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Colonial Presumptions: The War on Terror and the Roots of American Exceptionalism

NATSU TAYLOR SAITO*

INTRODUCTION

Shortly after the attacks on the Pentagon and the World Trade Center, George W. Bush, the forty-third president of the United States, said in an address to Congress, "Either you are with us, or you are with the terrorists This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight."¹ The resulting "war on terror," both a military and an ideological struggle, has evolved into a conflict with neither geographical boundaries nor a clear definition of victory, and has become a "global enterprise of uncertain duration."² Identified enemies have included Osama bin Laden and the al Qaeda network, the Taliban government of Afghanistan, the state of Iraq and its president Saddam Hussein, an "axis of evil" consisting of North Korea and Iran as well as Iraq, radical Islam, the hundreds of men and boys of several dozen nationalities indefinitely detained at the U.S. Naval Base at Guantánamo Bay, Cuba, and select U.S. citizens declared without proffer of evidence to be "enemy combatants."³ One thing is clear, however: this shape-shifting war is the United States' justification for the promotion of a "new paradigm" of international law.⁴

* © 2009 Natsu Saito. All rights reserved. Natsu Saito is a professor of Law at Georgia State University College of Law. She is grateful to Tiffany Bartholomew and Akilah Kinnison for their research assistance, to the Georgia State University College of Law for its support of this research, to her colleagues Andrea Curcio, Nancy Ehrenreich, and Jonathan Todres for their feedback, and to the scholars who laid the foundation for this work, especially Antony Anghie, Ward Churchill, and Robert A. Williams, Jr. Many thanks also to the editors of the Georgetown *Modern Critical Race Perspectives* journal and the organizers of the journal's inaugural symposium, where a version of this article was presented. The ideas presented herein are explored in further detail in NATSU TAYLOR SAITO, *WE HAVE MET THE ENEMY: AMERICAN EXCEPTIONALISM AND SUBVERSION OF THE RULE OF LAW* (forthcoming 2009).

1. George W. Bush, Presidential Address to a Joint Session of Congress (Sept. 23, 2001), in *WE WILL PREVAIL: PRESIDENT GEORGE W. BUSH ON WAR, TERRORISM, AND FREEDOM* 14-15 (National Review ed., 2003).

2. The White House, *Introduction to THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* (2002), available at <http://www.whitehouse.gov/nsc/nss/2002/index.html> [hereinafter NSS].

3. On the shifting definitions of the enemies at issue, see Hendrik Hertzberg, *War and Words*, THE NEW YORKER, Feb. 13, 2006, available at http://www.newyorker.com/archive/2006/02/13/060213ta_talk_hertzberg. On the detentions of individuals, see generally DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003); Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantánamo and Beyond*, 25 LOY. L.A. INT'L & COMP. L. REV. 457 (2003).

4. Thus, for example, in a January 25, 2002, memo to the President, White House Counsel and future Attorney General Alberto Gonzales noted Bush's announcement that "the war against terrorism is a new kind of war," and stated that "this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions." Stephen P. Marks, *Branding the 'War on Terrorism': Is there a 'New Paradigm' of International Law?* 14 MICH. ST. J. INT'L L. 71, 89 (2006) (quoting Memorandum from Alberto Gonzales, Att'y Gen., to George W. Bush, President, United States of America, (Jan. 25, 2002). President Bush also referred to this "new paradigm" in a February 7, 2002 memo in which he

According to President Bush, this new paradigm was “ushered in not by us, but by terrorists” and “requires new thinking in the law of war.”⁵ In the years since 2001, the United States has, in fact, engaged in numerous practices generally recognized to be at odds with both the laws of war and international law more generally.⁶ Often citing other parties’ failures to comply with the global rule of the law, U.S. officials have exempted themselves from adherence to existing norms, sparking debate as to whether the American stance is simply hypocritical or actually necessitated by the changing face of global terrorism.⁷ One way of analyzing this issue is to consider current arguments proffered in the war on terror in light of the history of the United States’ selective self-exemption from otherwise applicable international law and the invocation of an exceptional status to justify this practice.⁸ To the extent that current policies and their stated rationales comport with a consistent historical pattern, one can reasonably conclude that their impetus is not simply a new and imminent threat, but more deeply rooted.

In this essay I suggest that contemporary American policies and practices are entirely consonant with the policies that have been implemented throughout U.S. history, and that the United States has both invoked and exempted itself from international legal standards since its founding. Furthermore, the reasoning behind this approach is, I believe, firmly rooted in the arguments, both moral and legal, that have been utilized for centuries to justify European colonial expansion. If this analysis is accurate, it implies that in order to assess (much less change) contemporary U.S. practice, we would have to consider not only the current state of world affairs, but also the validity of the underlying worldview. This, of course, is a project far beyond the scope of this essay. My purpose here is simply to articulate some of the presumptions underlying the rationale for the current war on terror, and to point out some of the historical parallels to the arguments for American exceptionalism advanced during the settlement of this continent, the establishment of the American republic, and several wars waged by the United States.

This essay proceeds as follows: Section I outlines some of the underlying precepts of the war on terror, noting that these presumptions reflect a paradigm in which

states, “Our Nation recognizes that this new paradigm—ushered in not by us but by terrorists—requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.” Memorandum from George W. Bush, President, United States of America, to Richard B. Cheney, Vice President, United States of America, et. al., (Feb. 2, 2002), *available at* <http://www.gwu.edu/nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>.

5. Marks, *supra* note 5, at 89 (quoting Memorandum from George W. Bush, *supra* note 5, at 1).

6. *See infra* notes 42-52 and accompanying text.

7. *See, e.g.*, Aya Gruber, *Who’s Afraid of Geneva Law?*, 39 ARIZ. ST. L.J. 1017, 1082 (2007); Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1247 (2007); Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT’L & COMP. L. REV. 303, 303-06 (2002).

8. For more related analyses of American exceptionalism in the context of international law, see Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 1-26 (Michael Ignatieff ed., 2005) (breaking the concept down into American exceptionalism, legal self-sufficiency, and double standards); Harold Hongju Koh, *America’s Jekyll-and-Hyde Exceptionalism*, in AMERICAN EXCEPTIONALISM 111-43 (Michael Ignatieff ed., 2005) (distinguishing four components which he identifies as distinctive rights, different labels, the “flying buttress” mentality, and double standards).

Western civilization is the benchmark for human progress, and the United States is the model of that civilization. Section II summarizes some of the clearest examples of U.S. practices that have deviated from international norms, as what has been termed "a distinctly American internationalism" is implemented in the context of the war on terror.⁹ Section III briefly considers how the principles, or "values," invoked in the war on terror informed both the vision and the legal rationales of the 17th century English settlers as they established the colonies that would become the United States. Section IV addresses the extension of these presumptions and the arguments for American exemption from then-prevailing international law as the colonists' justification for establishing an independent state in the 18th century. Select examples of how these arguments were used in consolidating and expanding the territorial base of the country in the 19th century are provided in Section V, and Section VI addresses the extension of the exceptionalist rationale to U.S. foreign policy in the 20th century. In conclusion, I suggest that if we are to understand contemporary expressions of American exceptionalism in the war on terror, we must consider not only our recent history, but also the more fundamental constructs of international law and visions of "civilization" and human progress upon which the United States has always relied.

I. THE WAR ON TERROR AS A STRUGGLE FOR CIVILIZATION S

Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists . . . This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight.

*George W. Bush, Presidential Address to Congress, September 23, 2001*¹⁰

In assessing the "new paradigm" of international law emerging in the context of the current war on terror, it is helpful to begin by articulating several of its underlying presumptions.¹¹ There are, of course, many approaches to this project.¹² Here, I focus on five premises: the assertion that the enemy in this war is evil; that this evil is embodied in terrorist individuals and rogue states; that such enemies cannot be presumed to act rationally and, therefore, the normal rules of combat do not apply; that what is being defended is civilization, particularly Western civilization, which is claimed to embody universal values such as freedom and democracy; and that the United States embodies the highest stage of this civilization and, therefore, should be the model for the rest of the world.

9. See *infra* note 34.

10. WE WILL PREVAIL, *supra* note 2, at 15 (quoting George W. Bush, Presidential Address to a Joint Session of Congress (Sept. 23, 2001)).

11. In this formulation I am indebted to the late Judge A. Leon Higginbotham, Jr.'s explication of the American jurisprudence of slavery found in *The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney's Defense and Justice Thurgood Marshall's Condemnation of the Precept of Black Inferiority*, 17 CARDOZO L. REV. 1695 (1996); see also A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996).

12. Antony Anghie, for example, focuses on three primary points: the doctrine of pre-emptive self-defense, the concept of rogue states, and the idea of promoting democracy to transform such entities. See ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 275 (2005).

The first premise is that the enemy in this war on terror is evil, a term used as both a noun and as an adjective. Echoing Ronald Reagan's description of the Soviet bloc as an "evil empire,"¹³ President Bush said in his June 2002 West Point commencement address that "[w]e are in a conflict between good and evil, and America will call evil by its name."¹⁴ By framing the struggle in terms of good versus evil, it is much easier to bypass discussion of the motivations, legitimate or otherwise, that might prompt attacks against the United States. This construction stifles debate concerning the morality or legality of actions taken in course of the war for evil is, by definition, that which must be struggled against.¹⁵

A second core assertion made by those directing the current war is that the evil being fought is embodied in terrorism. *The National Security Strategy of the United States*, a 2002 policy report of the Bush administration, defines terrorism as "premeditated, politically motivated violence perpetrated against innocents."¹⁶ Terrorists, therefore, are the enemy and, according to the Bush administration, "We make no distinction between terrorists and those who knowingly harbor or provide aid to them."¹⁷ This enemy is elusive, unpredictable, and does not play by the rules. It operates from "shadowy networks," which are "organized to penetrate open societies

13. See Elaine Tyler May, *Echoes of the Cold War: The Aftermath of September 11 at Home*, in SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? 45 (Mary L. Dudziak ed., 2003) ("The clever term 'axis of evil' fuses the World War II memory of the Axis powers to Ronald Reagan's Cold War description of the Soviet Union as the 'Evil Empire.'").

14. George W. Bush, Excerpted Remarks by the President from Speech at the Graduation Exercises of the United States Military Academy (June 1, 2002), in *WE WILL PREVAIL*, *supra* note 2, at 161. For similar statements, see George W. Bush, Excerpted Remarks by the President from Speech at the Department of Defense Service of Remembrance (Oct. 11, 2001) in *WE WILL PREVAIL*, *supra* note 2, at 40.

15. As President Bush told a gathering of Federal Bureau of Investigation employees, those who attacked the World Trade Center and Pentagon "don't represent an ideology, they don't represent a legitimate political group of people. They're flat evil. That's all they can think about, is evil." President George W. Bush, Excerpted Remarks by the President from Speech to Employees at the Federal Bureau of Investigation (Sept. 25, 2001) in *WE WILL PREVAIL*, *supra* note 2, at 22. For other possible motivations for terrorist attacks, see *infra* note 32.

16. NSS, *supra* note 3, at 5. Legal scholar Antonio Cassese provides a more nuanced definition of international terrorism:

International terrorism as a discrete international crime perpetrated *in time of peace* exhibits the following requisites: (i) is an action normally criminalized in national legal systems; (ii) is transnational in character, i.e. not limited in its action or implications to one country alone; (iii) is carried out for the purpose of coercing a state, or international organization to do or refrain from doing something; (iv) uses for this purpose two possible modalities; either spreading terror among civilians or attacking public or eminent private institutions or their representatives; and (v) is not motivated by personal gain but by ideological or political aspirations.

Antonio Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law*, 4 J. INT'L CRIM. JUST. 933, 957 (2006) (emphasis in original).

17. NSS, *supra* note 3, at 5. For an analysis praising the material support laws, see generally Brian P. Comerford, *Preventing Terrorism by Prosecuting Material Support*, 80 NOTRE DAME L. REV. 723 (2005). On problems generated by the attempt to criminalize the financing of terrorism, see generally Peter Margulies, *Laus of Unintended Consequences: Terrorist Financing Restrictions and Transitions to Democracy*, 20 N.Y. INT'L L. REV. 65 (2007); Erich Ferrari, *Deep Freeze: Islamic Charities and the Financial War on Terror*, 7 SCHOLAR 205 (2005).

and to turn the power of modern technologies against us.”¹⁸ Terrorists, in turn, are supported by rogue states. Because such states and “their terrorist clients” must be stopped “before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends,”¹⁹ they are viewed as legitimate targets of preemptive strikes.²⁰

This characterization of the enemy as consisting of individuals, non-state organizations, or “rogue” states motivated by evil rather than by concrete political or economic interests, undergirds another presumption—that the laws of war, developed over several centuries by “civilized” states, cannot be adhered to in the current war on terror. Consequently, those who wish ill upon the United States are characterized as irrational, or “madmen.”²¹ The United States’ deviation from standard international norms is deemed necessary because, presumably, an irrational enemy will not play by the rules either.²² The assertion that terrorist enemies will not adhere to norms of international law also provides the rationale for arbitrarily detaining hundreds, perhaps thousands, of persons as “enemy combatants” without providing them with the due process guaranteed under international law.²³

If the enemy is “evil” as embodied in terrorism, what is the “good” which is being protected? We are repeatedly told that the war on terror is being fought to preserve civilization. To quote the Bush administration again, “America will help nations that need our assistance in combating terror. And America will hold to account nations that are compromised by terror, including those who harbor terrorists—because the allies of terror are the enemies of civilization.”²⁴ “Civilization” is not precisely defined, but it is clear that what we commonly call Western civilization is being referenced and that it is intimately associated with certain values. Thus, as President Bush said in a speech to the German Bundestag, “America and the nations in Europe

18. NSS, *supra* note 3, at Introduction.

19. *Id.* at 14.

20. On the definition of “rogue states,” see *id.* at 13-14. See also Anthony Clark Arend, *International Law and Rogue States: The Failure of the Charter Framework*, 36 NEW ENG. L. REV. 735, 735 (2002) (noting that “[w]hile almost all states may at times violate international legal rules, a rogue state would be a perennial violator”).

21. See Jeanne M. Woods & James M. Donovan, “Anticipatory Self-Defense” and Other Stories, 14 KAN. J. L. & PUB. POL’Y 487, 494-95 (2005). The “madman theory,” i.e., that madmen were dangerously unpredictable, had earlier been invoked by President Richard Nixon in suggesting that the North Vietnamese should be pressured into peace negotiations by being led to believe that he might “do anything,” even use nuclear weapons, to end the war in Vietnam. See STANLEY KARNOW, *VIETNAM: A HISTORY* 582 (1983).

22. “Deterrence—the promise of massive retaliation against nations—means nothing against shadowy terrorist networks with no nation or citizens to defend. Containment is not possible when unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorist allies.” George W. Bush, Excerpted Remarks by the President from Speech at the Graduation Exercises of the United States Military Academy (June 1, 2002), in *WE WILL PREVAIL*, *supra* note 2, at 160. See also RICHARD A. FALK, *THE DECLINING WORLD ORDER: AMERICA’S IMPERIAL GEOPOLITICS* 189-99, 245-47 (2004).

23. See David Cole, *The Priority of Morality: The Emergency Constitution’s Blind Spot*, 113 YALE L.J. 1753, 1754 (2004); see also *supra* note 4 and accompanying text.

24. NSS, *supra* note 3, at Introduction.

are more than military allies, we're more than trading partners; we are heirs to the same civilization"²⁵

In this framing, civilization is claimed to embody principles that are "right and true for all people everywhere," and summarized as "the nonnegotiable demands of human dignity: the rule of law; limits on the absolute power of the state; free speech; freedom of worship; equal justice; respect for women; religious and ethnic tolerance; and respect for private property."²⁶ Freedom is the touchstone to which justifications for the war predictably return. As President Bush said to Congress in September 2001, "They hate our freedoms—our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other."²⁷ In turn, democratic governance is the guarantor of freedom: "Americans are asking: Why do they hate us? They hate what we see right here in this chamber—a democratically elected government."²⁸ As Antony Anghie observes, "Democracy plays a crucial dual role in this [war on terror]: it liberates the oppressed people of Islamic states and it creates law-abiding societies that would be allies rather than threats to the United States."²⁹

A final core presumption is that the United States has the prerogative to take unilateral action in this war not simply because it was a target of terrorism, but because it represents the highest form of the civilization whose survival is at issue. The *National Security Strategy* states, "The great struggles of the twentieth century . . . ended with a decisive victory for the forces of freedom—and a single sustainable model for national success."³⁰ Clearly, the United States is that model. In this framing, the United States was targeted not because of its foreign policy, or its heavy-handed wielding of military and economic power, or any other of a range of possible reasons. Rather, the United States was attacked because it embodies the values of Western civilization.³¹ Thus, immediately after the attacks of September

25. George W. Bush, Excerpted Remarks by the President from Speech to the German Bundestag (May 23, 2002) in *WE WILL PREVAIL* *supra* note 2, at 156. As Richard Drinnon has noted in other contexts, the term "civilization" is not used "interchangeably with *culture*, so that other peoples might have 'civilizations.' Instead, [it is used] to distinguish Western superculture, or the one true 'civilization,' from so-called primitive cultures." RICHARD DRINNON, *FACING WEST: THE METAPHYSICS OF INDIAN-HATING AND EMPIRE-BUILDING* xxviii (1980).

26. NSS, *supra* note 3, at 3. As George W. Bush added in his presentation to the Bundestag, "These convictions bind our civilizations together and set our enemies against us. These convictions are universally true and right." George W. Bush, Excerpted Remarks from Speech to the German Bundestag (May 23, 2002) in *WE WILL PREVAIL*, *supra* note 2, at 157.

27. George W. Bush, Presidential Address to a Joint Session of Congress (Sept. 23, 2001) in *WE WILL PREVAIL*, *supra* note 2, at 14.

28. *Id.*

29. ANGHIE, *supra* note 13, at 277. The U.S. framing has, of course, been contested. In the hearings conducted by the International Court of Justice's Eminent Jurist Panel, "ICJ Jurist Hina Jilani asserted that democracy, or its absence is not the problem. Instead, disenchantment with the conduct of so-called democratic governments poses the greatest threat to the viability of democratic institutions." Mark W. Vorkink and Erin M. Scheick, *The 'War on Terror' and the Erosion of the Rule of Law: The U.S. Hearings of the ICJ Eminent Jurist Panel*, 14 HUM. RTS. BRIEF 2, 6 (2006).

30. NSS, *supra* note 3, at Introduction. Similar statements can be found in Excerpted Remarks by the President from Speech at the Graduation Exercises of the United States Military Academy, West Point, New York (June 1, 2002) in *WE WILL PREVAIL*, *supra* note 2, at 158, 162.

31. For alternate explanations of terrorist attacks on the United States, see generally CHALMERS JOHNSON,

11, 2001, without having to research the matter or consult in any depth with his intelligence advisors, President Bush could declare with confidence that "America was targeted for attack because we're the brightest beacon for freedom and opportunity in the world."³²

It is these premises which, I believe, underlie the United States' assertion that waging war on terrorism requires it to deviate from longstanding principles of international law and that such actions are justified by the greater good of bringing freedom, democracy and civilization to the planet. Some of the manifestations of this distinctly American internationalism are addressed in the following section.

II. IMPLEMENTING A "DISTINCTLY AMERICAN INTERNATIONALISM"

The United States possesses unprecedented—and unequaled—strength and influence in the world The great struggle [of ideas] is over. The militant visions of class, nation, and race which promised utopia and delivered misery have been defeated and discredited This is [] a time of opportunity for America The U.S. national security strategy will be based on a distinctly American internationalism that reflects the union of our values and our national interests.

*The National Security Strategy of the United States (2002)*³³

As noted in the previous section, according to United States officials, the so-called war on terror is being fought not only to protect the military and economic security of the American public, but to further freedom and democracy throughout the world. The *National Security Strategy* says the aim of American foreign policy "is to help make the world not just safer but better. Our goals on the path to progress are clear: political and economic freedom, peaceful relations with other states, and respect for human dignity . . . this path is not America's alone. It is open to all."³⁴ The cooperation of the international community is seen as vital to the success of this mission, and the U.S. emphasizes that these values have been generally accepted in international law. Thus, one of the defining characteristics of rogue states, according to the *National Security Strategy*, is that they "[d]isplay no regard for international law. . . and callously violate international treaties to which they are party."³⁵

Simultaneously, however, the United States is asserting a prerogative to define and control the path to progress. As noted above, there is but "a single sustainable model

BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE (2d ed. 2004); WARD CHURCHILL, ON THE JUSTICE OF ROOSTING CHICKENS: REFLECTIONS ON THE CONSEQUENCES OF U. S. IMPERIAL ARROGANCE AND CRIMINALITY (2003) [hereinafter CHURCHILL, ON THE JUSTICE OF ROOSTING CHICKENS]; ZIAUDDIN SARDAR & MERRYL WYN DAVIES, WHY DO PEOPLE HATE AMERICA? (2d ed. 2003); EQBAL AHMAD, TERRORISM: THEIRS AND OURS (2001) (interview with David Barsamian); WILLIAM BLUM, ROGUE STATE: A GUIDE TO THE WORLD'S ONLY SUPERPOWER (2000); NOAM CHOMSKY, THE CULTURE OF TERRORISM (1988).

32. George W. Bush, Presidential Address to the Nation (Sept. 11, 2001) in WE WILL PREVAIL, *supra* note 2, at 2.

33. NSS, *supra* note 3, at 1.

34. *Id.*

35. NSS, *supra* note 3, at 14.

for national success.”³⁶ Freedom, democracy, and human dignity are consistently portrayed as uniquely American values. Human progress, in turn, is framed as requiring a universal implementation of the unique and universally applicable model that the U.S. exemplifies.³⁷ Thus, the administration’s position paper clarifies that the United States does not intend to promote international law or legal institutions *per se* but “a distinctly American internationalism that reflects the union of our values and our national interests.”³⁸ In this context “internationalism” appears to refer not so much to accepted global standards or structures as to those U.S. policies and practices with transnational consequences.³⁹

In implementing this so-called American internationalism, U.S. officials have both emphasized the importance of the global rule of law and simultaneously distanced themselves from established principles of international law and the institutions created to implement those norms.⁴⁰ Thus, for example, when the United States invaded Iraq in March 2003, it relied upon the prerogative to engage in “preemptive self-defense” at such times and in such manner as it deems appropriate, in apparent disregard for the United Nations Charter’s prohibition on the use of force in such circumstances.⁴¹ Six months earlier, the White House had stated in the *National Security Strategy* that “While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists”⁴² In other words, “we recognize that our best defense is a good offense,”⁴³ and the goal is to “act against [] emerging threats before they are fully

36. NSS, *supra* note 3, at Introduction.

37. See generally speeches collected in WE WILL PREVAIL, *supra* note 2. For a critique of the universality of many of these norms, see generally GUSTAVO ESTEVA & MADHU SURI PRAKASH, GRASSROOTS POST-MODERNISM: REMAKING THE SOIL OF CULTURES (1998).

38. NSS, *supra* note 3, at 1.

39. For a summary of the approach to international law taken in the first several years of the George W. Bush Administration, see Philippe Sands, *Lawless World: The Cultures of International Law*, 41 TEX. INT’L L.J. 387, 391-94 (2006).

40. Analyses of American exceptionalism tend to focus on instances in which U.S. practice diverges from accepted international law. See, e.g., Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775, 777-91 (2001). Nonetheless, it is important to note the other side of the “double standard” invoked—i.e., the United States’ emphasis on the importance of the global rule of law and its insistence that other governments comport with international law—belies the arguments sometimes proffered that international law is simply irrelevant because it is not uniformly enforced. On double standards, see Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1485-87 (2003); for a summary of “realist” and “institutionalist” critiques of international law, see David J. Bederman, *Constructivism, Positivism, and Empiricism in International Law*, 89 GEO. L.J. 469, 472-80 (2001).

41. While military actions undertaken in self-defense are permitted by Article 51 of the Charter, this does not extend to the preemptive use of force under the circumstances faced by the United States in Iraq. See generally MARY ELLEN O’CONNELL, THE MYTH OF PREEMPTIVE SELF-DEFENSE (2002) <http://www.asil.org/taskforce/oconnell.pdf>. The UN Charter is a treaty under which member states explicitly agree that if conflicting obligations arise between the Charter and other treaties, member states’ “obligations under the present Charter shall prevail.” UN Charter, Art. 103; see also José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873, 878 (2003).

42. NSS, *supra* note 3, at 6.

43. NSS, *supra* note 3, at Introduction.

formed,” for “we cannot let our enemies strike first.”⁴⁴ This, of course, was the rationale for launching the current war in Iraq.⁴⁵ Another striking example of the recent exercise of American exceptionalism is found in the Bush administration’s position that the war on terror justifies the U.S. government’s disregard for, or unilateral reinterpretation of, the Geneva Conventions and their requirements concerning the treatment of captured combatants and noncombatants. Despite objections from the State Department and U.S. military officials, President Bush announced in January 2002 that members of al Qaida and the Taliban captured by U.S. forces would not be treated as prisoners of war under the Geneva Conventions.⁴⁶ Shortly thereafter, White House Counsel Alberto Gonzales, later appointed Attorney General, sent a memorandum to Bush supporting this position by arguing that the “new paradigm” occasioned by the war on terrorism “renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.”⁴⁷

The position that suspected terrorists were exempt from the Geneva Conventions laid the groundwork for the subsequent torture of prisoners held at Guantánamo Bay, in Afghanistan and Iraq, and in secret prisons in undisclosed locations around the world⁴⁸—the most notorious example being the abuse perpetrated by U.S. military personnel at the Abu Ghraib prison in Iraq.⁴⁹ In perhaps its most flagrant

44. NSS, *supra* note 3, Introduction. As Antony Anghie notes, the terrorist is being constructed not only in terms of the discourse of race, or economics, but now of war: “It is principally through the language of war-as-self-defence that the ‘other’ is constructed, excluded from the realm of law, attacked, liberated, defeated and transformed.” ANGHIE, *supra* note 13, at 278.

45. According to Harold Koh, “Diplomatic historians will long revisit the missed steps that led to the messy start of the second Gulf War. My view is that a transnational legal process solution—the exercise of multilateral coercive power, led by the United States through the U.N. mechanism—was available, but tragically bungled.” Koh, *supra* note 41, at 1479, 1518 (2003). See also ANGHIE, *supra* note 13, at 275–76.

46. See Evan J. Wallach, *The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and Al Qaeda and the Mistreatment of Prisoners in Abu Ghraib*, 36 CASE W. RES. J. INT’L L. 541, 549–50 (2004) (citing a Bush administration statement of January 18, 2002, and noting that the analytical justifications for this position were presented in a memorandum of January 9, 2002, sent by Assistant Attorney General John Yoo and Special Counsel Robert Delahunty to the General Counsel of the Department of Defense).

47. Memorandum from Alberto R. Gonzales, Att’y Gen., to George W. Bush, President of the United States (Jan. 25, 2002) available at <http://news.lp.findlaw.com/hdocs/docs/torture/gnzls12502mem2gwb2.html>. See also Wallach, *supra* note 47, at 552. For a compilation of the full text of related memoranda and reports, see generally THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg and Joshua L. Dratel eds., 2005).

48. For a summary of the United States’ 2006 report to the supervisory body of the Convention Against Torture and that committee’s findings that the indefinite detentions of persons at Guantánamo and those extrajudicially “rendered” to third countries constitutes a violation of the Convention, see *United States’ Periodic Report to Committee Against Torture*, 100 AM. J. INT’L L. 703 (2006). On the findings of the Organization of American States’ Inter-American Commission, see generally Brian D. Tittmore, *Guantánamo Bay and the Precautionary Measures of the Inter-American Commission on Human Rights; A Case for International Oversight in the Struggle Against Terrorism*, 6 HUM. RTS. L. REV. 378 (2006).

49. According to Wallach, “these legal rationales, and the Geneva-prohibited interrogation techniques they approved, eventually resulted in the abuses of Abu Ghraib.” Wallach, *supra* note 47, at 546. See also *id.* at 599–603. See generally Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345 (2007). On Abu Ghraib, see generally SEYMOUR HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11

assertion of a unique prerogative to disregard the norms of international law applicable to the rest of the world, the United States has undermined the prohibitions against torture articulated in the Convention Against Torture, ratified by the United States⁵⁰ and accepted as a *jus cogens* or preemptory norm of customary international law.⁵¹

In each of the previously mentioned cases, the United States has asserted the right, ability, and even responsibility to act unilaterally and in apparent violation of international law when multinational institutions do not function in ways U.S. officials believe most effective. Most often, these policies and practices have been justified by the recent emergence of terrorist threats against the United States.⁵² The attacks on the Pentagon and World Trade Center are often cited as the inauguration of a new era of global insecurity in which different rules of engagement apply. However, as early as 1999, George W. Bush announced in a campaign speech that "America has determined enemies, who hate our values and resent our success" and declared that he would bring to the table a "distinctly American internationalism."⁵³ Thus, al-

TO ABU GHRAIB (2004). On abuses at the U.S. prison in Guantánamo Bay, Cuba, see generally MICHAEL RATNER & ELLEN RAY, *GUANTANAMO: WHAT THE WORLD SHOULD KNOW* (2004).

50. In August 2002, the Department of Justice Office of Legal Counsel prepared a memorandum limiting its definition of torture to actions causing "physical pain . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" or psychological harm "lasting for months or even years." Further, the torturer has to specifically intend to inflict severe pain, thereby exempting those whose purpose is to obtain information. Memorandum from Jay S. Bybee, Asst. Att'y. Gen., to Alberto R. Gonzales, Att'y. Gen. (Aug. 1, 2002) available at <http://f1.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf>. By contrast, Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or with the consent or acquiescence of a public official or other person acting in an official capacity.

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. See Robert K. Goldman, *Trivializing Torture: The Office of Legal Counsel's 2002 Opinion Letter and International Law Against Torture*, 12 NO. 1 HUM. RTS. BRIEF 1, 1, 3 (2004). In December 2004, the Justice Department's position was superseded by a memorandum acknowledging that torture violates international law and omitting the narrow definition cited above. However, it was not clear that the administration considered this binding on CIA interrogations. See Mark A. Drumbl, *Guantánamo, Rasul, and the Twilight of Law*, 53 *DRAKE L. REV.* 897, 914-15 (2005).

51. On customary law, see generally Stephanie L. Williams, "Your Honor, I Am Here Today Requesting the Court's Permission to Torture Mr. Doe": *The Legality of Torture as a Means to an End v. The Illegality of Torture as a Violation of Jus Cogens Norms Under Customary International Law*, 12 *U. MIAMI INT'L & COMP. L. REV.* 301 (2004). Regarding the effect these actions have had on the United States' human rights reputation, see generally Harold Hongju Koh, *Restoring America's Human Rights Reputation*, 40 *CORNELL INT'L L.J.* 635 (2007).

52. Thus, for examples, the *National Security Strategy* notes that because today's adversaries use unconventional means and attack without warning, "anticipatory action" may be necessary "even if uncertainty remains as to the time and place of the enemy's attack." NSS, *supra* note 3, at 15.

53. George W. Bush, Governor, Tex., *A Distinctly American Internationalism*, Speech at Ronald Reagan Presidential Library (Nov. 19, 1999) available at <http://www.mtholyoke.edu/acad/intrel/bush/wspeech.htm>;

though there is widespread agreement that a new paradigm is emerging, it would appear to be a shift that was in the making well before the inception of the current war on terror.

In fact, the simultaneous invocation of and self-exemption from the rule of law by U.S. leaders is neither a new phenomenon nor unique to the Bush administration. When we look beyond the specific arguments about contemporary enemies to the broader rationale being proffered for the United States' failure to comply with select norms of international law, we see old and familiar exceptionalist justifications being made. These rationalizations are deeply rooted in the United States' longstanding claims to singular representation of the apex of Western civilization, and rely heavily on the colonial presumptions of international law as it emerged to justify European imperial expansion. Thus, it is my belief that current U.S. claims of a unilateral prerogative to re-shape international law are most effectively addressed by first examining and deconstructing the historical roots of American exceptionalism. The following sections provide examples from American history over the past four centuries that illustrate this thesis.

III. 17TH CENTURY ROOTS: THE AMERICAN VISION

We have been taught, inside the classroom and outside of it, that there exists an entity called the West, and that one can think of this West as a society and civilization independent of and in opposition to other societies and civilizations. Many of us even grew up believing that this West has a genealogy, according to which ancient Greece begat Rome, Rome begat Christian Europe, Christian Europe begat the Renaissance, the Renaissance the Enlightenment, the Enlightenment political democracy and the industrial revolution. Industry, crossed with democracy, in turn yielded the United States, embodying the rights to life, liberty, and the pursuit of happiness.

*Eric Wolf, Europe and the People Without History*⁵⁴

In waging the war on terror, the United States is often portrayed by its historians and leaders as the foremost representative of the universal values embodied in Western civilization. This was, perhaps, best summarized by President Bush's statement that "The great struggles of the twentieth century between liberty and totalitarianism ended with a decisive victory for the forces of freedom—and a single sustainable model for national success: freedom, democracy, and free enterprise . . ."⁵⁵ In other words, the American model of social, political and economic organization represents the highest stage of human development. It is the only truly viable option for any society: "These values of freedom are right and true for every person, in every society—and the duty of protecting these values against their enemies is the common

see also *Bush Outlines Foreign Policy*, BBC NEWS, Nov. 20, 1999, available at <http://news.bbc.co.uk/1/hi/world/americas/529018.stm>. The phrase was apparently originated by National Security Advisor Condoleezza Rice. See J. Michael Waller, *Bush Doctrine on Free-World Safety: the new National Security Strategy abandons the relativism of old in favor of what Condoleezza Rice has called 'distinctly American internationalism'*, BNET, Oct. 15, 2002, http://findarticles.com/p/articles/mi_m1571/is_38_18/ai_93457398/pg_1.

54. ERIC R. WOLF, *EUROPE AND THE PEOPLE WITHOUT HISTORY* 5 (1982).

55. NSS, *supra* note 3, at Introduction.

calling of freedom-loving people across the globe and across the ages.”⁵⁶ This perspective presumes that there is a unilinear trajectory of human progress, and that history is the story of human development along that one path.

As Richard Drinnon has noted in other contexts, the term “civilization” is not used “interchangeably with *culture*, so that other peoples might have ‘civilizations.’ Instead, [it is used] to distinguish Western superculture, or the one true ‘civilization,’ from so-called primitive cultures.”⁵⁷ If these premises accurately reflect the perspectives of U.S. leaders in their current reshaping of the contours of international law, the war on terror can, perhaps, best be understood as the latest phase in the extension of European and Euroamerican colonialism.⁵⁸ Consideration of some of the parallels between the rationale utilized in the war on terror and those given for the European colonial project, the establishment of the United States, and more recent American imperial ventures illustrate this historical continuity.

A. Puritan Ideology: The Beacon on the Hill

The underlying ideology of American exceptionalism—the assertion that the United States represents the highest stage of civilization achieved by humanity to date and, in particular, that it uniquely embodies the values of freedom and democracy—can be traced back to the earliest English settlers’ understanding of what their colonial venture would represent. Especially for the Puritans, North America was a promised land and, according to Anders Stephanson, their small settlements were simply the precursor to the establishment of the New Israel (or New Canaan) through which the world was to be regenerated and “God and humankind . . . reconciled at last.”⁵⁹ This vision, with or without the religious framing, continues to shape American identity. Thus, in 1630, Puritan minister John Winthrop predicted that “wee [sic] shall be as a Citty [sic] upon a Hill,” and more than three centuries later, President Ronald Reagan echoed this notion when he said in his farewell address, “And how stands the city on this winter night? . . . [S]he’s still a beacon, still a magnet for all who must have freedom”⁶⁰ George W. Bush also referenced this imagery when he said on September 11, 2001, “America was targeted for attack because we’re

56. *Id.*

57. DRINNON, *supra* note 26, at xxviii. See also Diego Panizza, *Conceptions of International Order in Eighteenth Century Political Thought: A Typology in Context*, 17 QUINNIPIAC L. REV. 61, 65 (1997) (noting how the theorists of the Scottish Enlightenment transformed the descriptions of societies in Montesquieu’s *Spirit of the Law* into the “stages” of savagery, barbarism, and civilization, stressing “the idea that the process was one of ‘improvement’”).

58. For an extensive analysis of the evolution of international law from this perspective, see generally ANGHIE, *supra* note 13.

59. ANDERS STEPHANSON, *MANIFEST DESTINY: AMERICAN EXPANSION AND THE EMPIRE OF RIGHT* 7 (1995). See also William T. Cavanaugh, *Messianic Nation: A Christian Theological Critique of American Exceptionalism*, 3 U. ST. THOMAS L. J. 261, 262-64 (2005).

60. See Steven G. Calabresi, “*A Shining City on a Hill*”: *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1336 (2006) (quoting John Winthrop, *A Modell of Christian Charity* (1630) in *SETTLEMENTS TO SOCIETY: 1584-1763* 66, 68 (Jack P. Greene ed., 1966) and President Ronald Reagan, *Farewell Address to the Nation* (Jan. 11, 1989)).

the brightest beacon for freedom and opportunity in the world."⁶¹ From Winthrop to Reagan, to the imagery associated with the Statue of Liberty⁶² and its invocation in the war on terror, the metaphor of the U.S. as a beacon of light is inextricably linked to the early English colonists' faith in the superiority of Anglo-Saxon civilization.

While other European powers played a significant role in settling the North American continent,⁶³ the United States has always seen itself as a uniquely English creation, and the vision of the American mission to bring freedom and civilization to this continent and beyond is most clearly articulated in the first instance by colonial settlers in what we now call New England.⁶⁴ By and large, both the Pilgrims and larger numbers of Puritans who followed them were convinced that the Anglo-Saxon race represented the highest stage of European civilization.⁶⁵ As evidence, they emphasized that the Saxons had developed structures of political governance more democratic than those imposed by the Normans in their Conquest of 1066 and that, with the Protestant Reformation, they had overcome the domination of the Roman Catholic Church.⁶⁶

The Puritans saw their journey to the New World as a "reenactment of the Exodus narrative revolv[ing] around a powerful theology of chosenness."⁶⁷ Central to their worldview was the concept of predestination—the belief in a divinely ordained plan for the world, and the notion that God had a particular covenant with humanity.⁶⁸

61. WE WILL PREVAIL, *supra* note 2, at 2. See also Peter Fitzpatrick, "What are the Gods to Us Now?": *Secular Theology and the Modernity of Law*, 1 THEORETICAL INQ. L. 161, 171 (2007).

62. See LYNNE CHENEY, AMERICA: A PATRIOTIC PRIMER (2002). This children's book depicts the Statue of Liberty on the unnumbered page for the letter "A." In the notes, Cheney quotes a portion of Emma Lazarus' 1883 poem inscribed on the statue: "Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me: I lift my lamp beside the golden door!" In the full poem, a prior phrase says: "A mighty woman with a torch, whose flame/Is the imprisoned lightning, and her name/ Mother of Exiles. From her beacon-hand/Glows world-wide welcome . . ." EMMA LAZARUS, THE NEW COLOSSUS (1883) available at <http://www.libertystatepark.com/emma.htm>. See also Joseph M. de Torre, *The Roots of International Law and the Teachings of Francisco de Vitoria as a Foundation for Transcendent Human Rights and Global Peace*, 2 AVE MARIA L. REV. 123, 131, n.40 (2004).

63. See ANTHONY PAGDEN, LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE, C.1500- C.1800 63-76 (1995); see also Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of 'Universal Recognition' of the Doctrine of Discovery*, 36 SETON HALL L. REV. 481, 499-540 (2006) (discussing distinctions between the views of the Spanish, French, Dutch, and English powers).

64. See CHARLES M. SEGAL & DAVID C. STINEBACK, PURITANS, INDIANS, AND MANIFEST DESTINY 30 (1977) (noting the similarities between the Puritan experience and the westward movement of manifest destiny). These similarities may also be, to some extent, a result of the influence of New England influence on American historiography. See also STEPHANSON, *supra* note 60, at 4.

65. SEGAL & STINEBACK, *supra* note 65, at 31 (noting the arrival of 100 Pilgrims in 1620, and 1500 Puritans in 1630).

66. See REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 9-14 (1981). See also RICHARD SLOTKIN, REGENERATION THROUGH VIOLENCE: THE MYTHOLOGY OF THE AMERICAN FRONTIER, 1600-1860 37-42 (1973) (discussing development of Puritan ideas as derived from the Protestant middle class of English cities).

67. STEPHANSON, *supra* note 60, at 6.

68. See ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 164-65 (1990).

The colonists could fulfill their part of this contract by bringing salvation to the New World, and in return, they would be rewarded by God in this life and the next. The "savages" of the Americas would benefit by receiving both Christianity and civilization, including "a well governed commonwealth" and education in the "mechanical occupations, arts, and liberal sciences."⁶⁹

These early English settlers, however, were concerned less with the salvation of the "savages" than with carving out space in North America for their promised land.⁷⁰ Most fundamentally, they believed themselves to be creating a new model of civilization for the European world; the purported benefits being brought to indigenous peoples in that process were of lesser concern.⁷¹ Nonetheless, they were not operating in a vacuum. In order to establish that they were furthering the civilization represented by Europe, they needed to rationalize their ventures within the law of nations dominant in that world, much as the United States today relies upon the fundamental principles of civilization and international law to justify its actions.⁷²

B. *The Legal Context of Euroamerican Colonialism*

The "law of nations," what we now call international law, was designed not only to regulate relations between "civilized" states, but to rationalize their colonial ventures. It has, therefore, consistently incorporated and relied upon the presumption of the superiority of European civilization.⁷³ To quote Robert A. Williams, Jr., this presumed superiority has been "the redemptive source of the West's presumed mandate to impose its vision of truth on non-Western peoples."⁷⁴ Conquest has always been significant to the narrative of colonialism, but claims of bringing the world to a higher stage of civilization could not be based solely on raw power.⁷⁵ This would pose significant ideological problems given the purported contrast between the order said to characterize western societies and the state of constant warfare Europeans claimed prevailed amongst those deemed savage.⁷⁶ As a result, law has assumed a

69. *Id.* at 172 (quoting George Peckham, an early English promoter of American colonization).

70. See SLOTKIN, *supra* note 67 at 38-39.

71. See NEAL SALISBURY, *MANITOU AND PROVIDENCE: INDIANS, EUROPEANS, AND THE MAKING OF NEW ENGLAND, 1500-1643* 178 (1982). See generally Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 430-431 (2006) (discussing the transition in settler ideology from viewing indigenous people as objects of salvation to threats to be destroyed).

72. Sacvan Bercovitch notes that the "New England Puritans gave America the status of visible sainthood," linking this concept "the American Way, to the usurpation of American identity by the United States, and to the anthropomorphic nationalism that characterizes our literature . . . American dream, manifest destiny, redeemer nation, and, fundamentally, the American self as representative of universal rebirth." Art Wolfe, *Corporations as Ships: An Inquiry into Personal Accountability and Institutional Legitimacy*, 19 PEPP. L. REV. 49, 82 (1991) (quoting SACVAN BERCOVITCH, *THE PURITAN ORIGINS OF THE AMERICAN SELF* 108 (1975)).

73. See generally, ANGHIE, *supra* note 13; WILLIAMS, *supra* note 69.

74. WILLIAMS, *supra* note 69, at 6.

75. This appears to parallel the manner in which the United States currently emphasizes the importance of the global rule of law while exempting itself from many of its mandates. See *supra* notes 41-52 and accompanying text.

76. See Christopher Tomlins, *In a Wilderness of Tigers: Violence, the Discourse of English Colonizing, and the Refusals of American History*, 4 THEORETICAL INQ. L. 451, 468 (2003) ("[F]or colonizers, that which lay beyond familiar civil association was a space of deprivation and savagery, inhabited only by barbarism's

primary role in the ideology of Western civilization, and European colonial expansion was conceived, from the beginning, as a legal project.⁷⁷

Christian Europe's conception of a unitary and hierarchical system of law grew out of an understanding of the world as a place in which God ruled over man and man, in turn, was responsible for governing nature.⁷⁸ Once civilization had been defined in terms of distance from nature, the gradation of humanity into those more and less civilized (i.e., those who were further removed from or closer to a state of nature) justified the rule of the civilized over the barbarian or the savage. As a result, the law became an instrument of the subordination or "uplifting" of the Other, depending upon one's perspective.⁷⁹ Furthermore, in very practical terms, international law became a means of governing relations among the "civilized" states aspiring to empire, enabling them to devote more of their resources to acquiring territories and developing trade, and less to fighting each other.⁸⁰

In the mid-thirteenth century, Pope Innocent IV attempted to reconcile Aristotelian natural law with the notion of papal supremacy by declaring that non-Christian peoples were rational beings and thus subjects of natural law, but that those who rejected God's will were irrational and, therefore, in violation of that law.⁸¹ The

profound lack of order[.]"); see generally Devin O. Pendas, *"The Magical Scent of the Savage": Colonial Violence, the Crisis of Civilization, and the Origins of the Legalist Paradigm of War*, 30 B.C. INT'L & COMP. L. REV. 29 (2007).

77. See WILLIAMS, *supra* note 69, at 6-8 (discussing the legitimating function of law and legal discourse in the colonial enterprise); see also Tomlins, *supra* note 77, at 474 (noting that law in the form of English colonial charters not only provided the medium for actualizing colonial relationships between people and places in the Americas, but also "were themselves the very violence they occluded").

78. This is stated forthrightly in the creation story foundational to the Judeo-Christian tradition: "So God created man in his own image . . . male and female created he them. And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." *Genesis* 1:27-28 (King James); See also Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 11-25 (1983) (discussing hierocratic structure of papal law); VINE DELORIA, JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* 78-95 (1994) (discussing distinctions between western and indigenous views on the relationship between people and nature). On the ongoing legal impact of the western conception of nature as subject to human domination, see generally Alex Geisinger, *Sustainable Development and the Domination of Nature: Spreading the Seed of the Western Ideology of Nature*, 27 B.C. ENVTL. AFF. L. REV. 43 (1999).

79. For explication of these interactive and often situationally-employed tropes, see generally ANTHONY PAGDEN, *EUROPEAN ENCOUNTERS WITH THE NEW WORLD: FROM RENAISSANCE TO ROMANTICISM* (1993).

80. At least as early as 1493, a primary motive propelling the evolution of colonial law was "keeping the peace between the great European powers engaged in the competition for overseas territories." SHARON KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* 45 (1996).

81. See WILLIAMS, *supra* note 69, at 44-47. Another scholar, Matthew Ritter, notes, "Throughout its various historical, philosophical, theological and ethical formulations . . . natural law has retained a governing structural presumption: A human nature that is the same for us all, in which inheres the essential means properly to realize itself in accordance with its nature." Matthew A. Ritter, *"Human Rights": Would You Recognize One if you Saw One? A Philosophical Hearing of International Rights Talk*, 27 CAL. W. INT'L L. J. 265, 279 (1997). Moreover, this nature, and therefore its law, can be discovered by human reason. *Id.* See also JOHN C. MOHAWK, *UTOPIAN LEGACIES: A HISTORY OF CONQUEST AND OPPRESSION IN THE WESTERN WORLD* 67 (2000) (suggesting that, ironically, Innocent was in all likelihood working from translations of Aristotle obtained from Islamic sources).

Church remained responsible for interpreting and ensuring the enforcement of natural law. Within this universalizing vision of law intent on eliminating or assimilating all other perspectives, those considered infidels possessed and had dominion over their own lands, but if they insisted on acting irrationally by denying Christian supremacy, their property could be confiscated.⁸² Thus, "[c]enturies prior to Columbus's transatlantic voyage, the thirteenth-century canon lawyer-pope Innocent IV had discovered for Christendom a new world of legal discourse, premised on the central orienting myth that the Christian European's vision of reason and truth entailed norms obligatory for all peoples."⁸³

Much of the subsequent framing of colonial law by discovery era legal scholars relied upon secularized variations of Innocent IV's articulation.⁸⁴ Writing in the first half of the sixteenth century, legal scholar Franciscus de Vitoria applied the principles of Thomistic natural law to Spanish discoveries and settlement, laying the foundation for an international jurisprudence designed to address relationships not only between recognized independent sovereign states, but also between the colonizers and the colonized.⁸⁵ In Vitoria's analysis, infidels were rational beings and, therefore, subject to the law of nations. As such, they had the right to possess and exercise jurisdiction over their lands.⁸⁶ However, Vitoria also attributed substantive natural law rights to the colonizing powers that effectively undermined indigenous peoples' rights to their lands. For example, the Spanish had a right to travel to and sojourn in foreign lands, and to proselytize those they encountered there. They also had a right to engage in commerce and trade with them.⁸⁷ It was from these premises that European settlers derived their purported right to colonize indigenous peoples and their lands.

Much of the subsequent legal justification for colonialism rests upon what is often termed the "doctrine of discovery."⁸⁸ While the concept can be traced to Vitoria's

82. See WILLIAMS, *supra* note 69, at 43-49.

83. *Id.* at 49-50.

84. Williams describes this universalization of law as a "singular innovation" that "initiated the process by which the European state system's legal discourse was ultimately liberated from its stultifying, expressly theocentric, medievalized moorings and was adapted to the rationalizing demands of Renaissance Europe's secularized will to empire." *Id.* at 96-97. See also ANGHIE, *supra* note 13, at 15.

85. Vitoria's legal framework was explicated in a series of lectures dealing with relations between the Spanish and the Indians of the New World, most famously *De Indis Noviter Inventis*, ("On the Indians Lately Discovered") and *De Jure Bellis Hispanorum in Barbaros* ("On the Law of War Made by the Spaniards on the Barbarians"). See KORMAN, *supra* note 81, at 52-56; ANGHIE, *supra* note 13, at 13-28; WILLIAMS, *supra* note 69, at 96-108. On the principles of natural law articulated by St. Thomas Aquinas, see WILLIAMS, *supra* note 69, at 41-50.

86. "Unbelief does not destroy either natural law or human law; but ownership and dominion are based either on natural law or human law; therefore they are not destroyed by want of faith." ANGHIE, *supra* note 13, at 18 (quoting Franciscus de Vitoria, The First Relectio of the Reverend Father, Brother Franciscus de Vitoria, On the Indians Lately Discovered, in FRANCIS DE VITORIA, *DE INDIS ET DE IVRE BELLI RELECTIONES* 123 (Ernest Nys ed., John Pawley Bate trans., Carnegie Institution of Washington 1917)); see also WILLIAMS, *supra* note 69, at 97; L.C. Green, *Claims to Territory in Colonial America*, in LAW OF NATIONS AND THE NEW WORLD 39-40 (L.C. Green & Olive P. Dickason eds., 1989).

87. ANGHIE, *supra* note 13, at 23; see also KORMAN, *supra* note 81, at 53.

88. See generally Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1 (2005); Watson, *supra* note 64, at 499-540.

analysis, Vitoria was clear that rights deriving from discovery only applied to vacant lands, or *territorium res nullius*. With respect to inhabited territory, the doctrine simply reflected an agreement between European colonizing powers over their respective priority to exercise these rights to sojourn, proselytize, or engage in trade.⁸⁹ This emphasis on the ordering of relations among the European colonial powers was summarized quite well by Supreme Court Chief Justice John Marshall in the early 19th century. Since the various states engaged in "discovery" were "all in pursuit of nearly the same object," Marshall observed:

[I]t was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated, as between themselves. The principle was, that discovery gave title to the government by whose subjects, or under whose authority, it was made, against other governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no European power could interfere.⁹⁰

From the perspective of those who intended to settle on native lands, the problem with Vitoria's framework was that it only gave the discovering power the right to acquire lands by otherwise legal means. "Conquest" is often proffered, along with discovery, as justification for colonization. However, occupying and appropriating inhabited land was not considered legal unless it came as the result of a "just war."⁹¹ Vitoria posited that colonial powers had rights under natural law to travel and sojourn among the Indians, to participate in commerce with them, and to send missionaries amongst them. Indian resistance to any of these activities was irrational, violated natural law, and thus provided grounds for waging "just war."⁹² While contemporary historians contest that the preconditions for "just war" were ever met, any resistance to colonial incursions was interpreted by the colonizers as a violation of law and used to legitimize warfare.⁹³

Indigenous peoples were characterized as having reason and, therefore, were subject to natural law, but "reason" was normatively interpreted by referencing Euro-

89. See Ward Churchill, *The Law Stood Squarely on Its Head: U.S. Legal Doctrine, Indigenous Self-Determination and the Question of World Order*, 81 OR. L. REV. 663, 665-67 (2002) [hereinafter Churchill, *Law Stood Squarely*].

90. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 572 (1823). See also Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 253-56 (1986) [hereinafter Williams, *Algebra*].

91. See Churchill, *Law Stood Squarely*, *supra* note 90, at 665-72.

92. See ANGHIE, *supra* note 13, at 20-24; see also Williams, *Algebra*, *supra* note 91 at 247 (observing that "[l]ike most writers of this period, Alberico Gentili identified the Law of Nations with natural law, asserting that the rules of this Law were binding on all mankind owing to their grounding in universal and absolute reason.").

93. See Churchill, *Law Stood Squarely*, *supra* note 91, at 680-86 (discussing the failure of native peoples to violate these conditions); see also ANGHIE, *supra* note 13, at 20-28 (discussing the characterization of resistance as *per se* violations).

pean understandings of civilization. As Antony Anghie summarizes, Vitoria described war as “the means by which Indians and their territory are converted into Spaniards and Spanish territory, the agency by which the Indians thus achieve their full human potential.”⁹⁴ Similarly, writing at the end of the sixteenth century, another natural law scholar Alberico Gentili argued that “if men clearly sin against the laws of nature and mankind, I believe that any one whatsoever may check such men by force of arms.”⁹⁵ Those deemed uncivilized were, by definition, in violation of such laws. Thus, Hugo Grotius, often credited with founding the discipline of international law,⁹⁶ characterized those who “excessively violate the law of nature or of nations” as barbarians, and argued that “the most just war is against savage beasts, the next against men who are like beasts.”⁹⁷

It was against this backdrop of legal theory that we approach the early American colonists’ claims of establishing exceptional communities. Initially, at least, English settlers in North America were reluctant to rely on a theory of conquest by just war, because of their commitment, framed within the context of the Norman Conquest, to “the ‘continuity theory’ of constitutional law in which the legal and political institutions of the conquered are deemed to survive a conquest.”⁹⁸ The first and easiest, if least accurate, way to justify the establishment of English colonies was by declaring the land to be vacant and claiming title under the doctrine of *territorium res nullius*, or the right to claim title to unoccupied lands.⁹⁹ This, however, required not only that the colonizers have a prior discovery claim against other colonial powers, but also that the land be uninhabited.

94. ANGHIE, *supra* note 13, at 23.

95. 2 ALBERICO GENTILI, *DE JURE BELLI LIBRI TRES* (1612), reprinted in *THE CLASSICS OF INTERNATIONAL LAW*, at 122 (James Brown Scott ed., John C. Rolfe trans., Oxford: The Clarendon Press 1933); see generally Benedict Kingsbury, *Confronting Difference: The Puzzling Durability of Gentili’s Combination of Pragmatic Pluralism and Normative Judgment*, 92 AM. J. INT’L L. 713 (1998) (discussing Gentili’s continuing influence on contemporary international legal theory).

96. See MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 1 (3d ed. 1999).

97. Williams, *Algebra*, *supra* note 91 at 250 (citing Hugo Grotius, *De Jure Belli Ac Pacis Libi Tres*). See also James Thuo Gathii, *The American Origins of Liberal and Illiberal Regimes of International Economic Governance in the Marshall Court*, 54 BUFF. L. REV. 765, 800 (2006) (explaining that a similar argument would be made by Justice John Marshall, who uses the theories of “discovery” and “conquest” to justify the taking of American Indian lands on the grounds that the Indians were “fierce savages, whose occupation was war . . .” (quoting *Johnson*, 21 U.S. at 590)). This, too, constituted an early example of American exceptionalism for, as Gathii notes, “although [Marshall] had spoken eloquently against the rights of belligerents insofar as they undermined free commerce in the United States’ international relations with its European counterparts, for Indians, war was the solution for their subjugation.” *Id.* at 801.

98. PAGDEN, *supra* note 64, at 77. Pagden also notes that “no less a person than Francis Bacon had demonstrated that ‘a country gained by conquest hath no right to be governed by English law.’” *Id.*

99. Pagden notes that the “only major exception to this rule was the much discussed conquest of Virginia,” where English claims were based on “the claim supposedly grounded in English common law that all infidels were aliens, *perpetui enemies*, ‘perpetual enemies’” with whom there could, by definition, be no peace. PAGDEN, *supra* note 64, at 94. However, even claims based on *res nullius* required prior discovery. For this purpose, the English relied upon mythic accounts of a Welsh Prince Madoc who was said to have arrived in what is now Alabama in the twelfth century, supplemented by claims based on John Cabot’s discovery of Florida in 1497. See *id.* at 81; WILLIAMS, *supra* note 69, at 121–22, 178.

C. *Justifying Conquest by Creating Vacant Lands*

Even before the Pilgrims set sail, John Smith had "proclaimed himself the true discoverer" of "New England," and these settlers arrived in 1620 with a map on which Smith had already identified the Plymouth colony.¹⁰⁰ According to Smith, the land he had discovered was "so planted with Gardens and Corne fields, and so well inhabited with a goodly, strong and well proportioned people" that its suitability for colonization could not be contested.¹⁰¹ Yet, virtually in the same breath, he described it as his favorite "of all the foure parts of the world that I have yet seene not inhabited."¹⁰² In other words, he was invoking the doctrine of *res nullius* to claim title to the territory by virtue of his discovery, relegating its peoples to non-human status despite his own glowing descriptions of both the peoples and their agricultural accomplishments.

The numerous Puritan settlers who soon followed relied on a combination of similarly contradictory arguments incorporating the notions that the land was unoccupied, that conquest had in any case been justified because of the savage nature of the Indians, and that the Indians had consented to the takings. John Cotton, perhaps the best known Puritan preacher, analogized their settlement to God's provision of a homeland for the people of Israel, noting that God had "espied" and "discovered" the land for them and had "carried them" to it over "all hindrances."¹⁰³ Once there, Cotton explained, God had made room for them in three ways—by casting out their enemies, by giving them "favor in the eyes of any native people" who thereafter sold or gave them the land, and by "mak[ing] a country though not altogether void of inhabitants, yet void in that place where they reside."¹⁰⁴

John Smith's counterfactual assertion that the land was "uninhabited" would soon become somewhat more accurate as a result of epidemics of smallpox and other diseases introduced by the colonizers, as well as by warfare and massacres.¹⁰⁵ In some areas, diseases introduced by Europeans led to the deaths of up to ninety percent of the inhabitants within two generations of initial contact.¹⁰⁶ This was proffered by

100. See SALISBURY, *supra* note 72, at 98, 109.

101. *Id.* at 98 (quoting *Travels and Works of Captain John Smith*).

102. *Id.*

103. SEGAL & STEINBACK, *supra* note 65, at 52.

104. *Id.* at 52-53. Similar arguments were made by the founder of the Massachusetts Bay colony, John Winthrop, who added the notion that colonizers had an equal right to share in commonly held property. See *id.* at 50-51.

105. FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* 16-31, 207-08 (1976); SALISBURY, *supra* note 72, at 101-06. When Juan Ponce de León first landed in Florida in 1513, there were approximately fifteen million people living in the territory now claimed by the United States and Canada. See Ward Churchill, "Nits Make Lice": *The Extermination of North American Indians, 1607-1996*, in *A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS, 1492 TO THE PRESENT* 129, 131-37 (1997) [hereinafter Churchill, "Nits make Lice"]. A pre-Columbian population of approximately 15 million in North America is an average commonly accepted by scholars. See, e.g., KIRKPATRICK SALE, *THE CONQUEST OF PARADISE: CHRISTOPHER COLUMBUS AND THE COLUMBIAN LEGACY* 316 (1990). See also BUREAU OF FOREIGN AND DOMESTIC COMMERCE, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES*, 1937, at 11 no. 14 (1938) (showing that by 1900, the Census Bureau recorded less than 250,000 native people living in the United States).

106. See, e.g., DAVID E. STANNARD, *AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE*

the colonists as evidence that God was on their side. In 1631, Cotton Mather rejoiced that "God ended the Controversy [between the Massachusetts' Bay Colony and its Indian neighbors] by sending the Smallpox amongst the Indians . . . who were before that time exceedingly numerous,"¹⁰⁷ and the governor of the Carolina Colony announced that "the hand of God was eminently seen in thin[n]ing the Indians, to make room for the English."¹⁰⁸

More than the hand of God was at work, however. As early as 1636, an officer of the Massachusetts Colony was tried and executed by the Narragansetts for having deliberately infected them with smallpox three years earlier.¹⁰⁹ In 1763, during the last of the "French and Indian Wars," Lord Jeffrey Amherst suggested that an officer under his command initiate peace talks with the Ottawas, allies of the French, in order to provide them "gifts" infected with smallpox. Amherst wrote, "You will do well to [infect] the Indians by means of blankets as well as to try every other method that can serve to extirpate this execrable race."¹¹⁰

The native peoples were not disappearing as a result of disease alone, of course. While the English colonists often found it expedient to have peaceful trade relations with their American Indian neighbors, their constant expansion continued to generate native resistance. In keeping with the theories of Vitoria, Gentili, and Grotius, this provided the excuse for warfare, as any resistance was characterized as the "treachery" of savages, and any killing of Europeans described as "massacre."¹¹¹ To give just

NEW WORLD 118-21 (1992) (noting native population declines in the 90th percentile in eastern Virginia and New England during the late 17th and early 18th centuries); 1 JAMES KIRBY MARTIN, RANDY ROBERTS, STEVEN MINTZ, LINDA O. McMURRAY & JAMES H. JONES, *AMERICA AND ITS PEOPLE, VOLUME ONE TO 1877* 17-19 (2d ed., 1993) (noting a 90 percent population decline in Mexico following Cortés' invasion).

107. PERCY M. ASHBURN, *THE RANKS OF DEATH: A MEDICAL HISTORY OF THE CONQUEST OF AMERICA* 22 (Frank D. Ashburn ed., Porcupine Press 1980) (1947) (quoting Cotton Mather).

108. JOHN ARCHDALE, *A NEW DESCRIPTION OF THAT FERTILE AND PLEASANT PROVINCE OF CAROLINA* (1707), reprinted in *NARRATIVES OF EARLY CAROLINA, 1650-1708* 284-85 (Alexander S. Salley, Jr. ed., 1911). While few Americans would today claim that the diseases which decimated Indian nations were the result of divine intervention on behalf of European colonialism, most see it as a "natural" and inadvertent consequence of intercontinental contact. See, e.g., 1 STEVEN T. KATZ, *THE HOLOCAUST IN HISTORICAL CONTEXT, VOLUME 1: THE HOLOCAUST AND MASS DEATH BEFORE THE MODERN AGE* 20 (1994) (describing the depopulation of the New World as "largely an *unintended* tragedy" caused by "[n]ature, not malice" (emphasis in original)). It must be recognized, however, that while the very first Europeans to come into contact with indigenous societies might have been unaware that they brought with them deadly pathogens, by "1550 at the latest, and probably earlier, it was common knowledge in Europe that there was a firm correlation between the arrival of 'explorers, settlers and military expeditions' on the one hand and massive die-offs of native peoples from [diseases such as smallpox, typhoid, diphtheria, measles and various plagues] on the other." Churchill, "*Nits Make Lice*," *supra* note 106, at 137-38.

109. Although it was known that Narragansetts had killed the officer John Oldham, the Massachusetts and Plymouth Plantation governors publicly blamed the Pequots, who were both militarily weaker than the Narragansetts and had land more immediately coveted by the colonies, leading to a war in which the Pequots were virtually annihilated. *Id.* at 152.

110. *Id.* at 154 (citing E. WAGNER STEARN AND ALLEN E. STEARN, *THE EFFECTS OF SMALLPOX ON THE DESTINY OF THE AMERINDIAN* 44-45 (1945), which quotes a letter from Lord Jeffery Amherst to Colonel Henry Bouquet written in 1763). See also STANNARD, *supra* note 107, at 112-17. For an overview of the intentional infliction of disease in this context, see Churchill, "*Nits Make Lice*," *supra* note 106, at 151-57.

111. According to Williams, many of the settlers already believed that "the way of conquering [the Indians] is much more easy than of civilizing them by fair means." WILLIAMS, *supra* note 69, at 218 (quoting 3

one example, when a confederation of Indian nations attacked English settlements which by 1622 already extended more than 60 miles from Jamestown, the Virginia Company announced that "our hands which before were tied with gentleness and fair usage, are now set at liberty by the treacherous violence of the savages So that we . . . may now by right of war, and law of nations, invade the country and destroy them" ¹¹²

Just as the enemy in the war on terror has been portrayed as evil, irrational, and uncivilized, ¹¹³ early colonists frequently portrayed American Indians as irrational and irredeemable savages, agents of the devil, and even cannibals. For example, William Bradford, Governor of the Plymouth Colony, claimed that his neighbors were "savage people, who are cruel, barbarous, and most treacherous, being most furious in their rage and merciless where they overcome; not being content only to take away life, but delight to torment men in the most bloody manner that may be; flaying some alive . . . cutting off the member and joints of others . . . [and eating] the collops of their flesh in their sight whilst they live" ¹¹⁴ Although the Puritan leaders were well aware of the falsity of such portrayals, ¹¹⁵ they provided the basis for English claims of a legal right to wage wars of conquest based on the nature and character of the enemy. Further, because that enemy was "uncivilized," the colonizers did not hold themselves to the laws of war to which they held "civilized" states.

Thus in 1637, English settlers from Connecticut, carrying with them an explicit declaration of "offensive warr," ¹¹⁶ set out to attack a Pequot fort on the Mystic River, where they had "formerly concluded to destroy them by the Sword and save the Plunder." ¹¹⁷ There was no debate here about the natural rights of the Indians to dominion over their lands; their status as "savages" rendered them natural enemies, against whom warfare was inevitable. In the words of one participant, "Many were burnt in the fort, both men, women, and children. Others forced out . . . which our soldiers received and entertained with the point of the sword. Down fell men, women, and children" ¹¹⁸ Between eight and nine hundred Pequots were ultimately killed, leaving only a few dozen survivors, ¹¹⁹ evidence, according to Captain

THE RECORDS OF THE VIRGINIA COMPANY OF LONDON: A JUSTIFICATION FOR PLANTING VIRGINIA 457 (S.M. Kingsbury ed., 1933)).

112. *Id.* at 217 (quoting THE RECORDS OF THE VIRGINIA COMPANY, *supra* note 112, at 556).

113. See George W. Bush, Excerpted Remarks by the President from Speech to Employees at the Federal Bureau of Investigation (Sept. 25 2001) in WE WILL PREVAIL, *supra* note 2, at 22 and Woods, *supra* note 22, at 494-95.

114. SLOTKIN, *supra* note 67 at 38 (quoting William Bradford, Governor of the Plymouth Colony).

115. See *id.* at 42-56 (describing the actual culture in contrast to Bradford's depiction).

116. JENNINGS, *supra* note 106, at 217 (this declaration was the product of the General Court of Connecticut, the main legislative body of the Connecticut Colony, on May 1, 1637).

117. *Id.* at 221 (quoting their commander, Captain John Mason).

118. *Id.* at 223 (quoting the report of Saybrook Company commander, Captain John Underhill.) See also DRINNON, *supra* note 26, at 41-45.

119. DRINNON, *supra* note 26, at 55.

John Mason, that "was God pleased to smite our enemies" and "give us their Land for an Inheritance."¹²⁰

The history of the early colonies is replete with similar illustrations of how the settlers relied upon extant European international law, with its theories of discovery and conquest, while simultaneously justifying their own deviations from this legal framework by invoking a "higher" purpose, i.e., the implementation of their vision of a "city on a hill" which would serve as a beacon of freedom, democracy, and civilization for the New World.¹²¹ Sometimes they emphasized the benefits of civilization that would accrue to the Indians; at other times, the indigenous inhabitants were simply portrayed as impediments to the settlers' God-given mission—"savages" to be "extirpated" for the greater good. In Michael Hunt's words, "Secure in their faith in liberty, Americans would set about remaking others in their image while the world watched in awe."¹²² Variations of this theme have characterized American exceptionalism throughout U.S. history, and continue to be seen in contemporary U.S. policy.

IV. 18TH CENTURY FOUNDING OF AN EXCEPTIONAL REPUBLIC

When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

*In Congress, July 4, 1776, The unanimous Declaration of the thirteen united States of America*¹²³

In laying the foundation for their war of independence, the American colonists were making the radical claim that they, rather than the British Crown, possessed the legal right to colonize North America as they deemed appropriate.¹²⁴ In three centuries of European expansion, the legal framing of colonialism had been considerably secularized, with sovereignty coming to be vested in the various European crowns rather than the pope, but in no case had the colonists made the case that they, rather than their Crown, independently possessed the right to possession and dominion over "infidel" lands.¹²⁵ The American rebels were taking a position that violated international law as it was recognized by the civilized world, for under the law of

120. *Id.* at 46 (quoting Captain John Mason). For a summary of such measures undertaken in North America by various European powers, see Churchill, "Nits Make Lice," *supra* note 106 at 157-245.

121. See Harlan Grant Cohen, *The American Challenge to International Law: A Tentative Framework for Debate*, 28 YALE J. INT'L L. 551, 557 (2003).

122. See *id.* (citing Michael H. Hunt, *Ideology of National Greatness and Liberty*, in MAJOR PROBLEMS IN AMERICAN FOREIGN POLICY 7 (Thomas G. Patterson ed., 1989)).

123. THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776).

124. On the contradictory arguments advanced by the colonists for rejecting British land claims in the Americas while justifying their own, see WILLIAMS, *supra* note 69, at 287-305.

125. See *infra* note 135.

nations of that time, colonies certainly had no right to rebel. Thomas Grey says bluntly, "The case for independence could not be made in legal terms."¹²⁶

One of the grievances cited by the American leaders was that the Crown was invoking feudal powers in violation of rights guaranteed to the colonists under both the British Constitution and the charters establishing the colonies. Thus, the litany of complaints found in the Declaration of Independence focused on the King's failure to pass or uphold laws needed by the colonies, or to allow their legislatures to function, resulting in "a long train of abuses and usurpations" designed to subject the colonists to "absolute Despotism."¹²⁷ The political theory of the emerging American republic focused on the notion that the English system, which theoretically prevented despotism by dividing governmental powers between the King, the House of Lords, and the House of Commons, had broken down.¹²⁸ It was asserted that the "King's friends" had colluded with him to undermine the independence of Parliament, rendering the English system of checks and balances "farical," to quote Thomas Paine.¹²⁹ The argument of the American rebels that they had a right under natural law to choose their own government, in Robert Williams' words, "deployed the mythology of the restless, freedom-loving Saxons to dramatize the continuity of the Saxon struggle for natural rights now being played out on the American stage," depicting the King's abuse of his sovereign powers as "a wrongful continuation of the perversion of Saxon principles of right and justice, traceable to the first imposition of the Norman Yoke in 1066."¹³⁰

One of the primary motivating factors of the American Revolution was the Proclamation of 1763, issued by King George III in an attempt to limit the costs of maintaining the colonies.¹³¹ The Proclamation prohibited English settlement, except with explicit royal permission, in all lands west of the Allegheny and Appalachian mountains, promising the Indian nations that they would not be "molested or disturbed" in lands they had not ceded or sold.¹³² The Proclamation and the Stamp Act, which was passed soon thereafter to fund it, marked the turning point in

126. Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 890 (1978).

127. THE DECLARATION OF INDEPENDENCE, *supra* note 124, at para. 2.

128. In turn, this was seen as destroying the heritage of the noble "race" of Saxons who were credited with establishing democratic governance in England. See WILLIAMS, *supra* note 69, at 267.

129. MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 62-63 (1970) (quoting Thomas Paine). While issues of taxation, trade, immigration and access to American Indian lands were clearly motivating the signers, it is interesting to note how the bulk of their complaints are phrased in terms of the King's refusal to comply with established processes of governance.

130. WILLIAMS, *supra* note 69, at 267 (summarizing Jefferson's arguments in a 1774 pamphlet entitled *A Summary View of the Rights of British America*, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch14s10.html>).

131. See WILLIAMS, *supra* note 69, at 233-86; see also FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834 13-20 (1962). The Proclamation is reprinted in 3 WILCOMB E. WASHBURN, THE AMERICAN INDIAN AND THE UNITED STATES 2135-39 (1979).

132. WILLIAMS, *supra* note 69, at 237 (quoting King George III of England, *The Royal Proclamation of 1763*, available at <http://www.ushistory.org/declaration/related/proc63.htm>). See also WASHBURN, *supra* note 132, at 2137.

relations between the Crown and the colonists.¹³³ From London's perspective, it was perfectly reasonable to reach an agreement with the Indians to assure maximum future profits, and to expect the colonies to shoulder some of the cost of their own protection. For the colonists, this was an unacceptable limitation on their expansionist visions, and an imposition of taxation without representation.¹³⁴ As articulated by Samuel Adams, Patrick Henry, and other emerging American leaders, both the 1763 Proclamation and the Stamp Act disregarded the colonists' rights to self-government, as established in the colonial charters, as well as "certain essential rights of the British Constitution of government, which are founded in the law of God and nature, and are the common rights of mankind."¹³⁵

King George's assertion of jurisdiction over territory that had not been ceded or purchased from the Indians reflected the British position that native land claims would only be recognized to the extent that indigenous peoples remained in actual possession of the land. As Robert Williams notes, sovereignty, and therefore "lawful" title, could only rest with the "English king whose subjects had discovered and laid claim to that land, which was possessed not by Christian peoples but by infidels, who lacked all rights and status in English legal colonizing theory."¹³⁶ In contesting this, the colonists relied on John Locke's articulation of natural law, in which the rights to life and liberty were inseparable from that of property.¹³⁷ Property rights, in turn, were defined by the labor people put into improving, or dominating, nature.¹³⁸

In this construction, the Indians were idle, wandering savages. The colonists, through their labor, would increase the value of indigenous "wastelands" many times over, and because such actions benefited all of humanity, the settlers had not only a right but an affirmative duty to possess and improve the land.¹³⁹ In international law, a similar argument had also been made by Swiss theorist Emmerich de Vattel in his 1758 *Le Droit de gens ou principe de la loi naturelle*, in which he described the cultivation of the land as not merely a right, but "an obligation imposed upon man by nature."¹⁴⁰ For Vattel, colonial conquest was not justified simply by the bringing of civilization or Christianity to the colonized. Colonists also had an obligation to appropriate and put to productive use the territory of those who "roamed" the

133. See Churchill, *Law Stood Squarely*, *supra* note 90 at 670-71; WILLIAMS, *supra* note 69, at 235-46.

134. See WILLIAMS, *supra* note 69, at 235-46. On the expansion of this notion to the argument that the British government had no right to impose any laws without representation, see Grey, *supra* note 127, at 884-90.

135. WILLIAMS, *supra* note 69, at 243 (quoting a resolution drafted by Samuel Adams and approved by the Massachusetts House of Representatives on October 29, 1765). On the Stamp Act, see also Grey, *supra* note 127, at 875-82.

136. WILLIAMS, *supra* note 69, at 216.

137. On the importance of Locke to the ideology of the American Revolution, see Grey, *supra* note 127, at 860-61.

138. See WILLIAMS, *supra* note 69, at 246-49. Williams emphasizes that Locke's philosophy was regarded as "common sense" amongst the colonial leaders of this period.

139. See PAGDEN, *supra* note 64, at 77-78; WILLIAMS, *supra* note 69, at 246-48.

140. PAGDEN, *supra* note 64, at 78 (quoting EMERIC DE VATTEL, *LE DROIT DE GENS OU PRINCIPE DE LA LOI NATURELLE* (1758)). On Vattel's influence on American thinking, see also Grey, *supra* note 127 at 862-63.

land.¹⁴¹ The law invoked by the settlers in rejecting British attempts to restrict their expansion was thus a combination of the legal theories developed by European powers over centuries of colonial expansion and the colonists' assertion that they represented good, in the form of God's will, which would inevitably prevail over evil.

The available legal framework, however, did not provide for the formation of an independent state, for it only addressed the rights of the colonizers in their relations with other colonial powers and with respect to those being colonized. To justify forming an independent state in violation of otherwise applicable international law, the founding fathers accused the King of violating the law of nations and acting in a barbarous manner "unworthy the Head of a civilized nation."¹⁴² In asserting their right under natural law to rebel under these conditions, however, the colonial leaders were not prepared to recognize a similar right for American Indians to self-determination.¹⁴³ This is evident in the Declaration of Independence's castigation of the King for leaving the colonists unprotected against "the merciless Indian Savages whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions."¹⁴⁴ As John Wunder notes, from the American Indian perspective, the Declaration of Independence was "perceived . . . as both a cruel myth and a dire geopolitical statement of purpose."¹⁴⁵

Thus, the United States was created as a state of exception with respect to the law of nations. Its founders justified their break with British colonial rule by claiming that their independent government more faithfully represented the underlying principles of natural law including the protection of democratic self-rule.¹⁴⁶ Simultaneously, however, they asserted their superior rights as colonizers, claiming in essence to be better representatives of civilization than Britain. They denounced King George for treating them as colonial subjects rather than actors, and invoked the very rationales for colonial expansion provided by then-extant international law to justify their appropriation of the colonial territory. In so doing, the founders replicated many of

141. See PAGDEN, *supra* note 64, at 78-79. This rationale was invoked by Justice Marshall in 1831, when he claimed that "the law of nations" would regard "Indian tribes" not as states but "as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state." *Cherokee Nation v. Georgia*, 30 U.S. 1, 19 (1831).

142. DECLARATION OF INDEPENDENCE, *supra* note 123, at para. 3.

143. The political ideology of both the American and French revolutions emphasized a right to self-determination. See B.C. NIRMAL, *THE RIGHT TO SELF-DETERMINATION IN INTERNATIONAL LAW* 27-29 (1999). However, the right of *colonized* peoples to self-determination only began to be recognized in the aftermath of World War I and then only in extremely limited form and with respect to the colonies of the defeated powers. See *id.*, 31-36; see also ANGHIE, *supra* note 13, at 115-95 (discussing the mandate system of the League of Nations); HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 27-49 (1990).

144. DECLARATION OF INDEPENDENCE, *supra* note 123, at para. 3.

145. John R. Wunder, "Merciless Indian Savages" and the Declaration of Independence: *Native Americans Translate the Ecnunnaunuxulgee Document*, 25 AM. INDIAN L. REV. 65, 66 (2000-2001). According to Wunder, the founders of the United States "are known as the 'Ecnunnaunuxulgee' to the Creeks of Georgia, meaning those 'people greedily grasping after the lands of red people.'" *Id.*

146. See Jordan J. Paust, *The Human Right to Participate in Armed Revolution and Related Forms of Social Violence: Testing the Limits of Permissibility*, 32 EMORY L.J. 545, 550-61 (1983) (describing the "right to revolution" articulated by the American colonists).

the arguments advanced by the Puritans and other early English settlers for the establishment of their colonies and, as will be briefly illustrated in the following section, similar justifications were provided for the continued extension of U.S. territorial claims and military actions.

V. 19TH CENTURY CLAIM TO A MANIFEST DESTINY

*Away, away with all these cobweb tissues of rights of discovery, exploration, settlement, contiguity, etc. . . . [The American claim] is by the right of our manifest destiny to overspread and to possess the whole of the continent which Providence has given us for the development of the great experiment of liberty and federative self government entrusted to us.*¹⁴⁷

John O'Sullivan, 1845

The phrase "manifest destiny," coined by attorney John O'Sullivan in 1845, quickly gained immense popularity.¹⁴⁸ According to historian Frederick Merk, its "postulates were that Anglo-Saxons are endowed as a race with innate superiority, that Protestant Christianity holds the keys to Heaven, that only republican forms of political organization are free, that the future—even the predestined future—can be hurried along by human hands, and that the means of hurrying it, if the end be good, need not be inquired into too closely."¹⁴⁹ This understanding of the American mission clearly resonated with the vision articulated by the Puritans and with the new Republic's plans for continental expansion. In 1783, George Washington had described the United States as a "rising empire," and both future president John Adams and his cousin Samuel believed that Canada would have to be incorporated into the Union.¹⁵⁰ According to Thomas Jefferson, writing in 1786, "our confederacy must be viewed as the nest from which all America, North and South, is to be peopled."¹⁵¹

The origins of the concept of manifest destiny can be traced to the Puritans' belief that "God had made them custodians of democracy and that they had a mission . . . to spread its principles."¹⁵² Despite widespread acceptance among the public that, as Merk noted, "if the end be good, [the means] need not be inquired into too closely,"¹⁵³ American leaders consistently have attempted to frame their realization of this destiny in legally acceptable terms. In this process we see the utilization of the same explanations that were advanced in the settlers' early encounters with American Indians—and are currently being invoked in the war on terror—for viola-

147. FREDERICK MERK, *MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY: A REINTERPRETATION* 32-33 (Greenwood Press 1987) (1963) (quoting John L. O'Sullivan, Column, N.Y. MORNING NEWS (Dec. 27, 1845)).

148. Shortly after the publication of O'Sullivan's column, Massachusetts Congressman, Robert C. Winthrop, referred to the phrase in Congress and it was soon widely referenced in popular discourse. See HORSMAN, *supra* note 67, at 220.

149. MERK, *supra* note 148, at 265. Merk's seminal work outlines the emergence of the concept in great detail. However, he explicitly declines to draw any connections between race and manifest destiny. See *id.*

150. SIDNEY LENS, *THE FORGING OF THE AMERICAN EMPIRE* 2 (Pluto Press 2003) (1971).

151. *Id.*

152. RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* 13 (3d ed. 1988) (1972).

153. See MERK, *supra* note 148, at 265.

tions of, or exemption from, accepted standards of international law. This section will provide a few illustrative examples.

A. *Legitimizing the Appropriation of American Indian Lands*

The American colonial legal paradigm was consolidated by the Supreme Court in a series of cases authored by Chief Justice John Marshall, himself the beneficiary of western land claims.¹⁵⁴ In the 1810 case of *Fletcher v. Peck*, the Court recognized the validity of a 1795 sale by Georgia of lands on its western frontier, thus acknowledging that Georgia's claims had not been extinguished by the Proclamation of 1763.¹⁵⁵ Marshall framed the issue in terms of state versus federal ownership of "vacant lands." Any claims the Indians may have had to that territory under natural law were disregarded on the theory that uncultivated land was "wasteland" which could be rightfully appropriated by those who would put it to "productive" use.¹⁵⁶

Subsequent Marshall opinions directly and explicitly denied native legal rights. The first, *Johnson & Graham's Lessee v. McIntosh*, decided in 1823, was a title dispute between two settlers, one of whom claimed to have purchased the land in question directly from its indigenous owners.¹⁵⁷ In order to establish that individuals could only obtain land from the state, Marshall declared that because the doctrine of discovery restricted the right of competing European powers to negotiate with the native inhabitants for purchase of the land, it also restricted those inhabitants from selling to anyone other than the "discovering" power.¹⁵⁸ On that basis, the Chief Justice concluded that indigenous peoples did not have absolute (and therefore alienable) title, but only the rights of occupancy and possession.¹⁵⁹ Acknowledging that his logic might appear "extravagant"—and ignoring the fact that most American Indian land had not, for the most part, been taken by conquest—Marshall as much as conceded that he was abandoning law in favor of raw power: "Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."¹⁶⁰

The 1831 case of *Cherokee Nation v. Georgia* addressed whether the state of Georgia could exercise jurisdiction over Cherokee lands.¹⁶¹ The issue, however, was not decided because Marshall held that the Cherokees did not constitute a "foreign

154. John Marshall and his father had each received scrip for 10,000 acres of land in what is now Kentucky, issued by the U.S. government in lieu of payment to troops during the war for independence. Ultimately, they jointly acquired more than 200,000 acres of western lands. See JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 74-75 (1996).

155. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). See also WILLIAMS, *supra* note 69, 308-09.

156. See *Fletcher*, 10 U.S. at 142.

157. *Johnson*, 21 U.S. at 543.

158. *Id.* at 573-574.

159. *Id.* at 574.

160. *Id.* at 587. See also Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 209, 248 (1984). See Churchill, *Law Stood Squarely*, *supra* note 90, at 673-75.

161. *Cherokee Nation*, 30 U.S. at 15.

nation" and, therefore, did not have standing to sue in federal court.¹⁶² Although the United States recognized the sovereignty of American Indian nations, including the Cherokees, by entering into numerous treaties with them, Marshall unilaterally assigned all indigenous nations a unique and lesser status. He declared, "They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will Their relation to the United States resembles that of a ward to his guardian."¹⁶³

Addressing the question most central to the legitimacy of the United States, Justice Marshall was asserting a jurisprudential version of American exceptionalism. International law is at the heart of the dispute in both *Johnson* and *Cherokee Nation*, but is applied in an extremely inconsistent manner. Marshall relies on the doctrine of discovery, yet disregards the distinction Vitoria made between occupied and unoccupied lands and his articulation of the rights of indigenous peoples under natural law.¹⁶⁴ In justifying U.S. hegemony in terms of "conquest," he similarly disregards the parameters of just warfare well established in the law of nations.¹⁶⁵ As Justice Thompson, dissenting in *Cherokee Nation*, emphasizes, Marshall's conclusion that American Indian nations were not sovereign states was clearly at odds with international law.¹⁶⁶

Justice Marshall could have chosen to acknowledge that Indians, like all other human beings, had rights universally cognizable under extant law. He could have held that a country that bases its claim to independence on overturning feudal law in favor of a natural law enshrining freedom and democracy has an obligation to abide by that higher law. Instead, Marshall reverted to arguments based upon the inherent superiority of Western civilization, describing American Indians a "an anomaly unknown to the books that treat of states, and which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state."¹⁶⁷ Thus, the arguments underlying American exceptionalism were entrenched in U.S. jurisprudence, and have been continually invoked to justify federal policy to the present day.¹⁶⁸

162. *Id.* at 74.

163. *Id.* Ward Churchill concludes, "In practical effect, Marshall cast indigenous nations as entities inherently imbued with a sufficient measure of sovereignty to alienate their territory by treaty when and wherever the U.S. desired they do so, but never with enough to refuse." Churchill, *Law Stood Squarely*, *supra* note 90, at 677-78.

164. *See supra* notes 86-88 and accompanying text.

165. *See supra* notes 90-93 and accompanying text.

166. *Cherokee Nation*, 30 U.S. at 52-54 (citing extensively to Vattel).

167. *Id.* at 27-28. *See generally* Watson, *supra* note 64, at 499-540.

168. *See generally* Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1 (2005). (discussing how the doctrine continues to be applied in American law). *See generally* Liam Seamus O'Melinn, *The Imperial Origins of Federal Indian Law: The Ideology of Colonization in Britain, Ireland, and America* 31 ARIZ. ST. L.J. 1207 (1999) (articulating the roots of this jurisprudence in European colonial thought).

B. Consolidating a Continental Base From Florida to Mexico

As the United States expanded its territorial claims to encompass the lower forty-eight states of the Union, it faced the legal and military issues of appropriating lands not only from indigenous peoples, but also from other European colonial powers. In this context U.S. officials justified their actions with variants of familiar arguments creating exemptions from otherwise applicable international law.

The "Louisiana Purchase" of 1803 more than doubled United States' territory, opening up western lands for the relocation of American Indians living east of the Mississippi.¹⁶⁹ Within a few years, the U.S. Congress, pressured by southern slaveholders who resented the refuge Spain provided to runaway slaves,¹⁷⁰ agreed in secret to acquire Spanish-controlled Florida.¹⁷¹ After several unsuccessful attempts at invasion, white settlers and adventurers occupied land in Florida and declared themselves a "republic," hoping for recognition and protection by the United States.¹⁷² Their uprisings, however, were defeated by Black and Indian forces, leading Andrew Jackson to initiate the first of three wars against the Seminole nation.¹⁷³

Echoing the rhetoric of other "Indian wars," Jackson's May 1818 "Proclamation on Taking Possession of Pensacola" accused the Seminoles of engaging in "all the horrors of savage massacre" and asserted that since the Spanish had not fulfilled their obligation to prevent such atrocities, "the immutable laws of self defence, therefore compelled the American Government to take possession of such part of the Floridas in which the Spanish authority could not be maintained."¹⁷⁴ Secretary of State John Quincy Adams supported Jackson's actions, which included a massacre of Seminole noncombatants, as "defensive acts of hostility," noting that it was acceptable to commit brutal acts against "a ferocious nation which observes no rules."¹⁷⁵ In other words, because the enemy was uncivilized, the United States was not bound to comply with otherwise applicable laws of war. Spain was unable to effectively counter

169. See HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 125 (1980).

170. In 1693 the King had issued an order freeing fugitive slaves and in 1704 the Spanish governor of Florida announced that "[a]ny negro of Carolina, Christian or not, free or slave, who wishes to come fugitive, will be [given] complete liberty." KEVIN MULROY, *FREEDOM ON THE BORDER: THE SEMINOLE MAROONS IN FLORIDA, THE INDIAN TERRITORY, COAHUILA, AND TEXAS* 8 (1993) (quoting the 1704 Proclamation of Governor José de Zuniga y Cerda). The Seminole nation, formed in the mid-1700s by native peoples and escaped African slaves and their descendants, vigorously resisted U.S. incursions. See generally JOSHUA R. GIDDINGS, *THE EXILES OF FLORIDA OR, THE CRIMES COMMITTED BY OUR GOVERNMENT AGAINST THE MAROONS, WHO FLED FROM SOUTH CAROLINA AND OTHER SLAVE STATES SEEKING PROTECTION UNDER SPANISH LAWS* (1858).

171. See KENNETH W. PORTER, *THE BLACK SEMINOLES: HISTORY OF A FREEDOM-SEEKING PEOPLE* 3 (Alcione M. Amos & Thomas P. Senter eds., 1996). See also David P. Currie, *Rumors of Wars: Presidential and Congressional War Powers, 1809-1829*, 67 U. CHI. L. REV. 1, 7 (2000). See generally JOSEPH BURKHOLDER SMITH, *THE PLOT TO STEAL FLORIDA: JAMES MADISON'S PHONY WAR* (1983).

172. MERK, *supra* note 148, at 7.

173. See Natsu Taylor Saito, *From Slavery and Seminoles to AIDS in South Africa: An Essay on Race and Property in International Law*, 45 VILL. L. REV. 1135, 1150-60 (2000) (providing a brief summary of the first war against the Seminole nation). On the Second Seminole War, one of the longest and most expensive waged by the United States, see GIDDINGS, *supra* note 171 at 315. See also PORTER, *supra* note 172 at 106-07.

174. DRINNON, *supra* note 26, at 106-07 (quoting Andrew Jackson, Proclamation on Taking Possession of Pensacola, May 29, 1818). See also NOAM CHOMSKY, *DETECTING DEMOCRACY* 35 (1991).

175. DRINNON, *supra* note 26, at 104, 111 (quoting John Quincy Adams).

the rising U.S. military power and quickly agreed to cede its claims to Florida for five million dollars.¹⁷⁶

Expansion into Mexico soon followed. Longstanding attempts to extend U.S. territory to the Rio Grande had been resisted consistently by the Spanish government. Nonetheless, by the time Mexico won its independence from Spain in 1822, American settlers were already moving into what would become Texas.¹⁷⁷ These colonists were reluctant to comply with Mexican laws, especially after Mexico abolished slavery in 1829,¹⁷⁸ and they lobbied for Texas to be recognized as an independent republic. Again, expansion was often couched in terms of extending American freedoms. Rejecting the terms of an 1819 treaty in which the U.S. had relinquished claims to Mexico, James Long led an unsuccessful attempt to establish the "Republic of Texas,"¹⁷⁹ and in 1826 Hayden Edwards seized the town of Nacogdoches and announced the creation of the "Republic of Fredonia." When the revolt was suppressed, U.S. newspapers described the insurgents as "apostles of democracy crushed by an alien civilization."¹⁸⁰ The Mexican government banned further immigration to Texas in 1830, but failed to stem the tide of U.S. settlers,¹⁸¹ who "saw themselves in danger of becoming the alien subjects of a people to whom they deliberately believed themselves morally, intellectually, and politically superior."¹⁸²

Eventually Texas was successfully occupied and recognized by the United States as an independent republic.¹⁸³ Soon thereafter, Americans were actively debating the acquisition of both Oregon and the rest of Mexico. John O'Sullivan was addressing the Oregon question in his 1845 editorial which popularized the phrase "manifest destiny," but earlier that year he had used it to criticize Mexico for allegedly interfering in U.S. affairs with "the avowed object of thwarting our policy and hampering our power, limiting our greatness and checking the fulfillment of our manifest destiny to overspread the continent allotted by Providence for the free development

176. GIDDINGS, *supra* note 171, at 59. See also *U.S. v. Percheman*, 32 U.S. (7 Pet.) 51 (1833) for Chief Justice John Marshall's acknowledgment that the United States thereby obtained approximately thirty million acres of land. Immediately thereafter, in 1823, the United States proclaimed, in what came to be known as the Monroe Doctrine, that the Americas were no longer open to colonization by Europe, but it did not similarly constrain itself). See MERK, *supra* note 148, at 17, 204, 206, 220.

177. By 1830, approximately 20,000 Anglo settlers and 2,000 of their slaves lived in Texas. ACUÑA, *supra* note 153, at 7.

178. The settlers circumvented this restriction by declaring their slaves "free" and then signing them to lifelong contracts as indentured servants. *Id.* See also RANDOLPH B. CAMPBELL, AN EMPIRE FOR SLAVERY: THE PECULIAR INSTITUTION IN TEXAS, 1821-1865 23-24 (1989).

179. ACUÑA, *supra* note 153, at 6; see also RICHARD W. VAN ALSTYNE, THE RISING AMERICAN EMPIRE 101 (1974).

180. ACUÑA, *supra* note 153, at 7 (citing T.R. FEHRENBACH, LONE STAR: A HISTORY OF TEXAS AND THE TEXANS 163-64 (1968)).

181. MERK, *supra* note 148, at 20-21 (citing H.R. Doc. No. 25-351, at 313-14 (1838)). See also ACUÑA, *supra* note 153, at 7 (noting that Sam Houston, protégé of Andrew Jackson, led a "war party" that rioted over customs duties in 1831 and launched an unsuccessful attack on a Mexican military garrison the following year). See also FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS 89 (David J. Weber ed., 1973).

182. EUGENE C. BARKER, MEXICO AND TEXAS, 1821-1835 148 (1965) (1928).

183. ACUÑA, *supra* note 153, at 11-13.

of our yearly multiplying millions."¹⁸⁴ In December 1845, Texas was incorporated into the Union. Soon thereafter the Mexican government broke off diplomatic relations with the U.S. and President Polk ordered General Zachary Taylor to "protect the border." U.S. troops were sent into a contested strip of land resulting, quite predictably, in an incident used to justify war on the grounds that Mexico had "invaded American territory and shed American blood upon the American soil."¹⁸⁵

Like many subsequent U.S. military ventures, including the recent invasion of Iraq, the war with Mexico was portrayed as an attempt to bring the "American values" of freedom and democracy to oppressed peoples. As Reginald Horsman puts it, "The sentiment that the United States' flag would be the flag of the world when tyranny had perished was a common one, and many united in conceiving of the invasion as a war of liberation A New York poet in May 1846 conjured up an image of Mexicans joyously shouting 'The Saxons are coming, our freedom is nigh.'"¹⁸⁶ Although often portrayed as an easy victory for the vastly superior American military, it was, in fact, a brutal war in which Mexican forces fiercely contested their "liberation" and, again, the laws of war were often disregarded. Huge areas of major cities were leveled by indiscriminate shelling, prisoners of war were executed, houses and fields burned, and civilians terrorized.¹⁸⁷ According to an 1846 Cincinnati newspaper editorial, these violations were not a problem considering the character of the enemy: "Though the barbarians fall thick as hail, still, as their disposition is warlike and as the slaughter of their armies by the superiority of scientific warfare and the unflinching bravery of men disposed to peace, would teach them healthful lessons, the loss of a few thousand of them would not be so deplorable."¹⁸⁸

Reflecting both early American settlers' justifications for the appropriation of Indian lands and their rationale for independence, the *New York Morning News* framed the conquest as an exercise of freedom for the settlers: "To say that the

184. HORSMAN, *supra* note 67, at 219 (quoting John L. O'Sullivan).

185. Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283, 287-88 (2003) (quoting statement of James K. Polk in FOREIGNERS THEIR NATIVE LAND, *supra* note 182, at 95); see also ACUNA, *supra* note 153, at 12-13; ZINN, *supra* note 170, at 147-52. Ulysses S. Grant later wrote that he believed Polk had provoked the war and that the annexation of Texas had been an act of aggression saying, "I had a horror of the Mexican War. . . only I had not moral courage enough to resign." ACUNA, *supra* note 153, at 13 (quoting statement of Andrew Jackson quoted in TO MEXICO WITH TAYLOR AND SCOTT, 1845-1847 3 (Grady McWhitney & Sue McWhitney eds., 1969)). Abraham Lincoln, then a member of Congress, also believed the war was "unnecessarily and unconstitutionally commenced by the President" but nonetheless voted to fund it. ZINN, *supra* note 170, at 151 (quoting Abraham Lincoln, Speech to the House of Representatives in Support of the Candidacy of Zachary Taylor for President (July 27, 1848)).

186. HORSMAN, *supra* note 67, at 233 (quoting William M'Carty).

187. See ACUÑA, *supra* note 153, at 16; see also ZINN, *supra* note 170, at 163-65 (noting that in two days 1300 shells were fired into Vera Cruz hitting, among other things, a hospital, and whole blocks of Mexico City were destroyed).

188. HORSMAN, *supra* note 67, at 236 (quoting *The Casket* (Cincinnati), May 13, 1846, at 37; June 10, 1846, at 69). One is reminded of the former U.S. Ambassador to the U.N. Madeline Albright's response to U.N. reports that economic sanctions on Iraq had, by 1996, resulted in the deaths of 500,000 Iraqi children: "[T]his is a very hard choice, but . . . we think the price is worth it." ARUNDHATI ROY, *THE ALGEBRA OF INFINITE JUSTICE* 200 (2002) (quoting *60 Minutes: Hunting Saddam* (CBS television broadcast May 12, 1996)).

settlement of a fertile and unappropriated soil by right of individual purchase is the aggression of a government is absurd An inalienable right of man is to institute for themselves that form of government which suits them best, and to change it when they please."¹⁸⁹ Thus, measures recognized as illegal under the prevailing international law were condoned. As it was bluntly acknowledged in a *New York Morning News* editorial of October 1845:

We are contiguous to a vast portion of the globe, untrodden save by the savage and the beast, and we are conscious of our power to render it tributary to man. This is a position which must give existence to a public law, the axioms of which a Pufendorf or Vattel had no occasion to discuss. So far as the disposition to disregard mere conventional claims is taken into account, the acquisition of Texas . . . may be admitted at once, to be aggressive.¹⁹⁰

Again, an exemption was carved out for U.S. practices based not only on the "uncivilized" character of the enemy, but the higher purpose of extending American civilization. The editorial continued, "But what then? It has been laid down and acted upon, that the solitudes of America are the property of the immigrant children of Europe and their offspring."¹⁹¹ As its authors explained, "This national policy, necessity or destiny, we know to be just and beneficent, and we can, therefore, afford to scorn the invective and imputations of rival nations."¹⁹²

By 1848, with victory imminent, the debate within the United States turned to how much of Mexico should be annexed and *who* was to be an American. Florida Senator James D. Westcott vigorously protested the notion of being "compelled to receive not merely the white citizens of California and New Mexico, but the peons, negroes, and Indians . . . and other half-monkey savages . . . as *equal citizens of the United States*."¹⁹³ On the other side, according to Horsman, "arguments claiming that large areas of Mexico could safely be annexed were based on the twin assumptions that the largely Indian Mexicans would fade away, and that the American Anglo-Saxons were destined to outbreed the whole world."¹⁹⁴ The issue was resolved by the 1848 Treaty of Guadalupe Hidalgo, under which Mexico ceded "only" the least populated northern third of its territory.¹⁹⁵

189. See MERK, *supra* note 148, at 22-23 (quoting Editorial, *The Popular Movement*, N. Y. MORNING NEWS, May 24, 1845).

190. *Id.* at 25 (quoting Editorial, N. Y. MORNING NEWS, Oct. 13, 1845).

191. *Id.*

192. *Id.* For a summary of the conquest of Mexico framed in terms of manifest destiny, see Gloria Sandrino-Glasser, *Los Confundidos: De-Conflicting Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 97-110 (1998).

193. HORSMAN, *supra* note 67, at 276 (citing CONG. GLOBE, 30th Cong., 1st Sess., app. at 48-49 (1848)). There was widespread agreement among Anglo-Americans that the Mexicans "had inherited the worst qualities of Spaniards and Indians to produce a 'race' still more despicable than that of either parent." FOREIGNERS IN THEIR NATIVE LAND, *supra* note 182, at 60; see also Perea, *supra* note 186, at 292.

194. HORSMAN, *supra* note 67, at 243. See also Perea, *supra* note 186, at 293-95; MERK, *supra* note 148, at 191-92.

195. Perea, *supra* note 186, at 294-95 (noting that this northern third, when combined with Texas,

C. Imperial Expansion: Hawaii, the Philippines, and Puerto Rico

As concern increased over the incorporation of territories with large non-white populations, the American vision of encompassing the hemisphere—"continentalism"—was replaced by a more explicitly imperialist vision of extended political, military and/or economic power.¹⁹⁶ Frederick Merk notes that continentalism, which focused on extending the Union and its principles of representative government, was necessarily limited to Euro-derivative peoples and, therefore, imperialism became the means of extending U.S. power to far-flung colonies whose peoples, by virtue of their incapacity to civilize, precluded annexation.¹⁹⁷ By the late 1880s internal resistance from indigenous nations was all but crushed and domestic markets were becoming saturated.¹⁹⁸ These factors encouraged U.S. commercial and military interests to focus on the Pacific and, in particular, the Kingdom of Hawaii.

At that time, U.S. relations with Hawaii were clearly governed by the international law. As Congress would acknowledge in 1993, "between 1826 and 1893 the United States recognized the independence of the kingdom of Hawaii, extended full and complete recognition of the Hawaiian Government, and entered into treaties and conventions with the Hawaiian monarchs."¹⁹⁹ Nonetheless, following the precedent set in Florida and Texas, American settlers moved in, displacing Native Hawaiians, restructuring the economy, and appropriating political power.²⁰⁰ In January 1893 a well-armed "committee" of U.S. citizens, backed by Marines to "assist in preserving public order," took over government buildings in Honolulu and installed a "provisional government," forcing Queen Lili'uokalani to step down.²⁰¹ Although President Grover Cleveland subsequently called the coup an "unprovoked act of war" and a gross violation of "international morality," he refused the Queen's repeated re-

resulted in a total loss for Mexico of about half its territory). See generally Richard Griswold del Castillo, *Manifest Destiny: The Mexican-American War and the Treaty of Guadalupe Hidalgo*, 5 SW. J. L. & TRADE AM. 31 (1998).

196. Because of the "national reluctance to add peoples of mixed blood to a blood that was pure . . . continentalism was allowed to die, and . . . another concept had to be devised to take its place." MERK, *supra* note 148, at 227.

197. *Id.* at 256-57.

198. See ZINN, *supra* note 170, at 290 (noting that in 1890 the U.S. government deemed the internal frontier to be closed). Celebrating the massacre at Wounded Knee, which occurred that same year, L. Frank Baum, author of *The Wonderful Wizard of Oz*, declared, "The nobility of the Redskin is extinguished . . . The Whites, by law of conquest, by justice of civilization, are masters of the American continent, and the best safety of the frontier settlements will be secured by the total annihilation of the few remaining Indians." 2 ELLIOTT J. GORN, RANDY ROBERTS & TERRY D. BILHARTZ, *CONSTRUCTING THE AMERICAN PAST: A SOURCE BOOK OF A PEOPLE'S HISTORY* 71 (Bruce D. Borland ed., HarperCollins College Publishers 1995) (1972) (quoting L. Frank Baum, Editorial, ABERDEEN SATURDAY PIONEER, Dec. 20, 1890).

199. WARD CHURCHILL, *PERVERSIONS OF JUSTICE: INDIGENOUS PEOPLES AND ANGLOAMERICAN LAW* app. at 408 (2003) (reproducing Congressional Apology to Native Hawaiians, Pub. L. No. 103-150, 107 Stat. 1510 (1993)).

200. See HAUNANI-KAY TRASK, *FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII* 4-20 (1993), for an overview of this process in Hawaii. See generally ISLANDS IN CAPTIVITY: THE RECORD OF THE INTERNATIONAL TRIBUNAL ON THE RIGHTS OF INDIGENOUS HAWAIIANS (Ward Churchill & Sharon H. Venne eds., 2004), for a comprehensive accounting of this history.

201. See TRASK, *supra* note 201, at 16-21. See generally HELENA G. ALLEN, *THE BETRAYAL OF QUEEN LILI'UOKALANI: LAST QUEEN OF HAWAII, 1838-1917* 281-94 (1982).

quests to reinstate her and restore the rule of law,²⁰² instead recognizing the new Republic of Hawaii as a lawful State.²⁰³

In the acquisition of Hawaii, as with the annexation of northern Mexico, the primary question for U.S. leaders was not the legality of the invasion but the incorporation of territory with a predominantly non-white population.²⁰⁴ Theodore Roosevelt argued that the United States' failure to immediately annex Hawaii was "a crime against white civilization."²⁰⁵ South Dakota Senator Richard F. Pettigrew, however, was more concerned about the effect it would have on maintaining an Anglo-American model of freedom and democracy:

The founders of this government . . . made it an unwritten law that no areas should be brought within the bounds of the Republic which did not, and could not, sustain a race equipped in all essentials for the maintenance of free civilization Therefore, if we adopt the policy of acquiring tropical countries, where republics cannot live, we overturn the theory upon which this Government is established.²⁰⁶

This led, in July 1898, to Congress' decision not to incorporate the islands, but to hold them as a "permanent trust territory of the United States," a colonial status that changed only in the wake of the decolonization movement which followed World War II.²⁰⁷

Pettigrew's statement reflects the tension between the United States' justification of continued expansion on the basis that it would bring civilization and freedom to those deemed Other and the conviction of many U.S. leaders that Others were racially incapable of civilization. Such debates resurfaced in 1898 as the U.S. considered its options with respect to territories "ceded" by Spain in the Spanish-American War. After the sinking of the *U.S.S. Maine* in Havana harbor, President McKinley announced that Spain's inability to protect the *Maine* had moved him "to secure in

202. President Grover Cleveland, Message to the Congress (Dec. 18, 1893), *reprinted in* A CALL FOR HAWAIIAN SOVEREIGNTY 25-46 (Michael Kioni Dudley & Keoni Kealoha Agard eds., 1990); *see also* SAMUEL P. WEAVER, HAWAII, USA 103 (1959).

203. WILLIAM ADAM RUSS, JR., THE HAWAIIAN REPUBLIC AND ITS STRUGGLE TO WIN ANNEXATION (1894-98) 37 (2d ed. 1992).

204. Carl Schurz, a European immigrant, wrote in *Harper's Magazine* in 1893:

Their population, according to the census of 1890, consists of 34,436 natives, 6,186 half castes, 7,495 born in Hawaii of foreign parents, 15,301 Chinese, 12,360 Japanese, 8,602 Portuguese, 1,982 Americans . . . and other foreigners. If there ever was a population unfit to constitute a State of the American Union, it is this.

MERK, *supra* note 148, at 243. Schurz also objected to annexing Cuba because Cubans were comparable to Mexicans. *Id.*

205. ZINN, *supra* note 170, at 293.

206. MERK, *supra* note 148, at 244. *See also* STUART CREIGHTON MILLER, "BENEVOLENT ASSIMILATION": THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899-1903 15-16 (1982). *See also* ACT OF WAR: THE OVERTHROW OF THE HAWAIIAN NATION (Na Maka o ka 'Aina 1993), for a documentary that captures the debate graphically.

207. MERK, *supra* note 148, at 255-56. On July 7, 1898, President McKinley signed the Joint Resolution To provide for the annexing of the Hawaiian Islands to the United States. J. Res. 55, 55th Cong. (1898) (enacted).

the island the establishment of a stable government, capable of maintaining order and observing its international obligations, ensuring peace and tranquility and the security of its citizens as well as our own."²⁰⁸ According to Philip Foner, however, by that point Cuban rebels had been struggling for independence for three years and McKinley was concerned that "if the United States waited too long, the Cuban revolutionary forces would emerge victorious, replacing the collapsing Spanish regime."²⁰⁹

Although McKinley was informed by the U.S. representative in Madrid that the Spanish government had all but capitulated to American demands, he obtained congressional authority to use military force to "end hostilities" on the island in April 1898.²¹⁰ As Richard Drinnon notes, McKinley's stated reasons for intervening in Cuba paralleled those articulated by John Quincy Adams in his defense of Andrew Jackson's 1818 invasion of Florida:

As with the "derelict province" of Florida, Spanish officials had allowed revolutionary Cuba to become a colony of "barbarities, bloodshed, starvation, and horrible miseries." In both colonies there had been the same "wanton destruction of property," the same chaotic conditions that invoked the "necessities of self-defence" for the United States; or, as McKinley put it, "the present condition of affairs in Cuba is a constant menace to our peace." . . . [Both McKinley and Adams] spoke and acted "in the name of humanity, in the name of civilization, [and] in behalf of endangered American interests."²¹¹

Spain put up little resistance and soon agreed to cede control over Cuba, Puerto Rico, the Philippines, and Guam to the United States in exchange for \$20 million.²¹² The peace treaty provided that the "civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."²¹³

In April 1898 Congress had disclaimed any intent to annex Cuba and therefore, instead of taking direct possession of the island, the U.S. sent in troops to ensure "stability" and protect American investments.²¹⁴ This military force was only withdrawn after the Cubans agreed under pressure to incorporate constitutional provisions that dramatically limited their sovereignty. The new constitution prevented

208. DRINNON, *supra* note 26, at 269-70.

209. Quoted in ZINN, *supra* note 170, at 296.

210. MERK, *supra* note 148, at 250.

211. DRINNON, *supra* note 26, at 269.

212. Treaty of Peace between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754 [hereinafter U.S.-Spain Treaty]. See also ZINN, *supra* note 169, at 302 (noting that no Cuban, Puerto Rican, Filipino or Chamorro was allowed to participate in the negotiations concerning the surrender or the terms of the treaty).

213. U.S.-Spain Treaty, *supra* note 213, art. IX. See also MERK, *supra* note 148, at 254 ("Inoffensively and inconspicuously a principle was thus adopted, new to the Constitution and revolutionary—the principle that peoples not candidates for equal statehood in the Union were annexed and their status as colonial subjects left to Congress. This was imperialism.").

214. See ZINN, *supra* note 170, at 303 (estimating the amount of U.S. capital invested during the occupation to be \$30 million).

Cuba from entering into treaties that might impair its independence. Of course, the U.S. exempted itself from this requirement, insisting that the Cubans enter into treaties which provided for the leasing of coaling or naval stations to U.S. and gave the U.S. a right to intervene at its discretion to "maintain orderly government."²¹⁵

The day after Spain sued for peace, future secretary of state John Hay promptly declared the conflict to have been a "splendid little war."²¹⁶ What he failed to understand was that even though Cuba had been taken quickly, the United States would be mired in a lengthy war, neither little nor splendid, to pacify the Philippines, another territory ceded by Spain. Despite having ordered Commodore George Dewey to destroy the Spanish fleet in the Far East as soon as hostilities commenced,²¹⁷ President McKinley later claimed that he had not wanted the Philippines "when they came to us as a gift from the gods," and that only after pacing the floor and praying "night after night" did he receive the word from "Almighty God . . . [t]hat there was nothing left for us to do but to take them all, and to educate the Filipinos, and uplift and civilize and Christianize them."²¹⁸ Apparently, however, as Howard Zinn put it, "[t]he Filipinos did not get the same message from God"²¹⁹ and the war continued until 1906, during which time perhaps a million Filipinos were slaughtered.²²⁰

As in the war with Mexico, the United States widely disregarded international law

215. MERK, *supra* note 148, at 258; *see also* ZINN, *supra* note 170, at 304-05. In 1934, in accordance with Franklin Roosevelt's "Good Neighbor" policy, these conditions were replaced by a treaty canceling all of the United States' special rights except the lease of the naval base at Guantánamo Bay. *See* MERK, *supra* note 148, at 258; *see also* Christopher J. Schatz & Noah A. F. Horst, *Will Justice Delayed Be Justice Denied? Crisis Jurisprudence, the Guantánamo Detainees, and the Imperiled Role of Habeas Corpus in Curbing Abusive Government Detention*, 11 LEWIS & CLARK L. REV. 539, 559-62 (2007) (discussing the continued U.S. occupation of the base); *see also* Rasul v. Bush, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) (noting that the lease term is "indefinite and at the discretion of the United States" and, therefore, "[f]rom a practical perspective . . . has produced a place that belongs to the United States").

216. DRINNON, *supra* note 26, at 269 (quoting John Hay).

217. DRINNON, *supra* note 26, at 279-80 (noting that the orders were issued prior to the explosion aboard the U.S.S. *Maine*, the claimed cause of the war).

218. DRINNON, *supra* note 26, at 279 (quoting President William McKinley); ZINN, *supra* note 170, at 305-06. *See also* MILLER, *supra* note 207, at 13-15 (discussing the genuine reluctance of American imperialists to acquire a densely populated colony).

219. ZINN, *supra* note 170, at 306.

220. *See* THE PHILIPPINES READER: A HISTORY OF COLONIALISM, NEOCOLONIALISM, DICTATORSHIP, AND RESISTANCE 19 (Daniel B. Schirmer & Stephen Rosskamm Shalom eds., 1987):

How many Filipinos died resisting American aggression? . . . The figure of 250,000 crops up in various works; one suspects it is chosen and repeated in ignorance . . . Records of the killing were not kept and the Americans were anxious to suppress true awareness of the extent of the slaughter . . . How many died of disease and the effects of concentration camp life is even more difficult to assess. [Major General Franklin J.] Bell, who, one imagines might be in as good a position to judge such matters as anyone, estimated in a [May 1901] *New York Times* interview that over 600,000 people in Luzon alone had been killed or had died of disease as a result of the war . . . Bell did not include the effect of the Panay campaign, the Samar Campaign, or his own bloodthirsty Batangas campaign (where at least 100,000 died) . . . Nor could [his estimate] include the "post-war" period . . . A million deaths? . . . Such an estimate . . . might conceivably err on the side of understatement.

for the "higher good" of civilization.²²¹ A year after the U.S. invasion, General William Shafter was predicting that "[i]t may be necessary to kill half the Filipinos in order that the remaining half of the population may be advanced to a higher plane of life than their present semi-barbarous state affords."²²² In April 1901, the *Philadelphia Ledger* reported, "The present war is no bloodless, opera bouffe engagement; our men have been relentless, have killed to exterminate men, women, children, prisoners and captives, active insurgents and suspected people from lads of ten up, the idea prevailing that the Filipino as such was little better than a dog . . ."²²³ Nonetheless, the United States maintained the view, proclaimed by President McKinley in 1898, that the United States' "paramount aim" was "to win the confidence, respect, and affection of the inhabitants of the Philippines by assuring them in every possible way that full measure of individual rights and liberties which is the heritage of free peoples, and by proving to them that the mission of the United States is one of BENEVOLENT ASSIMILATION substituting the mild sway of justice and right for arbitrary rule."²²⁴

In Puerto Rico, also ceded by Spain to the United States in 1898, resistance was more limited than in the Philippines. The United States quickly established a military government, and then a colonial civil government.²²⁵ This did not mean, however, that the legal issues were less complicated. The Supreme Court addressed Puerto Rico's status in a series of decisions known as the Insular Cases, in which the justices extended the arguments used by Justice Marshall in the 1820s and 1830s from American Indians to the United States' newly acquired overseas possessions.²²⁶ Efren Rivera Ramos summarizes Justice Brown's opinion in one of these cases, *Downes v. Bidwell*, as follows:

"The power to acquire territory by treaty," [Brown] affirmed, "implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American Empire.' . . . The Constitution applied to the territories only to the degree that it was extended to them by Congress."²²⁷

Recall that in declaring their independence, American leaders exempted themselves from complying with international law by arguing a right under natural law to free themselves from colonial tyranny and to establish a state that would more

221. See *supra* notes 188-193 and accompanying text.

222. PHILIPPINES READER, *supra* note 221, at 11 (quoting General William Shafter).

223. ZINN, *supra* note 170, at 308. See generally MILLER, *supra* note 207, at 196-252.

224. William McKinley, Proclamation of Dec. 21, 1898, *microformed on* CIS Presidential Executive Orders and Proclamations: Part I 219, available at <http://www.mcs.edu.ph/centennial/benevolent.html>.

225. See Organic (Foraker) Act of 1900, ch. 191, §§ 2-3, 31 Stat. 77 (1900) (current version at 48 U.S.C. §§ 738-39 (2000)); Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 5 (Christina Duffy Burnett & Burke Marshall eds., 2001).

226. See *supra* notes 156-168 and accompanying text.

227. Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225, 246-47 (1996) (citing *Downes v. Bidwell*, 182 U.S. 244, 280 (1901)).

effectively implement the democratic and liberatory potential of Western civilization.²²⁸ With the acquisition of "unincorporated territories,"²²⁹ the United States now had to harmonize its stated principles and Constitutional guarantees not only with its imposition of "domestic dependent nation" status on American Indians²³⁰—i.e., their maintenance as internal colonies—but also with its possession of external colonies.²³¹ In *Downes v. Bidwell*, Justice Brown addressed the concern that the United States was deviating from its commitment to democratic governance and the rule of law in acquiring explicitly colonial possessions.

First, with respect to the possibility of immediate incorporation, Brown noted that "it is doubtful if Congress would ever assent to the acquisition of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States."²³² He then acknowledged the "apprehensions of danger . . . felt by many eminent men,—a fear lest an unrestrained possession of power on the part of Congress may lead to unjust and oppressive legislation in which the natural rights of territories, or their inhabitants, may be engulfed in a centralized despotism."²³³ Brown concluded that such fears were unjustified, however, because "[t]here are certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests."²³⁴

Just as the colonial rationale for the acquisition of American Indian lands, articulated by Justice Marshall, continues to undergird contemporary law governing federal relations with American Indian peoples,²³⁵ the logic of the Insular Cases is still relied upon for the continued U.S. possession of Puerto Rico and its administration of other "non-self-governing" territories.²³⁶ These examples, I believe, illustrate the basic continuity we find in expressions of American exceptionalism, not only with respect to peoples subject to the plenary power of the United States but to general

228. See *supra* notes 127-147 and accompanying text.

229. *Downes*, 182 U.S. at 341-42 (White, J., concurring) (explaining that only the inhabitants of a territory which had been "incorporated" possessed constitutional rights, because "while in an international sense Porto Rico was not a foreign country, since it was . . . owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.").

230. See *supra* note 164.

231. See Ward Churchill, *The Indigenous Peoples of North America: A Struggle Against Internal Colonialism, in STRUGGLE FOR THE LAND: NATIVE NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE AND COLONIZATION* 15, 24-26 (2002), on internal and settler-state colonialism.

232. 182 U.S. at 279-280. Justice Brown continued by summarizing the status granted the residents of Louisiana, Florida, Mexico, and Alaska, and the terms of the treaty with Spain which allowed Congress to decide the rights to be granted those living in Puerto Rico and the Philippines. *Id.* at 280.

233. *Id.* at 280.

234. *Id.*; see also Rivera Ramos, *supra* note 228, at 246-47.

235. See generally Philip P. Frickey, (*Native*) American Exceptionalism in Federal Public Law, 119 HARV. L. REV. 431 (2005).

236. See NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO GUANTANAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE 32-34 (2006). See generally FOREIGN IN A DOMESTIC SENSE, *supra* note 226.

U.S. policies and practices in the international arena.²³⁷ A few examples reflecting this thesis are provided in the following section.

VI. MAKING THE WORLD SAFE FOR DEMOCRACY IN THE 20TH CENTURY

[I]t bears remembering that history is an art form [I]t can be colored in different ways, and it is usually the winners who get to choose the colors. A history of the United States can depict courageous men and women fighting for their freedom and then struggling to make a life for themselves on an "unsettled" continent. It can tell of the wisdom of the Founding Fathers—their belief that all men were created equal with the right to life, liberty, and the pursuit of happiness—and their genius in devising a government instituted among a free people to secure these ends It can tell of our bravery and courage in fighting two world wars to make the world safe for democracy. It can . . . recount the vision, ingenuity, and determination of those who made this nation the richest and most powerful on earth

Or a history can be told from a different perspective.

*Harold Southerland, The Case for American History
in the Law-School Curriculum*²³⁸

With the advent of the twentieth century, manifest destiny, the purported god-given mission of the Anglo-Saxon race to literally supplant all other peoples, was rebranded as "international cooperation" through which dominant colonial powers would bring civilization and progress to "underdeveloped" nations.²³⁹ Following World War I, the League of Nations established a "mandate system" through which the colonies of the defeated powers were placed under the tutelage of the victorious European powers. However, in many respects this structure maintained colonial relationships by requiring mandate territories to meet Eurocentric standards of progress in order to be recognized as "civilized" states.²⁴⁰ By placing imperial powers in the role of ward or guardian of "less developed" territories, the League was relying upon the legal theories articulated by Franciscus de Vitoria in the sixteenth century to justify the colonization of indigenous peoples, and their more recent articulation by Justice Marshall in the cases determining the status of American Indians.²⁴¹

After the Second World War, the central mission of the League's mandate system was adopted by the United Nations which, through its management of trust territo-

237. I have addressed the implications of these assertions of unrestricted political power in more detail in SAITO, *supra* note 236.

238. Harold P. Southerland, *The Case for American History in the Law-School Curriculum*, 29 W. NEW ENG. L. REV. 661, 678-79 (2007).

239. Thus, Frederick Merk argues that manifest destiny as a justification for U.S. actions died at this point, and was replaced by a more benign American "Mission." MERK, *supra* note 148, at 266. My belief is that it has mutated, but is far from dead.

240. See ANGHIE, *supra* note 13, at 136-56. The United States was involved in establishing this system, but ultimately chose not to participate in the League of Nations or its mandate system because of its failure to guarantee a "open door policy" in all mandate territories. See *id.* at 143.

241. On the invocation of Vitoria, see *id.* at 145. On the Marshall cases, see *supra* notes 158-167 and accompanying text.

ries, attempted to transform colonies into independent states.²⁴² Despite the stated goal of extending the right to self-determination to all peoples, as Anghie and other scholars have noted, “[t]he innovations and reforms of the U.N. period served in important ways to reproduce and reinstate the inequalities and power disparities that had characterized formal colonialism.”²⁴³ This was accomplished, particularly in the post-Cold War era, through the imposition of structures and agreements requiring compliance with neo-liberal economic policies.²⁴⁴ Again, a comprehensive analysis of this period is far beyond the scope of this essay. However, it is helpful to briefly consider a few twentieth century deployments of American exceptionalism in our efforts to juxtapose the policies and practices of early American history to the current war on terror.

During this period, U.S. leaders promoted a vision consonant with that of the first Puritan settlers.²⁴⁵ It was, perhaps, best articulated by Henry Luce in the 1940s: “America as the dynamic center of ever-widening spheres of enterprise, America as the training center of the skilled servants of mankind, America as the Good Samaritan . . . and America as the powerhouse of the ideals of Freedom and Justice”²⁴⁶ The most obvious invocation of this vision may be found in the twentieth century refrain that American military power was being employed to “make the world safe for democracy.” From the United States’ belated entry into World War I, when the phrase was popularized,²⁴⁷ through World War II, when it came to emphasize the importance of defeating fascism,²⁴⁸ many large and small-scale military ventures were undertaken in the name of combating communism, ensuring freedom, and promoting democracy.²⁴⁹

This exceptionalist perspective was reflected by American officials who laid the groundwork for the United States’ military involvement in Southeast Asia,²⁵⁰ which

242. See ANGHIE, *supra* note 13, at 196.

243. *Id.* at 199. See also Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansion*, 39 SAN DIEGO L. REV. 437, 500-20 (2002), on the United States’ explicitly colonial endeavors in the post-World War II era. See generally Andrew Coleman & Jackson Maogoto, *Democracy’s Global Quest: A Noble Crusade Wrapped in Dirty Reality?*, 28 SUFFOLK TRANSNAT’L L. REV. 175 (2005); Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT’L L. & POL’Y 903 (1997).

244. ANGHIE, *supra* note 13, at 223-44.

245. See *id.* at 416-22. See also CHOMSKY, *supra* note 175, at 9-19 (discussing ideological justifications of the Cold War); CHURCHILL, ON THE JUSTICE OF ROOSTING CHICKENS, *supra* note 32, at 63-79 (providing chronological summary of U.S. military interventions since World War II).

246. KARNOW, *supra* note 22, at 14 (quoting the famous magazine publisher Henry Luce, *The American Century*, LIFE, Feb. 1941).

247. See *id.* at 13 (noting a “rhetoric of redemption” that “permeated” Woodrow Wilson’s pledges).

248. See generally ZINN, *supra* note 170, at 398-408 (contrasting the U.S.’ stated goals with many of its actual policies).

249. For a chronology of such interventions, see CHURCHILL, ON THE JUSTICE OF ROOSTING CHICKENS, *supra* note 32, at 63-79.

250. On the economic interests involved, Howard Zinn quotes a 1952 secret National Security Council memorandum stating that “Southeast Asia . . . is the principal world source of natural rubber and tin, and a producer of petroleum and other strategically important commodities” and a 1953 congressional study which noted that “Indochina is immensely wealthy in rice, rubber, coal and iron ore. Its position makes it a strategic key to the rest of Southeast Asia.” ZINN, *supra* note 170, at 462.

had many parallels to earlier U.S. wars to liberate and/or pacify other territories.²⁵¹ In assessing the war in Vietnam, Telford Taylor, chief counsel to the Nuremberg prosecution, first noted “a deeply idealistic strain in the American interventionist tradition,” citing to McKinley’s justifications for war against Spain.²⁵² He suggested that President Eisenhower, in the spirit of the Nuremberg Tribunal and the Genocide Convention, had pledged support to South Vietnam in 1954 in order to “discourage any who might wish to impose a foreign ideology on your free people.”²⁵³ Nonetheless, even with this charitable framing of U.S. intent, Taylor was forced to conclude by 1970 that if the United States’ primary purpose remained the protection of ideological freedom or the deterrence of aggression,

it is inconceivable that our conduct of military operations should have taken the course that it has. Whatever peace-keeping and protective intentions may have governed our initial involvement in Vietnam have by now been so completely submerged under the avalanche of death and destruction that they no longer are credible descriptions of the operation as a whole.²⁵⁴

The Vietnam War was justified as an American effort to defend freedom in the face of communist aggression, but the broader notion of bringing “civilization” to Asia was never far behind.²⁵⁵ According to Orrin Schwab, by the time John Kennedy was elected,

the ‘Free World’ was thought to be in danger. The Soviets and their communist allies pressed against the boundaries of freedom from the city of Berlin . . . down through the Balkans and the Turkish Dardanelles, and across the vast undeveloped Afro-Asian heartland to the civil war in the Mekong Valley. The forces of freedom were fighting for what the new president called the ‘dignity of man’ against the palpable evil of international communism.²⁵⁶

251. There are striking parallels between U.S. wars of liberation and pacification in other territories and the domestic pacification of American Indians, Filipinos, and Vietnamese, especially in the creation of reservations or internment/concentration camps. See generally LYNN R. BAILEY, *BOSQUE REDONDO: THE NAVAJO INTERNMENT AT FORT SUMNER, NEW MEXICO, 1863-1868* (1982) (on American Indian internment); SIDNEY L. HARRING, *CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND THE UNITED STATES LAW IN THE NINETEENTH CENTURY* 204-06 (1994) (comparing Indian reservations to prison); MICHAEL LIEDER & JAKE PAGE, *WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES* (1997). On the mass internments in the Philippines, see MILLER, *supra* note 207, at 163-64, 208 (discussing mass internments in the Philippines). On Vietnamese internment, see D. MICHAEL SHAFER, *DEADLY PARADIGMS: THE FAILURE OF U.S. COUNTERINSURGENCY POLICY* 268 (1988), and DOUGLAS S. BLAUFARB, *THE COUNTERINSURGENCY ERA: U.S. DOCTRINE AND PERFORMANCE* 114-45 (1977) (on the “hamletization” program in Vietnam).

252. TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 186 (1970).

253. *Id.*

254. *Id.* at 187-88. See generally 1-4 *THE VIETNAM WAR AND INTERNATIONAL LAW* (Richard A. Falk, ed., 1976), for analyses of the legality of U.S. intervention in Vietnam.

255. See ZINN, *supra* note 170, at 465-67. See H. BRUCE FRANKLIN, *VIETNAM AND OTHER AMERICAN FANTASIES* 27-41 (2000) (comparing “dominant fantasies of American people during Vietnam War and reality of documented history”).

256. ORRIN SCHWAB, *DEFENDING THE FREE WORLD: JOHN F. KENNEDY, LYNDON JOHNSON, AND THE VIETNAM WAR, 1961-1965* 1 (1998).

The “freedom” being brought to the Vietnamese was closely associated with civilization. Stanley Karnow observes that Americans in Vietnam often “considered it their duty to educate the ‘natives’—just as, in their day, French administrators were committed to the *mission civilisatrice*.”²⁵⁷ When this mission met with staunch resistance, a U.S. military officer in Vietnam would echo General Shafter’s 1899 description of the war in the Philippines, explaining the devastation of the capitol of Ben Tre province by saying, “It became necessary to destroy the town to save it.”²⁵⁸ This was, of course, a classic example of the same rhetoric used to justify colonial ventures for at least five centuries.

As Neil Sheehan says about this era in U.S. history, “Americans perceived their order as a new and benevolent form of international guidance . . . Washington wanted native regimes that would act as surrogates for American power. The goal was to achieve the sway over allies and dependencies which every imperial nation needs to work its will in world affairs without the structure of old-fashioned colonialism.”²⁵⁹ While this approach was not particularly successful in Vietnam, it has apparently continued to undergird U.S. foreign policy, with its “benevolent” goals justifying both the self-laudatory and self-exempting aspects of American exceptionalism. Mary Ellen O’Connell states:

Officials in the Reagan Administration . . . applied this [exceptionalist] thinking to international law on the use of force. The belief also appears in the Clinton Administration policies . . . regarding the North Atlantic Treaty Organization (NATO) and its right to use force without [U.N.] Security Council authorization. American exceptionalism is fully evident on the part of those who proposed invading Iraq in the aftermath of September 11th²⁶⁰

As many scholars have noted, policies that serve to undermine fundamental rights while nonetheless appearing to comply with international norms have frequently been implemented through economic institutions such as the World Bank, the International Monetary Fund, or the World Trade Organization, rather than through explicitly military means.²⁶¹ In the realm of human rights, the United States has claimed the prerogative to exempt itself from numerous international treaties and

257. KARNOW, *supra* note 22, at 260.

258. FRANKLIN, *supra* note 256, at 95. For accounts of U.S. war crimes in Vietnam, see generally VIETNAM VETERANS AGAINST THE WAR, THE WINTER SOLDIER INVESTIGATION: AN INQUIRY INTO AMERICAN WAR CRIMES (1972); BERTRAND RUSSELL, WAR CRIMES IN VIETNAM (1967).

259. NEIL SHEEHAN, A BRIGHT SHINING LIE: JOHN PAUL VANN AND AMERICA IN VIETNAM 131 (1988).

260. Mary Ellen O’Connell, *American Exceptionalism and the International Law of Self-Defense*, 31 DENV. J. INT’L L. & POL’Y 43, 43 (2002) (citations omitted).

261. See ANGHIE, *supra* note 13, at 245-63. See generally James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. HUM. RTS. L. REV. 107 (1999) (arguing that the “good governance” requirements of the World Bank constrain the implementation of human rights); Namita Wahi, *Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability*, 12 U. C. DAVIS J. INT’L L. & POL’Y 331 (2006) (noting the coercive effect of such organizations on people in “developing” countries). For related arguments concerning the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), see generally Donald P. Harris, *Carrying a Good Joke Too Far: TRIPS*

implementing mechanisms, holding others to standards which it will not apply to its own conduct, and often justifying this position by claiming to have a superior system for ensuring such rights.²⁶² In each of these arenas, U.S. officials have continued to emphasize the importance of the global rule of law while often invoking a “higher good” to exempt the United States from compliance with particular provisions of international law.²⁶³

CONCLUDING REFLECTIONS

In waging the current war on terror, the United States government has taken the position that the new and ever-changing threat of global terrorism justifies many policies and practices that fail to comply with accepted norms of international law, particularly those intended to restrain the use of force and ensure basic human rights. U.S. representatives have noted the emergence of a “new paradigm” of international law, and claim to be implementing a “distinctly American internationalism.”²⁶⁴ This new paradigm emphasizes the importance of the global rule of law, but presumes the ability of the United States to exempt itself from international law at will. In the war on terror, U.S. officials have characterized the opposition as “evil” embodied in terrorists and rogue states. Much as early American leaders invoked the image of the uncivilized savage to justify otherwise illegal actions against indigenous peoples, U.S. officials now argue that established rules of warfare do not apply in the war on terror because the enemy does not behave rationally. More generally, they portray the United States as the preeminent representative of Western civilization, waging war to preserve its most sacred values of freedom and democracy. In turn, these values are posited as universally “right and true.” Thus, while the United States appears to be shunning norms and institutions established by the international community, it is doing so for the higher purpose of extending the benefits of civilization to all.

Much of the debate surrounding U.S. actions since 2001 has accepted the premise that we are collectively facing a new and distinctive threat and has focused on the acceptability or effectiveness of the particular measures being taken to address that threat. In this essay, I have noted some of the parallels between contemporary policies and practices and those of American settlers and political leaders throughout U.S. history to highlight ways in which the justifications for American exceptional-

and *Treaties of Adhesion*, 27 U. PA. J. INT'L ECON. L. 681 (2006); A. Samuel Oddi, *TRIPS—Natural Rights and a “Polite Form of Economic Imperialism,”* 29 VAND. J. TRANSNAT'L L. 415 (1996).

262. See David Mednicoff, *The Importance of Being Quasi-Democratic—The Domestication of International Human Rights in American and Arab Politics*, 38 VICT. U. WELLINGTON L. REV. 317, 320-26 (2007); van der Vyver, *supra* note 41, at 777-91.

263. In these cases, U.S. federal courts have, with relative consistency, refused to intervene to enforce international law. See generally William E. Thro, *American Exceptionalism: Some Thoughts on Sanchez-Llamas v. Oregon*, 11 TEX. REV. L. & POL. 219, 221-223 (2007) (discussing the Supreme Court's rejection in *Sanchez-Llamas* of the international community and its embrace of American Exceptionalism) and Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L. J. 1564 (2006) (providing nuanced analysis of the potential for both state and federal courts to apply international law).

264. See *supra* note 34 and accompanying text.

ism have remained remarkably consistent. In addition, I have argued that the ideological foundation of this approach is rooted in the legal, political, and religious framework upon which European colonialism was constructed, and that the United States has both invoked and exempted itself from international legal standards since its founding. Viewed from this perspective, I believe that we can develop accurate legal analyses of, and effective responses to, contemporary U.S. practice only if we are willing to consider current events in the context of our long history of American exceptionalism.

This is a more difficult project than it might seem at first blush. First, we have the problem of accessing accurate and multi-dimensional histories of how the United States was established, its claimed territories consolidated, and its power extended. These developments must then be placed in the context of the legal framework that has both limited and legitimated them.²⁶⁵ If we wish to learn from and apply this history, we will first have to excavate the continuities in both the theory and the practice of American exceptionalism, and assess their implications. Such analyses, of course, require clarification of the normative standards being applied. For some legal scholars, the presumptions that undergird the worldview associated with Western civilization may appear to be right, natural, or even inevitable. In that case, their extension into contemporary policy should not be problematic. However, for those of us intent on implementing the decolonization mandate of the post-World War II era, the historical illustrations and arguments I have presented in this essay imply, I believe, that we can neither effectively respond to contemporary legal developments nor fulfill that broader goal without questioning some of our most basic understandings of American “values,” as well as the fundamental presumptions about human civilization and “progress” that buttress our legal structures.

265. See generally Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383 (2003) (discussing imperialist consequences of increasing U.S. influence over international law); Sundhya Pahuja, *The Postcoloniality of International Law*, 46 HARV. INT'L L. J. (2005) (discussing imperial and anti-imperial tendencies operating within the international legal system).

Reactions

LAMA ABU-ODEH*

Is the word “civilization,” evoked by Bush in contemporary times, the direct genealogical descendant of the mission civilatrice¹ evoked by his Anglo Saxon predecessors to justify their onslaught on the native inhabitants of the land they have chosen to settle and appropriate? Is the contemporary project by the current political elites of the US to “spread democracy in the Middle East” the same as and co-equal with the mission to civilize the “beast” in the lands where “beasts” wandered two centuries ago? If the ethno/race of the old mission was Anglo Saxon, what is its contemporary ethnic/race today? Does the election of Obama complicate this question?

Perhaps to answer this question we first need to ask the following one: what is the meaning of “the race of a mission”? Is it that the mission acquires the race of those who launched it materially and discursively? Or is it that it acquires the race of whoever benefits from its ill effect even if they were not its initiators, indeed came long after it has been completed? Or is it the launching of the mission itself that distributes color/ethnicity among those concerned, so they would not be identifiable as a race even to themselves short of this mission? So that whether you agree or disagree, benefit or lose, participate in the mission or not, the mission endows you with color depending on which side of the dividing line you happen to fall? In contemporary times, the debate on “spreading democracy in the Middle East” between the Democrats (we should not be in the business of spreading democracy in other countries) and Republicans (yes, we should), the debate itself is a race distributor so that those “who own the democracy,” whether they are for spreading it or not are racially distinguished from/superior to those “who don’t own it”? Perhaps race is created and is continuously rejuvenated through the launching of missions: on crime (black), on illegal immigration (Latino), on terrorism (Muslim)? Perhaps, mission is the *modus operandi* of race. Or is it that we need to mix all of the above and argue that a mission civilatrice is launched by a particular ethnic/racial group configuration that is politically dominant but that marshals support for its mission (manufactures consent) by inviting others to participate in a discourse that colors them in a way that allows them to get a sense of superiority even though in fact they do not benefit, may indeed lose (their lives) by the launching of the mission?

If this is so, when Obama declares he will not hesitate to bomb Pakistan “in pursuit of terrorists” without consulting with the Pakistani government, how has the race/color of the mission civilatrice or should I say *disciplinaire*,² come to be re-aligned in the US?

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1. French for “civilizing mission.”

2. French for “disciplinary.”

DAVID PETERSON**

In the aftermath of Barack Obama's truly historic victory in the U.S. presidential election, the narrative of American progress and triumph is being enlarged and emphasized by the mainstream national press. Current political discourse centers on the notion that the United States has triumphed over its racial demons and restored itself as a beacon of freedom and opportunity. The validity of this dominant framing of the social trajectory of the United States body politic is called sharply into question by Natsu Taylor Saito in her essay titled "Colonial Presumptions: The War on Terror and the Roots of American Exceptionalism." Saito skillfully and convincingly demonstrates that U.S. foreign policy in the War on Terror is not fundamentally new, but is rather a contemporary manifestation of the "American worldview," which has been constant throughout the imperialist establishment and expansion of the United States. Saito argues this "American worldview" constructs the United States as the most advanced form of civilization in world history and is justified in forcefully imposing this "civilization" upon others, exempting itself from legal norms and obligations in the process.

Saito challenges legal scholars to seriously interrogate the fundamental American worldview and the ways in which it manifests itself in contemporary American life. The Obama presidency undoubtedly presents a unique and interesting opportunity to assess the strength and staying power of American assumptions about 'civilization' and "progress." The world possesses an arguably unprecedented level of hope that the United States, under the leadership of Obama, can join the family of nations as an equal partner rather than as a paternal dictator. Indeed, Obama promises to restore America's image, comply with established international agreements, and engage in dialogue with nations generally considered to be hostile towards the United States. Such promises and rhetoric, along with the overwhelming global support they have generated seem to indicate a humbling, if not complete overhaul, of the "American worldview." However, scholars must remain attentive in the face of such lofty promises and jubilant celebration. They must be willing to continually seek out the ways in which the American worldview both remains operative and is reshaped in the "Obama era." The great hope inspired by Obama should be encouraging but should not distract from the great task of elucidating and understanding the continuity of American domination through time.

In carrying out this great task scholars must acknowledge, as a central concern, the physical reality faced by the millions of people displaced from the sphere of human consideration, stripped of rights, denied dignity, and massacred in the course of American business as usual. Such realities are too often abstracted and removed from the sight and mind of those with the tools and privileges to change structural conditions. There must be compassion for those, particularly working class people of color, who are held to the strictest legal standards and punished within an ever

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expanding imprisonment apparatus while political leaders at the highest levels of power seem to view their legal agreements as worth little more than bathroom tissue. This inequality reflects not merely an imperfect legal structure but rather reveals the very function of law to mask the reality of lawlessness and raw power pursuit that define elite power politics in world affairs under the guise of lawfulness and order. Will the dehumanizing American worldview continue as a forceful undercurrent in American cultural life or can citizens, equipped with an ever-increasing awareness of historical domination and injustice, root out this cancer and replace it with a truly humanizing orientation to others? The answer to this question will certainly depend on the seriousness and vigilance with which scholars and citizens respond to Saito's challenge to anchor understandings of and challenges to American practice within an honest and critical historical framework.

