

# Constitutional Texting\*

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### I. INTRODUCTION: TALKING AND TEXTING

We can talk or we can text.

*What do I mean by that?* We can talk—we can have a conversation. He says, she says, I say, you say. We can text—we can write it down and send it off, preferably by Instant Messenger, or email, for sure, but also by snail mail, op/ed, or law review article. We can text by rule, by statute, by opinion, or even by constitution. That is what this is about—constitutional texting. Let us look at constitutional texting

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\*\* John E. Cribbet Professor of Law, University of Illinois College of Law. This one is for Rogers Albritton. I have never had a better teacher. I have never met anyone smarter. I'm still in awe. Without Rogers, I would not have written this.

in the context of Steve Smith's discussion of how the law means in *Law's Quandary*.<sup>1</sup>

We can talk or we can text.

*How do we mean by talking?* Suppose we talk. We utter some words, maybe in the form of complete sentences, maybe not. When we talk, we say and we mean. What we say might be what we mean. We might say what we mean, but we might not. Suppose we say in sentences. Our sentences have meanings—meanings in plain English; sentence meanings. But what we mean by our sentences is not necessarily what the sentences mean in plain English. Later on in this essay I am going to say, “Here is the roadmap.” But I will not refer to a map of any road. No roads. No maps. But you will understand what I mean. You will know that the roadmap is no map of a road. It is an outline of the article. Oops. Not exactly an outline, but like an outline. A roadmap. You know what I mean.

When we talk, we can say one thing but mean another. I can say “roadmap” and mean, well, you know. Or at least most of you know. Some of you may have never read a law review article before, but you have read essays and know about roadmaps. Or you can guess. Even if you could not guess, by now you would know that what I said is not exactly what I meant.

Someone asks me to evaluate a former student. I say, “She regularly attended class, and asked lots of questions.” What do I mean? You know what I mean. You know that I mean that she was a mediocre student. Oh, and I knew you would know. That is why I said it. In fact, now that you know what I meant, you may be thinking, “She must be terrible.” Why would you be thinking that? You would be making an inference from what I did say and what I did not say. I was asked for an evaluation. I did not say, “She was an excellent student.” I did not say, “She was a good student.” I said, “She regularly attended class.” If that is the best thing I could say, you infer, I must be implying that she was a truly awful student. In fact, you might think to yourself: “Solum is being cruel. That is a horrible thing to say.” But of course, I did not say anything horrible. What I said *implied* something horrible, given the context of our conversation. Oh, here is another interesting bit: I might not even mean she attended class regularly—I might not even know whether she did or did not. Because I did not say it to mean *that*—her attendance was not the point. It is what I said, but not what I meant. Not at all.

We can talk or we can text.

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1. See STEVEN D. SMITH, *LAW'S QUANDARY* (2004).

*How do we mean by texting?* Texting is a lot like talking. We even call it “chat.” Of course, legal texting is a bit different, not as immediate or interactive. But there is an important subset of legal texting that involves durable and noninteractive text messages. We can text legal norms—by opinion, by rule, or by statute. Or we can text by constitution. We can write it down now, and push *send to eternity*. Well, not really eternity, but a long time—centuries even. Not just to our friend, our colleague, our spouse, our significant other. But to a whole polity, for generations. We can do constitutional texting.

*How do we mean by constitutional texting?* Constitutional texting is a lot like talking, but it is not talking. It is texting. And it is not just any sort of texting. It is constitutional texting. I cannot resist. *It is a constitution we are texting*. So, how do we mean by constitutional texting? That is what this text—the one you are reading now—is all about. That question and a few others. Like these: How is constitutional texting like talking? How is it different? How is constitutional texting like IMing or emailing? How is constitutional texting like statutory texting? How do we figure out what the Framers meant? And how about the clauses—the text? What does the text mean and is that the same as what the Framers meant? And not just “what do the clauses say?,” but also “what do they imply?” Does the Constitution mean things it does not say? Does it say things it does not mean?

We can talk or we can text.

In this essay, I want to have a conversation—a textual exchange—with Steve Smith’s discussion of texting and meaning in Chapter Five of *Law’s Quandary*.<sup>2</sup> Smith claims that the meaning of legal texts is “basically identical” with the semantic intentions of the author or authors. That is the claim I want to engage. We can say what we intend and we can intend what we say, but these connections are not necessary in the sense that Smith identifies. My focus will be just a bit different than Smith’s. He is after global legal meaning, whereas I am focused on the meaning of constitutional texts.

*How is the rest of this text going to go?* By “this text” I meant this whole chunk of law review texting. Here is the roadmap. (I told you I would say that.) Part II is called “Constitutional Texting” and it sets the stage—it situates this Article in contemporary constitutional theory. Part III is “Smith,” and it is about Steve Smith and *Law’s*

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2. *Id.* at 101.

*Quandary*, as well as Paul Grice's theory of meaning. Part IV is called "Framer's Meaning and Clause Meaning" and it develops a Gricean and anti-Smithian account of constitutional meaning. Part V is "Conclusion: How to Do Things with Clauses," and it wraps things up.

Enough roadmap. Let's do things with words.<sup>3</sup>

## II. CONSTITUTIONAL TEXTING

The Constitution is a text message. The Framers texted us. We got it. We could hardly miss it. There are millions of copies. It is under glass in the National Archives. It gets some play in high school civics and American history. It is on the Web. Some folks carry it around—in their vest pocket, so to speak—although that is not literally what I mean or maybe, not *all* I mean. If you are reading this, you probably had to take "Constitutional Law." Or maybe you have to teach it. Or you cannot teach it, but you write about it. Or do it. Practice it. Interpret it. Apply it.

Of course, not many of us have actually read the whole text message. It is really long. It is complicated. It is dry and boring. On a cell phone, it would take thousands of screens to receive it. Maybe only Akhil Amar<sup>4</sup> has read the whole thing seriously. I mean that for all I know (for sure) Akhil Amar may be the only person in the history of this Republic to have read the whole Constitution from beginning to end with the kind of seriousness that would produce full and deep comprehension.<sup>5</sup> (Oh, there must be others. You may be among them and possibly you are rather annoyed with my ignorance.) Amar sure seems to have read each and every word of the text message. I have not. Oh, sure. I have read it. More or less. I have tried to read every word. But come on. Who can really read the Twelfth Amendment?<sup>6</sup> Once you know that it made sure that there

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3. See J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975).

4. Yale Law School Faculty, Akhil Reed Amar, <http://www.law.yale.edu/faculty/AAmar.htm> (last visited Apr. 12, 2007).

5. See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005).

6. You try reading it straight through for serious and deep comprehension:  
... The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President; and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and

will be no ties between the President and Vice President, why bother with the details? Unless you have to, because maybe the presidential election really will end up in the Senate.<sup>7</sup> Then you had better read it. Carefully. Every jot and tittle.<sup>8</sup>

The Framers texted us. We got the message. We have scanned it. Read it. Limned it. Glossed it. Interpreted it. Construed it. Applied it. Some parts are freaky. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a

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transmit sealed to the seat of the government of the United States, directed to the President of the Senate; The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately by ballot the President. But in choosing the President, the votes shall be taken by states, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President.

. . . The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

U.S. CONST. amend. XII.

7. See *Bush v. Gore*, 531 U.S. 98, 153 (2000) (Breyer, J., dissenting) (“[T]he Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes.”); ABNER GREENE, *UNDERSTANDING THE 2000 ELECTION* 176 (2001); Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 848 (2004).

8. See *Matthew* 5:18 (King James) (“For assuredly, I say to you, till heaven and earth pass away, one jot or one tittle will by no means pass from the law till all is fulfilled.”); see also Wikipedia, Tittle, <http://en.wikipedia.org/wiki/Tittle> (last visited June 3, 2007) (“The phrase ‘jot and tittle’ indicates that every small detail has received attention.”).

redress of grievances.”<sup>9</sup> *How cool is that?* “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>10</sup> *Totally aretaic!* But what do those bits of constitutional texting mean?

The Framers texted us. What do we make of the fact that *they* texted us. The Framers and ratifiers texted us, but are their purposes, expectations, or hopes relevant to what we do with their text? They *texted* us, but is the plain meaning of the text somehow binding on us? Does it require translation?<sup>11</sup> They texted *us*. Is it not up to us? After all, they are dead—as doornails. We have to live with their text message. Can we not choose what meaning to assign it? Or get involved in high politics and choose the judges who choose the meaning?<sup>12</sup> Or choose the judges who choose the *unmeaning*—after all, it is just a text message. Could we, should we, would we? Delete it. Redact it. Lose it. Or having lost it, find it again. Restore a lost constitution?<sup>13</sup>

Oh, and who is the *us* in “texted us” anyway? Did they text everyone—popular texting?<sup>14</sup> All three branches—departmentalism? Just the judiciary branch—judicial supremacy? Just the Supreme Court—the dictatorship of nine?

Part II is done. Almost. The text said it. Almost. Law review texting is special. So there was the text and then there were the footnotes. Lots of them. Do not read them, they are boring, deadly. Unless<sup>15</sup>

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9. U.S. CONST. amend. I.

10. U.S. CONST. amend. XIV.

11. See Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125 (1995); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

12. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001), available at <http://www.yale.edu/lawweb/jbalkin/writings.htm#constitutionalrev>. By the way, if you are reading this footnote, I just want to say, read Balkin and Levinson’s article. Really. You will not regret it. Actually, you might regret it. After all, I do not even know who you are. But you know what I mean. Right?

13. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004).

14. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); see also Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005).

15. The asterisk or “star” footnote is an exception to this general rule. See Charles A. Sullivan, *The Under-Theorized Asterisk Footnote*, 93 GEO. L.J., 1093 (2005). But this Article is an exception to the exception. Compare *supra* note \* (copyright notice and grant of open access license), with *supra* note \*\* (traditional asterisk footnote). The \*\* footnote is the interesting one. Well, actually, they are both interesting. But in different ways.

they are by Balkin<sup>16</sup>—that is a whole different story.<sup>17</sup> But these footnotes—not by Balkin, that is for sure. Hey! You do not really even know if they are by me. *What is up with that?* The footnotes could have been added by zealous law review editors or my research assistant. Same thing with opinions, even famous ones—who knows who writes them. Oh yes, I almost forgot: same thing with the Constitution—the Constitution of the United States. We do not know who wrote it in its final form; it happened in the committee of detail. No records, not many reports about who did what. And who *said* the Constitution anyway? Who *uttered* the Constitution of the United States? The Framers who drafted each bit of the text in its final form? The Framers as a corporate body—the Constitutional Convention in Philadelphia? The ratifiers—the bigger groups who met to say “yea” or “nay” in each of the states. And what about, “We the People.” Did they all say the Constitution? Or do we utter the Constitution? Are we saying it now? Maybe no one uttered the Constitution. Could that be right?

It gets kind of complicated. Anonymous texting. Collective texting. Retexting. Like those text messages from T-Mobile or Verizon. *Who sends those anyway?* And if you do not know who sends them, how do you know what they mean? Hey, I bet they are generated by some data system—which probably has bugs and generates messages never contemplated by the geeks who wrote the software. Do those text messages mean anything at all?

### III. SMITH

In *Law's Quandary*, Steve Smith addresses the question, “How does the law mean?” The answer he gives has something in common with Paul Grice—a recognition of the foundational role of intention. Let me give a name to Smith’s core position, which I shall call the “semantic intentions necessity thesis.” Here is how Smith expresses this idea: “[T]he meaning of a legal text is necessarily given by—

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16. Jack M. Balkin Home Page, <http://www.yale.edu/lawweb/jbalkin/> (last visited Mar. 26, 2007).

17. See J. M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989), available at <http://www.yale.edu/lawweb/jbalkin/articles/foot1.htm>.

indeed, is basically identical with—the semantic intentions of an author or authors *of some sort*.”<sup>18</sup>

Smith’s thesis requires considerable unpacking. In particular, I want to focus on the following elements of the thesis: (1) Smith’s use of the modal concept of necessity and his assertion that his claim of necessity is “ontological”; (2) Smith’s notion of “meaning”; (3) Smith’s use of the definite article *the* to qualify meaning; (4) Smith’s use of “identity”; and (5) Smith’s notion of semantic intentions.

Let us begin with the term *necessarily*, the adverbial form of the noun *necessity*. To belabor the obvious, necessity is not possibility. Smith is not claiming that it is merely possible to identify “the meaning of a legal text” with “the semantic intentions of an author or authors.” But what does he mean? Modal claims are notoriously ambiguous. One powerful technique for resolving their ambiguity is to translate the modal claim using possible worlds semantics. The phrase, “possible world,” is from Leibniz and it has a technical meaning: a “possible world” is a possible state of the whole universe—of everything that is.<sup>19</sup> If something is “necessarily true” in the broadest (or logical) sense, then it is true in all possible worlds. So when Smith makes a claim about ontological necessity, he seems to be making a claim about meaning that he asserts is true in all possible worlds, but he might be making a more limited claim—about only those possible worlds that are similar to the actual world in some specified way.

After “necessity” there is “meaning,” and Smith tells us quite a bit about what he means by *meaning*. Smith distinguished between semantic and nonsemantic meaning, and his claim is about semantic meaning, and not about nonsemantic significations of legal texts.<sup>20</sup> There is no good reason to quarrel with this distinction, but it may be helpful to add another distinction or three. In his famous discussion

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18. SMITH, *supra* note 1, at 101.

19. See generally JOHN DIVERS, POSSIBLE WORLDS (2002) (providing a comprehensive introduction to possible worlds semantics and the metaphysics of modality); SAUL A. KRIPKE, NAMING AND NECESSITY (1980) (discussing necessity); DAVID LEWIS, ON THE PLURALITY OF WORLDS (1986) (defending modal realism’s view that our world is one of many, each with its own inhabitants); ALVIN PLANTINGA, ESSAYS IN THE METAPHYSICS OF MODALITY (Matthew Davidson ed. 2003). The idea of possible worlds was introduced by Leibniz. See GOTTFRIED WILHELM FREIHERR VON LEIBNIZ, *The Theodicy: Abridgement of the Argument Reduced to Syllogistic Form*, in LEIBNIZ: SELECTIONS 509, 509-11 (Philip P. Weiner ed., Charles Scribner’s Sons 1951). Leibniz used the idea of a possible world in answer to the argument against the existence of good from the problem of evil. See *id.* at 511. The argument is not proven, Leibniz maintained, until it is shown that the actual world is not the best of all possible worlds. See *id.*

20. See SMITH, *supra* note 1, at 103-05.



of speech acts, Austin distinguishes between three different “acts” that can be associated with a single utterance.<sup>21</sup> First, there is the locutionary act—the uttering of semantic content.<sup>22</sup> So, as I am typing this sentence, I am using the roman alphabet (which has syntactic properties that conform to set a rules constituted by a complex social practice) and I am also saying something, which could be paraphrased in an indefinite number of ways or translated into German or Mandarin. Second, there is the illocutionary act—the use of syntax and semantics to perform actions.<sup>23</sup> “Illocutionary uptake”—in Austin’s felicitous phrasing<sup>24</sup>—is easy to identify in expressions like the following: “I [hereby] promise that this essay will be no more than 15,000 words” or “I [hereby] apologize for being late.” The “hereby” in brackets may or may not be part of the actual utterance, but usually if it can be inserted it makes it explicit that the expression is performing some action. Third, there is the perlocutionary act—the creation of a reaction through an expression.<sup>25</sup> So, if I say, “Duncan Kennedy will be attending the conference,” you may be surprised, thrilled, annoyed, or frightened. Smith divides meaning into two kinds—semantic and nonsemantic.<sup>26</sup> By invoking Austin, I mean to suggest that this dichotomy is truly crude because it focuses exclusively on locutionary acts and perlocutionary effects, leaving syntax and speech acts entirely out of the picture.

The next term we need to investigate is *the*. Smith uses the definite article *the* to modify *meaning* when he expresses the semantics intentions necessity thesis. This might be an accident, but my reading is that this was an intentional choice on Smith’s part. By using the definite article, he means to express an assumption. We contrast the definite article *the* with the indefinite article *a*. If Smith had said “a meaning of a legal text is necessarily given by—indeed, is basically identical with—the semantic intentions of an author or authors of some sort,” then he could have meant that among the possible meanings of a legal text is the meaning that is identical with the semantic intentions of the author or authors. By using the definite

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21. See AUSTIN, *supra* note 3, at 94-108.

22. See *id.* at 94.

23. See *id.* at 98-100.

24. See *id.* at 117.

25. See *id.* at 101-02, 107-10, 118-20.

26. See SMITH, *supra* note 1, at 103-05.

article, he seems to be asserting something like the following: for each and every legal text,  $T$ , there is one and only one meaning,  $M$ , and  $M$  is identical with the semantic intentions,  $I$ , of some author or authors,  $A$ . In other words, the semantics intentions necessity thesis incorporates the thesis that all legal texts have one and only one meaning. Of course, Smith would not deny that texts can have multiple meanings in some sense. For example, the same legal text can be interpreted in different ways by different courts. So Smith must mean that each text has one and only one “true” or “correct” or “real” meaning.

Next up is *identity*. Smith asserts that the meaning of a legal text is “given by” or “identical to” the semantic intentions of an author. I am not quite sure what Smith means by his identity claim. Here is one possibility: legal texts do not have truth conditions in the same way that assertions have truth conditions. But we might analogize to truth conditions and posit that legal texts have satisfaction conditions. Thus, a criminal prohibition on action  $X$ , is satisfied in circumstances  $Y$ , if no one  $X$ 's in  $Y$ . Smith might mean that the satisfaction conditions of any legal text  $T$  are identical to the satisfaction conditions of the author  $I(A,T)$ , where  $I$  is a function that yields a semantic intention,  $I$ , from an author,  $A$ , who utters a text token  $T$ . Perhaps Smith has something else entirely in mind, but for purposes of discussion, I will assume that whatever he has in mind, it follows a similar pattern. That is, the criteria for application of the legal text will map onto the criteria for success of the speaker's semantic intention in a way that preserves the relationship between criteria and facts about the world.

Finally, we have Smith's notion of “semantic intention.” Once again, I am not quite sure what Smith means. Suppose that an author,  $A$ , utters a text,  $T$ , in circumstances  $C$ . For Smith's project to get off the ground, it cannot be the case that  $A$ 's semantic intention in uttering  $T$  is simply the purpose of the utterance. The purpose may have been to produce a particular perlocutionary effect—to scare someone, for example. But this perlocutionary effect is not the semantic meaning of  $T$ —that is obvious. So semantic intentions must be something else? But what else? One possibility is that the semantic intention of a text,  $T$ , is itself a semantic entity—a sentence in the language of thought (mentalese) to borrow Jerry Fodor's provocative idea. So the meaning of  $T$  is a sentence,  $S$ , in *mentalese*. It might be the case that  $S$  in *mentalese* is a direct translation from the natural language in which  $T$  is expressed, English, into *mentalese*. But this need not be the case. So if I utter the sentence “I agree,” in English, it might be accompanied by the sentence “[I DO NOT AGREE]” in mentalese. In which case, the meaning of “I agree” is

“[I DO NOT AGREE].” And one could truthfully say, “When he said ‘I agree’ he meant ‘I do not agree.’” If Smith’s notion is like this, then Smith’s thesis might seem to entail that whatever we say, we always succeed in saying something which corresponds to what we meant. There is no possible gap, because of the identity relationship between the text token *T* and the semantic intention token *I*. Smith thinks (or might think) that we necessarily say what we mean.

Lacking direct access to Smith’s semantic intentions, I have done my best to lay out my reading of the semantic identity necessity thesis. Of course, Smith may think that I have gotten him wrong. And he might be right. But whether he is right or not will depend on what my semantic intentions are—just as much as it depends on his semantic intentions. And just as I have no direct access to Smith’s semantic intentions, he lacks direct access to mine. Of course, this issue is “merely epistemological.” What we mean is one thing; whether we know what others mean is another. In fact, it is not totally clear that either Smith or I has direct access to our own semantic intentions. Semantic intentions do not need to be occurrent thoughts—one can speak without a sentence in mentalese being present to consciousness. And this creates the possibility that we do not always know what we mean, even though what we mean is our own semantic intention. That is, when we author some text, *A*, it is possible that the accompanying *I* is inaccessible to conscious inspection—our meanings might be unconscious.

Before we go any further, we need to get a red herring out of the way. Smith’s discussion of this side issue focuses on an argument made by Gary Lawson, who argued that the Constitution should be read like a recipe and that recipes should be read in light of their original public meaning, as opposed to the private intentions of the cook (or correspondingly, the Framers).<sup>27</sup> Smith responds:

Lawson’s proposition seems positively perverse. After all, if we are reading the recipe in an effort to cook fried chicken and on the assumption that the recipe was written by someone who was a specialist in the art, then what we care about in reading the recipe is *what the cook intended*. Conversely, we care not at all about the recipe’s original public meaning—except perhaps as an aid to figuring out what the cook actually meant.<sup>28</sup>

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27. Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997).

28. SMITH, *supra* note 1, at 106.

There are many things that could be said about this passage, but one thing is absolutely crucial. This is not an argument in favor of the semantic intentions necessity thesis. Take a particular recipe—say the recipe for Mom’s apple pie. As applied to that recipe, the semantic intentions necessity thesis is that in all possible worlds (or all worlds in which Mom’s recipe exists), there is one and only one meaning of the recipe for Mom’s apple pie, and that meaning corresponds to the semantic intention of the author in that world. If semantic intentions were sentences in mentalese, then the meaning of a Mom’s recipe just is the equivalent recipe in Mom’s mentalese. If this were the case, then it would be silly to talk about how recipes “should be read” or “what we care about.” These are normative arguments for preferring one meaning to another, but if the semantic intentions necessity thesis were true, then the very idea of preferring one meaning to another meaning is nonsense.

Because Smith’s argument is framed in terms of choice between one meaning and another, his normative argument against Lawson presupposes that the semantic intentions necessity thesis is false. At this point, the principle of charity in interpretation requires us to interpret Smith’s argument in a way that avoids contradiction. So, let us assume that Smith means to say, “If it were possible to choose between public recipe meaning and cook’s intentions recipe meaning, then we should prefer the latter over the former.” Even fixed in this way, there is some tension between Smith’s argument and the semantic intentions necessity thesis: that is because Smith’s argument seems so reasonable and commonsensical that we are naturally led to accept that the choice it assumes is a real one. So even though Smith’s argument in response to Larson does not commit Smith to a logical contradiction, it does seem to create a tension.

The recipe example is a good one because it provides a marvelous context in which to test the semantic intentions necessity thesis. But in order to get at the test, we need to elaborate the example just a bit. Consider the following hypothetical situation. Let’s call it “Anonymous Recipe Bank”:

*Anonymous Recipe Bank.* Imagine that someone sets up an anonymous recipe bank. Let’s suppose it is on the Internet. Contributors submit their recipe via a Web page and the recipe is then indexed and classified. Let’s suppose that Mom submits her recipe for apple pie, which appears in the recipe bank as follows:

INGREDIENTS:

1 recipe pastry for a 9-inch double crust pie  
3/4 cup white sugar  
2 tablespoons all-purpose flour  
1/8 teaspoon salt  
1 teaspoon ground cinnamon  
1/4 teaspoon ground nutmeg  
6 tart apples—peeled, cored, and sliced  
2 tablespoons butter  
2 tablespoons whiskey

DIRECTIONS:

Preheat oven to 450 degrees F (225 degrees C). Fit bottom crust into a 9-inch pie plate.

In a small bowl, mix together sugar, flour, salt, cinnamon, and nutmeg. Place sliced apples in a large bowl and sprinkle with sugar mixture. Toss until apples are thoroughly coated. Spoon apples into pan.

Dot apples with butter or margarine, then sprinkle with whiskey. Cover with top crust. Seal edges and cut steam vents in top.

Bake in preheated oven for ten minutes. Lower temperature to 350 degrees F (175 degrees C) and bake an additional forty minutes. Serve warm.

The author of the text is Mom; she uploaded the recipe. But because this is an anonymous recipe bank, we do not know who Mom is. So we have no way of acquiring particular knowledge of her semantic intentions. But we do know this: Mom knew that her recipe would be anonymous. So we know that Mom knew that we would not know anything about her particular intentions. Mom would know that we would have to fall back on the ordinary or standard meaning of the various elements that make up recipe. Mom knows that we could not know that by “butter,” she means margarine. Mom knows that we could not know that by “whiskey,” she means rum. So Mom knows that her recipe will be given its “public meaning” or what Grice might call its “sentence meaning.”<sup>29</sup> So we will interpret Mom’s recipe by assigning the ordinary meanings to each of the ingredients and

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29. PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 117-37 (1989).

measures. To coin a phrase, we will interpret Mom's recipe for apple pie by using the idea of "recipe meaning" and not the idea of "cook's meaning."

And this is where it gets really interesting. Because it is precisely at this juncture that Smith can make an intuitive and apparently persuasive move—a wonderful move. Smith can say, "Yes, and this example proves my point." In this situation, we are interpreting Mom's intentions. Given the situation, our interpretation is that Mom intended the words to have their ordinary public meaning. In other words, we say that the meaning of the recipe is its "recipe meaning" because "recipe meaning" is "cook's meaning." So Smith can argue that *Anonymous Recipe Bank* confirms the semantic intentions necessity thesis.

Or does it? Consider a variation, which we can call *Anonymous Recipe Bank with Mistake*.

*Anonymous Recipe Bank with Mistake.* Mom submits her recipe as before. But now Mom has made a mistake. Mom has the mistaken belief that the name of rum is "whiskey." Mom's not much of a drinker, she got confused when she was a small child, and no one has ever corrected her mistake—although every so often Mom is puzzled by smirks and giggles provoked by her remarking that the "whiskey" in "whiskey sours" does not taste like "whiskey" at all. Of course, the recipe bank is anonymous, so when someone makes Mom's apple pie, they make it with whiskey and not rum.

Does this variation pose any difficulties for Smith? He has an obvious move. He can simply say, "The recipe calls for rum, not whiskey. Rum was Mom's semantic intention. Of course, it may be the case that no one (other than Mom) knows that the recipe calls for rum, but that is just an epistemological problem."

Now suppose that Mom learns of her mistake. Someone fills her in on the difference between rum and whiskey. "Oh dear," Mom says to herself, "what does the recipe taste like with whiskey?" And then Mom tries the recipe—and she decides that the pie actually is very good with whiskey rather than rum. And she now says, "The recipe that I submitted is not the one that I intended, but it is actually a very good recipe." I think it is beyond question that Mom might say something much like this. That is, she might say that that the recipe that she wrote is not the recipe that she intended to write. If we asked her whether someone who used whiskey rather than rum was making a mistake about the meaning of her recipe, she might say, "No, I made the mistake. They just followed the recipe." In other words, Mom might deny the meaning of her recipe is identical with her semantic intentions—and thus, she might deny the semantic intentions necessity thesis.

But Smith does not need to concede that Mom is right about this. Smith is entitled to say that Mom is simply mistaken about who is mistaken. Smith could insist that Mom's recipe really was for apple pie with rum and not for apple pie made with whiskey. Of course, Smith needs to acknowledge that Mom's way of putting things is consistent with the way that we ordinarily talk about meaning. But Smith can say that our ordinary talk is imprecise. Ordinary talk refers to "pseudo-meanings," Smith might say. Pseudo-meanings may be mistaken for real meanings because of epistemic mistakes. But precisely because it takes a mistake to produce a pseudo-meaning, we can see that they are not real.

Smith's move to pseudo-meanings can be illuminated by yet another variation, which we can call *Anonymous Recipe Contest*. Here is how it goes:

*Anonymous Recipe Contest.* The anonymous recipe bank now holds a contest for the best apple pie recipe. As before, Mom submits her recipe. As in the case of *Anonymous Recipe Bank with Mistake*, Mom writes "whiskey" but means "rum." But the rules for the contest were written by Gary Lawson, and they state explicitly: "The meaning of your recipe will be determined by the ordinary public meaning of the ingredients and procedures that you include. The judges of the contest will not consider any private meanings, no matter how much they improve the recipe."

Once again, Mom learns of her mistake. Let us suppose that Mom has been talking with Smith. She emails the organizers of the contest and instructs them to use rum rather than whiskey when they test her recipe. Their email in reply states that she knew the rules and the rules specified "ordinary public meanings." Mom replies that this "cannot be a rule. Because of the semantic intentions necessity thesis, it is impossible for the recipe to mean anything other than my semantic intentions." Mom demands that they follow her recipe, or call off the contest because of the ontological impossibility of the contest rules.

Are Mom and Smith right? Is recipe meaning impossible? Is cook's meaning necessarily the only meaning? This brings us to Smith's "ontological argument." As Smith puts it, "under the ontological conceptions that most of us entertain, and in a world in which most of us have discarded 'animistic' notions, *persons* have the property or capability of being able to mean."<sup>30</sup> Smith illustrates his thesis with

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30. SMITH, *supra* note 1, at 108.

the following case, adapted from Paul Campos, which we shall call *Written in the Sand by the Wind*:

[W]hile walking in the desert near the border between the United States and Mexico, you come across marks in the sand forming the figures “R E A L,” and you wonder what these marks mean. Your first step will be to guess whether the marks were made by an English-speaking or Spanish-speaking agent. If you think the marks were made by an English speaker, you probably will interpret them to mean something like “real” in the sense of “actual” or “existing.” If you suppose instead that the marks were made by someone speaking Spanish, then you will understand them to mean something like the English term “royal.” But if you think the marks were made by no one, and were instead simply the fortuitous effect of wind on the desert sand, then you will not suppose the marks actually mean anything at all: they are merely a strange accident devoid of meaning. The most you might do (and this will turn out to be a tremendously important possibility) is to imagine that *if* the marks had been made by an English speaker, they *would* mean . . . , and so forth. But even here, it is an author (albeit a hypothetical one), not the marks in themselves or as free-floating entities, that supplies meaning.<sup>31</sup>

Of course, there is something quite odd going on here, because Smith himself seems to use expressions that are inconsistent with his own thesis. Consider:

- “you wonder what these marks mean”
- “you will probably interpret them to mean”
- “you will understand them to mean.”

In each case, Smith refers to the meaning of the marks and not the meaning of the author of the marks. That is, Smith’s way of talking seems to assume that marks have meanings and to deny that meaning is identical to the semantic intentions of the author. Smith recognizes this difficulty. Here is what he says about it:

It is surely true that objects (such as marks on a page) can be used *by persons* to convey meanings; and so in a shorthand expression we may refer to the “meaning” of an object (in the same way that we may say, as a shorthand expression, that the “purpose” of a bus is to transport people, or that the “purpose” of a hammer is to pound nails). Taken too literally or simple-mindedly, such statements might seem to lapse into primitive animism—as in the assertion that “rocks fall because they crave the earth.” But in fact we readily understand such statements to be shorthand expressions of more complex propositions, such as “People make and use hammers to pound nails.”<sup>32</sup>

If we interpolate Smith’s shorthand expression notion into his own remarks in *Written in the Sand by the Wind*, then we see that Smith would expand each of the statements quoted above as follows:

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31. *Id.* at 108-09 (footnote omitted, ellipsis in original).

32. *Id.* at 109-10.



- “you wonder what these marks mean” *becomes* “you will wonder what the author of these marks meant by them”
- “you will probably interpret them to mean” *becomes* “you will probably interpret the author to have meant”
- “you will understand them to mean” *becomes* “you will understand the author to have meant”

But now something seems to have gone wrong. The expanded expressions clearly mean something that is different than the meaning of the so-called shorthand originals. For example, the expression “the purpose of a hammer is to pound nails” simply is not equivalent to the expression “people make and use hammers to pound nails.” Hammers do have a function that is a function of hammers *qua* hammers, and that function is to pound things. The function is a product of human design and the function enables the use, but the design and use are not equivalent to the function. So this example not only fails to support Smith’s shorthand expression notion, it actually undermines it. This same problem infects the attempt to analyze the expressions from *Written in the Sand by the Wind* as shorthand expressions.<sup>33</sup> That the

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33. In comments on a draft of Smith’s paper, I wrote:

When I say to a student this sentence in your paper means something quite different than you intended, this is not shorthand for, “You meant something quite different by using this sentence than you intended to mean by using this sentence.” Those are two different sentences with two different meanings. If [Smith were] correct, the first sentence would reduce to the second and then it seems incoherent. But the first sentence is coherent and does not reduce to the second.

The difference in meaning is highlighted by noticing that there is a syntactical difference between the transitive and intransitive forms of the verb “to mean.” Consider the following examples:

- Sentence tokens of the type “*X* means *Y*,” such as “The Intellectual Property Clause of the Constitution means that Congress must aim to promote the progress of science when it modifies copyright terms.”
- Sentence tokens of the type “*P* means *Y* by *X*,” such as “The Framers meant that the Intellectual Property Clause of the Constitution means that Congress must aim to promote the progress of science when it modifies copyright terms.”

The syntactic difference between the two sentence types suggests a difference in meaning. Moreover, sentences of the first type are not reducible to sentences of the second type—for the obvious reason that the second type includes content omitted in the first type. The fact that our ordinary language has two different forms (transitive and intransitive) of the verb “to mean” and that these forms have different semantic content suggests that sentence of the type “*X* means *Y*” are not equivalent to sentences of the type “*P* means *Y* by *X*.” If they are not equivalent, then I

meaning of these expressions would be a product of their inscription by an author does not entail that the meaning of the expressions is identical to the semantic intentions of the author. Indeed, the fact that the meaning is a product of the author's semantic intentions *shows* that the meaning is *not* identical to them. If *X* is the product of *Y*, then *X* is not identical to *Y*.

Let me state my own point more directly. It is an obvious fact about the grammar<sup>34</sup> of "meaning" that language, symbols, texts, speeches, sayings, and other expressions have meanings. That is why Smith himself talks about the meaning of expressions rather than the meanings intended by the author. He is simply going with the flow—conforming to, rather than resisting, the grammar of our concept of meaning. And that grammar is consistent with most of what Smith says about the relationship between meaning and authors. There is no contradiction (or even tension) between the claim that texts mean and the claim that the meaning of texts is produced by authors. It could even be consistent with Smith's much stronger and ambitious claim—that this connection is a matter of ontological necessity.

Let me begin by returning to *Written in the Sand by the Wind*. Consider the following dialog, which comes from comments I made on a draft of this part of *Law's Quandary*:

Does the example get rhetorical force from the ambiguity between Spanish and English? Suppose for example, you came across the following:

ΝΟΜΟΣ

Now, there is no ambiguity between English and Spanish, but the letters still might have gotten their shape from the random action of the wind.

"Look," I say, "*Nomos*, that means norm or law in Greek."

You say, "We do not know who or what inscribed those letters in the sand. It may mean something entirely different or it may mean nothing at all."

I say, "Well, it might also mean something different, but that is a token of the word type *Nomos* in ancient Greek. It means what it means, however it came to be."

You say, "No, you are now becoming the author of that meaning."

I reply, "Not me. I did not write it in the sand, and anyone else who knows ancient Greek would recognize the meaning."

"But you are implicitly attributing an author to those marks," you say.

"No I am not," I reply. "No such thought ran through my mind."

"Well maybe it was a subconscious thought," you reply.

"Maybe," I retort, "but you have no evidence for that hypothesis."

"But what if no one ever came here," you say, "would it mean anything then?"

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would think that we would ordinarily conclude that sentence tokens of the first type would not be mere shorthand for sentence tokens of the second type.

34. I mean "grammar" in the Wittgensteinian sense.

“Sure,” I say, “it would still mean what it means. Trees that fall in the forest when no one is listening still make an awful lot of noise.”

“But without an author,” you say, “those would be just a meaningless set of marks in the sand.”

“Try telling that to someone who can read ancient Greek. There is a difference between ‘It is all Greek to me,’ and ‘It is a meaningless set of marks,’” I say.

“But what if it was just the wind?” you say. “Surely it has no meaning then.”

“Surely, it does,” I say, “It is a well formed expression in ancient Greek. Its well-formedness is a property of the marks, and not of the agent that caused the marks to come into being. If the expression is well formed, it has meaning.”

“Not *true* meaning,” you say.

“Not *intended* meaning,” I reply.

“But it is an *ontological* fact about meaning that true meaning is intended meaning,” you say.

“No, it is simply a fact of the matter,” I say. “As a matter of fact, meanings are usually intentional, but nothing guarantees that this must be so. And sometimes it is not so.”

“You are missing the point,” you reply. “The connection between *semantic meaning* and persons is *ontological* precisely because it is a *necessary* property of semantic meaning that it is created by persons.”

“But how do you know *that*?” I ask.

Is there an ontological and necessary connection between meaning and the semantic intentions of persons? Smith recognizes that this claim is problematic:

Am I proposing [the semantic intentions necessity thesis] as a truth that will obtain in, as philosophers say, all “possible worlds”? Offered in these extreme forms, the claim connecting meaning with persons would be implausible, I think, because if we want to fantasize, we can *imagine*, for example, impersonal or inanimate entities somehow forming themselves into what look like words and sentences that in fact turn out to convey accurate information.<sup>35</sup>

Smith then presents three examples that originate in my comments on a prior draft of this discussion. Let me present the examples in their original form. Let us call this *Delphic Desert Wind*:

When you go out to the desert near the Mexican border and wait around for a while at a certain spot, well-formed expressions appear. Here are three examples:

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35. *Id.* at 111.

- On January 3, 2002, the following letters appeared in the sand, “Tomorrow, there will be an unusual hail storm in the Kearny Mesa area. Park your car in the garage.” The reader parks his car in the garage that night, and avoids the damage inflicted on his neighbor’s cars.
- On April 7, 2001, the following letters appeared in the sand, “Buy stock in Amalgamated Widgets and hang onto it for a year. Then sell.” The reader does not follow the advice, but the stock triples during the one-year period, and then falls back to its original value within a few weeks.
- On October 8, 2002, the following letters appear in the sand: “There is a really good deal on Charmin at Costco.” The reader goes to Costco, and buys one of those enormous containers of Charmin at half the usual price.

Is there any explanation for this phenomenon that does not include *semantic* meaning for the marks in the sand? A reader reads the marks, and the marks communicate to the reader. The reader is not the author of the marks or of their meaning. The meaning comes into the world independently of the reader. The marks successfully convey meaning to the reader.

In response to *Delphic Desert Wind*, Smith now writes:

I think Solum is right: we *can* imagine such a world—in fact, we just did—and that possibility suggests that the claim connecting meaning with persons is not an assertion of logical necessity or an *a priori* claim applicable to all possible worlds. . . . But Solum goes on to observe of his hypothetical communications by inanimate objects that “[i]n the actual world, this will never happen”; and that of course is the point. In *our* world, or within the ontological inventories that most of us employ, *persons* have the capacity to form and convey semantic meanings. Impersonal objects (such as rocks and rivers and teapots—and marks on a page) do not have this capacity; at most they can serve to convey *persons*’ meanings.<sup>36</sup>

It is very important that we get clear about what Smith is saying here. Recall Smith’s thesis: “[T]he meaning of a legal text is necessarily given by—indeed, is basically identical with—the semantic intentions of an author or authors *of some sort*.”<sup>37</sup> Smith has now clarified. His claim can still be interpreted as a modal claim about necessity of a particular sort—which we can call nomological and historical necessity. In all possible worlds that share the history of the actual world and its physical laws, each and every well-formed expression with semantic meaning is brought into being through the agency of some person.

Given this understanding, we can make two observations about Smith’s argument. First, it does not support the semantic intentions necessity thesis. The argument does not establish that the meaning of texts is identical to author’s intentions; rather, it establishes that

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36. *Id.*

37. *Id.* at 101.

intentional actions by authors are the necessary causes of texts—given the history and physical laws of the actual world. But causation and identity are two different relationships. Establishing that *X* is a necessary cause of *Y* is not the same as establishing that *X* and *Y* are identical.

Second, Smith’s causal claim—that things like “rocks and rivers and teapots—and marks on a page” lack the capacity to form and convey meaning is ambiguous and potentially misleading.<sup>38</sup> Notice that there are two separate claims—one about the capacity to “form meaning” and the other about the capacity to “convey meaning.” Let us deal with meaning formation first and then consider conveying.

Smith does not tell us what he means by “form meaning,” but it seems reasonable to assume that formation is a causal process. Rivers lack the capacity to form meaning because they operate according to causal laws that do not permit them to create syntactically well-formed expressions. Well, that is not quite true. One can imagine a river or the wind writing a well-formed sentence. It is not really impossible. It is just very unlikely. The best that we expect that rivers could do would be to inscribe a very rough approximation of a very short word.

Notice, however, that the formation claim as applied to “marks on a page” is very odd. On one level, this claim seems trivial. Marks on a page can *be* well-formed expressions, but they cannot themselves form *new* well-formed expressions. How can a sentence write a sentence? Of course, the individual marks can form a well-formed expression; in that sense, it is perfectly obvious that Smith’s claim would be incorrect. Moreover, there is a special category of marks on a page—expressions in a programming language—that actually can cause well-formed expressions to come into being. These days we have all had the experience of interacting with nonpersons—computer programs—that can form well-formed expressions that communicate semantic meaning to us. For example, you can interact with a program that will tell you when your flight is departing. Of course, humans wrote the program (or in some cases, wrote the program that wrote the program). But all this does is establish that the agency of some person is a necessary part of the causal chain—not that meaning is identical to the semantic intentions of some person. Indeed, the

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38. *Id.* at 111.

case of computer programs that produce well-formed expressions with semantic meaning actually *disproves* the claim that meaning is necessarily identical to the semantic intentions of some author or authors. Computer programs can be very complex indeed, and many actually existing programs can create sentences that the author of the program did not and could not have anticipated. One reason for this is that computers can execute routines that are beyond the capacity of any human. Of course, computer-generated meanings are dependent on human causes, but dependence does not entail identity.

We can now turn to Smith's second claim, that things like "rocks and rivers and teapots—and marks on a page" lack the capacity to *convey* meaning. Well, that claim is clearly false. Rocks, rivers, and teapots may lack the capacity to *convey* meaning, but marks on a page surely do have that capacity. In fact, Smith himself says that marks on a page can convey meaning.<sup>39</sup> So, I think we need to assume that Smith did not mean what he said. That is, the only way to make sense of Smith is to assume that the meaning of what he wrote is different than the meaning which he intended the text to convey. That is, to make sense of Smith, we must assume that the semantic intentions necessity thesis is false. The meaning of what Smith said is not identical with Smith's semantic intentions.

How can this be? What can explain the gap between what we say and what we intend to say? Smith argues, persuasively, that the gap cannot be explained by dictionary meaning.<sup>40</sup> Dictionaries merely report patterns of usage; they do not legislate meaning. And the meaning of well-formed expressions are not a simple concatenation of the meanings of individual words—language does not work like that. But Smith is wrong, I think, to claim that "[t]he same point applies to linguistic conventions."<sup>41</sup> He writes:

What sense would it make, after all, to say, "Although speakers in this culture *intend* this phrase to mean *X*, and although listeners *understand* speakers who use the phrase to mean *X*, nonetheless according to the 'conventions of the language' the sentence *actually means Y*." If persons understand that speakers use the phrase to have a particular meaning, then it is nonsensical to suppose that there could be conventions that "really" give it a different meaning.<sup>42</sup>

But this example simply does not do the work that Smith needs it to do. If the speaker intends *X* and the audience understands *X*, the reason is that there is a linguistic convention that the utterance means

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39. *Id.*

40. *See id.* at 114.

41. *Id.*

42. *Id.*

$X$  in the circumstances in which it is uttered.

The crucial case for Smith is one in which an author or speaker utters expression  $E$  and under the linguistic convention that applies in the circumstances,  $E$  means  $Y$ . The audience understands  $E$  to mean  $Y$ . The speaker, however, intends to mean  $X$ . For example:

Ben says, "That song is really cool."  
 Alice says, "Yeah, I love it."  
 Ben says, "But it is cool. How can you love it?"  
 Alice says, "I love it, because it is so cool."  
 Ben says, "But when I said it was cool, I meant it was awful."  
 Alice says, "That may be what you meant to say, but it was not what you said. Do you live under a rock? 'Cool' means cool, hip, happening, with it."  
 Ben says, "No, cool means bad."  
 Alice says, "Now you get it. That song was bad. It was phat."

Alice tells Ben that his communication misfired—he said something he did not mean. Of course, that case is quite different from one in which Ben and Alice share a special, nonstandard convention, as in the following example:

Ben says, "When I say cool, I mean awful."  
 Alice says, "Okay, cool means awful."  
 Ben says, "That song is really cool."  
 Alice says, "I do not agree. It is an awesome song."  
 Ben says, "But it is cool. How can you love it?"  
 Alice says, "It is not cool in that funny way you mean cool. I love it because its cool-cool. Really cool."

We can all agree that in this second example, Ben's communication has not misfired. The important point is that there is a difference between the two cases. In case one, the meaning of what Ben says departs from his semantic intentions. In case two, the meaning of what Ben says is identical to his semantic intentions. If Smith's analysis were correct, then this difference could not obtain. But it does obtain, and hence Smith's equation of meaning with the semantic intentions of the author cannot be correct.

One way to get at this issue is via Paul Grice's distinction between speaker's meaning and sentence meaning.<sup>43</sup> Grice's idea of speaker's

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43. See Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 SAN DIEGO L. REV. 493, 510 n.57 (2005) (citing PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 112-116 (1989)); B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 506 n.80 (2005) (citing PAUL GRICE, *Utterer's Meaning*,

meaning is actually quite familiar. We get at the idea of speaker's meaning all the time in ordinary conversations: "What did he mean by that?" In the context of legal texts, we ask questions like: "What did the legislature mean by the provision?" "What did the judge mean by that sentence in the opinion?" "What did the Framers mean by that clause in the Constitution?"

Grice contended that speaker's meaning, in turn, can be analyzed in terms of a speaker's (or author's) intentions. His point is illustrated by the following thought experiment:

[I]magine that you have stopped at night at an intersection. The driver of another car flashes her lights at you, and you make the inference the reason for her doing this is that she wants to cause you to believe that your lights are not on. And based on this inference, you now do, in fact, realize that your lights are not on.

In this example, the meaning of the flashing lights is the product of the following complex intention—as explicated by Richard Grandy and Richard Warner:

The driver flashes her lights intending:

- (1) that you believe that your lights are not on;
- (2) that you recognize her intention (1);
- (3) that this recognition be part of your reason for believing that your lights are not on.<sup>44</sup>

In the case of imperatives, the intention is that the audience (or reader) perform a certain act on the basis of the reader's recognition of the author's intention that the reader perform the act.

What about sentence meaning? In its simplest (and perhaps simplified) form, the idea is that words and expressions have standard meanings—the meanings that are conventional given relevant linguistic practices. As Hurd puts it, "In other words, the sentence meaning of a particular utterance can be understood not by reference to the illocutionary intentions of the speaker, but rather by reference to the illocutionary intentions that speakers *in general* have when employing such an utterance."<sup>45</sup> Hurd goes on to criticize this solution, but I want to put this sort of controversy to the side at this point.

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*Sentence-Meaning, and Word-Meaning*, in *STUDIES IN THE WAY OF WORDS* 117, 123 (1989)); John F. Manning, *What Divides Textualists From Purposivists?*, 106 *COLUM. L. REV.* 70, 72 n.7 (2006) (citing PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 26 (1989)).

44. Richard E. Grandy & Richard Warner, *Paul Grice*, *STAN. ENCYCLOPEDIA PHIL.*, May 8, 2006, <http://plato.stanford.edu/entries/grice/> (last visited Mar. 26, 2007).

45. Heidi M. Hurd, *Sovereignty in Silence*, 99 *YALE L.J.* 945, 964 (1990).



What does Smith have to say about the Gricean distinction between speaker's meaning and sentence meaning? He makes three points:

First, philosophers' references to "sentence meaning" or lawyers' talk of "objective meanings" should not be taken to show that words can have a context-free meaning independent of any author's semantic intentions.

Second, even for the limited purpose of distinguishing normal from idiosyncratic or deviant language uses, we should be wary of distinctions between "speaker's meaning" and "sentence meaning" or "conventional meaning."

Finally, the limited purposes that may be validly served by distinctions between speaker's and sentence meanings, or between "intended" and "objective" meanings, have scant relevance in any case to the interpretation of legal enactments.<sup>46</sup>

Each of these points requires some discussion. Let us take them in order.

Smith's first point should now be familiar. This is another version of the claim that sentence meaning is not independent of authors' intentions. That is right. But my reply is also familiar: dependence does not imply equivalence. Thus, the Gricean story about sentence meaning incorporates intentions in a complex way. Sentence meaning is dependent on the way language is typically used. Typical use consists of many exemplars of speaker's meaning—of the meaning that particular speakers intend in particular contexts. So, sentence meaning depends on speaker's meaning and speaker's meaning depends on the intentions of particular speakers. But there is no "typical speaker" whose intentions determine "speaker's meaning." Of course, we can speak as if there were a typical speaker. That is, we can use the typical speaker as a heuristic. But the typical speaker is not an actual person. And because the typical speaker is not an actual person, the typical speaker does not have actual intentions. And because there are no such actual intentions, it cannot be the case that sentence meaning is identical to them.

Recall that Smith's second point was that "even for the limited purpose of distinguishing normal from idiosyncratic or deviant language uses, we should be wary of distinctions between 'speaker's meaning' and 'sentence meaning' or 'conventional meaning.'"<sup>47</sup>

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46. SMITH, *supra* note 1, at 115-17.

47. *Id.* at 116.

Most of Smith's discussion of this second point does not really engage Grice's distinction. We need the distinction between speaker's meaning and sentence meaning to make sense of certain kinds of communication. For speaker's meaning to get off the ground, the author must know that the reader is aware of the speaker's intentions. This reflexive relationship may not be required for the text to "mean" in Smith's sense, but it is certainly required for the text to "communicate" or "convey" speaker's meaning. In the case of legal texts, the conditions for speaker's meaning frequently do not obtain. That is, the readers—citizens, lawyers, judges—frequently do not possess sufficient information about the intentions of the lawmakers—judges, legislators, Framers—for speaker's meaning to be conveyed.

Smith's third and final point was that "the limited purposes that may be validly served by distinctions between speaker's and sentence meanings, or between 'intended' and 'objective' meanings, have scant relevance . . . to the interpretation of legal enactments."<sup>48</sup> This point is based on the same confusion that characterized the second point—it assumes that sentence meaning is some sort of corrective for deviant meanings, but that is not even remotely close to Grice's point. Smith writes:

Parties to private contracts may sometimes use language in tricky or deviant ways that courts need to guard against by focusing on what they may choose (at their and our peril) to call "objective" meanings . . . . But the drafters and enactors of statutes and constitutional provisions do not tend to be highly idiosyncratic in their use of language after the manner of, say, humorists or poets. On the contrary, legislative drafters incline to dullness—to a numbing standardization—in their expressions.<sup>49</sup>

Smith's description of the phenomena is right on target, but he has the lesson backwards. What Smith calls "numbing standardization" is, in fact, a result of the communicative situation that Framers and legislators face. When the author knows that the reader will not know very much about the author's intentions, then you had better go with sentence meanings if you want to communicate. That is, you had better go with the meanings that can be attributed by readers who have only the scantiest information about your semantic intentions. Moreover, there are sound normative reasons to use sentence meaning rather than speaker's meaning when we interpret constitutions (or legislation). Constitutions are intended for a wide audience across generational and geographic lines. We have very good reason to adopt the interpretive conventions that will create shared public

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48. *Id.* at 117.

49. *Id.* at 117-18.

meanings for the Constitution; we have good reasons to eschew reliance on arcane or private knowledge about the semantic intentions of the drafters when that knowledge was not publicly available when the Constitution was ratified.

Recall that Smith talks about “the meaning of a legal text,” and thereby makes an implicit claim that a text can have only one true or correct meaning. Smith has no good argument for that claim, and it seems rather unlikely that he could possibly produce one because it is perfectly obvious that texts can have multiple meanings—speaker’s meaning, sentence meaning, and reader’s meanings. On close inspection, we found that Smith had no real argument for the semantic intentions necessity thesis. His normative arguments actually undermined rather than supported the thesis. On close inspection, we found that his claim about the necessary identity of meanings and semantic intentions was, in actuality, a claim that persons are causally necessary to the production of well-formed expressions. Even that modest claim turns out to be false, but the more important point is that Smith has no argument against the possibility of sentence meanings that are not identical with or reducible to speaker’s meanings. That point opens the door for our return to constitutional texting.

#### IV. FRAMER’S MEANING AND CLAUSE MEANING

There is an obvious parallelism between Grice’s discussion of speaker’s meaning and sentence meaning and contemporary debates in constitutional theory. In that debate, a distinction is drawn between two forms of originalism—“original meaning originalism” and “original intentions originalism.” Both forms of originalism are sometimes contrasted with textualism. In this Part of the essay, I shall explore this parallelism.

Let us begin with the idea that the Constitution should be interpreted to have the meaning that was originally intended by the Framers. I will not bother to recite the many withering criticisms of this proposal. Original intentions originalism runs into problems in two situations. First, there is the problem of inadequate information. If what we are after is the semantic intentions of the Framers, then we simply do not have the information that we need. Even if we put aside the complex problem of collective intentions yielded by multiple drafters and multitudinous ratifiers, we simply do not know very much about the semantic intentions of the Framers. Oh sure, we

have lots of information—the records of the Convention, the ratifying debates, and early debates about the application of the Constitution. But all of that is simply more text: if knowledge of semantic intentions is necessary to glean meaning, then adding more text to the stack of things to be interpreted does not really solve the problem, does it? Second, there is the problem of too much information. Sometimes we know more about the Framers' intentions than was known at the time the Constitution was ratified. For one thing, we have the records of the Philadelphia Convention; the ratifiers did not. We have the full record of ratification, but the actual ratifiers had only a fragmentary portion of what we have. To the extent that we know more than they did and that knowledge changes our view of the Constitution's meaning, we are on the road to the conclusion that the ratifiers did not know what they were ratifying.

Both problems suggest that our understanding of constitutional meaning should be modeled on Grice's conception of sentence meaning and not on speaker's meaning. In the case of a constitution, speaker's meaning (or author's meaning) can be redescribed as "Framer's meaning." Framer's meaning depends on what the Framers intended, given what they knew about contemporary ratifiers and interpreter's knowledge of their intentions. Likewise, "sentence meaning" can be redescribed as "clause meaning." Clause meaning is the meaning that would be assigned to a clause, on the assumption that the clause 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.

The meaning of the Constitution is best understood as the clause meaning of its provisions. But this does not entail that history and evidence about original meaning is not relevant to the process of constitutional interpretation. Clause meaning is not ahistorical or acontextual. Linguistic conventions change over time. Words and phrases that once had one public meaning may come, over time, to acquire another. Of course, in the case of the Constitution, the Constitution itself acts as a check on this process. That is because the Constitution itself is public, widely available, and central to our legal culture. Constitutional usages are likely to be preserved, simply because they are repeated, studied, quoted, and interpreted. But in those cases in which the original public meaning of the Constitution has been swept away by a shift in the linguistic winds, the clause meaning is the "sentence meaning" that would have been assigned at the time the Constitution was ratified and not the sentence meaning that we would assign based on contemporary linguistic practices.

## V. CONCLUSION: HOW TO DO THINGS WITH CLAUSES

In a sense, Smith's *Law's Quandary* is about a search for "the author"—the person or transcendent being who could supply the semantic intentions necessary for the law to mean. That search was motivated by the semantic intentions necessity thesis, a thesis that is not sustained by Smith's arguments. I have suggested a different picture of legal and constitutional meaning—a picture that prominently features well-formed expressions and sentence meaning. But the picture of meaning that I paint does not exclude the authors. Quite the contrary, my picture includes Austinian brushstrokes and Gricean hues that highlight the idea that we do things with words and the notion that Framers and ratifiers do things with clauses. Constitutions are illocutionary acts—they constitute, command, forbid, and empower. But doing things with clauses is tricky. Constitutional texting lacks the immediacy and interactivity of instant messaging. When you try to do things with clauses, the illocutionary uptake may occur centuries later in a distant locale. Constitutional text messages address unknown and unknowable readers. If you want your illocutionary act to succeed, then you need to avoid reliance on special knowledge of your semantic intentions. Constitutional text messages will work best if they are constructed from widely shared public meanings.

