The Hawai'i Affair: American Imperialism and the Engineering of Territorial Expansion:

The legal and political status of the Hawaiian Islands at the turn of the 19th century

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Final Draft
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December 27, 2020

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I. Introduction

This article will delve into whether there was a valid transfer of the Hawaiian Islands to the United States in 1898, making it a territory of the United States at that time. There is general agreement that the 1893 overthrow of the Hawaiian government leading up the annexation was illegal, though the specific reasons why it was illegal are not identified. Generally, the events just sound really bad. Further, there has been limited analysis on the legality of the annexation to the U.S. and there is not consensus on whether it was legal or illegal, and for what reasons either way. Existing research is often shallow with claims of illegality based on "conflicts of treaties," "limited extraterritoriality of congressional actions," or "violations of international law," but not the specifics of where law was broken. Law is rarely black and white, and policy never is. This paper endeavors to get into the specifics.

This topic is a complicated issue in its own right, but it is still merely a small step in a larger exploration of the status of the Hawaiian Islands today. This analysis is many things. This is the story of the Hawaiian Islands in the 19th century. It is a story of American Imperialism. It's a story of a young, thriving island nation. It is a love-story between American expansionists in the United States desiring to manifest more destiny, and pro-American businessmen living within that island nation, looking to build their fortunes. Much of what occurred, while unacceptable under today's standards, was common practice at that time by imperial and expansionist States, of which the United States joined the ranks following its actions towards Hawai'i, the Philippines, Puerto Rico, Sāmoa, and Guam in the 1890s.

The high-level facts for this paper are not in dispute. In fact, they are admitted by the U.S. federal government in United States Public Law 103-150, a Joint Resolution passed in 1993.[1] The most damning of which are as follows:

> *On January 14, 1893, John L. Stevens (hereafter referred to in this Resolution as the "United States Minister"), the United States Minister assigned to the sovereign and independent Kingdom of Hawaii conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii;*
>
> *In pursuance of the conspiracy to overthrow the Government of Hawaii, the United States Minister and the naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16, 1893, and to position themselves near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government;*

[1] U.S. Public Law 103-150 (107 Stat. 1510)

> *On the afternoon of January 17, 1893, a Committee of Safety that represented the American and European sugar planters, descendants of missionaries, and financiers deposed the Hawaiian monarchy and proclaimed the establishment of a Provisional Government;*
>
> *The United States Minister thereupon extended diplomatic recognition to the Provisional Government that was formed by the conspirators without the consent of the Native Hawaiian people or the lawful Government of Hawaii and in violation of treaties between the two nations and of international law;*
>
> *Without the active support and intervention by the United States diplomatic and military representatives, the insurrection against the Government of Queen Liliuokalani would have failed for lack of popular support and insufficient arms.*
>
> *In a message to Congress on December 18, 1893, President Grover Cleveland reported fully and accurately on the illegal acts of the conspirators, described such acts as an "act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress", and acknowledged that by such acts the government of a peaceful and friendly people was overthrown;*
>
> *The indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum.*

U.S. Public Law 103-150 (107 Stat. 1510)

Even though all this is admitted, this article will review major historic events leading up to 1898 because the history of the Hawaiian Islands is rich and nuanced. Then it will provide a lens on how to view and analyze the legality of events that occurred over 120 years ago. Then it will seek to understand Minister Steven's role, and as such the United States' role, in the overthrow. Finally, it will analyze if the U.S. had a valid claim to title of Hawai'i via conquest, session, or prescription. Along the way, we will examine legal, political, and policy implications – as well as ethical considerations. What can be done is not always what should be done, and some moral errors are severe enough that they cannot be upheld even through historical practice and the passage of time.

II. History

A. Origins and Geography

The Hawaiian Islands emerged out of the darkness of the ocean depths many millions of years ago. The island of Kaua'i was the first volcano to build up enough erupting lava to appear above the

waves and create a major island. Big Island was the most recent.[2] Many of the oldest volcanos have been eroded and now hide below the surface of the ocean.[3]

Today, the land area of the Hawaiian Islands consists of a chain volcanic mountains that form eight major islands and many smaller ones in the Hawaiian Archipelago.[4] The area of the islands cover 6,434 square miles (4,119,227 acres), which is slightly larger than the combined area of Connecticut and Rhode Island.[5]

The major islands include Hawai'i, O'ahu, Maui, Kaua'i, Moloka'i, Lāna'i, Ni'ihau, and Kaho'olawe.[6] Their position in the Pacific Ocean is central, situated upon a direct commercial route (between San Francisco and Australia, or from the Panamá canal to the ports of Japan and China), and with a point of vantage commanding the whole west coast of America, from Bering Sea to Cape Horn.[7]

B. Ancient Hawai'i: Settlement and Unification

The Hawaiian Islands were first settled by explorers from the Marquesas Islands (north of Tahiti) as early as 400 CE. [8] Westerner colonists have named these explorers "Polynesians," thought they likely came from the place we now call Taiwan and sailed to and from Hawai'i, Tahiti, Tonga, Samoa, Fiji, Bora Bora, and dozens of other islands.[9] These explorers traveled 2,200 miles to the Hawaiian Islands, one of the most remote island chains in the world, in canoes guided only by the stars.[10]

Native Hawaiian's (Kānaka Maoli) maintained contact with these other archipelagos by long distance canoe voyages for hundreds of years.[11] In the 11th century, Tahitians began sailing for the Hawaiian Islands with taro, coconut, berries, and banana to plant once they arrived.[12] [13] Travelers to Samoa returned with a tree with medicinal bark.[14] Around 1,300 these voyages stopped, likely due to

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[2] Helen Wong and Dr. Ann Rayson, Hawaii's Royal History (1987)
[3] Helen Wong and Dr. Ann Rayson, Hawaii's Royal History (1987)
[4] Hawaii Statehood Report, House of Representatives 86th Congress 1st Session, Report No. 32 (1959)
[5] Hawaii Statehood Report, House of Representatives 86th Congress 1st Session, Report No. 32 (1959)
[6] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[7] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[8] Office of Hawaiian Affairs, Native Hawaiian Population Enumerations in Hawai'i (2017)
[9] David A. Chang, The World and All the Things Upon It: Native Hawaiian Geographies of Exploration (2016)
[10] Helen Wong and Dr. Ann Rayson, Hawaii's Royal History (1987)
[11] David A. Chang, The World and All the Things Upon It: Native Hawaiian Geographies of Exploration (2016)
[12] Office of Hawaiian Affairs, Native Hawaiian Population Enumerations in Hawai'i (2017)
[13] David A. Chang, The World and All the Things Upon It: Native Hawaiian Geographies of Exploration (2016)
[14] David A. Chang, The World and All the Things Upon It: Native Hawaiian Geographies of Exploration (2016)

climate change impacting currents and winds.[15] However, a rich body of oral history would recount travel between Hawai'i and the other lands in Oceania for centuries to come, including the first Kānaka explorers who arrived on the islands.[16]

Before continuous western contact began, the dominant system of land ownership was an "intricate and interdependent arrangement based on agricultural needs and hierarchical structure."[17] The nature of society was collective and cooperative.[18] The Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system with sophisticated language, culture, and religion.[19] They were bound together in an elaborate web of obligation, ritual, and reverence for nature.[20]

Separate kingdoms evolved on each of the major islands.[21] In the 1600-1700s, the islands developed complex chiefdoms.[22] Different estimations vary based on growth models, but the population of the islands may have been around 250,000-500,000 people in the late 18th century.[23] [24] Around that time, a Hawaiian myth told of a priest named Kaopulupulu who prophesized that the land the Hawaiian people currently had would soon be possessed by foreigners.[25]

In 1555, following Magellan's famous voyage, a Spanish navigator visited the islands.[26] The first British explorer to visit the Hawaiian islands was Captain James Cook in 1778, during his third voyage around the globe.[27] He named the islands "The Sandwich Islands," after the Earl of Sandwich.[28] The title of "Sandwich Islands" has stuck around as a nickname.[29] When his ship approached the island of Kaua'i, the Hawaiians were intrigued and quickly paddled out to meet the sailors and investigate.[30]

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[15] David A. Chang, The World and All the Things Upon It: Native Hawaiian Geographies of Exploration (2016)
[16] David A. Chang, The World and All the Things Upon It: Native Hawaiian Geographies of Exploration (2016)
[17] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[18] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[19] U.S. Public Law 103-150 (107 Stat. 1510)
[20] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[21] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[22] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[23] Office of Hawaiian Affairs, Native Hawaiian Population Enumerations in Hawai'i (2017)
[24] Edward Joesting III, Kauai: The Separate Kingdom (1988)
[25] Thomas G. Thrum, Hawiian Folks Tales: This Land is the Sea's (1907)
[26] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[27] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[28] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[29] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[30] David A. Chang, The World and All the Things Upon It: Native Hawaiian Geographies of Exploration (2016)

In the 1790s, Cook returned and his crew quickly spread fleas, venereal diseases, iron, and guns across the islands.[31] Cook also spread word of the Hawaiian Islands and New England whaling ships began to frequent the Islands. [32] The whalers discovered sandalwood on the islands and began harvesting it and selling it to China. [33] Many of these visitors sold and gave the Hawaiians guns. [34] Some sailors also deserted their ships and became advisors to island chiefs. [35]

In 1792, Kamehameha I was king of the island of Hawaii (i.e.: "Big Island").[36] All of the islands were governed by individual chiefs or kings until 1795, when Kamehameha I began conquering and uniting the islands under the rule of a single monarch, himself.[37] [38] By that point, Kamehameha I had 16,000 troops and many European weapons at his disposal (including a collection of cannons and thousands of rifles and pistols)[39] "The Battle of Nu'uanu" was the final battle that unified the Kingdom.[40]

It can be assumed the eight islands became known as the "Hawaiian Islands" likely because Kamehameha I was king of the island of "Hawai'i" before he conquered the other seven islands. King Kamehameha I apportioned the lands to his followers according to rank and upon feudal principles[41], and in return exacted fealty, military service, and taxes.[42] He appointed a governor for each island, who in turn appointed lower ranking officers.[43]

It is worth noting the striking parallels in statehood development: in the late 18th century, both the leaders of the Hawaiian Islands and Colonial America were contemplating the possibility of creating a new nation. The foundation of the Hawaiian Monarchy was established less than twenty years following the U.S.' Declaration of Independence.

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[31] Frederick B. Wichman, Nu Pua Ali'i o Kaua'i: Ruling Chiefs of Kaua'i (2003)
[32] Edward Joesting III, Kauai: The Separate Kingdom (1988)
[33] Edward Joesting III, Kauai: The Separate Kingdom (1988)
[34] Edward Joesting III, Kauai: The Separate Kingdom (1988)
[35] Edward Joesting III, Kauai: The Separate Kingdom (1988)
[36] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[37] 42 U.S.C.A § 11701 Findings.
[38] U.S. Public Law 103-150 (107 Stat. 1510)
[39] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[40] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[41] Note: a way of structuring society around relationships that were derived from the holding of land in exchange for service or labor
[42] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[43] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)

Following Kamehameha I's unification of the majority of the Hawaiian Islands, he was often referred to as "The Napoleon of the Pacific."[44] Kamehameha I was known as a great warrior and politician, and as a foreign newspaper reported, "also as a very acute trader and a match for any European in driving a bargain."[45]

Kamehameha I intended to also conquer and unify Kaua'i and Ni'ihau but was delayed by poor weather, disease outbreak, and uprisings on the already conquered islands. [46]

By the late 18th century, Native Hawaiian began traveling on American and European ships to work as sailors and whalers in the Pacific, as laborers in the U.S. fur trade in the Atlantic, and then later others flocked to California for the Gold Rush.[47]

C. Emergence of a State and Attempted Claims to Title

In 1794, King Kamehameha ceded the Hawaiian Islands to Great Britain through an oral agreement, but requested to keep control of the domestic sovereignty. [48] Captain George Vancouver openly claimed the island for Great Britain.[49] However, the Great Britain government never enforced the cession, likely concluding King Kamehameha meant to request a protectorate instead.[50]

In 1779, one of Captain Cook's smaller ships was stolen and he took the Chief of the island of Hawai'i, Kalani'ōpu'u, hostage, demanding the ship be returned. [51] The Hawaiian people defended Kalani'ōpu'u and freed him, killing Captain Cook and four British Marines in the process.[52] The British struck back and killed and burned, however the incidence was quickly forgiven, because of the Hawaiians justification of self-defense, and also because sailors recently discovered sea otters and seals in the Pacific Northwest and realized the location of the Hawaiian Islands in that route was more valuable then revenge. [53] [54]

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[44] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[45] Noelani Arista, The Kingdom and the Republic: Sovereign Hawai'i and the Early United States (2019)
[46] Edward Joesting III, Kauai: The Separate Kingdom (1988)
[47] David A. Chang, The World and All the Things Upon It: Native Hawaiian Geographies of Exploration (2016)
[48] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[49] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[50] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[51] Edward Joesting III, Kauai: The Separate Kingdom (1988)
[52] Edward Joesting III, Kauai: The Separate Kingdom (1988)
[53] Edward Joesting III, Kauai: The Separate Kingdom (1988)
[54] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)

In 1804, the first of what would be many epidemics hit the islands. The disease (likely typhoid fever or dysentery), killed about 150,000 Hawaiians, roughly ½ - 1/3 the population.[55]

By 1805, King Kamehameha had built up a fleet of at least 20 vessels, weighing 20-30 ton each.[56] He even started manufacturing Hawaiian made ships[57]. He also began encouraging European's to settle on his islands providing they "be industrious."[58]

In 1810, following two failed attempts at invasion, the Kingdom of Kaumuai'i (which was founded in 1795 on the islands of Kaua'i and Ni'ihau), was allowed by King Kamehameha to remain a separate Kingdom run by King Kaumuai'i, though within the "realm" of the Hawaiian Kingdom.[59] This seemed to be in line with the idea of a "protectorate."

In 1814, King Kaumuai'i pledged allegiance to Russia and plotted with Russian agents to invade four of the Hawaiian islands in an attempt to drive Kamehameha back to the Big Island. [60] Russians built several military forts, and even briefly flew the Russian flag over the island in 1815.[61] The Russians pulled out of the scheme after interacting with Kamehameha and being impressed by his governance. [62] The Russians were forcibility removed in 1817.[63]

Kamehameha I died in 1819 and was succeeded by Kamehameha II. [64] The written Hawaiian language was created in 1820 and the Kānaka "vigorously embraced literacy."[65]

Protestant missionaries started settling Hawai'i in 1820,[66] with more than 100 sent from the U.S. alone between 1820-1850. [67] At this time, Hawaiians had a casual, communal nature-based spirituality – believing the land belonged to gods and goddesses. [68] The missionaries viewed them as "heathens waiting to be converted" and tirelessly worked to impute their own values upon them.[69]

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[55] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[56] Noelani Arista, The Kingdom and the Republic: Sovereign Hawai'i and the Early United States (2019)
[57] Noelani Arista, The Kingdom and the Republic: Sovereign Hawai'i and the Early United States (2019)
[58] Noelani Arista, The Kingdom and the Republic: Sovereign Hawai'i and the Early United States (2019)
[59] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[60] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[61] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[62] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[63] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[64] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[65] David A. Chang, The World and All the Things Upon It: Native Hawaiian Geographies of Exploration (2016)
[66] David A. Chang, The World and All the Things Upon It: Native Hawaiian Geographies of Exploration
[67] U.S. Public Law 103-150 (107 Stat. 1510)
[68] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2006)
[69] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2006)

In the 1822, Hawaii began to transition to written rather than oral law. The transition was in response to the disruptive and violent behavior of foreign seamen stopping off their ships in port towns.[70] The first published laws regulated prostitution, and the comings and goings of foreigners.[71]

The unification of the Hawaiian Islands was not complete until 1824, when King Kamehameha II conquered the islands of Kaua'i and Ni'ihau as well.[72] The Hawaiians and Kauaians called it "war" and a "brutal attack." [73]

Also in 1824, King Kamehameha II issued an proclamation encouraging learning and education.[74] By 1831, 52,000 Hawaiians attended 1,100 schools. [75] Supplies were in short supply and in the beginning, some school houses were created with thatched grass and desks were occasionally created with surfboards. [76]

King Kamehameha II died of measles in England shortly after, and was succeeded by Kamehameha III in 1825.[77] [78]

The Hawaiian Kingdom and the U.S. drafted their first treaty in 1826, negotiated by King Kamehameha III and Commodore Thomas ap Catesby Jones,[79] who was not a diplomat and thus was unofficially representing the U.S.[80] The agreement declared perpetual peace and friendship between the U.S. government and the Hawaiian monarchy.[81] It also noted the Hawaiian government will accept all U.S. ships and vessels in their ports and harbors, assist any U.S. ships and vessels that may become wrecked on Hawaiian shores, prevent desertion from visiting U.S. ships, and will protect U.S. people and property on the Hawaiian Islands during times of war.[82] The agreement also provided the U.S. the ability to sue Hawaiians in court under principles of equity or international law and it allowed the ability to trade goods.[83]

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[70] Sally Engle Merry, Colonizing Hawai'i: The Cultural Power of Law (1999)
[71] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[72] Edward Joesting III, Kauai: The Separate Kingdom (1988)
[73] Edward Joesting III, Kauai: The Separate Kingdom (1988)
[74] Edward Joesting III, Kauai: The Separate Kingdom (1988)
[75] Edward Joesting III, Kauai: The Separate Kingdom (1988)
[76] Edward Joesting III, Kauai: The Separate Kingdom (1988)
[77] Helen Wong and Dr. Ann Rayson, Hawaii's Royal History (1987)
[78] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[79] Thomas was born to Catesby and Lettice Jones. The middle name "ap Catesby" meant "son of Catesby," a traditional patronymic surname format used in Wales.
[80] John Chandler Bancroft Davis ed., Hawaiian Islands, reprinted in U.S. State Department, Treaties and Conventions concluded between the United State of America and other powers since July 4, 1776, (1873).
[81] Articles of Arrangement Between The United States and The Sandwich Islands (Hawaii) (1826)
[82] Articles of Arrangement Between The United States and The Sandwich Islands (Hawaii) (1826)
[83] Articles of Arrangement Between The United States and The Sandwich Islands (Hawaii) (1826)

The treaty was signed by the U.S. president at that time, John Quincy Adams, but the Senate never ratified the treaty. [84] The State Department stated in 1894 that the unratified treaty was "morally binding" and then in 1933 elaborated that the treaty was de facto in force.[85] They also speculated that the treaty was likely never ratified because the Hawaiian Government had never entered into a treaty before and likely did not understand or expect a "ratification" process.[86]

In 1827, the first code of laws was printed including laws prohibiting murder, theft, and adultery.[87] Written laws prohibiting selling rum, prostitution, and gambling were also proposed – but were successfully lobbied against by resident merchants.[88] In the 1820s, Hawaii also began holding public trails by jury and public hangings.[89] Before, infractions of the religious laws (kapu) were punished by secret killings without trials or sentences. [90] Credit is given to the missionaries' influence for this transition in methods of conviction and punishment. [91] [92]

By the late 1830s most Native Hawaiians were literate and in the following decades they generated tens of thousands of texts (chants, articles, books, songs, and more).[93]

In 1838, King Kamehameha III drafted a document called "Alien Laws" describing who he viewed to be "subjects" (or "citizens") of the Hawaiian Kingdom. [94] He described four categories: those born on the islands, those born to Native Hawaiians elsewhere, those born on Hawaiian ships, and any others as long as they took an oath of allegiance to the Kingdom.[95]

In 1839, a Hawaiian Bill of Rights was promulgated.[96] All power was still concentrated in the sovereign (the King) until the first written constitution was granted on October 8, 1840.[97] Academics believe the King pursued a constitution to protect the Native Hawaiians and in response to the frequent disputes about land use and land management with the new foreign settlers.[98]

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[84] Robert H. Stauffer, The Hawai'i-United States Treaty of 1826, page 40-60
[85] Robert H. Stauffer, The Hawai'i-United States Treaty of 1826, page 40-60
[86] Robert H. Stauffer, The Hawai'i-United States Treaty of 1826, page 40-60
[87] Sally Engle Merry, Colonizing Hawai'i: The Cultural Power of Law (1999)
[88] Sally Engle Merry, Colonizing Hawai'i: The Cultural Power of Law (1999)
[89] Sally Engle Merry, Colonizing Hawai'i: The Cultural Power of Law (1999)
[90] Sally Engle Merry, Colonizing Hawai'i: The Cultural Power of Law (1999)
[91] Sally Engle Merry, Colonizing Hawai'i: The Cultural Power of Law (1999)
[92] Annexation of Hawaiian Islands, 24 Cong. Rec. 973, 977 (1893)
[93] David A. Chang, The World and All the Things Upon It: Native Hawaiian Geographies of Exploration (2016)
[94] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[95] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[96] Richard H. Kosaki, Constitutions and Constitutional Conventions of Hawaii (Hawaiian Historical Society) (1978)
[97] Annexation of Hawaiian Islands, 24 Cong. Rec. 973, 977 (1893)
[98] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)

The constitution established a constitutional monarchy in the kingdom, including the creation of a House of Representatives and House of Nobles (bicameral legislature), executive department, and a Supreme Court.[99] Under this constitution, any subjects of Kingdom from the islands of Hawaii, Maui, Oahu, and Kaua'i were able to vote for the "representative body," the House of Representatives.[100] The constitution explained, "This representative body shall have a voice in the business of the kingdom. No law shall be passed without the approbation of a majority of them." [101] The 1840 constitution formally enacted the Alien Laws as well.[102]

It was rumored at that time that the creation of a constitutional monarchy was in response to pressures by the U.S. about repaying debts and to protect the Hawaiian Islands from being taken over by the U.S.[103]

Between 1840-1842, an extensive body of laws was passed called the "foundation of law", and later called the "Blue Laws" (based on the blue cover of the 200 page printed book they were contained in).[104] The Blue Laws incorporated significant amounts of Hawaiian customary law and practice, as well as Protestant Christian tradition.[105] Soon after, European powers recognized the Hawaiian Kingdom as a government "capable to provide for regulation of its relations with foreign nations."[106] In the mid-1840s, only 676 of 16000 foreigners had been naturalized.[107]

In 1842, President John Tyler recognized the sovereignty of Hawai'i and declared it the official policy of the U.S. to support Hawaiian independence.[108] Congress then appropriated funds for a minister to Hawai'i. [109] However, this "Tyler Doctrine" also noted that Hawaii was "under the sphere of U.S. influence."[110] President Tyler explained, the U.S. did not want any exclusive control over Hawaii, and was content with its independence and the U.S. is prepared to protest any other powers trying to

[99] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007); Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[100] Constitution of the Hawaiian Kingdom (Ke Kumukānāwai a me nā Kānāwai o ko Hawai'i Pae 'Āina), Honolulu, 1840
[101] Constitution of the Hawaiian Kingdom (Ke Kumukānāwai a me nā Kānāwai o ko Hawai'i Pae 'Āina), Honolulu, 1840
[102] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[103] Sally Engle Merry, Colonizing Hawai'i (1999)
[104] Sally Engle Merry, Colonizing Hawai'i: The Cultural Power of Law (1999)
[105] Sally Engle Merry, Colonizing Hawai'i: The Cultural Power of Law (1999)
[106] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[107] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[108] H.R. Exec Doc. No 35, 27th Cong., 3d Sess. (1842)
[109] H.R. Exec Doc. No 35, 27th Cong., 3d Sess. (1842)
[110] J. Kēhaulani Kauanui, Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indignity (2008)

influence control over the island.[111] The Tyler Doctrine essentially extended the Monroe Doctrine to include Hawaii. [112]

The independence of Hawai'i was formally recognized by Great Britain and France in 1843.[113] The treaty stated that Great Britain and France "consider the [Hawaiian] Islands as an Independent State, and never to take possession, either directly or under the title of Protectorate, or under any other form, of any part of the territory of which they are composed."[114] There was no expiration or method for termination noted in the treaty.[115]

D. The "Paulet Occupation" and the Resulting Revolution in Property Rights

In 1843, a rogue British lord, George Paulet, arrived at the Hawaiian Islands demanding payment of over $100,000 in debts.[116] He then forced King Kamehameha III to cede the kingdom to Great Britain under protest and at gun point.[117] Great Britain refused to support Paulet.[118] Five months later, a British Rear Admiral arrived in Hawai'i and took down the British Flag, reassuring King Kamehameha III that Lord Paulet had no authority or official order to claim Hawaii for Great Britain.[119]

In 1845, the "Organic Acts passed by the Legislature" expanded and better articulated the 1840 constitution, including defining the implied powers of the King.[120] The act also created a formal Foreign Relations department.[121] In 1846, the "naturalization" process was formalized for any person who lived in the Kingdom for over one year and who took an oath of allegiance.[122]

At this point, the King was understandably nervous about foreign interference after three instances of foreigners claiming the Hawaiian Islands for their own countries, including the five-month

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[111] https://prod.millercenter.org/the-presidency/presidential-speeches/december-30-1842-message-congress-regarding-us-hawaiian
[112] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[113] Annexation of Hawaiian Islands, 24 Cong. Rec. 973, 977 (1893)
[114] Declaration Between France and Great Britain Relative to The Reciprocal Guarantee of the Independence of the Sandwich Islands (1843)
[115] Declaration Between France and Great Britain Relative to The Reciprocal Guarantee of the Independence of the Sandwich Islands (1843)
[116] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[117] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[118] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[119] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[120] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[121] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[122] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)

occupation by Paulet. In response, over two years (from 1848-50) the King granted the individual right to possess and control real property ("fee" ownership), destroying the previous feudal system.[123] [124] These changes in property law from collective to private ownership became to be known as the "Great Māhele" (the Great Division).[125] He also set aside a large amount of land for the government ("public lands") and for the King ("Crown Lands").[126]

This change, while well intentioned, proved disastrous for the Native Hawaiians.[127] Very few Native Hawaiians made fee-simple claims for the land upon which they lived. [128] The majority of the land ended up with the King, the government, a few Chiefs, and the foreign businessmen. [129] The Māhele actually resulted in disinheriting the vast majority if Native Hawaiians. [130]

The King wanted to secure the Hawaiian Island land for the Native Hawaiians in response to the increased immigration and growing foreign business interests.[131] However, over time the native population diminished while foreign populations increased, and the foreign population (who was already familiar with individual property rights) began to accumulate more and more property.[132]

Over just a few years, the implications of the recent legal changes for the distribution of power in Hawaiian society was enormous with foreigners (or "haoles" as Native Hawaiians referred to them) now controlling most of the private property and who were importing substantial numbers of Asians and Europeans to work as plantation laborers under the new contract labor laws.[133]

E. Foreign Relations and The Growing Influence of Sugar Business

The first formal and ratified treaty between the U.S. and Hawai'i was signed in 1849 and ratified by the U.S. in 1850.[134] and the Hawaiian Kingdom on August 25, 1850. [135] The treaty addressed

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[123] Annexation of Hawaiian Islands, 24 Cong. Rec. 973, 977 (1893)
[124] Melody Melody Kapilialoha MacKenzie, Susan K. Serrano, and D. Kapua'ala Sproat, Native Hawaiian Law: A Treatise (2015)
[125] Melody Melody Kapilialoha MacKenzie, Susan K. Serrano, and D. Kapua'ala Sproat, Native Hawaiian Law: A Treatise (2015)
[126] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[127] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[128] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[129] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[130] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[131] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[132] Annexation of Hawaiian Islands, 24 Cong. Rec. 973, 999 (1893)
[133] Sally Engle Merry, Colonizing Hawai'i: The Cultural Power of Law (1999)
[134] U.S. - Hawaiian Kingdom Treaty of Friendship, Commerce and Navigation (1849), 1849 Treaty of Friendship, Commerce and Navigation between the United States of America and the Hawaiian Kingdom, Date of entry into force: 24 Aug 1850
[135] https://www.loc.gov/law/help/us-treaties/bevans/b-hawaii-ust000008-0864.pdf

"friendship, commerce, and navigation".[136] Article 1 addressed Friendship by saying, "There shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, his heirs and his successors."[137] The treaty also agreed that the U.S. and the Hawaiian Kingdom will give each other as good of a deal or better, on imports/exports and customs duties as they give to any other countries.[138] The treaty gave all U.S. government steam vessels free access to all Hawaiian ports, and U.S. whaling ships access to specific ports for maintenance and trading. [139] Finally, the treaty formalized the right for U.S. citizens and Hawaiian Kingdom subjects to contract with each other.[140]

The treaty was to be in force from ratification unless one party gives notice to terminate, and then until one year after that notice. The treaty requires any party infringing on the treaty shall be held responsible and asks for uninterrupted harmony between the governments of the United States and the Hawaiian Kingdom.[141] There is no record either party requested to terminate the treaty, however the Library of Congress records the treaty terminated on August 12, 1898 "upon annexation of Hawaii."[142]

In 1851, France began "menacing" the Hawaiian Islands and making "unjust demands."[143] France also recently began to occupy Tahiti. [144] King Kamehameha III was "hard pressed by the aggressions of France" and the Hawaiian legislature passed a joint resolution stating that if France continued down the current path, the King should place the Kingdom under the protection of a friendly State.[145] [146] The King sought the protection of the U.S. and began negotiations for a U.S. Protectorate over the Hawaiian Islands.[147] As threats of a French takeover continued through the 1850s, Kings Kamehameha III and IV would also seek to guarantee independence by forming treaties with European countries and the U.S. with occasional talks of protectorates.[148]

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[136] Treaty of Friendship, Commerce, and Navigation between the United States of America and His Majesty the King of the Hawaiian Islands, 9 Stat. 977 (1849).
[137] Treaty of Friendship, Commerce, and Navigation between the United States of America and His Majesty the King of the Hawaiian Islands, 9 Stat. 977 (1849).
[138] Treaty of Friendship, Commerce, and Navigation between the United States of America and His Majesty the King of the Hawaiian Islands, 9 Stat. 977 (1849).
[139] Treaty of Friendship, Commerce, and Navigation between the United States of America and His Majesty the King of the Hawaiian Islands, 9 Stat. 977 (1849).
[140] Treaty of Friendship, Commerce, and Navigation between the United States of America and His Majesty the King of the Hawaiian Islands, 9 Stat. 977 (1849).
[141] Treaty of Friendship, Commerce, and Navigation between the United States of America and His Majesty the King of the Hawaiian Islands, 9 Stat. 977 (1849).
[142] https://www.loc.gov/law/help/us-treaties/bevans/b-hawaii-ust000008-0864.pdf
[143] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2008)
[144] Sally Engle Merry, Colonizing Hawai'i: The Cultural Power of Law (1999)
[145] Hawaii, 31 Cong. Rec. 5940 (1898).
[146] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2008)
[147] Hawaii, 31 Cong. Rec. 5940 (1898).
[148] Sally Engle Merry, Colonizing Hawai'i: The Cultural Power of Law (1999)

1851 was the first election for the House of Representatives, and even though foreign settlers were only 2% of the overall population, 7 of the 24 elected representatives were white.[149]

A new Hawaiian constitution was enacted in 1852, maintaining universal male suffrage[150] and more formally differentiating the functions of government into the three departments typical of constitutional governments.[151] King Kamehameha III opposed universal suffrage and desired to a add a property requirement for voting rights, but was unable to get a constitutional amendment ratified for it.[152]

In the 1850s, a group was formed called the "Committee of Thirteen" which represented hundreds of Americans on the islands.[153] The committee pledged to end the monarchial government, overthrow the King, and replace the King with a "white-led Republic." One member, George Lathrop, an American doctor, was quoted as saying that "Native Hawaiians were no different than ni—ers."

In 1853-1854, the King began negotiations with the U.S. to annex the Hawaiian Islands, requesting that the Hawaiian Islands be admitted as a U.S. state and guaranteed all rights of American citizens.[154] In 1854, the U.S. Secretary of State, on behalf of President Pierce, authorized a treaty of annexation, but negotiations ceased after the death of King Kamehameha III and the succession of King Kamehameha IV in 1855, who strongly opposed annexation.[155] [156]

In November 1863, King Kamehameha IV died of chronic asthma and King Kamehameha V succeeded to the throne.[157] Kamehameha V did not take the now customary oath to support the existing constitution.[158]

King Kamehameha V desired a strong monarchy and resisted universal suffrage, especially precluding non-property owners.[159] Instead of convening the legislature that was to meet that year, he

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[149] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[150] He Kumukänäwai a me nä Känäwai o ka Mö'ï Kamehameha III, Honolulu, 1852, Constitution and Laws of His Majesty Kamehameha III, Honolulu, 1852. Forbes 1869 (III: 34-35), 1868 (III: 34).
[151] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[152] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[153] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[154] Sally Engle Merry, Colonizing Hawai'i: The Cultural Power of Law (1999)
[155] Hawaii, 31 Cong. Rec. 5940 (1898).
[156] Sally Engle Merry, Colonizing Hawai'i: The Cultural Power of Law (1999)
[157] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[158] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[159] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)

issued a proclamation for a constitutional convention to replace the 1852 constitution.[160] The convention was split on whether to require property qualifications.[161] The King grew impatient with the convention and in 1864, simply drafted his own constitution and declared the previous constitution abrogated.[162] At least several members of the convention protested that the king was a constitutional monarch, and he was bound to observe the existing constitution. [163] King Kamehameha V believed that he had the right to create a new constitution, saying "the right to the Throne of this country, originally acquired by conquest and birth, belongs hereditarily to the family of Kamehameha I."[164] King Liholiho had also stated that while the constitution prescribed a mode for amendment, that was only the "ordinary" way and did not preclude other methods.[165]

The new 1864 constitution reduced the legislature from bicameral to unicameral, freedom of the press was curtailed, and universal male suffrage was eliminated with property requirements were established for voting and serving in the legislature, essentially disenfranchising the working-class.[166] [167] Voting rights were still otherwise allowed for any male "subject of the Kingdom" who has been domiciled in the Kingdom for a least a year, with no race or language requirements (other than general literacy).[168] [169] Several years later, some critics of the new constitution would double back and support the changes to strengthen and centralize the authority of the government as wise considering the events to follow.[170] Despite having no conventional sanctions and no endorsement by the people, it continued

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[160] Clifford Putney, God vs. Sugar: the Gulick Brothers' Fight Against King Kamehameha V and the Sugar Planters in Hawai'i, 1864-1870

[161] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)

[162] Clifford Putney, God vs. Sugar: the Gulick Brothers' Fight Against King Kamehameha V and the Sugar Planters in Hawai'i, 1864-1870

[163] Clifford Putney, God vs. Sugar: the Gulick Brothers' Fight Against King Kamehameha V and the Sugar Planters in Hawai'i, 1864-1870

[164] Jonathan Kay Kamakawiwoʻole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)

[165] Jonathan Kay Kamakawiwoʻole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)

[166] Clifford Putney, God vs. Sugar: the Gulick Brothers' Fight Against King Kamehameha V and the Sugar Planters in Hawai'i, 1864-1870

[167] Kingdom of Hawai`i Constitution of 1864, GRANTED BY HIS MAJESTY KAMEHAMEHA V, BY THE GRACE OF GOD, KING OF THE HAWAIIAN ISLANDS, ON THE TWENTIETH DAY OF AUGUST, A.D. 1864, Article 62

[168] Kingdom of Hawai`i Constitution of 1864, GRANTED BY HIS MAJESTY KAMEHAMEHA V, BY THE GRACE OF GOD, KING OF THE HAWAIIAN ISLANDS, ON THE TWENTIETH DAY OF AUGUST, A.D. 1864, Article 62

[169] *Note: From 1789-1792, only white male property owners could vote in the United States. Property restrictions began to be removed in 1792, but were not abolished until 1856. Black men in the United States were not allowed to vote until after the Civil War, and suffrage was not codified until the 15th Amendment in 1870.*

[170] Clifford Putney, God vs. Sugar: the Gulick Brothers' Fight Against King Kamehameha V and the Sugar Planters in Hawai'i, 1864-1870

in force for twenty-three years with no serious opposition due to the fact that it contained fewer changes than what the people had expected the king to make.[171]

In 1864 a Scottish family purchased the island of Ni'ihau for $10,000 in gold coins.[172] This was the first, but not the last time, a white person or group would purchase the entirety of one of the islands.[173]

There was a large sugar boom in Hawaii during the U.S. Civil War. However, when the war ended in 1865 and the U.S. regained access to sugar from the southern U.S. States, the Hawaiian economy quickly slid into a severe depression.[174] In 1867, King Kamehameha V sent his advisor to the United States to lobby for a "reciprocity treaty," however the treaty stalled in U.S. Congress in 1868 and was formally rejected in 1870.[175] Many white planters started proposing annexation of the Hawaiian Islands by the U.S. as another way to avoid the U.S. tariff on foreign sugar. [176] The topic of annexation was debated at length in Hawaiian press in the late 1860s. [177] The idea of annexation outraged Kamehameha V who described proponents as "hellish conspirators." [178]

Many American descendants of missionaries had put their energy into heavily investing in sugar plantations.[179] By 1870, only fifty years since their ancestors first immigrated to Hawai'i, these wealthy descendant sugar companies were known as the "Big Five": Ladd and Company, H. Hackfeld and Company, C. Brewer and Company, Castle and Cooke, and Alexander and Baldwin.[180] For the next 30 years, despite being a very small portion of the Hawaiian population, this group would deeply influence Hawaiian politics and law in furtherance of their business interests.

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[171] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[172] Adam Clanton, The Men Who Would Be King: Forgotten Challenges to U.S. Sovereignty, 26 UCLA Pac. Basin L.J. 1 (Fall 2008)
[173] Larry Ellison, the billionaire CEO of Oracle Corporation, purchased 98% of Lāna'i in 2012 for an estimated $300-600m. He purchased it from fellow billionaire David Murdock, who bought the island in 2003. Murdock purchased the island along with the "Dole Food Company" from one of the "Big Five" sugar companies, Castle & Cooke.
[174] Clifford Putney, God vs. Sugar: the Gulick Brothers' Fight Against King Kamehameha V and the Sugar Planters in Hawai'i, 1864-1870
[175] Clifford Putney, God vs. Sugar: the Gulick Brothers' Fight Against King Kamehameha V and the Sugar Planters in Hawai'i, 1864-1870
[176] Clifford Putney, God vs. Sugar: the Gulick Brothers' Fight Against King Kamehameha V and the Sugar Planters in Hawai'i, 1864-1870
[177] Clifford Putney, God vs. Sugar: the Gulick Brothers' Fight Against King Kamehameha V and the Sugar Planters in Hawai'i, 1864-1870
[178] Clifford Putney, God vs. Sugar: the Gulick Brothers' Fight Against King Kamehameha V and the Sugar Planters in Hawai'i, 1864-1870
[179] https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[180] https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/

In 1872, Kamehameha V died without a successor.[181] The next king, King Lunalilo was the first monarch to be appointed with a popular election, even though the legislators still ultimately elected the monarch.[182] As the Hawaiian Kingdom continued to become more democratic, the election was held to hear the voice of the people.[183]

However, after being appointed, King Lunalilo died a year later from tuberculosis.[184] Following King Lunalilo's death, another election was held. King Kalākaua won overwhelmingly and was appointed in 1874.[185] However, supporters of another candidate, Queen Emma (the widow of King Kamehameha IV), caused a large riot after her defeat.[186] They complained King Kalākaua's friends bribed the legislators in order to elect him.[187] Her supporters, known as "Emmaites" attacked supporters of King Kalākaua to the extent Marines and sailors from three U.S. and British warships were required to quell the protests.[188]

King Kalākaua visited the U.S. twice, once in 1874, and again in 1881, continuing strong diplomatic relations with the United States.[189] He also repealed property and income requirements for voting rights.[190] Kalākaua created a movement of cultural initiatives that preserved, promulgated, and performed hula, songs, stories, and genealogies that wove together the Hawaii narrative stretching back to the ancient migrations and gods.[191] This narrative also captured the stories of movement between Hawaii, Samoa, Tahiti, and Bora Bora.[192]

In 1874, a scandal broke around King Kalākaua's unnecessary expenditures, the King's "manipulations of elections," and his opium bribes.[193] It was claimed the King took a bribe of $71,00 to grant a monopoly on opium selling on the islands,[194] and the agreement was documented in writing .[195]

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[181] Peter Galuteria, Lunalilo (1993)
[182] Peter Galuteria, Lunalilo (1993)
[183] Peter Galuteria, Lunalilo (1993)
[184] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[185] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[186] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[187] FOREIGN RELATIONS OF THE UNITED STATES, 1894, APPENDIX II, AFFAIRS IN HAWAII, Document 284
[188] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[189] Visits by Foreign Leaders of Hawaii, Office of the Historian, Department of State, https://history.state.gov/departmenthistory/visits/hawaii
[190] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[191] David A. Chang, The World and All the Things Upon It: Native Hawaiian Geographies of Exploration (2016)
[192] David A. Chang, The World and All the Things Upon It: Native Hawaiian Geographies of Exploration (2016)
[193] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[194] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[195] FOREIGN RELATIONS OF THE UNITED STATES, 1894, APPENDIX II, AFFAIRS IN HAWAII, Document 284

An "indignation" meeting was held in June in Honolulu where resolutions were passed and demands were drawn up to be presented to the King, including that the constitution be revised to reduce the power of the monarchy, that the King restore the $71,000 bribe, and that the King would not interfere with the legislature.[196] It's unclear how the issue was resolved.

The U.S. and Hawaiian Islands "Reciprocity Treaty" in 1875 allowed for the tax-free exchange of goods between the Hawaiian Islands and the United States. [197] The Hawaiian sugar farmers lobbied for the treaty, as it would allow Hawaiian sugar to enter U.S. markets under favorable tariff rates.[198] The 1875 treaty was sponsored by the King but protested by the Native Hawaiian population, as it further enriched and empowered the foreigners.[199]

The Hawaiian legislative assembly passed "An Act to facilitate the negotiation of a Treaty or Treaties of Reciprocity."[200] After the treaty was finalized, was never sent to the Hawaiian legislatures to ratify, as there were worries about its chance of success with the negative popular sentiment towards it.[201] However, the King and the Hawaiian Supreme Court both stated that ratification was not necessary, because the King has been empowered by the previous act to do what he needed to secure a treaty.[202] Native opposition passed a resolution finding a "want of confidence" in the ministry and demanding their resignation.[203] The treaty terminated after eight years but then could be renewed, and was later amended.[204]

The unratified treaty had the biggest effect on the Hawaiian government since the Māhele. [205] The treaty caused an explosive growth in the Hawaiian sugar industry.[206] Some called it an "economic annexation."[207]

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[196] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[197] Convention Between the United States of America and His Majesty the King of the Hawaiian Islands, 19 Stat. 625 (1875). Amended in 1887 to provide the U.S. exclusive use of the port of Pearl Harbor.
[198] J. Kēhaulani Kauanui, Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indignity (2008)
[199] Jonathan Kay Kamakawiwoʻole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[200] Jonathan Kay Kamakawiwoʻole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[201] Jonathan Kay Kamakawiwoʻole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[202] Jonathan Kay Kamakawiwoʻole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[203] Jonathan Kay Kamakawiwoʻole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[204] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[205] Jonathan Kay Kamakawiwoʻole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[206] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[207] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)

In 1882, naturalization requirements to become a "subject of the Kingdom" were revised to require approval of the King, at least five years residence on the islands, property ownership, and "good moral character." [208]

In 1886, King Kalākaua took tentative steps to form a federation with Sāmoa.[209] He desired to establish a Hawaiian lead Polynesian federation of nations.[210] He wanted to create a zone where the sovereignty of Natives was the rule, not the exception. [211] And editorial in the *Pacific Commercial Advertiser* advocated for Kalākaua's efforts saying, "there is no good reason why the islands of the South Pacific should become appendages of distant powers…. If anyone is to prevent further aggrandization of foreign powers in the Pacific, Hawaii out to do it."[212] H.A.P. Carter, the U.S.'s minister to Hawaii at that time, began looking into whether Hawai'i the U.S. would support Hawai'i playing a leading role in a political reorganization of the still sovereign islands of eastern Polynesia.[213]

A tri-nation convention was held to determine the fate of the sovereign state of Sāmoa, and only the United States, Great Britain, and Germany could attend. [214] Sāmoa was not allowed to attend, nor was Kalākaua's administration allowed to attend and represent Sāmoa's interests on their behalf. [215] Henry Poor was the charge d'affaires of the Hawaiian legation to Sāmoa.[216] Both Germany and Great Britain were outraged that the Hawaiian Kingdom had sought to intervene in their colonial dispute.[217] Kalākaua had even purchased a British warship and sent it to Sāmoa to assert Hawaii's interest in protecting Sāmoa's sovereignty. [218] At one point the German government even threatened war on Hawaii if King Kalākaua continued to "interfere" with Sāmoan politics.[219] However, by that time the Bayonet Constitution had already occurred and Kalākaua had lost most of his power. [220]

F. The "Bayonet Constitution" | The First Coup

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[208] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[209] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[210] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[211] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[212] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[213] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[214] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[215] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[216] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[217] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[218] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[219] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[220] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)

The Hawai'i Affair

In 1887, an organization formed that was based on concerns about the reversion of the government back to a strong monarchy.[221] The organization of thirteen white foreigner lawyers and sugar planters, accompanied by an armed militia, then forced the King, at gun point, to sign a new constitution addressing the group's demands.[222] The new constitution was written by Lorrin Thurston, a descendent of missionaries, graduate of Columbia University Law School, and advocate that only whites could rule the Hawaiian Islands effectively. [223]

The new constitution supported the group's goals of expanded property rights and better control of the economy. [224] The new constitution, referred to as the "Bayonet Constitution, " was written by the white businessmen and lawyers, including Stanford Dole (the future governor and president following the overthrow). [225] The new constitution radically restructured the Hawaiian government and reduced the power of the monarchy[226], essentially making the King a figurehead. One of the most devasting effects of the constitution, was the voting disenfranchisement of most Native-Hawaiians and all Asians.[227] Suffrage in the Hawaiian Islands had never been connected to race, until 1887 when Americans took over the government and inflicted their obsession with white supremacy upon the Hawaiian voters.[228]

New constitutional articles were passed which manufactured the Legislature to consist of wealthy Americans and Europeans, by two designs. First, while the 1864 constitution allowed the King to appoint members of the House of Nobles, [229] the new constitution allowed any Hawaiian, American, or European (even non-subjects) to vote for the members, as long as the nominees owned $3,000 of property or had an income above $250/year.[230] This meant non subjects (citizens) could now vote. Second, while the requirements to become a Representative did not change (owning property of $500 or more, or income of $250/year or more),[231] the voting requirements did. Under the 1887 constitution, the only men who could vote for Representatives must have real property worth at least $3,000[232] (up from

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[221] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[222] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[223] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[224] Hawaii, United States House of Representatives, History, Art, & Archive, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[225] Bayonet Constitution, National Geographic, https://www.nationalgeographic.org/thisday/jul6/bayonet-constitution/
[226] Hawaii, United States House of Representatives, History, Art, & Archive, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[227] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[228] Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the Hawaiian Nation to 1887 (2002)
[229] Kingdom of Hawaii Constitution, Article 58, 1864
[230] Constitution of the Hawaiian Islands, Article 56, July 7 1887
[231] Constitution of the Hawaiian Islands, Article 61, July 7 1887; Kingdom of Hawaii Constitution, Article 61, 1864
[232] Constitution of the Hawaiian Islands, Article 59, July 7 1887

$150 or $25/year rent).[233] The alternative income requirements were raised to $600/year (up from at least $75/year).[234]

The new voting requirements facially disenfranchised thousands of Asian voters (who were previously able to vote). In addition, by the impact of the financial requirements disenfranchised most Native Hawaiians because at that time very few property holders were Native Hawaiian due to lack of money and lack of understanding of the European and American property systems.[235] [236] The new House of Nobles eligibility requirements also disenfranchised, but through representation instead of through voting. Under this new constitution, only wealthy property-holders and those with a remarkably high income were enabled to elect the Representatives or serve as a Member of the House of Nobles.

In 1887, property worth $3,000 is equal today to about $83,200, [237] so if that amount needs to be above encumbrances like mortgages, that means the property overall is likely worth at least 3-4 times that amount. In 1887, an income of $600/year is equal today to about $175,000/year under nominal GDP per capita. [238]

Those who were elected to the Legislature following the new eligibility laws, predictably and quickly advanced self-serving laws to decrease property taxes and expand property rights.[239] Ultimately these changes left the King as a figurehead and put the Hawaiian government in the hands of U.S. and European businessmen.

The new voting requirements were upheld by Justice Sanford Ballard Dole in the Hawaiian Supreme Court.[240] Though that should not grant legitimacy, as before the coup, Dole had written to his brother saying if the King did not accept the new constitution, he would be promptly attacked and a Republic declared.[241]

The new constitution also greatly limited the power of the King. It eliminated the King as Commander in Chief, and gave control of the military to the Legislature, which based on the new

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[233] Constitution of the Hawaiian Islands, Article 59, July 7 1887; Kingdom of Hawaii Constitution, Article 62, 1864
[234] Constitution of the Hawaiian Islands, Article 59, July 7 1887; Kingdom of Hawaii Constitution, Article 62, 1864
[235] Annexation of Hawaiian Islands, 24 Cong. Rec. 973, 999 (1893)
[236] https://www.nationalgeographic.org/thisday/jul6/bayonet-constitution/
[237] Measuring Worth U.S. Worth Calculator, https://www.measuringworth.com/calculators/uscompare/result.php?year_source=1887andamount=3000andyear_result=2020
[238] Measuring Worth U.S. Worth Calculator, https://www.measuringworth.com/calculators/uscompare/result.php?year_source=1887andamount=600andyear_result=2020
[239] Annexation of Hawaiian Islands, 24 Cong. Rec. 973, 999 (1893)
[240] *Ahlo v Smith*, 8 HI 420 (1892)
[241] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)

constitution's voting and eligibility requirements, essentially gave control of the military to wealthy Americans and Europeans.[242] While all laws still required the King's signature to enact, now a super-majority vote of the Legislature allowed the law to proceed despite his veto.[243] [244]

After the first eight years of the Reciprocity Treaty, Louisiana sugar companies tried to block and renewal.[245] The King, pressured by the American and European controlled legislature, quickly worked with the United States to amend the Reciprocity Treaty in 1887 adding a further concession.[246] The amendment now granted the United States privileged access to Pearl Harbor.[247]

In 1889, a group of Native Hawaiians, led by Robert Wilcox, conspired and plotted to force King Kalākaua to either reinstate the 1864 constitution or to abdicate.[248] The group believed the King's sister, Lili'uokalani would fight harder against the foreign government officials.[249] Wilcox fought for the rights not Native Hawaiians, though not necessarily the monarchy, with his favorite saying of "Hawai'i for Hawaiians."[250] Wilcox marched with 80 men to the Palace with four cannons, however the U.S. landed marines to quell the insurrection at the King's request.[251] Wilcox quickly surrendered after only 18 hours.[252]

In June 1889, John L. Stevens was as Minister Plenipotentiary and Envoy Extraordinary to the Hawaiian Islands, reporting to Secretary of State Blaine, who he worked with previously a couple decades previously.[253] [254] Blaine was anti-slavery and was instrumental in drafting the 14th amendment of the constitution.[255] Blaine was also an expansionist and had openly endorsed the idea of the U.S. taking over Hawai'i, perhaps as a protectorate.[256] Stevens was anti-slavery and anti-capital punishment, and had previously served as ambassador to Paraguay, Uruguay, Sweden, and Norway.[257]

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[242] Constitution of the Hawaiian Islands, Article 26, July 7 1887
[243] Kingdom of Hawaii Constitution, Article 49, 1864
[244] Constitution of the Hawaiian Islands, Article 48, July 7 1887
[245] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[246] J. Kēhaulani Kauanui, Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indignity (2008)
[247] J. Kēhaulani Kauanui, Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indignity (2008)
[248] Hawaii, United States House of Representatives, History, Art, & Archive, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[249] Hawaii, United States House of Representatives, History, Art, & Archive, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[250] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[251] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[252] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[253] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[254] John L. Stevens is Dead, The New York Times, February 9 1895
[255] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[256] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[257] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)

Chronic disease and epidemics overwhelmed the Native Hawaiians throughout the 1800s.[258] The early European visits introduced typhoid fever, venereal diseases, tuberculosis, leprosy, and scabies.[259] Later, additional visits and immigration brought flus, measles, mumps, smallpox, and the bubonic plague.[260] After the first epidemic in 1804 another horrific epidemic occurred in 1848, when about a third of the remaining population was killed by the measles.[261] Perhaps only 1/10th to 1/20th of the original population remained following the introduction of European and Asian diseases in the 19th century.[262]

In 1890, Alfred Thayer Mahan, a U.S. captain and strategist wrote a wildly popular book called "The Influence of Sea Power Upon History, 1600-1783" which greatly influenced American political figures (Theodore Roosevelt especially) and shaped U.S. imperialism for decades to come.[263] Captain Mahan wrote extensively about the importance of Hawai'i to the U.S., and about the importance of a two-ocean strategy, including the need to build an isthmian canal.[264] Mahan's book is considered the single most influential book on naval strategy and directly.[265]

In the late 1880s and early 1890s, population estimates found 40,622 Native Hawaiians, 41,873 foreign born residents, and 33,356 born on the Hawaiian Islands but of foreign parents.[266] By 1890, the Native Hawaiian population was only 45%. They constituted 95% in 1853, 90% in 1872, and 55% in 1884.[267] Even in 1890, despite American's powerful influence, Americans did not exceed 2% of the population.[268]

The percentage of market stock ownership of sugar and rice plantations in the early 1890s was over $33 million total, with 74% owned by Americans, 18% owned by British, 6% owned by Germans, and less than 1% owned by Native Hawaiians.[269]

G. The McKinley Tariff, The Annexation Club, and Queen Lili'uokalani

[258] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2008)
[259] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2008)
[260] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2008)
[261] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2008)
[262] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[263] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[264] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[265] Robert B. Downs, *Books That Changed the World* (2004).
[266] Annexation of Hawaiian Islands, 24 Cong. Rec. 973, 979 (1893)
[267] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[268] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[269] Annexation of Hawaiian Islands, 24 Cong. Rec. 973, 979 (1893)

In 1890, protectionist Republicans gained control of the U.S. Congress and passed the McKinley Tariff, eliminating all duty arrangements on raw sugar. This effectively dismantled the special trade status Hawai'i enjoyed since 1875.[270] Sugar profits in Hawai'i plummeted by 40%.[271] Hawaiian diplomats objected, but to no avail.[272] Foreign officials in Hawai'i then began discussing either becoming an American protectorate or being fully annexed by the United States. Both options were opposed by Native Hawaiians.[273]

King Kalākaua died in January 1891, and Queen Lili'uokalani ascended to the throne.[274] Queen Lili'uokalani was 54 years old, Christian, spoke three languages, traveled the world, wrote "prolifically," and often composed music.[275] She was determined to restore the power of the monarchy and Native Hawaiians.[276]

At this time, Wilcox and some other Native Hawaiians formed the "Equal Rights League" and also sought annexation, but for the abolition of the monarchy and for democratic empowerment.[277]

During this time, sugar planters secretly formed a group they called the "Annexation Club" and contacted the U.S.' minister to Hawai'i, Minister Stevens, to gauge the U.S.' interest in taking Hawai'i as a territory.[278] They presented their case to the Secretary of the Navy and Stevens, and asked them to share the request with President Harrison.[279]

The Queen ended the 1892 legislative session by attempting to install a new constitution that favored Native Hawaiians.[280] The Queen wanted only subjects of the Kingdom to be able to vote, and for Nobles to be appointed instead of elected.[281] She thought it wise to limit the exercise of suffrage to

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[270] Hawaii, United States House of Representatives, History, Art, & Archive, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[271] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[272] Hawaii, United States House of Representatives, History, Art, & Archive, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[273] Hawaii, United States House of Representatives, History, Art, & Archive, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[274] Hawaii, United States House of Representatives, History, Art, & Archive, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[275] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[276] Hawaii, United States House of Representatives, History, Art, & Archive, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[277] Hawaii, United States House of Representatives, History, Art, & Archive, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[278] Hawaii, United States House of Representatives, History, Art, & Archive, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[279] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[280] Hawaii, United States House of Representatives, History, Art, & Archive, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[281] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2008)

those who owed an allegiance to no other country, and defended that policy as being no different than policy in other nations.[282]

Her proclamation of a new constitution was like what Kamehameha V had done in 1864. She reported that 2/3 of Native Hawaiians disagreed with the Bayonet Constitution, especially that voting no longer required naturalization.[283] Her revisions to the constitution included allowing non-property owners to vote.[284] (At this time only ~1% of Native Hawaiians held property, down from the 40% in 1840s.[285]

She discussed the changes with her legislatures but received feedback from some that the changes may be too radical.[286] U.S. Minister Stevens also objected to the changes.[287] [288] She decided to wait a few days and have more discussion before making any changes to the existing constitution.[289]

Months before the overthrow, Minister Stevens wrote the Department of State asking for guidance if the "Government here should be surprised and overturned by an orderly and peaceful revolutionary movement, largely of Native Hawaiians, and a provisional or republican government organized and proclaimed."[290] Thus, months before, he "predicted" the overthrow and asked for instructions in case that it should occur.[291] No response from the U.S. Department of State was recorded.[292]

In 1890, in response to the negative reaction to the new constitution, the legislature attempted to amended the constitution to reduce property requirements of voting for Nobles down to $1,000 (down from $3,000) and require voters be subjects (not just residents), however the amendment was never adopted as required in Article 82 of their constitution.[293]

H. Overthrow of the Monarchy | The Second Coup

[282] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2008)
[283] Lili'uokalani, Hawaii's Story by Hawaii's Queen (1898)
[284] Annexation of Hawaiian Islands, 24 Cong. Rec. 973, 999 (1893)
[285] Eric Steven O'Malley, Irreconcilable Rights and the Question of Hawaiian Statehood, 89 Geo. L.J. 501 (2001)
[286] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[287] Hawaii, 26 Cong. Rec. 1824, 1828 (1894).
[288] Hawaii, United States House of Representatives, History, Art, & Archive, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[289] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[290] Hawaii, 26 Cong. Rec. 1824, 1829 (1894).
[291] Hawaii, 26 Cong. Rec. 1824, 1829 (1894).
[292] Hawaii, 26 Cong. Rec. 1824, 1829 (1894).
[293] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2008)

The Hawai'i Affair

In 1892, Annexation Club representatives visited the White House to meet with President Harrison.[294] President Harrison sent his Secretary of the Navy to meet with them and share a message that if the Hawaiian Kingdom was to be overthrown, and they came back with a treaty of annexation, they would meet an "extremely sympathetic administration."[295] Following the visit, the U.S. Harrison administration sent a letter to the Annexation Club questioning whether Queen Lili'uokalani might be interested in exchanging the "assignment of the government of Hawaii to the U.S. for $250,000."[296] The Club replied they had no confidence the Queen would accept the offer.[297]

The source of the revolt against the Kingdom of Hawai'i government was the Annexation Club, now renamed as the "Committee of Safety."[298] Noted concerns of the wealthy businessmen included that the Native Hawaiians were the majority of the population, cast the majority of the votes, and held a majority of paid offices, but only pay a fraction of the taxes and only a fraction of the land.[299] An advocate of the overthrow argued "we do not want these islands tilled by contract labor, filled with the mongrel classes of China, and governed by so-called sugar kings... The whites own 9/10 of the property."[300]

The Committee consisted of 13 white men, all American and European, who had no armed forces at their command.[301] [302] Thus, they also partnered with the "Honolulu Rifles," an all-white civilian militia.[303] Minister Stevens conspired with the small group of non-Hawaiians, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii.[304] [305] While they were plotting the coup on the morning of Monday January 16th, the Queen's police chief Charles Wilson knocked on the door of the building they hid in and told them "I know what you fellows are up to and I want you to quit and go home" but they replied they would stay and things had already "gone too far."[306] Wilson personally guaranteed the Queen would not revise the constitution, but they still said they were

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[294] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[295] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[296] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[297] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[298] Hawaii, 26 Cong. Rec. 1824, 1826 (1894).
[299] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[300] Henry E Chambers, John Hopkins University studies in historical and political science: constitutional history of Hawaii (1896)
[301] Hawaii, 26 Cong. Rec. 1824, 1826 (1894).
[302] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[303] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[304] U.S. Public Law 103-150 (107 Stat. 1510)
[305] 42 U.S.C.A. § 11701 Findings
[306] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)

going to continue.[307] The Queen then had proclamations posted around Honolulu committing that the constitution would only be revised by the methods provided for within the constitution.[308]

On the same day, the Hawaiian Minister of Foreign Affairs, Samuel Parker, mailed Minister Stevens requesting the United States cease interference:

> *I have the honor to inform your excellency that the troops from the U.S.S. Boston were landed in this port at 5 o'clock this evening without the request or knowledge of Her Majesty's Government. As the situation is one which does not call for interference on the part of the United States Government, my colleagues and myself would most respectfully request of your excellency the authority upon which this action was taken. I would also add that any protection that may have been considered necessary for the American Legation or for American property and interests in this city would have been cheerfully furnished by Her Majesty's Government.*

Minister Stevens never replied. [309]

Instead on the 16th, Minster Stevens approached the U.S.S. Boston commander with this message:

> *United States Legation, Honolulu, January 16, 1893. Sir: In view of the existing critical circumstances in Honolulu, including an inadequate legal force, I request you to land marines and sailors from the ship under your command for the protection of the United States legation and United States consulate, and to secure the safety of American life and property. Very truly, yours, John L. Stevens, Envoy Extraordinary and Minister Plenipotentiary of the United States*[310].

In response, the U.S. naval forces landed from a man-of-war lying in the harbor of Honolulu.[311] The Boston was a 3,000 ton cruiser with a battery of cannons on each side and 200 sailors and marines on board.[312] The Minister claimed he deployed the marines to protect the lives and property of the Americans on the island.[313] [314] The U.S. later explained that Minister Stevens did not have the authority to do this.[315]

A U.S. House member, Henry W. Blair (a Republican from New Hampshire) testified later that the entire city was in great danger and it was the Minister's duty to land the troops because "the islands

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[307] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[308] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[309] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[310] Mr. Stevens to Mr. Foster, No. 79, Foreign Relations of the United States, 1894, Appendix II, Affairs in Hawaii, https://history.state.gov/historicaldocuments/frus1894app2/d73
[311] Hawaii, 26 Cong. Rec. 1824, 1826 (1894).
[312] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[313] Hawaii, 26 Cong. Rec. 1824, 1827 (1894).
[314] Hawaii, 31 Cong. Rec. 5940 (1898).
[315] U.S. Public Law 103-150 (107 Stat. 1510)

were full of lawless men, gathered from almost every country of the world – Chinamen, Japanese, Portuguese, cast-off Americans, English, and other foreigners. The tramps, the outcasts of all countries, naturally congregate in such a place."[316] He said the whole city was threatened by lawlessness, mobs, riot, and devastation. [317]

However, several sworn affidavits by witnesses stated there were no demonstrations, disturbances, or threats that would call for landing of troops to protect either life or property. [318] In fact, one statement claimed that when the Hawaiian Hotel received notice of the troops landing, the report was perceived to be a canard until the battalion was seen first-hand marching up to the palace.[319] [320] No other foreign nations sent troops to "protect the lives and property of their citizens." [321]

On Tuesday January 17th, the troops occupied a hall about eighty feet west of the 'Iolani Palace (center of government) and Ali'iōlani Hale (legislative building),[322] which together symbolized the sovereignty of the Hawaiian Kingdom).[323] The troops landed with haversack bags, canteens, and double cartridge belts filled with ammunition, within 200 feet of the government buildings (far from the residential areas), and trained their guns on the palace. [324]

The Queen's Police Chief Wilson ordered 550 soldiers and officers to prepare for action with rifles and other artillery.[325] The Hawaiian Attorney General informed the U.S. Minister Stevens that the Queen was still the head of the official government, but Stevens responded that if "insurgents were attacked or arrested by the Queen's forces, the U.S. troops would intervene."[326] The Queen's forces then did not intervene.

Later that day at 4:30pm, the new Provisional Government was recognized as de facto by the U.S. minister. [327] [328] Secretary of State Gresham clarified in 1894, "When our Minister recognized the provisional government the only basis upon which it rested was the fact that the Committee of Safety had [ ] declared it to exist. It was neither a government de facto nor de jure. That it was not in such

[316] Hawaii, 26 Cong. Rec. 1824, 1835 (1894).
[317] Hawaii, 26 Cong. Rec. 1824, 1835 (1894).
[318] Hawaii, 26 Cong. Rec. 1824, 1829 (1894).
[319] Hawaii, 26 Cong. Rec. 1824, 1829 (1894).
[320] Affidavit of John Ross, June 20, 1893 (Foreign Relations of the U.S. 1894, Appendix II, Affairs in Hawaii)
[321] Hawaii, 26 Cong. Rec. 1824, 1826 (1894).
[322] Hawaii, 26 Cong. Rec. 1824, 1829 (1894).
[323] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[324] Hawaii, 26 Cong. Rec. 1824, 1827-1828 (1894).
[325] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[326] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[327] Hawaii, 26 Cong. Rec. 1824, 1826 (1894).
[328] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)

possession of the Government property and agencies as entitled it to recognition is conclusively proved."[329] In 1993, the U.S. federal government went further and described the U.S. ministers participation and recognition being "in violation of treaties between the two nations and of international law."[330]

Following the coup, the Queen, now accustom to a history of rogue agents attempting to occupy the Hawaiian Islands (Russian, Britain, France, etc.) then referred the situation to the U.S. government for arbitration,[331] writing:

> *"I yield to the superior force of the United States of America, whose minister plenipotentiary, his excellence John L. Stevens, has caused to be landed in Honolulu, and declared that he would support the said Provisional Government. Now, to avoid any collision of armed forces, and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representative, and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands."*[332]

Secretary of State Gresham's summary of the Queen's actions described, "In this state of things if the Queen could have dealt with the insurgents alone her course would have been plain and the result unmistakable. But the United States had allied itself with her enemies, had recognized them as the true Government of Hawaii, and had put her and her adherents in the position of opposition against lawful authority. She knew that she could not withstand the power of the United States, but she believed that she might safely trust to its justice. Accordingly, some hours after the recognition of the provisional government by the United States Minister, the palace, the barracks, and the police station, with all the military resources of the country, were delivered up by the Queen upon the representation made to her that her cause would thereafter be reviewed at Washington, and while protesting that she surrendered to the superior force of the United States, whose Minister had caused United States troops to be landed at Honolulu and declared that he would support the provisional government, and that she yielded her authority to prevent collision of armed forces and loss of life and only until such time as the United States, upon the facts being presented to it, should undo the action of its representative and reinstate her in the authority she claimed as the constitutional sovereign of the Hawaiian Islands."[333]

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[329] https://history.state.gov/historicaldocuments/frus1894app2/ch7subch1
[330] 42 U.S.C.A. § 11701 Findings.
[331] Liliuokalani, Hawaii's Story by Hawaii's Queen (1898)
[332] Hawaii, 26 Cong. Rec. 1824, 1828 (1894).
[333] https://history.state.gov/historicaldocuments/frus1894app2/ch7subch1

On January 18th, Minister Stevens sent a telegram to Secretary of State John W. Foster saying, "Events in Hawaii in the past few days have moved rapidly. An entire overthrow of the Hawaiian monarchy and the establishment of a Provisional Government in the interest of the whole people of the islands without the sacrifice of a single life" [334] and "I promptly recognized the Provisional Government as the de facto Government of the Hawaiian Islands. The English minister, the Portuguese chargé d'affaires, the French and the Japanese commissioners promptly did the same; these, with myself, being the only members of the diplomatic corps residing here."[335] [336]

On February 9th, Minister Stevens attempted to claim a U.S. Protectorate over Hawaii in, accompanied by ordering the landing of a battalion from the Boston, its formation at the Government building in concert with three volunteer companies of the Provisional Government, reading of his proclamation by a Lieutenant, and the hoisting of the United States flag.[337] over the Government building.[338] However, on February 11th, Secretary of State Foster renounced the action and clarified that Stevens' actions were overstepping the instructions given to him, and the government of the United States did not want to in anyway impair the "independent sovereignty of the Hawaiian Government." [339] Foster clarified that Stevens was competent to accord or exercise in his discretion in a case of need, general protection of U.S. life and property only. [340] Foster even formally "disavowed" the raising of the U.S. flag on the islands. [341] Foster wrote, "No step should be taken by you, or will be sanctioned by this Government, which might tend to derogate in anyway from the independence of the Government of the Hawaiian Islands, which the United States have recognized as sovereign and with which they treat on terms of sovereign equality." [342] The U.S. Senate was notified of the clarification.[343]

The San Francisco Chronicle newspaper reported that Hawai'i had been taken over by a "military oligarchy."[344]

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[334] https://history.state.gov/historicaldocuments/frus1894app2/d72
[335] https://history.state.gov/historicaldocuments/frus1894app2/d73
[336] Hawaii, 26 Cong. Rec. 1824, 1827 (1894).
[337] U.S. Public Law 103-150 (107 Stat. 1510)
[338] https://history.state.gov/historicaldocuments/frus1894app2/d89
[339] Mr. Foster to Mr. Stevens, No 18, Department of State, https://history.state.gov/historicaldocuments/frus1894app2/d89
[340] Mr. Foster to Mr. Stevens, No 18, Department of State, https://history.state.gov/historicaldocuments/frus1894app2/d89
[341] Mr. Foster to Mr. Stevens, No 18, Department of State, https://history.state.gov/historicaldocuments/frus1894app2/d89
[342] Mr. Foster to Mr. Stevens, No 18, Department of State, https://history.state.gov/historicaldocuments/frus1894app2/d89
[343] [Untitled], President Cleveland and Secretary Gresham, Department of State, https://history.state.gov/historicaldocuments/frus1894app2/d93
[344] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)

Stanford Ballard Dole was offered and accepted the presidency of the new Provisional Government.[345] Dole was born in Honolulu in 1844, to American missionary parents. He served as the representative from Kaua'i in the legislature for four years, and then was appointed by King Kalākaua as a justice on the Supreme Court of the Hawaiian Kingdom.[346] [347] Dole had declined to join the Committee of Safety, but he did help them draft their declaration.[348]

I. The Provisional Government (1893-1894)

Following the overthrow, President Dole and his administration pursued extremely undemocratic policies, including: dis-enfranchising all non-white voters, declaring martial law, suspending right of habeas corpus and trial by jury (instead using military courts), limiting free speech, and converting the white militias into a National Guard.[349] [350] They also began stockpiling guns and ammunition, to the point that Queen Lili'uokalani once commented that they were "armed to the teeth."[351] Minister Willis commented about the voting restrictions that it was "certainly a novelty in government history to have a country without citizenship."[352]

President Dole petitioned Stevens again for U.S. protection, this time against any uprising of Asian laborers and migrants, who now represented a sizable portion of the population.[353] Dole's government also sent delegation to negotiate a treaty of annexation in Washington D.C. while his military forces controlled the islands.[354]

On Thursday January 19th, President Dole and other representatives of the Provisional Government sailed for the U.S. [355] On February 15th 1893, a treaty of annexation between them and President Harrison was signed and sent to the Senate for ratification. [356] Dole's government assured the

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[345] Hawaii, U.S. House of Representatives, Archives, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[346] Annexation of Hawaiian Islands, 24 Cong. Rec. 973, 980 (1893)
[347] Note: His cousin, James Dole, founded the Dole Food Company in 1851 in the Kingdom of Hawai'i (the multinational corporation is now the largest producer of fruit and vegetables in the world). https://www.dole.com/AboutDole
[348] Ralph Simpson Kuykendall Hawaiian Kingdom 1874-1893, the Kalakaua Dynasty. 3. University of Hawaii Press. (1967).
[349] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[350] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[351] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[352] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[353] Hawaii, U.S. House of Representatives, Archives, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[354] Hawaii, U.S. House of Representatives, Archives, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[355] Hawaii, 26 Cong. Rec. 1824, 1826 (1894)
[356] Hawaii, 26 Cong. Rec. 1824, 1826 (1894).

State Department that they had no interest in U.S. Statehood, because that would enfranchise the Native Hawaiian population.[357] The treaty stated the overthrow was not in any way promoted by the U.S. government, but had its origin in the "reactionary and revolutionary" policies of the Queen.[358] The treaty also included an annual payment to the Queen for $20,000, and a one-time $150,000 payment to the princess if the Royals would agree to submit to the authorities of the local and U.S. governments.[359] The U.S. Secretary of State explained he expected the "present rulers and chiefs would expect some [compensation for the] surrender of their political position." [360] The Queen was not actually consulted on this nor did she ever agree to it, and it was seen as an attempted bribe.

A few days later the Queen arrived in Washington D.C. and made clear that the rebellion in Hawai'i would not have lasted an hour without the support of U.S. military forces.[361] She said the new government had neither the moral or physical support of the Hawaiian people.[362] U.S. newspapers also condemned the overthrow with the *NY Evening Post* calling it a "revolution on a strictly cash basis" and *The New York Times* saying it was "purely a business operation."[363] Many directly called out that Minister Stevens' assisted in the overthrow. [364]

The British and German governments had recognized the Hawaiian Kingdom for many decades and had ongoing diplomatic relations with the monarchy, however they did not complain to the U.S. government about the overthrow.[365] This was either likely avoidance due to their desire to keep peaceful relations with the United States or approval of the action as European countries were concurrently colonizing Asia and Africa. The Japanese and Chinese governments quickly protested about the new voting and immigration restrictions. [366]

On December 18th, 1893, the next President, President Cleveland sent a letter to both chambers of Congress stating, he believed that "the Provisional Government owes its existence to an armed invasion by the United States."[367] He added that he withdrew the treaty of annexation from consideration

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[357] Hawaii, U.S. House of Representatives, Archives, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[358] Hawaii, 26 Cong. Rec. 1824, 1833 (1894).
[359] Hawaii, 31 Cong. Rec. 5940 (1898).
[360] https://history.state.gov/historicaldocuments/frus1894app2/d38
[361] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[362] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[363] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[364] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[365] Hawaii, 26 Cong. Rec. 1824, 1826 (1894).
[366] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[367] Hawaii, 26 Cong. Rec. 1824, 1833 (1894).

by the Senate and would not re-submit it, because he believes the U.S. "could not, under the circumstances disclosed, annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods." [368]

President Cleveland established an investigation into what occurred, which was conducted by former Congressman James Blount.[369] Blount's report concluded that Minister Stevens acted improperly, and both the minister and the military abused their authority and were responsible for the change in government.[370] Blount also found Queen Lili'uokalani to still be the legal, constitutional ruler of the Hawaiian Islands.[371] President Cleveland ordered the Queen to be restored to power.[372] His report also noted "the undoubted sentiment of the people is for the Queen, against the Provisional Government and against annexation."[373]

In response to Blount's findings, President Cleveland's administration replaced Stevens with Albert Willis as the new minister to Hawai'i.[374] Minister Willis apologized for the "reprehensible conduct of the [previous] American minister and the unauthorized presence of a U.S. military force."[375] The U.S. military commander that participated in the overthrow was also disciplined and forced to resign.[376]

On January 3rd, 1894, the new Minister to Hawaii, Albert Willis, showed up in Hawaii unannounced and staged a mock invasion with two ships, directing guns at the capital, in order to pressure Dole's government to return the Islands to Queen Lili'uokalani.[377] From the 3rd to the 11th, the U.S. unsuccessfully led negotiations with the Queen to restore the monarchy.[378] Willis admitted the invasion was a hoax on the 11th and returned the ships.

The Committee of Safety provided a report to the "citizens of Honolulu" describing the reason for the overthrow, citing the catalyst as the Queen's attempted revision of the constitution,[379] (which, as

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[368] Hawaii, 26 Cong. Rec. 1824, 1833 (1894).
[369] Hawaii, 26 Cong. Rec. 1824, 1833 (1894).
[370] U.S. Public Law 103-150 (107 Stat. 1510)
[371] Lili'uokalani, Hawaii's Story by Hawaii's Queen (1898)
[372] https://www.archives.gov/education/lessons/hawaii-petition
[373] Hawaii, U.S. House of Representatives, Archives, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[374] Hawaii, 26 Cong. Rec. 1824, 1830 (1894).
[375] Hawaii, U.S. House of Representatives, Archives, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[376] U.S. Public Law 103-150 (107 Stat. 1510)
[377] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[378] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[379] Hawaiian Special Commissioner to Mr. Foster, https://history.state.gov/historicaldocuments/frus1894app2/d82

reminder, would have required naturalization for voting, amongst other efforts to bring more representative democracy to the subjects of the Kingdom).

The U.S. government, recognizing the illegal acts of Minister Stevens, attempted to redress her injury by restoring the Queen's title. [380] However, President Dole declined and asked the United States to stay out of Hawaiian domestic affairs.[381] Following this, Democrats still desired to reinstate the Queen, however Republicans resisted. However, even the Republicans acknowledged the Provisional Government was an "oligarchy" and that the Minister's involvement in the overthrow created a "peculiar" situation for the U.S. government. [382]

J. The Republic of Hawaii (1894-1898)

In May 1894, a Hawaiian constitutional convention was called consisting of 19 legislative and executive authorities and 18 delegates chosen by popular election.[383] They drafted a new constitution. [384] The new constitution fully disenfranchised Native Hawaiians and Asians. [385] It also excluded royalists (supporters of the monarchy) from voting.[386] As a result, only 2,700 people were able to vote in the elections.[387]

On July 4, 1894 (purposefully timed with U.S. Independence Day) the Provisional Government promulgated the new constitution and declared itself "The New Hawai'i Republic."[388] [389] There was a "slim crowd" and there were armed white men in the basement of the Palace and on the roof of the nearby buildings.[390] Dole's martial law and restrictions on fundamental rights continued. [391]

The U.S. was facing economic issues, and President Cleveland understood the U.S. needed market expansion. [392] Despite his previous protests, Cleveland now recognized the new government.[393]

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[380] Hawaii, 26 Cong. Rec. 1824, 1831 (1894).
[381] Hawaii, 26 Cong. Rec. 1824, 1831 (1894).
[382] Hawaii, 26 Cong. Rec. 1824, 1831 (1894).
[383] Hawaii, 26 Cong. Rec. 1824, 1830 (1894).
[384] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[385] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[386] Hawaii, United States House of Representatives, History, Art, & Archives, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[387] Hawaii, United States House of Representatives, History, Art, & Archives, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[388] Richard H. Kosaki, Constitutions and Constitutional Conventions of Hawaii (Hawaiian Historical Society) (1978)
[389] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[390] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[391] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[392] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[393] The 1897 Petition Against the Annexation of Hawaii, National Archives, https://www.archives.gov/education/lessons/hawaii-petition

Native Hawaiians continued to protest the Dole government with mass rallies and petitions.[394] The Queen named a new cabinet, operating as a government in exile.[395] In late 1894, Wilcox joined royals and royalists to plot a counter-revolution to restore Lili'uokalani to the Hawaiian throne.[396] This was later called "the late war."[397] The revolt launched January 6, 1895.[398]

Dole once again declared martial law and ended the revolt through violence.[399] The rebels were arrested and sentenced to hard labor, with a threat of hanging.[400] [401] The Queen was arrested for misprision of treason (knowing of treason and not trying to stop it), and a cache of weapons were found under her garden including guns, bombs, and swords.[402] The Queen was convicted but was quickly pardoned after minimal time was served.[403] Wilcox was sentenced to 35 years in prison for treason.[404]

Following her arrest, Queen Lili'uokalani signed a document abdicating her throne, under force, and in hope her supporters would not be hung.[405] [406] However, as she noted in her memoir: "It is a rule of common law that the acts of any person deprived of civil rights have no force nor weight, either at law or in equity; and that was my situation. Although it was written in the document that it was my free act and deed, circumstances prove that it was not; it had been impressed upon me that only by its execution could the lives of those dear to me, those beloved by the people of Hawaii, be saved, and the shedding of blood be averted."[407] They also forced her to sign the document "Liliuokalani Dominis." Her birthname was Lydia Kamuka'eha[408] before it was changed to Lili'uokalani when she was identified

[394] The 1897 Petition Against the Annexation of Hawaii, National Archives, https://www.archives.gov/education/lessons/hawaii-petition
[395] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[396] Hawaii, United States House of Representatives, History, Art, & Archives, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[397] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[398] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[399] Hawaii, United States House of Representatives, History, Art, & Archives, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[400] Hawaii, United States House of Representatives, History, Art, & Archives, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[401] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[402] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[403] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[404] Stephen Kinzer, Overthrow: American's Century of Regime Change from Hawaii to Iraq (2007)
[405] Lili'uokalani, Hawaii's Story by Hawaii's Queen (1898)
[406] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[407] Lili'uokalani, Hawaii's Story by Hawaii's Queen (1898)
[408] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)

as heir apparent for the crown.[409] Despite her husband's last name being Dominis, no government records ever reflected that being her surname.[410]

K. Annexation and The Newlands Resolution

William McKinley, a fervent annexationist, was elected U.S. President in 1896 on the pledge to protect American business interests.[411] McKinley quickly sent a new treaty for annexation of Hawai'i to the U.S. Senate upon taking office. [412] The treaty prohibited any Japanese or Chinese on the Hawaiian islands from becoming citizens of Hawaii and from entering the United States.[413] This new treaty conflicted with an existing previous treaty Hawai'i had with Japan, allowing the immigration.[414] It also declared that "existing treaties of the Hawaiian Islands with foreign nations shall cease." [415]

U.S. House member Clardy (a Democrat from Kentucky) argued that prohibition on Asian immigration was a violation of the U.S. Constitution, saying: "then the fourteenth amendment does not mean anything."[416] The Republic of Hawaii Senate ratified the treaty unanimously, but the U.S. never did.[417] The treaty stalled with the U.S. Senate due to protests from the Japanese government.[418]

Starting in 1896, the Republic of Hawaii created a strategy they hoped would expedite annexation. They planned to provoke Japan to the extend it would appear if the U.S. did not annex Hawaii, then Japan would attack and/or annex it themselves.[419] The Republic banned Japanese immigration, even turning away multiple ships and housing over a thousand Japanese at detainment centers on the island. [420] They also created a new tariff for wine, but specifically wine made from rice (i.e. Japanese saké).[421] Both the immigration ban and the tariff violated the 1871 friendship treaty Japan had with Hawai'i. As desired, the Japanese government was concerned and frustrated, however they tried to negotiate with the Republic diplomatically. [422] The Republic was not interested in diplomacy and continued to look for more ways to agitate the Japanese while at the same time reporting back to the

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[409] Lili'uokalani, Hawaii's Story by Hawaii's Queen (1898)
[410] Lili'uokalani, Hawaii's Story by Hawaii's Queen (1898)
[411] President McKinley, https://www.whitehouse.gov/about-the-white-house/presidents/william-mckinley/
[412] Hawaii Statehood Report, House of Representatives 86th Congress 1st Session, Report No. 32 (1959)
[413] Hawaii, 31 Cong. Rec. 5940 (1898).
[414] Hawaii, 31 Cong. Rec. 5940 (1898).
[415] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[416] Hawaii, 31 Cong. Rec. 5940 (1898).
[417] Hawaii Statehood Report, House of Representatives 86th Congress 1st Session, Report No. 32 (1959)
[418] https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[419] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[420] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[421] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[422] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)

U.S. about "Japanese aggressions" and the "threat the Japanese will take over the Hawaiian Islands."[423] The Japanese did resort to sending a military ship to Hawai'i, but only a single ship, as they continued negotiations.[424]

In 1897, Harold M. Sewall was appointed as the new Minister to Hawaii following the death of Minister Willis.[425] Sewall as an imperialist and annexationist, and was previously minister to Sāmoa.[426] He was a Democrat, but said he switched to the Republic party after President Cleveland made efforts to return the Hawaiian Queen to her throne.[427] After arriving in Hawai'i, Sewall quickly partnered with the Republic in reporting back stories of Japanese aggression and the fear of needing to "surrender to the Japanese" if the U.S. did not proceed with the annexation.[428] McKinley's administration then dispatched the U.S. Navy to Hawai'i was well, while the U.S. Secretary of State helped mediate the Japanese "dispute."[429] The new Hawaiian legislature approved a revised annexation treaty on September 6, 1897 and U.S. Secretary of State Sherman assured Japan they would suffer no discrimination from annexation.[430]

The Native Hawaiians had never stopped protesting the overthrow and annexation, though English newspapers stopped covering their efforts around 1895.[431] However, when a joint congressional delegation visited Honolulu later that month, Hawaiian royalists presented evidence that many Native Hawaiians opposed annexation.[432] In addition, by October, the Native Hawaiians protestors had collected the signatures of 38,000 Native Hawaiians for their "Petition Against Annexation."[433] Four Native Hawaiian delegates arrived in Washington D.C. in December with the 556-page petition in hand and lobbied alongside Queen Lili'uokalani before the 55th Congress, including the Senate Committee on Foreign Relations.[434]

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[423] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[424] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[425] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[426] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[427] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[428] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[429] United States House of Representatives, History Art & Archives, Hawaii, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[430] United States House of Representatives, History Art & Archives, Hawaii, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[431] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[432] United States House of Representatives, History Art & Archives, Hawaii, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[433] J. Kēhaulani Kauanui, Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indigeneity (2008)
[434] National Archives, https://www.archives.gov/education/lessons/hawaii-petition, Note: The annexation petition with its voluminous signatures, along with many related records, is still filed in the Records of the U.S. Senate, Record Group 46, at the National Archives and Records Administration.

Due to the protests and lobbying by the Native Hawaiians, only 46 U.S. Senators were willing to ratify the treaty.[435] They were 14 votes short of the 60 votes needed for a 2/3 super-majority.[436]

The Spanish-American war began after the explosion of the U.S. Battleship Maine in February of 1898, the appetite for annexation increased as Hawai'i was seen as a war-time asset in the Pacific Ocean, a strategic military outpost.[437] [438]

A joint resolution of Congress was introduced for annexation of the Hawaiian Islands.[439] This Newlands resolution (named after the drafter, Representative Francis G. Newlands of Nevada) was approved by the House of Representatives 200 to 91 on June 15, 1898.[440] It was then approved by the Senate 42 to 21 in July and signed by the president the next day.[441] [442] The resolution only required a simple majority, instead of the super-majority vote the treaty would have required. While the revised treaty did not affect the Japanese residents, it did prohibit Chinese immigration to the Hawaiian Islands or Chinese entering the United States traveling from Hawaii.[443]

At one point, Senator Augustus O. Bacon of Georgia had introduced an amendment requirement a plebiscite, but it was voted down, likely because it was well known the Native Hawaiians did not want annexation.[444]

Add: Hawaii passed a resolution too

After Minister Stevens returned to the United States, he defended himself by questioning critics "wanton disregard of the opportunity to assume jurisdiction and ownership of a territorial and maritime prize."[445] Congressional debate following was shocked by Stevens attitude, and condemned they thought of the U.S. government capturing another independent government and confiscating it as a "maritime prize."[446] The U.S. House of Representatives even discussed a formal censure of Stevens.[447]

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[435] National Archives, https://www.archives.gov/education/lessons/hawaii-petition
[436] National Archives, https://www.archives.gov/education/lessons/hawaii-petition
[437] Hawaii, 31 Cong. Rec. 5940 (1898).
[438] National Archives, https://www.archives.gov/education/lessons/hawaii-petition
[439] United States House of Representatives, History Art & Archives, Hawaii, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[440] United States House of Representatives, History Art & Archives, Hawaii, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[441] United States House of Representatives, History Art & Archives, Hawaii, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[442] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[443] IX. RESOLUTION, Of the Senate of Hawaii for Ratifying the Treaty of Annexation, Article V, (1897)
[444] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2007)
[445] Hawaii, 26 Cong. Rec. 1824, 1829 (1894).
[446] Hawaii, 26 Cong. Rec. 1824, 1829 (1894).
[447] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)

Representative Isidor Rayner (a Democrat from Maryland) argued the testimony against Stevens was so overwhelming that Stevens violated the law of nations and committed a crime against the Government, that there is "no doubt whatever of his guilt."[448] He also stated there is "no difficulty in arriving at the irresistible conclusion that Government of Hawai'i was subverted by the armed intervention of the United States forces, not by any force or power that emanated from its subjects."[449] Another wrote, "the irresistible conclusion is that the Queen and her Government surrendered to no one else except to the power and authority of the U.S., who, through their representative, had unlawfully intervened in the political affairs of the Kingdom for the purpose of overthrowing the monarchy and establishing a form of government that would lead to annexation and union with the U.S."[450] Raynor later went on to become Attorney General of Maryland, and then a U.S. Senator for two terms.

By 1898, the Hawaiian population consisted of roughly 40,000 Native Hawaiians, 25,000 Japanese, 21,000 Chinese, 15,000 Portuguese, 3,000 Americans, and 1,000 European.[451]

The Hawaiian Organic Act was passed on April 30, 1900 and set aside the territorial governor, secretary, and judges as presidential appointments subject to Senate confirmation; in addition, Sanford Dole was nominated as Hawaii's first territorial governor.[452] Native Hawaiians were re-enfranchised, however Asians were excluded from voting despite the fact that they accounted for nearly 60% of the islands' population.[453] While U.S. citizenship was extended to all other Hawaiian citizens, Asians were excluded because at that time U.S. law excluded Asian immigration from becoming naturalized citizens.[454]

In 1900, Hawai'i was now included on U.S. maps along with Puerto Rico, the Philippines, Guam, Wake, Sāmoa, Alaska, Cuba, and Indian Country – all noted as "U.S. Possessions."[455] Books struggling with how to describe this new United States with numerous territories, began referring to the U.S. as "Imperial America," "The Greater U.S.," or the "Greater Republic."[456]

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[448] Hawaii, 26 Cong. Rec. 1824, 1826 (1894).
[449] Hawaii, 26 Cong. Rec. 1824, 1829 (1894).
[450] Hawaii, 26 Cong. Rec. 1824, 1826 (1894).
[451] Hawaii, 31 Cong. Rec. 5940 (1898).
[452] United States House of Representatives, History Art & Archives, Hawaii, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[453] United States House of Representatives, History Art & Archives, Hawaii, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[454] United States House of Representatives, History Art & Archives, Hawaii, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/Hawaii/
[455] Daniel Immerwahr, How to Hide an Empire: A History of the Great United States (2019)
[456] Daniel Immerwahr, How to Hide an Empire: A History of the Great United States (2019)

III. International Agreements and Territorial Acquisition

In international law, the word "territory" usually refers simply to a specific geographical area. The U.S. refers to "territory" as any region under the jurisdiction of the U.S. federal government.[457] For clarity, when referring to the U.S. definition of territory it will be written as "U.S. Territory."

Acquisition of territory by a State is often thought of as matter of political philosophy, not a matter of law.[458] Traditionally there are three various modes of acquiring already occupied territory: conquest, cession, and prescription.[459] These were based on Roman law regarding acquisition of property and courts extended to them to apply to the acquisition of territory.[460] These topics were and remain murky.[461]

Claims to territory of a State can be either the entire territory of the State (Kuwait, Belize, Israel, Mauritania, etc.) or a dispute about borders (i.e. Libya/Chad).[462]

L. International Foreign Affairs & Property Law

Nations are bound, by default, to the law of the international community "that results from the general and consistent practices of actions that are followed out of a sense of legal obligation," also known as customary international law (CIL) or the "law of nations."[463] The public law portion of the law of nations includes topics like war and diplomacy.[464]

In the 19th century, CIL was the principal form of international law.[465] When reviewing disputes today, international tribunals will still generally look to international law principles instead of deciding a

[457] USC Article IV
[458] James Crawford, The creation of states in international law (2nd ed. 2011).
[459] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[460] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[461] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[462] James Crawford, The creation of states in international law (2nd ed. 2011).
[463] Curtis A. Bradley, International law in the U.S. Legal System (2nd ed. 2015)
[464] Curtis A. Bradley, International law in the U.S. Legal System (2nd ed. 2015)
[465] Curtis A. Bradley, International law in the U.S. Legal System (2nd ed. 2015)

case strictly on one State's domestic law.[466] Further, a State cannot invoke their own domestic law as a basis for evading international legal obligations. [467]

The focus of international law is the direct relations between States. [468] The ruling individuals of each State relate with each other on behalf of their States, regardless of the form of government. [469]

International law did not only apply to European States or the United States. In 1825, the U.S. Supreme Court in *The Antelope* recognized the "law of nations" applying to African nations. [470] [471]

International law balances two conflicting values: legality and effectiveness.[472] And while there are international courts available to hear disputes, the decisions of those courts generally are not compulsory. [473] There is no executive function carrying out the decisions, with the exception of criminal tribunals. [474] Even the International Court of Justice within the United Nations has voluntary, not mandatory, jurisdiction.[475] If the U.S. accepts the legal consequences of an illegal act, it can accept the jurisdiction of the ICJ to try the case.[476]

1. International Law on International Agreements

Generally, treaty is an "agreement, of a suitable formal character, designed to give rise to legal rights and obligations, operating within the sphere of international law, and concluded between two or more parties possessing legal personality under international law."[477] There are no technical rules in international law for treaties, however there must be consent and capacity on both sides, and the purpose must be legal.[478]

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[466] David J. Bederman and Chimène I Keitner, International law frameworks (4th ed. 2016).
[467] David J. Bederman and Chimène I Keitner, International law frameworks (4th ed. 2016).
[468] Henry; Boyd Wheaton, A.C., Elements of International Law (1878)
[469] Henry; Boyd Wheaton, A.C., Elements of International Law (1878)
[470] Finding the Peripheries: Sovereignty and Colonialism in 19th Century International Law, 40 Harv. Int'l L.J. 1 (Winter 1999)
[471] *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825)
[472] Lauri Malksoo, Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR (2003)
[473] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[474] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[475] Nathan J. Miller, International Civil Disobedience: Unauthorized Intervention and the Conscience of the International Community, 74 Md. L. Rev. 315 (2015)
[476] Nathan J. Miller, International Civil Disobedience: Unauthorized Intervention and the Conscience of the International Community, 74 Md. L. Rev. 315 (2015)
[477] I. Roberts, Satow's Diplomatic Practice (6th ed. 2009).
[478] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).

Treaties have been used to formalize international legal obligations and transfers for hundreds of years.[479] These treaties created arrangements, titles, and interests. [480] International law says treaties are only valid if they are between subjects under international law (i.e. States).[481] International law also requires that agreements which are legally binding must be performed ("pacta sunt servanda").[482] Every treaty in force is binding upon the parties to it and must be performed by them in good faith.[483] A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.[484]

Treaties were made between European and non-European nations going back to the 15th century.[485] The Berlin (Congo) Conference in 1884-1885 created a policy that formal treaties are the way in which to acquire title to African territory. [486] Treaties with Pacific nations were also in the same form as the treaties European nations made with each other, and that European powers were using to acquire African territory. [487] Even in the late 19th century, the formalities of negotiation were not ignored and European powers understood they could only make treaties with Pacific rulers who had the capacity to enter into their government into the treaty. [488] [489] If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty. [490]

There was disagreement in the 19th century about whether force and coercion could be used to negotiate treaties, with some nations condoning it and others finding unequal power voided the

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[479] Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in the 19th Century International Law,* 40 Harv. Int'l L.J. 1 (1999)
[480] Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in the 19th Century International Law,* 40 Harv. Int'l L.J. 1 (1999)
[481] Tom Bennion*, Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi,* 35 Vict. U Wellington L Rev 165 (2004)
[482] Vienna Convention on the Law of Treaties, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf ; https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1449
[483] Vienna Convention on the Law of Treaties, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf
[484] Vienna Convention on the Law of Treaties, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf
[485] Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in the 19th Century International Law,* 40 Harv. Int'l L.J. 1 (1999)
[486] Tom Bennion*, Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi,* 35 Vict. U Wellington L Rev 165 (2004)
[487] Tom Bennion*, Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi,* 35 Vict. U Wellington L Rev 165 (2004)
[488] Tom Bennion*, Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi,* 35 Vict. U Wellington L Rev 165 (2004)
[489] See: Britain and Sultan of Sokoto; Brass Chiefs of Nigeria
[490] Vienna Convention on the Law of Treaties, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf ; https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1449

agreements.[491] [492] Some argued that treaties are reciprocal so both sides were getting something, while others argued that by the nature of granting protectorate powers or ceding sovereignty, the agreement in itself was unequal. [493] Generally, these treaties were upheld, regardless of whether they favored the European or non-European side. Even in 1902, a treaty between Britain and the Sultan of Muscat was upheld in British court, despite the Sultan seizing ammunition from British officers.[494] The court ruled that per the treaty, the Sultan's word was law and that the sovereignty and law of other countries must be upheld and cannot be questioned.[495]

2. International Property Law

Under William Blackstone's 18th century formulation, property is characterized by total dominion and a right of exclusive control from anyone else's competing interests.[496] Later, in the early 20th century a new view emerged that argued people do not have rights to an object, but rather have rights against each other. [497] Under this view, property rights are simply relationships between people.[498] Today, property is generally described as a bundle of rights, a loose collection of separately specifiable rights which typically include: the rights to exclude, to possess or use, and to transfer. [499] However the definition of property is still contested. [500] At the edges of difficult property disputes, where black letter law provides no clear resolution, these disagreements often emerge and answer may hinge on fundamental disagreements about what property is or is not. [501]

Property generally belongs to the person who got it first (the doctrine of first in time). [502] [503]Someone's claim to property typically comes from the claims she inherited from a prior possessor,[504]

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[491] Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in the 19th Century International Law,* 40 Harv. Int'l L.J. 1 (1999)
[492] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[493] Tom Bennion*, Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi,* 35 Vict. U Wellington L Rev 165 (2004)
[494]*Carr v Fracis Times and Co*, AC 176 (1902)
[495]*Carr v Fracis Times and Co*, AC 176 (1902)
[496] Christopher Serkin, The Law of Property (2nd Ed. 2016)
[497] Christopher Serkin, The Law of Property (2nd Ed. 2016)
[498] Christopher Serkin, The Law of Property (2nd Ed. 2016)
[499] Christopher Serkin, The Law of Property (2nd Ed. 2016)
[500] Christopher Serkin, The Law of Property (2nd Ed. 2016)
[501] Christopher Serkin, The Law of Property (2nd Ed. 2016)
[502] Christopher Serkin, The Law of Property (2nd Ed. 2016)
[503] *Pierson v Post*, 3 Cai. R 175 (1805)
[504] Christopher Serkin, The Law of Property (2nd Ed. 2016)

therefore the legitimacy of the present distribution of property and property rights depends on the legitimacy of the original allocation of property rights. [505]

3. Territory Disputes & Choice of Law

Resolving boundary and sovereignty disputes require applying facts that may go back for centuries.[506] Historic property disputes require the court to take a broad view of all historical events which relate to the disputed property, showing the circumstances under which the property transfer was settled. [507] Through this "intertemporal law" doctrine, courts are generally required to refer to historical law, not today's law.[508] This doctrine is entwined with the disfavor of retroactive laws.[509]

However, it is ultimately a choice of law issue and the court on rare occurrences may choose to apply today's law.[510] In addition, intertemporal law is just a doctrine and its theoretical extent may be reduced by factors like the effect of recognition, acquiescence, or estoppel.[511] Courts may also make geographical considerations (*Eastern Greenland* case), consider historical continuity (Indonesian claim to West New Guinea), and self-determination including plebiscites. [512]

There is considerable difficulty in employing tradition modes of territorial acquisition in the resolution of recent complicated territorial disputes where material facts are intertwined with other factors like political and historical issues. [513] Examples of territorial sovereignty disputes that included mixed political and legal issues include Kashmir, Israel, Kuwait, and the Congo to name a few.[514]

In the classic *Island of Palmas* case (a dispute between the U.S. and the Netherlands over the Island of Palmas), Judge Huber, the arbitrator, looked to the critical historical date that most impacted the rights of the parties, which in that case was the year of a purported transfer of title.[515] This is because

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[505] Christopher Serkin, The Law of Property (2nd Ed. 2016)
[506] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[507] *Coffee v Groover*, 123 U.S. 1 (1887) [In order to determine the border between Florida and Georgia, analyzed historical events back to early colonial times, including disputes between British provinces and the Spanish providence of Florida in the 1700s.]
[508] David J. Bederman and Chimène I Keitner, International law frameworks (4th ed. 2016).
[509] R. Y. Jennings, Acquisition of Territory in International Law (1963)
[510] *Republic of Austria v. Altmann*, 541 U.S. 677 (2004)
[511] James Crawford, Brownlie's Principles of Public International Law (7th ed. 2008)
[512] R. Y. Jennings, Acquisition of Territory in International Law (1963)
[513] Seokwoo Lee, Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal, 16 Conn. J. Int'L 1 (Fall 2000)
[514] R. Y. Jennings, Acquisition of Territory in International Law (1963)
[515] *Island of Palmas Case (or Miangas),* Perm. Ct. of Arbitration, 2 U.N. Rep. Int'l Arb. Awards 829 (1928). [Analyzing a dispute that occurred in 1898]

the principle of intertemporal law requires that the legal effect of transactions be determined by the law in force at the time of the transaction.[516] In other territorial disputes, the court simply identifies the "critical date" of the dispute, where the rights of the parties crystalized, and analyze the law and events leading up to that moment, but not after. [517] [518] [519] [520]

The foundation of the U.S.' own interpretations on this matter were formulated in cases about land disputes in U.S. Territories that were part of the Louisiana Purchase. Determining whether the property was part of the Louisiana Purchase treaty required interpreting ancient French and Spanish law to understand the rights created.[521] One of the most contentious territories was that of West Florida, which for some time the U.S. claimed was part of Louisiana while Spain still claimed their own [522] The U.S. Supreme Court consistently applied French and Spanish property law to determine the state of title before the U.S. acquired sovereignty. [523]

In *United States v Fullard-Leo*, the U.S. Supreme Court in analyzing an annexation by the Kingdom of Hawaii in 1862 (Palmyra Atoll) noted that U.S. courts must take notice of Hawaiian laws prior to annexation, and the rules under which the Hawaiian people lived defined the rights acquired during those periods and as such, now also affect property rights today.[524]

The U.S. Supreme Court stated that the laws under which the Hawaiian people lived under the monarchy or republic would be given "judicial notice" and they would define the rights acquired during those periods.[525] At least for property rights, this means Hawaiian domestic law before the annexation would be imported into current U.S. federal judicial decisions. [526]

The two events that most impacted the rights of Hawai'i and U.S. regarding the claim that Hawai'i became a territory of the U.S. in 1898, are the 1898 annexation and the 1893 overthrow of the Hawaiian Kingdom monarchy. As such, this article will look predominantly to the law for both States

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[516] James Crawford, The creation of states in international law (2nd ed. 2011).
[517] See: Legal Status of Eastern Greenland, Perm. Ct. of Int. Justice, Series A/B, No. 53, Judgements, Orders, and Advisory Opinions (1933).
[518] *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, I.C.J. 6, No. 45 (1962)
[519] *Case Concerning Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, I.C.J., No 129, (2007)
[520] *Frontier Dispute (Burkina Faso v Niger),* ICJ No 149 (2013).
[521] David P Currie, Rumors of War: Presidential and Congressional War Powers (1809-1829) 67 U chi L Rev 1 (2000)
[522] David P Currie, Rumors of War: Presidential and Congressional War Powers (1809-1829) 67 U chi L Rev 1 (2000)
[523] David L. Sloss, Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties, 53 Harv. Int'l L.J. 135 (2012)
[524] 331 U.S. 256 (1947)
[525] *U.S. v Fullard-Leo*, 331 U.S. 256 (1947)
[526] *U.S. v Fullard-Leo*, 331 U.S. 256 (1947)

and internationally in the 1890s. Where exact legal precedent or policy for that time cannot be identified, law from the early 1900s (1900-1935) may also be referenced. Current law may occasionally be referenced for policy considerations.

Determining the correct legal standard in international disputes can also be complicated. Domestic law governs each State. The U.S. Constitution governs the U.S. and the Hawaiian Constitution governs the Kingdom of Hawai'i. International law, such as treaties and customary law, also govern both the United States and Hawaiian Islands and their agreements with each other. Finally, policies also shape each State's intent, such as the international doctrines of discovery and conquest or domestic policies like the U.S.' Monroe Doctrine.

M. U.S. Foreign Affairs and Property Law

U.S. foreign recognition powers are vested exclusively in the President of the U.S., not Congress. The Framers listed the traditional avenues of recognition (receiving ambassadors, making treaties, and sending ambassadors) among the President's Article II powers. [527]

In the U.S., the U.S. Constitution prevails over international law, however that does not relieve the U.S. from its international obligations. [528] International customary law cannot take precedence over a contrary federal statute or treaty obligation.[529] In addition, the "Charming Betsy" doctrine originated in 1804, requires interpretation of ambiguous U.S. statutes to be as consistent as possible with international law. [530] "An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[531] However, later-in-time statutes can still supersede prior conflicting treaties.[532] The courts try to harmonize statutes with treaties whenever possible.[533] [534]

While international law cannot take precedence over the U.S. Constitution, it can fill the gaps. The *Paquete Habana* case of 1900 explained that "international law is part of our law" and "customs and usages of civilized nations" should be applied "where there is no treaty, and no controlling

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[527] *Zivotofsky v Kerry,* 576 U.S. 1059 (2015)
[528] David J. Bederman and Chimène I. Keitner, International law frameworks (4th ed. 2016).
[529] Curtis A. Bradley, International law in the U.S. Legal System (2nd ed. 2015)
[530] *Murray v Schooner Charming Betsy*, 2 Cranch 64 (1804).
[531] *Murray v. Schooner Charming Betsy,* 6 U.S.64, 2 L.Ed.208 (1804)
[532] *The Cherokee Tobacco,* 78 U.S. 616, 621 (1871)
[533] *Chew Heong v U.S.,* 112 U.S. 536, 549 (1884); *Pigeon River v Charles W. Cox Ltd* 291 U.S. 138, 160 (1934)
[534] David L. Sloss, Michael D. Ramsey, and William S. Dodge, The U.S. Supreme Court and International Law: Continuity and Change (August 2010)

executive or legislative act or judicial decision."[535] However, when it comes to foreign affairs, the law of nations occupies the executive and legislative domains, not the judicial. [536]

After the Treaty of Paris (1783) ended the Revolutionary War, Congress created the Department of Foreign Affairs in 1784, naming John Jay as Secretary of Foreign Affairs.[537] Under the Constitution, ratified in 1788 to replace the Articles of Confederation, the power and responsibility for conducting foreign affairs was given to the president as head of the Executive Branch. [538] The U.S. Constitution Article II §2 grants the president foreign affairs powers including: Commander in Chief, treaty making, and appointment of ambassadors.[539] In July 1789, President George Washington signed legislation that established the first cabinet agency of the new government, the Department of Foreign Affairs (now known as the State Department). [540] President Washington insisted Congress send congratulations to the new government of France through him.[541]

Today in the U.S., the president is the "sole organ" of the federal government in the field of international relations, presenting a clear and unified face to the world.[542] The president has the sole power to recognize foreign governments.[543] Congress has accepted that the power to recognize foreign States and governments and their territorial bounds is exclusive to the Presidency.[544] [545] However, the President is not free form the checks of Congress merely because foreign affairs are at issue. The 2/3 ratification of treaties is required so no one person or organization in the government could become too strong.[546]

Some foreign affairs powers are shared. Both the President and Congress share "passport power" over immigration, naturalization, and foreign commerce.[547] The President and Congress must work together to build American Embassies abroad. [548] And, of course, the Senate must ratify any

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[535] *The Paquete Habana*, 175 U.S. 677, 708 (1900)
[536] *Sosa v Alvarez-Machain*, 542 U.S. 692, 714 (2004).
[537] Department of State: History, Authorities, and The Interagency Process, §1, state.gov
[538] Department of State: History, Authorities, and The Interagency Process, §1, state.gov
[539] USC Article II §2
[540] Department of State: History, Authorities, and The Interagency Process, §1, state.gov
[541] David P. Currie, *Rumors of War: Presidential and Congressional War Powers, 1809-18*29, 67 U. Chi. L. Rev 1 (2000)
[542] *United States v Curtiss-Wright Export Corp* , 299 U.S. 304 (1936)
[543] *Zivotofsky v Kerry,* 576 U.S. 1059 (2015)
[544] *Zivotofsky v Kerry,* 576 U.S. 1059 (2015)
[545] Congressional Research Service, Zivotofsky v. Kerry: The Jerusalem Passport Case and Its Potential Implications for Congress's Foreign Affairs Powers (2015)
[546] Joyce P. Kaufman, *A Concise History of U.S. Foreign Policy* (4th ed. 2017)
[547] *Zivotofsky v Clinton,* 566 U.S. 189 (2012)
[548] *Zivotofsky v Clinton,* 566 U.S. 189 (2012)

treaties negotiated by the president.[549] That also means, the Senate cannot ratify treaties that were not negotiated by the President.[550]

Congress also has some Foreign Affairs powers. Congress may regulate Commerce with foreign Nations, establish a uniform rule of naturalization, declare war, grant letters of marque and reprisal, make rules for the government and regulation of the land and naval forces, and define and punish piracies and felonies, committed on the high seas, and offences against the Law of Nations. [551] [552] Every exercise of Congress must be traceable to an explicit or implicit grant of power to Congress by the Constitution. Article I vests Congress with "all legislative Powers herein granted."[553]

If not textually assigned in the U.S. Constitution, the Supreme Court framework for analyzing if a power is exclusive to the executive requires "required an examination of "the Constitution's text and structure, as well as precedent and history bearing on the question."[554] In foreign affairs, as in the domestic realm, the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[555] In separation-of-powers cases the U.S. Supreme Court has often "put significant weight upon historical practice."[556]

1. U.S. Treaties

While international law allows a broad definition of the word "treaty," in the U.S. the word "treaty" is understood to refer to the Article II treaty making powers as defined in the U.S. Constitution. An international agreement made by the U.S. in a form of an Article II treaty enters into force for the U.S. when the President, with the advice and consent of the Senate, has ratified it, provided the agreement is also in force internationally.[557] An international agreement does not enter into force for the U.S. until it is in force internationally, irrespective of whether the U.S. has ratified it or given other

[549] U.S. Const., Art. II
[550] *Zivotofsky v Kerry,* 576 U.S. 1059 (2015)
[551] *Zivotofsky v Kerry,* 576 U.S. 1059 (2015)
[552] U.S. Const., Art. I § 8
[553] U.S. Const. art. 1, § 1.
[554] *Zivotofsky v Kerry,* 576 U.S. 1059 (2015)
[555] *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952)
[556] *NLRB v Noel Canning*, 134 S. Ct. 2550 (2014)
[557] Restatement (Fourth) of The Foreign Relations Law of the United Sates, § 304 Entry into Force of International Agreements (2019)

notification of its consent to be bound.[558] The president has exclusive power to negotiate treaties on behalf of the United States. [559] [560]

The United States is one of the only a handful of countries that require a super-majority vote in the legislature to ratify a treaty.[561] The reason for this goes back to the Articles of Confederation. [562] The Confederation was incapable of living up to its treaty obligations, making it an unreliable treaty partner and thus the Confederation had a difficult time negotiating new treaties. [563] An important goal of the Constitution was to strengthen federal government power to create enforceable treaties.[564] Collective action by the U.S. states was essential to the success of the United States. [565]

In addition, the founders wanted to ensure there were limits to the power exercised by each branch, as they had just been witness to what was, in their minds, a "definite manipulation of Parliament by a corrupt and power-hungry monarchy and ministry."[566] During the Constitutional Convention, it was recommended against the Senate continuing to take direction of treaty negotiations and stated that "the President is the constitutional representative of the United States with regard to foreign nations."[567] However, even allowing the simple majority of Senators to determine which treaties were ratified still caused apprehension, and thus the 2/3 super-majority vote rule was also added.[568] Virginians even pushed for an amendment requiring a ¾ vote for especially sensitive topics like navigation restrictions.[569] The Separation of Powers doctrine was adopted by the founders to preclude the exercise of arbitrary power and to save the people from autocracy.[570]

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[558] Restatement (Fourth) of The Foreign Relations Law of the United Sates, § 304 Entry into Force of International Agreements (2019)
[559] *United States v Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936)
[560] Restatement (Fourth) of The Foreign Relations Law of the United Sates (2019)
[561] Oona A. Hathaway, Treaties' End: The Past, Present, and Figure of International Lawmaking in the United States, 117 Yale L.J. 1236 (2008)
[562] Oona A. Hathaway, Treaties' End: The Past, Present, and Figure of International Lawmaking in the United States, 117 Yale L.J. 1236 (2008)
[563] Oona A. Hathaway, Treaties' End: The Past, Present, and Figure of International Lawmaking in the United States, 117 Yale L.J. 1236 (2008)
[564] Oona A. Hathaway, Treaties' End: The Past, Present, and Figure of International Lawmaking in the United States, 117 Yale L.J. 1236 (2008)
[565] Oona A. Hathaway, Treaties' End: The Past, Present, and Figure of International Lawmaking in the United States, 117 Yale L.J. 1236 (2008)
[566] Lee B. Ackerman, Executive Agreements, the Treaty-Making Clause, and Strict Constructionism, 8 Loy. L.A. L. Rev. 587 (1975).
[567] S. Comm. On Foreign Relations, 14th Cong., 1st Sess., Rep. of Feb. 15, 1816
[568] Bruce Ackerman and David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995)
[569] Bruce Ackerman and David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995)
[570] Lee B. Ackerman, Executive Agreements, the Treaty-Making Clause, and Strict Constructionism, 8 Loy. L.A. L. Rev. 587 (1975).

The Senate's role in treaty making was established as an "advisory role" which brought a wide range of knowledge and also to give decisions the force of public backing.[571] The House of Representatives was purposely excluded from the treaty-making process due to concerns about secrecy and speed.[572]

Alexander Hamilton took treaty power quite seriously. He understood it to be used for contracts between foreign States and noted in the Federalist Papers:

> *[The treaty power] does not seem strictly to fall within the definition of either [the legislative or executive power]. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. . . . Its objects are CONTRACTS with foreign nations which have the force of law but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive.*[573]

George Washington also underscored the importance of treaties and emphasized that "the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate." [574]

The Treaty Clause procedure is legitimate only for international agreements fairly related to foreign relations. [575] Treaty power cannot extend to where the Constitution forbids, allow changes in the character of the Federal or U.S. State government, or enable a cession of any portion of the U.S. Territory or U.S. States without their consent.[576] [577]

Missouri v Holland is the leading case on U.S. treaty power and explains that treaties are the supreme law of the land.[578] The Supreme Court explained that Congress can use it's Necessary and Proper powers to enact legislation enabling the subject matter of an approved treaty, however otherwise all of Congress' actions must be limited to its enumerated legislative powers [579] Enumerated legislative

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[571] Lee B. Ackerman, Executive Agreements, the Treaty-Making Clause, and Strict Constructionism, 8 Loy. L.A. L. Rev. 587 (1975).
[572] Lee B. Ackerman, Executive Agreements, the Treaty-Making Clause, and Strict Constructionism, 8 Loy. L.A. L. Rev. 587 (1975).
[573] The Federalist No. 75, at 450-51 (Alexander Hamilton)
[574] Bruce Ackerman and David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995)
[575] Restatement (Third) of Foreign Relations Law of the United States §302 Reporter's Note 2 (1986)
[576] *De Geofroy v Riggs*, 133 U.S. 258, 267 (1890).
[577] *Fort Leavenworth R.R. CO v. Lowe*, 114 U.S. 525 (1885)
[578] *Missouri v Holland*, 252 U.S. 416 (1920)
[579] Lee B. Ackerman, Executive Agreements, the Treaty-Making Clause, and Strict Constructionism, 8 Loy. L.A. L. Rev. 587 (1975).

power does not depend on form, but what matters are contained in the form, which needs to be properly regarded as legislative in character and effect.[580] [581]

The Supreme Court can interpret treaties but must give the departments who negotiated and enforce them great weight.[582] The Supreme Court explained in *Curtiss-Wright* that "in the arena of foreign affairs, the President alone has the power to speak or listen as a representative of the nation," and Congress itself is powerless to invade [this realm]."[583] Similarly, the president has been able to terminate treaties without congressional approval and create executive agreements without Senate ratification.[584] In *Goldwater v Carter*, the Supreme Court plurality reasoning for finding treaty termination a non-justiciable political question: was the need for a "single voice" in foreign affairs.[585]

Since international agreements involve both a delegation and a subsequent constraint on the power of the people of the U.S. under international law, the treaty-making process includes special safeguards requiring an usual degree of deliberation and consensus. [586] The Senate must give its consent by super-majority of two thirds, ensuring that that interests of the people and the states cannot be bargained away to a foreign nation by a simple majority. [587]

Many of critical separation of powers cases had not yet been decided in the 19th century, however looking to the 1890 McKinley Tariff Act we can see that Congress was expanding the president's power to create international agreements, now allowing certain international agreements to be created without Senate ratification. [588] It seems illogical under separation of powers theories to think that while Congress was granting the President even more power to enter into international agreements, that Congress would at the same time shift the power to themselves to also enter into international agreements themselves. The Supreme Court reviewed the McKinley Act in *Field v Clark* in 1892 and upheld the delegation of discretionary power.[589]

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[580] *INS v Chadha*, 462 U.S. 919 (1983)
[581] S. Rep. No 1335, 54th Cong. 2d Sess 8 (1897)
[582] *Kolovrat v Oregon,* 366 U.S. 187 (1961)
[583] *United States v Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936)
[584] *Goldwater v Carter*, 444 U.S. 996 (1979)
[585] *Goldwater v Carter*, 444 U.S. 996 (1979)
[586] Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221 (1995)
[587] Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221 (1995)
[588] Bruce Ackerman and David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995)
[589] *Field v Clark*, 143 U.S. 649 (1892).

Further, in 1909, after Congress repealed the Dingley Tariff Act of 1897, U.S. Secretary of State Huntington Wilson wrote to France explaining that because the Act was not a formal treaty, it was terminated and the U.S. could not be bound under international law.[590] Later in *B. Altman and Co v United States*, the Supreme Court would use the contested implications of the Dingley Tariff Act to extend the meaning of the word "treaty" in statute to also include executive agreements authorized by congress, however it also indicated that the specific agreement lacked "the dignity" of a treaty and did not consider it a formal treaty.[591]

The four-Justice *Goldwater v Carter* opinion, written by Justice Rehnquist, (concluding that the case presented a nonjusticiable political question) has proven influential, and federal district courts have invoked the political question doctrine as a basis to dismiss challenges to unilateral treaty terminations by President Reagan and President George W. Bush.[592] President Carter unilaterally rescinded the Mutual Defense Treaty with Taiwan in 1979, on the ground that the treaty was with a State that no longer existed (the People's Republic of China replaced the Republic of China).[593]

U.S. treaty law is not absolute, as the International Court of Justice has rejected some Supreme Court interpretations of international treaty obligations, and even requested the U.S. to take remedial steps.[594] However, in two cases the Supreme Court refused to give affect to the ICJ decision.[595]

2. Other U.S. International Agreements

In addition to treaties, over the years there was an invention of "other international agreements" including "Congressional-Executive Agreements" which require a simple majority of both houses and the signature of the president; "Sole Executive Agreements" by the president without any ratification; and non-legally binding political commitments.[596] [597] [598]

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[590] Bruce Ackerman and David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995)
[591] B. Altman and Co. v. United States, 224 U.s. 583 (1912).
[592] *Goldwater v Carter*, 444 U.S. 996 (1979)
[593] Robert J. Reinstein, Recognition: A Case Study on the Original Understanding of Executive Power, 45 U. Rich L Rev 801 (March 2011)
[594] Michael P Van Alstine, Stare Decisis and Foreign Affairs, 61 Duke L.J. 941 (Feb 2012)
[595] Michael P Van Alstine, Stare Decisis and Foreign Affairs, 61 Duke L.J. 941 (Feb 2012)
[596] *Field v Clarke,* 143 U.S. 569 (1892)
[597] Igor I. Kavass, United States Treaties and International Agreements: Sources of Publication and Legislative History Documents, 76 LAW. LIBR. J. 442 (1983).
[598] Ryan Harrington, Understanding the Other International Agreements, 108 LAW LIBR. J. 343 (2016).

Nowhere in the U.S. Constitution (or even United States Code until 1972) does the term "executive agreement" appear.[599] The Constitution recognizes a distinction between "treaties" and "agreements" or "compacts," but does not indicate what the difference was.[600] Advocates of executive agreements argue the treaty-making clause in the U.S. Constitution uses permissive language, not mandatory language.[601] Others counter argue that "he may" is used for discretionary powers and "he shall" is non-discretionary.[602]

Executive agreements have been used as early as 1817 with the Rush-Bagot Agreement with Great Britain limiting naval forces on the Great Lakes, though it was submitted by President Monroe with a question to Congress if it required the treaty ratification process. [603] Executive agreements were used sparingly until World War II.[604]

The Legal Adviser for Treaty Affairs in the Department of State answers questions regarding whether to conclude an agreement as a treaty or with another type of international agreement, and the Department of State makes the final decision.[605] [606] A threshold question should be whether there is proper Constitutional authority for Congress to approve the international agreement without a treaty. [607] This requires identification of the enumerated Constitutional power Congress is acting with.[608] Generally the two most influential factors in the decision under the State Department's Circular 175 Procedure are "past U.S. practice as to similar agreements" and "the preference of Congress as to a type of particular type of agreement." [609] However, two additional factors likely have significant impact on an agreement to acquire territory: "the degree of formality desired for an agreement" and "the general international practice as to similar agreements." [610]

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[599] Margaret A. Leary, International Executive Agreements: A Guide to the Legal Issues and Research Sources, 72 LAW LIBR. J. 1 (1979).
[600] Margaret A. Leary, International Executive Agreements: A Guide to the Legal Issues and Research Sources, 72 LAW LIBR. J. 1 (1979).
[601] Lee B. Ackerman, Executive Agreements, the Treaty-Making Clause, and Strict Constructionism, 8 Loy. L.A. L. Rev. 587 (1975).
[602] Lee B. Ackerman, Executive Agreements, the Treaty-Making Clause, and Strict Constructionism, 8 Loy. L.A. L. Rev. 587 (1975).
[603] Margaret A. Leary, International Executive Agreements: A Guide to the Legal Issues and Research Sources, 72 LAW LIBR. J. 1 (1979).
[604] Igor I. Kavass, United States Treaties and International Agreements: Sources of Publication and Legislative History Documents, 76 LAW. LIBR. J. 442 (1983).
[605] Circular 175 Procedure,U.S. Dept of State, https://www.state.gov/treaty-procedures/ (Effective 1955 and forward)
[606] Ryan Harrington, Understanding the Other International Agreements, 108 LAW LIBR. J. 343 (2016).
[607] Margaret A. Leary, International Executive Agreements: A Guide to the Legal Issues and Research Sources, 72 LAW LIBR. J. 1 (1979).
[608] International Law and Agreements: Their Effect Upon U.S. Law, Congressional Research Service, 2018
[609] Ryan Harrington, Understanding the Other International Agreements, 108 LAW LIBR. J. 343 (2016).
[610] Ryan Harrington, Understanding the Other International Agreements, 108 LAW LIBR. J. 343 (2016).

Further, it is thought that the treaty-making process is to be invoked only when the agreement is of significant importance to the country.[611] [612] Congressional Research Service notes that "traditional subjects" of treaties include human rights, resolution of boundary disputes, taxation, and mutual legal assistance while that of agreements includes tariffs and trades, status of U.S. forces abroad, and foreign claims settlement.[613]

There are two types of Congressional-Executive Agreements, first "ex ante" in which Congress passed an authorizing statute that the president signed into law and then the president subsequently uses that authority to conclude an international agreement and second "ex post" where the president chooses not to submit a treaty to the Senate for formal Article II treaty ratification and instead submits to both branches of Congress for a simple majority agreement (like with domestic legislation).[614] The legitimacy of each type of international agreement requires an investigation into the source and authority for the agreement's approval.[615]

Ex Post Congressional-Executive Agreements are formed by the President or a representative on behalf of the United States with another nation and then brings the agreement back to Congress for approval. [616] These agreements then pass through both houses of Congress as ordinary legislation or joint resolutions and are subsequently signed by the President pursuant to the Presentment Clause. [617] These agreements differ from ordinary legislation because they require the agreement from another State. [618] Congressional-Executive Agreements and treaties are not interchangeable but they also do not have well-defined, exclusive areas of authority. [619]

One of the most famous Congressional-Executive Agreements is NAFTA (North American Free Trade Agreement). Upon a challenge of its Constitutionality, a federal district court in 1994 found the question was not barred by the Political Question doctrine (because it was a commercial agreement) and upheld the agreement as a valid international agreement based on the Foreign Commerce Clause,

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[611] Lee B. Ackerman, Executive Agreements, the Treaty-Making Clause, and Strict Constructionism, 8 Loy. L.A. L. Rev. 587 (1975).
[612] Why Certain Trade Agreements are Approved as Congressional-Executive Agreements Rather Than Treaties, Congressional Research Service, April 15, 2013
[613] Executive Agreement, Congressional Research Service, December 21 2015
[614] Ryan Harrington, Understanding the Other International Agreements, 108 LAW LIBR. J. 343 (2016).
[615] Ryan Harrington, Understanding the Other International Agreements, 108 LAW LIBR. J. 343 (2016).
[616] Ryan Harrington, Understanding the Other International Agreements, 108 LAW LIBR. J. 343 (2016).
[617] Ryan Harrington, Understanding the Other International Agreements, 108 LAW LIBR. J. 343 (2016).
[618] Ryan Harrington, Understanding the Other International Agreements, 108 LAW LIBR. J. 343 (2016).
[619] Ryan Harrington, Understanding the Other International Agreements, 108 LAW LIBR. J. 343 (2016).

combined with the Necessary and Property Clause, and the President's Article II foreign relations power.[620] The Supreme Court denied certiorari.[621]

In 1978, the House of Representatives did not believe Treaty power could be used to transfer the Panama Canal to Panama, and instead believed the Property Clause was the only power to support such an action.[622] A federal court ruled that the Treaty Clause is not the only way to transfer federal property, and either power could be used for that purpose. [623] The court ruled that the Property Clause does not limit the Treaty power, but instead provides Congress another avenue to accomplish its work. [624] The Supreme Court denied certiorari on this case as well.[625]

3. Manifest Destiny, Monroe Doctrine, & Western Expansion

The early United States practiced Unilateralism (military and political aloofness with other parts of the world). [626] President George Washington advised in his 1796 farewell address, "Do not get involved in "inveterate antipathies against partial nations and passionate attachment for others" and "steer clear of permanent alliances with any portion of the foreign world."[627]

However, in the early 1800s Unilateralism gave way to Manifest Destiny, the Monroe Doctrine, and Western Expansion.[628]

The term "Manifest Destiny" was coined in 1845.[629] It is the idea that the United States is destined by God, to expand dominion and spread democracy and capitalism across the entire North American continent. [630] Manifest Destiny (and similarly the term "Providence") were often cited by expansionists as a singular policy justification for annexing new territories.[631] Because most of North America was colonized by European countries by the end of the 18th century, the doctrine almost

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[620] Made in the USA Found v Untied States, 56 F.Supp.2d 1226 (W.D.Ala.1999)
[621] Why Certain Trade Agreements are Approved as Congressional-Executive Agreements Rather Than Treaties, Congressional Research Service, April 15, 2013
[622] Edwards v Carter, 580 F.2d 1055 (D.C. Cir 1978)
[623] Edwards v Carter, 580 F.2d 1055 (D.C. Cir 1978)
[624] Edwards v Carter, 580 F.2d 1055 (D.C. Cir 1978)
[625] Walter Dellinger, Whether Uruguay Round Agreements Required Ratification as a Treaty, Memorandum Opinion for the U.S. Trade Representative, Department of Justice (Nov 22 1994),
[626] Joyce P. Kaufman, *A Concise History of U.S. Foreign Policy* (4th ed. 2017)
[627] Tim Marshall, Prisoners of Geography (2016)
[628] Joyce P. Kaufman, *A Concise History of U.S. Foreign Policy* (4th ed. 2017)
[629] Amy S Greenberg, Manifest Destiny and American Territorial Expansion: A Brief History with Documents, 2nd Edition
[630] Amy S Greenberg, Manifest Destiny and American Territorial Expansion: A Brief History with Documents, 2nd Edition
[631] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)

seemed to run contrary to the U.S.' early unilateral policies.[632] However, the U.S. viewed Manifest Destiny more about protecting U.S. interests, rather than engaging with the European governments to create political alliances in order to transfer land.[633] In some ways, the Manifest Destiny Doctrine was a philosophical claim by the United States to the entire continent.[634] The U.S. quickly proceeded to execute on the doctrine, with the annexation of Texas from Mexico, Oregon from the Great Britain in 1846, and expanding into California, Nevada, Arizona, and parts of Utah and Colorado in 1848. [635]

In the 19th Century, under the Monroe Doctrine, the U.S. promised to not interfere in European politics, as long as the Europeans did not attempt to colonize the Americas.[636] At the time, U.S. national interest and priorities were best served by ensuring that the U.S. was no longer surrounded by foreign powers and by asserting primacy over its own lands. [637]

In 1898, following the Spanish-American war, many protested the U.S. annexation of new territory.[638] Protestors included university presidents, writers, several titans of industry including Andrew Carnegie, clergymen, labor leaders, politicians of both parties, and former President Cleveland. [639] They condemned the invasions abroad and urged Americans to allow other nations the right to self determination that they themselves so deeply cherished. [640] Around this time, foreign news was also critical of U.S. imperial actions. [641] Le Temps wrote the U.S. was formerly "as democratic as any society can be" but had become "a state closer to the other states of the old world that arms itself like them and aggrandizes itself like them." [642] President Roosevelt, a fervent annexationist and expansionist, wrote to a friend complaining about the protests calling the criticizers "futile sentimentalists of the international arbitration type" and "unhung traitors." [643]

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[632] Joyce P. Kaufman, *A Concise History of U.S. Foreign Policy* (4th ed. 2017)
[633] Joyce P. Kaufman, *A Concise History of U.S. Foreign Policy* (4th ed. 2017)
[634] Joyce P. Kaufman, *A Concise History of U.S. Foreign Policy* (4th ed. 2017)
[635] Joyce P. Kaufman, *A Concise History of U.S. Foreign Policy* (4th ed. 2017)
[636] Joyce P. Kaufman, *A Concise History of U.S. Foreign Policy* (4th ed. 2017)
[637] Joyce P. Kaufman, *A Concise History of U.S. Foreign Policy* (4th ed. 2017)
[638] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)
[639] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)
[640] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)
[641] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)
[642] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)
[643] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)

At that time, many Americans considered Pacific Islanders and Latin Amerians as "colored" natives in need of guidance from whites. [644] It was common to hear speeches justifying expansionism and imperialism on the basis of white supremacy. [645]

4. Imperialism and Foreign Meddling

The U.S. emerged as an Imperial power in the 19th century and since has relied heavily on military power in order to get its way.[646] Between 1845 and 1848, the continental U.S. grew by 1.2 million square miles (64%) with the additions of Texas, Oregon, California, Nevada, Arizona, Utah, and Colardo.[647] By 1913, the U.S. also "possessed" the territories of the Philippines (Pilipinas), Porto Rico (Puerto Rico), Hawaii (Hawai'i), Guam (Guåhan), American Samoa (Sāmoa), Wake Atoll, Midway Atoll (Pihemanu Kauihelani) – and also had a number of protectorates around the world including Cuba, Nicaragua, and Honduras. [648] At the same time, European powers were acquiring territories around the world.[649]

The United States has a long history of involvement in external regime changes, entailing both overt and covert actions aimed at creating, replacing, or preserving foreign governments. As early as 1801, Thomas Jefferson sanctioned an effort to throw a coup d'état and install a new leader in Tripolitania (a former Ottoman province of Libya).[650] Later, the U.S. annexed the American run Republic of Texas in 1846. [651] From then to now, the list of countries with a history of U.S. regime meddling seems endless. During the 19th century and early 20th century, just to name a few: Japan (1853-4), México (1835-45, 1865-7, 1913-19), Sāmoa (1887-89), 1893 (Hawai'i), Panamá (1903), Honduras (1903-25), Cuba (1906-1909), Nicaragua (1909-10, 12-33), Haïti (1915-34), and the Dominican Republic (1916-24).[652]

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[644] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)
[645] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)
[646] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)
[647] Joyce P. Kaufman, *A Concise History of U.S. Foreign Policy* (4th ed. 2017)
[648] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)
[649] Finding the Peripheries: Sovereignty and Colonialism in 19th Century International Law, 40 Harv. Int'l L.J. 1 (Winter 1999)
[650] Thomas Jefferson: Foreign Affairs, Peter Onuf, Miller Center, https://millercenter.org/president/jefferson/foreign-affairs
[651] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)
[652] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)

The United States government has occasionally requested its citizens not meddle in other countries affairs (see: Fenian Brotherhood address by President Grant in 1870), [653] however the difference in treatment seems to be whether it is state-sponsored meddling or a private action.

The U.S. government's meddling was responsible for a new term in the 1800s, "gunboat diplomacy." [654] The U.S. sailed to the coasts of Japan and Korea with military gunboats, a not so subtle threat of force, and intimidated both countries into signing treaties that favored the U.S. [655] The U.S. navy presence in Hawaii before and after the overthrow has also been called the same.

International law and policy in the 19th century does not seem to directly explain these types of policies and interactions, other than marketing lines like "The sun never sets on the British Empire." In fact the end of the 19th century was known as the "Age of Empire" and by 1914 virtually all territory in Asia, Africa, and the Pacific was claimed by European States or the United States.[656] This empire building took place by numerous methods including treaties of cession or annexation, or simply by conquest.[657] Even in the 20th century the United States settled disputes with other nations over the status of thirty islands in the Caribbean and Pacific.[658]

However, things changed by the 21st century. Today, the majority of the nations of the world openly disfavor "foreign meddling" and refer to the history of it shamefully as "colonization" and "puppet states."

Indeed, even in 2018, Dr. Alfred M. deZayas, a United Nations Independent Expert in the Office of the High Commissioner for Human Rights could only describe the current status of the Hawaiian Islands as a sovereign nation-state in continuity; but a nation-state that is under a strange form of occupation by the United States" and resulting from an "illegal military occupation and fraudulent annexation."[659] Dr.

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[653] President Ulysses S. Grant, May 24, 1870: Proclamation Regarding Fenian Brotherhood, https://prod.millercenter.org/the-presidency/presidential-speeches/may-24-1870-proclamation-regarding-fenian-brotherhood
[654] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)
[655] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)
[656] Finding the Peripheries: Sovereignty and Colonialism in 19th Century International Law, 40 Harv. Int'l L.J. 1 (Winter 1999)
[657] Finding the Peripheries: Sovereignty and Colonialism in 19th Century International Law, 40 Harv. Int'l L.J. 1 (Winter 1999)
[658] Formerly Disputed Islands, U.S. Department of the Interior, Office of Insular Affairs https://www.doi.gov/oia/islands/disputedislands,
[659] MEMORANDUM, Re: The case of Mme Routh Bolomet, February 25, 2018, Dr. Alfred M. deZayas to Honorable Gary W.B. Chang and Honorable Jeannette H. Castagnetti, and the Members of the Judiciary for the State of Hawaii

deZayas goes on to say that the laws of the Hawaiian Kingdom are still valid, as the occupied state, and the domestic laws of the occupier (the United States) should not be applied within the territory. [660]

i. Haïti

Looking at Haïti as an example, the U.S. sought annexation of the Island of Hispanola (Haïti and the Domican Republic) as early as 1868 under President Johnson in order to secure a defensive and economic stakes in the West Indies.[661] Secretary of State Blaine unsuccessfully attempted to obtain a lease of a city in Haïti from 1889-1991. [662] Haïti was subject to other foreign influence as well, and the U.S., wanting sole control, intervened in 1915 with U.S. Marines being deployed and then creation of a treaty granting the U.S. control over Haïtian finances and the right for the U.S. to intervene whenever it felt like it. [663] The U.S. also forced the "election" of a new pro-American President who did not have popular support. [664] President Wilson's administration also attempted to force a new constitution in 1917 which would allow foreign land ownership. [665] (Any of this sound familiar?) The Haïtian legislature resisted the U.S.'s request, so the U.S. dissolved the legislature until 1929 when the U.S. finally withdrew from Haïti under President Roosevelt's new "Good Neighbor Policy." [666]

Some of the U.S.' interactions with Haïti could be called a military occupation, because unlike Hawaii in 1893, they had formal support of the President to send Marines. The U.S.' actions in Haïti are not quite a coup however, since it was external (U.S. government) not internal forces (Haïtian) overthrowing the government. Where in Hawaii, it was internal forces (subjects and residents of the Kingdom, even though a racial and economic minority) who overthrew the government. While Minister Steven's support was critical to the coup, he was not officially part of the Committee nor did he act in

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[660] MEMORANDUM, Re: The case of Mme Routh Bolomet, February 25, 2018, Dr. Alfred M. deZayas to Honorable Gary W.B. Chang and Honorable Jeannette H. Castagnetti, and the Members of the Judiciary for the State of Hawaii
[661] Office of the Historian, *U.S. Invasion and Occupation of Haiti 1915–34,* https://history.state.gov/milestones/1914-1920/haiti
[662] Office of the Historian, *U.S. Invasion and Occupation of Haiti 1915–34,* https://history.state.gov/milestones/1914-1920/haiti
[663] Office of the Historian, *U.S. Invasion and Occupation of Haiti 1915–34,* https://history.state.gov/milestones/1914-1920/haiti
[664] Office of the Historian, *U.S. Invasion and Occupation of Haiti 1915–34,* https://history.state.gov/milestones/1914-1920/haiti
[665] Office of the Historian, *U.S. Invasion and Occupation of Haiti 1915–34,* https://history.state.gov/milestones/1914-1920/haiti
[666] Office of the Historian, *U.S. Invasion and Occupation of Haiti 1915–34,* https://history.state.gov/milestones/1914-1920/haiti

his official capacity as Ministers do not have the power to deploy the military on their own orders. He he would have required approval from at least the President in order for it to be a U.S. government action.

ii. Panamá

Another example is Panamá in the late 19th century. Panamá was a province of Columbia. [667] The U.S. desired access to the isthmus of Panamá to build a canal and offered compensation to Columbia for it. [668] The U.S. Senate ratified a treaty to lease the isthmus, but the Columbian Senate wanted more money and refused to ratify. [669]

President Roosevelt modeled his response after what Minister Stevens did in Hawai'i. [670] Roosevelt encouraged Panamánian rebels to seek independence from Columbia. [671] Once Roosevelt was aware a revolution was imminent, he sent three ships into the area to support the revolutionaries and quickly recognized the new government of Panamá.[672] He then sent more U.S. military force to prevent Columbia from regaining control. [673] Using "gunboat diplomacy" and recognition powers, the President essentially created a new country from the boundaries of another.[674]

Panamá achieved independence in 1903, with the help of U.S. forces. [675] The Hay-Bunau-Varilla Treaty of 1903 provided the United States with a 10-mile wide strip of land for the canal, a one-time $10 million payment to Panamá, and an annual annuity of $250,000.[676] The United States also agreed to guarantee the independence of Panamá.[677] The treaty was ratified in the U.S. and Panamánian senates.[678]

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[667] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)
[668] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[669] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[670] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)
[671] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[672] David Gartner, Foreign Relations, Strategic Doctrine, and Presidential Power, 63 Ala. L. Rev 499 (2012)
[673] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2009)
[674] Robert J. Reinstein, Recognition: A Case Study on the Original Understanding of Executive Power, 45 U. Rich L Rev 801 (March 2011)
[675] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[676] Office of the Historian, Building the Panama Canal, 1903-1914, https://history.state.gov/milestones/1899-1913/panama-canal
[677] Office of the Historian, Building the Panama Canal, 1903-1914, https://history.state.gov/milestones/1899-1913/panama-canal
[678] U.S. Capital Visitor Center, The Panama Canal, Hay-Bunau-Varilla Treaty, https://www.visitthecapitol.gov/exhibitions/artifact/senate-resolution-ratifying-hay-bunau-varilla-treaty-february-23-1904

The treaty was immediately condemned by many Panamánians.[679] However, the U.S. possessed the Canal Zone territory until 1999, after decades of protest and negotiations. [680] [681]

Like the situation with Haïti, Panamá's arrangement with the U.S. was the fruit of foreign meddling. And like with Hawaii, the U.S. supported something that was not quite a revolution, nor was it fully a coup, or a military occupation. Instead, it was creative engineering to support American business interests. The different with Panamá and Haïti versus Hawai'i, is that the former had formal U.S. government support for the overthrow and Hawai'i did not.

5. U.S. Property Law

U.S. property law is mostly common law, and as such begins with judge-made doctrine.[682] Property disputes are viewed first by considering existing rulings and any statutes.[683] Next, if there are gaps between existing law and the current problem, one looks to history, and the possible legal and economic outcomes of different decisions. [684]

The American war for independence was fought largely to vindicate the political and property rights of the colonial bourgeoisie.[685] Many of the founding fathers accepted the Lockean view that the political and property rights they were fighting for were inextricably linked. [686] Chief Justice John Jay once said, "the people who own the country ought to govern it." [687]

The Supreme Court has explained that the Constitution confers the government with the powers of making war and of making treaties – and consequently, the government possesses the power of acquiring territory: either by conquest, discovery and settlement, or by treaty.[688] [689] In addition, during

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[679] History, Panama declares independence from Columbia, https://www.history.com/this-day-in-history/panama-declares-independence
[680] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[681] https://www.history.com/this-day-in-history/panama-declares-independence
[682] Christopher Serkin, The Law of Property (2nd Ed. 2016)
[683] Christopher Serkin, The Law of Property (2nd Ed. 2016)
[684] Christopher Serkin, The Law of Property (2nd Ed. 2016)
[685] Nathan Goetting, The Marshall Trilogy and the Constitutional Dehumanization of American Indians, 65 Guild Prac. 207 (Winter 2008)
[686] Nathan Goetting, The Marshall Trilogy and the Constitutional Dehumanization of American Indians, 65 Guild Prac. 207 (Winter 2008)
[687] Nathan Goetting, The Marshall Trilogy and the Constitutional Dehumanization of American Indians, 65 Guild Prac. 207 (Winter 2008)
[688] *Am. Ins. Co. v. 356 Bales of Cotton,* 26 U.S. 511, 542, 7 L. Ed. 242 (1828*); Dorr v. United States*, 195 U.S. 138, 141 (1904)
[689] Carman F. Randolph, *Constitutional Aspects of Annexation,* Part First, Harvard Law Review Vol. 12, No. 5 (1898); Shively v Bowlby, 152 U.S. I, 57 (1894)

discussions around the Louisiana Purchase, while there was doubt about a Constitutional basis to acquire foreign territory, every member of Congress did agree that the U.S. government did have power to acquire new land via conquest or treaty.[690] In the 18th and 19th century, the courts recognized two philosophies for territorial acquisition, colloquially coined "might makes right" (conquest) and "first in time, first in right" (discovery).[691]

1. U.S. White-Supremacy

One cannot discuss U.S. property without acknowledging the long history of white supremacy. Philosopher bell hooks has bravely and persistently critiqued the U.S. political system as "imperialist white-supremacist capitalist patriarchy." [692] The U.S.' long history of express, implicit, and systemic racism color many of its historical decisions. While in this paper I will try to incorporate contextual quotes and facts to help shine light on the bias towards non-whites built into imperialism and Manifest Destiny, I feel the topic is important enough to address head-on in this segment as well.

White supremacy was infused into most if not all discussions and decisions about the U.S.' relationship with the Hawaiian Islands (with maybe the exception of purely capitalist maneuvers, or perhaps patriarchy mixed with racism directed at the Queen). The best evidence for this (in addition to the known systemic racism backdrop that is this country's history), is simply quoting Congressional debate from the 1890s regarding the Hawaiian Islands. The U.S. government's views on non-white people are self-evident.

Queen Lili'uokalani's interest in restoring voting rights for the Native Hawaiians and enforcing that only citizens/subjects of the government (of any race) can vote, a democratic and noble objective, was described by Representative Blair in 1894 as an attempt to "return the Hawaiian Islands to paganism, and the 'cannibal islands'.[693]" Blair alleged the islands were full of "Chinamen, Japanese, Portuguese" "tramps" with a tendency towards "devastation" and "lawlessness."[694] Blair went on to show relief the Native Hawaiians were disappearing from assimilation, but expressed concern the "Chinaman" will never disappear and he "rules or ruins wherever he is." [695]

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[690] Henry Adams, *History of the United States, vol ii* (1921); James Lowndes, The Law of Annexed Territory, Political Science Quarterly Vol. 11 No. 4 (1896)
[691] Adam Clanton, *The Men Who Would Be King: Forgotten Challenges to U.S. Sovereignty*, 26 UCLA Pac Basin LJ 1 (Fall 2008).
[692] Bell Hooks, Feminist Theory from Margin to Center (1984); Bell Hooks, Understanding Patriarchy ()
[693] 26 Cong. Rec. 1824, 1834 (1894), House
[694] 26 Cong. Rec. 1824, 1835 (1894), House
[695] 26 Cong. Rec. 1824, 1837 (1894), House

Representative Money declared that the "white race shall out to be dominate wherever on the face of the globe they assert their ascendency."[696] Money then proceeded to call Queen Lili'uokalani a "horrid wretch," "a monster beside whom the gorgons and hydras and chimeras dire of Milton fade into insignificance."[697]

Representative Berry insisted on referring to Queen Lili'uokalani as "Mrs. Dominis," and that minimalization of her status was likely some mixture of racism and misogyny.[698] Representative Berry, went on to advocate Chinese exclusion after annexation, saying "The Chinaman… will go back to die in happy Land of the Sun from which he came."[699] Representative Meyer simply asked "What are we to do with these Asiatics or with the Portuguese?"[700]

Representative Fitzgerald worried that annexation Hawaii could create a "Mongolian State in this Union."[701] Senator Johnson was more direct and explained his opposition to annexation because "the people of Hawaii are not sufficiently intelligent to be incorporated into our domain…ignorance is the general rule. The population is a mixed, a mongrel one."[702] Johnson then compared the situation to the Chinese Exclusion Act, claiming the Chinese had been "permeating our system and poison[ing] the blood of the [U.S.] body politic." [703] Johnson went on to infer the Chinese in Hawaii would either need to be deported or "driven into the sea." [704] Senator Creary stated "We have a serious race problem now in our country, and I am not in favor of adding to our domestic fabric a mongrel population."[705]

There are only a handful of quotes, and there are plenty more even just specific to Hawaii in the 1890s. We must keep the U.S' tendency towards (and even pride of) white supremacy in view when analyzing the U.S.' actions towards the Hawaiian Islands and later when considering what steps should be taken to redress the crimes and ethical violations by the U.S. and its agents.

Further, it's important to remember that very few Hawaiian language texts have been translated into English and the majority of the U.S.' "history" of Hawai'i relies on texts originally written in

[696] 26 Cong. Rec. 1824, 1838 (1894), House
[697] 26 Cong. Rec. 1824, 1839 (1894), House
[698] 31 Cong. Rec 5940, 5972 (1898) House
[699] 31 Cong. Rec 5940, 5972 (1898) House
[700] 31 Cong. Rec 5940, 5987 (1898) House
[701] 31 Cong. Rec 5940, 5967 (1898) House
[702] 31 Cong. Rec 2917, 2031 (1898) Senate
[703] 31 Cong. Rec 2917, 2031 (1898) Senate
[704] 31 Cong. Rec 2917, 2031 (1898) Senate
[705] 26 Cong. Rec. 1798, 1821 (1894). Senate

English and thus by white foreigners. We must also keep in mind that there is much we still do not know of Hawai'i' story, told from Native Hawaiians.[706]

N. Hawaiian Foreign Affairs & Property Law

The "Hawaiian Islands" were considered a fully sovereign State in international law, recognized as independent and sovereign by numerous treaties with other foreign nations (a clear reflection of Statehood[707]), and with active diplomatic activities across the globe. The constitutional-monarchy government known as the "Kingdom of Hawai'i" was the legal occupant of the territory of the Hawaiian Islands, and was the sovereign representing the State. The U.S. even codified Hawai'i's sovereignty in the 1993 Apology Resolution.

1. Constitutional Ambiguity

It is uncertain what the governing law of Hawai'i was at the time of the overthrow and annexation because there were three different possible constitutions in force. First, there was the duly enacted 1852 constitution.[708] Next, there was the 1864 constitution, which was problematic because it did not follow the constitutional amendment provisions set forth by the 1852 constitution.[709] Finally, there was the "Bayonet Constitution" in 1887 which also did not follow the constitutional amendment provisions set forth by either the 1852 or 1864 constitutions.[710] [711] In addition, the 1887 constitution was "never, in anyway ratified, either by the people or by their representatives."[712] While an analysis of the legality of the 1887 constitution would deserve its own article, the legality of the 1852 and 1864 constitutions are likely more straightforward, at least in a U.S. court who would likely be sympathetic.

Indeed, the U.S. Constitution was created in violation of the Articles of Confederation,[713] which required the agreement to be perpetual unless a unanimous vote was made by each of the thirteen States in the compact.[714] This was of course frustrated by several hesitant states, including Rhode Island and

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[706] David A. Chang, The World and All the Things Upon It: Native Hawaiian Geographies of Exploration (2016)
[707] Treaty of Friendship, Commerce and Navigation (USA-Sandwich Islands), Honolulu, 23 December 1826, 16 NRG 1; Commercial Convention (USA-Hawaii), 30 January 1875, 1 NRG 2d ser 72
[708] He Kumukänäwai a me nä Känäwai o ka Mö'ï Kamehameha III, Honolulu, 1852, Constitution and Laws of His Majesty Kamehameha III, Honolulu, 1852. Forbes 1869 (III: 34-35), 1868 (III: 34).
[709] Constitution of the Hawaiian Islands, Article 105, 1852
[710] Constitution of the Hawaiian Islands, Article 105, 1852
[711] Kingdom of Hawai'i Constitution of 1864
[712] Lili'oukalani, Hawaii's Story by Hawaii's Queen (1898)
[713] Bruce Ackerman and Neil Katyal, Our Unconventional Founding, 62 U. Chi. L. Rev. 475 (1995)
[714] Articles of Confederation, Article XIII

South Carolina.[715] While the U.S. Constitution is a compact of several States, it's birth is still comparable to a legal and rightful government deciding to change its constitution (such as the Hawaiian King).

Fortunately, all three constitutions note the same relevant foreign affairs powers, so it does not need to be determined which Constitution was in effect:

1) "It is the King's prerogative to receive and acknowledge public ministers;
2) "The King has the power to make treaties involving changes in the tariff or in any law of the Kingdom, shall be referred for approval to the Legislature.

The major change in the 1887 regarding foreign affairs powers was restricting all military power to require the consent of the Legislature, where previously the King had much more freedom to exercise those powers. However, the King's war powers do not come into this analysis so we can skip it.

As far as treaty powers, they seem similar to the U.S.' own power distribution. It is unclear what the intent was in relation to territorial transfer however, as the annexation of the Palmyra Atoll was done via an executive branch document that did not appear to be ratified by the legislatures. However, Palmyra Atoll did not have a permanent population, so a bilateral treaty would not be appropriate. In fact, when the Hawaiian Kingdom did consider being annexed by the U.S. on several occasions, it was always formal treaties that were drafted in preparation.

O. Statehood and Sovereignty

1. The Political Philosophy of Statehood

Cicero explained, a State is a body politic, a society of men, united together for the purpose of promoting their mutual safety and advantage by their combined strength.[716] [717] A state implies the union of a number of individuals in a fixed territory and under one central authority.[718] A State implies habitual obedience of its members to those with authority and of a fixed abode and definite territory belonging to the people by whom it is occupied.[719] The U.S. Supreme Court defined a State as a political community of free citizens, occupying a territory of defined boundaries, and organized under a

[715] Articles of Confederation, Article XIII
[716] The term "country" is often used interchangeably as the term State
[717] Cicero, Cic. De Rep. 1. i. §25
[718] Henry; Boyd Wheaton, A.C., Elements of International Law (1878)
[719] Henry; Boyd Wheaton, A.C., Elements of International Law (1878)

government sanctioned and limited by a written constitution, and established by the consent of the governed.[720]

A State occupies a definite part of the surface of the earth (its "territory" in international law[721]), within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of other States.[722] International relations between States are only possible if each State has a government with which the others many enter into relations, and whose acts the State may regard as binding on the State itself.[723] [724] Statehood, in other words, is a precondition for a territorially defined political entity to enter into treaties.[725]

Multiple States may be permanently united by a federal compact, such as a "system of confederated States" or a "composite State" with a supreme federal government.[726] The United States of America is a composite State. [727] In fact, the Articles of Confederation was a treaty creating a compact of States.[728] The Supreme Court found that the new government did not exist until the old one was replaced. [729] [730]

i. *State Obligations*

The government of a State is not the same as a State itself.[731] International rights and obligations belong to States, not to specific governments. [732] Once a State is created, it will exist until it is completely extinguished regardless of its internal constitution, form of government, or it is rulers – even if it is distracted with anarchy and revolution. [733]

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[720] *Texas v White,* 7 Wallace 721 (1868)
[721] Note: the term "territory" can also mean an administrative unit under the jurisdiction of a State, but not fully incorporated into the state (such as U.S. Territories like Puerto Rico).
[722] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[723] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[724] However, there are differing doctrines about how recognition may impact this, explored more later in this article.
[725] J. D. van der Vyver, Statehood in International Law, 5 Emory Int'L Rev. 9 (1991).
[726] Henry; Boyd Wheaton, A.C., Elements of International Law (1878)
[727] Henry; Boyd Wheaton, A.C., Elements of International Law (1878)
[728] Our Unconventional Founding, 62 U Chi Li Rev, 475, 573 (1995)
[729] Our Unconventional Founding, 62 U Chi Li Rev, 475, 573 (1995)
[730] Ownings v Speed 18 U.S. 420, 422 (1820)
[731] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[732] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[733] Henry; Boyd Wheaton, A.C., Elements of International Law (1878)

If an internal revolution occurs which merely alters the constitution and form of government, the State remains the same. [734] When a new government succeeds a previous one, the obligations (like treaties) entered into by previous governments on behalf of the State, still bind the new government. [735] A change in government does not cause a State to lose any rights, nor does it discharge the State from any of its obligations. [736]

The U.S. 9th Circuit Court of Appeals found the treat between the U.S. and the "Kingdom of Serbs, Croats, and Slovenes" was still in force despite the Kingdom changing its government structure and renaming itself to the "Federal People's Republic of Yugoslavia."[737] The court said political changes to not affect the validity of any treaty made under an effective government. [738]

However, when one State absorbs another, the newly extinguished State's treaties may be terminated following the "loss of separate existence." [739] For example, when Hanover and Nassau were incorporated into the Kingdom of Prussia following conquest.[740]

There's no debate that the Hawaiian Kingdom was a sovereign State, as the government exchanged diplomatic relations and treaties with numerous other countries, including the United States. In addition, the U.S. federal government once again recognized their sovereignty in the 1993 Apology Resolution. Further, the King Kalākaua even took action in 1886 to create a federation of States lead by the Hawaiian Islands. The Hawaiian Islands were not just a State, but they were a leading State.

i. Recognition

Recognition is a "formal acknowledgment" that a particular "entity possesses the qualifications for statehood" or "that a particular regime is the effective government of a State."[741] States may recognize or decline to recognize territory as belonging to, or under the sovereignty of, or having been acquired or lost by, other States. [742] Recognition is often effected by an express "written or oral

[734] Henry; Boyd Wheaton, A.C., Elements of International Law (1878)
[735] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[736] Henry; Boyd Wheaton, A.C., Elements of International Law (1878)
[737] *Ivancevic v. Artkovic*, 211 F.2d 565 (1954)
[738] *Ivancevic v. Artkovic*, 211 F.2d 565 (1954)
[739] *Terlinden v Ames*, 184 U.S. 270 (1902)
[740] *Terlinden v Ames*, 184 U.S. 270 (1902)
[741] *Zivotofsky v Kerry,* 576 U.S. 1059 (2015)
[742] *Zivotofsky v Kerry,* 576 U.S. 1059 (2015)

declaration. [743] It may also be implied—for example, by concluding a bilateral treaty or by sending or receiving diplomatic agents.[744]

The legal significance of recognition or non-recognition is controversial and deeply debated. The simplest view is that a grant of "recognition" to a new State is declaratory, not a basis for any legal rights.[745] Under this view, non-recognition is used to further foreign policy.[746] While some believe recognition is required for Statehood to exist, critics argue it is illogical to require recognition to establish the very independence that recognition is supposed to be a mere acknowledgment of.[747] In fact, some argue that States emerge fully out of a political process rather than any legal criteria.[748] In practice, recognition does not often play a predominate role in disputes over territorial status with only a few exceptions in the 19th century: Greece 1822-1830, Belgium 1830-39, and Albania 1913-21.[749]

The U.S. Supreme Court determined the United States became a new State when they declared themselves "free, sovereign, and independent States" in the Declaration of Independence on July 4th, 1776.[750] The court determined that Britain's recognition of the U.S.' independence in 1782 with the Treaty of Peace did not create the right and power for the U.S. to become a State, it simply recognized the State previously created by the declaration in 1776.[751]

In the 1920s and 1930s, a view emerged that if a State had been established in direct consequence of unlawful aggression as contemplated in article of the Covenant of the League of Nations, then the Members of the League should, on that account, refuse to recognize that State.[752] After the Japanese armies invaded Manchuria in 1932 and set up a de facto government, Manchukuo, which received limited international recognition.[753] These events led to the U.S. adopting the Stimson Doctrine

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[743] *Zivotofsky v Kerry,* 576 U.S. 1059 (2015)
[744] *Zivotofsky v Kerry,* 576 U.S. 1059 (2015)
[745] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[746] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[747] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[748] Jure Vidmar, Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice (2013)
[749] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[750] *M'Ilvaine v Coxe's Lesse,* 4 Cranch 212 (1808).
[751] Henry; Boyd Wheaton, A.C., Elements of International Law (1878)
[752] J. D. van der Vyver, Statehood in International Law, 5 Emory Int'L Rev. 9 (1991).
[753] Christopher R. Ross, Ex Injuria Jus Non Oritur, Ex Factis Jus Oritur, and the Elusive Search for Equilibrium after Ukraine, 24 Tul. J. Int'l and Comp. L. 143 (Winter 2015)

which declared the U.S. would not recognize any territorial or administrate changes brought about by force.[754]

We must consider the topic of recognition as related to the provisional government and the Republic of Hawaii. However, it was already conceded by the U.S. government that from 1826 until 1893, the U.S. extended full and complete diplomatic recognition to the Hawaiian Kingdom government.[755] [756] In fact, Hawai'i was recognized as a State by dozens of other countries during the 19th century, evidenced by dozens of treaties.[757] [758]

2. The Doctrine of Sovereignty

The term "sovereignty" has a long and troubled history, and a variety of meanings.[759] The words "sovereignty" and "State" are often used synonymously, however they are different. [760] When a State exercises an authority over a certain territory, it is popularly said to have sovereignty over the territory.[761] As a political term, sovereignty is the authority and power by which any State is governed. [762] As a legal term, sovereignty is the totality of powers that States may have under international law. [763] International law governs the exercise of sovereignty between States.[764] Issues of sovereignty and title are often complex and involve the application of various principles of the law to material facts.[765]

In 1839, during the Van Buren presidency, the Supreme Court noted that "when the executive branch of the government" assumes "a fact regarding the sovereignty of any island or country, it is

[754] Stimson Doctrine, 1932, U.S. Department of State, https://2001-2009.state.gov/r/pa/ho/time/id/16326.htm
[755] U.S. Public Law 103-150 (107 Stat. 1510)
[756] 42 U.S.C.A § 11701 (stating: "Throughout the 19th century and until 1893, the United States: (A) recognized the independence of the Hawaiian Nation; (B) extended full and complete diplomatic recognition to the Hawaiian Government; and (C) entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875 and 1887.")
[757] J. Kēhaulani Kauanui, Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indignity (2008)
[758] See treaties in the Appendix
[759] James R. Crawford, The Creation of States in International Law (2nd E 2007)
[760] Henry; Boyd Wheaton, A.C., Elements of International Law (1878)
[761] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[762] James R. Crawford, The Creation of States in International Law (2nd E 2007)
[763] James R. Crawford, The Creation of States in International Law (2nd E 2007)
[764] Henry; Boyd Wheaton, A.C., Elements of International Law (1878)
[765] Seokwoo Lee, Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal, 16 Conn. J. Int'L 1 (Fall 2000)

conclusive on the judicial department."[766] This was in response to the U.S. executive branch not having made any statements regarding Argentinian sovereignty over the Falkland Islands. [767]

For clarity, when we discuss sovereignty in relation to Hawai'i: the State is the Hawaiian Islands, territory is the geographic area of the Hawaiian archipelago, and the government is the Sovereign. Thus, if the monarchy was ruling, the Queen is the Sovereign. If the Republic of Hawaii was ruling, the government led by President Dole would be the Sovereign.

The U.S. Supreme Court stated that before 1898, the Hawaiian Islands existed independent from the rest of the world and was sovereign as far back as history and local tradition reaches.[768]

i. *Protectorate*

A special type of treaty emerged in the late 19th century, the "protectorate agreement."[769] It was commonly used by European states with Asian and African states. [770] The treaty did not officially assume sovereignty, but did allow for extensive control. [771] The idea is a stronger nation takes over the external affairs with a weaker nation in order to "look after" the interests of vulnerable states while the weaker state is still able to run its internal affairs.[772]

As discussed earlier, in 1893, Secretary of State Foster stated there was no desire for a U.S. Protectorate over Hawaii. In 1894, the new Secretary of State Macy put forth his position on a U.S. protectorate over Hawai'i saying, "A protectorate tendered to and accepted by the United States would not change the sovereignty of the country. In that case this Government would take upon itself heavy and responsible duties for which it could hardly expect compensating advantages."[773]

History shows that the U.S. did not intend to create a protectorate over Hawaiian and even if it created one, that would not eliminate or even reduce the Hawaiian Kingdom's sovereignty.

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[766] *Williams v Suffolk Insurance Co*, 38 U.S. 415 (1839).
[767] *Williams v Suffolk Insurance Co*, 38 U.S. 415 (1839).
[768] *United States v Fullard-Leo*, 331 U.S. 246 (1947)
[769] Finding the Peripheries: Sovereignty and Colonialism in 19th Century International Law, 40 Harv. Int'l L.J. 1 (Winter 1999)
[770] Finding the Peripheries: Sovereignty and Colonialism in 19th Century International Law, 40 Harv. Int'l L.J. 1 (Winter 1999)
[771] Finding the Peripheries: Sovereignty and Colonialism in 19th Century International Law, 40 Harv. Int'l L.J. 1 (Winter 1999)
[772] Finding the Peripheries: Sovereignty and Colonialism in 19th Century International Law, 40 Harv. Int'l L.J. 1 (Winter 1999)
[773] Mr. Macy to Mr. Gregg, Foreign Relations of the United States, 1894, Appendix II, Affairs in Hawaii, Office of the Historian, https://history.state.gov/historicaldocuments/frus1894app2/d38

IV. Status of the Government

P. De Jure or De Facto

A "de jure" government is one that possess the powers of sovereignty, even though at the time may be deprived of it.[774] De jure implies the government is legally elected and recognized by other States.[775] International law states that the usurper of a government constituted under a written constitution must take the responsibility of replacing the legitimate court and its judges (yet a further illegal act before he can be said to have usurped all powers of sovereignty) or the other powers must acquiesce in the illegal usurpation of power.[776]

A "de facto" government is in possession of sovereign powers, but the possession is wrong, unlawful, and precarious. [777] [778] A de facto government usually occurs when an usurping government expels the regular authorities from their customary seats and functions (a coup d'état), and establishes itself in their place.[779] De facto governments usually gain and maintain their control through force and arms.[780] However, even if there is effective control by a government, there is not even "de facto" status when it is observable a significant part of the country is opposed to the regime, violence is required by the regime to maintain order, there is no indication of consent of the governed, and instead the governed must be coerced and compelled.[781]

While circumstances may exist which could validate the grants of a government de facto valid, multiple Supreme Court cases have held that mere occupancy and de facto government, do not give the possessors right to the territory. [782] [783] [784] Cases where land grants by de facto governments were found valid involved de fact governments in actual and peaceable control, even if lacking recognition (i.e.

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[774] Henry; Boyd Wheaton, A.C., Elements of International Law (1878)
[775] Edward N. Luttwak, *Coup d'Etat: A Practical Handbook*, Revised Edition (2016)
[776] *Madzimbamuto v Lardner-Burke,* 25 Afr L.R. 284, 427 28, Rhodesia App Division (1968)
[777] Henry; Boyd Wheaton, A.C., *Elements of International Law* (1878)
[778] Edmond F. Trabue, In the Supreme Court of the United States, State of Vermont vs the State of New Hampshire, Report of the Special Master (1932)
[779] Henry; Boyd Wheaton, A.C., *Elements of International Law* (1878)
[780] Edmond F. Trabue, In the Supreme Court of the United States, State of Vermont vs the State of New Hampshire, Report of the Special Master (1932)
[781] Danny Auron, The Derecognition Approach: Government Illegality, Recognition, and Non-Violent Regime Change 45 Geo. Wash Int'l Rev 443 (2013)
[782] *Coffee v Groover*, 123 U.S. 1 (1887) [Noting several invalid grants made by Spanish governors in the late 1700s and early 1800s, while they were occupying land in Mississippi and Louisiana but did not have right to it. The land was eventually taken back by force by the United States. The courts stated Spain had "naked possession under a misapprehension of right."]
[783] *Coffee v Groover*, 123 U.S. 1 (1887)
[784] *Poole v Fleeger's Lessee*, 36 U.S. 185 (1837)

Tinoco's overthrow of the Costa Rican government from 1917-1919). [785] [786] The "Namibia exception" also allows for validity of acts by unlaw regimes only when they are necessary for inhabitants of the occupied territory to enjoy their rights.[787]

Generally, the form of State's political regimes and the manner in which power is transferred has historically been considered an internal matter, falling outside the jurisdiction of international law.[788] However, in 1894, during discussion about Minister Steven's conduct, House Representative Rayner argued that the "principle of international law that compels us to recognize a government that is in possession and authority does not apply to a case where the government has been wrongfully put into possession and authority by the unlawful acts of our representatives."[789]

The Safety Club's overthrow of the monarchy eventually created a de facto government. The overthrow was illegal, and at first maintained only martial law, and hotly protested by the monarchy and the majority of the Native Hawaiians, however eventually the usurpers were "in fact" the government. Under U.S. law, it appears territory transfers would be possible with a de facto government, however the concerns from the U.S. House of Representatives still echo valid ethical and policy concerns. And the ex injuria doctrine may also prevent grants as well.

Q. Revolution

A revolution implies a mass uprising against a particular ruling class.[790] Revolutions involve the "rapid tearing down of existing political institutions and building them anew on different foundations."[791] This envisages a complete metamorphosis that affects both civil society and the entire state; the transformation is so pervasive that legitimacy of the new order is completely autonomous of the processes and institutions of the old order. [792] A revolution involves a tremendous increase in mass participation in political activity, motivated by widespread opposition to existing social conditions.[793] A

[785] *Great Britain v Costa Rica*, AJIL 147 (1924); *Tinoco Claims Arbitration* 1 U.N. Rep. Int'l Arb. Awards 369 (1923)
[786] Note: General José Federico Alberto de Jesús Tinoco Granados and his brother seized power in a coup d'état and established a military dictatorship. His brother was assassinated in 1919 and he went into exile in Europe.
[787] William Thomas Worster, Territorial Status Triggering A Functional Approach to Statehood, 8 Penn. St. J. L. & Int'l Aff. 118 (2020)
[788] Jean D'Aspremont, Responsibility for Coups D'état in International Law, 18 Tul. J. Int'l and Comp. L. 451 (2010)
[789] Hawaii, 26 Cong. Rec. 1824, 1830 (1894).
[790] Gregor Ferguson, *Coup D'etat: A Practical Manual* (1987)
[791] Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup D'etat and Common Law*, 27 Cornell Int'l L.J. 49, (1994)
[792] Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup D'etat and Common Law*, 27 Cornell Int'l L.J. 49, (1994)
[793] James Defronzo, *Revolutions and Revolutionary Movements* (5th Ed. 2015)

revolution can only succeed if the government loses control of strong administrative capabilities and armed forces to coerce the dissidents into submission.[794]

Our own government originated in a revolution.[795] The U.S. Declaration of Independence states, "When any government becomes destructive to life, livery, and the pursuit of happiness, it is the right of the people to alter or abolish it and establish a new government." [796]

The closest example of revolution for the United States, other than our founding revolution and then the Civil War (and West Virginia[797]), is probably the history of West Florida. As mentioned, West Florida was a disputed territory between the U.S. and Spain.[798] In 1809, the people of West Florida declared independence from Spain and asked to join the U.S. [799] President Madison then proclaimed that West Florida was part of Orleans Territory (part of the U.S.) and sent the military to take possession. [800] Though, the territory was still disputed with Spain until the Adams-Onis Treaty in 1819. [801]

R. Coup D'états & Regime Changes

A coup is "the infiltration of a small but critical segment of the State apparatus, which is then used to displace the government from its control of the remainder."[802] A coup d'état typically aims at capturing political power extra-constitutionality, but only subverts the part of the constitution that bears on the formation of political organs of the State.[803] The judiciary usually survives, and is allowed to determine the validity of the new regime, despite a coup being a fundamentally political judgment not a judicial one. [804] Coups are quite common, with at least one coup being attempted in every major county between 1950-2000 (471 total during that time), with roughly half succeeding. [805]

A coup is distinct from civil war, in which large segments of society are mobilized against one another.[806] While a coup d'état may herald the start of a revolution, there is nothing "popular" about it.

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[794] James Defronzo, *Revolutions and Revolutionary Movements* (5th Ed. 2015)
[795] *Am. Commcns Ass'n CIO v Douds*, 339 U.S. 389, 439-42 (1950)
[796] Thomas Jefferson, *The Declaration of Independence*, July 4, 1776
[797] Note: West Virginia was founded at the start of the American Civil War, by Unionist counties who wanted to break away from the Confederate state of Virginia.
[798] David P Currie, Rumors of War: Presidential and Cognressional War Powers (1809-1829) 67 U chi L Rev 1 (2000)
[799] David P Currie, Rumors of War: Presidential and Cognressional War Powers (1809-1829) 67 U chi L Rev 1 (2000)
[800] David P Currie, Rumors of War: Presidential and Cognressional War Powers (1809-1829) 67 U chi L Rev 1 (2000)
[801] David P Currie, Rumors of War: Presidential and Cognressional War Powers (1809-1829) 67 U chi L Rev 1 (2000)
[802] Edward N. Luttwak, *Coup d'Etat: A Practical Handbook*, Revised Edition (2016)
[803] Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup D'etat and Common Law*, 27 Cornell Int'l L.J. 49, (1994)
[804] Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup D'etat and Common Law*, 27 Cornell Int'l L.J. 49, (1994)
[805] Glenn Harlan Reynolds, *Of Coups and the Constitution*, 48 Colum. Hum. Rts. L. Rev. 111 (2017)
[806] Glenn Harlan Reynolds, *Of Coups and the Constitution,* 48 Colum. Hum. Rts. L. Rev. 111 (2017)

[807] It is a swift, precise operation aimed at displacing the current rulers and replacing them with oneself or one's own nominees.[808] In the classic coup d'état, the nation wakes up one morning to hear that the political leadership has been arrested or co-opted, and the radio and television stations are under the control of the new regime. [809]

Coups have long been repudiated in international law, especially when overturning a democratic government.[810] It is not entirely surprising that States have long agreed to protect themselves against unconstitutional usurpations of power, for this can be understood as a reflex of self-protection that is almost instinctive.[811] While coups are not necessarily "illegal" under international law itself, they can be found violations of domestic constitutions and thus considered illegal under international law viewing the domestic law. [812]

Sanctions or other remedies from international law may be available if a foreign State is controlling actors in the coup. [813] However, if the coup is strictly internal, the State cannot be held accountable for its own coup, and it is simply up to that State to weather the change in its own government. [814] Philosophically, when a government comes to power extra-legally within a State, these acts of illegal regime change should not be allowed to produce valid consequences. [815]

The Espionage Act of 1917 was passed to prohibit interference with military operations or recruitment, to prevent insubordination in the military, and to prevent the support of the United States enemies during wartime.[816]

The U.S. passed the Alien Registration Act of 1940 to make it a federal crime to advocate the overthrow of the U.S. government.[817] The act is also known as the "Smith Act" after its author (Howard W. Smith, a Representative from Virginia). The law makes it a federal crime to " advocate or to teach the desirability of overthrowing the United States Government."[818] The purpose of the law is to "to protect [the] government not from change by peaceable, lawful and constitutional means, but from

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[807] Gregor Ferguson, *Coup D'etat: A Practical Manual* (1987)
[808] Gregor Ferguson, *Coup D'etat: A Practical Manual* (1987)
[809] Glenn Harlan Reynolds, *Of Coups and the Constitution*, 48 Colum. Hum. Rts. L. Rev. 111 (2017)
[810] Jean D'Aspremont, Responsibility for Coups D'état in International Law, 18 Tul. J. Int'l and Comp. L. 451 (2010)
[811] Jean D'Aspremont, Responsibility for Coups D'état in International Law, 18 Tul. J. Int'l and Comp. L. 451 (2010)
[812] Jean D'Aspremont, Responsibility for Coups D'état in International Law, 18 Tul. J. Int'l and Comp. L. 451 (2010)
[813] Jean D'Aspremont, Responsibility for Coups D'état in International Law, 18 Tul. J. Int'l and Comp. L. 451 (2010)
[814] Jean D'Aspremont, Responsibility for Coups D'état in International Law, 18 Tul. J. Int'l and Comp. L. 451 (2010)
[815] Danny Auron, The Derecognition Approach: Government Illegality, Recognition, and Non-Violent Regime Change 45 Geo. Wash Int'l Rev 443 (2013)
[816] 18 U.S.C. § 792, Pub.L. 65-24, 40 Stat. 217
[817] 18 U.S. Code § 2385
[818] *Dennis v United States*, 341 U.S. 494 (1951)

change by violence, revolution and terrorism."[819] Nazi sympathizers were the first charged under the law, and then members of the Communist Party during the Cold War and "McCarthyism."[820] The Hatch Act of 1939 further prevents federal employees in the executive branch from advocating for the overthrow of the U.S. government.[821]

i. USSR Coup D'état of 1991

The fall of the Soviet Union (USSR) is an interesting comparison to the 1893 Hawaiian coup d'état.[822] Preceding the USSR coup, 76.4% of Russians and eight of the USSR States voted to reform the USSR by restructuring the government into a new federation of sovereign States.[823] However, despite support of the people, President Gorbachev was still overthrown by Soviet leaders.[824] Several coups were initiated against Gorbachev in response.[825] The group leading the coup called themselves the "General Committee on the State Emergency," terminology which should sound somewhat familiar now.[826] Coup leaders included the Head of National Intelligence and Security (aka the KGB).[827]

While the USSR coup was primarily led by internal military and political leaders and the Hawaiian coup was primarily led by businessmen, they both share being executed by a very small number of people in privileged positions, against the will of the people, and in response to a change in the government that was desired by the majority of the population.

ii. Wilmington Coup D'état of 1898

The Wilmington Coup is known as the "only successful coup on U.S. soil." In 1898, the duly elected government of Wilmington, North Carolina was violently overthrown by white supremacists.[828] At least sixty Black men were killed as part of the carefully orchestrated coup to topple a multi-racial government in the South's most progressive Black-majority city.[829] The coup was the peak of a months

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[819] *Dennis v United States*, 341 U.S. 494 (1951)
[820] *Dennis v United States*, 341 U.S. 494 (1951); *Yates v US*, 354 U.S. 298 (1957); *Scales v United States*, 367 U.S. 203 (1961); *Noto v United States*, 367 U.S. 290 (1961)
[821] Pub.L. 76-252, 53 Stat. 1147, 5 U.S.C. §§ 7321-7326
[822] Stephen Sanderson, *Revolution: A Worldwide Introduction to Social and Political Contention*, 2nd Edition
[823] Stephen Sanderson, *Revolution: A Worldwide Introduction to Social and Political Contention*, 2nd Edition
[824] Stephen Sanderson, *Revolution: A Worldwide Introduction to Social and Political Contention*, 2nd Edition
[825] Stephen Sanderson, *Revolution: A Worldwide Introduction to Social and Political Contention*, 2nd Edition
[826] Stephen Sanderson, *Revolution: A Worldwide Introduction to Social and Political Contention*, 2nd Edition
[827] Stephen Sanderson, *Revolution: A Worldwide Introduction to Social and Political Contention*, 2nd Edition
[828] The 1898 Wilmington Massacre Is an Essential Lesson in How State Violence Has Targeted Black Americans, https://time.com/5861644/1898-wilmington-massacre-essential-lesson-state-violence/
[829] The 1898 Wilmington Massacre Is an Essential Lesson in How State Violence Has Targeted Black Americans, https://time.com/5861644/1898-wilmington-massacre-essential-lesson-state-violence/

long campaign to strip Black men of voting rights and remove them from public office permanently.[830] A "*White Supremacy Convention*" was held and then a "*The White Declaration of Independence*" was signed by 457 residents and published in the local newspapers.[831]

The 1898 coup, plotted by white politicians and businessmen who called themselves the "Secret Nine" and the "Committee of Twenty-Five," would not have been possible without the city's white soldiers and police, who led white vigilantes on a killing spree on Nov. 10, 1898.[832] The soldiers served in two all-white state militias, manned and commanded by white supremacists.[833] Both units ostensibly reported to the state's governor, but in fact served as the private militias of the white supremacists who directed the coup.[834] It was the most successful and lasting coup in American history.[835] No Black citizen would again serve in public office for three-quarters of a century.[836]

No one was ever prosecuted or punished for the violent coup.[837] In 2007 Representatives Wright, Jones, and Harrell introduced House Bill #1558, the "1898 Wilmington Riot Reconciliation Act", into the North Carolina General Assembly.[838] The Act would allow the estates of those injured, killed, or who suffered personal or property losses, resulting from the events on November 10, 1898 to file a lawsuit against the city for redress.[839] The Bill never advanced beyond its introduction[840] due to a Republican Senator demanding an amendment to resolution stating the "white Republican government" at the time joined with Black citizens to oppose the rioters.[841] While there were other massacres of Black people around that time (Tulsa Race Riot, etc), this was the only Black massacre with the purpose and result of removing all Black people from the local government and replacing them with whites officials.

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[830] The 1898 Wilmington Massacre Is an Essential Lesson in How State Violence Has Targeted Black Americans, https://time.com/5861644/1898-wilmington-massacre-essential-lesson-state-violence/
[831] "White Supremacy for North Carolina a White Man's Government". Wilmington Messenger. November 10, 1898.
[832] The 1898 Wilmington Massacre Is an Essential Lesson in How State Violence Has Targeted Black Americans, https://time.com/5861644/1898-wilmington-massacre-essential-lesson-state-violence/
[833] The 1898 Wilmington Massacre Is an Essential Lesson in How State Violence Has Targeted Black Americans, https://time.com/5861644/1898-wilmington-massacre-essential-lesson-state-violence/
[834] The 1898 Wilmington Massacre Is an Essential Lesson in How State Violence Has Targeted Black Americans, https://time.com/5861644/1898-wilmington-massacre-essential-lesson-state-violence/
[835] The 1898 Wilmington Massacre Is an Essential Lesson in How State Violence Has Targeted Black Americans, https://time.com/5861644/1898-wilmington-massacre-essential-lesson-state-violence/
[836] America's Only Successful Coup d'Etat Overthrew a Biracial Government in 1898, https://www.history.com/news/wilmington-massacre-1898-coup
[837] America's Only Successful Coup d'Etat Overthrew a Biracial Government in 1898, https://www.history.com/news/wilmington-massacre-1898-coup
[838] House Bill 1558, https://www.ncleg.net/Sessions/2007/Bills/House/PDF/H1558v1.pdf
[839] House Bill 1558, https://www.ncleg.net/Sessions/2007/Bills/House/PDF/H1558v1.pdf
[840] House Bill 1888 Status, https://www.ncleg.gov/BillLookup/2007/h1558
[841] https://www.theatlantic.com/politics/archive/2017/08/wilmington-massacre/536457/

The Wilmington Coup is like the coups against the Hawaiian Kingdom and USSR, in that the overthrow was perpetrated by a small group of people without popular support, and that it was in furtherance of a government that benefited the minority. The Wilmington Coup is also similar in that the U.S. federal military participated and was pivotal in the success of the coup. However it does not bode well for Hawaiian redress options that even a coup so violent and on U.S. soil was never redressed.

S. Consent of the People

"Popular sovereignty" is the thought that the basis of authority rests in the will of the people, an idea rooted in philosophy of Hobbes.[842] Under this idea, States and government sexist for the well being of their inhabitants. [843] The principle of self-determination is a long and respectable tradition which is now sanctioned by Article 1 of the United Nations charter.[844] Self-determination is essentially a political principle that may be useful in guiding political decisions, but is not sufficient on its own to effect the legality of an acquisition.[845] Self-determination can be realized through the use of plebiscites, though they depend on the specific situation and the initial agreement of the parties concerned. [846]

In President McKinley's State of the Union in 1897, he discussed the pending treaty for annexation before the Senate and reiterated his desire for annexation, though stating it should "be realized by the free will of the Hawaiian State" and that the treaty awaits action by the Senate in order to annex the islands.[847]

The Senate Foreign Relations Committee stated in 1898 "If a requirement should be made by the United States of a plebiscite to determine the question of annexation, it would work a revolution in Hawai'i which would abolish its constitution."[848] Congressional debate in 1898 about the possible annexation specifically pointed out that only 2,700 people, out of a population of 100,000, were consulted in regard to the annexation.[849] The senator went on to point out that the 40,000 Native Hawaiians were never given an opportunity to express their views.[850]

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[842] Danny Auron, The Derecognition Approach: Government Illegality, Recognition, and Non-Violent Regime Change 45 Geo. Wash Int'l Rev 443 (2013)
[843] Danny Auron, The Derecognition Approach: Government Illegality, Recognition, and Non-Violent Regime Change 45 Geo. Wash Int'l Rev 443 (2013)
[844] R. Y. Jennings, Acquisition of Territory in International Law (1963)
[845] R. Y. Jennings, Acquisition of Territory in International Law (1963)
[846] R. Y. Jennings, Acquisition of Territory in International Law (1963)
[847] https://history.state.gov/historicaldocuments/frus1897/message-of-the-president
[848] 31 cong. Rec. 6659 (1898).
[849] Hawaii, 31 Cong. Rec. 5940 (1898).
[850] Hawaii, 31 Cong. Rec. 5940 (1898).

U.S. federal law later documented the lack of consent, saying "In 1898, the United States annexed Hawai'i through the Newlands Resolution without the consent of or compensation to the indigenous people of Hawai'i or their sovereign government who were thereby denied the mechanism for expression of their inherent sovereignty through self-government and self-determination, their lands and ocean resources."[851]

This appears to have been by design with Secretary of State Gresham admitting in October of 1893, that while Mr. Blount was in Honolulu "he did not meet a single annexationist who expressed willingness to submit the question to a vote of the people, nor did he talk with one on that subject who did not insist that if the Islands were annexed suffrage should be so restricted as to give complete control to foreigners or whites."[852]

However, consent historically was not always required. For example, Florida was ceded by Spain in 1819 without the consent of the Spanish population of Florida and Louisiana was purchased from France in 1803 without the consent of the French population of Louisiana.[853] However, the treaty for the annexation of the Dominican Republic by the U.S. was terminated due to lack of consent from the people. And the cession of the Virgin Islands required a plebiscite for the population of the islands.

Overall, the global environment at that time showed little deference for the will of the people. In 1857, the British ruthlessly put down a rebellion in India.[854] In 1875, they took over the Suez Canal.[855] Various European counties cut pieces from China, including British Hong Kong, and France took over much of SE Asia.[856] Most of Africa was carved up and most pacific islands were colonized by the British, French, Dutch, and Germans.[857] The era was an "orgy of national enslavement" resulting in phrases like "the sun never sets on the British Empire."[858]

In the current era, the acceptance of a government by other States began to increasingly turn on whether the government governs with the consent of its people.[859] In addition, it matters if certain political authorities within a State are "recognized" as representing the State in the conduct of its foreign

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[851] 42 U.S.C.A. § 11701 Findings.
[852] https://history.state.gov/historicaldocuments/frus1894app2/ch7subch1
[853] Hawaii, 31 Cong. Rec. 5940 (1898).
[854] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[855] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[856] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[857] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[858] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[859] Thomas M. Franck, The Emerging Right to Democratic Governance, *The American Journal of International Law*, Vol. 86, No. 1. (1992)

relations. [860] It is through those legal relations that the State can lawfully negotiate and conclude international agreements. [861]

V. Minister Stevens Role, Influence, and Culpability

Before discussing the political status of the government or the legal status of the annexation, we must understand what Minister Steven's actual role was in the overthrow. Did he represent the U.S. government? Or was he acting as a rogue agent, harassing the Hawaiians like others like Paulet before him? If he acted alone, what is his culpability? Either way, how do his actions effect the United States' ability to annex the Hawaiian Islands?

T. U.S. Diplomats

The U.S. Secretary of State is appointed by the President with the advice and consent of the Senate, and is the President's foreign affairs advisor.[862] [863] The Secretary of State carries out the President's foreign policies through the State Department and the Foreign Service.[864] The executive branch maintained almost exclusive authority in developing the administrative policies governing the U.S. diplomatic and consular services and their personnel until the mid-19th century. [865]

U.S. Diplomats are individuals in Foreign Service who represent the interests and policies of the United States.[866] There are several types of diplomats in the U.S. with Ambassadors being the highest-ranking representatives to a specific nation or international organization,[867] followed by Ministers, Charge d'Affaires, Counselor, and then military Attaches.[868]

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[860] Sean D Murphy, Democratic Legitimacy and the Recognition of States and Governments, International and Comparative Law Quarterly 48 (1999)
[861] Sean D Murphy, Democratic Legitimacy and the Recognition of States and Governments, International and Comparative Law Quarterly 48 (1999)
[862] Duties of the Secretary of State, U.S. Department of State, https://www.state.gov/duties-of-the-secretary-of-state/
[863] U.S. Department of State Personnel, Background and Selected Issues for Congress, Cory R. Gill, Congressional Research Service (May 18, 2018)
[864] Duties of the Secretary of State, U.S. Department of State, https://www.state.gov/duties-of-the-secretary-of-state/
[865] U.S. Department of State Personnel, Background and Selected Issues for Congress, Cory R. Gill, Congressional Research Service (May 18, 2018)
[866] U.S. Department of State, Diplomacy, https://diplomacy.state.gov/diplomacy/what-are-the-roles-of-a-diplomat/
[867] U.S. Department of State, Diplomacy, https://diplomacy.state.gov/diplomacy/what-are-the-roles-of-a-diplomat/
[868] Protocol for the Modern Diplomat, U.S. Foreign Service Institute, U.S. Department of State, https://2009-2017.state.gov/documents/organization/176174.pdf

It has been heavily researched by scholars, and there appears to be no record that Minister Stevens' participation in the coup was under the orders of Secretary of State Blaine.[869] In addition, a U.S. commission tasked with looking for evidence of intent or malice from the U.S. in relation to the overthrow came up empty. [870] The commission was looking into possible reparations for the Native Hawaiians, but did not move forward when it was clear there was no evidence the U.S. participated in the coup. [871]

U. The Logan Act

The question of authority over foreign affairs emerged quickly under the new Constitution.[872] As tensions between the United States and revolutionary France escalated during the 1790s, Congress and the President became alarmed by the prospect of unauthorized individuals committing the U.S. Government to actions or positions that it may not support.[873] As a result, the Logan Act, enacted in 1799, stated that only persons who receive official sanction and authority from the president or his representative (e.g., Secretary of State) may conduct diplomacy on behalf of the United States.[874] Since only ambassadors or ministers received their credentials and instructions from the president during this time, the Act effectively centralized foreign affairs authority with the Ambassador at a U.S. embassy or legation. [875] [876]

There appear to have been very few indictments and no prosecutions under the Logan Act.[877] In 1803, a Kentucky farmer was indicted for writing an article advocating for a separate Western nation allied to France. [878] In 1861, a circuit court judge suggested the Southern states reaching out to British parliament for recognition during the Civil War would be a violation of the Logan Act. [879] In 1963, the same judge explained the Logan Act protects against "unauthorized individuals [entering] into

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[869] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[870] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[871] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[872] Department of State: History, Authorities, and The Interagency Process, §1, state.gov
[873] Department of State: History, Authorities, and The Interagency Process, §1, state.gov
[874] Named after Dr. George Logan, a Philadelphia doctor who sailed to France and attempted to settle disputes with the French Directory. France issued a decree, but the U.S. did not recognize the decree and were irritated with Logan's interference. President Adams recommended that Congress take action to stop the "temerity and impertinence of individuals affecting to interfere in public affairs between France and the United States." (CRS)
[875] Department of State: History, Authorities, and The Interagency Process, §1, state.gov
[876] Department of State: History, Authorities, and The Interagency Process, §1, state.gov
[877] Conducting Foreign Relations Without Authority: The Logan Act, Michael V. Seitzinger, Congressional Research Service (March 11, 2015)
[878] Conducting Foreign Relations Without Authority: The Logan Act, Michael V. Seitzinger, Congressional Research Service (March 11, 2015)
[879] 30 Fed. Cas. 1049, 1050-51 (No. 18, 277).

communication with members of parliament and foreign ministers and officers in order to influence their conduct, in controversies with the United States, or to defeat the measures of our government."[880]

The Department of State has weighed in on the Act at least twice. In 1975, they explained that the act does not restrict Congress from engaging in discussion with foreign officials in pursuance of their legislative duties under the Constitution.[881]

In the late 1800s, informal interagency coordination of foreign affairs continued, but formalized elements began to appear. [882] In the 1880s, the Departments of State and War agreed to assign military attachés at U.S. embassies (primarily in Europe) to provide information and build relationships with foreign militaries and their leaders. [883] As a matter of diplomatic procedure and protocol, military and other attachés acknowledged the ambassador's authority and supervision, though underlining that congress cannot negotiate on behalf of the United States. [884] In 1976, the department clarified that a trip to the People's Republic of China by former President Nixon was conducted entirely in Nixon's capacity as a private U.S. citizen and did not have the intent forbidden by the Logan Act.[885]

As for Minister Stevens, Secretary of State Foster made it clear that the U.S. government did not authorize a "Protectorate" following the overthrow, and still supported Hawaiian independence and sovereignty. Further, later, Secretary of State Gresham made it clear that the Provisional Government was not de facto or de jure at the time Stevens recognized them. He also noted, the provisional government was "led" into the "revolt against the [monarchy] by the "indefensible encouragement and assistance of our diplomatic representative [Stevens].[886]

V. William Walker & Neutrality Act

The U.S. does not allow individual citizens to wage private wars either. Numerous Americans have tried, and the most successful was an American lawyer named William Walker who at one point took over Nicaragua and part of Mexico proclaiming Manifest Destiny.[887] Walker was part of the

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[880] 30 Fed. Cas. 1042, 1046 (No. 18, 274).
[881] DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1975, p. 750.
[882] Department of State: History, Authorities, and The Interagency Process, §1, state.gov
[883] Department of State: History, Authorities, and The Interagency Process, §1, state.gov
[884] Department of State: History, Authorities, and The Interagency Process, §1, state.gov
[885] DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1976, pp. 75-76.
[886] Message To the Senate and House of Representatives, Foreign Relations of the United States, 1894, Appendix II, Affairs in Hawaii, Office of the Historian, https://history.state.gov/historicaldocuments/frus1894app2/ch7subch1
[887] Hundreds of 19th Century Americans Tried to Conquer Foreign Lands. This Man Was the Most Successful, History, Sarah Pruitt, 2019, https://www.history.com/news/manifest-destiny-william-walker-filibuster-nicaragua-mexico-invasion

"Filibuster Movement" where Americans, without the consent of the U.S. government, tried to assume power in a number of Latin American and Caribbean countries in the 19th Century.[888] In 1853, Walker "annexed" parts of Mexico (the southern half of what is now California), named it Republic of Sonora, and declared himself president to much protest from both the Mexican and U.S. governments.[889] [890] Walker was tried back home in San Francisco for violating the Neutrality Act by waging an illegal war, but was acquitted.[891] He then went on to take over Nicaragua with an army of 2,500 men until an international team of British and American troops removed him from power, although he would attempt to re-take Nicaragua twice.[892] He then went on to try to seize Honduras, but the British Army had lost patience with him and captured him upon arrival, turned him over to Honduran authorities, and he was executed via firing squad.[893] The U.S. discouraged Walker and other Filibusters with jail time, public denouncements, and seizure of their ships. [894]

The "Neutrality Act" Walker violated was first passed in 1794. [895] It was recommended by President Washington to Congress and drafted by Alexander Hamilton.[896] Chief Justice Jay had thought the same could be accomplished by enforcing international law in the U.S. courts, but it was still pushed forward to provide a more comprehensive code. [897] The Act forbids private participation in public, private, or civil war and instead insists upon the maintenance of peaceful relations between countries. [898] The Act says no nation can permit unauthorized acts of war within its territory. Britain passed an analogous statute called the "Foreign Enlistment Act." [899]

W. The 1849 Treaty

[888] The Filibuster Movement, PBS, http://www.pbs.org/opb/historydetectives/feature/the-filibuster-movement/
[889] The Filibuster Movement, PBS, http://www.pbs.org/opb/historydetectives/feature/the-filibuster-movement/
[890] Hundreds of 19th Century Americans Tried to Conquer Foreign Lands. This Man Was the Most Successful, History, Sarah Pruitt, 2019, https://www.history.com/news/manifest-destiny-william-walker-filibuster-nicaragua-mexico-invasion
[891] Hundreds of 19th Century Americans Tried to Conquer Foreign Lands. This Man Was the Most Successful, History, Sarah Pruitt, 2019, https://www.history.com/news/manifest-destiny-william-walker-filibuster-nicaragua-mexico-invasion
[892] The Filibuster Movement, PBS, http://www.pbs.org/opb/historydetectives/feature/the-filibuster-movement/
[893] Hundreds of 19th Century Americans Tried to Conquer Foreign Lands. This Man Was the Most Successful, History, Sarah Pruitt, 2019, https://www.history.com/news/manifest-destiny-william-walker-filibuster-nicaragua-mexico-invasion
[894] The Filibuster Movement, PBS, http://www.pbs.org/opb/historydetectives/feature/the-filibuster-movement/
[895] *Three Friends,* 166 U.S. 1 (1897)
[896] *Three Friends,* 166 U.S. 1 (1897)
[897] *Three Friends,* 166 U.S. 1 (1897)
[898] *Three Friends,* 166 U.S. 1 (1897)
[899] *Three Friends,* 166 U.S. 1 (1897)

The 1849 treaty between the U.S. and the Hawaiian Kingdom requires any party infringing on the treaty shall be held responsible and asks for uninterrupted harmony between the two governments.[900] Minister Stevens did just that. They treaty does not explain what "held responsible" means, but it further supports Stevens being culpable for some violations of domestic and/or international law.

X. Color of Title & Ex Injuria Jus Non Oritur

U.S. courts define "color of title" to be that which in appearance is title, but which in reality is no title.[901] The grounds for invalidity of a colorable title looks to whether the claim was made in good or bad faith, not necessarily an exclusive list of reasons for invalidity. [902] If the title is invalid due to a reason like fraud, it only matters that the grantee's had knowledge of the fraud or participated in it.[903] Color of Title can be used to establish Adverse Possession claims if the grant was invalid but it was received in good faith.[904]

"Color of title" seems to work in conjunction with the international law principle of "ex injuria jus non oritur" (a right cannot originate in an illegal act). There is a comparison of "color of title" to this situation, is to the U.S.' knowledge of the illegal coup d'état, as well as their own minister's unauthorized support of it (both ex injuria jus non oritur).

The U.S not only had knowledge of the illegal acts, but also participated in it. Following the understanding of Color of Title common law, the cession should be invalid because the U.S. accepted it in bad faith.

President Cleveland even said as much when he withdrew the treaty of annexation from consideration by the Senate, saying the U.S. "could not, under the circumstances disclosed, annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods." [905]

Y. Was Minister Stevens Acting Alone? Did he Commit a Crime?

These questions are closely linked. If Stevens acted as an authorized agent of the United States government, his culpability is different than if he acted alone. Much evidence supports that Minister

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[900] Treaty of Friendship, Commerce, and Navigation between the United States of America and His Majesty the King of the Hawaiian Islands, 9 Stat. 977 (1849).
[901] *Wright v Mattison,* 59 U.S. 50, 56 (1855)
[902] *Wright v Mattison,* 59 U.S. 50, 56 (1855)
[903] *Gregg v The Lesssee of Sayre and wife*, 8 Pet 253, 254 (1834); *Wright v Mattison,* 59 U.S. 50, 56 (1855)
[904] *Wright v Mattison,* 59 U.S. 50, 56 (1855)
[905] Hawaii, 26 Cong. Rec. 1824, 1833 (1894).

Stevens acted in 1893 without formal authorization from the U.S. government, though perhaps he thought there was implied approval for his actions. Over the years, the U.S. government has found numerous ways to disavow Stevens actions and deny any culpability related to the coup or the Republic of Hawaii. As far as the annexation goes, the U.S. governments culpability depends on both its and Steven's role in the coup and following support of the Republic.

In 1893, Minister Stevens acted outside his official role as a U.S. Minister. Domestically, it appears Stevens was likely guilty of at least the Logan Act and the Neutrality act. Internationally, it appears he also violated the 1849 treaty and should be "held responsible" for interrupting the "harmony" of the two governments. It appeared Congress considered sanctioning Stevens at one point, but did not appear to actually do so. There is also no record of prosecution against him. However, the international principle of Ex Injuria Jus Non Oritur and the domestic common law doctrine of "color of title" both cast a darkness on Steven's actions and the U.S. association with him.

While Stevens "acted alone" in one sense, he did induce the U.S. military to support his illegal actions, and in his position in the U.S. government, also dirtied the U.S.' hands for any future transactions.

VI. Conquest and the Hawaiian Islands (1893)

A. International Law Regarding Conquest

Property title by conquest was acquired and maintained by force.[906] Conquest was the acquisition of the territory of an enemy by its complete and final subjugation, and a declaration of the conquering State's intention to annex it.[907] Post-war annexation was usually carried out by treaty, which could either be seen as cession by treaty or as confirming a title already acquired by conquest.[908] If the previous government was entirely subdued or destroyed, the right of occupation became permanent, and the title vested absolutely in the conqueror.[909]

[906] *Johnson and Graham's Lessee v. McIntosh*, 21 U.S. 543 (1823)
[907] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[908] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[909] *Downes v. Bidwell*, 182 U.S. 244, 303 (1901)

If the Nation was not entirely subdued, the holding of the conquered territory was to be considered a mere military occupation until its fate is determined via a treaty.[910] Military conquest does not completely displace the sovereignty of the prior possessor, and generally, an occupant does not succeed to sovereignty over occupied territory, but has only limited administrative authority. [911] Thus, belligerent occupation or other types of intervention in absence of debellatio (complete defeat of the enemy, "warring the enemy down") does not affect the continuity of the State unless the conflict is settled by a peace treaty or equivalent.[912] Example include: the continuance of Austria after 1945; the U.S.'s continued sovereignty over Maine while Castine was occupied by British forces in 1812;[913] and the continuance of Grenada, Panamá, Afghanistan, and Iraq despite U.S. invasions.[914]

Territorial integrity is a cardinal norm of international relations and law.[915] This norm protects States against involuntary loss of territory to other states. [916] In the late 19th century the right of conquest transitioned to regulation of force in conduct and commencement, arising around the 1899 Hague convention.[917] Where a state has initially seized territory by the use of force, and its title to the territory is therefore derived from an illegal basis, it may be argued that the international law principle of ex injuria jus non oritur (a right cannot originate in an illegal act) should apply to deny such a state the right to cede the territory.[918] When an international norm is violated, a legal nullity is created and states are required to maintain nullity by refraining to recognize the legality of the situation created.[919]

B. U.S. War and Conquest Powers

Power to acquire territory either by conquest or treaties is vested in the U.S. by the Constitution.[920] Chief Judge Marshall explained, The Constitution confers absolutely on the U.S.

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[910] Jill Gustafson and Janice Holben, § 38.Conquest, 44B Am. Jur. 2d International Law (2019); *Dorr v. United States, 195 U.S. 138, 141, 24 S. Ct. 808, 809, 49 L. Ed. 128 (1904)*
[911] Jill Gustafson and Janice Holben, § 38.Conquest, 44B Am. Jur. 2d International Law (2019)
[912] James Crawford, The creation of states in international law (2nd ed. 2011).
[913] The Diamond Rings, 183 U.S. 176 (1901).
[914] James Crawford, The creation of states in international law (2nd ed. 2011).
[915] Mikulas Fabry, How to Uphold the Territorial Integrity of Ukraine, 16 German L.J. 416 (July 2015)
[916] Mikulas Fabry, How to Uphold the Territorial Integrity of Ukraine, 16 German L.J. 416 (July 2015)
[917] Christopher R. Ross, Ex Injuria Jus Non Oritur, Ex Factis Jus Oritur, and the Elusive Search for Equilibrium after Ukraine, 24 Tul. J. Int'l and Comp. L. 143 (Winter 2015)
[918] Seokwoo Lee, Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal, 16 Conn. J. Int'L 1 (Fall 2000)
[919] Danny Auron, The Derecognition Approach: Government Illegality, Recognition, and Non-Violent Regime Change 45 Geo. Wash Int'l Rev 443 (2013)
[920] *Downes v. Bidwell*, 182 U.S. 244, 303 (1901)

government the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory either by conquest or by treaty.[921]

In the U.S., military force (other than the repulsion of sudden attacks) requires a declaration war by Congress.[922] [923] Thus, in order for the U.S. to acquire territory by conquest, first, Congress must declare war on that territory.[924] This rule applied even for wars against Native Americans.[925] The founders, including Washington and Jefferson, understood this law and policy and communicated during decisions about conflict. [926] [927]

However, U.S. practice and precedent has shown the president committing armed forces to military actions without a declaration from Congress and the courts have been silent as to the legality The President has sent unauthorized military deployments into the Philippines (1899), China (1990), Venezuela (1902, Cuba (1906), Nicaragua (1910), Honduras (1911) – just to name a few.[928] The Philippines deployment was also in furtherance of territorial acquisition.

The U.S. extended it boundaries by treaty or by demanding cession of territory as a condition of peace following conquest, however, war could not be waged for the purpose of conquest or the acquisition of territory.[929] "War is a suit prosecuted by the sword; and where the question to be decided is one of original claim to territory, grants of soil made flagrante bello [in an actual state of war] by the party that fails, can only derive validity from treaty stipulations."[930]

1. Example of Conquest: Philippine-American War (1902) and the Moro Rebellion (1913)

Following the Spanish-American War, the U.S. then began to wage war on the Filipino nationalists.[931] The Philippine-American war is usually noted as ending in 1902, however the Moro

[921] *American Insurance Co. v Canter*, 26 U.S. 1 (1828).
[922] United States Constitution Article I §8
[923] Letter from George Washington to William Moultrie (Aug 28, 1793), in Fitzpatrick, ed, 33 The Writings of Washington at 73 (cited in note 2).
[924] Talbot v Seeman, 5 U.S. 1 (1801)
[925] United States Constitution Article I §8
[926] United States Constitution Article I §8
[927] David Gartner, Foreign Relations, Strategic Doctrine, and Presidential Power, 63 Ala. L. Rev 499 (2012)
[928] David Gartner, Foreign Relations, Strategic Doctrine, and Presidential Power, 63 Ala. L. Rev 499 (2012)
[929] *Fleming v Page*, 50 U.S. 603, 615 (1850).
[930] *Harcourt v Gaillard*, 25 U.S. 523 (1827) [analyzing the validity of a property grant made by a British governor of Florida following the Declaration of Independence]
[931] Antony Anghie, Imperialism, sovereignty, and the making of international law (2007)

region of the Philippines was under martial law until 1913 when it finally surrendered.[932] Arguably the Philippine-American War is the longest U.S. war after the war with Afghanistan, stretching nearly fifteen years.

Expansionists saw it as continuation of "manifest destiny" while anti-imperialists believed the U.S. had no right to take the islands as the spoils of war.[933] Pro-independence Filipinos battled for their independence from 1899-1902, while the U.S. put them under martial law.[934]

The Philippines included over seven million people and seven thousand islands.[935] There were up to 40,000 soldiers in the Filipino Army of Liberation, while the U.S. troop only had 20,800 soldiers. [936] The war resulted in 200,000 deaths, mostly Filipino citizens. [937]

Like with Hawai'i, the initial pronouncement of a new government was rejected by the majority of the population and marital law was required to keep order. However, with the Philippines, the U.S. waged a formal war and conquest, but in Hawai'i, the U.S took no formal military actions.

C. Hawaiian Kingdom Conquest and War Law

The Hawaiian Kingdom monarchy participated in at least two acts of conquest and war. First, Kamehameha's conquest of the majority of islands followed by unification under one government. Then second, the conquest of Kaua'i and Ni'ihau and bringing them into the Hawaiian Kingdom government as well in 1824.

The Hawaiian monarchy feared conquest against them based on seventy years of aggression from other countries. Queen Lili'uokalani shared her own thoughts on the Right of Conquest in her 1898 memoir:

> *Perhaps there is a kind of right, depending upon the precedents of all ages, and known as the "Right of Conquest," under which robbers and marauders may establish themselves in possession of whatsoever they are strong enough to ravish from their fellows. I will not pretend to decide how far civilization and Christian enlightenment have outlawed it. But we have known for many years that our Island monarchy has relied upon the protection always extended to us by the policy and the assured friendship of the great American republic. If we have nourished in our bosom those who have sought our ruin, it has been*

[932] Daniel Immerwahr, How to Hide an Empire: A History of the Great United States (2019)
[933] The Philippines, U.S. House of Representatives, History, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/The-Philippines/
[934] The Philippines, U.S. House of Representatives, History, https://history.house.gov/Exhibitions-and-Publications/APA/Historical-Essays/Exclusion-and-Empire/The-Philippines/
[935] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2007)
[936] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2007)
[937] Antony Anghie, Imperialism, sovereignty, and the making of international law (2007)

> *because they were of the people whom we believed to be our dearest friends and allies. If we did not by force resist their final outrage, it was because we could not do so without striking at the military force of the United States. []*
> *The conspirators, having actually gained possession of the machinery of government, and the recognition of foreign ministers, refused to surrender their conquest. So it happens that, overawed by the power of the United States to the extent that they can neither themselves throw off the usurpers, nor obtain assistance from other friendly states, the people of the Islands have no voice in determining their future, but are virtually relegated to the condition of the aborigines of the American continent.*[938]

D. No Conquest of the Hawai'i Islands by the Committee of Safety and Provisional Government (1893)

While a small number of actors attempted to install a puppet government to replace monarchy, they came nowhere near conquest. There was no "complete destruction" of the previous government; the Queen and Native Hawaiians were actively lobbying against their efforts. There was also never a peace treaty signed between the Queen and the new government.

Even into the late 1890s, the Queen actively advocated she was the current Sovereign, and that power should be controlled to her. See her protest letter from 1897:

> *I, Lili'uokalani of Hawai'i, by the will of God named heir apparent on the tenth day of April, A.D. 1877, and by the grace of God Queen of the Hawaiian Islands on the seventeenth day of January, A.D. 1893, do hereby protest against the ratification of a certain treaty, which, so I am informed, has been signed at Washington by Messrs. Hatch, Thurston, and Kinney, purporting to cede those Islands to the territory and dominion of the United States. I declare such a treaty to be an act of wrong toward the native and part-native people of Hawaii, an invasion of the rights of the ruling chiefs, in violation of international rights both toward my people and toward friendly nations with whom they have made treaties, the perpetuation of the fraud whereby the constitutional government was overthrown, and, finally, an act of gross injustice to me.*
> *BECAUSE the President of the United States, the Secretary of State, and an envoy commissioned by them reported in official documents that my government was unlawfully coerced by the forces, diplomatic and naval, of the United States; that I was at the date of their investigations the constitutional ruler of my people.*

Queen Lili'uokalani's Protest of Annexation, June 17, 1897, 1 Haw. J.L. and Pol. 227 (2004).

E. No Conquest of the Hawai'i by the U.S. (1893)

[938] Lili'uokalani, Hawaii's Story by Hawaii's Queen (1898)

The U.S. Congress did not declare war, and war is required for conquest. Minister Stevens, in a diplomatic role, was an agent of the government, however war powers are vested in the President and Congress, not their ambassadors and ministers. President Cleveland actively spoke out against the Safety Club's actions, calling it an illegal act of war. Queen Lili'uokalani's did surrender temporarily to the U.S. gov under duress, but that was not a conquest.

The Committee on Foreign Relations report stated that not only did the U.S. have no ground for war, but that the U.S. is the "best of friends" that Hawai'i has in the world, and Hawai'i is rather our adopted child than our enemy."[939] During Congressional debate about Hawai'i in 1898, a house member even stated, "no gentleman will contend that we are attempting to take Hawai'i by conquest."[940]

Because there was no conquest, the transfer of title needed to occur via voluntary cession or prescription.

VII. Cession and the Hawaiian Islands (1898)

During congressional debates, the joint resolution and the treaty for annexation were referred to directly as "cession."[941] Still, we will review the international and domestic law before beginning analysis.

A. International Law Regarding Cession

Cession is a mode of transferring the title to territory from one State to another, either from a successful war or peaceful negotiations.[942] International law places the principal emphasis on the intentions of the parties of an agreement. [943] International law is indifferent to whether there is consideration for the transfer.[944]

Cession has two primary elements, the agreement to cede embodied in the treaty and the actual handing over.[945] A tribunal explained in the *Iloila Case* that for States requiring ratification of treaties,

[939] 31 cong. Rec. 6659 (1898).
[940] Hawaii, 31 Cong. Rec. 5940 (1898).
[941] 31 cong. Rec. 6659 (1898).
[942] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[943] *Temple of Vihear*, ICJ Reports (1961).
[944] R. Y. Jennings, Acquisition of Territory in International Law (1963)
[945] R. Y. Jennings, Acquisition of Territory in International Law (1963)

the transferee State does not obtain sovereignty until the treaty of cession is properly ratified (explaining that the U.S. did not have sovereignty over the Philippines until after the Treaty of Paris of 1898 was ratified).[946] The transfer of sovereignty does not happen until the treaty is actually in force.[947]

The law prescribes no particular form; parties are free to choose what form they please provided their intention clearly results from it.[948] Territorial dispositions are generally matters of considerable importance to the various nations concerned, and most nations would doubtless desire that the disposing document be of the same dignity, namely a treaty.[949]

B. Hawaiian Law Regarding Cession

Even back to King Kamehameha I, the Hawaiian government make it clear it required at least some consent of the people in order to transfer sovereignty.[950] When Kamehameha I looked to cede the islands to Great Britain in 1794, either as a protectorate or full cession, he delayed the agreement for over a year in order to discuss with the "principal chiefs of the islands" and get consent from all of the chiefs under this authority.[951]

Treaties were the supreme law of the land in the Kingdom of Hawai'i.[952] The Supreme Court of the Kingdom of Hawai'i ruled that their domestic legislation should be interpreted in a way as to not conflict with existing treaty obligations.[953]

The unification of the majority of the islands in 1794 was before written law, so there was no treaty. The conquest of Kaua'i and Ni'ihau in 1824 was only two years following the start of written language, and there does not appear to be a treaty for it either. The Sāmoan federation efforts do not appear to have made much progress due to German's aggressions, and there does not appear to be any drafts of treaties for that either.

i. Palmyra Atoll

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[946] R. Y. Jennings, Acquisition of Territory in International Law (1963)
[947] R. Y. Jennings, Acquisition of Territory in International Law (1963)
[948] *Temple of Vihear*, ICJ Reports (1961).
[949] Seokwoo Lee, Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal, 16 Conn. J. Int'L 1 (Fall 2000)
[950] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[951] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[952] *In re McCarthy,* 5 Haw. 573 (1886)
[953] *Rex v Booth*, 2 Haw. 616 (1863)

Palmyra Atoll is around one thousand miles off of the main Hawaiian Islands, between the Hawaiian Islands and Sāmoa.[954] The Atoll contains about fifty islets, with coral, reefs, and trees. [955] Several British islands lie within a 500-mile radius to the south east. [956] Use of the Atoll has been intermittent. [957]

In 1862, two Hawaiian citizens requested the Palmyra Atoll become a Hawaiian "possession" and be placed under the Hawaiian Flag. [958] [959] King Kamehameha IV agreed and directed the Hawaiian Minister of the Interior to grant the request. [960] The document authorizing the citizens to take possession was signed by the King and the Ministers of the Interior. [961] The Palmyra Atoll became a Hawaiian Territory. [962] Today the Palmyra Atoll is the U.S. only "incorporated territory."[963]

C. U.S. Law Regarding Cession

From the founding to 1844, historical precedent for acquisition was either acquiring new lands by treaty or organically (by discovery and occupation of territory unoccupied by any other government or its citizens, i.e. Guano Island Act of 1856)."[964] Acquisition of territory by the U.S. has almost always been executed via Article II treaty powers. For example, California was annexed by the Treaty of Guadalupe Hidalgo with the Mexican Republic[965]; Alaska was annexed via the Treaty with Russia for $7,200,00[966]; and Florida was annexed from Spain via the Adams-Onís Transcontinental Treaty[967], Louisiana was annexed from France in 1803 for $15,000,000 (80,000,000 francs). [968] [969]

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[954] *United States v Fullard-Leo,* 331 U.S. 256 (1947)
[955] *United States v Fullard-Leo,* 331 U.S. 256 (1947)
[956] *United States v Fullard-Leo,* 331 U.S. 256 (1947)
[957] *United States v Fullard-Leo,* 331 U.S. 256 (1947)
[958] *United States v Fullard-Leo,* 331 U.S. 256 (1947)
[959] Department of the Interior, Palmyra Atoll, https://www.doi.gov/oia/islands/palmyraatoll
[960] *United States v Fullard-Leo,* 331 U.S. 256 (1947)
[961] *United States v Fullard-Leo,* 331 U.S. 256 (1947)
[962] Department of the Interior, Palmyra Atoll, https://www.doi.gov/oia/islands/palmyraatoll
[963] Definitions of Insular Area Political Organizations, Department of the Interior, Office of Insular Affairs, https://www.doi.gov/oia/islands/politicatypes
[964] *Jones v United States*, 137 U.S. 202, 212 (1890)
[965] Tim Marshall, Prisoners of Geography (2016)
[966] Tim Marshall, Prisoners of Geography (2016)
[967] Era of U.S. Continental Expansion, U.S. House of Representatives, https://history.house.gov/Exhibitions-and-Publications/HAIC/Historical-Essays/Continental-Expansion/Era-of-U-S--Continental-Expansion/
[968] John Gorham Palfrey, Growth of the Idea of Annexation and Its Breaking upon Constitutional Law, 13 Harv. L. Rev. 371 (1899-1900).
[969] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)

At the time when the U.S. Constitution was framed, a treaty (using the word broadly), was by far the most common method for transferring territory from one Nation to another.[970] By treaty; Scotland became a part of Great Britain; Alsace-Lorraine a part of Germany. [971] In 1894, U.S. Secretary of State William L. Marcy wrote that the transfer of the Hawaiian Islands to the United States "can only be done by a convention of treaty, which will not be valid until it is ratified by the Senate of the United States."[972] When President McKinley addressed the nation during his 1897 State of the Union, he specifically said a formal treaty should be confirmed "as every consideration of dignity and honor requires."[973] However, he changed his tune during the State of the Union the next year, simply stating "Pending the consideration by the Senate of the treaty signed June 16, 1897, by the plenipotentiaries of the United States and of the Republic of Hawaii, providing for the annexation of the Islands, a joint resolution to accomplish the same purpose by accepting the offered cession and incorporating the ceded territory into the Union was adopted by the Congress and approved July 7, 1898."[974] He did not address his previous statement or the reason for the change in form.

During congressional debate about annexation, the constitutional powers that authorize government branches to acquire territory was discussed at length. As mentioned earlier, it was agreed Hawai'i was not taken in conquest. It was also agreed Hawaii's situation was not comparable to the Guano islands legislation, because Hawai'i was inhabited.[975] The biggest issue at debate was where in the constitution the power to acquire territory lay, and whether Congress had the power to acquire territory via legislation.[976]

There is no enumerated territorial-annexation power in Article I or anywhere else in the Constitution. Many of the Senators in 1898 understood the federal government was one of limited power.[977] Chief Justice Marshall explained "The Government of the United States can claim no powers

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[970]John Gorham Palfrey, Growth of the Idea of Annexation and Its Breaking upon Constitutional Law, 13 Harv. L. Rev. 371 (1899-1900).
[971] John Gorham Palfrey, Growth of the Idea of Annexation and Its Breaking upon Constitutional Law, 13 Harv. L. Rev. 371 (1899-1900).
[972] Mr. Macy to Mr. Gregg, Foreign Relations of the United States, 1894, Appendix II, Affairs in Hawaii, Office of the Historian, https://history.state.gov/historicaldocuments/frus1894app2/d38
[973] Message of the President to the Senate and House of Representatives, December 6 1897, https://history.state.gov/historicaldocuments/frus1897/message-of-the-president
[974] Message of the President to the Senate and House of Representatives, December 5 1898, https://history.state.gov/historicaldocuments/frus1898/message-of-the-president
[975] Hawaii, 31 Cong. Rec. 5940 (1898).
[976] Hawaii, 31 Cong. Rec. 5940 (1898); 31 cong. Rec. 6659 (1898).
[977] 31 cong. Rec. 6659 (1898).

which are not granted to it by the Constitution; and the powers actually granted must be such as are expressly given, or given by necessary implication."[978]

In 1890, the court in *Jones v U.S.* explained that determining if an guano island becomes part of the U.S. is a "strictly executive power," as it affects foreign relations.[979] In this circumstance the Guano Islands Act by congress authorized the President to decide,[980] as a similar decision a year early also allowed as long as the President acted within the terms of another authorizing act of Congress.[981]

During 1898 congressional debate, many argued the only constitutional method to acquire territory that is not intended to become a U.S. state, is by a treaty.[982] After the 1897 treaty could not get a majority vote, it was never reintroduced.[983] In addition, the President never suggested to either branch of Congress that he desired to abandon the treaty and substitute a joint resolution for it, and if he had, he would have withdrawn the treaty.[984] Further, there was no implication that the President was acquiescing any power, as at the same time President McKinley unilaterally reached an armistice with Spain that ended the Spanish-American war and negotiated a treaty to annex several territories, which was formally ratified by the Senate.[985]

All U.S.-Hawaiian Kingdom trade agreements were indeed made via treaties. Further, it seems additionally illogical that if a trade agreement must be conducted via treaty with a super-majority vote, the complete acquisition of new territory could simply require a majority vote.

Today, the Department of Interior website states that cession of territory requires a treaty.[986] "Sovereigns can effect cession only in a treaty between the ceding and acquiring sovereigns."[987] The same website lists current U.S. Territories and their method of acquisition.

1. The Use of Legislation to Annex

[978] *Marin v Hunter's Lessee*, 1 Wheaton, 326 (1816)
[979] *Jones v United States,* 127 U.S. 202 (1890)
[980] *Jones v United States,* 127 U.S. 202 (1890)
[981] *Wolsey v Chapman*, 101 U.S. 755 (1879)
[982] 31 cong. Rec. 6659 (1898).
[983] 31 cong. Rec. 6659 (1898).
[984] 31 cong. Rec. 6659 (1898).
[985] Bruce Ackerman and David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995)
[986] DOI, Office of Insular Affairs, Acquisition Process, https://www.doi.gov/oia/islands/acquisitionprocess, Source: Joseph McDermott, OIA 2003
[987] DOI, Office of Insular Affairs, Acquisition Process, https://www.doi.gov/oia/islands/acquisitionprocess, Source: Joseph McDermott, OIA 2003

The Constitution enumerates no congressional territorial-acquisition power, yet the United States has previously acquired occupied foreign land statutorily (ex post congressional-executive agreements) several times.[988] Two of these times (Hawai'i and Texas) annexationists introduced a joint resolution only after failing to secure enough votes to ratify a duly negotiated treaty.[989] Once, annexationist's introduced a joint resolution when expecting to not secure enough votes to ratify a treaty (Sāmoa). The other occurrences were States who were already party to the Articles of Confederation (Rhode Island and South Carolina) or who fought in the American Revolution (Vermont).

Constitutional scholars Bruce Ackerman and David Golove discussed the annexations of Hawai'i and Texas in a 1995 Harvard Law Review article, introducing the precedent of using ex post congressional-executive agreements to annex territory as "puzzling," and labeled Congress' actions as "legislative unilateralism."[990]

The U.S.' annexations via legislation (omitting Guano Islands which was based on Discovery, not cession) are detailed below chronologically.

i. North Carolina and Rhode Island (1789)

New Hampshire became the 9th state to ratify the U.S. Constitution on June 21st, 1788 (thus enacting the constitution and scheduling the establishment of the Union on March 4th, 1789).[991] Five days later Virginia ratified, and then New York on July 26th.[992]

Rhode Island and North Carolina were reluctant to ratify and remained independent self-governing republics.[993] Neither State sent representatives to the first congress in March 1789.[994] North Carolina held out ratification until November 21, 1789.[995]

Rhode Island held out until May 29th 1790, over a year after the establishment of the Union.[996] After Rhode Island failed to ratify the U.S. Constitution eleven times, the Senate passed a bill to prohibit

[988] Daniel Rice, Territorial Annexation as a Great Power, 64 Duke L.J. 717 (2015); Douglas W. Kmiec, Legal Issues Raised by the Proposed Presidential Proclamation To Extend the Territorial Sea, 1 Territorial Sea J. 1, 19 (1990)
[989] Daniel Rice, Territorial Annexation as a Great Power, 64 Duke L.J. 717 (2015).
[990] Bruce Ackerman and David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995)
[991] Earl M. Maltz, The Constitution and the Annexation of Texas, 23. Const. Comment 381 (2006)
[992] Earl M. Maltz, The Constitution and the Annexation of Texas, 23. Const. Comment 381 (2006)
[993] Earl M. Maltz, The Constitution and the Annexation of Texas, 23. Const. Comment 381 (2006)
[994] Earl M. Maltz, The Constitution and the Annexation of Texas, 23. Const. Comment 381 (2006)
[995] Earl M. Maltz, The Constitution and the Annexation of Texas, 23. Const. Comment 381 (2006)
[996] Earl M. Maltz, The Constitution and the Annexation of Texas, 23. Const. Comment 381 (2006)

commercial intercourse with Rhode Island (essentially treating it as a foreign nation). [997] Rhode Island finally ratified eleven days after the prohibition.[998]

Both states were members of the Articles of Confederation and eventually planned to join the new United States, which puts them on much different footing than an external nation like Texas or Hawaii.

ii. Republic of Vermont (1791)

The Republic of Vermont was a sovereign and independent entity from 1777-1791.[999] In 1777 delegates from 28 towns met and declared independence from the British colony of Quebec and the American states of New Hampshire and New York. [1000] The Republic of Vermont had been in a sort of political limbo with a longstanding dispute over ownership of the territory by New York and New Hampshire, starting well before Vermont in 1749 with the founding of the town of Bennington (now Bennington, Vermont) on land claimed by both New York and New Hampshire.[1001]

Vermont took part in the American Revolution, but the Continental Congress initially refused to recognize Vermont's independence in 1777 due to New York's claims to the land as well other concerns. [1002] In fact, Congress went so far as to pass a resolution in 1779 prohibiting Vermont from joining the union. [1003] However, by 1780, 35 towns in New Hampshire and 12 towns in New York requested admission to the "Republic of Vermont" due to frustration with the new constitutions of their current States. [1004] Vermonter decided if the U.S. Congress would not recognize them, they had no reason to respect the sovereignty of their neighboring U.S. States and proceeding to expand their territory. [1005]

Despite the expansion, the Republic of Vermont worried its survival depended on joining one adjoining empire or another and so began discussions with Great Britain in 1781 (the Haldimand Negotiations). [1006] While Great Britain recognized the sovereignty of the three original U.S. states in the

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[997] Earl M. Maltz, The Constitution and the Annexation of Texas, 23. Const. Comment 381 (2006)
[998] Vermont History, the Proceedings of the Vermont Historical Society Vol 56, No 3 (Summer 1988)
[999] Vermont History, the Proceedings of the Vermont Historical Society Vol 56, No 3 (Summer 1988)
[1000] Vermont History, the Proceedings of the Vermont Historical Society Vol 56, No 3 (Summer 1988)
[1001] Vermont History, the Proceedings of the Vermont Historical Society Vol 56, No 3 (Summer 1988)
[1002] Vermont History, the Proceedings of the Vermont Historical Society Vol 56, No 3 (Summer 1988)
[1003] Vermont History, the Proceedings of the Vermont Historical Society Vol 56, No 3 (Summer 1988)
[1004] Vermont History, the Proceedings of the Vermont Historical Society Vol 56, No 3 (Summer 1988)
[1005] Vermont History, the Proceedings of the Vermont Historical Society Vol 56, No 3 (Summer 1988)
[1006] Vermont History, the Proceedings of the Vermont Historical Society Vol 56, No 3 (Summer 1988)

Treaty of Paris in 1783, the status of the Republic of Vermont's territory was unsettled. [1007] These negotiations were met with protest as a majority of Vermonters did not wish to rejoin the British Empire.[1008] In 1782, Vermont abandoned some of its expansion at the insistence of George Washington.[1009]

Vermont held a convention in January 1791 and decided again it wanted to become part of the United States.[1010] Vermont was finally admitted as the 14th state of the United States on March 4, 1791 via congressional resolution. [1011] [1012] Vermont was the first Republic to become a U.S. State.[1013]

Later analysis of use of legislation to admit Vermont as a U.S. State theorized the method was based on the idea that Vermont occupied territory previously claimed by New York. However, the Supreme Court in *Rhode Island v Massachusetts* acknowledged that while there were many controversies between the eleven states over their boundaries, and while New Hampshire and New York argued they owned the land that is now Vermont, that Vermont "settled the controversy" by becoming the "rightful sovereign" of the territory."[1014]

iii. Republic of Texas (1845)

The Republic of Texas existed from 1837 to 1845, following the Texas Revolution from 1835-6 after which Texans (mostly Americans armed with U.S. guns and ammunition) declared independence from Mexico.[1015] During that time Texas was still considered by Mexico to simply be a rebellious area of its nation. [1016] The Republic of Texas sook annexation by the United States because it feared it could not withstand any further incursion by Mexican troops, and would be reclaimed by Mexico.[1017]

In fact, the U.S. courts previously acknowledged similarly, with the Supreme Court in *Kennett v Cham*bers looking to a contract made after Texas had declared itself independence but was not

[1007] Vermont History, the Proceedings of the Vermont Historical Society Vol 56, No 3 (Summer 1988)
[1008] Vermont History, the Proceedings of the Vermont Historical Society Vol 56, No 3 (Summer 1988)
[1009] Vermont History, the Proceedings of the Vermont Historical Society Vol 56, No 3 (Summer 1988)
[1010] Daniel Chipman, The Life of Honorable Nathaniel Chipman, LLD (1846)
[1011] Vermont History, the Proceedings of the Vermont Historical Society Vol 56, No 3 (Summer 1988)
[1012] First congress, Sess III. Chap. VII – An Act for the admission of the State of Vermont into this Union, Statute III, Feb 18 1791.
[1013] To designate March 4, 1991, as "Vermont Bicentennial Day"., Public Law 102-9, 102 Congress. 105 Stat. 28 (1991)
[1014] *State of Rhode Island v. Com. of Massachusetts*, 37 U.S. 657, 723–24 (1838)
[1015] Tim Marshall, Prisoners of Geography (2016)
[1016] Tim Marshall, Prisoners of Geography (2016)
[1017] Texas, History, August 21 2018, https://www.history.com/topics/us-states/texas

"independent yet" in 1836, said that the Treaty of Amity of Friendship between the United States and Mexico prevented any legal obligations with "Texas" until the political branches formally recognize the new country.[1018] The court quoted the U.S. and Mexican FCN treaty, stating "there should be a firm, inviolable, and universal peace, and a true and sincere friendship between the United States of America and the United Mexican States in all the extent of their possessions and territories, and between their people and citizens respectively, without distinction of persons or place." [1019] These treaties, while they remained in force, were, by the Constitution of the United States, the supreme law, and binding not only upon the government but upon every citizen. [1020]

Prior to annexation, the Republic of Texas had entered into treaties with France, Great Britain, the Netherlands, Cherokee Nation, the Hanseatic League, and the United States.[1021] The Republic of Texas entered to into several FCN treaties, including one with the United States in 1842.[1022] The treaty with the U.S. expired five years after its creation. [1023] However, the U.S. court said when Texas achieved independence, the Mexican treaty could no longer bind it because it was a new State (not simply a change in government). [1024]

A treaty of annexation was drafted in 1844 and submitted to the Senate and was promptly rejected with a vote of 35 against and only 16 ayes.[1025] The treaty stated in the document itself it expected the document to be ratified by the President of the United States and with advice and consent of the U.S Senate. [1026] Further the document explained a treaty was chosen for the cession because the "objects so important to their mutual and permanent welfare." [1027]

Following the failed Senate ratification, a Joint Resolution was instead introduced to annex Texas in 1845.[1028] Many senators argued that foreign territory cannot be taken by legislative act, because Congress has no power to deal directly with foreign nations; only the treaty-making power can do

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[1018] *Kennett v Chambers*, 55 U.S. 38 (1852)
[1019] *Kennett v Chambers*, 55 U.S. 38 (1852)
[1020] *Kennett v Chambers*, 55 U.S. 38 (1852)
[1021] Texas (Republic). Department of State: An Inventory of Department of State Treaties between the Republic of Texas and Other Nations at the Texas State Archives, 1838-1844 https://legacy.lib.utexas.edu/taro/tslac/30179/tsl-30179.html
[1022] Texas (Republic). Department of State: An Inventory of Department of State Treaties between the Republic of Texas and Other Nations at the Texas State Archives, 1838-1844 https://legacy.lib.utexas.edu/taro/tslac/30179/tsl-30179.html
[1023] Texas (Republic). Department of State: An Inventory of Department of State Treaties between the Republic of Texas and Other Nations at the Texas State Archives, 1838-1844https://legacy.lib.utexas.edu/taro/tslac/30179/tsl-30179.html
[1024] *Kennett v Chambers*, 55 U.S. 38 (1852)
[1025] A Treaty of Annexation, concluded between the United States of America and the Republic of Texas, April 12, 1844
[1026] A Treaty of Annexation, concluded between the United States of America and the Republic of Texas, April 12, 1844
[1027] A Treaty of Annexation, concluded between the United States of America and the Republic of Texas, April 12, 1844
[1028] Earl M. Maltz, The Constitution and the Annexation of Texas, 23. Const. Comment 381 (2006)

that.[1029] Even the Senate Foreign Relations Committee disapproved of the Texas annexation saying that territorial annexation is too important of a legislative function to be inferred through the Necessary and Proper clause, and that if the founders had intended to provide for Congressional annexation power, they would have included it in the Constitution[1030].

The annexation of the Republic of Texas was unique because Congress planned to imminently admit Texas as a state of the United States following the annexation. [1031] Some argued that the Admissions Clause of the Constitution gave Congress footing for the joint resolution to annex Texas.[1032] However, even if that were true, Texas still would not be precedent for Hawai'i, as 61 years elapsed between Hawaii's annexation and admission to the Union. In addition, it was made clear during the congressional debate that in 1898, there was no intent, by anyone in Congress that Hawai'i would be introduced as a State into the Union.[1033]

The annexation of Texas by Joint Resolution generated enormous constitutional controversy.[1034] The debate ranged from arguing the "exclusivity" of Congress' power to admit new states, and on the other hand the "exclusivity" of the treaty power over annexation of territory. [1035] Proponents also argued that a treaty would have been required if it was a cession from Mexico, but because Texas was an independent State, there was no point in a treaty because the independent State would be immediately destroyed when the agreement was executed. [1036] This argument is direct disagreement with the actions taken 15 years later in the attempt to annex the Dominican Republic, in which a formal treaty was pursued with much effort, despite the same situation that the "intendent State would be immediately destroyed when the agreement was executed" and the Dominican annexation was abandoned after they were certain they could not get a super-majority of votes to ratify the treaty.

An interesting angle that did not seem to be discussed, was that the joint resolution for the annexation the Republic of Texas and admission to the Union, allowed for the State of Texas to create four new States from its territory. It was unclear if that division was to be required to submit to Article IV §3, mandating only Congress may admit new states, or if the state of Texas was allowed to do this

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[1029] John Gorham Palfrey, Growth of the Idea of Annexation and Its BreaKing upon Constitutional Law, 13 Harv. L. Rev. 371 (1899-1900).
[1030] Daniel Rice, Territorial Annexation as a Great Power, 64 Duke L.J. 717 (2015).
[1031] John Gorham Palfrey, Growth of the Idea of Annexation and Its BreaKing upon Constitutional Law, 13 Harv. L. Rev. 371 (1899-1900).
[1032] Hawaii, 31 Cong. Rec. 5940 (1898).
[1033] Hawaii, 31 Cong. Rec. 5940 (1898).
[1034] Bruce Ackerman and David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995)
[1035] Bruce Ackerman and David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995)
[1036] Bruce Ackerman and David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995)

itself. The resolution states "New States of convenient size not exceeding four in number, in addition to said State of Texas and having sufficient population, may, hereafter by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the Federal Constitution."[1037] If interpreted that the State of Texas has the power to create new sub-states itself, that conflicts with the arguments that a treaty was unnecessary because one of the nations would dissolve upon signing. If Texas wished to retain a power that other U.S. States did not, one would think it would desire the cession to be captured in a treaty in case they were required to seek international assistance to enforce that clause at some point in the future. Reading the clause to not include that extra power, makes it superfluous and unnecessarily.

The only reasonable explanation for the use of a joint resolution instead of treaty was the failure to obtain a super-majority vote to ratify the Texas treaty.

iv. Kingdom of Hawai'i (1898)

As mentioned, a treaty was signed in 1897 to annex the Hawaiian Islands but failed to achieve a 2/3 vote from the Senate, so other methods to execute it were considered by Congress. A joint resolution (ex post congressional-executive agreement) was purposed to "ratify" the treaty that was already signed. The text of the unratified treaty stated that the United States and Republic of Hawaii "have determined to accomplish by treaty an object so important to their mutual and permanent welfare."[1038] Article VII also states "This treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate, on the one part; and by the President of the Republic of Hawaii, by and with the advice and consent of the Senate, in accordance with the Constitution of said Republic, on the other; and the ratifications hereof shall be exchanged at Washington as soon as possible." [1039] All of which was written before the drafters knew a treaty ratifying super-majority vote could not be achieved.

In 1898, the Senate Foreign Relations Committee now argued that the annexation of Texas gave Congress footing for the Joint Resolution to annex Hawaii, however it did not explain the Constitutional footing.[1040] It stated: "this joint resolution clearly establishes the precedent that Congress has the power to annex a foreign state to the territory of the United States, either by assenting to a treaty of annexation

[1037] Joint Resolution for Annexing Texas to the United States, Approved March 1, 1845
[1038] Full Text of Treaty for Hawaiian Annexation, The Seattle Post-Intelligencer, June 18, 1897
[1039] Full Text of Treaty for Hawaiian Annexation, The Seattle Post-Intelligencer, June 18, 1897
[1040] Daniel Rice, Territorial Annexation as a Great Power, 64 Duke L.J. 717 (2015).; **S.** Rep. No. 55-681 (1898)

or by agreeing to articles of annexation or by act of Congress based upon the consent of such foreign Government obtained in any authentic way."[1041]

The 1898 Committee report was critiqued by Senators and Representatives as drawing many deductions unwarranted by the facts and arguing there was nothing in the precedent that could be construed to support the doctrine that Congress is a "treaty-making body." [1042] And the proposal quickly provoked a replay of the Texas annexation debate. [1043] Advocates argued that territory must be acquired through a formal agreement approved in the traditional procedure, while proponents insisted a treaty was unnecessary when one sovereign completely swallowed up the other. [1044]

Senator William Lindsay (a Democrat from Kentucky) argued: "For a hundred years we have construed the Constitution to mean that we may acquire territory by conquest as an incident to the war-making power, and that we may acquire territory by treaty as an incident to the treaty-making power, but to-day we are setting up the new theory that where we can not conquer because we have no ground for war, and where we cannot treat because the constitutional majority of the Senate will not consent to a treaty, we may substitute a joint resolution of Congress for a constitutional treaty or for a lawful conquest."[1045]

Thomas Ball, a Democratic Representative from Texas argued similarly, and was the most poignant as he represented the state Congress was attempting to use as precedent. It is worth quoting him at length. Representative Ball said:

> *"The very presence of this measure [in congress] is the result of a deliberate attempt to do unlawfully that which cannot be lawfully done." "The annexation of Hawai'i by joint resolution is unconstitutional, unnecessary, and unwise." "The president submitted the treaty to the U.S. Senate and has been unable to obtain the consent of two-thirds of that body, we are called upon to override the constitutions of both parties to the proposed contract." "When Louisiana was acquired, when Florida was received, when Alaska came to us, no statesman connected with the executive or legislative branch of the Government dreamed the territory sought to be added to our possessions could be received, except by treaty duly ratified. In their desperation, grasping at shadows for substance, those who now resort to this subterfuge cite the admission of the imperial State from which I hail-Texas-as warrant and authority for their purpose. Mr. Speaker, no one familiar with the history of that transaction should make such claim. Advocates of the annexation of Texas rested their case upon the express power conferred upon Congress in the Constitution to admit new States. Opponents of the annexation of Texas contended that even that express*

[1041] 31 cong. Rec. 6659 (1898).
[1042] 31 cong. Rec. 6659 (1898).
[1043] Bruce Ackerman and David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995)
[1044] Bruce Ackerman and David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995)
[1045] 31 cong. Rec. 6659 (1898).

> *power did not confer the right to admit States not carved from territory already belonging to the United States or some one of the States forming the Federal Union. Whether, therefore, we subscribe to the one or the other school of thought in that matter, we can find no precedent to sustain the method here proposed for admitting foreign territory,"*[1046]

It was known during the debate, that many of the most distinguished constitutional lawyers in the country believed that the joint resolution was beyond the powers granted to Congress in the Constitution.[1047]

A Department of Justice legal opinion published in 1988 for the State Department, explained that the President's constitutional status as the representative of the U.S. in foreign affairs authorizes him to claim territorial rights in the sea. [1048] The report, written by Douglas W. Kmiec, the Assistant Attorney General in the Office of Legal Counsel, notes that the only congressional power to acquire territory seems to be the power to admit new states into the union, as exercised during the annexation of Texas. [1049] Assistant Attorney General Kmiec cautioned against using this power for any acquisition outside of statehood admission, noting "it is doubtful that the acquisition of Hawai'i can serve as an appropriate precedent for congressional assertion of sovereignty over an extended territorial sea."[1050]

Another Department of Justice memo discussing the perplexing use of agreement to annex the Hawaiian Islands was published in 1994 by Walter Dellinger, Assistant Attorney General of the Office of Legal Counsel.[1051] Dellinger noted that a joint resolution was used (i.e. ex post congressional-executive agreement), "even though the Senate had previously rejected an annexation treaty, and even though opponents of the measure argued strenuously both in Congress and in the press that such an annexation could be accomplished only by treaty, and not by a simple legislative act." [1052]

2. Inconsistent Annexation Forms in the late 19th Century

While we've already compared the legal, policy, and historical requirements for completing cessions with treaties instead of congressional legislation; we can also look to a comparable example

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[1046] Hawaii, 31 Cong. Rec. 5940 (1898).
[1047] 31 cong. Rec. 6659 (1898).
[1048] Opinions of the Office of Legal Counsel of the U.S. DOJ, Volume 12, 1988
[1049] Opinions of the Office of Legal Counsel of the U.S. DOJ, Volume 12, 1988
[1050] Opinions of the Office of Legal Counsel of the U.S. DOJ, Volume 12, 1988
[1051] Walter Dellinger, Whether Uruguay Round Agreements Required Ratification as a Treaty, Memorandum Opinion for the U.S. Trade Representative, Department of Justice (Nov 22 1994), https://www.justice.gov/sites/default/files/olc/opinions/1994/11/31/op-olc-v018-p0232.pdf
[1052] Walter Dellinger, Whether Uruguay Round Agreements Required Ratification as a Treaty, Memorandum Opinion for the U.S. Trade Representative, Department of Justice (Nov 22 1994), https://www.justice.gov/sites/default/files/olc/opinions/1994/11/31/op-olc-v018-p0232.pdf

around the same time as the Hawai'i annexation where a treaty was to be used (Dominican Republic) and another where a treaty was attempted but never ratified, instead joint congressional resolution passed nearly 30 years later, all the while the territory was still essentially considered annexed (American Sāmoa).

i. Dominican Republic (1870 - Attempted)

While the U.S has attempted and then abandoned many additional attempts to annex other territories, I will analyze just one of them for historical practices of form. In 1870, the U.S. negotiated a treaty to annex the Dominican Republic, with the promise of eventual U.S. Statehood.[1053] The U.S. said the Dominican Republic government voluntarily sought the annexation. [1054] A plebiscite affirmed popular support, with a 99% approval though with only 30% voter turnout (15,706 people).[1055] President Grant chose make the cession under a formal treaty, with ratification requirements.[1056] The treaty failed ratification with a Senate vote of 28 to 28. [1057] There was no discussion of using a joint resolution to annex instead. Instead, President Grant fired an Ambassador and removed a Senator from the Senate Foreign Relations Committee to try to gain more votes. [1058] Grant also got Congressional approval to create a commission to investigate the potential annexation, which did report back favorably.[1059] However, due to the plebiscite only involving 30% of the electorate, the Senate worried the wishes of the population were not adequately accounted for and would not reconsider the annexation treaty.[1060]

Despite the use of congressional resolution to admit Texas, the topic did not arise here, even though the Dominican Republic was promised a path to Statehood and was an independent nation who's

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[1053] President Ulysses S. Grant, May 31, 1870: Message Regarding Dominican Republic Annexation, https://prod.millercenter.org/the-presidency/presidential-speeches/may-31-1870-message-regarding-dominican-republic-annexation
[1054] President Ulysses S. Grant, May 31, 1870: Message Regarding Dominican Republic Annexation, https://prod.millercenter.org/the-presidency/presidential-speeches/may-31-1870-message-regarding-dominican-republic-annexation
[1055] Dominican Republic, February 19, 1870: Annexation to the USA, http://www.sudd.ch/event.php?lang=enandid=do011870
[1056] President Ulysses S. Grant, May 31, 1870: Message Regarding Dominican Republic Annexation, https://prod.millercenter.org/the-presidency/presidential-speeches/may-31-1870-message-regarding-dominican-republic-annexation
[1057] Smith, Jean Edward (2001). *Grant*. New York: Simon and Schuster.
[1058] Smith, Jean Edward (2001). *Grant*. New York: Simon and Schuster.
[1059] Smith, Jean Edward (2001). *Grant*. New York: Simon and Schuster.
[1060] Montllor, Joseph J. (1941). "Oposición dominicana a la anexión a los Estados Unidos", *Boletín del Archivo General de la Nación*

sovereignty would be "extinguished" when it was brought into the U.S. Further, the lack of consent of the people here was a deal breaker for the Senate.

ii. *Sāmoa (1900)*

Sāmoa (now "American Sāmoa") is an archipelago of small islands with Tonga as the nearest nation, about 330 miles away.[1061] The total surface area is about 77 square miles.[1062] There were roughly 10,000 people living on the islands in 1900. [1063] The British and French governments had formally recognized the sovereignty of Sāmoa as early as 1844.[1064] In 1877, the King of Sāmoa had asked the King of England for a protectorate, but the King of England declined.[1065] In 1878, the U.S. entered into a FNC with Sāmoa. [1066]

A civil war broke out in Sāmoa in 1899, which led to the U.S., France, and Germany divvying up islands for their own in a treaty (Treaty of Berlin) which remarkably did not include Sāmoa as a party. [1067] Britain took Tonga and the U.S. took Sāmoa. [1068]

The Chiefs of the two Sāmoan islands ceded sovereignty to the U.S., one in 1900 and another in 1904.[1069] The Chiefs sent the documents to the U.S., but wanted to maintain domestic control of their governments, and also requested ratification.[1070] The islands were put under control the U.S. Navy and the President eventually send a "thank you" about two years later.[1071] Strangely, the treaties were never "ratified" until 1929 despite de facto control of the islands. [1072] [1073] In fact, a Representative who had to

[1061] Ian Fale fuafua Tapu, Who is Really a Noble? The Constitutionality of American Sāmoa's Matai System, 24 Asian Pac Am LJ 61 (2020)
[1062] Ian Fale fuafua Tapu, Who is Really a Noble? The Constitutionality of American Sāmoa's Matai System, 24 Asian Pac Am LJ 61 (2020)
[1063] Cong Rec 70 1929, House
[1064] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[1065] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[1066] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[1067] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[1068] Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi, 35 Vict. U. Wellington L. Rev. 165, Tom Bennion (April 2004)
[1069] https://www.doi.gov/oia/islands/acquisitionprocess
[1070] Congress Rec 69, Senate (1929)
[1071] Cong Rec 70 1929, House
[1072] Ian Fale fuafua Tapu, Who is Really a Noble? The Constitutionality of American Sāmoa's Matai System, 24 Asian Pac Am LJ 61 (2020)
[1073] Cong Rec 70 1928, House

introduce the topic did so by saying "This is rather hard to explain…" and blamed the situation on "largely the neglect of Congress."[1074]

The congressional debate leading up the ratification included the surprise of the House that the U.S. essentially already possessed the island, saying it was an "inconsequential stretch of territory" and just "little specks on the horizon." [1075] There was resistance to ratify the treaties, citing the "burdens" and "troubles" they were already having with the Philippines. [1076] But there then was also concerns that the U.S. military had essentially "been the government" of the islands for 25+ years. [1077] There was also concerns about the legality of concluding a treaty that sat unratified for so long, and then also the legality of using a Joint Resolution instead. [1078] There was much back and forth, until one Representative reminded them that Sāmoa had "one of the best harbors in the Pacific," they just used a Joint Resolution to annex Hawai'i so don't need to get a super majority vote, and that the U.S. would be close enough to be able to "see" other nations from the islands. [1079] At which point "applause" is noted in the debate. [1080] Indeed, the "treaties" were "ratified" with a joint resolution nearly 30 years after the original request.

Contrast this to the acquisition of the West Indies (American Virgin Islands) in 1916. The original treaty was drafted in 1867, however not enough votes could be gathered to ratify it. Instead, the U.S. tried again with a new treaty, but Denmark's parliament would not ratify it. In 1915, the topic reemerged once again, and this time a third treaty was negotiated and then signed in 1916.[1081] This one was ratified by both the U.S. Senate and Danish parliament.[1082]

Comparing Sāmoa the situation in Hawai'i, both times the U.S. Congress used joint resolutions to annex the islands when either a super-majority vote could not be achieved or it was thought it could not be achieved. Both times the joint resolution was used with little explanation of the legal basis for it.

D. Extraterritorial Reach of Domestic Legislation

[1074] Cong Rec 70 1929, House
[1075] Cong Rec 70 1928, House
[1076] Cong Rec 70 1928, House
[1077] Cong Rec 70 1929, House
[1078] Cong Rec 70 1928, House
[1079] Cong Rec 70 1928, House
[1080] Cong Rec 70 1928, House
[1081] The Danish Treaty, Los Angeles Herald October 23 1902, Center for Bibliographical Studies and Research, https://cdnc.ucr.edu/cgi-bin/cdnc?a=dandd=LAH19021023.2.21andsrpos=3ande=-------en--20--1--txt-txIN-danish+west+indies+tie-------1
[1082] 39 Stat. 1706; 7 Bevans 56.

The word "extraterritorial" is a legal construct indicating something is beyond territorial limits.[1083] The Constitution vests in Congress several powers which may allow extraterritorial reach, such as to "regulate Commerce with foreign Nations" and to "effectuate treaties."[1084] [1085] Challenges to the extraterritoriality of congressional actions can be made either on the subject matter of the act and/or the geographic reach.[1086]

The Supreme Court relies on the Presumption against Extraterritoriality policy when interpreting Congressional statutes in order to avoid violations of international law.[1087] The policy requires a default presumption that federal statutes do not apply extraterritorially.[1088] [1089] [1090] The International Court of Justice has also affirmed this policy in international disputes.[1091]

Extraterritorial reach of U.S. law was avoided earlier in the country's history. Early Supreme Court decisions disfavored application of the Constitution beyond the U.S..[1092] In 1808, the court in *Rose v Himley* explained "the laws of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens."[1093] The Supreme Court in the 1824 case, *The Apollon*, explained the domestic laws of one State cannot have force to control the sovereignty or rights of any other State.[1094] The Supreme Court in the 1825 case *The Antelope*, explained that each nation is perfectly equal and as a result, no nation can impose a rule on another and each legislates only upon itself.[1095] Further, obligations created by statute cannot transcend the legislative power of the state which may enact it. [1096]

In 1891, only seven years before the purported annexation of Hawai'i, the court in *In re Ross* suggested the Constitution only applied in U.S. territory, saying "the Constitution can have no operation in another country."[1097]

[1083] Anthony J. Colangelo, What is Extraterritorial Jurisdiction, Cornell Law Review Vol. 99 (2014).
[1084] U.S. Const. art. I, § 8.
[1085] Anthony J. Colangelo, What is Extraterritorial Jurisdiction, Cornell Law Review Vol. 99 (2014).
[1086] What is Extraterritorial Jurisdiction, Cornell Law Review Vol. 99 (2014).
[1087] Curtis A. Bradley, International law in the U.S. Legal System (2nd ed. 2015)
[1088] Curtis A. Bradley, International law in the U.S. Legal System (2nd ed. 2015)
[1089] *Sale v Haitian Centers Council, Inc*., 509 U.S. 157 (1993).
[1090] *Morrison v National Australia Bank Ltd,* 561 U.S. 247, 255 (2010)
[1091] David L. Sloss, Kiobel and Extraterritoriality: A Rule Without a Rationale, 28 Md. J. Int'l L. 241 (2013)
[1092] Curtis A. Bradley, International law in the U.S. Legal System (2nd ed. 2015)
[1093] *Rose v Himley*, 8 U.S. 241 (1808)
[1094] *The Apollon*, 22 U.S. (9 Wheat.) 362, 371 (1824)
[1095] *The Antelope*, 23 U.S. 66 (1825).
[1096] *The Antelope*, 23 U.S. 66 (1825).
[1097] *In re Ross*, 140 U.S. 453 (1891)

During the annexation debates, Senators argued that if the joint resolution is passed and approved by the President, it will not operate in the islands of Hawai'i by its own force because the Congress of the U.S. can have no extraterritorial effect.[1098] At least some constitutional law scholars at the time agreed, with textbooks describing the lack of extraterritorial application of legislation in as late as 1929.[1099] [1100]

As discussed above, there was no known enumerated power empowering Congress to acquire territory on its own and outside of a treaty. In addition, a treaty requires more than one State to consent to the agreement. A legislative action is a single-sided statement from one State. When Congress annexed Texas and Hawaii, no other sovereignty could object – "so far as other nations were concerned, it was as if Congress had voted to take possession of an unoccupied and unowned desert."[1101] This may explain why a treaty would still be used to annex the Dominican Republic fifteen years later. It's hard to defend the use of domestic legislation to transfer territory between international entities.

E. Authority to Annex the Hawaiian Islands

Methods of territorial acquisition like conquest and discovery create original title, however cession depends on existing title.[1102] When territory is transferred by cession, the validity of the title transferred to the transfer State depends on the validity of the title owned by the ceding State (nemo plus juris transferre potest quam ipse habet).[1103] The transferor of property may not transfer more rights than she herself possessed.[1104]

For example, in the Island of Palmas case, the United States' claim to the territory based on the Treaty of Paris of 1898 was denied because Spain could not transfer title it did not actually own.[1105]

[1098] 31 cong. Rec. 6659 (1898).
[1099] Westel Woodbury Willoughby, The Constitutional Law of the United States (1929)
[1100] Opinions of the Office of Legal Counsel of the U.S. DOJ, Volume 12, 1988 [citing Westel Woodbury Willoughby's writing on extraterritoriality, as a constitutional scholar]
[1101] John Gorham Palfrey, Growth of the Idea of Annexation and Its Breaking upon Constitutional Law, 13 Harv. L. Rev. 371 (1899-1900).
[1102] R. Y. Jennings, Acquisition of Territory in International Law (1963)
[1103] R. Y. Jennings, Acquisition of Territory in International Law (1963)
[1104] *Island of Palmas Case (or Miangas),* Perm. Ct. of Arbitration, 2 U.N. Rep. Int'l Arb. Awards 829 (1928). [Analyzing a dispute that occurred in 1898]
[1105] *Island of Palmas Case (or Miangas),* Perm. Ct. of Arbitration, 2 U.N. Rep. Int'l Arb. Awards 829 (1928). [Analyzing a dispute that occurred in 1898]

Beyond the method of transferring the Hawaiian Islands, we must look to the ownership and validity of title. Did the Republic of Hawai'i government actually have title to the Hawaiian Islands in 1898? Did the U.S. have at least a good-faith belief that the Republic of Hawai'i had legal title?

1. Hawaiian Island Title

The constitution of the Republic of Hawai'i stated "The President, with the approval of the cabinet, is hereby expressly authorized and empower to make a treaty of political or commercial union between the Republic of Hawai'i and the United States of America, subject to the ratification of the Senate."[1106] However, the U.S. Congress had no evidence the concurrent resolution was negotiated by and with the approval of the Hawaiian cabinet.[1107]

Further, land title transfers are only valid when made under the rule of the currently prevailing government.[1108] In 1887, the U.S. Supreme Court stated, "It is obvious that one nation cannot grant away the territory of another."[1109]

At least one U.S. Senator, (Senator Lindsay, a Democrat from Kentucky) argued that without the approval of the cabinet for an agreement between two nations, President Dole had no authority to act, at which point another U.S. Senator (Senator Allen, a Populist from Nebraska – Populism has ben criticized as anti-Semitic, nativist, and) immediately suggested the absence of a quorum (of which there was not).[1110]

Later, in the Apology Resolution, the U.S. federal government admitted "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum."[1111]

2. U.S.' Understanding of Hawaiian Title

Territorial sovereignty is a notion of great complexity.[1112] In matters of territorial acquisition, "title" means the facts which the law recognizes as creating a right.[1113] Territorial sovereignty generally

[1106] 31 Cong. Rec. 6659, Senate (1898).
[1107] 31 Cong. Rec. 6659, Senate (1898).
[1108] *Johnson v McIntosh*, U.S. 543 (1823)
[1109] *Coffee v Groover*, 123 U.S. 1 (1887)
[1110] 31 Cong. Rec. 6659, Senate (1898).
[1111] U.S. Public Law 103-150 (107 STAT. 1513)
[1112] R. Y. Jennings, Acquisition of Territory in International Law (1963)
[1113] R. Y. Jennings, Acquisition of Territory in International Law (1963)

requires the creation and maintenance of title by actual, effective control.[1114] However, the Permanent Court of International Justice in the *Eastern Greenland* case (a dispute between Norway and Denmark) explained that in cases of disputed title, the court will look to who has a superior claim, even if lacking actual control.[1115]

Further, who is the sovereign de jure or de facto of a territory is not a judicial but a political question, the determination of which, by the legislative and executive departments of any government, conclusively binds the judges as well as other officers, citizens, and subjects of that government.[1116]

Did the U.S. believe the Republic of Hawai'i was the sovereign? It seems unlikely the U.S. had a good faith belief that Republic of Hawai'i had the rightful and legal title, because the Queen was actively lobbying to regain her role and authority and Native Hawaiians were actively protesting. Even more damning, Cleveland had already disavowed the U.S.' actions and labeled the overthrow illegal. And the Senate had failed to ratify the McKinley treaty, because they also worried the actions were illegal.

In President Cleveland's 1893 address to Congress, he stated "Believing, therefore, that the United States could not, under the circumstances disclosed, annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods, I shall not again submit the treaty of annexation to the Senate for its consideration, and in the instructions to Minister Willis, a copy of which accompanies this message, I have directed him to so inform the Provisional Government."[1117]

During debate Senator Lindsay (a Democrat from Kentucky) argued: "We may acquire foreign territory, but we must acquire it in accordance with the limitations of our own Constitution: and if we do not deem it necessary to consult the people of that foreign territory, if we intend to treat the government of that foreign territory as authorized to speak for the people, then we must see that that government keeps within the constitutional limitations upon its own powers."[1118]

In 1894, Secretary of State Marcy told the Republic of Hawai'i that if they succeed in making a treaty transferring the islands to the U.S., he advised the treaty receive the ratification of the Hawaiian Government before sending it to the President and Senate for consideration.[1119] He also requested they

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[1114] R. Y. Jennings, Acquisition of Territory in International Law (1963)
[1115] P.C.I.J. Reports, Series A/B, No. 53, at p 46
[1116] Carman F. Randolph, Constitutional Aspects of Annexation, Part First, Harvard Law Review Vol. 12, No. 5 (1898)
[1117] Benjamin Harrison, December 18, 1893: Message Regarding Hawaiian Annexationhttps://prod.millercenter.org/the-presidency/presidential-speeches/december-18-1893-message-regarding-hawaiian-annexation
[1118] 31 Cong. Rec. 6659 (1898).
[1119] Mr. Marcy to Mr. Gregg, No 6, Foreign Relations of the United States, Affairs in Hawaii, 1854, https://history.state.gov/historicaldocuments/frus1894app2/d38

send representatives with the full power to assent to any modifications that may need to be made. [1120] This was due to "the great uncertainty as to the terms by which the cession of the sovereignty of the islands may be encumbered."[1121]

It seems clear that the United States had deep concerns about the Republic of Hawaii's ability to actually transfer title of the islands. As they should, with the doctrine of ex injuria casting a shadow on any action they take. And if it was a grant of personal property, it would not survive color of title analysis either.

3. Imperialism and Historical Practice

We can look at the U.S. policy of Imperialism apparently preempting domestic and international law, displayed in historic practice. While these examples may have been illegal, they have never been formally challenged.

i. Example: Cherokee Nation Treaty (And Trail of Tears)

Cherokee Nation stretched across Tennessee, Alabama, North Carolina, and Georgia. [1122] The Cherokee Nation adopted aspects of European culture, including plantations, Black slaves, building a capital building, and publishing a newspaper both in Cherokee and English. [1123] [1124] The Nation adopted a constitution in 1827 and elected a wealthy, Christian, mixed-race president, John Ross. [1125] The State entered many treaties with the U.S. federal government. [1126]

In 1826, the U.S. state of Georgia demanded the Cherokee Nation's land and even though the Supreme Court found Georgia's demand unconstitutional and in conflict with existing treaties[1127], Andrew Jackson stepped in and supported Georgia's demands. [1128]

A Cherokee named John Ridge represented a faction group within Cherokee Nation and bypassed the elected tribal government and signed a treaty with the U.S. federal government on behalf

[1120] Mr. Marcy to Mr. Gregg, No 6, Foreign Relations of the United States, Affairs in Hawaii, 1854, https://history.state.gov/historicaldocuments/frus1894app2/d38
[1121] Mr. Marcy to Mr. Gregg, No 6, Foreign Relations of the United States, Affairs in Hawaii, 1854, https://history.state.gov/historicaldocuments/frus1894app2/d38
[1122] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)
[1123] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)
[1124] Theresa A Martinez, Our Most Neglected Story: American History, Utah B.J 12 ()
[1125] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)
[1126] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)
[1127] Theresa A Martinez, Our Most Neglected Story: American History, Utah B.J 12 ()
[1128] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)

of the Cherokee Nation to exchange their homeland for new territory west of the Mississippi. [1129] Ridge imprisoned President Ross and formed a new government with the support of 75 citizens (out of 17,000 total). [1130] Ridge and his faction moved west voluntarily.

The "Trail of Tears" followed. 7,000 soldiers were sent to round up the remaining Cherokees into concentration camps, and then forced to walk 850 miles west. [1131] [1132] 4,000 Cherokees died of disease, starvation, and exposure at the camps and during the march. [1133] The U.S. seemed to understand Ridge was not the Sovereign, but contracted with him as one anyways.

ii. *Example: Spanish-American War and the Transfer of the Philippines*

The U.S. Congress declared a state of war on Spain in 1898, starting the "Spanish-American War." However, the U.S was a late comer, entering an existing war that started as an empire-wide revolt by Spain's colonial subjects.[1134] Spain's war with the Philippines started in 1896 (not counting decades of earlier uprisings). [1135]

The U.S. joined the Philippine independence movement, orally guaranteeing to support Filipino independence. [1136] Filipino military leader and revolutionary Emilo Aguindaldo had already liberated most major Filipino cities, and now with U.S. support laid siege to Manila as part of the "Independence war of the Philippines." [1137]

The independence army was winning and offered terms of surrender to the Spanish army, who rejected them and instead secretly conspired with U.S. troops to stage a mock battle where they would lose and then surrender to the U.S. instead of the Filipinos. [1138] When Manila fell to the U.S. and Filipinos, Aguindaldo quickly went to work building a new government: issuing a declaration of independence, raising a new flag, staring a newspaper, playing the Philippines national anthem, issuing currency, and appointing diplomats. [1139]

[1129] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)
[1130] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)
[1131] Nathan Goetting, The Marshall Trilogy and the Constitutional Dehumanization of American Indians, 65 Guild Prac. 207 (Winter 2008)
[1132] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)
[1133] Nathan Goetting, The Marshall Trilogy and the Constitutional Dehumanization of American Indians, 65 Guild Prac. 207 (Winter 2008)
[1134] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)
[1135] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)
[1136] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)
[1137] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)
[1138] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)
[1139] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)

All the while, unbeknownst to Aguindaldo, Spain signed the *Treaty of Paris* with the United States, purportedly transferring the Philippines to the U.S. for $20 million along with Puerto Rico and Guam for free. [1140] The drafted treaty stated "The present treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate."[1141]

U.S. opponents denounced the treaty as an imperialist grab of distant land that shamed American ideals and overextended American power.[1142] Senator Hoar of Massachusetts warned it would turn the U.S. into a "vulgar common place empire." [1143] However, the treaty was ratified 57:27 (barely more than 2/3), for two reasons: to support the soldiers fighting the war and to gain better access to China's markets. [1144]

When Spain lost to the U.S. and the Philippines, the title to the Philippines did not clearly belong to Spain. [1145] Arguably, the title belonged to the new, independent Filipino government and as such, Spain had no title to transfer to the U.S. despite McKinley proudly declaring that the Filipinos must recognize the military occupation and authority of the United States. [1146] However, the U.S. may have received their title via conquest during the bloody and long Philippine-American War that followed.

F. The Problem of the Existing Treaties

The U.S. Congress already admitted that when "the United States Minister thereupon extended diplomatic recognition to the Provisional Government that was formed by the conspirators without the consent of the Native Hawaiian people or the lawful Government of Hawai'i and in violation of treaties between the two nations."[1147]

As previously discussed, the U.S. had several treaties in enforce with the Hawaiian Islands in 1893. One of which, the "Treaty of Friendship, Commerce, and Navigation" said: "there shall be perpetual peace and amity between the United State and the King of the Hawaiian Islands, his heirs and his successors." [1148] This and the other treaties still reside on their "expensive, highly durable paper" in the

[1140] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)
[1141] Treaty of Peace Between the United States and Spain; December 10, 1898. Yale Law School Library, https://avalon.law.yale.edu/19th_century/sp1898.asp
[1142] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2006)
[1143] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2006)
[1144] Stephen Kinzer, Overthrow: America's Century of Regime Change from Hawaii to Iraq (2006)
[1145] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)
[1146] Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019)
[1147] U.S. Public Law 103-150 (107 STAT. 1511)
[1148] Articles of Arrangement Between the United States and The Sandwich Islands (Hawaii)

National Archives of the United States.[1149] The most binding species of treaties concern some perpetual union of several States. [1150]

Looking at the U.S.' annexation of Hawai'i – it is illogical for a State to simultaneously abrogate a treaty respecting the sovereign authority of another State, while unilaterally imposing jurisdiction over that State.[1151]

1. International Law on Breach and Treaty Conflicts

Breach of international agreements may occur when State's actions or omissions are incompatible with an obligation grounded in a treaty.[1152] Inured states may demand reparation, engage in counter measures, or invoke breach as grounds for terminating the treaty or suspecting operations in whole or part. [1153] However, obligations entered by an actual government cannot be simply repudiated by a later government in the same State.[1154]

The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty. [1155] The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty. [1156] A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and it appears from the later treaty that the parties intended that the matter should be governed by that treaty or the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.[1157] If a party desires to terminate or withdraw from a treaty, they must make their notification in writing, in pursuant to the provisions of the treaty, and signed by a representative of the State with the power to do so.[1158]

[1149] Tom Coffman, Nation Within: The History of the American Occupation of Hawai'i (2016)
[1150] Our Unconventional Founding, 62 U Chi Li Rev, 475, 573 (1995)
[1151] Eric Steven O'Malley, Irreconcilable Rights and the Question of Hawaiian Statehood, 89 Geo. L.J. 501 (2001)
[1152] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[1153] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[1154] Chief Justice Taft ruling *in Great Britain v Costa Rica*, AJIL 147 (1924)
[1155] Vienna Convention on the Law of Treaties, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf
[1156] Vienna Convention on the Law of Treaties, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf
[1157] Vienna Convention on the Law of Treaties, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf
[1158] Vienna Convention on the Law of Treaties, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

In the 19th century, the Doctrine of Clausaula Rebus Sic Stantibus added an implied clause to treaties that the treaty is only binding "so long as things stand as they are" and is not-binding if there is a vital change of circumstances. [1159] The doctrine was later rejected by the drafters of the Vienna Convention, and even in the 19th century, it was only upheld when there was more than simply new and unforeseen circumstances that become unexpectedly burdensome. [1160] Instead, the change must be a "disappearance of the foundation upon which the treaty rests." [1161]

2. U.S. Law on Conflicts of Law & Treaties

When an act of Congress conflicts with a prior treaty, the act controls.[1162] We can learn a bit about historical practice looking at Native American territorial disputes, however the law is a bit different that with foreign nations. The "Marshall Trilogy" of cases (*Johnson v McIntosh, Cherokee Nation v Georgia, and Worcester v Georgia*) explained Native Americans have a right to the land they occupy until that right is extinguished by U.S. Congress, which it can be at any time with just compensation. [1163] Justice Marshall explained the U.S. owns ultimate fee simple title to all of its land, and the Native American tribes may occupy it but, the U.S. government will still have a reversiary interest.[1164] These rulings were based on the Discovery Doctrine, which symbolized the longstanding tradition of racism and religious intolerance inherent in the laws related to Native peoples.[1165] The U.S. government rarely renegs on treaties with American Indians, however more often abrogates when it is convenient to do so, using its ability to extinguish property rights as a way out.[1166]

In 1882, The Chinese Exclusion Act suspended immigration from China for ten years but was found to be in conflict with U.S. and China treaties. [1167] The courts approved habeaus petitions based on the treaty rights, despite the Exclusion Act provisions.[1168] However, six years later in 1888, the U.S. passed

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[1159] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[1160] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[1161] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[1162] *Fong Yue Ting v U.S.,* 149 U.S. 698 (1893).
[1163] Johnson v M'Intosh (1823), Cherokee Nation v Georgia (1831), Worcester v Georgia (1832)
[1164] Johnson v M'Intosh (1823), Cherokee Nation v Georgia (1831), Worcester v Georgia (1832)
[1165] Nathan Goetting, The Marshall Trilogy and the Constitutional Dehumanization of American Indians, 65 Guild Prac. 207 (Winter 2008)
[1166] Sovereignty and Property, 86 NW VL Rev 1 (Fall 1991)
[1167] *In Re Tung Yeong* 19 F 185, 185 (D.C. Cal 1884)
[1168] *In Re Tung Yeong* 19 F 185, 185 (D.C. Cal 1884)

the Scott Act which explicitly said it would not comply with Chinese treaty obligations and the Supreme Court upheld that Act.[1169] The express statement of intent to not comply was enough to pre-empt the treaty obligations.

In 1980 the Supreme Court ruled Native Americans still had ownership of the Black Hills per the Treaty of Fort Laramie, signed 1868.[1170] The Black Hills were a place of prayer and devotion for many Native Americans. [1171] While the U.S. had taken over the land, they had never terminated the treaty. [1172] The Supreme Court found that the government owed the Sioux tribe $17,100,000 in damages. [1173] The tribe requested return of the land instead, which currently hosts "Mount Rushmore," among other U.S federal activities.[1174]

In 2020, the Supreme Court ruled that a significant portion of eastern Oklahoma still belonged to the Creek Nation tribe because the treaties had not been terminated by Congress.[1175] Justice Gorsuch's opinion summarized the argument made by the State of Oklahoma as "Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye" and found it unacceptable, instead using textual analysis instead of historical precedent. [1176] The case doesn't affect landownership, but instead gives the tribe sovereign power to prosecute crimes involving Native Americans with recognition that Congress never disestablished their reservations.[1177] [1178]

3. Friendship, Commerce, and Navigation Treaties

"Friendship, Commerce, and Navigation" (FCN) treaties were a staple of international diplomacy through the 19th and 20th centuries.[1179] Typically they were used to determine the legal status

[1169] *Chae Chan Ping v U.S.* 130 U.S. 581 (1881)
[1170] *United States v Sioux Nation of Indians*, 448 U.S. 371 (1980)
[1171] *United States v Sioux Nation of Indians*, 448 U.S. 371 (1980)
[1172] *United States v Sioux Nation of Indians*, 448 U.S. 371 (1980)
[1173] *United States v Sioux Nation of Indians*, 448 U.S. 371 (1980)
[1174] Amy McKeever, the Heart Breaking History of Mount Rushmore, National Geographic (10/31/2020)
[1175] *McGirt v Oklahoma* 591 U.S. [] (2020)
[1176] *McGirt v Oklahoma* 591 U.S. [] (2020)
[1177] McGirt v. Oklahoma: What the Supreme Court's Native American treaty rights decision is and is not, Denver Business Journal, https://www.bizjournals.com/denver/news/2020/11/04/mcgirt-v-oklahoma-what-the-supreme-court-decided.html
[1178] Chuck Hoskin Jr.: The tribes and the state can solve any problems created by the Supreme Court's McGirt rulings ... but only if we work together , Skiatook Journal, https://tulsaworld.com/community/skiatook/opinion/chuck-hoskin-jr-the-tribes-and-the-state-can-solve-any-problems-created-by-the/article_29649216-1eaf-11eb-a8c1-43388c12a4aa.html
[1179] John F. Coyle, The Treaty of Friendship, Commerce, and Navigation in the Modern Era, 51 Colum J. Transnat'l L 302 (2013)

that each country would grant to citizens of the other country living in its territory along with other general relations.[1180] [1181]

U.S. courts have upheld rights created by "Treaties of Friendship, Commerce, and Navigation" as pre-empting domestic legislation as recently as the 1980s[1182] [1183] and 1990s.[1184] The current friendliness of the partner nation has not disrupted the rights created by the agreement, with treaties enforce even with Serbia and Iran.[1185] While many historical FCN rights have been re-negotiated with new, more specific treaties; general FCN rights still rigorously upheld in courts to this day including issuance of visas, discrimination laws, and employment laws.[1186]

The United States is currently a party to FCN treaties with many nations including: Argentina, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brunei, Colombia, Costa Rica, Croatia, Denmark, Estonia, Ethiopia, Finland, France, Germany, Greece, Honduras, Iran, Ireland, Israel, Italy, Japan, Korea, Kosovo, Latvia, Liberia, Luxembourg, Macedonia, Montenegro, the Netherlands, Norway, Oman, Pakistan, Paraguay, Serbia, Slovenia, Spain, Suriname, Switzerland, Taiwan, Thailand, Togo and the United Kingdom.[1187]

4. Termination of U.S. / Hawaiian Kingdom Treaties

Here, the United States was in four existing treaties with the Hawaiian Kingdom. The 1826, 1849, and 1875 treaties speak of perpetual friendship, peace, and amity between the United States and the Kingdom of Hawaii. [1188] "There shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, his heirs and his successors." [1189]"The United States of America and His Majesty the King of the Hawaiian Islands, equally animated by the desire to strengthen and perpetuate the friendly relations which have heretofore uniformly existed between them…" [1190] The

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[1180] John F. Coyle, The Treaty of Friendship, Commerce, and Navigation in the Modern Era, 51 Colum J. Transnat'l L 302 (2013)
[1181] *Asakura v City of Seattle*, 265 U.S. 332 (1924)
[1182] *MacNamara v Korean Air Lines,* 863 F.2d 1135 (1988)
[1183] *Sumitomo Shoji America, Inc v Avagliano,* 457 U.S. 176 (1982)
[1184] *Papaila v Uniden America Corp*, 51 F.3d 54 (1995)
[1185] John F. Coyle, The Treaty of Friendship, Commerce, and Navigation in the Modern Era, 51 Colum J. Transnat'l L 302 (2013)
[1186] John F. Coyle, The Treaty of Friendship, Commerce, and Navigation in the Modern Era, 51 Colum J. Transnat'l L 302 (2013)
[1187] John F. Coyle, The Treaty of Friendship, Commerce, and Navigation in the Modern Era, 51 Colum J. Transnat'l L 302 (2013)
[1188] Arrangement Between The United States and The Sandwich Islands (Hawaii) (1826)
[1189] Treaty of Friendship, Commerce and Navigation Between Hawaii and The United States (1849)
[1190] Treaty of Reciprocity Between Hawaii and The United States (1875)

language of the treaties are clear. The 1826 treaty provided no termination provision and instead wrote in perpetuity:

> "The peace and friendship subsisting between the United States, and their Majesties, the Queen Regent, and Kaiukiaouli, King of the Sandwich Islands, and their subjects and people, are hereby confirmed, and declared to be perpetual." [1191]

Article XVI of the 1849 treaty stated termination was only possible when:

> *"The present treaty shall be in force from the date of the exchange of the ratifications for the term of ten years, and further, until the end of twelve months after either of the contracting parties shall have given notice to the other of its intention to terminate the same, each of the said contracting parties reserving to itself the right of giving such notice at the end of the said term of ten years, or at any subsequent term. Any citizen or subject of either party infringing the articles of this treaty shall be held responsible for the same and the harmony and good correspondence between the two governments shall not be interrupted thereby, each party engaging in no way to protect the offender or sanction such violation. "*[1192]

Article V of the 1875 treaty states it:

> *"shall remain in force for seven years,- from the date at which it may come into operation; and further, until the expiration of twelve months after either of the high contracting parties shall give notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of the said term of seven years, or at any time thereafter."*[1193]

Article I of the 1884 treaty states that:

> *"the time fixed for the duration of the said convention, shall be definitely extended for a term of seven years from the date of the exchange of ratifications hereof, and further, until expiration of twelve months after either of the High Contracting Parties shall give notice to the other of its wish to terminate the same, each of the High Contracting Parties being at liberty to give such notice to the other at the end of the said term of seven years or at any time thereafter."*[1194]

The 1875 and 1884 treaties are noted on the republished documents to have been terminated "on cession to the United States" but providing no reasoning.[1195]

While in force, these treaties should block the U.S. from annexing the Hawaiian Islands after the U.S. sponsored coup by the Committee of Safety. Instead, the U.S., in showing its "friendship" and

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[1191] Arrangement Between The United States and The Sandwich Islands (Hawaii) (1826)
[1192] Treaty of Friendship, Commerce and Navigation Between Hawaii and The United States (1849)
[1193] Treaty of Reciprocity Between Hawaii and The United States (1875)
[1194] Reciprocity Convention Between Hawaii and The United States (1884)
[1195] However, the 1875 does cite a case "Netherclift v. Robertson 23 Blatch 548" which is from 1886 and as such says nothing about the annexation in 1898. The case is from a New York circuit court and for some reason find the need to add unnecessary editorialization to treaty analysis, referencing the Hawaiian Islands as "a group of lonely and isolated islands far out in the Pacific."

"amity" should have continued its support of the monarchy and ignored the aggressions and flirtation by Dole's militant government.

Even if the 1849, 1876, and 1884 treaties were terminated (and there is no evidence to show that procedure noted was followed), the 1826 treaty was perpetual and could not be terminated other than by the extinguishing of the State. However, the State must be extinguished before the treaty is terminated. Until the treaty is terminated, it remains in force, and as such should block a bad faith and "unclean hands" annexation.

When a government is replaced, it does not destroy the State nor its international obligations, so if the Republic of Hawai'i did replace the monarchy as the de jure government, it would inherit it's treaty obligations. Because of all the illegal and bad faith conduct, it seems very unlikely however, that the Republic of Hawai'i was the "de jure" government even in 1898, and definitely not in 1893.

It could be argued that the drafted annexation treaty on June 6th, 1897 was the U.S.' "notice to terminate" the previous treaties with termination provisions. All three of those treaties give twelve months before notice to terminate is effective. If the U.S. gave notice to terminate on June 6th 1897, the treaty should be terminated on June 6th, 1898 as long as Hawai'i also gave notice to terminate at the same time. The joint resolution was passed on July 4th, 1898 so there's a possible argument the U.S. implicitly withdrew from those three treaties. However that still leaves the 1826 treaty in force, and also seems generally unlikely because if the annexation failed then the U.S. would lose all of it' international agreements with the Hawaiian Islands (including use of Pearl Harbor).

VIII. Prescription and the Hawaiian Islands

A. International Prescription Law

Prescription has been described as "the legitimization of a doubtful title by the passage of time and the presumed acquiescence of the former sovereign."[1196] Sometimes the concept of prescription is referred to as adverse possession, and sometimes simply the "passage of time."

B. U.S. Adverse Possession Law

[1196] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).

In the U.S., every jurisdiction has enacted statutes of limitation that set a period of time after which a landowner cannot take action to recover land from another person in possession of that land.[1197] The goal was to both bar stale claims and promote the effective transfer of land ownership. [1198]

The Supreme Court held in 1837 that the possession of land for a great length of time with no claims, will give the possessor good title.[1199] The court also extended this to apply to sovereigns in international law, and claims of adverse possession would not be bared by sovereign immunity because States "stand in the same relation to each other as individuals do in ordinary cases."[1200]

The court explained that the possession must have endured long enough to overcome a distinct acquiescence on the part of the adverse claimant in the rightfulness of the possession; and what length of possession is necessary for that purpose, must, of course, depend upon the peculiar circumstances of each case. [1201] To give to possession such an effect, it is requisite also, that it should have been held with the knowledge of the adverse claimant; for the fact of possession operates against the party which seeks to disturb it, as presumptive evidence of abandonment; and it furnishes to the party holding it, proof of the same description, and of equal force, in favor of the existence of the right.[1202]

C. Hawaiian Law

The Hawaiian Supreme Court in 1870 recognized Adverse Possession after five years of utilization (an usually short amount of time). [1203] They also applied it to the Crown Lands[1204] and it was very usual to apply Adverse Possession or any statute of limitations against a government.[1205] Under Hawaiian law, the Adverse Possessor must show clear and positive proof that the possession was continuous, actual, open, and notorious, exclusive, and hostile.[1206]

D. Adverse Possession of Hawaiian Islands by the U.S.

[1197] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[1198] Andrew Clapham, Brierly's law of nations: an introduction to the role of international law in international relations (7th ed. 2014).
[1199] *Poole v Fleeger's Lessee,* 36 U.S. 185 (1837).
[1200] *Poole v Fleeger's Lessee,* 36 U.S. 185 (1837).
[1201] *Poole v Fleeger's Lessee,* 36 U.S. 185 (1837).
[1202] *Poole v Fleeger's Lessee,* 36 U.S. 185 (1837).
[1203] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2008)
[1204] *Kahoomanu v Moehonua*, 3 Haw. 635, 640 (1875).
[1205] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2008)
[1206] *Manumand v Rickard*, 4 Haw. 207, 208 (1870).

One could argue that American possession began at the 1887 Bayonet Constitution, or perhaps at the 1893 overthrow, or maybe later at the establishment of the Republic of Hawaii.

However, looking at prescription up to 1900, as is the scope of this article, acquiescence cannot be supported. The Queen and the native people were actively lobbying and protesting the overthrow of the monarchy. The Queen spent much time and energy requesting U.S. assistance to reinstate her as ruling Queen, which in no way supports the "abandonment" looked for by the U.S. Supreme Court in prescription.

IX. U.S. Legal and Policy Interpretation Methods

While it seems unlikely the Supreme Court would hear a case disputing the legality of the 1898 annexation and the case would have better luck in an international court. However, if a case would succeed in a U.S. court, it would need to navigate several U.S. legal and policy interpretation methods.

In order to predict how the U.S. government and courts today might approach the question of the legality of the annexation of Hawai'i in 1898, we need to understand some of the common legal and policy interpretation methods relied upon for foreign affairs issues.

One thing to keep in mind is that there are two questions to answer: the legal title and the political arguments. In complex cases of territorial dispute, courts looks legal arguments to establish a present title and also political policy arguments as to why one side should be awarded title even if the legal evidence does not support it.[1207]

A. Provincialism

Provincialism are rules and doctrines created by U.S. Supreme Court which purposefully or effectively minimize the role of international law in U.S. courts.[1208] These rules and doctrines include standing requirements, subject matter and personal jurisdiction, political question doctrine, lis alibi pendens "dispute elsewhere pending" doctrine, foreign sovereign immunity, forum non conveniens, non self-executing treaties, congressional law superseding pre-existing treaties and customary international law, and the act of state doctrine, to name a few. [1209] U.S. courts may also refuse to hear international law cases, refuse to apply international rules to cases they do hear, or treat international issues as if it

[1207] R. Y. Jennings, Acquisition of Territory in International Law (1963)
[1208] Patrick M. McFadden, Provincialism in United States Courts, 81 Cornell L. Rev 4 (Nov 1995)
[1209] Patrick M. McFadden, Provincialism in United States Courts, 81 Cornell L. Rev 4 (Nov 1995)

were domestic issues. [1210] International law cannot provide the rule for a decision unless the U.S. courts allow the international rule to be recognized in domestic courts.[1211]

B. The Political Question Doctrine

A "political question" is a constitutional issue that federal courts will not decide. Application of these constitutional provisions is instead left to the political branches.[1212] These cases are dismissed as "non-justiciable political questions."[1213] To engage this doctrine the question must be 1) committed to another branch, 2) lack judicially management standards for resolution 3) requires making initial policy determination unsuitable for judicial discretion, 4) undertaking shows lack of respect for other branches, 5) a political decision was already made, or 6) need for a unified voice on foreign affairs.[1214]

The Supreme Court explained that questions respecting the boundaries of States are more of a political question than a legal question.[1215] The courts also explained any questions as to whether land belonged to the U.S. is a political question, not a judicial one. [1216]

There is already precedent on whether the Supreme Court of the United States is willing to decide which government in a U.S. State is legitimate if there are conflicting governments. In fact, that case, *Luther v Borden*,[1217] actually established the "Political Question Doctrine." In 1849, the State of Rhode Island was facing a civil war with two conflicting governments. [1218] The existing government was dominated by Whigs and the rural elite who would not allow universal male suffrage. [1219] Instead Rhode Island was the last U.S. state to require property ownership in order to vote.[1220] Thomas Dorr led a rebellion on behalf of the 60% who could not vote and drafted a new constitution. [1221] Dorr's

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[1210] Patrick M. McFadden, Provincialism in United States Courts, 81 Cornell L. Rev 4 (Nov 1995)
[1211] Patrick M. McFadden, Provincialism in United States Courts, 81 Cornell L. Rev 4 (Nov 1995)
[1212] *Baker v Carr*, 369 U.S. 186 (1962)
[1213] *Baker v Carr*, 369 U.S. 186 (1962)
[1214] *Baker v Carr*, 369 U.S. 186 (1962)
[1215] *Foster and Elam v. Neilson,* 27 U.S. 253 (1829)
[1216] Adam Clanton, *The Men Who Would Be King: Forgotten Challenges to U.S. Sovereignty*, 26 UCLA Pac Basin LJ 1 (Fall 2008).
[1217] *Luther v Borden*, 48 U.S. 1 (1849)
[1218] *Luther v Borden*, 48 U.S. 1 (1849)
[1219] The Dorr Rebellion: When RI Had 2 Govenors, https://www.newenglandhistoricalsociety.com/dorr-rebellion-ri-2-governors/
[1220] The Dorr Rebellion: When RI Had 2 Govenors, https://www.newenglandhistoricalsociety.com/dorr-rebellion-ri-2-governors/
[1221] The Dorr Rebellion: When RI Had 2 Governors, https://www.newenglandhistoricalsociety.com/dorr-rebellion-ri-2-governors/

constitution received 14,000 votes for it and only 100 votes against it. [1222] Dorr and Whig governor both asked President Tyler to identify the legitimate governor of the state, but Tyler refused.[1223] Tyler's administration did not believe the situation had escalated to a point where military intervention was required.[1224] Marital law was declared and Dorr's supporters took up arms in response. [1225] In *Luther v Borden*, the Supreme Court refused to decide which government was legitimate, saying the decision should left to the President and Congress, citing Article IV §4 "having the power to guarantee republican government in the states and to recognize lawful state governments." [1226]

Further, even before *Luther*, federal courts recognized that "determination of sovereignty over a territory is fundamentally a political question beyond the jurisdiction of the courts. Who is the sovereign, *de jure* or *de facto,* of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government."[1227]

Even if the only issue at dispute was the legality of the use of congressional-executive agreement to acquire foreign territory, adjudication of the propriety of congressional-executive agreements has been rare, in significant part because plaintiffs often cannot demonstrate that they have suffered a redressable injury giving them standing or fail to make a justiciable claim.[1228]

This means that if the Supreme Court of the United States was to decide a case questioning if the Provisional Government or the Hawaiian Kingdom as the legitimate government at the time of annexation – the court is likely to refuse to answer the question due to either recognition powers being assigned to the executive branch and/or questions of domestic government legitimacy being a nonjusticiable political question. In fact, several cases have acknowledged that challenging the legality of the State of Hawai'i is a political question and the court did not have the power to decide.[1229] [1230] [1231]

[1222] The Dorr Rebellion: When RI Had 2 Governors, https://www.newenglandhistoricalsociety.com/dorr-rebellion-ri-2-governors/
[1223] The Dorr Rebellion: When RI Had 2 Governors, https://www.newenglandhistoricalsociety.com/dorr-rebellion-ri-2-governors/
[1224] April 9, 1844: Message Regarding Disturbances in Rhode Island, President John Tyler, https://prod.millercenter.org/the-presidency/presidential-speeches/april-9-1844-message-regarding-disturbances-rhode-island
[1225] *Luther v Borden*, 48 U.S. 1 (1849)
[1226] *Luther v Borden*, 48 U.S. 1 (1849)
[1227] *Sai v. Clinton,* 778 F. Supp. 2d 1, 6 (D.D.C. 2011), *aff'd sub nom. Sai v. Obama,* No. 11-5142, 2011 WL 4917030 (D.C. Cir. Sept. 26, 2011)
[1228] International Law and Agreements: Their Effect Upon U.S. Law, Congressional Research Service, 2018
[1229] *Sai v Obama,* U.S. Court of Appeals, District of Columbia Circuit, 2011 WL 4917030 (2011)
[1230] *U.S. Bank Trust, N.A. for LSF8 Master Participation Trust v. Fonoti*, U.S. District Court, D Hawaii 2018 WL 3433295 (2018)
[1231] *Algal Partners, L.P. v Santos*, U.S. District Court, D. Hawaii 2014 WL 1653084

[1232] Further, the court has always decided not to rule on the validity of the Provisional Government at the time of the annexation. In a 2004 state court of appeals ruling (later agreed with by a 2018 District Court ruling) stated, "Whatever may be said regarding the lawfulness of the Provisional Government in 1893, the Republic of Hawai'i in 1894, and the Territory of Hawai'i in 1898, the State of Hawai'i was, on February 9, 2002, and is now, a lawful government."[1233] [1234] In 2011, a District Court wrote that "determining that the annexation of Hawai'i by the United States was unlawful and void" was a political question the court cannot decide.[1235] In the 2011 case, the court writes it could resolve the question through treaty analysis and statutory construction, but they "decline to do so." [1236]

Strangely, both federal and state courts have "decided" the Hawaiian Kingdom is no longer a sovereign State.[1237] [1238] [1239] [1240] Courts have even been so glib as to call a claim of Hawaiian Kingdom citizenship "patently frivolous", whatever that means.[1241] The U.S. Supreme Court has even gone so far as to perform full statutory interpretation on the 1993 Apology Resolution and found only an express disclaimer of claims against the U.S., overturning a decision by the Hawaiian Supreme court to the contrary.[1242] [1243] The Supreme Court also decided to offer additional opinions on the matter, writing that the Resolution reveals no indication Congress intended to amend or repeal Hawaii's rights, and if the Resolution was interpreted to grant Hawai'i sovereignty, it would "raise grave constitutional concerns" if the Resolution would change previous rights (and did not make any mention of the Resolution simply acknowledging what the rights previously were).[1244] Further, the court acknowledged the respondent argued "broader moral and political claims" for "the wrongs of the past" but instead of avoiding the question as a political question, they avoid the issue as a constitutional conflict and instead answer the question with no real answer, simply saying there is no domestic law established to authorize them to review the claims. [1245]

[1232] *Sai v Clinton,* U.S. District Court, District of Columbia 778 F. Supp 2d 1 (2011)
[1233] *State v Fergerstrom*, 106 Hawai'i 43 (2004)
[1234] *U.S. Bank Trust, N.A. for LSF8 Master Participation Trust v. Fonoti*, U.S. District Court, D Hawaii 2018 WL 3433295 (2018)
[1235] *Sai v Clinton,* U.S. District Court, District of Columbia 778 F. Supp 2d 1 (2011)
[1236] *Sai v Clinton,* U.S. District Court, District of Columbia 778 F. Supp 2d 1 (2011)
[1237] *Kingdom v United States,* U.S. District Court, D Hawai'i, 2013 WL 12184696
[1238] *Hawaii/State v French,* Intermediate Court of Appeals of hawai'i, 77 Hawai'i 222 (1994)
[1239] U.S. *v Lorenzo,* 995 F.2d 1448 (9th Cir 1993)
[1240] U.S. *v Lindsey*, U.S. District Court, D. Hawaii 2013 WL 7121226
[1241] *Waikki v Trump,* U.S. District Court, D. Hawaii 2020 WL 4340938
[1242] *Hawaii v Office of Hawaiian Affairs*, 556 U.S. 163 (2009)
[1243] *Penaflor v US*, U.S. District Court, D. Hawaii 2018 WL 6440872
[1244] *Hawaii v Office of Hawaiian Affairs*, 556 U.S. 163 (2009)
[1245] Hawaii v Office of Hawaiian Affairs, 556 U.S. 163 (2009)

Further, precedent and historical practice would require that the political branches of the government would need to make the decision of which government was legitimate and while they are able to interpret international and domestic law in doing so, but are not bound by it like the Supreme Court would be. The political branches did make this decision in 1993 with the Apology Resolution when they declared the Native Hawaiians still have their sovereignty, however it is unclear if any legal recourse was actually created by their acknowledgment. Instead, looking at the current conversations with Hawai'i led by the Department of the Interior (not the Department of State), it appears the political branches do not intend to remedy any legal issues related to the annexation, at lease in the current time.

On the Hawaiian side, their state legislature also passed a bill in 1993 (act 359) documenting the overthrow of Hawaii without the consent of the Hawaiian people, and in violation of treaties and international law, and the 1898 annexation occurred with the consent of the indigenous people of Hawaii.[1246] In 1994, a Hawaiian state court confirmed the 1993 Hawaiian legislation "tacitly recognized the illegal overthrow."[1247]

C. What Does the Constitution Actually Say: Textualism and Originalism

The term "Originalism" was coined in 1980 in a law review article as a "familiar approach to constitution adjudication that accords binding authority to the text of the constitution or the intentions of its adopters."[1248] The U.S. Constitution is supposed to be a legal document transcending the fluctuations of history.[1249] Originalism rejects the desire to adopt interpretations of the Constitution based on policy considerations and political necessity. [1250]

The constitutional interpretation methods of Strict Textualism and Formalism generally ignore historical practice as irrelevant in deciding constitutional questions, instead relying on other sources like the actual text of the Constitution. [1251] Originalists may also ignore history after the founding of the U.S.

[1246] Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? (2008)
[1247] *State v Lorenzo,* 77 Hawaii 219, 221 (Haw App 1994)
[1248] Lawrence B. Solum, *The Fixation Thesis; The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev 1 (2015)
[1249] Lee B. Ackerman, Executive Agreements, the Treaty-Making Clause, and Strict Constructionism, 8 Loy. L.A. L. Rev. 587 (1975).
[1250] Lee B. Ackerman, Executive Agreements, the Treaty-Making Clause, and Strict Constructionism, 8 Loy. L.A. L. Rev. 587 (1975).
[1251] Shalev Roisman, *Constitutional Acquiescence*, 84 Geo. Wash. L. Rev. 668, 703–04 (2016)

and instead exclusively rely on the Founder's understanding of the text while the constitution was written. [1252] However, some use of history is needed to anchor interpretations in the real world. [1253]

A compromise is described by Justice Homes, that "any case before us must be considered in the light of our whole experience and not merely of what was said a hundred years ago" while also interpreting provisions "by considering their origin and the line of their growth." [1254]

Interestingly, a student from Hawai'i met with famously Originalist, Associate Justice Antonin Scalia in 2015 and asked him about the constitutionality of the use of a joint resolution to annex a foreign nation. [1255] Justice Scalia apparently responded that there is nothing in the Constitution prohibiting Congress from annexing a foreign state through a joint resolution. [1256] He understood the resolution as the "same process" was used to acquire the Philippines and Puerto Rico, apparently skipping over the fact those states were the spoils of war.[1257]

D. "We've Always Done It This Way": Historical Practice, Gloss, and Acquiescence

The idea of "historical gloss" has been invoked by the Supreme Court, usually on Separation of Powers issues [1258] (likely because they are non-justiciable and left to the political branches). [1259] Gloss is based on the idea that the actions and interactions of federal government institutions over time can help resolve questions about the constitutional scope of their respective authority.[1260]

Gloss is not a free-standing source of law, but instead is used to help interpret other constitutional materials. [1261] Historical gloss is focused on longstanding governmental practices that have

[1252] Shalev Roisman, *Constitutional Acquiescence*, 84 Geo. Wash. L. Rev. 668, 703–04 (2016)
[1253] Shalev Roisman, *Constitutional Acquiescence*, 84 Geo. Wash. L. Rev. 668, 703–04 (2016)
[1254] *Missouri v Holland*, 252 U.S. 416, 433 (1920); *Gompers v United States* 233 U.S. 604, 610 (1914)
[1255] Supreme Court Justice Antonin Scalia, Hawaii and Annexation, Honolulu Civil Beat, https://www.civilbeat.org/2015/02/supreme-court-justice-antonin-scalia-hawaii-and-annexation/
[1256] Supreme Court Justice Antonin Scalia, Hawaii and Annexation, Honolulu Civil Beat, https://www.civilbeat.org/2015/02/supreme-court-justice-antonin-scalia-hawaii-and-annexation/
[1257] Supreme Court Justice Antonin Scalia, Hawaii and Annexation, Honolulu Civil Beat, https://www.civilbeat.org/2015/02/supreme-court-justice-antonin-scalia-hawaii-and-annexation/
[1258] Curtis A. Bradley and Neil S. Siegel, Historical Gloss, Madisonian Liquidation, and the Originalism Debate, 106 Va. L. Rev. 1, 18 (2020)
[1259] Shalev Roisman, Constitutional Acquiescence, 84 Geo. Wash. L. Rev. 668, 703–04 (2016)
[1260] Curtis A. Bradley and Neil S. Siegel, Historical Gloss, Madisonian Liquidation, and the Originalism Debate, 106 Va. L. Rev. 1, 18 (2020)
[1261] Curtis A. Bradley and Neil S. Siegel, Historical Gloss, Madisonian Liquidation, and the Originalism Debate, 106 Va. L. Rev. 1, 18 (2020)

proven to be stable: practices that have operated for a significant amount of time without generating continued inter-branch contestation.[1262]

As illustrated by *Noel Canning*, there are at least three requirements for gloss: 1) governmental practice; 2) longstanding duration; and 3) acquiescence, at least reasonable stability in the practice but not necessarily inter-branch constitutional agreement.[1263] The case for gloss is strongest when the practice has continued over numerous presidential administrations and has enjoyed the support of both major political parties (because such practices are less likely to be the product of mere partisan politics). [1264]

An issue with this approach frequently privileges the first branch that acts, which then creates reliance interests. [1265] Then, if the reliance interests are given weight in court decisions, it freezes constitutional interpretation, even if circumstances change later. [1266]

Looking to general historical practice to decide a case embodies "a choice not of one day, or one set of people" but rather "a deliberate election of ages and of generations; it is a Constitution made by ... the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time."[1267] Looking to historical practice can be of great interest in foreign relations law because of the limited text in the U.S. constitution allocating power over foreign affairs between the branches of government.[1268]

Longstanding practice refers to interpretations by democratic institutions (Congress, the executive, state legislatures, common law courts, and maybe even juries) over the many decades between the founding and today.[1269] Longstanding practice is the idea that when democratically accountable institutions, state as well as federal, act for many years on the basis of a particular understanding of constitutional principle, that interpretation becomes authoritative. [1270] Courts have

[1262] Curtis A. Bradley and Neil S. Siegel, Historical Gloss, Madisonian Liquidation, and the Originalism Debate, 106 Va. L. Rev. 1, 18 (2020)
[1263] Curtis A. Bradley and Neil S. Siegel, Historical Gloss, Madisonian Liquidation, and the Originalism Debate, 106 Va. L. Rev. 1, 18 (2020)
[1264] Curtis A. Bradley and Neil S. Siegel, Historical Gloss, Madisonian Liquidation, and the Originalism Debate, 106 Va. L. Rev. 1, 18 (2020)
[1265] Shalev Roisman, Constitutional Acquiescence, 84 Geo. Wash. L. Rev. 668, 703–04 (2016)
[1266] Shalev Roisman, Constitutional Acquiescence, 84 Geo. Wash. L. Rev. 668, 703–04 (2016)
[1267] Ernest A. Young, Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law, 58 Wm. and Mary L. Rev. 535, 556 (2016)
[1268] David Gartner, Foreign Relations Strategic Doctrine and Presidential Power, 63 Ala. L Rev 499 (2012)
[1269] Michael W. McConnell, Time, Institutions, and Interpretation, 95 B.U. L. Rev. 1745, 1771 (2015)
[1270] Michael W. McConnell, Time, Institutions, and Interpretation, 95 B.U. L. Rev. 1745, 1771 (2015)

recognized the authority of historical practice with the president's ability to settle international claims,[1271] make recess appointments,[1272] and recognize governments.[1273]

Like Originalism, this approach is historical rather than normative; but instead of viewing the relevant history as a snapshot of a particular moment (the beginning), it views as authoritative the gradually evolving moral and political principles of the nation, as expressed in actual laws, decisions, or practices.[1274] It is a more democratic counterpart to following longstanding judicial precedent. [1275]

Allowing historical gloss and practice weight in court decisions essentially suggests "if a historical practice is deeply entrenched, then it should simply be accepted as lawful, as there is nothing that finding it unconstitutional will do."[1276] International law literature frequently critiques this approach, because it leads to customary international law that focus exclusively on State practice without further normative inquiry, which results in a body of law that is not, in fact "law," but rather a "mere sociological description." [1277] We need some metric to differentiate what the law is from what has happened, or else the law has no independent authority.[1278]

Legislative vetoes were found unconstitutional in *INS v Chadha* (when they violated presentment and bicameralism requirements)[1279] and as such there is now even less justification for using anything but treaties for international agreements, as the major argument was long-term Senate acquiescence. [1280] Chadha rejected acquiescence as a justification in violating the Constitution. Indeed, legislative vetoes were a twentieth-century Congressional innovation[1281] that were tolerated (acquiesced) for some time despite the constitutional violations, until it was brought to the Supreme Court to rectify.

Furthermore, *Chadha*[1282] also established that Congress' powers are not just defined solely by Article I, but they are further limited by other structural constraints of the Constitution.[1283] *New York v*

[1271] *Dames and Moore v Rega*n, 453 U.S. 654 (1981)
[1272] *NLRB v Noel Canning*, 573 U.S. 513 (2014)
[1273] *Zivotofsky v Kerry*, 576 U.S. 1059 (2015)
[1274] Michael W. McConnell, Time, Institutions, and Interpretation, 95 B.U. L. Rev. 1745, 1771 (2015)
[1275] Michael W. McConnell, Time, Institutions, and Interpretation, 95 B.U. L. Rev. 1745, 1771 (2015)
[1276] Shalev Roisman, Constitutional Acquiescence, 84 Geo. Wash. L. Rev. 668, 703 (2016)
[1277] Shalev Roisman, Constitutional Acquiescence, 84 Geo. Wash. L. Rev. 668, 703–04 (2016)
[1278] Shalev Roisman, Constitutional Acquiescence, 84 Geo. Wash. L. Rev. 668, 703–04 (2016)
[1279] *INS v Chadha*, 462 U.S. 919 (1983)
[1280] Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221 (1995)
[1281] Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221 (1995)
[1282] *INS v Chadha*, 462 U.S. 919 (1983)
[1283] Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221 (1995)

U.S. expanded this concept in 1992,[1284] with the Supreme Court stressing that the structure and history of Article 1 reflects the Framer's deliberate decision to limit Congress' lawmaking power to the enactment of laws applying generally and directly to the nation's people, as opposed to enacting directives that commandeer the U.S. States inter-sovereign relationships.[1285]

E. Breaking Bad Judicial Precedent & Historical Practice

When precedent clearly speaks to an issue, it (like other sources of binding law) tends to crowd out practice. [1286] Precedent takes away the discretion and the potential for variation, that otherwise makes consistent practice constitutionally meaningful. [1287] This point is not limited to the Article III context, but applies to gloss-based analysis more generally. [1288] When the Supreme Court weighs in on a question, the political branches have to listen, too, regardless of their prior practices. [1289] Historical practices are most significant in separation of powers disputes where judicial review is most limited. [1290]

There is also an argument for overruling precedent. When courts determine whether to reconsider an established precedent, they consider a list of factors, including: "whether the rule has proven to be intolerable simply in defying practical workability, whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." [1291] [1292] Post-precedent judicial practice, even in the form of public criticism or endorsement, might be relevant to at

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[1284] *New York v U.S.*, 112 S. Ct. 2408, 2419-23 (1992)
[1285] Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221 (1995)
[1286] Joseph Blocher and Margaret H. Lemos, *Practice and Precedent in Historical Gloss Games*, 106 Geo. L.J. Online 1, 9–10 (2016)
[1287] Joseph Blocher and Margaret H. Lemos, *Practice and Precedent in Historical Gloss Games*, 106 Geo. L.J. Online 1, 9–10 (2016)
[1288] Joseph Blocher and Margaret H. Lemos, *Practice and Precedent in Historical Gloss Games*, 106 Geo. L.J. Online 1, 9–10 (2016)
[1289] Joseph Blocher and Margaret H. Lemos, *Practice and Precedent in Historical Gloss Games*, 106 Geo. L.J. Online 1, 9–10 (2016)
[1290] Joseph Blocher and Margaret H. Lemos, *Practice and Precedent in Historical Gloss Games*, 106 Geo. L.J. Online 1, 9–10 (2016)
[1291] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992)
[1292] Joseph Blocher and Margaret H. Lemos, *Practice and Precedent in Historical Gloss Games*, 106 Geo. L.J. Online 1, 9–10 (2016)

least the first, third, and fourth of these factors. [1293] In several pivotal cases, the courts have admitted to errors in historical practice

In 1942 the Supreme Court in *Skinner v Oklahoma* limited a previous decision upholding the practice of eugenics.[1294] In 1927, the court in *Buck v Bell* upheld forced sterilization of the "unfit," including the intellectually disabled.[1295] In *Skinner*, the court wrote about Oklahoma's sterilization laws "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." [1296] Further, government discrimination against the mentally disabled was given an elevated standard review in *Cleburne v Living Center* in 1985 (the judicial review often referred to as "rational basis with bite").[1297] [1298]

In 1946, the federal government finally began to reckon with its past discrimination and crimes against Native Americans. Congress passed the "Indian Claims Commission," a "body designed to hear historic grievances and compensate tribes for lost territories.[1299] The Commission awarded roughly $1.3billion to 176 tribes and bands.[1300] In 2009, the government also passed a formal apology.[1301]

In 1954, the Supreme Court in *Brown v Board of Education* overruled a previous decision (*Plessy v Ferguson*, which allowed racial segregation).[1302] The court in stated "We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal." [1303]

Overruling precedent is not only limited to the courts. The political branches can change path as well. In 1864, Congress finally repealed the 1850 *Fugitive Slave Act* (requiring all escaped slaves to be returned to their masters).[1304] In 1865 Congress passed the 13th and 14th amendments which overturned

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[1293] Joseph Blocher and Margaret H. Lemos, *Practice and Precedent in Historical Gloss Games*, 106 Geo. L.J. Online 1, 9–10 (2016)
[1294] *Skinner v Oklahoma,* 316 U.S. 535 (1942)
[1295] *Buck v Bell*, 274 U.S. 200 (1927)
[1296] *Skinner v Oklahoma,* 316 U.S. 535 (1942)
[1297] *City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432 (1985).
[1298] Gayle Lynn Pettinga, Rational Basis with Bite: Intermediate Scrutiny by Any other Name, Indiana Law Journal: Vol. 62 : Iss. 3 , Article 10. (1987)
[1299] Erin Blakemore, The Thorny History of Reparations in the United States, History, Library of Congress, Aug 29 2019, https://www.history.com/news/reparations-slavery-native-americans-japanese-internment
[1300] Erin Blakemore, The Thorny History of Reparations in the United States, History, Library of Congress, Aug 29 2019, https://www.history.com/news/reparations-slavery-native-americans-japanese-internment
[1301] S.J.Res.14 - A joint resolution to acknowledge a long history of official depredations and ill-conceived policies by the Federal Government regarding Indian tribes and offer an apology to all Native Peoples on behalf of the United States.
[1302] *Brown v Board of Education*, 347 U.S. 483 (1954); *Plessy v Ferguson* 163 U.S. 537 (1896)
[1303] *Brown v Board of Education*, 347 U.S. 483 (1954)
[1304] Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* (Oxford University Press, 2001)

the 1857 the *Dred Scott v Sandford* decision (which had denied U.S. citizenship for all Black people in the United States).[1305] [1306] The *Dred Scott* decision was a contributing factor the American Civil War in 1861.[1307] The *Emancipation Proclamation* was issued by President Lincoln in 1863, making slavery illegal.[1308] In 2007 the U.S. government also apologized for slavery and segregation in a joint resolution of Congress.[1309] The act quoted George W. Bush in saying that slavery "was one of the greatest crimes of history." [1310] There has been increasing discussion regarding reparations for Black Americans, but very few remedies have materialized thus far.

In 1964, the Supreme Court would finally rule to protect civil rights from private discrimination in *Heart of Atlanta Motel v U.S.,* overruling the *Civil Rights Cases* of 1883.[1311] The *Civil Rights Cases* struck down the *Civil Rights Act of 1875* banning racial discrimination in business and public accommodations, saying the 13th and 14th amendments do not allow prohibition of private (non-governmental) discrimination.[1312] Heart of Atlanta upheld the Civil Rights Act of 1964 and the prohibition of private racial discrimination under the Commerce Clause.[1313]

In 1967, the Supreme Court in *Loving v Virginia* struck down Virginia's (and thus all U.S.) anti-miscegenation laws and ended all race-based legal restrictions on marriage, overruling their 1883 decision in *Pace v Alabama*.[1314] The ruling found the discriminatory laws a violation of the 14th amendment.[1315] Anti-miscegenation laws had been in place since colonial times, and were formalized by Southern states during Reconstruction in "Black Codes," one of many types of Jim Crow-era discrimination. Justice Warren, in the 9-0 Loving decision said "Marriage is one of the "basic civil rights of man", fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly

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[1305] *Dred Scott v Sandford,* 60 U.S. 393 (1857)
[1306] David Konig, *The Dred Scott Case: Historical and Contemporary Perspectives on Race and Law*. Ohio University Press (2010)
[1307] David Konig, *The Dred Scott Case: Historical and Contemporary Perspectives on Race and Law*. Ohio University Press (2010)
[1308] Emancipation Proclamation; January 1, 1863, Yale Law School Library, https://avalon.law.yale.edu/19th_century/emancipa.asp
[1309] S. Con. Res. 26 Concurrent Resolution, June 18 2009
[1310] S. Con. Res. 26 Concurrent Resolution, June 18 2009
[1311] *Heart of Atlanta Motel v United States*, 379 U.S. 241 (1964)
[1312] *Civil Rights Cases*, 109 U.S. 3 (1883)
[1313] *Heart of Atlanta Motel v United States*, 379 U.S. 241 (1964)
[1314] *Loving v Virginia*, 388 U.S. 1. (1967); *Pace v Alabama*, 106 U.S. 58 (1883)
[1315] *Loving v Virginia*, 388 U.S. 1. (1967)

subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."[1316]

The political branches can also admit mistake without regards to a judicial decision. In the Iran-Contra hearings for instance, the 1987 Majority Report from the Congressional Committees Investigating the Iran-Contra Affair was damning.[1317] The report concluded:

> *"The common ingredients of the Iran and Contra policies were secrecy, deception, and disdain for the law. A small group of senior officials believed that they alone knew what was right. They viewed knowledge of their actions by others in the Government as a threat to their objectives. They told neither the Secretary of State, the Congress nor the American people of their actions. When exposure was threatened, they destroyed official documents and lied to Cabinet officials, to the public, and to elected representatives in Congress."* [1318]

And went on to admit, "The Administration's departure from democratic processes created the conditions for policy failure, and led to contradictions which undermined the credibility of the United States." [1319] The report also decides on the culpability of the president when it wrote:

> *"Nevertheless, the ultimate responsibility for the events in the Iran-Contra Affair must rest with the President. If the President did not know what his National Security Advisers were doing, he should have. It is his responsibility to communicate unambiguously to his subordinates that they must keep him advised of important actions they take for the Administration. The Constitution requires the President to 'take care that the laws be faithfully executed.' This charge encompasses a responsibility to leave the members of his Administration in no doubt that the rule of law governs... Thus, the question whether the President knew of the diversion is not conclusive on the issue of his responsibility. The President created or at least tolerated an environment where those who did know of the diversion believed with certainty that they were carrying out the President's policies."[1320]*

The minority report takes a different tone and argues,

> *"This history speaks volumes about the Constitution's allocation of powers between the branches. It leaves little, if any, doubt that the President was expected to have the primary role of conducting the foreign policy of the United States. Congressional actions to limit the President in this area therefore should be reviewed with a considerable degree of skepticism. If they interfere with core presidential foreign policy functions, they should be*

[1316] *Loving v Virginia*, 388 U.S. 1. (1967)
[1317] Majority Report, Congressional Committees Investigating the Iran-Contra Affair, Nov 18 1987, https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/h-themajorityreport.php
[1318] Majority Report, Congressional Committees Investigating the Iran-Contra Affair, Nov 18 1987, https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/h-themajorityreport.php
[1319] Majority Report, Congressional Committees Investigating the Iran-Contra Affair, Nov 18 1987, https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/h-themajorityreport.php
[1320] Majority Report, Congressional Committees Investigating the Iran-Contra Affair, Nov 18 1987, https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/h-themajorityreport.php

> *struck down. Moreover, the lesson of our constitutional history is that doubtful cases should be decided in favor of the President."*[1321]

In 1987, Congress also passed the "Civil Liberties Act" which granted reparations for Japanese-Americans who were relocated and forced into internment camps during World War II.[1322] The act granted checks for $20,000 accompanied by letters of apology to over 120,00 Japanese Americans.[1323] The 1944 Supreme Court case approved of the act authorizing the internment, *Executive Order 9066*, *Korematsu v United States*, was never overruled but was repudiated in the 2018 Supreme Court majority opinion in *Trump v Hawaii*.[1324] [1325] Justice Roberts wrote in *Trump*, "The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority."[1326]

In 1997, President Clinton apologized on behalf of the United States to 600 Black men who were experimented upon starting in the 1930s and not being shut down until 1972.[1327] Clinton wrote, "The United States government did something that was wrong—deeply, profoundly, morally wrong… It is not only in remembering that shameful past that we can make amends and repair our nation, but it is in remembering that past that we can build a better present and a better future." These men were subject to a secret experiment by the U.S. government to track the progression of syphilis.[1328] The U.S. government denied any medical care to these men despite the disease progressing to blindness, insanity, and death – and penicillin being a known cure by 1947.[1329] In 1974, the survivors and heirs of those who died received a $10,000,000 settlement and the US. issued new guidelines for government research on human-subjects.[1330]

[1321] Minority Report, Congressional Committees Investigating the Iran-Contra Affair, Nov 1987, https://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/h-thereport.php
[1322] H.R. 442 Civil Liberties Act of 1987
[1323] Isabella Rosario, The Unlikely Story Behind Japanese Americans' Campaign For Reparations, NPR Code Switch, March 24 2020, https://www.npr.org/sections/codeswitch/2020/03/24/820181127/the-unlikely-story-behind-japanese-americans-campaign-for-reparations
[1324] *Korematsu v United States*, 323 U.S. 214 (1944).
[1325] *Trump v Hawaii*, 585 ___ U.S. (2018)
[1326] *Trump v Hawaii*, 585 ___ U.S. (2018)
[1327] Remarks by the President in Apology for Study Done in Tuskegee, The White House, Office of the Press Secretary, May 16 1997, https://www.cdc.gov/tuskegee/clintonp.htm
[1328] Elizabeth Nix, Tuskegee Experiment: The Infamous Syphilis Study, History, National Archives, May 16 2017, https://www.history.com/news/the-infamous-40-year-tuskegee-study
[1329] Elizabeth Nix, Tuskegee Experiment: The Infamous Syphilis Study, History, National Archives, May 16 2017, https://www.history.com/news/the-infamous-40-year-tuskegee-study
[1330] Elizabeth Nix, Tuskegee Experiment: The Infamous Syphilis Study, History, National Archives, May 16 2017, https://www.history.com/news/the-infamous-40-year-tuskegee-study

In 2003, the Supreme Court in *Lawrence v Texas* overruled a previous 1986 case prohibiting private same sex sexual activity (*Bowers v Hardwick*).[1331] [1332] *Bowers* upheld a Georgia law criminalized oral and anal sex by private consenting adults.[1333] *Lawrence* reaffirmed the concept of 14th amendment "right to privacy and personal autonomy" and legalized same-sex sexual activity, including oral and anal sex. [1334] Justice. Kennedy stated, "an integral part of human freedom" for consenting adults to choose to privately engage in sexual activity." [1335] Later in 2015, in *Obergefell v Hodges*, the Supreme Court legalized same sex marriage and explained:

> *"History and tradition guide and discipline [the] inquiry [into what rights are fundamental,] but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present. The nature of injustice is that we may not always see it in our own times. . . . When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."*[1336]

And let us not forget about the actions already taken by the U.S. federal government in relation to Hawai'i. The 1993 "Apology Resolution" was a significant first step in redressing the errors of the U.S. government in relation to the sovereignty of the Hawaiian Islands. In 1920, the U.S. government also passed the Hawaiian Homes Commission Act which established a land trust for Native Hawaiians.[1337] The Act is complicated though, requiring a blood quanta which implicitly discourages mixed-race partnerships, and also relating to land that is remote and unfit for development. [1338] [1339]

This all is not to say the U.S. always rights its wrongs, as many violations of law and ethics have still not been addressed (e.g. much foreign meddling and U.S. sponsored coups), nor have all disastrous Supreme Court rulings been overruled or limited (e.g. *San Antonio Independent School District v Rodriquez* in 1973, *Bucky v Valeo* in 1976, *McCleskey v Kemp* in 1987, *Bush v Gore* in 2000, *Citizens United v FEC* in 2010, *Shelby County v Holder* in 2013, etc.). However, the apologies and remedies thus far are a start and should give hope for eventual future redress by the U.S. for the Hawaiian Islands and other U.S. "possessions" and "maritime prizes."

[1331] *Lawrence v Texas*, 539 U.S. 558 (2003)
[1332] *Bowers v Hardwick*, 478 U.S. 186 (1986)
[1333] *Bowers v Hardwick*, 478 U.S. 186 (1986)
[1334] *Lawrence v Texas*, 539 U.S. 558 (2003)
[1335] *Lawrence v Texas*, 539 U.S. 558 (2003)
[1336] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598, 192 L. Ed. 2d 609 (2015)
[1337] Erin Blakemore, The Thorny History of Reparations in the United States, History, Library of Congress, Aug 29 2019, https://www.history.com/news/reparations-slavery-native-americans-japanese-internment
[1338] The Problem With Hawaiian Homestead Land? Much Of It Can't Be Developed, Honolulu Civil Beat, June 12 2019, https://www.civilbeat.org/2019/06/the-problem-with-hawaiian-homestead-land-much-of-it-cant-be-developed/
[1339] J. Kehaulani Kauanui, Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indigeneity (2008)

X. Conclusion

It is an understatement to say that these events and arguments are complex. We do know, by the U.S.' own admission, that they were involved in the illegal overthrow of the Hawaiian Kingdom. However, we may never get clear and definitive answers to the rest of these questions.

It's also clear that the story of Hawai'i's overthrow is not just a story of Hawai'i, in fact it is a story of American Empire. It's difficult to understand the events in Hawai'i without holding them in context with the U.S.' other expansionist and colonial activities and goals during that era.

What my analysis leads me to believe is that at 1898 the Republic of Hawai'i was at best a de facto government based on a coup d'état, with the monarchy remaining as the de jure sovereign. The Hawaiian Islands State did not cease to exist, it was just a change of government, and thus all existing treaties and international obligations stay in place. So, the existing treaty with the United States where the U.S. agreed to recognize the Hawaiian Kingdom's independence and sovereignty should bar the U.S. from attempting to annex the territory without proper notice to terminate.

Further, annexation via domestic legislation is flawed because Congress does not have Constitutional power to make annexation decisions, domestic legislation does not have extraterritorial reach, and the congressional unilateral conflicts with existing executive foreign policy stances.

Finally, color of title and the disfavor in political meddling by individual citizens make it difficult to say the U.S. annexed Hawai'i in good faith.

However, this analysis was just the first step in unraveling the current state of the Hawaiian Islands today.

A. Next Steps

What is the current legal status of the Hawaiian Islands? Is it a U.S. state or territory? Are the Hawaiian Islands under illegal occupation by the U.S. government?

These are challenging questions to address. First, one must start from the beginning. First look to the history of the Polynesian settlers, then to the American, European, and Asian immigration to the Hawaiian Islands, then to the political and legal events in the 1890s, then to the Hawaiian Homes Commission Act and blood quotas in the 1920s, to the vote for Hawai'i Statehood and related legislation, to the Apology Resolution of 1993, to the Akaka bill and *Rice v Cayetano*, and then to the Department of the Interior's federal recognition activity in the 2010s.

One must then also address an even more challenging question: who is a Hawaiian and what is a Hawai'i nationality? Looking to race, ethnicity, religion, politics, government, history, and duration of residence – one must sift through many conflicting and complicated arguments to approach an answer, of which is there is sure to be more than one.

Finally, one must color the outcome of the preceding questions with yet another question – what is the right way to proceed today? This last question is not only about ethics and legality, but it is also about practicality, safety, and the passage of time.