

## Chapter 1

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### Introduction: American Exceptionalism and Human Rights

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#### Defining Exceptionalism

Since 1945 America has displayed exceptional leadership in promoting international human rights. At the same time, however, it has also resisted complying with human rights standards at home or aligning its foreign policy with these standards abroad. Under some administrations, it has promoted human rights as if they were synonymous with American values, while under others, it has emphasized the superiority of American values over international standards. This combination of leadership and resistance is what defines American human rights behavior as exceptional, and it is this complex and ambivalent pattern that the book seeks to explain.

Thanks to Eleanor and Franklin Roosevelt, the United States took a leading role in the creation of the United Nations and the drafting of the Universal Declaration of Human Rights in 1948.<sup>1</sup> Throughout the Cold War and afterward, few nations placed more emphasis in their foreign policy on the promotion of human rights, market freedom, and political democracy. Since the 1970s U.S. legislation has tied foreign aid to progress in human rights; the State Department annually assesses the human rights records of governments around the world. Outside government, the United States can boast some of the most effective and influential human rights organizations in the world. These promote religious freedom, gender equality, democratic rights, and the abolition of slavery; they monitor human rights performance by governments, including—and especially—the U.S. government. U.S. government action, together with global activism by U.S. NGOs, has put Americans in the forefront of attempts to improve women's rights, defend religious liberty, improve access to AIDS drugs, spread democracy and freedom through the Arab and Muslim worlds, and oppose tyrants from Slobodan Milošević to Saddam Hussein.

<sup>1</sup> Stephen C. Schlesinger, *Act of Creation: The Founding of the United Nations* (New York: Westview Press, 2003); Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001).

The same U.S. government, however, has also supported rights-abusing regimes from Pinochet's Chile to Suharto's Indonesia; sought to scuttle the International Criminal Court, the capstone of an enforceable global human rights regime; maintained practices—like capital punishment—at variance with the human rights standards of other democracies; engaged in unilateral preemptive military actions that other states believe violate the UN Charter; failed to ratify the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination against Women; and ignored UN bodies when they criticized U.S. domestic rights practices. What is exceptional here is not that the United States is inconsistent, hypocritical, or arrogant. Many other nations, including leading democracies, could be accused of the same things. What is exceptional, and worth explaining, is why America has both been guilty of these failings and also been a driving force behind the promotion and enforcement of global human rights. What needs explaining is the paradox of being simultaneously a leader and an outlier.

While the focus of this book will be on human rights, exceptionalism is also a feature of U.S. attitudes toward environmental treaties like the Kyoto Protocol as well as the Geneva Conventions and international humanitarian law. Since the attack of September 11, it has been accused of violating the Conventions as well as the Torture Convention in its handling of prisoners at Guantánamo, Abu Ghraib, and other detention facilities.

This pattern of behavior raises a fundamental question about the very place of the world's most powerful nation inside the network of international laws and conventions that regulate a globalizing world. To what extent does the United States accept constraints on its sovereignty through the international human rights regime, international humanitarian law, and the UN Charter rules on the use of force? To what degree does America play by the rules it itself has helped to create?

In this book, we do not revisit wider historical and sociological debates about why Americans have seen their society as exceptional at least since the Pilgrim Fathers, or why America has been exceptional in its absence of a socialist movement.<sup>2</sup> Nor is this another discussion of American uni-

<sup>2</sup> Alexis de Tocqueville, *Democracy in America*, ed. and trans. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2001), selections from introduction; vol. 1, pt. 1, chaps. 4–6; vol. 2, Ppt. 1, chaps. 1, 4–6; vol. 2, pt. 2, chaps. 1–4, 19; John Winthrop, "City Upon a Hill" Sermon (1630); Frederick Jackson Turner, *The Frontier in American History* (New York: Henry Holt and Company, 1920), preface and chap. 1, pp. 1–38; Michael Kammen, "The Problem of American Exceptionalism: A Reconsideration," *American Quarterly* 45 (March 1993): 1–43; Richard Wightman Fox and James T. Kloppenberg, eds., "American Exceptionalism," in *A Companion to American Thought* (Cambridge: Blackwell Publishers, 1995), 22–23; Andrew Greeley, "American Exceptionalism:

lateralism in foreign policy, since unilateralism and exceptionalism are different phenomena, requiring different explanations. Instead the volume is closely focused on U.S. human rights performance in comparative perspective, since this approach highlights new questions about the relation between U.S. rights traditions and political culture and their influence on U.S. projection of power, influence, and moral example overseas.

The book is the result of an academic collaboration by the scholars in this volume, initiated at a seminar series held at the Carr Center for Human Rights Policy at Harvard's John F. Kennedy School of Government and generously funded by the Winston Foundation. What began as a scholarly exercise has been given topical urgency by the war in Iraq and the war on terror. While the volume's contributors engage with both, the aim of the book is wider: to situate and explain current administration conduct within a historical account of America's long-standing ambivalence toward the constraining role of international law in general.

In this introduction, I will set out a three-part typology of American exceptionalism; identify and examine four central explanations offered by the contributors; and finally raise two questions about policy: What price does the United States pay for exceptionalism in human rights? What can be done to exercise human rights leadership in a less exceptional way?

### Distinguishing Types of American Exceptionalism

American exceptionalism has at least three separate elements. First, the United States signs on to international human rights and humanitarian law conventions and treaties and then exempts itself from their provisions by explicit reservation, nonratification, or noncompliance. Second, the United States maintains double standards: judging itself and its friends by more permissive criteria than it does its enemies. Third, the United States denies jurisdiction to human rights law within its own domestic law, insisting on the self-contained authority of its own domestic rights tradition.

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The Religious Phenomenon," in *Is America Different? A New Look at American Exceptionalism*, ed. Byron Shafer (Oxford: Clarendon Press, 1991); James Chace, "Dreams of Perfection: American Exceptionalism and the Search for a Moral Foreign Policy," in *America in Theory*, ed. Leslie Berlowitz et al. (New York: Oxford University Press, 1988), 249–61; Joseph Lepgold and Timothy McKeown, "Is American Foreign Policy Exceptional? An Empirical Analysis," *Political Science Quarterly* 110 (Autumn 1995): 369–84; Arthur Schlesinger, Jr., "Human Rights and the American Tradition," *Foreign Affairs* 57 (1978): 502–26; Alex Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000); Anders Stephanson, *Manifest Destiny: American Expansion and the Empire of Right* (New York: Hill and Wang, 1995), chaps. 1 and 4; Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (New York: W. W. Norton, 1996).

No other democratic state engages in all three of these practices to the same extent, and none combines these practices with claims to global leadership in the field of human rights.

The first variant of exceptionalism is *exemptionalism*. America supports multilateral agreements and regimes, but only if they permit exemptions for American citizens or U.S. practices. In 1998, the United States took part in the negotiations for the International Criminal Court but secured guarantees that its military, diplomats, and politicians would never come before that court. The Clinton administration signed the treaty before leaving office, only to have the incoming Bush administration unsign it.<sup>3</sup> The Bush administration then went on to negotiate agreements with allied countries requiring them to guarantee that they would not hand over U.S. nationals to the ICC.<sup>4</sup> Over the Land Mines Treaty, America took part in negotiations but sought exemption for American military production and deployment of land mines in the Korean Peninsula.<sup>5</sup>

Exemptionalism, of course, is not confined to the domains of human rights-related treaties. U.S. withdrawal from the Kyoto Protocol on Climate Change fits into the same pattern.<sup>6</sup> Exemptionalism has also been on display in the war on terror in the U.S. insistence that while conditions

<sup>3</sup> Sarah Sewall and Carl Kaysen, eds., *The United States and the International Criminal Court: Security and International Law* (Lanham, MD: Rowman and Littlefield, 2000); David J. Scheffer, "The United States and the International Criminal Court," *American Journal of International Law* 93 (January 1999): 12–22; Lee A. Casey and David B. Rivkin, Jr., "The International Criminal Court vs. the American People," in *The Heritage Foundation Backgrounder*, February 5, 1999 (Washington, DC: The Heritage Foundation, 1999); Lawyer's Committee for Human Rights, *The International Criminal Court: The Case for U.S. Support* (New York: Lawyers Committee for Human Rights, 1998); Sean D. Murphy, ed., "U.S. Signing of the Statute of the International Criminal Court," *American Journal of International Law* 95 (April 2001): 397; Marc Grossman, United States Under Secretary for Political Affairs, "Remarks to the Center for Strategic and International Studies," Washington, DC, May 6, 2002, <http://www.state.gov/p/9949.htm>; John R. Bolton, United States Under Secretary of State for Arms Control and International Security, "Letter to Secretary-General Kofi Annan," May 6, 2002, <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>.

<sup>4</sup> Colum Lynch, "3 Observers Pulled Out of East Timor: U.S. Move Underscores Vow to Shield Americans from War Crimes Court," *Washington Post*, July 2, 2002; "Explanation of Vote by Ambassador John D. Negroponte, United States Permanent Representative to the United Nations, on the Security Council Resolution on the International Criminal Court," Security Council Chambers, July 12, 2002, [http://www.un.int/usa/02\\_097.htm](http://www.un.int/usa/02_097.htm); Human Rights Watch, "Bilateral Immunity Agreements," June 20, 2003, <http://www.hrw.org/campaigns/icc/docs/bilateralagreements.pdf>.

<sup>5</sup> Andrew Latham, "Theorizing the Landmine Campaign: Ethics, Global Cultural Scripts, and the Laws of War," in *Ethics and Security in Canadian Foreign Policy*, ed. Rosalind Irwin (Vancouver: University of British Columbia Press, 2002).

<sup>6</sup> "Press Briefing by Ari Fleischer," The White House, March 28, 2001, <http://www.whitehouse.gov/news/briefings/20010328.html#KyotoTreaty>.

of detention at Guantánamo and elsewhere will comply with Geneva Convention standards, interrogation procedures and determination of status will be determined by executive order of the president.<sup>7</sup>

Exemptionalism is not the same as isolationism. The same administration that will have nothing to do with the ICC is heavily engaged in the defense and promotion of religious freedom abroad, the abolition of slavery, the funding of HIV/AIDS relief, and the protection of victims of ethnic and religious intolerance in Sudan.<sup>8</sup> Nor is exceptionalism a synonym for unilateralism. An administration that will not engage on the ICC is insistently engaged with the UN and other allies on the issue of HIV/AIDS. While some of the U.S. human rights agenda, like the promotion of religious freedom abroad, is exceptional in the sense that other democratic states place less emphasis upon it, much U.S. human rights policy is aligned with those of other European countries and is advanced through multilateral fora like UN Human Rights Committees.

Exemptionalism also involves the practice of negotiating and signing human rights conventions but with reservations. Thus the United States ratified the International Covenant on Civil and Political Rights (ICCPR) in 1991 while exempting itself from the provisions banning the infliction of the death penalty on juveniles.<sup>9</sup> America is not the only country to insist on this type of exemption. Saudi Arabia, for example, insists that international human rights convention language relating to free marriage choice and freedom of belief remain without effect in their domestic law.<sup>10</sup>

<sup>7</sup> Alberto Gonzales, White House Counsel to President Bush, "Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al-Qaeda and the Taliban," *Memorandum to the President*, January 25, 2002, available at <http://www.msnbc.msn.com/id/4999148/>; Jess Bravin, "Pentagon Report Set Framework for Use of Torture," *Wall Street Journal*, June 9, 2004; David Johnston and James Risen, "Aides Say Memo Backed Coercion Already in Use," *New York Times*, June 27, 2004; Suzanne Goldenberg, "Bush Memos Show Stance on Torture," *Guardian*, June 24, 2004.

<sup>8</sup> U.S. State Department Bureau of Democracy, Human Rights and Labor, *International Religious Freedom Report*, December 18, 2003, <http://www.state.gov/g/drl/rls/irf/2003/>; President George W. Bush, "Remarks by the President during Announcement of Proposal for Global Fund to Fight HIV/AIDS, Malaria and Tuberculosis," The Rose Garden, Washington, DC, May 11, 2001, <http://www.whitehouse.gov/news/releases/2001/05/20010511-1.html>; President George W. Bush, "State of the Union Address," January 28, 2003, <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>.

<sup>9</sup> See U.S. reservations to the ICCPR in "Reservations, Declarations, Notifications and Objections Relating to the International Covenant on Civil and Political Rights and the Optional Protocols Thereto," CCPR/C/2/Rev. 4, August 24, 1994, <http://www.unhchr.ch/html/menu3/b/treaty5.asp.htm>.

<sup>10</sup> Harold Koh, "On American Exceptionalism," *Stanford Law Review* 55 (2003); Harold Koh, "Bringing International Law Home" (the 1998 Frankel Lecture), *Houston Law Review* 35 (Fall 1998); Harold Koh, "Is International Law Really State Law?" *Harvard Law Review* 111 (May 1998); Harold Koh, "Why Do Nations Obey International Law?" *Yale Law Journal* 106 (1997).

These exemptions are simply the price that any universal rights regime has to pay for country-by-country ratification. Indeed, it is doubtful that the framework would exist at all if it did not allow latitude for countries to protect the specificity of their legal and national traditions.

While European states also ratify with reservations and exceptions, they question whether a U.S. exemption on the right to life—a core human rights principle—can be justified.<sup>11</sup> Allowing a state to pick and choose how it adheres to such a central principle threatens to empty international conventions of their universal status. Moreover, exemptionalism turns the United States into an outlier. The United States now stands outside an abolitionist consensus vis-à-vis capital punishment that applies to all democratic states and most nondemocratic ones, with the exception of China.<sup>12</sup>

Even when the United States ratifies international rights conventions, it usually does so with a stipulation that the provisions cannot supersede U.S. domestic law.<sup>13</sup> Thus, with a few exceptions, American ratification renders U.S. participation in international human rights symbolic, since adopting treaties does not actually improve the statutory rights protections of U.S. citizens in domestic law.

Exemptionalism also takes the form of signing on to international rights conventions and then failing to abide by their requirements. The U.S. record of treaty compliance is no worse than that of other democracies, but because of the superpower's exceptional political importance, U.S. forms of noncompliance have more impact than those of less powerful states. Examples of noncompliance include failing to inform UN human rights bodies when derogating from treaty standards; failing to cooperate with UN human rights rapporteurs seeking access to U.S. facilities; and refusing to order stays of execution in compliance with the Vienna Treaty on Consular Obligations.<sup>14</sup> Both the Canadian and German governments have sought stays of execution for their nationals in U.S. courts, on the grounds that these nationals were convicted without prior access to their consular officials. Neither Virginia nor Texas paid any at-

<sup>11</sup> See objections to U.S. reservations to the ICCPR by Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain, and Sweden in "Reservations, Declarations, Notifications and Objections Relating to the International Covenant on Civil and Political Rights and the Optional Protocols Thereto."

<sup>12</sup> William Schabas, *The Abolition of the Death Penalty in International Law* (New York: Cambridge University Press, 2002); Austin Sarat, *The Killing State: Capital Punishment in Law, Politics, and Culture* (New York: Oxford University Press, 1999).

<sup>13</sup> See U.S. reservations to the ICCPR.

<sup>14</sup> Oona Hathaway, "Do Human Rights Treaties Make a Difference?" *Yale Law Journal* 111 (June 2002).

tention to these foreign requests, and these states allowed the executions to proceed.<sup>15</sup>

A third element of exemptionalism is the practice of negotiating treaties and then refusing to ratify them altogether or ratifying them only after extended delays. For example, the Senate refused to ratify the Convention on the Rights of the Child, leaving the United States the only nation besides Somalia not to do so. The United States took nearly forty years to ratify the Genocide Convention.<sup>16</sup> Failure to ratify doesn't mean that the United States fails to comply: no one has complained that the United States is currently guilty of genocide. Nor does failure to ratify the Convention on the Rights of the Child mean that standards of child protection in the United States are as poor as those of the other nonratifier, Somalia.<sup>17</sup> Nonratification simply means that U.S. child advocates cannot use international standards in domestic U.S. litigation. Likewise, U.S. refusal to ratify the Convention on Eliminating Discrimination against Women does not leave American women without protections and remedies. Nonratification means that UN instruments and standards have no legal standing in U.S. courts. How serious this is depends on the extent of the gap between current U.S. federal and state standards and international norms. Where this gap is large, Americans may lack rights and remedies available in other democratic states.

The second feature of American exceptionalism is *double standards*. The United States judges itself by standards different from those it uses to judge other countries, and judges its friends by standards different from those it uses for its enemies. This is the feature that Harold Koh identifies as the most costly and problematic aspect of American exceptionalism. The United States criticizes other states for ignoring the reports of UN rights bodies, while refusing to accept criticism of its own domestic rights performance from the same UN bodies. This is especially the case in relation to capital punishment in general and the execution of juveniles in particular, as well as conditions of detention in U.S. prisons.<sup>18</sup> Overseas, the United States condemns abuses by hostile regimes—Iran and North Korea, for example—while excusing abuses by such allies as Israel, Egypt,

<sup>15</sup> David Stout, "U.S. Executions Draw Scorn from Abroad," *New York Times*, April 26, 1998; Harold Koh, "Paying 'Decent Respect' to World Opinion on the Death Penalty," *U.C. Davis Law Review* 35 (June 2002); "Agora: Breard," *American Journal of International Law* 92 (October 1998).

<sup>16</sup> Samantha Power, *"A Problem from Hell": America and the Age of Genocide* (New York: Perennial/HarperCollins, 2002): 161–69.

<sup>17</sup> Koh, "On American Exceptionalism"; Hathaway, "Do Human Rights Treaties Make a Difference?"

<sup>18</sup> Amnesty International, *United States of America: Rights for All*, September 30, 1998, <http://www.rightsforall.amnesty.org/info/report/r01.htm>.

Morocco, Jordan, and Uzbekistan. It has been condemned for arming, training, and funding death squads in Latin America in the 1980s, while condemning the guerrillas as terrorists. Hence when the United States called for a global war on all forms of terrorism after September 11, it faced accusations that its own policies toward attacks on civilians had been guilty of double standards.<sup>19</sup>

The third form of exceptionalism—*legal isolationism*—characterizes the attitude of the U.S. courts toward the rights jurisprudence of other liberal democratic countries. The claim here is that American judges are exceptionally resistant to using foreign human rights precedents to guide them in their domestic opinions. As Justice Antonin Scalia remarked, when rejecting a colleague's references to foreign jurisprudence in deciding *Printz v. US*, "We think such comparative analysis inappropriate to the task of interpreting a constitution."<sup>20</sup> This judicial attitude is anchored in a broad popular sentiment that the land of Jefferson and Lincoln has nothing to learn about rights from any other country. As Anne-Marie Slaughter points out in her contribution, this American judicial self-sufficiency is exceptional when compared to other judiciaries, with judges in Israel inspecting Canadian precedents on minority rights cases, and judges in the South African Constitutional Court studying German cases to interpret social and economic rights claims.<sup>21</sup> Historically, the American judiciary has stood apart from the trend toward comparative legal problem solving, although as Slaughter also points out, law is being globalized, like commerce and communications, and in the process American lawyers and judges are being drawn into the global conversation.

The American legal profession in general has not ignored global human rights developments, and American academic experts like Thomas Franck, Louis Henkin, and Thomas Buerghenthal have played key roles in international rights institutions.<sup>22</sup> American constitutional scholars as-

<sup>19</sup> Mark Danner, *The Massacre at El Mazote: A Parable of the Cold War* (New York: Vintage Books, 1994); Amnesty International, *Unmatched Power, Unmet Principles: The Human Rights Dimensions of US Training of Foreign Military and Police Forces* (New York: Amnesty International USA Publications, 2002); Raymond Bonner, *Weakness and Deceit: U.S. Policy and El Salvador* (New York: Times Books, 1984); Stephen Schlesinger and Stephen Kinzer, *Bitter Fruit: The Untold Story of the American Coup in Guatemala* (New York: Doubleday, 1982); Sam Dillon, *Commandos: The CIA and Nicaragua's Contra Rebels* (New York: Henry Holt and Company, 1991).

<sup>20</sup> *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997).

<sup>21</sup> Anne-Marie Slaughter, "Judicial Globalization," *Virginia Journal of International Law* 40 (2000); Anne-Marie Slaughter and David Bosco, "Plaintiff's Diplomacy," *Foreign Affairs* 79 (September/October 2000): 102.

<sup>22</sup> Thomas Franck is professor of law at New York University and has provided legal counsel to many governments, including those of Kenya, El Salvador, Guatemala, Greece, and Cyprus. He has also acted as an advocate before the International Court of Justice on



sisted their Eastern European and South African counterparts in drafting constitutions, and U.S. programs of democracy development abroad have an increasingly important rule-of-law component.<sup>23</sup> But the trade in legal understanding continues to be mostly one-way, with the U.S. legal tradition teaching others but not learning much itself. As Frank Michelman points out in his contribution, American judicial interpretation is marked by what he calls “integrity-anxiety,” a concern to maintain rules of judicial interpretation that are stable, continuous, and legitimate. These stable canons can appear threatened by indiscriminate or undisciplined recourse to foreign precedents and sources. In addition to concerns about the stability of the interpretive canon, there is the belief of some American judges that foreign judicial attitudes are too liberal—on issues like the death penalty, abortion, sentencing, and so on—and should be resisted as alien to the American mainstream.<sup>24</sup>

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behalf of Chad and Bosnia and served as a judge ad hoc at the ICJ. Furthermore, Franck has served on the Department of State Advisory Committee on International Law, was president of the American Society of International Law, and served as editor in chief of the *American Journal of International Law*.

Louis Henkin is director of the Columbia University Law School Institute for Human Rights. He serves on the Board of Directors of Human Rights First (formerly the Lawyers Committee for Human Rights) and is a member of the State Department Advisory Committee on International Law. In the past he has served as president of the American Society of International Law, coeditor in chief of the *American Journal of International Law*, and consultant to the United Nations Legal Department. He recently submitted an amicus curiae brief on behalf of Jose Padilla in *Donald Rumsfeld v. Jose Padilla and Donna R. Newman* along with Harold Hongju Koh and Michael H. Posner.

Thomas Buergenthal was elected in March 2000 for a nine-year term as the only U.S. judge serving on the International Court of Justice in The Hague. Previously, Buergenthal served as vice chairman of the Claims Resolution Tribunal for Dormant Accounts in Switzerland, on leave from his position as director of the International and Comparative Law Program at the George Washington University School of Law. He also served as chief justice of the Inter-American Court of Human Rights, was a member of the United Nations Truth Commission for El Salvador, and was the first American to serve on the United Nations Human Rights Committee.

<sup>23</sup> Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2001); Stephen Holmes, “Back to the Drawing Board,” *East European Constitutional Review* 31 (1993): 21–25; Stephen Holmes, “Conceptions of Democracy in the Draft Constitutions of Post-Communist Countries,” in *Markets, States, and Democracy: The Political Economy of Post-Communist Transformation*, ed. Beverly Crawford (Boulder, CO: Westview Press, 1995).

<sup>24</sup> In his dissenting opinion in *Printz*, Justice Breyer argues for the use of comparative constitutional analysis. 521 U.S. at 976–77. Justice Breyer refers to the *Federalist Papers* in arguing for comparative analysis. *Ibid.* at 977. He states, “Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.” *Ibid.*

American mainstream values are more than just the artifact of American conservatism since the 1960s. These values are structured legally by a rights tradition that has always been different from those of other democratic states and increasingly diverges from international human rights norms. As Frederick Schauer shows in his essay, in its free speech and defamation doctrine the United States has always been more protective of speakers' rights than any other liberal democratic state. Canada, France, and Germany permit the punishment of Holocaust deniers. New Zealand criminalizes incitement to racial hatred. UK libel laws provide more remedies against UK newspapers than would be conceivable in the United States.

U.S. law and international human rights standards also diverge markedly. International human rights laws allow more infringements of private liberty, in the name of public order, than do U.S. laws. The International Covenant on Civil and Political Rights mandates specific overrides of free speech if the free speech involves a threat to public order, the defamation of a religious or ethnic group, or the promotion of war propaganda. When the United States ratified the ICCPR, it specifically exempted itself from these provisions, just as it exempted itself from the ICCPR prohibition on juvenile execution.<sup>25</sup> The European Human Rights Convention permits states to suspend political and civil rights in times of national emergency, while the U.S. Constitution has no provision for the declaration of national emergencies and only a single reference to presidential power to suspend habeas corpus.<sup>26</sup>

The U.S. Constitution makes no reference to socioeconomic and welfare rights—entitlements to food, shelter, health care, and unemployment insurance—that are standard features of both international rights regimes and the constitutions of European states. As Cass Sunstein points out in his contribution, U.S. rights, moreover, are defined in negative terms (“Congress shall make no law”), while modern democratic constitutions enunciate rights as positive entitlements to welfare and assistance at the hand of the state. Certain U.S. constitutional rights like the right to bear arms do not feature in other democratic systems.<sup>27</sup> Hence no American ally approaches the problem of regulating the international trade in small arms with this constitutional restraint in mind.

While the West presents an appearance of a common rights identity to the non-Western world, its leader—the United States—increasingly stands

<sup>25</sup> Amnesty International, “Killing with Prejudice: Race and the Death Penalty in the USA,” May 1999, [http://web.amnesty.org/library/pdf/AMR510521999ENGLISH/\\$File/AMR5105299.pdf](http://web.amnesty.org/library/pdf/AMR510521999ENGLISH/$File/AMR5105299.pdf).

<sup>26</sup> For an extended discussion of this point, see Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton: Princeton University Press, 2004), chap. 2.

<sup>27</sup> John R. Bolton, *Statement to the Plenary Session of the UN Conference on the Illicit Trade in Small Arms and Light Weapons*, July 9, 2001, [http://www.un.int/usa/01\\_104.htm](http://www.un.int/usa/01_104.htm).

apart. As international rights conventions proliferate, as newer states like South Africa adopt new rights regimes and older states like Canada constitutionalize rights in new charters of rights and freedoms, the American Bill of Rights stands out in ever sharper relief, as a late eighteenth-century constitution surrounded by twenty-first-century ones, a grandfather clock in a shop window full of digital timepieces.

There is more to the distinctiveness of American rights culture than the fact that the U.S. Constitution is one of the oldest in existence. As various contributions to this book make clear, U.S. rights guarantees have been employed in the service of a political tradition that has been consistently more critical of government, more insistent on individual responsibility, and more concerned to defend individual freedom than the European socialist, social democratic, or Christian democratic traditions.

Changes in European law have widened the legal gulf that now divides the North Atlantic states. The U.S. legal tradition once shared a great deal with British common law. Thanks to the UK's recent incorporation of the European Human Rights Convention into its domestic law, the British rights system now shares more with the Europeans than with the Americans. The British have accepted the jurisdiction of the European Court of Human Rights; whenever that court hands down a ruling requiring legislative or administrative change, Parliament obliges.<sup>28</sup> Such deference to a transnational legal authority would be unthinkable in the United States. All of this helps to reduce the commonality of the common law tradition and to increase the degree to which American rights culture has become an outlier among the other liberal democracies.

### Explaining American Exceptionalism

Four types of explanation for American exceptionalism have been offered by the scholars in this volume: a *realist* one, based in America's exceptional power; a *cultural* one, related to an American sense of Providential destiny; an *institutional* one, based in America's specific institutional organization; and finally a *political* one, related to the supposedly distinctive conservatism and individualism of American political culture.

#### *Realism*

A *realist* explanation of American exceptionalism would begin with America's exceptional global power since 1945. Exceptionally powerful

<sup>28</sup> A. W. Bradley, "The United Kingdom, the European Court of Human Rights and Judicial Review," *Cardozo Law Review* 17 (1995).

countries get away with exemptions in their multilateral commitments simply because they can. Human rights and humanitarian law instruments are weakly enforced in any event. The United States can exempt itself from the ICC—and try to block its operation—because no other country or group of countries has the power to stop it. No other state has the capacity to sanction the United States if it ducks compliance with the Vienna Law of Treaties, ignores the derogation procedures of human rights conventions, and delays ratification of other treaties for decades.

On a realist account, support for international law and willingness to submit to its constraints would be in inverse relation to a state's power. The less powerful a state, the more reason it would have to support international norms that would constrain its more powerful neighbors. The more powerful a state, the more reluctant it would be to submit to multilateral constraint. Support for international law is bound to be strongest among middling powers like France, Germany, and Canada, democratic states that already comply with multilateral rights norms in their own domestic rights regimes, and that want to use international law to constrain the United States. As Joseph Nye, Jr., has put it, "multilateralism can be used as a strategy by smaller states to tie the United States down like Gulliver among the Lilliputians."<sup>29</sup> Thus for middling powers the cost of their own compliance with human rights and humanitarian law instruments is offset by the advantages they believe they will derive from international law regimes that constrain larger powers. For the United States the calculus is reversed. Moreover, as a country with a substantive commitment to the rule of law, not to mention vigilant human rights NGOs, the United States has to take treaty obligations seriously. Faced with strong domestic NGO lobbies seeking actual compliance with human rights treaties, administrations of both parties have rational reasons to endeavor to minimize the sovereignty constraints introduced by international human rights agreements.<sup>30</sup>

Realist explanations of this sort do help to explain why the United States would want to minimize the constraints imposed on it by a multilateral human rights and humanitarian law regime. A realist would argue that the United States seeks to maintain its power in a global order of states at the lowest possible cost to its sovereignty. In this, it behaves just like other states. The problem with realist explanations is that the United

<sup>29</sup> Joseph S. Nye, "Seven Tests: Between Concert and Unilateralism," *The National Interest* (Winter 2001/2002): 9.

<sup>30</sup> Hathaway, "Do Human Rights Treaties Make a Difference?"; see also Oona Hathaway, "Between Power and Principle: A Political Theory of International Law," *University of Chicago Law Review* 71 (May 2005); for a critique of Hathaway, see Ryan Goodman and Derek Jinks, "Measuring the Effects of Human Rights Treaties," *European Journal of International Law* 14 (2003): 171–83.

States has wanted to do much more than this. It has promoted the very system of multilateral engagements—human rights treaties, Geneva Conventions, UN Charter rules on the use of force and the resolution of disputes—that abridge and constrain its sovereignty. Realism alone cannot account for the paradox of American investment in a system that constrains its power. Strident unilateralism or strict isolationism are easier to explain on realist grounds than is the actual pattern of exceptionalist multilateralism.

### *Culture*

What realism fails to explain is why multilateral engagements that do constrain American power have appealed to American leaders as different as Roosevelt and Reagan. It seems impossible to explain this paradox without some analysis of culture—specifically, of the way in which American leaders have understood the relation between American constitutional values and human rights. Across the political spectrum since 1945, American presidents have articulated a strongly messianic vision of the American role in promoting rights abroad. This messianic cultural tradition has a long history, from the vision of the Massachusetts Bay Colony as a “City upon a Hill” in the sermons of the Puritan John Winthrop, through the rhetoric of Manifest Destiny that accompanied westward expansion in the nineteenth century, the Wilsonian vision of U.S. power making the world safe for democracy after World War I, and Roosevelt’s crusade for the “four freedoms” in World War II.<sup>31</sup> The global spread of human rights has coincided with the American ascendancy in global politics and has been driven by the missionary conviction that American values have universal significance and application. What is important here is the conflict between national interest and messianic mission. Messianism has propelled America into multilateral engagements that a more realist calculation of interest might have led the nation to avoid. In American domestic politics, this sense of mission has refigured the ideal of a multilateral order of international law, not as a system of constraints on U.S. power, but as a forum in which U.S. leadership can be exercised and American intuitions about freedom and government can be spread across the world.

This desire for moral leadership is something more than the ordinary narcissism and nationalism that all powerful states display. It is rooted in

<sup>31</sup> Walter Russell Mead, *Special Providence: American Foreign Policy and How It Changed the World* (New York: The Century Foundation, 2001): see especially chap. 5: “The Connecticut Yankee in the Court of King Arthur: Wilsonianism and Its Mission”; Stephanson, *Manifest Destiny*, chap. 1.

the particular achievements of a successful history of liberty that U.S. leaders have believed is of universal significance, even the work of Providential design. For most Americans human rights are American values writ large, the export version of its own Bill of Rights.

But if human rights are American values writ large, then, paradoxically, Americans have nothing to learn from international human rights. In the messianic American moral project, America teaches the meaning of liberty to the world; it does not learn from others.<sup>32</sup> Messianism does help to explain the paradox of exceptional multilateralism. Indeed, it suggests that American exceptionalism is not so paradoxical after all: since 1945 the United States has explicitly sought to fulfill its messianic mission at the lowest possible cost to its national interest and with the lowest possible impingement upon its own domestic rights system. U.S. policy, across administrations both Republican and Democratic, has been designed both to promote American values abroad and to safeguard them from foreign interference at home.

As Paul Kahn observes in his chapter, this concern to ward off foreign influence is more than just a powerful state's attempt to make the rules and exempt itself from them. The United States defends these exemptions in terms of the democratic legitimacy of its distinctive rights culture. The rights that Americans accept as binding are the ones written down in their own sacred texts and elaborated by their own courts and legislatures. These rights, authored in the name of "we the people," are anchored in the historical project of the American Revolution: a free people establishing a republic based in popular sovereignty. A realist account would explain exceptionalism as an attempt to defend U.S. sovereignty and power. The messianic account adds to this the idea that the United States is defending a mission, an identity, and a distinctive destiny as a free people.

Despite the fact that ratification of international conventions through the Senate is supposed to vest them with full domestic political authority, international human rights law, Kahn argues, continues to lack the full imprimatur of American democratic legitimacy. Only domestic law, authored in American institutions, meets the test of legitimacy as an authentic expression of national sovereignty. This point can be illustrated by the most controversial issue at stake, discussed by Carol Steiker in her contribution, the death penalty statutes enforced in twenty-eight American states. If the people of the state of Texas conscientiously believe that the death penalty deters crime, eliminates dangerous offenders, and gives public expression to the values that ought to hold Texas society to-

<sup>32</sup> Frederick Schauer and Richard H. Pildes, "Electoral Exceptionalism and the First Amendment," *Texas Law Review* 77 (June 1999); Frederick Schauer, *Free Speech: A Philosophical Enquiry* (New York: Cambridge University Press, 1982).

gether—as repeated polls indicate that they do—it is hardly surprising that such majoritarian political preferences should trump international human rights.

The contrast between American and European practice on the death penalty may depend on the institutional power that American voters possess in defining the balance between individual rights and collective moral preferences. Capital punishment has been abolished in most European societies not because electoral majorities support abolition—most polls across Europe indicate continuing support—but because political elites, especially ministers of the interior or home affairs, do not want the moral burden of ordering executions. These moral scruples are in direct contradiction to the expressed preferences of their own citizens.

If this is true, then the European human rights conventions that sustain the abolition of capital punishment are playing an antimajoritarian role in counterbalancing electoral preferences. It seems unlikely that international rights conventions or instruments could ever play such a role in the United States. Rights in America are the rules that a democratic polity constructs to define the scope of public authority. American exceptionalism may be anchored in a fundamental difference with other democratic states about the appropriate relation between rights and majority interests, and in turn the relation between rights and national identity. From an American perspective, rights cannot be separated from the democratic community they serve; they are enforced by that community, and their interpretation must therefore depend solely on the institutions of that community.<sup>33</sup>

America is not the only powerful state that has articulated its identity in terms of its rights and believed in a special mission to export its vision of government. From Napoleon onward, France sought to export its legal culture to neighbors and colonies as part of a civilizing mission.<sup>34</sup> The British Empire was sustained by the conceit that the British had a special talent for government that entitled them to spread the rule of law to Kipling's "lesser breeds."<sup>35</sup> In the twentieth century, the Soviet Union advanced missionary claims about the superiority of Soviet rule, backed by Marxist pseudoscience. Indeed the United States and the Soviet Union each battled for the allegiance of developing nations by advancing messi-

<sup>33</sup> Anne-Marie Slaughter's essay contends that my argument neglects the antimajoritarian decisions in American jurisprudence and thus mischaracterizes the contrast between American law and international human rights.

<sup>34</sup> On the "mission civilisatrice" in the French colonies, see Pascal Blanchard and Sandrine Lemaire, *Culture imperiale, 1931–1961: Les colonies au coeur de la République* (Paris: Editions Autrement, 2004).

<sup>35</sup> Niall Ferguson, *Empire: The Rise and Demise of the British World Order and the Lessons for Global Power* (London: Basic Books, 2002), chap. 3, "The Mission."

anic claims about the universal validity of their own rights systems. The Soviets sought to convince newly independent countries in Africa and Asia of the superiority of Soviet social and economic guarantees, while the Americans insisted that civil and political rights, guaranteeing property and political participation, were the sine qua non of development. It was not until a faltering Soviet regime signed the Helsinki Final Accord in 1976, allowing the formation of human rights NGOs in the Eastern Bloc, that the Soviets effectively admitted that there were not two human rights cultures in the world but one, in which social and economic rights enjoyed equality of status with civil and political ones.<sup>36</sup>

Viewed against this historical perspective, what is exceptional about American messianism is that it is the last imperial ideology left standing in the world, the sole survivor of imperial claims to universal significance. All the others—the Soviet, the French, and the British—have been consigned to the dustbin of history. This may help to explain why a messianic ideology, which many Americans take to be no more than a sincere desire to share the benefits of their own freedom, should be seen by so many other nations as a hegemonic claim to interference in their internal affairs.

The realist account, when combined with the emphasis on American messianic destiny, helps to explain the power dynamics and the distinctive ideology that shaped American participation in the postwar human rights order. But neither the realist account nor the messianic account is sufficiently fine-grained to account for the fact that American policy has changed in the past and may change in the future. American exceptionalism is not set in stone. Neither national interest nor messianic ideology dictates that it will persist forever.

### *Institutions*

A third explanation would get at these fine-grained and contingent features of American exceptionalism by stressing the distinctiveness of American institutions. Frank Michelman points out that judicial review is more strongly entrenched in the American system of government than in any other liberal democracy. With this entrenchment of judicial power goes a strong institutional imperative to safeguard prerogatives of judicial interpretation and keep them immune to foreign influence. Andrew Moravcsik also focuses on institutional factors, stressing the decisive importance of U.S. federalism and the ratification process for treaties in the U.S. Senate.<sup>37</sup>

<sup>36</sup> Daniel C. Thomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism* (Princeton: Princeton University Press, 2001).

<sup>37</sup> See also Andrew Moravcsik, “Why Is US Human Rights Policy So Unilateralist?” in *The Cost of Acting Alone: Multilateralism and US Foreign Policy*, ed. Shepard Forman and Patrick Stewart (Boulder, CO: Lynne Reiner, 2001).



The U.S. system devolves significant powers to the states, meaning that key dimensions of human rights behavior—like punishment—remain beyond the legislative purview of the central state, as they are in many European countries. Even if it wanted to do so, the United States lacks a central instrument to harmonize U.S. domestic law in the light of international standards. Next, the U.S. Senate requires two-thirds majorities for ratification of international treaties, thus imposing a significantly higher bar to incorporation of international law than do other liberal democracies. These institutional features, created by the founders to protect citizens from big government or from foreign treaties threatening their liberties, impose exceptional institutional barriers to statutory and nationwide compliance with international human rights.

In addition to different institutions, the United States has had a distinctive history of political stability, which increases its sense of political self-sufficiency and reduces incentives to stabilize its own institutions with foreign treaties. Moravcsik argues that the United States has never faced fascism or occupation at home or a credible threat of foreign invasion or subversion. What drove the Western Europeans to create the European Convention on Human Rights was the catastrophe of two world wars, followed by the vulnerability of their postwar democracies. A common human rights framework, enforced by a supranational court, was accepted by sovereign states because it was held to “lock in” the stability of the new democratic regimes in Italy, Germany, and France, against both communist subversion and the resurgence of fascism. Thus sovereign European states reluctantly accepted an enforceable transnational human rights regime limiting their sovereignty because it appeared to protect their democratic experiment. The United States had no such incentive to surrender its sovereign prerogatives as a state and has continued to regard transnational international law regimes as potential violations of its democratic sovereignty.

### *Politics*

Beyond these institutional factors, Moravcsik argues that in comparison to post-1945 Europe, American political culture is significantly more conservative and more influenced by evangelical religious minorities on certain key rights issues relating to abortion, family law, women’s rights, and gay marriage. This makes it unlikely that American opinion will ever align with the more liberal international consensus articulated in human rights conventions. The historical strength of American conservatism might qualify as a fourth factor explaining American exceptionalism. It is worth adding, however, that conservatism is not a synonym for isolationism.

Evangelical conservatism has been a driving force behind the cause of religious freedom in China and Sudan. Evangelical conservatism also helped to inspire the intervention in Iraq, configuring it for American domestic consumption as a campaign to bring democracy to the oppressed and unfree.

If America has been more conservative on key human rights issues than Europe, and more inclined toward engagement in issues of religious freedom than more secular Europeans, the next question is whether this conservative orientation is a permanent or a passing difference. Cass Sunstein remarks that the conservative ascendancy in American politics since the late 1960s makes it easy to forget just how strong its ideological competitor—social liberalism and liberal internationalism—used to be. Beginning with Roosevelt’s speech to the 1944 Democratic Convention, calling for a second bill of rights, guaranteeing rights to work, food, housing, and medical care, a liberal political consensus in Congress and in the courts drove toward statutory creation of social and economic entitlements, culminating in the social reform legislation of Lyndon Johnson’s Great Society and the momentous decisions of the Warren Court.<sup>38</sup> At the high-water mark of American liberalism in the mid-1960s, America would not have looked exceptional. The attitudes of its courts and legislatures toward welfare rights and entitlements would have seemed consistent with the European social democratic consensus of the period. Likewise, in that decade, as Steiker points out, America seemed poised to join the abolitionist consensus emerging in the North Atlantic countries. In the international sphere, at least until the Vietnam debacle, there were relatively few criticisms of American exceptionalism among its allies. The United States exercised global leadership through multilateral alliances and treaties. This period of North Atlantic convergence, however, was brief. Sunstein argues that the social revolution of the 1960s produced a conservative counterreaction, beginning with the Nixon administration and the Burger Court, that endures to this day. In international politics, the conservative ascendancy in American politics has been marked, since Ronald Reagan, by a reassertion of nationalist and exceptionalist rhetoric and policy.

The conservative counterrevolution in American politics does help to explain why America’s human rights performance, at home and abroad, has diverged from those of its democratic allies since the 1960s. But there remains a question of whether this is a permanent or a passing phenomenon. If Sunstein is correct, American exceptionalism may wax and wane according to the political fortunes of conservatism and liberalism, evangelicalism and secularism, in American domestic opinion.

<sup>38</sup> See also Cass Sunstein, “Social and Economic Rights? Lessons from South Africa,” *University of Chicago, Public Law and Legal Theory Working Paper* 12 (May 2001).

Already, one key explanatory factor driving American exceptionalism in human rights—America’s particular experience of slavery and racism—may be passing into history. Slavery and segregation made America exceptional among liberal democratic states, and southern politicians led the opposition to American adoption of international rights regimes from the late 1940s to the 1960s.<sup>39</sup> Eisenhower withdrew the United States from participation in the drafting of the International Covenant on Civil and Political Rights in the 1950s largely to appease southern conservative senators. The same politicians who wielded states’ rights arguments against the use of federal power to desegregate the South invoked national sovereignty arguments to resist adoption or implementation of international rights regimes. Conservative southern hostility to the use of federal power to promote civil rights at home extended to the use of international human rights to promote racial equality.<sup>40</sup> This dire historical experience may now be over. In the wake of the success of U.S. federal civil rights legislation, U.S. and international human rights norms on racial equality largely coincide. The United States is rarely in the dock of international opinion on matters of domestic race relations, and the rejectionist stance of southern Democrats and Republicans to international human rights standards on race is losing its political influence.

Southern conservatives, however, are still bastions of opposition to international law. Jesse Helms and other southern senators have fought measures like the ICC while they also oppose conventions on the rights of the child and the elimination of discrimination against women because these appear to impose secular and liberal doctrines about family discipline.<sup>41</sup> The United States is thus alone among liberal democracies in hav-

<sup>39</sup> Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton: Princeton University Press, 2000); Louis Henkin, “U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker,” *American Journal of International Law* 89 (April 1995).

<sup>40</sup> Gay McDougall, “Competing and Concordant Languages: U.S. Civil Rights and International Human Rights” (presentation given at the American Exceptionalism Seminar Series, Carr Center for Human Rights Policy, John F. Kennedy School of Government, Harvard University, Monday, December 9, 2002).

<sup>41</sup> “Remarks of Senator Phil Gramm (R-Tx) at the Christian Coalition’s ‘Road to Victory Conference,’ ” September 8, 1995, *Federal News Service*, available at <http://www.lexis-nexis.com/>; “Hearing of the Senate Foreign Relations Committee to Consider the Nomination of Madeleine Albright to Be Secretary of State: Afternoon Session,” January 8, 1997, *Federal News Service*, available at <http://www.lexis-nexis.com/>; “Hearing of the Senate Foreign Relations Committee Subject: Nomination of Bill Richardson to Be U.S. Ambassador to the United Nations,” January 29, 1997, *Federal News Service*, available at <http://www.lexis-nexis.com/>; Elisabeth Gusdek-Peterson, “Parental Rights Are Fundamental Human Rights,” in *Fifty Years after the Declaration: The United Nations’ Record on Human Rights*, ed. Teresa Wagner and Leslie Carbone (Washington, DC: Family Research Council, 2001); William Saunders, “Address to the World Congress of Families” (Washington, DC, October

ing a strong domestic political constituency opposed to international human rights law on issues of family and sexual morality. The same constituency has succeeded in turning the ICC into an issue of patriotism—that is, a question of how to preserve U.S. service personnel from vexatious international prosecutions by anti-American foreign prosecutors.<sup>42</sup> For the moment at least, the domestic conservative forces that have made America exceptional remain in the ascendant.

### Evaluating American Exceptionalism

If the previous analysis is correct, then current American exceptionalism, therefore, is fundamentally explained by the weakness of American liberalism. American commitment to international human rights has always depended on the political fortunes of a liberal political constituency, and as these fortunes have waxed and waned, so has American policy toward international law.

The first question in evaluating American exceptionalism is whether it is likely to be an enduring or a passing feature of American involvement in the international order. The contributors to this volume disagree on this matter. Sunstein emphasizes contingency, the unique combination of factors that produced the conservative counterrevolution of the sixties. If exceptionalism in social and economic rights is tied to this alone, then there is good reason to think that the tide of political opinion will turn. Such a view might draw further confirmation from Carol Steiker's essay on the death penalty: she notes that far from always having been in favor of capital punishment, the United States had joined in the abolitionist tide moving through other liberal democracies, like Canada, the UK, Germany, and France, and reversed itself only in the 1970s. This suggests that

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26–27, 2001), [http://www.efamilyaction.org/wcf/William\\_Saunders.htm](http://www.efamilyaction.org/wcf/William_Saunders.htm); Doug Domenech, “Hands Off Our Children,” *National Review Online*, June 11, 2001, <http://www.nationalreview.com/comment/comment-domenech061101.shtml>; “The New World Order Wants Your Children,” *Phyllis Schlafly Report* (Eagle Forum, March 1993), <http://www.eagleforum.org/psr/1993/mar93/psrmar93.html>; “Hearing of the House International Relations Committee Subject: International Efforts to End Discrimination against Women,” May 3, 2000, *Federal News Service*, available at <http://www.lexis-nexis.com/>; “Hearing of the Senate Foreign Affairs Committee Subject: Religious Freedom,” May 12, 1998, *Federal News Service*, available at <http://www.lexis-nexis.com/>; National Center for Home Education, “Oppose the United Nations Convention on the Elimination of All Forms of Discrimination against Women,” December 13, 1999, <http://nche.hslsda.org/docs/nche/000000/00000024.asp>.

<sup>42</sup> In 2000, Tom DeLay (R-TX) and Floyd Spence (R-SC) introduced the American Serviceman's Protection Act. Jesse Helms (R-NC) and John W. Warner (R-VA.) introduced the Senate version of the bill.

death penalty exceptionalism may not be as enduring as America's current outlier position might imply.

Other contributors also think American exceptionalism may be a passing phenomenon, but they do so for different reasons. Anne-Marie Slaughter, John Ruggie, and Frank Michelman focus on the rapid growth of transnational networks that have emerged to address problems that can't be resolved solely within national jurisdictions. These networks—anchored within the UN, the WTO, the European Union, and other international frameworks—are drawing American lawyers, NGOs, and policy makers into an ever tighter web of negotiations and deal making on issues ranging from human rights, to climate change, to corporate social responsibility, international trade, company law, and market regulation. Slaughter argues that the United States cannot remain disengaged from these developments. It will have ever stronger incentives to become less exceptional, to align its laws, markets, trade practices, and even its domestic rights with those of other states. Some of its most urgent national security problems, like terrorism, cannot be solved unilaterally and require ever closer multilateral cooperation with other states. Exceptionalism, in other words, may be out of step with globalization and with the convergence of state interests and practices in an interdependent world.

Other contributors, especially those who stress the historical distinctiveness of American institutions and rights, are skeptical that globalization equals convergence. Frederick Schauer sees no evidence that as America interacts with the free speech doctrines of other democratic states, its First Amendment doctrine will begin to change. Nor does he see any evidence that other nations are converging toward American norms in free speech and defamation law. Andrew Moravcsik, likewise, sees no evidence that the differences of institutional history and political culture between the United States and Europe are diminishing. Increasing integration of economic and security policy across the North Atlantic does not necessarily produce convergence in political vision or rights policy. Finally, Paul Kahn is probably the most intransigent believer in the unchanging nature of American exceptionalism. In his analysis, exceptionalism will endure because it is so deeply tied to the American commitment to sovereignty as an ideal of republican self-rule born of a revolutionary act of national self-creation.

Whether exceptionalism is an enduring or a passing phenomenon, it remains to determine whether it is a good or a bad thing. Here too the contributors divide sharply and so has academic debate.

From the 1950s through the 1970s, the liberal academic consensus held American exceptionalism to be a very bad thing indeed. The liberal international lawyers, like Thomas Franck and Louis Henkin, who believed passionately in America's role as a creator of international law, regarded

American withdrawal from the international human rights drafting table from 1953 onward with unqualified dismay.<sup>43</sup> They believed that international law could not develop without American leadership, and they believed that the international order should reflect American values. Yet this liberal consensus never went unchallenged. It always faced opposition from an influential strand of conservative and nationalist legal thinking, represented in the American Bar Association, some of whose chief members, suspicious of international law and of international organizations, led the opposition to the Genocide Convention and other international agreements.<sup>44</sup> Beginning in the 1980s, a conservative legal counterattack gained ground, taking a strongly Americanist or nationalist view of international law. Academic lawyers like John Bolton, Jeremy Rabkin, and Jack Goldsmith questioned the liberal assumption that American rights conduct needed to measure up to international standards.<sup>45</sup> By 2000, the conservative nationalist consensus had influential support inside the George W. Bush administration, and their influence helped to drive the administration's fierce opposition to the ICC, its withdrawal from Kyoto, and even its insistence that the United States had the right to interpret the Geneva Conventions and the Torture Convention as it pleased. For conservative nationalists, the most powerful state cannot be tied down, like Gulliver, by international human rights norms. Its effectiveness as a world leader depends on being free of such constraints. Besides, its rights performance at home does not stand in need of lessons from abroad. The conservatives did more than defend American national pride and national interest. They raised a key argument of principle: why should a republic, based in the rule of law, be constrained by international agreements that do not have the same element of democratic legitimacy?

In addition to a "nationalist" justification for exceptionalism, conservatives offer a "realist" argument as well. Far from being a problem, excep-

<sup>43</sup> Henkin, "U.S. Ratification of Human Rights Conventions"; Thomas M. Franck, "Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh's Optimism," *Houston Law Review* 35 (1998).

<sup>44</sup> See, for example, John Norton Moore, *Treaty Interpretation, the Constitution, and the Rule of Law* (Dobbs Ferry, NY: Oceana Publications, 2001); Phillip R. Trimble, "A Revisionist View of Customary International Law," *UCLA Law Review* 33 (February 1986).

<sup>45</sup> Jack Goldsmith, "International Human Rights Law and the US Double Standard," *Green Bag* 1 (1998); Jack Goldsmith, "Should International Human Rights Law Trump US Domestic Law?" *Chicago Journal of International Law* 1 (2000); Jack Goldsmith and Curtis Bradley, "Treaties, Human Rights, and Conditional Consent," *Pennsylvania Law Review* 149 (2000); John R. Bolton, "Downer Is Right to Tell the UN to Get Lost," *Australian Financial Review*, August 31, 2000; John R. Bolton, "Flaws Undermine Concept," *USA Today*, January 18, 2000; Jeremy Rabkin, *Why Sovereignty Matters* (Washington, DC: AEI Press, 1998).

tionalism might be a solution. By signing on to international human rights, with reservations and exemptions, by refusing to be bound by agreements that would constrain its sovereignty, the United States manages to maintain leadership in global human rights at the lowest possible cost to its own margin of maneuver as the world's sole superpower.<sup>46</sup> Exceptionalism, therefore, achieves a balance: the United States remains within the framework of international human rights law, but on its own terms. Given its preponderant power—and therefore its exceptional influence in the global order—it can dictate these terms. The rest of the world can choose to concede these exceptional terms, or to see the United States stand aside and take either a unilateralist or an isolationist turn. Exceptionalism is the functional compromise, therefore, that enables America to be a multilateral partner in the human rights enterprise.

A liberal internationalist would reply that if America wants to be a human rights leader, it must be consistent. It must obey the rules it seeks to champion. Leadership depends on legitimacy and legitimacy requires consistency. Certainly double standards increase resistance to American leadership, whether the issue is Palestine or Iraq. Double standards also diminish the lure of American example. But the argument that American exceptionalism is a costly mistake cannot be pushed too far. The fact that the United States exempts itself from some international norms does not diminish its capacity to enforce others. U.S. resistance to a permanent criminal court did not preclude its supporting the Hague tribunal or using its influence with Serbia to bring Slobodan Milošević to justice. In Iraq, the United States behaved in an exceptional and unilateralist manner, but the overthrow of the Ba'athist regime was a substantively just outcome. If it had bowed to world opinion on the use of force, a rights-violating regime would still be in power. Multilateralism is a good thing, therefore, only if it produces substantively just results.

Nor has American exceptionalism prevented the development of international human rights and humanitarian law. Other states have taken the lead in developing the ICC statute, and the Land Mines Treaty is in existence despite U.S. opposition. The European Convention on Human Rights did not wait for American inspiration. Of course, there are limits to what other states can achieve when the world's most powerful state opposes or refuses to engage. But equally, American leadership has not proven as crucial, nor its opposition as damaging, to international law as either American internationalists or their European allies are prone to believe.

<sup>46</sup> Goldsmith, "International Human Rights and the US Double Standard." See also Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005), chap. 4.

As John Ruggie points out, American opposition cannot stop multilateral transnational institutions and problem-solving networks from emerging. America may be exceptional in its illusion that it can exempt itself from these processes, but this, Ruggie argues, would be to swim against the tide of increasing international cooperation to master the problems that national governments cannot master on their own. So whether exceptionalism is a good or a bad thing, it may impose increasing costs on the United States in a globalizing world.

Exceptionalism can also directly damage U.S. national security interests. Stanley Hoffmann argues that America's unilateral arrogance in Iraq has alienated friends, made needless enemies, forced the United States to go it alone, and increased the cost of its projection of power overseas. To this might be added the evidence from Abu Ghraib prison. A country that thinks it is too virtuous, too exceptional, to pay respect to the Geneva Conventions and begins to write its own rules about detention, interrogation, and special status can end up violating every value it holds dear. In other words, what Jefferson called "decent respect for the opinions of mankind"—voluntary compliance with international humanitarian law and human rights law—may be essential for the maintenance of American honor and its own values overseas.

Human rights exceptionalism, especially double standards, may also end up endangering U.S. security. America's Iraq policy over the past twenty years demonstrates that when the United States supports authoritarian regimes, ignoring their human rights performance, these authoritarian rulers can metamorphose into a national security threat. Ignoring the rights behavior of Saddam Hussein in the 1980s turned out to be a disaster for U.S. interests in the Gulf region, as did turning a blind eye to the abuses of Sukarno of Indonesia. Pressuring them, before it was too late, to make changes, or quarantining them as a future danger, would have paid better dividends to U.S. security than keeping quiet about their abuses. Reducing double standards requires rethinking the supposed conflict between human rights and security interests. If U.S. policy consistently used human rights standards as a predictor of internal stability and external dangerousness, it would make better national security judgments about whom to trust and whom it can rely on. If it used its security relationships to pressure regimes toward better human rights performance, it would contribute something to stabilizing the regions where U.S. security interests are at stake.

This complementarity between human rights and national security interests is acknowledged, at least at the rhetorical level, in the national security policy of the George W. Bush administration. President Bush's speech in 2003 to the National Endowment for Democracy contends that America's national security interests in the Arab world depend upon the



promotion of women's rights, political participation, and market reforms.<sup>47</sup> It is by no means certain that this rhetoric will be transformed into practice, or even whether it can be. What is certain is that turning a blind eye to the human rights abuses rampant in the Arab regimes has eroded U.S. influence by rendering the United States complicit with regimes that have lost the confidence of their people.

Finally, any evaluation of American exceptionalism fundamentally expresses a certain preference for a certain type of America. Those who wish America were less exceptional are actually expressing the desire for it to be a certain kind of good international citizen, one bound, despite its exceptional power, by multilateral definitions of appropriate state responsibility toward its citizens and rules relating to the use of force against other states. The virtue of this multilateral identity is that it would make America more attractive to itself, a benevolent superpower voluntarily restricting its sovereignty for the sake of the greater global good.

The question to ask of this benevolent liberal internationalism is whether it has any sustained electoral appeal among the American public. Under Franklin Roosevelt's leadership, this image was briefly anchored in a constituency of political support. But the fate of this image of American identity has been tied to the fortunes of American liberalism, and these fortunes have not fared well in the past thirty years. For now a liberal multilateralism is more liberal than most Americans would be comfortable to be: against the death penalty, in favor of allowing American citizens to be tried in international courts, and in favor of surrendering some freedom of maneuver to the United Nations. The country that is often called the last fully sovereign nation on earth has yet to be convinced that it stands to gain from this identity.

## Conclusion

As a language of moral claims, human rights has gone global by going local, by establishing its universal appeal in local languages of dignity and freedom. As international human rights has developed and come of age, not much attention has been paid to this process of vernacularization. We must ask whether any of us would care much about rights if they were articulated only in universalist documents like the Universal Declaration, and whether, in fact, our attachment to these universals depends critically on our prior attachment to rights that are national, rooted in the tradi-

<sup>47</sup> President George W. Bush, "Remarks by the President at the 20th Anniversary of the National Endowment for Democracy" (United States Chamber of Commerce, Washington, DC, November 6, 2003), <http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html>.

tions of a flag, a constitution, a set of founders, and a set of national narratives, religious and secular, that give point and meaning to rights. We need to think through the relation between national rights traditions and international standards, to see that these are not in the antithetical relation we suppose. American attachment to its own values is the condition and possibility of its attachment to the universal, and it is only as the universal receives a national expression that it catches the heart and the conviction of citizens.

American exceptionalism lays bare the relation between the national and the universal in the rights cultures of all states that have constitutional regimes of liberty. The question is what margin of interpretation should be allowed these nations in their human rights performance, and what margin shades into a permissive surrender of those values that should be universal for all nations. If all nations are, at least to their own citizens, exceptional, we want an international rights culture that welcomes, rather than suppresses, authentic national expressions of universal values. Americans will not believe any truths to be self-evident that have not been authored by their own men and women of greatness, by Jefferson and Lincoln, Martin Luther King, Jr., and Sojourner Truth. The American creed itself—because it speaks so eloquently of the equality of all peoples—enjoins Americans to deliberate, to listen, to engage with other citizens of other cultures. This is what a modern culture of rights entails, even for an exceptional nation: to listen, to deliberate with others, and if persuasive reasons are offered them, to alter and improve their own inheritance in the light of other nations' example. The critical cost that America pays for exceptionalism is that this stance gives the country convincing reasons not to listen and learn. Nations that find reasons not to listen and learn end up losing.