



2014

Lincoln's Legacy for American International Law

Antonio F. Perez

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Recommended Citation

Antonio F. Perez, *Lincoln's Legacy for American International Law*, 28 Emory Int'l L. Rev. 167 (2014).
Available at: <https://scholarlycommons.law.emory.edu/eilr/vol28/iss1/6>

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LINCOLN'S LEGACY FOR AMERICAN INTERNATIONAL LAW

*Antonio F. Perez**

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* Professor of Law, The Columbus School of Law, The Catholic University of America; AB Harvard, JD Columbia. Research for this article was made possible by the generous support of the Columbus School of Law. I dedicate this article to my wife, Dr. Carol Perez, who, while I was working on this piece, insisted that I visit Lincoln's summer cottage at the Soldiers' Home in Washington, D.C. I should also disclose that, when as a very young lawyer working at the U.S. State Department I had a particularly tough problem to consider, I always found my mind would become clearer after a brief visit to the Lincoln Memorial.

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INTRODUCTION

Is the United States, as an international actor, different from all other international actors? If so, how is it different? What makes it different? How does American sovereignty fit into a larger conception of international law? These questions go back to the beginning of the Republic, and they remain pressing today. Many have debated this question in terms of the legacy of the Founding. Some find in the Founding the seeds of multilateralism and perhaps even cosmopolitanism;¹ others, rejecting this interpretation, advance a nationalist and unilateralist account of the Founding.² But the Founding is not the whole story.

This Article argues that our answers to these questions need to account for the Civil War, when the question whether the United States would survive as the continuation of the tradition commenced in 1776 was answered through an unprecedented and, since then, unrepeated violent transformation. The state reconstructed through that war arguably became a new kind of creature in international law, radically different from the arrangements that governed the antebellum regime, thus re-conceiving American sovereignty and refashioning American practice of international law in the image conceived by Abraham Lincoln’s rhetoric, statecraft, and worldview. In brief, Lincoln’s achievement was to transform the plural United States from a *sui generis* institutional arrangement in the community of states into a singular nation-state performing a *sui generis* role in the community of states. In this new role, the United States would serve as an exemplar of a particular kind of society and the kind of person Lincoln thought normatively superior, a vehicle for the formation of a kind of person he believed made such a society possible, and perhaps even a force in the world for the progressive and universal realization of those ideals. Much as Lincoln’s achievement was to refashion the American state, Lincoln’s vision of American sovereignty made possible and necessary an entirely new

¹ See, e.g., DAVID C. HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING* (2003) [hereinafter *PEACE PACT*]; PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS 1776–1814*, at 7 (1993).

² See, e.g., JEREMY RABKIN, *LAW WITHOUT NATIONS: WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* (2005).

approach to international law in which the American state re-defined its relation to the world.

To lay the groundwork for Lincoln's achievement, Part I of this Article first describes the Founding conception of American sovereignty. From the standpoint of institutional structure, it was a *sui generis* supra-national theory—living both in the world of international law and constitutional theory, finding its roots in Madisonian thought, evidenced in antebellum practice, defended in Senator Douglas's contribution in his famous debates with Lincoln, and almost salvaged in the Confederate Constitution. Part II outlines Lincoln's radically different, anti-supranational conception, shows how it expressed itself in Lincoln's criticism of the Mexican-American War, in the international dimensions of his debate with Senator Douglas concerning the relation between the United States and its newly acquired territories in the context of the question of the expansion of slavery, and then finally in terms of his conduct of war diplomacy. The conception of international law revealed in these debates and Lincoln's practice of statecraft subordinated customary international law to the law of reason and good faith in an international system of states in which virtue could multiply and flourish without coercion. Part III explores the ethical foundations of Lincoln's conception of American sovereignty and international law, arguing that Lincoln's vision was rooted in reason rather than experience, the hope for perfection coupled with a mature acceptance of imperfection, and a need to preserve the uniqueness of the American experience as the source of the nation's ability to make a difference in world history—indeed, in its capacity to make men and women like Lincoln himself possible. Part IV offers some preliminary thoughts on the implications of Lincoln's vision for present policy.

I. THE ANTEBELLUM REPUBLIC'S THEORY AND PRACTICE OF INTERNATIONAL LAW

To understand Lincoln's achievement, we need to recapture the debate leading to the Civil War about the nature of the United States. The debate need not be conducted in terms of modern assumptions that the United States ceased to be, upon the adoption of the Constitution,³ a confederation of sovereign states, each retaining some international capacity. In many ways, the

³ Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment*, 94 COLUM. L. REV. 457, 462–65 (1994) (arguing that even though the model of a treaty under international law best captures the period of the Articles of Confederation, this ceases to be true with the adoption of the Constitution).

antebellum United States retained elements of a supra-national entity—in ways that were in fact seriously debated during the antebellum era. Under this view, the supra-national character of the United States was closely connected to a pluralist conception of admissible political economies—making space for two distinct political economies based on slave and free labor, as well as combinations of the two. This pluralism was, in turn, connected to a commitment to international legality, through both the practice of free trade and respect for customary international law. These commitments, in turn, made possible and perhaps required competitive territorial expansion for the extension of the two equally admissible systems of political economy. The end of this logic of expansion in the 1850s signaled a regime crisis that forms the backdrop to Senator Douglas's and the Confederate attempts to reformulate the Madisonian supranational regime on a more sustainable basis.

A. *Madisonian Sovereignty—Constitutional and International Law*

It is fair to say that Madison's own view on the nature of sovereignty in the United States mutated over time. But most would treat Madison's essay in *Federalist No. 39* as the launching point for the discussion of his understanding of the Constitution's theory of sovereignty.⁴ Here, he is interpreted by modern commentators as oscillating between national and federalist understandings of the allocation of sovereignty for a single nation.⁵ Given the military and other enforcement attributes of the early federal government, this seems right in light of modern alternatives, radically differing from a supranational entity like the modern United Nations.⁶ In short, under this interpretation of Madison's views, the federation remained one nation for purposes of international law.

A generation later, however, John Calhoun directly challenged the supremacy of federal law in the Nullification Crisis, rejecting the authority of the federation to impose tariffs on foreign imports so as to protect Northern manufacturers.⁷ Northern protection would subject Southern exporters of cotton and other raw materials to the disadvantages of reciprocal protectionism and higher import costs.⁸ Arguing along lines parallel to Calhoun's opposition

⁴ See THE FEDERALIST, NO. 39, at 239–46 (James Madison) (Clinton Rossiter ed., 1961). Madison's hopes for continuity of the Union rested, not on grounds of constitutional necessity, but rather on the "veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability." THE FEDERALIST, NO. 49, *supra*, at 313, 314 (James Madison).

⁵ See DANIEL FARBER, LINCOLN'S CONSTITUTION 36–39 (2003).

⁶ *Id.* at 40–41.

⁷ I SAMUEL MORISON ET AL., THE GROWTH OF THE AMERICAN REPUBLIC 424–28 (1980).

⁸ See generally *id.* 424–28, 431–34 (1980).

to higher tariffs to protect Northern manufacturers, Jacksonians, especially from the South, opposed the Whig program sponsored by Henry Clay and others for the so-called "American System" of promoting internal improvements to facilitate commercial expansion and market integration between North, South, East, and West.⁹ Under Calhoun's view, if states wanted to join together to create transportation networks or other cooperative projects, then surely they could do so, albeit only with federal approval, through the Constitution's Interstate Compact Clause.¹⁰ Southern export markets were largely European, as the globalization of transatlantic commerce during England's industrial revolution resulted in a flow of European, mainly English, investments in Northern capital coupled with European, again mainly English, purchase of Southern cotton to service British textile manufacturers.¹¹ So, like high tariffs, internal improvements were perceived by many as an attempt to capture federal resources to further return on invested capital in the Northern, free-wage political economy. The larger connection between the federal power to privilege particular interests and the preservation of local political economy was never far from the surface; as one slave-state senator argued, "If Congress can make banks, roads, and canals under the Constitution, they can free any slave in the United States."¹² In short, the federation was to be fundamentally neutral as between the states and the sections, as though it were a supranational organ adjudicating disputes between semi-sovereign entities.

A much older Madison, confronting the Nullification Crisis a generation later and in light of constitutional practice following the Founding, now seemed to speak more ambiguously about the nature of state sovereignty. On the one hand, he rejected a pure international theory of the relations between the states, eschewing:

[T]hose who now [c]ontend that the States have never parted with an [a]tom of their sovereignty; and consequently that the Constitutional band which holds them together, is a mere league or partnership, without any of the characteristics of sovereignty or nationality.¹³

⁹ See *id.* at 389–90, 419 (noting that the rejection of this program required the substitution of state-level enterprise in the construction of transportation networks).

¹⁰ See U.S. CONST. art. I, sec. 10, cl. 3 ("No State shall, without the Consent of Congress . . . , enter into any Agreement or Compact with another State . . .").

¹¹ See ORVILLE VERNON BURTON, *THE AGE OF LINCOLN*, 22–23 (2007).

¹² *Id.* at 24 (quoting North Carolina Senator Nathaniel Macon).

¹³ Letter from James Madison to William Cabell Rives (Mar. 12, 1833), in JAMES MADISON, *WRITINGS* 863–64 (Jack N. Rakove ed. 1999) [hereinafter *MADISON'S WRITINGS*].

On the other hand, he refused to limit the sovereignty of the states:

Our political system is admitted to be a new [c]reation—a real nondescript. Its character therefore must be sought within itself; not in precedents, because there are none; not in writers whose comments are guided by precedents.¹⁴

Thus he adds: “Who can tell at present how Vattel,” the most-widely accepted European commentator on international law, “would have qualified (in the Gallic sense of the term) a [c]ompound & peculiar system with such an example of it as ours before them.”¹⁵

While endorsing neither national nor supranational conceptions, Madison’s reformulation does evidence a shift toward the supranational view. He excluded only the extreme position that the states had “never parted with an atom” of their sovereignty; thus, Madison permitted the inference that the states retained some of their external sovereignty, an inference supported by his citation to Vattel, author of the leading treatise on international law of the era.¹⁶ The citation to Vattel is significant because of Vattel’s particular conception of international law as the law governing Europe as “a kind of republic”¹⁷—actually, as an extended republic in which all the member-states were equal in right.¹⁸ Madison, in his analysis of the nullification debate, seemed to contemplate the possibility that states retained some capacity to act internationally independently of the federal union, albeit not on the question of tariffs then at issue,¹⁹ perhaps because common external tariffs would be necessary for the federal government to negotiate with other states and domestically implement a program of reciprocal reduction of trade barriers.²⁰

¹⁴ *Id.* at 864.

¹⁵ *Id.* Here, what Madison might mean is that the “Gallic” sense of the term “qualification” requires the precise classification of the Union as either international or national. Consistent with *Federalist No. 39*, Madison continued to hold the view that the United States was *sui generis* and could not be classified. See THE FEDERALIST NO. 39, *supra* note 4 (James Madison).

¹⁶ The concept of “the law of nations” in the Founding Era arguably comprised more than the subsequent term coined by Jeremy Bentham, but it was still in all respects law binding on states, rather than being the equivalent of domestic constitutional law. See generally MARK WESTON JANIS, THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS, 1789–1914, at 11–24 (2004).

¹⁷ See 1 EMMERICH DE VATTTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS III, iii, sec. 47 (1758).

¹⁸ Vattel famously pronounced: “A dwarf is as much a man as a giant; a small republic is as much a sovereign Stated as the most powerful Kingdom.” *Id.*, at sec. 18. See generally ONUF, *supra* note 1, at 7–19 (discussing the Vattelian world view and its influence on the Founding Generation).

¹⁹ But see FARBER, *supra* note 5, at 67–69 (advancing a more nationalist interpretation of Madison’s position).

²⁰ See *infra* Part I.B.1 (discussing the Plan of 1776).

The states were potentially part of a Vatellian extended republic constituting a qualified international system in other respects.

This interpretation of Madison views, as well as the common understanding of the early United States evidenced in the rejection of both the American System of internal improvements and high tariffs, is consistent with recent scholarship's exposition of the so-called Greco-Roman, "republican" heritage of the Founding Period.²¹ The context for Madison's theory of sovereignty, pluralism, and free trade is a major shift in the intellectual history of the West. In his highly influential effort to trace the pathways through which the fifteenth-century humanist revival of secular classical political theory—passing through Machiavelli, to the English Civil War and Locke's formulation of a theory of limited government, then to the Scottish Enlightenment's (especially Adam Smith's) embrace of principles of free trade—J.G.A. Pocock saw the American Founding as the last act of civic humanism.²² The Founders confronted what Pocock termed a "Machiavellian moment," in which consciousness of the mortality of a political order emerges and either choices are made to address the order's instability or the problem is ignored with deleterious consequences.²³ Under Pocock's interpretation of the American Revolution, this "Machiavellian moment" involved the recognition that corruption and instability flowed from the concentration of political power and geographical expansion of the polity through the Act of Union of 1706 forming Great Britain out of the separate kingdoms of the British islands—a recognition making the American Revolution necessary and possible.²⁴

According to Pocock, Americans recognized Adam Smith's conception of the division of labor as driving change and moving history.²⁵ They thus turned toward exploring the possibility of producing virtue, and regulating corruption, through largely self-interested activities connected to the division of labor. For political life, the central turn was Madison's theory of the enlarged republic in *Federalist No. 10*, allowing for the balancing of factional politics.²⁶ For economic life, the crucial move was the creation of a commercial republic that,

²¹ See generally CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME AND THE AMERICAN ENLIGHTENMENT* (1994); CAROLINE WINTERER, *THE CULTURE OF CLASSICISM: ANCIENT GREECE AND ROME IN AMERICAN INTELLECTUAL LIFE, 1780–1910*, at 8 (2002).

²² J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLIC TRADITION* 462–67 (1975).

²³ *Id.* at 462.

²⁴ See *id.* at 401–61.

²⁵ *Id.* at 498–99.

²⁶ *THE FEDERALIST PAPERS*, No. 10, *supra* note 4 (James Madison).

committed to Smithian free trade, would facilitate the production of virtue and suppress and counteract corruption of wealth, thus stabilizing the regime.²⁷ Pocock argues that Americans rejected solutions in Machiavelli's own thought—namely, Caesarism²⁸ and civil religion.²⁹ Given the American opposition to monarchy and commitment to religious pluralism, the search for stability would take another institutional form to buttress the commercial republic, the form of the *sui generis* supranational order envisioned by Madison. Indeed, the revival of classical thought and pursuit of a solution to the problem of instability, so the argument goes, gave impetus to the possibility of universalism—the reality of an international society and a tendency towards international governance. This universalist imperative suggested that the U.S. Constitution was not only a “peace pact” creating a security community among the states,³⁰ but also a platform for a continuously growing, non-imperial community of states.³¹ Indeed, during the optimistic “enlightenment” Founding era, “the European system,” according to Vattel and other progressive internationalists, was becoming more rational, predictable, and tractable because an increasingly refined balance of power supported a developing regime of law among nations. This was the world the American Revolutionaries aspired to join as sovereign equals. This was a world to engage, even to improve, through diplomacy.³² Peace through an expanding, pluralist, supranational union, combining constitutional and international law, committed to internal and external free trade, became the very definition of Madison's *sui generis* understanding of American sovereignty.

²⁷ See POCOCK, *supra* note 22, at 530–36.

²⁸ See *id.* at 528–33 & n.36 (citing GERARD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT (1970)) (rejecting the Hamiltonian call for Caesarism); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 739 (1993) (presenting a more sympathetic account of Hamilton's influence, focusing instead on the role of the civic republic he fostered in instilling virtue).

²⁹ Civic humanist theory maintained that customary norms no longer served to stabilize a world that had been legitimated in the Christian cosmology of the medieval world as divinely sanctioned. Thus, it became necessary to substitute a “substructure of religion” that could provide the “social means whereby men's natures might be transformed to the point where they became capable of citizenship.” POCOCK, *supra* note 22, at 192–93.

³⁰ See generally PEACE PACT, *supra* note 1, at 8.

³¹ See generally DAVID C. HENDRICKSON, UNION, NATION, OR EMPIRE: THE AMERICAN DEBATE OVER INTERNATIONAL RELATIONS, 1789–1941, at 6–22 (2009).

³² See ONUF, *supra* note 1 at 4–26. See NICHOLAS ONUF, THE REPUBLICAN LEGACY IN INTERNATIONAL THOUGHT (1998), for a more general theoretical treatment of “republican” visions of international law.

B. *Antebellum Practice*

Antebellum practice under this late or neo-Madisonian conception of U.S. sovereignty took at least three forms. First, the early external commitment to free trade and neutral rights evidenced the dominance of customary international law, since international law was the very means through which the American Union was defined. Second, because of supranationalism, constitutional questions required, where appropriate, resort to international law concepts and categories. This tendency manifested itself in the antebellum United States in a sustained dialogue between the external sovereignty of the federation and the external sovereignty of the states. This meant needing to find a way to manage the contrary tendencies of the states in the conduct of their own external relations. Finally, Madisonian supranationalism had significant force in the jurisprudence of the Supreme Court, serving to reinforce a pluralist recognition of the legitimacy of the competing domestic political economies of the states within a framework of domestic and international free trade.

1. *Supranational Law—Free Trade and Neutral Rights*

From the beginning, rights to commerce embedded in the law of nations became the basis for U.S. diplomacy.³³ U.S. foreign economic policy tilted towards free trade, seeking to break the chains of the British system of imperial preferences, and the states were constitutionally guaranteed equal access to the trading rights secured by the federation.³⁴ Under the Plan of 1776, the United States would enter into treaties for amity and commerce with European powers, based on a model treaty drafted by, among others, Benjamin Franklin.³⁵ Correlatively, in times of war, the United States would seek to promote an expansive view of neutral rights to trade.³⁶ Because these principles were thought to reflect the established practices of the international community throughout the 18th century, they were thought to reflect the customary law of nations.³⁷ Included among these rights were that neutral ships, freedom to carry goods to and from belligerents, subject to narrowly

³³ PEACE PACT, *supra* note 1, at 169–71.

³⁴ See U.S. CONST. art. I, sec. 9, cls. 5–6 (prohibiting export taxes and regulatory or tax preferences in maritime commerce); see *infra* text accompanying notes 216–22 (discussing Lincoln's circumvention of this equal access norm).

³⁵ SAMUEL FLAGG BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 25–27 (4th ed. 1957).

³⁶ See *id.* at 26.

³⁷ *Id.*

defined exceptions for militarily significant items known as “contraband.”³⁸ Only non-neutral commerce was subject to the law of prize, yielding limited, private rights to interrupt free trade.³⁹ The U.S. Constitution itself, in authorizing only the Congress to “grant Letters of Marque and Reprisal”⁴⁰—authorizations of private persons to engage in capture of non-neutral commerce that would otherwise not be permitted by the laws of war—is premised on this pro-free trade understanding of international law. Consistent with this view, Chief Justice John Marshall’s early prize case jurisprudence confirmed the limited nature of the rights of U.S. privateers, favoring neutral rights and promoting property interests and free trade.⁴¹ In sum, in seeking to follow a pro-free trade understanding of international law, the treaties modeled on the Plan of 1776 relied on the customary law of nations. They did not purport to change international law. Established usages in law, not power or the dictates of reason, would guide American diplomacy.

Complications arose during the French and Napoleonic Wars, however, as American neutral commerce filled the void left by English and French attempts to blockade and embargo each other; this profitable, so-called “carrying trade” was both within and across the two transatlantic empires.⁴² By 1805, Britain—now in a life-or-death struggle with Napoleonic France that the British believed threatened to subject all of Europe to French domination—expanded its blockade of occupied Europe, including more vigorous action against nominally neutral American commerce in ways that brought it into conflict with the United States and ultimately to the War of 1812.⁴³ British ships continued to “impress” into British service captured American sailors, on the ground that many were in fact deserters from the Royal Navy.⁴⁴

Perhaps more importantly, the Royal Navy expanded its definition of non-neutral commercial “carrying trade” subject to capture on the high seas and, upon judicial determination when brought to port, subject to seizure by the

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ U.S. CONST. art. I, sec. 8, cl. 11.

⁴¹ *See* *Brown v. United States*, 12 U.S. (8 C.) 110 (1814); *see generally* JOHN FABIAN WITT, LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 56–59 (2012) (discussing a number of cases in which Marshall limited capture rights of American privateers to reinforce U.S. neutrality). Marshall even interpreted the Congressional Declaration of War in 1812 not to operate automatically as a seizure within the territorial United States of foreign-enemy property. *Brown*, 12 U.S. at 149–51.

⁴² *See* BEMIS, *supra* note 35, at 141 (reporting significant increase in American exports and re-exports).

⁴³ *See id.* at 138–44.

⁴⁴ *Id.* at 144–45.

captor as lawful “prize.” Under the Rule of 1756, the British had taken the position that commerce between a metropolis and its imperial possessions that had been closed in peace could not be opened to neutral commerce during war.⁴⁵ Specifically, the Dutch—having been barred from carrying trade between French Caribbean possessions and France herself under the French system of imperial preferences excluding non-French carriage—would be deemed by the British to be engaging in non-neutral commerce between France’s imperial possessions and France herself during the war.⁴⁶ Dutch ships were viewed as agents, in effect, of a belligerent and therefore subject to capture and seizure of both the ship and its goods under the internationally-recognized law of prize.⁴⁷ American neutral commerce, however, had appeared to circumvent the Rule of 1756 by making stops in the ports of the territorial United States on voyages to or from French Caribbean possessions and the French homeland. In an English Prize Court appellate decision in 1805, *The Essex*, however, the Privy Council authorized expanded British implementation of the so-called Rule of 1756 to reach this American neutral commerce.⁴⁸ Under *The Essex*, these interrupted voyages would be deemed to constitute “continuous voyages” in violation of the Rule of 1756.⁴⁹

In substance, the dispute posed, on the one hand, British claims of military necessity based on the justice of Britain’s war against tyranny in Europe and, on the other, American assertions that the established customs of international law precluded both the Rule of 1756 and the doctrine of continuous voyage’s restraints on the right of free, neutral trade. Viewed from this perspective, Secretary of State James Madison’s 204-page *Examination* of the British position, published in 1806, subordinated just war theory and military necessity to the established doctrines of customary international law protecting neutral rights to engage in free trade.⁵⁰ Madison’s argument focused largely on established practice, as reflected in the opinions of the fathers of public international law (Grotius, Gentilis, Puffendorf, Bynkershoek, Vattel, and Martens);⁵¹ treaties, including but not limited to treaties under the Plan of 1776, as well as Britain’s own treaties, said to reflect customary international

⁴⁵ *Id.* at 39 n.3.

⁴⁶ *Id.* at 35–39.

⁴⁷ *Id.* at 39 & n.3.

⁴⁸ *Id.* at 141.

⁴⁹ *Id.*

⁵⁰ *See generally* JAMES MADISON, EXAMINATION OF THE BRITISH DOCTRINE WHICH SUBJECT TO CAPTURE A NEUTRAL TRADE NO OPEN IN TIME OF PEACE (1806).

⁵¹ *Id.* at 7–42.

law;⁵² and the practice of states recorded elsewhere.⁵³ Only then did Madison reach questions of policy, rejecting Britain's claim of military necessity as pretextual, since Britain's true motive was the commercial advantage it would gain from filling the gap left by excluded American commerce,⁵⁴ and unwise, since the legal rule Britain promoted might now someday be turned against her.⁵⁵ More importantly, Madison rejected Britain's methodological arguments that policy-based reasoning should persuade others that international law should be construed or adapted to accord with Britain's understanding of the needs of the moment, which Britain framed as an appeal to "reason." For Madison:

Reason is indeed the main source from which the law of nations is deduced; and in questions of a doubtful nature is the only rule by which the decision ought to be made. But the law of nations, as an established code, as an actual rule of conduct among nations, includes, as already explained, a variety of usages and regulations, founded in consent, either tacit or express, and superadding to the precepts of reason, rules of conduct of a kind altogether positive and mutable. If reason and conveniency alone, without regard to usage and authority, were to decide all questions of public law, not a few of the received doctrines would at once be superceded [sic].⁵⁶

Madison thus advanced a theory of international law that treated states as equals in the formation of customary international law, prioritized custom where evidence of custom was available, and depreciated claims that neutral application of legal principles would lead to undesirable results as a matter of policy, such as the expansion of Napoleonic tyranny in Europe.

Since customary international law looks to state practice irrespective of whether that practice is just or moral, the American doctrine of international law would not be predicated on natural rights or right reason.⁵⁷ In fact, the assumption that free trade was the normal state of affairs between nations explains in large part Jefferson's and Madison's misplaced belief that the United States could force Great Britain to change its policies by conducting its own embargo against Great Britain, policies which only impoverished Americans, deeply embarrassed both administrations, and may have resulted in

⁵² *Id.* at 43–78.

⁵³ *Id.* at 79–152.

⁵⁴ *See id.* at 162–64.

⁵⁵ *Id.* at 168.

⁵⁶ *Id.* at 150.

⁵⁷ ONUF, *supra* note 1, at 197–211 (discussing the *Examination*).

the War of 1812 due to subsequent frustration with the continuation of British policies.⁵⁸ Madison's theory of international law would accept different forms of social practice and, therefore, different forms of political economy. Rather than serve as policies of convenience during the European wars, American diplomacy's commitment to pluralism through non-intervention and neutrality, and to free trade, seemed to be built into the DNA of the foreign relations of the United States. Madison's supranational law and foreign policy were, in sum, consistent with Madison's stabilizing, universalizing and pluralist view of the internal character of supranational U.S. law.

After the War of 1812, neutrality and free commerce continued to be the essential elements of U.S. foreign policy. First, the original version of the Monroe Doctrine was as an effort solely to prevent European intervention against self-determination by the colonies of Spain,⁵⁹ which when freed might in time peacefully join the United States. Second, a renewed commitment to free trade agreements included provisions assuring non-discrimination against aliens by the United States and most-favored-nation commitments assuring nondiscrimination between different trading partners of the United States.⁶⁰ Free trade, as then understood in international terms, did not concern itself with the mode of domestic production. So implicit in much free trade theory is neutrality as to the domestic mode of production, such as slavery.⁶¹ In accord with this view, internally, the regulatory power of Congress during this period was thought not to extend to manufacturing processes,⁶² and it does not appear that the United States was a party to any treaties regulating trade on this basis. Not surprisingly, even though Congress formally declared the slave trade

⁵⁸ See BEMIS, *supra* note 35, at 151–56.

⁵⁹ See *id.* at 208–09. Implementing American non-intervention remained problematic, as so-called filibusterers and others adventurers engaged in private aggression in Latin America, leading to repeated efforts to amend and improve American laws forbidding and criminalizing violations of neutrality and piracy. *Id.* at 151, 199, 330 (expanding prohibitions against neutrality violations and criminalizing piracy as an offense against the law of nations).

⁶⁰ Act of Mar. 3, 1815, ch. 3, 3 Stat. 224, 224; BEMIS, *supra* note 35, at 172, 201 (discussing national treatment of discrimination against aliens and the most favored nation treatment).

⁶¹ Implicit in much free trade theory is neutrality as to the domestic mode of production. This is certainly implicit in Adam Smith and David Ricardo's work, which by 1817 had formalized a nascent theory of comparative advantage. See DAVID RICARDO, *ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 77–93 (1817) (citing ADAM SMITH, *THE WEALTH OF NATIONS*) (supplying the famous example of trade arising between Portugal and England in wine and cloth, even though England might have an absolute advantage in the production of each). Whether the two countries employed different production processes was simply not a reason for increasing trade barriers. *Id.*

⁶² *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 53 (1824); see also Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

piratical,⁶³ the United States did not join Britain's effort to police bans on the international trade in slavery until the Civil War, when the rump Congress of Northern states finally ended the fraud under which Congress previously afforded U.S.-flag protection from British enforcement operations to American slave traders.⁶⁴

In sum, the United States, through non-discrimination principles in trade, would respect the internal choices of foreign states in the same way that the supranational union, and each of its own states, would respect the internal choices of all the U.S. states. Put a different way, the antebellum regime accepted and generalized the international implications of pluralist recognition of the semi-sovereign right of states within the Union to employ different modes of production.

2. *Tips of the Spear of External State Sovereignty—North and South*

Because the Union was designed to require the federation to respect the sovereignty of the states, coordination problems posed important challenges to the stability of the union and its capacity to execute the peaceful expansion of the supranational constitution. In their relations with neighboring foreign states, U.S. states continued to exercise their external sovereignty. Among the most significant examples are, first, the foreign policies of New York and Maine, provoking conflicts with the United Kingdom; and, second, citizens of the United States “voting with their feet,” as their migration to Texas provoked conflict with Mexico and challenged federal attempts to maintain the non-interventionist policy of the Monroe Doctrine throughout the Caribbean. In part because of the independent conduct of the states on the frontier, Manifest Destiny, while coined initially in 1845 as a term to describe the United States's prior practice of peaceful extension towards the Pacific, was ultimately transformed from a theory of consensual supra-nationalism and “peaceful rise” to one of annexation and military conquest.⁶⁵

In the North, the external semi-sovereignty of the states immediately posed threats to the Union from offensive foreign conduct. In light of the federal government's mismanagement of trade policy during the time of the Napoleonic Wars, the United Kingdom was tempted to provoke dissolution of the Union through refraining from subjecting the New England states from the

⁶³ Act of May 15, 1820, ch. 113, 3 Stat. 600, 600–01.

⁶⁴ See BEMIS, *supra* note 35, at 333.

⁶⁵ *Id.* at 215, 281, 300.

blockade the Royal Navy sought to implement against the remainder of the United States.⁶⁶ This carrot no doubt played a role in the Hartford Convention's meeting to consider secession, and the British continued with these efforts even in the peace negotiations by offering to conclude a separate peace with those states in the event the treaty was not ratified by the United States.⁶⁷ Shortly after the conclusion of the Treaty of Ghent settling the War of 1812,⁶⁸ Britain accepted the proposal made by the American negotiators at Ghent to enter into an additional agreement virtually de-militarizing the Great Lakes.⁶⁹ The Rush-Bagot Agreement of 1817,⁷⁰ effected initially through an exchange of diplomatic notes was confirmed, at British insistence, through a treaty receiving senatorial advice and consent to ratification. This was presumably because of British doubts as to whether anything less than a treaty could bind the semi-sovereign states and forestall their retaliatory conduct after the war.⁷¹

In time, the semi-sovereign character of the states eventually did pose threats of offensive action against neighbors of the United States. British concerns about the possibility of independent action by the states were confirmed in *The Caroline* incident in 1837, when Canadian insurgents received assistance from supporters living in New York and British forces retaliated by destroying an American-owned steamship said to have been providing men and material support in British territory north of the Niagara Falls.⁷² After a sharp exchange of diplomatic notes over the legality of the British action in reprisal for the United States's violation of neutrality obligations during the Canadian insurgency, the dispute was exacerbated when a British national, Alexander McLeod, was arrested in New York City having publicly claimed to have been part of the British party responsible for the destruction of *The Caroline*.⁷³ Extradition to Canada did not appear to be an option in the absence of a federal extradition treaty or controlling statute. Moreover, in the roughly contemporaneous case of *Holmes v. Jennison*, the U.S. Supreme Court considered a habeas corpus petition by a Canadian prisoner whom the Governor of Vermont had sought to extradite to Canada to

⁶⁶ *Id.* at 160.

⁶⁷ *Id.* at 169 & n.2.

⁶⁸ Treaty of Peace and Amity, U.S.–U.K., Dec. 24, 1814, 8 Stat. 218.

⁶⁹ BEMIS, *supra* note 35, at 172

⁷⁰ Arrangement Between the United States and Great Britain, Apr. 28, 1817, 8 Stat. 231.

⁷¹ BEMIS, *supra* note 35, at 172.

⁷² *Id.* at 259.

⁷³ *Id.* at 259–60.

stand trial for murder.⁷⁴ The Court refused to grant the petition because it was equally split on the issue, thereby theoretically allowing the state of Vermont to proceed with an extradition without federal authorization.⁷⁵ The implications for independent state conduct of foreign policy in matters like the McLeod affair could not go unnoticed. While a New York jury ultimately acquitted McLeod in 1841, and the U.S. Congress enacted an enhanced Neutrality Act in an effort to prevent repetition of such incidents, the most important outcome of the affair was the inclusion of extradition obligations in the Webster–Ashburton Treaty of 1842.⁷⁶ The effect of these provisions was to federalize the question of extradition, enabling the United States to remove a British national from state custody in return for a British commitment to prosecute the individual concerned under British law. No longer would a Northern state be able to assert that federal means were unavailable to secure justice against foreign attacks on state persons or property, or that it was not required to cooperate in federal efforts to provide justice for British victims of conduct by persons for which the United States was internationally-responsible.

The 1842 Webster–Ashburton Treaty’s main purpose, however, was to resolve foreign policy problems arising from long-standing territorial concerns over the Maine-Canada border and the risk of independent action by Maine and its citizens. Indeed, tensions on the border resulted in violence, as the State of Maine attacked British military fortifications and attempted to expel British settlers and civil authorities in what became known as the “Restook War” of 1838–39.⁷⁷ U.S. military intervention was required to restrain Maine and keep the peace.⁷⁸ Political and military considerations favored a settlement of the boundary dispute that had given rise to the conflict, under which there would be mutual concessions of territorial claims, with the United States ceding portions of Maine and Britain ceding portions of the Canadian province of New Brunswick.⁷⁹ However, under the U.S. Constitution, just as new states could not be added to the supranational union without federal consent, the boundaries of existing states could not be adjusted without their consent.⁸⁰ The

⁷⁴ *Holmes v. Jennison*, 39 U.S. 540, 540 (1840).

⁷⁵ *Id.* Subsequently, however, Vermont refused to grant extradition. *Ex parte Holmes*, 12 Vt. 629, 642 (1840); CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 457 (4th ed. 2011).

⁷⁶ *See* BEMIS, *supra* note 35, at 260–66.

⁷⁷ *Id.* at 257–58.

⁷⁸ *See id.*

⁷⁹ *See id.* at 258 (taking into account Britain’s need for control of a major road that would assure uninterrupted communications between exposed New Brunswick and the Upper Provinces).

⁸⁰ U.S. CONST. art. IV, sec. 3. This section of the Constitution provides:

need for Maine's consent therefore complicated and delayed settlement of the territorial dispute.⁸¹ It appears that at least part of Maine's price for its consent was the inclusion in the Webster–Ashburton Treaty of a provision committing the United States to reimburse Maine for its expenses in fighting the Restook War, as though Maine were a party to the treaty, compelling Britain by means of a diplomatic note accompanying the treaty to disclaim international responsibility for ensuring that the United States performed this particular obligation.⁸²

In sum, by the early 1840s, independent state action had complicated U.S.–British relations, requiring stabilizing federal intervention. For many, however, the only long-term stable solution would entail further enlargement of the sphere of the supranational union, as interest in annexation increased on both sides of the Canadian border.⁸³

Southern expansionism, while at first unproblematic, eventually became even worse than Northern expansionism, threatening federal supremacy. Initially, a series of revolts by U.S. immigrants in Florida lead to consensual U.S. acquisition of Florida and Spain's claims to all western U.S. territory,⁸⁴ with British claims later resolved by the Treaty of 1846 and Mexican rights transferred by the settlement to the Mexican-American War. Initially, Texas emerged as an independent state in 1836 without direct official U.S. involvement, as migrants from the United States independently rose up against Mexican authorities.⁸⁵ Although factions in both the United States and Texas called for American annexation, immediate annexation was complicated by the

New States may be admitted by Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

This last clause in context prohibited the cession of Maine's claim to territory in New Brunswick without Maine's consent.

⁸¹ BEMIS, *supra* note 35, at 260–63.

⁸² *Id.* at 263.

⁸³ *Id.* at 299–300.

⁸⁴ *Id.* at 186–95 (discussing the origins, terms, and effects of the Adams–Onís Treaty, the so-called Transcontinental Treaty).

⁸⁵ *Id.* at 219.

need to maintain the slave-state, free-state balance norm under the Missouri Compromise of 1820,⁸⁶ wherein the state of Maine was created consensually to maintain balance in the Senate upon the admission of Missouri.⁸⁷

But soon, the situation in Texas became far more complex, as in New York and Maine, evidencing that treating states as independent could both support and undermine the supranational American system. The unprecedented emergence of another independent state of Americans put expansion in a whole new light. In particular, increasing commercial relations between Texas and Britain raised fears for many. For some, Texas's independent diplomacy would embroil it in a web of relationships that would complicate later annexation.⁸⁸ For others, British influence could ultimately lead to the extinction of slavery in Texas, which would make its annexation tip the balance against the South.⁸⁹ Finally, for others that Texas could emerge as a parallel state, one committed exclusively to a slavery-based political economy, which in turn could have served as a nexus for the secession of slave states, and thus the dissolution of the ever-expanding pluralist United States.⁹⁰ Ultimately, after failing to find the super-majority vote necessary to obtain the Senate's consent to annexation by treaty, President Tyler made the then-constitutionally questionable choice to obtain congressional approval by joint resolution, days before President Polk was to take office.⁹¹

Yet, notwithstanding annexation, the sense of independence and sovereignty Texas felt, coupled with the possibility of an independent Southern policy toward European export markets, probably reinforced the perceived sovereignty of all the Southern slave states as international semi-sovereigns. Consciousness of cultural difference between the North and the South also increased.⁹² At the same time, due in part to resentment against French army occupation during the Napoleonic Wars, nationalist sentiments erupted in

⁸⁶ *Id.* at 224–25.

⁸⁷ I MORISON ET AL., *supra* note 7, at 398.

⁸⁸ BEMIS, *supra* note 35, at 225–29; *see* BURTON, *supra* note 11, at 26–27.

⁸⁹ BEMIS, *supra* note 35, at 225–29; *see* BURTON, *supra* note 11, at 26–27.

⁹⁰ BEMIS, *supra* note 35, at 225–29; *see* BURTON, *supra* note 11, at 26–27.

⁹¹ BEMIS, *supra* note 35, at 229–30.

⁹² *See* BURTON, *supra* note 11, at 49 (noting the formation of the Southern Baptist Convention in 1845 when the national Baptist Board excluded slaveholders from missionary work, prompting Henry Clay to observe: “This sundering of the religious ties which have hitherto bound our people together, I consider the greater source of danger to our country.”).

Europe, arguably legitimizing separatist tendencies in the United States.⁹³ Even in this context of increasing contestation, however, until the crisis of the late 1850s, the Supreme Court's jurisprudence worked systematically to reinforce conceptions of state sovereignty grounded in the Madisonian pluralist supranational union.

3. *Supreme Court Practice*

The supranationalist and pluralist interpretation of American sovereignty acknowledged that international law frames of reference remained relevant in understanding the scope of the powers of states. The Supreme Court's practice reflected that interpretation through most of the antebellum era. After confirming federal power to create a free market within the United States, thus paralleling federal international free trade policy,⁹⁴ the Court continued to validate the international status of the states. In 1837 in *Mayor of New York v. Miln*, the Supreme Court approved a local regulation imposing a reporting requirement and a fine for noncompliance relating to the "influx of foreigners" who might become "paupers."⁹⁵ Like Madison, citing Vattel's international law treatise, the Court treated the states as having residual sovereignty as though creatures of international law, unless the specific power in question had been transferred to the federation through the Constitution.⁹⁶

Justice Story's famous opinion in *Swift v. Tyson* might thus be viewed as a case in which supranational law provided the rule for decision, as though the

⁹³ Daniel Webster may have been playing with fire when, as Secretary of State in Fillmore's Whig administration, he effectively endorsed the efforts of Hungarian nationalists to break away from the Austro-Hungarian Empire. See BEMIS, *supra* note 35, at 310–12.

⁹⁴ See *Gibbons v. Ogden*, 22 U.S. 1 (1824) (affirming the preemptive effect of federal law to ensure the flow of inter-state commerce over local police regulations); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829) (suggesting in dictum what later became the so-called Dormant Commerce Clause doctrine, forbidding discrimination by a state against foreign commerce or undue disruption of the federal free trade area).

⁹⁵ *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837).

⁹⁶ *Id.* at 132 ("That the state of New York possessed power to pass this law, before the adoption of the constitution of the United States, might probably be taken as a truism, without the necessity of proof. But as it may tend to present it in a clearer point of view, we will quote a few passages from a standard writer upon public law, showing the origin and character of this power. 'The sovereign may forbid the entrance of his territory, either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state.' 'Since the lord of the territory may, whenever he thinks proper, forbid its being entered, he has, no doubt, a power to annex what conditions he pleases, to the permission to enter.' The power then of New York to pass this law having undeniably existed at the formation of the constitution, the simple inquiry is, whether by that instrument it was taken from the states, and granted to congress; for if it were not, it yet remains with them.") (citations omitted).

parties in the case's commercial transaction were subjects of different nations. Indeed, for Story, "The law respecting negotiable instruments may be truly declared in the languages of Cicero, adopted by Lord Mansfield . . . , to be in a great measure, not the law of a single country only, but of the commercial world."⁹⁷ Story's internationalist approach to constitutional law was further reflected during the same term in *Prigg v. Pennsylvania*, a case arising under the Fugitive Slave Act of 1793 and raising the question of the supremacy of federal law concerning the recapture of slave property fleeing from Maryland to Pennsylvania.⁹⁸ Viewing the question as one decided by the Constitution, and invoking the notion that the Constitution embodied a compact between the two sections of the country to respect the Southern institution of slavery, Story made clear that the states were free to respect and give effect to the law of another state or not to do so in the same way that a state would be free to recognize or not recognize the law of a foreign sovereign.⁹⁹ Yet, he also described the right in question as the right to recapture property, which citations to Blackstone suggested was an unquestioned right under the common law of the states.¹⁰⁰ In sum, while acknowledging the exceptional and narrowly prescribed role of the federal government under the Fugitive Slave Act, Story's rhetoric in *Prigg* recognized the core sovereignty of the Southern states, as though they were sovereign international entities, to maintain their own political economy. By resorting to ordinary property law analogies, he normalized and morally neutralized the right in question, without prejudice to

⁹⁷ *Swift v. Tyson* 41 U.S. (16 Pet.) 19 (1842) (internal citations omitted).

⁹⁸ See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

⁹⁹ See *id.* at 614 ("If, therefore, the clause of the constitution had stopped at the mere recognition of the right, without providing or contemplating any means by which it might be established and enforced, in cases where it did not execute itself, it is plain, that it would have been, in a great variety of cases, a delusive and empty annunciation. If it did not contemplate any action, either through state or national legislation, as auxiliaries to its more perfect enforcement in the form of remedy, or of protection, then, as there would be no duty on either to aid the right, it would be left to the mere comity of the states, to act as they should please, and would depend for its security upon the changing course of public opinion, the mutations of public policy, and the general adaptations of remedies for purposes strictly according to the *lex fori*."). See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES (1834), for a useful backdrop to his view of federalism in terms of assumptions drawn from private international law. In that body of law, international comity—meaning the respect that states give each other's laws without, in strict law, the duty to accord foreign law domestic effect—and the international *lex mercatoria*—the common commercial norms held to bind each nation's courts under the law of nations—both play important roles. Comity served as Story's background assumption in *Prigg v. Pennsylvania*, while the commercial law of nations served as his background assumption in *Swift v. Tyson*. See generally *Prigg*, 41 U.S. (16 Pet.) 539; *Swift*, 41 U.S. (16 Pet.) 1.

¹⁰⁰ *Prigg*, 41 U.S. at 613.

the sovereign right of other states to exclude slave property from their political economies under their own common law.

The delicate question of the neutrality of the federation in respecting the political economy of both sets of states, the slave states and the free states, was raised indirectly in 1849 in *Luther v. Borden*. Here, the Court was called upon to resolve an ordinary trespass case. But the preliminary question in the case was whether one of the parties was privileged as the governmental authority, and the prior question was whether the Court had authority to determine the identity of the lawful government of the State of Rhode Island.¹⁰¹ Asserting the power to answer this question—under the Constitution's command that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government," the so-called Guarantee Clause¹⁰²—might have posed the threat that the Court would be equally authorized to determine the authority of competing governments in a state representing conflicting views on slavery versus free wage labor. In the immediate aftermath of the Mexican-American War, before the Compromise of 1850 tentatively resolved the question of the status of the new states and territories that were the fruit of that war,¹⁰³ the Court left the recognition question to the federal political branches.¹⁰⁴

Supranational recognition of the legitimacy of a state government by the federal political branches was consistent, moreover, with federal political management of the process of territorial expansion of new free and slave states within the terms of the Missouri Compromise of 1820. Through the recognition of new states and state governments, the federation in effect treated the states and their governments as though they were international entities, much as the current practice of recognition of states and their governments has shifted largely to acceptance of a new state or government's credentials at the

¹⁰¹ *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

¹⁰² U.S. CONST. art. IV, sec. 4; Erwin Chermersinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 849 (1994).

¹⁰³ 1 MORISON ET AL., *supra* note 7, at 567.

¹⁰⁴ *Luther*, 48 U.S. at 47. Justice Taney, writing for the Court, stated:

No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not, by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.

Id.

United Nations.¹⁰⁵ Thus, viewed as a set of consensual arrangements, albeit only tacitly acquiesced in by the states rather than as part of the specific provisions of the Constitution as treaty, the recognition practice of the antebellum regime operated as a kind of customary international law that preserved the peace and the rights of individuals to trade freely, within prescribed limits, throughout a territorial free trade and security sphere. It was not unlike the theory of traditional international law governing the external sovereignty of the federation as a whole under the Plan of 1776 and the U.S. assertion of neutral rights during the Napoleonic Wars.¹⁰⁶

But the Supreme Court's role in managing the strategic relationship of the states changed fundamentally after the territorial transformations of late 1840s and early 1850s. Transcontinental expansion was completed with the territorial settlements—with the United Kingdom to the northwest in 1846,¹⁰⁷ and Mexico to the southwest in 1848.¹⁰⁸ Almost immediately thereafter, to avoid potential conflict with the United Kingdom over the emerging possibility of an isthmian canal, and under a brief interlude of Whig presidential leadership, the United States agreed with the United Kingdom that it would seek no further territorial expansion in Central America in the Clayton–Bulwer Treaty of 1850.¹⁰⁹ Finally, the Marcy–Elgin Treaty of 1854 with Great Britain, which after 1846 was finally philosophically committed to free trade, substantially reduced commercial barriers to trade with Britain's Canadian colony, reducing pressure for northern territorial expansion into Canadian territory as a means for continued trade expansion. Indeed, it is argued that the Southern states supported this treaty because it slowed the pace of expansion of the wage-labor juggernaut emerging in the North.¹¹⁰

Indeed, by the early 1850s, viewed from the standpoint of a Peace Pact or security system theory, the supranational constitution was destabilizing. In game theory terms that are sometimes helpful in understanding strategic

¹⁰⁵ Compare *id.*, and 1 MORISON ET AL., *supra* note 7, at 397–99, with LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 314–23 (5th ed. 2009) (illustrating the role of European Community and United Nations acceptance of credentials and possible relevance of substantive criteria, such as compliance with international human rights criteria, through a case study of the former Yugoslavia).

¹⁰⁶ See *supra* Part I.B.1.

¹⁰⁷ BEMIS, *supra* note 35, at 283.

¹⁰⁸ *Id.* at 243–44.

¹⁰⁹ See *id.* at 250–51.

¹¹⁰ See *id.* at 299–302. The United States ultimately withdrew from the treaty after the Civil War as a direct consequence of the triumph of Lincoln's new vision of international law and international relations for the United States. *Id.* at 382.

cooperation, it now became possible for states to foresee the final move in the race for territorial expansion of their respective political economies. Thus, the stability of the iterated game of reciprocal territorial expansion of the two political economies of slave and wage labor was finally put at risk, as each side could now foresee a final move by the other party that would put it in a decisively disadvantageous position. In strategic international relations theory terms, the supranational regime had become a single-move Prisoner's Dilemma.¹¹¹ The understanding that the game was coming to an end may, therefore, explain Chief Justice Taney's partisan majority opinion in *Dred Scott v. Sandford*, which constitutionalized slavery and the right of slaveholders to carry their slave property with them throughout the federation.¹¹²

While one could explore in detail whether the various opinions in *Dred Scott* employed international law concepts persuasively,¹¹³ the fact remains that large portions of the debate in those opinions turned on the assumption that the states retained sovereign rights best understood through international law frameworks.¹¹⁴ Thus, the persistent use of international law frameworks as controlling rhetoric for a strategy of avoidance in most of the *Dred Scott* opinions suggests that a fundamental assumption was at work: Namely, that the basic architecture of the supranational regime was that one state could not impose upon another state—through statute, law, judicial judgments, or any other means—basic policy choices that were within the sovereignty of each state.¹¹⁵ In challenging that premise, Chief Justice Taney's 1857 *Dred Scott*

¹¹¹ See R. DUNCAN LUCE & HOWARD RAIFFA, GAMES AND DECISIONS: INTRODUCTION AND CRITICAL SURVEY 97–102 (1957); see also RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 208–09 (2d ed., 2009).

¹¹² *Dred Scott v. Sandford*, 60 U.S. 393, 399–454 (1857); see also Cecil J. Hunt II, *No Right to Respect: Dred Scott and the Southern Honor Culture*, 42 NEW ENG. L. REV. 79, 82 (2007).

¹¹³ See generally JANIS, *supra* note 16, at 81 (discussing Justice Nelson's opinion and international law elements in other concurring and dissenting opinions).

¹¹⁴ See, e.g., *Dred Scott*, 60 U.S. at 459–69 (concurring, Justice Nelson gives one example for the internationalist comity approach). Nelson, relying extensively on Justice Story's conflict of laws decisions and commentary, as well as Chancellor Kent and Dutch private international law commentator Huberus, argued that *Dred Scott*'s changed legal status by operation of his presence in a free-labor state or free-labor federal territory should have no necessary legal effect in a slave state. *Dred Scott*, 60 U.S. at 457–69. It would, he argued, be “subversive of the established doctrine of international jurisprudence, as, according to that, it is an axiom that the laws of one Government have no force within the limits of another, or extra-territorially, except from the consent of the later.” *Id.* at 464.

¹¹⁵ Even today, the possible existence of a “public policy” exception to the duty under Article IV, Section 1—the Full Faith and Credit Clause—of the U.S. Constitution for each state to give effect to the “Acts, Records, and judicial Proceedings of every other State” remains highly debated. See generally Baker v. General Motors Corp., 522 U.S. 222 (1998).

opinion set the immediate stage for the Lincoln-Douglas debates of 1858 and a crisis for the old regime.

C. Regime Crisis—Popular Sovereignty as a Supranational Pluralist Solution

Lincoln's foil in responding to the crisis prompted by *Dred Scott* was Senator Stephen Douglas, whom Lincoln confronted in what became known as the Lincoln-Douglas debates, winning Douglas another term representing Illinois in the Senate but ultimately winning Lincoln the presidency. While it is impossible to provide a concise summary of the context, it is fair to say that the crucial factor was that Taney's opinion had declared the Missouri Compromise unconstitutional insofar as the Compromise barred the expansion of slavery into the Northern territories.¹¹⁶

Whether or not the Court was correct in this conclusion, it was also possible to debate whether Congress had already dispensed with the policy, if not also the precise terms, of the Missouri Compromise. Douglas's position was that the Missouri Compromise was no longer good law even without regard to *Dred Scott* and that it had been superseded by the Compromise of 1850¹¹⁷—a complex set of measures which, in addition to enacting an enhanced Fugitive Slave Law and abolishing the domestic slave trade in the District of Columbia, had permitted the annexation of California as a free state and the acquisition of other territories from Mexico (which later formed the states of Utah and New Mexico) without prejudice to the question of whether slavery would be permitted.¹¹⁸ Moreover, Douglas was chief architect of the Kansas-Nebraska Act of 1854, which explicitly provided for a choice by the people of those territories as to whether slavery would be allowed.¹¹⁹ Indeed, a decade earlier in response to Congressman Wilmot's repeated attempts to condition annexation of the Mexican territories on slavery prohibition through the so-called Wilmot Proviso,¹²⁰ Douglas generally advocated "popular

¹¹⁶ 1 MORISON ET AL., *supra* note 7, at 398 (discussing the origin of Missouri Compromise).

¹¹⁷ See Stephen Douglas, Senator, First Lincoln-Douglas Debate, Ottawa, Illinois (Aug. 21, 1858), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858: SPEECHES, LETTERS, AND MISCELLANEOUS WRITINGS 495, 495-97 (Roy P. Basler ed., 1989) [hereinafter LINCOLN'S SPEECHES AND WRITINGS 1832-1858] (describing popular sovereignty as the principle governing the Compromise of 1850 and the common basis for the Whig and Democratic parties thereafter).

¹¹⁸ See 1 MORISON ET AL., *supra* note 7, at 564-67 (discussing the Compromise of 1850).

¹¹⁹ See *id.* at 584-87 (discussing the Kansas-Nebraska Act).

¹²⁰ See *id.* at 557-60 (discussing the Wilmot Proviso, which was repeatedly proposed by Congressman Wilmot as an amendment to a series of measures during and following the Mexican-American War of 1846, but first proposed as an amendment to a secret appropriation early in the war to enable President Polk to purchase California by bribing Mexican President Santa Ana).

sovereignty” as the means for resolving the slavery question.¹²¹ In other words, the peoples of the territories, in making their decision to become full members of the federal union of states, would be entitled to make a sovereign choice on their preferred form of political-economy.

Taney, however, went further, denying the supranational union the authority to determine the terms of territorial expansion. He held that slaveholders had a personal constitutional right to bring slaves with them, not only into all the territories, but also (as construed by Lincoln in his “House Divided” speech) into the free states of the Union.¹²² Douglas, in his debate with Lincoln, was thus forced to decide whether he adhered to Taney’s view on the individual right of slaveholders to export slavery into the territories (and perhaps even to other states), or his own longstanding commitment to “popular sovereignty” and its implications for the right of states and territories upon statehood to exclude slavery. Yet, in response to Lincoln’s pointed questions, Douglas, unwilling to jettison his longstanding commitment to “popular sovereignty,” attempted to reconcile the two positions at the debate in Freeport in what came to be known as his “Freeport Doctrine.” Because a state or territory would be free not to enact a system of laws governing slavery, slaveholders in other states would doubt the practical enforceability of their rights and would not, therefore, exercise their right under *Dred Scott* to take their slave property with them into free states or territories.¹²³

No doubt, in light of the civil-war-in-miniature then being fought by slave-state and free-state migrants in “bleeding Kansas,”¹²⁴ this answer seemed implausible to opponents of the extension of slavery to the territories, even if it allowed Douglas to retain the support of Northern Democrats. And his pragmatic answer to a question of principle lost Douglas even more political support among Southern pro-slavery Democrats, leaving him unable to secure a majority of delegates at the Democratic Party National Convention of 1860. The national Democratic Party fractured into Northern and Southern parties, dividing the Democratic vote in the presidential election and making possible

¹²¹ See *id.* at 559 (noting the first articulation of “popular sovereignty” by Congressman Caleb Blood Smith of Indiana and Douglas’s early support of the term).

¹²² See *supra* text accompanying note 112. Even before the debates, Lincoln had argued that *Dred Scott* could be interpreted to require respect for the slaveholders’ rights to bring slave property with him, not only to the territories, but to all the free states. See Abraham Lincoln, “House Divided” Speech at Springfield, Illinois (June 16, 1858), in *LINCOLN’S SPEECHES AND WRITINGS 1832–1858*, *supra* note 117, at 426, 430.

¹²³ See Stephen Douglas, Senator, Second Lincoln–Douglas Debate, Freeport, Illinois (Aug. 27, 1858), in *LINCOLN’S SPEECHES AND WRITINGS 1832–1858*, *supra* note 111, at 551–52.

¹²⁴ See I MORISON ET AL., *supra* note 8, at 589–90 (discussing “bleeding Kansas”).

Lincoln's election as the head of a largely united Republican party, albeit with only a plurality of the national popular vote.¹²⁵ Douglas's commitment to "popular sovereignty," therefore, was the efficient cause of Lincoln's election as a sectional candidate and the secession crisis Lincoln's election provoked.

Yet, properly understood, Douglas's theory of "popular sovereignty" was fully consistent with the antebellum supranational regime. Unlike Taney's *Dred Scott* opinion, it can best be understood as an attempt to preserve that traditional internationalist security system by providing space for what international lawyers would now call a people's right to self-determination¹²⁶—rather than to recognize, as the strange bedfellows Taney and Lincoln did, that the supranational system's days were numbered. In describing his doctrine of "popular sovereignty," Douglas framed it and its origins in the broadest possible terms, as if not even rooted in U.S. law.¹²⁷ Thus, "Popular Sovereignty" operated as a broader right of "self-determination" as that term is understood in international law,¹²⁸ and, on this view, it was a necessary ingredient for the continued expansion of the United States—thus extending the sphere of liberty as envisioned by the Founders' strategy of free trade, the law of nations, and pluralism. In articulating his Freeport Doctrine, Douglas made it clear that he envisioned continued expansion of the United States, without natural limit, arguing:

[J]ust as fast as our interests and our destiny require additional territory in the north, in the south, or on the islands of the ocean, I am for it, and when we acquire it will leave the people, according to the

¹²⁵ See *id.* at 603–07.

¹²⁶ See generally LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 324–27 (5th ed. 2009). One scholar has recently sought to test the legitimacy of Southern secession from the Union under the modern "right of self-determination" under the standard employed by the Supreme Court of Canada. See FARBER, *supra* note 5, at 110–11.

¹²⁷ Referring to his opposition to the proposed pro-slavery "Lecompton Constitution" for Kansas, which he saw as a fraudulent expression of the will of the people of Kansas, Douglas argued:

I held then, and hold now, that if the people of Kansas want a slave State, it is their right to make one and be received into the Union under it; if, on the contrary, they want a free State, it is their right to have it, and no man should ever oppose their admission because they ask it under the one or the other. I hold to that great principle of self-government which asserts the right of every people to decide for themselves the nature and character of the domestic institutions and fundamental law under which they are to live.

Stephen Douglas, Senator, Fifth Lincoln–Douglas Debate, Galesburg, Illinois (Oct. 7, 1858), in LINCOLN'S SPEECHES AND WRITINGS 1832–1858, *supra* note 117, at 687, 689–90.

¹²⁸ See DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 55–56 (3d ed. 2010).

Nebraska Bill, free to do as they please on the subject of slavery and every other question.¹²⁹

Jaffa argues that “the ultimate logical consequence of his foreign policy would have been a federal republic of the world.”¹³⁰ Just as Pocock saw the American founding as a “Machiavellian moment” prompted also by a classically informed recognition of the problem of regime stability,¹³¹ Douglas’s theory may be understood to have recognized a new Machiavellian moment, in which consciousness of the regime’s instability required a reformulation in response to the problem of instability. Like Madison’s federalist theory of enlargement,¹³² Douglas’s theory of “popular sovereignty” would be a necessary, stabilizing feature of continuing U.S. expansion. Destabilizing tyranny would be avoided through “popular sovereignty”—each community’s free exercise of its right to choose the terms for its accession to the union,¹³³ leaving no arbitrary limit to continued American expansion.¹³⁴

¹²⁹ Douglas, *supra* note 123, at 406.

¹³⁰ See HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES* 48 (1959) [hereinafter *CRISIS OF THE HOUSE DIVIDED*]. Jaffa’s criticism was deeply influenced by the classical roots of his mentor Leo Strauss’s theory of natural right. See LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 81–119 (1950). See also HARRY V. JAFFA, *A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR* 309–10 (2000) [hereinafter *A NEW BIRTH OF FREEDOM*], for a recent restatement and extension of these views that liken it now to racial imperialism.

¹³¹ See *supra* text accompanying notes 22–24.

¹³² See *supra* text accompanying notes 26–27.

¹³³ Thus, wrote Jaffa, just as Hawaii and Alaska were becoming states of the Union, the first outside the contiguous territory of the United States:

Something like the Roman dream of a universal republic was the driving force behind his policies, but it was a universal republic in which local autonomy was genuine, not spurious. The American republic, unlike the Roman, would not be characterized by the ascendancy or hegemony of any one of its parts within the whole. The name “American” would belong originally, and of equal right, to each constituent community. It was the constitutional equality of each distinct political community within the federal system which provided the guarantee that each accession of territory and population to the Union would mean an increase of human freedom and welfare. It was this which made American imperialism, unlike every other imperialism, a blessing to all humanity as well as to itself. It was popular sovereignty which made expansion both feasible (by disarming malice and envy) and desirable (by extending republican freedom).

CRISIS OF THE HOUSE DIVIDED, *supra* note 130, at 48–49.

¹³⁴ Douglas, providing a more precise and coherent theoretical argument, continued but revised the vision Jefferson articulated throughout his life for the progressive expansion of the United States in order to promote liberty for peoples who would otherwise live without freedom under other nations’ inferior systems of government. See generally GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC* 357–99 (2009).

From this perspective, the Confederate Constitution can also be understood as a last ditch effort to reconstruct that supranational, pluralist regime in light of the capture of the executive branch by a person and a party dedicated to its ultimate unraveling. While it confirmed the holding of *Dred Scott* that slaveholders had a “confederal” right to bring their slave property with them anywhere in the Confederacy,¹³⁵ nowhere did the Confederate Constitution provide that a state in the Confederacy must permit slavery or enact a Slave Code making rights in slave property enforceable.¹³⁶ Moreover, it did not provide for a secure system of “confederal” courts to protect the rights specified in *Dred Scott*.¹³⁷ In a sense, the Confederate Constitution proposed a new Peace Pact—one in which the border states could remain in flux as to their preferred political economy; even the free states could in theory join the Confederacy on terms consistent with Douglas’s theory of popular sovereignty, as interpreted under his Freeport Doctrine. If so, American sovereignty could continue to consist in the *sui generis* character of America’s supranational governmental structure.

D. Summary and Transition to Lincoln’s International Law and Ethics

In sum, the majority opinion in *Dred Scott*, as was widely understood at the time, triggered a crisis in the antebellum regime, with the federalization of slave-holding rights beyond even the expanded but still narrow confines of the Fugitive Slave Acts. Yet, as the body of opinions in *Dred Scott* makes clear, American sovereignty continued to be understood as a *sui generis* amalgamation of international law and constitutional law, requiring a legalist approach to international trade and security policy and, correlatively, a largely pluralist approach to domestic political economy. The roots of these specific characteristics of antebellum American sovereignty were located in the Founding and the diplomacy of the antebellum United States. The Plan of 1776, the diplomacy of the Napoleonic Wars, and territorial expansionism to protect and expand the competing domestic political economies of slavery and free wage labor, reinforced the perceived legitimacy of pluralist supranational

¹³⁵ See G. Edward White, *Recovering the Legal History of the Confederacy*, 68 WASH. & LEE L. REV. 467, 505 (2011) (discussing Article IV, Clause 3 of the Confederate Constitution providing specific protection of existing institutions of “negro slavery” and “the right to take to [Confederate States or Territories] any slaves lawfully held . . . in any of the States or Territories of the Confederate States”) (alteration in original) (citations omitted).

¹³⁶ *Id.* at 504 (noting the absence of a prohibition requiring slavery, because a requirement to keep slavery would have been “inconsistent with the principle of state sovereignty”).

¹³⁷ See *id.* at 509–29 (discussing the weakness of Confederate courts).

theory. These elements are the underlying principles of Senator Douglas's position on the Kansas–Nebraska Act of 1854 and in the famous Lincoln–Douglas debates of 1858; and they lead ineluctably to the specific form of the Confederate Constitution, which one scholar has called a proposed “basis for reconciliation,” a new peace pact between the Northern and Southern confederacies.¹³⁸ These alternatives to Lincoln's vision would have preserved the pluralist compromises that had sustained a *modus vivendi* between the two competing political economies of the antebellum United States.

Plainly, Lincoln did not accept the supranational understanding of the antebellum regime. For him, “[t]he States have their *status* in the Union, and they have no other *legal status*.”¹³⁹ Indeed, the Union was “older than any of the States; and, in fact, it created them as States.”¹⁴⁰ In short, the states were never subjects of international law. As Part II of this Article will detail, Lincoln's rejection of Madisonian premises as reconceptualized by Douglas proved consequential for his understanding of American sovereignty and his theory and practice of international law.

Why Lincoln rejected supranationalism is a more complicated question. Some hold that Lincoln rejected the supranational account primarily because of his practical understanding that military security for the American people required the continued survival of the Union and because of his openness to the practical possibility of a multi-racial society,¹⁴¹ which suggested that mobilizing human potential in warfare may also have served as a practical rationale for rejecting supranational pluralism. Admittedly, the experience of the Confederacy as a war-fighting machine supports the hypothesis that the supranational antebellum regime was not adapted to politico-military success against integrated industrialized polities of the kind emerging during the nineteenth century's Industrial Revolution.¹⁴² Supranational premises also

¹³⁸ BURTON, *supra* note 11, at 123–24.

¹³⁹ Abraham Lincoln, Message to Congress in Special Session, Address Before Congress (July 4, 1861), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865: SPEECHES, LETTER, AND MISCELLANEOUS WRITINGS 246, 256 (1989) [hereinafter LINCOLN'S SPEECHES AND WRITINGS 1859–1865].

¹⁴⁰ *Id.* Lincoln's vision on this point preceded his election as president. See Abraham Lincoln, Fifth Lincoln–Debate, Galesburg, Illinois (October 7, 1858), in LINCOLN'S SPEECHES AND WRITINGS 1832–1858, *supra* note 117, at 721 (using the formula that the question of the dissolution of the Union was for the “people” of the United States to decide).

¹⁴¹ See Akhil Amar, *The David C. Baum Lecture: Abraham Lincoln and the American Union*, 2001 U. ILL. L. REV. 1109, 1130–33.

¹⁴² See White, *supra* note 135, at 529–52 (detailing the various ways, including the inability to conscript or easily suspend habeas corpus, in which the Confederate Constitution disabled the Confederacy from effectively fighting what became a “total war”).

undercut the Confederacy's diplomatic efforts to obtain European recognition of a new independent state. The leadership of the Confederacy, much as Jefferson and Madison mistakenly believed that an embargo could compel Britain to change its policies prior to the War of 1812, erroneously believed that the threat of Southern embargo of cotton sales to Europe would compel England and France to recognize Southern independence and even intervene against the North.¹⁴³ In short, as Bobbitt has argued, supranationalism turned out not to be adapted to the emerging conditions of international society.¹⁴⁴ On this view, Lincoln's building of a nation-state was, in some sense, inevitable.

Yet, while these practical advantages may be good explanations for why Lincoln should have opposed the antebellum supranational regime, Part III of this Article will argue that they are not the true reason why he insisted on a particular vision of the United States as a member of the international community. Rather, his understanding of law, both domestic and international, reflected deeper roots; these can be found in the formation of his mind and character and his basic mode of reasoning about ethical questions, which are, in turn, deeply related to his understanding of the meaning of American sovereignty.

II. LINCOLN'S THEORY AND PRACTICE OF INTERNATIONAL LAW

Lincoln rejected the antebellum supranational legal order. First, he rejected Douglas's "popular sovereignty," precisely because it reflected an international law conception of the supranational regime that, through the continuing exercise of the international law right of peoples to self-determination, could continue to expand territorially. Self-determination, as Lincoln understood in international law, was simply inapposite to the status of the territories, even if antebellum constitutional practice and precedent might have suggested otherwise. For Lincoln, self-determination was a right the American people had already exercised once and, he hoped, for all time at the Founding. Second, his commitment to international nonaggression and economic protectionism flowed from rejecting the ever-expanding supranational community. Protection of his preferred form of political economy—free wage labor—was a corollary

¹⁴³ See generally HOWARD JONES, *BLUE & GRAY DIPLOMACY: A HISTORY OF UNION AND CONFEDERATE FOREIGN RELATIONS* 119–20, 126, 147, 157, and 161 (2010).

¹⁴⁴ See PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 178 & n.* (2002) (arguing that technological change resulted in the replacement of the constitutional order of the "state-nation," what is called a supranational order here, with a "nation-state," describing "Lincoln's nation-state" as the first "fully realized example of this constitutional order").

of his rejection of pluralism in the domestic political economy. Third, his anti-expansionist nonaggression and anti-pluralist protectionism flowed from his skepticism towards finding legitimacy in established social practices, including common law precedent and customary international law. Instead, for controlling domestic political principles and rules of international law, Lincoln turned to standards grounded in the dictates of reason and the expression of reason in public opinion. In sum, Lincoln envisioned a single state forming a community of value, rather than a *modus vivendi* between different polities; a single polity that would focus on internal thickening and deepening, rather than external expansion; and a community that would find guidance in public reason, rather than past habits.

A. *Rejecting Popular Sovereignty and Self-Determination*

To be sure, Lincoln's opposition to Douglas's doctrine of "popular sovereignty" rested on moral, political, cultural, economic, and, perhaps most importantly, strategic grounds. He rejected Douglas's implicit, and sometimes explicit, position of moral neutrality as to slavery.¹⁴⁵ And, like other Republican politicians, he feared that the continuing territorial expansion of race slavery under the political economy of cotton production victimized whites—"white masters who found themselves enslaved and driven ceaselessly by cotton's demands for more land and labor, and white non-slaveholders who found their every effort to better their lot blocked and thwarted by the plantation regime."¹⁴⁶ Still, he thought, most famously in his House Divided Speech, that in the absence of expansion into the territories, slavery would be

¹⁴⁵ Lincoln argued:

If you will take [Douglas'] speeches, and select the short and pointed sentences expressed by him—as his declaration that he "don't care whether Slavery is voted up or down"—you will see at once that this is perfectly logical, if you do not admit that slavery is wrong.

Lincoln, Fifth Lincoln–Douglas Debate, *supra* note 140, at 708. Contrasting his own position with Douglas's neutrality, Lincoln believed the "institution is wrong," and thus in "a policy springing from that belief which looks to the arrest of the enlargement of that wrong." *Id.* at 709. More generally, he argued:

. . . I confess myself as belonging to that class in the country who contemplate slavery as a moral, social and political evil, having due regard for its actual existence amongst us and the difficulties of getting rid of it in any satisfactory way, and to all the constitutional obligations which have been thrown about it; but, nevertheless, desire a policy that looks to the prevention of it as a wrong, and looks hopefully to the time when as a wrong it may come to an end.

Id.

¹⁴⁶ See BURTON, *supra* note 11, at 91.

“in [the] course of ultimate extinction.”¹⁴⁷ Accordingly, notwithstanding all the reasons to oppose slavery, it would be possible to accept temporarily the continued existence of slavery in the Southern states as the lesser of two evils.¹⁴⁸

But his objection to “popular sovereignty” was not merely instrumental. He rejected the overall theory of constitutional and international law by which “popular sovereignty” was said to have become binding. As to whether “popular” sovereignty had become part of U.S. law and practice, Lincoln rejected Douglas’s argument for the implicit repeal of the Missouri Compromise in the adoption of the Compromise of 1850 and the Kansas-Nebraska Act. Rather, he saw in the Compromise of 1850 a series of mere *quid pro quo* agreements, not a general acceptance of “popular sovereignty.”¹⁴⁹ This reticence to find constitutional custom in a single precedent, or even a limited set of precedents, is consistent with Lincoln’s well-known critique of the precedential force of the *Dred Scott* decision.¹⁵⁰ Neither individual statutes nor judicial decisions could, for Lincoln, dispose of questions of fundamental principle of the kind raised by Douglas’s theory of “popular sovereignty.”

Rather, as a matter of first principles, no rights arose for the “people” of the territories deriving from their status as members of the political communities

¹⁴⁷ “House Divided” Speech at Springfield, Illinois, *supra* note 122, at 426.

¹⁴⁸ Abraham Lincoln, Speech on the Kansas-Nebraska Act at Peoria, Illinois (Oct. 16, 1854), in LINCOLN’S SPEECHES AND WRITINGS 1832–1858, *supra* note 117, at 307, 333 (forswearing attempts to use federal power to end slavery in the Southern states).

¹⁴⁹ Fifth Lincoln–Douglas Debate, *supra* note 140, at 707 (“They did not lay down what was proposed as a regular policy for the Territories; only an agreement in this particular case to do in that way, because other things were done that were to be a compensation for it,” such as the elimination of the slave trade in the District of Columbia.).

¹⁵⁰ Lincoln famously opined:

If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.

But when, as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country. . . .

Abraham Lincoln, Speech on the Dred Scott Decision at Springfield, Illinois (June 26, 1857), in LINCOLN’S SPEECHES AND WRITINGS 1832–1858, *supra* note 117, at 390, 393; *see also* Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1235 (2008).

formed by the states themselves until those rights were fixed by their state's admission to the Union. As Lincoln was to make clear in his first Presidential Message to Congress, in his view, the states (*qua* states) existed only as members of the Union and had no prior political capacities or rights.¹⁵¹ Indeed, "even Texas, in its temporary independence, was never designated a State."¹⁵² More important, the people in the territories themselves held no right to self-determination as a separate community, since they were already members of the political community of the United States.

Lincoln's rejection of "popular sovereignty" in the territories is plainly foreshadowed, and framed in international law terms, in his earlier criticism of President Polk's Mexican-American War.¹⁵³ There, the precise grounds for his opposition reveal a view of international law that privileges state sovereignty based on clear territorial lines of authority and reserves the right of self-determination only to those clearly outside of an existing state. During the war, Lincoln proposed a series of interrogatories to President Polk—which came to be known as the "Spot" resolutions¹⁵⁴ and caused Lincoln some political difficulty as insinuations of a lack of fortitude caused him to be known in some quarters as "Spotty Lincoln."¹⁵⁵ Later, in a major address, as if prosecuting a case, he pointedly asked Polk where, precisely, the initial conflict between U.S. and Mexican forces occurred.¹⁵⁶ Locating the boundary was central, in Lincoln's view, to determining whether U.S. forces had acted in self-defense or, instead, were responsible for an act of aggression. Lincoln then dismissed as somewhat trivial arguments that the Adams-Onís Treaty, or Transcontinental Treaty, had conferred Spanish rights to Texas territory as far as the Rio Grande river; that General Santa Ana, while a prisoner of the republic of Texas, had entered into an agreement operating as a treaty ceding all Mexican territory beyond the Rio Grande; or, separately, that the admission

¹⁵¹ Message to Congress in Special Session, *supra* note 139, at 255

¹⁵² *Id.*

¹⁵³ See Abraham Lincoln, Speech in the U.S. House of Representatives on the War with Mexico (Jan. 12, 1848), in LINCOLN'S SPEECHES AND WRITINGS 1832–1858, *supra* note 117, at 161, 161–62.

¹⁵⁴ Abraham Lincoln, "Spot" Resolutions in the U.S. House of Representatives (Dec. 22, 1847), in LINCOLN'S SPEECHES AND WRITINGS 1832–1858, *supra* note 117, at 158–59.

¹⁵⁵ WILLIAM LEE MILLER, LINCOLN'S VIRTUES: AN ETHICAL BIOGRAPHY 164–91 (Alfred Knopf ed. 2002) (describing the incident and its political consequences for Lincoln and his Whig party). According to Doris Kearns Goodwin, the lesson Lincoln learned was that "'one fundamental principle of politics is to be always on the side of your country in a war. It kills any party to oppose a war.' As, indeed, Lincoln knew from his own experience in opposing the Mexican War." DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 546 (2005).

¹⁵⁶ Speech in the U.S. House of Representatives on the War with Mexico, *supra* note 153, at 161–63.

of Texas had conferred to the United States rights Texas claimed to that boundary.¹⁵⁷ As he read the record, the land west of the Nueces River and east of the Rio Grande had never authoritatively been determined to be part of Mexico or part of Texas (and therefore, by subsequent acquisition, the United States) by any of these instruments.¹⁵⁸ The boundary, if there was a fixed boundary, could be somewhere in between the two rivers; thus, President Polk's claim that U.S. forces were on U.S. territory simply because they were deployed east of the Rio Grande River could not be sustained without further factual and legal analysis.¹⁵⁹

But, Lincoln added, the question of legal right was amenable to an answer through "the true rule for ascertaining the boundary between Texas and Mexico."¹⁶⁰ This, he argued, "is, that *wherever* Texas was *exercising* jurisdiction, was hers; and *wherever* Mexico was exercising jurisdiction, was hers; and that *whatever* separated the actual exercise of jurisdiction of the one, from that of the other, was the true boundary between them."¹⁶¹ In short, in lieu of an express agreement, the actual exercise of governmental authority by Mexico and, through Texas, the United States would determine the *de facto* boundary. Earlier in his speech, Lincoln had mocked President Polk's argument:

I know a man, not very unlike myself, who exercises jurisdiction over a piece of land between the Wabash and Mississippi . . . [whose] neighbor between him and the Mississippi . . . I am sure, he could neither *persuade* nor *force* to give his habitation; but which nevertheless, he could certainly annex, if it were to be done, by merely standing on his own side of the street and *claiming* it, or even, sitting down, and a writing a *deed* for it.¹⁶²

And later, in his House Divided Speech and his debates with Senator Douglas, Lincoln would deprecate "popular sovereignty" with the pejorative term "squatter sovereignty,"¹⁶³ trivializing what Douglas thought was a fundamental right of peoples as a mere land grab that, in the English law Lincoln learned

¹⁵⁷ *Id.* at 163–65.

¹⁵⁸ *Id.* at 166.

¹⁵⁹ *See id.* at 167.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 166.

¹⁶³ "House Divided" Speech at Springfield, Illinois, *supra* note 122, at 427; Abraham Lincoln, Sixth Lincoln–Douglas Debate, Quincy, Illinois (Oct. 13, 1858), in *LINCOLN'S SPEECHES AND WRITINGS 1832–1858*, *supra* note 117, at 730, 769.

from his study of Blackstone, would generate qualified rights based on theories of adverse possession.¹⁶⁴

Indeed, if they were squatters, the facts showed that they were largely Mexican squatters, rather than Texans. Thus, as far as Lincoln could tell, contrary to Polk's claim that he was deploying troops to protect U.S. territory and U.S. settlers, "the President sent an army into the midst of a settlement of Mexican people, who had never submitted, by consent or by force, to the authority of Texas or of the United States, and that *there*, and *thereby*, the first blood of the war was shed . . ."¹⁶⁵ While Lincoln conceded that settlers could have been exercising their original right of revolution against Mexico to effect secession from it and create the independent State of Texas,¹⁶⁶ he maintained that it was only "just so far as she carried her revolution, by obtaining the *actual*, willing or unwilling, submission of the people, *so far*, the country was hers, and no farther"¹⁶⁷ that Texans exercised this right. To put the point in modern terms, it followed for Lincoln that Texan settlers in the disputed territory living under de facto Mexican sovereignty would not have had a legal right to receive American assistance, nor would the United States have an international law right or duty to intervene, to enable the Texans to exercise a right of self-determination they did not possess.

To summarize, the legal rights of settlers had nothing to do with the legality of the United States's use of force. Indeed, nowhere in his analysis does Lincoln suggest that, even if the boundary were indeterminate, either side

¹⁶⁴ No doubt he was familiar with Kent's *Commentaries on the Law of the United States*. See DAVID HERBERT DONALD, *LINCOLN* 102 (1995). Indeed (or but), "[t]o judge from the advice that he later gave other law students, he read Blackstone through twice." *Id.* at 54. Drawing on the civil law tradition, for Blackstone, the relevant term was "prescription." See 2 WILLIAM BLACKSTONE, *COMMENTARIES* 263–66.

¹⁶⁵ Speech in the U.S. House of Representatives on the War with Mexico, *supra* note 153, at 166.

¹⁶⁶ Lincoln then recited the creed of the American Revolution:

The extent of our territory in that region depended, not on any *treaty-fixed* boundary (for no treaty had attempted it) but on revolution. Any people anywhere, being inclined and having the power, have the *right* to rise up, and shake off the existing government, and form a new one that suits them better. This is most valuable,—a most sacred right—a right, which we hope and believe, is to liberate the world. . . . More than this, a *majority* of any portion of such people may revolutionize, putting down a *minority*, intermingled with, or near about them, who may oppose their movement. . . . It is a quality of revolutions not to go by *old* lines, or *old* laws; but to break up both, and make new ones.

Speech in the U.S. House of Representatives on the War with Mexico, *supra* note 153, at 167. Lincoln thus describes the U.S. Declaration of Independence as the assertion of a right that will, in time, "liberate the world," something that Lincoln believed was not a fair description of Polk's principle for decision in the Mexican War. See *id.*

¹⁶⁷ *Id.* at 167–68.

would have the legal right to protect its settlers (or squatters, to use Lincoln's later characterization) and their rights of self-determination. Since he denied the right of foreign powers to save the settlers from oppression or ensure their rights to self-government, Lincoln implicitly rejected what might today be called humanitarian or pro-democratic intervention, even though European powers had already exercised rights of intervention for such reasons well before the Mexican-American War.¹⁶⁸ What makes his international law theory critical to his argument is that in this particular speech Lincoln did not focus (although he did in other pronouncements) on President Polk's lack of the constitutional authority to engage in a war of aggression, or even to intervene to protect American settlers in or outside of Mexico.¹⁶⁹ For Lincoln, the right of self-determination seems to have meaning for one narrow purpose: to validate a people's right to create a state and, once inside of a state, express their sovereignty with the help of their government's exercise of its delegated authority. He appears to have been inclined by this encounter with the question of self-determination and the possible excuse of humanitarian intervention to see both rationales as pretextual—legal theories that should be reserved only for the most egregious offenses and justified only by results that could “liberate the world,”¹⁷⁰ such as the American Revolution itself. Significantly, as early as the immediate aftermath of the Mexican-American War and his speech before Congress, Lincoln's public rhetoric in other settings began to identify the connection between a defensive posture for the United States externally and the kind of nation it would become internally, both in its constitutional structure and in the morals and education of its people.¹⁷¹

¹⁶⁸ See GARY J. BASS, FREEDOM'S BATTLE: THE ORIGINS OF HUMANITARIAN INTERVENTION 51–151 (2008) (discussing the Greek Revolution and European intervention).

¹⁶⁹ This is not to say that he considered Polk's action constitutional. As William Miller notes, Lincoln's speech on the House floor on July 27, 1848 also described the war as “unconstitutionally commenced.” WILLIAM LEE MILLER, LINCOLN'S VIRTUES: AN ETHICAL BIOGRAPHY 189 (2002) (citations omitted); Abraham Lincoln, Speech on Presidential Question (July 27, 1848), in LINCOLN'S SPEECHES AND WRITINGS 1832–1858, *supra* note 117, at 205, 219. Lincoln also made this argument in a more fully theorized form to his law partner, William Herndon, who argued for a presidential right to engage in preemptive self-defense. Lincoln replied: “Allow the President to invade a neighboring nation, whenever *he* shall deem it necessary to repel an invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for such purpose—and you allow him to make war at pleasure.” Letter from Abraham Lincoln to William H. Herndon (Feb. 15, 1848), in LINCOLN'S SPEECHES AND WRITINGS 1832–1858, *supra* note 117, at 175, 175–76. Lincoln also seemed to have argued that congressional ratification could not be inferred from the subsequent adoption of funding measures. See MILLER, *supra*, at 188–89.

¹⁷⁰ See Speech in the U.S. House of Representatives on the War with Mexico, *supra* note 153, at 167 (“[A] most sacred right—a right, which we hope and believe, is to liberate the world.”).

¹⁷¹ At a speech in Worcester, Massachusetts on September 12, 1848 on the Whig position on the war, Lincoln argued that Whigs wished “to keep up the character of this Union . . . did not believe in enlarging our

B. Defense and Protectionism Supplant Pluralism, Expansion, and Free Trade

In rejecting self-determination and popular sovereignty in the territories under international and constitutional law, Lincoln insisted that there would ultimately be one form of political economy in the United States. Accordingly, he suggested that the South had betrayed what he deemed to be the central premise of Americanism—the idea “that every man can make himself.”¹⁷² He further believed that the existence of slavery in the United States undermined its claim to serve as a model for the world.¹⁷³ In other words, while viewing the expansion of free institutions as a corollary of American sovereignty, Lincoln held that this expansion would be achieved by an imitation of, rather than incorporation into, the United States. But that model—of the United States as a community where “every man can make himself”—would, in order to continue to serve as a model, need to be preserved and defended by economic

field, but in keeping our fences where they are and cultivating our present possession, making it a garden, improving the morals and education of the people” See MILLER, *supra* note 169, at 190 (citation omitted).

¹⁷² He noted:

We are a great empire. We are eighty years old. We stand at once the wonder and admiration of the whole world, and we must enquire what it is that has given us so much prosperity, and we shall understand that to give up that one thing, would be give up all future prosperity. This cause is that every man can make himself. It has been said that such a race of prosperity has been run nowhere else. We find a people on the North-east, who have a different government ours, being ruled by a Queen. Turning to the South, we see a people who, while they boast of being free, keep their fellow beings in bondage. Compare our Free States with either, shall we say here that we have no interest in keeping that principle alive?

Abraham Lincoln, Speech at Kalamazoo, Michigan (Aug. 27, 1856), in LINCOLN'S SPEECHES AND WRITING 1832–1858, *supra* note 117, at 376, 379. Cf. MERRILL D. PETERSON, LINCOLN IN AMERICAN MEMORY 33–35 (1994) (identifying the theme of Lincoln himself as a “self-made man” as one of the central themes in Lincoln’s perception in American history). In this basic ideology, Lincoln held the foundational beliefs of the emerging Republican Party. See generally GABOR S. BORITT, LINCOLN AND THE ECONOMICS OF THE AMERICAN DREAM 180–81 (1978) (detailing Lincoln’s commitment to capital and labor mobility within a market economy); ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 83 (2d ed. 1995) (finding the roots of Republican ideology in its precursor, the Free Soil Party).

¹⁷³ In his Peoria speech on the Kansas–Nebraska Act, he argued:

I think, and shall try to show, that it is wrong; in its direct effect, letting slavery into Kansas and Nebraska. . . . [and] because of the monstrous injustice of slavery itself. I hate it because it deprives our republican example of its just influence in the world—enables the enemies of free institutions, with plausibility, to taunt us as hypocrites—causes the real friends of freedom to doubt our sincerity, and especially because it forces so many really good men amongst ourselves into an open war with the very fundamental principles of civil liberty—criticising the Declaration of Independence, and insisting that there is no right principle of action but *self-interest*.

Speech on the Kansas–Nebraska Act, *supra* note 148, at 315.

protectionism rather than military force. In sum, he rejected the pluralist and supranationalist commitment to free trade of antebellum regimes in order to protect his vision of what made the United States special.

That said, Lincoln's rejection of territorial expansion throughout his presidency, like his rejection of self-determination and popular sovereignty in the territories, had both principled and prudential dimensions. In the months before he took office, in advising his allies in Congress on negotiations on the threatened secession, Lincoln insisted there could be no compromise on the question of extending slavery to the territories.¹⁷⁴ Indeed, shortly thereafter as president, he rejected proposals to forestall the war by unifying the North and the South in an aggressive war for territorial expansion. He rejected Secretary of State Seward's infamous call in an April 1, 1861 memorandum to invite the Southern states to join the North in a war of conquest against France and Spain for their interventionist activities in Mexico and Santo Domingo, respectively.¹⁷⁵ Seward's April Fool's Day memo even contemplated war against Great Britain and Russia, presumably as a pretext for acquiring portions of Canada and Alaska, justified by "their threats to intervene in the American crisis."¹⁷⁶ Although this proposal, unlike the proposal to face France and Spain, would not result in the expansion of slavery, Lincoln would have none of it either.

Similarly, in his posture towards the South, despite early inclinations to take a more aggressive posture to "reclaim" taken federal property, he maintained a defensive posture, declaring his intention merely to "hold" federal forts and authorizing only a mission to re-supply Fort Sumter.¹⁷⁷ Whether or not Lincoln in effect baited the Confederacy into initiating the use of force, he could say in his Second Inaugural Address that the South would "make war rather than let the nation survive," while the North "would accept war rather than let it perish."¹⁷⁸ Unlike Polk's aggression against Mexico, which by the time of the election of 1860 Lincoln had begun to describe not only as aggression but also as "unconstitutionally begun,"¹⁷⁹ Lincoln could claim his was a just war in self-defense.

¹⁷⁴ See GOODWIN, *supra* note 155, at 296.

¹⁷⁵ JONES, *supra* note 143, at 27.

¹⁷⁶ See GOODWIN, *supra* note 155, at 342.

¹⁷⁷ *Id.* at 324–25, 346 (following Senator Browning's advice).

¹⁷⁸ Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in LINCOLN'S SPEECHES AND WRITINGS 1859–1865, *supra* note 139, at 686, 686 (emphasis added).

¹⁷⁹ Abraham Lincoln, Autobiography Written for Campaign (June 1860), in LINCOLN'S SPEECHES AND WRITINGS 1859–1865, *supra* note 139, at 160, 166 ("[B]ecause the power of levying war is vested in

Finally, Lincoln's foreign relations posture during the war eschewed direct use of force by the United States and employed instead subtle diplomatic signals. For example, Lincoln indicated his support for international acceptance of black self-rule when he recognized the independent republic of Haiti, which had been blocked for a half-century because of its connection to the sectional issue in the United States.¹⁸⁰ At the same time, Lincoln joined Britain in a treaty finally authorizing British ships to board and investigate U.S.-flagged vessels violating the slave trade ban, although reciprocal U.S. rights were largely chimerical. Thus, the larger purpose of the treaty, like the recognition of Haiti, was a diplomatic signaling of Lincoln's underlying objectives in the Civil War.¹⁸¹

Moreover, according to the Secretary of the Navy, in late 1864 Lincoln refused to intervene against Spanish efforts to recover Santo Domingo, even after the Civil War had become a total war for the emancipation of American slaves and notwithstanding the support of U.S. abolitionists for intervention.¹⁸² Lincoln ostensibly thought it wiser to avoid driving the Spanish into the arms of the British and French and attempt to influence Spain's Caribbean Empire through more peaceful means.¹⁸³

In the intersection of the Civil War and foreign policy at the end of the war, Lincoln disavowed his political counselor Francis Blair's proposal to Jefferson Davis to bring the Civil War to a pause by uniting the armies of the North and South "against the French, who had invaded Mexico and installed a puppet regime in violation of the Monroe Doctrine."¹⁸⁴ Lincoln, rather than engage in aggressive war against Mexico, simply deployed U.S. forces to Texas in order to deter Emperor Napoleon's or (his puppet) Mexican Emperor Maximilian's aspirations to expand northwards.¹⁸⁵ Seward informed the French that the United States would no more intervene in France's war with Mexico than France should intervene in the U.S. Civil War, albeit hinting that the President was concerned about the consequences of French expansionism into the

Congress . . ."); *see also supra* text accompanying note 168–171 (which Lincoln criticized as international aggression and as unconstitutional).

¹⁸⁰ BEMIS, *supra* note 35, at 395 n.1.

¹⁸¹ JONES, *supra* note 143, at 122. *But see* GIDEON WELLES, LINCOLN AND SEWARD 132–45 (Books for Libraries Press, 1969) (1874) (demonstrating that the treaty would not result in any increased enforcement efforts by the United States for a variety of technical reasons).

¹⁸² *See* JONES, *supra* note 143, at 27–28; *see also* WELLES, *supra* note 181, at 184.

¹⁸³ *See* WELLES, *supra* note 181, at 183–84.

¹⁸⁴ *See* GOODWIN, *supra* note 155, at 690–91.

¹⁸⁵ JONES, *supra* note 143, at 311.

territory of the United States.¹⁸⁶ Lincoln would let time and the withdrawal of French military support do their work in undermining Maximilian's dictatorship. Indeed, days before his assassination, in a conversation with the Marquis de Chambrun who asked about the situation in Mexico, Lincoln said: "There has been war enough . . . [in] my second term there will be no more fighting."¹⁸⁷

Lincoln's posture on the northern frontier of the United States was equally circumspect. In his final Annual Message to Congress, Lincoln reported that, because of pro-Confederate attacks emanating from Canadian territory,¹⁸⁸ he had given notice of an intention to withdraw from the Rush-Bagot Treaty with Great Britain, which had reduced armaments on the Great Lakes, but only as a diplomatic means to secure a solution to the problem, not as an end in itself.¹⁸⁹ Lincoln's tone was measured, demanding action but expressing confidence in the good faith of his neighbors.¹⁹⁰ In due course, the concerns were resolved and the United States revoked its notice of withdrawal; the treaty remains in effect today.¹⁹¹ In sum, Lincoln's posture towards Britain to the north was just as defensive as his posture toward France and Spain to the south.

¹⁸⁶ See *id.* at 311–12.

¹⁸⁷ GOODWIN, *supra* note 155, at 722.

¹⁸⁸ These attacks included piracy on Lake Eire, terrorist attacks on private property in New York, and a full-blown raid from a Canadian base against St. Albans in Vermont, whose captured perpetrators were released by a Canadian magistrate after having been returned to the British military by U.S. authorities. WILLIAM LEE MILLER, *PRESIDENT LINCOLN: THE DUTY OF A STATESMAN* 206 (2008).

¹⁸⁹ See BEMIS, *supra* note 35, at 381.

¹⁹⁰ He simply noted:

In view of the insecurity of life and property in the region adjacent to the Canadian border, by reason of recent assaults and depredations committed by inimical and desperate persons, who are harbored there, it has been thought proper to give notice that after the expiration of six months, the period conditionally stipulated in the existing arrangement with Great Britain, the United States must hold themselves at liberty to increase their naval armament upon the lakes, if they shall find that proceeding necessary. . . . I desire, however, to be understood, while making this statement, that the Colonial authorities of Canada are not deemed to be intentionally unjust or unfriendly towards the United States; but, on the contrary, there is every reason to expect that, with the approval of the imperial government, they will take the necessary measures to prevent new incursions across the border.

Abraham Lincoln, Annual Message to Congress (Dec. 6, 1864), in *LINCOLN'S SPEECHES AND WRITINGS 1859–1865*, *supra* note 140, at 646, 649–50 [hereinafter 1864 Annual Message to Congress].

¹⁹¹ BEMIS, *supra* note 35, at 381. Lincoln did once hint at his irritation with Britain's insistence on relying on its rights as a neutral trading nation, even to the extent of seriously compromising Union war strategy, noting that "if this nation should happen to get well we might want that old grudge against England to stand." GOODWIN, *supra* note 155, at 711. However, it was Lincoln's successor President Johnson, under the influence of the Radical Republicans in Congress and Secretary Seward, who continued to dream of expansion into Canada, that the U.S. withdrew from the Marcy-Elgin Reciprocity Treaty of 1854, in the hope of stimulating

Rather than use force against external enemies or absorb or transform competing political economies, Lincoln simply sought to protect free wage labor in the United States through higher tariffs. Indeed, the adoption of the Morrill Tariff of 1861 in February 1862 as part of Lincoln's legislative program was aimed in effect at British products in competition with Northern manufacturers at precisely the time Seward's State Department was working desperately to persuade Great Britain not to recognize the Confederacy and to respect the Northern blockade of Southern ports.¹⁹² In risking British displeasure when seizing the opportunity provided by having a Northern, pro-manufacturing, protectionist rump Congress, Lincoln revealed the importance he placed on the long-term implementation of his vision of political economy.¹⁹³ The roots of his view were in Clay's American System of internal improvements,¹⁹⁴ also finally coming to fruition in the Homestead Act and Pacific Railways Acts of 1862.¹⁹⁵ But Lincoln framed his own support in terms that revealed his understanding of the role of protectionism in facilitating human development, preferring the maximization of employment to consumer welfare.¹⁹⁶ Setting aside the quality of Lincoln's understanding of economics, he evidently hoped to maximize employment as a means to an end, preventing the harm of idleness and ensuring a just reward for labor.¹⁹⁷ It was the means

Canadian willingness to join the Union's free trade area. See BEMIS, *supra* note 35, at 382 (suggesting these U.S. measures encouraged Britain to devolve authority to Canada in 1867 in order to increase support for a continued constitutional relationship with the British Empire).

¹⁹² See AMANDA FOREMAN, *A WORLD ON FIRE: BRITAIN'S CRUCIAL ROLE IN THE AMERICAN CIVIL WAR* 68 (2010).

¹⁹³ See *supra* Part II.A–C.

¹⁹⁴ See *supra* text accompanying notes 8–12.

¹⁹⁵ BURTON, *supra* note 11, at 228–29.

¹⁹⁶ Lincoln wrote:

[T]hat to reason and act correctly on this subject, we must look not merely to *buying* cheap, nor yet to *buying* cheap *and* *selling* dear; but also to having constant employment, so that we may have the largest possible amount of something to sell. This matter of employment can only be secured by an ample, steady, and certain market, to sell the products of labour in.

Abraham Lincoln, Fragments on the Tariff, in *LINCOLN'S SPEECHES AND WRITINGS 1832–1858*, *supra* note 117, at 149, 152.

¹⁹⁷ He wrote:

But it has so happened in all ages of the world, that *some* have laboured, and *others* have, without labour, enjoyed a large proportion of the fruits. This is wrong, and should not continue. To secure to each labourer the whole product of his labour, or as nearly as possible, is a most worthy object of any good government. But then the question arises, how can a government best effect this? In our own country, in its [sic] present condition, will the protective principle *advance* or *retard* this object? . . . The only remedy for this is to, as far as possible, drive *useless* labour and *idleness* out of existence. . . . It appears to me, then, that all labour done *directly* and *incidentally* in

by which he could protect the germ of American sovereignty—“This cause is that every man can make himself.”¹⁹⁸

In sum, Lincoln rejected supranationalism’s commitment to territorial expansion and an ever-increasing community of free trade; he turned, instead, to an anti-expansionist, defensive policy coupled with economic protectionism. This put his policies in tension with longstanding U.S. positions on international law.

C. *The Laws of Necessity and Public Opinion Supersede the Law of Nations*

As a corollary of rejecting free trade and supranational expansion, Lincoln also rejected the customary law of nations. In particular, he rejected the law of nations that, like statutory precedent of the Compromise of 1850 and Kansas-Nebraska Act or the judicial precedent of the *Dred Scott* decision,¹⁹⁹ drew its normative force from social practice or acceptance and judicial precedent in constitutional law. “Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power, except where the acquiescence of the people and the States can be considered as well settled,” said Lincoln in his speech on the *Dred Scott* decision.²⁰⁰ His diplomacy and war strategy as president revealed a similarly deep skepticism of customary international law and a willingness to adjust its principles to accord with his understanding of necessity or reason.

As Subpart C.1 shows, Lincoln’s first move during the war was to minimize traditional *jus in bello* constraints, the rules of international law governing rights during war. This shift, particularly in the area of neutral rights of commerce and blockade, may merely reflect the shift in the interests of the United States from those of a small-navy neutral relying on its neutral trading rights under customary international law to those of a large-navy belligerent

carrying articles to their place of consumption, which could have been produced in sufficient abundance, *with as little labour, at the place of consumption*, as at the place they were carried from, is useless labour. . . . [T]he abandonment of the protective policy by the American Government, must result in the increase of both useless labour, and idleness; and so, in proportion, must produce want and ruin among our people.

Id. at 153–54, 158.

¹⁹⁸ Speech at Kalamazoo, Michigan, *supra* note 172, at 379.

¹⁹⁹ See *supra* text accompanying notes 145–153.

²⁰⁰ Speech on the *Dred Scott* Decision, *supra* note 150, at 394.

asserting expansive powers to blockade.²⁰¹ However, a close reading of Lincoln's practice evidences a principled unwillingness to submit to traditional authority of the *jus in bello* in itself; rather, every decision is subject to the requirements of military necessity, justified in turn by the fundamental justice of the Union cause in the Civil War, the so-called *jus ad bellum* rules of international law. As Subpart C.2 shows, this purposive approach to international law extended to a subversive use of the war power to effect emancipation, violating a perceived norm against promoting anarchy through slave uprisings, and to an inchoate concept of total war. Finally, as Subpart C.3 maintains, Lincoln sought through public reason, rather than settled precedent, to win support for his revolutionary use of the war power to effect emancipation and sustain his related war measures. He resorted to international public diplomacy to win the hearts and minds of the British working classes for his revolutionary policies. Similarly, Lincoln's post-war policy of reconciliation rather than punishment towards Confederate war leadership envisioned the de-legalization of the *jus post bellum*.

In short, much like his resistance to statutory and judicial practice as a source of constitutional law, he depreciated customary international law and its stabilizing, retrospectively oriented, rule-like norms in international law; instead, Lincoln relied on fundamental principles of justice and public reason with a prospective orientation and transformative effects. On the external front of the blockade and neutral rights, the internal front of emancipation and total war, and the twin popular fronts of international public diplomacy and national reconciliation, Lincoln's international law, rather than relying on usages and customs of states, cleared new paths through the exercise of public reason.

1. *The Blockade and Neutral Rights—The Limits of Custom*

Lincoln's problem, and the Union's, was to be caught on the horns of a legal dilemma. After the initiation of hostilities, all members of his Cabinet agreed on the need for economic warfare against the Confederacy by closing off its trade with Europe.²⁰² However, Secretary of the Navy Gideon Welles argued that declaring a blockade would permit European powers to recognize the existence of a legal state of "belligerency" between the North and South,

²⁰¹ See *infra* text accompanying notes 202–241. This has led many to ignore the underlying philosophical roots of Lincoln's approach to international law. See, e.g., STEPHEN C. NEFF, *JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR 167–202* (2010) (discussing the radical shifts in neutrality policy and blockade rules as "pragmatic oscillation" between treating Confederates as criminals and belligerents).

²⁰² See NEFF, *supra* note 201, at 176.

thereby extending semi-sovereign belligerent rights to the Confederacy—authorizing Europeans to engage in neutral trade with it, as permitted by customary international law.²⁰³ He argued that it would be better to rely on domestic law to close Southern ports.²⁰⁴ But there appeared to have been concern over whether the Constitution permitted closing of the ports of some states but not others.²⁰⁵ Tilting towards Seward, Lincoln then authorized a blockade of Southern ports “in pursuance of the laws of the United States, and of the law of nations”²⁰⁶

Within weeks, the political and legal implications of the blockade manifested themselves. The United Kingdom and others took the opportunity to seize on the declaration of the blockade, as Welles had feared, as the basis for recognizing the existence of belligerency, with a declaration of neutrality soon to follow.²⁰⁷ Yet, the question of whether the powerful British Navy would respect the blockade arose. The British took the position that the customary laws of war applied to a civil war, but whether under those laws the Union had the power to proclaim a blockade was less than clear.²⁰⁸ Moreover, the European powers in the aftermath of the Crimean War had purported to codify the customary international rules on blockade and piracy, “consolidat[ing] the principle that a blockade had to be effective” and stating that “[p]rivateering is, and remains, abolished.”²⁰⁹ While the United States had consistently endorsed the first principle, it had declined to adhere to this declaration because it objected to the alleged customary rule against privateering. The American practice, most notably during the War of 1812,²¹⁰ had previously relied on the issuance of so-called letters of marque and reprisal, as contemplated under the U.S. Constitution,²¹¹ to mobilize the substantial American merchant marine as a militia of privateers on the high

²⁰³ See GOODWIN, *supra* note 155, at 351.

²⁰⁴ *Id.*

²⁰⁵ U.S. CONST. art. I, §. 9, cl. 6 (“No Preference shall be given by any Regulation of Commerce or Revenue of the Ports of one State over those of another”); JONES, *supra* note 143, at 56.

²⁰⁶ Proclamation No. 4, 12 Stat. App. 1258, 1259 (Apr. 19, 1861).

²⁰⁷ British Proclamation for the Observance of Neutrality in the Contest Between the United States and the Confederate States of America, May 13, 1861, 51 B.S.P. 165 (U.K.); JONES, *supra* note 143, at 40, 44–45.

²⁰⁸ See *id.* at 40 (reporting that Foreign Minister Lord John Russell relied on the writings of Vattel for this conclusion).

²⁰⁹ Declaration Respecting Maritime Law, art. 1, Apr. 16, 1856, 46 B.S.P. 26 (U.K.); WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 537–38 (Michael Byers trans., 2000).

²¹⁰ Witt, *supra* note 41, at 134–35 (reporting that during the war, 517 American privateering vessels had seized approximately 1,350 British merchant ships).

²¹¹ U.S. CONST. art. I, § 8, cl. 11 (authorizing Congress to “[t]o declare War, grant Letters of Marque and Reprisal . . .”).

seas. Now, the Union suggested it would adhere to the Declaration of Paris, on behalf of the South as well, to close the door to Southern use of privateers to break the blockade; and the President declared that captured Southern privateers would be executed.²¹² But British Ambassador Lyons asked Secretary Seward whether the United States could enforce the Declaration of Paris in its own waters, indirectly making the point that the Union blockade against the Southern ports was not effective in the least.²¹³ This, in turn, raised the even more serious question of whether, under customary international law as reflected in the Declaration of Paris, the Union had the power to declare a blockade that European ships would be required to respect without making that blockade fully “effective.” More to the point, the United States itself had consistently maintained the position that such so-called “paper blockades” were not binding.²¹⁴

Yet, after some hesitation, the United States and Britain reached a *modus vivendi*. Britain nominally questioned the legality of the blockade, yet British neutrality assured that the Union blockade, when implemented, would not be challenged by the superior naval forces of the British Empire.²¹⁵ It has been suggested the British admiralty saw the wisdom in *de facto* recognition of the North's thin blockade, since the British Navy could declare a blockade in the future without expending significant resources in satisfying a narrower interpretation of the Paris Declaration's requirement of “effectiveness.”²¹⁶ Lincoln also reformulated his position in his July 4, 1861 Message to Congress; rather than proclaim a blockade “pursuant to the law of nations,” he merely announced that he was “closing the ports of the insurrectionary districts by proceeding in the nature of Blockade.”²¹⁷ He also insinuated, however, that retaliatory action was possible, pointedly noting that European commercial interest in the payment of Northern debt obligations exceeded European interests in the continued supply of Southern cotton.²¹⁸ Thus, Lincoln coupled his minimal acquiescence in a customary international law carrot with the

²¹² See FOREMAN, *supra* note 192, at 80.

²¹³ See JONES, *supra* note 143, at 41.

²¹⁴ *Id.* at 43; see also BEMIS, *supra* note 35, at 374–75. The United States maintained the point of view that a blockade must be effective and maintained with “a force sufficient really to prevent access to the coast of the enemy.” Declaration Respecting Maritime Law, art. 1, Apr. 16, 1856, 46 B.S.P. 26 (U.K.)

²¹⁵ See JONES, *supra* note 143, at 43, 53.

²¹⁶ See JAY MONAGHAN, *DIPLOMAT IN CARPET SLIPPERS* 125 (1945); see also BEMIS, *supra* note 35, at 376–77.

²¹⁷ Message to Congress in Special Session, *supra* note 139, at 252

²¹⁸ *Id.* at 252; see also MONAGHAN, *supra* note 216, at 123–24 (reporting the diplomatic corps' interpretation of Lincoln's message).

threat of a discriminatory economic stick in violation of alien investor property rights.

The precise scope of British neutrality obligations repeatedly raised questions for that country, some of which were ultimately the subject of arbitration after the war.²¹⁹ And for the United States, the anomalous legal situation also continued to generate controversy, particularly in the circumstances related to the capture of two British ships, the *Trent* and the *Peterhoff*, by blockading Union ships. Like the institution of the blockade itself, both cases revealed Lincoln's flexibility in his approach to the customary law of nations.

The *Trent* Affair, which brought the Union and Great Britain to the brink of war, involved a clear U.S. violation of customary international law. On November 8, 1861, a Union sloop, the *San Jacinto*, under the command of Captain Charles Wilkes, seized a British vessel, the *Trent*, based on intelligence that it was transporting James Mason and John Sidell to England to serve as Confederate representatives to Great Britain and France.²²⁰ After some confusion, Wilkes seized the *Trent*, rather than take the ship to port and submit it to the jurisdiction of a prize court—as required by the law of nations at that time, and consistent with American practice going back to James Madison—to determine whether the ship itself was enemy or neutral property and whether any of its contents could be subject to seizure as contraband of war.²²¹ Wilkes' rather tortured argument was that, since customary law allowed him to seize a “dispatch” or message from the Confederacy as “contraband of war,” he could also seize a “living, breathing dispatch.”²²²

Even though the Union disavowed the seizure, stating to the British that *San Jacinto* was not acting under orders,²²³ the United Kingdom commenced preparations for war. Learning of an American attempt to buy remaining stocks of British saltpeter, which was an important strategic import for gunpowder manufacture, Britain imposed an export ban on all munitions to the United States.²²⁴ It began to deploy additional troops to Canada in preparation for the outbreak of war, demanded an apology and return of the prisoners, and issued a virtual ultimatum, threatening to break diplomatic relations on a certain date if

²¹⁹ BEMIS, *supra* note 35, at 412–13.

²²⁰ See Moorefield Story, *The Trent Affair*, CHARLES SUMNER—AMERICAN STATESMAN 208, 209 (1900).

²²¹ GOODWIN, *supra* note 155, at 396–99.

²²² FOREMAN, *supra* note 192, at 181 n.*.

²²³ See *id.* at 179.

²²⁴ See *id.* at 183.

its terms were not met.²²⁵ At that point, Lincoln's Cabinet convened and debated the issue, with Seward calling for submission to the British demands. The gist of Seward's argument was that acquiescing in the British position would confirm the longstanding American objection to impressment, dating back to the British practice during the Napoleonic Wars of seizing American nationals from American ships claimed by the United Kingdom to be British nationals. This strained analogy was ultimately viewed by the British as a face-saving ploy designed simply to give the Lincoln Administration domestic political cover for a diplomatic capitulation.²²⁶

Nonetheless, Seward's position prevailed, but in a way that further revealed the limited weight Lincoln attached to customary international law. Lincoln asked for Seward's opinion in writing, saying that he would undertake the effort to draft the argument against Seward's position. As Seward later recounted, when he failed the next day to produce such a document, Lincoln said: "I found I could not make an argument that would satisfy my own mind, and that proved to me your ground was the right one."²²⁷ In other words, Lincoln simply accepted Seward's tortured position out of political and military necessity.²²⁸ Rather than agree, he simply was in no position to disprove him. From Lincoln's standpoint, Seward's argument prevailed, not because it was right, but only because it could not be contradicted.

In another case, the *Peterhoff*, the United States refused to rely on customary international law when by right it might have done so. In March 1863, Captain Wilkes, this time commanding the *Vanderbilt* in the Caribbean, captured the *Peterhoff* after observing a large packet being thrown into the water.²²⁹ The effect of the capture was to make the cost of insurance for sailing in Mexican waters prohibitive for suppliers seeking to circumvent the Union blockade of the Confederate Caribbean coast, but it also increased anti-Union

²²⁵ See *id.* at 183–89 and 191–92.

²²⁶ See *id.* at 196.

²²⁷ GOODWIN, *supra* note 155, at 399–400 (citation omitted).

²²⁸ According to a Grant confidante, Grant—after reporting to Lincoln Seward's explanation of the "tangled" questions involved in the *Trent* affair—was told by Lincoln: "Seward studied up all the works ever written on international law, and came to cabinet meetings loaded to the muzzle with the subject. We gave due consideration to the case, but at that critical period of the war it was soon decided to deliver up the prisoners. It was a pretty bitter pill to swallow, but I contented myself with believing that England's triumph in the matter would be short-lived, and that after ending our war successfully we would be so powerful that we could call her to account for all the embarrassments she had inflicted upon us." GOODWIN, *supra* note 155, at 710–11. The last sentence sounds more like Grant's or Grant's confidante's interpolation than Lincoln, who would surely have made such a point, if ever he would, through a parable or anecdote.

²²⁹ See FOREMAN, *supra* note 192, at 412–13.

sentiment in Britain.²³⁰ According to Welles, the source of the controversy was an unauthorized commitment by Secretary Seward to the British Ambassador that the U.S. Navy would not exercise its lawful right to visit and inspect British ships for the purpose of inspecting enemy mail to or from Great Britain.²³¹ During the *Trent* affair, it was conceded by both sides that such a right existed, although the British deemed it inapplicable to the particular facts of the case. This time, the Cabinet was not divided on the legal question, with only Seward arguing that the captured mail packets should be returned to British authorities.²³² Senator Sumner, the highly influential chairman of the Senate Foreign Relations Committee who had been brought into these deliberations, contradicted Seward not only on the legal question but also on the policy question of whether the threat of British intervention in the war at this stage remained significant.²³³ Indeed, the weakness of Seward's customary international law argument was emphasized by Sumner's failure to support him. For Sumner, in important cases such as Secretary Seward's suggestion that the Union employ privateers in violation of past U.S. positions, had consistently argued that the United States should comply with customary international law.²³⁴ The United States, viewing the matter solely from the standpoint of customary international law, was on firm ground to reject the British claim.

Yet, in view of Seward's prior commitment, and his understanding of the political complications the seizure had appeared to cause domestically for the British Foreign Ministry which had relied on him, Lincoln asked for memoranda from Seward and Welles answering specific questions. He asked for "cases" involving the question whether such mails could be opened, but, more important, he asked for arguments on both sides of the question of "the dangers and evils of detaining and opening" or "of forwarding such mails unopened."²³⁵ Welles's memorandum paid little attention, if any, to the "dangers and evils" question, focusing instead on the potential violation of domestic law and the precedent that might be set through the unnecessary waiver of an international legal right.²³⁶ Yet, Seward won the argument and the mails were returned to the British unopened.

²³⁰ See *id.* at 423, 456.

²³¹ See GIDEON WELLES, LINCOLN AND SEWARD 85–98 (Books for Libraries Press, 1969) (1874).

²³² GOODWIN, *supra* note 155, at 517–518.

²³³ *Id.* at 517–18.

²³⁴ See MONAGHAN, *supra* note 216, at 39, 291.

²³⁵ WELLES, *supra* note 231, at 99.

²³⁶ See *id.* at 100–15.

Why Lincoln followed Seward's advice in the *Peterhoff* affair has seemed unclear to many. Lincoln's legal advisers and Sumner, who were well versed in the law of nations, sharply criticized Lincoln and Seward for their "ignorance" of international law.²³⁷ Yet, in light of Welles's laborious memorandum, surely Lincoln understood that failure to assert the right could give rise to the suggestion that the right no longer reflected the customary law of nations. For some commentators, Lincoln's decision reflected the Whig lawyer's tendency to settle cases whenever possible.²³⁸ Yet, as generally known, Lincoln brought many cases to trial. For others, Lincoln's lack of respect for customary international law in the *jus in bello* reflected the special weakness of those norms in the international law of that era.²³⁹ Yet, commentators find significant respect for the customary law of nations on *jus in bello* and related issues in the work of the Supreme Court during this era.²⁴⁰

Perhaps, whatever Lincoln's advisers, the Supreme Court, later students of Whig lawyers' professional habits, or historians of the Supreme Court of that era might think, a more important factor for Lincoln was simply that the customary law of nations carried little normative weight compared with the value of promises. Quoting President Jackson, Lincoln had argued in relation to the duty of constitutional interpretation that each "officer, who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others."²⁴¹ Similarly, for Lincoln as an international lawyer, Seward's promise to the British ambassador, even though Seward never maintained that he had entered into an oral treaty, trumped Welles' recitation of hypothetical dangers flowing from normative claims based on the practice and precedents of self-interested states. Lincoln was not ignorant of customary international law; he simply formed his own opinion of it. For him, oaths mattered more.

²³⁷ GOODWIN, *supra* note 155, at 517–18.

²³⁸ William D. Pederson, *President Lincoln: The International Lawyer*, in ABRAHAM LINCOLN, ESQ.: THE LEGAL CAREER OF AMERICA'S GREATEST PRESIDENT 229, 236 (Roger Billings & Frank J. Williams eds., 2010).

²³⁹ See Scott Sullivan, *International Law and Domestic Legitimacy: Remarks Prepared for Lincoln's Constitutionalism in Time of War: Lessons for the Current War on Terror?*, 12 CHAP. L. REV. 489, 494–98 (2009).

²⁴⁰ See, e.g., Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1859 (2010); Thomas H. Lee, *The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal for Modern Transformations*, 53 ST. LOUIS U. L.J. 53, 55 (2008).

²⁴¹ See Speech on the Dred Scott Decision, *supra* note 150, at 394.

2. *Emancipation and Total War—Necessity Takes Hold*

Lincoln's problem, and the Union's, was to be caught on the horns of a politico-military dilemma. The border states on the military frontlines of the initial stages of the war, and Northern "peace" Democrats opposed to emancipation in key states further to the north, together barred a premature policy declaration by Lincoln that the object and purpose of the Civil War was the end of slavery throughout the United States.²⁴² Rather, in the initial stages of the War, Lincoln was required to maintain publicly that the purpose of the war was solely to preserve the Union, as he continued to maintain his public position that he would not seek to liberate Southern slaves.²⁴³ Given Lincoln's long-standing position that preservation of the Union, coupled with the limitation of slavery in the territories, would ultimately result in the end of slavery.²⁴⁴ This fooled no one in the South and only those who wished to be fooled in the Northern and border states.²⁴⁵

But, as a consequence, "the Lincoln administration now confronted the serious challenge of convincing the British and others across the Atlantic that the conflagration threatening to break out over slavery did not concern slavery after all."²⁴⁶ It thus left abolitionists in Europe "skeptical about the president's motives."²⁴⁷ Even after issuing the Emancipation Proclamation, Lincoln was criticized in Europe for failing to free any slaves over whom the Union actually had any practical control and for leaving out of the Proclamation rhetoric emphasizing the moral dimension of the question.²⁴⁸ Indeed, Lincoln included in the final Proclamation his assertion—in passive voice no less, that emancipation was "sincerely believed to be an act of justice"²⁴⁹—only at the insistence of Treasury Secretary Chase, the foremost abolitionist in the Cabinet, and the leading abolitionist Senator Charles Sumner.²⁵⁰

These objections are merited, since Lincoln resisted emancipation at every stage. Unlike Seward, his chief rival for the Republican nomination for the

²⁴² See ISAAC N. ARNOLD, *THE HISTORY OF ABRAHAM LINCOLN AND THE OVERTHROW OF SLAVERY* 283–87 (1866).

²⁴³ See *id.* at 289.

²⁴⁴ See *id.* at 85.

²⁴⁵ See *id.*

²⁴⁶ JONES, *supra* note 143, at 28.

²⁴⁷ *Id.* at 122.

²⁴⁸ See GOODWIN, *supra* note 155, at 482–83.

²⁴⁹ Emancipation Proclamation, 12 Stat. 1268, 1269 (Jan. 1, 1863)

²⁵⁰ See BURUS M. CARNAHAN, *ACT OF JUSTICE: LINCOLN'S EMANCIPATION AND THE LAW OF WAR* 115 (2007).

Presidency, Lincoln eschewed relying on natural law as the ground for ending slavery. Yet, it was Lincoln's long-standing position that the positive law of the United States, understood to include the Declaration of Independence, deemed slavery to be an exceptional institution to be eliminated when conditions so permitted.²⁵¹ Similarly, rather than rely on moral arguments and treating war as the continuation of politics by other means,²⁵² Lincoln relied on his war power and "military necessity" to emancipate slavery in Southern-occupied territory alone. The Preliminary Emancipation Proclamation of September 22, 1862 was in the form of a threat to compel Southern forces to lay down arms and return to the Union on *status quo ante* terms, thus preserving slavery in the South.²⁵³ It was only when this peace offer was refused, as it seemed clear it would be, that the final Emancipation Proclamation purported to exercise, solely as a "necessary" war measure under the President's constitutional power as Commander-in-Chief, the power to emancipates slaves—again, only outside Northern-occupied territory.²⁵⁴ When it appeared that the policy of the Preliminary Emancipation Proclamation was to encourage slave uprising in the South as an aid in the overthrow of Southern forces, the British objected that this "would incite slave rebellions and therefore constituted a last-ditch effort to win the war."²⁵⁵ Thus, the draft language was modified in the final Emancipation Proclamation in response to these British concerns. Based on the advice of Secretary of the Treasury Chase and Secretary of State Seward, arguably the two foremost abolitionists in the Cabinet, Lincoln instead proposed the incorporation of escaped slaves in the military forces of the Union, while simultaneously encouraging the freed Southern slaves to "abstain from all violence, unless in necessary self-defence" and, where possible, "labor faithfully for reasonable wages."²⁵⁶ When Lincoln did finally declare that the larger purpose of the war was to emancipate all slaves in the United States through constitutional amendment, it was only on proposed terms of "compensated" emancipation,²⁵⁷ leaving in doubt the ultimate resolution of the matter. In sum, Lincoln's progression toward

²⁵¹ See GOODWIN, *supra* note 155, at 146–49 (discussing Seward's "higher law" rationale against slavery and Lincoln's insistence that the Constitution and Declaration, properly understood, provided a sufficient basis for opposing slavery).

²⁵² See KARL VON CLAUSEWITZ, *ON WAR* 9–10 (Penguin Books 1982) (1832).

²⁵³ See Abraham Lincoln, Preliminary Emancipation Proclamation (Sept. 22, 1862), in LINCOLN'S SPEECHES AND WRITINGS 1859–1865, *supra* note 139, at 368, 368.

²⁵⁴ See Emancipation Proclamation, 12 Stat. 1268 (Jan. 1, 1863).

²⁵⁵ JONES, *supra* note 143, at 121–22.

²⁵⁶ Emancipation Proclamation, 12 Stat. 1268, 1269 (Jan. 1, 1863), at 425; see also CARNAHAN, *supra* note 250, at 127 (reporting the concerns of Lord Lyons, British Ambassador to the United States).

²⁵⁷ See 1864 Annual Message to Congress, *supra* note 190, at 393, 406.

eventually supporting unconditional universal emancipation through the Thirteenth Amendment seemed compelled by circumstances of war—no less than what was required by military necessity and no more than what would be tolerated by public opinion²⁵⁸—and the ultimate requirements for a peace built on a stable foundation.²⁵⁹

As a matter of international law, the Emancipation Proclamation also stood on uncertain ground. It was arguably inconsistent with the United States's position during the Revolutionary War and the War of 1812, when the United States had demanded the return of slaves unlawfully freed by Britain as war measures.²⁶⁰ Moreover, even if customary law permitted seizure of enemy property during a civil war on grounds analogous to those upon which the President relied in his blockade policy, “neither civilian courts nor military authorities could change the ownership of private property still under enemy control.”²⁶¹ At the same time, Lincoln declined the opportunity to follow the European consensus against slavery as an emerging customary norm of international law. Rather, Lincoln continued to follow the dictates of the U.S. Constitution and the political imperative of taking only those measures he thought he could defend as a matter of “military necessity” because all other possible courses of action had come to be viewed as unacceptable.²⁶² He also

²⁵⁸ Lincoln claimed that “the voice of the people” in re-electing him signaled the need to adopt the final eradication of slavery. See ERIC FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY* 312 (2010).

²⁵⁹ Lincoln refused to negotiate with Confederate representatives on terms for peace until the Amendment was adopted, locking him in on constitutional grounds to full abolition as the minimum terms for Confederate surrender. See *id.* at 314.

²⁶⁰ S. JOURNAL, 2d Cont'l Cong., at 241–43 (1783), available at [²⁶¹ CARNAHAN, *supra* note 250, at 114 \(relying by chain of authority ultimately on then leading international lawyer Richard Henry Dana\). Dana, it should be noted, was the U.S. Attorney who argued on behalf of the United States in *The Prize Cases*, 67 U.S. \(2 Black\) 635 \(1863\), in which the President's authority as Commander-in-Chief to declare and enforce a blockade against the South authorizing the taking of prize under the customary law of war was at issue. Thomas Lee & Michael D. Ramsey, *The Story of the Prize Cases: Executive Action and Judicial Review in Wartime*, in *PRESIDENTIAL POWER STORIES* 65, 65–67 \(Christopher H. Schroeder & Curtis A. Bradley eds., 2009\) \(suggesting that if the president's blockade authority had been undermined in *The Prize Cases*, the legality of the Emancipation Proclamation would also have been called into question\).](http://memory.loc.gov/cgi-bin/ampage;CARNAHAN, supra note 250, at 6–7.</p></div><div data-bbox=)

²⁶² CARNAHAN, *supra* note 250, at 96–97. *But see* Robert Fabrikant, *Lincoln, Emancipation, and “Military Necessity”*: Review of Burrus M. Carnahan's *Act of Justice, Lincoln's Emancipation Proclamation and the Laws of War*, 52 HOW. L.J. 375, 376 (2009) (reviewing BURRUS M. CARNAHAN, *ACT OF JUSTICE: LINCOLN'S EMANCIPATION PROCLAMATION AND THE LAW OF WAR* (2007)) (disputing Carnahan's argument that Lincoln's delay in issuing the Emancipation Proclamation under a theory of military necessity was grounded in deference to the Constitution); Allen C. Guelzo, *Restoring the Proclamation: Abraham Lincoln, Confiscation, and Emancipation in the Civil War Era*, 50 HOW. L.J. 397, 407 (2007) (agreeing that the

would not subordinate these considerations to doubtful customary international law precedents against emancipation or rely more expansively on merely inchoate norms justifying emancipation drawn from the emerging global practice of condemnation and interruption of the slave trade.²⁶³ Thus, with reason understood as military necessity, it was public opinion—not established or emerging custom—that formed the basis for his emancipation policy.

At the same time, assertion of the right to emancipate slaves through the war power opened the door for further escalation. By appearing to transform the war rhetorically into a battle between good and evil—as he did in the extraordinary peroration of his December 1, 1862 message to Congress and in his Gettysburg Address—Lincoln's language appeared to many to subordinate *jus in bello* concerns to the single-minded pursuit of the *jus ad bellum*. With Sherman's "war is hell," "March to the Sea" through Georgia, and Grant's "if it takes all summer" campaign in Virginia,²⁶⁴ the logic of military necessity seemed to justify total war. Lincoln's refusal to compromise on the terms of peace by demanding the unconditional surrender of the South²⁶⁵ arguably extended the war when terms leading to the indirect and ultimate end of slavery in the South might still have been negotiable.

3. *External Public Diplomacy and Internal Public Reconciliation*

Yet, for both principled and prudential reasons, Lincoln took steps not to follow the full logical implications of military necessity. Both internationally and domestically, instead, he found molding international public opinion and forging international consensus to be more effective and sustainable than the direct use of force.

Proclamation was inconsistent with the "niceties" of international law but arguing that, rather than reflect political cynicism, the Proclamation reflected Lincoln's idealism).

²⁶³ Some scholars have come to a different conclusion. CARNAHAN, *supra* note 250, at 14–16.

²⁶⁴ See generally JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 718–30* (1988); JAMES M. MCPHERSON, *TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF* 221, 251 (2008). While Lincoln approved the promulgation of the so-called Lieber Code, General Order 100, in order to provide rules of conduct for Union soldiers, the Lieber Code was General Halleck's initiative, not Lincoln's. The Lieber Code was widely criticized for the scope of the exception for "military necessity." See MILLER, *supra* note 155, at 364. Compare HARRY G. STOUT, *UPON THE ALTAR OF THE NATION: A MORAL HISTORY OF THE AMERICAN CIVIL WAR* 138 (2006) ("When forced to choose between principled war and victory, Lincoln chose victory"), with MILLER, *supra* note 155, at 216 (defending Lincoln as a "principled warrior" seeking a "principled victory"), and Burrus M. Carnahan, *Lincoln, Lieber, and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213 (1998) (offering a more nuanced and restrictive portrayal of Lincoln's concept of "military necessity" in terms of the actions he specifically authorized yet acknowledging a relatively minuscule role for Lincoln in the adoption of the Lieber Code).

²⁶⁵ FONER, *supra* note 258, at 314.

Pragmatically, the external challenge of potential European intervention based on moral and economic reasons, was an important concern. Gladstone, later an advocate for human rights, saw Lincoln's policies as a direct threat to civilization. In his speech at Newcastle on October 7, 1862, even after Antietam and the Preliminary Emancipation Proclamation, Gladstone argued for British recognition of the Confederacy and humanitarian intervention against the Union.²⁶⁶ The English ruling classes already viewed Lincoln's incitement of slave uprisings as threats to order that could harm British interests.²⁶⁷ Perhaps more importantly, the British aristocracy also viewed them as vindication of the traditional European view that democracy would lead to anarchy and despotism, not to mention the British aristocracy's sympathy for Southern aristocratic moral superiority to the plebeian North.²⁶⁸ In addition, the blockade meant risking European displeasure by cutting off export markets to the South (while increasing tariffs against European exports to the North) and, more importantly, depriving Europe of important cotton supplies for textile production.²⁶⁹ Stockpiles of cotton, among other factors, temporarily mitigated the effects of the blockade.²⁷⁰ Still, the increasing effectiveness of the blockade exacerbated political pressure from England's textile factories and workers for British intervention.²⁷¹ Thus, notwithstanding the British governing elite's moral opposition to slavery, Gladstone's moral argument for humanitarian intervention elevated the pressure on the British government to recognize the Confederacy to unprecedented levels.²⁷²

To counteract these effects, in early 1863, shortly after issuing the Final Emancipation Proclamation, Lincoln spoke directly to the British people in his Letter to the Workingmen of Manchester,²⁷³ then the center of British textile production. He had already called the Civil War: a "People's contest."²⁷⁴ With Europeans volunteering to fight on both sides of the struggle, it was fast

²⁶⁶ JONES, *supra* note 143, at 236.

²⁶⁷ MONAGHAN, *supra* note 216, at 80–81.

²⁶⁸ *Id.*; JONES, *supra* note 143, at 2, 58. See PLATO, THE REPUBLIC 303–07 (Paul Shorey, trans., 1935) for the classical Greek view that democracy leads to tyranny.

²⁶⁹ See BURTON, *supra* note 11, at 144.

²⁷⁰ *Id.*

²⁷¹ See *id.* (reporting shift of British exports towards opium to China); JONES, *supra* note 143, at 131 (reporting cotton imports from India and increased effects, especially in France).

²⁷² See JONES, *supra* note 143, at 236–44.

²⁷³ Letter from Abraham Lincoln to the Workingmen of Manchester, England (Jan. 19, 1863), in SPEECHES AND WRITINGS 1859–1865, *supra* note 139, at 431, 431. American funds were used to support the organization of public meetings in support of the Union cause. See DONALD, *supra* note 164, at 415.

²⁷⁴ Message to Congress in Special Session, *supra* note 139, at 259.

becoming an “international” people’s contest.²⁷⁵ From his London exile, Marx proclaimed that “[a]s the American War of Independence initiated a new era of ascendancy for the middle class, so the American anti-slavery war will do for the working classes.”²⁷⁶ As early as his 1860 campaign for president, Lincoln had connected the anti-slavery campaign not only with the principle of wage labor but also with specific workers’ rights, including the right to strike.²⁷⁷ Yet, without resorting to Marxist rhetoric, Lincoln now internationalized the campaign against slavery in a way that workers everywhere would find appealing. Lincoln called the United States and Great Britain “kindred” nations, acknowledged the “sufferings . . . [of] the workingmen at Manchester and in all Europe . . .”, and lauded the continued support of British workers as “an instance of sublime Christian heroism which has not been surpassed in any age or in any country [and] . . . an energetic and reinspiring assurance of the inherent power of truth and of the ultimate and universal triumph of justice, humanity, and freedom.”²⁷⁸ And, foreshadowing his Gettysburg Address delivered later that year honoring those who sacrificed their lives for others,²⁷⁹ Lincoln praised British workers for their choice to sacrifice their immediate economic self-interest by supporting the Union’s cause, implicitly affirming their right to decide as free people.²⁸⁰ In effect, Lincoln sought to persuade the people of Great Britain, indeed all of Europe, that Southern calls for European humanitarian intervention and protection for Southern free trade, even if they reflected emerging British values in international law and diplomacy, lacked persuasive force when applied to the American Civil War.²⁸¹ In this he

²⁷⁵ See FOREMAN, *supra* note 192, at 110–19.

²⁷⁶ JONES, *supra* note 143, at 209.

²⁷⁷ See Abraham Lincoln, Speech at New Haven, Connecticut (Mar. 6, 1860), in LINCOLN’S SPEECHES AND WRITINGS 1859–1865, *supra* note 139, at 132, 144 (“And at the outset, *I am glad to see that a system of labor prevails in New England under which laborers CAN strike* when they want to [Cheers,] where they are not obliged to work under all circumstances, and are not tied down and obliged to labor whether you pay them or not! [Cheers.] *I like the system which lets a man quit when he wants to, and wish it might prevail everywhere. [Tremendous applause.] One of the reasons why I am opposed to Slavery is just here.*”). But see RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 162–74 (Alfred Knopf, 1964) (1948) (revisionist account that the regime of concentrated industrial capital spawned by Lincoln’s war machine destroyed workers’ rights).

²⁷⁸ See Letter from Abraham Lincoln to the Workingmen of Manchester, England, *supra* note 273, at 432–33.

²⁷⁹ See Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), in LINCOLN’S SPEECHES AND WRITINGS 1859–1865, *supra* note 139, at 536, 536; MILLER, *supra* note 188, at 209–10 (noting the same foreshadowing and drawing attention to Lincoln’s attempt to invoke the traditional European, Christian moral norm of self-sacrifice as a point of contact between the United States and Europe).

²⁸⁰ Letter from Abraham Lincoln to the Workingmen of Manchester, England, *supra* note 273, at 432–33.

²⁸¹ *Id.* at 208–210.

succeeded, as the support of British workers for the Union cause played a major part in persuading the British government not to intervene, even as the Civil War continued to intensify and seemed to demand some form of humanitarian intervention to bring the ever-growing slaughter to an end.²⁸²

Lincoln employed public diplomacy in the same way towards the conquered peoples of the South as towards the conquering people of the North. Lincoln reputedly once said, “[a]s I would not be a *slave*, so I would not be a *master*.”²⁸³ Yet, it might also be said that he no more wished to prosecute the insurrectionists for treason than he wished himself to be prosecuted for war crimes. Still, in fairness, Lincoln’s clemency towards Union soldiers who had committed offenses requiring punishment under the strict laws of military discipline was legendary.²⁸⁴ Extending this spirit of clemency to all, in his brief but beautiful Second Inaugural Address, Lincoln argued for national reconciliation, emphasizing the moral equality of the victor and the vanquished—without malice, with charity, yet with “firmness in the right.”²⁸⁵ Indeed, by late March 1865—perhaps fearing that the pursuit of justice might become, or at least be perceived as, the pursuit of vengeance—Lincoln, through a parable, indirectly conveyed his desire that General Sherman allow Confederate President Jefferson Davis and his associates to somehow “escape the country.”²⁸⁶ And, days before he died, in response to an old friend’s demand that Davis not be allowed “to escape the law,” Lincoln repeated the Biblical injunction that he recited in the Second Inaugural: “Let us judge not, that we be not judged.”²⁸⁷

Thus, in a larger sense, in Lincoln’s *jus post bello* diplomacy towards the conquered Confederacy, much like his diplomacy toward neutral Europe, he sought to achieve his goals, as much as possible, through persuasion rather than punishment. Lincoln seemed not to be bound by a rigid, rule-bound conception that law required enforcement or punishment to resolve the legal

²⁸² See JONES, *supra* note 143, at 225–28.

²⁸³ See Abraham Lincoln, On Slavery and Democracy, in LINCOLN’S SPEECHES AND WRITINGS 1832–1858, *supra* note 117, at 484, 484 (attributed to sometime in 1858 but unverified).

²⁸⁴ Indeed, he once perversely turned his reputation for clemency into a justification of the arrest and exile of the incendiary Congressman Clement Vallandigham, saying: “Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley agitator who induces him to desert?” See GOODWIN, *supra* note 155, at 524.

²⁸⁵ Lincoln observed, “Each looked for an easier triumph, and a result less fundamental and astounding. Both read the same Bible, and pray to the same God; and each invokes His aid against the other.” Second Inaugural Address, *supra* note 178, at 686–87.

²⁸⁶ GOODWIN, *supra* note 155, at 713.

²⁸⁷ *Id.* at 722.

and politico-military dilemmas facing him and the Union. Rather, if international law gave him constitutional power to fight the war, it did not impose upon him a duty to punish all traitors or war criminals. Again, his understanding of the *jus post bello* was instrumental, requiring it to serve the larger purpose of preserving the world's "last best hope,"²⁸⁸ and calling, in the end, for "a just, and a lasting peace, among ourselves, and with all nations."²⁸⁹

In sum, Lincoln's over-arching theory of the relation between constitutional and international law suggested a shift away from Vattel's universalism and pluralism—one in which constitutional law was derivative from, or equivalent to, international law—to a view of international law that made it subservient to the requirements of the American constitutional order. Under this view, supranational expansion and popular sovereignty disappeared, a normatively superior mode of production was privileged and protected from domestic and international competition, and customary practices from the earlier regime lost normative force. Rather, the legitimacy of new norms would be sought primarily in the principles of justice, dictates of reason, and popular understanding of those requirements in the pursuit of the twin objectives of preserving American sovereignty as a way of life, rather than merely as a mode of government, and the peaceful modeling of that way of life for all nations.

III. THE RELATION TO LINCOLN'S APPROACH TO INTERNATIONAL LAW TO ETHICAL IDEALS

One might summarize Lincoln's practice of international law in terms of an overarching approach to decision-making in public policy: The approach is grounded in an understanding of the potentially transformative force of reason, yet evidences mature recognition of reason's internal and external limits. First, Lincoln reasoned to political truth from the basic and shared axioms found, at a minimum, in the Declaration of Independence's concept of equal liberty and his own understanding of the Declaration as implying every individual's right and opportunity to realize his or her potential. Thus, he seemed to resist inferring truth or values from the facts of human or state customary practices, whether in constitutional or international law. Second, and perhaps more importantly, he repeatedly exercised restraint in the application of reason, even from accepted axioms, to particular facts, which manifested itself in skepticism

²⁸⁸ Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), in LINCOLN'S SPEECHES AND WRITINGS 1859–1865, *supra* note 139, at 393, 415 [hereinafter 1862 Annual Message to Congress].

²⁸⁹ Second Inaugural Address, *supra* note 178, at 686–87.

about his own decisions and charity towards the decisions of others. It is in the roots of these commitments that Lincoln's understanding of American sovereignty—the relationship between the United States and the world—becomes clear.

A. *Reason—Its Form and Substance*

The roots of Lincoln's commitment to reason may lie in Blackstone's natural law framework. While Lincoln did not share Seward's view that slavery was unconstitutional because it was contrary to natural law²⁹⁰ his mode of analysis appears to have been deeply influenced by his study of Blackstone, whom he read cover-to-cover at least twice.²⁹¹ Blackstone wrote, the "law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to anyother. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."²⁹² Similarly, Blackstone did not view international law as having any independent normative significance, for it "depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities . . ."²⁹³

In short, Lincoln's devoted study of Blackstone could only have directed him toward a view of international law as limited to rules "deducible by natural reason, and established by universal consent."²⁹⁴ Custom or social practice was not, of itself, sufficient to establish binding law. Thus, in his first major public address in 1838 against anti-abolitionist mob violence, he called for "reverence for the laws" through "cold, calculating, unimpassioned reason."²⁹⁵ And, in a

²⁹⁰ See *supra* text accompanying notes 251–247.

²⁹¹ See *supra* text accompanying note 164.

²⁹² 1 WILLIAM BLACKSTONE, COMMENTARIES 41.

²⁹³ *Id.* at 43. In fact, Blackstone gives sparse attention to international law, supplying only a brief discussion towards the end of his multi-volume treatise concerning "offences against the law of nations" that have direct effects under English law. 4 WILLIAM BLACKSTONE, COMMENTARIES 66–73. Kent, by contrast, in Americanizing the common law, gave extensive treatment to international law, including customary international law. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *passim* (Charles M. Barnes ed., 13th ed. 1884). There is no strong evidence that Kent's writings played a major part in Lincoln's formation as a lawyer; rather, it was Blackstone's principled approach that commanded his attention. See Mark E. Steiner, *Abraham Lincoln and the Rule of Law Books*, 93 MARQ. L. REV. 1283, 1298–309 (2010).

²⁹⁴ 4 WILLIAM BLACKSTONE, COMMENTARIES 66.

²⁹⁵ Lincoln asked for "reverence for the laws, [to] be breathed by every American mother, to the lisping babe" and for the law to "become the political religion of the nation." Abraham Lincoln, Address to the Young Men's Lyceum of Springfield, Illinois. (Jan. 27, 1838) (alteration in original), in LINCOLN'S SPEECHES AND WRITINGS 1832–1858, *supra* note 117, at 28, 32 (emphasis omitted). Indeed, he proclaimed, "Passion has

phrase Lincoln once used to describe the behavior of his political adversaries, he assumed that “history is philosophy teaching by example”²⁹⁶ Before coming to Congress, in arguing against an abolitionist’s refusal to support Henry Clay for president because Clay himself was a slave owner, Lincoln attempted to refute the argument that “[w]e are not to do evil that good may come” with a lesser evils response: “If the fruit of electing Mr. Clay would have been to prevent the extension of slavery, could the act of electing have been evil?”²⁹⁷ Shortly thereafter, his critique of President Polk focused on the logical error of omitting the third possibility that the boundary between the United States and Mexico could lay somewhere between the Rio Grande and the Nueces, rather than at only one of those two rivers.²⁹⁸ In sum, even in the earliest phases of his career, Lincoln’s traditional Blackstonian commitments and worldview linked law with reason.

Later, Blackstone’s deductive approach to legal reasoning was reinforced by Lincoln’s continuing program of education, most importantly in the proofs of geometry. Even before his study of Euclid, as the only president of the United States ever to hold a patent, Lincoln’s capacity for mathematical and scientific thought was extraordinary.²⁹⁹

But, after serving in Congress, where he no doubt encountered minds better educated than his own, as reported in his 1860 campaign autobiography, Lincoln appears to have dedicated himself to the study of geometry, modestly describing himself as only having “nearly mastered” Euclid.³⁰⁰ According to one account, while it was always his “childhood passion to wrestle an idea,” Lincoln revealed that, committed to self-improvement, “he had studied Euclid

helped us; but can do so no more. It will in future be our enemy. Reason, cold, calculating, unimpassioned reason, must furnish all the materials for our future support and defense. Let those materials be moulded into general intelligence, sound morality and, in particular, a reverence for the constitution and laws” *Id.* at 36 (emphasis omitted).

²⁹⁶ Abraham Lincoln, Speech to the Scott Club of Springfield, Illinois (Aug. 26, 1852), in *LINCOLN’S SPEECHES AND WRITINGS 1832–1858*, *supra* note 117, at 273, 286.

²⁹⁷ Letter from Abraham Lincoln to Williamson Durley (Oct. 3, 1845), in *LINCOLN’S SPEECHES AND WRITINGS 1832–1858*, *supra* note 117, at 111–12 (emphasis omitted).

²⁹⁸ See *supra* text accompanying notes 64–65. William Miller nonetheless criticizes Lincoln from a moral perspective as over-simplistic in framing his attack on Polk through a “series of prosecutorial interrogatories” amenable to definite answers. MILLER, *supra* note 152, at 166.

²⁹⁹ See DONALD, *supra* note 164, at 156 (reporting Lincoln’s invention and patenting of a device to lift ships over shoals, after having grown interested in the problem during a return trip from Congress in 1848).

³⁰⁰ Autobiography Written for Campaign, *supra* note 179, at 162 (“He studied and nearly mastered the Six-books of Euclid, since he was a member of Congress.”).

until he knew what was meant by demonstration beyond the possibility of doubt.”³⁰¹

Indeed, Lincoln’s study of Euclid became central to the clarity of thought that typified his political rhetoric through the 1850s and thereafter. But logical reasoning must begin with a premise or set of premises, the axioms or postulates of geometric proof. Accordingly, Lincoln’s basic mode of argument was to work from what he considered the agreed premises from which all Americans reasoned. As he explained after the Lincoln-Douglas debates and before beginning his presidential campaign:

One would start with great confidence that he could convince any sane child that the simpler propositions of Euclid are true; but, nevertheless, he would fail, utterly, with one who should deny the definitions and axioms. The principles of Jefferson are the definitions and axioms of free society. And yet they are denied, and evaded, with no small show of success.³⁰²

Similarly, in his speech on the Kansas-Nebraska Act years earlier, he noted that one had to begin with the proposition, for example, that “Illinois came into the Union as a free state,” for “[t]o deny these things is to deny our national axioms, or dogmas, at least; and it puts an end to all argument.”³⁰³

But taking into account the potential that his axiom is merely a dogma, Lincoln framed his argument in terms of a deeper ground. Explicitly employing “lesser evils” moral theory, he framed the even deeper premise of his argument as a stark choice between opposites, namely: “Much as I hate slavery, I would consent to the extension of it rather than see the Union dissolved, just as I would consent to any great evil, to avoid a greater one.”³⁰⁴ He appeared, initially, to define the loss of the Union as the “evil” which serves as the axiom of his logical system; yet, shortly thereafter, he defined the preservation of the Union as a means for the realization of the deepest axiom of his thought, the possibility that “every man can make himself.”³⁰⁵ Then, and as if in that insight finding a corollary, he saw in the Declaration of Independence, which, in his view, created the Union and the states which constitute it, the promise of “the progressive improvement in the condition of

³⁰¹ PETERSON, *supra* note 173, at 85 (reporting a conversation with Rev. John P. Gulliver).

³⁰² Letter from Abraham Lincoln to Henry L. Pierce and Others, Springfield, Illinois (Apr. 6, 1859), in LINCOLN’S SPEECHES AND WRITINGS 1859–1865, *supra* note 117, at 18, 19.

³⁰³ Speech on the Kansas–Nebraska Act, *supra* note 148, at 347.

³⁰⁴ *Id.* at 333 (emphasis omitted).

³⁰⁵ Speech at Kalamazoo, Michigan, *supra* note 172, at 379; *see supra* text accompanying note 148.

all men everywhere.”³⁰⁶ This insight led him to a more general view of who could participate in the Declaration; for immigrants, “finding themselves our equals in all things . . . have a right to claim [that moral principle] as though they were blood of the blood, and flesh of the flesh of the men who wrote that Declaration”³⁰⁷ Finally, deepening the premise into a brilliant metaphor, in reply to Alexander Stephens’s request during the months before his inauguration that Lincoln modify his position in words that would be seen like “apples of gold in pictures of silver,” Lincoln wrote:

There is something back of [the Constitution and the Union], entwining itself more closely about the human heart. That something is the principle of “Liberty to all”—the principle that clears the *path* for all—gives *hope* to all—and, by consequence, *enterprize*, and *industry* to all. . . . The assertion of that principle . . . has proved an “apple of gold” to us. The *Union*, and the *Constitution*, are the picture of silver, subsequently framed around it.³⁰⁸

In short, even the Union was subordinated to an even deeper set of axioms, the moral premises that Lincoln found expressed in the Declaration. Thus, the Declaration, more than speaking to the world as a plea for international recognition,³⁰⁹ was the American people speaking to themselves as an assertion of the basic convictions, rather than institutional arrangements, that constituted American sovereignty.

The truth of these basic propositions was as clear to Lincoln as the axioms or postulates of Euclidean geometry. Indeed, shortly after the *Dred Scott*

³⁰⁶ Speech on the Dred Scott Decision, *supra* note 150, at 400.

³⁰⁷ Abraham Lincoln, Speech at Chicago, Illinois (July 10, 1858), in LINCOLN'S SPEECHES AND WRITINGS 1832–1858, *supra* note 117, at 439, 456.

³⁰⁸ Abraham Lincoln, Fragment on the Constitution and the Union, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 168, 169 (Roy P. Basler ed., 1953); see also Hans j. Morgenthau, *The Mind of Abraham Lincoln*, in 4 ESSAYS ON LINCOLN'S FAITH AND POLITICS 3, 82–83 (Kenneth W. Thompson ed., 1983). Because Morgenthau's essay was edited and published posthumously by his co-author Kenneth Thompson, the precise line of his thought may never be known. Morgenthau is considered the father of “realism” in American international relations theory, which rejects reliance on moral principles in the analysis of the relations between states. See HANS MORGENTHAU & KENNETH THOMPSON, POLITICS AMONG NATIONS 166 (6th ed. 1985). That he made a close study of Abraham Lincoln as the final intellectual task of his life suggests perhaps that, in the tradition of classical realism going back to the ancient Greeks including even Thucydides, he did not exclude analysis of ethical virtue from the study of politics.

³⁰⁹ See David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 942 (2010) (“[T]he primary audience for the Declaration was in Europe; what the drafters sought was precisely international recognition.”); see generally DAVID ARMITAGE, THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY (2007); David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY Q. 1, 42 (2002) (describing the Declaration's international dimensions).

decision polarized the nation, Lincoln closed one of his debates with Senator Douglas thus:

If you have ever studied geometry, you remember that by a course of reasoning Euclid proves that all the angles in a triangle are equal to two right angles. Euclid has shown you how to work it out. Now, if you undertake to disprove that proposition, and to show that it is erroneous, would you prove it to be false by calling Euclid a liar?³¹⁰

Lincoln too had shown his audience “how to work it out.” Thus, his hatred of slavery was grounded, in no small part, on his belief that “it forces so many really good men amongst ourselves into an open war with the very fundamental principles of civil liberty—criticising the Declaration of Independence, and insisting that there is no right principle of action but *self-interest*.”³¹¹ From Lincoln’s Euclidean standpoint, advocacy for the moral rightness of slavery forced Americans to falsify “the definitions and axioms” of Jefferson’s Declaration of Independence, putting an “end to all argument,” except through trial by battle.

B. Skepticism—Self-Doubt and Transformative Charity

Yet, Lincoln’s understanding of reason was clouded by doubt. As Blackstone wrote, to apply the law of nature “to the particular exigencies of each individual, it is still necessary to have recourse to reason,” yet “every man now finds . . . that his reason is corrupt, and his understanding full of ignorance and error.”³¹²

Similarly, Lincoln knew only too clearly the limits of reason, both internal and external. Reason itself is limited. Once while riding circuit, his law partner William Herndon discovered Lincoln surrounded by tools of logic—pen and paper, compass and ruler—lost in thought, revealing that “he was trying to solve the difficult problem of squaring the circle,” a task that would consume him “for the better part of the succeeding two days . . . almost to the point of exhaustion.”³¹³ The problem technically involves constructing a square with the same area as a given circle by using only a finite number of steps with a compass and straightedge.³¹⁴ It was shown to be insoluble a generation later,

³¹⁰ Abraham Lincoln, Fourth Lincoln–Douglas Debate, Charleston, Illinois. (Sept. 18, 1858), *in* LINCOLN’S SPEECHES AND WRITINGS 1832–1858, *supra* note 117, at 636, 674, 683–84.

³¹¹ Speech on the Kansas–Nebraska Act, *supra* note 148, at 315.

³¹² 1 WILLIAM BLACKSTONE, COMMENTARIES 41.

³¹³ GOODWIN, *supra* note 155, at 152–53 (citing to Herndon).

³¹⁴ See generally ERNEST WILLIAM HOBSON, SQUARING THE CIRCLE: A HISTORY OF THE PROBLEM (1913).

when pi was proven to be a transcendental number, which is a special kind of number having, among other properties, irrationality, which in mathematics is merely to say that it cannot be expressed as a ratio.³¹⁵ In short, Lincoln was trying to achieve what later would be considered impossible to prove and beyond rationality in its most literal sense, though it was not in Lincoln's character to give up easily. Nonetheless, the recognition of the limits of logic in his own reasoning no doubt enabled Lincoln to doubt the capacity of others to see the right. Indeed, any logician recognizes the difficulty of proof of propositions even more complex than the relatively simple geometric exercises Lincoln studied with Euclid's aid. Thus, experience in the effort needed to construct proofs of necessity yields a deep sense of humility.

But even more powerful as a limit to reason was Lincoln's Blackstonian understanding that self-interest impairs the application of reason and social practice reflects that impairment. Reason thus runs into human fallibility. Critical to Lincoln's rhetoric about the moral defects of others was his acceptance of his own fallibility and his doubts about his moral capacity to judge others. This becomes most clear in the rhetoric of his presidency.³¹⁶ However, Lincoln's refusal to assume a posture of moral superiority based on moral certainty begins as early as his first important address on temperance in 1842, well before his discovery of Euclid. He pointedly told his audience, "In my judgment, such of us as have never fallen victims, have been spared more from the absence of appetite, than from any mental or moral superiority over those who have. Indeed, I believe, if we take habitual drunkards as a class, their heads and their hearts will bear an advantageous comparison with those of any other class."³¹⁷ As Lincoln would famously later say as president-elect, he would "be most happy indeed" to "be an humble instrument in the hands of the Almighty, and of this, his *almost* chosen people . . ."³¹⁸

³¹⁵ See generally *id.*; MARTIN GARDNER, *THE UNIVERSE IN A HANDKERCHIEF* (1996).

³¹⁶ See GOODWIN, *supra* note 155, at 722; Lincoln, *supra* note 178, at 686–87; *infra* Part III.B; see also MILLER, *supra* note 155, at 293 (noting Lincoln's repeated qualifiers, in his Cooper Union Address, to "do our duty as we understand it" and, in his Second Inaugural, "with firmness in the right—as God gives us to see the right").

³¹⁷ Abraham Lincoln, Address to the Washington Temperance Society of Springfield, Illinois (Feb. 22, 1842), in *LINCOLN'S SPEECHES AND WRITINGS 1832–1858*, *supra* note 117, at 81, 88. William Miller observes that this singular and stunning rebuke of the temperance movement was considered highly incendiary but evidences the distinctive virtue of Lincoln's statesmanship. See Miller, *supra* note 155, at 151–53.

³¹⁸ Abraham Lincoln, Address to the New Jersey Senate at Trenton, New Jersey (Feb. 21–22, 1861), in *LINCOLN'S SPEECHES AND WRITINGS 1859–1865*, *supra* note 139, at 209 (emphasis added).

It seemed to follow for Lincoln that temperance advocates should avoid coercion or moral criticism of the intemperate. He also advanced the practical ground that:

[T]o have expected them not to meet denunciation with denunciation, crimination with crimination, and anathema with anathema, was to expect a reversal of human nature, which is God's decree, and never can be reversed. When the conduct of men is designed to be influenced, *persuasion*, kind, unassuming persuasion, should ever be adopted.³¹⁹

The essential pattern of his decision-making seemed to be grounded in the principle that, to paraphrase Chief Justice Roberts, if it is not necessary to use force, it is necessary not to use force.³²⁰ In short, both on ethical and pragmatic grounds, a position of moral superiority against an acknowledged moral evil was, for Lincoln, unacceptable.

This posture, reinforced after his study of Euclid by his more refined understanding of the limits of logical inference, influenced his response to the slavery question. In his initial reaction to the Kansas–Nebraska Act, Lincoln was prepared to accept the “lesser evil” of slavery in the South largely because of his basic recognition of his own moral doubts as to how justice might be achieved. He charitably said of Southerners: “I surely will not blame them for not doing what I should not know how to do myself. If all earthly power were given me, I should not know what to do, as to the existing institution.”³²¹ And he further acknowledged that, as for making former slaves “politically and socially” the equals of whites:

My own feelings will not admit of this; and if mine would, we well know that those of the great mass of white people will not. Whether this feeling accords with justice and sound judgment, is not the sole question, if indeed, it is any part of it. A universal feeling, whether well or ill-founded, cannot be safely disregarded.³²²

³¹⁹ Address to the Washington Temperance Society of Springfield, Illinois, *supra* note 317, at 83.

³²⁰ At his confirmation hearing for Chief Justice, Roberts said: “If it is not necessary to decide more to a case, then in my view it is necessary not to decide more to a case.” *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES (May 22, 2006), available at <http://www.nytimes.com/2006/05/22/washington/22justice.html>.

³²¹ Abraham Lincoln, First Lincoln–Douglas Debate, Ottawa, Illinois. (Aug. 21, 1858) LINCOLN'S SPEECHES AND WRITINGS 1832–1858, *supra* note 117, at 510.

³²² Speech on the Kansas–Nebraska Act, *supra* note 148, at 316.

But that does not mean that “universal feelings” were a touchstone for truth. Lincoln merely was not prepared to discount such “universal feelings.” In his temperance address, he noted that because they could be for good, such as the universal feeling justifying faith, one should hesitate in condemning them.³²³ Even in his House Divided Speech, shortly before the Lincoln–Douglas debates, Lincoln only makes it clear that either the axioms of the Declaration will be falsified or “the opponents of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction”³²⁴ His formulation is predictive and, more than that, only cautiously predictive, leaving substantial space for the continuing accommodation of existing “universal feelings” when continuing accommodation might be the lesser of two evils.

Yet, in his debate with Douglas, Lincoln’s condemnation of slavery escalates. During the first debate, Lincoln suggests that there may be room for change in that “universal feeling.”³²⁵ He acknowledged that “[t]here is a physical difference between [the white and the black races], which in my judgment will probably forever forbid their living together upon the footing of perfect equality”; he then said:

I agree with Judge Douglas [that the black person] is not my equal in many respects—certainly not in color, perhaps not in moral or intellectual endowment. But in the right to eat the bread, without leave of anybody else, which his own hand earns, he is my equal and the equal of Judge Douglas, and the equal of every living man.³²⁶

The *probability* that blacks and whites could never live together in perfect equality, and the *possibility* that blacks and whites were not equal in moral or

³²³ See Address to the Washington Temperance Society of Springfield, Illinois, *supra* note 317, at 83–84. In his 1842 temperance speech, Lincoln intimated that universal feelings might also be salutary. He observed

The universal sense of mankind, on any subject, is an argument, or at least an influence not easily overcome. The success of the argument in favor of the existence of an over-ruling Providence, mainly depends upon that sense; and men ought not, in justice, to be denounced for yielding to it, in any case, or for giving it up slowly, especially, where they are backed by interest, fixed habits, or burning appetites.

Id. at 85 (emphasis omitted).

³²⁴ “House Divided” Speech at Springfield, Illinois, *supra* note 122, at 426 (emphasis omitted).

³²⁵ See First Lincoln–Douglas Debate, *supra* note 321, at 511.

³²⁶ *Id.* at 512 (emphasis omitted).

intellectual attainments, were qualifiers that could not be lost upon Lincoln's audience.³²⁷

At the end of the campaign, after the debates were concluded, Lincoln said he would gladly defer to Douglas, should "the Missouri restriction be restored, and the whole slavery question replaced on the old ground of 'toleration by necessity' where it exists, with unyielding hostility to the spread of it"³²⁸ But even if, for now, doubt about the possibility of eliminating slavery justified toleration "by necessity"³²⁹ of the existing institution, doubts over the assumption of natural inequality and the impossibility of integration justified leaving open the possibility of radical change.³³⁰ Indeed, in the years before the debates, Lincoln had already fixed in his mind his larger goal of reasoning with the people, saying:

Our government rests in public opinion. Whoever can change public opinion, can change the government, practically just so much. Public opinion, on any subject, always has a "central idea," from which all its minor thoughts radiate. That "central idea" in our political public opinion, at the beginning was, and until recently has continued to be, "the equality of men."³³¹

In short, what appeared to be "necessity" could change as a result of the force of reason in changing public opinion. General acceptance of the truth of the Declaration would be the means by which "minor thoughts radiate," so that the complete equality of right that once was seen as impossible could in time be perceived as necessary.³³² In short, "universal feelings," the wisdom of crowds, could have transformative effects too.

C. Lincoln's Ethical Commitments and International Law

One can now see the roots of Lincoln's attack on the antebellum system's supra-nationalist pluralism, commitment to free trade, and deference to

³²⁷ Harry Jaffa, viewing Lincoln's thought from the perspective of Straussian natural right theory, first noticed this subtle progression in Lincoln's argument a half-century ago, as the Second Reconstruction in the South increased in momentum. JAFFA, *supra* note 130, at 382–84; *see also* GOODWIN, *supra* note 155, at 205 (endorsing Jaffa's insight).

³²⁸ Abraham Lincoln, Portion of Last Speech in Campaign of 1858, Springfield, Illinois. (Oct. 30, 1858) *in* LINCOLN'S SPEECHES AND WRITINGS 1832–1858, *supra* note 117, at 826, 827 (emphasis omitted).

³²⁹ *Id.*

³³⁰ *See* JAFFA, *supra* note 130, at 382–84.

³³¹ Abraham Lincoln, Portion of Speech at Republican Banquet in Chicago, Illinois. (Dec. 10, 1856) *in* LINCOLN'S SPEECHES AND WRITINGS 1832–1858, *supra* note 117, at 385, 385–86 (emphasis omitted).

³³² *Id.*

customary international law in his ethical posture. There was, for Lincoln, one distinctive and morally superior way of life rooted in the principle of free labor, which in turn made possible the self-development of the person.³³³ A supranational constitution committed to expansion through pluralism was antithetical to that basic premise.³³⁴ International expansion was a diversion from focusing on the progressive realization of that basic premise through internal improvement,³³⁵ and openness to other modes of production through unconditional free trade undercut the continuing realization of self-development.³³⁶ Finally, even though existing “universal feelings” must be given their due, they do not in themselves reflect truth and may reflect self-interest.³³⁷ Thus, the customary law of nations only has provisional significance.³³⁸ Custom cannot stand in the way of the dictates of reason—expressed in fundamental principles of justice, including the obligation to keep one’s promises, *pacta sunt servanda*; and these dictates of reason—when articulated in appeals via public diplomacy to the world’s peoples, validated by public conscience, and confirmed in a new “universal feeling”³³⁹—formed the basis of true international law. Accordingly, for Lincoln, international persuasion, not coercion or moralistic prosecution, was the basic international law norm for a polity, such as the United States, committed to human self-development through reason.³⁴⁰

IV. IMPLICATIONS FOR PRESENT POLICY

Many have described Lincoln’s commitments in ways that parallel the ethical pattern described here, some seeing Lincoln simultaneously as an exemplar of both Christian and classical virtues.³⁴¹ His rhetorical style was, as Xenophon wrote comparing the historical Socrates to the mythical Odysseus, to build his argument from premises which received general agreement.³⁴²

³³³ See *supra* Parts II.A–B.

³³⁴ See *supra* Part II.B.

³³⁵ See *supra* Part II.B.

³³⁶ See *supra* Part II.B.

³³⁷ See *supra* Part II.C.1.

³³⁸ See *supra* Part II.C.1.

³³⁹ See *supra* Part II.C.3.

³⁴⁰ See *supra* Part III.A.

³⁴¹ See e.g., Perry O. Chrisman, *Confessions of a Baptist Lawyer*, 27 TEX. TECH L. REV. 1041, 1044 (1996); William T. Ellis & Billie J. Ellis, *Beyond the Model Rules: Aristotle, Lincoln, and the Lawyer’s Aspirational Drive to an Ethical Practice*, 26 T.M. COOLEY L. REV. 591, 596 (2009).

³⁴² See JAFFA, *supra* note 130, at 345.

However, his conclusions transcended present reality.³⁴³ And, in Gary Wills' perceptive re-interpretation of Lincoln's Gettysburg Address, Lincoln re-founds the republic in terms of the *telos* of the Declaration rather than the institutional arrangements of the Constitution, employing rhetorical techniques of classical origin.³⁴⁴ Perhaps drawing on Pocock's understanding of Machiavelli's own proposed solutions to the problem of the Machiavellian moment, some have viewed Lincoln as precisely the potential tyrant foreseen in Lincoln's own Lyceum Address, who would run roughshod over the Constitution and the laws unless the law became the American civil religion.³⁴⁵

Yet others have lionized Lincoln in other-worldly terms. Leo Tolstoy saw him as a "Christ in miniature, a saint of humanity."³⁴⁶ Indeed, in Tolstoy's view, "Napoleon was a typical Frenchman, but Lincoln was a humanitarian as broad as the world. He was bigger than his country—bigger than all the Presidents together. Why? Because he loved his enemies as himself."³⁴⁷ But, in Walter McDougall's stunning turn of phrase, Lincoln is the new "Christ" of the American Civil Religion.³⁴⁸ Catholic Harry Jaffa has also noted Lincoln's appropriation of New Testament rhetoric, in his discussion of the "people" of the American Church, and as American immigrants became blood of the blood and flesh of the flesh of the men who wrote that Declaration.³⁴⁹ For Jaffa,

But whenever [Socrates] went through something in argument (*logos*) by himself, he proceeded via what was most agreed upon, holding this to be safety in argument. Therefore, of those I know, he, when he spoke, produced by far the most agreement in his listeners. And he said that Homer, too, applied to Odysseus the attribute of being a safe orator on the grounds that he was competent to lead his arguments through the opinions of human beings.

XENOPHON, MEMORABILIA 144 (Amy L. Bonnette trans., 1994).

³⁴³ XENOPHON, *supra* note 342, at 144.

³⁴⁴ See GARY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 99–102 (1992).

³⁴⁵ See Address to the Young Men's Lyceum of Springfield, Illinois, *supra* note 295, at 34–36; see EDMUND WILSON, PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR x-xxxii (1962). Wilson's work complements Richard Hofstadter's "political hack" interpretation. See generally HOFSTADTER, *supra* note 277, at 92–134 (*seemingly* inspiring a renewed, Machiavellian approach to understanding Lincoln in scholarship and literature); GORE VIDAL, LINCOLN (1984) (the most successful recent novel offering the Machiavellian interpretation).

³⁴⁶ PETERSON, *supra* note 172, at 185.

³⁴⁷ *Id.* at 186.

³⁴⁸ Walter A. McDougall, *Meditations on a High Holy Day: The Fourth of July*, WATCH ON THE WEST NEWSLETTER OF FPRI'S CENTER FOR THE STUDY OF AMERICA AND THE WEST (July 4, 2004) <http://www.fpri.org/ww/0504.200407.mcdougall.july4holyday.html> ("Lincoln never could bring himself to embrace Christian faith, but was himself the Christ of the [American Civil Religion]," as that religion was conceived in secular terms by Robert Bellah); see also PETERSON, *supra* note 172, at 361 (discussing Bellah's view that the new "civil religion" of the Founders is sharpened and enhanced by Lincoln).

³⁴⁹ A NEW BIRTH OF FREEDOM, *supra* note 130 at 151.

Lincoln here uses “the very idiom of transubstantiation,” the belief in the miraculous transformation of the substance of bread and wine into the substance of the body and blood of Christ.³⁵⁰ Under this view, perhaps Lincoln, like Christ, who spoke in the language of the Old Testament and claimed to fulfill but transcend Israel’s first constitution, now America fulfills and transcends the promise of the Constitution, the American Old Testament, with the Emancipation Proclamation and the Thirteenth Amendment. For Protestant theologian Reinhold Niebuhr, Lincoln’s special quality was to combine “moral resoluteness about the immediate issues with a religious awareness of another dimension of meaning and judgment. . . .”,³⁵¹ leading Merrill Peterson to say it enabled Lincoln to avoid “national pride and hypocrisy and ethnocentrism.”³⁵² Indeed, William Miller observes that the mature Lincoln characterized both the classical and Christian virtues of “prudence,” or right action in the public realm—an idea also reflected in German sociologist Max Weber’s formulation of an “ethic of responsibility,” contrasted with an “ethic of absolute ends.”³⁵³ Yet, as Miller acknowledges, Lincoln’s stance might also be paraphrased in distinctly absolutist, Lutheran language: “Here [America] stand[s]. I[t] can do no other.”³⁵⁴

In sum, partisans of the Old and New Testaments, believers and secularists, as well as poetic idealists and scientific sociologists alike, have embraced Lincoln. Perhaps all that can be said is that his study of law and mathematics imbued in him a deep acknowledgment, perhaps one can call it faith, in the ultimate orderliness of the moral universe, coupled with recognition of a duty to pursue the progressive realization of that moral order, notwithstanding the limits of human reason’s capacity to perceive that order. That said, whatever Lincoln’s private religious beliefs were, it is his body of rhetoric and statecraft that must form the basis for drawing lessons from Lincoln’s approach to international law for the issues that confront the United States. But, even if one

³⁵⁰ *Id.*; see Speech at Chicago, Illinois, *supra* note 307, at 456.

³⁵¹ REINHOLD NIEBUHR, *THE IRONY OF AMERICAN HISTORY* 172 (1952). See generally Jason A. Adkins, *Lincoln’s Constitution Revisited*, 36 N. KY. L. REV. 211, 214–24 (2009) (providing a more recent formulation of Lincoln’s theologically-inspired American civil religion).

³⁵² PETERSON, *supra* note 172, at 360 (quoting Niebuhr).

³⁵³ Miller emphasizes Max Weber’s modern reformation of political virtue as the “ethic of responsibility.” Compare MILLER, *supra* note 155, at 195, with Max Weber, *Politics as a Vocation*, in MAX WEBER: *ESSAYS IN SOCIOLOGY* 77–128 (H. H. Gerth & C. Wright Mills trans., 1946) (distinguishing between the politician’s “ethic of responsibility,” which reflects an essentially consequentialist mode of thought, with the alternative “ethic of ultimate ends,” which is more akin to a deontological mindset).

³⁵⁴ See MILLER, *supra* note 155, at 225 (noting that Martin Luther’s phrase would have been known to Weber as well).

dispenses with a psychohistory of Lincoln's private theology, even the more modest task of reconstructing Lincoln's public action might also be, as Justice Jackson once wrote, akin to interpreting the Pharaoh's dream—mere quotations that “largely cancel each other.”³⁵⁵ Still—like the possibility that the U.S. boundary with Mexico was neither the Rio Grande nor the Nueces, but somewhere in between—perhaps we can view Lincoln's approach to international law as something more than a dream and something less than a creed. Many have looked to Lincoln's personal journey even today as a guide for how to think about our constitutional law³⁵⁶—on some accounts because he transformed, rather than, saved the Constitution.³⁵⁷

Perhaps, then, even today, if we agree with Lincoln's axioms, his worldview could continue to provide the framework for the United States's orientation toward international law, giving general guidance, and sometimes even specific content, to the modern meaning of American sovereignty. And perhaps Lincoln's focus on public reason and agreement reflecting agreed axioms or “universal feelings,” rather than settled customs, are best suited to an era of radical transformation in the system of states, the relations between states and non-state actors, and the growing direct interactions between the peoples of the world. Perhaps Lincoln himself would offer fewer caveats about the rightness of his approach. But this I doubt.

³⁵⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35. (Jackson, J., concurring).

³⁵⁶ See William Michael Treanor, *Learning from Lincoln*, 65 *FORDHAM L. REV.* 1781, 1786 (1997).

As Lincoln set about his task of defining his constitutional commitments and giving them life, he was not thinking about grand abstractions. He was thinking about the life he had led, the things he had seen, the struggles he faced, the people he knew, the son he had lost. And so it should be with us. Constitutional fidelity is not about something external to us. The Constitution that deserves our fidelity is the Constitution that reflects our hopes, our lives, our struggles, our commitments. And when we are faithful to that Constitution, what we are faithful to, ultimately, is ourselves.

Id.

³⁵⁷ Craig S. Lerner, *Saving the Constitution: Lincoln, Secession, and the Price of Union*, 102 *MICH. L. REV.* 1263, 1294 (2004) (appearing to support President Buchanan's view that secession was unconstitutional, but also that the federal government did not have the authority to suppress the insurrection by the means Lincoln would use). *But see* Michael Paulson, *The Civil War as Constitutional Interpretation*, 71 *U. CHI. L. REV.* 691, 692 (2004) (rejecting the implicit transformation view by stating that the Civil War repudiated the “South and the Supreme Court's misappropriation of the Constitution.”).