

THE CONSTITUTION AND THE PHILOSOPHY OF LANGUAGE:  
ENTAILMENT, IMPLICATURE, AND IMPLIED POWERS

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INTRODUCTION

H.L.A. Hart's predecessor in the Oxford Chair of Jurisprudence, Arthur L. Goodhart, once described the U.S. Constitution as "the most important single legal document in the history of the world."<sup>1</sup> Goodhart was an American by birth and upbringing, so naturally one might detect a bit of chauvinism in this remark, and smile at the hyperbole. If "legal document" is not interpreted too narrowly, one might think, then surely there are many texts that would give the Constitution a run for its money. Is the U.S. Constitution more important historically than the Bible, Upanishads, Analects, or Koran? How about Magna Carta or the *Corpus Juris Civilis*? In light of examples like these, Goodhart's remark may seem parochial or rather foolish.

Still, if one is to be charitable to Goodhart, then perhaps it is worth considering whether his striking comment is not too far off base. A more qualified claim, after all, seems defensible. The U.S. Constitution is one of the world's most important legal documents. Particularly with respect to ideas such as popular sovereignty, separation of powers, federalism, judicial review, a bill of rights, and other similar concepts, it seems dif-

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\* Professor of Law, Georgetown University Law Center. Although my interest in semantics and pragmatics began in graduate school, my interest in the specific topics of this Article has been sparked by the seminal work of my colleague, Larry Solum. See, e.g., Lawrence B. Solum, *Semantic Originalism* (November 22, 2008), (unpublished manuscript, available at <http://ssrn.com/abstract=1120244>). I wish to extend my gratitude to Larry for many stimulating conversations about contemporary philosophy of language and its implications for legal theory. He should not be blamed, however, for any of the crazy or outrageous things I say in this Article. The implicatures also are all mine. Thanks also to Charles Barzun and Dan Priel for organizing and inviting me to participate in this symposium; to Deborah Hellman for her generous and insightful commentary on this Article; and to all of the other participants in the symposium, especially Kim Ferzan, Brian Leiter, David Luban, Jeff Pojanowski, Gerald Postema, Fred Schauer, John Henry Schlegel, Larry Solum, and Ted White, for their helpful feedback. Jared Kelson, Paul Ritchey, Franklin Sacha, and the other editors of the *Virginia Law Review* provided excellent editorial assistance. Finally, I wish to thank Randy Barnett, Mary Bilder, Frederic Bloom, William Ewald, Michael Morley, James Pfander, Richard Primus, William Treanor, and the students in Dean Treanor's and my Advanced Constitutional Law Seminar, for their valuable input and encouragement.

<sup>1</sup> Arthur L. Goodhart, *English Law and the Moral Law* 13 (1953).

difficult to think of a single legal text that has been consistently more influential over the past 225 years. The Charter of the United Nations begins with the same three words as the Constitution—"We the People[s]"—and many of its professed objects are similar to those ends for which the Constitution was established: union (unity), tranquility (peace), justice, common defense, general welfare, and liberty (human rights).<sup>2</sup> Nor is this an isolated comparison. An astonishing number and variety of countries—approximately eighty-five, by my rough estimate—have modeled the opening words of their constitutions on the Preamble of the U.S. Constitution: "We the people of Afghanistan," "We, the people of Albania," "We, the people of Angola," "We, the people of Bangladesh," "We, the People of Belarus," "We, the Bolivian people," "We, the people of Cambodia," "We, the People of Egypt," "We the People of India," "We the Japanese people,"—and so on down the line. Many other illustrations could be given of such direct influence.

Remarkably, some of the Framers of the U.S. Constitution anticipated this result and took pride in it. The most philosophical and cosmopolitan of them believed that the document they had drafted was a major step forward in the theory of government. In his famous State House Yard Speech, for example, James Wilson boldly proclaimed that the new system he and his colleagues had designed was "the best form of government which has ever been offered to the world."<sup>3</sup> Later, at the Pennsylvania ratifying convention, Wilson could hardly contain his enthusiasm for the Constitution. "I feel myself lost in the contemplation of its magnitude," he exclaimed. "By adopting this system, we shall probably lay a

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<sup>2</sup> Compare U.S. Const. pmb. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."), with U.N Charter pmb. ("We the Peoples of the United Nations determined to save succeeding generations from the scourge of war, . . . to reaffirm faith in fundamental human rights, . . . to establish conditions under which justice . . . can be maintained, . . . to promote social progress and better standards of life in larger freedom, . . . to unite our strength to maintain international peace and security, and . . . to employ international machinery for the promotion of the economic and social advancement of all peoples, . . . do hereby establish an international organization to be known as the United Nations.").

<sup>3</sup> 1 James Wilson, State House Yard Speech (1787), *reprinted in* Collected Works of James Wilson 171, 177 (Kermit L. Hall & Mark David Hall eds., 2007). Wilson's speech was delivered on October 6, 1787, just weeks after the federal convention drew to a close. *Id.* at 171.

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foundation for erecting temples of liberty in every part of the earth.”<sup>4</sup> From our vantage point, with the benefit of over two centuries of hindsight, remarks like these might seem overstated or even a bit preposterous. How could a document that sanctioned slavery or treated women as virtually invisible, for instance, be worthy of such praise? Nonetheless, the theoretical core of Wilson’s bold prediction has proved to be essentially sound, or so I am inclined to believe. By establishing a new government for themselves—peacefully, deliberately, and, to a significant extent, democratically—the people of the United States did, in fact, accomplish something new and exceptional on the world stage. Legally speaking, they performed an act of incorporation, exercising their inherent right to self-determination. “We the People . . . do ordain and establish this Constitution” are the nine simple, operative words.<sup>5</sup> Wilson felt confident that this dramatic exercise of popular sovereignty would be progressive in its operation and effects, and that its effects would be felt around the world.<sup>6</sup> About this much, at least, he was prescient. To a considerable extent, the language and style of the U.S. Constitution have transformed every part of the globe.<sup>7</sup>

Today, it is difficult to find many informed observers who believe that the U.S. Constitution is “the best form of government which has ever been offered to the world.” In the domain of historical scholarship, one of the watershed events occurred just over a century ago, when

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<sup>4</sup> 1 James Wilson, Remarks in Pennsylvania Convention, *in* *Collected Works of James of Wilson*, supra note 3, at 178, 284.

<sup>5</sup> U.S. Const. pmb.

<sup>6</sup> Wilson, supra note 4, at 284; see also, e.g., 1 James Wilson, Oration Delivered on the Fourth of July 1788, at the Procession Formed at Philadelphia to Celebrate the Adoption of the Constitution of the United States (1788), *reprinted in* *Collected Works of James Wilson*, supra note 3, at 285, 285–86 (“A people free and enlightened, establishing and ratifying a system of government, which they have previously considered, examined, and approved! This is the spectacle, which we are assembled to celebrate; and it is the most dignified one that has yet appeared on our globe. . . . What is the object exhibited to our contemplation? A whole people exercising its first and greatest power—performing an act of sovereignty, original and unlimited!”). For the Enlightenment philosophy of popular sovereignty from which Wilson drew inspiration, see, for example, John Locke, *Second Treatise of Government* ch. VIII, §§ 95–122, at 52–65 (C.B. Macpherson ed., 1980) (1689); 2 Jean-Jacques Burlamaqui, *The Principles of Natural and Politic Law* pt. 1, ch. VI, at 301–306 (1748) (Peter Korkman ed., Thomas Nugent trans., 2006).

<sup>7</sup> Recently, however, the global influence of the U.S. Constitution appears to be waning. See generally David S. Law & Mila Versteeg, *The Declining Influence of the U.S. Constitution*, 87 *N.Y.U. L. Rev.* 762, 764–70 (2012) (demonstrating that other countries have become less likely to model rights-related provisions on the U.S. Constitution).

Charles Beard published *An Economic Interpretation of the Constitution of the United States*.<sup>8</sup> In a nutshell, Beard argued that economic interest, not political theory, was the dominant factor that explained how the Constitution was drafted and ratified. Far from being theoretical visionaries, the Framers of the Constitution were more akin to self-interested businessmen. By means of such ingenious devices as the Contracts Clause, the Sweeping Clause, the Supremacy Clause, and above all, powerful courts, they feathered their own nests at the expense of ordinary citizens, who in turn were led to ratify the Constitution only under an avalanche of Federalist propaganda. Beard supported these and other provocative claims by pointing to evidence that other scholars had often ignored, such as the holdings of land, slaves, and, most importantly, public debt, which each of the Framers held at the time, and by relating these findings to particular features of the constitutional text and of the drafting and ratification history. The cumulative effect of these ideas on American political theory was profound.<sup>9</sup> In the postwar era, a number of historians mounted detailed challenges to Beard's thesis,<sup>10</sup> but the new paradigm he ushered in has largely endured.<sup>11</sup> Since then, several generations of "neo-Beardian" scholars have continued to enhance our

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<sup>8</sup> Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (1986) (1913).

<sup>9</sup> For a useful introduction to Beard's book and its impact, see Morton G. White, *Social Thought in America: The Revolt Against Formalism* 107–27 (1949). The title of White's chapter, "High Ideals and Catchpenny Realities," nicely captures the main thrust of Beard's work as it was perceived by his contemporaries. *Id.*

<sup>10</sup> See, e.g., Robert E. Brown, *Charles Beard and the Constitution: A Critical Analysis of "An Economic Interpretation of the Constitution"* (1956); Forrest McDonald, *We the People: The Economic Origins of the Constitution* (1958).

<sup>11</sup> See, e.g., Forrest McDonald, *Introduction to Beard*, *supra* note 8, at ix ("Beard's work was seminal, in the same way the work of Darwin and Freud was seminal: it created a new and broader mode of thought than what had existed before, and once one has read it, one can never return to an older and narrower pattern of thinking."); cf. Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 626 (1969) (explaining that "while Beard's interpretation of the origins of the Constitution in a narrow sense is undeniably dead, the general interpretation of the Progressive generation of historians—that the Constitution was in some sense an aristocratic document designed to curb the democratic excesses of the Revolution—still seems to me to be the most helpful framework for understanding the politics and ideology surrounding the Constitution"). One measure of Beard's ongoing influence is the continued prominence of Madison's Federalist No. 10, which Beard was among the first to highlight and make the centerpiece of an economic interpretation of the Constitution. See Beard, *supra* note 8, at 14–16.

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understanding of the economic and political factors that led to the formation and adoption of the Constitution.<sup>12</sup>

For most Americans, disillusionment with their democracy is rooted in far more practical concerns than the historical topics that occupied Beard and his critics. On many pressing social issues—economic inequality, immigration reform, gun violence, child welfare, climate change, campaign finance, and so on—they observe their national government to be highly dysfunctional, often little more than an elaborate stage for political theater and corruption. Increasingly, influential legal commentators, such as Sanford Levinson and Michael Seidman, place a large part of the blame on the Constitution.<sup>13</sup> I am far from a blind admirer of the Constitution, and I tend to agree with many of the objections that have been leveled against it by critics such as Levinson and Seidman. At the same time, it has often seemed to me that the Constitution is a much better document than it is given credit for—and certainly much better than what our politicians and courts have typically made of it. Reasonably construed, the Constitution protects fundamental human rights and vests the government of the United States with all the legitimate authority it needs to provide for the common defense, promote the general welfare, and fulfill the other ends for which that government was established. Surprisingly enough, these simple ideas are sometimes considered radical or outside the mainstream—“off-the-wall,” in Jack Balkin’s sense<sup>14</sup>—and they are at variance with the prevailing jurisprudence of the U.S. Supreme Court, which tends to be remarkably stingy about both human rights and national powers to promote the general welfare. They also are at odds with many hornbook treatments of constitutional

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<sup>12</sup> See, e.g., Thomas Perkins Abernethy, *Western Lands and the American Revolution* (1937); E. James Ferguson, *The Power of the Purse* (1961); Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution, 1774–1781* (1940); Jackson Turner Main, *The Antifederalists: Critics of the Constitution, 1781–1788* (1961). A more recent monograph in the same tradition is Woody Holton, *Unruly Americans and the Origins of the Constitution* (2007).

<sup>13</sup> See, e.g., Sanford Levinson, *Our Undemocratic Constitution* 5–9 (2006); Louis Michael Seidman, *On Constitutional Disobedience* 8–10 (2012); see also, e.g., Louis Michael Seidman, *Let’s Give Up on the Constitution*, *N.Y. Times*, Dec. 31, 2012, at A19 (identifying the Constitution as one root cause of our political dysfunction); Sandy Levinson, *Our Constitution Gives Us the Worst of Both Worlds*, *Balkanization* (Sept. 28, 2008), <http://balkin.blogspot.com/2008/09/our-constitution-gives-us-worst-of-both.html> (criticizing the fact that the Constitution restricts removing an unpopular president).

<sup>14</sup> See Jack M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* 179–82 (2011).

law.<sup>15</sup> Nevertheless, these simple propositions appear to reflect the core convictions of some of the greatest statesmen and constitutional theorists in American history, including Benjamin Franklin, Alexander Hamilton, John Marshall, Abraham Lincoln, Theodore Roosevelt, and Franklin Delano Roosevelt, among others.<sup>16</sup> They also correspond to the original design of the Constitution as it was conceived by its principal draftsmen, or so the weight of the historical evidence seems to indicate.<sup>17</sup>

### I. THE QUESTION PRESENTED

The main purpose of this Article is to begin to recover and elucidate the core textual basis of a progressive approach to constitutional law, which appears to have been embraced in essential respects by many influential figures, including Wilson, Hamilton, Marshall, and the two

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<sup>15</sup> See, e.g., John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 138 (7th ed. 2004) (“[B]ecause the federal government is one of enumerated rather than inherent powers, the Court must decide if the action is pursuant to one of the powers that the Constitution grants to the federal government. The central government can act only to effectuate the powers specifically granted to it, rather than acting for the general welfare of the populace.”).

<sup>16</sup> See, e.g., 2 *Annals of Cong.* 1239–40 (Joseph Gales ed., 1834) (February 12, 1790) (reproducing the Petition of the Pennsylvania Society for promoting the Abolition of Slavery, signed by Franklin, which called on Congress to abolish slavery by exercising its powers for “promoting the welfare and securing the blessings of liberty to the people of the United States.”); 10 Alexander Hamilton, *Report on Manufactures* (1791), *reprinted in* *The Papers of Alexander Hamilton*, December 1791–January 1792, at 1, 190 (Harold C. Syrett ed., 1966) (explaining that it is “left to the discretion of [Congress] to pronounce upon the objects, which concern the general welfare”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.) (holding that the federal government may use all appropriate means to carry out the legitimate ends within the scope of the Constitution); Abraham Lincoln, *Speech at Cincinnati, Ohio* (September 1859) (1859), *reprinted in* *Political Debates Between Abraham Lincoln and Stephen A. Douglas* 300, 315 (1894) (noting that the federal government “is expressly charged with the duty of providing for the general welfare,” and arguing that suppressing slavery is a means of “providing for the general welfare”); 5 Theodore Roosevelt, *Speech at the Dedication Ceremonies of the New State Capitol Building at Harrisburg, Pennsylvania* (Oct. 4, 1906) *in* *Presidential Addresses and State Papers* 825, 832 (endorsing the doctrine of Wilson and Marshall, according to which “an inherent power rested in the Nation, outside the enumerated powers conferred on it by the Constitution, in all cases where the object involved was beyond the power of the several States and was a power ordinarily exercised by sovereign nations”); Franklin D. Roosevelt, *Second Inaugural Address* (Jan. 20, 1937), *in* *Nothing to Fear: The Selected Addresses of Franklin Delano Roosevelt 1932–1945*, at 87 (B.D. Zevin ed., 1946) (explaining that the Government of the United States is empowered “to promote the general welfare and secure the blessings of liberty to the American people”).

<sup>17</sup> See John Mikhail, *The Necessary and Proper Clauses*, 102 *Geo. L.J.* 1045 (2014); see also *infra* note 119 and accompanying text.

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Roosevelts, and which rests on an implied power to promote the general welfare. To do so, I will rely on two strange bedfellows: the law of corporations and the philosopher Paul Grice.<sup>18</sup> An ordinary language philosopher like Grice, who writes about truth-functional connectives, bald French kings, and the like, might seem like an unlikely ally to enlist in this endeavor. As I will seek to demonstrate, however, underestimating the significance of Grice's ideas for constitutional law would be a mistake. Plausibly interpreted, the Constitution vests an implied power in the government of the United States to promote the general welfare, and Grice's distinction between semantic and pragmatic implication is a helpful means of understanding why. In what follows, I first summarize some key aspects of Grice's philosophy of language (Part II) and briefly illustrate their relevance for constitutional law (Part III). The remainder of the Article (Parts IV to VI) is then devoted to explaining how, along with a relatively simple principle in the law of corporations, according to which a legal corporation is vested with the power to fulfill its purposes, Grice's distinction between semantic and pragmatic implication helps to illuminate a thorny problem of enduring interest: What powers does the Constitution vest in the government of the United States?

In one guise or another, this question is an unavoidable element in virtually every case involving the constitutionality of federal laws. In 1857, the Supreme Court famously gave a restrictive answer to this question, holding that Congress did not have the authority to prohibit slavery in U.S. territories.<sup>19</sup> In 1918, the Court relied on a similar understanding to hold that the federal government could not outlaw child labor.<sup>20</sup> More recently, the Court has held that Congress lacks the authority to prohibit the possession of firearms near school zones,<sup>21</sup> to require state or local officials to perform background checks on the purchase of handguns,<sup>22</sup> or to provide a civil remedy for victims of gender-motivated violence.<sup>23</sup> In 2012, five members of the Court concluded that the federal government could not require Americans to obtain health insurance (although the Court did sustain, by one vote, the power to impose a tax

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<sup>18</sup> For a collection of Grice's essays, see Paul Grice, *Studies in the Way of Words* (1989).

<sup>19</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

<sup>20</sup> *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>21</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>22</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>23</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

on those who fail to do so).<sup>24</sup> Last term, the Court struck down a critical provision of the Voting Rights Act, holding that Congress lacked the power to reenact the provision in 2006, when it sought to extend its coverage for another twenty-five years.<sup>25</sup>

None of these landmark cases was litigated on the ground that the Constitution authorizes Congress to carry into effect the implied power of the federal government to promote the general welfare.<sup>26</sup> My primary objective here is to explain how the text of the Constitution can be plausibly construed to support such an argument. Because of the limited nature of this Article, I do not discuss the full range of textual, structural, historical, or practical considerations that might lend weight to this argument. Nor do I consider any of the familiar and important objections to the argument, of which there are many.<sup>27</sup> Instead, I simply take for granted that when these objections are carefully assessed and evaluated, the argument may prove unconvincing, unattractive, or impractical. My aim here is not to resolve these issues conclusively one way or another, but merely to frame the initial argument itself in a new and more promising light. What is the strongest *prima facie* case that can be made to support the claim that the Constitution vests the government of the United States with the implied power to promote the general welfare? My suggestion is that Grice's philosophy of language and the law of corporations appear to be fruitful and largely untapped resources for answering this question.

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<sup>24</sup> *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>25</sup> *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

<sup>26</sup> It is true, of course, that *Sebelius* was litigated and decided in part on the ground that Congress has the authority to carry into effect its own enumerated power to tax and spend for the general welfare. My concern here is with a slightly different question: whether Congress has the authority to carry into effect the federal government's implied power to promote the general welfare. For an illuminating history of the former power and its role in the genesis of the modern welfare state, see Michelle Landis Dauber, *The Sympathetic State: Disaster Relief and the Origins of the American Welfare State* (2013).

<sup>27</sup> See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 35 (1905); *The Federalist* No. 41 (James Madison); 1 Joseph Story, *Commentaries on the Constitution* §§ 459, 462–63 (Boston, Hilliard, Gray, & Co. 1833); Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions*, 44 *Duke L.J.* 110, 121, 130 (1994) (quoting Letter from Attorney General Randolph to President Washington (Feb. 12, 1791)); Henry St. George Tucker, *The General Welfare*, 8 *Va. L. Rev.* 167, 179 (1922).



## II. GRICE'S PHILOSOPHY OF LANGUAGE

Let me turn first to Grice and recall some well-known features of his philosophy of language, before considering how they might bear on the topic of implied federal powers. Grice's starting point was the premise that the ordinary use of language is a cooperative enterprise. On this basis, he formulated an overarching maxim of conversation that he labeled the Cooperative Principle: "Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the [conversation] in which you are engaged."<sup>28</sup> Grice identified a series of subordinate maxims which inform and fall under this principle. For convenience, he divided these maxims into four categories: Quantity, Quality, Relation, and Manner.

The Quantity category relates to the amount of information that is to be provided in ordinary conversation. Under this heading, Grice identified two maxims:

1. Make your contribution as informative as is required (for the current purposes of the exchange).
2. Do not make your contribution more informative than is required.<sup>29</sup>

With respect to the Quality category, Grice articulated a "supermaxim"—"Try to make your contribution one that is true"—along with two more specific maxims:

1. Do not say what you believe to be false.
2. Do not say that for which you lack adequate evidence.<sup>30</sup>

Under the Relation category, Grice identified a single, specific maxim:

1. Be relevant.<sup>31</sup>

Finally, under the Manner category, which, unlike the previous categories, relates not to what is said, but rather to *how* it is said, Grice identified another "supermaxim"—"Be perspicuous"—along with four additional maxims:

1. Avoid obscurity of expression.

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<sup>28</sup> Grice, *supra* note 18, at 26.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 27.

<sup>31</sup> *Id.*

2. Avoid ambiguity.
3. Be brief (avoid unnecessary prolixity).
4. Be orderly.<sup>32</sup>

Grice did not assume that the foregoing maxims were exhaustive. He understood that they were merely a first stab at getting a handle on the linguistic phenomena with which he was concerned, all of which were related to his interest in analyzing different strands of meaning and implication. Among other things, Grice emphasized the importance of distinguishing (1) what an expression means (sentence meaning); (2) what a speaker says by producing it (what is said); and (3) what a speaker means by producing it in those circumstances (speaker meaning).<sup>33</sup> With respect to the third category, Grice held that what a speaker means has at least two elements: (1) what she literally says, and (2) what other information she suggests or implies.<sup>34</sup> Grice recognized that language is used for a variety of purposes, and he was struck by the fact that speakers often communicate by means of implication rather than overt statement. His maxims were part of a theory designed to classify these implications and to explain how this process works.

For our purposes, Grice's most important idea was the conceptual distinction he drew between two forms of implication: *entailment* and *implicature*.<sup>35</sup> The former is sometimes called a "genuinely semantic" implication, whereas the latter is sometimes described as "merely pragmatic." These labels are potentially misleading, partly because drawing a clear line between semantics and pragmatics is not always

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<sup>32</sup> Id.

<sup>33</sup> See, e.g., id. at 86–88, 107–09, 117–22, 290–98; see generally Stephen Neale, Paul Grice and the Philosophy of Language, 15 *Linguistics & Phil.* 509 (1992) (explaining these and other features of Grice's philosophy of language).

<sup>34</sup> See, e.g., Neale, *supra* note 33, at 520.

<sup>35</sup> See, e.g., Grice, *supra* note 18, at 22–40, 41–57. Grice distinguishes different kinds of implicatures, including conventional, nonconventional, conversational, and generalized implicatures. Other writers have identified additional categories, including conjunction, disjunction, quantity, relevance, and scalar implicatures. See generally Grice, *supra* note 18, at 22–30 (discussing different types of implicatures); Wayne Davis, *Implicature*, *Stan. Encyclopedia Phil.* 2–4, 25–27, <http://plato.stanford.edu/entries/implicature> (last updated June 24, 2014) (same). For the limited purposes of this Article, I largely ignore the differences among these various subcategories of implicature and focus instead on Grice's more basic distinction between implicature and entailment.

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easy.<sup>36</sup> Nor, for that matter, is locating the boundary between semantics and syntax.<sup>37</sup> For our limited aims, it is unnecessary to take a position on these or other theoretical problems in linguistics and the philosophy of language. Instead, all that is required is to grasp the basic distinction Grice drew between entailment (semantic implication) and implicature (pragmatic implication) and to consider how it applies to the problem of implied federal powers.

There are many illustrations of Grice's distinction to which one might appeal in this context; to help fix ideas, consider this variation of one of Grice's own most famous examples:

(1) Dear Judge Posner,

My law student, Mr. Alan Jones, has asked me for a recommendation. He wants to clerk for you on the Seventh Circuit. He is unfailingly polite and punctual. I have never seen anyone who dresses so well.

Sincerely,

Larry Lessig

Jones seems unlikely to land a clerkship with Judge Posner. Why? Well, because a clear message of Professor Lessig's letter is that Jones is not an especially good law student. To be sure, the letter does not *say* that Jones is a bad student. Nor does it *entail* this conclusion. Entailment is a logical or semantic relation between propositions, defined in terms of valid rules of truth-preserving inference. For A to entail B, it must be the case that in every conceivable situation in which A is true, B is also true. It also must be the case that one cannot deny B without contradicting A. Here, it is perfectly conceivable that Jones possesses all of the attributes Lessig attributes to him (wanting to clerk on the Seventh Circuit, being a great dresser, etc.), yet is not a bad student at all, but rather an outstanding one. Nor would it be self-contradictory for Lessig to say so:

(2) Dear Judge Posner,

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<sup>36</sup> See, e.g., Josh Dever, *The Revenge of the Semantics-Pragmatics Distinction*, 27 *Phil. Perspectives* 104 (2013); Philippe Schlenker, *The Semantics/Pragmatics Interface*, in *Handbook of Semantics* (Maria Aloni & Paul Dekker eds., forthcoming), available at <https://files.nyu.edu/pds4/public/SemPrag.pdf>.

<sup>37</sup> See, e.g., Noam Chomsky, *Studies on Semantics in Generative Grammar* (1972); Ray Jackendoff, *Semantic Structures* (1990).

My law student, Mr. Alan Jones, has asked me for a recommendation. He wants to clerk for you on the Seventh Circuit. He is unfailingly polite and punctual. I have never seen anyone who dresses so well. *But you should not infer from these remarks that he is bad student.* On the contrary, he is an incredibly gifted student, indeed the single best student I have ever encountered in all my years of law teaching. Quite frankly, he is a much better candidate than I was when you selected me to be your clerk, and much better than anyone I have sent to you in the past. So don't let my clever allusion to Grice fool you. You should nab this guy before someone else does.

Sincerely,

Larry Lessig

Now, Posner will no longer infer that Jones is a bad student, and the chances seem good that he will at least invite Jones for an interview. Yet if "Jones is a bad student" is an entailment of (1), then (2) would be self-contradictory—which, again, it is not. How then can "Jones is a bad student" be such a clear implication of (1)?

Grice's distinction between implicature and entailment provides one plausible answer to this question. The distinction enables one to infer that although "Jones is a bad student" is a clear implication of (1), it is an implicature, not an entailment. Grice coined the term "implicature" to refer to those inferences that are made, not only on the basis of what someone says, or the meaning or logical entailments of what she says, but also by virtue of the premise that the speaker is cooperative and the fact that she expressed herself in a particular way under a particular set of circumstances. In this case, we infer that Jones is a poor student because we know or assume that a recommendation letter should highlight the *most favorable* things that can be said about a candidate. If the most favorable thing that can be said about Jones is that he unfailingly polite, punctual, etc., we can infer that his academic performance is mediocre, or at least not good enough to be worth highlighting in the context of a letter of recommendation.

Implicature is a weaker type of inference than entailment because it is based on context and background assumptions, rather than exclusively on what is said or the literal meaning of what is said. As Grice emphasized, these pragmatic inferences have at least three related characteristics, at least two of which distinguish them from entailments. First, like

entailments, implicatures are *calculable*. According to Grice, this feature means that “[t]he presence of a conversational implicature must be capable of being worked out; for even if it can in fact be intuitively grasped, unless the intuition is replaceable by an argument, the implicature (if present at all) will not count as a conversational implicature.”<sup>38</sup> This implies, in turn, that “the final test for the presence of a conversational implicature [has] to be . . . a *derivation* of it. One has to produce an account of how it could have arisen and why it is there.”<sup>39</sup>

Second, unlike entailments, implicatures are *cancelable*. In order to generate these inferences, one must assume that Grice’s cooperative maxims are being observed. Because it is possible to violate, opt out, flout, or otherwise fail to fulfill these maxims, it follows that a conversational implicature can always be canceled in a particular case, either explicitly or contextually, without contradiction. Thus, as we have seen, Lessig can cancel the implication that Jones is a bad student simply by adding further information to his letter that counteracts this inference. By contrast, if Lessig writes, “He is unfailingly polite and punctual. I have never seen anyone who dresses so well. In other words, he is a mediocre law student. But you should not infer from these remarks that he is a mediocre law student.” then his statement would be self-contradictory.

Finally, unlike entailments, implicatures are *nondetachable*. By this, Grice means that the derivation of implicatures depends only on the combination of the relevant background assumptions and the semantic content of what is said, rather than on any particular syntactic configuration or manner of expressing what is said. Grice elaborates this point as follows:

Insofar as the calculation that a particular conversational implicature is present requires, besides contextual and background information, only a knowledge of what has been said (or of the conventional commitment of the utterance), and insofar as the manner of expression plays no role in the calculation, it will not be possible to find another way of saying the same thing, which simply lacks the implicature in question, except where some special feature of the substi-

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<sup>38</sup> Grice, *supra* note 18, at 31.

<sup>39</sup> Neale, *supra* note 33, at 527 (emphasis added) (quoting Paul Grice, *Presupposition and Conversational Implicature* 187 (1981)).

tuted version is itself relevant to the determination of an implicature (in virtue of one of the maxims of Manner).<sup>40</sup>

According to Grice, it follows that implicatures are “nondetachable insofar as it is not possible to find another way of saying the same thing (or approximately the same thing) which simply lacks the implicature.”<sup>41</sup> Thus, in our example, not only can Lessig convey the same implied content by means of other comparable or equivalent expressions, but he could *not* fail to do so (as long as these alternatives do not violate some maxim of Manner).

### III. CONSTITUTIONAL IMPLICATURES

The distinction between entailment and implicature is exceedingly useful for analyzing the implications of everyday acts of communication, such as Professor Lessig’s letter to Judge Posner, as well as many other ordinary uses of natural language.<sup>42</sup> But can this distinction be fruitfully applied to complex legal documents like the Constitution? At first glance, there would seem to be considerable grounds for skepticism on this score. As Andrei Marmor has emphasized, Grice’s maxims are conventional norms that apply most naturally in ordinary conversation, where the common aim “is the cooperative exchange of information.”<sup>43</sup> The basic model is that of a simple, bilateral conversation, where one

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<sup>40</sup> Grice, *supra* note 18, at 39.

<sup>41</sup> *Id.* at 43.

<sup>42</sup> See, e.g., Jerry A. Fodor, *Psychological Explanation: An Introduction to the Philosophy of Psychology* 153 n.3 (1968) (“It is difficult to exaggerate the service Grice has performed by reviving and insisting upon what amounts to the distinction between semantic and pragmatic implication.”). Inferences arising out of letters of recommendation, of course, are hardly the only examples of Gricean implicatures. Ordinary language use is full of similar illustrations. For example:

Ann: “My car is out of gas.” Bob: “There is a gas station on Route 66.” Implicature: The gas station on Route 66 is open for business and can supply Ann with the gas she needs.

Susan: “Are you going on vacation this summer?” Meredith: “Yes, I am planning on visiting India or China.” Implicature: Meredith does not yet know which of these two countries she will visit.

David: “Do you have any kids?” John: “I have two children.” Implicature: John has *only* two children, not three or more.

In each case, the inference may seem strong enough at first glance to be necessary or conceptual. Yet each inference can be canceled without contradiction. Hence each is an implicature rather than an entailment.

<sup>43</sup> See Andrei Marmor, *The Pragmatics of Legal Language* 19 (unpublished manuscript, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1299938](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1299938)).

person asserts a proposition (or perhaps asks a question) that says one thing but also communicates something else. Whatever else is true about the Framing and ratification of the Constitution, it does not seem to fit easily into this model of a simple, bilateral, cooperative conversation. For one thing, the historical evidence suggests that the Framers were often engaged in highly strategic behavior when they drafted the Constitution. Far from consistently adhering to norms like “avoid ambiguity,” “avoid obscurity of expression,” and the like, they were sometimes deliberately ambiguous or obscure in their choice of language, particularly when it came to controversial issues like slavery.<sup>44</sup> In addition, the Framers were sometimes less direct or informative than they could have been, and it seems clear that they often settled on particular clauses of the Constitution as a result of political compromises.<sup>45</sup> Finally, some of their most intractable disagreements were resolved by what Marmor calls “tacitly acknowledged incomplete decisions.”<sup>46</sup> Simply put, they left some issues for another day.

For these and similar reasons, one might question whether Grice’s philosophy of language has anything important to teach us about how to interpret the Constitution. Yet further reflection suggests that any such conclusion may be overdrawn. In the first place, it is important to recognize that Grice’s model is not an all-or-nothing affair. Even if some of his maxims must be qualified or abandoned in a given context, it does not follow that all of them are inapt or inapplicable in that setting. Grice himself reasons along these lines when he notes that the maxims of Quality, which relate to veracity and evidentiary warrant, may have a special stringency and stand on a different footing than the other maxims, whereas the maxims of Manner “as a generator of implicature seem to be somewhat open to question.”<sup>47</sup> Of particular interest, he also points out that the maxims of Quantity and Relation may be mutually interde-

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<sup>44</sup> See, e.g., Joseph M. Lynch, *Negotiating the Constitution: The Earliest Debates Over Original Intent* 107 (1999); George William Van Cleve, *A Slaveholders’ Union: Slavery, Politics, and the Constitution in the Early American Republic* 174 (2010).

<sup>45</sup> See, e.g., Richard Beeman, Plain, Honest Men: *The Making of the American Constitution* (2009) (supplying a detailed narrative of the Philadelphia Convention, including many political compromises reached by the delegates); William M. Meigs, *The Growth of the Constitution in the Federal Convention of 1787* (Philadelphia, J.B. Lippincott Co. 1899) (tracing the history of each separate clause of the Constitution, many of which originated in overt compromises).

<sup>46</sup> Marmor, *supra* note 43, at 20.

<sup>47</sup> Grice, *supra* note 18, at 372.

pendent.<sup>48</sup> “To judge whether I have been undersupplied or oversupplied with information,” Grice observes, “seems to require that I should be aware of the identity of the topic to which the information in question is supposed to relate; only after the identification of a focus of relevance can such an assessment be made . . . .”<sup>49</sup> This statement sounds very much like the interpretive principle underlying one of John Marshall’s most famous remarks in *McCulloch v. Maryland*—“[W]e must never forget, that it is *a constitution* we are expounding”<sup>50</sup>—which also concerns how to interpret a potential undersupply or oversupply of information in light of the topic to which that information relates.

Grice’s maxims will often yield results that are identical or closely analogous to the results of well-established canons of legal interpretation, such as *ejusdem generis*, *expressio unius*, and the rule against surplusage. Drawing upon a technical framework to explicate the precise norms that underlie these canons can therefore be quite illuminating. Likewise, Grice’s distinctions among what a sentence means, what a speaker says, and what a speaker means appear to reflect genuine conceptual categories, which can be fruitfully applied to constitutions and other legal instruments, as well as to ordinary uses of language. Significantly for our purposes, the same is true of the distinction between entailment and implicature. The Constitution is shot through with implications, only some of which are entailments. Carefully distinguishing the one from the other can be useful for many reasons—including getting clear on the fact that what is commonly referred to as the “original meaning” of the Constitution frequently turns on constitutional implicatures, rather than “what is said” or “what is entailed” by constitutional provisions.

To grasp the significance of these claims, it helps to look closely at some concrete examples. Consider first the so-called Fugitive Slave Clause of Article IV. This clause does not say or entail that fugitive slaves must be delivered up to their masters. Instead, it says:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but

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<sup>48</sup> *Id.* at 371–72.

<sup>49</sup> *Id.*

<sup>50</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).



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shall be delivered up on Claim of the Party to whom such Service or Labour may be due.<sup>51</sup>

In 1842, a plausible *implicature* of this clause may have been that it secured “to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union, into which they might escape.”<sup>52</sup> Like all implicatures, however, this inference rests on complex assumptions that go well beyond the syntax and semantics of the particular expression at issue. Furthermore, the inference is cancelable. The Framers could have added the following language to the clause without contradiction: “Nevertheless, slavery shall not exist in the United States, or in any place subject to its jurisdiction.” If so, then the clause would naturally be interpreted to refer only to fugitive *servants*, of which there were, potentially, many in 1787. In the decades leading up to the Civil War, Salmon P. Chase, Lysander Spooner, and other prominent abolitionists often made arguments along these lines, insisting that the Constitution *itself* contained no requirement for the surrender of fugitive slaves.<sup>53</sup> In Grice’s terms, what they argued, in effect, was that constitutional implicatures involving slavery must be resolved in favor of justice and liberty.

Many constitutional provisions can be analyzed in a similar fashion. For example, the Eleventh Amendment reads: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>54</sup> Does this amendment say or entail that federal courts lack jurisdiction to hear appeals of state criminal convictions? No, it does not, nor does it imply this, according to the Supreme Court’s landmark deci-

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<sup>51</sup> U.S. Const. art. IV, § 2.

<sup>52</sup> *Prigg v. Pennsylvania*, 41 U.S. 539, 540 (1842) (Story, J.).

<sup>53</sup> See, e.g., *Birney v. State*, 8 Ohio 230, 235 (1837) (argument of S.P. Chase) (“If I am correct in this construction of the constitution and the ordinance, it follows that there is nothing in either which requires or authorizes the legislature of any state to pass laws for the protection of the right of property in human beings.”); Lysander Spooner, *A Defence for Fugitive Slaves Against the Acts of Congress of February 12, 1793, and September 18, 1850* (1850), reprinted in Randy E. Barnett, *Constitutional Law: Cases in Context* 186, 187 (2008) (“One can hardly fail to be astonished at the ignorance, fatuity, cowardice, or corruption, that has ever induced the north to acknowledge, for an instant, any constitutional obligation to surrender fugitive slaves.”).

<sup>54</sup> U.S. Const. amend. XI.

sion in *Cohens v. Virginia*.<sup>55</sup> In a closely reasoned opinion, Chief Justice Marshall held that a writ of error to review a state criminal conviction was not a “suit in law or equity,” and that even if it were, the precise language of the Eleventh Amendment does not extend to suits “commenced or prosecuted against one of the United States” by one of its own citizens.<sup>56</sup> The “Framers could have, but didn’t” form of argument on which Marshall implicitly relied in *Cohens* is familiar and commonplace. In essence, all such arguments turn on the cancelability of Gricean implicatures.

Consider finally the Vesting Clause of Article I, which reads: “All legislative Powers herein granted shall be vested in a Congress of the United States . . . .”<sup>57</sup> Does this clause limit Congress to the exercise of its enumerated powers? Many commentators appear to think so; thus, one often encounters claims like these on popular legal blogs:

“Congress *only* has the powers ‘herein granted’”<sup>58</sup>

“[T]he powers of Congress . . . are *only* those ‘herein granted.’”<sup>59</sup>

“Per Article I, Section 1, Congress’ lawmaking power is *textually limited* to the ‘legislative powers herein granted.’”<sup>60</sup>

Yet the Vesting Clause does not say—nor does it entail—that Congress has *only* the powers that are “herein granted” to it in Article I or else-

<sup>55</sup> 19 U.S. (6 Wheat.) 264 (1821).

<sup>56</sup> *Id.* at 305; see generally John V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* 37–40 (1987) (discussing Chief Justice Marshall’s opinion in *Cohens*); G. Edward White, *The Marshall Court and Cultural Change, 1815–35*, at 504–24 (1988) (discussing the historical context and implications of the case). Marshall’s logic in *Cohens* was later partly curtailed in *Hans v. Louisiana*, which held that the Eleventh Amendment prohibited a state from being sued in federal court by one of its own citizens without its consent. 134 U.S. 1, 21 (1890).

<sup>57</sup> U.S. Const. art. I, § 1.

<sup>58</sup> Randy Barnett, “Constitutionality” and the Real Constitution, *The Volokh Conspiracy* (Sept. 22, 2009, 11:00 AM), <http://www.volokh.com/posts/1253566626.shtml> (emphasis added).

<sup>59</sup> Nick Rosenkranz, *Treaties Can Create Domestic Law of Their Own Force, But It Does Not Follow That Treaties Can Increase the Legislative Power of Congress*, *The Volokh Conspiracy* (Jan. 19, 2013, 10:23 PM), <http://volokh.com/2013/01/19/treaties-can-create-domestic-law-of-their-own-force-but-it-does-not-follow-that-treaties-can-increase-the-legislative-power-of-congress/> (emphasis added).

<sup>60</sup> Michael Ramsey, *Curt Bradley on Bond v. United States* (and My Response), *The Originalism Blog* (Jan. 28, 2013, 7:00 AM), <http://originalismblog.typepad.com/the-originalism-blog/2013/01/curt-bradley-on-bond-v-united-states-and-my-response-michael-ramsey.html> (emphasis added).

where in the Constitution.<sup>61</sup> Again, this may or may not be a plausible implication of this clause, but, if so, the implication in question is an implicature, not an entailment. Grice's test of cancelability is particularly revealing here:

All legislative powers herein granted shall be vested in a Congress of the United States . . . ; in addition, Congress may exercise any powers it wishes, so long as it thinks they are necessary and proper.

All legislative powers herein granted shall be vested in a Congress of the United States . . . ; Congress shall also have whatever other powers are vested in the Swedish Parliament by the Swedish Constitution, now or at any time in the future.

All legislative powers herein granted shall be vested in a Congress of the United States . . . ; however, Congress may also prohibit anything it wants, if it violates the natural moral law or (which is the same thing) if the thought of it makes the man on the Clapham omnibus sick.

None of these vesting clauses is self-contradictory, and all of them effectively cancel the implication that Congress is "textually limited" to the other powers "herein granted" by the Constitution. The inference that Congress is limited to these powers is not, therefore, part of the original meaning of the Vesting Clause, if that phrase is taken to extend only to the "sentence meaning" of that clause, or to what the clause says or entails.

#### IV. THE QUESTION PRESENTED (AGAIN)

With this background in mind, let us return to the specific problem I highlighted earlier: What powers are vested by the Constitution in the government of the United States? For at least three reasons, it seems reasonable to expect a simple and straightforward answer to this question. First, it has become a virtual axiom of American political theory that the United States is "a government of limited and enumerated powers."<sup>62</sup> If

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<sup>61</sup> Logically, the fallacy here is to assume "all As which are Bs are also Cs" entails "all As which are Cs are also Bs." From "all legislative powers [which are] herein granted are [also] vested in Congress," it does not follow that "all legislative powers [which are] vested in Congress are [also] herein granted."

<sup>62</sup> *NFIB v. Sebelius*, 132 S. Ct. 2556, 2573 (2012); see also, e.g., *New York v. United States*, 505 U.S. 144, 156 (1992) (O'Connor, J.) ("Being an instrument of limited and enu-

the powers of government are enumerated, then it ought to be possible to enumerate them. Second, one of the cornerstones of American federalism, the Tenth Amendment, also seems to require a clear answer to our question. The Tenth Amendment declares that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>63</sup> To understand what powers are reserved by this amendment, one first needs to know what powers are delegated. Third, the Constitution itself refers to “powers vested by this Constitution in the Government of the United States” in another important provision: the Necessary and Proper Clause. To comprehend the language of this clause, one needs to grasp the meaning of its constituents—one of which is the very phrase that interests us.<sup>64</sup> For all of these reasons, then, one might naturally assume that it should be easy to provide a clear and convincing answer to the question with which we began: What powers are vested by the Constitution in the government of the United States?

Here is where the problems begin, and where sensitivity to the lessons Grice and other philosophers of language have taught us reveals that what may look simple on the surface is actually rather complicated. The question presented is not what powers the Constitution vests in *Congress*, but what powers it vests in *the government of the United States*. That these are different semantic categories follows from Grice’s cooperative maxims, as well as from any number of considerations. The “stile” or official name of the federal government, which appears on the face of its laws, contracts, and treaties, is “The United States of America.” Legally speaking, this government is a corporation, an artificial juridical person endowed by its creators with various capacities, including the ability to endure in perpetual succession. By common acknowledgement and established practice, the United States also has the power to sue and be sued; to enter into contracts; to fulfill its contractual obligations; to acquire, sell, hold, and lease property; to operate under a

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merated powers, it follows irresistibly that what is not conferred, is withheld, and belongs to the state authorities.” (quoting 3 Story, *supra* note 27, at 752); Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 Mich. L. Rev. 752 (1995).

<sup>63</sup> U.S. Const. amend. X.

<sup>64</sup> See U.S. Const. art. I, § 8, cl. 18 (authorizing Congress “[t]o make all Laws which shall be 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 any Department or Officer thereof” (emphasis added)).

common seal; and a host of other unenumerated powers that are incidental to every corporation, unless they are explicitly denied or abridged by its constitution or articles of incorporation.<sup>65</sup> Likewise, the United States has the power to recognize foreign governments, to control the flow of persons across its borders, to establish its own paper currency as legal tender, and a wide range of other capacities that are incidental to every sovereign nation.<sup>66</sup> By contrast, the Congress of the United States is not itself a sovereign nation or independent legal corporation, and it does not obviously possess any of these powers or capacities in its own right. Congress is a department *of* the government of the United States, and it, too, is vested with certain powers by the Constitution, including, of course, the enumerated powers of Article I, Section 8. All of these enumerated powers, and indeed every power vested in Congress or the other departments or officers of the United States, are also powers vested by the Constitution in the government of the United States. But the reverse is not true: All of the powers vested by the Constitution in the government of the United States are not also powers vested in the departments or officers of the United States. And Congress is assuredly not the *same thing* as the government of the United States. Nor, for that matter, is the Executive Department, the Judicial Department, the President, or the President and two-thirds of the Senate.<sup>67</sup> The epigram to Moore's

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<sup>65</sup> See, e.g., *Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1850) (Grier, J.) (explaining that "as a corporation or body politic" the United States may bring lawsuits to enforce its contract and property rights); *United States v. Maurice*, 26 F. Cas. 1211, 1216 (C.C.D. Va. 1823) (No. 15,747) (Marshall, C.J.) ("The United States is a government, and, consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers for important purposes."); cf. William Blackstone, Commentaries \*463–64 (enumerating powers that are necessarily incident to every legal corporation); 2 James Wilson, *Of Corporations*, in *Collected Works of James Wilson* 1035, 1035–37 (Kermit L. Hall and Mark David Hall eds., 2007) (same).

<sup>66</sup> See, e.g., *Ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (presupposing the power of the United States to recognize foreign sovereigns); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889) (recognizing a national power over immigration as one of the "incident[s] of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution"); *The Legal Tender Cases*, 79 U.S. 457, 553–54 (1871) (recognizing the power of the U.S. government to issue paper money as legal tender).

<sup>67</sup> Collectively, the President and two-thirds of the Senate have the power to make treaties under the authority of the United States, but they are not thereby the party to these treaties, any more than they—or Congress, the President, the Supreme Court, or any concatenation of the departments or officers of the United States—are the party at interest in debts contracted by the United States, lawsuits against the United States, or property owned by the United

*Principia Ethica* comes to mind here, and is directly on point. “Everything is what it is, and not another thing.”<sup>68</sup>

#### V. THE NECESSARY AND PROPER CLAUSE

The Constitution itself requires us to draw a distinction between the powers it vests in Congress or other departments or officers of the United States, on the one hand, and the powers it vests in the government of the United States, on the other. It does so in a particularly noteworthy provision: the Necessary and Proper Clause. Like the opening words of the Preamble, “We the People,” this clause was first incorporated into the Constitution by Wilson, one of the Founding generation’s most sophisticated lawyers and political theorists, and perhaps its most outspoken champion of implied national powers. Contrary to a popular misconception, the three most significant words Wilson used in drafting this clause were not “necessary and proper,” but “and all other”—a common formula by which “sweeping clauses” perform their essential function of canceling the implication that a given list of items is exhaustive.<sup>69</sup> As many astute observers recognized at the time, Wilson’s sweeping clause is exceedingly complex, not only because it cancels the inference that Congress’s other Article I powers are exhaustive, but also because it implicitly differentiates no fewer than *six* distinct sets of powers vested by the Constitution in the government of the United States, only some elements of which are clearly specified. Because of this complexity, teasing apart the various powers given and reserved by the Constitution is no easy task—a feature of the document that Wilson and other Federalists often exploited during the campaign to ratify the Constitution, and that was not lost on its most perceptive critics.

Before the adoption of the Constitution, a distinction between the powers vested in Congress and the powers vested in the government of

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States. The United States of America is a distinct legal corporation, with its own rights, duties, powers, and liabilities, which cannot be reduced to those of its departments or officers, or any combination thereof. These facts must be kept firmly in mind when interpreting the language of the Constitution referring to “the United States” (for example, in the Tenth Amendment) or “the Government of the United States” (for example, in the Necessary and Proper Clause).

<sup>68</sup> George Edward Moore, *Principia Ethica* (1903). This quotation from Moore originates with the eighteenth-century British moralist Joseph Butler. See Joseph Butler, *Five Sermons Preached at the Rolls Chapel and a Dissertation on the Nature of Virtue* 20 (Stephen L. Darwall ed., Hackett Publ’g Co. 1983) (1736).

<sup>69</sup> See Mikhail, *supra* note 17, at 1106–28.

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the United States was not easily drawn. For all intents and purposes, Congress and the government of the United States were one and the same, a fact illustrated by the common use of the phrase “the United States in Congress assembled” in the Articles of Confederation and other American state papers.<sup>70</sup> In his early drafts of the Constitution, Wilson sought to change this, making clear that “the United States of America” was the official name of a *government*, not a confederation; that “Congress” was the name of a department *of* that government, not the government itself; and that the powers vested by the Constitution in Congress and the other departments and officers of the United States did not *exhaust*, but instead were merely a *proper subset* of, the powers vested by the Constitution in the government of the United States. In addition, Wilson sought to ground the authority of that government directly in the will of the people, rather than in the consent of the states.

The documentary records of the Committee of Detail lend support to these claims and shed light on Wilson’s thought process.<sup>71</sup> For example, these records indicate that Wilson toyed with different versions of the Preamble,<sup>72</sup> all of which used the transformative language, “We the People,” before settling on the following version:

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<sup>70</sup> See, e.g., Articles of Confederation of 1781, art. V, para. 4 (“In determining questions in the United States, in Congress assembled, each State shall have one vote.”); *id.* art. VI, para. 1 (“[N]or shall the United States in Congress assembled, or any of them, grant any title of nobility.”); *id.* para. 5 (“No state shall engage in any war without the consent of the United States in Congress assembled . . . .”); see also, e.g., The Declaration of Independence (U.S. 1776) (“In Congress, July 4, 1776. A Declaration by the Representatives of the United States of America, in General Congress Assembled”); *id.* para. 32 (“We, therefore, the Representatives of the United States of America, in General Congress, Assembled . . . .”).

<sup>71</sup> For a comprehensive treatment of the documentary records of the Committee of Detail, including digital reproductions of the available records, see William Ewald & Lorraine Updike Toler, *Committee of Detail Documents*, 135 *Pa. Mag. Hist. & Biography* 239 (2011). For a critical discussion and analysis of the committee’s work product, see William Ewald, *The Committee of Detail*, 28 *Const. Comment.* 197 (2012).

<sup>72</sup> See 2 *The Records of the Federal Convention of 1787*, at 150 (Max Farrand ed., 1966) [hereinafter *Records of the Convention*] (“We The People of the States of New-Hampshire &C do agree upon, ordain declare and establish the following Frame of Government as the Constitution of ‘the United States of America’ according to which we and our Posterity shall be governed under the Name and Stile of the ‘United States of America.’”); *id.* (“We the People of the States of New-Hampshire &C do ordain declare and establish the following Frame of Govt as the Constitution of the said United States.”); *id.* (“We the People of the States of New Hampshire &C, already confederated united and known by the Stile of the ‘United States of America,’ do ordain declare and establish the following Frame of Government as the Constitution of the said United States.”); *id.* at 152 (“We the People of and the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Caro-

We the People of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare, and establish the following Constitution for the Government of ourselves and our Posterity.<sup>73</sup>

Likewise, although the first two articles of his draft constitution were patterned on the Articles of Confederation, Wilson made at least two crucial modifications to the language of that document. First, in Wilson's draft the "United States of America" became the official name of a "Government", not of a "Confederacy";<sup>74</sup> and second, the powers vested in the United States were identified as "supreme legislative, executive, and judicial powers" rather than only those powers "expressly delegated."<sup>75</sup>

With respect to legislative powers, the documentary records suggest that Wilson considered multiple versions of what became the Vesting Clause of Article I<sup>76</sup> including one version that used the phrase "U.S. in

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lina, South Carolina, and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity."). These renditions of the Preamble are reconstructed from Farrand's records and the digital images of the original manuscripts given by Ewald and Toler, *supra* note 71. Wilson appears to have considered each of them before settling on the version of the Preamble given in the main text.

<sup>73</sup> Records of the Convention, *supra* note 72, at 163.

<sup>74</sup> Compare Articles of Confederation of 1781, art. I, para. 1 ("The stile of this confederacy shall be 'The United States of America.'") with 2 Records of the Convention, *supra* note 72, at 163 ("The Stile of this Government shall be 'the United States of America.'").

<sup>75</sup> Compare Articles of Confederation of 1781, art. II ("Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."), with 2 Records of the Convention, *supra* note 72, at 163 ("The Government shall consist of supreme legislative, executive, and judicial Powers.").

<sup>76</sup> See, e.g., 2 Records of the Convention, *supra* note 72, at 150–51 ("The legislative Power of the United States shall be vested in two Branches a Senate and a House of Representatives; each of which Bodies shall have a Negative on the other."); *id.* ("The legislative Power of the United States shall be vested in a general Assembly to consist of two separate and distinct Bodies of Men, the one to be called the House of Representatives, of the People of the United States the other the Senate of the United States."); *id.* at 152 ("The Supreme legislative Power shall be vested in a Congress to consist of two separate and distinct Bodies of Men, one to be called the House of Representatives, the other to be called the Senate each of which shall in all Cases have a Negative on the other in all cases not otherwise provided for in this Constitution."); *id.* ("The legislative Power shall be vested in a Congress to consist of two separate and distinct Bodies of Men, a House of Representatives, and a Senate each of which shall in all Cases have a Negative on the other."). These renditions of the Vesting Clause are likewise reconstructed from Farrand's records and the images given by Ewald



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Congress assembled”<sup>77</sup> before discarding that phrase and settling on the following language in his draft: “The legislative Power shall be vested in a Congress, to consist of two separate and distinct Bodies of Men, a House of Representatives, and a Senate; each of which shall in all Cases, have a Negative on the other.”<sup>78</sup>

Finally, with respect to the Necessary and Proper Clause, the records suggest that Wilson first took John Rutledge’s early draft of that clause, which had given Congress the power “to make all Laws necessary to carry the foregoing Powers into Execu[tion],”<sup>79</sup> and revised it in the following manner:

and to make all Laws *that shall be necessary and proper* for carrying into *full and complete* Execution the foregoing Powers . . . .<sup>80</sup>

Wilson then added the crucial language of his sweeping clause (“and all other powers”) to Rutledge’s “foregoing powers” provision, while taking care to differentiate the “other powers” vested in the government of the United States from those vested in its departments or officers:

*and all other powers vested, by this Constitution, in the Government of the United States, or in any Department or Officer thereof . . . .*<sup>81</sup>

Perhaps because he thought it was superfluous, Wilson next actually *deleted* Rutledge’s “foregoing powers” provision altogether, along with the phrase “full and complete.” As a result, his draft of the Necessary and Proper Clause looked like this for a time:

and to make all Laws that shall be necessary and proper for carrying into Execution all other powers vested, by this Constitution, in the Government of the United States, or in any Department or Officer thereof;<sup>82</sup>

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and Toler, *supra* note 71. Once again, Wilson appears to have considered each of them before settling on the version given in the main text. Cf. *supra* note 72.

<sup>77</sup> 2 Records of the Convention, *supra* note 72, at 158 (“The Legislature shall consist of two distinct Branches—a Senate and a House of Delegates, each of which shall have a Negative on the other, and shall be stiled the U.S. in Congress assembled.”).

<sup>78</sup> *Id.* at 163, 177.

<sup>79</sup> *Id.* at 144.

<sup>80</sup> *Id.* at 168 (emphasis added).

<sup>81</sup> *Id.* (emphasis added).

<sup>82</sup> *Id.*

Nevertheless, Wilson or another committee member—or perhaps the full committee—later decided to put Rutledge’s “foregoing powers” language back into the Necessary and Proper Clause, while retaining Wilson’s “all other powers” provision. Consequently, the version of the clause that the Committee of Detail presented to the convention on August 6 included both Rutledge’s “foregoing powers” provision and Wilson’s “all other powers” provision:

[a]nd to make all laws that shall be 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 any department or officer thereof;<sup>83</sup>

Apart from a few minor edits, this language is identical to the final version of the Necessary and Proper Clause that appears in the Constitution.<sup>84</sup>

When one examines the full text of the Necessary and Proper Clause in its original context, it seems clear that one of its intended functions was to give Congress the instrumental power to carry into effect its own enumerated powers, while a second objective was to cancel the implication that these enumerated powers were exhaustive. The clause Wilson drafted did more than this, however. Just this much could have been achieved by means of a more targeted sweeping clause, which referred only to “all other powers” vested in *Congress*. For example, Wilson could have achieved both of these objectives using the following language:

Alternative #1:

and to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Legislature of the United States.

Because he understood that Congress would need to carry into effect the powers vested in other parts of the federal government, Wilson also could have drafted a broader “all other powers” provision, which encompassed all of the government’s other departments and officers:

Alternative #2:

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<sup>83</sup> Id. at 182.

<sup>84</sup> See Mikhail, *supra* note 17, at 1101–03.

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and to make all laws that shall be 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.

Likewise, if Wilson had wanted to reinforce the notion that all of the powers delegated to the government of the United States are assigned to one or more of its departments or officers, he might have omitted the second provision entirely and drafted the full clause in this manner:

Alternative #3:

and to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in any Department or Officer of the United States.

And of course there are many other possibilities.

Each of the three foregoing examples is a genuine alternative to the Sweeping Clause that Wilson could have drafted, but did not. Moreover, each has its own unique set of implications, which appealed to various individuals and political constituencies at the time. Alternative #1 is identical in relevant respects to a provision Pierce Butler of South Carolina drafted and may have proposed to the other delegates in late August, in an apparent effort to curtail the broad reach of Wilson's Sweeping Clause.<sup>85</sup> Alternative #2 is identical to the abridged version of the Necessary and Proper Clause that appeared in the original version of Madison's Federalist No. 44, which Madison only corrected thirty years later, when the Gideon edition of *The Federalist* was published in 1818.<sup>86</sup> By paraphrasing the Sweeping Clause in this manner, Madison managed to convey the impression, or at least the possibility, that all of the "other powers" vested in the government of the United States to which the clause refers are delegated to one or more of its departments or officers.

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<sup>85</sup> See 2 Records of the Convention, supra note 72, at 231 (James H. Hutson ed., Supp. 1987) ("And to make all Laws, not repugnant to this Constitution that may be necessary for carrying into execution the foregoing powers and such other powers as may be vested by this Constitution in the Legislature of the United States.").

<sup>86</sup> See The Federalist No. 44, at 302 (James Madison) (Jacob E. Cooke ed., 1961) ("The sixth and last class [of powers lodged in the general government] consists of the several powers and provisions by which efficacy is given to all the rest. 'Of these the first is the power to make all laws which shall be 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.'"); id. at 632 (listing the following edit supplied by Madison in 1818: "Or in any department or office thereof").

Finally, Alternative #3 tracks in relevant respects the precise meaning of the Sweeping Clause that was presupposed, and thus reinforced, by the reserved powers clauses that were offered as constitutional amendments by three of the most anti-Federalist state ratifying conventions: Virginia, New York, and North Carolina.<sup>87</sup> More important, Alternative #3 also tracks the meaning of the Sweeping Clause that was implied and reinforced by the original language of what became the Tenth Amendment that Madison proposed to Congress on June 8, 1789.<sup>88</sup> Because all these proposed amendments refer exclusively to the powers vested in Congress or the other departments and officers of the United States, they leave no room for any additional powers vested by the Constitution in the government of the United States itself. Thus, all of these proposed amendments, including Madison's, would have deprived Wilson and the nationalists of the significant victory they had achieved when the more comprehensive language of the Constitution was adopted and ratified.

Madison's apparent effort to limit the scope of implied national powers in this manner has been overlooked by historians, who tend to accept uncritically the public assurances Madison gave at the time that his proposed amendments were intended to leave the powers of government untouched.<sup>89</sup> Madison's apparent effort was defeated when his prefatory language, stating that all of the powers granted by the Constitution "are appropriated to the departments to which they are respectively distribut-

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<sup>87</sup> See *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 675 (Neil H. Cogan ed., 1997) (North Carolina, August 1, 1788) ("That each state in the union shall, respectively, retain every power, jurisdiction and right, which is not by this constitution delegated to the Congress of the United States, or to the departments of the Federal Government." (emphasis added)); *id.* at 674 (New York, July 26, 1788) ("[T]hat every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same . . . ." (emphasis added)); *id.* at 675 (Virginia, June 27, 1788) ("That each state in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or to the departments of the Foederal [sic] Government." (emphasis added)).

<sup>88</sup> *Id.* at 663 (proposal by Madison in House, June 8, 1789) ("The powers delegated by this constitution, are appropriated to the departments to which they are respectively distributed . . . . The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the States respectively." (emphasis added)).

<sup>89</sup> See, e.g., Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* 285 (1995) (noting that Madison was "careful to assure the House that he had not included anything that would dilute essential powers"); Irving Brant, *James Madison: Father of the Constitution 1787–1800*, at 264–75 (1950).

ed,” was first revised in such a way as to negate its intended implications, and then was struck altogether.<sup>90</sup> Later, two delegates from Connecticut, Roger Sherman in the House and Oliver Ellsworth in the Senate, each apparently inserted “to the Government of the United States” and “to the United States,” respectively, after “delegated by this Constitution” in the text of Madison’s original proposal.<sup>91</sup> Sherman and Ellsworth thus reinforced the parallel with the precise language of the Necessary and Proper Clause, which refers to other powers vested in the government of the United States, in addition to those powers vested in its departments or officers. By doing so, they probably sought to ensure that none of the implied or incidental powers vested by the Constitution in the government of the United States would be curtailed or abridged by the Tenth Amendment.

#### VI. POWERS, POWERS, AND MORE POWERS: THE GRICEAN IMPLICATIONS OF THE SWEEPING CLAUSE

The Necessary and Proper Clause was one of the main reasons why three delegates to the constitutional convention—George Mason and Edmund Randolph of Virginia and Elbridge Gerry of Massachusetts—refused to sign the Constitution.<sup>92</sup> Along with the conspicuous absence of a reserved powers clause such as Article II of the Articles of Confederation, it also was one of the principal reasons why “Brutus,” “An Old Whig,” “Federal Farmer,” and other anti-Federalists repeatedly warned of the uncertain and potentially dangerous powers given by the Constitution.<sup>93</sup> The Necessary and Proper Clause was a major source of dispute at several of the state ratifying conventions,<sup>94</sup> and Madison’s failure to limit its reach by means of his own artfully worded reserved powers clause was probably a major catalyst in “The Great Divergence” between Madison and his former Federalist allies that emerged publicly soon thereafter, with momentous consequences for the future of the political party system and American history more generally.<sup>95</sup> To under-

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<sup>90</sup> See The Complete Bill of Rights, *supra* note 87, at 663–64.

<sup>91</sup> See *id.* at 666–68 (detailing proposal by Sherman to House Committee of Eleven); Creating the Bill of Rights 47 (Helen E. Veit et al. eds., 1991) (describing amendments in the hand of Ellsworth).

<sup>92</sup> See Mikhail, *supra* note 17, at 1050–51.

<sup>93</sup> *Id.*

<sup>94</sup> See, e.g., Lynch, *supra* note 44, at 31–49.

<sup>95</sup> See generally Banning, *supra* note 89, at 293–333 (describing the Great Divergence).

stand these events and to appreciate why many astute observers were concerned about the broad powers they perceived to be lurking in the Necessary and Proper Clause, it is crucial to recognize that the precise text of the Necessary and Proper Clause is comprised of *three* distinct provisions, not merely one or two. To tease apart their apparent meanings and implications, a useful first step is to distinguish all three provisions and to assign them different names:

*Foregoing Powers Provision (“FPP”):*

“Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .”<sup>96</sup>

*Government Powers Provision (“GPP”):*

“Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States.”<sup>97</sup>

*Department or Officer Powers Provision (“DOPP”):*

“Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in . . . any Department or Officer [of the United States].”<sup>98</sup>

When read in the context of the other two provisions, the central implicature of the second provision is that the “other powers” to which it refers are not merely identical or co-extensive with the powers vested in Congress or other departments or officers of the United States. Otherwise, the Government Powers Provision is pointless and violates the rule against surplusage, as well as Grice’s maxims. The conclusion that these “other” government powers are not express but *implied* powers is not an implication of this provision in its own right; instead, it derives from the contextual meaning of that provision, together with the fact that the Constitution does not *expressly* vest *any* powers in the government of the United States as such, as distinct from the powers it vests in its various departments or officers. The key language of the GPP, which refers

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<sup>96</sup> U.S. Const. art. I, § 8, cl. 18.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

to “other powers vested by the Constitution in the Government of the United States,” must, therefore, be taken to refer to implied powers.

The Foregoing Powers Provision adds another layer of complexity to this picture. On its face, the FPP affirms the existence of another set of powers—namely, those powers “which shall be necessary and proper for carrying into execution the foregoing powers” of Article I, Section 8. Like the implied powers of the government of the United States to which the GPP refers, the content of these instrumental powers given by the FPP is left unspecified by the Constitution. The language, structure, and context of the first two provisions of the Necessary and Proper Clause thus point to at least two sets of unspecified powers given by that clause. The first is the set of implied powers vested by the Constitution in the government of the United States to which the GPP refers. The second is the set of unspecified powers given by the FPP to carry Congress’s “foregoing” enumerated powers into effect.

Are these two sets of powers coextensive? Applying the rule against surplusage and Grice’s maxims, the best answer must be that they are not. The powers given by the FPP are vested directly in Congress, and on its face they are clearly meant to be instrumental to the exercise of the other enumerated powers in Article I, Section 8. Although the latter powers are not ends in themselves, the powers given by the FPP thus stand to the enumerated powers as means to ends. This relationship is asymmetrical: Congress may utilize these unspecified powers if and only if it does so in order to carry into effect the enumerated powers, but not the other way around. The unspecified powers given by the FPP might appropriately be called “subordinate” powers, therefore, because they are incidental, instrumental, or subordinate to the enumerated powers.

By contrast, the unspecified powers to which the GPP refers are vested in the first instance in the government of the United States as a whole, and they are not necessarily subordinate to the other enumerated powers of Article I, Section 8. Moreover, it seems clear that they cannot be subordinate to these powers, for at least two reasons. First, if these powers were subordinate to the enumerated powers, then they already would be encompassed by the FPP. Thus, the GPP would be redundant, and the rule against surplusage and Grice’s maxims would again be contravened. Second, the language of the *third* Necessary and Proper Clause—the Department or Officer Powers Provision—evidently presupposes a background principle, according to which the legislative, ex-

ecutive, and judicial departments of the government of the United States are components of that government, rather than the other way around.<sup>99</sup> If so, then it follows that the two sets of powers given by the Necessary and Proper Clause examined thus far—one the set of relationally subordinate legislative powers given by the FPP, and the other the set of relationally superordinate government powers presupposed by the GPP—not only cannot be coextensive. These sets of powers also must be mutually exclusive.

All this may seem unduly complicated, but, in fact, the semantic complexity of the Necessary and Proper Clause is just beginning to unfold. The DOPP also refers to a set of instrumental powers: namely, those powers “which shall be necessary and proper for carrying into execution” whatever “other powers” are vested by the Constitution “in any Department or Officer [of the United States].” On the most natural and plausible reading of this provision, these “other powers” include all of the executive powers delegated in Article II, all of the judicial powers delegated in Article III, and—since Congress itself is a “Department” of the U.S. government—all of the legislative powers delegated outside of Article I, Section 8, such as the power to declare the punishment of treason (Article III), the power to dispose of property belonging to the United States (Article IV), and the power to admit new states (also Article IV).<sup>100</sup> Although this is perhaps more debatable, the “other powers” to which the DOPP refers are also most plausibly construed to include all of the shared powers given to more than one department or officer of the government, such as the treaty and appointment powers of Article II, which are jointly delegated to the President and the Senate.<sup>101</sup> The in-

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<sup>99</sup> This principle was embodied in one of the resolutions referred to the Committee of Detail. See 2 Records of the Convention, *supra* note 72, at 129 (“Resolved: That the Government of the United States ought to consist of a Supreme Legislative, Judiciary and Executive.”). The principle was made explicit in the Committee of Detail’s August 6 draft, the second article of which reads: “The Government shall consist of supreme legislative, executive, and judicial powers.” *Id.* at 177.

<sup>100</sup> Does this mean that all of the “other powers” to which the DOPP refers are *express* powers? No, not necessarily, for once one recognizes that the “other powers” to which the GPP refers are, or at least may be, implied powers, then the same could be true of at least some of the “other powers” to which the DOPP refers.

<sup>101</sup> Although it is tempting to assume that shared government powers, such as the Treaty and Appointment powers, are among the “other powers” to which the GPP refers, this interpretation of the Necessary and Proper Clause runs into at least two major difficulties. First, as we have seen, the government of the United States is both conceptually and legally distinct from the President and two-thirds of the Senate. Second, the Treaty and Appointment



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strumental powers to which the DOPP refers gives Congress the authority to carry these other powers into effect by necessary and proper means. Finally, the GPP also refers to a set of instrumental powers—namely, those powers “necessary and proper for carrying into execution” the unspecified “other powers” presupposed by that provision. Like the instrumental powers assigned by the FPP and DOPP, these instrumental powers are vested directly in Congress and are incidental or subordinate to the “other powers vested by this Constitution in the Government of the United States.”

All told, then, the underlying semantic structure of the Necessary and Proper Clause points to the existence of no fewer than *six* different powers or sets of powers. Four of these sets are vested directly in Congress, three of which are relationally subordinate and introduced by the first sentence of Article I, Section 8. The fourth is relationally super-ordinate: namely, the “foregoing” powers presupposed by the FPP. The last two sets of powers to which the full Necessary and Proper Clause refers are: (1) the set of “other powers” vested in the government of the United States; and (2) the set of “other powers” vested in any department or officer of the United States. Each of these sets is relationally super-ordinate to the powers given to Congress to carry these “other powers” into effect. Once again, these two sets cannot be equivalent, however, unless one of them is redundant. In sum, the entire scheme of government powers presupposed by the Necessary and Proper Clause can be given as follows:

*Foregoing Powers Provision (“FPP”):*

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powers were *not* characterized as shared powers when Wilson first drafted the Necessary and Proper Clause for the Committee of Detail. Nor were they identified as shared powers in the Committee of Detail’s August 6 draft. Instead, these powers were vested exclusively in the Senate. See 2 Records of the Convention, *supra* note 72, at 169 (Wilson’s “Draft IX”) (“The Senate of the United States shall have Power to make Treaties; to send Ambassadors; and to appoint the Judges of the Supreme (national) Court.”); *id.* at 183 (Committee of Detail’s August 6 draft) (“The Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court”). Therefore, whatever “other powers” the Framers originally understood the GPP to refer to cannot plausibly be held to include the Treaty and Appointment powers. It is possible, of course, that this referent later changed once the Treaty and Appointment powers became shared powers, but that interpretation seems untenable for many reasons.

“Congress shall have [unspecified, instrumental] Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing [specified, enumerated] Powers . . . .”<sup>102</sup>

*Government Powers Provision (“GPP”):*

“Congress shall have [unspecified, instrumental] Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . all other [unspecified, implied] Powers vested by this Constitution in the Government of the United States . . . .”<sup>103</sup>

*Department or Officer Powers Provision (“DOPP”):*

“Congress shall have [unspecified, instrumental] Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . all other [unspecified, express or implied] Powers vested by this Constitution in . . . any Department or Officer [of the United States].”<sup>104</sup>

Again, the key element of this scheme—the one which probably meant the most to Wilson, Gouverneur Morris, Robert Morris, Alexander Hamilton, and the other leading nationalists at the constitutional convention, and which probably caused the greatest concern to Mason, Randolph, Gerry, and the anti-Federalists—is the set of “other powers vested by this Constitution in the Government of the United States,” to which the GPP refers. The Constitution never vests power *expressly* to “the Government of the United States” as a single unified entity—although there certainly are clauses which presuppose or imply the existence of such powers.<sup>105</sup> Yet the GPP clearly refers to such government

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<sup>102</sup> U.S. Const. art. I, § 8, cl. 18.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> On several occasions, Professor Gary Lawson and his colleagues have argued that the Constitution does not vest *any* powers in the government of the United States as such, as distinct from the powers it vests in the government’s departments or officers. See, e.g., Gary Lawson et al., *The Origins of the Necessary and Proper Clause 1* (2010) (“The Constitution never grants power to the ‘national government’ or the ‘federal government’ as an undifferentiated entity, but instead grants various aspects of governmental power to discrete actors.”); Gary Lawson, *Delegation and the Constitution*, 22 Reg. 23, 24 (1999) (“The Constitution nowhere grants power to ‘the federal government’ as a unitary entity.”). However, this generalization does not appear to be accurate, and counterexamples seem relatively easy to find. For example, the Constitution arguably vests the government of the United States with the implied power: (1) to sue and be sued (assumed by Article III, Section 2, which refers to “controversies to which the United States shall be a party”); (2) to acquire

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powers and gives Congress the explicit authority to carry these powers into effect. If one assumes that the Framers were intelligent draftsmen and carefully traces the implications of all three Necessary and Proper Clauses, the conclusion to which one is led is that the Constitution vests implied powers in the government of the United States, which are distinct from all of the express and implied powers the Constitution vests in the departments and officers of the United States. This conclusion, however, hardly leaps off the page. On the contrary, the grant of power appears to be somewhat hidden or disguised.

## VII. "CORPORATE AMERICA" AND THE GENERAL WELFARE

This appears to be what John Marshall had in mind when he offered this curious and telling remark about the Necessary and Proper Clause in *McCulloch v. Maryland*:

The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power, than its limitation.<sup>106</sup>

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and own real estate and other property (assumed by Article IV, Section 2, which gives Congress the authority "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"); (3) to enter into contracts and incur legal debts (assumed by Article IV, Section 1, which refers to "Debts contracted and Engagements entered into . . . [by] the United States," as well as by Article I, Section 8, which authorizes Congress "[t]o borrow Money on the credit of the United States" and "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States"); and (4) to enter into treaties with other nations (assumed by Article III, Section 2, which extends the judicial power of the United States "to all cases . . . arising under . . . Treaties made, or which shall be made, under [the] Authority [of the United States]" and by Article VI, Section 2—the Supremacy Clause—which also refers to "Treaties made, or which shall be made, under the Authority of the United States"). Furthermore, the Republican Guarantee Clause of Article IV, Section 4 arguably vests an obligation in the United States to "guarantee to every State in this Union a Republican Form of Government, and protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." If "ought" implies "can," then this clause also vests the United States with the implied power to: (5) guarantee each state a republican form of government; (6) protect each state against invasion; and (7) protect each state against domestic violence under the specified circumstances. The claim made by Lawson et al. does seem to be accurate, however, if it is qualified to refer only to express powers; hence the more precise formulation given in the text.

<sup>106</sup> 17 U.S. (4 Wheat.) 316, 420 (1803).

The broad grant of authority to which Marshall refers in this remarkable passage also supplies a plausible explanation of many other textual, structural, and practical features of the Constitution. To elaborate further on these important themes lies beyond the scope of this Article. Instead, I wish to conclude these brief remarks by returning to the progressive theory of constitutional law with which I began, which rests on an implied power to promote the general welfare. In light of the foregoing analysis, how exactly is the core argument of that theory supposed to go? In its most compressed and simplified form, I suggest it consists of the following schematic steps:

1. The Necessary and Proper Clause implies that the Constitution vests powers in the government of the United States that are not identical or coextensive with the powers it vests in its departments or officers.
2. The United States of America is a legal corporation.
3. A legal corporation is vested with the implied power to fulfill its purposes.
4. The purposes of the United States include promoting the general welfare.
5. The Constitution vests the government of the United States with the implied power to promote the general welfare (from 1, 2, 3, and 4)
6. The Necessary and Proper Clause gives Congress the express authority to carry into effect the powers vested by the Constitution in the government of the United States.
7. The Constitution authorizes Congress to make all laws which are necessary and proper to carry into effect the implied power of the United States to promote the general welfare (from 5 and 6).

This reasoning may strike some readers as new and outlandish, but in fact it is not new, nor does it seem particularly outlandish. In essence, it appears to be the same basic argument that Mason, Randolph, and Gerry perceived at the close of the constitutional convention;<sup>107</sup> that “Brutus,”

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<sup>107</sup> See 2 Records of the Convention, *supra* note 72, at 563–64 (September 10: statement of Edmund Randolph) (objecting to “the general clause concerning necessary and proper laws” and “the want of a more definite boundary between the General & State Legislatures”); *id.* at 631 (September 15: statement of Edmund Randolph) (criticizing the “indefinite and danger-

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“An Old Whig,” “Federal Farmer,” and other anti-Federalists warned against during ratification;<sup>108</sup> that Franklin drew upon when he called on Congress to abolish slavery;<sup>109</sup> that Hamilton and his supporters in Congress used to defend the first Bank of the United States;<sup>110</sup> that Marshall outlined in *McCulloch*, *Cohens*, and other landmark opinions;<sup>111</sup> that

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ous power given by the Constitution to Congress”); id. at 632–33 (September 15: statement of Elbridge Gerry) (objecting to “the general power of the Legislature to make what laws they may please to call necessary and proper”); id. at 635 (September 15: Mr. Gerry’s objections) (objecting to “[t]he Legislature allowed to make any laws they please”); id. (September 15: Mr. Gerry’s Objections) (highlighting “the power in the last clause to make any laws pursu[ant] to [the] Con[stitution] to carry the same into Effect”); 2 Records of the Convention, supra note 72, at 249 (James H. Hutson ed., Supp. 1987) (August 30: Objections to the Constitution, attributed to George Mason) (“The sweeping Clause absorbs every thing almost by Construction.”); id. at 251 (August 31: Alterations to the Constitution, proposed by Mason) (“The Objects of the National Government to be expressly defined, instead of indefinite powers, under an arbitrary Constructions of general Clauses.”).

<sup>108</sup> See, e.g., Brutus, No. 5, 13 December 1787, *New York Journal* (1787), reprinted in 1 Bernard Bailyn, *The Debate on the Constitution* 499, 500 (1993) (linking the Necessary and Proper Clause with the ends of the Preamble and observing: “The great objects then are declared in this preamble in general and indefinite terms to be to provide for the common defence, promote the general welfare, and an express power being vested in the legislature to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the general government. The inference is natural that the legislature will have an authority to make all laws which they shall judge necessary for the common safety, and to promote the general welfare”); see also Mikhail, supra note 17, at 160 nn.52–57 (referencing similar arguments made by “An Old Whig,” “Federal Farmer,” and other anti-Federalists).

<sup>109</sup> See 2 *Annals of Cong.*, supra note 16, at 1239–40.

<sup>110</sup> See, e.g., 14 *Documentary History of the First Federal Congress of the United States of America*, 4 March 1789–3 March 1791, at 390, 393 (William Charles diGiacomantonio et al. eds., 1995) (statement of Rep. Ames) (explaining that “[t]hat construction [of the Necessary and Proper Clause] may be maintained to be a safe one which promotes the good of the society, and the ends for which the government was adopted, without impairing the rights of any man, or the powers of any State”); 4 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, at 424 (Jonathan Elliot ed., 1836) (statement of Rep. Lawrence) (“The principles of the government, and ends of the constitution, he remarked, were expressed in its preamble; it is established for the common defence and general welfare; the body of that instrument contained provisions the best adapted to the intention of those principles and attainment of those ends. To these ends, principles and provisions, congress was to have, he conceived, a constant eye, and then by the sweeping clause, they were vested with the powers to carry the ends into execution.”); see also Lynch, *Negotiating the Constitution*, supra note 44, at 83–92 (discussing these and other arguments for the bank given by Hamilton and his supporters).

<sup>111</sup> See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380–81 (1821) (Marshall, C.J.) (“To this supreme government ample powers are confided, and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared, that they are given ‘in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defence, promote the general welfare, and se-

Frederick Douglass effectively drew upon when *he* called on the United States to abolish slavery;<sup>112</sup> that Theodore Roosevelt embraced at the turn of the twentieth century;<sup>113</sup> and that Franklin D. Roosevelt affirmed at the height of the New Deal.<sup>114</sup> Perhaps most significantly, it also appears to be the same basic argument that James Madison employed in Congress in 1789 to justify the need for a bill of rights.<sup>115</sup> Is the argument valid, and can each premise be given a reasonable justification? Without purporting to settle these questions one way or another, let me conclude by saying a brief word about each step of the argument, leaving a more extensive, critical, and balanced discussion for another occasion.

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cure the blessings of liberty to themselves and their posterity.”); *McCulloch*, 17 U.S. (4 Wheat.) at 421 (Marshall, C.J.) (holding that the government may use all appropriate means to carry out the legitimate ends of the Constitution); see also, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188–89 (1824) (Marshall, C.J.) (“If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. . . . We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connexion with the purposes for which they were conferred.”); *United States v. Maurice*, 26 F. Cas. 1211, 1216 (C.C.D. Va. 1823) (No. 15,747) (Marshall, C. J.) (“The United States is a government, and, consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers for important purposes.”).

<sup>112</sup> See Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?* Speech Delivered in Glasgow, Scotland, March 26, 1860 (1860), *reprinted in* Barnett, *supra* note 53, at 112, 227–28 (“It has been said that Negroes are not included within the benefits sought under [the Preamble]. This is said by the slaveholders in America . . . but it is not said by the Constitution itself. Its language is ‘we the people;’ . . . not we the high, not we the low, but we the people; . . . we the human inhabitants; and, if Negroes are people, they are included in the benefits for which the Constitution of America was ordained and established. . . . [I]f there is once a will in the people of America to abolish slavery, there is no word, no syllable in the Constitution to forbid that result.”).

<sup>113</sup> See Theodore Roosevelt, *Legislative Actions and Judicial Decisions*, *supra* note 16.

<sup>114</sup> See Franklin D. Roosevelt, *Second Inaugural Address*, *supra* note 16.

<sup>115</sup> *Creating the Bill of Rights* 82 (Helen E. Veit et al. eds., 1991) (statement of James Madison, June 8, 1789) (explaining that “because in the Constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the Government of the United States, or in any department or officer thereof,” the federal government possesses “certain extraordinary powers” which “enables [it] to fulfil every purpose for which the Government was established”); 1 *Annals of Cong.*, *supra* note 16, at 438 (June 8, 1789) (statement of Rep. Madison).

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The first premise is a restatement of the main thesis of Parts V and VI. The implication to which it refers may seem like an entailment, but in fact it seems more accurately classified as an implicature. The Framers could, in principle, have added a “Madisonian” rider to the Necessary and Proper Clause stating: “However, there are no powers vested by this Constitution in the Government of the United States that are not delegated to one or more of its Departments or Officers.” This statement does not appear to generate a contradiction; instead, it merely implies that a particular definite description given by the Constitution picks out a null set. The language would be a roundabout and uncooperative piece of draftsmanship, but it does not quite amount to affirming both P and not P.<sup>116</sup>

The second premise, that the United States is a legal corporation, appears to have been embraced or presupposed by a long string of authorities.<sup>117</sup> The same is true of the third premise, which in some respects is

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<sup>116</sup> Another possibility worth considering is that the implication in step 1 is a presupposition. According to Neale, Grice held “that any alleged presupposition is either an entailment or an implicature, and hence the notion of presupposition, to the extent it was ever coherent, can be dispensed with altogether.” Neale, *supra* note 33, at 522 n.17. Not all linguists and philosophers would agree, however, and most probably conceive presupposition as a genuine third category at the borderline of semantics and pragmatics. See, e.g., Gennaro Chierchia & Sally McConnell-Ginet, *Meaning and Grammar: An Introduction to Semantics* 23 (1990) (classifying presupposition as a third category, alongside entailment and implicature). Linguists typically distinguish two classes of presupposition: “semantic presupposition” and “pragmatic presupposition.” A standard definition of the former holds that a sentence, S, semantically presupposes a proposition, P, if P must be true in order for S to have a truth value; and a standard definition of the latter holds that the use of a sentence, S, in a particular context, C, pragmatically presupposes a proposition, P, if P is a member of a set of background assumptions that is taken for granted by the speaker in C. *Id.* at 28–29. Accordingly, there are at least two ways in which a presupposition relation might exist between the Necessary and Proper Clause and the implication in step 1. First, the latter could be a semantic presupposition of the former, that is, a proposition that must be assumed to be true if the clause itself is capable of being either true or false. Second, the implication could be a pragmatic presupposition, that is, a background assumption taken for granted by the Framers (or ratifiers) when the Necessary and Proper Clause was written (or adopted.)

<sup>117</sup> See, e.g., sources cited *supra* note 65; see also, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 447 (1793) (Iredell, J.) (“The word ‘corporations,’ in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate) whether its power be restricted or transcendent, is in this sense ‘a corporation.’ . . . In this extensive sense, not only each State singly, but even the *United States* may without impropriety be termed ‘corporations.’”); *Respublica v. Cornelius Sweers*, 1 U.S. (1 Dall.) 41, 44 (Pa. 1779) (“From the moment of their association, the *United States* necessarily became a body corporate; for, there was no superior from whom that character could otherwise be derived. In *England*, the king, lords, and commons, are certainly a body corporate; and yet there never was any charter or statute, by which they were expressly so created.”). As Mary

the core principle of the argument.<sup>118</sup> The remaining steps of the argument are simple and straightforward. The fourth step is a direct inference from the Preamble. The fifth step follows from the first four premises. The sixth step is a paraphrase of the Government Powers Provision of the Necessary and Proper Clause. Finally, the seventh step follows directly from steps five and six.

As indicated, the third premise is in many respects the heart of the argument. It is probably best construed as a tacit background principle or default rule that could be overridden by contrary language in any particular case. Here, bearing in mind again the limited and *prima facie* character of this Article, there are at least two mutually reinforcing observations worth emphasizing by way of conclusion. First, it seems noteworthy that many of the sharpest legal minds in the Founding generation—Wilson, Hamilton, Marshall, and others—repeatedly indicated that they understood the Constitution to be a corporate charter, which was framed in such a way as to ensure that the government of United States was vested with all of the express and implied powers it needed to fulfill the ends or purposes for which it was established. Second, James Madison is often called “The Father of the Constitution,” but this label seems in many respects more myth than reality. In fact, for all of his undoubted influence, Madison had far less to do with the precise language and structure of the original Constitution of 1787 than is commonly believed. The best reading of the evidence suggests that the two principal draftsmen of the original Constitution were James Wilson and Gouver-

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Bilder has persuasively argued, corporate theory influenced the development of judicial review. See Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 *Yale L.J.* 502 (2006).

<sup>118</sup> See, e.g., sources cited *supra* notes 65 and 111; see also, e.g., 1 Wilson, *supra* note 3, at 174 (“The next accusation I shall consider, is that which represents the foederal [sic] constitution as not only calculated, but designedly framed, to reduce the state governments to mere corporations, and eventually to annihilate them. Those who have employed the term corporation upon this occasion, are not perhaps aware of its extent. In common parlance, indeed, it is generally applied to petty associations for the ease and conveniency of a few individuals; but in its enlarged sense, it will comprehend the government of Pennsylvania, the existing union of the states, and even this projected system is nothing more than a formal act of incorporation.”); 2 James Wilson, *Lectures on Law* pt. 2, ch. X, in *Collected Works of James Wilson* 1035, 1036 (Kermit L. Hall & Mark David Hall eds., 2007) (“When a corporation is duly established, there are many powers, rights, and capacities, which are annexed to it tacitly and of course.”); *id.* at 1037 (“The general duties of every corporation may be collected from the nature and design of its institution: it should act agreeably to its nature, and fulfil the purposes for which it was formed.”).



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neur Morris.<sup>119</sup> Both were Enlightenment rationalists, ardent nationalists, antislavery cosmopolitans, and sophisticated commercial lawyers—the Bank of North America’s lawyers—who conceived of the United States of America as a legal corporation, who sought to vest the government of the United States with implied powers, and who understood how the objects clause and sweeping clause of a corporate charter could work in tandem to vest the corporation with the implied power to fulfill its purposes. Wilson was largely responsible for drafting the Sweeping Clause, and both men appear to have been ultimately responsible for drafting the Preamble.

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<sup>119</sup> A list of Framers who apparently were most responsible for the specific language of the Constitution would also include Madison, Charles Pinckney, Edmund Randolph, and John Rutledge, among others. Nevertheless, insofar as one seeks to identify and evaluate the specific contributions of individual delegates, the most significant influence and control over the final text and structure of the Constitution appears to have been exercised by Wilson and Morris. See, e.g., Ewald, *supra* note 71 (discussing the contributions of Randolph, Wilson, and other members of the Committee of Detail); Mikhail, *supra* note 17 (discussing the influence of Wilson); William Michael Treanor, *Gouverneur Morris’ Constitution* (unpublished manuscript, on file with the author) (discussing the contributions of Morris and other members of the Committee of Style); see also Charles Warren, *The Making of the Constitution* 686–88 (1928) (summarizing the documentary evidence that suggests that Wilson and Morris had the chief hand in the final arrangement and composition of the Constitution).