

## UNINTENDED IMPLICATIONS

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**I**N an elegantly written article, John Mikhail claims that the Necessary and Proper Clause of the Constitution grants to Congress an implied power to promote the general welfare. He is not talking here about the power needed to carry out the enumerated powers of Article I, Section 8. Rather he argues that the clause grants to Congress the power to enact laws that are necessary for the government of the United States to fulfill its purposes—one of which is to promote the general welfare of its people.

Mikhail builds his argument for this provocative and interesting claim using the contributions of philosopher of language Paul Grice.<sup>1</sup> For Grice, language is a cooperative enterprise and is thus governed by the principle that contributions to conversation should help facilitate the purpose of the particular exchange.<sup>2</sup> Mikhail is particularly focused on Grice's distinction between entailment and implicature. Roughly, an entailment derives from the semantic meaning of the statement alone while an implicature derives from the semantic and pragmatic meaning—the words in the particular context.<sup>3</sup>

To elucidate the Gricean idea of “implicature,” Mikhail focuses on a modified version of Grice's example of the recommendation letter that damns with faint praise. In Mikhail's example, a fictional Professor Larry Lessig recommends a prospective law clerk to Judge Richard Posner by noting that the student is “unfailingly polite and punctual” and dresses extremely well. The implicature of this letter is, according to Grice and Mikhail, that the student (Jones) is weak. We know this is what the letter means “by virtue of the premise that the speaker is cooperative and . . . we infer that Jones is a poor student because we know or assume that a recommendation letter should highlight the *most favorable* things

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<sup>1</sup> John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 Va. L. Rev. 1063 (2015) (citing Paul Grice, *Studies in the Way of Words* (1989)).

<sup>2</sup> *Id.* at 1070–71; see Grice, *supra* note 1, at 26.

<sup>3</sup> Mikhail is careful to note that “drawing a clear line between semantics and pragmatics is not always easy.” Mikhail, *supra* note 1, at 1072.

that can be said about a candidate.”<sup>4</sup> In other words, the “context and background assumptions” give the positive comments about Jones’s punctuality and sartorial flair a different meaning.

Mikhail uses these insights about language and communication to say something about constitutional interpretation. But that is where the trouble begins. While Mikhail offers a masterful textual analysis of the Necessary and Proper Clause of the Constitution, I am not convinced that his analysis demonstrates its meaning, and if it does, I fear that Mikhail’s efforts yield the perverse consequence of delegitimizing the very document he is at great pains to enlarge. In what follows, I raise three worries about Mikhail’s analysis. First, a constitution is not a conversation between its drafters and some other people and, as a result, it is unclear whether the Gricean paradigm has anything useful to say about constitutional interpretation.<sup>5</sup> Second, it is far from clear what a constitution is for and consequently there are unlikely to be accepted conventions about how to interpret the meaning of statements within them. Third, Mikhail’s article presents evidence that the Constitution’s drafters were strategic and crafty. But if the drafters are violating the cooperative principle Grice identified, this fact calls into doubt the significance of the ratification of the Constitution from which that document, purportedly, derives its legitimacy.

#### I. A CONSTITUTION IS NOT A CONVERSATION

The recommendation letter conveys that the law student described is a poor student because, according to Grice and Mikhail, the recommender and the recipient of the letter are involved in a conversation, a practice governed by a principle of cooperation. When a person intends to communicate with another, we assume that she is being informative (but not overly so), is telling the truth while only asserting that which she has evidence for, and is being relevant and not obscure.<sup>6</sup> These maxims, proposed by Grice, make sense given the communicative aims of a conversation. But a constitution is not a conversation. Unlike the recommendation letter, the purposes of the drafters of a constitution are not obvious. Nor is

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<sup>4</sup> Id. at 1074.

<sup>5</sup> If it is a conversation, one might wonder *between whom*? Is it a conversation between the drafters and the ratifiers? Or is it a conversation between the drafters and future citizens of the United States? Or someone else?

<sup>6</sup> Mikhail, *supra* note 1, at 1071–72 (detailing these cooperative maxims of Grice’s).

it clear that, in writing the text, they intend to cooperatively communicate with their readers. In fact, Mikhail specifically acknowledges that the Framers were often strategic rather than cooperative and in particular that they often flouted the specific maxims that Grice derived from that overarching principle: The Framers deliberately adopted language that was ambiguous or obscure, which reflected compromise and that avoided decisions about controversial issues.<sup>7</sup>

The difference between a genuine conversation and the enactment of a constitution casts doubt on the usefulness of the Gricean paradigm to this context. Mikhail describes Grice's super-maxim "Be perspicuous," as including four sub-maxims: avoid obscurity, avoid ambiguity, be brief, and be orderly.<sup>8</sup> If the Framers were strategic, ambiguous and complex, one wonders if the project was simply too different from that of a conversation to make Gricean analysis relevant.

## II. CONVENTIONS OF CONSTITUTIONAL INTERPRETATION ARE UNCLEAR

The reason we know how to interpret the recommendation letter that commends the punctuality of Jones as an indictment of his legal ability is that these statements occur in the context of a clerkship recommendation letter and everyone knows what such a letter is for. Mikhail explains, quoting Grice, that the cooperative principle requires that one make one's "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>9</sup> Because the conventions of recommendation letters are fairly well established (one is supposed to say the most flattering things one has to say about the person), we can interpret this letter as saying that Jones is not a good law student.

Perhaps as an aside, I should note that even the conventions of recommendation letters are less clear than the extreme example provided by Grice and Mikhail would suggest. For example, the British are thought

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<sup>7</sup> To be fair, Mikhail recognizes this potential problem with his analysis. However, he thinks that while not all of the maxims may apply, some still can. Moreover he thinks Grice's maxims are similar enough to familiar canons of statutory and constitutional interpretation to lend support to the relevance of Grice's analytical framework to his task. *Id.* at 1078 ("Grice's maxims will often yield results that are identical or closely analogous to 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 may therefore be quite illuminating.").

<sup>8</sup> *Id.* at 1071–72 (citing Grice, *supra* note 1, at 27).

<sup>9</sup> *Id.* at 1071 (emphasis added) (quoting Grice, *supra* note 1, at 26 (1989)).

to be much more muted in their praise, even for candidates they think exceptionally highly of, than would an American recommender. If a British academic writes a letter for a U.S. law school, should we assume she is complying with her own country's norms? Or should we assume she is inflating her praise to conform to ours? Even between a U.S. recommender and a U.S. audience, it is often unclear how inflated tones have become and therefore how damning a criticism of an applicant's work should be taken to be. These examples make clear that while conventions regarding the purposes of a recommendation letter make some meanings clear, many other possible implications will remain in doubt.

More importantly, the implications to be drawn from constitution writing are significantly more uncertain because it is dramatically less clear what the conventions of constitution writing are. A constitution is not a conversation and thus is not governed by conversational norms. In addition, it is both unclear and controversial what norms should govern instead. Should we assume, because it is a constitution we are interpreting, that any ambiguity in meaning should be interpreted in favor of expansive power as the document needs to be functional over time? Or should we assume that power will always find an outlet and that the function of a constitution is to limit that power and thus that any ambiguity should be interpreted with that function in mind? While we can all agree on the purpose of a recommendation letter and that a shared understanding of its purpose guides the pragmatics of interpretation in this context, the same cannot be said of a constitution. Rather, people disagree about a constitution's purpose and they do so at a deep level that tracks important differences in political philosophy. As a result, the meaning of constitutional text will always be unclear precisely because it will be read in light of different and controversial assumptions about a constitution's purpose.

### III. THE IMPLICATIONS OF OBFUSCATION

Mikhail notes at several spaces that the drafters were being deliberately crafty in the choice of text in the Necessary and Proper Clause:

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.*<sup>10</sup>

Or later:

If one assumes that the Framers were intelligent draftsman 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.*<sup>11</sup>

What are we to make of this disguise—where obfuscation is “exploited” so that the text’s implicatures are conveyed to the most perceptive readers but “hardly leap[] off the page” and so are lost on most others? We might conclude that a constitution is simply too different from the sort of conversation Grice envisioned for his methods to be applied (as I suggested in Part I). Or perhaps the cooperative maxim still applies to the relationship between the drafters and the perceptive readers, while intentionally leaving others out. If so, what are the implications for the legitimacy of its ratification?

Grice himself envisioned the context in which a speaker uses deliberate obscurity, breaking the cooperative convention for a reason. He provides the following example:

Suppose that A and B are having a conversation in the presence of a third party, for example, a child, then A might be deliberately obscure, though not too obscure, in the hope that B would understand and the third party not. Furthermore, if A expects B to see that A is being deliberately obscure, it seems reasonable to suppose that, in making his

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<sup>10</sup> Id. at 1084 (second emphasis added).

<sup>11</sup> Id. at 1097 (emphasis added).

conversational contribution in this way, A is implicating that the contents of his communication should not be imparted to the third party.<sup>12</sup>

This example seems similar in some ways to the historical situation described by Mikhail. James Wilson and Gouverneur Morris were writing so as to be understood only by other cognoscenti but not to be understood “by the children.” However, these children are the ones who ratify the Constitution and on whose consent its legitimacy depends. “We the People” so begins the document, a form of words that has become a constitutional trope according to Mikhail. And yet, as he shows us, “We the People” do not understand the document issued in our name. Perhaps Mikhail’s analysis, ironically, implies that the Constitution’s ratification is illegitimate.

In other ways, however, the situation Mikhail describes is not quite like the Gricean example. In the historical example, the anti-Federalist perceptive critics do not share in the desire to keep the children in the dark. Can this difference save Mikhail’s analysis from its unintended delegitimizing consequence? One has to imagine that the anti-Federalists would have attempted to make clear what the implications of the text were. And yet, this meaning seems to have remained obscure and hidden.<sup>13</sup> If so, this fact unravels Mikhail’s analysis in another way. As the recommendation letter example makes plain, an implicature derives, at least in part, from meaning imbued in the text from context and convention. But if such supposed meaning can remain hidden, even when explained, then the conventions on which it depends must be weak and in doubt. While Mikhail offers us an entirely logical explication of the textually implied powers, in order to be entitled to claim this meaning as a genuine implicature, the contextual grounding of this meaning must be more robust than the story he tells suggests.

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<sup>12</sup> Grice, *supra* note 1, at 36–37.

<sup>13</sup> I am not myself asserting that the public meaning of the Necessary and Proper Clause at the time of the adoption of the Constitution was unclear. Rather, I am concluding that Mikhail thinks so based on the fact that he characterizes the drafters as strategic in this context.