

# TERRITORIAL ANNEXATION AS A “GREAT POWER”

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## ABSTRACT

*The Roberts Court has recently begun reviving a long-latent structural constitutional principle—that some unenumerated powers are too important to be inferred through the Necessary and Proper Clause. Under this abstractly sensible theory, some powers are too “great” to have been conferred by implication alone. This structural logic seems poised to command majority holdings in the Supreme Court. But it is largely unclear what results so undertheorized a concept might dictate. Now is the time to survey the domain of “great powers” in service of developing an appropriately modest and judicially enforceable great-powers doctrine.*

*This Note argues that a power to annex foreign territory is too important to be inferred through the Necessary and Proper Clause. Because the Constitution does not enumerate a territorial-acquisition power, Congress therefore disregarded great-powers limitations in annexing Texas and Hawaii through joint resolution. Congressional Globe debates from 1845 reveal that opponents of annexing Texas boldly anticipated this very argument. This Note explores their forgotten constitutional claim in the course of highlighting annexation’s historical pedigree as a great power.*

*Rethinking the constitutional basis for territorial expansion demonstrates that judges cannot apply great-powers principles consistently. And previously overlooked congressional annexation rhetoric supplies fresh diagnostic tools for identifying other great powers, allowing scholars to escape deceptively stale search terms. In fact, this Note marks the first attempt to identify a federal statute struck down on great-powers grounds: the Court’s decision in*

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† Duke University School of Law, J.D. expected 2015; University of Arkansas, B.A. 2011. Many thanks to Professors Stephen Sachs, Neil Siegel, and Joseph Blocher for their excellent suggestions throughout the life of this project. I am also immensely grateful to the *Duke Law Journal* editorial team for their careful engagement with my words and ideas, and to the National Archives’ Center for Legislative Archives for providing me the internship that fueled my passion for researching congressional constitutional interpretation. But most of all, I thank my wife Elise for her constant love and good cheer.

*Afroyim v. Rusk can be fairly read as holding that involuntary expatriation is too important a power to be inferred through the Necessary and Proper Clause.*

## INTRODUCTION

Under traditional understandings of the Necessary and Proper Clause, Congress enjoys virtually boundless authority to choose how best to effectuate its enumerated powers.<sup>1</sup> But in his 2012 *National Federation of Independent Business v. Sebelius*<sup>2</sup> opinion, Chief Justice Roberts recognized a core set of powers that may *not* be implied to carry out Congress's explicit power grants. He explained that although Congress may exercise "incidental powers" under the Necessary and Proper Clause,<sup>3</sup> that clause does not warrant "the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated."<sup>4</sup> In other words, some powers are too important to be exercised merely through implication, even if they might be the most convenient means imaginable for executing Congress's enumerated powers.<sup>5</sup> These so-called "great powers" are off limits to Congress unless the Constitution specifically mentions

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1. See *United States v. Comstock*, 560 U.S. 126, 134 (2010) ("[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."); Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1136 (2001) ("The question . . . is simply whether the congressional measure facilitates or assists in some meaningful sense the effective implementation of a primary power."); Jennifer Mason McAward, *McCulloch and the Thirteenth Amendment*, 112 COLUM. L. REV. 1769, 1776 (2012) ("Since the New Deal, the standard reading of *McCulloch* [*v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)] emphasizes Congress's wide latitude in choosing the means by which to effectuate its enumerated powers and posits that the Court must accord near-complete deference to those choices.").

2. *Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 132 S. Ct. 2566 (2012).

3. *Id.* at 2591 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

4. *Id.* (alteration in original) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 411).

5. See William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1749 (2013) ("[S]ome powers are so great, so important, or so substantive, that we should not assume that they were granted by implication, *even if* they might help effectuate an enumerated power."); *id.* at 1752 ("If the power was important enough, it was one that the Constitution would be expected to grant explicitly, if at all."); Brief of Federalism Scholars as *Amici Curiae* in Support of Respondent Windsor at 15, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter Brief of Federalism Scholars] ("The Necessary and Proper Clause . . . does not grant all conceivable implicit powers that could be useful to an enumerated power; it does not grant powers we would expect the Constitution to enumerate separately.").

them.<sup>6</sup> Roberts reiterated this conceptual bombshell in his *United States v. Kebodeaux*<sup>7</sup> concurrence the very next Term.<sup>8</sup>

Long before *NFIB*, Chief Justice Marshall introduced Roberts's structural precept in the Supreme Court's earliest (and greatest) exposition of congressional power under the Necessary and Proper Clause—*McCulloch v. Maryland*.<sup>9</sup> The Court has never repudiated Marshall's distinction between “great substantive and independent power[s]”<sup>10</sup> and “incidental powers.”<sup>11</sup> Yet because that language so rarely appeared in later opinions,<sup>12</sup> the great-powers concept seemed to fall from the sky in 2012.<sup>13</sup> And not in any ordinary constitutional case: Roberts opined that the Affordable Care Act's (ACA's) minimum-coverage provision,<sup>14</sup> which one scholar has called “the most significant change to the American social contract since the

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6. See Baude, *supra* note 5, at 1749 (“These powers, sometimes called ‘great powers,’ are the kinds of powers we would expect the Constitution to mention if they were granted.”). The structural concept of great powers resembles a statutory-interpretation device familiar to administrative lawyers: that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

7. *United States v. Kebodeaux*, 133 S. Ct. 2496 (2013).

8. See *infra* notes 91–96 and accompanying text.

9. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

10. *Id.* at 411.

11. *Id.* at 421.

12. Only two post-*McCulloch*, pre-*NFIB* Supreme Court opinions even quote Marshall's “great substantive and independent” phrase: *Union Pacific Railroad Co. v. Peniston*, 85 U.S. 5, 46 (1873) (Bradley, J., dissenting), and *Luxton v. North River Bridge Co.*, 153 U.S. 525, 529 (1894).

13. As Professor Andrew Koppelman writes, “The distinction between a ‘great substantive and independent power’ and lesser powers, on the other hand, was ignored until the ACA case. That language is only quoted in two nineteenth-century Supreme Court cases between *McCulloch* and *NFIB*, both upholding congressional power.” Andrew Koppelman, “Necessary,” “Proper,” and *Health Care Reform*, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 105, 109 (Nathaniel Persily et al. eds., 2013) [hereinafter Koppelman, *Health Care Reform*]; see also Andrew Koppelman, *Bad News for Everybody: Lawson and Kopel on Health Care Reform and Originalism*, 121 *YALE L.J. ONLINE* 515, 517 (2012) [hereinafter Koppelman, *Everybody*] (“For nearly 200 years, the federal government has taken on ever larger responsibilities without reference to these limits, which had been forgotten.”); Alison L. LaCroix, *The Shadow Powers of Article I*, 123 *YALE L.J.* 2044, 2080 (2014) (characterizing *NFIB*'s great-powers analysis as “the sudden appearance of a new distinction in the case law”); Michael C. Dorf, *What Really Happened in the Affordable Care Act Case*, 92 *TEX. L. REV.* 133, 150 (2013) (reviewing ANDREW KOPPELMAN, *THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM* (2013)) (claiming that *McCulloch*'s “great substantive and independent” language “had previously been almost entirely ignored”).

14. 26 U.S.C. § 5000A (2012).

Great Society programs of the 1960s,”<sup>15</sup> could not be sustained under the Necessary and Proper Clause. A power to compel individuals to purchase health insurance or pay a penalty—the ability to *create* commerce, rather than regulate preexisting commerce—would be constitutionally great, incapable of being claimed inferentially.<sup>16</sup>

Critics of the great-powers idea have underscored its dubious administrability: At what point, precisely, does a power become too important to be left to implication? Justice Ginsburg has suggested that judges lack the analytical tools to conclude that Congress has exercised an “independent” and “substantive” power, or else a “derivative” and “incidental” one.<sup>17</sup> Roberts had effectively assured lower courts that “[y]ou will know it when you see it.”<sup>18</sup> More cynically, Professor Andrew Koppelman insists that the “great substantive and independent power” label is simply a placeholder for the “interpreter’s pretheoretical intuitions about which government powers are particularly scary.”<sup>19</sup> Roberts’s strange inquiry “take[s] us into terra incognita”<sup>20</sup> and would unsettle much black-letter constitutional law.<sup>21</sup>

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15. Jack M. Balkin, *The Court Affirms the Social Contract, in THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS*, *supra* note 13, at 11, 12.

16. Nat’l Fed’n of Indep. Bus. (NFIB) v. Sebelius, 132 S. Ct. 2566, 2592 (2012).

17. *Id.* at 2627–28 (Ginsburg, J., dissenting). Appointments Clause jurisprudence reinforces Ginsburg’s line-drawing concern. The Constitution explicitly distinguishes between “principal” and “inferior” executive officers, U.S. CONST. art. II, § 2, cl. 1–2, but the Court has struggled to conceptualize “greatness” in this context. Compare *Edmond v. United States*, 520 U.S. 651, 662 (1997) (“Whether one is an ‘inferior’ officer depends on whether he has a superior.”), with *Morrison v. Olson*, 487 U.S. 654, 672 (1988) (“[F]actors relating to the ‘ideas of tenure, duration . . . and duties’ of the independent counsel are sufficient to establish that appellant is an ‘inferior’ officer in the constitutional sense.” (second alteration in original) (citation omitted)). As *Morrison v. Olson*, 487 U.S. 654, acknowledged, “The line between ‘inferior’ and ‘principal’ officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn.” *Id.* at 671. So too with the line between great and incidental powers under the Necessary and Proper Clause.

18. *NFIB*, 132 S. Ct. at 2628 (Ginsburg, J., dissenting).

19. Koppelman, *Health Care Reform*, *supra* note 13, at 118.

20. *Id.* at 113.

21. See Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 10–11 (2011) [hereinafter Koppelman, *Mail Robbers*] (“These new rules would, if consistently applied, randomly blow up large parts of the U.S. Code.”); Koppelman, *Everybody*, *supra* note 13, at 517 (“The[] logic [of great powers] implies the greatest revolution in federal power in American history. . . . Lawson and Kopel do not merely want to burn the house to roast the pig. They are ready to torch the whole city.”); Dorf, *supra* note 13, at 151 (“[T]o adopt th[is] . . . methodology would be to invalidate a good deal more than purchase mandates.”). Koppelman, writing before *NFIB*, was critiquing the claims of Gary Lawson and David Kopel, two scholars who had argued that the ACA’s

These are legitimate concerns. Professor William Baude began to grapple with them in a groundbreaking article published soon after *NFIB*.<sup>22</sup> Baude takes the know-it-when-you-see-it objection seriously,<sup>23</sup> because “we do not have anything approaching a clear test for deciding whether each particular unenumerated power is incidental or great or somewhere in between.”<sup>24</sup> But he does believe that the legal community can develop an appropriately modest, judicially enforceable great-powers doctrine. Declining to reason exclusively from first principles, Baude would have judges proceed “inductively”—that is, heeding “specific evidence about powers that seem to have been thought great, either at the Founding or in post-ratification thought and practice.”<sup>25</sup> He hopes that “further

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minimum-coverage provision was not merely “incidental” to the Commerce power and was too important to be exercised through implication. *See infra* notes 88–90 and accompanying text.

22. Baude, *supra* note 5. Baude intriguingly posits that Congress’s long-established power to condemn land in the states was originally (and widely) assumed to be too important to exist without enumeration. *Id.* at 1741. He also identifies the doctrines of commandeering, state sovereign immunity, military conscription, and freedom of the press as fertile ground for great-powers scholarship. *Id.* at 1744; *see also* Stephen E. Sachs, *Constitutional Backdrops*, 80 *GEO. WASH. L. REV.* 1813, 1875–76 (2012) (speculating that a power to abrogate state sovereign immunity might be too important to have been granted implicitly).

23. *See* Baude, *supra* note 5, at 1810 n.405 (expressing his “basic sympathy with Koppelman and Justice Ginsburg on the vagueness point”).

24. *Id.* at 1810; *see also* MARK TUSHNET, *IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT* 17 (2013) (claiming that Roberts’s “opinion gets fuzzy” when it addresses the individual mandate’s constitutionality under the Necessary and Proper Clause); David Kopel, *Postscript*, in *A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE* 261, 264 (Randy E. Barnett et al. eds., 2013) (conceding that “reasonable people can differ about the right result” when applying great-powers principles); LaCroix, *supra* note 13, at 2080 (dismissing Roberts’s “vaguely defined” understanding of great powers); Neil S. Siegel, *More Law than Politics: The Chief, the “Mandate,” Legality, and Statesmanship*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS*, *supra* note 13, at 204 (“Roberts’s language is vague and difficult to apply.”); Dorf, *supra* note 13, at 151 (characterizing as “mysterious” the alleged distinction between great and incidental powers); Ilya Somin, *Is There a Federal Eminent Domain Power?*, *JOTWELL* (Sept. 4, 2013), <http://conlaw.jotwell.com/is-there-a-federal-eminant-domain-power/> (“[M]uch more needs to be said about how we should draw the line between incidental powers and great and independent ones.”).

25. Baude, *supra* note 5, at 1810. In short, “the relative indeterminacy of the [Necessary and Proper] Clause and the idea of great powers it incorporated lend themselves to a historical inquiry focused on concrete practices.” *Id.* at 1808; *see also* Christian R. Buset, *The Messy History of the Federal Eminent Domain Power: A Response to William Baude*, 4 *CALIF. L. REV. CIRCUIT* 187, 188 (2013) (“Baude’s boldly revisionist account calls us to employ the [great-powers] concept with greater historical specificity and analytical rigor.”). Baude predicts that a power’s greatness will usually be too unclear to justify invalidating challenged legislation, but not if “subsequent practice . . . adequately liquidates its [importance].” Baude, *supra* note 5, at 1812.

scholarship may soon catalog more fully what powers were so considered and why.”<sup>26</sup>

This Note takes up Baude’s invitation. It argues that annexation of foreign territory is exactly the sort of power that is too important to be left to implication through the Necessary and Proper Clause. The Constitution enumerates no congressional territorial-acquisition power, yet the United States has twice—and only twice—acquired foreign land statutorily<sup>27</sup>: the annexations of Texas (in 1845)<sup>28</sup> and Hawaii (in 1898).<sup>29</sup> Each time, annexationists introduced a joint resolution only after failing to secure enough votes to ratify a duly negotiated treaty.<sup>30</sup> Perhaps uniform reliance on the treaty process before and between these famous outliers amounts to the kind of “clear historical practice”<sup>31</sup> Baude would require for judicial invalidation on great-powers grounds. Perhaps congressional constitutional objections to Texas’s annexation,<sup>32</sup> relying critically on the notion of great powers, are the sort of “post-ratification thought”<sup>33</sup> that can enhance annexation’s historical pedigree as a great power. But in any case, the example of annexation confirms that scholars should not despair of achieving consensus while reasoning deductively about great powers. Considered entirely in the abstract, territorial acquisition—like levying taxes or declaring war<sup>34</sup>—is

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26. Baude, *supra* note 5, at 1811.

27. See Douglas W. Kmiec, *Legal Issues Raised by the Proposed Presidential Proclamation To Extend the Territorial Sea*, 1 TERRITORIAL SEA J. 1, 19 (1990) (identifying the annexations of Texas and Hawaii as the “two instances in which the United States acquired territory by legislative action”). Kmiec’s article was originally written as a formal Office of Legal Counsel opinion. *Id.* at 1.

28. Joint Resolution for the Admission of the State of Texas into the Union, J. Res. 1, 29th Cong., 9 Stat. 108 (1845).

29. Joint Resolution To Provide for Annexing the Hawaiian Islands to the United States, J. Res. 55, 55th Cong., 30 Stat. 750 (1898).

30. See *infra* notes 149, 226 and accompanying text.

31. Baude, *supra* note 5, at 1818. As the Court recently concluded in the context of recess appointments, “when considered against 200 years of settled practice, we regard [a] few scattered examples as anomalies.” *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2567 (2014).

32. For an overview of these unheeded objections, see *infra* Part II.A.

33. Baude, *supra* note 5, at 1810.

34. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (classifying these enumerated powers, among others, as “great powers”). Marshall presumably meant that these powers could not have been exercised through implication had they not been enumerated. I take no position on whether every enumerated congressional power is properly regarded as a great power because of its enumeration. See also Baude, *supra* note 5, at 1754–55 (“This is not

precisely the sort of power that seems too great and substantive to be used as a means of fulfilling express power grants.<sup>35</sup>

Part I of this Note traces the Necessary and Proper Clause's relationship with the idea of great versus incidental powers. It builds on other scholars' work to connect the Clause's original meaning, early debates on the constitutionality of the proposed Bank of the United States, Chief Justice Marshall's *McCulloch* opinion, and Chief Justice Roberts's surprising resurrection of the great-powers concept in *NFIB* and *Kebedeaux*.

Part II makes an affirmative case for territorial annexation as a "great substantive and independent power." It features forgotten congressional great-powers rhetoric that demonstrates how the concept "can be useful in nonjudicial constitutional interpretation,"<sup>36</sup> even if judges might disagree on borderline applications. Congressional opponents of annexing Texas generated the most striking evidence I have found of a legislative body's reasoning about the idea of great powers. Fifty-three years later, opponents of annexing Hawaii chose to distinguish (rather than dispute) the precedent of annexing Texas and immediately admitting it to statehood.<sup>37</sup> They thereby deprived themselves of the ability to characterize annexation as a great power, since the Constitution apparently did permit statutory annexation under certain circumstances. But their crusade against "powers inherent in sovereignty"<sup>38</sup> furnished constitutional scholars with a useful diagnostic tool: when a congressional power can be defended only on such flimsy extraconstitutional grounds, it is an especially fine candidate for great-power status.

Part III considers two consequences of the argument presented in Part II. First, if territorial annexation is too important to be inferred from some other power, the great-powers doctrine simply

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to say that *every* explicitly enumerated power is a great one that could not otherwise be implied . . .").

35. My argument extends to all statutory annexations, regardless of the acquired territory's square mileage. Declaring war does not cease to be a great power if the belligerents clash once and call it quits; levying taxes is constitutionally "great" even if Congress exacts trifling sums. Likewise, this Note argues, all forms of legislative annexation necessarily exceed congressional competencies.

36. Baude, *supra* note 5, at 1810.

37. See *infra* Part II.B.2.b.

38. I borrow this term from Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, *passim* (2002).

cannot be applied consistently. Much as some judicial originalists avowedly make “pragmatic exception[s]”<sup>39</sup> to their methodology for entrenched constitutional settlements achieved outside Article V, no judge will ever use Texas’s or Hawaii’s unconstitutionality as a premise in constitutional decisionmaking. So judges who deploy Roberts’s (and Marshall’s) doctrine of great versus incidental powers must be prepared to explain why they should sometimes decline to follow their best understanding of the Constitution.

Second, congressional debates about territorial annexation demonstrate that constitutional actors are capable of reflecting on great powers without using Marshall’s familiar “great substantive and independent” phraseology. Scholars should therefore parse Supreme Court opinions more carefully before asserting that the great-powers idea simply disappeared from constitutional adjudication (if not constitutional discourse) for nearly two hundred years.<sup>40</sup> Indeed, this Note marks the first attempt to identify a federal statute struck down on great-powers grounds: *Afroyim v. Rusk*<sup>41</sup> can be fairly read as holding that involuntary expatriation is too important a power to be inferred through the Necessary and Proper Clause.<sup>42</sup>

## I. OF BANKS AND MANDATES

The great-powers principle enjoys a rich intellectual heritage, and Chief Justice Roberts has begun to restore its place in constitutional law. This Part examines early understandings of the Necessary and Proper Clause, Chief Justice Marshall’s pathbreaking implementation of great powers in *McCulloch*, and the Roberts Court’s growing fascination with the idea as a leading principle of structural constitutional law.

### A. *The Intellectual Origins of Great Powers*

A group of historically minded scholars has persuasively argued that the Necessary and Proper Clause—which was drafted by five

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39. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 140 (Amy Gutman ed., 1997).

40. See John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 59 n.349 (2014) (“[I]n no case has the Court ever invalidated an act of Congress on the ground that it employed a ‘great substantive and independent power,’ in contravention of the Necessary and Proper Clause.”).

41. *Afroyim v. Rusk*, 387 U.S. 253 (1967).

42. See *infra* notes 308–21 and accompanying text.



legally skilled public servants who “th[ought] of government responsibilities in terms of agency and other fiduciary relationships”<sup>43</sup>—embodied the agency-law doctrine of principal and incidental powers.<sup>44</sup> An incidental power “had to be less important or less valuable than its [enumerated] principal,” and also “subordinate to or dependent on the principal.”<sup>45</sup> Thus, an implied power cannot be “necessary and proper for carrying into Execution”<sup>46</sup> an enumerated power if it is more important or far-reaching than the explicitly granted one. Only if an implied power is inferior (that is, incidental) to its principal may an interpreter then ask whether it is sufficiently adapted to effectuate the principal.<sup>47</sup>

Even Koppelman, the most outspoken critic of the great-powers doctrine, seems to concede that the best understanding of the Constitution—from both a historical and theoretical standpoint—is that it requires some greater-and-lesser relationship between express and implied powers.<sup>48</sup> He disputes only that principle’s contemporary administrability and the wisdom of adhering to it after an apparently

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43. Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 84, 86 (2010).

44. See Baude, *supra* note 5, at 1750–51 (“[B]oth before and after ratification, commentators repeatedly described the Necessary and Proper Clause as confirming established principles of implicit or incidental powers. . . . Lawyers would thus have understood the words ‘necessary and proper’ to invoke the ‘incidental powers’ doctrine that had developed under existing principles of law.”).

45. Natelson, *supra* note 43, at 52, 61.

46. U.S. CONST. art. I, § 8, cl. 18.

47. Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267, 273 (2011).

48. See Koppelman, *Everybody*, *supra* note 13, at 516 (“The book is a valuable contribution, an original and enlightening exploration of the contemporaneous meaning of the Clause.”); Koppelman, *Mail Robbers*, *supra* note 21, at 116 (granting that Lawson and Kopel’s research “sure looks impressive”); see also John Harrison, *Enumerated Federal Power and the Necessary and Proper Clause*, 78 U. CHI. L. REV. 1101, 1122 (2011) (reviewing LAWSON ET AL., *supra* note 43) (concluding that “the authors make a strong case” that the Necessary and Proper Clause authorizes only certain incidental powers); John F. Manning, *The Necessary and Proper Clause and Its Legal Antecedents*, 92 B.U. L. REV. 1349, 1371 (2012) (reviewing LAWSON ET AL., *supra* note 43) (“I have no problem concluding that the Necessary and Proper Clause is an incidental powers clause.”). A decade earlier, Professor Caleb Nelson argued that “Marshall’s concept of ‘great substantive and independent power[s]’ reflects a sensible canon of interpretation. . . . [Otherwise,] relatively small tails [could] wag some very big dogs.” Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1640 (2002) (first alteration in original).

extended judicial dormancy.<sup>49</sup> After all, the great-powers framework explains why certain enumerations are not superfluous.<sup>50</sup> And given that Congress may also legislate to effectuate its implied powers—even ones *three steps removed* from an associated enumerated power<sup>51</sup>—surely some structural limitation must exist to ensure that doubly and triply derivative powers do not overshadow the enumerated objects they obliquely serve.<sup>52</sup>

In 1791, great-powers thinking underwent a lasting shift. The First Congress debated whether to charter a Bank of the United States as a corporation; once the bill passed, President Washington solicited his cabinet's formal legal advice on whether to sign it.<sup>53</sup> Because no enumerated power authorized Congress to create financial instrumentalities,<sup>54</sup> a national bank would have been constitutional only if inferable through the Necessary and Proper Clause. As these early explications revealed, the nation's leading legal thinkers understood that clause to distinguish between principal (greater) and incidental (lesser) powers.<sup>55</sup> And beyond merely

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49. See Koppelman, *Everybody*, *supra* note 13, at 518 (“[I]t is not obvious how to translate these terms from their then-familiar applications in property law or the law of corporations to the very different context of governmental powers.”).

50. Congress's powers to call out the militia and raise armies reinforce the power to declare war, but each was explicitly mentioned in Article I. Baude, *supra* note 5, at 1752. Likewise, “If Congress has all powers, great and small, that are helpful to carrying out its other powers, then surely it would implicitly have a general power to tax already.” *Id.* at 1754.

51. See *United States v. Comstock*, 560 U.S. 126, 147 (2010) (“[E]ven the dissent acknowledges that Congress has the implied power to criminalize any conduct that might interfere with the exercise of an enumerated power, *and* also the additional power to imprison people who violate those (inferentially authorized) laws, *and* the additional power to provide for the safe and reasonable management of those prisons, *and* the additional power to regulate the prisoners' behavior even after their release.” (emphases added)); *id.* at 148 (“[W]e must reject [the] argument that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress.”).

52. See James Madison, Speech on Feb. 2, 1791, reprinted in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 39, 42 (M. St. Clair Clarke & D.A. Hall eds., 1832) [hereinafter HISTORY OF THE BANK] (arguing that “Necessary and Proper” cannot mean merely “conductive,” because “[i]f implications, thus remote, and thus multiplied, can be linked together, a chain may be formed, that will reach every object . . . within the whole compass of political economy”).

53. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 914 (1985).

54. See BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 103 (1957) (“There is nothing in the Constitution about banks and banking . . .”).

55. See Baude, *supra* note 5, at 1751–54 (recounting this constitutional debate through the lens of principal and incidental powers).

claiming that implied powers may not eclipse the enumerated powers they help execute, these actors also assumed that some powers are *too important to have been granted by implication*.

Representative James Madison, for example, argued that “the degree of [a power’s] importance” determines “the probability or improbability of its being left to construction.”<sup>56</sup> Similarly, Attorney General Edmund Randolph informed President Washington that congressional powers “are either incidental, or substantive, that is, independent powers.”<sup>57</sup> Most conceivable powers need not be expressly delegated, he reasoned, but “substantive and independent” powers “would not otherwise have existed” had they not been enumerated.<sup>58</sup> Secretary of the Treasury Alexander Hamilton also endorsed this principle, arguing that “[t]he power to erect corporations, is not to be considered as an independent and substantive power, but as an incidental and auxiliary one; and was, therefore, more properly left to implication, than expressly granted.”<sup>59</sup>

In sum, Madison, Randolph, and Hamilton—the last of whom even believed the Bank bill to be constitutional<sup>60</sup>—all agreed that an implied power’s perceived importance affects a federal statute’s constitutionality under the Necessary and Proper Clause.<sup>61</sup> These Founding-era bank debates, then, powerfully illustrate the great-powers concept’s impressive intellectual ancestry. They also seem to have permanently reconfigured great-powers thinking—instead of asking whether an implied power reached more broadly than its enumerated parent, the relevant inquiry became whether a power was so important that it could not be exercised without itself being enumerated.

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56. Madison, *supra* note 52, at 40. Madison also insisted that the constitutional structure “condemn[s] the exercise of any power, *particularly a great and important power*, which is not evidently and necessarily involved in an express power.” *Id.* at 43 (emphasis added).

57. Memorandum from Edmund Randolph, Att’y Gen. of the U.S., to George Washington, President of the U.S. (Feb. 12, 1791), *reprinted in* HISTORY OF THE BANK, *supra* note 52, at 89, 90.

58. *Id.*

59. Memorandum from Alexander Hamilton, Sec’y of the Treasury of the U.S., to George Washington, President of the U.S. (Feb. 23, 1791), *reprinted in* HISTORY OF THE BANK, *supra* note 52, at 95, 105.

60. Baude, *supra* note 5, at 1752.

61. See William Baude, *Sharing the Necessary and Proper Clause*, 128 HARV. L. REV. F. 39, 42–43 (2014) (concluding that these “bank debates . . . [took] as common ground that the Necessary and Proper Clause extended only to incidental powers, and not potentially great ones”).

*B. Great Powers in the Marshall Court*

In *McCulloch*, which sustained the constitutionality of the Second Bank of the United States,<sup>62</sup> these legal giants' intuitions about principal versus incidental powers acquired the force of constitutional law. Chief Justice Marshall explained that some powers are too important to have been granted to Congress by implication alone. He styled these "great powers,"<sup>63</sup> "great outlines,"<sup>64</sup> "great objects,"<sup>65</sup> "vast powers,"<sup>66</sup> powers "less usual, . . . of higher dignity, . . . more requiring a particular specification,"<sup>67</sup> powers "distinct and independent,"<sup>68</sup> and "great substantive and independent power[s]."<sup>69</sup>

The Necessary and Proper Clause confirms that Congress also possesses an unspecifiable number of lesser powers to carry its enumerated grants into execution. These lesser powers are "incidental,"<sup>70</sup> "subdivisions,"<sup>71</sup> "minor ingredients which compose [larger] objects,"<sup>72</sup> and "powers . . . of inferior importance."<sup>73</sup> For Marshall, creating a corporation *could* "pass as incidental to those powers which are expressly given,"<sup>74</sup> as several other powers could not.<sup>75</sup> In any event, *McCulloch* can be fairly cited for the proposition that some powers are sufficiently important that they "cannot be

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62. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 424 (1819).

63. *Id.* at 407, 421.

64. *Id.* at 407.

65. *Id.* at 418.

66. *Id.* at 408.

67. *Id.* at 421; *see id.* (intimating that there is "reason to suppose that a constitution . . . ought to have specified" some powers); *id.* at 422 (suggesting that constitutional drafters feel a "motive for particularly mentioning" some powers).

68. *Id.* at 421.

69. *Id.* at 411.

70. *Id.* at 406.

71. *Id.* at 407.

72. *Id.*

73. *Id.* at 408.

74. *Id.* at 411.

75. Marshall provided several data points. *See id.* at 407 (characterizing as "great" the powers "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies"); *id.* at 411 (classifying "the power[s] of making war, or levying taxes, or of regulating commerce" as "great substantive and independent power[s]").

implied as incidental to other powers, or used as a means of executing them.”<sup>76</sup>

If Marshall had advanced this dichotomy to *invalidate* a congressional statute, as Chief Justice Roberts seems willing to do, constitutional scholars would surely have committed his several phrases to heart. But the logic of great powers hasn’t atrophied since *McCulloch*, even if efforts to operationalize it are “strange-sounding to modern ears.”<sup>77</sup> Nearly two centuries later, Marshall’s distant successor has championed the great-powers idea anew.

### C. *Great Powers in the Roberts Court*

Chief Justice Roberts explicitly revived this “old, established line of thinking”<sup>78</sup> in his 2012 *NFIB* opinion. The ACA’s minimum-coverage provision was not warranted under the Necessary and Proper Clause, he reasoned, because it bore the marks of a “great substantive and independent power.”<sup>79</sup> The individual mandate was not a *proper* means of executing the Commerce power, because requiring people to obtain adequate health insurance or pay a penalty “vest[ed] Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.”<sup>80</sup> It would “work a substantial expansion of federal authority” for Congress to “draw within its regulatory scope those [people] who would otherwise be outside of it,” so that it could then regulate them in a manner authorized by Article I, Section 8.<sup>81</sup>

This is an odd way of revitalizing an elementary structural principle—predicate-creation seems to have nothing to do with comparative assessments of importance and inferiority, or with abstract notions of greatness.<sup>82</sup> Nor did Roberts assist readers by

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76. *Id.* at 411; *see also* Baude, *supra* note 5, at 1753 (concluding that *McCulloch* endorsed the idea that lesser powers are more properly left to implication). Not even Professor John Manning, who opposes robust judicial enforcement of necessary-and-proper limitations, denies that *McCulloch* created such a “test”; he claims only that it “was not central to *McCulloch*’s analysis.” Manning, *supra* note 40, at 59 n.349.

77. Lawson & Kopel, *supra* note 47, at 270.

78. Baude, *supra* note 5, at 1749; *see* Burslet, *supra* note 25, at 188 (observing that “the notion of ‘great powers’ is well established”).

79. Nat’l Fed’n of Indep. Bus. (NFIB) v. Sebelius, 132 S. Ct. 2566, 2593 (2012) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 411).

80. *Id.* at 2592.

81. *Id.*

82. Koppelman claims that “here [Roberts] is no longer relying on the ‘great substantive and independent power’ idea.” Koppelman, *Health Care Reform*, *supra* note 13, at 114. If

“explain[ing] the provenance or implications of that statement.”<sup>83</sup> But he did claim that manufacturing the means for exercising an enumerated power can never truly qualify as *incidental*.<sup>84</sup> And the mandate’s perceived greatness surely accounted for the “substantial expansion of federal authority”<sup>85</sup> he predicted. Congress had attempted to aggrandize its authority relative to its proper “regulatory scope”<sup>86</sup>—that is, powers specifically enumerated and implied powers that are not themselves “great substantive and independent power[s].”<sup>87</sup> If Roberts indeed adapted his great-powers argument from Professor Gary Lawson and David Kopel’s scholarship,<sup>88</sup> he very likely understood the theoretical underpinnings of Marshall’s great-powers phraseology, because those scholars explicitly argued that a power to issue economic mandates was not *incidental* to the related Commerce power<sup>89</sup> and was too important to be left to implication.<sup>90</sup>

Roberts resorted to more orthodox great-powers reasoning in his 2013 *Kebedeaux* concurrence, propelling his intellectual stewardship of the idea. Justice Breyer’s majority opinion held that Congress could, under the Military Regulation and Necessary and Proper Clauses, require a former military serviceman to register as a sex offender well after his release from federal custody.<sup>91</sup> Roberts

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Koppelman is right, it is unclear whether Roberts *ever* relies on great-powers principles in his *NFIB* opinion. I doubt that Roberts would have emphasized predicate-creation had he not felt compelled to distinguish *NFIB* from three recent power-sustaining Necessary and Proper Clause decisions: *United States v. Comstock*, 560 U.S. 126 (2010); *Sabri v. United States*, 541 U.S. 600 (2004); and *Jinks v. Richland County*, 538 U.S. 456 (2003). See *NFIB*, 132 S. Ct. at 2592 (summarizing and distinguishing these cases).

83. Baude, *supra* note 5, at 1749.

84. *NFIB*, 132 S. Ct. at 2592.

85. *Id.*

86. *Id.*

87. *Id.* at 2593 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819)).

88. See Koppelman, *Health Care Reform*, *supra* note 13, at 112 (“The distinction . . . is drawn, without acknowledgment, from an attack on the mandate developed by Gary Lawson and David Kopel.”); *id.* at 117 (“Roberts didn’t give the credit that Lawson and Kopel deserved.”); Dorf, *supra* note 13, at 150 (“[T]his claim draws on an argument developed at some length by Gary Lawson and David Kopel.”).

89. Lawson & Kopel, *supra* note 47, at 279–80 (“[T]he power to compel the purchase of a product from another private party is not a ‘less worthy’ or less substantial power than the power to regulate commerce . . .”).

90. *Id.* at 280 (“It is an extraordinary power of independent significance, or ‘high[] dignity,’ that would be enumerated as a principal power if it were granted at all to the federal government.” (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421)).

91. *United States v. Kebedeaux*, 133 S. Ct. 2496, 2505 (2013).

concurred only in the Military Regulation Clause holding; he wrote separately to clarify that the majority opinion should not be interpreted as relying on a federal police power.<sup>92</sup> For he could imagine no clearer example of a “great substantive and independent power”<sup>93</sup> than what the majority seemed willing to countenance: an ill-defined license to “help protect the public . . . and alleviate public safety concerns.”<sup>94</sup> When a power is of “that magnitude,” Roberts “find[s] it implausible to suppose—and impossible to support—that the Framers intended to confer such authority by implication rather than expression.”<sup>95</sup> Because the majority’s military-regulation rationale upheld a power “less substantial” than a pure federal police power, the challenged registration requirement was “not such a ‘great substantive and independent power’ that the Framers’ failure to enumerate it must imply its absence.”<sup>96</sup> Perhaps Baude’s elegant article prompted Roberts to clarify his theoretical basis for quoting *McCulloch*.<sup>97</sup> In any event, the Chief Justice’s *Kebedeaux* concurrence crisply depicts the notion of great powers, improving on *NFIB*’s more enigmatic invocation.

None of Roberts’s colleagues joined these *NFIB* and *Kebedeaux* passages, but his message has begun to resonate. Writing separately in the highly anticipated 2014 case of *Bond v. United States*,<sup>98</sup> Justice Scalia argued that a congressional power to implement non-self-executing treaties<sup>99</sup> without observing structural constitutional limitations would qualify as a “great substantive and independent power.”<sup>100</sup> With the right enabling treaty, such legislative discretion would constitute a “general police power”<sup>101</sup> and enable Congress to abrogate the Court’s constitutional decisions.<sup>102</sup> Although it would

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92. *Id.* at 2507 (Roberts, C.J., concurring).

93. *Id.*

94. *Id.* (quoting *id.* at 2503 (majority opinion)).

95. *Id.*

96. *Id.* at 2508.

97. Baude clerked for Chief Justice Roberts, after all. *John G. Roberts, Jr.*, OYEZ, [http://www.oyez.org/justices/john\\_g\\_roberts\\_jr](http://www.oyez.org/justices/john_g_roberts_jr) (last visited Nov. 26, 2014).

98. *Bond v. United States*, 134 S. Ct. 2077 (2014).

99. As the Supreme Court has explained, a non-self-executing treaty “does not by itself give rise to domestically enforceable federal law” without “implementing legislation passed by Congress.” *Medellín v. Texas*, 552 U.S. 491, 505 n.2 (2008).

100. *Bond*, 134 S. Ct. at 2101 (Scalia, J., concurring) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819)).

101. *Id.*

102. *Id.* at 2100.

seem illogical for Article I to enumerate the power to allow the “principle of limited federal powers to be set aside,”<sup>103</sup> Scalia should be considered as firmly within the great-powers camp, because he favorably cited Baude’s seminal distillation of the idea of great powers.<sup>104</sup> As should Justice Thomas, who signed on to Scalia’s *Bond* concurrence in full.<sup>105</sup> Litigators have also taken the hint: Paul Clement’s brief for Carol Anne Bond itself characterized an unfettered congressional ability to effectuate non-self-executing treaties as a prohibited great power.<sup>106</sup>

Roberts’s renascent doctrine is hitting its jurisprudential stride. Because three Justices have openly endorsed the idea,<sup>107</sup> great-powers limitations may soon begin to command majority holdings, and even serve as the basis for striking down historic federal legislation. It is largely unclear where this undertheorized principle might lead.<sup>108</sup> Newfound interest in the Necessary and Proper Clause<sup>109</sup> portends “important and potentially far-reaching consequences that have not been fully appreciated—even by the Court itself.”<sup>110</sup> Now is the

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103. *Id.* at 2102. Scalia’s application is therefore conceptually problematic, because he presumably means that an unreviewable power to implement non-self-executing treaties is too important to be exercised through implication rather than enumeration.

104. Scalia specifically cited Baude’s seven-page synopsis of the great-powers concept, not just his article generally. *Id.* at 2101. And it is fair to assume that the Justice who insisted that Congress “does not . . . hide elephants in mouseholes,” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001), believes that Article I does not, either.

105. *Bond*, 134 S. Ct. at 2094 (Scalia, J., concurring).

106. See Brief for Petitioner at 61, *Bond v. United States*, 134 S. Ct. 2077 (2014) (No. 12-158) (“[T]he last place such plenary power lies inchoate . . . is the Necessary and Proper Clause. An unchecked power to implement treaties would amount to exactly the sort of ‘great substantive and independent power’ that the Necessary and Proper Clause cannot supply.” (citations omitted)). Similarly, in a 2013 amicus brief disputing the constitutionality of the Defense of Marriage Act, a group of federalism scholars argued that a congressional power to define marital status is “exactly the type of power we would expect the Constitution to enumerate.” Brief of Federalism Scholars, *supra* note 5, at 16.

107. Manning, *supra* note 40, at 59 (“Several members of the Roberts Court, though not the Court itself, have now endorsed the ‘great powers’ approach as one metric for determining what is ‘necessary and proper.’”).

108. See Baude, *supra* note 61, at 48 (“We just don’t know yet how much that inquiry will yield, and what the answers will be. Much of the post-Founding discussion . . . will probably be found in congressional and executive materials, not case law, and nobody has yet systematically perused those materials with the relevant ‘revisionist’ lens.” (footnote omitted)).

109. See LaCroix, *supra* note 13, at 2060 (“In recent years . . . the Court has increasingly brought the necessary and proper power to the center of federalism doctrine.”).

110. *Id.* at 2049; see *id.* at 2060 (“Because the power is relatively undertheorized, it provides new avenues for doctrinal development, sometimes in surprising directions.”).



time—not in the crucible of litigation—for scholars to survey the great-powers concept’s sphere of operation.

## II. TERRITORIAL ANNEXATION: A TEXTBOOK GREAT POWER

“It is worth asking,” of course, “whether and in what fashion the Constitution permits the United States to expand its territory.”<sup>111</sup> Consistent application of the great-powers doctrine suggests a shocking consequence: Texas and Hawaii were very likely acquired unconstitutionally, their legislative annexations “merely acts of usurpation.”<sup>112</sup> Both land masses were annexed to the United States through ordinary lawmaking in the form of a joint resolution.<sup>113</sup> I start with the assumption, required by the Tenth Amendment, that “every exercise of [congressional] power must be traceable to an explicit or implicit grant of power in the document.”<sup>114</sup> There is no enumerated territorial-annexation power in Article I, Section 8 or anywhere else in the Constitution.<sup>115</sup> Congress’s power to acquire foreign territory must be inferred as incidental to a granted power, or it does not exist.<sup>116</sup>

Article IV, Section 3’s Admissions Clause provides that “[n]ew States may be admitted by the Congress into this Union.”<sup>117</sup> With

111. GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 21 (2004); see John Gorham Palfrey, *The Growth of the Idea of Annexation, and Its Breaking upon Constitutional Law*, 13 HARV. L. REV. 371, 394 (1899) (“Whether the [C]onstitution is violated or not is a serious question.”).

112. Nat’l Fed’n of Indep. Bus. (NFIB) v. Sebelius, 132 S. Ct. 2566, 2592 (2012) (quoting *Printz v. United States*, 521 U.S. 898, 924 (1997)).

113. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 835 (1995) (characterizing both annexation resolutions as “ordinary domestic legislation”). For the joint resolutions themselves, see generally Joint Resolution for the Admission of the State of Texas into the Union, J. Res. 1, 29th Cong., 9 Stat. 108 (1845), and Joint Resolution To Provide for Annexing the Hawaiian Islands to the United States, J. Res. 55, 55th Cong., 30 Stat. 750 (1898).

114. LAWSON & SEIDMAN, *supra* note 111, at 22; see *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (“[O]ur Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones.”). Article I, after all, vests Congress with “[a]ll legislative Powers *herein granted*.” U.S. CONST. art. I, § 1 (emphasis added).

115. CONG. GLOBE, 28th Cong., 2d Sess. 186 (1845) (statement of Rep. Dromgoole); *id.* app. at 84 (statement of Rep. Brengle); 31 CONG. REC. 6334 (1898) (statement of Sen. Foraker); LAWSON & SEIDMAN, *supra* note 111, at 21.

116. See CONG. GLOBE, 28th Cong., 2d Sess. 125 (1845) (statement of Rep. Kennedy) (“If, therefore, there was a power to acquire territory at all, conveyed in that instrument, all must admit it to be a power of implication alone.”).

117. U.S. CONST. art. IV, § 3, cl. 1.

respect to Texas, this clause was the only textual “great outline” to which an implied annexation power might have fairly answered.<sup>118</sup> But regardless of means–ends fit, acquiring sovereign territory is exactly the kind of power that seems so important, so consequential, that it would have been enumerated if Congress were meant to possess it. And the relevant incident–principal relationship—using an implied power (annexation) to create the necessary predicate for the exercise of an enumerated power (admission of new states)—eerily resembles the arrangement Roberts condemned in *NFIB*.<sup>119</sup>

The typical constitutional defense of Congress’s annexation of Texas goes something like this: Article IV empowers Congress to admit new states to the Union. “It does not say precisely how this must be accomplished. Congress chose to admit Texas as a new state, by joint resolution. End of debate.”<sup>120</sup> But several structural and functionalist considerations,<sup>121</sup> along with pre-1845 governmental practice,<sup>122</sup> suggest that Congress may admit new states only from territory that existed when the Constitution was ratified or that might be acquired through treaty. Moreover, the above defense highlights Hawaii’s even shakier constitutional status, because sixty-one years elapsed between its annexation and admission to the Union.<sup>123</sup> Regarding Hawaii, it is irrelevant for great-powers purposes whether the language of the Admissions Clause actually authorizes Congress to admit foreign territory directly to statehood, because Congress

118. See CONG. GLOBE, 28th Cong., 2d Sess. 280 (1845) (statement of Sen. Morehead (“[O]f all the articles in the [C]onstitution, and of all the enumerated powers of that instrument, it is only upon the [Admissions Clause], that reliance is placed for the authority of Congress to annex a foreign territory to this Union.”)). As Ralph Brock has noted, when Congress annexed Texas through joint resolution, it purported to “act[] under [its] power to admit new states.” Ralph H. Brock, “*The Republic of Texas Is No More*”: An Answer to the Claim That Texas Was Unconstitutionally Annexed to the United States, 28 TEX. TECH L. REV. 679, 728 (1997).

119. See *supra* notes 80–81 and accompanying text.

120. James W. Paulsen, *If at First You Don’t Secede: Ten Reasons Why the “Republic of Texas” Movement Is Wrong*, 38 S. TEX. L. REV. 801, 803 (1997); see also LAWSON & SEIDMAN, *supra* note 111, at 93 (“If Congress passed (and the President signed) ordinary legislation authorizing the annexation of territory, that legislation would be fully effective as a matter of domestic law. . . . [T]he legislation could be enacted pursuant to the Admissions Clause if the territory was immediately entering statehood.”).

121. See *infra* Part II.A.2.

122. See *infra* notes 144–49, 198–206 and accompanying text.

123. See *infra* notes 228–29 and accompanying text. Lawson and Seidman see no constitutional problem here, either: they argue that Congress may acquire foreign territory “pursuant to the [Necessary and Proper] Clause if [the acquired land] was to be held as a territory for some time (or if, for some reason, acquisition must temporally precede admission).” LAWSON & SEIDMAN, *supra* note 111, at 93.

chose not to confer statehood on Hawaii immediately.<sup>124</sup> Hawaii thus presents the perfect test case for territorial annexation as a “great substantive and independent power.”

This jarring application of the great-powers concept is not entirely original. Constitutional opponents of annexing Texas repeatedly anticipated this Part’s exact argument,<sup>125</sup> though no one seems to have consciously invoked Marshall’s magic phrases. In both 1845 and 1898, congressmen assembled a strong textual and structural case for the unconstitutionality of annexation through joint resolution. Even if constitutional objections ultimately subserved antislavery and anti-imperialist motives,<sup>126</sup> these congressmen exhibited an impressive devotion to the limiting logic of a government of enumerated powers.<sup>127</sup> This Part explores their arguments against the backdrop of the reinvigorated great-powers doctrine. Consistent application of this doctrine should lead its proponents to conclude that Texas and Hawaii were unconstitutionally annexed to the United States.

In 1898, though, virtually all congressional opponents of annexing Hawaii implicitly conceded that Texas withstood constitutional rigor, because it had been annexed (and admitted) pursuant to the literal words of the Admissions Clause.<sup>128</sup> Hawaii would not elect senators and congressmen immediately,<sup>129</sup> so no

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124. See *infra* note 229 and accompanying text.

125. To my knowledge, this Note is the first effort to canvass Texas’s annexation through the lens of great powers. So I disagree that Professor Earl Maltz’s excellent article provides a “complete analysis of the constitutional aspects of the struggle over Texas.” Earl M. Maltz, *The Constitution and the Annexation of Texas*, 23 CONST. COMMENT. 381, 381 (2006).

126. But see Mark A. Graber, *Settling the West: The Annexation of Texas, The Louisiana Purchase, and Bush v. Gore*, in *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803-1898*, at 83, 88 (Sanford Levinson & Bartholomew Sparrow eds., 2005) (denying that “objections to [Texas’s] annexation overtly based on opposition to the joint resolution and expansionism were smokescreens for the objections based on opposition to slavery”).

127. Their exertions thus powerfully demonstrate how the great-powers concept “can be useful in nonjudicial constitutional interpretation,” since “Congress and the President . . . are supposed to decide whether the laws they pass and implement are constitutionally permissible.” Baude, *supra* note 5, at 1810.

128. See, e.g., CONG. GLOBE, 28th Cong., 2d. Sess. 246 (1845) (statement of Sen. Walker) (“[T]hat clause of the [C]onstitution, which authorizes Congress to admit new States into the Union . . . was in express words, and no man has a right to interpolate restrictions.”); *id.* at 321 (statement of Sen. Merrick) (“‘New States may be admitted by the Congress into the Union.’ How plain! [H]ow explicit! [H]ow comprehensive! Language could not be plainer; and words could not show more directly and more certainly our authority and power to pass the joint resolution now on the table, than these words.”).

129. Hawaii did not become a state until 1959. See *infra* note 229.

institutional precedent could squarely legitimate its annexation. But by conceding Texas's constitutionality to facilitate distinction-drawing, opponents surrendered the even clearer great-powers objection to acquiring foreign territory not immediately intended for statehood. After all, the Constitution apparently permitted one species of legislative annexation, and surely the power to acquire new possessions *and* convert them to statehood included the power merely to acquire those possessions. Accordingly, great-powers rhetoric appeared nowhere in the congressional campaign to defeat Hawaii's annexation,<sup>130</sup> where it could have operated even more forcefully than in 1845.

The annexation of Hawaii therefore represents a regrettable missed opportunity for a robust congressional debate about what "great substantive and independent power[s]" are and how to reason about them responsibly. But the terms on which this debate was conducted nonetheless suggest a useful heuristic for identifying great powers: if a power can be (or historically has been) justified only as an incident of national sovereignty, it is an especially worthy contender for great-power status.

Four objections are worth answering before examining the Texas and Hawaii annexations in Parts II.A and II.B. First, "it is wrong to view the admission of Texas as if it involved a congressional-executive agreement," and "[t]he same is true of Hawaii."<sup>131</sup> Congress acted unilaterally in both cases; its "ordinary domestic legislation" did not simply ratify executive agreements negotiated with foreign powers.<sup>132</sup> So I disagree with Vasán Kesavan and Professor Michael Stokes Paulsen that Texas's annexation represents "the first 'congressional-executive agreement' in the history of the United States."<sup>133</sup>

Second, a congressional territorial-annexation power cannot be inferred from the enumerated power "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . *all other Powers* vested by th[e] Constitution in the Government of the United

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130. Congressmen debated the issue throughout June 1898. See 31 CONG. REC. 5770–6712 (1898) (analyzing the political and constitutional issues related to Hawaii's annexation).

131. Ackerman & Golove, *supra* note 113, at 835.

132. *Id.*

133. Vasán Kesavan & Michael Stokes Paulsen, *Let's Mess with Texas*, 82 TEX. L. REV. 1587, 1593 (2004). Nor was either statutory annexation essentially a "treaty ratified by joint resolution." Eric Steven O'Malley, Note, *Irreconcilable Rights and the Question of Hawaiian Statehood*, 89 GEO. L.J. 501, 512 (2001).

States.”<sup>134</sup> Article II empowers the president to “make Treaties” with foreign governments, subject to Senate ratification.<sup>135</sup> But a congressional power to annex foreign territory in no way effectuates the president’s power to conclude treaties annexing foreign territory—it supplants it. Annexing foreign territory no more implements the power to annex foreign territory than granting letters of marque effectuates the power to grant letters of marque.<sup>136</sup>

Third, Professors Bruce Ackerman and David Golove object that the treaty process was ill-suited to acquire the Republics of Texas and Hawaii. After all, “what would have been the point of a treaty with a country that was immediately going out of existence when the agreement was executed? . . . Any promises made in a treaty would have immediately lost their international character.”<sup>137</sup> But annexation clauses do not make promises—they transfer land. Cession treaties need not stipulate *any* ongoing obligations between sovereign nations. And regardless, the specter of international-law anomalies cannot create congressional authority within a framework of limited and enumerated powers.<sup>138</sup> If the Constitution does not authorize congressional acquisition of foreign territory, any oddity in allowing entire countries to be acquired through treaty cannot rectify statutory annexation’s constitutional defects.

Fourth, and similarly, Congress cannot bootstrap its way into possessing a territorial-annexation power merely because the treaty form seems poorly adapted to acquiring certain lands. Consider the case of truly unoccupied territory, or of territory so sparsely inhabited

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134. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

135. U.S. CONST. art. II, § 2, cl. 2.

136. See U.S. CONST. art. I, § 8, cl. 11 (empowering Congress to “grant Letters of Marque and Reprisal”).

137. Ackerman & Golove, *supra* note 113, at 835; see also LAWSON & SEIDMAN, *supra* note 111, at 109 (“A treaty could secure the consent of the foreign sovereign to annexation, but as soon as the annexation is complete, the treaty no longer exists because one of the parties to the treaty no longer exists.”).

138. As Lawson and Seidman themselves insist, “The United States government is defined by the federal Constitution, not by the law of nations.” LAWSON & SEIDMAN, *supra* note 111, at 100; see *Nat’l Fed’n of Indep. Bus. (NFIB) v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (“If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted . . . .”); *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (“Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones.”); *Fleming v. Page*, 50 U.S. (9 How.) 603, 618 (1850) (“Our own Constitution and form of government must be our only guide.”); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) (“The enumeration [of certain congressional powers] presupposes something not enumerated.”).

as to enjoy no centralized control and therefore no obvious authority to cede land.<sup>139</sup> No negotiating counterparty would exist in such situations. Yet the Supreme Court accounted for them in 1890, when it recognized an organic mode of acquiring territorial sovereignty: “dominion of new territory may be acquired by discovery and occupation . . . of territory unoccupied by any other government or its citizens.”<sup>140</sup> Whatever the merits of this position,<sup>141</sup> the more fundamental point is that Congress may never legislate over an area simply because denying it such power would be inconvenient.<sup>142</sup>

#### A. Texas

Despite President Jefferson’s constitutional misgivings,<sup>143</sup> the United States annexed the Louisiana Territory by treaty in 1803.<sup>144</sup> It acquired Spanish Florida through the same means in 1819.<sup>145</sup> By 1828, Chief Justice Marshall could declare that the “government possesses the power of acquiring territory, either by conquest or by treaty.”<sup>146</sup> So when the Tyler administration set its sights on Texas, it was black-letter law that the United States could constitutionally acquire foreign

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139. I thank Bill O’Connell for pressing this point.

140. *Jones v. United States*, 137 U.S. 202, 212 (1890).

141. Lawson and Seidman argue that *Jones* was “singularly unpersuasive” on this score because it justified discovery-based acquisition through “general understandings about governmental power drawn from the law of nations,” apparently without reference to domestic constitutional limitations. LAWSON & SEIDMAN, *supra* note 111, at 100. Those same limitations also undermine Lawson and Seidman’s defense of a congressional annexation power. *See infra* notes 328–34 and accompanying text.

142. *See supra* note 138 and accompanying text.

143. *See* EVERETT SOMERVILLE BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE, 1803-1812*, at 23 (1920) (describing Jefferson’s perceived “need of a constitutional amendment to authorize the acquisition” of foreign territory). Jefferson presumably would have been doubly opposed to statutory annexation because of the additional burden of justifying congressional power.

144. Treaty Between the United States of America and the French Republic, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200.

145. Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252.

146. *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 542 (1828). If territorial annexation is indeed a great power, any assumed *national* power to acquire enemy territory through military conquest should not be understood as a latent *congressional* power incidental to its enumerated power to declare war. For if annexation is too important to be inferred, this holds true regardless of which enumerated power it might effectuate. The propriety of acquiring territory through military conquest is therefore governed not directly by domestic constitutional law, but by *jus in bello*—the body of international law marking the limits of acceptable belligerent behavior.

territory through treaty.<sup>147</sup> American and Texian<sup>148</sup> diplomats signed such a treaty in April 1844, but the Senate rejected it by the overwhelming margin of 35–16.<sup>149</sup>

Annexationists soon resorted to the more numerically permissive device of ordinary lawmaking in the form of a joint resolution. This proposal was unprecedented, since the United States had never acquired foreign territory legislatively.<sup>150</sup> As Chief Justice Roberts later observed in *NFIB*, “sometimes ‘the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent’ for Congress’s action.”<sup>151</sup> Opponents of annexation certainly “pause[d] to consider the implications”<sup>152</sup> of a never-before-asserted congressional power. Congressman Samuel Sample, for one, labeled this opportunistic circumvention of the customary treaty process “a hop, skip, and jump over the [C]onstitution.”<sup>153</sup> The Supreme Court’s

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147. It appears that not a single congressman disputed this proposition during the debates over annexing Texas. *See, e.g.*, CONG. GLOBE, 28th Cong., 2d Sess. 186 (1845) (statement of Rep. Dromgoole) (“[H]e did not question the power of this government to be exercised by the President, in the form of a treaty, by and with the advice and consent of the Senate, to acquire territory.”); *id.* at 187 (statement of Rep. Barnard) (“[H]e admitted—and this was the important point in his admissions—that the government may acquire foreign territory by treaty.”); *see also* Palfrey, *supra* note 111, at 386 (“[S]carcely a word was said [in 1845] against acquisition of territory by the treaty-making power . . .”). The Supreme Court has repeatedly acknowledged (though never held) that the United States may annex foreign territory through treaty. *See* *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 673 (1945) (“It is no longer doubted that the United States may acquire territory by . . . treaty . . .”); *Wilson v. Shaw*, 204 U.S. 24, 32 (1907) (“It is too late in the history of the United States to question the right of acquiring territory by treaty.”).

148. Citizens of the Republic of Texas referred to themselves as “Texians,” not “Texans.” Dorman H. Winfrey, *Mirabeau H. Lamar and Texas Nationalism*, 59 S.W. HIST. QUART. 184, 188 (1955).

149. CONG. GLOBE, 28th Cong., 1st Sess. 652 (1844); LAWSON & SEIDMAN, *supra* note 111, at 92.

150. *See* CONG. GLOBE, 28th Cong., 2d Sess. 121 (1845) (statement of Rep. Sample) (“[T]his question was a new one, so far as regarded the power of the House to act on the subject.”); *id.* app. at 84 (1845) (statement of Rep. Brengle) (“It was now, for the first time, after the lapse of almost three score years and ten, that we were called to exercise a power hitherto latent, and which had remained undiscovered, or at least unused, all that time.”); *id.* app. at 215 (statement of Rep. Seymour) (“There is not, sir, a solitary case to be found in the whole history of our legislation . . . for a period of more than half a century, in which foreign territory has been acquired by the action of the legislative power alone.”); *id.* app. at 411 (statement of Rep. Rayner) (characterizing legislative annexation as entirely “unsanctioned by national usage”).

151. *Nat’l Fed’n of Indep. Bus. (NFIB) v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010)).

152. *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

153. CONG. GLOBE, 28th Cong., 2d Sess. app. at 72 (1845) (statement of Rep. Sample). Others were less diplomatic: “[I]t was a new and monstrous heresy on the [C]onstitution, got up

treatment of historical practice suggests a wisdom to Sample's skepticism.<sup>154</sup>

Part II.A.1 tracks individual congressmen's assertions that the power to annex foreign territory is too important to have been left to implication. Part II.A.2 rounds out the great-powers objection to annexing Texas by providing textual and structural support for a reading of the Admissions Clause that forbids Congress to admit foreign territory directly to statehood.

1. *The Great-Powers Objection.* Echoing *McCulloch*, and prefiguring *NFIB* and *Kebedeaux*, opponents of acquiring Texas converged on a basic objection: annexation of foreign territory was too important a constitutional power to have been left to implication. Senator William Archer observed that congressional "powers of principal order" were enumerated "in one place, and with each other."<sup>155</sup> Acquiring foreign land was a fateful undertaking—it could "change the whole character of the government."<sup>156</sup> Could it be believed that "if a power far larger than any of these principal powers . . . was intended to be given," the Framers would have failed to mention it?<sup>157</sup> How could annexationists account for "this great power[']s" omission from the schedule of enumeration?<sup>158</sup> Annexation-through-implication could not be squared with the act's "extraordinary importance," or with the painstaking scheme of legislative empowerment.<sup>159</sup> Others esteemed annexation a "very important and high power,"<sup>160</sup> a "distinct, substantive, independent power,"<sup>161</sup> "peculiarly important,"<sup>162</sup> "so vast and responsible a

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. . . for the mere purpose of carrying a measure by a bare majority of Congress, that could not be carried by a two-thirds majority of the Senate." *Id.* at 304 (statement of Sen. Choate).

154. Very recently, the Court "*put significant weight upon historical practice*" in interpreting the Recess Appointments Clause. *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (emphasis in original). Regardless of the subject matter, the "Court has treated [historical] practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute." *Id.* at 2560 (collecting several cases).

155. CONG. GLOBE, 28th Cong., 2d Sess. app. at 328 (1845) (statement of Sen. Archer).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* app. at 85 (statement of Rep. Brengle).

161. *Id.* at 188 (statement of Rep. Barnard). Chief Justice Marshall used each of these descriptors in *McCulloch*. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819) (labeling as "great substantive and independent" those powers that cannot be implied as incidental to an enumerated power); *id.* at 421–22 (claiming that "distinct and independent"



power,”<sup>163</sup> and a “proposition so important.”<sup>164</sup> Annexation was the “the main question” to which associated enumerations seemed “incidental” by comparison.<sup>165</sup>

Proponents of annexation pointed to the Admissions Clause of Article IV, Section 3, which provides that “[n]ew States may be admitted by the Congress into this Union.”<sup>166</sup> Were these not the “plainest and broadest words known to the English language”?<sup>167</sup> The Constitution’s text interposed “nothing to limit the constitutional power of Congress” to admit new states.<sup>168</sup> For Congressman James Pollock, though, such offhand literalism elided a crucial structural inquiry. If the power to admit implies the power to acquire in order to admit, “the incident is superior to the principal; the implied power more important than the power granted.”<sup>169</sup> Although in most instances “the major proposition may and does include the minor . . . here the minor is made to include the major, which is an absurdity.”<sup>170</sup>

Likewise, Congressman Kenneth Rayner warned that failing to police the concept of incidentality “would convert this government into one of unlimited and undefinable power.”<sup>171</sup> Annexationists had

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powers cannot be exercised without a “place among the enumerated powers of [Congress]”). It seems extremely unlikely that someone would have independently composed this precise configuration of words, but I also doubt that a Whig congressman would have consciously declined to invoke Marshall’s authority on this divisive constitutional issue. The *Globe* gives no indication that Barnard drew his words or ideas from *McCulloch*.

162. CONG. GLOBE, 28th Cong., 2d Sess. app. at 339 (1845) (statement of Rep. Garrett Davis).

163. *Id.* at 125 (statement of Rep. Kennedy).

164. *Id.* at 191 (statement of Rep. McIlvaine).

165. *Id.* at 121 (statement of Rep. Sample). This Note does not consider whether annexation is somehow more or less important than the associated power to admit new states.

166. U.S. CONST. art. IV, § 3, cl. 1; *see* Kmiec, *supra* note 27, at 19 (“Congress’ power to admit new states, it was argued, was the basis of constitutional power to [e]ffect the annexation.”).

167. CONG. GLOBE, 28th Cong., 2d Sess. 122 (1845) (statement of Rep. Dean); *see also id.* at 281 (statement of Rep. Morehead) (characterizing the argument as follows: “The [C]onstitution said that Congress might admit new States into the Union; Texas was [to be] a new State; *ergo*, Congress might admit Texas into the Union.”).

168. *Id.* at 122 (statement of Rep. Dean).

169. *Id.* app. at 359 (statement of Rep. Pollock).

170. *Id.*

171. *Id.* app. at 411 (statement of Rep. Rayner). Almost 170 years later, Chief Justice Roberts concluded that characterizing the ACA’s minimum-coverage provision as “incidental” to the Commerce power “would work a substantial expansion of federal authority.” *Nat’l Fed’n of Indep. Bus. (NFIB) v. Sebelius*, 132 S. Ct. 2566, 2592 (2012).

forgotten that “implied power[s] must be proper, as well as necessary.”<sup>172</sup> Rayner thus shoehorned his structural intuition into the Necessary and Proper Clause’s text, as Chief Justice Roberts would later do.<sup>173</sup> Rayner analogized annexation for the sake of admission to the seizure of private bullion in order to coin money, or the impressment of sailors in order to provide and maintain a navy.<sup>174</sup> All three “absurdities” would warp the constitutional structure through a licentious reading of the Necessary and Proper Clause.<sup>175</sup>

The Senate Foreign Relations Committee also exposed the joint resolution’s perceived constitutional deficiencies in a scathing report denouncing the proposed annexation of Texas. The Committee, too, argued that territorial annexation was too important a legislative topic to be discovered through the Necessary and Proper Clause. Incidental powers must be “fair, not forced, accidents” of their enumerated parents.<sup>176</sup> The Constitution nowhere mentioned a congressional annexation power, “as might have been expected, supposing it contemplated.”<sup>177</sup> Annexationists derived this power from “a single line in the Constitution”: the Admissions Clause.<sup>178</sup> “How brief the phrase, how pregnant the import, if the widest of the interpretations claimed for it is to be adopted!”<sup>179</sup> As the Committee contended, that clause—“so circumscribed in words, and inserted . . . in no important connection in the Constitution”—could not accommodate the claimed power’s “indefiniteness and magnitude.”<sup>180</sup> So the Committee specifically asserted that annexation was too great to be accomplished through implication, and it more broadly suggested that a vast and important power should not be inferred from an enumerated relative if the granted power was apparently not

172. CONG. GLOBE, 28th Cong., 2d Sess. app. at 411 (1845) (statement of Rep. Rayner).

173. Roberts explained that “[e]ven if the individual mandate is ‘necessary’ to the Act’s insurance reforms, such an expansion of federal power is not a ‘proper’ means for making those reforms effective.” *NFIB*, 132 S. Ct. at 2592.

174. CONG. GLOBE, 28th Cong., 2d Sess. app. at 411 (1845) (statement of Rep. Rayner).

175. *Id.*

176. S. REP. NO. 28-79 (1845) [hereinafter TEXAS REPORT], in 6 COMPILATION OF REPORTS OF COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 1789-1901, FIRST CONGRESS, FIRST SESSION, TO FIFTY-SIXTH CONGRESS, SECOND SESSION 78, 81 (1901) [hereinafter REPORTS OF COMMITTEE ON FOREIGN RELATIONS].

177. *Id.* at 83.

178. *Id.* at 92.

179. *Id.* In other words, the Constitution “does not . . . hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

180. TEXAS REPORT, *supra* note 176, at 92.

significant enough to warrant inclusion in Article I, Section 8's fraternity of "great outlines."<sup>181</sup>

Congressman Francis Brengle emphasized annexation's importance by examining the rest of Article IV, Section 3. Under that section's Property Clause, Congress may also "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>182</sup> If the power to dispose of territory was "a matter of so much interest" as to induce its enumeration, why was the power to *acquire* territory—so "high and important an act"—not also mentioned if Congress was supposed to possess it?<sup>183</sup> As Brengle remarked, "Here was the proper place to insert it, and yet not a word was said about it. Surely the one power was as important as the other."<sup>184</sup>

For what it might be worth, constitutional critics of annexing Texas also anticipated the peculiar variant of great-powers thinking that Chief Justice Roberts introduced in *NFIB*: that Congress may not create the necessary predicate to the exercise of an enumerated power, thereby drawing within its regulatory ambit something properly outside of it.<sup>185</sup> If an annexation power followed from the power to admit new states, Congressman Daniel Barnard reasoned, "the incident precedes, and actually creates, the principal power. There is no subject-matter for the principal power to operate upon, till the incident has acted."<sup>186</sup> Surely this was "a new discovery in the way of incidental powers."<sup>187</sup> On the same principle, Congress could acquire foreign territory in order to establish post roads or conduct a census there.<sup>188</sup> But Article IV, Section 3's cognate clauses conferred

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181. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). Senator Willie Mangum similarly noted the "peculiar position which [the Admissions Clause] occupied in that instrument. . . . It was not placed in juxtaposition to the enumerated powers of Congress, but was found in the third section of the fourth article, separate from the enumerated powers of Congress." CONG. GLOBE, 28th Cong., 2d Sess. 280 (1845) (statement of Sen. Mangum).

182. U.S. CONST. art. IV, § 3, cl. 2.

183. CONG. GLOBE, 28th Cong., 2d Sess. app. at 85 (statement of Rep. Brengle).

184. *Id.*

185. *Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 132 S. Ct. 2566, 2592 (2012).

186. CONG. GLOBE, 28th Cong., 2d Sess. app. at 350 (1845) (statement of Rep. Barnard); *see also id.* ("[T]he Texian territory must be brought into the United States, and under its jurisdiction, before the power to admit a State into the Union out of it can begin to operate.").

187. *Id.*

188. *See id.* (offering a slightly different example—annexation of foreign territory in order to regulate commerce between such land and the United States "on the footing of commerce between the States").

no “power of acquisition, or authority of primary character.”<sup>189</sup> Both clauses spoke instead to the “auxiliary power of arrangement and regulation of subjects already, or by some other warrant to be brought within the jurisdiction of the government.”<sup>190</sup> In other words, the enumerated power to regulate territory and property did *not* “confe[r] as an incident upon Congress the power to acquire territory and property to furnish something to govern and to regulate.”<sup>191</sup>

2. *Structural and Functionalist Arguments Against Admissions Clause Literalism.* The argument that Texas’s annexation was too important to be left to implication depends, of course, on the assumption that the Admissions Clause did not itself authorize foreign acquisitions. (If it did, the power would be enumerated, not implied.) The Clause itself seems capacious enough: “New States may be admitted by the Congress.”<sup>192</sup> But admitted from what territory? This Subsection does not exhaustively survey the Framing generation’s subjective hopes and expectations (if any) about how the Clause would apply, nor does it reconstruct the putative semantic content of “new” and “state” at the time of ratification.<sup>193</sup> It instead summarizes anti-annexationists’ powerful rejoinder to Admissions Clause literalism: that Congress may admit new states only from the

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189. *Id.* app. at 340 (statement of Rep. Garrett Davis).

190. *Id.*

191. *Id.*

192. U.S. CONST. art. IV, § 3, cl. 1.

193. Immediately after Hawaii’s annexation, one public-minded lawyer offered a restrictive originalist take on congressional power under the Admissions Clause. See James W. Stillman, *A New Method of Acquiring Territory*, 10 GREEN BAG 373, 375 (1898) (“[T]he provision of the Constitution authorizing Congress to admit new States was intended by its authors to apply only to such States as might be formed out of territory already belonging to the United States and out of such other territory as it might afterwards acquire by the treaty-making power and by conquest.”). But perhaps because the Articles of Confederation explicitly authorized Canada’s admission to the old Confederation, an informed citizen might have understood the Constitution’s Admissions Clause to permit foreign annexations, too. See ARTICLES OF CONFEDERATION of 1781, art. XI (“Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.”). Then again, Article XI explicitly authorized foreign annexations; the Admissions Clause did not. This shift may have been a deliberate effort to disallow legislative annexation. Or perhaps the Framers intentionally sidestepped the issue in order to preserve a precarious coalition, allowing later generations to fix the Admissions Clause’s geographic scope through resort to structural and functionalist arguments that experience might illuminate.

territories in existence when the Constitution was ratified or from land later acquired through treaty.<sup>194</sup>

Especially because the rest of Article IV speaks only to domestic concerns,<sup>195</sup> the great-powers concept should inform our interpretation of the Admissions Clause's surface ambiguity; that is, we should resolve any semantic doubt *against* an enumerated power's directly encompassing legislative objects that seem too important not to have been unequivocally authorized.<sup>196</sup> Congressmen marshaled the following six arguments to discredit an interpretation of the Admissions Clause that would allow Congress to admit foreign territory directly to statehood. The stronger their arguments, the more purely great-powers principles apply to the annexation of Texas.<sup>197</sup>

First, history had demonstrated that the treaty power was the sole governmental means of acquiring foreign territory.<sup>198</sup> Annexation through treaty had been “sanctioned by a number of precedents”<sup>199</sup>—

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194. Or, technically, from land acquired through discovery or military conquest. For several congressional assertions of the Admissions Clause's limited geographic domain, with varying levels of historical substantiation, see CONG. GLOBE, 28th Cong., 2d Sess. 121 (1845) (statement of Rep. Sample); *id.* at 188 (statement of Rep. Barnard); *id.* at 190 (statement of Rep. Stephens); *id.* at 280 (statement of Sen. Morehead); *id.* at 292 (statement of Sen. Rives); *id.* at 321 (statement of Sen. Simmons); *id.* at 391 (statement of Sen. Barrow).

195. The Admissions Clause is “immediately followed by two distinct provisions which limit the exercise of the power, and which, by their very terms, are confined to the United States.” *Id.* app. at 385 (statement of Sen. Berrien). Why would “the grant of the power relate to one subject and the limitation to another; the power to foreign, the limitation to domestic States?” *Id.* It is much more likely that “the same subject was in the minds of the framers of the [C]onstitution, in granting the power, as in prescribing its limitation.” *Id.*

196. Perhaps great-powers concerns are themselves responsible for this perception of textual ambiguity. See Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. (forthcoming 2015) (explaining how extratextual considerations such as structural inferences, customary practice, and anticipated consequences can shape constitutional interpreters' initial perceptions of textual clarity).

197. In any event, this Admissions Clause defense applies only to foreign territory annexed and admitted to statehood simultaneously. No enumerated power directly authorized Hawaii's statutory annexation to the lesser status of a federal territory. See *infra* note 276 and accompanying text.

198. For several endorsements of the exclusivity of treaty-based annexation, see CONG. GLOBE, 28th Cong., 2d Sess. 108 (1845) (statement of Rep. Caleb Smith); *id.* at 121 (statement of Rep. John Davis); *id.* at 137 (statement of Rep. Garrett Davis); *id.* at 190 (statement of Rep. Adams); *id.* at 279 (statement of Sen. Morehead); *id.* at 292 (statement of Sen. Rives); *id.* at 321 (statement of Sen. Simmons); *id.* app. at 71 (statement of Rep. Sample); *id.* app. at 216 (statement of Rep. Seymour); *id.* app. at 359 (statement of Rep. Barnard); *id.* app. at 410 (statement of Rep. Rayner).

199. *Id.* at 280 (statement of Sen. Morehead).

Louisiana,<sup>200</sup> Florida,<sup>201</sup> and the earlier-attempted Texas agreement.<sup>202</sup> This unbroken progression demonstrated the treaty power's exclusivity as "the only legitimate construction of the constitution."<sup>203</sup> Treating for foreign territory had become "our settled policy,"<sup>204</sup> the proper course "from the first organization of the government to the present time."<sup>205</sup> The federal government had likely resorted to the treaty process out of a sense of constitutional obligation, given that "there had been frequent occasion for using [the congressional annexation power], had its existence been known."<sup>206</sup> Why did annexationists let themselves suffer such an excruciating embarrassment—the Texas treaty's failure—if there had been a much simpler procedural alternative consistent with the Constitution?

Second, because no one doubted that the United States could validly acquire foreign territory through treaty, annexationists would bizarrely locate the same constitutional power in multiple sets of federal actors. An expansive reading of the Admissions Clause would thus "destroy the marks and the lines of division" in the Constitution.<sup>207</sup> The Framers could not have countenanced an institutional race to the negotiating table, granting a concurrent annexation authority "to be exercised by the first which might seize upon its subject."<sup>208</sup>

200. Treaty Between the United States of America and the French Republic, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200.

201. Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252.

202. See CONG. GLOBE, 28th Cong., 1st Sess. 652 (1844) (documenting the Senate's rejection of an annexation treaty with the Republic of Texas).

203. CONG. GLOBE, 28th Cong., 2d Sess. 280 (1845) (statement of Sen. Morehead).

204. *Id.* app. at 72 (statement of Rep. Sample).

205. *Id.* app. at 215 (statement of Rep. Seymour); see also TEXAS REPORT, *supra* note 176, at 81 ("The foreign territory which the nation has acquired having come through the avenue of the treaty-making power of the Government, the opinion until very recently has prevailed universally that this was the sole avenue through which it could be derived.").

206. CONG. GLOBE, 28th Cong., 2d Sess. app. at 84 (1845) (statement of Rep. Brengle); see also *id.* ("When this measure of annexation was first proposed, who thought of resorting to the legislation of Congress to effect it? No resort was thought of but to the treaty-making power."). But perhaps a starting sample of three treaties and no joint resolutions was insufficient to "liquidate[] and ascertain[]" any original constitutional uncertainty regarding annexation. THE FEDERALIST NO. 37, at 183 (James Madison) (George W. Carey & James McClellan eds., 2001). Regardless, the annexation saga demonstrates that Professor Baude's desire to tether judges to concrete historical practices cannot avoid irreducibly subjective line-drawing problems.

207. CONG. GLOBE, 28th Cong., 2d Sess. app. at 85 (1845) (statement of Rep. Brengle).

208. *Id.* app. at 340 (statement of Rep. Garrett Davis); see also *Helvidius No. II*, reprinted in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 621, 625–26 (J.B. Lippincott & Co.,

Third, and relatedly, if Congress may acquire foreign territory, it may also exercise any powers necessary and proper to effectuate its annexation power. Such powers would logically include the appointment of ambassadors and foreign ministers, which Article II explicitly assigns to the president.<sup>209</sup> A founding generation acutely concerned with achieving international recognition<sup>210</sup> would surely not have tolerated multiple, perhaps dueling, ensembles of American diplomatic representatives.<sup>211</sup>

Fourth, a congressional annexation power would allow fleeting majorities to transform the “character and the destiny of the Republic.”<sup>212</sup> A legislature permitted to acquire Texas could also “receive England, Ireland, Holland, and the world.”<sup>213</sup> A “fanatical majority” intoxicated with “temporary ascendancy” might annex Cuba, Haiti, Liberia, or China directly to statehood.<sup>214</sup> Worse still, such momentous judgments would be entirely immune from reflection and reversal, because states simply do not deprive themselves of their equal suffrage in the Senate.<sup>215</sup> If slightly more than one-third of the states may defeat alliances with foreign powers, how could annexationists plausibly maintain that a bare majority of senators—partnered with the right minority of state delegations in the House—may consummate an essentially unamendable political alliance?<sup>216</sup>

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1867) (“A concurrent authority in two independent departments to perform the same function with respect to the same thing, would be as awkward in practice as it is unnatural in theory. . . . [A]ll the powers of government, of which a partition is so carefully made among the several branches, would be thrown into absolute hotchpot, and exposed to a general scramble.”).

209. CONG. GLOBE, 28th Cong., 2d Sess. app. at 85 (1845) (statement of Rep. Brengle).

210. See generally David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010) (interpreting American constitution-making as an effort to achieve full recognition from the European-based community of sovereign states).

211. Three decades earlier, a Senate Foreign Relations Committee report maintained that “[t]he nature of transactions with foreign nations . . . requires caution and unity of design.” REP. OF SEN. BIBB (1816), in 6 REPORTS OF COMMITTEE ON FOREIGN RELATIONS, *supra* note 176, at 21.

212. TEXAS REPORT, *supra* note 176, at 92.

213. *Id.*

214. CONG. GLOBE, 28th Cong., 2d Sess. 281 (1845) (statement of Sen. Morehead).

215. See U.S. CONST. art. V (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”). As the Court noted in *Mississippi v. Johnson*, 71 U.S. 475 (1866), the annexation of Texas “made important and permanent changes in the relative importance of States and sections.” *Id.* at 500; see also *Texas v. White*, 74 U.S. (7 Wall.) 700, 726 (1869) (claiming that Texas “entered into an indissoluble relation” in 1845).

216. CONG. GLOBE, 28th Cong., 2d Sess. 95 (1845) (statement of Rep. Winthrop).

The smaller States never would have yielded their consent to having such a power placed any where but where the States stood on an equal footing, had all the same voice, and all the same weight. . . . [No other power] touched so nearly State interests and State sovereignty as the power of acquiring territory and dividing it up into States. Had the idea ever entered their minds that Congress was to have the power of admitting foreign States, the small States would have withdrawn from the convention at once.<sup>217</sup>

Fifth and sixth, anti-annexationists noted two final oddities entailed by an “incidental” acquisition power. The United States would thereby purport to bind foreign governments through ordinary municipal laws. In this sense, Congressman Rayner argued, federal statutes were “inoperative and void” beyond the Republic’s borders.<sup>218</sup> And annexationists defended the present joint resolution on the grounds that Texas would literally become a “New State[]”<sup>219</sup> upon annexation; Congress presumably could not acquire foreign territory without immediately admitting it to statehood.<sup>220</sup> But annexing territory *and* admitting it to statehood “would necessarily comprehend the entire substance of [mere annexation], and at the same time be of a much higher and more comprehensive character.”<sup>221</sup> To suppose that Congress may “accomplish the major, with an admission of its incompetency as to the minor included object . . . leaves no further room for sophistry.”<sup>222</sup>

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217. *Id.* app. at 392 (statement of Sen. Barrow); *see also* Graber, *supra* note 126, at 89 (endorsing the argument that “a framing generation concerned with preserving a sectional balance of power was unlikely to have sanctioned mere majorities to determine the course of American expansion”).

218. CONG. GLOBE, 28th Cong., 2d Sess. app. at 411 (1845) (statement of Rep. Rayner). For similar formulations of this objection, *see id.* at 280 (statement of Sen. Morehead), *id.* app. at 72 (statement of Rep. Sample), *id.* app. at 340 (statement of Rep. Garrett Davis), and *id.* app. at 350 (statement of Rep. Barnard); *cf.* Johnson v. Eisentrager, 339 U.S. 763, 784 (1950) (rejecting the extraterritorial application of federal constitutional rights to nonresident aliens).

219. U.S. CONST. art. IV, § 3, cl. 1.

220. *See* CONG. GLOBE, 28th Cong., 2d Sess. app. at 340 (statement of Rep. Garrett Davis) (“[S]ome gentlemen involve themselves in a solecism. They concede that Congress has not the power to annex Texas as a territory, but may admit her as a State.”).

221. *Id.*

222. TEXAS REPORT, *supra* note 176, at 99. The annexationists of 1898 conveniently disregarded any earlier stipulations of “incompetency as to the minor included object.” *See infra* Part II.B.2.



President Polk signed the joint resolution annexing and admitting Texas on December 29, 1845.<sup>223</sup> But this act remained an anomaly in the history of American territorial expansion. Although the United States enlarged its borders on three separate occasions over the next quarter century, it acquired each of these possessions through the more mathematically cumbersome treaty process.<sup>224</sup> In fact, the Supreme Court overlooked (or ignored) the Texas departure in 1890, when it declared that “[t]he power to acquire territory . . . is derived from the treaty-making power and the power to declare and carry on war.”<sup>225</sup>

### B. *Hawaii*

Strikingly, American efforts to acquire Hawaii mirrored the two-step process undertaken in 1845. The McKinley administration first negotiated an annexation treaty in 1897, but the Senate failed to ratify it.<sup>226</sup> Only then did annexationists propose a joint resolution to annex the Hawaiian islands,<sup>227</sup> which would require mere majority approval by both houses.

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223. Joint Resolution for the Admission of the State of Texas into the Union, J. Res. 1, 29th Cong., 9 Stat. 108 (1845); Kesavan & Paulsen, *supra* note 133, at 1597.

224. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico (Treaty of Guadalupe-Hidalgo), U.S.-Mex., Feb. 2, 1848, 9 Stat. 912; Treaty with Mexico (Gadsden Purchase), U.S.-Mex., Dec. 30, 1853, 10 Stat. 1031; Treaty Concerning the Cession of the Russian Possessions in North America (Alaska-Purchase Treaty), U.S.-Russ., June 20, 1867, 15 Stat. 539.

225. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890); *see Stewart v. Kahn*, 78 U.S. 493, 507 (1871) (“The war power and the treaty-making power, each carries with it authority to acquire territory. Louisiana, Florida, and Alaska were acquired under the latter, and California under both.”). Only in 1901 did the Court explicitly assume the constitutionality of statutory annexation. *See De Lima v. Bidwell*, 182 U.S. 1, 196 (1901) (“The territory thus acquired [by treaty or conquest] is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of Congress.”). This ipse dixit was a “complete reversal” of the Court’s earlier pronouncements. Brock, *supra* note 118, at 733 n.252. Professor Mark Graber downplays the importance of this “single sentence in an opinion concerned with other issues,” because neither party’s attorney had addressed the constitutionality of annexation through joint resolution. Graber, *supra* note 126, at 90. “Such unsupported dictum is not normally considered sufficient to establish any proposition of constitutional law. . . . Whether the United States may annex a foreign country by joint resolution has never been the subject of debate before the justices. That issue, under conventional understandings of legal precedent, remains undecided.” *Id.*

226. LAWSON & SEIDMAN, *supra* note 111, at 108.

227. *See JOHN W. FOSTER, II DIPLOMATIC MEMOIRS* 174 (1909) (“Owing to the opposition of many of the Democratic Senators to the Hawaiian Treaty and the facility of obstruction and delay in that body, it was decided to attempt to bring about the annexation by joint resolution, following the precedent of the annexation of Texas.”).

Congress has acquired foreign territory without admitting it directly to statehood just once—on July 7, 1898, when President McKinley signed the joint resolution annexing the Hawaiian islands.<sup>228</sup> Hawaii's annexation presents an ideal fact pattern for consideration of the great-powers theory, since it requires no disputable assumptions about the Admissions Clause's meaning (that is, whether Congress may admit foreign territory directly to statehood). The power to acquire territory would undoubtedly enable Congress to exercise its Admissions power. After all, Congress admitted the earlier-acquired Territory of Hawaii to statehood in 1959.<sup>229</sup> But if territorial annexation is a great power, Congress may not infer an annexation power in order to facilitate the exercise of its Admissions power, however convenient or useful available territory might be for that purpose.

In 1845, opponents of annexation argued that territorial acquisition is precisely the kind of power that must be conferred expressly, if at all.<sup>230</sup> Their objections apply perforce to Hawaii, since no clause directly authorized the joint resolution annexing Hawaii.<sup>231</sup> But in 1898, none of the critics' constitutional grievances sounded in the logic of "vast powers"<sup>232</sup> and "great objects."<sup>233</sup> Instead, congressmen quarreled over whether they even needed to ground legislative action in the Constitution's text, and whether historical practice validated or precluded congressional acquisition of territory not immediately admitted to statehood.<sup>234</sup>

I suspect that most congressmen who opposed the 1898 joint resolution on constitutional grounds would have gladly characterized

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228. Joint Resolution To Provide for Annexing the Hawaiian Islands to the United States, J. Res. 55, 55th Cong., 2d Sess., 30 Stat. 750 (July 7, 1898); H. WAYNE MORGAN, WILLIAM MCKINLEY AND HIS AMERICA 225 (rev. ed. 2003).

229. More precisely, Congress delegated the Admissions power to the president. *See* Act of Mar. 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 (prescribing terms for Hawaii's admission to the Union as a state); Proclamation No. 3309, 24 Fed. Reg. 6868 (1959) (admitting Hawaii as a state).

230. *See supra* Part II.A.1.

231. *But see infra* note 252 and accompanying text (describing three annexationists' contention that Congress may annex foreign territory under a strikingly capacious reading of the General Welfare Clause).

232. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819).

233. *Id.* at 418. Senator William Lindsay did describe annexation as "the very highest conceivable legislative power," but not in the course of arguing that it was too important to be employed as incidental to a granted power. 31 CONG. REC. 6671 (1898) (statement of Sen. Lindsay).

234. *See infra* Part II.B.1–2.

annexation as a great power and denied, as a theoretical matter, that the Admissions Clause empowers Congress to acquire foreign territory and admit it to statehood immediately. But virtually no one dared to relitigate Texas during the debates over annexing Hawaii.<sup>235</sup> Far easier to argue that only the treaty power can acquire foreign territory, save the constitutionally special (and obviously distinguishable) situation of foreign land being admitted directly to statehood.

Merely denying Texas's precedential relevance would not have precluded anyone from labeling annexation a great power, of course. And perhaps no one as much as pondered the concept in 1898 or considered its application to Hawaii. But because annexationists relied so crucially—perhaps entirely—on historical precedents, critics apparently made a calculated political choice simply to concede Texas's constitutionality and focus their energies on contrasting the relevantly dissimilar facts of 1845 and 1898.

Part II.B.1 examines dueling congressional claims regarding the need to anchor any congressional annexation power in the constitutional text. If the power were inherent, after all, it would be exempt from great-powers strictures.<sup>236</sup> Part II.B.2 questions annexationists' reliance on Texas as a precedent for acquiring foreign land without simultaneously admitting it to statehood. It then criticizes their argument that if Congress may admit foreign land directly to statehood, surely it may annex such land to the lesser constitutional status of a federal territory. Part II.B.2 concludes by observing that congressional powers historically defended as essential to nationhood are especially likely to be classifiable as great powers.

1. *"Powers Inherent in Sovereignty" Versus the Need for a Textual Hook.* At least in 1845, annexationists attempted to derive a congressional territorial-expansion power from the Constitution's text. Most advocates of annexing Hawaii simply discarded this quaint

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235. Senator Donelson Caffery seems to have been the sole exception. See 31 CONG. REC. 6405 (1898) (statement of Sen. Caffery) (arguing that Texas furnished "nothing more nor less than the precedent that a certain political majority in Congress, having political purposes in view, voted as for a partisan necessity to take Texas into the Union"); *id.* at 6480–81 (statement of Sen. Caffery) ("[T]he Constitution of the United States was violated in the admission of Texas under a joint resolution. . . . She got in by a violation, in my opinion, of the Constitution.").

236. If nationhood itself created legislative authority, the relative greatness of such a power would be immaterial. And there would be no need to justify an inherent power as incidental to an enumerated one—it would simply exist.

approach. Because “the right to extend its territory is inherent in any nation,” one congressman argued, “it requires no special provision of the Constitution to enable us to annex additional territory.”<sup>237</sup> There was nothing wrong with venturing outside the Constitution, because the “power to annex is a necessary consequence of our existence as a sovereign and independent nation.”<sup>238</sup> Only a “positive constitutional prohibition,” absent here, could have altered this universal baseline.<sup>239</sup>

But however seductive the notion that some arm of the U.S. government must be able to extend America’s national borders, the Tenth Amendment confirms that “delegation alone warrants the exercise of any [congressional] power.”<sup>240</sup> Even if one grants that the federal government must possess a certain power, it does not at all follow that *Congress* may wield that power.<sup>241</sup> The Tenth Amendment functions as a “positive constitutional prohibition” on congressional annexation of foreign territory absent express or incidental empowerment, because extraconstitutional national powers are “not delegated to the United States by the Constitution.”<sup>242</sup>

Constitutional critics of annexing Hawaii vehemently denounced the notion of powers inherent in sovereignty. Their unheeded civics lesson evinced an admirable dedication to the project of written

237. *Id.* at 5839 (statement of Rep. Henry).

238. *Id.* at 5919 (statement of Rep. Bromwell); *see also id.* at 5914 (statement of Rep. Danford) (“[T]he right to acquire additional territory by the Government of the United States was one of the inherent rights that belong to sovereign countries.”); *id.* at 6156 (statement of Sen. Teller) (“[T]he United States may add territory to territory without any constitutional provision whatever.”); *id.* at 6334 (statement of Sen. Foraker) (“What does the Constitution of the United States say about the annexation of territory? Not one word. . . . I contend that it is inherent.”); *id.* at 6347 (statement of Sen. White) (arguing that Congress may annex territory “because this is a nation”); *id.* at 6369 (statement of Sen. Stewart) (“It is sovereign power. It is not written in the Constitution.”); *id.* at 6572 (statement of Sen. Pettus) (characterizing territorial annexation as “one of the attributes of government”).

239. *Id.* at 5919 (statement of Rep. Bromwell).

240. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 620 (Jonathan Elliot ed., 2d ed. 1836) (statement of James Madison to the Virginia Ratifying Convention). Madison presumably understood implication to be included within delegation.

241. *See Stillman, supra* note 193, at 375 (“The writer does not deny the power of the Federal Government to acquire territory; but he insists that if that is to be done at all, it must be done in accordance with the provisions of the Constitution; and unless it can be shown that this power has been therein conferred upon Congress either by express grant or by necessary implication, it does not exist.”).

242. U.S. CONST. amend. X. For an incisive judicial critique of the notion of powers inherent in sovereignty, *see Fong Yue Ting v. United States*, 149 U.S. 698, 737 (1893) (Brewer, J., dissenting).

constitutionalism, and specifically to the idea of a federal legislature with limited regulatory competencies.<sup>243</sup> “The preservation of the constitutional limitations and guarant[ees] is of infinitely greater importance” than gratifying today’s ephemeral desires, one congressman assured his colleagues.<sup>244</sup> Legislative proposals must always “ru[n] the ga[un]tlet of every constitutional safeguard.”<sup>245</sup> Accordingly, congressmen should internalize the maxim that “[i]f it is not written in the Constitution or is not implied to carry out some written power, then it does not exist.”<sup>246</sup> The issue was not whether the national government ought to be able to acquire foreign territory, but *where*, within *this* constitutional system, such a power might reside.<sup>247</sup> For annexationists’ inherent-powers argument to work, they needed to “establish that sovereignty resides in Congress.”<sup>248</sup> Especially because no tribunal would dare to invalidate an enlargement of America’s national borders,<sup>249</sup> “the consciences of Senators ought to be quick and alive to the necessity of observing the constitutional limitations in this regard.”<sup>250</sup> Territorial annexation was

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243. Fortunately, the notion of inherent congressional powers has “recently come under strong criticism. That skepticism should be extended to” annexation. Baude, *supra* note 5, at 1743.

244. 31 CONG. REC. 5920 (1898) (statement of Rep. Crumpacker); *see id.* at 6148 (statement of Sen. Bacon) (imploing his colleagues “to consider the question whether or not they have the right, under their constitutional obligations, to vote for this resolution, however much they may favor the annexation of Hawaii,” because “[n]o senator ought to desire its annexation sufficiently to induce him to give his support to an unconstitutional measure”).

245. *Id.* at 5976 (statement of Rep. Ball).

246. *Id.* at 6369 (statement of Sen. Allen); *see also id.* at 6635 (statement of Sen. Allen) (“[P]owers not expressly granted or not necessarily implied or proper for the execution of granted powers do not exist and can not be constitutionally employed.”); *id.* at 6671 (statement of Sen. Lindsay) (“Is there any other legislative power vested in the Congress? If so, by whom, and when and where was the grant made?”).

247. *Id.* at 6332 (statement of Sen. Turley); *see also id.* at 6578 (statement of Sen. Mallory) (“We do not deny that the United States Government has the power . . . to annex territory. . . . [B]ut that right must be exercised in a particular way and through a particular branch of the Government of the United States.”); *id.* at 6667 (statement of Sen. Lindsay) (“Powerful as this Government may be . . . it has no power independent of the Constitution—no power self-existent, to be exercised independently of a constitutional grant, express or implied.”).

248. *Id.* at 6370 (statement of Sen. Caffery). After all, “Why not the executive, why not the judicial, if you please, as well as Congress, if this power can be exercised indiscriminately without any regard to the Constitution”? *Id.*

249. *See* Palfrey, *supra* note 111, at 398 (“[I]f the [annexation] question should come up in the courts to-day . . . they would undoubtedly hold the legislation valid.”).

250. 31 CONG. REC. 6366 (1898) (statement of Sen. Caffery).

therefore a “dangerous step, and one that can hardly, if ever, be retraced.”<sup>251</sup>

To the extent that annexationists in 1898 sought to trace the power to any piece of constitutional text, they gestured to the General Welfare Clause. This provision supposedly licensed Congress to act in any way conducive to the national interest, assuming the chosen action wasn’t expressly prohibited.<sup>252</sup> But instead of articulating a textually grounded case for congressional empowerment, most annexationists simply declared the issue settled by historical practice.

2. *Characterizing Historical Practice.* When the United States acquired territory before 1898, it almost always did so through treaty.<sup>253</sup> Texas—the sole exception—was admitted to statehood immediately, pursuant to the allegedly clear text of the Admissions Clause.<sup>254</sup> The proposed annexation of Hawaii followed neither of these models. Yet annexationists in 1898 confidently announced that previous territorial acquisitions had decisively resolved the present question of constitutional power.

a. *Dueling Understandings of the Texas Precedent.* There were more and less disciplined versions of this argument from historical practice. Less laudably, annexationists pommeeled a straw man. How, they asked, could anyone seriously argue that the United States was powerless to acquire territory? That a nation might extend its territory was “no longer an open question. . . . [N]or will it ever again become a practical, living question before the American people.”<sup>255</sup> The federal government had engaged in territorial expansion “repeatedly” since the beginning of the Republic.<sup>256</sup> The power to annex foreign land had therefore been “settled by this uniform,

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251. *Id.* at 6590 (statement of Sen. Mallory).

252. For interpretations of the General Welfare Clause that would effectively grant Congress carte blanche and eviscerate the idea of great powers, see *id.* at 5892 (statement of Rep. Pearce), *id.* at 5910 (statement of Rep. Barham), and *id.* at 6334 (statement of Sen. Foraker). General Welfare Clause textualism is actually *more* legislatively enabling than the theory of powers inherent in sovereignty, because not all convenient or advantageous powers can be plausibly said to reside in the United States by virtue of nationhood.

253. See *supra* notes 143–45, 224 and accompanying text.

254. See *supra* notes 128, 167–68 and accompanying text.

255. 31 CONG. REC. 5840 (1898) (statement of Rep. Henry).

256. *Id.*

unbroken practice for almost a century.”<sup>257</sup> “[O]nly the antediluvian” would dispute the nation’s ability to acquire new territory.<sup>258</sup>

Of course, no one disputed the United States’ power to acquire territory through treaty. Critics demanded a demonstration that *Congress* could constitutionally acquire foreign territory (at least without promptly admitting it to statehood).<sup>259</sup> Rather than point to any particular constitutional warrant, annexationists paraded their all-sufficient talisman: Texas. Even before the lengthy House and Senate debates throughout the summer of 1898, a Senate Foreign Relations Committee report insisted that Congress could constitutionally acquire Hawaii “under the precedent that was established in the annexation of Texas.”<sup>260</sup> The Committee claimed that Texas’s annexation through joint resolution “clearly establishes the precedent that Congress has the power to annex a foreign State to the territory of the United States.”<sup>261</sup> But the Committee failed to elaborate on the commonly understood constitutional justification for annexing Texas, technical conformity with the Admissions Clause; doing so would have undermined the precedential value of American history’s sole instance of legislative annexation.

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257. *Id.* at 5890 (statement of Rep. Grow).

258. *Id.* at 5981 (statement of Rep. Parker); *see id.* at 5892 (statement of Rep. Pearce) (“I had supposed until this hour that the right of annexing foreign territory was a settled question and not open to further discussion.”); *id.* at 5908 (statement of Rep. Hamilton) (“The Constitution of the United States has been interpreted many times in favor of the general power of annexation. . . . This is no new question.”); *id.* at 5919 (statement of Rep. Bromwell) (“[T]hese questions are not new and have all been settled by the highest authorities known to our system of government. . . . [W]e commenced such annexation in the very infancy of our Republic and have continued in that policy down to the present time.”); *id.* at 5932 (statement of Rep. Davidson) (“[T]he same question has been raised five times during our national history. . . . [I]t has been passed upon and overruled, so that it now has no standing in court.”); *id.* at 5981 (statement of Rep. Parker) (“It is rather late to talk about the constitutional power of the United States to annex territory.”); *id.* at 5991 (statement of Rep. Graff) (“Our right under the Constitution to acquire territory . . . has been too well established by precedents in our own history to be questioned.”); *id.* at 6010 (statement of Rep. Todd) (“[H]appily we have many high constitutional authorities as well as historic precedents for the proposed annexation.”); *id.* at 6369 (statement of Sen. Stewart) (“It is a settled constitutional doctrine in this country that the power to acquire territory exists. It has been exercised for a hundred years, and it is settled. Some things get settled by practice, by precedent. It has been settled beyond controversy, and no court will ever deny it.”).

259. *See supra* notes 246–48 and accompanying text.

260. S. REP. NO. 55-681 (1898) [hereinafter HAWAII REPORT], *in* 7 REPORTS OF COMMITTEE ON FOREIGN RELATIONS, *supra* note 176, at 189, 189; *see also* Kmiec, *supra* note 27, at 19 (“Congress acted in explicit reliance on the procedure followed for the acquisition of Texas.”).

261. HAWAII REPORT, *supra* note 260, at 190.

Several annexationist congressmen likewise invoked Texas, improving (if only slightly) on their belabored argument from the *United States government's* periodic practices. Texas was admitted “over a new legislative highway which has been blazed so wide and so straight that in the present emergency we have a precedent ample indeed.”<sup>262</sup> In essence, “the Texas precedent has made the votes of a majority of both branches of Congress sufficient” to annex foreign territory.<sup>263</sup> That earlier episode “is on all fours with the very question we are now debating,” right down to the failed treaties and course-correcting joint resolutions.<sup>264</sup> Congress had done all of this before,<sup>265</sup> of course annexing Hawaii would be constitutional.

But Texas was distinguishable in a constitutionally material sense: “it was admitted as a State and not as a Territory.”<sup>266</sup> Proponents of annexing Texas had rested on their scrupulously literal compliance with the Admissions Clause—they indisputably proposed that Congress admit a new state.<sup>267</sup> But congressman after congressman grumbled that the resolution to annex Hawaii would not similarly admit those islands as a state, so Texas was no precedent at all.<sup>268</sup> If anything, it undermined the constitutional case for Hawaii's

262. 31 CONG. REC. 6005 (1898) (statement of Rep. William Smith).

263. *Id.*

264. *Id.* at 6572 (statement of Sen. Pettus).

265. For other invocations of the 1845 joint resolution's precedential status, see *id.* at 5877 (statement of Rep. Grosvenor), *id.* at 5890 (statement of Rep. Grow), *id.* at 5911 (statement of Rep. Barham), and *id.* at 5991 (statement of Rep. Graff).

266. *Id.* at 5920 (statement of Rep. Crumpacker); see also ANDREW McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 504 (1936) (“[T]he method of annexing Texas did not constitute a proper precedent for the annexation of a land and people to be retained as a possession or in a territorial condition.”); Kmiec, *supra* note 27, at 20 (“The stated justification for the joint resolution [annexing Hawaii]—the previous acquisition of Texas—simply ignores the reliance the 1845 Congress placed on its power to admit new states.”); Palfrey, *supra* note 111, at 398 (“The [annexation] power . . . cannot properly be claimed under the express provision for the admission of new states.”); Stillman, *supra* note 193, at 378 (“[T]here is no analogy between the admission of Texas into the Union as a State, and the annexation of Hawaii to this country as a Territory by a joint resolution of Congress.”).

267. See *supra* note 128.

268. See 31 CONG. REC. 5778 (1898) (statement of Rep. Dinsmore) (“You must admit [it] as a State. . . . [I]t is feeble of gentlemen to cite Texas as authority for the procedure asked in this present emergency.”); *id.* at 5935 (statement of Rep. Broussard) (“[N]or can [Texas] be quoted as a precedent for this ‘scheme,’ for it is not here sought to admit Hawaii into the Union as a new State.”); *id.* at 5976 (statement of Rep. Ball) (“[T]he advocates of this measure have no ground to stand upon so far as the annexation of Texas is concerned.”); *id.* at 6013 (statement of Rep. Williams) (“Texas was not ‘annexed’ in the sense in which we to-day are talking about ‘annexing’ Hawaii. Texas came into this Union by joint resolution under an express power given to Congress in the Constitution, ‘to admit new States.’”); *id.* at 6148 (statement of Sen. Bacon)



annexation, because Congress presumably admitted Texas as a state precisely because the Constitution excluded the customary territorial path as an option.<sup>269</sup>

Once annexationists' cursory claims were swept away, congressmen would see that "never in the history of the country ha[d] territory been admitted as such by joint resolution."<sup>270</sup> Annexationists attempted a "novel and unprecedented proceeding."<sup>271</sup> Acquiring foreign land outside constitutional limitations was, if nothing else, "a clear departure from American traditions" and an "open abandonment of American precedents."<sup>272</sup> In fact, annexationists' initial preference for the treaty form revealed their sympathy with this restrained vision of Congress's annexation power: If Texas stood for the proposition that Congress may annex foreign territory under any circumstances, why risk the humiliation of another botched supermajority ratification? Why not simply introduce a joint resolution from the outset if that device was clearly constitutional (and ultimately chosen)? Annexationists never marshaled a satisfactory response.

*b. Annexationists' Flawed "Greater Includes the Lesser" Argument.* Annexationists answered with a second reason why the Texas precedent legitimated Hawaii's annexation, one that avoided contestable premises about the scope of historical practice. In short, the greater includes the lesser: given that Congress may lawfully annex and admit foreign territory directly to statehood, surely it may

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(noting a constitutional "distinction between the authority of Congress to admit a State . . . and the power to acquire foreign territory not for the purpose of making it a State"); *id.* at 6405 (statement of Sen. Caffery) ("They have not followed the precedent. Take Hawaii in her Statehood, such as it may be, if you want to follow the precedent."); *id.* at 6518 (statement of Sen. Bates) ("[A]nalogous facts' must sustain the application of a precedent. Between the annexation of Texas and the proposed annexation of Hawaii there are no analogous facts."); *id.* at 6587 (statement of Sen. Spooner) ("Texas was not a Territory. . . . [W]here has Congress ever admitted a Territory as a Territory?"); *id.* at 6667 (statement of Sen. Lindsay) ("Congress admitted [Texas] not as mere territory, but as a sovereign State. . . . This much this precedent establishes. It does not go a single step beyond the admission of an organized Republic as a State under the express grant of power by the Constitution to the Congress to admit new States.").

269. Congressman Thomas Ball, a Texan, suggested that Congress chose to treat Texas differently than previous territorial acquisitions "for the purpose alone of coming within the constitutional power to admit new States." *Id.* at 5976 (statement of Rep. Ball).

270. *Id.* at 5920 (statement of Rep. Crumpacker).

271. *Id.* at 6518 (statement of Sen. Bates).

272. *Id.* at 6668 (statement of Sen. Lindsay).

merely acquire such territory to create a less momentous (and more easily dissoluble) political connection.<sup>273</sup> Just because Congress had not yet annexed alien territory to an “inferior relation, it does not follow that we have not that power when we have exercised the greater power.”<sup>274</sup> It would take “some lawyer” to explain why “the exercise of the power which admits a State to that high relation . . . can not acquire territory out of which a State can be created.”<sup>275</sup>

This greater-includes-the-lesser argument exploited opponents’ pragmatic concession of Texas’s constitutionality. But to the disinterested student of American constitutionalism, it gets the inquiry exactly backward. Because the Admissions Clause is facially ambiguous—may Congress admit *any* pocket of earth to statehood, or just presently owned U.S. territory?—analyzing the “lesser” issue of annexation first can help decide which interpretation of the “greater” Admissions power to adopt. If, on the best reading of the Constitution, Congress may not constitutionally enlarge our national boundaries (whether or not it simultaneously increases the pool of states), then Congress may not increase the pool of states through an enlargement of our national boundaries.

In other words, we should prefer an interpretation of the Admissions Clause that accommodates a more constitutionally coherent greater-includes-the-lesser argument. The annexationists of 1898 should not have invoked Texas to bootstrap their way into constitutionality without some textual warrant for Hawaii’s legislative acquisition *as a territory*. Without Texas, Hawaii’s annexation was constitutionally indefensible.<sup>276</sup> This stark truth reveals the unsoundness of an interpretation of the Admissions Clause that rendered Hawaii’s annexation plainly constitutional on greater-includes-the-lesser grounds.

Once opponents of annexing Hawaii assumed Texas’s constitutionality, they deprived themselves of the ability to oppose

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273. *Id.* at 5910–11 (statement of Rep. Barham); *see id.* at 6148 (statement of Sen. Elkins) (asking “why, if [Congress] can admit a State, it can not admit anything less than a State”).

274. *Id.* at 6587 (statement of Sen. Teller).

275. *Id.*

276. *See* Kmiec, *supra* note 27, at 20–21 (concluding that “[i]t is . . . unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution”). To be sure, acquiring Hawaii must have greatly facilitated Congress’s ability to “provide and maintain a Navy.” U.S. CONST. art. I, § 8, cl. 13. But if annexation is too important to be discovered through implication, it is irrelevant which enumerated power might profit from a great-powers violation.

annexation on great-powers grounds. Instead, they were left to protest the apparent lack of an annexation power under traditional modes of inquiry.<sup>277</sup> By conceding that the Constitution did expressly permit legislative annexation in some instances, these opponents assumed the enormous burden of explaining why the lesser power to annex foreign territory was not included within the Article IV, Section 3 power to annex foreign territory *and* admit it to statehood. Conceding Texas's constitutionality avoided a messy and futile struggle, to be sure, and enabled opponents to draw attention to annexationists' chief vulnerability: that Hawaii fell outside the Admissions Clause rationale for acquiring Texas.<sup>278</sup> But Hawaii *was* ultimately annexed, and the modern Supreme Court has implicitly acknowledged the validity of statutory annexation under a greater-includes-the-lesser theory.<sup>279</sup> The annexation of Hawaii therefore represents an unfortunate road not taken in the life of great powers—a missed opportunity for a group of conscientious constitutional dissenters to explicate a vital structural precept that now figures to play a leading role in constitutional law.

*c. The Overlap Between Alleged Inherent Powers and Great Powers.* These scholarly squabbles over inherent and enumerated congressional power did, however, contribute something to great-powers theory. Annexationists evidently invoked alleged sovereign prerogatives because their claimed power was not enumerated and could not be fairly characterized as merely incidental to one or more granted powers. As Professor Baude has noted, the Supreme Court originally sustained a federal eminent-domain power through

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277. Writing in the *Green Bag* in 1898, James W. Stillman concluded that “the action of Congress . . . was entirely without constitutional authority” because “there is no provision of the Constitution authorizing the passage of the joint resolution in question.” Stillman, *supra* note 193, at 375, 378. Somewhat more opaquely, former Secretary of State John W. Foster later recalled that Hawaii's annexation was “repugnant” to him “because of its evasion of the constitutional provision.” FOSTER, *supra* note 227, at 174.

278. See *supra* notes 266–68.

279. In *Boumediene v. Bush*, 553 U.S. 723 (2008), a landmark case on whether habeas corpus protections extend to Guantánamo Bay detainees, all nine Justices assumed that Congress may annex foreign territory under the Admissions Clause. See *id.* at 765 (asserting that “[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory”); *id.* at 839 (Scalia, J., dissenting) (“The Insular Cases all concerned Territories [including Hawaii] acquired by Congress under its Article IV authority . . .”). Justice Kennedy wrote for a five-Justice majority, and three Justices joined Justice Scalia's dissent.

identical considerations of inherent power and national sovereignty.<sup>280</sup> The Court concluded that “[s]uch an authority is essential to [the United States’] independent existence and perpetuity. . . . The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law.”<sup>281</sup> But the concept of inherent powers cannot be squared with the idea of great powers, which assumes that every congressional power (great or not) ultimately owes its existence to the Constitution’s text.<sup>282</sup> If annexation and eminent domain are any indication, congressional powers that have historically been justified through reference to unfalsifiable assertions of national sovereignty are especially apt to be categorized as great powers.<sup>283</sup>

### III. THE FUTURE OF GREAT POWERS

This Note’s identification of territorial annexation as a great power highlights two essential avenues for future research. First, because judges will not (and should not) declare Texas and Hawaii unconstitutional, the legal community must offer a credible justification for applying the great-powers doctrine inconsistently if it is to flourish as a judicially administrable principle. And second, the Texas-annexation debates demonstrate that legal actors have squarely confronted great-powers limitations without summoning *McCulloch*’s famed terminology.<sup>284</sup> It is therefore an open question whether the Supreme Court actually issued any great-powers holdings between *McCulloch* and *NFIB*. In fact, under a newly persuasive reading of *Afroyim v. Rusk*, the Court has actually decided that

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280. See Baude, *supra* note 5, at 1800–04 (recounting the birth of modern eminent-domain jurisprudence).

281. *Kohl v. United States*, 91 U.S. 367, 371–72 (1875); see also *United States v. Jones*, 109 U.S. 513, 518 (1883) (“The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and . . . requires no constitutional recognition.”); Edward S. Corwin, *Constitutional Aspects of Federal Housing*, 84 U. PA. L. REV. 131, 141 (1935) (“[I]n relation to the eminent domain power the ‘necessary and proper’ clause merely recognizes a universal attribute of governments, that of being able to obtain by expropriation the lands they require for the carrying out of their powers.”).

282. See *supra* note 236.

283. For one scholar’s list of alleged “inherent sovereign powers construed as ancillary to enumerated powers” (but without reference to great-powers limitations), see Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82, 83 (2004).

284. For a comprehensive list of *McCulloch*’s great-powers language, see *supra* notes 63–69 and accompanying text.

involuntary expatriation (citizenship-stripping) is too important a power to have been granted to Congress implicitly.

A. *The Need To Justify Inconsistent Application of Great-Powers Principles*

Professor Koppelman is right: “It is . . . an open question how much of existing law would have to be scrapped if [the great-powers idea] were adopted by the courts.”<sup>285</sup> In such a world, judges would strike down any exercise of an implied power that seemed too important to exist without being enumerated<sup>286</sup> (or perhaps that reached more broadly than the enumerated power it purported to effectuate).<sup>287</sup> For example, the unenumerated (but plenary) congressional power to control immigration, even to the point of excluding entire ethnic groups, sure seems more important than the enumerated power to specify standardized procedures by which individual aliens may become American citizens.<sup>288</sup> Likewise, Congress’s unwritten power to print vast sums of paper money is not clearly inferior to its enumerated power to “coin” money.<sup>289</sup> And perhaps both of these powers are simply too far-reaching to be exercised through implication.<sup>290</sup>

In any case, redefining the United States through territorial enlargements is as great, substantive, and independent as powers come. And even if reasonable minds could differ on the perceived importance of annexing foreign territory, Roberts’s *NFIB* opinion would prohibit the Hawaii two-step, whereby Congress uses an unenumerated power (acquiring foreign land) to create the necessary

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285. Koppelman, *Health Care Reform*, *supra* note 13, at 113. For Koppelman’s somewhat extravagant effort to compile a list of possible great powers, see Koppelman, *Everybody*, *supra* note 13, at 519–20 (citations omitted).

286. See *supra* note 5 and accompanying text.

287. See *supra* notes 45–47 and accompanying text.

288. See Koppelman, *Health Care Reform*, *supra* note 13, at 113, 117 (identifying immigration control as a probable great power under Roberts’s framework). Not surprisingly, the Court early on denied the necessity of enumerating this power: “[E]very sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.” *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (quoting *Ekiu v. United States*, 142 U.S. 651, 659 (1892)).

289. U.S. CONST. art. I, § 8, cl. 5; Koppelman, *Everybody*, *supra* note 13, at 520.

290. See *Ajit V. Pai, Congress and the Constitution: The Legal Tender Act of 1862*, 77 OR. L. REV. 535, 557 n.133 (1998) (suggesting that the creation of legal-tender notes is too important to be inferred through the Necessary and Proper Clause).

predicate for the eventual exercise of an enumerated power (admitting new states).<sup>291</sup>

The example of annexation vividly demonstrates that judges cannot apply the great-powers doctrine consistently across the full range of possible scenarios, Koppelman's alarmism notwithstanding. This is understandable, since they have inherited a jurisprudence—and a political history—that rarely strained to ensure that implied powers were truly *incidental* to associated enumerated powers and were not too important to have been granted by implication.<sup>292</sup> But in championing this Rip Van Winkle of constitutional law, great-powers practitioners must tread carefully to avoid a trenchant critique leveled at judicial originalism: that the selective granting of indulgences corrupts the concept's normative rigor and so spoils its intellectual appeal.<sup>293</sup>

This Note does not aim to delegitimize Texas's or Hawaii's present political status, retroactively negate their federal officeholders' votes, or inaugurate an intellectually respectable “birther” movement.<sup>294</sup> These oddly linked states are “deeply embedded into our law and lives,”<sup>295</sup> and their legality is “no longer a viable issue for courts to decide.”<sup>296</sup> Texas and Hawaii must therefore remain “pragmatic exception[s]”<sup>297</sup> to the consistent application of great-powers principles. This Note has aimed to show that, barring an unlikely constitutional amendment authorizing Congress to acquire foreign land, the doctrine will always be beset by at least this glaring inconsistency.

Few governmental practices are as deeply entrenched as the components of our national Union. It may be politically conceivable to invalidate less foundational arrangements on great-powers

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291. See *supra* notes 80–81.

292. The aforementioned annexation episodes are Exhibits A and B, at least with respect to the second point.

293. See JACK M. BALKIN, *LIVING ORIGINALISM* 8–9 (2011) (arguing that so-called “faint-hearted” originalism “undercuts the claim that legitimacy comes from adhering to the original meaning of the text adopted by the framers”).

294. For an amusingly bookish effort to demonstrate that President Obama was not actually born in Hawaii, see generally JEROME R. CORSI, *WHERE'S THE BIRTH CERTIFICATE?: THE CASE THAT BARACK OBAMA IS NOT ELIGIBLE TO BE PRESIDENT* (2011).

295. Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205 (2006). Gerhardt was describing especially canonical judicial decisions, but his language also applies here.

296. *Id.* at 1206.

297. Scalia, *supra* note 39, at 140.

grounds,<sup>298</sup> though practically impossible to eliminate others. But regardless of *where* the line is drawn, proponents of the great-powers doctrine must offer a principled justification for following their best understanding of the Constitution's meaning only sometimes; they must articulate sufficiently nonarbitrary criteria for subjecting only some offending practices to *NFIB*'s great-powers scrutiny.

*B. Digging Deeper: Involuntary Expatriation as a Hidden Great Power*

As Baude<sup>299</sup> and Robert Natelson<sup>300</sup> have shown, the great-powers concept has a much richer intellectual history than *NFIB* readers may have initially realized. It seems extremely improbable that a structural principle so theoretically sensible, so substantiated by Founding-era legal authorities, must have taken a two-hundred-year vacation after *McCulloch* merely because the phrase “great substantive and independent” yields almost no search results.<sup>301</sup> The Texas debates support my instinct: in one of the most dramatic and constitutionally erudite legislative exchanges in American history,<sup>302</sup> great powers played a starring role—but without appropriating Marshall's most recognizable expression.

In the era of searchable digital archives, easy congressional targets may still exist. For example, at least one senator parsed the constitutionality of the Freedmen's Bureau using the familiar Marshallian language of principals and incidents:

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298. For example, in *NFIB*, Chief Justice Roberts cast doubt on the constitutionality of the ACA's minimum-coverage provision by claiming that “Congress ha[d] never attempted to rely on th[e] power to compel individuals not engaged in commerce to purchase an unwanted product.” *Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 132 S. Ct. 2566, 2586 (2012).

299. See generally Baude, *supra* note 5 (cataloguing prominent Founders' endorsement of great-powers principles and attempting to explain widespread resistance to a federal eminent-domain power in the antebellum era).

300. See generally Natelson, *supra* note 43 (contending that the Necessary and Proper Clause incorporated the agency-law concept of incidental powers).

301. For two obscure exceptions in the *U.S. Reports*, see *supra* note 12.

302. See Maltz, *supra* note 125, at 381, 399 (observing that the Texas debates “raise[d] fundamental questions about the structure of the nation” and that “[t]he depth and sophistication of the constitutional analysis was often extremely impressive”). The decision to annex Hawaii also featured “one of the greatest debates in American congressional history.” TYLER DENNETT, *AMERICANS IN EASTERN ASIA: A CRITICAL STUDY OF THE POLICY OF THE UNITED STATES WITH REFERENCE TO CHINA, JAPAN AND KOREA IN THE 19TH CENTURY* 624 (1922).

[The Thirteenth Amendment] does not enumerate the power to establish a Freedmen's Bureau as a constitutional power; it does not expressly confer on Congress the power to create a Freedmen's Bureau. Then, if such a power exist[s], like the power to establish a bank, it is an implied power. It is not a 'substantive, independent power,' for the execution of which other and incidental powers may be invoked; but it is itself an incidental power, to be used only to execute some other and an express or enumerated power.<sup>303</sup>

But as jurists and scholars begin to categorize congressional powers as "vast"<sup>304</sup> and "inferior,"<sup>305</sup> after *NFIB* and *Kebedeaux*, the most immediately relevant materials will be any Supreme Court opinions clarifying the doctrine's contours. The conventional wisdom holds that zero majority opinions said much of anything about great powers from 1819 to 2012.<sup>306</sup> In his recent *Harvard Law Review* Foreword, for example, Professor John Manning claimed that "in no case has the Court ever invalidated an act of Congress on the ground that it employed a 'great substantive and independent power,' in contravention of the Necessary and Proper Clause."<sup>307</sup> But if the evidentiary lens is widened beyond the narrow linguistic core of "great substantive and independent power[s]," noncanonical necessary-and-proper cases may nonetheless reveal a Court mindful of enumeration's role in the American constitutional system and cautious of sustaining legislation that would destroy the distinction between great and incidental powers.

Consider *Afroyim v. Rusk*,<sup>308</sup> which held that Congress is powerless to expunge U.S. citizenship absent voluntary renunciation of that citizenship.<sup>309</sup> The Court had recently upheld a federal expatriation statute as the exercise of a power inherent in sovereignty.<sup>310</sup> But in *Afroyim*, the Court sharply reversed course. It

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303. CONG. GLOBE, 39th Cong., 1st Sess. 934 (1866) (statement of Sen. Davis). Unfortunately, Senator Davis seems to have misunderstood the idea of great powers: he wrongly assumed that a power is not "substantive" and "independent" unless it is enumerated.

304. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819).

305. *Id.*

306. Five such scholarly expressions are cited above. See *supra* notes 13, 40 and accompanying text.

307. Manning, *supra* note 40, at 59 n.349.

308. *Afroyim v. Rusk*, 387 U.S. 253 (1967).

309. *Id.* at 257.

310. See *Perez v. Brownell*, 356 U.S. 44, 57 (1958) (concluding that the ability to expatriate U.S. citizens is a "power[] indispensable to . . . functioning effectively in the company of



began by insisting that Congress may never exercise a power merely because it is thought to be “an implied attribute of sovereignty possessed by all nations.”<sup>311</sup> “*Our Constitution* governs us,” and it “limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones.”<sup>312</sup> Crucially, Article I enumerates no citizenship-stripping power.<sup>313</sup>

Could such a power be implied, then? The Court favorably quoted Congressman William Lowndes’s remarks from an 1818 debate on a proposed bill concerning *voluntary* expatriation: “[I]f the Constitution had intended to give to Congress so delicate a power, it would have been expressly granted. That it was a delicate power, and ought not to be loosely inferred, . . . appeared in a strong light.”<sup>314</sup> For Congressman Lowndes, “delicate” meant “great”; even the power to prescribe the conditions by which individuals could voluntarily relinquish their citizenship was too important to be left to implication.

The Court took precisely this approach as to *involuntary* expatriation. It remarked that “[c]itizenship is no light trifle to be jeopardized any moment Congress decides to do so under . . . implied grants of power.”<sup>315</sup> The consequences were too important, too grave: “In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country.”<sup>316</sup> It would be “completely incongruous” to allow temporary majorities to “forcibl[y] destr[o]y” the bonds that unite full-fledged Americans to their government.<sup>317</sup> *Afroyim*’s reasoning closely tracked one lawyer’s striking assertion in the *Harvard Law Review* seven years earlier: “The right to destroy the citizenship of one of the sovereign people is ‘a great substantive and independent power’ within Chief Justice Marshall’s meaning. It is not

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sovereign nations”), *overruled in part by* *Afroyim v. Rusk*, 387 U.S. 253 (1967); *id.* (“[T]here can be no doubt of the existence of this power in the law-making organ of the Nation.”).

311. *Afroyim*, 387 U.S. at 257.

312. *Id.* (emphasis added).

313. *Id.*

314. 31 ANNALS OF CONG. 1050 (1818) (statement of Rep. Lowndes) (quoted in *Afroyim*, 387 U.S. at 260).

315. *Afroyim*, 387 U.S. at 267–68; *cf.* *Greene v. McElroy*, 360 U.S. 474, 508 (1959) (expressing the “Court’s concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation’s lawmakers”).

316. *Afroyim*, 387 U.S. at 268.

317. *Id.*

an incidental power which can reasonably be inferred from a more explicit one.”<sup>318</sup>

*Afroyim* demanded more than a “rational nexus” or “relevant connection”<sup>319</sup> between unwritten means and enumerated ends. Rather, involuntary expatriation’s weighty consequences— “[c]itizenship is no light trifle”<sup>320</sup>—inspired the Court’s unwillingness to imply the power through the Necessary and Proper Clause.<sup>321</sup> *Afroyim* is, at the very least, a first cousin of *McCulloch*, *NFIB*, and *Kebedeaux*. Continued research will likely reveal a much larger immediate family than anyone has yet realized.<sup>322</sup>

### CONCLUSION

In 2004, Professor Lawson coauthored a marvelous book on the constitutional basis for American territorial expansion.<sup>323</sup> In it, Lawson and Professor Guy Seidman relied on a somewhat permissive reading of the Necessary and Proper Clause (“the Sweeping Clause”<sup>324</sup>) to deny any constitutional deficiency in the congressional annexations of Texas<sup>325</sup> and Hawaii.<sup>326</sup> The perceived importance of annexing foreign land appeared nowhere in their analysis. Instead, they reasoned that Congress may admit alien territory directly to

318. Leonard B. Boudin, *Involuntary Loss of American Nationality*, 73 HARV. L. REV. 1510, 1526 (1960).

319. *Perez v. Brownell*, 356 U.S. 44, 58 (1958), *overruled in part by Afroyim v. Rusk*, 387 U.S. 253 (1967).

320. *Afroyim*, 387 U.S. at 267.

321. One contemporaneous observer drew this very conclusion. See Warren B. Elterman, Comment, *An Expatriation Enigma: Afroyim v. Rusk*, 48 B.U. L. REV. 295, 300 (1968) (interpreting *Afroyim* to hold that “a power of this dimension is unsuitable for implication under the ‘necessary and proper’ clause or any other general grant of power”).

322. For starters, Baude has argued that “[w]hen adjudicating modern federalism cases, the Supreme Court increasingly invokes a version of the great powers argument, but without a thorough explanation (or even obvious awareness) of the roots of the idea it is invoking.” Baude, *supra* note 5, at 1815.

323. LAWSON & SEIDMAN, *supra* note 111.

324. *Id.* at 93.

325. See *id.* at 91 (“[F]ew acquisitions were as constitutionally unproblematic.”); *id.* at 92 (“The case for the constitutionality of annexation by legislation is actually quite simple.”); *id.* at 93 (“[T]he annexation of Texas by statute was entirely constitutional.”).

326. See *id.* at 109 (“The only potentially relevant difference between the annexation of Hawaii and the prior annexation of Texas was that Texas entered the United States as a state, while Hawaii entered as a territory. That is not a difference of constitutional dimension. As a matter of domestic American law, ordinary legislation is always sufficient for the acquisition of property as long as the acquisition carries into effect a constitutionally granted power, such as the admissions power.”).

statehood under the literal words of the Admissions Clause, or to the status of a federal territory as a means of implementing the Admissions power.<sup>327</sup>

But in 2013, Lawson published a confession that seems to undercut his earlier analyses: “[T]he present author is moderately ashamed to admit that he did not understand the import of this [“great substantive and independent power”] language until a few short years ago, when it was made clear to him by Robert Natelson.”<sup>328</sup> This crosscutting concept “is an incredibly important idea that was in danger of getting lost.”<sup>329</sup> Unfortunately, it played no role in the most comprehensive scholarly treatment of territorial expansion and the Constitution—Lawson’s own book.

Now that Chief Justice Roberts has restored the great-powers concept to the American legal consciousness, the constitutionality of annexing foreign territory by statute must be rethought. Opponents of acquiring Texas explicitly claimed that statutory annexation was too important to be inferred through the Necessary and Proper Clause,<sup>330</sup> and they proffered a splendid textual and structural defense of that position.<sup>331</sup> The government’s uniform reliance on treatymaking before 1845’s fateful joint resolution only strengthened that case.<sup>332</sup> And reasoning entirely from first principles, territorial annexation is so plainly important—so nation-altering—that it is exactly the sort of “great object[]”<sup>333</sup> that should not be inferred as merely incidental to a more dignified power grant. It is “entirely reasonable to expect that power to be dealt with on its own terms.”<sup>334</sup>

One need not consider land acquisition to be “particularly scary”<sup>335</sup> to agree that scholars and judges should know where this alluring concept might lead them. Like any constitutional doctrine,

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327. *Id.* at 94; *see also* Palfrey, *supra* note 111, at 398 (“[I]n no case . . . could it be properly said that annexation was so remote from any permissible end of legislation—regulation of commerce, for instance, or provision for defence—that it could not have been a ‘necessary and proper’ means to that end.”).

328. Gary Lawson, *Night of the Living Dead Hand: The Individual Mandate and the Zombie Constitution*, 81 *FORDHAM L. REV.* 1699, 1704 (2013).

329. *Id.* at 1707.

330. *See supra* Part II.A.1.

331. *See supra* Part II.A.1–.2.

332. *See supra* notes 198–206 and accompanying text.

333. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418 (1819).

334. Baude, *supra* note 5, at 1754.

335. Koppelman, *Health Care Reform*, *supra* note 13, at 118; *see* Kopel, *supra* note 24, at 264 (“[I]t’s only Koppelman who thinks that scariness is part of the test.”).

“great substantive and independent power[s]” augurs briar patches as well as strawberry fields. Justifying the doctrine’s inevitably inconsistent application will be critical to its achieving widespread purchase as a judicially administrable principle. But this doctrinal conversation cannot flourish unless scholars continue to uncover the hidden history of great powers. This Note represents an early effort to plot that concept’s parameters.