Introduction

“A Distinctly American Internationalism”

We remain the most prosperous, powerful nation on Earth. . . . We will not apologize for our way of life, nor will we waver in its defense. . . . Let it be said by our children’s children that when we were tested . . . with our eyes fixed on the horizon and God’s grace upon us, we carried forth that great gift of freedom and delivered it safely to future generations.

—Barack Obama, Inaugural Address, January 2009

In January 2009 President Barack Obama took office “amidst gathering clouds and raging storms,” with, among other things, the United States “at war, against a far-reaching network of violence and hatred.”1 According to U.S. officials, this so-called war on terror is being fought not only to secure the physical and economic well-being of the American people but also to preserve and extend freedom and democracy throughout the world. In his acceptance speech, Obama emphasized the “enduring power of our ideals: democracy, liberty, opportunity, and unyielding hope,” and his inaugural address assured his worldwide audience that America was again ready to lead the world in realizing these values.2 Similarly the National Security Strategy of the United States (NSS), a 2002 policy report of the Bush administration, stated that the aim of the U.S. international strategy “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.”3

The aims described by both Barack Obama and George W. Bush correspond to the foundational principles and goals of international law—international peace and security, fundamental human rights, and the global rule of law—clearly articulated in the UN Charter, the Universal Declaration of Human Rights, and numerous multilateral treaties.4 Nonetheless, as the NSS
made clear, the United States was not making a commitment to international law per se but to what it called, echoing a 1999 Bush campaign speech, “a distinctly American internationalism that reflects the union of our values and our national interests.” The “path to progress” envisioned by Presidents Obama and Bush, as well as many of their predecessors, is considered uniquely American yet universally applicable. Barack Obama has repeatedly emphasized that the United States is “the last, best hope of Earth.” This sentiment was put a bit more bluntly by George W. Bush in the NSS: “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.” In both cases claims are being made that freedom, democracy, and human dignity are peculiarly “American” values, and that human progress is dependent upon the universal implementation of the “single sustainable model” which the U.S. exemplifies.

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. In fact, one of the key attributes of “rogue states,” as defined in the NSS, is that they “display no regard for international law . . . and callously violate international treaties to which they are party.” Since World War II, the international community as a whole has recognized that the maintenance of international peace and cooperation requires structures for developing agreements and resolving disputes between states, and it is generally accepted that the global stability necessary for the protection of fundamental rights and freedoms requires adherence to the rule of law, both within and between states.

Nonetheless, the United States has consistently distanced itself from many established principles of international law, as well as the international institutions that have evolved to implement such law. For example, despite playing an influential role in the drafting of all major human treaties, the U.S. took forty years to ratify the Genocide Convention, and fifteen to ratify the International Covenant on Civil and Political Rights. It still refuses to become a party to many basic treaties such as the Convention on the Rights of the Child, and it has ratified others with reservations that undermine meaningful participation.

In the mid-1980s the United States withdrew its agreement to submit to the compulsory jurisdiction of the International Court of Justice, and, more recently, it has announced its intent not to become a party to the Rome Statute establishing the International Criminal Court. Throughout the 1990s the U.S. insisted on sanctions against Iraq that are estimated to have resulted in the deaths of more than a million Iraqis, many of them children under
the age of five. In deciding to invade Iraq and hold detainees indefinitely at Guantánamo Bay in the current “war on terror,” U.S. officials have asserted the right, ability, and even responsibility to act unilaterally when international bodies do not function in ways the U.S. believes most effective. Simultaneously the U.S. has attempted to unilaterally reshape certain doctrines of international law, such as the rules precluding preemptive warfare, while apparently disregarding others, including provisions of the Geneva Conventions and the prohibition on torture. With respect to environmental matters, the U.S. is now the only “advanced” country that has refused to ratify the Kyoto Protocols.

Selective self-exemption undermines not only specific legal institutions and norms, but it also leads to the decreased effectiveness of the global rule of law. Such exemption is therefore problematic when engaged in by any state, but the United States’ practice of shaping, invoking, and selectively rejecting international law is particularly significant because of the extraordinary influence it currently wields as the world’s sole “superpower.” A fundamental premise of this book is that we have now been placed at a critical juncture because of the combination of certain factors: the unilateral prerogatives that the United States, as well as some of its key allies, are asserting; the increasingly desperate responses of those without comparable economic, military, or political power; and the fragile state of the environment on which we all depend. We face the choice between a world increasingly dominated by raw power, accompanied by the heightened levels of repression necessary to maintain that power, or one in which global relations are transformed and democratized, allowing international institutions to build the base for a peaceful, just, and sustainable world order.

This book is the result of my attempt to understand why the United States’ frequent—if selective—disregard of international law and institutions is met with such high levels of approval, or at least complacency, by the American public. Some of this, of course, can be attributed to fear-mongering but I believe that the answer lies much deeper in our history, for attempts by the United States to invoke underlying principles of law while exempting itself from specific applications are not a new phenomenon, nor unique to any particular administration. The thesis of this book is that the United States’ current approach to international law is not simply a response to a new crisis in world order but is best understood as the most recent extension of a consistent history in which international law has been both invoked and disregarded.

Since its inception, the U.S. has grappled with contradictions between its stated values and its actions, its constitutional framework, and its legal
practices. The new republic was born in a state of exception to international law, needing to justify its otherwise illegal break with British colonial rule by claiming that it was more faithfully representing the underlying principles of “natural law.” The “Founding Fathers” were clear that in order to be recognized as a legitimate state the U.S. had to comport with international law, a position confirmed by the text of the Constitution as well as by early Supreme Court opinions. Yet they were also determined to expand and consolidate a territorial and economic base as broadly and expeditiously as possible, often resulting in violations of international law as wars of extermination were waged against Indigenous peoples, treaties consistently broken to appropriate land and natural resources, and chattel labor imported in disregard of an international ban on the slave trade. The United States has, as a result, consistently based its claims to legitimacy on advocacy of the principles of freedom, democracy, and the rule of law, while simultaneously developing policies and engaging in practices, often shored up by convoluted legal “interpretations,” to exempt itself from compliance, thereby subverting the realization of these principles both domestically and internationally.

Rather than concretely reconciling these contradictions, it seems that Americans find it easier to remain in denial, dismissing the country’s history with the assertion that it all happened “a long time ago” and moving on to some version of “well, the injustices were unfortunate, but we’ve ended up with the most democratic—or freest or richest—country in the world, so it must have been for the best.” In this construction America is special, or exceptional, because it claims certain incontestable values; the possibility that its hegemony was consolidated and continues to be exercised at the expense of those values can be ignored in the name of a greater good. This is the conception of American exceptionalism that is addressed in this book, for the contradictions embodied within this formulation set the stage for the United States’ assertion of a “uniquely American” posture toward international law today.

The phenomenon of American exceptionalism in international affairs has, of course, been widely criticized. Many critiques focus on the hypocrisy evidenced by U.S. officials, dismissing their selective invocation of international law as a cynical means of enhancing political or economic power. Although this may be accurate in any given instance, such realpolitik arguments disregard the extent to which the United States—indeed, all states—rely upon legal structures to further their political or economic ends. More significant, this critique ultimately privileges the rule of power over the rule of law by presuming that power cannot be channeled through international institutions to enforce, and reinforce, law on a global scale.
A second line of criticism emphasizes the value of legal institutions but tends to focus on specific instances in which the United States has failed to comply with international law. It is undoubtedly important to challenge each assertion of American exceptionalism (the failure to ratify particular conventions, for example) and to make good the promise articulated by Supreme Court Justice and chief Nuremberg prosecutor Robert Jackson that “if certain acts in violation of treaties are crimes they are crimes whether the United States does them or whether [another country] does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us.” Nonetheless, counter-exceptionalist arguments on a case-by-case basis will not alter the underlying dynamic at issue. The problem cannot be solved simply by challenging its most current manifestation or by attributing blame to the latest political administration.

As a result, I believe that neither of the more familiar approaches to American exceptionalism effectively addresses the dangers posed by the perhaps distinctive but not especially new “American internationalism,” and that we must, instead, recognize and confront the historical patterns and structural dynamics that make such policies seem right, natural, even inevitable to the American public. The questions addressed in this book are not of recent origin, but they take on a heightened urgency in light of the current war on terror, the pervasive reach of global economic institutions, the rapid expansion and dissemination of military technology, and the realization that “civilization” as we know it poses an imminent threat to the environment of the entire planet. Under these circumstances, it is hardly a radical position to assert that our collective survival and well-being require effective systems of international justice and that these cannot be achieved as long as the most powerful state on the globe exempts itself from their application.

While advocating adherence to the global rule of law as well as the U.S. Constitution, I believe it is critical to remember that each of these legal systems emerged in large measure to rationalize and regulate imperial expansion and to consider the extent to which they continue to replicate colonial relations. Quite consistently the advance of “civilization” has been posited as the goal of these legal systems, and those deemed “uncivilized,” or Other, constructed as the enemy. Only recently have legal frameworks posited by both the Constitution and international law evolved sufficiently through their guarantees of equality and self-determination to offer a truly liberatory potential. Nonetheless the ideology of colonialism, with its presumption that only one viable path of human “progress” and “development” exists,
continues to constrain our thinking. It is important, therefore, to disentangle freedom, equality, and democratic governance, which I believe are fairly characterized as universal aspirations, from the “civilizing mission” that has characterized both European colonial expansion and the consolidation and extension of U.S. hegemony. Similarly the “enemies of freedom” must not be conflated with those who resist being “civilized.”

The question is not whether we should struggle for freedom or democracy but, instead, what those values actually mean and how they can best be ensured and sustained in a diverse and rapidly changing world. In the following chapters I attempt to identify key points at which U.S. practice has diverged from its stated principles in the domestic and international arenas and how the gaps between principle and practice have been rationalized. This history is essential, I believe, to understand both the dangers inherent to the assertion of American exceptionalism and the ways in which it can most effectively be countered.

Chapter 1 begins with a brief overview of the justifications asserted for American exceptionalism in the context of the current “war on terror,” with the purpose of identifying some of the asserted values, identity, and mission of the United States that have remained remarkably consistent throughout its history. It focuses, in particular, on the precepts undergirding the construct of civilization that U.S. officials are invoking, presumptions that, to many Americans, appear simply as “common sense” but rely on a particularly “Western” understanding of human progress, measured by development along a unilinear path and juxtaposed to conditions of savagery or barbarism. It is this construction of human purpose that provides the underlying ideology for the United States’ establishment and expansion and the framework of Euroderivative international law addressed in this book.

George W. Bush sparked international controversy when he alluded to the war on terror as a “crusade.” Yet in many ways this was an apt reference, for it was in the context of the Crusades that contemporary international law emerged. Chapter 2 considers the notion of civilizing the infidel Other that provided the ideological underpinnings not only of the Crusades but of Europe’s “Age of Discovery,” and summarizes how this mission became a foundational premise of international law. Chapter 3 begins with the earliest English settlers’ belief in their divinely ordained mission to bring progress and civilization to the wilderness. Their vision of establishing a “city on a hill,” a beacon of freedom for the world, was perpetuated in the faith of the American colonists that their new republic was taking European civilization to a higher level. By thus situating themselves in the “genealogy” of Western progress, the found-
ers quite literally created a “state of exception,” justifying their divergence from prevailing norms of international law by claiming to better represent the fundamental values, such as freedom and democracy, of a higher law.

The United States was then forced to confront the contradictions between its stated commitment to the “American” values of freedom, democracy, and the rule of law, and the reality that it was a settler colonial power whose legitimacy was necessarily grounded in the legal framework of European colonialism which it was purporting to supersed. Chapter 4 addresses how this new government “of the people” reconciled its decimation of Indigenous peoples, the appropriation of their lands, and the institution of chattel slavery with its foundational principles by invoking the premises of “civilization” to construct racialized identities that excluded American Indians and Africans from the American polity. In this process, the arguments made to justify American exceptionalism in the international sphere were being made within domestic law to justify internal colonial practices.

This convergence of the ideological framing of U.S. domestic practice and foreign policy is illustrated in chapter 5, which addresses the consolidation of U.S. claims to what are now the “lower forty-eight” states, from the “conquest” of the more than four hundred Indigenous nations on the continent to the “acquisition” of Florida and the northern half of Mexico. In realizing what was envisioned as America’s “manifest destiny” of continental expansion, however, the tensions between appropriating additional territories and incorporating their inhabitants became increasingly problematic, given the racialized construction of American identity discussed in chapter 4. Within U.S. law these contradictions became more acute when, following the Civil War, the Constitution was amended to extend formal equality and civil rights to a much larger sector of the American populace. At the same time, however, the “internal frontier” would soon be declared closed, bringing early U.S. visions of extending beyond the continent much closer to realization. At this point the United States began its explicitly imperialist project of acquiring external colonies, such as Hawai‘i, Puerto Rico, and the Philippines, inaugurating a new phase of its “civilizing mission.” This development, and the legal justifications accompanying it, is the subject of chapter 6.

The international legal system, meanwhile, was struggling with similar tensions in the wake of the Great War, as European and American leaders attempted to create structures of international order that maintained the dominance of Western civilization and colonial ideology within a new paradigm of self-determination that envisioned the emergence and assimilation of additional “civilized” states. With the decolonization and national libera-
tion movements that followed World War II, the international legal regime was even more significantly restructured. Chapter 7 looks at the dominant role the United States played in this process, from the League of Nations and its mandate system, through the establishment of the United Nations and the international financial institutions, such as the World Bank and International Monetary Fund, which have become increasingly influential forces in the global project of “development.”

Since the end of the Cold War U.S. claims to and justifications for American exceptionalism, articulated since its inception, have been writ large. The attitude in the United States toward “foreign” relations and global law has often been characterized as isolationist, with intermittent bursts of internationalism, but the history considered in this book indicates that those advocating for unilateral or multilateral policies and practices virtually always have agreed about the underlying principle of “America First.” If the United States is presumed to be the exemplar of Western civilization and therefore human progress, it becomes reasonable, indeed desirable, that it bring its uniquely American but nonetheless universal values of “freedom” and “democracy” to the rest of the planet. It becomes appropriate, moreover, to do so by whatever means, unilateral or multilateral, it deems most effective. Chapter 8 proposes that American exceptionalism can be seen as fraught with practical contradictions but nonetheless quite ideologically coherent when viewed from this perspective. Observing that “civilization,” as it has emerged over the past several centuries, has given us a world in which human well-being is threatened by armed conflict, poverty, and disease, and the planet itself appears to be on the verge of imminent environmental collapse, it suggests that these problems will not be solved by remaking the world in the image of the United States.

The tensions between colonialism and self-determination reflected within the trajectory of American exceptionalism provide a lens through which contemporary relations of law and power can be understood and perhaps changed. The lesson I take from the history outlined in this book is that the principles and structures of international law, as they have emerged over the past century, provide as viable a starting point as any currently available for the creation of a sustainable and just world order. Still, realizing this potential will require a willingness to confront the continuing influence of colonial ideology honestly and to take seriously the many alternative visions of human purpose and social structure that have resisted assimilation into the paradigm of Western civilization. These ideas are discussed in chapter 9, which summarizes the dangers posed by American exceptionalism and the liberatory potential of a decolonized international legal framework.