

Testimony and Appendix of Williamson B.C. Chang, Professor of Law, University of Hawaii at Manoa, William S. Richardson School of Law, on "The Management of Mauna Kea and the Mauna Kea Science Reserve," April 16, 2015, 11:30, University of Hawaii at Hilo. Copyright Williamson Chang, Do not Distribute or Quote without Permission Page 1

The Testimony in Person of Williamson B.C. Chang, Professor of Law, April 16, 2015
[Professor Chang will appear in person at the meeting of the Board of Regents]

Meeting of the University of Hawaii Board of Regents
University of Hawai'i at Hilo
UCB 127, Ho'olulu terrace
200 W. Kawili Street
Hilo, Hawai'i 96720
Fax Number: (808) 956 5156

April 15, 2015

Re: The Management of the Mauna Kea and the Mauna Kea Science Reserve; Testimony of
Professor Williamson B.C. Chang, Professor of Law, William S. Richardson School of
Law, University of Hawai'i at Manoa

Honorable Board of Regents:

I have had the honor and pleasure to serve as a Professor of Law at the University of Hawai'i for the last 39 years. I have served the University and the community well. I am also grateful for the opportunity to serve and work in the University.

Let me start by saying this:

I know a place, I know a country where there would never be a question whether to build an eighteen-story thirty meter telescope on the summit of Mauna Kea. That country, that nation is "Hawai'i."

Before 1893, it would have been unthinkable that the Government of the Kingdom of Hawai'i would ever conceive of such a plan. Yes, Kalakaua loved astronomy. All Hawaiians loved the stars. However, they loved Mauna Kea even more. Mauna Kea is "sacred" it is the Sky-Father it is the essence, the beginning of the creation chant of the Hawaiian people. All Hawaiians, all Islands, even Taro are descendants of Mauna Kea.

When I say "Mauna Kea" is sacred, I do not mean use "sacred" the way most people use that term. I mean "sacred" not in the same sense of worship. I use "sacred" in the sense of "precious" and "so important that nothing else counts"---I apply it to those things and people that we care so much about that we would do anything, even flout and break the law, to preserve their existence.

The child of a parent, especially a young child is "sacred" in this sense. So are parents to their children. So are grandparents. Even the family pet is "sacred." If your house was burning down would you risk your life to go into the burning house to rescue your children, your mother, your grandparents, even your beloved dog or cat? Would you go even if forbidden by first responders, firemen or policemen? Yes, many of us would go without hesitation--without thinking of the consequences. Would you give a kidney to save or extend the life of your child, your brother, your uncle? Would you spend all of your money to save a loved one from cancer? from Lou Gehrig's disease or from a life in prison without parole? Yes, we all would.

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Moreover, we praise such emotions and desires of others who make such sacrifices every day. We understand the soldier who sacrifices himself by instinctively jumping on a grenade. We understand the parent or grandparent who gives all their money to see their child or grandchild through college.

Whether one worships Mauna Kea or not, whether one considers it “sacred” does not matter as much as understanding the instincts that drive those to defend and save Mauna Kea—much as one would understand the absolute love for a child, or a parent even if such acts break the law.

When we see the instinct of family, of brotherhood, of sisterhood of love for mankind in others we celebrate that—we gravitate to that. We love and defend Mauna Kea because it reminds us what makes us human. Sacred is not necessarily a place. It is a relationship, a deep visceral relationship: beyond reason, beyond law, beyond rationality.

The Mauna Kea movement is a movement that has grown because of young people. They live in new confusing world themselves--a world of cognitive dissonance. That is they live within an outright contraction—a Hawaii in decline where there is nothing they can do. They see their world being attacked and destroyed, its water taken, its plants doused with foreign chemicals, its agricultural lands disappear in the name of gentlemen farmers, its open lands used for artillery practice, and its shoreline becoming high-end condominiums that only rich foreigners can afford.

Moreover, to the young, Hawaii is unlivable, there is no viable future: There are no places to rent, no jobs that fit their training, no money for retirement and the endless, life-sapping traffic congestion. And now an eighteen story telescope on Mauna Kea!

It would never be built on other sacred sites: not over the Western Wall, the Dome of the Rock, Angkor Wat, Gettysburg, Arlington, or the Arizona Memorial? No one would think of putting a pair of glasses on the eyes of God. Why then, Mauna Kea? We, and our youth are inundated today with the attacks on the treasures of the earth and why?

So, what happened to this “nation” called Hawaii, where Mauna Kea was loved and adored? Hawaii was a nation, that by a series of events, starting with an overthrow in 1893 and ending with annexation in 1900, by which another nation, the United States, forcefully took the sovereignty of Hawaii.

What do I mean by that?---to take one nation’s sovereignty? Sovereignty is the monopoly of a government on the legitimate use of violence.

By that I mean the State, the police and DLNR are the only ones today who can do so-called “legal” violence to Mauna Kea. Similarly, the police of Hawaii County and the officers DLNR are the only ones who can use the violence of arrest and jail or fine to force down the protectors of Mauna Kea. Protect the mountain and you go to jail. It is legal. It is called law. It is a power possessed only by the sovereign of a nation. There once was a time in Hawaii when that monopoly on the use of legal power protected not defiled Mauna Kea.

In 1893 and 1900 a new Nation took over in Hawaii—a new nation with new rules. These were new rules that had the power to interfere with our very human, emotions and instincts, instincts

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derived over time from our kupuna, our ancestors and the culture of this nation of Hawaii. Hawaii has changed.

Today, government has the legitimate power to do violence to families as well. Government agencies can take a child away from a parent. Government agencies can put a Hawaiian in prison for the smallest of offenses—denying him or her freedom and the chance to be with and raise their families. The world of Hawaii has been turned upside down.

The answer lies in power, that is law—the shift over their lives by which all is reversed. In 1898 the United States, by Joint Resolution took the nation of Hawaii. I am a legal historian. In the appendix attached I show my work---that concludes definitively that the joint resolution had no such power. It was impotent, it was an act of Congress not a treaty. It could no more take Hawaii by a law then Hawaii by a law could take America.

It was a fraud—in created a disease that spread, a malaise we all suffer—called the myth of annexation. We all believe we are part of America, we all act as if that were true. We have been taught that way. We follow the lead of others who act that way.

The truth is that the joint resolution did not give to the United States the monopoly on the use of legitimate violence—a violence to build on Mauna Kea, the violence to arrest those who seek to stop that building. Most of all the University claims Mauna Kea by lease—a lease derived from the Joint Resolution.

It is said that the Joint Resolution gave Mauna Kea to the United States, which gave it to the State, which gave it to the University. As a matter of law that is false. It is a lie. The University has no power over Mauna Kea. It cannot build, it cannot give permits, it cannot arrest us.

The mass of young people are here today in protest because live in a world of cognitive dissonance. They live in a world where they are learning, at the University about the truth of the Joint Resolution, which gives no power, no sovereignty to the state. Outside of their classes they see the State taking what they love--preventing them from running into the burning house to save their Mauna Kea, their father, their sky-father.

And this dissonance makes them ill. It makes our youth sick. It is a crisis that creates mental illness. In short, to build on Mauna Kea is to cast a sickness throughout these islands, a sickness and sadness, not only on Native Hawaiians but on all people who live here.

I have included an appendix, taken from my work, which speaks to the myth of annexation and demonstrates that the Joint Resolution had no capacity to take the Nation of Hawaii. I will place this testimony and my appendix on my “Scholar Space” at Hamilton Library, the University of Hawaii at Manoa, under my name. This is the link to that site:

Mahalo and Mahalo Ke Akua.

Williamson Chang
Professor of Law
University of Hawai'i at Manoa
William S. Richardson School of Law

The Appendix to the Testimony of Williamson B.C. Chang April 16, 2015

“A Rope of Sand:” A Documentary History¹ of the Failure of the United States to Annex the Hawaiian Islands Part I

By Williamson Chang, Professor of Law
University of Hawaii School of Law at Manoa
The William S. Richardson School of Law

A. Introduction:

To the unquestioning eye, Hawaii looks every inch American. English, with an American accent, is the primary mode of speech. The dollar is the currency. Everyone acts as if they are in the United States. On its face, Hawaii is consummately American: Hawaii has for its size the largest military population in the United States.

The Hawaiian Islands purportedly became territory of the United States on July 7, 1898 when President McKinley signed a “Joint Resolution Providing for the Annexation of the Hawaiian Islands by the United States of America,” 30 Stat 750.

The Joint Resolution was merely a bill, that is, an act of Congress. It was not a treaty. Yet, for a century the United States has officially claimed that it is this instrument, an act of Congress, by which the United States acquired the Hawaiian Islands.

The annexation of Hawaii is a myth. The purpose of this article is to present the historical and legal evidence that demonstrates that Hawaii was never acquired by the United States. The United States and the State of Hawaii do not possess sovereignty and jurisdiction over the land and dominion of the Hawaiian Islands.

There are five statutes or laws of the United States and the State of Hawaii that support this claim. These five are divided into two parts.

Part I presents an analysis of two acts or statutes: (1) the various treaty claims and (2) the Joint Resolution.

Part II examines two statutes of the United States Congress, one in 1900, the other in 1959, as well as the Constitution of the State of Hawaii. All three statutes confirm the conclusions reached in Part

¹ This is a “documentary history” in the sense that a large proportion of the material presented consists of the government records, documents from the Library of Congress and materials from the Hawaii Archives. This is a historical examination of annexation and the legislative history of Statehood. These documents are included knowing that many people want to see the actual words and sources I rely on.

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I. the Joint Resolution did not acquire the Hawaiian Islands. The three statutes in Part II demonstrate that by the laws of the United States Congress and the Constitution of Hawaii the Hawaiian Islands have been explicitly excluded from the United States and the State of Hawaii.²

This article relies heavily on primary resource material. Much of this primary material is taken from sources more than a century old. A century ago, it was widely known that the United States could not acquire Hawaii by a Joint Resolution.

Proof lies in the Senate debate on the Joint Resolution. The Senate debate on the Joint Resolution was filled with speeches asserting the Joint Resolution had no capacity to acquire Hawaii. Moreover, there was no treaty of cession however formulated: The necessary “meeting of the minds” for such a treaty never existed between the Republic of Hawaii and the United States.

The legislative history of the Joint Resolution shows that the Joint Resolution had no capacity to acquire Hawaii---that is the “meaning” of the Joint Resolution. The appearance that Hawaii is territory of Hawaii has been created by deception, coercion and law.

We have forgotten the voices that spoke so passionately against the annexation of Hawaii---voices like that of Senator William V. Allen of Nebraska. Senator Allen was, perhaps, the loudest and most adamant opponent of the Joint Resolution during the 1898 debate. When Congress, finished with annexation, was discussing the creation of a government for Hawaii Senator Allen was still a member of the Senate.

One day in 1900, during the discussion of the Organic Act, Senator Allen simply had enough. No longer could he sit still while his colleagues discussed a government for Hawaii, acting as if the Joint Resolution had actually acquired Hawaii. No longer could Senator Allen remain silent among other Senators who acted as if their actions would never be known to the world. That day, Senator William V. Allen would rise and provide one of the most memorable speeches in Senate history. Then he would walk out. The following words are taken from the verbatim record in the Congressional Record of 1900.

Mr. Allen: I shall vote against this bill from top to bottom. . .

But the thing I object to most of all, Mr. President is the wild unrestrained dream for power, to acquire somebody to get hold of people who do not belong to us, whether they contaminate us or not. Have re reached that period in our history of our country that all of the glories and the sacred limitations must go down in dust that we may extend our commerce as I heard, the Senator from South Carolina [Mr. McLaurin] argue this afternoon? . . .

The Constitution is a mere rope of sand. So say some of these gentlemen, and the decisions of the Supreme Court construing the Constitution throughout the history of our nation have no force, according to their opinion. . . .

²In Part II, I present three statutes of the United States and the State of Hawaii that make clear, that the Hawaiian Islands were never acquired by the United States. Such evidence confirms the conclusions in Part I. There was no annexation. There was no treaty of cession of any kind and the Joint Resolution lacked the capacity to acquire the Hawaiian Islands.

The whole course of our nation, which has been to build up a strong domestic government and keep us free from alliances that will bring about nothing but contamination and injury to the country, is to be abandoned . . .

Mr. Spooner. The Senator, I believe voted against the annexation of Hawaii.

Mr. Allen. I did.

Mr. Spooner. So did I, Mr. President,. . .but Hawaii was annexed; the Congress of the United States made it a part of the United States and we are now engaged in framing for it a government as part of the United States.

Mr. Allen. I utterly repudiate the power of Congress to annex the Hawaiian Islands by a joint resolution such as passed the Senate. It is ipso facto null and void.

Mr. Spooner: But that is a political question,³ not subject to judicial review.

Mr. Allen: It could be made the subject of review by the courts. It could very easily be made the subject of review by quo warranto or some other process.

Mr. Spooner: Quo warranto? How? The Hawaiian Islands were annexed to the United States by a joint resolution passed by Congress. I reassert, although my distinguished legal friend, the Senator from Nebraska is absent, that that was a political question and it will never be reviewed by the Supreme Court or any other judicial tribunal. That is too well settled to admit of any doubt except perhaps Nebraska.

Today, we ask the same questions. Was the Joint Resolution a “Rope of Sand?”-- A necklace of sand, not a binding rope, -- with no power to take, hold and acquire Hawaii? Is the Joint Resolution ipso facto null and void? Will the Courts of the United States and the State of Hawaii ignore any challenge to the legitimacy of annexation under the “political question doctrine”? Or, will it be possible, as Senator Allen suggests, to challenge the Joint Resolution and annexation by a writ of “quo warranto” [a legal writ which demands proof of authority or power—literally--“by what right?”]?

The Joint Resolution was indeed a “Rope of Sand,” it had no power, as mere legislation of the United States to acquire the dominion of the foreign, sovereign and independent nation of Hawaii. If the United States could acquire Hawaii by legislation; Hawaii too, could acquire the United States by an act of its own legislature.

As Senator Spooner of Wisconsin suggested in the dialogue above, the courts of the United States and the State of Hawaii have and will apply the “political question” doctrine. The Courts of the

³ Under the “political question” doctrine, the Supreme Court will not review “political questions” such as the actions of the Executive branch as to foreign affairs--including questions as to the dominion of the United States.

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United States and State of Hawaii will adopt any means to avoid ruling on the validity and legal effect of the Joint Resolution.

However, to do so they have to ignore their own laws and disregard the foundation of law which calls for a nation governed by the "rule of law." In the case of Hawaii, the United States is no longer acting within the realm of law. Without explanation, Federal and State courts since 1900 have simply ignored the obligation to take judicial notice of the limitations of their own boundary statutes---statutes which clearly deny them jurisdiction and sovereignty over Hawaii.

Can sovereignty and jurisdiction be challenged by a writ of quo warranto as Senator Allen suggests? The writ of quo warranto is similar to a motion to dismiss for want of subject matter jurisdiction. The writ of quo warranto⁴ is an old common law writ which allows a party to demand of an official, or a judge that he or she present the credentials that proves his or her authority to hold office.

It could used, for example, to demand that the President of the University of Hawaii, or its Board of Regents, show their chain of authority which empowers them to issue a permit for the Thirty Meter Telescope on Mauna Kea.

The writ of quo warranto is similar to the modern motion to dismiss for want of subject matter jurisdiction---including territorial jurisdiction. Such motions are common today. They are part of the Federal Rules of Civil Procedure. Subject matter and territorial jurisdiction can be raised at any time, by any part, including the Court sua sponte.

A motion to dismiss for lack of subject matter jurisdiction could be used to challenge the power of the Department of Land and Natural Resources to grant a conservation district permit for the construction of the Thirty Meter Telescope on Mauna Kea.

Most important, the burden of proving territorial sovereignty rests upon the party that claims such sovereignty. This principle is embedded in section 12(b) of the Federal Rules of Civil Procedure. In an *in rem* cases as to property, such as action to quiet or prove title, it is a critical burden. This burden of proof is established in international law,⁵ the laws of the United States,⁶ and the laws of the State of Hawaii.⁷

⁴ Quo warranto (Medieval Latin for "by what right?") is a prerogative writ requiring the person to whom it is directed to show what authority they have for exercising some right or power (or "franchise") they claim to hold.

⁵ The party claiming dominion or sovereignty has the burden of proof. See Case Concerning Sovereignty over Pedra Branca/Pulau Puteh, Middle Rocks and South Ledge ((Malaysia/Singapore) General list No. 130, International Court of Justice Slip Opinion page 13 12 May 2008:

Malaysia appears to forget that 'the burden of proof in respect of [the facts and contentions on which the respective claims of the Parties are based] will of course lie on the Party asserting or putting them forward. (Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962, p. 16); it is thus for Malaysia to show that Johor could demonstrate some title to Pedra Branca, yet it has done no such thing."

See also *Minquiers and Ecrehos Case*, (United Kingdom and France) 1953 ICJ Lexis 5 November 17, 1953; Judgment

In addition, the question of burden of proof was reserved: each Party therefore had to prove its alleged title and the facts upon which it relied.

The Court then examined the titles invoked by both Parties.

See *Case Concerning Territorial And Maritime Dispute Between Nicaragua And Honduras In The Caribbean Sea (Nicaragua V. Honduras)* 2007 ICJ Lexis 1, 8 October 2007; *Case Concerning Sovereignty Over Pulau Ligitan And Pulau Sipadan (Indonesia/Malaysia)* 2002 ICJ LEXIS 6 17 December 2002; *Case Concerning Maritime Delimitation In The Area Between Greenland And Jan Ma Yen (Denmark V. Norway)* 1993 ICJ Lexis 214 June 1993; *Case Concerning Delimitation Of The Maritime Boundary In The Gulf Of Maine Area (Canada/United States Of America)* 1984 ICJ Lexis 412 October 1984;

⁶*Durfee v. Duke*, 375 U.S. 106 (1963), *New Jersey v. New York*, 523 U.S. 767 (1998), *Illinois v. Kentucky*, 500 U.S. 380, 384 (1991):

"Although Kentucky has styled its acquiescence claim an affirmative defense, this "defense," if successfully proved, would not only counter Illinois' boundary claim but also establish Kentucky's own position. To do this on a theory of prescription and acquiescence, Kentucky would need to show by a preponderance of the evidence, first, a long and continuous possession of, and assertion of sovereignty over, the territory delimited by the transient low-water mark. [HN3]

"Longstanding "possession and dominion are essential elements of a claim of sovereignty by prescription and acquiescence." *Georgia v. South Carolina*, 497 U.S. 376, 389, 111 L. Ed. 2d 309, 110 S. Ct. 2903 (1990). Kentucky would then have the burden to prove Illinois' long acquiescence in those acts of possession and jurisdiction. As we stated in *Oklahoma v. Texas*, 272 U.S. 21, 47, 71 L. Ed. 145, 47 S. Ct. 9 (1926), [HN4] there is a "general principle of public law" that, as between States, a "long acquiescence in the possession of territory under a claim of right and in the exercise of dominion and sovereignty over it, is conclusive of the rightful authority." See also *Georgia v. South Carolina*, supra, at 389 ("Long [*385] acquiescence in the practical location of an interstate boundary, and possession in accordance therewith, often has been used as an aid in resolving boundary disputes" between States."

And see *Oklahoma v Texas* 260 U.S. 606, 638 (1923)[as to disputed boundary];

Common experience suggests that there probably have been changes in this stretch of the Red River since 1821, but they cannot be merely conjectured. The party asserting material changes should carry the burden of proving them, whether they be recent or old. Some changes are shown here and conceded. Others are asserted on one side and denied on the other.

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Hawaii in 1843 was recognized as a sovereign and independent nation equal to that of the United States. By the presumption of continuity in international law, the sovereignty nation of Hawaii was not extinguished by the overthrow in 1893. That was a change of governments. It did not extinguish the sovereignty of the Hawaii any more than the overthrow of one regime in Iraq extinguishes the nation of Iraq.

The United States claims, in the words of its Official Historian, that the United States annexed Hawaii by a Joint Resolution. The Department of State publicly states on the Department’s website:

The McKinley Administration also used the war as a pretext to annex the independent state of Hawaii. In 1893, a group of Hawaii-based planters and businessmen led a coup against Queen Liliuokalani and established a new government. They promptly sought annexation by the United States, but President Grover Cleveland rejected their requests. In 1898, however, President McKinley and the American public were more favorably disposed toward acquiring the islands.

⁷see C.A.B. v. Island Airlines, 352 F.2d 735, 741 (9th Cir. 1965) [“. . . the burden of proof is thus logically an emphatically placed upon the claimant state.”]; United States v. 0.08246 Acres of Land 888 F. Supp. 693 (E.D. Pa., 1995):

Consequently, on balance, after careful consideration of the detailed exhibits submitted by the parties, the testimony presented at the hearing, and the parties' trial and post-trial memoranda, we find that plaintiff has overwhelmingly met its burden of proof and hold that Court House Square did indeed exist in 1864 at the southwest corner [**53] of Hamilton and Margaret Streets; that ownership of the Square was in the public at that time; and the signatories of the 1864 Agreement at no time possessed any ownership rights in the Square, a part of which is now the condemned property and the subject of this action. 20

⁷ See Makila Land Co., LLC. V. Kapu, 114 Haw. 56; 156 P.3d 482; (Intermediate Court of Appeals 2006):

In an action to quiet title, the burden is on the plaintiff to prove title in and to the land in dispute, and, absent such proof, it is unnecessary for the defendant to make any showing. State v. Zimring, 58 Haw. 106, 110, 566 P.2d 725, 729 (1977) (citations omitted). The plaintiff has the burden to prove either that he has paper title to the property or that he holds title by adverse possession. Hustace v. Jones, 2 Haw.App. 234, 629 P.2d 1151 (1981); see also Harrison v. Davis, 22 Haw. 51, 54 (1914). While it is not necessary for the plaintiff to have perfect title to establish a prima facie case, he must at least prove that he has a substantial interest in the property and that his title is superior to that of the defendants. Shilts v. Young, 643 P.2d 686, 689 (Alaska 1981). Accord Rohner v. Neville, 230 Ore. 31, 35, 365 P.2d 614, 618 (1961), reh'g denied, 230 Ore. 31, 368 P.2d 391 (1962)

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Supporters of annexation argued that Hawaii was vital to the U.S. economy, that it would serve as a strategic base that could help protect U.S. interests in Asia, and that other nations were intent on taking over the islands if the United States did not.

At McKinley’s request, a joint resolution of Congress made Hawaii a U.S. territory on August 12, 1898.⁸

The Joint Resolution was not a treaty of cession. It was merely a bill or an act of Congress. Under the principle of the equality of sovereignty among nations, the Joint Resolution had no power to acquire the real property and dominion of a foreign, sovereign and independent nation. The Republic of Hawaii never consented to or ratified the Joint Resolution. The Joint Resolution, had no power to annex⁹ the Hawaiian Islands.

B. The Pervasiveness of the Myth of Annexation:

The myth of annexation has become pervasive. Annexation, for most, is unquestioned. Although The United States Supreme Court, like other Federal Courts, has taken jurisdiction as to cases from Hawaii on many occasions, it has never directly examined or ruled on the capacity or constitutionality of the Joint Resolution. In a 1900 case, the Supreme Court stated, in dicta, that Hawaii was acquired by the Joint Resolution.¹⁰

⁸ See United States Department of State, Office of the Historian, Milestones, Milestones: 1866–1898 The Spanish-American War, 1898 <http://history.state.gov/milestones/1866-1898/spanish-american-war> [Last Visited February 22, 2015 1:30 PM HST]. The website describing the Annexation of Hawaii was taken down in the Fall of 2014: Annexation of Hawaii, 1898

“Notice to readers: This article has been removed pending review to ensure it meets our standards for accuracy and clarity. The revised article will be posted as soon as it is ready. In the meantime, we apologize for any inconvenience, and we thank you for your patience.”

<http://history.state.gov/milestones/1866-1898/hawaii>. [Last Visited February 22, 2015 1:25 PM HST]

⁹ The term “Annex” has many meanings and is not a precise legal term. In various contexts it has been used to describe acquisition of territory by conquest, by inheritance, by treaty of cession, by gift, by prescription or even transfer of deed. In this article “annex” is limited to mean “acquire”.

¹⁰ *Downes v. Bidwell*, 182 U.S. 244 (1901)“ . . . after reviewing the cases of Louisiana and Florida with reference to their transition periods, spoke of Hawaii in much the same way as follows: So in the act annexing the Republic of Hawaii, there as a provision continuing in effect the custom relations of the Hawaiian Islands with the United States and other countries, the effect of which was to compel the collection.”

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Three years later in 1903 the Court in Hawaii v. Mankichi 190 U.S. 197 (1903), assumed, without analysis, that Hawaii was territory of the United States. Hawaii v. Mankichi raised issues as to whether the Joint Resolution imposed the Bill of Rights of the United States Constitution in Hawaii as of the date of the Joint Resolution, July 7, 1898. Justice Brown wrote on behalf of the judges who formed the plurality in denying the application of the fifth and sixth amendment of the Constitution.

Without any analysis, Justice Brown simply stated that the Joint Resolution annexed Hawaii. . Justice Brown simply stated.

By a joint resolution adopted by Congress, July 7, 1898, 30 Stat. 750, known as the Newlands Resolution, and with the consent of the Republic of Hawaii, signified in the manner provided in their constitution, the Hawaiian Islands and their dependencies were annexed “as part of the Territory of the United States and subject to the sovereign dominion thereof,”

Justice Brown went on to state that:

“ . . . though the Resolution was passed July 7, the formal transfer was not made until August 12, when at noon that day, the American flag was raised over government house, and the islands ceded with appropriate ceremonies to a representative of the United States.”¹¹

Under the conditions named in this resolution, the Hawaiian Islands remained under the name of the Republic of Hawaii until June 14, 1900, when they were formally incorporated by act of Congress under the name of the “Territory of Hawaii.” By this act, the Constitution was formally extended to these islands, section 5, and special provisions were made for empanelling grand juries and for unanimous verdicts of petit juries.

Justice Brown then adopted the dicta in the 1900 case of Downes v. Bidwell:

“ . . . the joint resolution established jurisdiction over Hawaii and the Organic Act incorporated the territory as part of the United States.”

In other words, it was a two-step annexation. As stated in its title: “Joint Resolution Providing for the Annexation of the Hawaiian Islands by the United States of America,” the Joint Resolution did not annex Hawaii it merely *provided* for the [future] annexation of Hawaii. That was the first step.

The second step was the enactment of the Organic Act, “An Act to Provide for the Territory of Hawaii,” (Act of April 30, 1900) 31 Stat 141. Thus, in so many words, the United States conceded that the Joint Resolution had no power to acquire the Hawaiian Islands. The United States held two “annexation ceremonies,” one on August 12, 1898 recognizing the effect of the Joint Resolution [providing for the Territory of Hawaii] and one on June 14, 1900, recognizing the effect of the Organic Act [establishing the Territory of Hawaii.]

¹¹ This statement blurs the “effective date” of annexation. The effective date should be July 7, 1898. By referring to the ceremonies, he implies that the oral expressions of offer and acceptance made on August 12, 1898 confirmed the Joint Resolution.

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Yet, both the Joint Resolution and the Organic Act were merely acts of Congress, not treaties. Neither had the power to acquire the territorial dominion of a foreign sovereign nation—the nation of Hawaii.

In Mankichi, one opinion, a dissenting opinion by Justice Harlan, attempted to explain how the United States acquired Hawaii. Justice Harlan asserted that the “purposes of the Treaty of Annexation of 1897, [which never took effect for lack of ratification by the United States] were fulfilled by the Joint Resolution.” Harlan’s theory was that the Treaty of 1897 was “ratified” by the later Joint Resolution of 1898.¹² These are two different instruments. The United States never ratified the Treaty of 1897. The Republic of Hawaii never consented to or ratified the Joint Resolution of 1898. There was no instrument which both nations ratified. Moreover, the terms of the two instruments were different.

In the Supreme Court cases that have followed, the propriety of United States and State jurisdiction over the Hawaiian Islands has simply been assumed.¹³ For example, the United States Supreme began its decision, in Rice v Cayetano in 2000 by referring to the annexation of Hawaii:

In 1898, President McKinley signed a Joint Resolution, sometimes called the Newlands Resolution, to annex the Hawaiian Islands as territory of the United States. 30 Stat.750....

This brings us to Justice Scalia who was outspoken in Rice v. Cayetano.

C Justice Scalia on the Annexation of Hawaii

Apparently, the myth of annexation is now pervasive among the Justices of the Supreme Court. Justice Antonin Scalia of the United States Supreme Court recently aired his opinions on the legality and constitutionality of the annexation of Hawaii. The opinions and views of Justice Scalia are critical to the fate of Native Hawaiians. His legal position on the issues in Rice v. Cayetano¹⁴

¹²As I discuss later, this theory is erroneous. Article VII of the Treaty of 1897 requires ratification by the United States Senate, not by a congressional Joint Resolution.

¹³ In the Island Airlines litigation, the Federal Court held that Hawaii was acquired by a “Treaty” whereby the Joint Resolution ratified the offer of cession made by the Republic of Hawaii by its ratification, in September of 1897, of the Treaty of 1897:

Annexation was effected by a cession made by the Republic of Hawaii by ratification by the Senate of the Republic on September 9, 1897 of a treaty, Article I of which provided:

"Article I. The Republic of Hawaii hereby cedes absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies; and it is agreed that all the territory of and appertaining to the Republic of Hawaii is hereby annexed to the United States of America under the name

C.A.B. v. Island Airlines, 352 F.2d 735, 741 (9th Cir. 1965)

¹⁴ Rice v. Cayetano 528 U.S. 495 (2000) (Justice Scalia was part of majority) Rice v. Cayetano held unconstitutional the voting system electing trustees to the Office of Hawaiian Affairs. By that

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altered our understanding of the concept of being a Native Hawaiian and fomented the need for Federal Recognition of Hawaiian

Justice Scalia’s statements to a George Washington University Native Hawaiian student, on February 11, 2015, were recently published in “Civil Beat,” the daily Honolulu, on-line newspaper. On February 11, 2015, Jacob Aki, of George Washington University asked Justice Scalia, who was speaking at George Washington University, the following question:

“Does the Constitution provide Congress the power to annex a foreign nation through a Joint Resolution rather than a Treaty?”

Scalia turned the question back at Mr. Aki: “Why would a treaty be needed? He asked.

“I [Jacob Aki] asked him. ‘What happened in the case of Hawaii when it was annexed in 1898?’

His answer: ‘It’s the same thing.’ He ended his response by commenting that in terms of international law, well, there have been hundreds of years worth of problems there.

Then, Justice Scalia continued.

“There is nothing in the Constitution that prohibits Congress from annexing a foreign state through the means of a joint resolution. If the joint resolution is passed through both the U.S. House and Senate, then signed by the president, it went through a “process.”

Scalia then proceeded to discuss the history of Hawaii. He implied that Hawaii was just another colony of Spain, taken in the Spanish-American War, like the Philippines and Puerto Rico.¹⁵ Justice Scalia was clearly wrong on all points.

First, Justice Scalia claimed that if a power is not explicitly prohibited by the Constitution then it exists. In effect he stated that since the annexation of territory by Congress is not specifically prohibited by the United States Constitution then the Federal Government has the power to annex by Joint Resolution.

Justice Scalia knows well that the Constitution is a constitution of enumerated powers. The States are sovereign. The powers not explicitly or implicitly given to the Federal Government rest in the States and the People. That is preserved in the Ninth and Tenth Amendments of the Constitution. Moreover, where a power is specially delegated to a branch of the Federal Government the Constitution does not allow the exercise of that same power by other means.

system, only Native Hawaiians, defined as persons with any Hawaiian ancestry could vote for trustees.

¹⁵ “Justice Scalia then proceeded to talk about how that same process was used to acquire the Philippines—which he points out, “we gave back”---and Puerto Rico.

“Supreme Court Justice Antonin Scalia, Hawaii and Annexation: A Student from Hawaii queried the judicial firebrand about the way the U.S. took formal control of the Islands. He got an answer.” From Civil Beat, Honolulu, Hawaii, February 11, 2014, by Jacob Bryan Aki.

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The power over foreign affairs, that is the power to acquire the territory of a foreign sovereign nation like the nation of Hawaii in 1898, is a matter of foreign affairs. Under Article II, that power is specifically delegated to the President and the Senate. Thus, foreign affairs are not within the legislative power delegated to and exercised by Congress.

The Joint Resolution was the exercise of legislative power to achieve a goal restricted to the President and the Senate. Justice Scalia know this well. He should know, one assumes, that the use of Joint Resolution to achieve the ends of a treaty is unconstitutional.

Second, the Joint Resolution, as an act of Congress, had no power to acquire the territory of another sovereign nation. Third, Hawaii was never a colony of Spain.¹⁶

This is an example of cognitive dissonance. This is cognitive dissonance in one of the most important and influential men in the United States. As a Justice his decisions decide and determine the destiny of Hawaii. The fact that someone as esteemed, powerful and fully versed on the Constitution as Justice Scalia could believe the myth of annexation is evidence of how deeply the myth is embedded in our society The myth of annexation has swept the world. There is cognitive dissonance in all of us---at least all of us for some part of our lives.

Apparently, as to Hawaii, he lives in a world that contradicts his professional learning and knowledge. It is a contradiction to believe in both the constitutionality of the legislative annexation of Hawaii and the principle of constitutional limitations. This demonstrates what afflicts many of us—when it comes to the annexation of Hawaii, we have suspended all learning, all principles, and all law, to accommodate the apparent fact that Hawaii is territory of the United States. We live in cognitive dissonance.

The views of Justice Scalia are the views of America. Hawaii and Native Hawaiians are oppressed by the hegemony justifying the taking and occupation of Hawaii.

If Justice Scalia had been in the Senate in the summer of 1898, he would have heard the voices of Senators Allen of Nebraska, White of California and Bacon of Georgia. They quoted from the same Constitution used by Justice Scalia. Those Senators, relying on the correct principle of constitutional limitations defied the Administration’s rush to annex Hawaii. They were heroes to the Hawaiian people then, as they should be today. They defended the independence of Hawaii.¹⁷

D. Government Officials and Annexation

Government officials and official statements of the United States have consistently claimed that Hawaii was annexed by a Joint Resolution. One finds such an explanation for the annexation of

¹⁶ Hawaii was not a colony of Spain. See Treaty of Paris December 10, 1898. In that treaty, ratified by both the United States and Spain, Spain directly ceded the sovereignty and territory of the Philippines, Puerto Rico Guam, but not Cuba to the United States.

¹⁷Their statements will be presented in the section on the incapacity of the Joint Resolution to acquire the Hawaiian Islands, *infra*.

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Hawaii in each Report to Congress in the drive for Statehood for Hawaii. For example, in testimony supporting statehood the Hawaii Statehood Commission used the following language:

Accepting these considerations in good faith, the free citizens of the independent Republic ceded their sovereignty to the Government of the United States and annexation as a Territory followed July 7, 1898¹⁸.

Others, fell back on different explanations—such as their belief in the success of the Treaty of 1897 [It was not ratified by the United States] by a combination of the Treaty and the Resolution whereby the Resolution effectively ratified the Treaty of 1897. Governor Quinn in 1960 described Hawaii as acquired by the “Treaty of Annexation.”¹⁹

Rather Hawaii was an independent country and was annexed under a treaty of annexation. Under this treaty of annexation, the public lands of the Republic of Hawaii were “ceded” to the United States.

There was no treaty of annexation. The United States did not ratify the Treaty of 1897. Governor Quinn was wrong: the public lands [Crown and Government lands] were never ceded to the United States, passed to the State, and ultimately to others such as the University of Hawaii.

As will be discussed in Part III, the Joint Resolution served two purposes: the cession of sovereignty and the conveyance of the Crown and Government lands. Mauna Kea is on Crown and Government lands. If the Joint Resolution had no power to convey sovereignty, it had no power to convey public property—the Crown and Government lands of Hawaii.

Thus, there is a break in the chain of title as to the lands of Mauna Kea. The burden of proof is on the State of Hawaii and the University to show an unbroken chain of title to the lands of Mauna Kea that can be traced from the Mahele. The State and the University cannot show such good title. Not only do they lack jurisdiction over Mauna Kea, they do not own Mauna Kea. The State of Hawaii and the University of Hawaii have no right to permit the construction of the Thirty Meter Telescope on land that they do not own.

The most important government document on annexation is a carefully drafted “confession” that the United States lacked the constitutional power to acquire Hawaii. In 1988, Douglas Kmiec the

¹⁸See hearing of March 1953 before the Subcommittee on Territories and Insular Affairs of the Committee on Interior and Insular Affairs United States, Senate 83rd Congress 1st Session, on S.49 a bill to enable the people of Hawaii to form a constitution and State Government and to be admitted into the Union on an Equal Footing.” There are numerous State and Territorial government documents which rely on the Joint Resolution as the basis for the acquisition of Hawaii:

The independent monarchy was overthrown on January 17, 1893, the newly constituted political government, headed by Sanford Dole immediately sent commissioners to Washington to negotiate a treaty for full and complete “political union” of the Hawaiian Islands on the basis of statehood. . . . Accepting these considerations in good faith, the free citizens of the independent Republic ceded their sovereignty to the Government of the United States and annexation as a Territory followed July 7, 1898.

¹⁹ Special Message of Governor Quinn April 25th 1960.

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legal counsel for the Justice Department wrote an opinion for the State Department on Congressional power to expand the territorial seas. He thus examined the case of Hawaii as a possible example of congressional power to unilaterally acquire territory.

He searched in vain for a constitutional basis for the annexation of Hawaii. Kmiec ultimately concluded that he could not identify the constitutional power enabling annexation.²⁰ Such an

²⁰ That legal opinion by Douglas Kmiec states:

"The United States also annexed Hawaii by joint resolution in 1898. Joint Res. 55, 30 Stat. 750 (1898). Again, the Senate had already rejected an annexation treaty, this one negotiated by President McKinley with Hawaii. And again, Congress then considered a measure to annex the land by joint resolution. Indeed, Congress acted in explicit reliance on the procedure followed for the acquisition of Texas. As the Senate Foreign Relations Committee report pronounced, "the joint resolution for the annexation of Hawaii to the United States . . . brings that subject within reach of the legislative power of Congress under the precedent that was established in the annexation of Texas." S. Rep. No. 681, 55th Cong. 2d Sess. 1 (1898).

This argument, however, neglected one significant nuance: Hawaii was not being acquired as a state. Because the joint resolution annexing Texas relied on Congress' power to admit new states, "the method of annexing Texas did not constitute a proper precedent for the annexation of a land and people to be retained as a possession or in a territorial condition." Andrew C. McLaughlin, *A Constitutional History of the United States* 504 (1936).

Opponents of the joint resolution stressed this distinction. *See, e.g.*, 31 Cong. Rec. 5975 (1898) (statement of Rep. Ball). n30 Moreover, as one constitutional scholar wrote:

The constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. . . . Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force -- confined in its operation to the territory of the State by whose legislature it is enacted.

1 Westel Woodbury Willoughby, *The Constitutional Law of the United States* § 239, at 27 (2d ed. 1929).

Representative Ball argued:

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 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. [Hawaii—author's addition]

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admission of failure, given that the United States has the burden of proof²¹ to show how it acquired Hawaii, is a virtual confession of the lack of United States sovereignty over Hawaii.

31 Cong. Rec. 5975 (1898). He thus characterized the effort to annex Hawaii by joint resolution after the defeat of the treaty as "a deliberate attempt to do unlawfully that which can not be lawfully done." *Id.*

Notwithstanding these constitutional objections, Congress approved the joint resolution and President McKinley signed the measure in 1898. Nevertheless, whether this action demonstrates the constitutional power of Congress to acquire territory is certainly questionable. The stated justification for the joint resolution -- the previous acquisition of Texas -- simply ignores the reliance the 1845 Congress placed on its power to admit new states.

It is therefore unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea"

Department of Justice Office of the Legal Counsel "Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea" 1988 OLC LEXIS 58; 12 Op. O.L.C. 238 October 4, 1988.

²¹ The party claiming dominion or sovereignty has the burden of proof. See Case Concerning Sovereignty over Pedra Branca/Pulau Puteh, Middle Rocks and South Ledge ((Malaysia/Singapore) General list No. 130, International Court of Justice Slip Opinion page 13 12 May 2008:

Malaysia appears to forget that 'the burden of proof in respect of [the facts and contentions on which the respective claims of the Parties are based] will of course lie on the Party asserting or putting them forward. (Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962, p. 16); it is thus for Malaysia to show that Johor could demonstrate some title to Pedra Branca, yet it has done no such thing."

See also *Minquiers and Ecrehos Case*, (United Kingdom and France) 1953 ICJ Lexis 5 November 17, 1953; Judgment

In addition, the question of burden of proof was reserved: each Party therefore had to prove its alleged title and the facts upon [*2] which it relied.

The Court then examined the titles invoked by both Parties.

See Case Concerning Territorial And Maritime Dispute Between Nicaragua And Honduras In The Caribbean Sea (*Nicaragua V. Honduras*) 2007 ICJ Lexis 1, 8 October 2007; Case Concerning Sovereignty Over Pulau Ligitan And Pulau Sipadan (Indonesia/Malaysia) 2002 ICJ LEXIS 6 17 December 2002; Case Concerning Maritime Delimitation In The Area Between Greenland And Jan Ma Yen (Denmark V. Norway) 1993 ICJ Lexis 214 June 1993; Case Concerning Delimitation Of The Maritime Boundary In The Gulf Of Maine Area (Canada/United States Of America) 1984 ICJ Lexis 412 October 1984;

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E. The Pervasiveness of the Myth of Annexation: Historians, Legal Scholars and School Texts

Historians, even those who have concentrated solely on annexation make the same error: they conclude that Hawaii was taken by a Joint Resolution. There are two books devoted to annexation: Thomas J. Osborne, *Annexation Hawaii: Fighting American Imperialism* (Island Style Press 1998) and the second volume of William A. Russ, Jr.’s two part history: *William A. Russ, Jr. The Hawaiian Republic (1894-98) And its Struggles to Win Annexation* (Susquehanna University Press 1961).

Both are excellent histories delving in depth into the personalities and events that led to annexation. Neither, however, challenges the assumption that once the Joint Resolution was signed into law, Hawaii was annexed.

Thus, Osborne concludes by stating:

After Hawaii was brought into the Union, it was easier to acquire other dependencies even though the difficult process of treaty ratification was involved. This point is illustrated by the fact that the Hawaiian debate of the 1890s lasted more than five years and was terminated by the approval of a joint resolution because a treaty would not pass the Senate. However, within approximately seven months of the passage of the Newlands measure the United States acquired Guam, the Philippines, Puerto Rico and Wake Island.²²

Russ who devotes two full chapters on the debates to the Joint Resolution. However, neglects all statements in the Senate challenging the capacity of the Joint Resolution to acquire Hawaii. Russ assumes that annexation was complete upon the President’s signing of the joint resolution.

Hawaii was annexed at last, but the people of the islands could not know that fact for a week. . . .Secretary Day hastened to inform Minister Sewall and the Hawaiian Government that the islands were at last American. . . .

Russ’ analysis, which is otherwise lengthy, well sourced and careful, ends with a description of the ceremonies he calls the “formal transfer of the Hawaiian Islands:”

With this major difficulty solved, preparations were made for the formal transfer of the islands to the United States.²³

See also *C.A.B. v. Islands Airlines*, 235 F. Supp. 990 (D.C. Dist Hawaii, 1964) and, *New Jersey v. New York*, 523 U.S. 767 (1998) [burden of proof in cases claiming dominion by prescription]:

²² See Thomas J. Osborne, *Hawaii Annexation: Fighting American Imperialism* (Island Style Press 1998). William A. Russ, Jr. *The Hawaiian Republic (1894-98) And its Struggles to Win Annexation* (Susquehanna University Press 1961).

²³ William A. Russ, Jr. *The Hawaiian Republic* at 364 (1894-98) *And its Struggles to Win Annexation* 357 (Susquehanna University Press 1961).

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Even the outstanding historian Barbara Tuchman, while chronicling the courageous stand of Speaker Thomas Reed in the House of Representatives against annexation, concludes by acknowledging that annexation by resolution did take place: She writes:

Annexation of Hawaii was formally ratified on July 7, four days after the war in Cuba was brought to an end by a naval battle off Santiago.²⁴

Professor Gavan Daws taught world history at the University of Hawaii for many years. In his work, *Shoals of Time*, he also agrees that Hawaii was annexed:

President McKinley signed the resolution on July 7, and a week later to the day the news arrived at Honolulu. The annexationist press was delirious with excitement. The native Hawaiians were desperately gloomy. Liliuokalani, who had been on the American Mainland, came home sadly on August 2, ten days before the transfer of sovereignty was to take place. . . .With this out of the way, the ceremony of transferring sovereignty could be held.²⁵

Lawrence Fuchs, author of the generally excellent Hawaii Pono also succumbed to the trend:²⁶

²⁴ See Barbara w. Tuchman, *The Proud Tower: A Portrait of the World Before the War 1890 to 1914* (Ballantine Books, New York 1963).

²⁵Gavan Daws: *Shoals of Time: A History of the Hawaiian Islands 290-91* (University of Hawaii Press 1968):

²⁶ See Lawrence Fuchs, *Hawaii Pono: An Ethnic and Political History 36* (Bess Press 1961). See also Norris W. Potter and Lawrence M. Kasdon, *Hawaii: Our Island State 220* (Charles E. Merrill Books 1964) write:

Although a majority of the American Senators was in favor of annexation, the necessary two-thirds majority for ratification of the annexation treaty was not available. Therefore, those in favor of annexation decided to try to achieve their goal by a joint resolution, which required only a simple majority of both house of Congress for passage. This method had been used in the annexation of Texas. Two resolutions were introduced, one in the Senate on March 16, 1898 and the other in the House of Representatives on May 4 By July 6, 1898, both houses of Congress approved annexation and the next day President McKinley signed the bill. 1898. Annexation was accomplished,--the fruit of approximately seventy five year of expanding American influence in Hawaii

And see: Theon Wright, *The Disenchanted Isles at 20* (Dial Press 1972)

On June 15, 1898, a joint resolution was introduced in the House and passed by a vote of 209 to 91 and on July 6, the Senate adopted the same resolution, 42 to 21. The following day McKinley signed the bill, known as the Newlands Resolution. Subsequently, an Organic Act was passed by Congress, spelling out the constitution under which Hawaii would exist for the next sixty years.

Stanford’s Robert M.C. Littler did note some of the ambiguity created by the joint resolution. See Robert M.C. Littler, *The Governance of Hawaii at 28* (Stanford University Press 1929):

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The annexation treaty could not muster a two-thirds vote in the Senate, but the Senate foreign Relations committee circumvented the treaty procedures by favorably reporting a joint resolution for annexation, needing only a majority of one in each House, which it obtained in July of 1898.

On July 6, in the midst of the fever of war, a Joint Resolution of Congress, called the Newlands Resolution, as passed by a simple majority of each house, thus supposedly making Hawaii a territory of the United States.

Only recently have scholars been successful in challenging the myth²⁷: Thomas Coffman asserts that Hawaii is occupied as a result of the failure of annexation. Coffman, *Nation Within: The History of American Occupation of Hawai'i* (2009)

School textbooks have been the most influential means of spreading the myth of annexation. Every child in Hawaii is taught that Hawaii was annexed. The present text in Hawaii's public schools repeats these assumptions.²⁸

During the years 1893 to 1898, Hawaii functioned under two kinds of governments, first a provisional government set up by the members of the Committee of Safety, then the government of the Republic of Hawaii. The leaders of both government had a definite goal in mind—annexation to the United States. In 1898, just 5 years after the overthrow of the monarchy, the United States officially annexed Hawaii. The Hawaiian Islands became the Territory of Hawaii.

Scholarship has been largely derivative. Most authors have relied on others who assumed the validity of the Joint Resolution. The myth of annexation had become ingrained in American

It was the purpose of Congress to put the Islands on a temporary basis and Hawaii did not become a territory until the passage of the Organic Act of 1900. The exact status of Hawaii during those two years has been the subject of much debate among historians and lawyers.

Even Hawaii based writers accepted the Annexation Myth. see Noel J. Kent, *Hawaii: Islands Under the Influence* at 67 (Monthly Review Press 1983):

Finally, in July 1898, annexationist supporters in the Senate, unable to pass a treaty, managed instead to muster the votes to pass a resolution, the Newlands Resolution –which had the same result.

²⁷ See Noenoe De Silva, *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism* 160 (Duke University Press 2004); Umi Perkins “Is Hawai'i and Occupied State?” *The Nation*, January 16, 2015 <http://www.thenation.com/article/194745/hawaii-occupied-state#> [Last visited March 27, 2015]

²⁸ See Linda Mento and Eileen Tamura, *A History of Hawaii* at 28 (University of Hawaii 1989) (Curriculum Research and Development Group College of Education University of Hawaii Honolulu):

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society. It confirms what the United States has coercively created out of Hawaii: an American territory now State.

The first well-known criticism came in 1929 from the noted Constitutional Scholar W. Willoughby,

It has long been held in some quarters that the annexation of Hawaii by joint resolution was unconstitutional; relations between independent nations can be governed legitimately only by treaties, inasmuch as a legislative act necessarily has no extraterritorial force. This question has never been passed upon directly by the Supreme Court, as it consistently recognized that the methods and means of acquiring territory constitute matters that are within the province exclusively of the political branches of the Government.²⁹

Native Hawaiian and non-Native Hawaiian scholars have, in the last two decades, challenged these assumptions with meticulous scholarship and documentation. The work of Dr. Keanu Sai has been most significant. Among his many writings is “Establishing An Acting Regency In Order To Restore the Hawaiian Kingdom Government: A Countermeasure Necessitated to Protect the Interest of the Hawaiian State” (December 30, 2008)³⁰ Dr. Sai relies on the sovereignty of Hawaii as a State and the presumption of the continuity of States. Thus, the burden is on the United States to demonstrate the extinction of the nation of Hawaii. The overthrow did not extinguish the nation. There was no treaty of Annexation and that the Joint Resolution lacked the capacity to acquire the Hawaiian Islands. Dr. Sai concludes that the United States violated the neutrality of the Hawaiian Nation in the Spanish American War. Therefore, the laws of occupation apply. The United States is in violation of the laws of occupation today.

He asserts that the desecration of sacred sites violates the laws of occupation and is a war crime. Thus, the building of the Thirty Meter Telescope on a sacred site of the Kingdom of Hawaii would constitute a violation of the Hague Convention.³¹

F. A Brief History of Hawaii from 1893 to 1898

The Joint Resolution of 1898, 30 Stat 750, annexing the Hawaiian Islands as territory of the United States is a direct result of the United States overthrow of the Kingdom of Hawaii in 1893. The involvement of the United States in the overthrow is apparently clear. The United States was in communication with the conspirators in Hawaii who overthrew the monarchy. The conspirators

²⁹ Westel W. Willoughby, in his classic *Constitutional Law of the United States* (New York, 1929, 2d Ed. Vol. I p. 429) From "The Inapplicability of the Commonwealth Concept to Alaska and Hawaii" by William Tansil (prepared at the request of honorable Clinton P. Anderson Congressional Research Service, found in the Manuscripts and papers of Clinton Anderson, Library of Congress, and Washington, D.C.

³⁰ See also Kamanamaikalani Beamer: “State cannot have clear title to former kingdom lands” Editorial Honolulu Star Bulletin. and Aran Alton Ardaiz, *Hawaii: The Fake State* (Truth of God Ministry, Hawaii 2008)

³¹ Other authors are Chang, *A Rope of Sand: a Documentary History of the Joint Resolution to Annex Hawai‘i* (1997) Other works of mine are available on “scholar space” at the University of Hawaii’s Hamilton Library.

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knew that the United States would intervene to protect the small coterie of rebels who sought overthrow. The United States was aware that the conspirators intended to immediately seek annexation to the United States.

A letter of December 14, 1892, just a month from the insurrection indicates that the leader of the coup, Lorrin Thurston was seeking the advice and consent of the United States to undertake the overthrow. In his letter of that date to Archibald Hopkins, a co-conspirator in Washington, Thurston explored a number of issues by which Hopkins was to negotiate with the United States. These included whether or not the existing monarch, Queen Liliuokalani could be bribed to sign a treaty of annexation and whether or not the United States, upon future annexation would abolish the contract labor system used by Hawaii's sugar planters. That contract labor system was a form of involuntary servitude. If Hawaii was annexed as territory of the United States, and if the thirteenth amendment applied to Hawaii, which by the terms of the amendment it should, the contract labor system so essential to the sugar industry would be abolished. Thurston, in his letter, sought a commitment from the United States that a treaty of annexation could override the thirteenth amendment.

The fact that the United States and the conspirators were in communication before the coup on January 16, 1893 is also borne out by the stenographic record of the negotiations of the treaty of annexation that immediately followed in the aftermath of the coup.

The conspirators, thirteen in number to begin with, occupied only a small portion of the government buildings in Honolulu. United States marines were landed to protect this small coterie of rebels. The American Minister to Hawaii who publicly favored overthrow had prematurely recognized the Provisional Government on a de facto basis.

The Queen did not challenge the United States marines but sought the assistance of the American President. In her letter to the President, she asked the President to undo the acts of the rebels and restore her government to power. While the rebels proclaimed themselves in power in the form of a provisional government. The Queen yielded her executive powers to the President of the United States.

By February 10th, the representatives of the Provisional Government and the United States Secretary of State were meeting in Washington. Secretary Foster had drafted a treaty. Nonetheless, the rebel mission to the United States seeking a treaty of annexation failed. The treaty was laid before the Senate for ratification. The Senate refused to ratify.

In March of 1893, a newly elected President Grover Cleveland, withdrew the treaty from Senate consideration. His representative and special envoy to Hawaii, James Blount, lowered the American flag and raised the Hawaiian flag. Blount conducted a thorough and comprehensive investigation of American involvement. He presented his findings to Gresham, Cleveland's Secretary of State.

On December 18, 1893, President Cleveland made a public address. He admitted that the United States had violated the sovereignty of the Kingdom, violated international law, and breached treaties with Hawaii. He promised to restore the Government of the Queen to power.

Senators opposed to Cleveland's policies rallied around Senator John Tyler Morgan of Alabama. From Washington, Morgan conducted his own investigation of United States involvement and concluded that the United States was faultless. Meanwhile, any attempt to restore the Queen's

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government was blocked by a resolution sponsored by Senator Turpie that specified that no nation, including the United States³² should intervene in the "internal affairs" of Hawaii.³³

Turpie's resolution thus scuttled Cleveland's plans to restore the Queen to the throne. This imposed a stalemate on the status of affairs in Hawaii. Events in Hawaii moved quickly. In 1894, the Provisional Government reinvented itself as a Republic. It was republic in name only as it severely limited the voting franchise to only those few that the conspirators could trust. A counter-revolution by Royalist in 1895 was quickly put down.

Martial law was imposed after the counter-revolution. A number of prominent Hawaiians, including the Queen, as well as Prince Kuhio, were put on trial. The rebels demanded that the Queen abdicate in exchange for their sparing the Hawaiian defendants from execution. The Queen abdicated.

William McKinley was elected to replace Cleveland. McKinley earnestly supported annexation. In June of 1897, the United States Secretary of State, John Sherman, and four representatives of the Republic of Hawaii negotiated a new treaty: The Treaty of Annexation of June 16, 1897. In Hawaii, there was heavy resistance among Native Hawaiians. Massive petitions were sent to Washington in opposition to the Treaty. The annexationists in Hawaii supported the Treaty. In September of 1897 the Senate of the Republic of Hawaii, all supporters of the conspirators who overthrew the monarchy, ratified the Treaty. The treaty was also presented to the United States Senate and debated in secret. The Senate never voted on the Treaty. The United States Senate never ratified the Treaty of 1897. It was clear that the administration could not garner the necessary two thirds of Senators present to win ratification under the terms of the United States Constitution.

The annexation of Hawaii became an enormous issue in American politics. It was a proxy for the future of the United States. On one side stood the expansionists and imperialists. On the other were those who sought to defend the "Older America."³⁴ The imperialist would prevail. The United States took aim at Spain as the weakest of all the European imperial powers.

Once the imperialists were able to convince the country to go to war with Spain, annexation of Hawaii was a foregone conclusion.³⁵ The report of the House Committee on Foreign Affairs

³² In light of the Turpie Resolution, a number of nations, not wanting to antagonize the United States, reinstated relations Hawaii and recognized the new government, the Republic of Hawaii, de jure.

³³ The Turpie Resolution aimed at Japan which had protested annexation in light of its concern for the large number of Japanese contract laborers in Hawaii. In effect, by the Turpie Resolution the United States imposed a version of the Monroe Doctrine over Hawaii.

³⁴ A number of Senators opposed to annexation did so for racist reasons. They feared the immigration of non-whites to the United States from the insular territories. With expansion, the Constitution would change. If the United States was to start taking colonies, beginning with Hawaii, they demanded that Constitution should not be equally applied to persons of color from the new outlying territories

³⁵ Senator Pettigrew challenged his opponents to debate this issue openly: "If you are going to make the American people believe that this is a war measure and is necessary in order to rescue Dewey, answer these things, do not sit silent and refuse to debate the question: but give us something to justify abandoning the century old policy of this country." See Statement of Senator Pettigrew at 31 Congressional Record 6267 June 23, 1898, 55th Cong 1st Sess.

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emphasized both military reasons and a fear that Japan would seize the Hawaiian Islands. As the historian William A. Russ Jr., points out

There is little doubt that Hawaii was annexed because of the Spanish War," although the archipelago would probably have been annexed at some later time. As has been pointed out, the Maine and Manila Bay were the factors which revived the dying annexation issue.

In short, Hawaii as a war measure —Hawaii as a necessary coaling station—Hawaii as a trusting friend who had risked punishment from Spain for its un-neutral policy—Hawaii as a link with the Philippines—

...

Melville, to the delight of Annexationists, talked about defending the Pacific Coast and American commerce; he dilated upon "Our Paramount Right in the North Pacific ;" he quoted from Jomini to prove Hawaii's military strength and resources; and discoursed on "Hawaii as the Gibraltar of the Pacific," as well as on "Our Opportunity in the Pacific.

Several men in Congress were opposed-- like Congressman John C. Bell of Colorado, who declared that, inasmuch as Hawaii must be defended, annexation would weaken American naval power by spreading that power out too thinly." Opponents argued that Hawaii was so distant from the West Coast of the United States that it was likely to start a war rather than prevent one.³⁶

Senator Roach of North Dakota added ironically:

"If we need to annex Hawaii to protect our Pacific coast, it is absolutely necessary that we annex the British Islands and the continent of Europe in order to protect our Atlantic coast

Nonetheless, Imperialists in the United States and annexationists in Hawaii saw an opportunity. With America taking the Spanish possessions including the Philippines after the Spanish-American War why not take Hawaii? However, the administration still lacked the votes to ratify the Treaty of Annexation of 1897.³⁷

³⁶“Mr. Bacon. The Hawaiian Islands if annexed would prove as barren of military importance as of commercial, which is wholly based on our unfortunate grant of a free market for their sugar, and their annexation would be a source of weakness, and no more desirable for the defense of the Pacific coast than the back side of the moon. As owners it would at once require on our part a large and permanent naval and military force to be stationed there to maintain our mastery, but as an independent state the United States could shield Hawaii from any hostile attack by merely announcing that we were their ally in the support of their independence.”

³⁷ The Treaty of 1897 had failed because of the Ku’e petitions and a coalition that consisted of patriots, anti-imperialists, racists and supporters of the sugar trust who sought to preserve the “Older America.” Treaties are debated in secret in the Senate. There is no transcript or record of the proceedings.

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Instead, the Administration turned to the use of an act of Congress—a Joint Resolution. A Joint Resolution, like a law, required a mere majority of the Senate to pass. It required a majority of the House as well. The administration, bolstered by American wartime patriotism felt it could gain both chambers. The resolution passed the House.³⁸ Hawaii was annexed because of the Spanish-American War.

The Senate would be different. In June, opponents of the Joint Resolution filibustered against annexation in the Senate. Carl Schurz argued that the annexation of Hawaii would be a form of conquest and not worth its military gain.³⁹ Senator Augustus Bacon of Georgia argued that Hawaii was already an ally—it would not deny American ships coal. There was no need to annex Hawaii. Nonetheless, as in any war, the people of the United States and their Congress were willing to give the President whatever he wanted. McKinley wanted Hawaii.⁴⁰

They blocked passage of the Joint Resolution until they finally faltered under the blistering heat and humidity of Washington. On July 6th the Senate approved the Joint Resolution. It was signed into law the next day by President McKinley.

Thus, from beginning to end, from January 16, 1893, [when the marines landed to support the overthrow of the Queen] until August 12, 1898, when the United States flag was again raised over Hawaii, the annexation of Hawaii was the first step in the American plan of becoming a world power.⁴¹

Most Hawaiians did not believe annexation was permanent. Senator Shelby Cullom reported that most Hawaiians believed that annexation was a temporary affair---to end with the cessation of the Spanish American war. That was the beginning of a century of deception. American annexation of Hawaii and its subsequent occupation continues to this day

G. The Joint Resolution had no Capacity to Acquire the Hawaiian Islands

Contrary to the myth of annexation, the Joint Resolution, as a mere act of Congress, had no power to acquire the dominion of the independent and sovereign nation of Hawaii. If the United States could so acquire Hawaii, the legislature of Hawaii could acquire the United States. If this were

³⁸ Thomas Reed, Speaker of the House and a possible presidential candidate was so opposed to annexation that after the House passed the Newlands Resolution [The Joint Resolution] he left politics for good.

³⁹ “On May 9 he [Schurz] wrote President McKinley as follows: "It will be in vain to say that for the purposes of the war we must have a naval station in Hawaii, for the world knows that we own Pearl Harbor which we use as a naval station without annexing Hawaii. The annexation of Hawaii under such circumstances," he warned, would be tantamount to conquest.” See Russ, Jr., at

⁴⁰ “It has also been urged that a harbor and coaling station would be a great convenience to our commerce across the Pacific Ocean. . . . We have such a harbor under an irrevocable grant. It is not probable that any harbor would ever be denied to us in time of peace; and in case of war, the strongest naval power would keep or take whatever it chose to have. Pearl Harbor could be made of immediate use at a very inconsiderable expense by the removal of a coral reef which now obstructs its entrance.” Senator Bacon at page 6157 31 Cong. Rec.

⁴¹ Hawaii was the American bastion of the Pacific, the key “Gibraltar,” protecting the future Panama Canal and the West Coast of America.

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possible the notion of “nation” and “sovereignty”---as the absolute law-making power within a nation’s territory, would be meaningless.

Yet, a hundred years ago, the incapacity of a Joint Resolution to acquire foreign sovereign territory was well understood.⁴² Senator Allen of Nebraska and others would have reminded Justice Scalia that a joint resolution is merely an act of Congress and has no power to reach out and acquire foreign territory or a foreign country:

Mr. Allen. A Joint Resolution if passed becomes a statute law. It has no other or greater force. It is the same as if it would be if it were entitled “an act” instead of “A Joint Resolution.” That is its legal classification.

It is therefore impossible for the Government of the United States to reach across its boundary into the dominion of another government and annex that government or persons or property therein. But the United States may do so under the treaty making power, which I shall hereafter consider.⁴³

And:

Mr. President, how can a joint resolution such as this be operative? What is the legislative jurisdiction of Congress? Does it extend over Hawaii? May we in this anticipatory manner reach out beyond the sea and assert our authority under a resolution of Congress within the confines of that independent nation?

Where is our right, our grant of power, to do this? Where do we find it? Some assume to discover it in the supposition that there has been a cession, which has in truth never been made. Hawaii is foreign to us. We base our jurisdiction upon a falsehood desired to be made conclusive in a resolution the verity of which is said cannot be attacked, however groundless it may be.⁴⁴

In addition, Senator Turley added:

Mr. President I wish to illustrate this by just the condition of affairs which is before the Senate now. It is admitted that if the Joint Resolution is adopted the Republic of Hawaii can determine whether or not it will accept the provisions contained in the joint resolution. In other words, the adoption of the resolution does not consummate the transaction.

⁴² One must be careful to be clear about the claim of incapacity: it is not a claim that the United States Congress cannot make laws that have power and effect abroad—such laws simply cannot acquire and take the dominion or real property of another sovereign. In 1898, the law of the United States did prohibit the application of the Constitution and U.S. laws extraterritorially. That has all changed. The laws and Constitution apply outside the United States to persons and activities that have effects within the United States are concern United States citizens or nationals.

⁴³ Statement of Senator Allen July 4 1898 31 Congressional Rec at 6636

⁴⁴ Statement of Senator Allen 31 Cong Rec. at 6636 July 4, 1898. 55th Cong. 2d Sess.

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The Republic of Hawaii does not become a part or the territory of the United States by the adoption of the joint resolution, but after its adoption and signature by the President and after it becomes the law of the land the Republic of Hawaii may refuse to accept the terms contained in it and remain an independent and sovereign state.⁴⁵

Senator John Coit Spooner of Wisconsin, the greatest constitutional scholar in the Senate’s history added:

Mr. Spooner: Of course, our power would not be extraterritorial.⁴⁶

A host of other Senators reaffirmed the same point:⁴⁷

The Joint Resolution itself, it is admitted, amounts to nothing so far as carrying any effective force is concerned. It does not bring that country within our boundaries. It does not consummate itself.⁴⁸

Senator Bacon of Vermont made the unforgettable point that if the United States by legislation could take Hawaii by legislation it could do so as to Jamaica.

Mr. Bacon . . . If the President of the United States can do it in the case of Hawaii, he can with equal propriety and legality do it in the case of Jamaica,⁴⁹

Senator White of California made an eloquent plea to stop the Joint Resolution:

⁴⁵ See remarks of Senator Turley, 31 Cong Rec. at 6336, June 25, 1898, 55th Cong 2d Sess.

⁴⁶ Statement of Senator Spooner, 31 Cong Rec. at 6636, July 4, 1898, 55th Cong 2d Sess.

⁴⁷ Mr. Spooner. “It is not a question of degree. It is a question of possibility.”

Statement of Senator Spooner 31 Cong Rec. at 6485, June 30, 1898, 55th Cong 2d Sess.

Mr. Turley. “The Joint Resolution itself, it is admitted, amounts to nothing so far as carrying any effective force is concerned. It does not bring that country within our boundaries. It does not consummate itself.”

Statement of Senator Turley 31 Cong Rec. at 6339, June 25, 1898, 55th Cong 2d Sess.

Mr. Allen. “Whenever it becomes necessary to enter into any sort of a compact or agreement with a foreign power, we cannot proceed by legislation to make that contract.”

Statement of Senator Allen 31 Cong Rec. at 6636, July 4, 1898, 55th Cong 2d Sess.

⁴⁸ Statement of Senator Turley, 31 Cong Rec. at 6339, June 25, 1898, 55th Cong 2d Sess.

⁴⁹ Statement of Senator Augustus Bacon at 31 Cong. Rec. 6148 to 6152 June 20, 1898, 55th Cong. 2d. Sess.

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Whatever may be said of the past history of this country or of the records to which senators have adverted; there is one proposition, which cannot be contested, mainly, that there is no precedent for this proposed action.

States have been admitted into the Union, territory has been acquired and has been annexed by treaty stipulation, but there is no instance where by a joint resolution it has been attempted not only to annex a foreign land far remote from our shores, but also to annihilate a nation, to withdraw it from the sovereign societies of the world as a government. . .⁵⁰

Senator Allen of Nebraska also stated:

Mr. President the Constitution must begin and end with the territorial jurisdiction of the United States: It can not reach beyond the boundaries of our Government.

It would be as lifeless and impotent as a piece of blank paper in Canada or in the Hawaiian Islands; and so with a statute or joint resolution.⁵¹

Under the law of nations, every nation, large or small, is equal as to its sovereignty. The incapacity of a Joint Resolution to annex Hawaii is inherent in the meaning of “sovereignty” itself.⁵² Sovereignty means the absolute law making authority over the territory of one’s nation.⁵³ Under

⁵⁰ Statement of Senator Stephen M. White at 31 Cong. Rec. Appendixes 591 to 595 June 21 1898, 55th Cong. 2d. Sess.

⁵¹ Senator Allen July 4 1898 31 Congressional Rec at 6636

⁵² There is an old riddle that asks: “What happens when the immovable object meets the irresistible force?” Intuitively, one wants to say something like: “there is a big collision, or ‘boom’” To answer, we can use a device used in philosophy and science called “possible world’s theory.” If we postulate a world in which there is an “immovable object”, it is a world in which there can never be an “irresistible force.” And, if we think of a world in which there is an irresistible force, there can never in that world be an immovable object. In short, there can never be a world in which there exists both an immovable object and an irresistible force. What we mean by “immovable object” is a world in which there are no irresistible forces.

The same applies to the word “sovereign,” as applied to states in international law. If all states are sovereign in international law, all states have absolute lawmaking power over their dominion. If so, the meaning of sovereign is that there is no state which can by its legislative act acquire the dominion of another sovereign state.

Just as there is no world in which both an immovable object and an irresistible force exist, there can be no world in which there are sovereign states and in which an act of law of another state can acquire the territory of another state

⁵³ Assume two nations side by side, such as Germany and France. Germany has absolute sovereignty over its real property up to the line which is the border with France. France has absolute sovereignty over its real property up to the line which is its border with Germany. A “nation” would not be “sovereign” in an absolute sense if another nation had power within its border. No nation can “reach out,” by an act of its own sovereignty, namely by an enactment of legislation to acquire the dominion of another sovereign nation.

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the principle of equality, every nation has absolute authority over its own dominion, that is, within its own borders.⁵⁴

The lack of capacity was the most important point in opposition to the Joint Resolution. Namely, the Senate could pass the Joint Resolution and it would be law—but law without effect. This is not a matter of legality or constitutionality; it is a matter of capacity. Senators rose repeatedly to make this point.⁵⁵ Senators William Allen of Nebraska and Stephen Mallory White⁵⁶ were the most eloquent on this issue. Listen to the words of Senator Allen:

Mr. President, a few moments ago, I said, and it will do no more harm to repeat it now, that those who discussed the Texas case pointed with unerring accuracy to the fact that there was there no cession of territory whatever, but that congress by virtue of its power to admit new States brought in that commonwealth as such.

Here we are expected to reach out the legislative arm beyond and to assert dominion not only without our shores but beyond the confines of the Government with which we are concerned.

Mr. President, how can a joint resolution such as this be operative? What is the legislative jurisdiction of Congress? Does it extend over Hawaii? May we in this anticipatory manner reach out beyond the sea and assert our authority under a resolution of Congress within the confines of that independent nation?

Where is our right, our grant of power, to do this? Where do we find it? Some assume to discover it in the supposition that there has been a cession, which has in truth never been made.

Mr. President, when we reflect as to the lines which demark the jurisdiction of the legislature, we must confine that department to our nation. We cannot as I said before extend our legislative right to act without until there has been some authority by which that which is without is brought within.

⁵⁴ Edwin DeWitt Dickinson, *The Equality of States in International Law* 335 (1920)

⁵⁵ “No foreign territory under our Constitution can be admitted into the united States by an act of Congress.” See Statement of Senator Caffrey 31 Cong. Rec. 6526

⁵⁶ “We cannot as I said before extend our legislative right to act without until there has been some authority by which that which is without is brought within. Whence do acts of Congress go? Upon whom do they operate? Upon the people of the United States. They have no efficacy beyond the United States except in so far as the influence the conduct of her people in certain excepted cases and those exceptions are more apparent than real. They are impotent to effect the title or the status of the people of those who live upon alien soil. Where, then do we obtain the authority to annex unless by some treaty provision.” Senator White at 31 Cong. Rec. 6653 (1898)

“There is no constitutional power to annex foreign territory by resolution, . . .” Statement of Senator Stephen M. White June 21 1898 591 to 595 31 Cong. Rec. Appendix

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[The Joint resolution] ha[s] no efficacy beyond the United States except in so far as they influence conduct of her people in certain excepted cases, and those exceptions are more apparent than real.

Have we acquired Hawaii by treaty? No. Against the assumption of this resolution every Senator here knows that there has been no acquisition

We cannot as I said before extend our legislative right to act without until there has been some authority by which that which is without is brought within. Whence do acts of Congress go? Upon whom do they operate? Upon the people of the United States.

Senator Allen and others pointed out that a Joint Resolution was merely an act of Congress, a law, a bill.⁵⁷

Mr. President the Constitution must begin and end with the territorial jurisdiction of the United States: It cannot reach beyond the boundaries of our Government. It would be as lifeless and impotent as a piece of blank paper in Canada or in the Hawaiian Islands; and so with a statute or joint resolution.⁵⁸

A Joint Resolution if passed becomes a statute law. It has no other or greater force. It is the same as if it would be if it were entitled "an act" instead of "A Joint Resolution." That is its legal classification. It is therefore impossible for the Government of the United States to reach across its boundary into the dominion of another government and annex that government or persons or property therein. But the United States may do so under the treaty making power, which I shall hereafter consider

Senators White⁵⁹ and Turley⁶⁰ affirmed and reaffirmed the incapacity of the Joint Resolution. It is only by treaty⁶¹ that the United States could acquire Hawaii.⁶²

⁵⁷ "The power to make laws is "the power of pronouncing authoritatively the will of the nation as to all persons and things over which it has jurisdiction:" or it may be defined to be "the power of prescribing rules binding upon all persona and things over which the nation has jurisdiction". . . . But it can have no obligatory action whatsoever upon a foreign nation, or upon any person or thing within the jurisdiction of a foreign nation." Senator Bacon 31 Cong. Rec. at 6152 June 20, 1898.

⁵⁸ Senator Allen 31 Cong Rec 6635 (July 4, 1898)

⁵⁹ "They [legislative acts] are impotent to affect the title or status of property of those who live upon alien soil."Statement of Senator White Appendix to the Congressional Record, Volume 31, 55th Cong, 2d Sess. Remarks of Senator White at p. 593

⁶⁰ Senator Turley also added his opinion:

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Mr. Allen: But what I want to say, and then I will quit is that I have no respect whatever for the judgment of the Senate in passing a joint resolution to annex the Hawaiian Islands, and I discharge my full constitutional duty, in the light of my responsibility to God, and to my country when I vote against every measure of this kind.

I should like to say this, that I have not any more doubt about the lack of power to annex the Hawaiian Islands, the lack of constitutional power outside of the Treaty methods or regulations than I have of my existence in the slightest.⁶³

Senator Foraker, one of the few Senators who sought to explain how the Joint Resolution could acquire Hawaii, as we shall see, conceded that Hawaii could not be annexed by a Joint Resolution.

Mr. Allen. Will the Senator permit me to ask him if a constitution or a statute can operate extraterritorially?

"The Constitution and the statutes are territorial in their operation: that is they cannot have any binding force or operation beyond the territorial limitation of the government in which they are promulgated. In other words, the Constitution and statutes cannot reach across the territorial boundaries of the United States into the territorial domain of another government and affect that government or persons or property there." 31 Cong. Rec. 6339 (1898)

⁶¹ "The Joint Resolution itself, it is admitted, amounts to nothing so far as carrying any effective force is concerned. It does not bring that country within our boundaries. It does not consummate itself. The Republic of Hawaii may reject it, but nobody will deny that the treaty [referring to the Treaty of Annexation of 1897] having been ratified by the "Republic of Hawaii, having been agreed to by it, . . . it becomes a perfect contract and if the Republic of Hawaii attempted to withdraw from it we would be entitled to enforce our right to the territory by war or by arms." Senator Turley 31 Cong. Rec. 6339 June 25 1898

See also Senator White: "Have we acquired Hawaii by treaty? No. Against the assumption of this resolution every Senator here knows that there has been no acquisition." Senator White Appendix page 31 Cong Rec. 594 July 6 1898

⁶² "Whenever it becomes necessary to enter into any sort of a compact or agreement with a foreign power, we cannot proceed by legislation to make that contract. While we may thus release ourselves by our own power from its obligation in the form of law, we cannot force another to nation to enter into an agreement with us merely by our own act in the form of legislation. No such one-sided performance is known to either international law or to any system of jurisprudence in the world." Senator Allen 31 Cong. Rec. 6636 (July 4 1898)

⁶³ Senator Allen, 31 Cong Rec. at 6335, June 23, 1898, 55th Cong 2d Sess.

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Mr. Foraker. Certainly not. We went over that a few days ago pretty thoroughly and it seemed to be agreed all around that the proposition was well taken.

Mr. Allen. If the Constitution is confined to the territory of the Government and cannot reach to the territory an people of another government, and the statute is confined to the territory and the people of the Government and can not reach the pole of another government how can you annex those people by a law?

Mr. Foraker. You cannot annex that people by a law or by a joint resolution without the consent of the people.

Senator Pettigrew observed that as the Joint Resolution was impotent annexation would really amount to a form of conquest.⁶⁴

And Senator White cited from Alexander Hamilton:

Laws are the acts of legislation of a particular nation for itself. Treaties are the acts of legislation of several nations for themselves jointly and reciprocally. The legislative powers of one State cannot reach the cases which depend on the joint resolution of two or more states. For this resort must depend on the joint resolution of two or more States. For this resort must be had to the pactitious

During the attempt to acquire Santo Domingo, during the administration of President Grant, Senator Thurman took a similar position against the logic of annexation by resolution:⁶⁵ In the end, the Joint Resolution did pass.

Nations are sovereign. That is, by "sovereign," one means that each nation, no matter their size, has absolute lawmaking authority over its dominion---the real property within its boundaries. The claim that a nation is "sovereign" is akin to a claim that all bachelors are unmarried males. It is true by its own definition, not by reference or study of all the bachelors in the world.

⁶⁴ "You are obliged, then, to employ the force, the conquering power of this Government and reduce it to our possession by conquest. That is the only way, except by purchase, that this Government can acquire territory and make it a part of the national domain." Senator unknown.

⁶⁵ Senator White of California cited to Senator Thurman from the Congressional Globe as to the abortive attempt to acquire Dominica by Joint Resolution as was the case [he believed] with Texas. Speech of Thurman Sept 29, 1845: "Mr. Thurman: It was upon this doctrine that the resolution in the case of Texas was passed. But no one has ever pretended that you could by joint resolution annex territory as Territory without admitting it as a State."

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It is, in formal terms, an analytic claim---true by its own definition. In other words, what one means by claiming that all "nations are sovereign" is that there is no case, in which one nation, by its sovereignty can acquire the "nationhood", or territorial dominion of another.

Since all nations are sovereign, no other nation can take dominion of another sovereign nation by an act of its own sovereignty. However, this is precisely what the United States claims—that by an act of its sovereign law-making power, it acquired the dominion of the sovereign nation of Hawaii.

Just as one is confident that there are no "married" bachelors in the world, and one should be justifiably suspicious if another claimed to have found a married bachelor, there can be no examples of one nation acquiring another by its sovereignty that is by a Joint Resolution or other legislative act. Such a claim undermines the whole meaning and usefulness of the words "nation" [which is sovereign] and sovereignty [which is an attribute of all nations].

Thus, one can sense the anger and futility in the voices of Senators Allen, White, Turley and Bacon in the above discussion as to the capacity of a joint resolution to acquire Hawaii. Such a claim is not only nonsense but it blows apart the structure of international law.

In the following section, numerous Senators declare that the Joint Resolution is unconstitutional as it undermines or circumvents the foreign affairs power delegated in the Constitution to the President and the Senate.⁶⁶ The attempted use of the Joint Resolution to achieve a treaty with Hawaii violated the delegation of the foreign affairs power

H. The Joint Resolution was Unconstitutional

Senators opposed to annexation stood fast not only the proposition that the Joint Resolution had no power to acquire Hawaii, but also on the fact that the use of a Joint Resolution in place of a

⁶⁶The question of constitutionality is different from a claim of incapacity or impossibility. An act may be unconstitutional and may yet take place. A search or seizure may take place and later be declared unconstitutional. The United States may go to war without the consent of Congress. Bombs may actually fall and such action may be deemed unconstitutional. Nonetheless, it can happen. That is not the case with the Joint Resolution. It is incapable of acquiring the Hawaiian Islands.

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Treaty was unconstitutional.⁶⁷ The Constitution is a compact of powers delegated by the States. The foreign affairs powers of the states, inherent in their individual sovereignty, was fully delegated to the United States by the Constitution. The Constitution provides a specific, delegated path for the exercise of the foreign affairs power. Article II of the Constitution specifies that the foreign affairs power is to be exercised by the President with the advice and consent of the Senate. As to Treaties, the President shall initiate such treaties which must be ratified by the Senate by a two-thirds vote of the members present.⁶⁸ Such a treaty becomes law upon the exchange of ratifications by the nations who are parties to such treaty.⁶⁹

Senator Bacon was particularly vocal about the unconstitutionality of the Joint Resolution.

⁶⁷ The lack of capacity and unconstitutionality are vastly different claims. An act, a bill or a joint resolution may be constitutional, but have no effect. Or it can be both unconstitutional and lack capacity, like the Joint Resolution of 1898

⁶⁸ "Mr. Bacon: A treaty was negotiated between the President of the United States and the Hawaiian Government. Why did the President of the United States and the Hawaiian Government negotiate a treaty for the annexation of those islands? ..." Because it was the proper subject matter of a treaty?" Why did the Senate of the United States, when the President submitted the treaty here, undertake to consider it and to give its consent to the treaty which had been negotiated between the President of the United States and the Hawaiian authorities?

Why was it that it did not return it to the President and a "This is not the subject matter of a treaty, and we should not be asked for our advice and consent?" Simply because of the fact that the Senate of the United States, without exception regardless of what the opinion of any Senator might be on the merits, recognized that it was the proper subject matter of a treaty. Aside from this direct recognition, it comes within the general definition of that which must be a treaty.

It is to accomplish something, which cannot be accomplished by the unaided act of the United States. It is to accomplish something, which requires not only the consent of the United States but also the consent of Hawaii, and therefore must be in essence and in its character a treaty."

Statement of Senator Augustus O. Bacon of Georgia, 31 Cong. Rec. 6156 (June 20, 1898)

⁶⁹ "Senator Bacon: On the contrary, in the manner prescribed in the Constitution, he [The President] is part of the treaty-making power. A treaty is not obligatory until he himself proclaims it as a treaty. It may be even ratified by the Senate, and he can withdraw his approval, for there is nothing that makes it law until he does proclaim it; but when you put it in the form of a joint resolution or statute it becomes law whenever it has what the Constitution says shall be requisite to make a law, and it is then as binding on him as on anyone else." Senator Bacon at 31 Cong Rec. 6152 (June 20, 1898)

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Congress was not given the power to annex a foreign state, except in the admission of that nation as a state. Under the law of the equal sovereignty of states, one independent and sovereign nation such as the United States cannot take another nation, such as Hawaii by means or its own legislative act.

The only means by which one nation can acquire the sovereignty and jurisdiction of another nation is by some kind of consensual act usually in the form of a treaty of some kind.⁷⁰ Justice Scalia's belief in the constitutionality of annexation would have encountered stiff opposition in the Senate in 1898:

Two propositions are plain: First that territory can only be annexed or acquired by treaty, second, that the president under the Constitution may occupy the Hawaiian islands under the war power and by virtue of his office as Commander in Chief of the Army and Navy.⁷¹

Senator Bacon of Georgia added:

Mr. Bacon The proposition which I propose to discuss is that a measure which provides for the annexation of foreign territory is necessarily, essentially, the subject matter of a treaty, and that the assumption of the House of Representatives in the passage of the bill and the proposition on the part of the Foreign Relations Committee that the Senate shall pass the bill, is utterly without warrant in the Constitution.⁷²

Enacting a joint resolution requires a mere majority of the Senate and House.⁷³ The use of joint resolution to accomplish a treaty with a foreign sovereign nation undermines the super-majority

⁷⁰ Senator White reminded the Senate that there was no constitutional power to annex by Joint Resolution: "Mr. Presiden , if it be true as stated in this decision that the authority to acquire territory is derived from the treaty-making power and the power to declare and carry on war, where do we find the right to annex these peaceful islands of the sea? Where is the grant, where is the authority for which Senators contend?" Statement of Senator White, 31 Cong. Rec. 565 Appendix (July 1898)

⁷¹ See remarks of Senator Allen at 31 Cong Rec. at 6635, June 23, 1898, 55th Cong 2d Sess.

⁷² Mr. Bacon at 31 Cong Rec.6145 (June 20, 1898) 55th Cong 2d Sess.

⁷³ Mr. Allen. ". . . The House has no jurisdiction over the subject matter whatever." Statement Senator Allen, 31 Cong Rec. at 6634, July 4, 1898, 55th Cong 2d Sess.

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required of the Senate as to the ratification of treaties.⁷⁴ The Senate must ratify by two-thirds majority of those Senators present. It was for precisely this reason that the McKinley administration turned away from the Treaty of 1897 to a mere Joint Resolution, which requires only a majority of both Houses to pass.

Mr. Bacon. If Hawaii is to be annexed it ought certainly to be annexed by a constitutional method; and if by a constitutional method, it can not be annexed, no Senator ought to desire its annexation.⁷⁵

Moreover, Allen added:

Mr. Allen. But as respects the treaty-making power, the President is authorized to open negotiations with foreign countries and enter into treaties of all kinds, subject to the right of the States as represented in this Chamber to approve or reject; and whenever we depart from this specific and plain pathway, we abandon the provision, the letter, the spirit, and the policy of the Constitution.⁷⁶

The Joint Resolution was alleged to be unconstitutional because it sought to achieve an end by which the constitution provides a specific process. The United States can acquire dominion of another sovereign only by means of treaty, conquest or prescription. Conquest and prescription are not relevant here. The United States claims it acquired Hawaii by law, by legislation, by a joint resolution.

That is simply impossible. That is what the Senators in the previous section were stating. Impossibility is different from constitutionality. The acquisition of Hawaii, a sovereign nation, by an act of the sovereignty of the United States [an exercise of its law making, not treaty making power] is impossible because it undermines the very concept of "nation" and "sovereignty".

One can visualize the dilemma. The treaty was not withdrawn at the time the Joint Resolution was presented to the Senate. Thus, Senators had two documents on their desks: the Treaty of Annexation of 1897 and the Joint Resolution. Both documents purported to have the power to

⁷⁴ United States Constitution, Article II, Clause 2: "He shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . . "

⁷⁵ Statement of Senator Bacon, 31 Cong Rec 6152, (June 20, 1898) 55th Cong 2d Sess.

⁷⁶ Statement of Senator Allen, 31 Cong Rec. 6636, (July 4, 1898) 55th Cong 2d Sess.

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acquire the Hawaiian Islands. Only one of those documents was constitutional.⁷⁷ It was the Treaty.

The following section provides a sampling of the vivid objections to the Joint Resolution on the basis that it was unconstitutional, the second most important defect in the use of the Joint Resolution to annex Hawaii.

The esteemed Senator Augustus O. Bacon of Georgia was the second Senator to speak on June 29, 1898, the second day of debate on the Joint Resolution. He immediately attacked the constitutionality of the Joint Resolution:

Mr. Bacon: Now, whether wise or unwise that is the law. If only a majority concur, the treaty cannot be made. Therefore the effect of the failure in the Senate to ratify that treaty was the same as the failure of an attempted passage of a statute law. The friends of annexation seeing that it was impossible to make this treaty in the manner pointed out in the Constitution, attempted then to nullify the provision in the Constitution by putting that treaty in the form of statute, and here we have embodied the provisions of the treaty in the joint resolution which comes to us from the House.

Mr. Bacon: . . . it must necessarily be in the form of a treaty, but that if the purpose were to cede to this Government a part of the territory of another government it must necessarily lie in the form of a treaty,⁷⁸

Bacon raised another varied important aspect of constitutionality. The foreign affairs powers are delegated to the President and the Senate. The House is excluded from matters of foreign affairs. In passing the Joint Resolution of Annexation, the resolution was first brought to the House or Representatives which approved it. This "end run" around the Constitution would ruin the country.⁷⁹ Senator Bacon cites from a historical episode in which President George

⁷⁷“ Senator Allen: That where a constitution expressly provides a means to be pursued for the accomplishment of a given thing or purpose, it impliedly excludes all other means; and the Constitution having specifically placed the treaty-making power, which embraces the authority to annex territory, in the President, to be concurred in or not by two-thirds of the Senators present when submitted to the Senate, it excludes any other method of acquiring additional territory.” Statement of Senator Allen 31 Cong. Rec. 6635 (July 4, 1898)

⁷⁸Statement of Senator Bacon, 31 Cong. Rec. 6152 (June 20, 1898)

⁷⁹ “Senator Bacon: I confess that I am utterly unable to understand how anyone can possibly get away from the proposition which I have submitted which is that if what is here contended for is legal, whenever a treaty is rejected by the Senate because it can not get a two thirds vote, and whenever the project can command the assent of a foreign government, a majority of the Senate and a majority of the House of Representatives with the approval of the President any treaty thus rejected by two thirds of the senate can be enacted into law. If that is so, the provision in the

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Washington⁸⁰ ignored the request of the House of Representatives which sought to examine a Treaty proposed between the United States and another country, here is Bacon, quoting from President Washington⁸¹:

Constitution which gives to the President and two –thirds of the Senate the treaty making power is not worth the paper or the ink which it has taken to express it; it can be nullified at will.” Statement of Senator Bacon, 31 Cong. Rec. 6156 (June 20, 1898)

⁸⁰ “Mr. President, I propose to read what George Washington said about it. The House of Representatives called upon President Washington in 1796 to lay before the House copies of instructions to the ministers of the United States who had negotiated a treaty with Great Britain, and the President, replying to the House of Representatives, asserts the power of the President and of the Senate to the exclusive control of all matters which are treaties, and gives the reasons for it. I read from the first volume of Messages and Papers of the President, by Richardson, page 104.

“United States, March 30, 1796.
To the House of Representatives of the United States.

With the utmost attention I have considered your resolution of the 24th instant, requesting me to lay before your House a copy of the instructions of the minister of the United States who negotiated a treaty with the King of Great Britain together with the correspondence and other documents relative to that treaty, excepting such of said papers as any existing negotiation may render improper to be disclosed.

In deliberating upon the subject it was impossible for me to lose sight of the principle which some have avowed in the discussion, or to avoid extending my views to the consequences, which must flow from the admission of that principle.” Statement of Senator Bacon, 31 Cong Rec. 6152 (June 20, 1898)

⁸¹Bacon referred to Washington’s Farewell. The First President warned against “entangling alliances.”

“The historic policy of the Republic of the United States for the hundred years just passed, based as it has been upon the sound doctrine promulgated by Washington in his Farewell Address with words of perennial wisdom against foreign entangling alliances, has taken roots in the hearts of the American people, where it is treasured up as their political Bible and can not now be “mocked at, “as merely an ancient tradition. Its acceptance has made the Nation great, made it respected. If our fidelity to the well ripened statesmanship of the Father of his Country shall be perpetuated for the next hundred years as in the past, the honor prosperity and power of our Republic, it may safely be predicted will light and lead all nations.” Statement of Senator Bacon, 31 Cong Rec. 6158 (June 20, 1898)

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Mr. President I desire that Senators will mark the peculiar significance of this utterance by Washington. The distinct question, which he was having under consideration, was whether the House of Representatives had the right to any consideration whatever of the subject matter of the treaty. They had called on him for information with reference to a treaty, and he had stated to them practically, "It is none of your business; that is a matter that belongs to the President and to the Senate and does not belong to the House of Representatives."⁸²

Another reason for keeping matters of foreign affairs from the House is the importance of maintaining confidentiality and secrecy. The Senate does not debate Treaties publicly. Moreover, the House has four times the number of members as the Senate:

The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President with the advice and consent of the Senate, the principle on which that body was formed, confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have, as a matter of course, all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent. It does not occur that the inspection of the papers asked for can be relative to any purpose under the cognizance of the House of Representatives, except that of an impeachment, which the resolution has not expressed.

Senator Bacon also notes that there have been three treaties of annexation proposed between the United States and Hawaii, the first in 1854:

In the summer of 1854, our commissioner to Honolulu, Mr. Gregg, advised Secretary William L. Marcy that the Kingdom Hawaii was on the verge of a revolution and resting on a political volcano; that four British ships of war and four French war ships had just arrived at Honolulu. Annexation, therefore must be quickly sought or Hawaii would be forever lost. A treaty was asked for and obtained from Hawaii, but as it was to be admitted as a State, with Senators and Representatives, it was not swiftly accepted by Marcy. The King of the Islands did not sign an amended treaty, and in short time he died. The Prince Royal having ascended the throne, the political volcano disappeared and so did this embryonic treaty.⁸³

⁸² Senator Bacon, 31 Cong Rec. 6152 (June 20, 1898)

⁸³ Senator Bacon, 31 Cong Rec. 6152 (June 20, 1898)

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Another important issue that will be examined in this paper is the precedent of Texas. Some Senators in the 1898 debate claim that Texas was annexed, that is, admitted as a State by a Joint Resolution. Therefore the rule that requires a treaty in all transactions involving the acquisition of the sovereign dominion of a foreign state is not true:

Not to elaborate it further, I will merely state that it is the distinction between the authority of congress to admit a State, to do which it is given the power in the words in the Constitution, and the power to acquire foreign territory nor for the purpose of making it a State, which as I shall endeavor to show, is essentially and necessarily the subject matter of a treaty between two governments.. "Treaties" means treaties.

Senator Bacon is also to note that the reason why a Joint Resolution has been sought is that the annexationists lack the two thirds majority to ratify the Treaty of Annexation before the Senate. That would be the proper, and only, means of acquiring Hawaii. Lacking the sufficient two-thirds majority, the annexationists now turn to using a law, or Joint Resolution to accomplish annexation. A Joint Resolution requires only a simple majority of both Houses:

Now, whether wise or unwise that is the law. If only a majority concur, the treaty cannot be made. Therefore, the effect of the failure in the Senate to ratify that treaty was the same as the failure of an attempted passage of a statute law. The friends of annexation seeing that it was impossible to make this treaty in the manner pointed out in the Constitution, attempted then to nullify the provision in the Constitution by putting that treaty in the form of statute, and here we have embodied the provisions of the treaty in the joint resolution which comes to us from the House

Mr. President it is contrary to every rule of construction that such a construction shall be put upon any constitutional provision as will enable it to be utterly nullified and made of no effect.⁸⁴

Bacon notes that President Grant eventually proposed to take Santo Domingo by a Joint Resolution, the treaty and constitutionality arguments were made before the Senate.

This, as was stated by Garrett Davis, was a pet project of the President of the United States. That President was Ulysses S. Grant, the very idol of the country at that time certainly. In this body were those who were his extreme partisans, and yet while the suggestion that it was his purpose to have a joint resolution passed to annex Dominica was denounced in this body, we do not find one single man

⁸⁴ Senator Bacon, 31 Cong Rec. 6154 (June 20, 1898)

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who would defend the doctrine that there could be any right by joint resolution to annex Dominica.

Bacon also raised the constitutional question of whether the United States could constitutionally acquire territory not contiguous to the continent and the other States. In his statement he also refers to the questions President Jefferson had as to the ability to acquire foreign territory at all under the Constitution, unless amended:

The annexation of the Hawaiian Islands by the United States presents a question of national policy, of constitutional power, and of national honor of the utmost gravity. The islands are not near to the American continent, but far out in the middle of the Pacific Ocean. President Jefferson regarded the question of constitutional power to annex even the contiguous territory of Louisiana so doubtful as properly to require an amendment of the Constitution, but the irresistible power of the mouths of the Mississippi silenced that question.

Senator Bacon was also concerned with the policy decision to acquire foreign territories. Such, he claimed would undermine a premise of the Declaration of Independence and the Constitution that the United States would not be a nation of colonies.⁸⁵ He prophesized that the Joint Resolution if carried out by force would be a disaster⁸⁶, a revolution of great magnitude, in fact a number of revolutions:

⁸⁵“Senator Bacon: My firm conviction, however, is that annexation of distant islands is not in harmony with the Constitution of the United States, but is conspicuously repugnant thereto; nor is it in harmony with the history or even with any of the recorded opinions of our earlier and ripest statesmen.

Claiming nothing in consideration of any words of mine, except for the facts here presented, I have yet to hear any sufficient reasons which should induce me to break the consistency of my record of many years standing against the annexation of distant foreign lands. May I not ask, has the country ever lamented the rejection of Santo Domingo? Manifestly, no.” Senator Bacon, 31 Cong Rec. 6155 (June 20, 1898)

⁸⁶ “Mr. President, if we pass the joint resolution we have entered upon a revolution which shall change the entire character of the Government, which is a government of equals, a government solely for the benefit of its citizens, into a government in which the flag shall float over communities that we would never agree should be equals with us in this Government.” Senator Bacon, 31 Cong Rec. 6156 (June 20, 1898)

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On our part the annexation of the Hawaiian Islands is only an overdone example of the European colonial system. It belongs to and emanates from the aristocratic school of politics. It has no abhorrence of coolie labor, which is the double cousin of slavery. It covets prodigal expenditures and a big display of power. It does not listen to the still, small voice of peace, industry and economy but to the blast of the popular trumpet which would conquer worlds and reign over Hawaii rather than serve in heaven.

Senator Bacon predicted profound consequences for the United States:

That is a great enough revolution, Mr. President, but if we pass the joint resolution, we have entered upon a revolution which I consider greater and more to be objected than that; that is a revolution where, because the majority has the power, it will in this body surrender the great function which the Constitution gives to the President of the United States, and also to us as a part of our treaty-making power, and we have entered upon a field where the restraints of the Constitution are no longer to be observed where the will of the majority shall obtain regardless of constitutional restrictions.

I desire to submit to the Senate what I consider to be a very grave question. It is a question, if we pass this joint resolution, not only of one revolution, of two revolutions.

If we pass the joint resolution we enter upon a revolution which shall convert this country from a peaceful country into a warlike country.

If we pass this resolution, we revolutionize this country from one engaged in its own concerns into one which shall immediately proceed to intermeddle with the concerns of all the world.

If we pass this joint resolution we inaugurate a revolution which shall convert this country from one designed for the advancement and the prosperity and the happiness of our citizens into one which shall seek its gratification in dominion and domination and foreign acquisition

Many others, making the same points would speak over and over on the unconstitutionality of the Joint Resolution. In particular, Senators William Allen of Nebraska⁸⁷ and Senator Stephen

⁸⁷Mr. Allen: In fact, so notorious and open have been the violations of the Constitution within the last few years that a distinguished American statesman, who for many years served this chamber and who is yet alive, declared that "The Constitution means whatever a majority in Congress says it means." Senator Allen 31 Cong. Rec. 6636 (July 4 1898)

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Mallory White of California would fill the pages of the Congressional Record with their objections. Senator Allen would make a uniquely important point: all territory ever acquired by the United States was acquired by Treaty—and as we shall see, this included Texas

And, Mr. President, if we will turn to the precedents, we will find this assertion well sustained by the history of our country.

Alaska came to us by treaty from Russia March 30, 1867.

Arizona was included in the Territory of New Mexico ceded to the United States by Mexico by treaty of February 2, 1848. Its boundary was extended south by the Gadsden treaty of December 3, 1853-June 30, 1854.

California came to us from Mexico, primarily by conquest in 1846-47, followed by treaty of February 2, 1848.

Florida came to the United States by treaty from Spain February 22, 1819.

Louisiana came to us from France by treaty April 30, 1803. New Mexico came to the United States from Mexico by treaty of February 2, 1848.

Santo Domingo was proposed to be annexed by treaty in 1869-70, but it failed. That treaty contained a clause for the assent or a vote of the people, which was taken in March, 1870, and they voted 1,006 for to 9 against.

In 1867 the United States negotiated a treaty with Denmark for St. Thomas and St. Johns, and the assent of the people of those islands was made a condition precedent, and they voted "aye " about January 18, 1868, but the treaty failed.

Mr. President, notwithstanding these precedents, it is proposed to annex the Hawaiian Islands without consulting the people of that country.⁸⁸

The deception as to the Joint Resolution worked so well that in the following century officials of the United States themselves became actual believers.⁸⁹ Indeed, a most fitting quotation comes

⁸⁸ Statement of Senator Allen, 31 Cong. Rec. 6635 (July 4, 2898)

⁸⁹ Saddam Hussein even knew Hawaii's history. When Saddam Hussein was asked by the coalition to evacuate Kuwait, he criticized the United States about its taking of Hawaii. "He said

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from the 1900 debate on the Organic Act as to the general attitude that Senators had as to the Constitution and the Question of Hawaii.

Mr. Caffrey: The argument of the Senator from Nevada reminds me of an answer give by a celebrated ex-member of the House as to the question of whether a certain act he wanted done was constitutional. What was the reply of the gentleman? He said "What's the constitution between friends... What is the constitution between friends of this measure who want to incorporate Hawaii into the United States by joint resolution? Mr. Stewart: They are all friends."⁹⁰

J. Senator Stewart: Arguments Supporting the Joint Resolution

The Republican majority lay silent. They said nothing.⁹¹ Those opposing annexation had formidable arguments: First, the Joint Resolution could not possibly acquire the sovereign territory of another nation. Second, the use of a Joint Resolution in place of a treaty was unconstitutional. Finally, there were moral arguments against annexation. There had been no plebiscite of the people of Hawaii. Hawaii had slavery. The Republic was an undemocratic oligarchy.

Only a few of the proponents of the Joint Resolution rose to explain how the Joint Resolution could acquire Hawaii. The most memorable defense came from Senator Stewart of Nevada. He argued that the Joint Resolution, if it became law, would have to be enforced by the President under the duty to "faithfully execute laws in the Constitution." Stewart posed a hypothetical resolution whereby Congress moved, by law, the U.S. Mexico boundary three hundred miles into Mexico.

Iraq would consider leaving Kuwait about as much as the United States would consider abandoning Hawaii."

USA Today October 30, 1990, Gannet Company Final Edition, News Pg 4A Headline: "Saddam: Iraq won't abandon Kuwait" Byline Betty Ciacchi "Iraqi President Saddam Hussein, calling himself a warrior of God insisted Monday he won't withdraw from Kuwait

⁹⁰ Statements of Senators Morgan, Allen and Spooner, 33 Cong. Rec. 2389 (February 28, 1900)

⁹¹ "There was a marked lack of debating on the part of Senatorial defenders of annexation, in spite of the jibes of Senator Pettigrew and many others that the imperialists never justified their views. The Baltimore Sun thought the silence of proponents of the resolution proved they intended to let the opposition talk itself out, and then they would annex." See Russ, Jr., at

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Mr. Caffrey: Will the Senator from Nevada permit me to interrupt him? I wish to know how he proposes to extend those limits down 300 miles into Mexico. The Senator says, "Suppose we extend them." I want to know by what rule.

Mr. Stewart: We do not propose to do it. I do not think Congress would commit such an outrage as that.

Mr. Caffrey: Exactly, but in the supposititious case of the extension of territory 300 miles into Mexico how would you do it?

Mr. Stewart: It might be done by act of Congress and if the President would sign it, he and the Congress would be bound by it if Congress said the boundary line should be in another place.

Mr. Caffrey: It would surely be a peaceful act?

Mr. Stewart: It would be a purely peaceful act if Mexico did not object. If Mexico did object, it would be a case for war.

Mr. Teller: Suppose Mexico agreed, then what?

Mr. Stewart: If Mexico agreed to it, that would be the end of it.

Mr. Teller: Of course, that would be the end of it.

Mr. Allen: But suppose the Mexican Congress or the Mexican executive agreed to it; and that neither the Congress nor the executive had the authority to agree to it.

Mr. Stewart: It would not matter whether they had any authority or not.

If we took the territory inside of our boundary, Mexico would have no redress but war.

Mr. Allen: But to carry out the Senator's simile further suppose Congress should declare that it we a necessity to annex England and the President should approve it, would that annex England to the United States?

Mr. Stewart: Yes, if England did not object.

Mr. Allen: But suppose the people of England did object?

Mr. Stewart: Then we would have to fight for it.

Mr. Allen: And if the English parliament would consent would that bind the people of England, though the parliament lacked the authority to consent?

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Mr. Stewart: If the people of England were not satisfied, they might fight too.

Mr. Allen: Then we can annex the world?

Mr. Stewart: We can annex anything. But we do not suppose that Congress is going to do those things. The fact that sovereign power exists implies that it might be abused. It is not abused in this case [Hawaii] because we know that the people of the Sandwich Islands want to be annexed to this country.

Mr. Stewart. Well, it amounts to the same thing. The war-making power is the sovereign power. But that is a rather loose expression of the Supreme Court. It would require the war making power. The treaty-making power would not do. I undertake that it is the political power confided in the legislature and there is not any the power to acquire territory.

Stewart's claim was an example of conquest, not the sovereign power of Congress to acquire territory peaceably.⁹²

The silence of the proponents of the Joint Resolution masked their reliance on two misplaced assumptions: First, they assumed that since the conspirators in Hawaii wanted annexation that the conspirators would accept annexation under any terms. As discussed *infra*, this assumption was incorrect. Second, many in the Senate did not differentiate between taking Hawaii by Joint Resolution or by conquest. Acquisition of territory by conquest was deeply embedded in American history as a means of acquisition of Native American lands.⁹³ Today, of course, conquest is unlawful.

⁹² Senator Mallory criticized Stewart's theory of conquest. Stewart apparently believed a treaty was not necessary at all.

"The Senator from Nevada [Mr. Stewart] proclaimed the fact that he did not believe that you could annex any territory by treaty at all, in the face of the history of this country and the precedents established by the annexation of Louisiana, Florida, and other territories to this country. The Senator from Nevada found it was necessary, in order for him to maintain his position that he should adopt that extraordinary attitude before the Senate; that is, that the treaty making power did not include the annexation of territory from foreign countries." Statement of Senator Mallory at 31 Cong. Rec. 6586 (July 1, 1898)

⁹³ Through the nineteenth century, the right of conquest was expressly recognized by the U.S. Supreme Court. See *id.* at 45 (citing Johnson and Graham's Lessee v. McIntosh, 8 Wheat. 543, 587-88 (1823) (holding that "conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinion of the individuals respecting the original justice of the claim . . .").

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K. Senator Foraker: Arguments Supporting the Joint Resolution

Senator Foraker made a series of famous, or rather, infamous, claims that the Joint Resolution was a treaty during the Senate debate. He also offered a number of theories by which a treaty was not necessary---based on his understanding of the general welfare clause, the inherent sovereign powers of the United States and the power to annex municipalities.

The most well known of Foraker's claim was that there was no need for a treaty of annexation between Hawaii and the United States. Once the Treaty was concluded, one party, the Republic of Hawaii, died and ceased to exist. Thus, the consent, or signature of Hawaii to the treaty was not necessary. So long as the United States consented, or signed, Hawaii would be annexed.⁹⁴

Notwithstanding President Woodrow Wilson's declarations of the principles of self-determination and non-annexation at the end of World War I, the United States never formerly renounced the doctrine until the 1941 Atlantic Charter, the agreement between allied forces which declared that the allies "seek no aggrandizement, territorial or otherwise" and "desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned." *Id.* at 162 (quoting Llewellyn Woodward, *British Foreign Policy in the Second World War* 202-03 (1976).. See Treaty of Guadalupe Hidalgo, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922. See Treaty of Amity, Settlement, and Limits, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252.

⁹⁴ "The Ohio senator's constitutional justification for the resolution was interesting, whether it could be defended or not. He argued that a treaty in this case would be foolish, because a treaty presupposed two independent contracting parties; and yet one died as soon as the treaty was ratified. Inasmuch as this would be an absurdity, a joint resolution became the only logical method.¹⁶¹ White replied that nevertheless all Republicans had been advocating such an absurdity until they found that the treaty could not be confirmed.¹⁶² Pressed to the wall touching the treaty whereby Louisiana was acquired, Foraker replied that a treaty was necessary in that case because France, one of the contracting parties, still existed after Louisiana was sold ; furthermore, that in acquiring Louisiana the United States undertook certain obligations which France could later demand to be carried out. In the case of Hawaii, the United States was promising nothing and was undertaking no future obligations. "Can there be," he asked, "two parties when only one party is still in existence?"

"Foraker's theory, although somewhat fantastic, was rather important because it was the first real Republican defense of the constitutionality of the joint resolution." Superficially, the argument appeared plausible until anti-Annexationists tore it apart. Allen, for instance, recalled to Foraker's attention that the death of one party to a private contract did not breach that contract. Why should the same not be true when Hawaii ceased to exist? Augustus O. Bacon of Georgia asked him what was to be done if Hawaii, as was its right, refused to accept the joint resolution? Foraker answered that Hawaii might legally refuse to do so; but that, having already ratified the annexation treaty, it would not reject the joint resolution." Clay

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Therefore, since the agreement was not a treaty it was not relegated to the foreign affairs power of the President and the Senate. On June 25, 1898, Senator Foraker presented this theory on the floor of the Senate:

Senator Foraker. You cannot have a contract unless you have two parties to it. That has been your contention throughout until the treaty has been signed on both sides. The very minute that is done one of the parties is gone, and there is no continuing contract. Therefore, it is simply a cession on their part and an acceptance on ours.

I was contending that the term "treaty" implied an existing and continuing contractual relation between existing parties, and therefore any transaction that did not involve that idea was not so properly the subject matter of a treaty as it was of legislation. . . .

Mr. Spooner It is not a question of degree. It is a question of possibility. The Senator correctly says a treaty is a contract between two sovereign states. There could not be a unilateral treaty.

Mr. Foraker: Yet in legal effect, the result by treaty was the same because the very moment it was consummated the party ceased to be, . . . and there was nobody left to complain.

Mr. Spooner. My friend the senator from Ohio is a good lawyer. He is analytical and he is accurate. But there is no middle ground. He has to take one side or the other. A contract between nations by the very terms of which the moment it becomes effective one dies, the Senator says, is not a treaty. Now that being true, how can he say that it may be more properly done by legislation than by some . . . treaty."

Since the Republic of Hawaii desired annexation on any terms supporters of the Joint Resolution assumed that it did not matter how annexation was achieved. Many supporters of annexation thought the President should seize Hawaii by executive order. Senator Bacon, an opponent of the Joint Resolution was the first to point this out on the first day of the debate:

inquired whether the United States, contrary to Foraker's statement, was not promising to carry out certain obligations, such as to pay Hawaii's debts. Foraker admitted the truth of this, but replied that if the United States later failed to implement the bargain, Hawaii could do nothing since its international position had ended." See Russ Jr., at

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If the President of the United States can do it in the case of Hawaii he can with equal propriety and legality do it in the case of Jamaica and I repeat that I am more than gratified, . . . that the President of the United States has not seen proper to listen to their unwise counsels.⁹⁵

Mr. President, we could not annex Hawaii by statute or by a joint resolution if Hawaii had not consented. It would be brutum fulmen [a futile threat or display of force] unless we proposed to enforce it by war.⁹⁶

Senator Foraker also asserted that Hawaii had already ceded its sovereignty. This could be assumed, he reasoned, because the Provisional Government of Hawaii in 1893 and the Republic of Hawaii in 1897 had drafted, with the United States, Treaties of Annexation.

The United States as having initiated and supported the overthrow assumed there was but one goal-- annexation of Hawaii as a territory of the United States. Foraker was not aware that the conspirators in Hawaii had a very different view of the terms that would define the nature of the relationship between territory of Hawaii and the United States.

Hawaii would not come in as just any territory. It would retain many of the attributes of its sovereignty that it enjoyed as a Republic. The Republic desired to retain involuntary servitude in the form of contract labor. It desired to retain the power over foreign affairs. It desired to retain its own system of laws, criminal and civil. Most of all, it sought to retain the exceptionally high barriers on the franchise that allowed a small minority of the islands population to control the legislature.

Thus, Foraker and others made the mistake of assuming that Hawaii would become a territory much like existing territories, such as Arizona or Utah. Foraker and others assumed that the general Revised Laws of the United States that applied to all territories would apply to Hawaii.

They completely misjudged the vast gulf of misunderstanding between the United States and the Republic of Hawaii. In his ignorance Foraker thus asserted that Hawaii, by various acts, had already lain itself at the doorstep of the United States. Hawaii, to Foraker, merely awaited some act, any act, by which the United States "took" Hawaii. That act, of course was the Joint Resolution. Hawaii offered to cede itself and the Joint Resolution accepted that offer. To Foraker it was simply a matter of contract law, not treaty law. There was no need for a perfect meeting of the minds between the United States and Hawaii.

Mr.Foraker. You can do it more appropriately because in the first instance, when you undertake to do it by treaty, the transaction amounts to nothing more than a tender on the part of one side and an acceptance on the part of the other, and that is all there is in the legislation that we are now considering. When they came to the treaty making power in the Constitution, they did not say in the Constitution what should be the subject matter of a treaty.

Thus, on the key issue of the capacity of the Joint Resolution to acquire Hawaii Foraker was compelled to agree that the United States could not annex Hawaii by Joint Resolution.⁹⁷ Yet, he did not think that really mattered. The

⁹⁵ Statement of Senator Bacon, 31 Cong. Rec. 6152 (June 20, 1898)

⁹⁶ Statement of Senator Bacon, 31 Cong. Rec. 6152 (June 20, 1898)

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United States would take Hawaii anyway if not by Joint Resolution by some other means. Thus, he was caught a number of times with his foot in his mouth—claiming that Hawaii, without consenting to the Joint Resolution, had already ceded itself to the United States. On a number of occasions, he was s reprimanded by Senator Spooner:

Mr. Spooner. It is not a question of degree. It is a question of possibility. The Senator correctly says a treaty is a contract between two sovereign states. There could not be a unilateral treaty.

Spooner pointed out that with the extinction of a party there would be concomitant extinction of a continuing duty. Senator Foraker also confused annexation of nations with the annexation of towns and cities.⁹⁸

Mr. Allen: If the Constitution and statutes begin and end on territorial limitation, how can you annex a people beyond that limitation by statute?

Mr. Foraker. We have that kind of law in the State of Ohio, applicable to cities of the first grade of the first class.

It provides that in any city of the first grade there may be an annexation of territory whenever outlying contiguous territory will comply with certain terms and conditions, with a view of annexation which the statute designates.

Then it is provided that it may be regarded as annexed, and the city jurisdiction extends to it. Now, it is upon the same general principle, though, of course, not in the same way.

Mr. Allen: That is a case of municipal extension⁹⁹

Senator Foraker claimed that annexation was not forbidden by the Constitution—and thus it was permitted.¹⁰⁰

⁹⁷Mr.Foraker: "You cannot annex that people by a law or joint resolution without the consent of the people."

Statement of Senator Foraker, 31 Cong. Rec. 6585 (July 1, 1898)

⁹⁸ Statements of Senators Allen and Foraker, July 1, 1898, 31 Congressional Record 6585

⁹⁹Statements of Senators Allen and Foraker, 31 Cong. Rec. 6585 (July 1, 1898)

¹⁰⁰ Senator Allen and Senator Foraker debated whether the United States could simply take Hawaii under the "general welfare" power of the Constitution. Senator Allen insisted that the acquisition of all territory of a foreign and sovereign nation must be by treaty.

Mr. Foraker. Senators talk about it being unconstitutional to annex except only by treaty as though the Constitution of the United States had provided that there should be annexation by treaty.

Mr. President the Constitution is silent on the question of annexation of territory. It does not seem to have entered into the minds of the framers of the Constitution to put into that instrument any express provision on the subject with a general provision. They gave to Congress the power to promote the general welfare, and that carries along all the powers essential to consummation of that purpose.

When they came to the treaty making power they did not say in the Constitution what should be the subject matter of a treaty. They simply said that the President might negotiate treaties, subject to ratification by the Senate; they did not say what we should treat about, and I agree with Senators on the other side that a treaty is a contract.

Foraker also turned to a variety of old and new constitutional powers by which to annex Hawaii.

Mr. Foraker. So I say, Mr. President if the Congress of the United States sees fit, in the exercise of her power to promote the general welfare to annex this island or any other, it is competent for congress to do so."

Mr. Allen: They I will ask the Senator another question, with his permission.---

Mr. Foraker: I will say I mean in this kind of a case with the limitation I state a while ago.

Mr. Allen: Have we the power to deal with any foreign nation except by treaty?

Mr. Foraker: I think so, undoubtedly.

Mr. Allen: I think we have not.

Mr. Foraker: There is no provision in the Constitution which says we cannot deal with other nations otherwise than by treaty.

Mr. Allen: That is not the question. The question is whether we have the power to do it.

See statements of Senators Foraker and Allen, 31 Cong Rec. at 6335, June 23, 1898, 55th Cong 2d Sess.

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Foraker claimed that the United States could annex Hawaii under a theory of "inherent powers," by the "general welfare" clause¹⁰¹, or by the Treaty of Reciprocity with Hawaii. As to the general welfare clause, Foraker claimed:

Mr. Foraker. So I say, Mr. President if the Congress of the United States sees fit, in the exercise of her power to promote the general welfare to annex this island or any other, it is competent for congress to do so.

Senator Foraker also urge a version of the "super-sovereignty" theory espoused in the 1930s by Justice Southerland.¹⁰² Namely, the States did not delegate all of their powers over foreign affairs to the Federal Government. Thus, the residue of foreign affairs powers left in the States provided a basis by which the United States as a nation, not a federal government, had "inherent sovereign" powers in foreign affairs not limited by the Constitution.¹⁰³

Mr. Foraker: My contention is simply that the inherent power of sovereignty, which you must admit belongs in the State, in the people of the State, exists still somewhere, and that it now belongs to the General Government.¹⁰⁴

And I contend that the same power thus conceded to the State is lodged somewhere today. The State that comes into this Union must surrender this power. Where does it go? I contend that it goes to the General Government. That is my view of it.

Senator Allen challenged this contention"

Mr. Allen. If we do possess an implied power to annex, have we a coterminous implied power to be annexed?

Mr. Foraker: I suppose if the people of this country should desire it to be annexed to some other country, they could bring it about.

¹⁰¹Senator White attacked Foraker on the use of the "general welfare" clause as a basis for annexation:

"This novel extension of the general welfare clause deserves to be classed with the somewhat more candid utterance of another who asked: "What is the Constitution between friends."

Cited in Appendix to the Congressional Record, Volume 31, 55th Cong, 2d Sess. Remarks of Senator Stephens at p. 593

¹⁰² United States v. Curtiss-Wright Export Corp. 299 U.S. 304 (1936)

¹⁰³ Statement of Senator Foraker 31 Cong. Rec.6586 (July 1 1986)

¹⁰⁴ Statement of Senator Foraker, 31 Cong. Rec. 6586 (July 1, 1898) 55th Cong. 2d Sess.

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Spooner challenged Foraker's theory of super-sovereignty:¹⁰⁵ Spooner and Foraker disagreed on the basic question of whether the Constitution was a limitation on existing power or rather a grant of new power. Spooner asked Foraker if inherent power was higher than the Constitution.

Mr. Foraker: I do. I think so.

Mr. Spooner: Is it the higher law?

Mr. Foraker: I do not call it any higher law. The proposition is that it is inherent in sovereignty to do whatever sovereignty may see fit to do and among other things to acquire territory. The senator from Wisconsin will admit that sovereignty certainly carries with it the inherent power to annex territory. I assume that he will admit it. If he will not, he will dissent now. His contention is that the United States—

Mr. Spooner: I have made no such contention.

Mr. Foraker: Well so far as I understand the views of the Senator from Wisconsin, judging from the intimations he has thrown out here, his idea is that because our Government is one of limited powers—“

Mr. Spooner. Allow me to finish. I understand that the Congress of the United States has such legislative power as is granted to it expressly by the Constitution or by reasonable and necessary implication under the Constitution. When you leave the granted and implied powers, I want to know where the Senator gets his theory of inherent sovereignty outside of the Constitution.

Senator Turley also responded to the challenge of super-sovereignty.¹⁰⁶ The theory of inherent sovereign powers espoused by Justice Southerland has been thoroughly discredited today.

¹⁰⁵ Statements of Senators Foraker and Spooner, 31 Cong. Rec. 6584 (July 1, 1898)

¹⁰⁶At one point, Senator Foraker asserted that the United States had extra constitutional “inherent powers” by which it could annex Hawaii. By “annex” Foraker meant “acquire the sovereignty of Hawaii without a treaty.” In response Senator Turley stated:

“I read from the remarks of the Senator from Colorado [Senator Teller] in Monday's Congressional Record. The first proposition is that it is the right of every sovereign power, every nation to add to its territory whenever it sees fit. Properly construed that could only apply to the war making power. Any sovereign nation whether it has just cause or not, on any and every occasion, it can involve itself in war. However, it is not correct to say that every sovereign nation under any and all circumstances can annex foreign territory whenever it sees fit. Unless it is annexed by forceful measures, by war, it can only be annexed by some kind of agreement or compact and that requires the consent of some other nation or some other people.”

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Senator Foraker must be commended for his courage to single handedly attempt to defend the power of the Joint Resolution to acquire Hawaii. Nonetheless, he failed miserably. His theories of (1) super-sovereignty, (2) the use of the general welfare power, (3) the use of powers derived from the Reciprocity Treaty with Hawaii, (4) the argument Hawaii need not agree or sign the Joint Resolution as a treaty because it "died" the moment it signed (5) and his claim that Hawaii had already irrevocably gifted its sovereignty to the United States were all terrible arguments. Senator Foraker was a sacrificial lamb for the Republican administration of President McKinley. Senator Foraker and Senator Stewart failed completely in their attempt to explain how the Joint Resolution would acquire Hawaii. Thus, there is nothing on the record explains the annexation of Hawaii by Joint Resolution. If one conjured up the formal legislative history of the Joint Resolution, it would be this: Congress can pass anything it wants. Congress can pass a bill that claims to acquire Hawaii. That bill, or Joint Resolution, can have no effect whatsoever. One may as well annex the moon.

There is no proof, no statement and no explanation in the Senate debates as to how the Joint Resolution acquired Hawaii. Congress passed a Joint Resolution with the full knowledge that the Joint Resolution had no power to acquire the Hawaiian Islands. As a matter of legislative history of the Senate, the Senate passed a bill that had no legal effect.¹⁰⁷

Nevertheless, the overarching issues were so important to America that the debate in the Senate is considered one of the most important in American history. It is a debate that transformed the United States from a nation content to live within the confines of the North American continent to a nation bent on global dominance. The debate forced changes in the constitution: under the insular cases the Constitution would no longer apply uniformly to all places under the jurisdiction of the United States. The debate raised issues of the character of the American Republic¹⁰⁸ and of a commitment to the rule of law and the principle of government by the

Statement of Senator Turley, 31 Cong. Rec. ()

¹⁰⁷ Therefore, the legislative intent of the Joint Resolution was not to acquire Hawaii, but to simply "provide" in some sense, for the later acquisition of Hawaii. Indeed, that is the form title of the Joint Resolution: It does not claim acquisition. It simply states that it "provides" for the [future?] acquisition of the Hawaiian Islands. That event would never come.

¹⁰⁸ Representative Hitt considered abandoning the Constitution to be an act of Treason:

"I noticed when I alluded to the constitution there were smiles on some of the countenances of gentleman in the House. I know it has become quite old-fashioned to talk about the Constitution. I know that in these degenerate days, it is not considered up to date to talk about being governed and restrained by the Constitution of the United States.

But sir, I for one wish to declare in this honorable presence that I hope never to arrive at a time when I shall be induced by any temptation to say that I recognize any higher law for the

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consent of the governed. It was a turning point for America—an enormous shift in the basic values of the United States.¹⁰⁹ It is noted that some of the finest speeches ever made in the Senate were made in the debate over the Join Resolution.¹¹⁰

Many, such as Senator Turley of Tennessee, realizing the gravity of the moment, spoke out.

government of this nation and the Congress in its duties toward it than the Constitution which I swore before the Speaker to defend against all enemies, foreign and domestic. It is not only the men who are guilty of treason at home who attempt by cooperation with a foreign enemy to break down and destroy the Constitution or that are distinguished as domestic enemies; they are enemies of the Constitution who, for any cause, in any way, attempt at home to nullify and render inoperative the provisions of that Constitution and trample them under foot.”

Statement of Representative Hitt, 31 Cong. Rec.

¹⁰⁹ “Mr. Morrill: One prominent objection to our pending measure is that the people neither of Hawaii nor of the United States have been consulted nor taken into confidence in relation to the impending compact. The promoters have been reluctant to trust the people with it. The country is to wake up next week and find a new but unwelcome member, “incorporated,” as Mr. Sherman, the Secretary of State, described it, into the “body politic of the United States.” Statement of Senator Morrill 31 Cong. Rec. at 6144 (June 20, 1898)

See also Statement of Senator Hoar who noted that the Indians were not consulted as to their desire to be a part of the United States:

“We did not consult the Indians in Texas or in California or in New Mexico or in Alaska when those Territories were taken into the Union. We did not consult the Indians when we declared our own independence.” See Statement of Senator Hoar 31 Cong. Rec. at 6662 (July 5, 1898)

In the House of Representatives Representative Hitt also spoke to the lack of a plebiscite of the people:

“I do not believe that we have the power to take them to ourselves except as a state, and I do not believe that the people of these islands are suitable for citizenship of the United States. I am opposed to it because the people of Hawaii have not been consulted in the manner. . See Statement of Representative Hitt, 31 Cong. Rec. ().

¹¹⁰ Dennett, *op. cit.*, p. 624. Marion Mills Miller, editor of *Great Debates in American History* (N. Y., 1913), considered the Congressional forensics important enough to justify much space in the fourteen volumes of the series. The speeches of the following Representatives are given in whole or in part: Hitt of Illinois, Tawney of Minnesota, Walker of Massachusetts, Sulzer of New York, Dolliver of Iowa, Hepburn of Iowa, Dinsmore of Arkansas, Clark of Missouri, Gaines of Tennessee and Johnson of Indiana; in the Senate, Hoar, Morrill, Bacon, and Bate are represented (III, 169-245).

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Mr. Bayard, on the next page says: The policy of the United States, declared and pursued for more than a century, . . .forbids distant colonial acquisitions. Our action in the past, touching the acquisition of territory by purchase and cession and our recorded disinclinations to avail ourselves of voluntary proffers made by other powers to place territories under the sovereignty or protection of the United States are matters of historical prominence. Mr. Bayard, Secretary of State to Mr. Pendleton, September 7, 1885. Mss. Insti. German¹¹¹

Others, like Senator Lindsay of Kentucky demanded a plebiscite of the people of Hawaii. America stood for government by the consent of the governed.¹¹² Senator Pettigrew of South Dakota travelled to Hawaii on his own monies to ascertain the sentiment of the Hawaiian people. He recalled vividly a visit to a Church in Hilo. When Senator Pettigrew stopped the services and asked all those who opposed annexation to rise—the whole congregation stood. Moreover, Pettigrew and others severely criticized the character of the government of the Republic of Hawaii--the original conspirators of 1893 and 1887:

In 1887 they forced a constitution from the King of those islands which disfranchised his own people and in addition provided that any foreigner could become a voter and participate in the Government without releasing his allegiance to a foreign country, thus enabling those Americans and the other foreigners to claim protection of the consuls of their country or the ships of their country in that port while participating, to the full extent in the control of the local Government. How did they secure that constitution?

They secured it by threatening to assassinate the King. Twenty of the very men who today form the Government, which they call a republic down in those islands, got together and swore to an oath that any five of the number drawn should assassinate the King if he did not submit to their constitution.

The King' yielded, disfranchised his own people, and set up a Government in which the men I have mentioned were the dominant and controlling factor.

What reasons were there for the last revolution?

The Queen insisted upon adopting a new constitution, which would give her own people a voice in the Government, which would, give her own people, who had

¹¹¹ Statement of Senator Turley, 31 Cong. Rec. 6333 to 6340.

¹¹² "To submit the question of annexation to the Legislature of Hawaii will just as much work a revolution and just as much abolish the constitution of Hawaii" Statements of Senator Lindsay, 31 Cong. Rec. 6668 (July 5, 1898)

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had the fostering care of the fathers of these sons of missionaries, a voice in that Government.

The excuse for the revolution was, then, that the native Hawaiian desired a voice in his own behalf. When the Queen insisted upon it—that is all there is of her offense—they called upon the sailors of the United States, and only with their aid could they have overturned the monarchy.

In conclusion, the joint resolution lacked the capacity to acquire the Hawaiian Islands. The Joint Resolution was unconstitutional. The enactment of the Joint Resolution without a plebiscite of the people violated the fundamental American principle that government exists by the consent of the governed. Annexation was premised on the value of Hawaii as a military base. Yet, those who seized Hawaii did so by risking the fabric and well-being of the American Republic. Annexation purported to give to a corrupt Republic in Hawaii a place in the American family.

L. Conclusion: The State of Hawaii, the University of Hawaii and the Department of Land and Natural Resources have no power to permit the construction of the Thirty Meter Telescope

By the myth of annexation, the myth that a joint resolution could acquire the Hawaiian Islands, the United States and the State of Hawaii assert a wrongful jurisdiction and sovereignty over the Hawaiian Islands. It is this claim of sovereignty by which the University of Hawaii holds the power to issue a permit to construct the Thirty Meter Telescope.

It is by this wrongful claim of sovereignty, derived from a Joint Resolution which had no capacity to divest the Kingdom of Hawaii of its own sovereignty that the Department of Land and Natural Resources and the Courts of the State of Hawaii claim subject matter jurisdiction to rule with finality on the building of the Thirty Meter Telescope.

Perhaps most important, the Joint Resolution was also the document of conveyance by which the United States claims it received the lands of Mauna Kea, Crown and Government Lands, from the Republic of Hawaii. Yet, if the Joint Resolution had no power to convey sovereignty it had no power to convey real property. There is a break in the chain of title in 1898.

The University of Hawaii cannot trace its lease by a title search back to the original Mahele. The University has no ownership because the United States had no ownership. The Joint Resolution could not convey Mauna Kea from the Republic of Hawaii to the United States.

Thus, the University of Hawaii, the Department of Land and Natural Resources, and the Courts of the State of Hawaii are all acting without subject matter jurisdiction. The burden is on the

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University, as the issuer of the permit, to prove it has subject matter jurisdiction over Mauna Kea as well as title. That it has not done. That it cannot do. It can only be done if the University acts in collusion with the myth, disproved here, that the Joint Resolution annexed the Hawaiian Islands.