1. Market Niche:

The book presents a novel argument about originalism, language and law. It argues that originalism is incompatible with the American legal system because of the way the legal culture treats enacted law. The book clarifies when it is permissible to use history to read a constitution and when it is not. The book also thoroughly analyzes originalism as a system of belief and differentiates new and old versions along lines not previously understood. It provides critical new insights into what originalism actually is.

The book has fresh thinking. It offers a unique Wittgensteinian perspective of the American Constitution. It offers a completely new way to think about the role that judges assume when interpreting an ordinary-language legal document. And it leaves us with a bold conclusion: the truth of the American Constitution can only be given by connoisseurs, not by history.

- **Title:** The Flexible Constitution
  *(Alternate title: The Flexible Constitution – A Philosophic Approach)*
- **Length:** 102,274 words, 14 chapters, 19 tables & 8 illustrations.
- **Status:** 100% Complete (seeking publisher).

2. Market/Audience:

The primary audience is anyone interested in legal theory, the meaning of the Constitutional and the Supreme Court. But the secondary audience is anyone interested in Ludwig Wittgenstein. The book could be marketed to professors, students, and even those in the general public interested in the popular topic of how to interpret the Constitution and how originalism works. The book can serve as a supplementary text for a classroom or a book of general interest.

**Comparable Books:**
- Ronald Dworkin, *Law’s Empire*, Belknap Harvard, (1986);
- Sotirios A. Barber and James Fleming, *Constitutional Interpretation: The Basic Questions*, Oxford (2007);

**Competitors:**
3. Why Needed?

In January of 2011, The New Yorker reported that four in ten Americans favor originalism. Its outbreak among conservative segments of American political culture has been severe. Even in the academy, the last 15 years has seen the ascendancy something called “the new originalism.” Virtually every American law professor who writes on the subject of legal philosophy has adopted the phrase, “the original meaning of the Constitution.” Even liberal scholars like Jack Balkin have declared himself to be an “originalist.” It has even been declared by some scholars, “We’re all originalists now.”

This book is desperately needed for two reasons. First, it uncovers confusions that exist in the current conversation about “what the Constitution means” and presents a novel argument for why the American legal system and originalism are incompatible. Second, it provides an unparalleled analytical and theoretical investigation into originalism as a philosophy of law. The book comes at the subject with a new angle and isn’t like any other on the market.

4. Relevance to Literature:

(a) Wittgenstein and Law

This book makes a novel contribution to “law and Wittgenstein” scholarship. It follows the courageous path traversed by John Brigham’s 1978 work, *Constitutional Language*. In doing so, it differentiates itself from the postmodern scholarship that emerged in Wittgenstein’s name in the 1990s, with the works of Phillip Bobbitt and Dennis Patterson. The key difference is threefold. First, the book rejects skepticism. In doing so, it specifically sets forth criteria for differentiating judicial decisions by merit, relying upon Wittgenstein’s views about connoisseur judgment. Second, it focuses upon the text of the Constitution, rather than the forms of argument that lawyers deploy. Finally, it never adopts a static or rule-driven account of “grammar,” which means it is more faithful to Wittgenstein’s views.

(b) Conservative Originalists

This book directly confronts the “new originalism” espoused by scholars such as Keith Whittington, Larry Solum, Randy Barnett and Supreme Court Justice Antonin Scalia. It shows why Whittington’s view that constitutional law (secretly) enacts its authorial and social context is problematic. And it takes on the issue of whether the Constitution acquired a “fixed meaning” at the time it was enacted, a view championed by many. Because the Constitution is written in ordinary language, what is “fixed” is determined by how the brain processes ordinary words and by what Ludwig Wittgenstein described as family resemblance. This idea is bolstered with modern research in cognitive linguistics and the views of famous linguist Steven Pinker.

The book also provides a major clarification into what the idea of “original meaning” consists of, an expression that is popular among American legal scholars. But it does so using means different from Dennis Goldford’s work, which relied upon literary conceptions of meaning. The book uses techniques in philosophy.

(c) Dworkinians & “Liberal Originalists”

Importantly, the book also challenges the so-called “liberal originalists.” It takes on Balkin’s idea that one can use history to reveal the Constitution’s so-called “abstract principles.” Once this claim is analyzed, serious flaws emerge. Secondly, the book rejects the idea that the Constitution is about moral reasoning *per se* -- a view espoused Sotirios Barber/James Fleming and Michael Moore, who are all disciples of Ronald Dworkin. Instead, the book argues for a Wittgensteinian approach to philosophy of law that stresses stresses cultural orientation, assertability conditions (grammar), family resemblance and something Wittgenstein called "aesthetics" (connoisseur judgment). The book is not critical of the Dworkin, however. The author believes the two approaches can co-exist.
5. Why It Is Unique

(1) “Mapping” Originalism. The work maps the system of originalist belief. Readers learn to “diagnose” different kinds of originalist belief systems based upon certain features that they hold.

(2) Defining Originalism. Major clarification of what originalism is. The work places originalism between natural law and positivism, which is a critical breakthrough in understanding how originalism fits into jurisprudence.

(3) Theory of Legislation. Provides key insight into “philosophy of legislation.” What actually becomes enacted in positivistic legal cultures, when, as they say, “the ayes have it?” This answer is absolutely critical to understanding the originalist conversation.

(4) Wittgenstein’s Jurisprudence. The first work to incorporate Wittgensteinian thought in the areas of family resemblance, meaning-is-use, and connoisseur-judgment\(^{(1)}\) to constitutional law. Follows the path set by John Brigham’s 1978 work, *Constitutional Language*.

\(^{(1)}\) derived from Wittgenstein’s ideas about Aesthetics, Aspect-Seeing & Imponderable Evidence

(5) New/Old Originalism. First truly coherent difference between new and old originalism. Distinguishes and explains like no other prior work.

(6) “Original Meaning.” Clears up a major source of confusion about the phrase “the original meaning of the Constitution.” Scholars routinely conflate the situation where language requires one to select a way to “follow it,” versus referring to the first thing selected. The former is the language meaning; the latter is its social arrangement. This distinction alone clears up many problems that have concerned scholars.

(7) Constitutional Interpretation. Provides new insights regarding models for interpreting a written constitution. Provides a new critique of “speaker’s meaning” and introduces three alternative methods for understanding the Constitution.

(8) Relevance of the Past. Provides key insight into what might be called “philosophy of the past” in jurisprudence. Of what relevance is the constitutional past to future generations who are beholden to the same legal document?

(9) Family Resemblance. Provides an excellent orientation into Wittgenstein’s idea of family resemblance. Bolsters this explanation with supportive research by linguists and the views of Steven Pinker.

(10) Polysemy. Invents an interesting theory of polysemy that relies upon Wittgenstein.


6. The Author.

The author is Sean Wilson, an assistant professor at Wright State University. His primary areas of concern are legal theory, public law, judicial politics and Ludwig Wittgenstein. He has taught at Penn State and University of Alabama at Birmingham. He holds a Ph.D. and a J.D. and has ten years of previous experience as a practicing lawyer. This is his first book.
Chapter Summary

Chapter 1: Wittgenstein, Law & Originalism

The chapter reviews the literature. It shows how the book affects two areas of concern: works mixing law and Wittgenstein, and scholarship about originalism.

PART-I: Understanding Originalism

Chapter 2: The Philosophy of “Framer Intent”

This chapter considers how “framer intent” arguments work. It analyzes the elements of belief and presents important analytic distinctions, such as whether the arguments are text-free, text-centered, devotional or formalistic. Special attention is paid to the most common form of argument: text-centered, formalistic. The chapter ends with the contention that all ‘framer intent” argument share one thing in common: the belief that the wishes of an imagined personification must be “followed.”

Chapter 3: Why Framer Intent is Flawed

This chapter demonstrates the challenges of “framer-intent” as a belief system. Every argument against the old-style originalism is listed in an organized fashion. Readers learn not only what the obstacles are, but what alternatives exist. Different and new models of interpretation are introduced at the end of the chapter.

Chapter 4: The Rise of the “New Originalism”

This chapter explains the so-called “new originalism” that became popular in American legal culture during the last ten to fifteen years. After “framer intent” became resoundingly rejected by the American legal academy – including the main of its conservatives – scholars attempted to “repair” originalism. The chapter presents a detailed analysis of what the new thinking consists of and how it tries to differentiate itself from the older versions of belief.

Chapter 5: The Constitution as Old Society

The chapter explores a distinct approach to originalism that treats past historical society as the thing that reveals what the Constitution “really means.” The argument is that the provisions of the constitution ultimately mean what relevant societal preference thought about them during passage. This chapter “maps” these views analytically and explores how they could work. Then, a short critique follows.

PART-II: Understanding the Constitution

Chapter 6: Is There a Fixed Meaning?

This chapter considers an extremely important thesis that originalists often raise. Do the provisions of the Constitution acquire a “fixed and definite meaning” when passed into law? The difficulty of this thesis is shown for every level of meaning (even generality). And the positions of conservative and liberal originalists, and of Ronald Dworkin, are distinguished. The chapter also sets forth an analysis of
the Fourth Amendment Search and Seizure Clause from a perspective of cognitive linguistics. And it explains how the idea of rigidity works in constitutional language. The chapter ends with a short critique of the term "original meaning" and an introduction to what it means to be “originalist.”

Chapter 7: Public Meaning v. Meaning as Use

The chapter explains how the mind is said processes ordinary language, relying heavily on famous linguist Steven Pinker and research in cognitive linguistics. It also explains Ludwig Wittgenstein’s idea of “family resemblance” and the idea of meaning-is-use in language. And it shows that the linguistic positions advocated by many so-called new originalists are contrived, resulting in problematic assertions for “the true meaning” of ordinary words.

Chapter 8: The Flexible Constitution

This chapter presents a thesis for what any constitution written in ordinary language necessarily means, given the insights of the previous chapter. One of the central points is that different generations with different culture – say, agrarian versus industrial – can each follow the same constitution differently, while both remain obedient to the same flexible words. In fact, the whole point of a plain-language constitution is for generations to pick examples of how to follow flexible ideas. This means that the “first following” that occurs in society is not “better” or more linguistically precious than subsequent ones.

The chapter also explains how judges of ordinary-language constitutions are to approach their task. The point is for jurists to speak the language of the law back to the past in a manner that could be understood in those language games. This is called the intelligibility thesis. It differs from those who think that the past is specifically trying to “speak to us” about our choices. All that is being passed along is the plain language of the document, nothing more. This means that judges can shift the sense of constitutional ideas and pick new arrangements for them, so long as doing so has “family resemblance” for the lexicon, and is therefore intelligible.

Chapter 9: Structuralism & Polysemy

This chapter shows two things. First, it shows that judges from different historical eras who read the same plain-language document have meaningful limits placed upon the choices that can be said to comply with its text. Plain language constitutions are not “willy nilly.” Second, the chapter shows that even ordinary language has an important parameter that cannot be breached. The chapter shows where this parameter lies. It introduces a novel theory of “polysemy” that is influenced by Wittgenstein and sets forth brief criteria for what good judging should entail.

Chapter 10: Cultural Construction

The chapter presents a hypothetical involving time travelers from the framing culture who are summoned to help modernity decide two big cases: abortion and sodomy. The lesson is clear: the travelers cannot help. Everything they put forward is inherently opinionated and is culturally constructed. The key revelation is that all views about constitutionality are inherently perspectival. As such, what the Constitution means is ultimately a question involving allegiance to defensible intellectual frameworks, which gain or lose their validity based upon developments in information, knowledge, culture, science and philosophy. For this reason, old opinions cannot be automatically regarded as constitutional gospel. If frameworks become outdated, they are of no use to use any longer.
Chapter 11: What Originalism Really Is

This chapter takes a birds-eye-view of originalism. It shows what the belief system really amounts to. Importantly, it places originalism between positivism and natural law, having certain affinities with both, which is an important clarification. It also differentiates new and old originalism along lines never before argued. And it shows why American legal culture treats the enacted law as speaking solely for itself, something that originalism cannot do. It is this very issue that makes originalism a problematic approach for the American legal system, as it exists today.

Chapter 12: Law as Connoisseur Judgment

This chapter describes Wittgenstein’s views on connoisseur judgment and shows how they apply to judgments about constitutionality. The chapter also sets forth aesthetical criteria for what constitutional judgment is as a behavior and what makes one decision better than another. This approach is compared and contrasted with Ronald Dworkin’s views. The basic point is that the problems of constitutional law are not intrinsically about “moral reasoning.” Rather, they are aesthetical judgments. Making good constitutional decisions is no different than making good music. They both require a culture of appreciation for the thing in question and for connoisseurs to define what is “correct.” The chapter leaves us with a bold conclusion: the American Constitution ultimately means what its best connoisseurs say, not what history says.

Appendix-A: The Philosophic Investigation

Appendix-A presents a thought experiment. The central purpose is to answer a single question: what does it mean to say that something violates “the original meaning of the Constitution?” The thought experiment involves the 1960s generation creating a Declaration of Justice (DoJ) that sets forth the right way to live. The DoJ is passed onto children, who claim to accept it. However, the children, known as “Generation-X,” turn out to be materialistic and wealth-maximizing. The question is then posed: are they violating the DoJ? The parents take the position that they are; the children say they are not. The question ultimately turns upon the wording of a specific provision and various arguments about what it means.

To further complicate matters, the thought experiment has the DoJ being sent back in time to 1787 American culture, to see how the past might read its dictates. Hence, the revered period of American constitutional history is forced into the role of being the receiver of authority rather than the promulgator – in essence, talking backward in time instead of forward. And the so-called “originalists” in the scenario are from the 60s generation arguing to preserve an idealistic youth outlook that is no longer in vogue.

Appendix-B: Three Levels of Analysis

This chapter presents the view that constitutional meaning is a problem involving three distinct levels of analysis. It challenges, and builds upon, Ronald Dworkin’s famous distinction between “concepts and conceptions.” The chapter presents its view using two basic examples: (a) the Equal Protection Clause; and (b) a hypothetical Ronald Dworkin offered in 1997 concerning how to follow the command of a boss.
# Table of Contents

Citation Abbreviations ................................................................. xii  
Citation Form & Style ................................................................. xv  
Chapter Outline ............................................................................ xvi  
Preface ............................................................................................ xi  
Acknowledgements .......................................................................... xxiii  
The Conclusion ................................................................................ xxiv

Chapter 1: Wittgenstein, Law and Originalism

§ 1. Law and Wittgenstein
   (a) John Brigham ................................................................. 1  
   (b) Postmodern Scholars ...................................................... 4  
   (c) Format & Innovation ......................................................... 5  
   (d) Beyond Skepticism .......................................................... 8

§ 2. Originalism ............................................................................. 9  
   (a) Philosophic Approach ..................................................... 10  
   (b) “New Originalists” .......................................................... 11  
Notes ............................................................................................. 13

PART-I: Understanding Originalism

Chapter 2: The Philosophy of "Framer Intent"

§ 1. The Role of Text ................................................................. 27  
§ 2. Temporal Issues ................................................................. 28  
§ 3. What Kind of Beliefs Matter? ............................................. 29  
   (a) The Memory Pensieve .................................................... 30  
   (b) Specificity in Belief ......................................................... 31  
   (c) Confusion? ..................................................................... 31  
§ 4. Imaginary Personification ................................................... 32  
Notes ............................................................................................. 33

Chapter 3: Why Framer Intent is Flawed

§ 1. An Unattainable Idea
   (a) Who are “the Framers?” .................................................. 37  
   (b) Which Mental States? ....................................................... 40  
   (c) “The Frankenstein” ......................................................... 42  
   (d) Skepticism ..................................................................... 42

§ 2. A Misguided Idea
   (a) Knotted Grammar .......................................................... 44  
   (b) “Textualism” ................................................................. 45  
   (c) The New Unit of Analysis ................................................ 46  
   (d) Beyond Speaker’s Meaning ............................................ 47  
Notes ............................................................................................. 49

Chapter 4: The Rise of the New Originalism

§ 1. No “Boss Logic” ................................................................. 55  
   (a) Authorial Intent? ............................................................ 56  
§ 2. Bystander-Textualism .......................................................... 58  
§ 3. Speaker’s Meaning? ............................................................ 60  
   (a) Judging Language? .......................................................... 62  
Notes ............................................................................................. 64
Chapter 5: The Constitution as Old Society

§ 1. Whose Preferences Count? ............................................. 69
  (a) Aggregating Philosophy ........................................... 70
  (b) Qualitative Factors .............................................. 72
§ 2. Criticism ................................................................. 73
  (a) Social Learning .................................................... 73
  (b) Presentism .......................................................... 74
  (c) Wrong Unit of Analysis ........................................... 75
  (d) Domination Isn’t Special ......................................... 76
Notes .............................................................................. 77

PART-II: Understanding the Constitution

Chapter 6: Is There a Fixed Meaning?

§ 1. The Baptismal Thesis .................................................. 85
§ 2. Language Rigidity ....................................................... 86
§ 3. History as Law? .......................................................... 88
§ 4. Abstract Principles? ................................................... 89
  (a) Dworkinians ............................................................ 91
  (b) Example: “Unreasonable” Searches ............................ 92
§ 5. Original Meaning? ....................................................... 95
Notes .............................................................................. 95

Chapter 7: Public Meaning v. Meaning as Use

§ 1. “Public Meaning” ....................................................... 103
  (a) Majority Preference? .................................................. 103
  (b) Historical Stereotypes/Archetypes ............................... 105
  (c) Aggregated Historical Behavior .................................. 107
§ 2. HCPH’s Fundamental Flaws ....................................... 108
§ 3. Family-Resemblance – Wittgenstein ............................ 108
§ 4. Family-Resemblance – Pinker .................................... 110
§ 5. Sharp Boundaries ....................................................... 111
§ 6. Technicality ............................................................... 112
Notes .............................................................................. 113

Chapter 8: The Flexible Constitution

§ 1. Sense-Shifting ............................................................. 123
  (a) “The Army” ............................................................ 124
  (b) “Citizen” ................................................................. 128
  (b) “Age” ....................................................................... 131
§ 2. Many Ways to Follow ................................................. 132
§ 3. Interpretation v. Construction ...................................... 134
§ 4. Cooperative Talking .................................................. 135
Notes .............................................................................. 136

Chapter 9: Structuralism & Polysemy

§ 1. Structuralism .............................................................. 141
§ 2. Culturally Appropriate ................................................ 143
§ 3. Polysemy (Semantic-Gist)
  (a) Definition ............................................................... 143
  (b) Significance ............................................................ 145
  (c) Legal Examples ....................................................... 146
  (d) Not Originalism! ...................................................... 147
§ 4. Assertability Conditions ............................................. 148
Notes .............................................................................. 149