To Enumerate or Not To Enumerate: A Theory of Congressional "Great Powers"

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Daniel Rice, Territorial Annexation as a "Great Power", 64 **Duke L.J.** 717 (2015).

I have a soft spot for any argument that tends to show the relevance of long-settled constitutional controversies over territorial annexation to hotly debated current events. Even so, I wouldn't write about this piece if I didn't think it was well worth reading regardless of how much one cares about the United States' imperial adventures of over a century ago—or about any given headline today, for that matter. The piece is a student Note by Daniel Rice in a recent issue of the Duke Law Review entitled *Territorial Annexation as a "Great Power."* The annexations in question are those of Texas in 1845 and Hawaii in 1898—statutory annexations accomplished by Congressional joint resolution instead of by treaty. And the current event is Supreme Court's decision in *NFIB v. Sebelius* in 2012. Rice's Note makes a convincing case that the basic significance of the healthcare decision cannot be properly understood without a solid grasp of the debates around the constitutionality of Texas' and Hawaii's annexation. As Rice describes the evolution of doctrine on Congressional power and the Necessary and Proper Clause from *McCulloch v. Maryland* to *NFIB v. Sebelius*, it simply isn't possible to get from the former to the latter, and fully understand where we've been and where we're headed, without stopping to consider nineteenth-century territorial expansion.

Rice's Note contributes to the debate on Chief Justice Roberts' claim in *NFIB v. Sebelius* that, as Rice paraphrases it, "some powers are too important to be exercised merely through implication, even if they might be the most convenient means imaginable for executing Congress' enumerated powers. These so-called 'great powers' are off-limits to Congress unless the Constitution specifically mentions them." (P. 718.) Applying what Rice describes as this "conceptual bombshell" to the Affordable Care Act's minimum-coverage provision, Roberts explained that the power to require individuals either to purchase health care or pay a fine—"the ability to *create* commerce, rather than regulate preexisting commerce" (again in Rice's words)—qualifies as a "great power," that is, a power "incapable of being claimed inferentially." (P 720.)

Although the idea of "great substantive and independent powers" features prominently, and in those words, in Chief Justice Marshall's opinion in the foundational *McCulloch v. Maryland* (1819), the phrase appears in only two pre-*NFIB v. Sebelius* cases decided since *McCulloch*. As a result, Rice observes, Roberts' invocation of it seemed to come out of nowhere. Critics responded with skepticism concerning the workability of the concept: What counts as a "great power"? Why? How would we know? But Rice argues that whatever the answers turn out to be, we won't find them using keyword searches. Instead, Rice proposes that we start by examining a power we all surely agree counts as a "great substantive and independent" one: the power to annex foreign territory.

Rice's basic insight is simple and powerful: "[T]he 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." (P. 722.) Obvious, right? Equally obvious, the power to annex foreign territory appears nowhere on the list of Congress' enumerated powers. Yet Congress annexed both Texas and Hawaii statutorily, by joint resolution; unlike other foreign territory before and after, these territories were not acquired by treaty (because, in a nutshell, the votes for a treaty weren't there). Having identified a power that most people

would likely agree counts as "great," Rice briefly reviews the relevant case law (such as it is), before turning his attention to more fruitful material: the congressional debates on the annexations of Texas and Hawaii. As Rice shows, these debates featured "great-powers rhetoric" (P. 723) and therefore constitute a rich source of nonjudicial constitutional interpretation of the concept.

Rice's discussion of these debates and their implications for Roberts' view in *NFIB v. Sebelius* is a pleasure to read: descriptively elegant, analytically convincing, thoroughly informed. Moving easily from historical materials to current case law and back, Rice weaves *McCulloch*, Texas, Hawaii, and *NFIB v. Sebelius* into a coherent doctrinal arc. Teachers of first-year constitutional law who read Rice's Note will be left wondering how to fit the annexations of Texas and Hawaii into a syllabus that is already so bursting at the seams that most of what's on it has been crammed into it by aggressive editing. One cannot truly grapple with the implications of *NFIB v. Sebelius,* or even more ambitiously, think clearly at all about the scope of Congressional powers, without first examining the "great" power to annex foreign territory that Congress exercised when it took the dramatic steps of annexing first Texas and then Hawaii to the United States.

Rice's conclusion is equally compelling, and refreshingly straightforward: If the annexation of foreign territory is too great a power to be inferred from another power, then the great-power doctrine "simply cannot be applied consistently." (P. 723.) There—he said it. Before wrapping things up, though, he gives us just a little more, teeing up the first step in the next stage of the inquiry. Circling back around to the question of whether there is any Supreme Court case law on point, he once again overcomes the obstacle of the missing keywords: "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." (P. 763.) To prove the point, he points us in the direction of a plausible next step in our effort to understand the scope and content of the concept of a "great substantive and independent" power: *Afroyim v. Rusk*, the 1967 Supreme Court decision holding that U.S. citizens may not be stripped of their citizenship involuntarily. Surely involuntary expatriation is a great power as defined by Roberts—one simply too important to be inferred, right? The Court's decision in *Afroyim v. Rusk* confirms that instinct.

And yet the turn to the topic of citizenship at the close of the Note brings to mind the related jurisprudence on immigration, which in contrast to cases on citizenship like *Afroyim* is a fertile source of decisions upholding, not striking down, exercises of powers too great to be inferred, yet nowhere enumerated. Once *Afroyim* has been invoked, surely the next step in our inquiry into the scope and content of "great powers" will be the Court's foundational decision in *Chae Chan Ping v. United States* (the *Chinese Exclusion Case*), right? The 1889 *Chinese Exclusion Case* upheld Congress' power to exclude aliens from its sovereign territory. We agree that the power to exclude aliens is a "great power," yes? Yet not only was the Court in the *Chinese Exclusion Case* undaunted by its absence from Article I, section 8, but it grounded its decision instead on the proposition that the power to exclude is, quite simply, essential to the existence and survival of the nation and, therefore, must be "inherent in sovereignty." In other words… it's a power too great to enumerate? Are we thus left with not one but two kinds of great powers—those too great to enumerate, and those too great not to enumerate? Could be: as Rice put it in an earlier passage discussing the view that the power of territorial annexation is, like the power to exclude aliens, "inherent in sovereignty," "when a congressional power can be defended only on such flimsy extraconstitutional grounds" as that of being "inherent in sovereignty," "it is an especially fine candidate for great-power status." (P. 723.) If the result of our inquiry will be that we have two apparently irreconcilable doctrinal lines on great powers—those too great to enumerate and those too great not to enumerate—then I believe we would all benefit if Rice decides to take up the project of making sense of it all.

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