Language, Law, and the Ninth Amendment

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I. Introduction

The debate between originalists and living Constitutionalists has reached a stalemate. Neither proponent is able to convince the other of the truth hood of their stance and neither is willing to concede. Attempting to make 'headway' in promoting their respective position, each side has incorporated other disciplines, namely the philosophy of language. Such incorporation was brought to the forefront of jurisprudence with the publication of Ronald Dworkin's response to the late Justice Antonin Scalia's work *A Matter of Interpretation: Federal Courts and the Law*. However, since Dworkin's "ransacking [of] the cupboard of linguistic philosophy,"[1] both originalists and living constitutionalists have weaponized the philosophy of language in furthering their arguments for their respective constitutional interpretations. However, in the context of the Ninth Amendment, neither have utilized the philosophy of language to ascertain its meaning. This I believe is a critical oversight if we are to defend our unenumerated rights. Thus, the goal of this paper is twofold. The first goal is to demonstrate that in attempting to uncover the meaning of the constitution, public meaning originalism mirrors Grice's influential account of how-to understanding meaning. The second is that by then utilizing public meaning originalism, one can uncover a rudimentary understanding of the Ninth Amendment. More specifically, that at its most basically understanding, the Ninth Amendment protects unenumerated individual rights.

II. The Philosophy of Language & Constitutional Interpretation

The use of language is indispensable to our legal system. Legislatures depend on the use of written language to proscribe laws. Decades prior to the current debate, H.L.A Hart correctly

[1] Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. OF POL. 197, 210 (2000).

noted "that many central issues in jurisprudence depended on an adequate conception of language."[2] One can assert that it is an "obvious fact that both legal theory and legal practice are, and have always been, heavily dependent upon the tools of rhetorical and linguistic analysis."[3] Thus, we should not be stunned that "lawyers, judges, and legal commentators have sought whatever assistance they could find from other fields that deal with the meaning and interpretation of words."[4] However, contrary to the recognized importance of the philosophy of language on law, there is relatively little subject material on the topic, especially concerning the moral reading versus the originalist debate.

III. Grice's Theory of Meaning

We first must roughly understand the distinction between semantics and pragmatics to understand Grice's theory of meaning.[5] Semantics can *loosely* be defined as the meaning of words independent of the context in which they are uttered. However, relying solely on semantics to ascertain meaning excludes segments of language use, namely, irony and sarcasm.[6] In response to this problem, Grice distinguishes semantic content "from implications reasonably derived by the addressee" using specific pragmatic principles.[7] Pragmatics can *loosely* be defined as "all non-semantic facts – such as facts about context – that are relevant to utterance interpretation."[8] He sought to explore the meaning of words separate from their speaker and what

[2] Andrei Marmor & Scott Soames, *Introduction*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 1 (Andrei Marmor & Scott Soames eds., 2011).
[3] Peter Goodrich, *Language and Law: An Historical and Critical Introduction*, 11 J. L. & SOC. 173, 173 (1984).
[4] Brian H. Bix, *Legal Interpretation and the Philosophy of Language*, *in* THE OXFORD HANDBOOK OF LANGUAGE AND LAW 145 (Peter M. Tiersma & Lawrence M. Sloan eds., 2012).
[5] I use the term 'roughly' because the distinction between semantics and pragmatics is contentious in the philosophy of language.
[6] Tory L. Booher, *Putting Meaning in its Place: Originalism and Philosophy of Language*, 25 L. & PHIL. 387, 395-96 (2006).
[7] *Id.*; *see* Elisabeth Camp, *Sarcasm, Pretense, and The Semantics/Pragmatics Distinction*, 46 NOUS 587, 587-588 (2012).
[8] Booher, *supra* note 5, at 396.

the speaker meant by their words.[9] In his work *Meaning,* Grice draws an illuminating distinction between what he calls 'speaker meaning' and 'sentence meaning.' A "speaker's meaning of an utterance is the illocutionary uptake that the speaker intended to produce in the audience on the basis of the audience's recognition of the speaker's intention."[10] From this, Grice derives sentence meaning. "The sentence meaning of an utterance is the conventional semantic meaning of the words and phrases that constitute the utterance."[11] In other words, "a sentence *s* means that *p* if and only if people regularly use *s* to mean that *p*, where a speaker's meaning that *p* is equated with the intention to induce a belief in an audience by means of the audience's recognition of that intention."[12] The other notable idea Grice puts forth is that of 'implicature.' Implicature can be defined as "the notion that illocutionary force of a particular communicative act can be implied rather than directly stated." Otherwise stated, implicature is an inference made "based on context and background assumptions" without relying solely on what was said or the literal meaning of a sentence.[13] One version of the example illuminating this point is as follows:

> A student asks his law professor for a letter of recommendation to submit along with his application to a law firm. The professor writes the following: "The student never missed a lecture or an assignment. Additionally, the student always had the proper materials for class."

The letter the professor wrote semantic says relatively little concerning whether the student possess the requisite qualifications for the job. In fact, the semantic content of the letter only refers to the student's adherence to various class policies. But provided the context in which the letter was received, the implication of the letter may be that the student is not qualified or the

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[9] COLIN MCGINN, PHILOSOPHY OF LANGUAGE: THE CLASSICS EXPLAINED 192 (MIT Press ed. 2015).
[10] Lawrence B. Solum, *Semantic Originalism*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 (draft) (Nov. 28, 2008) [hereinafter Solum, Semantic Originalism].
[11] Id. at 35.
[12] COLIN MCGINN, PHILOSOPHY OF LANGUAGE: THE CLASSICS EXPLAINED 199 (MIT Press ed. 2015).
[13] John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1074 (2015).

best candidate for the position. But if the context is changed, lets posit that another professor wrote to the professor asking about the student's adherence to classroom policies, then the letter would seemingly give a glowing endorsement of the student. Notice, that the content of the words did not shift, only the *meaning*. Thus, we may conclude that "the semantic content of the letter would consist of assertions and the illocutionary uptake of the letter consists of a different set of assertions."[14] Simply formulated – to ascertain the meaning of any utterance we must look at the: (1) semantic content; (2) context in which the utterance was made; and (3) speaker's intention.

IV. Meaning & Constitution Interpretation

In the previous section, I put forth Grice's theory of meaning. This raises the question – *how does Grice's theory of meaning relate to constitutional interpretation?* The short answer is, "when we interpret the Constitution, we are interpreting particular utterances of words."[15] Thus, the 'fundamental premise' is that the content of the constitution can be understood in the context of the philosophy of language. Otherwise stated, the content of the constitution is not materially queer in its relation to the way other utterances are understood and we must reconcile constitutional meaning with "our understanding of how humans communicate with language in general and written texts in particular."[16] However, it is imperative to note that we must be careful to not commit 'Dworkin's' fallacy.[17] In short, the argument is not that Grice's theory of

[14] Solum, Semantic Originalism, *supra* note 5, at 36.
[15] Booher, *supra* note 5, at 407.
[16] Solum, Semantic Originalism, *supra* note 5, at 38.
[17] *See generally* Michael S. Green, *Dworkin's Fallacy, or What the Philosophy of Language Can't Teach Us About the Law*, 89 VA. L. REV. 1897 (2003). In a highly influential article, Green argued that Dworkin utilized the principles of the philosophy of language to draw the conclusion that the constitution should be understood as putting forth aspirational principles, or otherwise stated, as requiring a moral reading of the constitution. However, the latter does not follow from the prior. How the constitution 'ought' to be read is a distinct question from how one ascertains the meaning of the utterances in the constitution. For example, it could be the case that how we ought to read the constitution is different from what the constitution says.

meaning *necessitates* an originalist methodology of constitutional interpretation, but instead, Grice's theory of meaning mirrors the originalist methodology in interpreting the constitution. Having provided that distinction, I will now turn to the originalist methodology most aligned with Grice's theory of meaning, namely public meaning originalism.

Public meaning originalism, as contrasted with original intent, original method, and original law originalism,[18] holds that "the best understanding of constitutional meaning focuses on the meaning communicated by the constitutional text to the public" when the "each" provision was "framed and ratified."[19] It aims to uncover the communicative content of the constitution.[20] This then raises the question – *why does original public meaning originalism best uncover the meaning of the constitution?* But before I explore the above question, I must first distinguish between two types of intentions. The first concerns sematic intentions, or otherwise stated, "the meaning of what the constitution provides."[21] This is the quest originalists must embark upon to uncover the meaning of the constitution. However, the second, expectation or application intent, which is how the framers thought a law should be applied to particular cases, should not be the concern of originalists[22] as it is "inevitable that changes occur over time in the class" of activities to which specific constitutional provisions would apply.[23] Thus, if originalism's goal is to "revel and clarify" the meaning of the laws the founders put forth it is not

[18] *See* Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 BOS. U. L. Rev. 1953, 1965 (2021) [hereinafter *The Public Meaning Thesis*].
[19] *Id*. at 153.
[20] *See* Solum, *supra* note 18, at 1962. There is an importance difference distinction interpretation and construction. Interpretation is discerning "the communicative content of a legal text whereas construction is determining "the legal effect of a text." *Id*.
[21] Jeffery Goldsworthy, *The Case for Originalism*, 49-51 (Monash University Faculty of Law Legal Studies, Working Paper No. 2016-46, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216376.
[22] *Id.*
[23] Lawrence B. Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 123, 150 (2007) [hereinafter, *Texting*]. One must further keep in mind that the constitution "was written with the knowledge that it would be ratified and interpreted by readers who would have very limited access to information about the framing and who would be under normative pressure to disregard any information that was not universally accessible." *Id*.

necessarily important to consider their intentions on how the law ought to apply.[24] Thus, returning to the question raised above, it would follow that to uncover the meaning of constitutional clauses one must embark on a historical archeologic survey on the public meaning that would be assigned to the clause.[25] But as Lawrence B. Solum notes, "there is the problem of too much information."[26] For example, the general public and ratifiers of the amendments did not have the records of the Philadelphia Convention. Thus, in making judgments about the information necessary to ascertain the meaning of the constitution, originalists ought to be cabined only by those sources which were readily available. Moreover, in understanding the original meaning of the constitution, it is false to appeal to original practices as it may be the case that the constitution prohibited practices that were already occurring.[27] Thus, an originalist theory that best uncovers the meaning of Constitution would take into context the public understanding of the constitutional provision and rely, if necessary, on those documents that express drafters' intent to supplement any understandings that are unclear.[28]

Here, "there is an obvious parallelism" between Grice's theory of meaning and originalism as the public meaning.[29] Both incorporate the "fixation thesis," which can broadly be understood as the linguistic meaning of an utterance being "fixed at the time" of utterance.[30] Moreover, by requiring that the Constitution be understood in terms of its "public meaning," this mirrors Grice's idea that audiences and speakers have common knowledge for communication to

[24] *Id*. at 51. This distinction is meaning in the theory of language because as showed above, the meaning of a sentence can communicate something different than what the speaker intended.
[25] *Id*. at 51. One must further keep in mind that the constitution "was written with the knowledge that it would be ratified and interpreted by readers who would have very limited access to information about the framing and who would be under normative pressure to disregard any information that was not universally accessible." *Id*.
[26] *Id*.
[27] *See* Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 Georgetown L. J. 569 (1998).
[28] Solum, *Texting*, *supra* note 22, at 150. Solum notes that "clause meaning is not ahistorical or acontextual" and that history and evidence of the original meaning may be relevant.
[29] *Id*.
[30] *See* Solum, *The Public Meaning Thesis*, *supra* note 18, at 1959; Solum, Texting, *supra* note 22, at 50.

succeed.[31] In other words, if "the speaker" (or drafters) must know to a sufficient degree what the audience knows about the speaker's (drafters) intentions, then it would follow that if one was able to ascertain the public meaning of the constitution then subsequently we can reasonably understand the intention behind such.[32] However, *what does this mean in the context of ascertaining the meaning of the Ninth Amendment?* In the next section I will show that enough the Ninth Amendment is a relic lost to time, we can reasonably ascertain its meaning in hopes of securing our enumerated rights.

IV. The Ninth Amendment's Meaning

As previously stated, the Ninth Amendment is a relic lost to time. The Supreme Court has never solely relied on the amendment in issuing an opinion. Furthermore, it remains a mystery to most. Judge Robert H. Bork, a Supreme Court nominee, once compared the Ninth Amendment to an inkblot stating, "if you had an amendment that says, 'Congress shall make no' and then there is an inkblot and you cannot read the rest . . . I do not think the court can make up" what might be underneath."[33] Moreover, Justice Antonin Scalia once stated, "if you had asked me what the Ninth Amendment was and my life depended on it, I would be dead!"[34] Thus, the goal of this section will be to provide a framework in which to uncover the meaning of the Ninth Amendment.

The Ninth Amendment states: *The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people*. At first glance the amendment seems to state, the rights listed in the constitution should not be construed to "deny

[31] Solum, *The Public Meaning Thesis*, *supra* note 18, at 1971.
[32] *Id*. Moreover, it is the case that the Constitution "was intended to communicate to the public."
[33] *The Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary*, 100th Cong. 1st Sess. 249 (1987).
[34] Interview by Don Frazen with Antonin Scalia, Just., Sup. Ct., in L.A., Cali. (Oct. 1, 2012).

or disparage" the "others" held by the people. Although the terms deny and disparage are ambiguous, they likely meant that the enumeration in the constitution, of certain rights, shall not be understood to "withhold the possession" and "treat slightingly of" *others* retained by the people. But what does "others" mean? Conceded among all Ninth Amendment theorists, "others" refers to unenumerated rights.[35] Thus, if we rephrase the amendment, subbing in the posited definitions, the Ninth Amendment states: *The enumeration in the Constitution, of certain rights, shall not be construed to [withhold possession] or [treat slightly] [unenumerated rights] retained by the people*. However, this does not end the inquiry. Both Grice's theory of meaning and originalism hold that one must consider the "audience." Thus, it is imperative to consider what the audience understood and what the was intended for the audience to understand.

It is important then to understand the context in which the Ninth Amendment was ratified. Federalists and anti-federalists engaged in great debate regarding the ratification of the constitution. Federalist argued that a Bill of Rights, which includes the Ninth Amendment, was unnecessary because the Constitution only granted limited powers.[36] Otherwise stated, government had no authority to act if it was not explicitly mentioned in the Constitution. However, anti-federalists countered by citing the expansive power granted to congress by the Necessary and Proper Clause.[37] Federalists also put forth the argument that by enumerating specific rights there may be an implication that those rights not enumerated would not be worthy of protection or the same kind of protection, namely constitutional protection. Again, however,

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[35] *See* Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983); Thomas B. McAffee, *Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990); AKHIL REED AMAR, THE BILL OF RIGHTS 120 (1998), Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006).

[36] Bennett B. Patterson, The Forgotten Ninth Amendment 7 (2008 eds.)

[37] *See* Barnett, *supra* note 35 at 7. The Necessary and Proper Clause states that Congress shall have Power, "to make all laws which shall be deemed necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in and Department or Officer thereof." U.S. CONST. art. 1, §8.

anti-federalists argued that enumerated rights already existed in the proposed constitution and thus if federalists were to maintain such a position, a contradiction would arise. Thus, in the context of this debate, one can reasonably infer two conclusions. The first is that the addition of the bill of rights in its entirety concerns the protection of individual rights. The second conclusion that may be reasonably inferred is that the Ninth Amendment specifically acts as a response to the second federalist argument by acknowledging that while all rights cannot be enumerated an amendment can safeguard those unenumerated rights and provide them constitutional protection.

Furthermore, it is important to understand how people thought about their relationship to government at the time of ratification. As clearly expressed by thinkers such as John Locke and Stuart Mill, government was thought only to exist through the consent of the governed.[38] Additionally, the governed retained certain unalienable *natural* rights which were antecedent and above any source of positive law. These principles are codified in the Deceleration of Independence. Thomas Jefferson declares that human rights are human entitlements from the "Laws of Nature" and "God" and that such rights and unalienable.[39] Moreover, it is imperative to note that Jefferson uses the phrase "*among* such these [rights] are Life, Liberty, and the pursuit of Happiness."[40] Here the word "among" can reasonably be concluded to mean that life, liberty, and the pursuit of happiness" are not the only unalienable rights but are merely *some* of those rights. Thus, in a historical context it would be fair to conclude that people understood that they could not attempt to list all protected rights and thus needed a constitutional provision to address those "outstanding."

[38] *See generally* John Locke, Two Treatises of Government (1689); John Stuart Mill, On Liberty (1859).
[39] Declaration of Independence (July 4, 1776).
[40] *Id*.

V. Conclusion

In this paper I have aimed to demonstrate the importance of the philosophy of language in constitutional interpretation. The philosophy of language provides a mechanism by which to overcome the originalist and living constitutionalist divide and truly understand the meaning of the constitution. However, my more specific goal was to demonstrate that although the philosophy of language has been utilized, it has been neglected in the most fundamental way. The Supreme Court has never solely utilized the Ninth Amendment in issuing an opinion but when utilized it at all, it has been to uphold fundamental rights. Thus, if any practical purpose is assigned to this paper, it is to serve as a call to action to academics and Court activists in urging the Court to recognize both the hypocrisy it has displayed and to acknowledge that not all rights need be enumerated to be protected. Grice has put forth an influential theory and the framers of the constitution did all that they could to ensure that unenumerated rights were protected. Thus, the burden now falls on us to carry forth the message and restore those liberties that have been lost.