavanaugh, J., concurring).

88 *Id.* at 1911.

89 *Id.* at 1920.

90 *Rahimi*, 144 S. Ct. at 1912 (Kavanaugh, J., concurring).

91 *Id.*

92 *Id.*

93 *Id.* at 1925 (Barrett, J., concurring).

94 *Id.* at 1926.

95 *Id.* at 1925 n.*; *see also, e.g.*, Amy Coney Barrett, then-Judge, U.S. Ct. of Appeals for the Seventh Cir., Remarks at the 2019 National Lawyers Convention, Showcase Panel II: Why, or Why Not, Be an Originalist? (Nov. 15, 2019) (transcript on file with the *George Mason Law Review*) ("[T]here's always going to be disagreement about what the Constitution requires no matter what interpretive

V. Significance

It should come as no surprise that a theory advocating judicial policymaking has not won the day at an originalist Supreme Court. Neither *Chevron,* nor Justice Kagan, nor law-runs-out scholars have been able to reconcile their call for judicial policymaking with the Supreme Court originalists' beliefs about the judicial role.[96] Chief Justice Roberts summed up those beliefs in his 2005 confirmation hearing with comments that foreshadowed his *Loper Bright* opinion and the *Rahimi* concurrences. Judges should decide interpretive issues "with a mind toward finding the better legal answer," Chief Justice Roberts asserted, not "choos[e] between two reasonable interpretations based on personal preferences."[97] "If legal texts and arguments could not yield determinate answers," he explained, "then only the will of the judges could."[98] And that "would result in a rule of men, not the rule of law."[99]

By converting questions that are properly legal questions into policy questions, in other words, law-runs-out theory disestablishes rule of law. When a legal question arises, judges are supposed to merely apply existing We the People-made law.[100] But if instead the legal question is

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standpoint you are approaching the document from so I don't think that's a fatal flaw [of] originalism . . . .").

96 Justice Kagan might differentiate herself from law-runs-out scholars by asserting that she is *not* advocating for judicial policymaking—that she is instead advocating for *agency* policymaking when the law runs out. Indeed, Justice Kagan asserted in *Loper Bright* that courts have "no proper basis for making policy." Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2294 (2024) (Kagan, J., dissenting). But that does not work, because not all interpretive disputes involve an agency. *See id.* at 2266 (majority opinion) ("Courts, after all, routinely confront statutory ambiguities in cases having nothing to do with *Chevron*—cases that do not involve agency interpretations or delegations of authority."). If the law sometimes "runs out" in agency cases, it presumably also sometimes runs out in interpretive disputes that do not involve agencies. There is no logical way for Justice Kagan to cabin to agency cases her assertion that interpretive disputes should sometimes be resolved with policymaking. It is unsurprising, then, that in *Corner Post* she defended the policy-focused analysis of lower *courts* by asserting that there was not much in the statutory text to look at.

97 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 569–70 (2005) (statement of John G. Roberts, Jr., then-Judge, U.S. Court of Appeals for the D.C. Circuit).

98 *Id.* at 570.

99 *Id.*

100 That is why the "province and duty of the judicial department" is to "say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). The judicial branch, it was understood, "can take no active resolution whatever"—it has "neither FORCE nor WILL, but merely judgment." THE FEDERALIST NO. 78 (Alexander Hamilton). Under our Constitution, there are no exceptions—judicial

metamorphosed into a policy question, and the question is therefore answered by someone asking what the law *should* be, new law is made outside our constitutional strictures by someone We the People never so authorized.

The modern originalist movement arose as a counterrevolution against that sort of usurpation of power.[101] As the pioneers of modern originalism saw it, the New Deal and Warren Courts had infused what should have been exclusively legal analysis with their policy views.[102] Justice Antonin Scalia and others argued forcefully that judges must be constrained by original understanding and may not resort to normative, political considerations.[103] And they allowed no exception for text that is contestable. Justice Scalia coldly described the law-runs-out concept as a tool of "theorists who wish to liberate judges from the texts they construe."[104] Many originalist scholars have agreed.[105]

Law-runs-out theory failed at the Supreme Court because no one could explain *why* the inquiry flips from law to policy when there is interpretive uncertainty. There is no good conceptual reason to treat instances of contestable legal text and incontestable legal text differently; originalism's justifications apply the same to both. And no one explained why the fact of contestability might make legal decision-making impossible—why judges facing interpretive uncertainty cannot simply apply their best understanding of the law like they normally do. No one could explain why judges can no longer say what the law is when someone might disagree with their answer. (Imagine a judge instructing a jury to consider policy when reasonable people could disagree about whether a

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power is "never" exercised to implement "the will of the Judge" but rather is "always" exercised to implement "the will of the law." Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 866 (1824).

101 *See* Alicea, *supra* note 21.

102 *See* O'Scannlain, *supra* note 34, at 304–05 ("At that time, as Justice Kagan explained [in a 2015 lecture], the approach was 'what should this statute be,' rather than what do 'the words on the paper say.' Our law schools made common law lawyers of future judges, who believed it was the role of the judiciary to make law, not merely to interpret it .... To quote Justice Kagan, the entire judicial endeavor was 'policy-oriented' with judges and law students alike 'pretending to be congressmen.'" (footnote omitted)).

103 *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 28 (2012) (explaining that originalism prevents "an aristocratic regime in which wise, modest judges (trust them) allow or forbid whatever they like or dislike").

104 *Id.* at 14.

105 *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 774 (2009); *see generally* GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS 118–24 (2017). For a recent critical examination of law-runs-out theory, see Charles F. Capps, *Does the Law Ever Run Out?*, 100 NOTRE DAME L. REV. (forthcoming 2025) (available at https://perma.cc/ZG8E-SH98).

factual burden of proof has been met.) No one could explain why we should demand that legal questions leave only a single reasonable answer when we don't demand that standard for anything else.[106] (Imagine telling a policymaker that policy has "run out" and only other considerations are "left over" whenever a policy question is subject to reasonable disagreement.)

Indeed, accepting a construction zone filled with normative considerations would seem to give cover for the judge's ever-present temptation to exercise will rather than judgment—precisely the concern motivating the originalist counterrevolution.[107] Because every interpretive dispute is contested, and Supreme Court disputes in particular often involve disagreement between even federal appellate judges, it would seem all too easy for a covert pragmatist to wave the wand of indeterminacy and reach the policymaking promised land in virtually any case.[108] As Professor Gerard Bradley once put it, "requiring 'cocksure conclusions' allows the justices to honor plain [original] meaning but as a theoretical or imaginary construct only."[109]

In summer 2024, the Supreme Court took a position: In all interpretive disputes, no matter how hard the question presented, judges

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106 As Professor Gary Lawson has observed, because "any theory of interpretation will generate some measure of uncertainty . . . across some set of questions," "every important question under any remotely plausible interpretative theory is indeterminate" "[i]f constitutional meaning must be established beyond a conceivable doubt." Lawson, *supra* note 105, at 112. Yet that (or perhaps more accurately a clear-and-convincing standard) is the standard law-runs-out theorists apply to legal interpretation. *See, e.g.*, Jonathan H. Choi, *Measuring Clarity in Legal Text*, 91 U. CHI. L. REV. 1, 10 (2024) (arguing that "two readings may be so close to equally plausible that there would be no point in declaring one of them clearly correct" without explaining why "clearly correct" is the standard or identifying on what basis the adjudicator would select the slightly inferior reading). As Lawson has observed, a legal system can be entirely determinate as a matter of adjudication even if it is partly, or even largely, indeterminate as a matter of factual ascertainment through allocations of burdens of proof, along with accompanying standards of proof that define those burdens. *See* Lawson, *supra* note 105, at 123. If the standard of proof is that "an interpretation must be better than the available alternatives," for example, then "the zone of indeterminacy includes only those questions for which the evidence is in complete and precise equipoise." *Id.* at 112–13.

107 *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) ("[T]he main danger in judicial interpretation . . . of any law . . . is that the judges will mistake their own predilections for the law.").

108 *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2140 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("[A] judge may find that the answer provided by the legislative history accords better with the judge's sense of reason, justice, or policy. In that situation, the judge is subtly incentivized to categorize the [law] as ambiguous in order to create more room to reach a result in line with what the judge thinks is a better, more reasonable policy outcome.").

109 GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 138 (1987).

must judge and not legislate. We are not all originalists now when the law is contestable, but the Court's majority is. At this Court, the law never runs out.