LINCOLN's INTERNATIONAL LAW -- REDEFINING AMERICAN EXCEPTIONALISM

Antonio F Perez
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Is the U.S. different, an international actor different from all other international actors? If so, how is it different? What makes it different? These questions have always been pressing and go back to the beginning of the republic, but in light of President Obama’s implicit rejection of American exceptionalism, comparing American exceptionalism to Greek exceptionalism, perhaps never more pressing than today.

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1 In April 2009, the President responded to a journalist's question in Strasbourg with the statement, "I believe in American exceptionalism, just as I suspect that the Brits believe in British exceptionalism and the Greeks believe in Greek exceptionalism." See Michael Sheer, On European Trip, President Tries to Set a New, Pragmatic Tone, WASHINGTON POST (April 5, 2009).
2 See, e.g., Uri Friedman, American Exceptionalism: Anthropology of an Idea, FOREIGN POLICY 22 (July/August 2012) (attributing the origin of the term to Stalin’s condemnation of the “heresy of American exceptionalism” yet recognizing earlier comparable concepts attributable to, among others, Alexis de Tocqueville). Writing in Lincoln’s time, de Tocqueville observed: “The position of the Americans is therefore quite exceptional, and it may be believed that no democratic people will ever be placed in a similar one. Their strictly Puritanical origin, their exclusively commercial habits, even the country they
Whether the U.S. would survive as the continuation of the tradition commenced in 1776, however, is a question that has been posed pointedly only during the Civil War. Then, the very survival of the United States as a subject of international law was in question. But the state refashioned through that war arguably became a new kind of creature in international law, giving American exceptionalism a new meaning. That meaning can be revealed by tracing its roots to the transformation achieved during the Civil War through Abraham Lincoln’s statecraft. In brief, Lincoln’s achievement was to transform the plural United States from a sui generis and exceptional 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 U.S. would serve as an exemplar of a particular kind of society and kind of person Lincoln thought normatively superior, as a vehicle for the formation of a kind of person he believed made such a society possible, and perhaps as 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 exceptionalism required, and made possible, an entirely new approach to international law in which the American state redefined its relation to the world.

Thus, arguably, the prism through which Lincoln’s understanding of American exceptionalism becomes clear is Lincoln’s own understanding of international law and its relation to American statecraft. And, if Lincoln’s understanding continues to be our understanding, it might even now yield insight into the current meaning of America’s “exceptionalism” in its relation to the world and, more specifically, its relation to the world through its understanding of international law. So, as we near the sesquicentennial of the Emancipation Proclamation and the Gettysburg Address, international lawyers also need to pay more attention to Lincoln’s understanding of international legal doctrine and how it was refashioned. Any continuing commitment to American exceptionalism must be aware of why and how Lincoln transformed this nation’s perception of its exceptionalism. Only then can one hold a serious discussion about whether Lincoln’s vision and his approach to international law have continuing relevance to a modern understanding of American exceptionalism and the implications of that understanding for the U.S.’s approach to international law and its current tendencies. Indeed, if one shares Lincoln’s views, and in the tradition of the Declaration of Independence’s call for a “decent respect” – neither a slavish obedience nor an arrogant indifference -- to the Opinions of Mankind,” one might find that some features of international law, as it is

inhabit, which seems to divert their minds from the pursuit of science, literature, and the arts, the proximity of Europe, which allows them to neglect these pursuits without relapsing into barbarism, a thousand special causes, of which I have only been able to point out the most important, have singularly concurred to fix the mind of the American upon purely practical objects. His passions, his wants, his education, and everything about him seem to unite in drawing the native of the United States earthward; his religion alone bids him turn, from time to time, a transient and distracted glance to heaven. Let us cease, then, to view all democratic nations under the example of the American people.” DEMOCRACY IN AMERICA [supply cite] For recent, influential views of American exceptionalism, focusing on the U.S. role in international relations, compare Robert Kagan, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER (2003) (favorable, pre-Iraq occupation view, arguing for expansive U.S. role) with Andrew Bacevitch, THE LIMITS OF POWER: THE END OF AMERICAN EXCEPTIONALISM (2008)(critical, post-Iraq occupation perspective, arguing for U.S. retrenchment).

3 See Declaration of Independence, preamble.
understood by others who might not share in American exceptionalism, may deserve less respect, while other features may deserve more.

Accordingly, this paper analyzes Lincoln’s understanding of international law, shows how that understanding flows from the premises from which Lincoln rejected the pre-Civil War understanding, explains how those premises in turn are grounded in Lincoln’s ethical principles, and draws some tentative conclusions as to the inferences that can be drawn today from Lincoln’s conception of American exceptionalism. First, the essential features of Lincolnian exceptionalism become clear only in the context of a detailed description of the previous ruling conception of American exceptionalism. American exceptionalism, under this theory, focused on 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 pre-Civil War practice; defended in Senator Douglas’s contribution in his famous debates with Lincoln; and almost salvaged in the Confederate Constitution (Part I). Second, Lincoln’s radically different approach, falsifying the premises of the supranational conception, becomes clear in his 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 in what became the first example of modern total war. 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 II). Third, this conception of international law flowed from Lincoln’s new definition of American exceptionalism, a vision rooted in reason rather than experience, in the hope for perfection coupled with a mature acceptance of imperfection, and in 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 III). Finally, what this means for the United States today is, as Lincoln himself might have thought, clear in its central message albeit unclear in its details (Part IV).

I. The Pre-Civil War 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, a confederation of sovereign states, each retaining some international capacity. In many ways, the pre-Civil War United States retained elements of a supra-national entity, in ways that were in fact seriously debated during the pre-Civil War 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

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4 Compare Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment., 94 COLUM. L. REV. 457, 465 (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).
two. This pluralism was, in turn, connected to a commitment to international legality, both through 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

Madison’s essay in Federalist No. 39 seems to be the launching point for the discussion of the Constitution’s theory of sovereignty, in which he is interpreted by modern commentators as oscillating between national and federalist understandings of the allocation of sovereignty for a single nation. Given the military and other enforcement attributes of a federal government, thus radically differs from a supranational entity like the United Nations. In short, under this interpretation of Madison’s views, the federation remained one nation for purposes of international law.

A generation later, 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. Northern protection would subject southern exporters of cotton and other raw materials to the disadvantages of reciprocal protectionism and higher import costs. Arguing on lines parallel to Calhoun’s opposition to higher tariffs to protect northern manufacturers, Jacksonians, especially from the south, opposed the Whig program, sponsored by Henry Clay among others, for the so-called “American system” of promoting internal improvements to facilitate commercial expansion and, in effect, market integration between north, south, east and west. 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 so-called Inter-state Compact Clause. Southern export markets were largely European, for the globalization of trans-Atlantic commerce during England’s industrial revolution resulted in a flow of European, mainly English, investments in northern capital coupled with European, again mainly English,

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5 See James Madison, THE FEDERALIST PAPERS, No. 39, 240-46 (Rossiter ed. 1961). Madison 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.” See THE FEDERALIST PAPERS, No. 49, supra, at 313, 314.
6 See Daniel Faber, LINCOLN’S CONSTITUTION 36-39 (2003)[Lincoln’s Constitution].
7 Id. at 40-41.
9 See Morison, Commager, and Leuchtenburg, GROWTH OF THE AMERICAN REPUBLIC, supra note xx, at 389-90 and 419 (noting that the rejection of this program required the substitution of private enterprise in the construction of transportation networks).
10 See U.S. Constitution, Article I, section 10, cl. 3 (“No State shall, without the Consent of Congress, … enter into any Compact or Agreement with another State, with a Foreign Power, or engage in War, unless actually invaded or under such imminent Danger as will not admit of delay.”).
purchase of southern cotton to service British textile manufacturers.\footnote{See Orville Vernon Burton, \textit{The Age of Lincoln}, 22-23 (2007)[Age of Lincoln].} So, like high tariffs, internal improvements were perceived by many as an attempt to capture federal resources to benefit the return on invested capital in the northern, free-wage political economy. And the larger connection between federal power to privilege particular interests and the preservation of local political economy was never far from the surface; for, as one slave state Senator argued, “If Congress can make banks, road, and canals under the Constitution, they can free any slave in the United States.”\footnote{See Burton, \textit{Age of Lincoln}, supra note xx, at 24 (citation omitted).} 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 given the constitutional practice following the Founding, now seemed to speak more ambiguously about the nature of state sovereignty. On one hand, he rejected a pure international theory of the relations between the states, eschewing “those who now contend that the State have never parted with an atom 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.”\footnote{See Letter to William Cabell Rives, in Madison, \textit{Writings} 863-864 (Rakove ed. 1999)(Mar. 12, 1833)[Madison’s Writings].} On the other, he refused to limit the sovereignty of the states, acknowledging “That our political system is admitted to be a new creation—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.” But he goes on to say, “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 Compound & peculiar system with such an example of it as ours before them.”\footnote{See Letter to William Cabell Rives, \textit{Madison’s Writings}, supra note xx, at 864. 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 39, Madison continued to hold the view that the United States as \textit{sui generis} and could not be classified.}

Madison’s reformulation evidences 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, in so doing, 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.\footnote{See Emmerich de Vattel, \textit{The Law of Nations or the Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns} (1758). The concept of “the law of nations” in the founding era arguably comprised more that the subsequent term coined by Jeremy Bentham, but it was still in all respect law binding on states rather than domestic constitutional law. See generally Janis, \textit{The American Tradition of International Law: Great Expectations}, 1789-1914, 11-24 (Clarendon Oxford 2004)[Janis].} The citation to Vattel is significant because of Vattel’s particular conception of international law as the
law governing Europe as “a sort of republic”\textsuperscript{16} – actually, an extended republic in which all the member-states were equal in right.\textsuperscript{17} 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,\textsuperscript{18} perhaps because common external tariffs would be necessary for the federal government to negotiate with other states and implement domestically a program of reciprocal reduction of trade barriers.\textsuperscript{19} The states potentially in other respects were part of a Vatellian extended republic constituting a qualified international system.

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.\textsuperscript{20} 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 15\textsuperscript{th} 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, and then to the Scottish enlightenment, 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.\textsuperscript{21} The Founders confronted what Pocock termed a “Machiavellian moment,” in which consciousness of the mortality of a political order emerges and choices are made to address the order’s instability or the problem is ignored with deleterious consequences.\textsuperscript{22} 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; and this recognition made the American Revolution

\textsuperscript{16} See Emmerich de Vattel, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, supra note xx, III, iii, Section 47.

\textsuperscript{17} Vattel famously pronounced: “A dwarf is as much a man as a giant is; a small republic is no less a sovereign Stated than the most powerful Kingdom.” See Emmerich de Vattel, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (1758), supra note xx, Section 18. See generally Onuf & Onuf, Federal Union, supra note xx, at 7-19 (discussing the Vatellian world view and its influence on the Founding Generation).

\textsuperscript{18} But see Faber, LINCOLN’S CONSTITUTION, supra note xx, at 67-69 (advancing a more nationalist interpretation of Madison’s position, consistent with his interpretation of the quasi-nationalist views assumed to be held, in varying degrees, by all the Supreme Court’s opinions in U.S. Term Limits v. Thornton, 514 U.S. 779 (1995), where the nature and location of sovereignty was most recently debated). Faber suggests that none of the competing modern theories reflected in U.S. Term Limits goes as far as Lincoln’s radical understanding that the “Union is older than any of the State; and, in fact, it created them as States.” Id. at 30 (citation omitted); for further discussion, see infra text accompanying notes xx – xx.

\textsuperscript{19} See infra text accompanying notes xx – xx (discussing the Plan of 1776).


\textsuperscript{22} See Pocock, supra note xx, at 462.
necessary and possible. The Americans then recognized Adam Smith’s conception of the division of labor as driving change and moving history. 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. For economic life, the crucial move was the creation of a commercial republic that, committed to Smithian free trade, would facilitate the production of virtue and suppress and counteract corruption of wealth, thus stabilizing the regime.

Pocock finds the Americans rejected, therefore, solutions in Machiavelli’s own thought – namely, Caesarism and civil religion. Caesarism, or the Machiavellianism of the prince, is the most common understanding of Machiavelli’s work, suggesting that the ruler must disregard conventional morality in order to establish and stabilize a commonwealth. Some have seen the Founders’ rejection of the Hamiltonian project for the creation of a quasi-monarchy and the creation of a financial colossus as an explicit rejection of Machiavellian Caesarism. But perhaps more important -- in view of the civic humanist belief customary norms no longer served to stabilize a world that had been legitimated as divinely-sanctioned in the Christian cosmology of the medieval world – the need to find a “substructure of religion” that could provide the “social means by which men’s natures could be transformed to the point where they became capable of citizenship.” Here, Pocock drew attention to Machiavelli’s exploration of the religious practices of the Romans and their role in legitimating the state. Given the American commitment to religious pluralism, rather than forge a civil religion, the Founders turned to the commerce republic committed to free trade as an escape, albeit an imperfect escape, from the unbearable demands classical republicanism imposed on the individual for the virtue necessary for participation in public life as a solution to the effect of corruption on the stability of a political order.

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23 See Pocock, supra note xx, at 401-61.
24 See Pocock, supra note xx, at 498-99.
25 See Pocock, supra note xx, at 530-36.
26 For Pocock, this means simply that “the new prince has entered the domain of contingency; the time he is living in is shaped by human behavior as it is when men are no longer guided by structures of habitual legitimacy. He is therefore vulnerable to fortune, but it is perhaps the central assertion of [The Prince] that the time-realm he now inhabits is not wholly unpredictable or unmanageable. It is a Hobbesian world in which men pursue their own ends without regard to any structure of law; that they do so is partly the innovator’s own doing, that he inhabits this world is almost wholly so; and that by which they pursue their ends is power, so defined that each man’s power constitutes a threat to every other’s.” See Pocock, supra note xx, at 165.
28 See Pocock, supra note xx, at 192-93.
29 Whether Lincoln’s solution to the breakdown of the supranational free trade republic described by Pocock is a version of either of these two Machiavellian solutions is a matter of great dispute. See infra text accompanying notes xx – xx (discussing the ways in which Lincoln’s disregard regard for law has been alleged to be Machiavellian in the tyrannical or amoral sense, but his call for a “political religion” of
If this civic humanist understanding of the American experience at the Founding is correct, one excluding Caesarism and civil religion as bases for stability, then the search for stability must take another institutional form, 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—meaning, the reality of an international society and a tendency towards international governance. But American universalism also recognized the necessity for toleration of local differences, as was customary even in the Roman Empire. This universalist imperative suggested that the U.S. Constitution was not only a “peace pact” creating a security community among the states, but also a security-community that could serve as the platform for a continuously growing community of states, albeit one that in its worst form could be transmogrified into a modern version of the ever-expanding Roman imperial system. However, according to modern scholars of international law during the optimistic and “enlightenment” Founding era, “the eighteenth-century 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.” Peace through a pluralist, supranational union, combining constitutional and international law, committed to internal and external free trade, became the very definition of American exceptionalism.

B. Pre-Civil War Practice

Pre-Civil War practice confirms the American exceptionalist perspective Lincoln would confront was an exceptionalism of the United States as a “they.” The practice took three forms—the external; the intersection of the external and internal; and the internal. 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 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 pre-Civil War United States in a sustained dialogue between the external sovereignty of the federation and the external sovereignty of the states. For the federation, this also meant a commitment to

fidelity to the “law” might be understood in the Machiavellian sense of searching for a “civil religion” as a substitute for faith and custom as means for creating the virtue necessary for citizenship).

30 See generally [supply cite].
32 See generally David C. Hendrickson, UNION, NATION, OR EMPIRE: THE AMERICAN DEBATE OVER INTERNATIONAL RELATIONS, 1789-1941 (2009)[Union, Nation, Or Empire].
33 See Peter Onuf & Nicholas Onuf, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS 7 (1993)[Federal Union]; for a more general theoretical treatment of “republican” visions of international law, see Nicholas Onuf, THE REPUBLICAN LEGACY IN INTERNATIONAL THOUGHT (Cambridge 1998).
international legalism in the construction of an external policy of free trade; for the federation and 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, the supranational frameworks 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 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. U.S. foreign economic policy tilted towards free trade, seeking to break the chains of the British system of imperial preferences. Under the Plan of 1776, the U.S. would enter into treaties for amity and commerce with European powers, based on a model treaty drafted by, among others, Benjamin Franklin. Indeed, the United States would seek to promote an expansive view of neutral rights to trade. 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. Included among these rights were that neutral ships would be free to carry goods to and from belligerents, subject to narrowly defined exceptions for militarily significant items known as “contraband.” Only non-neutral commerce was subject to the law of prize, yielding limited, private rights to interrupt free trade. The U.S. Constitution itself in authorizing the Congress to “grant letters of Marque and Reprisal” -- which are 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 understanding of international law. 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 U.S. diplomacy.

Complications arose during the French and Napoleonic Wars, however, as U.S. 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 Trans-Atlantic empires. By 1805, understanding that Britain was finally in life-or-death struggle with Napoleonic France, which the British believed threatened to subject all of Europe to French domination, Britain expanded its blockade of occupied Europe, including more vigorous action again nominally-neutral U.S. commerce in ways that brought it into conflict with the U.S. and ultimately lead to the war of 1812. British ships continued to “impress” into British service captured U.S. sailors, on the ground that many were in fact deserters from the Royal Navy; but the Royal Navy also expanded its definition of non-neutral commercial “carrying trade” that was subject to capture on the

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34 See David Hendrickson, PEACE PACT, supra note xx, at 170-71.
36 See U.S. Constitution, Art. 1, Section 8, Clause 11.
37 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 141 (reporting a 500 percent increase in U.S. exports and re-exports).
high seas and, upon judicial determination when brought to port, subject to seizure by the captor as lawful “prize.” This expanded British view was predicted on English Prize Court appellate in 1805, *The Essex*, in which the Privy Council expanded British implementation of the so-called rule of 1756, actually the Rule of the War of 1756, otherwise known as the Seven Years War, which was first applied to Dutch neutral commerce.

Under that 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. In other words, the Dutch -- having been barred from carrying trade between the French Caribbean possession 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 and, therefore, as if Dutch ships were agents of a belligerent would be subject to capture and seizure of the ship and its goods under the internationally-recognized law of prize. \(^{38}\) The critical move in *The Essex* decision was to extend the Rule of 1776 to U.S. neutral commerce that had appeared to circumvent the rule by making stops in the ports of the territorial United States on voyages to or from the French Caribbean possessions and the French homeland. Under rule of *The Essex*, these interrupted voyages would be deemed to constitute “continuous voyages” in violation of the Rule of 1776. \(^{39}\) In substance, the dispute posed, on one hand, British claims of military necessity based on the justice of Britain’s war against tyranny in Europe and, on the other, U.S. 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, then Secretary of State James Madison’s 204-page *Examination* of the British position, published in 1806, evidenced a subordination of just war theory and military necessity to the established doctrines of customary international law protecting neutral rights to engage in free trade. \(^{40}\) Madison’s argument focused largely on established practice, as reflected in the opinions of the fathers of public international law (Grotius, Gentilis, Pufendorf, Bryknershoek, Vattel, and Martens) \(^{41}\); treaties, including but not limited to, treaties under the Plan of 1776, as well as Britain’s own treaties, said also to reflect customary international law \(^{42}\); and the practice of states recorded elsewhere. \(^{43}\) Only then did Madison reach questions of policy, rejecting Britain’s claim of military necessity as pre-textual, since Britain’s true motive was the commercial advantage it would gain from filling the gap left by excluded U.S. commerce \(^{44}\); and unwise, since the legal rule Britain promoted now might someday be


\(^{39}\) See Bemis, *A DIPLOMATIC HISTORY OF THE UNITED STATES*, supra note xx, at 141.

\(^{40}\) See James Madison, *EXAMINATION OF THE BRITISH DOCTRINE WHICH SUBJECT TO CAPTURE A NEUTRAL TRADE NO OPEN IN TIME OF PEACE* (1806)[*Examination*].

\(^{41}\) See Examination, supra note xx, at 10-42.

\(^{42}\) See Examination, supra note xx, at 43-78.

\(^{43}\) See Examination, supra note xx, at 79-152.

\(^{44}\) See Examination, supra note xx, at 162-64.
turned against her. 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 regulates, 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.” 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 deprecated 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. In fact, the assumption that free trade was the normal state of affairs between nations explains in large part Jefferson and Madison’s misplaced belief that the U.S. could force Britain to change its policies by conducting its own embargo against Britain, policies which only impoverished Americans, deeply embarrassed both Administrations, and in the subsequent frustration with the continuation of British policies may have resulted in the War of 1812. Rather, the U.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, U.S. diplomacy’s commitment to pluralism, through non-intervention and neutrality, and free trade seemed to be built into the DNA of the foreign relations of the United States. Supranational foreign policy was, 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, which when freed might in time peacefully join the United States. Second, a renewed commitment to free trade agreements included provisions assuring

45 See Examination, supra note xx, at 172.
46 See Examination, supra note xx, at 154 (sic).
47 See Onuf & Onuf, FEDERAL UNION, supra note xx, at 197-211 (discussing the Examination).
48 See Bemis, A DIPLOMATICAL HISTORY OF THE UNITED STATES, supra note xx, at 151-56.
49 See Bemis, A DIPLOMATICAL HISTORY OF THE UNITED STATES, supra note xx, at 208-09. Implementing U.S. non-intervention remained problematic, as so-called filibusters and others adventurers engaged in private aggression in Latin America, leading to repeated efforts to amend and improve U.S. laws forbidding and criminalizing violations of neutrality and piracy. See id. at 199 (expanding prohibitions against neutrality violations) and 330 (criminalizing piracy as an offense against the law of nations).
non-discrimination against aliens in the United States and most-favored-nation commitments assuring nondiscrimination between different trading partners of the United States.  

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 the question of slavery.  

In accord with this view, internally, the regulatory power of Congress during this period was thought not to extend to manufacturing processes, and it does not appear that any U.S. treaties regulated international trade on this basis. Not surprisingly, even though Congress formally declared the slave trade piratical, the United States did not join Britain’s effort to policy bans on the international trade in slavery until the Civil War, when the rump Congress of northern states finally ending the fraud under which Congress had previously permitted Americans to engage in that commerce under U.S.-flag protection from British enforcement operations. In sum, the U.S., through non-discrimination principles in trade, would respect the internal choices of foreign states in the same way that supranational union, and each of its own states, would respect the internal choices of all the U.S. states. 

In sum, put a different way, the pre-Civil War regime accepted and generalized the implications of pluralist recognition of the semi-sovereign right to employ different modes of production. By way of analogy, because the modern international legal trading regime continues to be built largely on pluralist premises, the degree to which production processes can become grounds for the imposition of tariff and non-tariff barriers is a highly contentious issue, raising sovereignty concerns not unlike those of in pre-Civil War America. In Madison’s understanding, the pre-Civil War regime’s theory of free trade was rooted in existing social practice of customary international law, rather

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50 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 172 (national treatment) and 201 (MFN).

51 Implicit in much free trade theory is neutrality as to the domestic mode of production. Certainly this is 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 (1817) (supplying the famous example of trade arising between Portugal and the U.K. in wine and cloth even though Britain 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.

52 See Gibbons v. Ogden, 22 U.S. 1 (1824).

53 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 333.

54 In the internal market of the United States, the U.S. Supreme Court seemed to take the same view in Hammer v. Dagenhart, 247 U.S. 251 (1918), which struck down a federal law banning from inter-state commerce the products of child labor, and Bailey v. Drexel Furniture, 259 U.S. 20 (1922)[The Child Labor Tax Case], which barred the taxation of products of child labor so as to exclude the products of child labor from inter-state commerce. In trade law terms, this involved the use of production-process based distinctions to impose quotas and tariffs on products. In United States v. Darby, 312 U.S. 100 (1941), the Supreme Court concluded that Dagenhart had been wrongly decided. The effect of that decision is to make the domestic mode of production relevant to defining the depth of the common market created in the United States through the Federal Commerce Clause power and related powers having regulatory effects, such as the tax power.

55 For critical commentary, see Robert House and Donald Regan, The Product/Process Distinction—An Illusory Basis for ‘Disciplining’ Unilateralism in Trade Policy, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW 249 (2000)(arguing that the conventional wisdom that World Trade law forbids production-process based distinctions is misplaced).
than principles of reason or justice. Similarly, the currently broad-yet-thin consensus underlying the international trade regime could be understood as reflecting a moral consensus no deeper than that of pre-Civil War supranational regime, which relied on the semi-sovereign rights of states to choose their mode of production and international recognition of the moral equality of those modes through nondiscrimination commitments. But the Pre-Civil War regime evidenced pluralist respect for the internal and external sovereignty of the states in other areas of governance as well.

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. As early as Jefferson’s Louisiana Purchase, expansion seemed to be built into the DNA of the supranational constitution, with Jefferson’s own constitutional doubts set aside. In their relations with neighboring foreign states, the 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 U.S.’s prior practice of peaceful extension towards the Pacific, ultimately was transformed from a theory of consensual supra-nationalism and a “peaceful rise” to one of annexation and military conquest.

In the north, the external semi-sovereignty of the states immediately posed threats from offensive foreign conduct to the Union. In light of the federal government’s mismanagement of trade policy during the Napoleonic Wars, the United Kingdom was tempted to provoke dissolution of the Union through the tactic of refraining from subjecting the New England states from the blockade the Royal Navy sought to implement against the remainder of the United States. 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 these states in the event the treaty was not ratified by the United States. Shortly after the conclusion of the Treaty of Ghent settling the War of 1812, Britain accepted the proposal made by the American negotiators at Ghent to enter into an additional agreement virtually de-militarizing the Great Lakes. The Rush-Bagot Agreement of 1817, effected initially through an exchange of notes of diplomatic notes, at British

56 But see Robert Knowles, The Balance of Forces and the Empire of Liberty: States’ Rights and the Louisiana Purchase, 88 IOWA L. REV. 343 (2003) (arguing that a consistent understanding of federalism principles would have required a constitutional amendment to re-shape the basic constitutional order along the lines contemplated by territorial expansion).
57 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 215.
58 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 169 and 169 n.2.
insistence was confirmed through a treaty receiving Senatorial advice and consent to ratification, presumably given British doubts as to whether anything less than a treaty could bind the semi-sovereign states and forestall retaliatory conduct by these semi-sovereign entities after the war. 59

In time, the semi-sovereign character of the states eventually did pose threats of offensive action against U.S. neighbors. 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 to British territory north of the Niagara Falls. 60 After a sharp exchange of diplomatic notes over the legality of the British action in reprisal for U.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 after having publicly claimed to have been part of the British party responsible for the destruction of The Caroline. 61 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 Supreme Court considered a habeas corpus petition by a Canadian prisoner whom the Governor of Vermont had sought to extradite to Canada to stand trial there for murder; the Court refused to grant the petition because it was equally split on the issue, thereby allowing the State of Vermont to proceed with an extradition without federal authorization. 62 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 United States 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. 63 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 revolve 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. U.S. military intervention was required to

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59 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 172.
60 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 259.
61 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 260.
63 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 260-61.
restrain Maine and keep the peace. 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 by the United States, transferring portions of Maine, and Britain, transferring portions of the Canadian province of New Brunswick. 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. The need to acquire Maine’s consent therefore complicated and delayed settlement of the territorial dispute. 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 under the treaty.

Thus, by the early 1840s, New York violated of its neutrality obligations, McLeod affair in New York revealed the potentially dangerous implications of Vermont’s assertion of a right unilaterally to engage in extradition relations with a foreign state, and Maine’s semi-sovereign status as to the settlement of its frontier with Canada complicated U.S.-British relations. These circumstances required a federal settlement that adjusted the federation’s relations with Britain as well as its relations with the states bordering British Canada. Yet, just as the tensions reflected the partially independent international status of the state, they also gave impetus to the apparent need for further enlargement of the sphere of the supranational union, as interest in annexation on both sides of the Canadian border increased.

Southern expansionism, however, unlike northern expansionism, was driven by special circumstances. Initially, a series of revolts by U.S. immigrants in Florida ultimately lead to consensual U.S. acquisition of Florida and Spain’s claims to all western U.S. territory, with British claims later resolved by the treaty of 1846 and Mexican

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64 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 257-58.
65 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, 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).
66 U.S. Constitution, Article IV, section 3 provides, as follows:
“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 Untied 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.
67 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 260-63.
68 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 263.
69 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 299-300.
70 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 186-95 (discussing the origins, terms and effects of the Adams-Onis Treaty, the so-called Transcontinental Treaty).
rights transferred by the settlement to the Mexican-American War. The situation in
situation in Texas was far more complex, much like New York and Maine, evidencing
the effects of the independent state policy capable of both supporting and undermining
the supranational U.S. system. Texas, however, emerged as an independent state in 1836,
without direct official U.S. involvement, as migrants from the U.S. independently rose up
against Mexican authorities. 71 Although factions in both the U.S. and Texas called for
U.S. annexation, immediate annexation was complicated by the need to maintain the
slave-state, free-state balance norm under the Missouri Compromise of 1820, 72 when the
State of Maine was created consensually to maintain balance in the Senate upon the
admission of Missouri. 73

But a wholly new situation of an independent state of Americans put expansion in
a whole new light. In particular, increasing commercial relations between Texas and
Britain raises fears – for some that Texas’s independent diplomacy would embroil it a
web of relationships that would complicate later annexation; for others that British
influence would ultimately lead to the extinction of slavery in Texas, which would make
its annexation tip the balance against the south; and, finally, 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. 74 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 of obtaining
congressional approval by joint resolution, days before President Polk was to take
office. 75

Notwithstanding annexation, however, Texas’ felt sense of independence and
sovereignty, 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 -- for nationalist sentiments
erupted in Europe, 76 and consciousness of cultural difference between the north and the
south also increased. 77 In this context, the Supreme Court’s jurisprudence also worked to
reinforce, and eventually intensity, conceptions of state sovereignty in a pluralist
supranational union.

71 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 219.
72 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 225.
74 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 225-28; and Orville
75 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 229-30.
76 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, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at
310-12.
77 See Orville Vernon Burton, AGE OF LINCOLN, supra note xx, 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 religious ties which have hitherto bound our people
together, I consider the greater source of danger to our country.”)(citations omitted).
3. Supreme Court Practice

The supranationalist and pluralist interpretation of American “exceptionalism” – acknowledging that international law frames of reference remained relevant in understanding the scope of the powers of states -- is also reflected in the practice of the Supreme Court during the pre-Civil War era. After confirming federal power to create a free market within the United States, thus paralleling federal international free trade policy,78 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 imposing a fine for noncompliance relating to the immigration or “influx of foreigners” who might become “paupers.”79 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.80

Justice Story’s famous opinion in Swift v. Tyson, might be viewed similarly as a case in which something like international law provided the rule for decision, as though the parties involved in the commercial transaction involved in that case were subject of different nations.81 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.”82 Story’s internationalist approach to constitutional law was further reflected during the same term Swift was decided in Prigg v. Commonwealth of 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.83 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 his understanding that the states were otherwise sovereign whether or not to respect and give effect to the law of another state.

78 See Gibbons v. Ogden, 22 U.S. 1 (1824)(Marshall, C.J., affirming the preemptive effect of federal law to ensure the flow of inter-state commerce over local police regulations); and Willson v. Black-Bird Creek Marsh Col, 27 U.S.245 (1829)(Marshall, C.J., 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).
79 Mayor of New York v. v. Miln, 36 U.S. 102 (1937),
80 Justice Barbour, writing for the Court, stated: “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. Vattel, book 2, ch. 7, § 94.-‘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.’ Ibid. ch. 8, § 100.-‘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 is was taken from the states, and granted to congress; for if it were not, it yet remains with them.” Id. at 132.
81 See Swift v. Tyson, 41 U.S. 1 (1842).
82 Id. at 19 (citations omitted).
in the same way that a state would be free to recognize or not recognize the law of a foreign sovereign. Yet, he also described the right in question as well-established right to recapture of property, which citations to Blackstone suggested was an unquestioned right under the common law of the states. In sum, Story’s virtuoso rhetoric recognized that the core sovereignty of the southern states to maintain their own political economy, as though they were sovereign international entities; and he also normalized and morally-neutralized the right in question, albeit with the aid of the federal government in narrowly-prescribed circumstances, but without prejudice to 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 to that was whether the Court had authority to determine the identity of the lawful government of the State of Rhode Island. Asserting the power to answer this question -- under the Constitution’s command that “United States shall guarantee to every State in this Union a Republican Form of Government,” the so-called Guarantee Clause -- 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 the political-economy of 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, the Court left the recognition question to the federal political branches.

84 Story wrote: “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*.” Id. at 614. Story’s COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES (1834), provide 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 held to bind each nation’s courts under the law of nations – both play important roles. Comity served as Story’s the background assumption *Prigg v. Commonwealth of Pennsylvania*, while in *Swift v. Tyson* the commercial law of nations served as his background assumption.

85 Id. at 613.
87 U.S. Constitution, Article IV, Section 4.
88 See infra text accompanying notes xx – xx.
89 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
Supranational recognition by the federal political branches of the legitimacy of a state government 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 the recognition of 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 United Nations. 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 pre-Civil War 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 U.S. assertion of neutral rights during the Napoleonic Wars.

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 in 1846 to the northwest, and with Mexico in 1848 to the southwest. 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, in the Clayton-Bulwer Treaty of 1850 the United States agreed with the United Kingdom that it would seek no further territorial expansion in Central America. 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, which reduced pressure for northern territorial expansion into Canadian territory as a means for continued trade expansion. Indeed, it is argued that the south supported this treaty, which had effect of further pacifying the northern frontier of the northern states, because it slowed the pace of expansion of the wage-labor juggernaut emerging in the north. Only in the short term, therefore, could free trade stabilized the frontier along the lines prescribed by the

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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.” See Luther v. Borden, 48 U.S., at 47.
90 See generally Damrosch, Henkin, Murphy and Smit, INTERNATIONAL LAW: CASES AND MATERIALS 314-23 (2009)(former Yugoslavia case study illustrating role of UN acceptance of credentials and possible relevance of substantive criteria, such a compliance with international human rights criteria).
91 See supra text accompanying notes xx – xx.
92 See Bemis, A Diplomatic History of the United States, supra note xx, at 271-83.
93 See Bemis, A Diplomatic History of the United States, supra note xx, at 243-44.
94 See Bemis, A Diplomatic History of the United States, supra note xx, at 250-51.
95 See Bemis, A Diplomatic History of the United States, supra note xx, at 299-302. The U.S. ultimately withdrew from the treaty after the Civil War as a directly consequence of the triumph of Lincoln’s new vision of international law and international relations for the United States. See infra text accompanying notes xx – xx (citing Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 302 and 382).
universalist project, for a the long-term structural settlement of enlarging the Union to include Canada seemed inevitable.

Indeed, by the early 1850s, viewed from the standpoint of a Peace Pact or security system, the supranational constitution was destabilizing. In game theory terms that are sometimes helpful in understanding strategic cooperation, it now became possible for states to foresee the final move in the race for territorial expansion of their respective political economies; and, 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 terms of international relations theory, the supranational regime had become a single-move Prisoner’s Dilemma.96

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.97 Yet, one finds in Justice Nelson’s concurring opinion continuing evidence for the internationalist comity approach.98 Nelson, relying extensively on Justice Story’s conflict of laws decisions and commentary,99 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. 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.100 In short, the extension of the presumptions of private international law to status questions involving the competing sovereignties of the states reflected and understanding that, at least in respect of the question of whether slave or free labor modes of production could be conducted within the territory of one of the states, the states generally remained sovereign subjects of international law. While one could explore in detail whether the various opinions in Dred Scott employed international law concepts persuasively,101 the fact remains that large portions of the debate continued to turn on the assumption that the states retained sovereign rights that were best understood through international law frameworks.

Certainly the international law arguments might be viewed simply as rhetorical strategies for avoiding the question of the pre-Constitutional Northwest Ordinance’s prohibition of slavery from the Northwest Territory or the continuing validity of the

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96 See generally 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 (Wolters Kluwer 2nd ed. 2009).
99 See Dred Scott v. Sandford, supra note xx, at 460 (as well as Chancellor Kent and the Dutch private international law commentator Huberus).
100 See Dred Scott v. Sandford, supra note xx, at 464.
101 See Janis, THE AMERICAN TRADITION OF INTERNATIONAL LAW, supra note xx, at 81-83 (discussing Nelson) and 83-92 (discussing international law elements in other concurring and dissenting opinions)
Missouri Compromise’s exclusion of slavery from the territory acquired under the Louisiana Purchase. Yet, the persistent use of international law frameworks as controlling rhetoric for a strategy of avoidance in most of the Dred Scott opinions suggests 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. In challenging that premise, Taney’s 1857 Dred Scott 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 his response 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.

Whether or not the Court was correct in this conclusion, it was also possible to debate whether the Congress had already dispensed with policy, if not also the precise terms, of the Missouri Compromise. Douglas’s position was that the Missouri Compromise was no longer good law without regard to Dred Scott, that it had implicitly been superseded by the Compromise of 1850 -- a complex set of measures which, in addition to enacting an enhanced Fugitive Slave Law but 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. 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.

102 See infra text accompanying notes xx – xx (reviewing these issues in the context of the Douglas’s theory of “popular sovereignty” in the territories under the supervening Compromise of 1850 and the Kansas-Nebraska Act).  
103 Even today, the possible existence of a “public policy” exception to the duty under Article IV, Section 1 (the so-called “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 Baker v. General Motors Corp, 522 U.S. 222 (1998).  
104 See Morison, Commager, and Leuchtenburg, GROWTH OF THE AMERICAN REPUBLIC, supra note xx, at 397-99 (discussing the Missouri Compromise)  
105 See First Lincoln-Douglas Debate, Ottawa, Illinois, August 21, 1858, 1 LINCOLN’S WRITING, supra note xx, at 495, 496 (describing “popular sovereignty” as the principle governing the Compromise of 1850 and the common basis for national party of the Whig and Democratic parties thereafter).  
106 See Morison, Commager, and Leuchtenburg, GROWTH OF THE AMERICAN REPUBLIC, supra note xx, at 564-64, (discussing Compromise of 1850).  
107 See Morison, Commager, and Leuchtenburg, GROWTH OF THE AMERICAN REPUBLIC, supra note xx, at 584-87 (discussing Kansas-Nebraska Act)
Congressman Wilmot’s repeated attempts to condition annexation of the Mexican territories on a slavery prohibition, the so-called Wilmot Proviso,\textsuperscript{108} Douglas generally advocated “popular sovereignty” as the means through which the slavery question would be resolved.\textsuperscript{109} 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 their 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, when held that slaveholders had a personal constitutional right to bring slaves with them into all the territories (and, as construed in Lincoln’s “House Divided” speech just before the Lincoln-Douglas debates, by necessary implication, the free states of the Union as well).\textsuperscript{110} 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 to continue his 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” – namely, that because a state or territory would be free not to enact a system of laws governing slavery, a Slave Code, slaveholders in other states would doubt the practical enforceability of their rights and would not, therefore, exercise their right under \textit{Dred Scott} to take their slave property with them into free states or territories.\textsuperscript{111}

No doubt, in light of the civil war in miniature then being fought by slave-state and free-state migrants to “bleeding Kansas,”\textsuperscript{112} 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; which, in turn, fractured the national Democratic party into northern and southern parties, dividing the Democratic vote in the presidential election;

\textsuperscript{108} See Morison, Commager, and Leuchtenburg, \textit{GROWTH OF THE AMERICAN REPUBLIC}, supra note xx, at 557-58 (discussing the Wilmot Proviso, which was repeatedly proposed by Congressman Wilmot publicly as an amendment to a series of measures during and following the Mexican-American War of 1846, but was 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).


\textsuperscript{110} See supra text accompanying notes xx – xx. Lincoln even before the debates 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 also to all the free states. See “House Divided” Speech at Springfield, Illinois, June 16, 1858, 1 \textit{LINCOLN’S SPEECHES AND WRITINGS}, supra note xx, at 426, 430.


\textsuperscript{112} See Morison, Commager, and Leuchtenburg, \textit{GROWTH OF THE AMERICAN REPUBLIC}, supra note xx, at 589-90 (discussing “bleeding Kansas”).
and, thus, making possible Lincoln’s election as the head of a largely united Republican party, albeit with only with a plurality of the national popular vote.113 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 pre-Civil War 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-determination114 -- rather than 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 the U.S. law.115 Thus, “Popular Sovereignty” operated as a broader right of “self-determination,” as that term is understood in international law; and, on this view, it was a necessary ingredient for the continued expansion of the United States -- thus extending the sphere of liberty, as was envisioned by the Founders’ strategy of free trade, the law of nations, and pluralism. Douglas in articulating his Freeport Doctrine made clear that he envisioned continued expansion of the United States, without natural limit, arguing: “just as our interests and our destiny require additional territory in the north, in the south, or in the islands of the ocean, I am for it, and when we acquire it will leave the people, according to the Nebraska Bill, free to do as they please on the subject of slavery and every other question.”116 Jaffe argues that “the ultimate logical consequence of his foreign policy

113 See Morison, Commager, and Leuchtenburg, GROWTH OF THE AMERICAN REPUBLIC, supra note xx, at 603-07.
114 See generally Damrosch, Henkin, Murphy and Smit, INTERNATIONAL LAW: CASES AND MATERIALS 324-27 (2009). The modern debate concerning the existence and scope of the right of a “people” under international law is extensive, but the right has even been thought by the Canadian Supreme Court to be relevant to the question of Quebec’s secession from Canada, see Reference Re Secession of Quebec, Supreme Court of Canada, 1998, 2 S.C.R. 217 (Can.), 37 I.L.M.1340 (1998); and has been invoked to identify cultural and political rights for sub-national groups, even if secession was not within those rights, see, e.g., Pellet, The Opinions of the Badinter Arbitration Committee: A Second Breadth for the Self-Determination of Peoples, 3 EUROPEAN JOURNAL OF INTERNATIONAL LAW 178 (1992). One scholar has recently even 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 Faber, LINCOLN’S CONSTITUTION, supra note xx, at 110-111.
115 Referring to his opposition to the proposed pro-slavery “Lecompton Constitution” for Kansas, which he saw as 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.” See Fifth Lincoln-Douglas Debate, Galensburg, Illinois, October 7, 1858, Douglas’ Speech, 1 LINCOLN’S WRITING, supra note xx, at 687, 689-90
would have been a federal republic of the world. Just as Pocock saw the American founding as a “Machiavellian moment” prompted also by a classically-informed recognition of the problem of regime stability, Douglas’s operated as a solution to the problem of stability. Like Madison’s federalist theory of enlargement, Douglas’s theory of “popular sovereignty” was a necessary, stabilizing feature of continuing U.S. expansion. Instability through tyranny would be avoided through “popular sovereignty” in a community’s free exercise of its right to choose the terms for its accession to the union, leaving no arbitrary limit to continuing American expansion.

From this perspective, the Confederate Constitution can 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, nowhere did the Confederate Constitution provide that a state in the Confederacy was required to permit slavery or enact a Slave Code making rights in slave property enforceable. Moreover, it did not provide for a secure system of “confederal” courts to protect the rights specified in *Dred Scott*. 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; and even the free states could in theory join the Confederacy on terms

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118 See supra text accompanying notes xx – xx.

119 See supra text accompanying notes xx – xx.

120 Thus, wrote Jaffe, 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 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 of the Union would mean an increase in 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).” See Jaffe, *CRISIS OF THE HOUSE DIVIDED*, supra note xx, at 48-49.

121 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 nation’s inferior system of government. See generally Gordon S. Wood, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC* (2009).

122 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 specific protection of existing institutions of “negro slavery” and “the right to take to [Confederate States or Territories] any slaves lawfully held … in any States or Territories of the Confederate States”)(citations omitted).

123 See G. Edward White, Recovering the Legal History of the Confederacy, 68 WASH. & LEE L. REV. 467, 504 (2011)(noting the absence of a prohibition against slavery, because it would have been “inconsistent with the principle of state sovereignty”)(citations omitted).

consistent with Douglas’s theory of popular sovereignty, as interpreted under his Freeport Doctrine. If so, American exceptionalism 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 pre-Civil War regime, with the federalization of slave holding rights beyond even the expanded but still narrow confines of the Fugitive Slave Act of 1854. Yet, as the body of opinions in *Dred Scott* makes clear, American exceptionalism 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 pre-Civil War American exceptionalism were located in the Founding and the diplomacy of the pre-Civil War 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 theory. These elements are the underlying principles in Senator Douglas’s position in Kansas-Nebraska Act of 1854 and 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.¹²⁵ 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 pre-Civil War United States.

Plainly, Lincoln did not accept the supranational understanding of the pre-Civil War regime. For him, “The states have their *status* in the Union, and they have no other *legal status*.” Indeed, the Union was “older than any of the States; and, in fact, it created them as States.”¹²⁶ In short, the states were never subjects of international law. This proved consequential in his theory and practice of international law (Part II).

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,¹²⁷ which suggested that mobilizing human potential in warfare may also have served as a practical rationale for rejecting supranational pluralism. Admittedly,

¹²⁶ See Abraham Lincoln, Special Message to Congress, July 4, 1861, in Abraham Lincoln: Speeches and Writings, 1859-65, 246, 256 (Fehrenbacher ed. 1989)[2 Lincoln’s Speeches and Writings](italics in the original). Lincoln’s vision on this point preceeded his election as president. See Abraham Lincoln, Fifth Lincoln-Debate, Galesburg, Illinois, Lincoln’s Reply, October 7, 1858, in Abraham Lincoln: Speeches and Writings, 1832-58, 700, 721 (Fehrenbacher ed. 1989)[1 Lincoln’s Speeches and Writings](using the formula that the question of the dissolution of the Union was for the “people” of the United States to decide). ¹²⁷ See Akhil Amar, *The David C. Baum Lecture: Abraham Lincoln and the American Union*, 2001 U. ILL. L. REV. 1109, 1126-29, 1130-33 (2009).
the experience of the Confederacy as a war-fighting machine supports the hypothesis that the supranational pre-Civil War regime was not adapted to politico-military success against integrated industrialized polities of the kind emerging during the 19th century’s Industrial Revolution. Supranational premises also undercut the Confederacy’s diplomatic efforts to obtain European recognition of a new independent state; for 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. In short, as Bobbitt has argued, supranationalism turned out not to be adapted to the emerging conditions of international society. 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 pre-Civil War supranational regime, they are not truly why Lincoln himself 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; and 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 exceptionalism (Part III).

II. Lincoln’s Practice of International Law

Lincoln rejected all the elements of the pre-Civil War supranational legal order. First, he rejected Douglas’s “popular sovereignty,” precisely because it reflected an international law conception of the supranational regime that through continuing exercise of the international law right of peoples to self-determination could continue to expand territorially. Self-determination, as understood in international law, was simply inapposite, even if constitutional practice and precedent suggested otherwise, since this was a right Americans had already exercised 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 of his rejection of pluralism in the domestic political economy. Third, his anti-expansionist nonaggression and anti-pluralist protectionism flowed from his skepticism over finding legitimacy in established social practices, including customary international law; he thus turned, instead, for controlling domestic political principles and rules of international law to standards grounded in the

128 See G. Edward White, Recovering the Legal History of the Confederacy, 68 WASH. & LEE L. REV. 467, 529-52 (2011) (detailing the various ways, including inability to conscript or easily suspend habeas corpus, in which the Confederate Constitution disabled the Confederacy from effectively fighting what became a “total war”).

129 See generally Howard Jones, BLUE & GREY DIPLOMACY: A HISTORY OF UNION AND CONFEDERATE FOREIGN RELATIONS 119-120, 126, 147, 157, and 161(2010)[Blue & Grey Diplomacy].

130 See Philip Bobbitt, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE CURSE OF HISTORY 178 (Alfred Knopf, 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 “truly realized example of this constitutional order”).
dictates of reason and the expression of reason in public opinion, the so-called wisdom of crowds. 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’ doctrine of “popular sovereignty” rested on moral, political, cultural, economic grounds and, perhaps most important, strategic grounds. He rejected Douglas’ implicit, and sometimes explicit, position of the moral neutrality as to slavery.\(^{131}\) And, like other Republican politicians, he feared that the continuing territorial expansion of race slavery under political economy of cotton production victimized whites, for “white masters who found themselves enslaved and driven ceaselessly by cotton’s demands for more land and labor, and white nonslaveholders who found their every effort to better their lot blocked and thwarted by the plantation regime.”\(^{132}\) Still, he thought, most famously in his House Divided Speech, that in the absence of the expansion into the territories, slavery would be “in the course of ultimate extinction.”\(^{133}\) Accordingly, notwithstanding all the reasons to oppose slavery, it would be possible to accept temporarily the continue existence of slavery in the southern states as the lesser of two evils.\(^{134}\)

But his objection to “popular sovereignty” was not merely instrumental. He rejected the overall theory of constitutional and international law by which “popular sovereignty” had become part of U.S. law and practice, Lincoln rejected Douglas’ 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.”\(^{135}\) This reticence to find constitutional custom in a single precedent, or

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\(^{131}\) Lincoln argued “If you will take the [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.” Contrasting his own position with Douglas’ neutrality, Lincoln believed the “institution is wrong,” and thus he “a policy springing from that belief which looks to arrest of the enlargement of that wrong.” 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 its as a wrong, and looks hopefully to the time when as a wrong it may come to an end.” See Fifth Lincoln-Douglas Debate, Galesburg, Illinois, October 7, 1858, Lincoln’s Reply, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 701, 708-09.

\(^{132}\) See Burton, AGE OF LINCOLN, supra note xx, at 91.

\(^{133}\) See “House Divided” Speech at Springfield, Illinois, June 16, 1858, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 426.

\(^{134}\) Speech on the Kansas-Nebraska Act at Peoria, Illinois, October 16, 1854, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 307, 333 (forswearing attempts to use federal power to end slavery in the southern states.

\(^{135}\) See Fifth Lincoln-Douglas Debate, Galesburg, Illinois, October 7, 1858, Lincoln’s Reply, 1 LINCOLN’S WRITING, supra note xx, at 701, 706-707 (“They did not lay down what was proposed as a regular policy
even limited set of precedents, is consistent with Lincoln’s well-known critique of the precedential force of the Dred Scott decision.\textsuperscript{136} Neither individual statutes nor judicial decisions could, for Lincoln, dispose of questions of fundamental principle of the kind raised by Douglas’ theory of “popular sovereignty.”

Rather, as a matter of first principles, no rights arose for the “people” of the territories deriving from their status of members of the political communities 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 Message to Congress, in his view, the states (\textit{qua} states) existed only as members of the Union and have no prior political capacities or rights. Indeed, “even Texas, in its temporary independence, was never designated a State.”\textsuperscript{137} More important, in Lincoln’s view, under his approach to international law, the people in the territories themselves, individually or collectively, had no right of self-determination as a separate community, since they were already members of the political community of the United States.

In a sense, Lincoln’s rejection of popular sovereignty flowed directly from his earlier criticism of President Polk’s Mexican-American War.\textsuperscript{138} 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. In short, his theory of international law was ultimately consistent with his refusal to accept even a qualified right of self-determination within an existing, self-governing state -- described by Senator Douglas as “popular sovereignty” -- within the United States as well. Lincoln had earlier proposed a series of interrogatories to President -- which came to be known as the “Spot” resolutions,\textsuperscript{139} and caused Lincoln some political difficulty and caused him to be known

\textsuperscript{136}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.” See Speech on the Dred Scott Decision at Springfield, Illinois, June 26, 1857, 1 Lincoln’s Speeches and Writings, supra note xx, at 390, 393; see generally Michael Stokes Paulson, Lincoln and Judicial Authority, 83 NOTRE DAME L. REV. 1227, 1235 (2008).

\textsuperscript{137}See Message to Congress, July 4, 1861, 2 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 246, 255.

\textsuperscript{138}See Speech in the U.S. House of Representatives on the War with Mexico, January 12, 1848, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 161.

\textsuperscript{139}“Spot” Resolutions in the U.S. House of Representatives, December 22, 1847, 1 Lincoln’s Speeches and Writings, supra note xx, at 158-59.
in some quarters as “Spotty Lincoln” to determine where, precisely, the initial conflict between U.S. and Mexican forces occurred. Locating the boundary was central, in Lincoln’s view, to determining whether U.S. forces had acted in self-defense or were, instead, responsible for an act of aggression.

Lincoln’s first dismissed as somewhat trivial arguments that the Adams-Onis 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, and entered into an agreement operating as a treaty ceding all Mexican territory beyond the Rio Grande; or, separately, that the admission of Texas had conferred to the U.S. rights Texas claimed to that boundary. 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 acquisition, the United States) by any of these instruments. The boundary, if there was a fixed boundary, could be somewhere in between the two rivers; thus, the President Polk’s claim that U.S. 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.

But, added Lincoln, the question of legal right was amenable to an answer through “the true rule for ascertaining the boundary between Texas and Mexico.” This, he argued, is, that wherever Texas as 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. 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 as not like the case of 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 certainty 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.” And later, in his House Divided Speech and in his debates with Senator Douglas, Lincoln would depurate “popular sovereignty” with the pejorative term “squatter

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140 See William Lee Miller, LINCOLN’S VIRTUES: AN ETHICAL BIOGRAPHY 164-91 (Alfred Knopf 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.” See Goodwin, TEAM OF RIVALS, supra note xx, at 546.
141 See Speech in the U.S. House of Representatives on the War with Mexico, January 12, 1848, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 163-65.
142 See Speech in the U.S. House of Representatives on the War with Mexico, January 12, 1848, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 167 (italics in original).
143 See Speech in the U.S. House of Representatives on the War with Mexico, January 12, 1848, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 166.
sovereignty," trivializing what Douglas thought a fundamental right of peoples as a mere land grab that, in the English law Lincoln learned from his study of Blackstone, would generate qualified rights based on theories of adverse possession. But if there were squatters in the disputed territory, they were Mexicans.

And, 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 that there, and thereby, the first blood of the war was shed.” In fact, while he conceded that settlers in Mexico could have been exercising within Mexico their original right of revolution against Mexico to effect secession from Mexico and to create the independent State of Texas, 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” that Texans exercised this right. Lincoln thus implied that those settlers would not have had a legal right to receive U.S. assistance to enable them to exercise their right of self-determination.

In other words, the legal rights of settler had nothing to do with the legality of the U.S. use of force. Indeed, nowhere in his analysis does Lincoln suggest that, even if the boundary were indeterminate, either side would have the legal right to protect its settlers (or squatters, to use Lincoln’s later characterization) and their rights of self-determination. Thus, since he denied the right of foreign powers to save the settlers from oppression or to ensure their rights to self-government, he 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

144 See “House Divided” Speech at Springfield, Illinois, June 16, 1858, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 427; and Sixth Lincoln-Douglas Debate, Quincy, Illinois, October 13, 1858, Lincoln’s rejoinder, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 764, 769.

145 No doubt he was familiar with Kent’s Commentaries on the Law of the United States. See David Herbert Donald, Lincoln 102 (Simon & Shuster, 1995). But “To 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 William Blackstone, 2 COMMENTARIES ON THE LAW OF ENGLAND 263-66 (University of Chicago 1979) [A Facsimile of the First Edition of 1765-69].

146 See Speech in the U.S. House of Representatives on the War with Mexico, January 12, 1848, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 166.

147 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 share off the existing government, and form a new one that suits them better. This is most valuable, -- 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.” See Speech in the U.S. House of Representatives on the War with Mexico, January 12, 1848, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, 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 cannot be a fair description of Polk’s principle for decision in the Mexican War.

148 See Speech in the U.S. House of Representatives on the War with Mexico, January 12, 1848, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 168.
Mexican-American War. 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.

In sum, for Lincoln, the right of self-determination seems to have meaning for one narrow purpose, the right to create a state and, once inside of a state, a group of people finds its protection from the exercise of their government’s authority. Lincoln thus was 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 for the most egregious offenses, and justified only by results that could “liberate the world,” such as the American Revolution itself. Significantly, as early as the immediate aftermath of the Mexican-American War, Lincoln’s public rhetoric 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.

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

In rejecting self-determination and popular sovereignty, under international and constitutional law within the United States, Lincoln insisted that ultimately there would be one form of political economy in the United States. Accordingly, he suggested that the South, as though it were even a foreign country, did not share in what he deemed to be the central premise of Americanism – “This cause is that every man can make

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150 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.” See William Lee Miller, LINCOLN’S VIRTUES: AN ETHICAL BIOGRAPHY 189 (Alfred Knopf, 2002)(citations omitted); see Speech on Presidential Question, July 27, 1848, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 205, 219. Lincoln also made this argument in a more fully theorized form to his law partner, William Herndon, who argued for a form a presidential right to engage in preemptive self-defense. Lincoln replied: “Allow the President to invade a neighboring nation, whenever he shall deem is 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.” See Letter to William H. Herndon, February 15, 1848, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 175-76 (emphasis in the original); see supra text accompanying notes xx – xx. 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 (citing February 1, 1848 correspondence to Herndon).

151 See Speech in the U.S. House of Representatives on the War with Mexico, January 12, 1848, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 167 (a most sacred right—a right, which we hope and believe, is to liberate the world”).

152 Lincoln at a speech in Worcester, Massachusetts, on September 12, 1848 on the Whig position on the war argued that Whigs wished “to keep up the character of this Union…did not believe in enlarging our 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, LINCOLN’S VIRTUES, supra note xx, at 190 (citation omitted).
himself.” He further believed that the existence of slavery in the United States undermined the claim of American exceptionalism to serve as a model for the world. In other words, while viewing the expansion of free institutions as a corollary of American exceptionalism, Lincoln held that this expansion would be achieved by imitation of, rather than incorporation into, the United States. But that model—of the United States as “every man can make himself”—would, in order to continue to serve as a model, need to be preserved by defended by economic protectionism rather than military force. In sum, he rejected the pluralist and supranationalist commitment to free trade of pre-Civil War regime in order to protect his vision of what made the United States special.

That said, Lincoln rejection of territorial expansion throughout his presidency, like his rejection of self-determination and popular sovereignty, 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. According to one scholar, “If the door were opened to slavery in any of the new territories, Lincoln feared that the South would eventually try to annex Cuba or invade Mexico, thereby restarting the long struggle.”

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 famous call in his April 1, 1861 memorandum to

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153 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?” See Speech at Kalamazoo, Michigan, August 27, 1856, in 1 LINCOLN’S WRITING, supra note xx, at 376, 379. Cf. Merrill D. Peterson, LINCOLN IN AMERICAN MEMORY 33-35 (Oxford 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)](Lincoln in American Memory]. In this basic ideology Lincoln held the basic beliefs of the emerging Republican Party. See generally Eric Foner, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (Oxford University Press, 1970)(finding the roots of Republican ideology in its precursor, the Free Soil Party); Gabor Boritt, LINCOLN AND THE ECONOMICS OF THE AMERICAN DREAM (Memphis State University Press, 1978)(detailing Lincoln’s commitment to capital and labor mobility within a market economy).

154 In his Peoria speech on the Kansas-Nebraska Act, he argued: “I think, and shall try t 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 republic example of its just influence in the world—enable 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 [sic] the Declaration of Independence, and insisting that there is no right principle of action but self-interest.” See Speech on the Kansas-Nebraska Act at Peoria, Illinois, October 16, 1854, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 307, 315 (italics in the original).

155 See Doris Kearns Goodwin, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 296 (Simon & Schuster 2006)[Team of Rivals].
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. 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, “for their threats to intervene in the American crisis.” 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, 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 Ft. Sumter. Whether or not Lincoln in effect baited the Confederacy into initiating the use of force, he could say in his Second Inaugural Address say that the South would “make war rather than let the nation survive,” while North “would accept war rather than let it perish.” 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,” Lincoln could claim his was a just war in self-defense.

Lincoln’s foreign relations posture during the war was, of necessity, defensive. During the war, Lincoln had 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. 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, and the larger purpose of the treaty, like the recognition of Haiti, diplomatic signaling of Lincoln’s underlying objectives in the Civil War. Yet, according to 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 U.S. abolitionists for intervention. Lincoln thought ostensibly thought it wiser to avoid driving the Spanish into the arms of the British and French and attempt to influence Spain’s Caribbean through more peaceful means.

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156 See Jones, BLUE & GREY DIPLOMACY, supra note xx, at 27.
157 See Goodwin, TEAM OF RIVALS, supra note xx, at 342.
158 See Goodwin, TEAM OF RIVALS, supra note xx, at 324-46 (following Senator Browning advice).
159 See Second Inaugural Address, March 4, 1865, 2 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 686 (emphasis in original).
160 See Autobiography Written for Campaign, June 1860, 2 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 160, 166 (“because the power of levying war is vested in Congress”); see also supra text accompanying note xx – xx (which Lincoln criticized as international aggression and as unconstitutional).
161 See Bemis, A Diplomatic History of the United States, supra note xx, at 395 n.1.
162 See Jones, BLUE & GREY DIPLOMACY, supra note xx, at 122 (Seward and Lyons sign treaty); but see Welles, LINCOLN AND SEWARD 132-145 (1874)[reprinted by Books for Libraries Press, 1969](demonstrating the treaty would not result in any increased enforcement efforts by the United States for a variety of technical reasons).
163 See Gideon Welles, LINCOLN AND SEWARD, supra note xx, at 183-84.
Finally, 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.” Lincoln, rather than engage in aggressive war against Mexico, had simply deployed forces U.S. forces to Texas in order to deter Emperor Napoleon’s or his puppet Mexican Emperor Maximilian’s aspirations to expand northwards. Relying on statements of principled nonaggression, Seward informed the French that the U.S. 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 territory of the United States. 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.”

At the end of the war, Lincoln’s posture on the northern frontier of the United States was equally circumspect. In his final Annual Message to Congress, Lincoln made clear that the activities of Canadians across the border forced him to give notice of an intention to withdraw from the Rush-Bagot Treaty, 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. Rather than issue a statement like Secretary Webster’s incendiary diplomatic note in The Caroline affairs, Lincoln’s tone was measured, demanding action but expressing confidence in the good faith of his neighbors. In due course, the concerns were resolved and the United States revoked its notice of withdrawal; and the treaty remains in effect today. In sum, Lincoln’s posture towards Britain in the north was just as defensive as his posture toward France and Spain to the south.

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164 See Goodwin, TEAM OF RIVALS, supra note xx, at 690-91.
165 See Jones, BLUE & GREY DIPLOMACY, supra note xx, at 311-12.
166 Quoted in Goodwin, TEAM OF RIVALS, supra note xx, at 722.
167 See Bemis, A Diplomatic History of the United States, supra note xx, at xxx.
168 He simply noted: “In view of the insecurity of life and property in the region adjacent to the Canadian border, y reason of recent assaults and depredations committed by inimical and desperate person, 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, 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 incidents across the border.” See Annual Message to Congress, December 6, 1864, in 2 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 646, 649-50.
169 See Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES, supra note xx, at 381. Lincoln did once hint that 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 “if this nation should happen to get well we might want that old grudge against England to stand.” See Goodwin, TEAM OF RIVALS, supra note xx, 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, see supra note xx, in the hope of stimulating Canadian willingness to join the Union’s free trade area. See Bemis, A DIPLOMATIC HISTORY
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 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 port. 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. The roots of his view were in Clay’s American System of internal improvements, finally coming to fruition also in the Homestead Act and Pacific Railways Acts of 1862. 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. 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 the good of a just reward for labor. It was the means by which he could protect the germ of American exceptionalism – “This cause is that every man can make himself.”

170 See Amanda Foreman, A WORLD ON FIRE: BRITAIN’S CRUCIAL ROLE IN THE AMERICAN CIVIL WAR 68 (Random House 2010) (offering, from the British perspective, a highly critical portrayal of Secretary Seward’s diplomatic competence).
171 See supra text accompanying notes xx – xx.
172 See Burton, AGE OF LINCOLN, supra note xx, at 228-29.
173 Lincoln wrote: “that 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 product of labour in.” See Fragments on the Tariff, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 149, 152 (written sometime between election to Congress in 1846 and taking seat in December 1847)(italics in original).
174 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. The question arises, how can a government best, effect this? In our own country, in it’s (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 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.” See Fragments on the Tariff, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 149, 153-154, 158 (written sometime between election to Congress in 1846 and taking seat in December 1847)(italics in original).
175 See Speech at Kalamazoo, Michigan, August 27, 1856, in 1 Lincoln’s Writing, supra note xx, at 376, 379.
In sum, Lincoln’s rejected supranationalism’s commitment to territorial expansion and an ever-increasing community of free trade; he turned, instead, to an ant expansionist, defensive policy on the use of force coupled with economic protectionism. This put his policies in tension with longstanding U.S. positions in 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 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, drew its normative force from social practice or acceptance and judicial precedent in constitutional law. “Mere precedent is a dangerous source of authority,” said Lincoln, “and should not be regarding questions of constitutional power, except where the acquiescence of the people and the States can be considered as well settled.” 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.

Arguably, this permitted a shift from strict adherence to jus in bello constraints, the rules of international law governing the means of warfare. Instead, Lincoln seemed to subordinate the jus in bello 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 governing whether war can be fought at all. This shift, particularly in the area of neutral rights of commerce, may merely reflect the shift in the interests of the United States, from a small-navy neutral relying on its neutral trading rights under customary international law to a large-navy belligerent asserting expansive powers to blockade. But Lincoln’s focus on public reason and policy in neutral rights and the Union blockade of the Confederacy also extended to his subversive approach to emancipation, violating a perceived norm against promoting anarchy through slave uprisings, and to his resort to public diplomacy to win the hearts and minds of the British working classes for his revolutionary policies. Similarly, Lincoln’s post war policy towards Confederate war leadership of reconciliation rather than punishment 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 related stabilizing, retrospectively-oriented rule-like norms in international law, relying instead on fundamental principles of justice and public reason with a prospective orientation and transformative effects.

In sum, 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 rely on usages and customs of states, cleared new paths with public reason and the wisdom of crowds.

176 See supra text accompanying notes xx –xx.
177 See Speech on Dred Scott, June 26, 1857, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 394.
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. Welles, however, argued that declaring a blockade would permit European powers to recognize the existence of a legal state of “belligerency” between the north and south and thereby extend semi-sovereign belligerent rights to the Confederacy -- authorizing Europeans to engage in neutral trade with it, as permitted by customary international law. He argued that it would be better to rely on domestic law to close southern ports. But there appeared to have been concern over whether the Constitution permitted closing of the ports of some states but not others. 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.”

Within weeks the political and legal implications of the blockade manifested themselves. Britain and others took the opportunity to seize on the declaration of blockade, as Welles had feared, as the basis for recognizing the existence of belligerency, with declaration of neutrality soon to follow. Yet, the question arose whether the powerful British Navy would respect the blockade. 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. Moreover, the European powers in the aftermath of the Crimean War had purported to codify as a customary international norm rules relating to blockade and piracy, “consolidating the principle that a blockade had to be effective” and stating that “privateering is and remains abolished.” While the U.S. had consistently endorsed the first principle, it had declined to adhere to this treaty because it objected to the alleged customary rule against privateering; the U.S. practice had previously relied on the issuance of so-called letters of marque and reprisal, as contemplated under the U.S. Constitution, to mobilize the substantial U.S. merchant marine as a militia of privateers, as it were, on the high 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. But British Ambassador Lyons asked Secretary Seward whether the U.S. could enforce the Declaration of Paris in its own

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178 See Goodwin, TEAM OF RIVALS, at 351 (citing John Niven, GIDEON WELLES; LINCOLN'S SECRETARY OF THE NAVY 356 (Oxford University Press, 1973)).
179 See Jones, BLUE & GREY DIPLOMACY, supra note xx, at 56. Article I, Section 9, Clause 6 provided: “No preference shall be given by any Regulation Commerce or Revenue of the Ports of one State over those of another ….”
180 See Proclamation of Blockade, 2 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 233-34.
181 See Jones, BLUE & GREY DIPLOMACY, supra note xx, at 44-45 (reporting that Foreign Minister Lord John Russell relied on the writings of Vattel for this conclusion).
182 See Jones, BLUE & GREY DIPLOMACY, supra note xx, at 40 and n.66.
184 See U.S. Constitution, Article I, Section 8, Clause 11 (authorizing Congress to “To declare War, grant letters of Marque and Reprisal …”).
185 See Foreman, A WORLD ON FIRE, supra note xx, at 80 (citations omitted).
waters, making indirectly the point that the Union blockade against the Southern ports was not effective in the least.\textsuperscript{186} This, in turn, raised the even more serious question 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 U.S. itself had consistently maintained the position that such so-called “paper blockades” were not binding.\textsuperscript{187}

Yet, after some hesitation, the United States and Britain reached a \textit{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.\textsuperscript{188} It has been suggested the British Admiralty saw the wisdom in \textit{de facto} recognition of the North’s thin blockade, since the British Navy in the future could declare a blockade without expending significant resources in satisfying a narrower interpretation of the Paris Declaration’s requirement of “effectiveness.”\textsuperscript{189} Lincoln also reformulated his position in his July 4, 1861 Message to Congress; for, 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.” 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.\textsuperscript{190} Thus, Lincoln coupled his minimal acquiescence in a customary international law carrot with the threat of a discriminatory economic stick in violation of alien investor property rights.

For the British, the precise scope of their neutrality obligations repeatedly raised questions, some of which were ultimately the subject of arbitration after the war.\textsuperscript{191} And, for the U.S., the anomalous legal situation also continued to generate controversy, particular in the circumstances related to the capture of two British ships, the \textit{Trent} and the \textit{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. Indeed, in neither case -- either in whether not to assert; or in whether to assert U.S. rights -- did customary law of nations seem to be controlling to Lincoln,

The \textit{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 \textit{San Jacinto}, under the command of Captain Charles Wilkes, seized a

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\textsuperscript{186} See Jones, \textit{BLUE \\& GREY DIPLOMACY}, supra note xx, at 41.
\textsuperscript{187} See Jones, \textit{BLUE \\& GREY DIPLOMACY}, supra note xx, at 43; see Bemis, \textit{A DIPLOMATIC HISTORY OF THE UNITED STATES}, supra note xx, at 374-75.
\textsuperscript{188} See Jones, \textit{BLUE \\& GREY DIPLOMACY}, supra note xx, at 43 and 53.
\textsuperscript{189} See Monaghan, \textit{DIPLOMAT IN CARPET SLIPPERS}, supra note xx, at 125; and Bemis, \textit{A DIPLOMATIC HISTORY OF THE UNITED STATES}, supra note xx, at 376-77.
\textsuperscript{190} See Message to Congress in Special Session, July 4, 1861, \textit{2 LINCOLN’S SPEECHES AND WRITINGS}, supra note xx, at 246, 252; see also Monaghan, \textit{DIPLOMAT IN CARPET SLIPPERS}, supra note xx, at 123-24 (reporting diplomatic corps’ interpretation of Lincoln’s message).
\textsuperscript{191} See Bemis, \textit{A DIPLOMATIC HISTORY OF THE UNITED STATES}, supra note xx, at 412-13.
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U.K. 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. 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 U.S. 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. Wilkes’ rather tortured argument was that, since customary law allowed him to seize a “dispatch” of message from the Confederacy as “enemy property,” he could also seize a “living, breathing dispatch.”

Even though the Union disavowed the seizure, stating to the British that San Jacinto was not acting under orders, the United Kingdom commenced preparations for war. Learning of a U.S. attempt to buy remaining stocks of British saltpeter, which was important strategic import for gunpowder manufacture, it imposed an export ban on all munitions to the U.S. It began to deploy additional troops to Canada in preparation for the outbreak of war, demanded an apology and the prisoners, and issued a virtual ultimatum, threatening to break diplomatic relations on a date certain if its terms were not met. At that point, Lincoln’s Cabinet convened, 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 U.S. objection to impressment, dating back to the British practice during the Napoleonic Wars of seizing U.S. nationals claimed by Britain to be British nationals from U.S. ships; this strained analogy was ultimately viewed by the British a face-saving ploy designed simply to give the Lincoln administration domestic political cover for a diplomatic capitulation.

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.” In other words, Lincoln simply accepted Seward’s tortured position out of political and military necessity. Rather than agree, he simply was in no position to

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192 See Goodwin, TEAM OF RIVALS, supra note xx, at 396-399.
193 See Foreman, WORLD ON FIRE, supra note xx, at 179.
194 See Foreman, WORLD ON FIRE, supra note xx, at 181.
195 See Foreman, WORLD ON FIRE, supra note xx, at 183.
196 See Foreman, WORLD ON FIRE, supra note xx, at 183-89 and 191-92.
197 See Foreman, WORLD ON FIRE, supra note xx, at 196.
198 See Goodwin, TEAM OF RIVALS, supra note xx, at 399-400 (citation omitted).
199 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.” See Goodwin, TEAM OF RIVALS, supra note xx, at 710-11 (quoting Porter). The last sentence sounds more like
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 U.S. 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 the burning of documents and a large packet being thrown into the water.\footnote{See Foreman, WORLD ON FIRE, supra note xx, at 412-13.} 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 sentiment in Britain.\footnote{See Foreman, WORLD ON FIRE, supra note xx, at 423 and 456.} 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.\footnote{See Gideon Welles, LINCOLN AND SEWARD 85-98 (Books for Libraries Press, Freeport, NY 1969)[1874].} 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. And Congressman 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 whether the threat of British intervention in the war at this stage remained significant.\footnote{See Goodwin, TEAM OF RIVALS, supra note xx, at 517-18.} 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 U.S. should comply with customary international law.\footnote{See Jay Monaghan, ABRAHAM LINCOLN DEALS WITH FOREIGN AFFAIRS: A DIPLOMAT IN CARPET SLIPPERS 39 and 291 (1945)[Diplomat in Carpet Slippers].} The U.S., viewing the matter solely from the standpoint of customary international law, was on firm ground to reject the British claim.\footnote{Welles, LINCOLN AND SEWARD, supra note xx, at 99.}

Yet, in view of Seward’s prior commitment, and his view 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.” Welles 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. Yet, Seward won the argument and the mails were returned to the British unopened.

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. Yet, in light of Welles’ 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. 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. Yet, commentators find in the work of the Supreme Court during this era significant respect for the customary law of nations on jus in bello and related issues.

Perhaps, whatever Lincoln’s advisers, the Supreme Court, later students of Whig lawyers’ professional habits, or 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 when compared to 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.” 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.

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 front lines of the initial stages of the war, and northern “peace” Democratic opposed to emancipation in key states further to the north, together barred a premature policy declaration by Lincoln that the object and

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206 See Welles, LINCOLN AND SEWARD, supra note xx, at 100-115.
207 See Goodwin, TEAM OF RIVALS, supra note xx, at 518.
211 See Speech on Dred Scott, June 26, 1857, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 394.
purpose of the Civil War was the end of slavery throughout the United States. Rather, in the initial stages of the War, Lincoln was required to maintain publicly that the purpose of the war was solely preserve the Union, as he continued to maintain his public position that he would not seek to liberate southern slaves. Given Lincoln’s long-standing position that preservation of the Union, coupled with the limitation of slavery in the territories, would in the end result in the end of slavery, this fooled no one in the South and fooled only those who wished to be fooled in the northern and border states.

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 at all.” It thus left abolitionists in Europe “skeptical about the president’s motives.” Indeed, 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. Indeed, Lincoln included in the final Proclamation his assertion -- in passive voice no less, that the Proclamation was an “act, sincerely believed to be an act of justice” only at the insistence of Treasury Secretary Chase, the foremost abolitionist in the Cabinet, and the leading abolitionist Senator Charles Sumner.

These objections seemed merited, since Lincoln seemed at every stage to resist emancipation. Unlike Seward, his chief rival for the Republican nomination for the Presidency, Lincoln eschewed relying on natural law as the ground of ending slavery. He consistently took the 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. Similarly, rather than rely on moral arguments, and treating war as the continuing of politics by other means, Lincoln relied on his war power and “military necessity” to emancipate slave in southern-occupied territory alone. The initial 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. 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 emancipate.

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212 See Jones, BLUE & GREY DIPLOMACY, supra note xx, at 28.
213 See Jones, BLUE & GREY DIPLOMACY, supra note xx, at 122.
214 See Goodwin, TEAM OF RIVALS, supra note xx, at 482-82.
215 See Jones, BLUE & GREY DIPLOMACY, supra note xx, at 122.
217 See Goodwin, TEAM OF RIVALS, supra note xx, 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).
218 See Karl von Clausewitz, ON WAR 9-10 (Random House, Richard McKeon ed. 1943).
219 See Preliminary Emancipation Proclamation, September 22, 1862, 2 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 368.
slaves, again only outside northern-occupied territory.\textsuperscript{220} When it appeared that the policy of the Preliminary Emancipation Proclamation initially 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.”\textsuperscript{221} Thus, the draft language was modified in the final Emancipation Proclamation in response to these British concerns, and 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 slaves to “abstain from all violence, unless in necessary self-defence” and where possible “labor faithfully for reasonable wages.”\textsuperscript{222} When Lincoln did finally declare the larger purpose of the war was emancipate all slaves in the United States through constitutional amendment, it was only on proposed terms of “compensated” emancipation,\textsuperscript{223} leaving in doubt the ultimate resolution of the matter. In sum, Lincoln’s seemed to be compelled by circumstances – no less than what was required by reason and no more than what would be tolerated by public opinion – to take each step in the progression towards universal emancipation.

As a matter of international law, the measure also seemed to stand on uncertain ground. It was arguably inconsistent with the U.S. position during the Revolutionary War and the War of 1812, when the U.S. had demanded the return of slaves unlawfully freed by Britain as war measures during both of those conflicts.\textsuperscript{224} 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.”\textsuperscript{225} 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

\textsuperscript{220} See Final Emancipation Proclamation, January 1, 1863, \textit{2 Lincoln’s Speeches and Writings}, supra note xx, at 424.
\textsuperscript{221} See Jones, \textit{Blue & Grey Diplomacy}, supra note xx, at 122.
\textsuperscript{222} See Final Emancipation Proclamation, \textit{2 Lincoln’s Speeches and Writings}, supra note xx, at 424, 425; see also Carnahan, \textit{Act of Justice}, supra note xx, at 127 (reporting the concerns of Lord Lyons, British Ambassador to the United States).
\textsuperscript{223} See Annual Message to Congress, December 1, 1862, \textit{2 Lincoln’s Speeches and Writings}, supra note xx, at 393, 406.
\textsuperscript{224} See Carnahan, \textit{Act of Justice}, supra note xx, at 6-7.
\textsuperscript{225} See Carnahan, \textit{Act of Justice}, supra note xx, 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 \textit{The Prize Cases}, 67 U.S. 635 (1863), in which at issue was 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. See generally Thomas Lee and Michael D. Ramsey, \textit{The Story of the Prize Cases: Executive Action and Judicial Review in Wartime}, 53, 67 in \textit{Presidential Power Stories} (Foundation Press, Schroeder and Bradley eds., 2009)(suggesting that if the president’s blockade authority had been undermined in \textit{The Prize Cases}, the legality of the Emancipation Proclamation would also have been called into question).
action had come to be viewed as unacceptable.\textsuperscript{226} And he would not subordinate these considerations to doubtful customary international law precedents against emancipation or rely more expansively on merely potentially emerging norms for emancipation drawn from the emerging global condemnation of the slave trade. Thus, reason understood as military necessity, public opinion, but not established or emerging custom, formed the basis for his implementation of policy.

At the same time, assertion of the right to emancipate slaves through the war power had the effect of opening 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 his Gettysburg Address -- for many Lincoln’s language psychologically opened to escalation, subordinating \textit{jus in bello} concerns to the single-minded pursuit of the \textit{jus ad bellum}. With Sherman’s “war is hell” so-called “March to the Sea” through Georgia, and Grant’s “if it takes all summer” campaign in Virginia,\textsuperscript{227} the logic of military necessary seemed to justify total war; and Lincoln’s refusal to compromise on the terms of peace, demanding the unconditional surrender of the south,\textsuperscript{228} 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

Thus, for both principled and prudential reasons, Lincoln took steps not to follow the full logical implications of military necessary, both internationally and domestically, seeking instead consensus and molding public opinion as a more effective and sustainable instrument of coercion than the direct use of force.

Pragmatically, the external challenge of potential European intervention, based on for 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.\textsuperscript{229} The English ruling classes had already

\textsuperscript{226} But see Robert Fabrikan, 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 (2009)(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); and 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 Proclamation was inconsistent with the “niceties” of international law but arguing that, rather than reflect political cynicism, the Proclamation reflected Lincoln’s idealism).
\textsuperscript{227} See Goodwin, TEAM OF RIVALS, supra note xx, at 691.
\textsuperscript{228} See Jones, BLUE & GREY DIPLOMACY, supra note xx, at 236.
viewed Lincoln’s suspension of habeas corpus and his toying with the incitement of slave uprising as threats to order that could harm British interests. Perhaps more importantly, the British aristocracy also viewed them as vindication of the traditional English, and Greek classical, 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. 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. Stockpiles of cotton, among other factors, temporarily mitigated the effects of the blockade. Still, the increasing effectiveness of the blockade increased political pressure for British intervention. Gladstone’s speech, together with the increasing effect of the denial of southern cotton to England’s textile factories and workers as a result of the mounting efficacy of the blockade, increased the pressure on the English Government. Notwithstanding its opposition to slavery, dependence on northern wheat exports, and exposure for prior British investments in, and loans to, northern business enterprises, pressure on the British Government to recognize the Confederacy was reaching unprecedented levels.

To counteract these effects, Lincoln spoke directly to English workers. He had already called the Civil War a “People’s contest.” With Europeans volunteering to fight on both sides of the struggle, it was fast becoming an “international” people’s contest. Marx from his London exile proclaimed that, as “the American war for independence initiated a new era of ascendancy for the middle class, so the American anti-slavery war will do for the working classes.” 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. Yet, without resorting to Marxist rhetoric, now Lincoln internationalized the campaign against slavery in a way workers everywhere would find appealing. Shortly after issuing the Final Emancipation Proclamation, in his “Letter to the Workingmen of Manchester,

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230 See Monaghan, DIPLOMAT IN CARPET SLIPPERS, supra note xx, at 60-61 and 80-81.
231 See Burton, AGE OF LINCOLN, supra note xx, at 144 (reporting shift of British exports towards opium to China); Jones, BLUE & GREY DIPLOMACY, supra note xx, at 131, 266 (cotton imports from India) and 266 (increased effects especially in France).
232 See Jones, BLUE & GREY DIPLOMACY, supra note xx, at 236-44.
233 See Special Message to Congress, July 4, 1861, 2 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 246, 259.
234 See Foreman, WORLD ON FIRE, supra note xx, at 110-119.
235 Quoted in Jones, BLUE & GREY DIPLOMACY, supra note xx, at 209.
236 See Speech at New Haven, Connecticut, March 6, 1860, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, 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, 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. I like the system which lets a man quit when he wants to, and wish it might prevail everywhere. One of he reasons why I am opposed to Slavery is just here.”)(emphasis omitted). Notwithstanding Lincoln’s own commitment to the rights of all workers, in a famous revisionist account of Lincoln as mere politician who was unaware that the regime of concentrated industrial capital spawned by the war machine he created during the Civil War would, in time, destroy workers’ rights. See Richard Hofstadter, Abraham Lincoln and the Self-Made Myth, in THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 118-174 (Alfred Knopf, 1973)[1948].
England,” then the center of British textile production, Lincoln called the U.S. 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.”

Foreshadowing his Gettysburg Address delivered later that year, the honoring of those who sacrificed their lives for others, Lincoln praised British workers for their choice to sacrifice their immediate economic self-interest by supporting the Union’s cause, implicitly affirming their rights as free people to make that choice. 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 preferred norms in European law and diplomacy, lacked persuasive force when applied to the American Civil War. In this he 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 continue to intensify and seemed to demand some form of humanitarian intervention to bring the slaughter to an end.

Lincoln employed public diplomacy in the same way towards the conquered peoples of the south, as well as towards the conquering people of the north. Lincoln reputedly once said that he “no more wished to be a master than he wished to be a slave.” 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.

Extending this spirit of clemency to all, in his brief but beautiful Second Inaugural Address, Lincoln argued for national reconciliation; he emphasizing the moral equality of the victor and the vanquished – without malice, with charity, yet with “firmness in the right.” 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 communicated

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237 See To the Workingmen of Manchester, England, January 19, 1863, 2 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 431, 432-33. Lincoln’s efforts were not limited to letters. U.S. funds were used to support the organization of public meetings in support of the Union cause. See David Donald, LINCOLN 415 (1995).

238 See Address at Gettysburg, November 19, 1863, 2 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 536; see William Miller, PRESIDENT LINCOLN: THE DUTY OF A STATESMAN, 210 (Alfred Knopf, 2008)(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 U.S. and Europe)[Duty of a Statesman].


240 See 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 484 (sometime in 1858 but unattributed).

241 Indeed, he once perversely turned his reputation for clemency into an asset to justify the arrest and exile of the incendiary Congressman Clement Vallandigham, saying: “Must I shoot a simple-minded soldier boy who desert, while I must not touch a hair of a wiley agitator who induced him to desert?” See Goodwin, TEAM OF RIVALS, supra note xx, at 524 (sic).

242 Lincoln observed: “Each looked to 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.” See Second Inaugural Address, March 4, 1865, 2 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, 686-687.
his preference to General Sherman through a parable or anecdote Confederate President Jefferson Davis and his associates should somehow “escape the country.” 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 he recited in the Second Inaugural: “Let us judge not, that we be not judged.”

Thus, in a larger sense, in Lincoln’s *jus post bello* diplomacy towards with the conquered Confederacy, much like his diplomacy toward neutral Europe, he sought to achieve his goals, as much as possible, through persuasion rather than punition. Lincoln seemed not bound by a rigid, rule-bound conception that law required enforcement or punishment. 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,” and calling, in the end, for “a just and lasting peace, among ourselves, and with all nations.”

D. Summary of Lincoln’s International Law

Lincoln’s over-arching theory of the relation between constitutional and international law suggested as 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, beginning with the Declaration of Independence, in which the states were creatures of the nation; from a robust doctrine of self-determination including popular sovereignty within even the supranational constitution, to strong protection of the nation-state, limiting self-determination as a right to secession in the narrowest of circumstances; from free trade’s tendency to pluralize modes of production to protectionism, in order to privilege a particular mode of production from domestic and international competition based on other modes of production; from a doctrine of sources of international law that prioritized the customary law of nations to doctrines of military necessity and the priority of the obligation to keep one’s word, *pacta sunt servanda*; and from limited war, regulated by the *jus in bello* in order to reduce the effects of war on combatants, innocents and neutrals exercising their rights to free trade, to acceptance of total war, justified by the *jus ad bellum*, but risking disregard of customary restraints and justifying those lapses by the ultimate end of a just war to preserve the nation, albeit coupled with a magnanimous and non-expansionist *jus post bellum*. In short, established practices would have little force on their own, and instead the legitimacy of a legal norm would be sought primarily in principles of justice, the dictates of reason, and the popular understanding of those requirements in the pursuit of the twin objectives of preserving American exceptionalism as a way of life, rather than 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

243 See Goodwin, TEAM OF RIVALS, supra note xx, at 713.
244 See Goodwin, TEAM OF RIVALS, supra note xx, at 722.
245 See Second Inaugural Address, March 4, 1865, 2 LINCOLN’S WRITING, supra note xx, at 686-87.
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 potential 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, or gloss, on 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 important, he repeatedly exercised restraint in application of reason, even from accepted axioms, to particular facts, which manifested itself in skepticism 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 exceptionalism, and thus America’s exceptionalism in international law, becomes clear.

A. Reason: Its Form and Substance

The roots of Lincoln’s commitment to reason lie in Blackstone and Blackstone’s natural law framework. While Lincoln did not share Seward’s view that slavery was unconstitutional because it was contrary to natural law, finding it unnecessary to reach the question give the positive law basis, his mode of analysis appears to have been deeply influenced by his study of Blackstone, whom he read cover-to-cover at least twice. And Blackstone wrote, the “law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to all other. 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.” 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 the several communities.”

In short, Lincoln’s study of Blackstone, to whom he was devoted, could have directed him only towards a view of international law as limited to those rules “deducible

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246 See supra text accompanying notes xx – xx.
247 See supra text accompanying notes xx –xx.
248 See William Blackstone, 1 COMMENTARIES ON THE LAW OF ENGLAND 41 (University of Chicago 1979)[A Facsimile of the First Edition of 1765-69].
249 See Blackstone, 4 COMMENTARIES ON THE LAWS OF ENGLAND, supra note xx, at 43. In fact, Blackstone gives sparse attention to international law, supplying only a brief discussion towards the end of his multi-volume treatise only concerning “offences against the law of nations” that have direct effects under English law. See Blackstone, 4 COMMENTARIES ON THE LAWS OF ENGLAND 66-73 (University of Chicago 1979)[A Facsimile of the First Edition of 1765-69]. Kent, by contrast, in Americanizing the common law, gave extensive treatment to international law, including customary international law. See James Kent, COMMENTARIES ON AMERICAN LAW, VOL. 1, 1-200 (Little, Brown, and Company, O.W. Holmes ed., 1884). But 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, 1298-1310 (2010).
by right reason and established by universal consent.” Custom or social practice was not, of itself, sufficient to establish binding law. Thus, in his first major public address in 1838 against mob violence against anti-abolitionist mob violence, called for “reverence to the laws” through “cold, calculating reason.” And, in a phrase Lincoln once used to describe the behavior of his political adversaries, he assumed that that “History is philosophy teaching by example.” In sum, in the earliest phases of his career, Lincoln linked law with reason, not social practice, and reason through law would serve as the means for the progressive realization of American philosophical ideals.

Blackstone’s deductive approach to legal reasoning was reinforced by Lincoln’s continuing program of education, most importantly in the proofs of geometry. After serving in Congress, where he no doubt encountered minds better educated than his own, as reported in his 1860 campaign autobiography, he appears to have dedicated himself to the study of geometry, modestly describing himself as only having “nearly mastered” Euclid. Even before studying Euclid, Lincoln’s inclination was to phrase political arguments in terms of logical analysis of abstract questions of philosophy. 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 deontological argument that “We are not to do evil that good may come” with a consequentialist argument that “If the fruit of electing Mr. Clay would have been to prevent the extension of slavery, could the act of electing have been evil.” Shortly thereafter, his critique of President Polk focused on the logical error of omitting the third possibility that the boundary between the U.S. and Mexico could lie somewhere between the Rio Grande and the Nueces, rather than at only one of those two rivers.

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250 See Blackstone, 4 COMMENTARIES ON THE LAWS OF ENGLAND, supra note xx, at 66.
251 See 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.” See Address to the Young Men’s Lyceum of Springfield, Illinois, January 27, 1838, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 28, 32 (emphasis omitted). Indeed, he proclaimed: “Passion has 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 the laws.” See Address to the Young Men’s Lyceum of Springfield, Illinois, January 27, 1838, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 28, 36 (emphasis omitted).
253 See Autobiography Written for Campaign, June 1860, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 160, 162 (“He studied and nearly mastered the Six-books of Euclid, since he was a member of Congress.”).
254 See Letter to Williamson Durley, October 3, 1845, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 111-12 (emphasis omitted).
255 See supra text accompanying notes xx – xx. 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. See Miller, LINCOLN’S VIRTUES, supra note xx, at 166. Miller similarly criticizes Lincoln’s even earlier argument against mob attacks against abolitionists designed to suppress abolitionists’ free speech rights. See Address to the Young Men’s Lyceum of Springfield, Illinois, January 27, 1838, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 28. Miller judged that Lincoln’s argument depended too much on the tenuous ground that the speech must be protected as “right” because it was not “wrong,” rather than the more general ground that even false speech is or should be protected. See Miller, LINCOLN’S VIRTUES, supra note xx, at 136. Perhaps so, but one
only president of the United States ever to hold a patent, Lincoln’s capacity for mathematical and scientific thought, even before his study of Euclid was extraordinary. But logic’s influence on his study of non-scientific questions became ever more pronounced as he continued to improve his own education. According to one account, while it was always his “childhood passion to wrestle with an idea,” Lincoln then revealed that, committed to self-improvement, “he had studied Euclid until he knew what was meant by demonstration beyond the possibility of doubt.”

Lincoln’s study of Euclid thus was 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 American 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.”

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 “to deny these things is to deny our national axioms, or dogmas, at least; and it puts an end to all argument.”

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 consequentialist 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 a avoid a greater one.” 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.”

might argue that Lincoln’s object and purpose in his Lyceum Address was not to further the cause of free speech as such, but rather the cause of the intrinsic worthiness of abolitionist speech.

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256 See David Donald, LINCOLN, supra note xx, 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 through the Great Lakes)(citations omitted).
257 See Peterson, LINCOLN IN AMERICAN MEMORY, supra note xx, at 85 (reporting 1864 record of 1860 conversation with Reverend John P. Gulliver)(citations omitted).
258 See Letter to Henry Pierce and Others, Springfield Illinois, April 6, 1859, 2 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 18, 19.
259 See Speech on the Kansas-Nebraska Act, October 16, 1854, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 307, 347.
260 See Speech on the Kansas-Nebraska Act, October 16, 1854, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 307, 333.
261 See Speech at Kalamazoo, Michigan, August 27, 1856, in 1 LINCOLN’S WRITING, supra note xx, at 376, 379; see supra text accompanying notes xx -- xx.
in his view, created the Union and the states which constitute it, “the progressive improvement in the condition of all men everywhere.” This insight led him to more general under of the participants in the Declaration, for immigrants, “finding themselves our equals in all things ... have right to claim [that moral principle] as though they were blood of the blood, and flesh of the flesh of the men who wrote the Declaration ....”

Finally, deepening the premise into a brilliant metaphor, in reply Alexander Stephens’ 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 around 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, enterprise, 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.”

In short, even the Union was subordinated to an even deeper set of axioms, the moral premises Lincoln found expressed in the Declaration; thus, the Declaration, more than speaking to the world as a plea for international recognition, was the American people speaking to themselves as an assertion of the basic convictions that made Americans different.

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 decision polarized the nation, Lincoln closes 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.”

Lincoln too had

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264 Quoted in Hans J. Morgenthau, The Mind of Abraham Lincoln, in ESSAYS ON LINCOLN’S FAITH AND POLITICS, VOL. 4, 3, 82-83 (Kenneth W. Thompson ed. University Press, 1983)(edited posthumously by Thompson)(emphasis omitted)(citing Roy P. Basler, COLLECTED WORKS OF ABRAHAM LINCOLN, VOL. IV, 161, 168-69 (Rutgers University Press, 1953)). 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 and Kenneth Thompson, POLITICS AMONG NATIONS 166 (6th ed., McGraw-Hill, 1985). That he made a close study of Abraham Lincoln as the final intellectual task of his life suggest 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.
266 See Lincoln’s Rejoinder, Fourth Lincoln-Douglas Debate, Charleston, Illinois, September 18, 1858, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 636, 674, and 683-84.
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—criticizing the Declaration of Independence, and insisting that there is no right principle of action but self-interest.” 267 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 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.” 268

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.” 269 The problem, technically involves constructing a square with the same area as a given circle by using only a finite number of steps with compass and straightedge. 270 It was shown to be insoluble a generation later, 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. 271 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 seems not to have been 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 that 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 with human fallibility. Critical to Lincoln’s rhetoric about the moral defects of others was his acceptance of his own

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267 See Speech on the Kansas-Nebraska Act, October 16, 1854, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 307, 315.
268 See Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND, supra note xx, at 41.
269 See Goodwin, TEAM OF RIVALS, supra note xx, at 152-53 (citing to Herndon).
faliability and his doubts about his moral capacity to judge others. This becomes most clear in the rhetoric of his presidency.  However, the 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.” Americans were, as Lincoln would famously later say as president-elect, that he would “be most happy indeed” to “an humble instrument in the hands of the Almighty, and of this, his almost chosen people.”

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 “to have expected them not to meet denunciation with denunciation, criminalization with crimination, and anathema with anathema, was to expect a reversal of human nature, which is God’s decree, and never to be reversed. When the conduct of men is designed to be influenced, persuasion, kind, unassuming persuasion, should ever be adopted.” The essential pattern of his decision-making seemed to be grounded in the principle, to paraphrase Chief Justice Roberts, that if is was not necessary to use force, it is necessary not to use force. 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 that 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.” And her further acknowledged that, as making former slaves

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272 See supra text accompanying notes xx – xx; Goodwin, TEAM OF RIVALS, supra note xx, at 722; and Second Inaugural Address, March 4, 1865, 2 LINCOLN’S WRITING, supra note xx, at 686-87. See also Miller, LINCOLN’S VIRTUES, supra note xx, 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”).
273 See Address to the Washington Temperance Society of Springfield, Illinois, February 22, 1842, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, 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, LINCOLN’S VIRTUES, supra note xx, at 151-53.
274 See Address to the New Jersey Senate at Trenton, February 21-22, 1861, 2 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 209.
275 See Address to the Washington Temperance Society of Springfield, Illinois, February 22, 1842, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 81, 83.
276 As 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.” See Chief Justice Says His Goal Is More Consensus on Court, New York Times, May 22, 2006 (available at http://www.nytimes.com/2006/05/22/washington/22justice.html).
“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 while 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, can not be safely disregarded.”

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. Even in his House Divided Speech, shortly before the Lincoln-Douglas debates, Lincoln makes clear only 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.” 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.” He acknowledged that “there is a physical difference between [the white and the black races], which in my judgments will probably forever forbid their living together upon the footing of perfect equality”; he then said “I agree with Judge Douglas that [the Negro] 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 any living man.” The mere probability that blacks and whites could never live together in perfect equality, and the mere possibility that blacks and whites were not equal in moral or intellectual attainments, were qualifiers that could not be lost upon Lincoln’s audience.

277 See Speech on the Kansas-Nebraska Act, October 16, 1854, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 307, 316.
278 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.” See Address to the Washington Temperance Society of Springfield, Illinois, February 22, 1842, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 81, 85 (emphasis omitted).
279 See “House Divided” Speech at Springfield, Illinois, June 16, 1858, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 426 (emphasis omitted).
280 See First Lincoln-Douglas Debate, Lincoln’s Reply, Ottawa, Illinois, August 21, 1858, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 495, 508, and 512.
281 Harry Jaffe, viewing Lincoln’s thought from the perspective of Stausonian 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. See Jaffe, CRISIS OF THE HOUSE DIVIDED, supra note xx, at 382-84; see also Goodwin, TEAM OF RIVALS, supra note xx, at 205 (endorsing Jaffe’s insight).
And at the end of the campaign, after the debates were concluded, Lincoln said he would gladly defer to Douglas in the campaign, 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.” But even if, for now, doubt about the possibility of eliminating slavery justified toleration “by necessity” of the existing institution, doubts over the assumption of natural inequality and the impossibility of integration justified leaving open the possibility of radical change. 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’.” 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. In short, “universal feelings,” the wisdom of crowds, could have transformative effects too.

C. Lincoln’s Ethical Posture and International Law

One can now see the roots of Lincoln’s attack on the pre-Civil War system’s supranationalist pluralism, commitment to free trade, and deference to 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. A supranational constitution committed to expansion through pluralism was antithetical to that basic premise. International expansion was a diversion from focusing on the progressive realization of that basic premise through internal improvement; and openness to other modes of production through unconditional free trade undercut the continuing realization of self-development. Finally, even though “universal feelings” must be given their due, they do not in themselves reflect truth and may reflect self-interest; thus, the customary law of nations has only provisional significance, and cannot stand in the way of the dictates of reason – fundamental principles of justice; the obligation to keep one’s promises, pacta sunt servanda – are confirmed, through appeals of public diplomacy to the world’s peoples, by public conscience, forming a new “universal feeling.”

282 See Portion of Last Speech in Campaign of 1858, Springfield, Illinois, October 30, 1858, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 826, 827.
283 See Portion of Last Speech at Republic Banquet in Chicago, Illinois, October 30, 1858, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 385-86.
284 See supra text accompanying notes xx – xx.
285 See supra text accompanying notes xx – xx.
286 See supra text accompanying notes xx – xx.
287 See supra text accompanying notes xx – xx.
288 See supra text accompanying notes xx – xx.
289 See supra text accompanying notes xx – xx.
290 See supra text accompanying notes xx – xx.
persuasion, not coercion or moralistic prosecution, was the basic norm of a polity committed to human self-development through reason. 291

IV. Implications for Present Policy

Others 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. 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. However, his conclusions transcended present reality. 292 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. 293 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. 294

Yet, others have lionized Lincoln in other-worldly terms. Leo Tolstoy saw him as a “Christ in miniature, a saint of humanity.” 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.” 295 But, in Walter McDougall’s stunning turn of phrase, Lincoln is the new “Christ” of the American Civil Religion. 296 Under this view, perhaps Lincoln, like Christ, who spoke in the language of the Old Testament and claimed to fulfill but

291 See supra text accompanying notes xx – xx.
292 “His own—that is, the Socratic—method of conducting a rational discussion was to proceed step by step from one point of general agreement to another: “Herein lay the real security of reasoning,” he would say; and for this reason he was more successful in winning the common assent of his hearers than any one I ever knew. He had a saying that Homer had conferred on Odysseus the title of a safe, unerring orator, because he had the gift to lead the discussion from one commonly accepted opinion to another.” See Xenophon, THE MEMORABILIA, Book IV, Chapter VI (citations omitted)(available at http://www.gutenberg.org/files/1177/1177-h/1177-h.htm#2H_4_0006).
294 See Address to the Young Men’s Lyceum of Springfield, Illinois, January 27, 1838, 1 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 28, 34-35. See also Edmund Wilson, Patriotic Gore (1962). Wilson’s work -- coupled with Richard Hofstadter’s “political hack” interpretation, see THE AMERICAN POLITICAL TRADITION, supra note xx, seems to have inspired a renewed, Machiavellian approach to understanding Lincoln in scholarship and literature. See, e.g., Gore Vidal, LINCOLN (1984)(the most successful recent novel offering the Machiavellian interpretation).
295 See Peterson, LINCOLN IN AMERICAN MEMORY, supra note xx, at 185-86 (citations omitted).
296 Walter A. McDougall, Meditations on a High Holy Day: The Fourth of July, Newsletter of FPRI’s Center for the Study of America and the West, Volume 5, Number 4 (July 4, 2004) (available at 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], but as that religion was conceived in secular terms by Robert Bellah); see also Peterson, LINCOLN IN AMERICAN MEMORY, supra note xx, at 361 (discussing Bellah’s view that new “civil religion” of the Founder is “perfected” in Lincoln).
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 13th Amendment. Indeed, 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,” leading Peterson to say it enabled him to avoid “national pride and hypocrisy and ethnocentrism.” For some, Lincoln might appear to paraphrase Martin Luther: “Here America stands. It can do no other.” For others, the mature Lincoln’s characterized the classical and Christian virtue of “prudence,” or right action in the public realm -- an idea also reflected in German sociologist Max Weber’s 20th century less-freighted formulation of the so-called “ethic of responsibility,” rather than Martin Luther’s “ethic of ultimate ends.”

While this may all go too far, one might be tempted to speculate on the specific implications of Lincoln’s approach to international law for the particular issues that confront the United States. But that might also be, as Justice Jackson once wrote, akin to interpreting the “dreams of Pharaoh” -- mere quotations that “largely cancel each other.” 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 even today as a guide for how to think about our constitutional law, on some accounts because he transformed, rather than saved, it. Perhaps also, even today, Lincoln’s worldview could continue to provide the framework for the U.S.’s orientation toward international law, giving general guidance, if not specific content, to the modern meaning of American exceptionalism.

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298 See Peterson, LINCOLN IN AMERICAN MEMORY, supra note xx, at 360 (quoting Niebuhr).
299 See Miller, LINCOLN’S VIRTUES, supra note xx, at 225 (noting Martin Luther’s phrase would have been known to Weber, too).
300 See Miller, LINCOLN’S VIRTUES, supra note xx. Miller gives particular emphasis also to Max Weber’s modern reformation of political virtue as the “ethic of responsibility. See Miller, Lincoln’s Virtues, supra at 195-96. See generally Max Weber, POLITICS AS A VOCATION, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77-128 (edited and translated, Gerth and Mills, Oxford, 1946 [1976 reprint](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).
301 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (Jackson, J., concurring).
302 “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.” See William Michael Treanor, Learning from Lincoln, 65 FORDHAM L. REV. 1781, 1786 (1997).
303 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 succession 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 (2004)(rejecting the implicit transformation view).
Along these lines, Lincoln’s belief in the need for a nationalist perspective, to enable the nation to make possible the realization of the free labor ideal, would suggest restraint in international cooperation in international trade. Regulation of the particular circumstances of a domestic economy in a cultural context may require protection from comparative advantages of other nations that flow from “peculiar institutions.” Competition from English capitalism required compensatory protection for American production. Lincoln’s reformulation of Clay’s American system, viewed thin, race-to-the-bottom internationalism as a threat, one that might impoverish free American labor and further the extension of slavery. In short, protecting against the international was a necessary element of Lincoln’s domestic project, which in turn had international implications – saving the “apple of gold” so that the U.S. could model for the world. If our political economy triumphed, developing the kind of person who could fulfill the natural capacities of the species, then it could triumph anywhere. This perspective might foreclose World Trade law or UN General Assembly resolutions that, in order to cooperate in the creation of a morally thin, pluralistic international order, reduce the capacity of Americans to fulfill their potential. On the other hand, one wonders, how in the long run international persuasion can be reconciled with protectionist policies that are perceived as unjustly privileging relatively wealthier Americans from competition from the relatively poorer peoples of the less industrialized parts of the world.

On the other hand, Lincoln’s resistance to customary international law, and self-doubt about our own exercise of power, might call into question not only relying on existing customary international law but also the U.S. practice of using U.S. power to forge customary international law in a way that benefits U.S. self-interest. Under this view, to develop a body of international law, the U.S. should adhere instead to treaties. Rather than exercise power to shape customary international law, promises should be made to specific parties, in such areas as the law of the sea and international human rights and humanitarian law, and these promises should be kept. To the extent possible, reason and international public conscience, not power, should shape the international law that governs the abstract principles governing the just distribution of international resources and basic principles of human dignity. But at the level of specific application, explicit bargains, serving merely as political compromises, might be necessary. If so, rather than meriting a slavish obeisance, these should not be regarded as meriting anything more than the “decent respect to the opinions of mankind”\textsuperscript{304} called for in the Declaration of Independence. Promises should be kept, but such promises must not be relied upon as precedents from which general principles can be deduced. For Lincoln, international law was a consequence, not a source, of the pursuit of international justice.

Finally, through his career, Lincoln was exceptionally cautious about the use of force, not only on legal, but also on ethical, grounds. His own doubts about others’ morality compelled him to doubt his own. Even if other states violate the central axioms of justice, use of force becomes justified (as in Ft Sumter) only to defend a principled position. The exercise of public power must truly be “the last resort” of just war theory; in this sense, Lincoln’s philosophical commitment to fatalism or necessity could operate

\textsuperscript{304} See Declaration of Independence, July 4, 1776 (preamble).
as an ethical, not a legal, check on pro-democratic and pro-humanitarian intervention. Yet, once the threshold of necessity is crossed, Lincoln’s approach might call for less restraint in the use of force and less accountability for war crimes than some might wish.\textsuperscript{305}

Shortly after the U.S. invasion of Iraq in 2003, recalling Lincoln’s characterization of the United States as “the last best hope of earth,”\textsuperscript{306} Yale historian John Lewis Gaddis wrote, “Our ability as a democracy to question all values depends upon our faith in and our determination to defend certain values. They are the bedrock beliefs that make it possible for us to be here and for so many others to wish to be here.” He observed “Lincoln evoked that hope at what seemed a hopeless time for this nation.”\textsuperscript{307} But Gaddis then added: “We keep hope alive, as well, by taking responsibility” and “The essence of responsibility, however, is to remember what the ancients taught us about the sin of pride.”\textsuperscript{308} What he failed to add is that Lincoln’s “hope” was also chastened by a deep awareness of the sin of pride, of the fallibility of our natures and our reason. His hopes never became dreams. He would never have confused the geometric mental construct of a triangle for an empirical reality. He would never have succumbed to a fantasy life in his view of international law; this much, though it be little, he would have thought necessary and, with all the force of a geometric proof, certain.

Yet, for Lincoln, just as domestic constitutional law must make room for this telos, all law, including international law, must be oriented toward a set of purposes. And for Lincoln, no axiom was deeper than American exceptionalism -- “This cause is that every man can make himself,”\textsuperscript{309} The exceptionalism of the United States internationally means, in the peroration of one of Lincoln’s most memorable messages, that we not lose

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\item[\textsuperscript{305}] Some might think U.S. has relied too much on the consequentialist calculus of the \textit{jus ad bellum} to justify disrespect for the \textit{jus in bello}, including such instances as: U.S. use of nuclear weapons at Hiroshima and Nagasaki to end World War II; U.S. claims that Geneva Convention \textit{jus in bello} rules were unduly restrictive in the just war against terrorism; and U.S. resistance to international treaties, such as the Rome Statute creating the International Criminal Court, that would limit discretion to provide immunity for regime leaders from accountability for international human rights violations committed while those leaders were in power, regardless of whether providing or respecting prior grants of such immunity might facilitate pro-democratic regime transition or national reconciliation. One cannot wish away Sherman’s “war is hell” campaign and Lincoln’s willingness, in order to facilitate national reconciliation, to let the southern war leadership disappear with impunity. See supra text accompanying notes xx – xx. While Lincoln approved the promulgation of the so-called Lieber Code, General Order 100, in order to provide rules of conduct for Union soldiers, it was General Halleck’s initiative, not Lincoln’s, and was widely criticized for the scope of the exception for “military necessity.” See William Miller, \textit{President Lincoln: The Duty of a Statesman} 364 (Alfred Knopf, 2008); \textit{compare} Harry G. Stout, \textit{Upon the Altar of the Nation: A Moral History of the American Civil War} 138 (Viking Press, 2006)(“When forced to choose between principled war and victory, Lincoln chose victory”); \textit{with} Miller, \textit{President Lincoln: The Duty of a Statesman}, supra, at 216 (defending Lincoln as a “principled warrior” seeking a “principled victory”).
\item[\textsuperscript{306}] See supra note xx.
\item[\textsuperscript{308}] See John Lewis Gaddis, \textit{Surprise, Security, and the American Experience}, supra note xx, at 117.
\item[\textsuperscript{309}] See Speech at Kalamazoo, Michigan, August 27, 1856, in \textit{1 Lincoln’s Speeches and Writings}, supra note xx, at 376, 379.
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this “last best, hope of earth.” That exceptionalism was to preserve in the United States the possibility of making possible men and women like Lincoln: those who, like Lincoln, from birth and throughout their lives had “made” themselves; and those immigrants who could choose to share – as if they were “blood of the blood and flesh of the flesh” – in the heritage of the Declaration; and, finally, by preserving the American example, to preserve the hope of making possible such men and women elsewhere, men and women who, like Lincoln, also could “make themselves” into more than what they are. Under this view, it is only when America stands not only for itself but also for something other than itself that it remains an exceptional nation. The Lincolonian meaning of America’s exceptionalism must be, if it is to mean anything at all, that Americans continue to be exceptional.

310 See Annual Message to Congress, December 1, 1862, 2 LINCOLN’S SPEECHES AND WRITINGS, supra note xx, at 393, 414.