

IT DOES NOT MEAN WHAT YOU THINK IT MEANS: HOW
KRIPKKE AND WITTGENSTEIN’S ANALYSIS ON RULE
FOLLOWING UNDERMINES JUSTICE SCALIA’S TEXTUALISM
AND ORIGINALISM

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I. INTRODUCTION

Professor Felix Cohen once said that one of the only two significant questions in the field of law is “how do courts actually decide cases of a given kind?”¹ The answer to Professor Cohen’s question is the focus of my project. More precisely, my project is principally concerned with how judges do *not* decide cases.

Presumably, judicial resolution turns upon finding or deciding what the proper rule of law is or should be. This, in turn, provokes the question of how one determines what the proper rule of law is for any given case.

One method of grappling with this question is to find proper guidelines (or better yet, rules) that will aid judges in finding the, or a, correct rule of law. Such rules I call “meta-rules.” That is, they are rules used to decide what the rule of law is, or should be, in any given case. Such rules can also be called “rules of interpretation.” I will use the terms “meta-rules” and “rules of interpretation” interchangeably to signify rules used to determine what the appropriate rule of law is or should be.

This article deals with constitutional hermeneutics. Hermeneutics is the art or theory of interpretation.² Deciding what the constitutionally appropriate rule is in any given case hinges on what methods any particular judge utilizes to interpret the Constitution. Constitutional hermeneutics, then, is the theory of constitutional interpretation. In this paper, I address a specific constitutional hermeneutic: textualism-originalism.³

This article is a critique of the constitutional hermeneutic of textualism-originalism. As such, my thesis is that the model of interpretation embodied by textualism-originalism cannot possibly serve to do what its proponents assert it does: constrain judicial interpretation.⁴ This is because textualism-originalism depends on two seemingly innocuous premises: (1) rules, including meta-rules, are determinate (that is, rules can determine outcomes in and of themselves); and (2) rules of interpretation exist antecedent to a judge’s application of that rule.

This article seeks to challenge these premises. The means for this challenge is the later philosophy of Ludwig Wittgenstein, supplemented by the analysis of several legal pragmatists: John Dewey, William James, and Chief Judge Richard Posner. My thesis is two-pronged: (1) because meta-rules, like any other rules, are indeterminate, the picture of constitutional interpretation that relies on meta-rules to constrain judicial discretion is mistaken, and (2) assuming *arguendo* that

¹ Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 824 (1935).

² THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 323 (2d ed. 1995).

³ Insofar as the chief purpose of textualism and originalism is the same—to properly constrain a judge’s constitutional interpretations such that they do not impermissibly become what the judge thinks the Constitution ought or ought not provide—I will treat them as constituents of the same functional hermeneutic unit and refer to them singularly as “textualism-originalism” throughout this article. However, at times when I treat them as separate hermeneutic units, I will refer to them individually as either “textualism” or “originalism.”

⁴ See discussion *infra* Part III. The *raison d’être* of textualism is judicial minimalism—to prevent judges from deciding cases according to their own predilections rather than on the law.

Wittgenstein's analysis shows that rules are actually determinate, the efficacy of textualism-originalism is still not preserved because meta-rules do not exist antecedent to the question presented in any individual case. The first premise seems a stronger claim to me insofar as it challenges the determinacy and meaning of all rules. Accordingly, I will call the first argument the "strong thesis" and the second argument the "weak thesis."

In Part II of this article, I trace a traditional model of legal rule-following. Part III illustrates how textualism-originalism follows this traditional model. Part IV, the meat of this paper, analyzes and critiques textualism-originalism utilizing the philosophies of Wittgenstein and Kripke. Finally, Dewey's analysis provides the transition into Part V, which concludes with my answer to Professor Cohen's question—my perspective on how judges actually decide cases.

Before proceeding, I would like to make several points about my use of Wittgenstein's philosophy. First, Wittgenstein's later philosophy is extremely controversial.⁵ There is serious debate in the philosophical community about the precise meaning of Wittgenstein's later philosophy.⁶ I admittedly present a view of Wittgenstein's work that is by no means widely accepted. I present it not as settled doctrine, but as one view among many views of Wittgenstein's later philosophy.⁷

Second, I view Wittgenstein's project as negative. "What [Wittgenstein] opposes to the misunderstandings and false pictures that he examines is not an alternative explanation" ⁸ I do not view Wittgenstein as providing any model of rule-following in lieu of the model he rejects.⁹ In critiquing textualism-originalism, I follow what I perceive to be Wittgenstein's lead. As such, I do not pretend to have any idea what the correct method of interpreting the Constitution is, nor do I explicate any such theory. I do not know the correct method of constitutional

⁵ MARIE MCGINN, WITTGENSTEIN AND THE PHILOSOPHICAL INVESTIGATIONS 1 (1997) ("[T]he philosophical responses to [Wittgenstein's] work present no . . . coherent picture, but rather display wide discrepancies in both the interpretation and assessment of his work.").

⁶ See *id.*; Brian Bix, *The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations to Legal Theory*, 3 CAN. J. L. & JURIS. 107, 108 n.10 (1990) ("One note of caution: Wittgenstein's ideas in the Philosophical Investigations, including the material on rule-following, is presented in short passages, which are often aphoristic or cryptic. To read a particular argument or viewpoint into these comments requires an implicit or explicit filling out of details and clarification of ambiguities.").

⁷ Part IV also examines in detail an alternate interpretation of Wittgenstein's later philosophy. In fact, the second prong of my thesis accepts the alternate view *arguendo*, and proceeds to show it cannot save textualism and originalism.

⁸ MCGINN, *supra* note 5, at 21.

⁹ Of course, this view is hardly settled. The alternate interpretation of Wittgenstein I examine does tend to find a positive model of rule-following in his work. Though I recognize this perspective, I disagree with it. Cf. Dennis M. Patterson, *Wittgenstein and The Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335, 354 (1988) ("[T]he particular virtues of the Wittgensteinian approach to problems of meaning can be measured only by the degree to which the approach succeeds . . ."). In any case, in Part IV, I assume *arguendo* that Wittgenstein does espouse a positive model of rule-following, and deny its ability to preserve the utility of textualism and originalism.

interpretation. Indeed, I doubt there is any correct method. This paper simply attempts to identify some incorrect methods and explain why they are fallacious.¹⁰

II. THE TRADITIONAL MODEL OF LEGAL RULE-FOLLOWING

Essentially, the traditional model of legal rule-following is known as “legal formalism.” It is so named because the traditional model can be depicted by the formula: *rule* → *facts* → *decision*.

The formula has its roots in the logic of the syllogism. A syllogism, as countless authors have explained ad nauseum, consists of a major premise, a minor premise, and a conclusion.¹¹ The classic syllogism obeys the following form: if A and if B then C, such that if “all men are mortal, and if Socrates is a man, then Socrates is mortal.”

The syllogism is perhaps the touchstone of modern legal method.¹² “So compelling and familiar is syllogistic reasoning that lawyers and judges try hard to make legal reasoning seem syllogistic.”¹³ John Dewey described the operation of the syllogism:

as the model of all proof or demonstration. It implies that what we need and must procure is first a fixed general *principle*, the so-called major premise, such as ‘all men are mortal;’ then in the second place, a fact which belongs intrinsically and obviously to a class of things to which the general principle applies: Socrates is a man. Then the conclusion automatically follows: Socrates is mortal. According to this model every demonstrative or strictly logical conclusion ‘subsumes’ a particular under an appropriate universal. It implies the prior and given existence of particular and universals.¹⁴

Dewey’s analysis, while a fair description, ought to be read in context of the critique of logical forms in law that is the subject of his paper. To be sure, numerous scholars, including Dewey, critique the syllogism as it is used in legal method. Arguably, the most famous of these is the analysis of Justice Oliver Wendell Holmes, epitomized in his classic aphorism, “[t]he life of the law has not been logic: it has been experience.”¹⁵

The extent to which syllogistic reasoning is at the core of legal formalism depends on the definition of legal formalism.¹⁶ While I acknowledge that there is no

¹⁰ Laurence H. Tribe, *Comment, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 73 (Amy Gutmann ed., 1997).

¹¹ See, e.g., Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 830 (1988).

¹² See, e.g., John Dewey, *Logical Method and Law*, 10 CORNELL L. Q. 17, 21 (1924) (noting that the type of logic “which has had greatest historic currency and exercised greatest influence on legal decisions, is that of the syllogism”).

¹³ Posner, *supra* note 11, at 831.

¹⁴ Dewey, *supra* note 12, at 21-22.

¹⁵ OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

¹⁶ Cf. Dewey, *supra* note 12, at 21 (observing that for Justice Holmes, “logic is equivalent with the syllogism . . . in accord with the orthodox tradition”).

widely accepted definition of legal formalism, I agree with Professor Radin that “[t]raditionally, legal ‘formalism’ is the position that a unique answer in a particular case can be ‘deduced’ from a rule, or that application of a rule to a particular is ‘analytical.’”¹⁷ For my purposes, it suffices to recognize the core of legal formalism as the “traditional conception of the nature of rules, [that] a rule is self-applying to the set of particulars said to fall under it; its application is thought to be analytic.”¹⁸ By analytic, of course, Professor Radin means the technical sense of the word—that the truthfulness of the proposition formalizing the word is not contingent on the world at large. For example, if I state that $2 + 2 = 4$, I do not need to examine the empirical world to know that the proposition is true.¹⁹

In this way, syllogistic reasoning is analytic. One need know nothing about the world to state that all men are mortal, and if Socrates is a man, then Socrates must be mortal.²⁰ However, my project is not aimed at criticizing the use of syllogisms or of pure legal formalism.

Rather, for the purposes of this paper, the essential point of legal formalism, is its emphasis on the notion of an antecedent rule to which the facts are applied (and which gives forth the conclusion). Dewey notes that syllogistic reasoning “implies that for every possible case which may arise, there is a fixed antecedent rule already at hand”²¹ This is what gives rise to the *rule* \rightarrow *facts* \rightarrow *decision* formula. There is a rule, to which the particular facts of a given case are applied, out of which a decision is produced. The Socrates syllogism illustrates the point. The “rule” is that all men are mortal, the “fact” is that Socrates is a man, and the “decision” is that Socrates is mortal. In this form of reasoning, the rule precedes the fact. If, for example, one was not aware of the rule or rule-like proposition that all men are mortal, the conclusion that Socrates is mortal does not follow. To make sense of a

¹⁷ Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 793 (1989).

¹⁸ *Id.* at 795.

¹⁹ In contrast, if I say that “The University of Houston is in Texas,” one would have to know something about the empirical world (or consult an encyclopedia, etc.) to evaluate the truth of that statement. This case is described as a “synthetic” proposition. As Dewey elaborates, “the philosophy embodied in the formal theory of the syllogism asserted that thought or reason has fixed forms of its own, anterior to and independent of concrete subject-matters” Dewey, *supra* note 12, at 21.

²⁰ In the technical sense, a valid argument is one in which if the premises are true, then the conclusion must necessarily follow. HOWARD POSPESEL, *INTRODUCTION TO LOGIC: PROPOSITIONAL LOGIC* 4 (3d ed. 2000). The following argument is thus valid:

p: Napoleon was Japanese.

p: All Japanese are Europeans.

\therefore Napoleon was European.

This is valid, because *if* the premises are true, the conclusion must follow. Of course, the premises are dubious, but that does not render the argument invalid, because technical validity concerns the form of the argument, rather than the content. This, of course, explains why syllogism is a core element of legal formalism—it is a logical form that need not be filled with empirical content to be valid. It is analytic.

²¹ Dewey, *supra* note 12, at 22.

sylogism, the rule must exist antecedent to the specific case established by the minor premise.

The concept of the rule existing antecedent to the facts is crucial and will be explored in detail in the following section. Having examined this conceptual underpinning of legal formalism, I now turn to an explanation of the specific link between legal formalism and textualism-originalism.

III. TEXTUALISM AND ORIGINALISM FOLLOW THE FORMALIST MODEL

A. *Basic Premises of Textualism and Originalism*

United States Supreme Court Justice Antonin Scalia put it quite succinctly: “[o]f all the criticisms leveled against textualism, the most mindless is that it is ‘formalistic.’ The answer to that is, *of course it’s formalistic!* The rule of law is *about* form.”²² Aside from a formalist, Justice Scalia also calls himself a textualist-originalist.²³

Both textualism and originalism are descendants and close kin of the traditions of legal formalism. Textualism is a constitutional hermeneutic that purportedly explains the proper way of interpreting the Constitution. Rather than identifying what the law ought to be, a textualist construes the meaning of the constitutional text itself and conforms the words of the text to fit this desired interpretation. Justice Scalia terms the latter approach the “common-law attitude” of the federal judge.²⁴

A textualist approach argues that a decision may be desirable because it advances freedom or creates an Orwellian equality for all,²⁵ but is nevertheless wrong if it fails to follow the words of the text.²⁶ “The text is the law and it is the text that must be observed.”²⁷

Of course, Justice Scalia acknowledges that “a good textualist is not a literalist,”²⁸ and stresses that textualism is not strict constructionism.²⁹ The textualism Justice

²² Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 25 (1997).

²³ Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129, 132 (1997). As an aside, I would like to note here that I am examining textualism and originalism as it strikes Justice Scalia. I am well aware that the intellectual edifices of textualism and originalism are not monolithic, and that there may be other variants. In this article, I am concerned only with the model of textualism and originalism that Justice Scalia espouses. However, I do suspect that Justice Scalia’s model has features that are significant to most serious notions of textualism and originalism.

²⁴ Scalia, *supra* note 22, at 13 (“I do question the *attitude* of the common-law judge—the mind-set that asks ‘What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?’”).

²⁵ See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 705 (2001) (Scalia, J., dissenting) (describing the majority’s application of the Americans with Disabilities Act as “its Animal Farm determination [regarding] fairness . . .”).

²⁶ Scalia, *supra* note 22, at 22 (reasoning that a specific decision “was wrong because it failed to follow the text”).

²⁷ *Id.*

²⁸ *Id.* at 24.

Scalia espouses recognizes that there is a range of possible meanings words may have—there is not only one possible meaning, which is what a strict constructionist might hold.³⁰ Nevertheless, the range is limited, “and no interpretation that goes beyond that range is permissible.”³¹

Originalism directs a judge to search for the original meaning of the constitutional text, or in other words, the way the Constitution was originally understood at the time of its inception.³² Originalism is not the search for the original intent of the Framers—it is rather the search for the original meaning of the constitutional provision(s) at issue.³³

Thus, textualism and originalism work in tandem, at least for Justice Scalia. Textualism aids a judge in staying close to the meaning of the text, and originalism ensures the judge will interpret the Constitution according to its original meaning, rather than interpreting the text according to “the philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of Aristotle[.]”³⁴

The similarity between these two methods of interpretation is their purpose: to constrain the “common-law attitude” of the judge. The problem with judge-made law is that it seems to exist uncomfortably with, if not in stark contradiction to, the notion of separation of powers.³⁵ A federal judge is appointed, rather than elected as the representative of the people, and is therefore not charged with the responsibility to promulgate laws. The difficulty is that the “common-law attitude,” insofar as it directs a judge to find the interpretation he or she feels most just rather than the interpretation that remains faithful to the original meaning of the text, “render[s] democratically adopted texts mere springboards for judicial lawmaking.”³⁶

Judges ought not make law, according to Justice Scalia, because it is the function of legislators to make law.³⁷ Textualism and originalism serve to enhance democracy by ensuring that only those elected by the citizenry with the express

²⁹ *Id.* at 23 (terming strict constructionism a “degraded form of textualism”).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 45 (“[T]he originalist at least knows what he is looking for: the original meaning of the text.”).

³³ *Id.* at 38 (instructing that the proper search is for the “original meaning of the text, not what the original draftsman intended”).

³⁴ *Id.* at 45. Justice Scalia’s point is that, *sans* originalism, a judge has no proper standard for evaluating what meaning the Constitution has evolved to. *Id.* Under an originalist approach, the standard is quite clear—the meaning to be applied to the facts is the meaning that most resembles, if not matches, the meaning of the constitutional provision at issue at the time the provision was adopted. *See id.*

³⁵ As Justice Scalia remarks, judge-made law “would be an unqualified good [] were it not for a trend in government that has developed in recent centuries, called democracy.” *Id.* at 9.

³⁶ *Id.* at 25.

³⁷ This is not to assert that Justice Scalia denigrates the common law as a whole. Rather, he rejects the common law attitude of the judge inasmuch as that attitude directs judges to stray from the meaning of the statutory text in favor of their own desired interpretations. The topic of Justice Scalia’s essay is federal judges, who are, of course, not elected.

purpose of promulgating law do in fact make law. Textualism and originalism accomplish this by constraining the judge to remain faithful to the original meaning of the words of the constitutional text. Therefore, the essence of both textualism and originalism is proper constraint. A judge who does not interpret the Constitution according to the dictates of textualism and originalism virtually guarantees, according to Justice Scalia, that the judge's predilections about what the law ought to be will inevitably color the judge's interpretation of what the law is. "Should there be—to take one of the less controversial examples—a constitutional right to die? If so, there is. Should there be a constitutional right to reclaim a biological child put out for adoption by the other parent? If so, there is."³⁸

Insofar as the chief purpose of textualism and originalism is the same—to properly constrain a judge's constitutional interpretations such that they do not impermissibly become what the judge thinks the Constitution ought or ought not provide—I will treat them as constituents of the same functional hermeneutic unit and refer to them singularly as textualism-originalism.³⁹ Though obviously textualism and originalism are not equivalent, I adopt this locution for ease of reference, and also because my critique applies equally to both textualism and originalism. This is because my critique challenges whether these meta-rules could possibly fulfill their *raison d'être* and constrain interpretation. Even Justice Scalia regards them as somewhat coextensive; he terms himself a "textualist-originalist."⁴⁰

B. Cases Applying Textualism and Originalism

Before turning to the substance of my critique, it seems worthwhile to examine textualism and originalism in action—to see how Justice Scalia applies them in actual decisions. I will use three cases to depict how Justice Scalia applies the hermeneutics.

The first case is *Michael H. v. Gerald D.*⁴¹ Writing for the majority, Justice Scalia virtually encapsulates his philosophy of textualism and its import when he notes that:

[w]ithout that core textual meaning as a limitation [on the definition of the term 'liberty'], defining the scope of the Due Process Clause 'has at times been a treacherous field for this Court,' giving 'reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court.'⁴²

It is fidelity to the "core textual meaning" that prevents judging from becoming merely the whims of the judges instantiated. Accordingly, Justice Scalia highlights the need for "restraint."⁴³ This is textualism, or at least textualism as it strikes Justice Scalia.

³⁸ *Id.* at 39.

³⁹ *See supra* note 3.

⁴⁰ Scalia, *supra* note 22, at 132.

⁴¹ 491 U.S. 110 (1989).

⁴² *Id.* at 121 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)) (alteration in original).

⁴³ *Id.* at 122.

Similarly, Justice Scalia expounds originalism.⁴⁴ Justice Scalia explains, “[i]n an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.”⁴⁵ Note the metaphor at work in this analysis: the purpose of examining the historical treatment of the liberty interest at issue is to “limit and guide interpretation.”⁴⁶ The prism of interpretation is whether the “asserted liberty interest [is] rooted in history and tradition.”⁴⁷ This is originalism.

Two cases more recently decided by the United States Supreme Court show how textualism and originalism continue to have meaning for Justice Scalia. The case of *INS v. St. Cyr*, a case that has grown more relevant since the events of September 2001, concerned the meaning of the Suspension Clause.⁴⁸ In his dissenting opinion, Justice Scalia argued that “[a] straightforward reading of this text discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not . . . be suspended.”⁴⁹ Here, Justice Scalia is applying the meta-rule of textualism (remaining faithful to the meaning of the words of the text) to ascertain the correct rule of law. He reasons that it would be unacceptable “for this Court to write a habeas law, in order that the Suspension Clause might have some effect.”⁵⁰

Justice Scalia thus employs the textualist model to point to the “plain meaning” of the constitutional text and to constrain the Court’s alleged temptation to write a habeas law.⁵¹ It is the latter predilection that textualism is intended to guard against. Moreover, following this section of Justice Scalia’s dissent, he proceeds to analyze how the Framers and those alive when the Constitution was originally ratified understood the term “suspend.”⁵² This is the originalist hermenutic in action.

In a terse dissent in *Shafer v. South Carolina*, Justice Scalia argues that the majority decision, though consistent with precedent, is inconsistent with the Constitution. He implies that the majority is making law: “I am more attached to the logic of the Constitution, whose Due Process Clause was understood as an embodiment of common-law tradition, rather than as authority for federal courts to promulgate wise national rules of criminal procedure.”⁵³ Justice Scalia’s apparent point is that the text of the Constitution simply does not instantiate the rule the

⁴⁴ *See id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 123.

⁴⁸ *INS v. St. Cyr*, 533 U.S. 289, 300-01 (2001).

⁴⁹ *Id.* at 337 (Scalia, J., dissenting).

⁵⁰ *Id.* at 338.

⁵¹ *Id.* at 334 (reflecting on the frequent occurrence of courts “distort[ing] plain statutory text in order to produce a ‘more sensible’ result”).

⁵² *Id.* at 337.

⁵³ *Shafer v. S.C.*, 532 U.S. 36, 55 (2001) (Scalia, J., dissenting).

majority finds. Even if the majority's rule is desirable, when it is not supported by a reasonable construction of the words of the Constitution, it is impermissible.⁵⁴

In *Michael H., St. Cyr*, and *Shafer*, and in the textualism and originalism models generally, it is the application of the meta-rule itself that determines the correct interpretation and simultaneously serves to constrain judicial discretion. Justice Scalia does not contest the majority's assessment in either *St. Cyr* or *Shafer* that the rule of the case is wise or appropriate. This is precisely the point of the textualism and originalism hermeneutics. To its proponents, and particularly Justice Scalia, the Constitution cannot be thought of as an evolving document due to the lack of standards that govern what the Constitution has evolved to mean.⁵⁵ Whether the proposed rule is wise or desirable does not negate the notion that it is undemocratic, not to mention dangerous, for appointed judges to be essentially promulgating law.

Thus goes the rationale for the textualism and originalism hermeneutics. Apparently grounded in respect for democracy and separation of powers, textualism and originalism constrain the judge from an interpretation that strays from the original meaning of the constitutional text. Such constraint is necessary to prevent a judge from substituting his or her own predilections for what the law actually is.

I am not averse to the rationale for textualism-originalism. I am sympathetic to Justice Scalia's arguments concerning the antidemocratic nature of the common-law judge. If there were some way of preventing judges from making policy, of keeping that function solely in the hands of the legislators, I might well agree with the desirability of using that method. The key clause for me, however, is "if there were some way." Justice Scalia thinks there is a way: the textualism-originalism hermeneutic. This is where our disagreement arises. I do not believe that textualism-originalism can possibly serve to constrain judicial interpretation. I believe all judges make policy, for better or worse.⁵⁶ In my opinion, it is impossible for judges to do anything but make policy.⁵⁷

⁵⁴ See *id.* ("Providing . . . information [to the jury regarding the possibility of parole for the defendant] may well be a good idea (though it will sometimes harm rather than help the defendant's case)—and many States have indeed required it The Constitution, however, does not.").

⁵⁵ See Scalia, *supra* note 22, at 44-47 (imparting that there is a lack of a guiding principle assessing how the meaning of the Constitution has evolved).

⁵⁶ Professor Robert Cover coins the phrase "jurisgenerative" to describe the judicial function; that "the problem [is] of the multiplicity of meaning . . . the too fertile forces of jurisgenesis . . ." Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 15-16 (1983). Judges, he observes, "are people of violence." *Id.* at 53. "[T]he jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence." *Id.* at 40. Connecting the phenomenon to the open expanse of interpretation, he explains that "[i]t is the multiplicity of laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution." *Id.* I believe Justice Scalia might actually concur with this analysis insofar as it dovetails with his analysis of the "attitude of the common-law judge." See *supra* note 36 and accompanying text.

⁵⁷ However, I reject the coherence of the criticism that a particular judge is making law, or legislating from the bench. Since no judicial opinion is subject to bicameralism and presentment, it follows that judges plainly do not make law. I do not mean this as a mere quibble over semantics, because there is good reason for rejecting the notion that judges make law.

In a prior article, I argued that the textualism-originalism hermeneutic fundamentally misconstrues the way individuals interact with the world.⁵⁸ I contended that textualism-originalism is predicated on flawed scientific metaphors that have long since been rejected by the scientific community.⁵⁹ Scientists rejected these models because they no longer accurately described the world we inhabit.⁶⁰ I urged that the legal community ought similarly reject the textualism-originalism model for precisely the same reason.⁶¹

I take a different course in this article, though I hope to arrive at a similar conclusion: textualism-originalism cannot possibly do what its proponents assert it does—constrain, if not prevent, judicial lawmaking. The reason it cannot constrain judicial lawmaking is inherent in the very concept of the meta-rule itself. I do not explain the scientific metaphor behind the meta-rule in this article, but the analytic concept of what it is to be a meta-rule and of what I believe rules do—and of what I believe they do not do. In this, I am guided by the later philosophy of Ludwig Wittgenstein.

IV. A WITTGENSTEINIAN CRITIQUE OF THE TRADITIONAL MODEL OF RULE-FOLLOWING

A. Caveats

As previously noted, I am espousing a somewhat controversial position using Wittgenstein's analysis.⁶² Namely, I find that Wittgenstein's analysis in *Philosophical Investigations* can be used to support an argument that all rules, including legal rules (and meta-rules), are indeterminate. Several caveats must be observed before proceeding.

First, I do not argue, as do some scholars of Wittgenstein, that he himself actually espoused skepticism. I do believe that his analysis can be employed in support of an argument for rule indeterminacy, regardless of whether he personally espoused skepticism regarding rule-following (presuming that the notion of rule indeterminacy is skeptical in nature). Second, as noted in the Introduction, the conception of Wittgenstein's later philosophy as demonstrating skeptical tendencies through the

Namely, once it is established that no judge makes law, or legislates from the bench, one is left with the rather pedestrian notion that judges make policy. The extent to which judicial policy-making is either desirable or warranted is far more complicated than the question of whether judges ought to make law. Few would agree that judges should truly make law; indeed, the very obviousness of the transgression of separation of powers is what makes the criticism "this judge is making law" so effective. Given that policy-making seems to be an element of the judicial function, whereas legislating is not, it is the former that is the most fruitful locus for inquiry. The latter is incoherent, and something of a straw man, as well.

⁵⁸ Daniel S. Goldberg, Comment, *And the Walls Came Tumbling Down: How Classical Scientific Fallacies Undermine the Validity of Textualism and Originalism*, 39 HOUS. L. REV. 463, 467 & n.20 (2002).

⁵⁹ *Id.* at 475 & n.80.

⁶⁰ *Id.* at 487.

⁶¹ *Id.* at 490.

⁶² See notes 5-7, *supra*, and accompanying text.

concept of rule indeterminacy is controversial.⁶³ In all fairness, such a view is probably supported by only a minority of Wittgenstein scholars. I thus present the argument neither as recognized truth nor as established Wittgensteinian doctrine, but as one possible way of reading *Philosophical Investigations*. In any case, as I shall demonstrate, even if I am incorrect in my reading of Wittgenstein, the alternate reading urged by the majority of Wittgenstein scholars does not save the textualism-originalism hermeneutic from incoherence.

B. Kripke's Argument for Rule Skepticism and the Implications for Textualism and Originalism

1. The Argument

Saul Kripke voiced similar caution in his well-known book, *Wittgenstein on Rules and Private Language*.⁶⁴ He stressed that he did not view his analysis as pure explication of Wittgenstein's argument, but rather as "Wittgenstein's argument as it struck Kripke, as it presented a problem for him."⁶⁵

Nevertheless, Kripke's analysis is the support I proffer for a reading of rule indeterminacy. Kripke begins by citing § 201 in Wittgenstein's *Philosophical Investigations*: "this was our paradox: no course of action could be determined by a rule, because every course of action can be made to accord with the rule."⁶⁶ Kripke attempts to explain the paradox.

He begins by considering the rule for addition. Kripke notes that, "[a]lthough I myself have computed only finitely many sums in the past, the rule determines my answer for indefinitely many new sums that I have never previously considered."⁶⁷ Or does it? He poses a "simple" expression of this rule: that when one adds $68 + 57$, the computation yields 125.⁶⁸ Kripke supposes that the individual performing the computation has never performed this computation, nor any computation involving addends greater than 56.⁶⁹

⁶³ See, e.g., Bix, *supra* note 6, at 108 n.10 ("It is very hard to find a Wittgenstein scholar who is in substantial agreement with Kripke's reading."). Kripke explained the notion of rule indeterminacy as he perceived it from the *Investigations*. SAUL A. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* (1982).

⁶⁴ KRIPKE, *supra* note 63. I will examine a sampling of the criticisms of Kripke's analysis, and respond to them in kind.

⁶⁵ *Id.* at 5; see also MCGINN, *supra* note 5, at 74 (same). Some scholars, however, dispute that Kripke's reading of Wittgenstein is in any way Wittgensteinian, terming the Kripke in his book as "Kripgenstein." See, e.g., Jules L. Coleman & Brian Letter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 571 & n.38 (1993).

⁶⁶ See KRIPKE, *supra* note 63, at 7 (citing LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 81e (G.E.M. Anscombe trans., Prentice Hall 3d ed. 1958) (1953)). Many scholars have expressed dismay at reading a statement of Wittgenstein's out of the context of the sections that preceded and/or followed it. See, e.g., Bix, *supra* note 6 and accompanying text.

⁶⁷ KRIPKE, *supra* note 63, at 7.

⁶⁸ *Id.* at 8.

⁶⁹ See *Id.*

Kripke then poses the existence of a “bizarre skeptic,” who questions the computation.⁷⁰ This skeptic contends that the answer to “68 + 57” is 5.⁷¹ The skeptic reasons that the individual computing (hereinafter, “the adder”) has actually changed what he means by “+” if the answer to 68 + 57 is 125. Rather, the rule the adder has applied up until this point will yield 5, the skeptic challenges.

How? The adder cannot produce a sum of 125 by “explicitly [giving the adder] instructions that 125 is the result of performing the addition in this particular instance. By hypothesis, [the adder] did no such thing.”⁷² The skeptic continues his troubling analysis, noting that the adder has only in the past computed

a finite number of examples instantiating this function So perhaps in the past [the adder] used ‘plus’ and ‘+’ to denote a function which I will call ‘quus’ and symbolize by ‘ \oplus ’. It is defined by: $x \oplus y = x + y$, if $x, y < 57 = 5$ otherwise. Who is to say that this is not the function I previously meant by ‘+’?⁷³

Essentially, the skeptic argues that the adder has always added numbers according to the “quus” function, and is “now misinterpreting [his] own previous usage . . . now, under the influence of some insane frenzy, or a bout of LSD, I have come to misinterpret my own previous usage.”⁷⁴ If correct, the skeptic’s argument illustrates that there is no fact arising out of the adder’s past that establishes that the adder meant “plus” rather than “quus.”⁷⁵ “But if this is correct, there can of course be no fact about which function [the adder] meant, and if there can be no fact about which particular function [the adder] meant in the *past*, there can be none in the *present* either.”⁷⁶ There is nothing that justifies the adder’s response of “125” to the computation of 68 + 57, rather than answering “5.” “Every possible answer is compatible with some possible function, and thus the idea of any answer being the correct answer becomes completely idle or empty.”⁷⁷

Finally, and perhaps most importantly for my purposes, Kripke completes the sketch of the argument by rejecting the possibility that meta-rules can resolve the skeptical paradox. Kripke considers the possibility that one may develop an algorithm for addition, a set of instructions that directs the adder to come up with 125 in answer to the computation 68 + 57.⁷⁸ This set of instructions comprises a meta-rule. It is a rule, or set of rules, for interpreting or applying the rule of addition.

Ultimately, Kripke rejects the utility of meta-rules for establishing rule determinacy because the meta-rules themselves fall prey to the same skeptical

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* This follows because the adder has not yet computed this sum in the past.

⁷³ *Id.* at 8-9.

⁷⁴ *Id.* at 9.

⁷⁵ *Id.* at 13.

⁷⁶ *Id.*

⁷⁷ MCGINN, *supra* note 5, at 76 (explaining Kripke’s analysis).

⁷⁸ KRIPKE, *supra* note 63, at 16.

analysis enumerated above. As Professor McGinn explains, there will “always be a way of interpreting the additional rule that will bring its application into conformity with the original rule.”⁷⁹ Suppose, Kripke says, that the meta-rule charges the adder to count out a given number of marbles (x) in a heap, to which another number (y) in a separate heap is added, yielding a new heap consisting of $x + y$.⁸⁰ Counting out 68 marbles in one heap and 57 marbles in another heap cannot possibly yield 5 marbles. Therefore, goes Kripke’s response to the skeptic, the meta-rule (or algorithm) dictates the correct application of the rule: “plus” rather than “quus.” However, this analysis fails to resolve the paradox.

But I applied ‘count’, like ‘plus’, to only finitely many past cases. Thus the sceptic can question my present interpretation of my past usage of ‘count’ as he did with ‘plus’. In particular, he can claim that by ‘count’ I formerly meant *quount*, where to ‘quount’ a heap is to count it in the ordinary sense, unless the heap was formed as the union of two heaps, one of which has 57 or more items, in which case one must automatically give the answer ‘5’. It is clear that if in the past ‘counting’ meant quounting, and if I follow the rule for ‘plus’ that was quoted so triumphantly to the sceptic, I must admit that ‘68 + 57’ must yield the answer ‘5’.⁸¹

In short, “[r]ules for interpreting rules don’t get us any further.”⁸² Furthermore, Kripke explicitly notes that the difficulty is not restricted merely to mathematical cases.⁸³ “For any word in my language, we can come up with alternative

⁷⁹ MCGINN, *supra* note 5, at 77 (explaining Kripke’s analysis). It should be noted that Professor McGinn assuredly rejects Kripke’s analysis, though she depicts it accurately, and does not specifically disabuse Kripke’s argument concerning meta-rules. I therefore see no difficulty with using her succinct explication of Kripke’s argument for my own admittedly brief analysis.

⁸⁰ KRIPKE, *supra* note 63, at 15.

⁸¹ *Id.* at 16.

⁸² MCGINN, *supra* note 5, at 77.

⁸³ See KRIPKE, *supra* note 63, at 19 (“These problems apply throughout language and are not confined to mathematical examples.”); see also Ahilan T. Arulanantham, Note, *Breaking the Rules?: Wittgenstein and Legal Realism*, 107 YALE L.J. 1853, 1871-72 (1998). Arulanantham explains that,

[a]s Kripke made clear, the arguments for the indeterminacy of meaning guided by rules are general. Just as there is no fact that can definitively settle what someone meant by ‘plus’ in a previous case, there is also no fact about what the rule that two signatures make a valid will meant with respect to this new case (e.g., it may have meant two signatures make a valid will except when the inheritor did wrong to gain inheritance, or something more bizarre, such as the meaning must be different once we enter the age of electronic signatures, so that now a will needs three signatures).

Id. at 1872. Arulanantham’s paper coheres in many significant ways with the views I will attempt to articulate here. The fact that Arulanantham’s paper is a Note may mean that the paper is a student’s product. Insofar as one may question the wisdom of relying too much on student work, I am reminded of the Italian humanist Giovanni Pico della Mirandola’s (1463-1494) admonition to his audience that, “since it will be their task to judge my discoveries and my scholarship, they ought to look to the merit or demerit of these and not to the age of their

interpretations of what I mean by it that are compatible with both my past usage and any explicit instruction that I might have given myself.”⁸⁴ For example, Kripke considers his application of the word “green” to a new circumstance: “Perhaps by ‘green’ in the past I meant *grue*, and the color image, which indeed was *grue*, was meant to direct me to apply the word ‘green’ to *grue* objects always.”⁸⁵ And so on and so forth, in a *reductio ad absurdum*.

To summarize, if Kripke’s argument is valid, it illustrates that one’s application of a rule “is an unjustified stab in the dark. [One applies] the rule *blindly*.”⁸⁶ Moreover, any meta-rule, or rule used to interpret or apply another rule correctly or determinately, is likewise impossible. A meta-rule is just as much an unjustified stab in the dark as a functional rule itself (such as addition). “The rule cannot by itself determine correct applications (because there is no fact of the matter that makes the rule inconsistent with one application and consistent with another).”⁸⁷

2. Implications for Textualism and Originalism

I find Kripke’s analysis simply devastating. If he is correct, any hope of utilizing textualism-originalism to constrain judicial interpretation is baseless. This is because the meta-rule cannot possibly determine which of several possibilities is the correct application or interpretation. Application of the textualism-originalism hermeneutic does not determine whether the Constitution grants individuals a right to die because there is no fact about a judge’s history that allows the judge to conclude that deciding one way versus the other is consistent with the judge’s prior applications of textualism-originalism. The point of Kripke’s argument is to demonstrate that one “can have no justification for one response rather than another.”⁸⁸ It is entirely consistent to apply the textualism-originalism hermeneutic to a constitutional dilemma and use it to justify any response whatsoever because the rule, or meta-rule in this case, is irreducibly indeterminate. The rule cannot by itself determine correct applications.⁸⁹ As Wittgenstein himself stated, “whatever is going to seem right to me is right.”⁹⁰ In short:

author.” GIOVANNI PICO DELLA MIRANDOLA, ORATION ON THE DIGNITY OF MAN 11 (trans. C.R. Shalizi), available at <http://cscs.umich.edu/~crshalizi/Mirandola>.

⁸⁴ MCGINN, *supra* note 5, at 77.

⁸⁵ KRIPKE, *supra* note 63, at 20.

⁸⁶ *Id.* at 17. As a side note, it is worth mentioning that Kripke does not endorse the skeptical argument he has laid out because he enumerates a “skeptical solution.” See *id.* at 55 (laying out the solution to the skeptical paradox). Kripke is careful to label his solution as skeptical in nature: “[a] skeptical solution of a sceptical philosophical problem begins . . . by conceding that the sceptic’s negative assertions are unanswerable.” *Id.* at 66. I will address Kripke’s skeptical solution below.

⁸⁷ Arulanantham, *supra* note 83, at 1869. Arulanantham explicitly links Kripke’s argument to law: “If language exhibits this baseline indeterminacy, and legal rules are built on language (and share all of its instability), legal propositions can have no determinative force either. Therefore, the realists conclude, judges are never compelled by rules.” *Id.* at 1866.

⁸⁸ KRIPKE, *supra* note 63, at 21.

⁸⁹ See note 79 *supra* and accompanying text. Similarly, Professor Marmor explains that [t]his is the crucial point: *If a rule could not determine which actions were in accord with it, then no interpretation could do this either.* Interpretation is just another

Wittgenstein's arguments against a rule-based picture (which show that a rule-based picture justifies skepticism) apply quite straightforwardly to law. Consequently, the arguments for why a rule-based picture of language cannot provide linguistic determinacy also give us good reasons to believe that a rule-based picture of law cannot generate legal determinacy.⁹¹

Under the same analysis, nor can meta-rules generate legal determinacy. As such, the *raison d'être* of textualism-originalism dissipates if Kripke is right. Application of textualism-originalism cannot possibly serve to constrain interpretation if every interpretation can be made to accord with the original meta-rule. It is a fiction, a chimera.

3. Challenges to Kripke's Argument

The real question is whether Kripke is right. I will consider two groups of responses to Kripke's analysis. The first category opines that Wittgenstein would assuredly not agree with Kripke's interpretation of his later philosophy, and that "Kripkestein"⁹² invents a paradox that is not, and would not, be supported by Wittgenstein. The second category attacks Kripke's argument on its face and argues that the "skeptical paradox" he claims to have traced is absurd. The two categories are related.

a. First Category of Challenges

As to the first category, Professor McGinn's analysis is illustrative. She essentially argues that Wittgenstein was largely concerned with exposing the incoherence of some entrenched theories of meaning. However, in depicting these difficulties, she argues, nowhere does he espouse any kind of skeptical beliefs. In fact, goes the argument, Wittgenstein's concern is largely based in anti-skepticism—in showing how rule-based meaning is possible (while destroying the traditional basis for rule determinacy).

Professor McGinn begins by examining Wittgenstein's discussion of a cube.⁹³

He asks us to reflect on what does actually come before my mind when I hear and understand the word 'cube' . . . Perhaps, he suggests, what

formulation of this rule, substituting one rule with another, as it were. Hence it cannot bridge the gap between a rule and an action.

Andrei Marmor, *No Easy Cases*, 3 CAN. J. L. & JURIS. 61, 76 (1990).

⁹⁰ LUDWIG WITGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 258 (G.E.M. Anscombe trans., Prentice Hall 3d ed. 1958) (1953). Again, I am loath to quote any direct language of Wittgenstein out of context of the language surrounding the quote. Kripke himself cites this language, *see* KRIPKE, *supra* note 63, at 23-24, and expressly notes that this seems apparently contrary to Wittgenstein's own aims. However, there is neither the time nor the space to canvass the imposing literature on how to read or not to read Wittgenstein. I follow Kripke's lead in quoting such language here, and I trust that quoting verbatim the primary source on occasion does not constitute too woeful an infirmity.

⁹¹ Arulanantham, *supra* note 83, at 1872.

⁹² *See supra* note 65 and accompanying text.

⁹³ MCGINN, *supra* note 5, at 83.

comes before my mind is a schematic drawing of a cube. Now the question is how does the schematic drawing that comes before my mind connect with the use I go on to make of the word 'cube.'⁹⁴

An objection similar to that raised by the bizarre skeptic may be posed here. The use of the schematic drawing of a cube supposedly steers one to conclude that a triangular prism does not fit the schematic.⁹⁵ "Wittgenstein responds: 'Doesn't it fit? I have purposely so chosen the example that it is quite easy to imagine a *method of projection* according to which the picture does fit after all.'"⁹⁶

This sounds of Kripke's argument for skepticism, but Professor McGinn disabuses the notion. According to Professor McGinn, Wittgenstein's point is not that any interpretation of a rule can be justified, but rather, that "there is a great temptation to misunderstand or misrepresent the nature of this link [between the schematic and the cube]."⁹⁷ Wittgenstein's project is to point out the errors of our traditional ways of thinking, not to ground a radical form of skepticism. His point "is to reveal that the picture we're inclined to construct in response to the question 'What is understanding?' is empty, and that everything that we need to remove our puzzlement lies already open to view in our practice of using language."⁹⁸

I daresay that many scholars of Wittgenstein agree that he was uniquely concerned with language as a practice.⁹⁹ The picture Wittgenstein depicts as empty is a picture that requires some rule that embodies the logical connection we believe must exist between the schematic and the cube. "Thus the connection between a rule and a practice that Wittgenstein makes is not put forward as a philosophical analysis of the concept of 'a rule', but is intended to describe what is observable in the structure of our language-game, in how our concepts actually function."¹⁰⁰

The words we use are not justified by any logical connection between our past history and our present usage of the word—and they do not *need* to be. [W]e can see that ordinary practice does not depend upon the spurious idea of a mysterious link between a rule and its use, simply by observing the fact that our ordinary experience of the rules of our language involves a sense of how the rule must be applied that is completely independent of this notion.¹⁰¹

Once we wean ourselves of the requirement that a logical connection compels the connection of schematic and cube, or of the addition function and "68 + 57," "the

⁹⁴ *Id.*

⁹⁵ *Id.* at 83-84.

⁹⁶ *Id.* at 84 (citing WITTGENSTEIN, *supra* note 90, at § 139).

⁹⁷ *Id.*

⁹⁸ *Id.* at 97.

⁹⁹ *See, e.g., id.* at 103 (tracing Wittgenstein's analysis as based on the notion of language as practice rather than a set of rules).

¹⁰⁰ *Id.* at 102-03.

¹⁰¹ *Id.* at 104-05.

actual ground of our practice of rule-following [is left] completely untouched.”¹⁰² As Wittgenstein himself noted, “[a]nd hence ‘obeying a rule’ is a practice.”¹⁰³

Before I respond to this critique (though I will ultimately accept it *arguendo*), it is worthwhile to note that Professor McGinn’s argument does not challenge Kripke’s view that Wittgenstein rejects a theory of meaning based on logical connections between rules and applications. On the contrary, she accepts it, but reasons that as grounded in our practice, we simply do not need such logical compulsions to use language meaningfully.¹⁰⁴ “Wittgenstein’s target in the passages on rule following was not meaning itself, but rather a particular rule-based picture of meaning.”¹⁰⁵ In other words, Professor McGinn accepts that Wittgenstein repudiates a rule-based theory of meaning.¹⁰⁶

Indeed, Kripke himself reaches a similar conclusion as McGinn, albeit for disparate reasons. He ultimately resolves the paradox by way of a skeptical solution. In a passage that is reminiscent of some of his critics, Kripke notes that even though the skeptical paradox can never be truly resolved, “[n]evertheless our ordinary practice or belief is justified because—contrary appearances notwithstanding—it need not require the justification the sceptic has shown to be untenable.”¹⁰⁷ Justification is not required because when “each of us *automatically* calculates new addition problems (without feeling the need to check with the community whether our procedure is proper) . . . the community feels entitled to correct a deviant calculation [and] in practice such deviation is rare”¹⁰⁸

¹⁰² *Id.* at 105.

¹⁰³ WITTGENSTEIN, *supra* note 90, at § 202; *see also* Bix, *supra* note 6. Bix reasons that “[t]he sceptic’s complaint is unwarranted because there is nothing more that *could* be offered as justification and there is nothing more that is needed as justification.” Bix, *supra* note 6, at 109. Professor Marmor concurs: “[W]hatever it is that connects a rule to its application cannot consist of logic or analyticity.” Marmor, *supra* note 89, at 64-65.

¹⁰⁴ *See* MCGINN, *supra* note 5, at 105 (“The emptiness of the idea that there is something in the rule itself that compels this application shows only that our practice of following rules is not dependent on this altogether mysterious idea.”). Thus, Professor McGinn agrees with Kripke that the notion of a theory of meaning wholly based on the notion of rules and propositions is incoherent; she terms the idea of logical compulsion between a rule and its application a “chimera.” *Id.*

¹⁰⁵ Arulanantham, *supra* note 83, at 1869.

¹⁰⁶ However, she takes pains to stress that she does not agree with Kripke that Wittgenstein offers a positive theory of meaning. Wittgenstein, she argues, achieves “a resolution of the tangle of philosophical problems that surround the concepts of meaning, rules and understanding by doing something *other* than provide a *theory* of what meaning or rule-following consist in.” MCGINN, *supra* note 5, at 81. *See also* Coleman & Letter, *supra* note 65, at 572 (“Wittgenstein’s goal—as opposed to Kripke’s—is to call into question a certain Platonic picture of the foundation of semantics that some might have thought explains or justifies important features of our linguistic practices.”).

¹⁰⁷ KRIPKE, *supra* note 63, at 66.

¹⁰⁸ *Id.* at 111-12. I must admit that Kripke’s analysis here sounds strikingly similar to the points critics assert as errors in Kripke’s argument. If so, perhaps Kripke and his critics agree on more than the literature suggests. At least one commentator observes that “every legal

Though McGinn does not expressly make this move, many of the anti-Kripkeans reason that “it is the community’s agreement in judgments that make our practices stable.”¹⁰⁹ Kripke agrees, though he assuredly does not embrace the view that it is community consensus that establishes the truth of our applications of a rule.¹¹⁰ Instead, Kripke argues that Wittgenstein replaces a truth-condition theory of meaning with an assertability-condition theory of meaning.¹¹¹ The difference is subtle but significant. For Kripke, community consensus justifies our assertion that a particular application conforms to the rule.¹¹² This is distinct from a notion that consensus grounds the truth conditions of a particular application of a rule—Kripke does not believe that any entity or concept can do so; this is why he terms the solution a “skeptical solution” (one which grants that the skeptical paradox is unanswerable).

“On this account of Wittgenstein, it is the community’s agreement in judgments that make our practices stable. Judgments about right and wrong ways to follow rules are immune from skeptical doubt because there is a settled practice that determines what counts as following a rule correctly.”¹¹³

It appears, then, that both Kripke and his critics concur that there is a way to save the notion of meaning from incoherence. More importantly, there is a “basis for understanding how legal discourse can be determinate, even in the face of the skeptical uncertainty that he describes as arising on a purely rule-based view.”¹¹⁴ If rules truly are determinate, then this obviously poses a problem for my thesis. In the first case, I argue that rules, including meta-rules, are indeterminate. I will respond to both Kripke and his critics, who maintain that rule determinacy is possible. Then,

scholar that I have encountered has misunderstood Kripke’s conclusion. All of them read Kripke as endorsing skepticism.” Arulanantham, *supra* note 83, at n.86.

¹⁰⁹ Arulanantham, *supra* note 83, at 1870; *see also* Radin, *supra* note 17, at 797-802 (expounding on the “Wittgensteinian Social Conception of Rules”). Professor Radin is not an anti-Kripkean: she assuredly takes Wittgenstein to be rejecting a rule-based theory of meaning, and of endorsing a limited brand of skepticism (limited by the extent to which rules can be made determinate in practice by the community).

¹¹⁰ Arulanantham, *supra* note 83, at 1868 n.86 (“[Kripke] explicitly rejects the view that skepticism is justified and that truth is determined by community consensus. Instead, he says that what we are warranted in asserting is determined by community consensus, while remaining agnostic about the truth of these matters.”). This is partly why I find that Kripke and his critics are not as dramatically far apart as the literature might lead one to believe. To be sure, there is a point of contention, but Kripke simply is not a skeptic. *See also* Coleman & Letter, *supra* note 65, at 571 (endorsing Kripke’s skeptical solution as proving adequate justification for meaning).

¹¹¹ KRIPKE, *supra* note 63, at 74 (opining that “Wittgenstein proposes a picture of language based, not on *truth conditions*, but on *assertability conditions* or *justification conditions*: under what circumstances are we justified in making a given assertion?”).

¹¹² *See id.* (same).

¹¹³ Arulanantham, *supra* note 83, at 1870.

¹¹⁴ *Id.* at 1868. (discussing the argument of the “anti-realist” scholars Brian Langille, *Revolution without Foundation: The Grammar of Scepticism and Law*, 33 McGill L.J. 451 (1988); Andrei Marmor, *No Easy Cases?*, in WITTGENSTEIN AND LEGAL THEORY (Dennis M. Patterson ed., 1992); Gene Anne Smith, *Wittgenstein and the Sceptical Fallacy*, in WITTGENSTEIN, *supra*).

assuming *arguendo* that the view of rule determinacy is valid, I will demonstrate why this does not save textualism-originalism.

b. Second Category of Challenges

Before embarking along these lines, it is necessary to return to the second category of challenges to Kripke's argument. Under this second category, critics generally agree that justification of an application of the rule is not required, but they do so for entirely different reasons. Whereas Kripke grounds his argument in the notion of assertability, critics argue that requiring justification of an application of a rule is in and of itself absurd.¹¹⁵ This appears to be a more radical rejection of Kripke's analysis—it is not a skeptical solution because it rejects the paradox as absurd altogether.

The Zapf and Moglen article embodies just such a rejection.¹¹⁶ Zapf and Moglen contend that once a scientist produces the hypothesis that "all frogs are green," challenging the scientist to explain how a new "green frog counts as an application of [the] hypothesis" is absurd.¹¹⁷

That question surely does not make sense: one cannot question what counts as an application if one concedes there is a hypothesis. The skeptic cannot rationally say, 'I have understood your rule that all frogs are green, but I do not understand if this green frog accords with your rule.' Understanding a rule consists of the ability to specify what is in accord with it.¹¹⁸

This analysis is entirely unconvincing to me. In the first case, the argument here seems to beg the question. Namely, once we have already decided that what we have is a green frog, the new event has *already conformed to the rule*. The entire point of the skeptical paradox—in fact, I daresay of any skeptical argument—is to challenge an underlying epistemological assertion. In this case, the assertion in question is whether the rule that "all frogs are green" applies to the situation (animal) before us now.

The question is not whether the new green frog counts as an application of the rule. Rather, the more fundamental questions are: (1) whether this animal is in fact a "frog" instead of a "quog;" and (2) whether this animal is in fact "green" and not "grue."¹¹⁹ The skeptic will of course argue that our every prior application of the

¹¹⁵ See Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 GEO. L.J. 485, 504 (1996) ("[O]ne cannot sensibly ask for a justification of what counts as the application of a rule."); Marmor, *supra* note 89, at 75 ("[I]t simply doesn't make sense to say that one has understood a rule and [not know the actions that are in accord with it.]).

¹¹⁶ Zapf & Moglen, *supra* note 115, at 485 ("[T]he logical relation between words and the applications we read off from them is unproblematic.").

¹¹⁷ *Id.* at 504.

¹¹⁸ *Id.*; see also Bix, *supra* note 6, at 111 ("Similarly, after being taught the colour words by ostensive definitions, we will all agree that this particular tomato is red and that patch of grass is green.").

¹¹⁹ Or whether this thing before us is an animal and not a "quanimal," or whether this entity before us is a "thing" and not a "quing"

rule referred to “quogs,” and that what we have before us is in actuality a “quog” and not a “frog.” Continuing, the skeptic will argue that a “frog” refers only to the set of “quogs” that one has viewed pictures of in books. All other such amphibians, including all the ones scientists have experimented on, have in fact been “quogs.”¹²⁰ Now, under some kind of delusion or drug-induced hallucination, the scientist is thinking that what is before him or her are “frogs” instead of “quogs.” Along the same lines, the skeptic gapes at the scientist and says: “What do you mean this quog is green? This quog is grue!” The color image the scientist has always associated with the word “green” is in fact the color “grue,” and so this “quog” is assuredly the color “grue.”

The skeptic does not say: “I have understood your rule that all frogs are green.” In my opinion, the challenge is more fundamental. The skeptic states: “I am not sure about frogs, but this new thing before you is definitely a ‘quog’.” The skeptic says: “The quog before you is the color ‘grue’, so I am not sure where you get this ‘green’ business from.”

In short, the Zapf and Moglen analysis is unpersuasive to me. To be sure, I find the skeptical paradox absurd. But that is a characteristic of paradoxes.¹²¹ Following apparently logical chains of reasoning, one arrives at preposterous conclusions.¹²² This itself is not reason to dismiss the paradox. While I do not mean to argue that Zapf and Moglen are dismissive, I do find their explanation for why the skeptical paradox is illegitimate somewhat lacking. I fail to understand how the rule that “all frogs are green” by itself determines correct applications of that rule. There is no fact about the scientist’s past history that renders the argument that what the scientist in fact has is a “grue quog” inconsistent with his or her prior practices.

In any case, I concur with Kripke that any possible resolution to the skeptical paradox must be skeptical in nature—that is, any solution ought to begin by accepting the skeptical paradox. A skeptical solution challenges the conclusion that meaning is indeterminate, but does not challenge the premise that a rule-based theory of meaning is incoherent.¹²³

¹²⁰ This is loosely patterned after Kripke’s analysis of the word “table”:

I think that I have learned the term ‘table’ in such a way that it will apply to indefinitely many future items. So I can apply the term to a new situation, say when I enter the Eiffel Tower for the first time and see a table at the base. Can I answer a sceptic who supposes that by ‘table’ in the past I meant *tabair*, where a ‘tabair’ is anything that is a table not found at the base of the Eiffel Tower, or a chair found there?

KRIPKE, *supra* note 63, at 19.

¹²¹ See R.M. SAINSBURY, *PARADOXES* 1 (2d ed. 1995) (defining a paradox as “an apparently unacceptable conclusion derived by apparently acceptable reasoning from apparently acceptable premises”).

¹²² I am reminded of an excellent article by Peter Unger, entitled *I Do Not Exist*. Peter Unger, *I Do Not Exist*, in *PERCEPTION AND IDENTITY: ESSAYS PRESENTED TO A.J. AYER* (G.F. MacDonald, ed., 1979). Professor Unger uses the sorites paradox to conclude that the concept of “I” is incoherent. Or, consider the Liars’ Paradox: “This sentence is false.” If that proposition is true it is false, and if it is false, it is true. Surely this is absurd, but that does not mean that the paradox can be dismissed because of its absurdity.

¹²³ See *supra* notes 107-13 and accompanying text.

The first category of responses to Kripke essentially holds that “[w]hile Wittgenstein did show that a rule-based understanding of language was flawed, [they] argue, he did not believe in the indeterminacy or instability of meaning in general; in fact, that such instability did not exist was a premise of Wittgenstein’s argument.”¹²⁴ I now move on to reply to this category of responses by first challenging it on its face, and then by accepting it but contending that the social conception of rule-following does not save textualism-originalism.

c. Irrelevancy of Wittgenstein’s Agreement with Kripke

Whether Wittgenstein would agree with Kripke has little bearing on whether Kripke’s analysis is sound. The notion that rule skepticism is either unsupported by Wittgenstein or would be rejected by him is, while significant, inadequate to derail that skepticism. Perhaps Kripke’s analysis is in fact “Kripgenstein” and nothing he argues is fully supported by Wittgenstein’s *Philosophical Investigations*. This hardly undermines the merits of the skeptical argument Kripke lays out. To be sure, if Wittgenstein dissents with Kripke, the nature of this dissent must be examined. However, simply because Wittgenstein might not agree with what Kripke attributes to him does not signify that Kripke’s argument is somehow without merit.¹²⁵ In any case, even if Wittgenstein would not himself support Kripke’s analysis, nor does this mean that Kripke’s argument is without support in *Philosophical Investigations*. Wittgenstein may not have intended to reason as Kripke does, but whether his arguments (unintentionally) provide a means to sketch a skeptical paradox is an altogether different question. As a result, the irreducibly speculative question of whether Wittgenstein would agree with Kripke does not concern me.

d. Rule-Following As a Poor Analogy to the Legal Language Game

Insofar as Wittgenstein’s model of rule-following is determinate, it may analogize poorly to the legal language game. There is serious difficulty in applying Wittgenstein’s language-as-practice analysis to law.¹²⁶ “[T]he arguments Wittgenstein uses to establish his alternative to a rule-based account of language, which justifies itself as practice and does not require interpretation, cannot easily be made to work in law.”¹²⁷ The difficulties arise upon examination of two characteristics of Wittgenstein’s theory: the notion of consensus and disagreement and the concept of justification.

The importance of consensus to the concept of rule determinacy cannot be overstated. As previously discussed, it is the community consensus that renders determinate the application of a rule, according to both the anti-Kripkeans and to

¹²⁴ Arulanantham, *supra* note 83, at 1868.

¹²⁵ See *supra* note 65 and accompanying text; Coleman & Letter, *supra* note 65, at 571 (noting that the accuracy of Kripke’s reading of Wittgenstein “is really beside the point . . . Kripke can be all wrong about Wittgenstein, but right about meaning.”).

¹²⁶ Arulanantham, *supra* note 83, at 1871 (“Problems arise when we consider the difference between applying Wittgenstein’s methodology to language or mathematics and applying it to law.”); see also Bruce A. Markell, *Bewitched by Language: Wittgenstein and the Practice of Law*, 32 PEPP. L. REV. 801 (2005) (arguing that Wittgenstein’s later philosophy cannot properly be used to solve specific legal problems).

¹²⁷ Arulanantham, *supra* note 83, at 1872.

Kripke himself (and to supporters of Kripke, such as Professor Radin).¹²⁸ It is the community's agreement on what counts as an application of a given rule that enables individuals to judge an application as conforming or deviating from the rule.¹²⁹ "[I]t is the community's agreement in judgments (rather than the logical power of rules) that makes our practices stable and immune from skeptical doubt."¹³⁰

However, what happens where the community has substantial disagreement (as opposed to minor differences of opinion) as to the application of a rule? After all, "Wittgenstein uses examples of rule following where there is no disagreement about how to go on in new cases. In fact, his examples are all ones in which there would be immediate agreement about which response was correct."¹³¹ The notion of consensus seems to have at its core that "[w]e can judge the skeptic as wrong because he or she is radically out of step with our way of doing things. However, if there is substantial disagreement within the community already, this type of correctness judgment is impossible."¹³² Even some of the anti-Kripkeans submit that consensus is a *sine qua non* for rule determinacy, "[i]t is far from inevitable that all persons will always react in all matters in the same way; where we do not go on the same way there will simply be no stable practice."¹³³

To illustrate this point further, consider the game of baseball. The consensus argument holds that we do not require a batter to explain how his swinging of the bat counts as an application of the rule for a "strike." It is true that if one batter dropped his bat, produced a football, hurled it into the outfield and began tearing around the bases, the community of baseball players and watchers would have no problem labeling the batter's actions as deviant from the rules of baseball. However, if every baseball player suddenly dropped his bat, hurled a football into the outfield and began tearing around the bases, we might eventually have a new game instead of a case of a rather odd deviation from the rule. But what if only some players throw their footballs and others use their bats in the traditional sense? It is not at all clear to me what the rules of this amalgamated game are, or, more importantly, whether a particular player's behavior conforms to the rule.¹³⁴ Justice Scalia himself observed

¹²⁸ See *supra* notes 109-13 and accompanying text.

¹²⁹ KRIPKE, *supra* note 63, at 111-12.

¹³⁰ Arulanantham, *supra* note 83, at 1873.

¹³¹ *Id.* at 1872 (footnotes omitted).

¹³² *Id.* at 1873.

¹³³ Bix, *supra* note 6, at 112.

¹³⁴ See David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 21 (1990) (citing DEREK PARFIT, REASONS AND PERSONS 213 (1984)). Professor Dow discusses the notion of "empty questions" as explained by Derek Parfit: "There are cases in which what we recognize is all there is; there is nothing additional to which we can resort." *Id.* In such a case, to question the legitimacy of the proposition or belief is an empty question. There is no "deeper fact that would settle the matter." *Id.* (citing DANIEL DENNETT, THE INTENTIONAL STANCE 41 (1987)). When there is substantial community disagreement, the notion of rule determinacy or coherence is questionable at best, because there is no deeper fact that settles what game the athletes are actually playing. The reply I am sketching here agrees with Professor Dow and Professor Parfit, but extends the analysis further: what happens when the community is unsure what it recognizes or, more precisely,

this same phenomenon in *PGA Tour, Inc. v. Martin* when he noted, “I suppose there is some point at which the rules of a well-known game are changed to such a degree that no reasonable person would call it the same game.”¹³⁵ On this point, Justice Scalia is exactly correct.

Questions of how to interpret the Constitution hardly attain a consensus within the community.¹³⁶ Many reject the textualism-originalism hermeneutic for numerous reasons. When there is substantial disagreement within the legal community regarding whether textualism-originalism is a desirable or even coherent interpretive methodology, this lack of consensus seriously obstructs even a “skeptical solution” to rule indeterminacy. In short, I do not believe that the legal community has grounded textualism-originalism in its practice to the extent that asking whether textualism-originalism is applied consistently is to ask an empty question.¹³⁷ Where there is no consensus on the utility of textualism-originalism, it becomes impossible to “judge the skeptic as wrong because he or she is radically out of step with our way of doing things.” Consensus is what establishes ‘our way of doing things.’ If the community’s practice is unclear, and if there is substantial disagreement as to the practice (for example, the number who practice it), then the standard for evaluating the skeptic’s conduct itself becomes vague and indecipherable. As such, Arulanatham maintains that “Wittgenstein’s account of how we follow a rule cannot be applied to contexts where there is substantial disagreement.”¹³⁸ Even anti-skeptics

recognizes nothing at all? Without this recognition, without the community consensus, rule skepticism seems to return with a vengeance. This is because absent community consensus, there is no recourse for determining whether a putative application of the rule actually conforms to the rule. Under the anti-skeptical view of Wittgenstein, he might well agree with Parfit that requiring a logical connection between the rule for “strike” and the batter’s conduct is just such an empty question. My point is that where recognition and consensus break down, rule skepticism again comes into play, no pun intended.

¹³⁵ *PGA Tour, Inc.*, 532 U.S. at 701 (Scalia, J., dissenting).

¹³⁶ Arulanatham points out that “the legal system has been designed with a recognition that disputes are inevitable (hence appellate review, preclusion law designed to minimize inconsistent judgments, etc.). Thus, a certain level of disagreement is recognized as an inevitable part of the legal framework.” Arulanatham, *supra* note 83, at 1873. Thus, the extent to which there is community consensus on many legal issues is questionable.

¹³⁷ See *supra* note 134; see also Posner, *supra* note 11, at 859 (“Either there is a strong political or ethical consensus and it penetrates and shapes legal doctrine, or there is not—and a fragmented political and ethical discourse will no more yield determinative outcomes than legal reasoning will.”). As Professor Bix explains:

I am not sure that there is a bright line between those “easy cases” that fit under the rubric of Wittgenstein-on-rule-following and those that do not. That is, I am not sure that a theorist can usually (if ever) be confident in determining which interpretation questions are completely beyond the pale of legitimate debate (“outside the language game”).

Bix, *supra* note 6, at 113.

¹³⁸ Arulanatham, *supra* note 83, at 1873. Arulanatham also cites Simon Blackburn for support:

For Wittgenstein is taken to teach us that . . . coming adrift, that is going wrong in a new application of an old term, is not a matter of jumping pre-existent Platonic rails determining which way one ought to go, for there can be no such things. It is a matter of getting out of step, of having an organism that whirls differently from the others.

agree. Brian Bix explains that “law is a reflective activity: the participants consider, discuss and argue over how they should go on. Contrary to Wittgenstein’s descriptions of mathematicians and mathematical series, disputes *do* break out in law over the question of whether a rule has been obeyed or not.”¹³⁹

I do not mean to oversimplify. Obviously, there may be substantial disagreement about various and sundry mathematical problems. But, I daresay, there is comparatively little dissent concerning what counts as application of the rule of addition. To be sure there may be disagreement on the answer, but far less so on whether the mathematician has actually applied the rule of addition (as opposed to “quaddition”). Wittgenstein’s examples of rule-following take this form—where there would be little disagreement about whether a particular interpretation conforms to the rule. In a game where there is little, if any, consensus as to whether a given interpretation conforms to the rule—such as whether a specific constitutional interpretation conforms to the meta-rule of textualism-originalism—the ability to judge the skeptic as deviant diminishes.

The second reason Wittgenstein’s analysis of language-as-practice may correlate poorly to law is because law is an enterprise that requires justification. “Perhaps the central distinctive feature of the legal language game, at least when compared with Wittgenstein’s examples from simple mathematics and everyday language use, concerns the need to provide justifications for why legal decisions come out the way they do.”¹⁴⁰ The thrust of Wittgenstein’s argument, if the anti-skeptics are correct, is that justification is not required in applying, for example, an arithmetic rule: “[w]hen someone whom I am afraid of orders me to continue the series, I act quickly, with perfect certainty, and the lack of reasons does not trouble me.”¹⁴¹ “Thus, Wittgenstein says there is a sort of behavior for which we do not need the kinds of reasons the skeptic demands because we can behave without explanation. Furthermore, when faced with a skeptic who demands reasons in such situations, we are unable to provide them.”¹⁴² This inability is what Parfit calls an empty question.¹⁴³ The question is empty because one is unable to provide any answer to the skeptic as to why the rule for addition is being applied—and no answer is needed according to this reading of Wittgenstein.¹⁴⁴

Suppose this is true. If that is the kind of way to see judgments of inconsistency . . . then it follows that they cannot be made when . . . there is no consensus to serve as a background upon which they are based.

Id. (citing Simon Blackburn, *Reply: Rule-Following and Moral Realism*, in WITTGENSTEIN: TO FOLLOW A RULE 172 (Stephen H. Holtzman & Christopher M. Leich eds., 1981)).

¹³⁹ Bix, *supra* note 6, at 115.

¹⁴⁰ Arulanantham, *supra* note 83, at 1877.

¹⁴¹ *Id.* (citing WITTGENSTEIN, *supra* note 90, at § 212).

¹⁴² *Id.*

¹⁴³ See *supra* note 134; see also Arulanantham, *supra* note 83, at 1877-78 (“When faced with a skeptic like the one imagined by Wittgenstein, we eventually have nothing to say, and nothing to point to, that could justify our continuation of the mathematical series in a way that would satisfy him.”). This “nothing to say” is what renders the question empty, as Professor Dow describes Parfit’s analysis.

¹⁴⁴ See Arulanantham, *supra* note 83, at 1878 (“When dealing with uncontroversial processes like the addition rule, we never have a need for such a justification.”).

In contrast, the legal enterprise is founded on the need for justification. As Dewey noted, “[c]ourts not only reach decisions; they expound them, and the exposition must state justifying reasons.”¹⁴⁵ A legal decision *sans* justifications is regarded as arbitrary and likely of poor precedential value. Dewey articulates that the purpose of exposition “is to set forth grounds for the decision reached so that it will not appear as an arbitrary dictum, and so that it will indicate a rule for dealing with similar cases in the future.”¹⁴⁶ Where law as a process requires justifications as a fundamental component of legal method in contrast to, for example, the application of an arithmetic rule to a particular problem, the extent to which Wittgenstein’s analysis can be appropriately analogized to law is dubious.

In law, however, most legal theorists and judges would want to provide more . . . when asked to justify their account of what constitutes the correct following of a legal rule. Unlike Wittgenstein’s examples, those analyzing judicial decisions do typically demand explanations and reasons for those decisions (whereas, on Wittgenstein’s view, only misguided philosophers scrutinize an addition problem to see how it could be decided otherwise).¹⁴⁷

Furthermore, the fact that justification is generally required for sound legal method has bi-directional implications. I previously examined the forward consequences: the requirement of justifications means that Wittgenstein’s position that our practices need no justification does not analogize well to the practice of law.¹⁴⁸ Additionally, and somewhat ironically, the justification requisite is what prompted the need for logical connections between an antecedent rule and concrete subject-matter for individual cases. Dewey explains that “[i]t is highly probable that the need of justifying to others conclusions reached and decisions made has been the chief cause of the origin and development of logical operations in the precise sense; of abstraction, generalization, regard for consistency of implications.”¹⁴⁹ Thus, the requirement for justification not only results in a disconnect between Wittgenstein’s allegedly anti-skeptical analysis and law, but also, at least in part, contributed the development of an elaborate rule-based system.

Thus, Wittgenstein’s anti-skepticism, if he indeed rejects skepticism, analogizes poorly to the legal language game, if at all. First, the legal language game—and

¹⁴⁵ Dewey, *supra* note 12.

¹⁴⁶ *Id.*

¹⁴⁷ Arulanantham, *supra* note 83, at 1878; *see also* Bix, *supra* note 6, at 114-15 (rejecting Brian Langile’s attempts to move from the “grammar of language” to the “grammar of law,” and implying that law, unlike basic mathematics, is in need of “further justification”).

¹⁴⁸ Arulanantham explains that a simple attempt to apply the Wittgensteinian formula for determinacy in mathematics and language straightforwardly to the legal context is doomed to failure. Correctness in law must be different from correctness in mathematics or language because in law one must provide a justification that explains why a particular outcome is correct and that goes beyond merely stating that it is the way things are done. Arulanantham, *supra* note 83, at 1878.

¹⁴⁹ Dewey, *supra* note 12, at 24.

more specifically, the constitutional hermeneutics game—is fraught with disagreement, and, in the absence of consensus, rule skepticism seems to rear its head. Second, law has at its very core the requirement of justification. To the extent that Wittgenstein’s anti-skeptical arguments rely on circumstances in which the community needs no justification (for example, application of the rule for addition or the rule for “strike”), such tendencies seem too disparate to cogently apply to the law.

In spite of the serious difficulties of applying Wittgenstein’s analysis to law or the legal language game, I will assume *arguendo* that Wittgenstein’s anti-skepticism is valid and applicable to law.¹⁵⁰ Even under this assumption, textualism-originalism is not saved. If the language-as-practice analysis is correct, it may prevent rule indeterminacy, but it does not save the textualism-originalism hermeneutic.

4. Incoherence of Textualism and Originalism Aside from Kripke

Even assuming Kripke is wrong, textualism and originalism are not saved from incoherence. Why? The traditional model of rule-following provides that rules determine outcomes.¹⁵¹ This is even more crucial for textualism-originalism because its avowed purpose is to constrain judicial policy-making.¹⁵² The anti-skeptical argument indicates that it is our practices that guide our rules rather than our rules that guide our practices. This point deserves explanation. The language-as-practice analysis instructs that we do not apply the rule for addition or the rule for “strike” determinately because of any logical connection between an antecedent rule and a particular application. Rather, determinacy exists because the community agrees that particular applications instantiate the rule at issue and that such actions require no justification to ground meaning.

But our rules do not come prior to our practices even under the anti-skeptical view. Consider the baseball analogy again. The reason the rule for “strike” coheres is assuredly not, according to this reading of Wittgenstein, because Abner Doubleday or Major League Baseball created such a rule years ago. This is precisely backwards and is what the skeptical paradox derails.¹⁵³ Instead, the rule is meaningful because baseball players and umpires, as a practice, behave in ways that set “community” standards for what is and is not a strike. If umpires and players suddenly decided by consensus that curveballs may never be strikes, then the rules of the game have changed, regardless of what Abner Doubleday had set forth as the antecedent rules of baseball years ago.

¹⁵⁰ At least one anti-skeptic, however, views such an effort as erroneous. Bix, while rejecting the skeptical analysis, nevertheless also rejects an attempt to use Wittgenstein’s analysis to ground assurance in law and rule determinacy: “The over-reading danger occurs when Wittgenstein’s message is interpreted as guaranteeing ascriptions of correctness or the achievement of consensus in more controversial matters.” Bix, *supra* note 6, at 113.

¹⁵¹ See *supra* Part III.

¹⁵² See *supra* notes 34-38 and accompanying text.

¹⁵³ Indeed, this is the familiar rule-based theory of meaning. According to this view, the rules (for strike) uniquely determine, by themselves, the correct applications. There is a logical connection between the rule for “strike” and any given correct interpretation. This is what many scholars, even the anti-skeptics, agree that Wittgenstein rejects as incoherent. See *supra* notes 104-06 and accompanying text.

The consequence for textualism-originalism, however, is that it cannot possibly constrain interpretation because, as a meta-rule, it does not exist antecedent to the practice of judicial resolution. It is the practice of judicial resolution that determines what our rules are. It only makes sense to obey a rule where it is community practice to obey that rule. It is community practice to apply the rule for addition instead of quaddition, or “strike” in a baseball game instead of “quike.” However, it is not community practice to apply textualism-originalism, and in any case, this meta-rule does not exist antecedent to our practices.

If it arises anywhere, the textualism-originalism hermeneutic arises out of community (in this case, the judicial community) practice. Of course, a core element of judicial practice is interpretation and, to a lesser extent, constitutional interpretation (lesser in frequency, but not in importance). The result is that the process of interpreting the Constitution is what grounds or determines or warrants (for Kripke) our assertion that a particular interpretation accords with textualism-originalism.¹⁵⁴ Under Wittgenstein’s language-as-practice analysis, it is assuredly not the case that a logical connection from the textualism-originalism meta-rule dictates any particular interpretation. The rule is apparent in the practice; the rule does not determine the practice.¹⁵⁵ Under the anti-skeptical reading of Wittgenstein, it is the search for the logical connection between the rule and the “correct” interpretation that is quixotic. Accordingly, textualism-originalism could not, purely as a meta-rule, constrain a judge’s decisions. The meta-rule simply does not and could not determine the practice.¹⁵⁶

In other words, because the meta-rule by itself cannot determine the correct application, the textualism-originalism hermeneutic simply does not and cannot determine the correct decision. More importantly, even if rules are determinate by reference to the praxis of language, the “correct” result does *not* stem from the rule itself—thus textualism-originalism hardly serves to constrain interpretation.

John Dewey’s analysis dovetails with the argument I have sketched above. Dewey speaks primarily to what he sees as the chief fallacy of legal formalism: the emphasis on antecedent rules. As should be plain, my contention that the notion of antecedent rules that determine outcomes holds little weight with even an anti-skeptical Wittgenstein converges with Dewey’s analysis. Accordingly, I will begin Part V, which details my answer to Professor Cohen’s question, my position on how judges actually decide cases,¹⁵⁷ by sketching Dewey’s argument.

¹⁵⁴ See Bix, *supra* note 6, at 109 (explaining that Wittgenstein “would not have endorsed [the proposition that] language can be understood separate from its applications”).

¹⁵⁵ See Arulanantham, *supra* note 83, at 1876 (“We must look at the way the concept is used in order to determine how we define it, rather than bringing a pre-formed notion of what counts as a definition and then applying it to the working concept itself.”).

¹⁵⁶ See Marmor, *supra* note 89, at 73 (“Indeed, no sense can be given to the idea that a rule contains its own application, as it were.”).

¹⁵⁷ I have hitherto only been concerned with explaining my opinion on how judges do not decide cases. Namely, judges do not decide cases by applying antecedent rules, including meta-rules on how to interpret text, to concrete subject-matter.

V. MY PERSPECTIVE ON PROFESSOR COHEN'S QUESTION:
HOW DO JUDGES DECIDE CASES?

A. Dewey's Rejection of Antecedent Rules

As previously noted, the model of judicial resolution that formalists (and, I argue, textualists and originalists) espouse is: *rule* → *facts* → *decision*. There is a prior rule to which judges apply the facts of the case, which directs judges to the conclusion. Or, in the case of textualism-originalism, the judge applies the rule that directs the interpretation of the substrate text, which in turn directs the rule of decision. The key is that the rule, or meta-rule, is antecedent to the application of the concrete subject-matter. I have suggested one argument for repudiating this model. Dewey also rejects this notion. He reasons that, "as a matter of actual fact, we generally begin with some vague anticipation of a conclusion (or at least of alternative conclusions), and then we look around for principles and data which will substantiate it."¹⁵⁸

Therefore, one might visualize Dewey's model of judicial resolution as: *facts* → *decision* → *rule*.¹⁵⁹ I maintain that Wittgenstein would endorse this view, at least insofar as the rule only arises through the practice of decisionmaking. It does not exist antecedent to the application of concrete subject-matter (the "facts" of the legal language game). Dewey notes that "men do not begin thinking with premises Premises only gradually emerge from analysis of the total situation."¹⁶⁰ The notion that premises only emerge after analyzing the circumstances further substantiates the concept that rules do not exist logically prior to consideration of the facts. Inasmuch as the major premise is a legal rule or meta-rule, such as "all men are mortal," Dewey's analysis instructs that individuals actually begin with such rules in the process of legal analysis.

No lawyer ever thought out the case of a client in terms of the syllogism. He begins with a conclusion which he intends to reach, favorable to his client of course, and then analyzes the facts of the situation to find material out of which to construct a favorable statement of facts, to *form* a minor premise.¹⁶¹

Dewey's observation here is that even the lawyer does not use the formalist model (my point is that the judge certainly does not). Rather, the lawyer begins with a conclusion and works backwards to ascertain an appropriate minor premise. Dewey's model can be encapsulated in a single sentence that is consistent with my

¹⁵⁸ Dewey, *supra* note 12, at 23.

¹⁵⁹ Of course, as Judge Posner notes, a judge takes into account much more than the simple facts of the case in reaching a decision. See Posner, *supra* note 11 at 872-73. Numerous policy, ethical, and even intuitional considerations combine to aid a judge in reaching a decision. *Id.* The process sketched above is thus vastly oversimplified, but not, I daresay, inaccurate. In any case, the key point of Dewey's model is that the rule is not antecedent to the decision: "The 'universal' stated in the major premise is not outside of and antecedent to particular cases" Dewey, *supra* note 12, at 22.

¹⁶⁰ Dewey, *supra* note 12, at 23.

¹⁶¹ *Id.*

argument: the logic of judicial decisions “must be a logic *relative to consequences rather than to antecedents*”¹⁶²

It is important to observe that the model I attribute to Dewey is static. That is, it only applies to a discrete case before a judge. Judicial decisionmaking is a dynamic process. Each individual decision is not a discrete event in isolation from the numerous decisions of higher or equivalent courts of authority.¹⁶³ The judge might ask: “What is the relationship of the rule to case 2 or case 10?” One might argue that by the time case 10 comes around, one has a ready-made antecedent rule that can be applied, particularly if the facts are indistinguishable.¹⁶⁴ The argument continues that it makes little sense to speak of rules as only following practices—one can make up a rule and then follow it. Surely, then, rules may be antecedent to practices.

While I agree that one can make up a rule antecedent to a given practice, I daresay that the dynamic process of “creating” and applying rules in the legal language game is somewhat more complicated than making a rule such as “I will rise at 6 a.m. every Monday morning for the next year.” However, the thrust of this note is not on the creation of legal rules but rather the process by which rules are followed. Rules do not meaningfully exist antecedent to practices because it is our practices that give birth to our rules.¹⁶⁵ The fact that rules do not meaningfully exist outside of practices does not mean that rules cannot be invented outside of practices. I believe that Wittgenstein would agree that one can create a rule antecedent to a given game. However, the insight is that the continued existence of that rule in that game is predicated on community practice.¹⁶⁶ The authority of the rule, indeed its very existence, is contingent on practice.

Abner Doubleday may have set forth the rules of baseball in the late 19th Century, but the meaning and content of those rules are wholly supplied by the community of baseball and the players’ and umpires’ actual practices. I may well make up a rule, but what gives content to that rule, what grounds or warrants its meaning and existence, is how the rule is followed in practice. Thus, the point is not whether one can invent a rule antecedent to a practice. Rather, for both Dewey and myself, the point is that the practice of judicial decisionmaking does not follow a formalist model in which prior rules constrain and produce subsequent decisions. The key is this: rules are not *followed* in the ways that the formalist model suggests.

¹⁶² *Id.* at 26.

¹⁶³ See Marmor, *supra* note 89, at 77 (“Wittgenstein’s emphasis here is on the multiplicity of the occasions for use”).

¹⁶⁴ I might pause here to note that I am dubious that any two events are really indistinguishable, in a metaphysical sense. It is my contention that facts of different cases are almost always distinguishable. See, e.g., Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI-KENT L. REV. 665, 772 (1999) (“[T]he vast majority of cases can be distinguished from other similar cases, at least to some degree.”). But, I will assume *arguendo* cases exist in which no judge could ever distinguish the facts.

¹⁶⁵ See *supra* Part IV.B.4; see also Dewey, *supra* note 12, at 22 (“We find that general principles emerge as statements of generic ways in which it has been found helpful to treat concrete cases”).

¹⁶⁶ See *supra* Part IV.B.4.

This phenomenon changes little from case 1 to case 10. By case 10, the contours of the general principle(s) that may be relevant are better defined than in case 1. However, in either case, the rule or meta-rule simply does not produce or constrain a decision. There may be a rule, but the rule itself never determines or produces the correct application of that rule no matter how its contours are defined. This is the fallacy of the textualism-originalism hermeneutic: its efficacy is predicated on its ability, in and of itself, to constrain interpretation.¹⁶⁷ Even under the anti-skeptical reading of Wittgenstein, a rule cannot do this by itself, whether the rule comes from case 1 or case 100.

In my opinion, no meta-rule determines the result of any particular case. This, of course, does not mean that rules are empty or meaningless, though indeterminate for, *inter alia*, the reasons articulated by Kripke.¹⁶⁸ To the extent that a textualist-originalist relies on a meta-rule alone to constrain interpretation, the reliance is misplaced. Judges do not decide cases solely on the basis of rules or meta-rules that constrain interpretation. As Dewey observed, general principles may emerge from the treatment of cases; however, this is a far cry from signifying that these principles or rules constrain interpretation in the way textualism-originalism is meant to. Rules are contingent on practices—they do not meaningfully exist antecedent to the application of concrete subject-matter, which occurs in the decision process.

B. The Pragmatic Model of Decisionmaking

John Dewey is one of the great pragmatists in American legal history.¹⁶⁹ Chief Judge Richard Posner espouses a similarly pragmatic model in his 1989 article, *The Jurisprudence of Skepticism*.¹⁷⁰ In his article, Chief Judge Posner articulates his vision of how judges actually decide cases, his answer to Professor Cohen's question. He does not view all rules as indeterminate, as I do. However, Chief Judge Posner does challenge the "overblown rhetoric (which is still very common among judges at all levels . . .) about the power of legal reasoning to yield demonstrably correct answers to difficult legal questions"¹⁷¹ His contention is that legal reasoning is "for the most part a branch of practical reason."¹⁷² For Chief

¹⁶⁷ See *supra* Part III.

¹⁶⁸ See *supra* Part IV.B.1.

¹⁶⁹ See Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 CARDOZO L. REV. 21, 25 (1996) (locating Dewey among the great American pragmatist legal scholars).

¹⁷⁰ Posner, *supra* note 11.

¹⁷¹ *Id.* at 858.

¹⁷² *Id.* at 859; see also Dewey, *supra* note 12, at 25. Dewey argues that practical certainty is an attainable and desirable goal of the law. He differentiates "theoretical certainty and practical certainty" by reasoning that the former is sought by the formalists, while the latter simply embodies "the reasonable proposition that judicial decisions should possess the maximum possible regularity" *Id.* Dewey does maintain that rules of interpretation aid in reaching practical certainty—but he is quick to add that "principles of interpretation do not signify rules so rigid that they can be stated once and for all and then be literally and mechanically adhered to." *Id.* This is not necessarily inconsistent with my analysis. Though my strong thesis is that all rules are inherently indeterminate, the weak thesis posits that rules and meta-rules may be determinate and even useful. However, even in the latter case, meta-rules in particular do not definitively constrain interpretation. They could not do so because

Judge Posner, it is not a matter of applying the appropriate rule or meta-rule, which will then produce the “correct” result; indeed, he rejects the “power of legal reasoning to generate determinate outcomes.”¹⁷³

Wittgenstein himself might have agreed with Chief Judge Posner’s analysis that “the law is not a thing [judges] discover; it is the name of their activity. They do not act in accordance with something called ‘law’, they just act”¹⁷⁴ This view is entirely consistent with Wittgenstein’s language-as-game analysis. Rules of law do not exist antecedent to a question presented; they are not something to which a judge can apply a rule of interpretation and ascertain an answer. Rather, the judge simply acts, as the baseball player swings, as the adder adds, all in accordance with the anti-skeptical reading of Wittgenstein. The key is that even under this reading, rules of interpretation do not constrain a judge’s decision as to a particular question presented. A judge acts according to an amalgam of precedent, social policy considerations, and ethical considerations.¹⁷⁵ A rule does not produce a given outcome; a meta-rule does not constrain interpretation. Chief Judge Posner makes this quite clear:

The fact that a position cannot be shown to be correct does not mean that it is the product of impulse or meanness. The position may reflect a social vision that can be articulated and defended even though it cannot be proved right or wrong. Few ethical propositions—almost none that people are interested in debating—can be proved right or wrong, yet ethical discourse is not fruitless; and in indeterminate cases legal discourse is a form of ethical or political discourse.¹⁷⁶

Following (or more precisely, preceding) Dewey’s and Posner’s logic, yet another famous pragmatist, William James, observed that law is a result.¹⁷⁷ James also discerned the fallacy of the formalist model:

Common-law judges sometimes talk about the law, and schoolmasters talk about the [L]atin tongue, in a way to make their hearers think they

they do not exist meaningfully as an antecedent. In any case, even if Dewey’s belief in the utility of meta-rules is in tension with my view, that only signifies that Dewey and I do not agree on every detail. I daresay his vision—that judges do not decide cases based on antecedent rules—meshes with my argument sufficiently to provide support.

¹⁷³ Posner, *supra* note 11, at 859.

¹⁷⁴ *Id.* at 881 (footnote omitted).

¹⁷⁵ *See id.* at 863 (opining that legal analysis is “a form of policy analysis”). Chief Judge Posner notes throughout the article that judges often decide cases based on policy and ethical considerations. *See, id.* at 872-73 (“[B]ecause policy and ethical considerations are permissible elements of decision in our judicial culture, the judge may lack a distinct sense of where legal reasoning leaves off and policy judgment or social vision . . . begins.”).

¹⁷⁶ *Id.* at 874. Chief Judge Posner’s analysis supports my belief, a full exposition of which is beyond the scope of this paper, that rule indeterminacy is not equivalent to semantic nihilism. Even in a world in which rules are radically indeterminate, meaning is still possible.

¹⁷⁷ WILLIAM JAMES, PRAGMATISM 93 (Thomas Crofts & Phillip Smith eds., Dover Publications Inc. 1995) (1907).

mean entities pre-existent to the decisions or to the words and the syntax, determining them unequivocally and requiring them to obey.¹⁷⁸

This is precisely the model I am criticizing as well. Taking its place is a more accurate description of the way judges actually decide cases.

It will come as no surprise to the careful reader that the positive model I endorse¹⁷⁹ is sympathetic to pragmatism. Of course, Dewey and James are famous and avowed pragmatists, and though Chief Judge Posner's article is entitled *The Jurisprudence of Skepticism*, he also acknowledges the pragmatic color of his reasoning.¹⁸⁰

James argued that one of the merits of pragmatism was its rigorously empirical focus. "No particular results then, so far, but only an attitude of orientation, is what the pragmatic method means. *The attitude of looking away from first things, principles, 'categories', supposed necessities; and of looking towards last things, consequences, facts.*"¹⁸¹ The empirical slant of pragmatism is beneficial inasmuch as it steers individuals away from purely abstract formal thought. However, the benefits stem from the notion that formalism does not accurately describe the ways individuals interact with the world. James invites his readers to "imagine a youth in a courtroom trying cases with an abstract notion of 'the' law What progress [does he] make?"¹⁸²

James doubts that any real progress will be made, and in explaining himself, he sketches a method closely analogous to my own answer to Professor Cohen's question: "[Truth, law, and language] *make themselves* as we go. Our rights, wrongs, prohibitions, penalties, words, forms, idioms, beliefs, are so many creations that add themselves as fast as history proceeds. *Far from being antecedent principles that animate the process, law, language, truth are but abstract names for its results.*"¹⁸³

The notion that law "makes itself" is consistent with the Wittgensteinian notion of language as a practice. The law is the name of the activity that judges perform; it is experiential, as would be expected from a model with pragmatic tendencies. The

¹⁷⁸ *Id.* at 92.

¹⁷⁹ It must be stressed that I do not endorse this model because I normatively believe it is the most proper. That is beside the point. Rather, I endorse this model because I believe it accurately describes the way judges decide cases. Textualism and originalism are incoherent in terms of their avowed purposes—they simply cannot constrain interpretation in the formal way that its proponents assert it does. Judges could not possibly decide cases solely on the basis of the textualist-originalist meta-rule.

¹⁸⁰ Posner, *supra* note 11, at 866 (explaining that his "ontological skepticism" about law "emerges naturally from the pragmatism of a Charles Peirce"); see also Grey, *supra* note 169, at 25 (stating that Posner thinks of himself "as a jurisprudential follower[] of James and Dewey").

¹⁸¹ JAMES, *supra* note 177, at 22; see also Dewey, *supra* note 12, at 26 ("logic relative to consequences"). JAMES also notes that "[p]ragmatism is uncomfortable away from facts." JAMES, *supra* note 177, at 26.

¹⁸² *Id.* at 93.

¹⁸³ *Id.* at 93 (second emphasis added).

law is not a set of “antecedent principles that animate the process.”¹⁸⁴ According to the pragmatist model of decisionmaking, judges assuredly generate policy. To judge is to make policy, because the law itself is the name of the practice and the process of judicial decisionmaking. The law is a result; it is the name of the activity judges perform rather than any set of principles that serve to constrain interpretation in and of themselves. It is born in the stream of experience, as Justice Holmes suggested.¹⁸⁵

VI. CONCLUSION

I have demonstrated why textualism-originalism cannot possibly accomplish the tasks that one of its notable adherents, Justice Scalia, has expressly set forth.¹⁸⁶ For a legal formalist like Justice Scalia, the formula *rule* → *facts* → *decision* captures a vital feature of constitutional hermeneutics: it constrains interpretation.¹⁸⁷

In my opinion, the problem is that neither rules nor meta-rules can constrain interpretation. And it is Ludwig Wittgenstein’s later philosophy that structures my critique, which is comprised of both strong and weak theses.

The strong thesis, as sketched by Kripke’s analysis of the skeptical paradox of meaning, is that rules are radically and hopelessly indeterminate.¹⁸⁸ Though I am personally sympathetic to the notion of radical determinacy, I recognize that it is beset with a host of profound difficulties. Though I advance the thesis, it is not my project here to defend such a view against all comers.

The weak thesis, which seems to be a point with which Kripke and the anti-skeptics agree, is that language is defined by practice, and that the community of linguistic practitioners ground meaning and interpretation, such that radical indeterminacy does not accurately characterize the body of our experience.¹⁸⁹ However, it is a premise of the weak thesis that the rule by itself *never* determines its own application.¹⁹⁰ Indeed, this is the very explanation of Wittgenstein’s undertaking in *Philosophical Investigations* that anti-skeptics like Marie McGinn proffer.¹⁹¹

Of course, if rules cannot define appropriate applications of a rule, then their utility in constraining interpretation is dubious.¹⁹² This is the heart of my critique. Even under an anti-skeptical reading of Wittgenstein, rules alone do not constrain interpretation.¹⁹³ Neither does the textualism-originalism hermeneutic.¹⁹⁴ It cannot accomplish the objectives Justice Scalia intends it to.

¹⁸⁴ *Id.*

¹⁸⁵ *See supra* note 14.

¹⁸⁶ *See supra* Part III.

¹⁸⁷ *See id.*

¹⁸⁸ *See supra* Part IV.B.1.

¹⁸⁹ *See supra* Part IV.B.3.

¹⁹⁰ *Id.*

¹⁹¹ *See supra* notes 101-06 and accompanying text.

¹⁹² *See supra* Part IV.B.4.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

As such, I do not think the legal formalist model accurately depicts the practice judges engage in. Rather, some of the great pragmatists of this century, such as Dewey and James, supply a model of legal practice that is both more accurate and more faithful to the Wittgensteinian critique I have attempted to sketch here.¹⁹⁵ The pragmatic model of judicial decisionmaking can be conceptualized as *facts* → *decision* → *rule*. Rules are the results of our practice.¹⁹⁶ As Chief Judge Posner explains, this is why the law is the name of an activity.¹⁹⁷ The law, so to speak, is a result. Insofar as the practice of following the specific rule gives the rule its meaning, legal rules arise out of that practice rather than existing antecedently. It is just as Justice Holmes explained so many years ago: “the life of the law is not logic, it is experience.”¹⁹⁸

¹⁹⁵ See *supra* Part V.

¹⁹⁶ See, e.g., note 181 and accompanying text.

¹⁹⁷ See *supra* note 174 and accompanying text.

¹⁹⁸ See HOLMES, *supra* note 15, at 1.