

2018

## America's Relation to World Order: Two Indictments, Two Thought Experiments, and a Misquotation

Philip C. Bobbitt  
*Columbia Law School*, [pbobbi@law.columbia.edu](mailto:pbobbi@law.columbia.edu)

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty\\_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

Philip C. Bobbitt, *America's Relation to World Order: Two Indictments, Two Thought Experiments, and a Misquotation*, 1(4) *TEX. NAT'L SEC. REV.* 57 (2018).

Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/3780](https://scholarship.law.columbia.edu/faculty_scholarship/3780)

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact [scholarshiparchive@law.columbia.edu](mailto:scholarshiparchive@law.columbia.edu), [rwitt@law.columbia.edu](mailto:rwitt@law.columbia.edu).



# ***America's Relation to World Order: Two Indictments, Two Thought Experiments, and a Misquotation***

**Philip Bobbitt**

Texas National Security Review: Volume 1, Issue 4 (August 2018)

Print: ISSN 2576-1021 Online: ISSN 2576-1153



The State is undergoing a crisis of legitimacy owing to its inability to cope with novel problems of weapons proliferation, transnational threats including climate change, a fragile global financial infrastructure, cultural influences carried by electronic communications, and an undemocratic regime of human rights law. These fatal inadequacies are summoning forth a new constitutional order, the latest in a series of century-spanning archetypal regimes that have arisen since the Renaissance and the collapse of feudalism. A backlash against the harbingers of this new order, however, is crippling the development of those modes of action that are required to deal with the underlying crisis. In the United States, this crippling reaction has operated in tandem with a formidable critique of America's right to lead an international order that has brought unprecedented prosperity and low levels of warfare to the world. This backlash is as much a reaction to the critique of the United States' political and cultural heritage as it is to the governing techniques that are harbingers of this new constitutional order. Only a restoration of faith in America's constitutional and strategic heritage — its exceptional ethos — will make possible the preservation of liberal traditions of governing in the new world that is being born. To accomplish this, we must answer the critiques by identifying what is the animating American quality that entitles the United States to compete for leadership.

Within states, the rise of populist, illiberal movements in the democracies of the West<sup>1</sup> and the increasing authoritarianism of China<sup>2</sup> at first appear to be unrelated developments. In the West, governments are losing their prestige, while the stature of China's government has never been higher. The condition of Russia's autocracy, meanwhile, continues to plunge. Its economy is growing weakly, and for the fourth year in a row life expectancy has declined. Yet the self-confidence and public approval of the Russian regime appear high. Surely these developments are so various that they could not be related to one another.

Internationally, too, things seem to be moving in different directions. For the first time since the founding of the institutions of the current, post-World War II order, a European state has invaded a member of the United Nations and annexed its territory.<sup>3</sup> An East Asian state has relentlessly developed nuclear weapons in defiance of U.N. Security Council resolutions<sup>4</sup> and has successfully tested an intercontinental ballistic missile<sup>5</sup> in a campaign to expand its territory through the reunification of the Korean Peninsula. In contrast to these centralizing acts of aggression, a leading

state has defected from the European Union<sup>6</sup> and secessionist movements are active in several other E.U. member states.<sup>7</sup> To complicate matters, the unity and cohesion of the North Atlantic Alliance is in crisis.<sup>8</sup> Surely these upheavals are so contradictory that their causes could not be similar.

Many thoughtful commentators have observed that the apparent retrenchment of the liberal world order is a consequence of developments in the international system: the end of bipolarity,<sup>9</sup> the abandonment of Bretton Woods,<sup>10</sup> the weakening of U.N. Charter rules against intervention,<sup>11</sup> the rise of global terror groups,<sup>12</sup> the upsurge in the number of economic and political refugees,<sup>13</sup> and the novel policies of the Trump administration.<sup>14</sup> These writers are not wrong, exactly, but they have gotten the origins and dynamics of the breakdown of the liberal world order wrong: It's not that these changes in the international order have prompted reactions in the countries that have commenced trade wars, weakened security alliances, and the rest. Rather, it's that changes in the *constitutional order* of the constituent states of the international system have led to decisions and actions that are dismantling the world order that has been in place

1 E.g. the Front National in France (see James McAuley, "As France's Far-Right National Front Rises, Memory of Its Past Fades," *Washington Post*, Jan. 26, 2017, [https://www.washingtonpost.com/world/as-frances-far-right-national-front-rises-memory-of-its-past-fades/2017/01/26/dfeb0d42-e1ac-11e6-a419-eefe8eff0835\\_story.html](https://www.washingtonpost.com/world/as-frances-far-right-national-front-rises-memory-of-its-past-fades/2017/01/26/dfeb0d42-e1ac-11e6-a419-eefe8eff0835_story.html)), the M5S in Italy, the ÖVP and FPÖ in Austria (see Jon Henley, "Rise of Far-Right in Italy and Austria Gives Putin Some Friends in the West," *Guardian*, June 7, 2018, <https://www.theguardian.com/world/2018/jun/07/rise-of-far-right-in-italy-and-austria-gives-putin-some-friends-in-the-west>), and the U.K. Independence Party (UKIP) in Britain (see Alex Hunt, "UKIP: The Story of the UK Independence Party's Rise," *BBC.com*, Nov. 21, 2014, <https://www.bbc.com/news/uk-politics-21614073>).

2 See Xi Jinping's removal of presidential term limits (Steven Lee Myers, "With Xi's Power Grab, China Joins New Era of Strongmen," *New York Times*, Feb. 26, 2018, <https://www.nytimes.com/2018/02/26/world/asia/china-xi-jinping-authoritarianism.html>) and China's massive and invasive domestic surveillance program (James A. Millward, "What It's Like to Live in a Surveillance State," *New York Times*, Feb. 3, 2017, <https://www.nytimes.com/2018/02/03/opinion/sunday/china-surveillance-state-ughurs.html>).

3 Steven Lee Myers and Ellen Barry, "Putin Reclaims Crimea for Russia and Bitterly Denounces the West," *New York Times*, March 18, 2014, <https://www.nytimes.com/2014/03/19/world/europe/ukraine.html>.

4 Alex Beuge et al., "A Guide to North Korea's Advance Towards Nuclear Weapons," *Guardian*, Nov. 29, 2017, <https://www.theguardian.com/world/2017/sep/11/how-has-north-koreas-nuclear-programme-advanced-in-2017>.

5 Josh Smith, "How North Korea's Latest ICBM Test Stacks Up," *Reuters*, Nov. 28, 2017, <https://www.reuters.com/article/us-northkorea-missiles-technology-factbo/how-north-koreas-latest-icbm-test-stacks-up-idUSKBN1DT0IF>.

6 Letter from U.K. Prime Minister Theresa May to E.U. President Donald Tusk, March 29, 2017, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604079/Prime\\_Ministers\\_letter\\_to\\_European\\_Council\\_President\\_Donald\\_Tusk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf).

7 Will Martin, "This Map Shows the European Regions Fighting to Achieve Independence," *Independent*, Oct. 2, 2017, <https://www.independent.co.uk/news/world/politics/map-european-regions-fighting-for-independence-vote-europe-countries-state-a7979051.html>.

8 See, among many commentators, Robert Kagan, "Things Will Not Be Okay," *Washington Post*, July 12, 2018, [https://www.washingtonpost.com/opinions/everything-will-not-be-okay/2018/07/12/c5900550-85e9-11e8-9e80-403a221946a7\\_story.html](https://www.washingtonpost.com/opinions/everything-will-not-be-okay/2018/07/12/c5900550-85e9-11e8-9e80-403a221946a7_story.html).

9 Alan S. Alexandroff and Andrew F. Cooper, eds., *Rising States, Rising Institutions: Challenges for Global Governance* (Brookings Institution Press, 2010).

10 Richard Hurowitz, "What We Can Learn From Bretton Woods," *Weekly Standard*, July 1, 2017, <https://www.weeklystandard.com/richard-hurowitz/what-we-can-learn-from-bretton-woods>. See also G. John Ikenberry, "The End of Liberal International Order?" *International Affairs* 94, no. 1 (January 2018): 7–23, <https://doi.org/10.1093/ia/iix241>.

11 Jayshree Bajoria and Robert McMahon, "The Dilemma of Humanitarian Intervention," *Council on Foreign Relations*, June 12, 2013, <https://www.cfr.org/background/dilemma-humanitarian-intervention>.

12 See, e.g., Janet Daley, "Islamic Terror Could Kill Off the West's Liberal Values," *Telegraph*, July 30, 2016, <https://www.telegraph.co.uk/news/2016/07/30/islamist-terror-could-kill-off-the-liberal-values-of-the-liberal/>.

13 "Figures at a Glance," U.N. High Commissioner for Refugees, June 19, 2017, <http://www.unhcr.org/en-us/figures-at-a-glance.html>.

14 Kori Schake, "The Trump Doctrine Is Winning, and the World Is Losing," *New York Times*, June 16, 2018, <https://www.nytimes.com/2018/06/15/opinion/sunday/trump-china-america-first.html>.

since 1949.<sup>15</sup>

All these developments are, in fact, related to the deep change in the State that is underway. Nowhere is this more evident than in the United States, the leading industrial nation-state and the chief architect and defender of the current world order. It is no coincidence that the United States is not alone in experiencing the traumatic unsettling of its constitutional order, but it is difficult to understand the steady weakening of the international order without grasping first what is happening within America.

## I. American Exceptionalism

American exceptionalism is usually defined as the rather preening claim that the United States is uniquely virtuous or wise. This is the inference doubtless intended by Ronald Reagan's speechwriter who bowdlerized John Winthrop's address to his fellow pilgrims about "a shining city on a hill."<sup>16</sup> This is also probably what President Barack Obama had in mind when he stated that all countries are exceptional<sup>17</sup> — that is, he didn't mean that they are all paragons but, rather, he wanted to avoid offense by giving out a trophy to every team member who showed up.

If the United States *is* exceptional, what is it an exception to? "The exception provides the rule" because it delimits the boundaries of the rule's application. To what rule does America's exception then provide a boundary?<sup>18</sup> The most famous remark in the study of the State and the exceptions to its rules was made by Carl Schmitt, who wrote, "Sovereign is he who decides on the exception."<sup>19</sup> That, presumably, is because determining the exception provides the limit of the application of the rule and determining rules and their application is the prerogative of the sovereign.

That brings us to the first step in the analysis of "American exceptionalism." By this hackneyed phrase I do not mean what makes the United

States so much better than other states but rather what makes America so *American*, as opposed to Japanese or South African, and thus the answer must be a cultural, contingent one. If it is true that he who is sovereign determines what is exceptional, then it is striking that it is the United States' innovative ideas about sovereignty that define the American state and what makes the United States a constitutional outlier among states.

The U.S. Constitution reflects the idea that the State is a limited sovereign: There are certain inalienable powers that are reserved to the People and cannot be delegated to the State. Therefore, the State's power rests on a compact with the empowering people, a contract whose terms limit the scope of the state's potential as well as its actual authority. As a rule of sovereignty, it might be thought oxymoronic to proclaim a limited sovereign that cannot determine the extent of its own powers. Yet this is precisely what makes the government of the United States exceptional: It cannot determine the boundaries of its authority — these are set by the U.S. Constitution — beyond recognizing that there are some boundaries it cannot cross. This explains the unusual powers given to lawyers and courts in the American system: The rule of law is not merely an instrument of the State but the basis for determining its scope.

It is all too common to neglect this remarkably innovative feature of the American state. Louis Hartz, among others, once argued that American constitutional ideas derived from those of John Locke.<sup>20</sup> For Locke,

equality is natural to human beings because at a minimum all people own the same property: their labor. Freedom is preferable to authoritarianism because the best governments are those that win the consent of the people. Religious toleration is a good idea because faiths that are free will be stronger than those that are coerced.<sup>21</sup>

15 For a history of the constitutional orders of the modern state, see Philip Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* (New York: Knopf, 2001). Industrial nation-states first appeared in the last third of the 19th century and by the end of World War I had largely supplanted the imperial state nations of the great powers that dominated the 19th century. We still live within this constitutional order, but elements of its challenger, the informational market state, are already evident — for examples, see Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* (New York: Knopf, 2008) — and have provoked the backlash to which I refer. This essay is not about a new constitutional order, nor is it principally about the backlash that is taking place in many societies. Rather it is about the role of the United States in managing this transition in the face of powerful critiques of its past actions.

16 Ronald Reagan's election-eve address, "A Vision for America," Nov. 3, 1980, <http://www.presidency.ucsb.edu/ws/?pid=85199>.

17 "I believe in American exceptionalism, just as I suspect that the Brits believe in British exceptionalism and the Greeks believe in Greek exceptionalism," Obama said in an April 4, 2009, news conference. White House transcript is available at: <https://obamawhitehouse.archives.gov/the-press-office/news-conference-president-obama-4042009>.

18 All persons born in the United States are eligible to serve as president, except those who would be younger than age 35 when inaugurated. The exception provides the rule that one must be 35 years of age to be president.

19 Carl Schmitt, *Politische Theologie*, 8th ed. (1934), ch. 113 ("Souverän ist, wer über den Ausnahmezustand entscheidet").

20 See, generally, Louis Hartz, *The Liberal Tradition in America* 2nd ed. (Wilmington, MA: Mariner Books, 1991).

21 Alan Wolfe, "Nobody Here but Us Liberals," *New York Times*, July 3, 2005, <https://www.nytimes.com/2005/07/03/books/review/nobody-here-but-us-liberals.html>.

Well, not exactly. Precisely because all people do not own the same property, or rather the property they do own, their labor, has value that varies enormously from person to person, from time to time, from place to place, it is hard to ground equality in the material endowments of human beings. Rather, what made equality seem “natural” in the Western liberal tradition is that all peoples’ natures were held equally subject to divine judgment, redemption, and salvation, a concept that would be nonsensical if every person were not endowed with the freedom of conscience, on the basis of which he or she is to be judged. One might say “all men are created equal because they are endowed by their Creator with certain inalienable rights.” The equality enshrined in the Declaration of Independence — a document that provides the basis for the U.S. Constitution — is said to be “self-evident,”<sup>22</sup> the Creator of mankind having determined that it is to be so.

Freedom is not preferable to authoritarianism because the “best” governments win the consent of the people. The term “best” is too vague to support this assertion and can be easily manipulated to prove the opposite proposition (as it often has been). Rather, freedom is preferable to authoritarianism because coercion is incompatible with the exercise of the conscience, which is the ultimate basis for constitutional decision-making in America.

Religious toleration is a good idea not because faiths that are free will be stronger than those that are coerced. Much of the history of Christianity and Islam seems to prove just the opposite. Rather, religious toleration is preferable to intolerance because intolerance suppresses the ability to determine facts and also suppresses the faculties of reflection and reconsideration, all of which are essential attributes of the individual conscience if it must make judgments for which it will be held accountable.

A recent essay on the U.S. Constitution concluded,

Far from [being] a blueprint for democracy, the Constitution kept real power away from ordinary people while protecting wealthy investors and slave-owners. It had nothing to do with human rights or social equality.<sup>23</sup>

In reality, the U.S. Constitution explicitly provides a blueprint for democracy by creating republican structures far more democratic than

anything else at the time and that were designed to protect democracy by enabling it to defend itself against imperial opponents and to keep it from decaying into license and anarchy. Unlike the laws in other states of the late 18th century, the U.S. Constitution does not exempt aristocrats from taxation. To observe that it has “nothing to do with human rights” or equality reveals how little the writer understands the complexity of his subject, in which rights are often inferred from affirmative grants of power — that is, when the rule provides its exception.

Such assertions as the one I have quoted, which would have been trite in Charles Beard’s day, are today part of a more general war on the legacy of America’s constitutional history. That war — and that legacy — will be discussed presently. For now, I will take up briefly just why the Constitution, in fact, has everything to do with human rights and equality. To do this will require going beyond the customary claims that the historiography of America’s founding pits liberalism and human rights against republicanism and state power.

As I have suggested, the liberal, human rights consensus in America regarding the constitutional status of property rights, social mobility, individual freedom, and popular democracy arose from shared commitments to the decisive role of the conscience in determining the individual’s fate. This might more aptly be called the “Protestant ethic,”<sup>24</sup> which is incompatible with insecure property rights and promises, rigid and inherited class boundaries, and coercive rules that suppress individual expression. It is similarly incompatible with the derivation of legitimate governmental authority from traditions and processes that privilege the few while denying the many equality before the law.

In a review tracing the historiography of America’s founding, Michael Millerman described this founding as “Lockean Liberalism versus Republicanism.” According to Millerman, Lockean liberalism

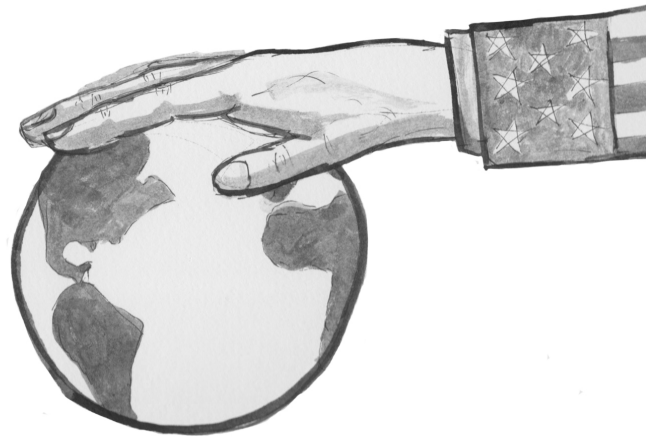
insists that America was founded on principles that recognize an abstract, natural right to life, liberty, property, and the pursuit of one’s private happiness. These natural rights are liberties that define a private sphere, to be protected from government interference. By contrast, [some argue that] Republicanism informed the Founders’ vision of what America is and should be.

22 Declaration of Independence, 1776, para. 2.

23 J.M. Opal, “America Should Never Be ‘Great Again,’” *Time*, April 5, 2017, <http://time.com/4726868/donald-trump-america-great-again-myth/>.

24 Max Weber, *Die protestantische Ethik und der Geist des Kapitalismus* [The Protestant Ethic and the Spirit of Capitalism] (1905).

Republicanism elevates such notions as, 'the common good,' and 'the public sphere' above those of, 'individual liberties' and, 'private happiness.' Indeed, it can justify infringing on the latter for the sake of the former. Hence it is in conflict with Lockean liberalism.<sup>25</sup>



To anchor this in sacred American texts, it is often claimed that the liberal (Lockean) Declaration of Independence conflicts with the Republican (Machiavellian) Constitution.<sup>26</sup>

This antinomy between liberalism and republicanism may indeed be relevant to British thought, where popular sovereignty is fully vested in the State and human rights are expressly granted, as in the Magna Carta. But it gets wrong the American constitutional settlement and its most important element: that the purpose of putting the State under law is to protect human rights, and that the protection of human rights requires that the State treat its citizens equally. America's peculiar constitutional innovation is to create a partial sovereign, removing from the State and irrevocably vesting in the People the power to determine the exception to the rules that govern the State. This constitutional structure implies an infinite list of human rights — actions that cannot be taken by the State — that can be inferred from the limited grant of governmental powers. A structure of enumerated powers, where any power not permitted is prohibited, necessarily implies a complement of unenumerated rights. This means the republic enlists Americans' energies and its collective efforts and mutual obligations on behalf of individual rights. America is neither a conservative nor a liberal state but a state that seeks to conserve a liberal tradition. This is the American constitutional ethos.

To understand this, we must see the Constitution as the embodiment, the instantiation, of the Declaration of Independence. Like most law students of my generation, I used to think that the Declaration of Independence had no legal status because it was not ratified like the Constitution. On this, as in so many things, the late Charles Black turned me around. I came to realize that the 1787 Constitution sought to create a state that was based

on the Declaration, a state structure that could more perfectly execute the ideas of the Declaration than could the Articles of Confederation. Thus, the ratification of the Constitution also amounted to the ratification of the Declaration, *nunc pro tunc*. Indeed, this is why Abraham Lincoln alludes to the Declaration of Independence ("Four score and seven years ago") when he makes the constitutional argument to refute secession. This also explains why the Declaration is a rich source for ethical argument — one of the six fundamental modalities of constitutional argument that collectively form the standard model taught today in first-year law classes<sup>27</sup> — just as the *Federalist Papers* are an abundant source for historical argument or the *U.S. Reports* for doctrinal argument.

Ethical argument — the argument from the American constitutional ethos — is sometimes called "the argument from tradition." This fits with my thesis that it is a liberal, human rights tradition that is conserved by the bulwarks and bastions, the watchtowers, moats, and high walls of America's constitutional architecture. Indeed, you might say that the oath "to preserve, protect, and defend" is a pretty good metonym for "to fortify."

The American constitutional ethos is the United States' unique paradigm of the liberal tradition that flows from the Reformation and the decisive role the liberal tradition gives to the individual

25 Michael Millerman, "The Historiography of America's Founding: Lockean Liberalism versus Republicanism," *Telos*, July 16, 2013, <http://www.telospress.com/the-historiography-of-americas-founding-lockean-liberalism-versus-republicanism/>.

26 See, e.g., Luigi Marco Bassani, "The Bankruptcy of the Republican School," *Telos* 124 (Summer 2002): 131–57.

27 See generally Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford University Press, 1982), and Philip Bobbitt, *Constitutional Interpretation* (Hoboken, NJ: Blackwell, 1992). The six fundamental forms of constitutional argument — or "modalities" of argument, as they are sometimes called — are: historical, textual, doctrinal, structural, prudential, and ethical.



conscience. If this tradition is prefigured in the late Renaissance<sup>28</sup> and the early Reformation,<sup>29</sup> then one might say that communism, with its focus on scientific orthodoxy and prediction, is a child of the Enlightenment two centuries later and that fascism, with its focus on the genetic basis for nationalism and collective behavior, is a child (if an illegitimate one) of Darwinian biology a century after that. The materialism of both these legacies is fundamentally incompatible with human consciousness (as Thomas Nagel has recently argued<sup>30</sup>) and thus with the role assigned to the conscience by parliamentarianism.

The imperial state nations<sup>31</sup> that dominated the 19th century were the first modern states to unite the State and the nation. The industrial nation-states that came to dominate the 20th century also fused the constitutional order with nationalism. Thus, Americans whose state descends from a late-18th-century founding tend to forget that what is meant by a nation is a cultural, linguistic, ethnic, religious, and historic group — not a state. Indeed, there are some nations — like the Kurds, the Palestinians, or the Cherokee — that don't have states. In the Bible, when Jonah's fellow seafarers asked him, "Of what nation are you?" they were not inquiring about his citizenship.<sup>32</sup> Americans forget this because, in the United States, we make precisely this inquiry. In America, it is citizenship and not national origin that forms the basis for the nation. This is one important divergence from the constitutional traditions of Europe and one reason why fascism has never had much of a toehold in America.

Marxism and fascism embrace progress, whether it be the progress of science or the steady winnowing of the survival of the best adapted. Both ideologies claim to rely on science and the social sciences, which are themselves thought to be indicia and drivers of progress.

The Anglo-American liberal tradition, by contrast, embraces pluralism, the idea that we can never be too sure of any orthodoxy and must perforce tolerate dissent. It is skeptical of progress but always open to incremental change. This ideology has its roots in tolerance — that we conserve

competing values over time by giving them a chance at their turn of Fortuna's wheel. The liberal tradition assumes that, at any one moment, one not only can be wrong but, to some degree, almost certainly is.

Certain progress, however, demands certainty. Thus, Marxism and fascism were illiberal in the sense that they wished to destroy the impediments to progress, which, it was said, included dissent and free debate. The liberal tradition not only had different sources than its enemies in the Long War that began in 1914 and ended in 1990 — it had different constitutional methods and assumptions as well.

## II. The Outer Critique

This description of the American constitutional ethos has lately been under attack, both as to its outer manifestations abroad and its inner legacy for the American people. These critics deny that America's values, political system, and history — the American constitutional ethos — are really unique and worthy of admiration. While conceding that the United States possesses certain exceptional traits — some dubious, it is said, like gun ownership; some mystifying and inexplicable (to their critics), like high levels of religiosity — this critique asserts that U.S. action abroad has nothing to do with this ethos. Instead, America's international history, like that of every other state, has been determined primarily by power and the competitive context of the international system. This is the "outer" assault. (The "inner" assault will be dealt with in the next section.) The indictment has six counts.

First, it is said that while Americans claim they are exceptional and indispensable — two different points, by the way — many states and many nations have made this claim. In fact, according to one such critic, "Among great powers, thinking you're special is the norm, not the exception,"<sup>33</sup> and it is true that American "exceptionalism" is rarely carefully defined beyond the most general and anodyne terms.

28 Niccolò Machiavelli, *The Prince*, ed. and trans. Peter Bondanella (New York: Oxford University Press, 2005); Philip Bobbitt, *The Garments of Court and Palace: Machiavelli and the World that He Made* (New York: Atlantic Monthly Press, 2013), 10, 16.

29 Martin Luther, *Martin Luther's 95 Theses* (2008), ebook available at <http://www.gutenberg.org/cache/epub/274/pg274-images.html>.

30 Thomas Nagel, *Mind and Cosmos: Why the Materialist Neo-Darwinian Conception of Nature Is Almost Certainly False* (New York: Oxford University Press, 2012), 8, 13–16, 127–28.

31 My terminology for the constitutional order that achieved dominance in the 19th century; it sought popular allegiance on the grounds that the State would exalt the nation by fusing it with the State. See Bobbitt, *Shield of Achilles*, 144–204; also Bobbitt, *Terror and Consent*, 26 et seq.

32 Jonah 1:8.

33 Stephen M. Walt, "The Myth of American Exceptionalism," *Foreign Policy*, Oct. 11, 2011, <http://foreignpolicy.com/2011/10/11/the-myth-of-american-exceptionalism/>.



Second, although Americans like to think their country behaves better than other states, and certainly better than other great powers, this is false. The United States has an expansionist history that began with its conquest of the North American continent. The Allied strategic bombing campaigns in World War II killed 353,000 Germans,<sup>34</sup> and approximately 330,000 Japanese civilians were killed by American bombs.<sup>35</sup> The United States dropped more than seven million tons of explosives during the war in Indochina<sup>36</sup> and should be held responsible for the more than 600,000 civilian deaths in that war.<sup>37</sup> In the past three decades, U.S. military action has been directly or indirectly responsible for the deaths of 250,000 Muslims in Iraq, Afghanistan, and the Balkans.<sup>38</sup> U.S. drones tracking terrorists in at least five countries have killed an unknown number of innocent civilians.

Third, while the United States proclaims its devotion to human rights and international law, it has refused to sign most human rights treaties, including the Ottawa Landmines Treaty,<sup>39</sup> and is not a party to the International Criminal Court.<sup>40</sup> Nor has the United States energetically moved in the direction of decommissioning its vast nuclear arsenal, as it committed to do, in principle, when it acceded to the Nonproliferation Treaty (NPT). In the face of such facts, how dare the United States claim to be devoted to the rule of law.

Fourth, the United States has often made common cause with some of the worst dictators and human-rights-abusing regimes. Nor has its own record been without blemish: The abuse of prisoners at Abu Ghraib and the Bush administration's reliance on

torture and preventive detention are well-known. President Obama's decision to conduct drone warfare without judicial warrants and even to wage war with questionable congressional authority suggests that such abuses are not a partisan or unusual matter. How dare the United States claim to be committed to human rights and due process.

Fifth, U.S. claims to have defeated aggression in the 20th century ring hollow when the history of 20th-century conflicts is actually consulted. Although Americans tend to congratulate themselves for winning World War I, there are scholars who think the U.S. entry into the war only once the great European empires were thoroughly depleted was really aimed at succeeding those empires as the master of the international scene.<sup>41</sup> Woodrow Wilson may have proclaimed the war a fight to make the world "safe for democracy,"<sup>42</sup> but anyone can see in retrospect — it is asserted — that it was really the opening salvo in an effort to build an American empire in Europe.

Critics also argue that, although Americans similarly congratulate themselves for having won World War II, most of the fighting was done in Eastern Europe and the main burden of defeating Hitler's war machine was borne by the Soviet Union.<sup>43</sup> And while Americans also tend to think they won the Cold War all by themselves, they ignore the contributions of the courageous dissidents whose resistance to communist rule produced the "velvet revolutions" of 1989.<sup>44</sup>

Sixth, although President Bill Clinton said that the United States was "indispensable to the forging of stable political relations,"<sup>45</sup> and his secretary of state,

34 Richard Overy, *The Bombers and the Bombed: Allied Air War Over Europe, 1940–1945* (New York: Viking, 2014), 304–7.

35 Michael Tillman, *Whirlwind: The Air War Against Japan 1942–1945* (New York: Simon & Schuster, 2010), 256.

36 Michael Clodfelter, *Vietnam in Military Statistics: A History of the Indochina Wars, 1792–1991* (Jefferson, NC: McFarland, 1995), 225.

37 Guenter Lewy, *America in Vietnam* (New York: Oxford University Press, 1978), 442–53.

38 I am by no means convinced of these figures, to say nothing of the blithe assumptions of "direct or indirect responsibility," but they are a customary feature of the critique and it would not change minds if the numbers were significantly less (even if more accurate).

39 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction; see treaty status information at <http://www.icbl.org/en-gb/the-treaty/treaty-status.aspx>.

40 For a summary of the U.S. policy toward the court per an Obama administration *National Security Strategy*, see: <https://www.state.gov/j/gcj/icc/>.

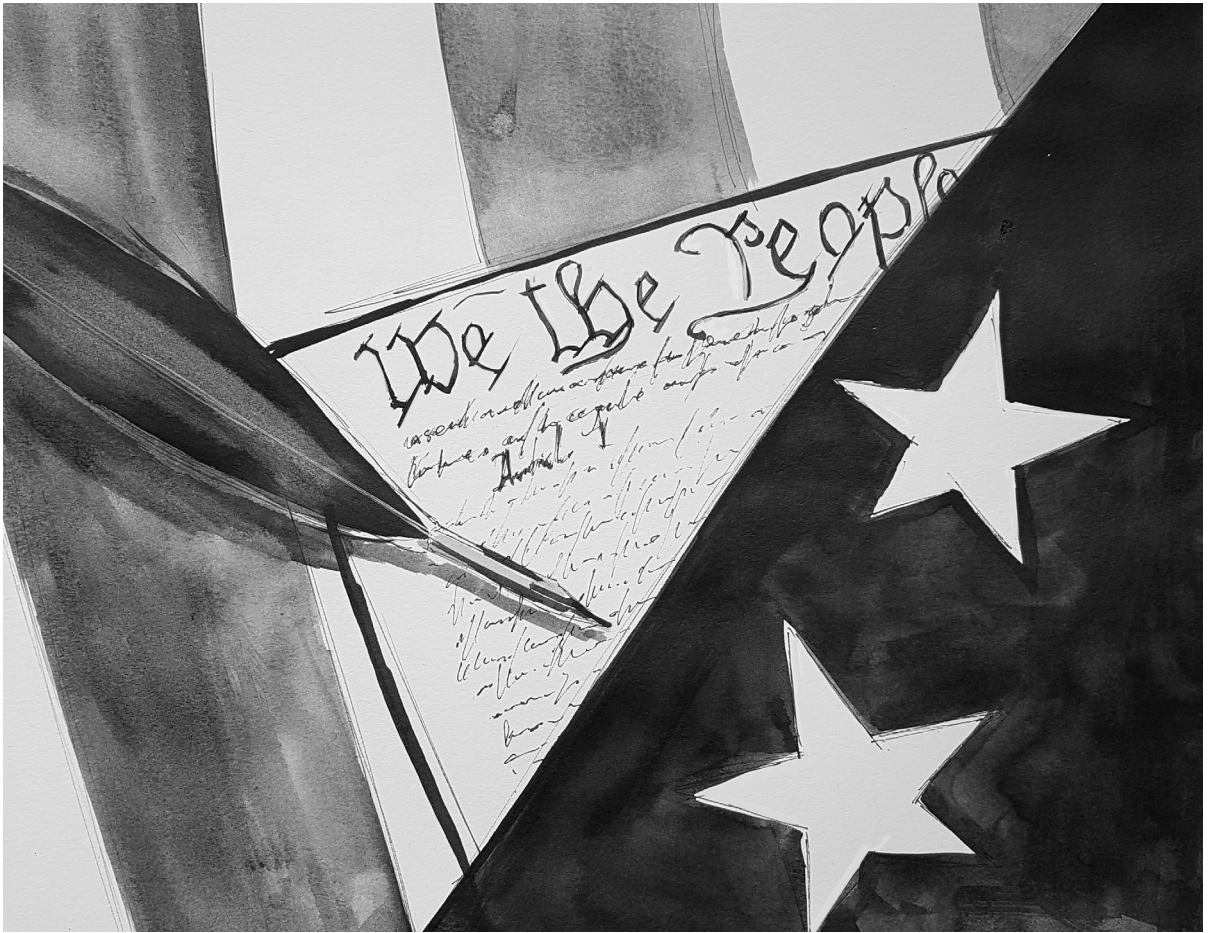
41 See Howard Zinn, *A People's History of the United States* (New York: Harper, 1980), 362; Richard Hofstadter, *The American Political Tradition and the Men Who Made It* (New York: Knopf, 1948), 266; and "Trials of the Great War 1914–2014: War and the American Century," [https://www.youtube.com/watch?v=E\\_hNqTp3UJ](https://www.youtube.com/watch?v=E_hNqTp3UJ); Craig Calhoun, Frederick Cooper, and Kevin W. Moore, eds., *Lessons of Empire: Imperial Histories and American Power* (New York: New Press, 2006); Michael Mann, *Incoherent Empire* (London: Verso, 2003).

42 55 Cong. Rec. 1, 120 (1917).

43 Walt, "Myth of American Exceptionalism." See also Ishaan Tharoor, "Don't Forget How the Soviet Union Saved the World from Hitler," *Washington Post*, May 8, 2015, <https://www.washingtonpost.com/news/worldviews/wp/2015/05/08/dont-forget-how-the-soviet-union-saved-the-world-from-hitler/>.

44 Walt, "Myth of American Exceptionalism."

45 *A National Security Strategy of Engagement and Enlargement*, White House (July 1994), 5, <http://nssarchive.us/NSSR/1994.pdf>.



Madeleine Albright, even referred to the United States as “the indispensable nation,”<sup>46</sup> we will soon find out whether this is really true. Like the little boy who finds himself at the head of a marching band and thinks he is leading it through the streets, should the little boy turn down an alleyway, the band will go on without him. What states look to the United States for moral and political leadership today, critics ask? As Donald Tusk, the president of the European Council, remarked, today America doesn’t have “that many” friends.<sup>47</sup>

Thus runs what one may call the “outer critique”: the exposé of the true history (it is said) of America’s interaction with the international system. Now let us engage these critiques, *seriatim*.

It may be best to concede that every society and every state not only claims to be exceptional but is, in fact, exceptional. However, they are exceptional not in the way that Obama proclaimed: that every state, like every child, is “exceptional.”<sup>48</sup> Instead,

what makes a society exceptional is simply what defines it in contrast to other societies. What makes a Japanese or an Australian not a Frenchman or a Ugandan is a function of his or her country and its culture and history. What makes a state exceptional is its unique constitutional ethos — the way it deploys its sovereignty to achieve legitimacy in the eyes of its people and territorial integrity in the face of its adversaries. This account of exceptionalism does not make the United States or any other state uniquely virtuous or successful, although the constitutional institutions that each state creates will channel the virtue of its citizens and martyrs and can accelerate its successes. It really does not say much at all except that it is important to determine the “nature of the exception” — how the state determines who will decide the ambit of law. In the case of the United States, this is its greatest legacy — not the hamburger, not the Corvette, not jazz or baseball — but the daring constitutional

46 Secretary of State Madeleine K. Albright, interview by Matt Lauer, *Today Show*, NBC, Feb. 19, 1998, <https://1997-2001.state.gov/statements/1998/980219a.html>.

47 Remarks by President Donald Tusk on E.U.-NATO cooperation, European Council, July 10, 2018, <http://www.consilium.europa.eu/en/press/press-releases/2018/07/10/remarks-by-president-donald-tusk-on-eu-nato-cooperation/>.

48 Schake, “Trump Doctrine Is Winning.”

innovation by which the State was put under law. That America has sometimes failed to live up to that legacy only means that it is fallible. Indeed, the self-criticism that points out these flaws is actually a necessary part of such a pluralist, yet individualist, system.

Now let us try a thought experiment as we work our way through the various charges of the “outer” indictment against the United States. Let us imagine the present as if the past simply omitted the role of the United States in world affairs.

Such a thought experiment is merely a heuristic device to overcome the Anachronistic Fallacy that underlies so much of both the outer and inner critiques of American behavior. That Fallacy occurs when we transport our current context — not just its technology and wealth but its attitudes and mores — to earlier periods. Why, for example, didn't earlier societies treat infectious diseases more successfully? Koch's postulates weren't “discovered”; they were formulated using ideas that had been present in many cultures for centuries. Should we reproach our ancestors for not having figured this out earlier? Or must we concede that without something like these postulates, the causal connection between disease and germs isn't apparent? The Anachronistic Fallacy enshrines itself in an attitude that everything about the present can be held fixed and imported into the past even though the present is a result of the past.<sup>49</sup>

It is true that by purchasing the Louisiana Territory from France and by pacifying lands through countless aggressions and defensive battles against the native population of the continent, the United States created an empire on our island continent. It is also true that along with these strategic accessions, including those of the Mexican War, the United States brought the American political culture westward. Would the West and Southwest have been better off today if California and Texas had remained under a European emperor like Napoleon or the Mexican

dictator Santa Ana, even if we assume that his attitude toward slavery was preferable? Even if we concede that the life of the Native Americans was better before their defeat, despite their own internecine campaigns of ethnic cleansing against each other,<sup>50</sup> would this way of life have prevailed against the Spanish conquistadors? It didn't in South America, where the native populations were better armed and organized to resist invasion than their northern counterparts. Have those states fared better with the legacy of Iberian colonial culture? Has the rule of law prospered as a guiding principle in politics even at the hortatory level? I am aware of the critique that American meddling and exploitation in Latin America have given rise to a structure of plunder that is responsible for the chronic poverty and underdevelopment there. Without addressing the economic merits of this description — which is sometimes reduced to “We're poor; it's their fault”<sup>51</sup> — does it lead to the conclusion that the U.S. presence in the hemisphere prevented its liberal practices and traditions from flourishing in Latin America? Those revolutionary leaders who expelled the European colonialists in the early 19th century felt otherwise.<sup>52</sup>

The strategic bombing campaigns against Germany and Japan had elements that today one might think of as war crimes — the pitiless attacks against urban populations, for example. But those campaigns, fought with less precision and with cruder aerial weapons than are now deployed, played a crucial role in the defeat of the fascist dictatorships. Would those wars have been won without the Americans (and without their sometimes ruthless tactics)? If it is true, as I believe, that the atomic weapons used against Japan discredited Japanese fascism in the eyes of its own people, what would have been the outcome had there been no Manhattan Project? Besides the United States, only Germany had the technology, organized technocracy, and wealth to create nuclear weapons during World War II — suppose it had? If the Americans had not fought in the Pacific,

49 Note, this is not the same as saying we must not judge an earlier society by our current moral, political, and aesthetic values; as I remark later in the essay, “Who else's judgments would we apply,” the consciousnesses of earlier cultures being so inaccessible to us.

50 See Jeffrey P. Blick, “The Iroquois Practice of Genocidal Warfare (1534–1787),” *Journal of Genocide Research* 3, no. 3 (2001): 405–29, <https://doi.org/10.1080/14623520120097215>.

51 “Author Changes His Mind on '70s Manifesto,” *New York Times*, May 23, 2014, <https://www.nytimes.com/2014/05/24/books/eduardo-galeano-disavows-his-book-the-open-veins.html>.

52 See Simón Bolívar's Letter from Jamaica, Sept. 6, 1815. “As long as our countrymen do not acquire the abilities and political virtues that distinguish our brothers of the north, wholly popular systems, far from working to our advantage, will, I greatly fear, bring about our downfall. ... Although I seek perfection for the government of my country, I cannot persuade myself that the New World can, at the moment, be organized as a great republic. Since it is impossible, I dare not desire it; yet much less do I desire to have all America a monarchy because this plan is not only impracticable but also impossible. Wrongs now existing could not be righted, and our emancipation would be fruitless. The American states need the care of paternal governments to heal the sores and wounds of despotism and war.” *Selected Writings of Bolívar*, trans. Lewis Bertrand (New York: Colonial Press, 1951). Accessed via Brown University Center for Digital Scholarship: <https://library.brown.edu/create/modernlatinamerica/chapters/chapter-2-the-colonial-foundations/primary-documents-with-accompanying-discussion-questions/document-2-simon-bolivar-letter-from-jamaica-september-6-1815/>.



would China and Korea have been liberated? If so, by whom? It is worth recalling that the Soviet Union did not even declare war against Japan until the Americans had used the atomic bomb against Hiroshima.<sup>53</sup>

The U.S. mission in Vietnam did not achieve its war aim of preserving the South Vietnamese regime, but it did buy time for the other states in the region. No less an authority than Lee Kuan Yew<sup>54</sup> stated many times that without the U.S. effort in Vietnam, Singapore, Malaysia, Indonesia, Thailand, and perhaps even the Philippines would have become communist states.<sup>55</sup> His point is that the widely assumed discrediting of the “domino theory” only possesses a superficial credence because the United States did in fact intervene in Southeast Asia. The American occupation of Iraq was a fiasco, but can it really be assumed that the world would be safer today if Saddam Hussein and his psychopathic dynasty were still in power in Baghdad? Based on the testimony of his own scientists, Saddam planned to seek nuclear weapons at the earliest possible moment after sanctions were loosened<sup>56</sup> — sanctions that were themselves unraveling before the U.S. invasion.<sup>57</sup> Is it even conceivable that there would have been an agreement with Iran to cease production of nuclear weapons if Saddam were still in power? With respect to the suffering of the Iraqi people that the invasion and its aftermath brought, it seems highly relevant that, however much they rightly condemn the U.S.-led coalition’s failures during the occupation, a large majority of Iraqis, when polled in the early months of the occupation, supported the coalition’s invasion and removal of Saddam, saying it was “worth it.”<sup>58</sup>

U.S. drones and special operations forces do inadvertently kill civilians. But are the number of civilian casualties not dramatically reduced by using drones and special forces instead of high-altitude

bombing?<sup>59</sup> Is it true that countries that suffer from terrorist attacks, countries that implore the United States to aid their armed struggles, would be better off if America ceased trying to cripple those malevolent and savage terror networks? Would there be fewer Muslim deaths if the Islamic State still reigned over much of Iraq and Syria? Is Syria today better off because the United States chose not to intervene in force?

What about the claim that the United States is hypocritical in its promotion of human rights and international law? It is true that America, along with other democracies, has refused to sign a number of human rights treaties that have been signed by dictators. However, scholars have persuasively argued that this is because the United States actually enforces those treaties in its domestic courts and therefore has to be very careful about its commitments.<sup>60</sup> Dictators, on the other hand, can sign whatever they please, knowing that such treaties amount to nothing but scraps of paper in their judicial systems. Is it really the case that the cause of human rights around the world would be further advanced today without the American efforts that fostered these rights? Without the Helsinki Accords?<sup>61</sup> Without the Universal Declaration of Human Rights?

Landmines are useful in military defense because they persist — that is, they do not fail when a tactical position is lost, and they do not require the presence of troops to maintain a position in order to give fire. This is also why landmines pose a humanitarian problem. Long after the battle is over, they continue to explode when innocent civilians set them off. As a matter of technology, however, this does not have to be the case. Timing mechanisms can be used that cause landmines to deactivate within as little as a few hours or as long as 30 days, which is the maximum allowed under the Convention on Certain Conventional Weapons, to

53 Though violent clashes had occurred in 1939 between the two powers.

54 First prime minister of Singapore and leader of the People's Action Party that campaigned for Singapore's independence from Britain.

55 See, e.g., Lee Kuan Yew, *From Third World to First: The Singapore Story, 1965–2000* (New York: HarperCollins, 2000), 467, 573.

56 See statement by David Kay on the interim progress report on the activities of the Iraq Survey Group, hearing before the House Permanent Select Committee on Intelligence, House Appropriations Committee's subcommittee on defense, and the Senate Select Committee on Intelligence, Oct. 2, 2003, [https://www.cia.gov/news-information/speeches-testimony/2003/david\\_kay\\_10022003.html](https://www.cia.gov/news-information/speeches-testimony/2003/david_kay_10022003.html).

57 David Rieff, "Were Sanctions Right?" *New York Times*, July 27, 2003, <https://www.nytimes.com/2003/07/27/magazine/were-sanctions-right.html>.

58 Richard Burkholder, "Gallup Poll of Iraq: Liberated, Occupied, or in Limbo?" *Gallup*, April 28, 2004, <https://news.gallup.com/poll/11527/gallup-poll-iraq-liberated-occupied-limbo.aspx>.

59 Daniel L. Byman, "Why Drones Work: The Case for Washington's Weapon of Choice," Brookings Institution, June 17, 2013, <https://www.brookings.edu/articles/why-drones-work-the-case-for-washingtons-weapon-of-choice/>.

60 See Oona A. Hathaway, "Between Power and Principle: An Integrated Theory of International Law," *University of Chicago Law Review* 72 (2005): 469, 499. "States that are more likely to engage in domestic enforcement of the terms of international legal agreements are therefore less likely to commit to them in the first place, all other things held equal."

61 See Michael Cotey Morgan, *The Final Act* (Princeton, NJ: Princeton University Press, 2018).

which the United States is a party.<sup>62</sup> By contrast, the Ottawa Convention of 1997, the Landmines Treaty, to which the United States is not a party, bans only anti-personnel mines and freely permits all types of anti-vehicular mines.<sup>63</sup> Yet few members of the public seem to realize that anti-vehicular mines can be every bit as dangerous to civilians as anti-personnel mines. Indeed, persistent anti-vehicular mines kill innocent civilians trying to use roads, thus preventing refugees from returning to their homes and keeping humanitarian assistance from reaching them. The public seems to be generally unaware that this treaty bans only one class of explosives or that the U.S. policy of deploying time-sensitive mines — mines that effectively turn themselves off — would do far more to reduce civilian casualties if it were universally adopted. In any case, it has been U.S. policy not to use any persistent landmines since 2010 and this policy covers all mines, those that target persons as well as vehicles.<sup>64</sup>

But why doesn't the United States simply cease using landmines? To do so would mean removing mines from the 38th parallel that separates North from South Korea — virtually the only place where the United States currently deploys mines. It is a no man's land where a highly dangerous and unpredictable regime has more than one million active soldiers in its military, with 70 percent of its ground forces positioned south of the Pyongyang-Wonsan line, most less than 100 miles from Seoul.<sup>65</sup> Without mines, no realistic conventional force could protect South Korea's capital — which is less than 35 miles from the Demilitarized Zone — from a surprise attack by North Korean forces. Would it really be a step toward peace on the peninsula to remove this barrier? Suppose the United States stopped trying to defend South Korea. Would the Canadians and Swedes, who have been the most critical of the American deployment of landmines, be willing to take up these responsibilities with their own forces? Would South Korea long be content to remain a nonnuclear power when it becomes clear, as it will, that North Korea's acquisition of nuclear weapons has been in service of that state's aggrandizement? Would Japan? Surely the resulting

nuclear proliferation to these states would not bring about a safer and more humane world.

What about the International Criminal Court? What is America afraid of? That it would lose its impunity to commit war crimes? In the first place, it is important to remember that even if the United States were a party to the treaty that created the International Criminal Court, the jurisdiction of that tribunal would engage only when the United States fails to prosecute its war criminals. Yet, in 2005, U.S. military tribunals handed down stiff sentences to prison guards who abused Iraqi prisoners.<sup>66</sup> Of course, there is more to it than that. In fact, the

## **The principle of self-determination with which Wilson is most prominently associated is anathema to the very concept of empire...**

U.S. government fears prosecutions by the court — unlike those prosecutions that are authorized and instructed by the U.N. Security Council, whose tribunals the United States supports — because it fears these would tip the balance against American intervention in marginal theaters, eroding the already vanishing public support in America for humanitarian intervention. Today, the world order depends upon American soldiers to protect human rights in Kosovo, Bosnia, Somalia, Haiti, and many other places. The spectacle of U.S. soldiers being tried before a foreign tribunal for acts committed while in the service of such interventions should give pause to anyone who wishes to persuade Washington to undertake those missions. It is difficult enough to muster public and congressional support for such deployments. The tragedies in Somalia, for example, led directly to the horrors in Rwanda because once American soldiers had been murdered and mutilated in Mogadishu there

62 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons; see Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Technical Annex 3(a).

63 See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Art. 1, § 1(a).

64 For more on U.S. policy on landmines, see: <https://2001-2009.state.gov/t/pm/wra/c11735.htm>.

65 Dave Majumdar, "North Korea's Army by the Numbers: 4,300 Tanks and 200,000 Lethal Special Forces," *National Interest*, Feb. 1, 2018, <http://nationalinterest.org/blog/the-buzz/north-koreas-army-by-the-numbers-4300-tanks-200000-lethal-24301>.

66 See, for example, "Graner Gets 10 Years for Abu Ghraib Abuse," *Associated Press*, Jan. 16, 2005, <https://web.archive.org/web/20121231082819/http://www.msnbc.msn.com/id/6795956>; "Harman Found Guilty for Abu Ghraib," *Army News Service*, May 19, 2005, <https://web.archive.org/web/20071123112051/http://www4.army.mil/news/article.php?story=7348>; "Two More Soldiers Sentenced for Abu Ghraib Abuse," *Army News Service*, Feb. 10, 2005, [https://web.archive.org/web/20050915220948/http://www4.army.mil/ocpa/read.php?story\\_id\\_key=6843](https://web.archive.org/web/20050915220948/http://www4.army.mil/ocpa/read.php?story_id_key=6843).

was no political will to engage them again in an African humanitarian mission. U.S. missions only make things worse, it is often said. So, suppose the Americans didn't go abroad. Consider what life would be like now in the Balkans.

When President Lyndon B. Johnson overruled the unanimous opinion of his advisers to press for the creation of the NPT regime, he may well have hoped that someday the world would be rid of nuclear weapons. This hope is enshrined in the treaty. But would the world be safer — would there be fewer states with nuclear weapons — if the American nuclear deterrent that protects so many other states was withdrawn? For technological and economic reasons, the United States may be the one nuclear power that could dispense with its nuclear arsenal. If it did, would the net number of nuclear powers actually decrease in the frenzy of rearmament that would ensue?

The fourth charge of this “outer” indictment implies that war crimes, torture, and extrajudicial killings are as American as apple pie. Many states have resorted to torture — Britain in Ireland, France in Algeria, Israel in Palestine — and often on a scale considerably greater than the American abuses. It seems worth noting that the U.S. abuses, at Abu Ghraib and Guantanamo for example, were not exposed simply by intrepid journalists and litigators but by the U.S. Armed Forces themselves. The point isn't that the American constitutional ethos ensures that the United States will not commit terrible wrongs but that it makes it possible — indeed depends upon — the United States owning up to its errors and attempting to avoid their repetition. In fact, a nuanced and accurate assessment of American action, when it succeeds in upholding the professed values of its ethos as well as when it fails, is both consistent with our constitutional principles and a necessary guide to a stronger footing in establishing a global order that reflects those values.

The charge that drone warfare amounts to extrajudicial killing not only misunderstands changes underway in the nature of warfare,<sup>67</sup> it

also fails to comprehend the constitutional system by which actors other than courts play a role in waging wars and in ensuring their lawfulness.

Addressing the fifth charge that the United States entered World War I to further its economic interests and to provide the basis for an American imperial role in Europe, it is hard to credit that anyone familiar with Wilson's policies truly believes him to have been seeking such a role in Europe (or anywhere else). The suggestion is not only ahistorical, it is laughable. The principle of self-determination with which Wilson is most prominently associated is anathema to the very concept of empire, as the empires that began World War I discovered for themselves.

Nor is it germane to the question of the American contribution to the defeat of the Nazis in World War II to observe that the great sufferings and sacrifices of the Soviet Union are also responsible for the defeat of Germany. Again, consider a counterfactual: Is there a military strategist or historian alive who believes the Soviet Union could have successfully resisted Germany without American aid, without a second front, and without American strategic bombing? Aerial bombing of German cities forced Germany to move its fighter aircraft away from the Russian front, giving Soviet arms air superiority. Perhaps equally important, Germany was compelled to move its 88mm anti-aircraft guns back to Germany when these were the most effective anti-tank weapons against Russian forces.<sup>68</sup>

As for the Cold War, the United States, of course, did not win it alone. Far from it. Indeed, U.S. strategy was to build alliances so that it could win with the help of others. But rather than solicit the opinion of critics who decried the American policy of containment at the time, why not ask the dissidents themselves in the states that were liberated? Do they believe that without the American presence in Germany the Berlin Wall would have come crashing down? Why not ask Angela Merkel, who grew up in East Germany?<sup>69</sup>

Finally, although it may seem hubristic to cast

67 See Philip Bobbitt, "The ACLU Goes to War," *Just Security*, Nov. 25, 2016, <https://www.justsecurity.org/34885/aclu-war/>.

68 See Antony Beevor, "Freedom Sweeps Europe — But at What Cost?" *Guardian*, Sept. 10, 2009, <https://www.theguardian.com/world/2009/sep/10/second-world-war-liberation-europe>; see also Antony Beevor: "Hitler's anger with Goering over the Luftwaffe's inability to stop Allied bombers getting through, forced Nazi Germany to withdraw the bulk of its fighter squadrons and its 88mm anti-aircraft guns from the eastern front to defend the Reich. By 1944, there were just 1,200 heavy anti-aircraft guns left for the whole of the eastern front, yet more than 7,000 back in Germany. And if these 88mm anti-aircraft guns, which were also the most devastating anti-tank weapons of the whole war, had not been withdrawn from the eastern front, even more Soviet soldiers would have died. But the most decisive contribution to the outcome of the war was the withdrawal of Luftwaffe fighter formations from the eastern front to defend German cities. This gradually tipped the balance of air superiority on the eastern front away from the Luftwaffe, to such a degree that by 1944, it could hardly send any reconnaissance flights over Soviet lines. This allowed the Red Army to prepare the huge deceptions which culminated in Operation Bagration, the destruction of Army Group Centre in Belorussia, the most devastating victory of the whole war." Antony Beevor, email message to the author.

69 Werner Reutter, "Who's Afraid of Angela Merkel? The Life, Political Career, and Future of the New German Chancellor," *International Journal* 61, no. 1 (2005/2006): 214, 216, <https://www.jstor.org/stable/40204139>.

the United States as “the indispensable nation,”<sup>70</sup> to use this claim as a slur raises many questions. For example, indispensable to what? I’ve tried to give a number of examples in which American participation abroad, often in the face of powerful domestic opposition, has proved a decisive force for good. But perhaps the more important question today is, if not the United States — if not U.S. leadership of the world order that was established with America’s allies after World War II — then to which state should that leadership be committed? To the European Union? To China? To Russia and Iran? To a deadlocked U.N. Security Council? Perhaps the proffered answer is that there should be no leader, that the world we seek should be multipolar. Well, that has been tried. The multipolar world brought us both World War I and World War II. No single state was powerful enough to prevent either of those conflicts. Is it just a coincidence that the number of wars in the world, and the number of deaths both of soldiers and civilians, has dramatically declined since America took up its role as leader of the Alliance?

### **III. The Inner Critique**

This essay began by discussing the subject of constitutional law and now has strayed into strategy. Such is the stuff of the “outer critique” because it claims that America’s diplomatic and strategic initiatives have been a sham, that it’s just old-fashioned rent-seeking, in contrast to the inspiring claims made by the architects of the current world order. Thus, it should not surprise anyone that the “inner critique” focuses on discrediting the heroic myths of America’s own history. For law, strategy, and history are intertwined in a way that the separated academic disciplines tend to obscure. As disciplines, each has its own understanding of causal dynamics, and practitioners are loath to increase, rather than reduce, the multiplicity of causal accounts by suggesting that some factor outside their own field is at work. Within each subject — law, strategy, and history — academics and analysts expect economic or political or perhaps sociological causes to account for developments. They are unlikely to see any necessary relations among these three classical ideas themselves. They do not appear to depend upon each other.

Historians record how events in one arena can affect events in another. A war is won, and the peace conference that ends the war writes the ensuing international law in the victor’s terms. Or a war is lost, and a new constitutional structure is imposed. The first happened after World War II in San Francisco;<sup>71</sup> the second, at about the same time, in Tokyo.<sup>72</sup> Thus, the outcomes of strategy change law — and it becomes history. Or, a revolution changes the constitutional order of a state, replacing the aristocratic armies of the 18th-century territorial state with the mass armies of conscripts of the imperial state nation, enabling Napoleon to conquer Europe. Thus, constitutional law shapes strategy, and this too is called history. Or, new developments come into play — a new religion drives migration across a continent or technological innovation creates a mobile cannon — and an empire falls, and with its strategic collapse, its laws also die.

While such examples are familiar, we are inclined to see their inter-relationship — the relationship among law, strategy, and history — as the byproduct of cause and effect, the result of developments of which history is simply the record. But history is not brought into being by context, whether strategic or legal. History brings context into being. And as this context unfolds, strategy and law are made manifest in events. It is therefore hardly surprising that the “inner critique” would be an attack on the American perception of its own history.

For law and strategy are not merely made in history — a sequence of events and culminating effects — they are made of history. It is the self-portrayal of a society that enables it to have an identity. Without this self-portrayal, this identity, a society cannot establish its rule by law because every system of laws depends upon the continuity of legitimacy, which is an attribute of identity. Furthermore, without such a self-portrayal, no society can pursue a rational strategy because it is the identity of the society that strategy seeks to promote, protect, and preserve. One might say that without its own history, its self-understanding, no society can have either law or strategy, because it cannot be constituted as an independent political entity.<sup>73</sup>

70 See footnote 31.

71 Multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169.

72 Surrender by Japan, Terms Between the United States of America and the Other Allied Powers and Japan, Sept. 2, 1945, U.S.–Japan, 59 Stat. 1733.

73 See Bobbitt, *Shield of Achilles*, 5–6.



The view of American history that forms the basis for the “inner critique” claims that the U.S. national narrative is born in original sin, three sins, actually: slavery, the theft of land, and genocide. On this telling of the American story, the United States has grown powerful owing to monstrous crimes. That history cannot provide Americans with a common morality, or common heroes, or a common etiquette where national symbols, like the American flag or an unsingable national anthem, are concerned because to make common cause with these cultural artifacts is to drink the draughts that have poisoned U.S. history from the founding. This account has significant implications for world order and for the U.S. defense of that order.

Indeed, the connection between the inner and outer critiques now becomes clear: They are a combined effort to dismantle the foundation of America’s international behavior, which is America’s confidence in the constitutional ethos that makes the United States exceptional. As the writer I quoted at the outset of this essay put it,

The American myth is at a crossroads. Our old stories will not save us. We need a new way to understand ourselves ... Our new story would admit that much of our democracy has grown despite the rules and myths of the Founders and the frontier, not because of them. *Freed of those rules and myths ... we would be less eager to use our war machine and to spend so much of our wealth upon it.* More aware of our own sins, we would feel less driven to avenge them abroad.<sup>74</sup>

One seldom sees such a frank admission of the synergy of outer and inner critique. And it’s not hard to see the sort of constitutional rules the author has in mind. At one point in his essay, he complains that the Constitution forbids legislatures from abrogating private contracts as if this was a telling exposé of the class bias of the Constitution’s ratifiers (very few of whom were creditors) and not in fact a rule that actually protects the availability and lowers the costs of credit in a developing economy. In any case, this is hardly what is *exceptional* about the U.S. Constitution. What made the Constitution unique among modern states is the decisive role it gives

to law and, in constitutional law, to the individual conscience. It is true that the Constitution forbids the federal and state governments from coercing the press or establishing religious orthodoxy, including requiring a religious test for office; that it protects free speech and requires the equal protection of the laws for all persons — not just citizens — and insists on due process in the application of its rules. The constitutions of many countries do these things. More importantly, America’s Constitution limits the scope as well as the application of state power. It does not allow the State to determine where its citizens shall live, whom they shall marry, how many children a family can have, or what profession or trade to pursue not through the granting of rights but through the withholding of power. It does not define the “nation” as an ethnic or religious or racial group but as a body of citizens. It does not enshrine a popular democracy with the power to oppress by means of the law but, instead, aims to protect democracy with complicated structures — like the protection of civil contracts, including marriage<sup>75</sup> — that safeguard human rights. By these means it seeks to transmute deadly political questions into legal ones.

The original, unamended Constitution was written in the context of a particular way of life that was shared by the European societies that had colonized the Americas. That worldview was patriarchal, racist, and imperialistic, and America lives with its consequences and, for some few, even its ideology — although that worldview is no longer widely held in those countries. The Three-Fifths Compromise, for example, is often cited as a constitutional concession to the Southern states that allowed for counting slaves in determining the census, which was the basis for representation in the House of Representatives.<sup>76</sup> But it is also true that this provision, similar to the decision to count children and women in the census, aligns with the idea that a male head of family represents the household — including any slaves who lived there. That slaves were counted only as three-fifths of a person was resented and objected to by white Southerners,<sup>77</sup> only 5 percent of whom ever owned a slave. Indeed, this figure underscores the conclusion that racism and patriarchy, rather than mere slavery, were at the heart of the dispute that

74 Schmitt, *Politische Theologie* (emphasis added).

75 Brief for the United States on the Merits Question, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307), <https://www.justice.gov/sites/default/files/osg/briefs/2012/01/01/2012-0307.mer.aa.pdf>.

76 See Paul Finkelman, “How the Proslavery Constitution Led to the Civil War,” *Rutgers Law Journal* 43, no. 3 (2013): 405, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2243060](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243060).

77 South Carolina and Georgia both voted for a proposal to count slaves “as equal to Whites in the apportionment of Representation.” See Madison Debates, “Wednesday, July 11, 1787,” Yale Law School *Avalon Project*, [http://avalon.law.yale.edu/18th\\_century/debates\\_711.asp](http://avalon.law.yale.edu/18th_century/debates_711.asp).



divided the Union: Perhaps as many as a third of white Southerners were members of households that owned slaves and thus subordinated them regardless of ownership.<sup>78</sup> This does not exonerate that generation but simply gives a clearer description of the cultural basis for American constitutional practices. A Constitution cannot be better than its people, but it can provide for the ways in which the People can change because their values are not only reflected in law, they are shaped by it.

Bear in mind that, in the 18th century, when the original constitution was drafted, most of the world's slaves were owned by Europeans, Africans, and Ottoman Muslims. Many more slaves were brought through the trans-Atlantic slave trade to European colonies elsewhere (especially Brazil) than to North America.<sup>79</sup> Slavery itself — the conquest of captives who were sold into bondage and traded like chattel — was an ancient practice that thrived in many countries and in the empires of native peoples in the Americas. American and British opinion that despised slavery was a notable advance. What made American slavery so odious, however, and has left such a pernicious legacy was the racial element in American slavery, a result of 18th-century globalization and the slave trade with Africa, something that was deplored in the Declaration of Independence. There was no room in such an institution for an Epictetus. Thus, even freedmen were held by the U.S. Supreme Court to be ineligible for citizenship because race came to determine rights.<sup>80</sup> Yet in other ways, the United States appeared more progressive than its peer countries at the time, for instance, in imposing no property ownership requirement to vote in federal elections.<sup>81</sup> It required an internal war, the most costly in American lives of all U.S. wars combined, to correct this terrible and degrading defilement, but correct it the Americans did.

Would the American continent have remained unsettled by Europeans if the Anglo-Dutch colonies had never been established? Even assuming harmony among Native American tribes, such an assumption seems uninformed. Is it reasonable

to suppose that the other powers that coveted an American empire for themselves would have forborne the conquest of land from the Native Americans they found here? Or that slavery would not have come to the continent when those powers arrived with their own customs and practices? Were those countries less patriarchal, racist, and imperialist than Britain and the Netherlands? Was that the lesson of the French in Haiti or the Spanish in Latin America? And what exactly does “land theft” mean for states for whom conquest

**If a people lose confidence in or despise or become disgusted by their history, it will result in their national enervation.**

was legitimate under the law of nations, and for those native tribes whose nomadic practices defied the conventional concept of land ownership?

Let me be clear: My plea for historical realism cannot excuse slavery or genocide, acts that have been condemned for millennia. It cannot condone Gen. Nathan Bedford Forrest's or President Andrew Jackson's racist policies. But it might give us a fuller picture of the intentions of Gen. Robert E. Lee, who detested slavery but shrank from the civil war he believed would attend immediate abolition,<sup>82</sup> and President Sam Houston, who was a protégé and supporter of Jackson's but who was adopted by the Cherokee and fought to expose the behavior of government agents against them.<sup>83</sup>

For the purposes of this essay, the question is not whether America's history is pristine but whether that history would have been better in some other country's hands and, given how history unfolded, what efforts America has made to overcome its negative legacies because that overcoming is an

78 Information from the 1860 Census is available at [http://www.civil-war.net/pages/1860\\_census.html](http://www.civil-war.net/pages/1860_census.html).

79 See Trans-Atlantic Slave Trade Database estimates here: <http://www.slavevoyages.org/assessment/estimates>.

80 *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

81 Akhil Amar, *America's Constitution: A Biography* (New York: Random House, 2012), 66–67.

82 "In this enlightened age, there are few I believe, but what will acknowledge that slavery as an institution, is a moral & political evil in any Country." Robert E. Lee, Dec. 27, 1856. See: <http://fair-use.org/robert-e-lee/letter-to-his-wife-on-slavery>.

83 In 1830, Houston began representing the Cherokee nation and other Native American tribes in Washington. See his absorbing series of articles for the *Arkansas Gazette* defending Native American rights and exposing the exploitation of Native Americans by U.S. officials. Jack Gregory and Rennard Strickland, *Sam Houston with the Cherokee, 1829–1833* (Austin: University of Texas Press, 1967); Amelia Williams and Eugene C. Barker, *The Writings of Sam Houston, 1813–1863* (Austin: University of Texas Press, 1938).

essential element in the ethos I have described above.

If a people lose confidence in or despise or become disgusted by their history, it will result in their national enervation. It is evident that that is what the writer quoted above and many other critics of U.S. national security policy want. Perhaps this might be wise in some instances. You may want an aggressive society enervated, as the Germans and Japanese were after World War II. But a world order cannot be led or protected by a psychologically enfeebled society. With its allies, the United States created the current world order — the Charter of the United Nations, the Bretton Woods international financial system, the International Monetary Fund and World Bank, the North Atlantic Treaty Organization. The United States did not act alone and could never have succeeded by trying to impose a post-war order. The United States sought, by benefiting others, to secure itself. Thus, the enervation of the United States can be costly to many states and is not just a matter of one actor sitting out the dance.

That is why the criticism that U.S. policy has been self-serving is so beside the point. Of course U.S. policy was self-serving; it would have been unsustainable otherwise. U.S. leadership attempted to serve American interests, however, by embedding the interests of other states in the United States' calculus of costs and benefits.

Such leadership imposes costs that will not be willingly borne by a society that believes its principal legacy is shame. In fact, such a society will turn inward toward the accumulation of material advantage because this is the surest means by which it can reassert its self-respect. Because of its pessimism and self-loathing, it will come to resent other states and hold them in contempt as the only way of salvaging its own history.

With its allies, America has created and led the current world order because it has been strategically successful — it is rich and powerful — and because it has put that leadership in service of democratic and humane principles — the source of its reliance on law. To give an unrealistic and fanciful account of America's history — for the fancy of some of its

critics reflects their resentments and obsessions as fancies do — is to deny the true sources of that order to undermine it. And because strategy and law are made of history, this process works both ways: If the critiques are historically uninformed and naïve, then the defenses must take care not to degenerate into cheerleading,<sup>84</sup> but must be historically well-formed and sophisticated enough to avoid anachronism. This is not simply a matter of research; it also requires imagination, for most peoples in the late 20th and early 21st centuries have been spared and can scarcely imagine the atrocities that would have befallen them without U.S. leadership.<sup>85</sup>

This is not to say — I emphasize — that American history is unblemished, or a more morally admirable one than that of other societies. Far from airbrushing the past, America must take its historic wrongs — for example, against African Americans and Native Americans at home and against Southeast Asians and Filipinos abroad — and study them to create a future that is more humane and more inclusive. When it functions as it was designed to work, the operation of the American constitutional ethos requires criticism, debate, and decisions according to conscience.

#### **IV. Disillusion Leads to Dissolution**

Unfortunately, the loss of common ground — even the willingness to engage in debate and discussion with those with whom one disagrees — can be facilitated by the decentralized U.S. constitutional system with as-yet uncalculated consequences.

Thoughtful analysts such as the liberal James Fallows<sup>86</sup> and the conservative David Brooks<sup>87</sup> have celebrated the regeneration of the United States through the renewal of localities. While there are many inspiring stories — and not just in the United States,<sup>88</sup> because the devolutionary change in the constitutional order I have described elsewhere<sup>89</sup> is not limited to America — there are also grounds for concern about the “new localism.”<sup>90</sup>

Fission is what happens when the nucleus of a large atom splits into smaller nuclei. When an

---

84 An observation urged on me by my research assistant Andrew Elliott.

85 I am indebted to my research assistant Philippe Schiff for this point.

86 James Fallows and Deborah Fallows, *Our Towns: A 100,000-Mile Journey into the Heart of America* (New York: Pantheon, 2018).

87 David Brooks, “The American Renaissance Is Already Happening,” *New York Times*, May 14, 2018, <https://www.nytimes.com/2018/05/14/opinion/the-american-renaissance-is-already-happening.html>.

88 “This trend is accelerating and moving outside the U.S. ... Copenhagen, Hamburg and Kings Cross in London are held up as good examples. ... [M]illennials are more collaborative ... and want to create a new narrative from what they see at the national level.” “The Untold Good News Story of America Today,” *BBC News*, June 18, 2018, <https://www.bbc.co.uk/news/world-us-canada-44349211>.

89 Philip Bobbitt, “The Decay and Renewal of the American Constitutional Order,” in *Nation, State and Empire* (Engelsberg Seminar, 2017).

90 Bruce Katz and Jeremy Nowak, *The New Localism: How Cities Can Thrive in the Age of Populism* (Brookings Institution Press, 2018).

atom undergoes nuclear fission, a few neutrons are ejected from the reaction. These free neutrons then react with other isotopes, like uranium 235, and cause more fissions. This is the phenomenon known as a chain reaction. This “fissioning” is what is happening, at a varying but often accelerating pace, within the political society of the United States.

In 2004, the writer Bill Bishop described a development he called “the Big Sort,”<sup>91</sup> which traced the self-segregation of Americans into like-minded, evermore ideologically polarized communities. At the regional level, the sorting has been distinctly bicoastal, with New England, the mid-Atlantic, and Pacific regions growing more Democratic, while the West, Texas, and the South grew more Republican. At the same time, America’s coastal cities are becoming better educated, wealthier, and more cohesive while much of the center of the country is hollowing out. In most states, this trend has picked up momentum in the last 25 years. Just three states had less political polarization in 2012 than in 1992.<sup>92</sup> Like-minded people are clustering together, and clustering together seems to make people even more like-minded. Data from the 2016 presidential election show that this sorting is actually increasing: Although the Democratic candidate decisively won the popular vote, she carried only 487 of the 3,141 counties.<sup>93</sup> Four years before, Barack Obama won 689.<sup>94</sup> In 20 years, one-half the population will live in eight states; the 16 most populous states will have about 70 percent of the population. This means that 34 states will have about 30 percent of America’s people.

This raises concerns that the people in two-thirds of the states (34) — the number required to call a constitutional convention or propose constitutional amendments — could amount to far less than two-thirds of the population and, similarly, that the population of three-quarters of the states — 38 states — could ratify the results even though they contain far less than three-quarters of the population.

Whatever the formal consequences of this demographic and political sorting, there is a real threat to America’s common tradition when states that have become overwhelmingly representative

of particular minorities — and I include white Anglo-Saxon Protestants — achieve overwhelming political power in the various states. For one thing, this could bring about a reversal of the constitutional dynamic of the last century and a half by which human rights were made uniform across all the states. Right now, a shoplifter or a bank robber arrested in Wyoming is read the same *Miranda* rights as one arrested in Florida. The same standards are applied banning prayer in schools, or forbidding the criminalization of abortion, or prohibiting the use of narcotics. This could change. Already, some states practice capital punishment while others do not — even though in most foreign states there is a uniform rule with respect to this question. In some instances, this fissioning of the national project might encourage welcome reform — I am thinking of the decriminalization of certain drug use. But there is also deadly risk to the American constitutional project in such market-driven variation, which treats the citizen more like a consumer than a member of the national polity. For example, I need hardly observe that racializing discourse would add an accelerant to this fissioning that could prove fatal to the American project.

## V. Overcoming

Reflecting on the effort to create a world order after World War II, Dean Acheson wrote that his task was “just a bit less formidable than that described in the first chapter of Genesis. That was to create a world out of chaos; ours, to create half a world, a free half, out of the same material without blowing the whole [thing up] in the process.”<sup>95</sup>

Acheson’s hope was to craft political and economic arrangements that would bind the anti-communist world through the benefits conferred by free trade, stable currencies, and the example of liberal democracies that flourished in the atmosphere of tolerance and open debate. Since the end of World War II, this world order has achieved more, perhaps, than Acheson could have hoped for. The United States has contributed money and ideas to expand trade, fight disease, encourage the development of new technologies,

91 Bill Bishop, *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart* (Wilmington, MA: Mariner Books, 2008).

92 Ron Johnston, David Manley, and Kelyvn Jones, “Spatial Polarization of Presidential Voting in the United States, 1992–2012,” *Annals of the American Association of Geographers* 106, no. 5 (2016): 1047, <https://doi.org/10.1080/24694452.2016.1191991>.

93 “Thanks to a Bad Map and Bizarre Math, Breitbart Can Report That Trump Won the REAL Popular Vote,” *Washington Post*, Nov. 15, 2016, <https://www.washingtonpost.com/news/the-fix/wp/2016/11/15/thanks-to-a-bad-map-and-bizarre-math-breitbart-can-report-that-trump-won-the-real-popular-vote/>.

94 “Obama Won a Record-Low Share of U.S. Counties — But He Won Them Big,” *NBC News*, Dec. 4, 2012, <http://www.nbcnews.com/id/50073771/t/obama-won-record-low-share-us-counties-he-won-them-big/>.

95 Dean Acheson, *Present at the Creation: My Years in the State Department* (New York: W.W. Norton, 1969), “Apologia Pro Libre Hoc” (1987).

and increase the scope and lower the cost of global transport. Most importantly, America has risked its own safety to guarantee the safety of other states. It was American leadership of that world order that ended the Cold War, that reversed the Iraqi annexation of Kuwait, that finally halted the ethnic cleansing in the Balkans, and that brought peace between Israel and Egypt.

It is hardly implausible to say that had the American state not developed as it has, the world would be poorer, less free, and, above all, less hopeful.

America can vindicate its role in defending the world order if it can maintain confidence in its constitutional and strategic values. Those values reflect the American assumptions that alliances are a strategic asset (America's first foray into world affairs was the Monroe Doctrine, guaranteed by the British Royal Navy<sup>96</sup>); that public policy abroad, like policy at home, must reflect America's values, because the assertion of U.S. interests is the assertion of U.S. values; that security, wealth, and freedom flourish in environments that aim to nurture them and therefore are not the result of a mercantile competition that assumes that one person's gain is another's loss. America will succeed because constitutional innovation and free markets and ingenious technology are endeavors America is good at. But if America betrays its constitutional

## The industrial nation state is increasingly unable to make the claim that it will improve the material well-being of its people...

ethos — what makes it exceptional but cannot by itself make it exceptionally virtuous or good — it will lose confidence and won't even try.

The weakest link in U.S. national strategy is a growing lack of confidence in America's institutions, its heritage, and its goals. When America has succeeded as a country, it is because it has relied on a sense of purpose and a shared belief that it can and will do the right thing because — not in every case and every time — it has subscribed to

the ideals of the American constitutional ethos, and it has taken pains to convince others that it would act in accordance with that ethos. Without this sense of past achievements and of struggles overcome, America will necessarily fail, because it will have defeated itself. Other states, motivated by different principles, will take up this role. As William Burns, former deputy secretary of state, put it, "We can shape things or wait to get shaped by China and everybody else."<sup>97</sup> Indeed, one can already see in the backlash that triumphed in the 2016 presidential election, the disabling of those steps — like the Trans-Pacific Partnership trade agreement — that would have been positive steps in countering the de-stabilizing rise of China.

• • •

The rise of populist movements in the West, the rise of China in the East, and the growth of social media all have converged to undermine America's commitment to democratic republics, which are the structural form of the U.S. constitutional ethos, an ethos of liberal values that the United States has championed in the international system.

The rise of these movements is widely taken to be an implicit criticism of that system. As has been observed earlier in this paper, it is an illiberal reaction to the unresponsiveness of the democratic political process. This reaction is supercharged by the growth of social media that bypasses the traditional processes of party politics and representative government. Perhaps equally important, social media platforms also bypass the intellectual gatekeepers of the mainstream media, upon which Americans have relied for a factual consensus to ground political debate. Champions of this development claim to be disenchanted with the corruption of the republican structure of representation. Thus, both populism and its developmental companion, social media, are fueled by disgust.

As Jack Balkin has put it, populists are angry about the democratic shortfall of government,<sup>98</sup> and social media reflects anger about the unrepresentative shortcomings of representation. The evidence, however, might be characterized differently.

One might say that only a few political scientists care about democracy *per se* — or republicanism for that matter — and, while they obsess about

96 See Jay Sexton, *The Monroe Doctrine: Empire and Nation in Nineteenth-Century America* (New York: Hill and Wang, 2011).

97 Dexter Filkins, "Rex Tillerson at the Breaking Point," *New Yorker*, Oct. 16, 2017, <https://www.newyorker.com/magazine/2017/10/16/rex-tillerson-at-the-breaking-point>.

98 Jack M. Balkin, "Constitutional Rot" in *Can It Happen Here? Authoritarianism in America*, ed. Cass R. Sunstein (New York: Dey Street Books, 2018). Also published by Yale Law School as Public Law Research Paper no. 604, <https://ssrn.com/abstract=2992961>.



the unrepresentative nature of the Senate and the loss of civic virtue in politicians, the public is not similarly preoccupied. Rather, what motivates contemporary populists and social media movements are the expectations that their members should be treated like customers and consumers rather than citizens, and thus that they bear no responsibility for reforming the system through their own participation, other than simply going on to another carrier or vendor to satisfy their needs.

This attitude, reflected in various surveys, is especially worrying among the young.<sup>99</sup> Not only is there an illiberal “cohort shift,” with young citizens today being more skeptical about democracy than their parents were at the same age, but Millennials are also more likely to denigrate democratic institutions and to express a preference for a shift — to the right in some places, to the left in others — away from their liberal democratic heritage.

In such a situation, the legitimacy of the State is put into play. It is a commonplace to say that the governments of the West are dysfunctional, but are there agreed-upon ends they are not functioning to achieve? A debate between Sanford Levinson and Balkin on this subject quickly revealed that “dysfunctional” was largely a label for “unable to pass the legislation I favor and that, I concede, is widely opposed.”<sup>100</sup>

The admiration and confidence accorded the governing operating systems of the democratic republics are waning, but it is not their functionality as operating systems so much as their legitimacy — the relationship of the State to the People — that is responsible for this. The industrial nation-state is increasingly unable to make the claim that it will improve the material well-being of its people, and this claim has been the basis of the legitimacy of this constitutional order for more than a century. In fact, with regard to the spread of nuclear and chemical weapons; the growth of global terror networks, international criminal conspiracies, and hacking threats; the frequency and virulence of epidemics; climate change; the fragility of national financial institutions; the protection of national morals and culture; and the use of law to enforce moral

codes, the State seems increasingly to be at a loss.

This is why the rise of China is salient for the constitutional order of democratic republics. China provides an alternative, undemocratic, unrepresentative form of government that does seem to be able to affirm its basis for legitimacy. The Chinese regime appears capable of increasing the total wealth of society steadily, consistently, even dramatically, while increasing the economic opportunities available to its people. As such, it is a harbinger of the new constitutional order of states that tends to treat its citizens as consumers.<sup>101</sup> Globally, Millennials are much more positive about President Xi Jinping and his ability to invest in the future, and they appear less troubled by his repression of political opposition and debate.<sup>102</sup> China’s rise in the international order is directly proportional to its success domestically, a success that depends upon jettisoning the basis for legitimacy that undergirds the other great states of the world.

By contrast, in the United States the increase in racial antagonism and alienation, increasing income inequality and hostility to leading elites, considerable illegal immigration and the largest levels of legal immigration since 1890, and the executive’s increasing reliance on discretionary law enforcement all testify to an unraveling of the compact that forms the basis of democratic republics, the triumphant variant of the constitutional order of industrial nation-states. Calling this “dysfunction” is a misnomer. It is instead the transition from one constitutional order to another.

One dreadful consequence of these developments is the growing, concomitant hatred of various groups within society. The white supremacists at Charlottesville are indeed more vile than the antifa mob at Berkeley, because racial and religious prejudice is uniquely odious, but both are marinated in hatred for the other. The threat to the rest of society arises, as Machiavelli observed, from the fact that tyranny comes to power by promising to crush the elements that the people hate.

So what is to be done? The first step is to recognize that what is happening in the United States is happening everywhere and that it is a

99 See Roberto Stefan Foa and Yascha Mounk, “The Danger of Deconsolidation,” *Journal of Democracy* 27, no. 3 (July 2016): 5, <https://www.journalofdemocracy.org/article/danger-deconsolidation-democratic-disconnect>.

100 Sanford Levinson and Jack M. Balkin, “Democracy and Dysfunction: An Exchange,” *Indiana Law Review* 50 (posted online Aug. 8, 2016). Also published by Yale Law School as Public Law Research Paper no. 579, <https://ssrn.com/abstract=2820202>.

101 Charles Rollet, “The Odd Reality of Life Under China’s All-Seeing Credit Score System,” *Wired*, June 5, 2018, <https://www.wired.co.uk/article/china-social-credit>.

102 Richard Wike, Jacob Poushter, and Hani Zainulbhai, “China and the Global Balance of Power,” *Pew Research Center*, June 29, 2016, <http://www.pewglobal.org/2016/06/29/3-china-and-the-global-balance-of-power/>.

fundamental, not a transient, development. That development is the challenge to the current constitutional order of the United States and other dominant states by a new form of the State.<sup>103</sup> Absent this recognition, America is condemned to dealing with its problems piecemeal and ineffectively. But armed with this awareness, America can instead craft its own version of the coming constitutional order, just as it did with its predecessor within which we now live.

Second, America must recognize those common threats that beset the world order: climate change, networked terror, an increasingly febrile and fragile international financial system, and the proliferation of technologies of mass destruction that could lead to the use of nuclear and biological weapons. Failure to deal with all of these matters is destroying the legitimacy of the industrial nation-state. Third, the United States must use those techniques it is best at: assimilation and tolerance against terror; the ingenuity of markets and innovative technology to manage climate change and global financial connectedness; deterrence and — if necessary — intervention by an alliance against the proliferation of weapons of mass destruction. America knows that it knows how to do these things because it has done them successfully in the past.

If it is true that the international order is shaped by the most successful and dynamic constitutional order, then America must look to its domestic polity to begin these initiatives. As much as such efforts may cause unease, America must find a way to bring together the concerns of protesting students, grieving and outraged African-Americans who are victims of state violence, marginalized sexual groups of varying self-identification, working-class persons frustrated by apparently unstoppable immigration and evaporating economic opportunity, families discouraged by the coarsening of American life, and religious communities that feel themselves at war with the larger culture, along with the currently dispirited liberal advocates of tolerance, dispassion, and debate. That will mean inventing a constitutional order based on the traditional values of America's democratic republic and legitimating its structure through an equal responsiveness to the concerns

of those currently alienated from that structure and to those who are alienated from the apparent shifts in that structure. In this task, the sheer bloody-mindedness of the current administration may be a solvent, dissipating the hardening molds of distrust and making possible a new era of faith in the American enterprise. As a start, the United States should consider some regime of reparations for African-Americans — who regardless of their relationship to the practice of racial slavery still labor under its legacy — and Native Americans whose treaties with the United States remain to be honored. It is not simply a matter of obligation to these groups so much as it is a matter of self-respect. The way to redress foreign wrongs is to recover American self-confidence so that the United States can lead the international order to a prosperity and security that embraces all states that wish to participate in that order.

Although it has been routinely misinterpreted by American politicians — or perhaps because it has been so misinterpreted — I want to close with a reflection on John Winthrop's famous speech charting a vision for the American colonists in 1630. He said to the passengers of the *Arbella*, "We shall be as a city upon a hill, the eyes of all people are upon us."<sup>104</sup>

By this Winthrop emphatically did *not* mean that the excellence of America's example would be the marvel of the age or that the virtue of the immigrants he addressed would make their enterprise a success. On the contrary, he knew that Europeans expected this experiment to fail. This is what Winthrop meant when he warned that "the eyes of all people are upon us." His words were a *caution* to the new Americans to behave themselves, to take up their grave responsibilities and face their equally grave challenges with a decent respect for the opinions of mankind.

An elected legislature was established. Ministers were prohibited from holding political office. Harvard College was founded six years later.<sup>105</sup> All this was done without a formal charter from the British government.

No one can say where the American experiment is headed. Its strife and failures have also been a part, perhaps an indispensable part, of its triumphs. Its legacy — the American constitutional

103 For a discussion of market-states in the context of contemporary international politics, see Philip Bobbitt, "States of Disorder," *New Statesman*, March 1, 2016, <https://www.newstatesman.com/politics/uk/2016/03/states-disorder>. As constitutional orders are differentiated by their claims to legitimacy, one way to understand the industrial nation-state and its competitor the informational market-state is to specify their respective bases for legitimacy. Very roughly, the nation-states say, "Give us power and we will improve your well-being by using law to tame the operations of the market," while market-states say, "Give us power and we will maximize your opportunities by using the market to make the society richer and more spacious."

104 Winthrop's speech can be read at [http://www.digitalhistory.uh.edu/disp\\_textbook.cfm?smtID=3&psid=3918](http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=3918).

105 Harvard College was founded in 1636: <https://college.harvard.edu/about/mission-and-vision>.



ethos — has redeemed its history. Now that ethos must create history anew.

## **Conclusion**

In this essay I have argued that what makes the United States exceptional is also what makes it indispensable going forward as the states of the world adapt a new constitutional order to cope with the challenges that are overwhelming the industrial nation-state. The alternative is not a return to the halcyon days of national identity secured by laws that privileged a dominant ethnic or national group's values in the governance of the State, not because these laws were morally wrong, though in some places and at some times they certainly were by the contemporary standards of today (for what other moral standards can we authentically apply?), but because such constitutional regimes cannot manage the challenges of the 21st century. The alternative is an illiberalism of both the left and the right that will infect the emerging market-states of the world just as fascism and communism infected the industrial nation-states of the last century.

American exceptionalism does not make the United States uniquely virtuous or especially virtuous, for that matter; it merely makes the American state capable of adaptation according to rules that rely on the conscience.

The constitutional challenges that currently beset states are responsible for the various, seemingly contradictory, crises that are occurring globally; these challenges can be resolved favorably to the values of the liberal tradition that ground the American constitutional ethos. Only a recognition of that ethos and its reinvigoration will enable the United States to play a positive role in leading the world to that resolution. 🇺🇸

**Acknowledgements:** *I should like to thank two remarkable research assistants, Andrew Elliott and Philippe Schiff, for their outstanding efforts on this essay; and I would also like to thank Megan Oprea, Autumn Brewington, and Ryan Evans for their editorial assistance at the Texas National Security Review. Of course, any errors of fact or judgment that remain, despite their help, are mine alone.*

**Philip Bobbitt** is Herbert Wechsler Professor of Federal Jurisprudence and Director of the Center on National Security, Columbia Law School and Distinguished Senior Lecturer at the University of Texas.

