Professor Chang’s, and others’, argument is that the current government in Hawaii is illegitimate. His premise is that Hawaii was annexed illegally after the 1893 overthrow. He relies on quotes by legislators who opposed Hawaiian annexation by President McKinley’s preferred means: a simple legislative act. According to those quotes and Professor Chang’s testimony, the only way for the US to annex territory is through a treaty ratified by two-thirds of the Senate under Article 10, Section 2, Clause 2 of the United States (US) Constitution. Because the Senate never ratified the treaty, the argument goes, Hawaii was never legally annexed. Because the annexation was illegal, he and others seem to argue, statehood must be void, and the State of Hawaii does not hold legal title to Hawaiian land.

That argument is seductively persuasive, but ultimately unconvincing. It relies on contemporaneous constitutional arguments and the text of the Constitution itself. It has some strength, but the US— even today— has never been free from constitutional disagreements. Professor Chang’s argument neglects other facts. He assumes that a treaty was the only legal way to annex territory and without a valid treaty, any actions after that were void. That assumption elides some things: (1) Supreme Court precedent, (2) other examples of annexation, (3) the fact that two-thirds of the Senate did vote for annexation, and (4) the fact that 93% of people in Hawaii voted to become a state.

A. Treaties were not the only means of acquiring territory.

It is important to clarify the fact that the Constitution is silent about how the federal government may obtain territory. In spite of that silence, every branch of the government has recognized the right to annex territory by conquest, legislation, and treaty.

1. Conquest

In modern times, conquest is viewed as reprehensible and international law does not recognize it as a legitimate means to acquire territory. However, as I explain below, it was a valid, normal state behavior.

a. The Legal Case for Conquest

Some of the earliest Supreme Court decisions recognized that the treaty making power was not the only means of annexing territory. In 1828, Chief Justice Marshall wrote: “[t]he Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of

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1 Williamson B.C. Chang, 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,” http://scholarspace.manoa.hawaii.edu/handle/10125/35797 (last visited May 18, 2015) (“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.”) (emphasis added).
acquiring territory, either by conquest or by treaty.”

It follows, then, that conquest is an additional means of acquiring territory. The Supreme Court still agreed with that opinion in 1904, shortly after the US annexed Hawaii.

International law also viewed conquest as a valid means of acquiring territory. “In the nineteenth century, it was inevitable that international law should allow states to acquire territory by conquest, because at that time customary international law imposed no limit on the right of states to go to war.”

It follows that using force to install a sympathetic government to cede the territory to the US would certainly have been permissible. The US, also, was not a foreigner to using force to annex territory. It did so in the Mexican-American War, in the Spanish-American War, and it did so when it took territory from scores of Native American nations.

Many people in Hawaii—and perhaps Professor Chang—believe that Hawaii was taken by force for use as a base for military operations. That belief fits well with allegations that the United States Armed Forces supported the armed coup to overthrow Queen Liliuokalani and the fact that the US did use Hawaii as a base for military operations. The theory has further support due to the fact that the US issued a formal apology for intervening with military force. That conquest theory is not a stretch, since military leaders such as Teddy Roosevelt sought to annex Hawaii for strategic reasons. The historical record is not entirely clear about the role of the US armed forces in the overthrow. But if one accepts the theory that the armed forces assisted in the coup with the goal of installing a friendly regime, it suggests that the US took Hawaii by conquest, which was legal under both international and US law.

b. The Case Against Conquest

There is a two-pronged argument that many proponents of the illegal annexation theory assert. First, they argue that the US violated the 1849 Friendship Treaty with the Kingdom of Hawaii by supposedly aiding and abetting the overthrow. The second theory is


4 PETER MALANZUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 52 (7th ed. 1997).

5 Chang, supra note 1, at 25 (quoting a Senator calling the annexation through the Joint Resolution “conquest”); Jennifer M.I. Chock, One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawaii’s Annexation, and Possible Reparations, 17 U. HAW. L. REV. 463, 481-86 (1995) (arguing that agents of the US used the threat of violence to assist in overthrowing Queen Liliuokalani).

6 ROGER BELL, LAST AMONG EQUALS 31 (1st ed. 1984).

7 MALANZUK, supra note 4, at 151-52.

8 Chock, supra note 5, at 488.
that international customary law in the Americas, and by extension in Hawaii, disallowed the use of force to annex territory or to resolve disputes. Neither argument is persuasive.

The first argument is weak because the treaty and repercussions for breaching the treaty are vague. The key text in the treaty read, “[t]here shall be perpetual peace and amity between the United States and the King of Hawaiian Islands, his heirs and his successors.” For one thing, the historical record is not clear that the US instigated the revolt, since there are differing historical accounts. If the US did not instigate or assist the revolt, then it did not violate the treaty. And for another, it is not clear that the US was the first to breach the agreement. There was a revolt because of allegations that Liliuokalani intended to take property from Americans and ignore the constitution then in place. Thus, it could be that Liliuokalani breached the treaty first.

But even if the US did breach its treaty obligations, it does not follow that therefore the statehood vote is void and there is now a right for an amorphous government to secede from the union. Most people like Professor Chang claim that the Hawaiian government is illegitimate without pointing to any source of law that states if a treaty like the 1849 Friendship Treaty is breached, then the remedies are the ones they prefer. The international system was and still is anarchic. States were largely left to enforcing treaties themselves. And as I discuss below, Hawaii ceded its sovereignty, or alternatively its sovereignty was taken by force.

The customary international law theory is even weaker. It relies on a few historical incidents. For instance, the US made statements to European powers in the course of asserting its hegemony over the Western Hemisphere, relying on the so-called Monroe Doctrine. These statements might suggest that the US was opposed to the use of force in the Americas. At least the US opposed Europeans from using force in its sphere of influence. The US also entered into a failed treaty negotiation with Latin American states and made statements and endorsed draft treaties that suggested that the use of force should be unlawful. Besides the fact that this was a failed endeavor, this argument fails because the US did not practice what it preached in order to be bound under customary international law.

There are two elements to customary international law: (1) general practice and (2) opinio juris. Practice comprises, not just what states do, but also what government officials, such as legislators, courts, and executive branch officials, say and do. Consistency is also important: “[M]ajor inconsistencies in the practice (that is, a large amount of practice which

\[9 Id. at 473-83.\]

\[10 Id.\]

\[11 MALANZUK, supra note 4, at 39 (quoting Continental Shelf (Libya v. Malta), ICJ Rep. 1985, 29) (“[T]he substance of customary law must be ‘looked for primarily in the actual practice and opinio juris.’”\]

\[12 Id.\]
goes against the ‘rule’ in question) prevent the creation of a customary rule.”\textsuperscript{13} Opinio juris, on the other hand, is “a conviction felt by states that a certain form of conduct is required by international law.”\textsuperscript{14} A norm is customary international law when states adhere to the norm and the states also think that adhering to the norm is required by international.

While there might be evidence that the US preached peace, it did not adhere to that norm in practice. The US did not adhere to that norm when it started a war against Mexico and acquired vast amounts of territory in the 1850s. Its practice did not reflect non-aggression when it waged numerous campaigns against the Native Americans throughout the 19th Century. Similarly, forcing open relations with Japan through its gunboat diplomacy was not a commitment to non-aggression. And the US did not practice non-aggression when it started the Spanish-American War and took a number of Spanish territories. As for the practice of US officials, we know the Supreme Court regarded conquest as legitimate.

In sum, there were too many inconsistencies in the US—and the world for that matter—to state that non-aggression was customary law in the 1890s. The fact is that international law condoned conquest, and “[m]ost wars, in fact, concerned the acquisition of territory . . . .”\textsuperscript{15} As one international legal scholar put it in 1905, “[a]s long as a Law of Nations has been in existence, the states as well as the vast majority of writers have recognized subjugation as a mode of acquiring territory.”\textsuperscript{16}

2. **Acquisition by Legislation**

Just as Professor Chang failed to address sources of law that recognized the US government’s authority to annex territory by military force, he neglects to consider that the US has annexed territory by legislation in other instances. The first instance of the US annexing territory by simple legislation, instead of by treaty, was in 1790—one year after the Constitution was ratified. In 1789, the North Carolina legislature resolved to cede some of its western territory to the federal government. Congress obliged and passed legislation to annex it.\textsuperscript{17} There was no constitutional dispute. In another instance, Congress passed the Guano Islands Act to annex uninhabited Islands with deposits of guano in spite of a lack of

\textsuperscript{13} *Id.* at 42.

\textsuperscript{14} *Id.* at 44.


\textsuperscript{16} *Id.*

an explicit power in the Constitution.\textsuperscript{18} The Supreme Court ruled that the law was constitutional just eight years before the US annexed Hawaii.\textsuperscript{19}

Of course, both of those instances were different from Hawaii’s case. The main difference that Professor Chang and others focus on is the fact that Hawaii was a sovereign, inhabited state. Professor Chang is correct that one country cannot simply pass a law that purports to annex another country; the US cannot simply annex Mexico by fiat. The difference, however, is that Hawaii \textit{asked} to be annexed, just like North Carolina \textit{asked} to cede its territory to the federal government.

My point in discussing the two historical incidents is that the North Carolina cession and the Guano Island Act suggest that the federal government may constitutionally annex territory by legislation, which contradicts Professor Chang’s argument. This appears to be especially true when the government that controls the territory agrees to annexation, which was the case in the North Carolina cession and Hawaii annexation.

\textbf{B. The treaty argument neglects international law.}

Professor Chang argues that the Joint Resolution was invalid because Hawaii did not ratify the same document, or a document with precisely the same wording. But this is a problematic argument. First, he does not cite any authority that requires a specific written agreement. Second, there is no real argument that the government that controlled Hawaii did not agree to become a territory. Both the draft treaty that the Hawaii legislature approved and the Newlands Resolution are evidence that Hawaii and the US intended Hawaii to be annexed.

\textbf{1. Hawaii and the US complied with the formal requirements for a treaty.}

The 1969 Vienna Convention on the Law of Treaties largely codified the international law of treaties. It defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation.”\textsuperscript{20} A treaty becomes effective when the parties express their intent to be

\textsuperscript{18} Id.; Acquisitions of unoccupied land were usually justified under the principal of \textit{terra nullius}. MALANZUK, \textit{supra} note 4, at 148. Incidentally, that statute is still codified in the United States Code. 48 U.S.C. § 1411.

\textsuperscript{19} See Jones \textit{v. United States}, 137 U.S. 202 (1890). The fact that the court declined, under the political questions doctrine, to review the Legislative and Executive branches’ determination of constitutionality does not mean that the act was unconstitutional. That just means that the Supreme Court defers to the other two branches on some constitutional questions.

bound. The requirement for the agreement to be in writing is a modern requirement that began with the Vienna Convention. Domestically, the Constitution requires that “two-thirds of the Senators present concur” with the treaty.

The parties satisfied all the technical requirements for a treaty. Two-thirds of the Senate voted to annex Hawaii. The tally was 42 in favor 21 opposed, which was exactly two-thirds. The Hawaiian legislature unanimously agreed to annexation, the US President wanted annexation, and two-thirds of the Senate voted for annexation by passing the Newlands Resolution. Those are the constitutional requirements for a treaty: an agreement between the United States and another state that has been ratified by two-thirds of Congress.

Professor Chang’s treaty argument is overly formalistic. The Treaty of Annexation and the Newlands Resolution are virtually identical except for a precatory clause and a section on ratification in the treaty Hawaii approved. In fact, the Newlands Resolution specifically references the fact that Hawaii agreed to be annexed. So the terms of the agreement were clear, and “two-thirds of the Senators present concur[ed].”

By all accounts, there was an agreement in-fact between Hawaii’s government and the US federal government. While written treaties now tend to be the norm, oral treaties were permissible in the 19th Century and there was not—and is there now—a requirement that two states sign the same document. All that the law requires under the stricter standards of the Vienna Convention is an agreement “embodied in . . . two or more related instruments.” The Hawaii legislature unanimously approved the first document (the treaty of annexation), and Congress and President McKinley approved a second document (the Newlands Resolution). So even if legislation and conquest were not constitutionally permissible, Hawaii and the US most likely had a valid treaty, since no documents were even

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22 The writing requirement only came into effect for treaties after January 27, 1980. MALANCZUK, supra note 4, at 130; see Restatement (Third) of Foreign Relations Law, § 301, cmt. b (1987) “While most international agreements are in writing, written form is not essential to their binding character. The Vienna Convention specifies (Article (2)(1)(a)) that it applies only to written agreements, but under customary international law oral agreements are no less binding although their terms may not be readily susceptible of proof.”; see also the Comments to the 1969 Vienna Convention on the Law of Treaties in Vienna Convention on the Law of Treaties, 6 Int’l Lawyer 428, 430 (1972).

23 U.S. Const., Art. 2, § 2, cl. 2.

24 BELL, supra note 5, at 34.

25 MALANCZUK, supra note 4, at 130-31.


27 BELL, supra note 5, at 33-34.
required. But there were documents: there were two documents that showed that both parties intended for Hawaii to be annexed.

Granted, signing two different documents with the same intent--annexation--might be unorthodox, but under the international law of treaties, it was not void. Both documents were “related.” They were almost identical, which certainly meets the standard to evidence an agreement. There did not have to be a single, written document, since even notes passed between states can suffice to form a binding international agreement.\(^{28}\)

In sum, there was an agreement between Hawaii and the US: Hawaii and the US intended to be bound by the agreement, and the Senate approved the agreement by a two-thirds vote.

2. **Formal ratification was not necessary.**

The formalistic treaty argument also elides the fact that states may become bound under a treaty even if they have not formally ratified the treaty. “[P]erformance of a treaty can constitute tacit ratification. In particular, if a state successfully claims rights under an unratified treaty, it will be estopped from alleging that it is not bound by the treaty.”\(^{29}\) In Hawaii’s case, there was a negotiated, written treaty, and both parties acted in conformity with it: that is to say, they both acted as if Hawaii had been annexed as outlined in the treaty.

True, only Hawaii ratified a document titled “treaty.” But, assuming the Newlands Resolution did not suffice to ratify a treaty, the US acted as if it had been bound by the treaty, and two thirds of the Senate agreed to the substance of the negotiated treaty. Hawaii also acted as if it had been bound by the treaty and it never disputed the validity of annexation. Thus, there is a strong argument that even if there was not a valid express ratification, both parties tacitly ratified the treaty.

3. **The Republic of Hawaii had the authority to bind Hawaii.**

There is an argument that the new government, which overthrew the Kingdom of Hawaii, did not have the authority to cede the Islands to America for two reasons: (1) it did not have the “approval by the majority of the people”; and (2) it lacked the “legitimate


\(^{29}\) MALANCUK, supra note 4, at 133; see G.G. Fitzmaurice, *Do Treaties Need to be Ratified?*, 15 BRIT. Y.B. INT’L L. 113, note 1 (1934). One could argue that the treaty was ineffective because the US and Hawaii did not exchange signed documents, but the text of the treaty did not require an exchange for the treaty to become effective, and Hawaii never objected to annexation. Such an argument would amount to a mere technicality because there was an agreement and both parties consented to the agreement.
authority to represent Hawaii."\textsuperscript{30} Because those who overthrew the government manipulated the constitutional convention, Hawaiians boycotted the vote and refused to participate in the new government.\textsuperscript{31} And because the Hawaiians boycotted the political process, they never consented to secession.\textsuperscript{32}

This argument, however, misconstrues international law and assumes that a state’s populace must consent to the government or the government’s acts. International law is largely indifferent to the internal politics of states.\textsuperscript{33} A person or government has the power to enter into an international agreement if it has the authority to do so under the state’s domestic law.\textsuperscript{34}

There is no credible dispute that the new government in Hawaii had the authority under domestic law to enter into treaties. The new government controlled the territory, property, and the population of Hawaii. "[I]t . . . had real political authority at home."\textsuperscript{35} It continued to do so for about 5 years until annexation in 1898. Even after President Cleveland asked the new government to reinstate the queen, the new government refused.\textsuperscript{36} Eventually, every government that had a diplomatic presence in Hawaii began to recognize the new government after the overthrow.\textsuperscript{37} For all intents and purposes, the Republic of Hawaii had the authority to enter into a binding agreement with the US.

Popular support is not sufficient or necessary for a government to enter into a treaty. There was no rule of international law in the 19th Century or now that required popular support. Were that the case, then regimes like the USSR, North Korea, Latin American juntas, and most of the colonial powers of the 19th would have been unable to enter treaties. That certainly is not the case. National self-determination was a nascent idea in 19th Century, but international law did not recognize it until after World War I. So that, too, is

\textsuperscript{30} Chock, \textit{supra} note 5, at 490. It should be noted that the Kingdom of Hawaii was at least equally undemocratic. It excluded Asians from the political process, even though Asians comprised about 70% of Hawaii’s population. Bell, \textit{supra} note 6, at 24.

\textsuperscript{31} Chock, \textit{supra} note 5, at 490-91.

\textsuperscript{32} \textit{Id.} at 490. This argument relies, at least in part, on the paper by Thomas M. Cooley. \textit{See} Thomas M. Cooley, \textit{Grave Obstacles to Hawaiian Annexation}, 15 Forum 389 (1893).

\textsuperscript{33} MALANCKUK, \textit{supra} note 4, at 79.

\textsuperscript{34} Restatement (Second) of Foreign Relations Law of the United States § 123(1) (1965).

\textsuperscript{35} BELL, \textit{supra} note 6, at 29.

\textsuperscript{36} \textit{Id.}

not a viable basis to argue that the Republic of Hawaii did not have the power to enter into treaties.

C. There was probably no continuity of sovereignty after annexation and statehood.

In his testimony, Professor Chang argued that the Hawaii has maintained its sovereignty under international law. This argument is, at best, shaky. Hawaii was a sovereign state that was recognized by many other states. However, after the 1893 overthrow, those same states began to recognize Hawaii’s new government. That new government, which by all measures of international law was the sovereign government, in turn, agreed to cede sovereignty to the US. As I discussed, the agreement with the US bound Hawaii either tacitly or explicitly. At best, then, any residual sovereignty that might exist hypothetically is on par with other states’ sovereignty.

D. Statehood changes the analysis.

Finally, even if the US did illegally annex Hawaii, Professor Chang and others overlook the fact that the 1959 vote to join the union was over 93% in favor. In his testimony in opposition to the Thirty Meter Telescope, he seemed to agree that Texas was legally annexed as a state via a joint resolution. Hawaii’s situation is not much different from Texas’s: the majority of the state’s inhabitants voted in favor of statehood. The statehood vote should have some effect on Professor Chang’s and others’ analysis.

E. Conclusion

This is not to suggest that the 1893 overthrow or the annexation were morally justified. The coup led by robber barons, whose businesses ran on what probably amounted to involuntary servitude, was morally suspect at best. I am suggesting that the argument that Hawaii was illegally annexed—under international law and US law—is weak and not as black-and-white as many believe. Law and morality are two separate things: Jim Crow was legal, but it was not moral.

38 Chang, supra note 1, at 9 (“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.”).

39 Chang, supra note 1, at 16, note 20 (discussing the Department of Justice’s opinion on the constitutional basis to annex Hawaii).

40 I am aware that many have questioned the legitimacy of the statehood vote, but I do not find those criticisms persuasive. See, e.g., Statehood Hawaii, The Statehood Plebiscite, http://statehoodhawaii.org/2009/05/12/the-statehood-plebiscite/ (last visited on May 18, 2015).
The honest, and more comprehensive, assessment is that the Constitution is mostly silent on the issue of annexation, but the treaty power is not the government’s only means of annexing territory. It presumes that the federal government has the power to own and manage territory; it just fails to mention how Congress can acquire it. Congress’s authority to annex territory has never been clear. Even Thomas Jefferson doubted that the treaty power allowed the US complete the Louisiana Purchase. Similarly, almost all legal scholars agree that international law is far from clear, and some would disagree with my assessment. In spite of the Constitution’s silence and international law’s opacity, there is a good (however unwelcomed) argument that Hawaii was legally annexed.

41 U.S. Const., Art. IV, § 3, cl. 2.