The Rhetoric of Originalism
David M. Finkelstein

Introduction: Jurisprudence and the Philosophy of Language
1. This will be an article on the sort of support that the philosophy of language lends to originalism. I want to begin by considering a remarkable exchange during the Federalist Society’s 2010 Student Symposium. The topic for one panel was whether originalism is “a rationalization for conservatism or a principled theory of interpretation?” Rather than addressing the question head-on, Professor Mary Anne Case – a member of the panel – argued that even if originalism could be principled, it saddles us with a species of conservatism that no actual conservative would find acceptable. According to Case, even if we could “heroically” reconstruct Brown v. Board of Education and its progeny on originalist grounds, “you can’t find anything,” in the original meaning of the Constitution, that is “good for women.” Specifically, nothing in the Constitution as it was originally understood would prevent the wholesale exclusion of women from the public sphere. Thus, Case argued that conservative legal scholars face a dilemma: either repudiate the Supreme Court’s sex discrimination jurisprudence and constitutionalize the return to coveture, or repudiate originalism. For non-originalists, this isn’t a problem – although no one thinks that the reconstruction amendments were originally understood to address unequal treatment of the sexes, the language of the Constitution’s guarantee of “equal protection of the laws” can fairly be read to encompass discrimination on the basis of sex, as well as discrimination on the basis of race.

Case’s point is that originalism is inconsistent with contemporary intuitions concerning the Constitution’s meaning. It is the response of one of Case’s fellow panelists, Professor Sarkrishna Prakash, on which I want to focus. Challenged by Case to justify an original understanding of the Constitution notwithstanding the fact that “the text can easily be interpreted to achieve the results I want,” Prakash’s response was “I think text can be understood any way you wish it to be understood.” As if to emphasize that he really meant it, Prakash repeated his remark, stating again “any text can be understood any way if you posit the right author.”

2. The notion that “any text can be understood any way” is an extreme formulation of a problem to which originalism is often presented as the solution. The problem is that

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1 Law Clerk to the Hon. Rosemary S. Pooler, U.S. Court of Appeals for the Second Circuit. J.D., Columbia Law School, 2006. Ph.D, Philosophy, University of Pittsburgh, 2006. Thanks to Andrew Ayers and Lisa Daly for helpful comments on an earlier draft.
3 Cf. McDonald v. City of Chicago, Ill., 561 U.S. 130 S.Ct. 3020, 3099 (Stevens, J., dissenting) (“[W]e must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history”).
4 See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 94-109 (2004) (arguing that adherence to a written text's objective original meaning yields the highest degree of
legal texts seem too open-ended to constrain those who interpret them. Thus, a clever lawyer can come up with an interpretation of a text that reflects what she wants the text to say. Indeed, according to Justice Scalia, “the main danger in judicial interpretation … is that the judges will mistake their own predilections for the law.”7 Nor are all scholars prepared to consider this a “danger” of judicial interpretation. Elsewhere, Scalia complains that law students are taught to envision the great judge as “the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken field running through earlier cases that leaves him free to impose that rule.”8

Scalia’s complaint concerns common law judging – the process of working with (and building on) precedent – but the same concern is obviously and easily translatable to one that applies to any form of legal interpretation. Common law precedent comes to us in the form of written judicial opinions, a form of text. To the extent that the skillful judge can perform the requisite “broken field running” through what other judges have written, it should go without saying that legislative and constitutional texts provide no more of an obstacle. As Scalia goes on to state, one shouldn’t suppose that “proponents of The Living Constitution follow the desires of the American people in determining how the Constitution should evolve. They follow nothing so precise; indeed, as a group they follow nothing at all.”9

Interestingly enough, the notion that legal texts fail to constrain those who work with them is a central theme of anti-originalist jurisprudence as well. Take the proponents of the critical legal studies movement. Probably the central commitment of the “Crits” is what’s been called “the indeterminacy thesis”: the notion that the law permits a judge to justify any result in any case. Thus, David Kairys writes that “[t]he starting point of critical theory is that legal reasoning does not provide concrete real answers to particular legal or social problems … decision is not based on, or determined by, legal reasoning.”10 The reason for this, according to the Crits, is that the judge is free to choose from among the various rules that might apply to the particular case. Here is Duncan Kennedy:

a ‘rule’ that appears to dispose cleanly of a fact situation is nullified by a counterrule whose scope of application seems to be almost identical … 
The realists taught us to see this arrangement as a smokescreen hiding the

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9 Id. 44.
skillful judge’s decision … and as a source of confusion and bad law when skill was lacking.\textsuperscript{11}

Surprisingly then, there appears to be something on which Crits and originalists agree. Both insist that legal texts can be interpreted in incompatible ways, and the texts themselves don’t tell us how to interpret them. For the Crit, this is an opportunity to be celebrated.\textsuperscript{12} Originalists, of course, have the opposite response. For the originalist, since the text, standing alone, fails to constrain the judge, we need to find something that will. If, like Justice Scalia, you think that “[t]he ability of omnidirectional guideposts to constrain is inversely proportional to their number,”\textsuperscript{13} then an obvious first step would be to restrict the sorts of materials the judge can use to interpret texts. For instance, we might seek to prevent judges from appealing to morality, public policy, legislative purpose, and the like. All this, we might think, is nothing more than “a variety of vague ethico-politico First Principles whose combined conclusion can be found to point in any direction the judges favor.”\textsuperscript{14}

However, one might think that even this is not enough. Even if the judge is confined to the mere words on the page, these words will often mean different things to different people. (Any text can be understood in any way if you posit the right author.) This is particularly likely to be the case with legal texts, which are often couched in open-ended, normative terms. (The Constitution prohibits unreasonabl\textsuperscript{e} searches and seizures,\textsuperscript{15} cruel and unusual punishment,\textsuperscript{16} and so on.) Again, the concern is not that ordinary interpretive methods can’t be brought to bear on constitutional and statutory provisions. The problem, rather, is that it’s too easy to bring the ordinary methods of interpretation to bear of open-ended legal texts. As a result, ordinary interpretative methods don’t unambiguously supply unique answers to every legal question.

According to the originalist, of course, the solution is to focus on what the words meant at the time the text was enacted, “what those words would mean in the mouth of a

\textsuperscript{11} Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685, 1700 (1976). Kennedy is speaking specifically of indeterminacy in contract law. But the example of contract law is meant to be illustrative. According to the Crits, not just the rules of contract, but all legal rules, and indeed, the sorts of public policy considerations that are typically taken to justify legal rules, fail to produce determinate results. See, e.g., Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781 (1983); see also Duncan Kennedy, Cost-Benefit Analysis of Entitlement Problems: A Critique, 33 STAN. L. REV. 387 (1981) (arguing that utilitarian cost-benefit analysis fails to produce determinate results in particular cases). But cf. Robert W. Gordon, Lawyers, Scholars, and the Middle Ground, 91 MICH. L. REV. 2075 (1993) (“We need not waste time on the charge that they believe that legal texts are ‘infinitely plastic and subjective,’ since no critical scholar has ever, anywhere, argued anything of the kind.”).


\textsuperscript{13} McDonald, 130 S.Ct. at 3052 (Scalia, J., concurring).

\textsuperscript{14} Id. at 3058.

\textsuperscript{15} U.S. CONST. AMEND. IV.

\textsuperscript{16} U.S. CONST. AMEND. VII.
normal speaker of English, using them in the circumstances in which they were used.”

According to the originalist, this method limits the judge’s ability to give exercise to naked policy preferences because “it establishes a historical criterion that is conceptually quite separate from the preference of the judge himself.”

To repeat, both Crits and originalists are committed to a hermeneutics according to which legal texts, standing alone, are too malleable to genuinely constrain. This conception of law is grounded in a particular way of thinking about language. The picture of language can seem unavoidable, but it isn’t. At any rate, so I will argue.

3. Let us say more about the picture of language on which, I take it, originalism (and critical legal studies) rests. The originalist assumes that there is a gulf between the words on the page and a particular reader’s understanding of the words’ meaning. The reader needs to bridge this gap for herself, which she does by interpreting the text. This is obviously true in some cases. Famously, the words “no vehicles in the park” express a prohibition that may or may not apply to bicycles and strollers depending on how we interpret the word “vehicles.” On reflection, some legal philosophers have worried that all language is like the “no vehicles in the park” example – all language stands there innocently meaning nothing until it is interpreted. It appears that legal theorists were the first to notice this. Consider, for instance, the following account, which was given roughly a century before analytic philosophy developed its current obsession with language:

Let us take an instance of the simplest kind, to show in what degree we are continually obliged to resort to interpretation. By and by we shall find that the same rules which common sense teaches every one to use, in order to understand his neighbor in the most trivial intercourse, are necessary likewise, although not sufficient, for the interpretation of documents or texts of the highest importance … Suppose a housekeeper says to a domestic: ‘fetch some soupmeat,’ accompanying the act with giving some money to the latter; he will be unable to execute the order without interpretation, however easy and, consequently, rapid the performance of the process may be. Common sense and good faith tell the domestic, that the housekeeper’s meaning was this: 1. He should go immediately, or as soon as his other occupations are finished; or, if he be directed to do so in the evening, that he should go the next day at the usual hour; 2. that the money handed him by the housekeeper is intended to pay for the meat thus ordered, and not as a present to him; 3. that he should buy such meat and of such parts of the animal, as to his knowledge, has commonly been used in the house he stays at, for making soups; 4. that he buy the best meat he can obtain, for a fair price; 5. that he go to that butcher who usually provides the family with whom the domestic resides, with meat, or to

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18 Scalia, *supra* note 7, at 864.
some convenient stall and not to any unnecessary stall, and not to any unnecessarily distance place; 6. that he return the rest of the money; 7. that he bring home the meat in good faith, neither adding anything disagreeable nor injurious; 8. that he fetch the meat for the use of the family and not for himself.  

The simplest conceivable instruction, in other words, requires a great deal from its audience. Nor is this a purely theoretical concern. Famous judges’ struggles with the meaning of simple words like “chicken” are now required reading for every first year law student.  

Of course, once we recognize that interpretation is necessary, we are unlikely to find any particular interpretation to be sufficient. The remark that immediately follows the one I quote above is:

Suppose, on the other hand, the housekeeper, afraid of being misunderstood, had mentioned these eight specifications, she would not have obtained her object, if it were to exclude all possibility of misunderstanding. For, the various specifications would have required new ones. Where would be the end? We are constrained, then, always, to leave a considerable part of our meaning to be found out by interpretation, which, in many cases must necessarily cause greater or less obscurity with regard to the exact meaning, which our words were intended to convey …. Human speech is the clearer, the less we endeavor to supply by words and specifications that interpretation which common sense must give to human words.

Interpretations, in other words, are themselves susceptible to multiple interpretations, which are in turn further interpretable, and so on. As courts have recognized, any “definition only pushes the problem back to the meaning of the defining terms.” Originalism, it should be noted, has no obvious solution to this last problem. Justice Scalia candidly admits that the “greatest defect” of originalism “is the difficulty of applying it correctly … it is often exceedingly difficult to plumb the original understanding of an ancient text.”

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21 See Frigaliment Importing Co. v. B.N.S. Int’l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960) (Friendly, J.) (“The issue is, what is chicken?”). For a classic account of the Frigaliment decision, see Marvin A. Chirelstein, Concepts and Case Analysis in the Law of Contracts 85-86 (4th ed. 2001) (“When the merchandise arrived in Switzerland … instead of the tender young ‘broilers and fryers’ which plaintiff intended to resell to its customers – presumably retailers and restaurants – and which plaintiff clearly had in mind when it forwarded its purchase order, the shipment was found to consist of stringy old stewing chicken – good for boiling up in a soup with noodles and a chunk of carrot, but entirely unsuitable for the grill or the lightly buttered frying pan.”).
22 Lieber, supra note 20, at 31.
24 Scalia, supra note 7, at 856.
The Rule-Following Considerations

4. I have described the problem to which originalism attempts to respond in a way that hopefully will make it familiar to many. Approximately 100 years after Leiber recognized this problem identified above, this problem was considered in some detail by Ludwig Wittgenstein in his famous discussion of following a rule.

Wittgenstein’s discussion of rule-following is principally contained in the early middle parts of his *Philosophical Investigations*—roughly §§ 185-242. In these sections Wittgenstein attempts to illuminate “understanding, meaning, and thinking” by discussing a skeptical paradox that seems to threaten our ordinary ways of thinking about rules and rule-following. He dramatizes this paradox by imagining a student’s effort to develop a simple mathematical series: “starting from zero, add by twos.” Imagine that we begin the series up to 8—that is, we write “2, 4, 6, 8” on the chalkboard—and ask the student to continue. Imagine further that she carries on as expected up until 1000, and thus appears to show that she really has mastered the relevant rule, but that when she reaches 1000 she begins adding by fours. (That is, she writes “… 996, 998, 1000, 1004, 1008 …” on the chalkboard.) We might attempt to correct her by saying something like, “no, after you reach 1000, you’re to keeping going on as before.” But what if her response is “I know; that’s precisely what I’m doing.” What would we say then?

The challenge is to point to something in virtue of which “… 998, 1000, 1002 …” is the right answer and “… 998, 1000, 1004 …” the wrong answer. But it’s harder to do so than we might have thought. After all, the initial sequence we wrote on the board doesn’t rule out our student’s unexpected behavior—that sequence is equally compatible both with what we had hoped she would do and what she actually did. (Viz. the sequence “2, 4, 6, 8 …” is compatible with f(x)=2x; but it’s also compatible with (x≤500)(f(x)=2x) & (x>500)(f(x)=4(x-250)).

Because the initial sequence was capable of being interpreted in various ways, we might think that all we need to do is tell our student how we interpret the series. Thus, we might say: “when I said continue on as before, I meant keep on adding by twos.” But this expression of our interpretation of the series suffers from the same problem as the initial sequence: our instruction, no less than the series itself, can itself be interpreted in various ways. The instruction “add by twos” is just words. You and I may understand the words in the same way, but the words themselves don’t tell us how to understand them. For instance, “keep on adding by twos!” could be interpreted to mean “continue adding by twos until you get to 1000.” (Since the problem arises when we imagine someone who interprets our initial behavior in a non-standard way, it would stand to

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25 Material from the rule-following considerations also shows up in *The Blue and Brown Books: Preliminary Studies for the “Philosophical Investigations”* (1942), and in *Remarks on the Foundations of Mathematics* (G.H. von Wright, R. Rhees & G.E.M. Anscombe eds., G.E.M. Anscombe trans., 1978). I will have more to say about the latter below.


27 *Investigations* § 185.

28 Judge Easterbrook has suggested that we can solve the problem with sheer patience, stating that, “[a]n external interpretive community could discover whether the speaker embraced a rule carrying additional past 10,000 by asking questions and evaluating the answers.” Frank H. Easterbrook, *Levels of Generality in Constitutional Interpretation*, 59 U. Chi. L. Rev. 349, 360-61 (1992). At the risk of getting ahead of ourselves, it’s worth noting that Easterbrook misses Wittgenstein’s point. The point is that no matter how many answers the speaker gives, there will be infinitely many rules compatible with those answers.
reason that such a person might interpret our subsequent behavior in non-standard ways as well.) The same, of course, would be true if we were to try to interpret our interpretation.29 As Wittgenstein says, “any interpretation hangs in the air along with what it interprets lending it no support.”30

The trouble we find ourselves in when we attempt to explain ourselves to our student is analogous to the judge’s difficult when choosing from among different interpretations of the word “chicken”: the problem is that bits of objective reality considered as such are semantically inert.31 The marks we made on the chalkboard are mere squiggles, and our subsequent instructions just noise; neither the squiggles nor the noise considered in itself rule out unintended interpretations.32 (For one thing, a set of squiggles can be invested with any semantic significance, or with no semantic significance at all. There’s no particular reason that “2” should denote the number two—we could just as well have used “ii”, or some altogether different sign.33 Further, even if we allow ourselves to assume that “2” refers to the number two, “4” to the number four, and so on, as we’ve seen, the finite series that we’ve written on the board is equally compatible with infinitely many mathematical interpretations.)34

Moreover, what’s true of the chalk marks is equally true of what I go on to say in order to rule out unintended interpretations of the chalk marks. In what has been characterized as the climax of the rule-following dialectic, Wittgenstein summarizes the point as follows:

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29 Do not suppose that it helps matters if we conceive of interpretation as some private mental act rather than an external performance. Imagine that the formula “f(x)=2x” flashes before my mind’s eye as I write the initial series on the chalkboard. It’s unclear how this would be of any help. Clearly it wouldn’t help the student, since she would have to guess what’s in my mind. More importantly, what’s in my mind is just a mental picture of a possible physical expression of the rule. Pictures, no less than that which they depict, are susceptible to various interpretations. Cf. GILBERT RYLE, THE CONCEPT OF MIND 30 (1949) (“[I]f, for any operation to be intelligently executed, a prior theoretical operation had first to be performed and performed intelligently, it would be a logical impossibility for anyone ever to break into the circle … The endlessness of this implied regress shows that the application of the criterion of appropriateness does not entail the occurrence of a process of considering this criterion.”).

To the extent that we find ourselves inclined to deny this—to insist that metal pictures are somehow different from objective expressions of interpretations—we have effectively insisted that the problem is solved by magic. Cf. SAUL Kripke, Wittgenstein: On Rules and Private Language 51 (1982) (“Such a move … seems desperate: it leaves the nature of this postulated primitive state … completely mysterious.”).

30 Investigations § 198.

31 Cf. LAWRENCE TRIBE & MICHAEL DORF, ON READING THE CONSTITUTION 81-82 & n.5 (1991) (“all meaning is external to text … [viz. for any text] there will remain an irreducible minimum of meaning that the reader will have to supply on her own.”).


33 A toddler of my acquaintance recently informed her father that “2” means five, and was adamant that he had the wrong idea. I am grateful to Andy Ayers for bringing his daughter’s precociousness to my attention.

34 To properly express this thought, it helps to have a bit of set theory. In this case, we can say that we want our student to extend a particular function, namely f(x)=2x. And functions are sets of ordered pairs. Now, insofar as the function with which we’re concerned is defined on the naturals, it will be an infinite set. And the instructions we gave our student pick out some finite subset of that set. So we give our student a finite sequence and ask her, “which set, which unique function, does this belong to?” But any finite sequence must by definition belong to infinitely many sets. (In fact, it must belong to uncountably many.)
This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict.\textsuperscript{35}

5. Having said something about a famous problem in the philosophy of language that looms as a threat for those committed to the picture of language on which originalism rests, I should also say something about how Wittgenstein proposes to solve it. Unfortunately, there’s almost nothing that I could say on the subject that would be uncontroversial. On one interpretation, Wittgenstein thought that there is no solution to this problem – or rather, the solution is to reconcile ourselves to the fact that there is no fact of the matter as to the rules we follow.\textsuperscript{36} And if this is right – as the philosopher Saul Kripke has shown – then there are also no facts as to what words mean.\textsuperscript{37} On another interpretation, Wittgenstein thought that there are facts as to the rules we follow – and hence, what our words mean – but these facts are constituted by what the community \textit{says}.\textsuperscript{38} On still another view, Wittgenstein rejects as nonsense the idea that we can say

\textsuperscript{35} \textit{Investigations} § 201. Cf. McDonald, 130 S.Ct. at 3052 (Scalia, J., concurring) (“If there are no right answers, there are no wrong answers either.”).

\textsuperscript{36} Ahilan T. Arulanantham, \textit{Breaking the Rules?: Wittgenstein and Legal Realism}, 107 YALE L.J. 1853, 1869 (1998) (“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.”); Stephen Brainerd, \textit{The Groundless Assault: A Wittgensteinian Look at Language, Structuralism, and Critical Legal Theory}, 34 AM. U. L. REV. 1231, 1238 (1985) (“Wittgenstein’s theme, hopefully, is familiar by now; he contends that the meanings of our concepts have no firm grounding. Instead, he believes they are arbitrarily applied and perpetuated.”).

\textsuperscript{37} Recall that when our imaginary student began adding by fours, we found ourselves inclined to correct her by telling her to “add by twos.” In virtue of what, however, am I entitled to conclude that when I say “add” I mean for her to \textit{add}? Or to put the examples in the terms Kripke uses: how do I know that I mean \textit{plus} by “plus”? Kripke, supra note 29, at 8-9. Certainly nothing about my past use of the word fixes it that I mean \textit{plus} rather than some other, non-standard arithmetic function. Consider the “quus” function: quus is just like plus, only it yields strange values when one plugs in extremely high inputs. Imagine, for instance, that “x quus y” equals x plus y when x and y are less than one million, but is otherwise equal to five. As it happens, I’m fairly confident that I’ve never actually added (or quadded) numbers larger than one million. Nothing in my past behavior, therefore, settles it that by “plus” I mean \textit{plus} and not \textit{quus}. Nor does anything that flashes before my mind. \textit{Id.} at 15. Nor, for that matter, do my \textit{dispositions} concerning how the word “plus” is to be used. \textit{Id.} at 30.

According to Kripke, it is precisely Wittgenstein’s point that there is no fact as to what I mean by “plus.” Kripke’s Wittgenstein “does not give a ‘straight’ solution, pointing out to the silly skeptic a hidden fact he overlooked, a condition in the world which constitutes my meaning addition by ‘plus’. In fact, he agrees with his own hypothetical skeptic that there is no such fact.” \textit{Id.} at 69. Thus, “[t]here can be no such thing as meaning anything by any word.” \textit{Id.} at 55.

\textsuperscript{38} Crispin Wright, \textit{Rule-Following, Objectivity and the Theory of Meaning}, in \textit{Rails to Infinite: Essays on Themes from Wittgenstein’s Philosophical Investigations} 41 (2001) (“[T]he community does not go right or wrong—it just goes.”). \textit{See also} Radin, supra note 12, at 799-800 (“The rules do not cause the agreement; rather, the agreement causes us to say there are rules.”); Daniel S. Goldberg, \textit{I Do Not Think it Means what you Think it Means: How Kripke and Wittgenstein’s Analysis of Rule Following Undermines Justice Scalia’s Textualism and Originalism}, 54 CLEV. ST. L. REV. 273, 299 (2006) (“[Wittgenstein’s] anti-skeptical argument indicates that it is our practices that guide our rules rather than our rules that guide our practices.”).
anything substantive about what rule-following, meaning, thinking, and understanding consists in.\[^39\]

I think each of these interpretations is mistaken. I have pointed out what I take to be the problems with these interpretations elsewhere.\[^40\] I will not reproduce my arguments here. Instead, I will sketch what I take to be an alternative to the standard interpretations, having hopefully sufficiently warned the reader that in the world of Wittgenstein scholarship, there are only plurality opinions. In my view, the take-away lesson of the rule-following considerations is that claims about the rules we follow – or the meanings of the words we use – are not reducible to other sorts of claims. The problem, recall, gets going when we ask ourselves what meaning \(\text{plus}\) by “+”, or adding by twos, consists in. Implicit in the question is the idea that an adequate answer to the question would be one that does not draw on the concepts whose employment we now intend to justify. But perhaps this is a mistake. In roughly the middle of the rule-following chapter, Wittgenstein writes

> “How am I able to obey a rule?” – if this is not a question about causes, then it is about the justification for my following the rule in the way I do. If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: “This is simply what I do.”\[^41\]

Elsewhere he adds that “[t]he mistake is to say that there is anything that meaning something consists in.”\[^42\]

That I “hit bedrock” when I attempt to locate an external foundation for claims about what meaning does not, as some have supposed, mean that there is no fact of the matter. On the contrary, as Crispin Wright has explained,

> there is an explicit and unacceptable reductionism involved at the stage at which the skeptic challenges his interlocutor to recall some aspect of his former mental life which might constitute his, for example, having meant

\[^39\] See Cora Diamond, \textit{Wittgenstein and Metaphysics}, in \textit{The Realistic Spirit} 13 (1991) (“we … make meaning … into mysterious achievements that … call for philosophical explanation. Seeing [it] as [it is] in our life and giving up the desire for such explanations go together.”); David H. Finkelstein, \textit{supra} note 32, at 69 (“A philosopher who asks, ‘How is it that the statement of a rule is connected to its meaning?’ has—even before she’s offered any answer to the question—already succumbed to the idea that some link is needed if our words are to have significance; she presupposes that there is always a gulf between words and their meanings.”). \textit{See also} Christian Zapf and Eben Moglen, \textit{Linguistic Indeterminacy and the Rule of Law: on the Perils of Misunderstanding Wittgenstein}, 84 Geo. L.J. 485, 503 (1996) (“The demand for a justification is out of place because applying a word is not the sort of activity one can justify.”). Douglas Lind, \textit{Constitutional Adjudication as a Craft-Bound Excellence}, 6 YALE J.L. & HUMAN. 353, 362 (1994) (“Wittgenstein saw a fundamental mistake of understanding in what I call the externalist method of standing outside any central human activity … to … justify the results of judgment, the concepts used, or the linguistic meanings employed.”).


\[^41\] \textit{Investigations § 217.}

addition by “plus”. It is not acceptable, apparently, if the interlocutor claims to recall precisely that. Rather, the challenge is to recall some independently characterized fact, in a way which does not simply beg the question of the existence of facts of the disputed species, of which it has to emerge—rather than simply be claimed—that it has the requisite properties (principally, normative content across a potential infinity of situations). The search is thus restricted to phenomena of consciousness which are not—for the purposes of the dialectic—permissibly assumed “up front” to have a recollectable content.43

In other words, the fact in which my having meant plus by “plus” consists is the fact that I meant plus. Nothing more needs to be said. As Paul Boghossian has said, “[m]eaning properties appear to be neither eliminatable, nor reducible. Perhaps it is time we learned to live with that fact.”44

The picture I sketch above according to which discourse about meaning can be justified even though its claims are not reducible to some other discourse is a species of what is sometimes called the “default-and-challenge” picture of justification.45 Under the default-and-challenge standard, beliefs may be presumed justified in the absence of a positive challenge.

Relative to this standard, there’s simply no way to get the skeptical paradox going. With this in mind, recall what Wittgenstein himself says at the climax of the rule-following considerations: “if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict.”46 The passage continues

It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of another standing behind it. What this shews is that there is a way of grasping a rule which is not an interpretation, but which is exhibited … in actual cases.47

To say that the paradox rests on a misunderstanding, and that in ordinary cases we grasp the rule that a person follows without having to interpret her behavior, is to deny the picture of language on which originalism arguably rests.48 On that picture of language,

43 Wittgenstein’s Rule-Following Considerations and the Central Project of Theoretical Linguistics, in Wright, supra note 38, at 176.
45 See, e.g., ROBERT BRANDOM, MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT 174-76 (1994).
46 Investigations § 201.
47 Id.
48 Let me be clear: I am not suggesting that the originalist’s worries about legal indeterminacy – her concern that “any [legal] text can be understood in any way” – is explicitly based on an antecedent philosophical commitment to linguistic indeterminacy. (One can only imagine the derision that would be visited on the interlocutor who dared to ask Justice Scalia how he knows that “2” means the number two!) Rather, my claim is that the notion that the ordinary resources of interpretation aren’t enough to restrain the
recall, the noises we make, or the squiggles on the page, are empty until we infuse them with semantic content. The rule-following considerations amount to what mathematicians call an “indirect argument” against this sort of view. To assume this view is true – this is the strategy of indirect argument – is to saddle ourselves with paradox. Therefore, the view must be false. Q.E.D. Words means what they mean. And interpretations, when they happen, are right or wrong in light of the words’ meaning. We could, of course, still insist on tethering judges to particular methods for interpreting texts. But once we see that interpretations are in the same boat with what they interpret, why would we?

Original Meaning & Constraint
6. The discussion above has been meant to suggest that it ordinary cases, concerns about the free play of interpretation are overblown, and that therefore originalism is a solution in search of a problem. Consider how these lessons might apply in some actual cases. (The common denominator of these examples is that they present issues of statutory interpretation on which the circuits are split.)

The Religious Land Use and Institutionalized Persons Act (or “RLUIPA”) provides, inter alia, that “No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.” This means, among other things, that state and local governments may not discriminate against religious groups in their zoning laws. The circuits are split, however, on what it means to offer a religious group “less than equal terms.” The Eleventh Circuit, the first to interpret this provision, has held that the Equal Terms provision is violated whenever a religious assembly is subject to less favorable terms than a secular assembly, irrespective of whether the religious and secular groups are similarly situated. The Third Circuit, by contrast, has held that “a religious plaintiff under the Equal Terms Provision must identify a better-treated secular comparator that is similarly situated in regard to the objectives of the challenged regulation.” Thus, if a religious group is treated less favorably under a zoning regulation than a non-religious group, but if the groups are different in some material respect – if the non-religious group is a commercial establishment, and if the purpose of

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49 Although the examples I consider involve questions of statutory interpretation, I take it that the conclusions I attempt to derive from these examples are equally applicable to the theory of constitutional interpretation. Consider, for instance, the question of whether it is reasonable for an officer to fail to identify herself before attempting to effect an arrest. Catlin v. City of Wheaton, 574 F.3d 361 (7th Cir. 2009). If anyone should object that originalism is more plausible as applied to this sort of question than it is to the examples I consider below, I would invite her to explain how.


51 Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230 (11th Cir. 2004).

52 Lighthouse Inst. For Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 268 (3d Cir. 2007) (emphasis added).
the regulation is to encourage commercial development of a blighted area – then the Eleventh Circuit would find an Equal Terms violation, but the Third Circuit would not. This was the example that the Seventh Circuit confronted in River of Life Kingdown Ministries v. Village of Hazel Crest.\textsuperscript{53} A unanimous panel of the Seventh Circuit adopted the Third Circuit’s interpretation.\textsuperscript{54} However, the court subsequently granted \textit{en banc} rehearing, and issued adopted an approach that appears to split the difference between the Third and Eleventh Circuit tests.\textsuperscript{55}

I do not propose to weigh in on the strengths and weaknesses of the different interpretations of the Equal Terms provision. Instead, I want to consider what originalism adds to the conversation. Suppose, like the originalist, we are worried about judicial activism – we want to adopt the method of interpretation that minimizes the risk that the unelected judge will interpret the statutory language in a way that substitutes her own policy preferences for Congress’s. To what extent does originalism help us to achieve this goal?

An obvious first thing to say is that originalism adds nothing to garden-variety textualism in a case like this, where the statutory language was recently enacted. RLUIPA was enacted in 2000 in response to the Supreme Court’s invalidation of the Religious Freedom Restoration Act,\textsuperscript{56} which itself was enacted to counter the Supreme Court’s decision in \textit{Employment Division v. Smith}.\textsuperscript{57} Whatever the phrase “equal terms” means, it is unlikely that its meaning has changed from 2000 to 2010. Nor is this a trivial point. Both the Constitution and the U.S. Code are full of normative language, of phrases like “equal protection,” “due process,” and etc. It is unlikely that the dictionary definitions of the words of which these phrases are composed have changed much in the past one hundred and fifty years, between the ratification of the reconstruction amendments and today. To the extent, therefore, that we imagine that originalism adds anything to our understanding of older texts, we must retreat from “original meaning” originalism to “original expectation” originalism – viz. the view that judges should be constrained, not only by what the words meant at the time of their enactment, but also by how the public at the time expected that that meaning would be applied in particular cases.\textsuperscript{58}

\textsuperscript{53} 585 F.3d 364 (7th Cir. 2009)
\textsuperscript{54} \textit{Id.} at 373.
\textsuperscript{55} 08-2819, 2010 LEXIS 13681 (July 10, 2010) (en banc) (Posner, J.).
\textsuperscript{56} \textit{City of Boerne v. Flores}, 521 U.S. 507 (1997)
\textsuperscript{57} 494 U.S. 872 (1990) (holding that neutral and generally applicable laws that incidentally burden the exercise of religion do not violate the Free Exercise Clause).
\textsuperscript{58} Locus classicus for this view was given by Attorney General Meese in his address at the American Bar Association annual meeting in Washington, D.C., July 9, 1985; \textit{see also} RAOUL BERGER, \textsc{Government by Judiciary: The Transformation of the Fourteenth Amendment} 117-33 (1977).

The difference between originalism with respect to public meaning and originalism with respect to expectations – or fidelity to the framers’ \textit{concepts} versus fidelity to the framers’ \textit{conceptions}, see SOTIRIOS A. BARBER & JAMES E. FLEMING, \textsc{Constitutional Interpretation: The Basic Questions} 82 (2007) – is redolent of Gottlob Frege’s famous distinction between \textit{Sinn} (or sense) and \textit{Bedeutung} (reference). Frege’s idea was to distinguish between two ways of thinking about a word’s meaning: first, there is the word’s extension, the set of things it names; this is reference. But there is also the content of a \textit{thought} about that which the word names; this is sense. \textit{See, e.g., On Sinn and Bedeutung}, 155 \textsc{The Frege Reader} (M. Beaney, ed., 1997). Along the same lines, the literature on originalism distinguishes between those who think that interpretation should be guided by the text’s original public meaning – or its sense – and those who think that what matters is the public expectations concerning how the text would be applied at
Because “expectations” are mental events, expectations originalism invites consideration of the sort of squishy, subjective facts that (for the originalist) fail to furnish an empirically verifiable, objective tribunal to which we can appeal in order to hold judges accountable. Further, as many originalists have acknowledged, interpreting texts in the light of the enactors’ unexpressed expectations seems anti-democratic; Congress votes on what the Bill’s author said, not what she thought. Additionally, this method of interpretation yields strikingly counterintuitive outcomes, threatening not only antidiscrimination laws but also most practices of modern government, including social security, labor laws, a great deal of federal criminal law, and even the Air Force. Not surprisingly, therefore, the leading originalists profess to be uninterested in subjective facts about what the enactors merely thought a text means. (As Justice Scalia once said, “I don’t care what Congress expected.”)

Further, as the recent Heller and Citizens United decisions demonstrate, historical sources are almost always inconclusive: for every historical text that the majority can find that putatively stands for the proposition that in the light the average person’s understanding of words at time t, the law requires φ, the dissent will be able to find some other historical text that purports to show that in the light of the average person’s understanding of words at time t, the law requires not-φ. This isn’t to say that history is irrelevant. It is, however, to say that history leaves us no more or less constrained than we were before.

the time it was enacted – its reference. However, as Frege reminds us, sense and reference are related: sense determines reference. POSTHUMOUS WRITINGS 124 (H. Hermes, F. Kambartel, & F. Kaulbach, eds., P. Long and R. White, trans. 1979) (“It is via a Sinn, and only via a Sinn, that a proper name is related to an object.”). Thus, in addition to the pragmatic worry that original expectations don’t genuinely constrain – which I develop below – there is the philosophical worry that any understanding of the public’s original expectations must be parasitic on an understanding of the text’s original meaning.


61 Oral Argument Transcript, Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, No. 06-1595. See also Scalia, supra note 8, at 22 (“The text is the law, and it is the text that must be observed. I agree with Justice Holmes’s remark, quoted approvingly by Justice Frankfurter in his article on the construction of statutes: ‘Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don’t care what their intention was. I only want to know what the words mean.’” (quoting Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 538 (1947)); West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100 (1991) (Scalia, J.) (the idea that courts should ask how congress would have decided had they actually considered a question “profoundly mistakes our role”).

62 As Justice Stevens recently observed, “history is not an objective science, and ... its use can therefore point in any direction the judges favor.” McDonald, 130 S.Ct. at 3117 (Stevens, J., dissenting); cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring) (“Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.”). As an example of what Justices Stevens and Jackson describe, compare Citizens United v. FEC, 130 S.Ct. 876, 925-29 (2010) (Scalia, J., concurring) (discussing the history of government regulation of corporate political speech) with id. at 948-52 (Stevens, J., dissenting) (same). Compare also District of Columbia v. Heller, 128 S.Ct. 2783, 2790-2816 (2008) (Scalia, J.) (discussing at tedious length
Consider all this in the light of Wittgenstein’s “regress of interpretations.” The regress of interpretations gets going when we notice that ordinary-seeming instructions – instructions such as “add by twos” – can be interpreted in incompatible ways. Prompted by this observation, it is tempting to want to prop up the instruction by interpreting it, which we could do by saying something along the lines of “add by twos, by which I mean that for nth member of a series, the value should be n*2.” But as we now know, interpretations stand in the same semantic and epistemic boat as that which they interpret: interpretations leave us no more constrained than we were before. Thus, the phrase “equal terms” does not interpret itself, and reasonable judges can disagree about how best to interpret it. But it appears to be of little avail to learn that “equal” has been defined to mean “[h]aving the same quantity, measure, or value as another.” Both the interpretation and that which it interprets fails to uniquely determine how we are to go on in actual cases. According to Wittgenstein, this shows that in ordinary cases, interpretation is an idle wheel; we can grasp rules without interpreting them. Language and law are full of phrases like “equal terms”; often there will be disagreements about what these phrases mean; but when disagreements do break out, it is a mistake to suppose that the judge can eliminate her need to rely on her own best judgment by opening up the edition of the dictionary from the time the words were originally spoken. Again, “interpretation hangs in the air along with what it interprets lending it no support.”

Or as Judge Easterbrook has said, “the choice among meanings must have a footing more solid than a dictionary – which is a museum of words, a historical catalog, rather than a means to decode the work of legislatures.”

At the risk of overkill, consider an additional example, more briefly this time. The Resource Conservation and Recovery Act ("RCRA") allows the EPA to commence actions seeking to order the owner of a waste site to clean up conditions that present a substantial danger to health or the environment. However, the Bankruptcy Code allows debtors to discharge “debts,” which include equitable claims provided that the same breach that gives rise to the equitable claim also gives rise to a right to payment. Are RCRA cleanup orders “debts” within the meaning of the Bankruptcy Code? Again, the circuits are split. The Sixth Circuit has held that cleanup orders are dischargeable “claims” where “fulfilling [the] obligation … would force the defendant to spend money.” Four Circuits have taken a contrary view, holding that RCRA cleanup orders

the historical meaning of the various clauses out of which the Second Amendment is composed) with id., at 2824-36 (Stevens, J., dissenting) (same).

To be clear, I am not suggesting that there are no right answers to historical questions. My point is merely that even when the historical facts concerning the framers’ understanding is obvious and uncontroversial, this alone won’t be enough to answer questions concerning how the law should apply to specific factual situations. Cf. Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954) (although historical sources may “cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.”).

63 http://www.thefreedictionary.com/equal
64 Investigations, at § 201.
65 Id. at § 198.
70 United States v. Whizco, Inc., 841 F.2d 147, 150 (6th Cir. 1988).
cannot be discharged in bankruptcy, even when the debtor must pay someone else to abate the hazardous condition rather than taking out a bucket and mop and doing so itself. \(^{71}\)

Again, my object is not to decide who is right, but instead to consider what originalism adds to the conversation. In this case, the language from the Bankruptcy Code that defines a dischargeable “debt” was enacted in 1978. \(^{72}\) The reader, however, may be disappointed to learn that a leading dictionary definition of the term has not changed from the time the relevant statutory language was enacted to the present day: in both cases, the dictionary defines “debt” as “a neglect or violation of duty.” \(^{73}\) The judge who sends her law clerk looking for a dictionary from 1978, therefore, will be no more or less constrained than the judge who grabs the nearest dictionary off the shelf. Indeed, it’s hard to see how it would constrain the judge at all to learn that a leading dictionary defines “debt” as “a neglect or violation of duty.” \(^{74}\)

Wittgenstein’s regress shows that once we start to worry that our instructions will be misunderstood, nothing will count as bridging the gap between what we have said and what we mean. But this is something that lawyers who are not in the grips of theory (or ideology) have long recognized. Writing a century before Wittgenstein, Francis Lieber states that “Human speech is the clearer, the less we endeavor to supply by words and specifications that interpretation which common sense must give to human words.” \(^{75}\) Recall that Lieber’s point was that even simply instructions such as “fetch me some soupmeat” can be interpreted in various ways. According to Wittgenstein – and Lieber – this shows that as an epistemological matter, interpretation is an idle wheel. \(^{76}\)

**Conclusion: the Relevance of Philosophy of Language to Jurisprudence**

7. Let me conclude by saying something about what I have not attempted to do in this article. I have not attempted to rebut all – or even most – of the arguments people have given in support of originalism. People have argued that originalism promotes democracy, that it improves predictability, that it is the interpretive strategy a legislator would prefer, that it results in better outcomes, and etc. \(^{77}\) In my view, each of these arguments is easily answerable. However, the philosophy of language has nothing to contribute to the answers.

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\(^{71}\) See *In re Torwico Elecs., Inc.*, 8 F.3d 146, 150 (3d Cir. 1993); *Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 864 (4th Cir. 2001); *In re Commonwealth Oil Ref. Co., Inc.*, 805 F.2d 1175, 1183, 1186-87 (5th Cir. 1986); *United States v. Apex Oil*, 579 F.3d 734, 738 (7th Cir. 2009) (Posner, J.).


\(^{73}\) Compare Webster’s Third International Dictionary (Unabridged) 583 (1971) with Webster’s Third International Dictionary (Unabridged) 582 (1993).

\(^{74}\) Id. Indeed, some have gone so far as to suggest that reliance on dictionaries increases the judge’s discretion. See, e.g., Ellen Aprill, *The Law of the Word Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998); Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 1 (1993).

\(^{75}\) Lieber, supra note 20, at 31.

\(^{76}\) Compare Lieber, supra note 20, at 31 (“Human speech is the clearer, the less we endeavor to supply by words and specifications that interpretation which common sense must give to human words.”); with *Investigations*, § 198 (“any interpretation hangs in the air along with what it interprets lending it no support.”).

The sole concern of this article has been to address whether originalism constrains judges. This article is not the first to have argued that it does no such thing. My contribution to the literature – such as it is – is my suggestion that the notion that it does rests on bad philosophy of language. There may be perfectly respectable reasons for wanting to reign in judges. Whether a particular proposal for doing so is desirable is a matter for public policy, not for philosophy. What is not a matter for public policy, however, is the question of whether originalism is all that can save us from the void – whether originalism is needed because “any text can be understood any way if you posit the right author.” I have suggested that this latter idea is of a piece with a position that leads to paradox.

The mistake is to assume that because different people can – and often do – understand the words in which our laws our expressed in different ways, we need to be able to point to something else – something outside of the words themselves – in order to preserve the notion that there are objective facts concerning what the law requires. If you’re worried about the possibility of legal error, then it will be natural to think that we should be able to give rigid limits all judgments, including legal judgments – viz., we should be able to specify in advance the sorts of actions that would be in accord with the law as well as those that would not. This idea, in turn, appears to go hand in hand with a certain conception of the natural world. After all, the concepts of the physical sciences can be given rigid limits. For instance, an “acid” is a chemical compound that, when dissolved in water, increases the hydrogen ion activity of the solution. Accordingly, if the solution in my beaker is acidic and the filter paper on my desk is infused with litmus, then the solution will turn the paper red. Further the relation between premise and conclusion in science appears to be particularly strong: if you acknowledge that this is litmus paper on my desk and that the solution in the beaker turns the paper red, but you nevertheless insist that the solution isn’t an acid, then this wouldn’t show that you were stubborn or unreasonable – it would show that you don’t really understand the meaning of the word “acid” (or the meaning of the word “litmus”). To the extent that we think that all reasoning should like this, it will be natural to want to look for independent, unproblematically verifiable facts for our judgments about the law to be based on as well.

78 See, e.g., McDonald, 130 S.Ct. at 3118 (Stevens, J., dissenting) (“Justice Scalia’s defense of his method, which holds out objectivity and restraint as its cardinal and, it seems, only-virtues, is unsatisfying on its own terms. For a limitless number of subjective judgments may be smuggled into his historical analysis.”) See also Richard A. Posner, In Defense of Looseness, New Republic, August 27, 2008 (“originalism licenses loose construction … especially … for interpreting a constitutional provision ratified more than two centuries ago, dealing with a subject that has been transformed in the intervening period by social and technological change”); CHRISTOPHER EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS 40-41 (2007) (“What happens … is that originalist judges (or law professors) recite a lot of facts about the framers and then announce a legal conclusion remarkably consistent with their own views.”); Robert W. Bennett, Objectivity in Constitutional Law, 132 U. PA. L. REV. 445, 457 (1984) (“a rigorous attempt to treat the framers' intentions as authoritative places far fewer constraints on judicial decisionmaking than originalists assume.”); Peter J. Smith, The Marshall Court and the Originalist’s Dilemma, 90 MINN. L. REV. 612, 675-76 (2006) (“judges have vast discretion in choosing which sources to rely on when reconstructing the original understanding, and this suggests that originalism's advantage over other approaches to constitutional interpretation in its ability to constrain judicial discretion is marginal.”).
79 Supra note 3, at 1:26.
80 The idea that this is so is due to my teacher, John McDowell. See MIND AND WORLD 66-86 (1996).
It is against this temptation that the rule-following considerations is directed. The regress of interpretations shows that once we get started trying to rein in the free play of interpretation, then we won’t be able to stop. Further, if we think of our inability to give rigid rules for interpretation as a problem, then mathematical reasoning will seem as problematic as any. But mathematical concepts are the gold standard: we can give recursive (i.e. mechanical) definitions of such concepts. Thus, because mathematical reasoning is indistinguishable from ordinary reasoning as far as the skeptic is concerned – because we can never give the sort of substantive vindication of our understanding of a rule’s demands that the skeptic wants – this shows that the skeptic was asking for too much to begin with.

8. Properly thought through, the rule-following considerations also help us to get clear on why this assumption is so tempting. Wittgenstein spends a surprising amount of time talking about Martians, children, and animals. The opening moments of the Investigations, for instance, concern an utterly prosaic, putatively autobiographical account St. Augustine gives of learning to speak. On Augustine’s account, his elders would point to objects and name them, and he, as a child, grasped that the thing was called by the sound they uttered. As Wittgenstein goes on to say, one interesting thing about Augustine’s account is that he seems to imagine that learning a first language is just like learning a second: the child, on Augustine’s story, comes pre-wired with awareness of the sorts of things she later learns the words for. Wittgenstein thought that the problem with this way about thinking about language – with locating the child in a logical space in which we are home – is that it doesn’t do justice to the close connection between language and thought.

This idea that language and thought are inextricably connected ends up being one of the great themes of the Investigations: thinking and speaking—and indeed living—all come as a package. To imagine beings whose lives are very different from ours, Wittgenstein thinks, would be to imagine beings whose concerns would be very different from ours, who would see the world in different ways, and who would accordingly express themselves, if at all, in different ways. As Wittgenstein says, “If a lion could talk, we could not understand him.”

Properly thought through, this idea implies that our ability to open our minds to one another through speech depends on our sharing what Stanley Cavell has called “routes of feeling.” Wittgenstein puts this point by saying “if language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments.” I, in turn, translate Wittgenstein’s remark as follows: in order for two people to understand each other, to speak a shared language consisting of

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82 Of course, that this isn’t always true is the whole point of recursion theory. Nevertheless, it is true enough for the mathematical concepts with which most non-mathematicians are familiar.
83 Investigations at 54(a).
84 Id. at §§ 1, 32.
85 Id. at §25, 174e, 223e.
86 Id. at § 1.
87 Id. at § 32.
88 Id. at 230e.
89 Id. at 223e.
90 Id. at § 242.
words with agreed upon meanings, they must belong to a community consisting of what are in some sense like-minded individuals. Reasoning together, and indeed meaning anything by a word, is possible only against the backdrop of a great deal of agreement over what matters. And we don’t reason our way into this agreement. So the foundation of our responsiveness to reasons—of our ability to give and ask for reasons for what we say and do—consists of contingent facts about us. Worse: it rests on social facts. (This is what Wittgenstein means when he says, “to imagine a language is to imagine a form of life.”) Worse still: it rests on facts about our emotional makeup, our “routes of feeling.” And Wittgenstein shows that this is true even of logical and mathematical rationality: there’s a sense in which even the hardest, most objective-seeming norms rest on precisely the sort of squishy facts about human non-cognitive dispositions that originalism seeks to exorcise from the picture.

It would be a mistake, however, to conclude that because meaning depends on our shared sense of what matters, there must be no objective facts as to what we mean. Consider again the remark on which the last two paragraphs were largely based: meaning depends on agreement about judgments. Wittgenstein goes on to say: “This seems to abolish logic, but does not do so.” The proposition seems to abolish logic because it makes meaning seem arbitrary, insubstantial, subjective, fictitious. The rule-following considerations show, however, that this does not abolish logic, and the thought that it does is self-refuting. Thus, although our sensitivity to meaning rests on our shared sense of what matters, facts about meaning can be as robustly real as any. Having seen this, the hope is that the project of attempting to supply external limits to our interpretation of linguistic texts in general – and legal texts in particular – will cease to tempt us.

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91 As Stanley Cavell evocatively puts it, “We learn and teach words in certain contexts, and then we are expected, and expect others, to be able to project them into further contexts. Nothing insures that this projection will take place (in particular, not the grasping of universals nor the grasping of books of rules) … That on the whole we do is a matter of our sharing routes of interest and feeling, senses of humour and of significance and of fulfillment, of what is outrageous, of what is similar to what else, what a rebuke, what forgiveness, of when an utterance is an assertion, when an appeal, when an explanation—all the whirl of organism Wittgenstein calls ‘forms of life.’” Must We Mean what We Say?, in MUST WE MEAN WHAT WE SAY? 52 (1969).
92 Investigations § 19.
93 Id. at § 242.